THE PRIESTLY CLASS: REFLECTIONS ON A JOURNALIST'S PRIVILEGE

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INTRODUCTION

During the December 8, 2004 oral argument of *In Re Grand Jury Subpoena, Judith Miller*,[1] prominent First Amendment attorney Floyd Abrams conceded that web bloggers should have a constitutional privilege to refuse to disclose their confidential sources, just like journalists at major news outlets. Abrams' concession caused a "collective flinch" to ripple "through the establishment media in the gallery."[2] The notion that bloggers are journalists does not sit well with those journalists who consider themselves "a priestly class"[3] set apart from the rest of society by the First Amendment's Press Clause.

Unfortunately for the establishment media, the Supreme

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[1] 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 2005 U.S. LEXIS 5190 (June 27, 2005).

[2] Douglas McCollam, *Attack at the Source*, COLUM. JOURNALISM REV., Mar.-Apr. 2005, at 29.

[3] Howard Kurtz, *Contempt & Praise for Reporter: Facing Jail, Judith Miller Gains Support for Stance*, WASH. POST, Feb. 17, 2005, at C1.

Court has consistently held that the constitutional protections for journalists are coextensive with the rights of the public. As the Court noted in *Branzburg v. Hayes*,[4] a 1972 decision rejecting a testimonial privilege for reporters, freedom of the press is a "fundamental personal right" protecting the "lonely pamphleteer" just as much as the large metropolitan newspaper publisher.[5] Moreover, the *Branzburg* Court emphasized that newsgathering was not as central to the First Amendment as the right to publish. The Court held that generally applicable laws serving substantial interests were valid regardless of their incidental burden on newsgathering.[6]

Despite *Branzburg*, many journalists regard judicial orders compelling the identification of confidential sources as an "assault on journalistic freedom."[7] The prevalence of this "myth" prompted the following comments from United States District Judge Ernest C. Torres at the December 9, 2004 sentencing hearing for James Taricani, a Providence, Rhode Island television reporter, who refused to reveal a confidential source's identity:

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[4] 408 U.S. 665 (1972).

[5] *Id.* at 704.

[6] *Id.* at 681-83.

[7] *R.I. Reporter Convicted of Criminal Contempt for Protecting Source, Faces Prison Time*, WASH. POST, Nov. 19, 2004, at A2 (quoting statement of James Taricani). After the Court of Appeals for the First Circuit rejected Taricani's First Amendment arguments for a reporter's privilege, *In re* Special Proceedings, 373 F.3d 37 (1st Cir. 2004), Judge Torres said the following to Taricani at a November 4, 2004 hearing:

> Now, if it hasn't been apparent to you since 1972 when the Supreme Court decided Branzburg, I think it should be apparent to you now that you have no legal right to refuse to answer the special prosecutor's questions, and you certainly have no legal or other right to disobey lawful court orders. And I can think of only two possible reasons why you have persisted in your refusal to answer the special prosecutor's questions. *One is that you may believe that despite what the law says, a reporter should have the privilege to refuse to identify confidential sources.* The only other reason I could think of is that you promised the source that you would not reveal his or her identity, and even if you had no right to make that promise or you now recognize that that was an improvident promise, that you feel bound to keep it.

Transcript of Hearing on Decision on Motion to Modify Contempt Order at 11, *In re* Special Proceedings, No. 01-47 (D.R.I. Nov. 4, 2004) (emphasis added) (on file with author).

Shortly before Judith Miller was incarcerated for refusing to testify before a grand jury, her lawyers told the judge her refusal was "based on journalistic principle grounded on the First Amendment." William Branigin, *N.Y. Times Reporter Jailed for Refusing to Reveal Source*, WASHINGTONPOST.COM, July 6, 2005, http://www.washingtonpost.com/wp-dyn/content/article.html (on file with the author). This prompted the special prosecutor to state, "Miller and The New York Times appear to have confused Miller's ability to commit contempt with a legal right to do so." Adam Liptak, *Prosecutor in Leak Case Calls for Reporters' Jailing*, N.Y. TIMES, July 6, 2005, at A14. After Miller was incarcerated, the *Times* editorialized that Miller "is surrendering her liberty in defense of a greater liberty, granted to a free press by the founding fathers." Editorial, *Judith Miller Goes to Jail*, N.Y. TIMES, July 7, 2005, at A26.

> The First Amendment does not confer on reporters or anyone else the right to violate the law in order to get information that they might consider newsworthy, the right to encourage others to do so, or the right to conceal the identity of a source who committed a criminal act in providing the information by refusing to comply with a lawful court order directing the reporter to identify the source.
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> To suggest that these things are protected by the First Amendment, demeans the First Amendment.[8]

Shortly after Taricani was sentenced, the District of Columbia Circuit Court of Appeals ruled in *Miller* that journalists—no matter how defined—do not have a testimonial privilege based on the Press Clause.[9] For more than thirty years, media lawyers have claimed with a surprising level of success[10] that Justice White's opinion for the *Branzburg* Court was a plurality opinion and the crucial opinion was Justice Powell's concurring opinion, which arguably implied that some form of reporter's privilege should be recognized.[11] The court of appeals, however, characterized Justice

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[8] Transcript of Sentencing Hearing at 12-13, *In re* Special Proceedings, No. 01-47 (D.R.I. Dec. 9, 2004) (on file with author).

[9] *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005).

[10] Judge Richard Posner summarized the post-*Branzburg* cases in the following manner:

> A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope. See, e.g., *In re Madden*, 151 F.3d 125, 128-29 (3d Cir. 1998); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Schoen v. Schoen*, 5.3d 1289, 1292-93 (9th Cir. 1993); *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986). A few cases refuse to recognize the privilege, at least in cases, which *Branzburg* was but this case is not, that involve grand jury inquiries. *In re Grand Jury Proceedings*, 5 F.3d 397, 402-03 (9th Cir. 1993); *In re Grand Jury Proceedings*, 810 F.2d 580, 584-86 (6th Cir. 1987). Our court has not taken sides.
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> Some of the cases that recognize the privilege, such as *Madden*, essentially ignore *Branzburg*, see 151 F.3d at 128; some treat the "majority" opinion in *Branzburg* as actually just a plurality opinion, such as *Smith*, see 135 F.3d at 968-69; some audaciously declare that *Branzburg* actually created a reporter's privilege, such as *Shoen*, 5 F.3d at 1292, and *von Bulow v. von Bulow*, *supra*, 811 F.2d at 142; see also cases cited in *Shoen*, 5 F.3d at 1292 n.5, and *Farr v. Pritchess*, 522 F.2d 464, 467-68 (9th Cir. 1975). The approach that these decisions take to the issue of privilege can certainly be questioned.

McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003); *see also* United States v. King, 194 F.R.D. 569 (E.D. Va. 2000) (commenting that appellate courts have "been less than faithful in adhering" to *Branzburg*). For a concise summary of the manner in which lower courts have interpreted *Branzburg*, see C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW 639-45 (1997).

[11] *See, e.g.*, Brief for Appellants at 4, *In re* Grand Jury Subpoenas, 397 F.3d 964 (D.C. Cir. 2005) (Nos. 04-3138, 04-3139 and 04-3140) (lower court "ignored the impact of Justice Powell's critical concurring opinion in *Branzburg*"). These claims were buttressed by Justice Stewart's suggestion that the vote in *Branzburg* was perhaps "a vote of four and a half to four and a half." Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 635 (1975). For a broader perspective on Justice Powell's concurring opinion in *Branzburg*, see Igor Kirman,

White's *majority* opinion as "authoritative precedent" which "in no uncertain terms" rejected a reporter's privilege.[12] Moreover, the court of appeals read Justice Powell as emphasizing that there would be First Amendment protection in the case of bad faith investigations—a protection available to the public as well as the press. "The Constitution protects all citizens, and there is no reason to believe that Justice Powell intended to elevate the journalistic class above the rest."[13]

In late June, 2005, the Supreme Court denied certiorari in *Miller*,[14] setting the stage for an extraordinary confrontation between the government and the press. Time Inc. faced contempt sanctions along with *Time* magazine's White House correspondent Matthew Cooper. After the Supreme Court refused to hear the case, Norman Pearlstine, Editor-in-Chief of Time Inc., decided to hand over Cooper's notes and e-mails to a federal grand jury investigating the leak of a CIA agent's name. "I think it is detrimental to our journalistic principles to think of ourselves as above the law," Pearlstine stated.[15] Cooper, who was prepared to go to jail, agreed to testify after his confidential source released him from the pledge of confidentiality.[16] The *New York Times* did not face a contempt charge, but its reporter Judith Miller refused to cooperate and was incarcerated on July 6. She told the court, "If journalists cannot be trusted to guarantee confidentiality, then journalists cannot function and there cannot be a free press."[17] Patrick J. Fitzgerald, the special prosecutor, countered, "Journalists

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Note, *Standing Apart To Be A Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083 (1995).

12 *Miller*, 397 F.3d at 971, 969.

13 *Id.* at 972.

14 Miller v. United States, 125 S. Ct. 2977 (2005).

15 Joe Hagan, Time *Says It's Not Above Law; Will Obey Court*, WALL ST. J., July 1, 2005, at B1; *see also* Bill Saporito, *When to Give Up a Source*, TIME, July 11, 2005, at 34; David Carr, *A Tough Call, and Then Consequences*, N.Y. TIMES, July 11, 2005, at C1.

16 Joe Hagan & Anne Marie Squeo, *In Source Case, One Reporter Will Testify, One Goes to Jail*, WALL ST. J., July 7, 2005, at B1; *see also* Adam Liptak, *For Time Inc. Reporter, a Frenzied Decision to Testify*, N.Y. TIMES, July 11, 2005, at A12. For Cooper's first-person account of his grand jury testimony, see Matthew Cooper, *What I Told the Grand Jury*, TIME, July 25, 2005, at 38. For a behind-the scenes discussion of the different legal strategies taken by the *New York Times* and Time Inc., see Laurie Cohen, Joe Hagen & Anne Marie Squeo, *Divided Front: How Media Split Under Pressure In the Leak Probe*, WALL ST. J., July 29, 2005, at A1.

17 Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1. Arthur Sulzburger Jr., publisher of *Times*, commented, "[t]here are times when the greater good of democracy demands an act of conscience." *Id.*

In a separate inquiry concerning a leak to Miller of the government's plans to block the assets and search the offices of two Islamic charities, Fitzgerald sought Miller's telephone records. The District Court for the Southern District of New York recognized a qualified First Amendment and federal common law privilege and ruled that the government had not met the burden necessary to overcome the privilege. N.Y. Times v. Gonzales, 382 F. Supp. 2d 457 (SD.N.Y. 2005); *see infra* text accompanying notes 186-189.

are not entitled to promise complete confidentiality—no one in America is."[18] After spending eighty-five days in jail, Miller was released on September 29 due to an agreement her lawyers reached with Fitzgerald. Miller's September 30 and October 12 grand jury testimony narrowly focused on her conversations with I. Lewis Libby, Vice President Cheney's Chief of Staff; Libby personally assured Miller earlier in September that his waiver of a pledge of confidentiality was voluntary.[19]

As *Miller, Taricani* and other contemporary cases reveal, the judicial mood has recently turned away from creative readings of *Branzburg.* Judges have begun questioning the value of leaks, especially where the leakers violate federal law, judicial orders, or a fundamental sense of fair play. For example, anonymous sources revealed to the press that Wen Ho Lee was the target of an investigation into security breaches at the Los Alamos nuclear research facility.[20] Lee claimed these leaks, which included information about his employment history, finances, and results of polygraph examinations, were in violation of the Privacy Act. United States District Court Judge Thomas Penfield Jackson ordered several reporters to reveal their sources to Lee's attorneys. In doing so, Jackson questioned whether a "truly worthy First Amendment interest resides in protecting the identity of

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[18] Joe Hagan, *U.S. Prosecutor Says Reporters Deserve Jail,* WALL ST. J., July 6, 2005, at B1. *But see infra* text and notes accompanying notes 169-174.

[19] Jim VandeHei, Times *Reporter Testifies Again in CIA Leak Probe,* WASH. POST, Oct. 13, 2005, at A10; Carol Leonig & Jim VandeHei, *Freed Writer Testifies in CIA Leak Probe; N.Y. Times' Miller Tells Grand Jury About 2003 Talks with Cheney Aide Libby,* WASH. POST, Oct. 1, 2005, at A4; David Johnstone & Douglas Jehl, *Times Reporter Free from Jail; She Will Testify,* N.Y. TIMES, Sept. 30, 2005, at A1. For Miller's first-person account of her grand jury testimony, see Judith Miller, *My Four Hours Testifying in the Federal Grand Jury Room,* N.Y. TIMES, Oct. 16, 2005, section 1, at 31.

Libby signed a waiver of confidentiality on January 5, 2004 so reporters could testify about conversations they had with him concerning Valerie Plame, a CIA employee. However, signing the waiver was a condition of continued employment at the White House. Based on statements made in the summer of 2004 by Libby's lawyer to Floyd Abrams, one of Miller's lawyers, Miller regarded the waiver as coerced. *See* Letter from Floyd Abrams to Joseph Tate (Sept. 29, 2005), *available at* http://www.nytimes.com/packages/pdf/national/nat_MILLER_051001.pdf. After being incarcerated for more than a month, Miller asked her lawyers to seek clarification of the waiver from Libby. On September 15, 2005, Libby wrote a letter to Miller assuring her that he "waived the privilege voluntarily." Letter from Lewis Libby to Judith Miller (Sept. 15, 2005) *available at* http://www.nytimes.com/packages/pdf/national/nat_MILLER_051001.pdf. Miller and Libby were also allowed have a telephone conversation on September 19 during which Libby encouraged Miller to testify. *See generally* Don Van Natta Jr., Adam Liptak & Clifford Levy, *The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal,* N.Y. TIMES, Oct. 16, section 1, at 1; Adam Liptak, *Phone Call With Source and Deal Led Reporter to Testify, but Questions Remain,* N.Y. TIMES, Oct. 1, 2005, at A12.

[20] *See, e.g.,* James Risen, *U.S. Fires Scientist Suspected of Giving China Bomb Data,* N.Y. TIMES, Mar. 9, 1999, at A1; James Risen & Jeff Gerth, *Breach at Los Alamos: A Special Report; China Stole Nuclear Secrets For Bombs, U.S. Aides Say,* N.Y. TIMES, Mar. 6, 1999, at A1.

government personnel who disclose to the press information that the Privacy Act says they may not reveal."[21] Steven Hatfill, who was identified as a "person of interest" in the investigation of the 2001 anthrax attacks,[22] is also seeking the identity of government leakers in a Privacy Act case. United States District Court Judge Reggie B. Walton, expressed outrage about the Hatfill leaks at an October 2004 hearing:

> "They're undermining what this country is supposed to be about—that is, that we treat people fairly," Walton said of the anonymous sources. "If you don't have enough to indict this man, then it's wrong to drag his name through the mud."
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> The judge's voice grew even louder as he added: "That's not a government I want to be part of. It's wrong and you all need to do something about it."[23]

Contemporary journalist's privilege cases also take place against the backdrop of several highly-publicized instances of fraudulent reporting at *Newsweek*, *USA Today*, CBS News, and the *New York Times*, including fabrication of anonymous sources or reliance upon anonymous sources that proved to be unreliable.[24] Some leading editors believe the public's increasing distrust of the press is tied to "casual reliance" on anonymous sources[25] and have recently called for an industry-wide reduction in the use of anonymous sources or a tightening of standards for confidentiality

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21 Lee v. Dept. of Justice, 287 F. Supp. 2d 15, 23 (D.D.C. 2003). The District Court subsequently found five journalists to be in contempt. Lee v. Dept. of Justice, 327 F. Supp. 2d 26 (D.D.C. 2004). The Court of Appeals for the District of Columbia Circuit upheld the contempt order for four journalists and vacated the order for one journalist. Lee v. Dept. of Justice, 413 F.3d 53 (D.C. Cir. 2005). In a separate proceeding, Walter Pincus of the *Washington Post* was found to be in contempt and ordered to seek waivers from his sources. Lee v. Dept. of Justice, No. 99-3380 (D.D.C. Nov. 16, 2005). *See infra* note 97.

22 *See, e.g.*, Marilyn W. Thompson, *The Pursuit of Steve Hatfill*, WASH. POST, Sept. 14, 2003, (Magazine), at W6; Tom Jackman, *Handling of Anthrax Inquiry Questioned: Scientist's Attorney Criticizes Ashcroft Statements, Accuses FBI of Leaks to Media*, WASH. POST, Aug. 25, 2002, at A13.

23 Carol D. Leonig, *Anthrax Probe Leaks Assailed; Judge Scolds U.S. in Scientist's Case*, WASH. POST, Oct. 8, 2004, at B1. Judge Walton authorized the questioning of journalists about confidential sources in February 2004. Carol Leonig, *Hatfill Lawyers Given Go-Ahead*, WASH. POST, Feb. 7, 2004, at A15. In October 2004, Justice Department officials agreed to distribute waiver forms (known as Plame waivers, *see supra* note 19) to at least 80 government officials involved in the anthrax investigation so they can release journalists from a pledge of confidentiality. Scott Shane, *Anthrax Figure Wins a Round on News Sources*, N.Y. TIMES, Oct. 22, 2004, at A12.

24 *See, e.g.*, REPORT OF THE INDEPENDENT REVIEW PANEL ON THE SEPTEMBER 8, 2004 *60 Minutes Wednesday* Segment "For the Record" Concerning President Bush's Texas Air National Guard Service 4-30 (Jan. 5, 2005) [hereinafter CBS REPORT] (on file with author) (critiquing broadcast news producer's reliance on a confidential source and recommending changes in CBS News practices).

25 *Commentary; An Exchange on Reporters and Their Confidential Sources*, L.A. TIMES, Oct. 20, 2004, at B11 (letter from Bill Keller, executive editor of the *New York Times*).

agreements between reporters and sources.[26] In response, *Newsweek*, *USA Today* CBS News, and the *New York Times* have revised their standards and practices concerning anonymous sources.[27]

The use of anonymous sources, though, is deeply embedded in contemporary journalism. A year after the *New York Times* adopted a more stringent approach to unidentified sources,[28] a panel of the newspaper's staff members reported, "[t]he Times plainly finds it hard to curtail its dependence on anonymous sources."[29] The panel found that almost "every issue of the paper includes anonymously-attributed information of no great moment . . . . Many instances involve government officials saying routine things. Others have business executives, athletes, or cultural figures making expendable comments about their fields."[30] Nonetheless, the panel agreed that anonymous sources were critical to reporting on national security and law enforcement matters. In these areas, "information cannot be obtained without assurance to sources that their identities will not be disclosed. We would deny our readers critical information about vital issues if we barred the use of anonymous sources outright."[31]

Journalists faced with the forced disclosure of the identity of their confidential sources, which has been rare in the post-

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[26] James T. Madore, *A Call to Revise Journalists' Guidelines*, NEWSDAY, Jan. 13, 2005 (Norman Pearlstine, Editor-in-Chief of Time, Inc., urging reporters to reexamine their use of confidential sources); Michael Kinsley, *Sources Worth Protecting?* WASH. POST, Oct. 10, 2004, at B7 (editorial page editor of *Los Angeles Times* advocates stricter guidelines for use of anonymous sources).

[27] Richard M. Smith, *A Letter to Our Readers*, NEWSWEEK, May 30, 2005, at 4; Lorne Manley, *Big News Media Join in Push to Limit Use of Unidentified Sources*, N.Y. TIMES, May 23, 2005, at C1; Katharine Q. Seelye, *Panel at The Times Proposes Steps to Increase Credibility*, N.Y. TIMES, May 9, 2005, at C6; CBS REPORT, *supra* note 24.

[28] N.Y. TIMES, CONFIDENTIAL NEWS SOURCES (Feb. 25, 2004), http://nytco.com/company-properties-times-sources.html.

[29] N.Y. TIMES CREDIBILITY COMMITTEE, N.Y. TIMES, PRESERVING OUR READERS' TRUST: A REPORT TO THE EXECUTIVE EDITOR 7 (May 9, 2005), http://nytco.com/pdf/siegelreport050205.pdf.

[30] *Id.* at 8. In response, Bill Keller, executive editor of the *New York Times*, wrote the following:

> Sourcing is an area where progress will be measured in increments, and subjectively. There is no reliable statistic that will tell us whether we are being sufficiently vigilant. But here's my subjective standard of success: A year from now, I would like reporters to feel that the use of anonymous sources is not routine, but an exception, and that if the justification is not clear in the story they will be challenged.

BILL KELLER, ASSURING OUR CREDIBILITY 6 (June 23, 2005), http://nytco.com/pdf/assuring-our-credibility.pdf.

[31] PRESERVING OUR READERS' TRUST, *supra* note 29, at 8. Bill Keller added, "[t]he idea that a news organization can conduct serious, aggressive journalistic inquiry without the use of anonymous sources is a fantasy." ASSURING OUR CREDIBILITY, *supra* note 30, at 5.

Branzburg era,[32] paint a dire picture. Matthew Cooper, who narrowly avoided being jailed in July, 2005, wrote the following in an affidavit:

> I could not effectively report on matters of concern to the public—war, peace, the budget—without using confidential sources; nor could any of my colleagues at *Time* magazine. Many newsworthy stories come to me from people—some connected with the Administration, some not—who make it clear to me that they will not offer the information to me unless I can promise them that their identities will remain secret. This is widely understood to be the case not just for myself but for journalists at all major publications . . . . By promising confidentiality to [those sources who demand it], I am able to report on many things that would otherwise go unreported.[33]

Scott Armstrong, former national security correspondent for the *Washington Post* added that compelled disclosure of sources "would do catastrophic damage to the quality of information available on national security issues."[34] In an era when secrecy controls are often used for political rather than national security reasons, Armstrong said compelled identification would "unsettle an untidy and well-established accommodation between government institutions and the media that allows critically important

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32 The Department of Justice has guidelines and procedures relating to the issuance of subpoenas to reporters and news organizations. *See* 28 C.F.R. § 50.10 (2005); *see also infra* text accompanying notes 66 & 205. In July 2005, Deputy Attorney General James Comey told the Senate Judiciary Committee that the guidelines have "served to limit the number of subpoenas authorized for source information to little more than a handful" since *Branzburg*. *Reporters' Shield Legislation: Issues and Implications: Hearing before the U.S. Senate Comm. on Judiciary*, 109th Cong. 4 (July 20, 2005) (testimony of James Comey) (on file with author). According the Department of Justice (DOJ), during the period between 1991 and September 6, 2001, the DOJ authorized seventeen subpoenas seeking information that could identify a reporter's source or source material. REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001 6 (2003) (on file with author). In 2001, the majority of subpoenas served on the news media were from criminal defendants in state court proceedings. *Id.* at 7. Only one percent of subpoenas served on the news media in 2001 sought the "identity of a confidential source or information obtained under a promise of confidentiality." *Id.* at 9.

33 Brief for Appellants at 15, *In re* Grand Jury Subpoenas, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005) (Nos. 04-3138, 04-3139 and 04-3140) (quoting affidavit of Matthew Cooper).

34 *Id.* at 13 (quoting affidavit of Scott Armstrong). Armstrong added that national security stories "warrant confirmation, contextual perspective and detailed elaboration" which is only available from confidential sources. *Id.* "At one time or another, the vast majority of high level government officials become confidential sources. In my experience, they understand that the efficient operation of government and minimal standards of accountability to the public require that they provide confidential briefings to journalists covering daily stories." *Id.*

information to surface publicly . . . ."[35] Karen Tumulty, *Time* magazine's national political correspondent, described the need for confidential sources more succinctly. In Washington, she stated, "confidentiality is the lubricant of journalism."[36]

The Supreme Court considered and rejected similar claims by journalists in *Branzburg*.[37] While the empirical evidence on impact of subpoenas on journalist-source relations is arguably stronger today than it was in 1972,[38] the "sources will dry up" argument is still subject to criticism as being speculative. Equally speculative, though, is the Court's countervailing claim that due to the symbiotic relationship between sources and reporters, sources were "unlikely to be greatly inhibited" by subpoenas aimed at reporters.[39] Why did the *Branzburg* Court find one assumption about source behavior to be more convincing than the competing assumption? The answer, as shown in Part I of this Article, is found in the *Branzburg* Court's definition of First Amendment rights, its aversion to ad hoc balancing, its reluctance to create First Amendment-based exemptions to generally applicable laws, and its belief that the complex policy questions raised by journalist's privilege should be answered by legislatures rather than the judiciary.[40] Part II of the Article shows that the Court is unlikely to overrule *Branzburg* and create a First Amendment-based journalist's privilege. To do so would require a radical revision in the manner in which the Court defines speech and press rights. However, because legislatures are free to exempt journalists from generally applicable laws, legislation creating a journalist's privilege is constitutionally suspect only in rare circumstances.

Part III of the Article argues that legislatures should create a journalist's privilege. This would not be a step toward licensing, as journalists commonly fear. Since lower courts in the post-*Branzburg* era have created "inconsistent and conflicting" legal standards,[41]

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[35] *Id.* at 13-14. Similar comments by journalists are quoted in N.Y. Times v. Gonzales, 382 F. Supp. 2d 457, 470-71 (S.D.N.Y. 2005).

[36] Lorne Manly, *Editors at Time Inc. Offer Reassurances to Reporters*, N.Y. TIMES, July 13, 2005, at A18.

[37] *See* Branzburg v. Hayes, 408 U.S. 665, 693-99 (2005).

[38] *See* sources cited in *N.Y. Times*, 382 F. Supp. 2d at 506 n.44.

[39] *Branzburg*, 408 U.S. at 694.

[40] Part I of the Article does not explore *Branzburg*'s ambiguities, such as the implications of Justice Powell's concurring opinion. Instead, the purpose is to explain why the Court decided against the journalists' First Amendment claims. For a contemporary judicial dialogue on *Branzburg's* implications for a federal common law reporter's privilege, compare the concurring opinions of Judges Sentelle and Tatel in, *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005).

[41] Petition for Writ of Certiorari at 13, Cooper v. United States, 397 F.3d 964 (D.C. Cir.), *cert. denied*, 125 S. Ct. 2977 (2005) (No. 04-1508).

and state shield laws vary widely, national legislation is needed to create a cohesive and comprehensive journalist's privilege. States remain free to augment any federally-conferred protection.

I. EXPLICATING *BRANZBURG*

Shortly after the Court began hearing the oral argument in *Branzburg,* Edgar A. Zingman, counsel for journalist Paul Branzburg, was barraged by a series of questions about the definition of a "newsman." Zingman responded that defining this class was not a problem and suggested, as a starting point, that a "newsman" was "any person who, on a continuous basis is engaged in the process of gathering information and preparing such information for dissemination to the public."[42] This prompted the following colloquy:

> THE COURT: We're talking about the First Amendment. The First Amendment protects free speech just as well as it does a free press, does it not?
> MR. ZINGMAN: Yes, sir.
> THE COURT: And I suppose your argument, based as it is on the First Amendment, could not possibly be confined to "newsmen" however defined. I suppose every one of us is protected in his right to free speech, and the right to speak also includes the right to keep silent. And I suppose, logically carried to its conclusion, your argument would be that anybody would be protected if he just said, "I don't want to talk." Why is it confined to newsmen? We all have the right of free speech, do we not?
> MR. ZINGMAN: Yes, Mr. Justice Stewart. I would not agree that logically carried to its conclusion, everyone under the exercise of the grant of free speech would have the right to refuse to testify.
> THE COURT: Why?
> MR. ZINGMAN: Specifically, we're talking about press, which is also mentioned in the First Amendment.
> THE COURT: They're both there, and are equally protected—a free press, and free speech.[43]

Since the Supreme Court first began protecting First Amendment rights in 1931, it has emphasized the exchangeability of the terms speech and press.[44] In hindsight, Justice Stewart's role

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[42] 74 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 676 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter TRANSCRIPT].

[43] *Id.* at 677.

[44] *See* William E. Lee, *Modernizing the Law of Open-Air Speech: The Hughes Court and the Birth of Content-Neutral Balancing,* 13 WM. & MARY BILL RTS. J. 1193, 1197-98 (2005).

in the colloquy quoted above is surprising because his dissenting opinion in *Branzburg* advocated a special role for the press. The *Branzburg* Court's reluctance to recognize a testimonial privilege for reporters, though, was not surprising. As Justice White's majority opinion stated, the "administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order."[45] On rare occasions, primarily in the area of religious freedom, the Court has created First Amendment-based exemptions to generally applicable laws. Those cases involve serious burdens on core First Amendment freedoms. The newsgathering activities at issue in *Branzburg*, however, were placed at the periphery of First Amendment freedoms.

A. *Defining Freedom of the Press*

Justice Stewart's dissenting opinion claimed that a "corollary of the right to publish must be the right to gather news."[46] The majority agreed to a limited extent, at least rhetorically, stating that "without some protection for seeking out the news, freedom of the press could be eviscerated."[47] This was tempered, however, with a quotation from an earlier opinion in which the Court stated that the "right to speak and publish does not carry with it the unrestrained right to gather information."[48]

To emphasize the diminished importance of newsgathering, Justice White described the core protections of the First Amendment:

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[45] Branzburg v. Hayes, 408 U.S. 665, 703-04 (2005).

[46] *Id.* at 727 (Stewart, J., dissenting).

[47] *Id.* at 681. This was amplified later in the opinion by the following:

> Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.

Id. at 707-08 (footnote omitted). Judge Posner read this as requiring that subpoenas be reasonable, a requirement that would apply to journalists and non-journalists alike. *See* McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003).

[48] *Branzburg*, 408 U.S. at 684 (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)). The *Branzburg* Court added that although "stealing documents or private wiretapping could provide newsworthy information, neither reporter not source is immune from conviction for such conduct, whatever the impact on the flow of news." *Id.* at 691. Professor Blasi believes the "gap between the Court's rhetoric regarding newsgathering and the level of protection actually accorded the interest" is explained by the Justices' ambivalence toward newsgathering. The Justices are reluctant to grant full protection to newsgathering "because (1) they cannot foresee the implications of such a step, and (2) they sense that, in some imperfectly understood way, newsgathering is different from such core First Amendment activities as public speaking, pamphleteering, and demonstrating." Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 602.

> [T]hese cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here.[49]

White then drew upon a series of cases which ruled that the business or commercial practices of the newspaper industry, like other industries, were subject to generally applicable laws.[50] Apparently, reporter-source relationships were not much more constitutionally significant than business practices. Stated differently, core First Amendment activities such as publishing, were not burdened by the requirement that reporters testify before grand juries. Reporters were free to seek information from confidential sources, but where that information was relevant to a legitimate grand jury inquiry, it was not privileged.

In addition to their disagreement about the constitutional significance of newsgathering, Justices White and Stewart offered starkly differing views of the role of the press in society. The *Branzburg* majority opinion is bereft of any reference to the uniqueness of the press.[51] Indeed, to Justice White, a special, constitutionally mandated position belonged to the grand jury.[52] Justice Stewart, though, opened his dissenting opinion by criticizing the Court's "disturbing insensitivity to the critical role of an independent press in our society."[53] The difference was theoretical, not just rhetorical. Justice Stewart believed special protection for reporters stemmed from the broad societal interest in the free flow of information. Justice White regarded press compliance with subpoenas as being essential to the social interest in fair and effective law enforcement.

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[49] *Branzburg*, 408 U.S. at 681. Justice White added that compelled testimony before grand juries "involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources." *Id.* at 691.

[50] *Id.* at 682-83.

[51] Supreme Court rhetoric about the importance of the press tends to appear in content-based cases involving the freedom to publish. *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently . . . ."); N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The press was to serve the governed, not the governors."); Mills v. Alabama, 384 U.S. 214, 219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials . . . .").

[52] *Branzburg*, 408 U.S. at 686-88.

[53] *Id.* at 725 (Stewart, J., dissenting) *see also* Stewart, *supra* note 11, at 633 (stating that the publishing business is the "only organized private business that is given explicit constitutional protection.").

Branzburg presented the Court with the opportunity to break from the past and provide distinct First Amendment treatment for the press. At critical points, especially during its discussion of a constitutional right of access to information, the Court emphasized that the press is subject to the same laws as everyone else. For example, if the public can be excluded from certain government meetings, so may the press.[54] Likewise, the Court downplayed any special role the "organized press" played in society; a variety of other communicators, such as "lecturers, political pollsters, novelists, academic researchers, and dramatists" also contributed to public dialogue.[55] "*Almost any author* may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury," Justice White wrote.[56]

The idea that speech and press activities are equally valuable in informing the public provides a critical perspective to the Court's belief that defining "newsmen" would present difficulties. In freedom of religion, for example, the difficulty of defining religion and protected religious practices has not precluded the Court from doing so.[57] The *Branzburg* Court's reluctance to embark on separate readings of the First Amendment's speech and press provisions is understandable because of the Court's view of those provisions as coextensive. Stated differently, because freedom of the press is a "fundamental personal right," it is difficult to exclude any citizen from the class of journalists.[58] Thus,

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54 *Branzburg*, 408 U.S. at 684-85.

55 *Id.* at 704; *see also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 782 (1978) ("[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten.").

56 *Branzburg*, 408 U.S. at 705 (emphasis added). Arguing for the United States as amicus curiae, William Bradford Reynolds said:

> [I]f we're going to construct a privilege based on a First Amendment interest in news gathering, that the privilege is going to have to attain not just to news reporters, but to anybody who says that an appearance before the grand jury is going to have a chilling effect on his confidential sources of information.

TRANSCRIPT, *supra* note 11, at 701.

57 As Floyd Abrams remarked:

> [W]hatever the definitional difficulties as to religion, it has never been urged that they bar affording constitutional protection to those who plainly fall within whatever definition is chosen. In this context, it is difficult to comprehend why the difficulties in defining 'press' should lead to the conclusion that no uniquely 'press' protections may be afforded.

Floyd Abrams, *The Press* Is *Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 581 (1979).

58 Judge Sentelle posed the following questions in *Miller*:

> Are we then to create a privilege that protects only those reporters employed by *Time Magazine*, the *New York Times*, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-

rather than create a First Amendment-based privilege for everyone, the Court chose to deny the existence of a privilege for anyone.

B. *Constitutionally-Compelled Exemptions*

In rare circumstances, the Court has exempted certain speakers from generally applicable laws.[59] In these cases, involving unpopular groups such as the Socialist Workers Party, the Court found the disparate impact of a law threatened to "cripple a minor party's ability to operate effectively and thereby reduce 'the free circulation of ideas both within and without the political arena."[60] Central to the argument in *Branzburg* was the claim that journalists are uniquely affected by subpoenas and the absence of a reporter's privilege would substantially reduce the flow of information to the public.[61]

The *Branzburg* Court rejected both claims. First, the Court found that nothing in the record showed that a large number of sources were implicated in a crime, or possessed information about crimes committed by others.[62] Hence, the bulk of confidential sources would be unaffected by the absence of a reporter's privilege. Second, while the record showed that some reporters relied on confidential sources, the "evidence fails to demonstrate there would be a significant constriction to the flow of news" if there were no testimonial privilege.[63] Third, the press had

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> conspirators? Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? *How could one draw a distinction consistent with the court's vision of a broadly granted personal right?*

In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 979 (D.C. Cir. 2005) (Sentelle, J., concurring) (emphasis added). The proliferation of technologies that can be used for newsgathering poses additional problems for defining journalists. During the recent bombings on the London subway system, survivors recorded the aftermath and e-mailed video and still pictures to British television networks. *See generally* Allison Romano, *Why Everybody Is a Reporter: Citizen Journalists Go Mainstream*, BROADCASTING & CABLE, Aug. 22, 2005, at 14 (describing the use of inexpensive devices by "citizen journalists").

[59] *See, e.g.*, Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). The Court is more likely to create an exemption under the Free Exercise Clause than in cases involving free expression. *See* Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985 (1986).

[60] *Brown*, 459 U.S. at 98. *See generally* Geoffrey R. Stone & William P. Marshall, Brown v. Socialist Workers: *Inequality As A Command of the First Amendment*, 1983 SUP. CT. REV. 583.

[61] TRANSCRIPT, *supra* note 11, at 677-78 (the record shows the impact of subpoenas on journalists, but there is no record showing the impact on speakers).

[62] Branzburg v. Hayes, 408 U.S. 665, 691 (2005). The Court added that where sources knew of crimes or committed crimes, "agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy." *Id.* at 696.

[63] *Id.* at 693. *But see id.* at 723 (Douglas, J., dissenting) (record is replete with "weighty

"flourished" without a constitutional privilege for reporter-source relationships.[64] The burden of proof required by the Court is additional evidence of its skepticism toward newsgathering as constitutionally significant activity.

Most interestingly, the Court portrayed the press as a powerful political player that was "far from helpless to protect itself from harassment or substantial harm."[65] The press could use its influence to convince law enforcement officials to adopt policies sharply limiting efforts to obtain information from journalists. As an example, the Court cited Department of Justice guidelines, adopted in 1970, requiring that officials pursue information from non-press sources, negotiate with the press, and issue a subpoena only with the Attorney General's consent.[66]

The political power of the press stands in sharp contrast to groups such as the Socialist Workers Party. These unpopular groups not only lack influence with public officials, they have also been subject to government harassment.[67] Thus, judicial protection of these groups was necessary, but the press could fend for itself. As Justice White later wrote in *Zurcher v. Stanford Daily*, "the press is not only an important, critical, and valuable asset to society, but it is not easily intimidated—nor should it be."[68]

C. *Ad Hoc Balancing*

The *Branzburg* Court doubted that the conditional privilege advocated by the press, which depended on a case-by-case determination of the necessity of a reporter's testimony,[69] would offer much assurance to sources concerned about the prospect of

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affidavits from responsible newsmen"); *id.* at 732 (Stewart, J., dissenting) (existence of deterrent effects was developed by lower court).

64 *Id.* at 699.

65 *Id.* at 706.

66 *Id.* at 706-07 & n.41. The current version of the guidelines appears at 28 C.F.R. § 50.10 (2005); *see also* DEP'T. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-13.400 (2005).

For analysis of the application of the guidelines in the period shortly before and after the *Branzburg* decision, see *Newsmen's Privilege: Hearings Before the Subcomm. On Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 94th Cong. 15-20, 33-93 (1975) [hereinafter *House Hearings, 1975*].

67 *See, e.g.*, Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 99-100 (1982) (detailing government harassment of Socialist Workers Party).

68 436 U.S. 547, 566 (1978).

69 Brief for Petitioner at 38-41, Branzburg v. Hayes, 408 U.S. 665 (1972) (No. 70-85) (describing factors that must be assessed before a reporter is compelled to testify at grand jury proceedings). Justice Douglas excoriated the press for its "amazing position that First Amendment rights are to be balanced against other needs or conveniences of government." Branzburg v. Hayes, 408 U.S. 665, 713 (1972) (Douglas, J. dissenting).

being unmasked.[70] Viewed from a broader perspective, the *Branzburg* Court's aversion to ad hoc balancing reflects its belief that the judicial role is sharply limited where generally applicable laws incidentally affect First Amendment freedoms. *Branzburg* may also be seen as part of the Court's emphasis on categorical rules in First Amendment doctrine.

The petitioners argued that the state must show a compelling need for a reporter's testimony, something that would only be present if the alleged criminal activity presented a threat to national security, human life, or liberty.[71] Justice White believed this would "embroil" courts in policy determinations.[72] He explained:

> [B]y considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not others, they would be making a value judgment the legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment . . . . The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.[73]

Justice White also saw that judicial recognition of a reporter's privilege in the grand jury context would have implications for the questioning of reporters at legislative proceedings, as well as civil and criminal trials.[74]

Justice Stewart offered a different view of the judicial role, advocating a three-part ad hoc balancing test.[75] He acknowledged that courts would be required to make "some delicate judgments" in working out an accommodation between the administration of

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70 *Branzburg*, 408 U.S. at 702 & n.39; *see infra* text and accompanying notes 163-179.

71 Brief for Petitioner at 40, Branzburg v. Hayes, 408 U.S. 665 (1972) (No. 70-85). The state would also have to show that the reporter had information about the criminal activity, and that it had no other means of acquiring the information. *Id.*

72 *Branzburg*, 408 U.S. at 705.

73 *Id.* at 705-06.

74 *Id.* at 702.

75 Before a reporter is compelled to appear before a grand jury:
> the 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 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.

Id. at 743 (Stewart, J., dissenting) (footnote omitted).

justice and the free flow of information.[76] Nonetheless, balancing "is the function of courts of law."[77] Recall that Justice Stewart regarded newsgathering as a corollary to the right to publish, while Justice White found newsgathering to be of minimal constitutional significance. Consequently, Stewart's qualified privilege was designed to protect confidential sources in all but the most extreme cases; White's categorical approach emphasized the grand jury's entitlement to every person's evidence.

If a journalist's privilege were to be created, Justice White observed, this was a task for Congress or state legislatures.[78] At the time of *Branzburg*, seventeen states had enacted statutes protecting journalist's confidential sources;[79] in 2005, thirty-one states and the District of Columbia have such statutes.[80] The press has preferred, though, to base its claim for a reporter's privilege on the First Amendment.

Not surprisingly, federal courts applying ad hoc balancing have reached conflicting and confusing results in post-*Branzburg* journalist's privilege cases.[81] The consequence is "confusion by sources and reporters, and the specter of jail and other harsh penalties for reporters who do not know what promises they can make to their sources . . . ."[82]

II. POST-*BRANZBURG* CONSTITUTIONAL DEVELOPMENTS

In the thirty-three years since *Branzburg*, the Court has adhered to the presumption that generally applicable laws do not interfere with press freedom. Additionally, the equal status of the press and public remains as fundamental First Amendment doctrine. Accordingly, it is unlikely the Court would support a First Amendment-based journalist's privilege. Legislatures, however, are free to exempt the press from generally applicable laws; such exemptions are suspect when viewpoint based or overly narrow.

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[76] *Id.* at 745.
[77] *Id.* at 746.
[78] *Id.* at 706.
[79] *Id.* at 689 n.27.
[80] *See* N.Y. Times v. Gonzales, 382 F. Supp. 2d 457, n.34 (S.D.N.Y. 2005) (listing statutes). "Of the 19 states without statutory shield laws, all but one—Wyoming, which has remained silent on the issue—have recognized a reporter's privilege in one context or another." Brief of Appellants at 38-39, *In re* Grand Jury Subpoenas, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005) (Nos. 04-3138, 04-3139 and 04-3140). For a collection of these cases, see *id.* at 39 n.12.
[81] Petition for Writ of Certiorari at 12-13, Cooper v. United States, 397 F.3d 964 (D.C. Cir.), *cert. denied*, 125 S. Ct. 2977 (2005) (No. 04-1508).
[82] *Id.* at 9-10.

A. *Generally Applicable Laws*

In *Zurcher v. Stanford Daily*,[83] the Court rejected the view that the Fourth and First Amendments imposed special requirements before newspaper offices may be searched. Under Fourth Amendment doctrine, Justice White commented, "valid warrants may be issued to search *any* property . . . at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found."[84] As in *Branzburg*, the press claimed that newsroom searches would cause confidential sources to dry up, a claim Justice White quickly dismissed. "Whatever incremental effect there may be," he wrote, "it does not make a constitutional difference in our judgment."[85] The Framers of the Constitution sought to curb unjustified searches of press offices, but did not forbid warrants where probable cause, specificity, and reasonableness were present.[86]

In *Herbert v. Lando*,[87] the Court rejected an absolute First Amendment privilege for journalists' thoughts, conclusions, and conversations with colleagues. These matters are critical to defamation plaintiffs who must prove that the defendant acted with actual malice, a constitutional requirement established in *New York Times Co. v. Sullivan*.[88] The press claimed that disclosure of editorial conversations would chill editorial decision-making, but Justice White said that if disclosure of these matters "discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate . . . ."[89]

Citing *United States v. Nixon*,[90] Justice White said that evidentiary privileges are not favored in litigation; courts could control discovery abuses through application of rules applicable to the press and other defendants alike.[91]

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83 436 U.S. 547 (1978).

84 *Id.* at 554.

85 *Id.* at 566.

86 *Id.* at 565. As in *Branzburg*, Justice White commented that the legislative and executive branches were free to establish nonconstitutional protections for the press. Congress did so in the Privacy Protection Act of 1980. *See* 42 U.S.C. § 2000aa (2005).

87 441 U.S. 153 (1979).

88 376 U.S. 254 (1964).

89 *Herbert*, 441 U.S. at 172. Nor was Justice White persuaded that disclosure of the editorial process would cause the press to terminate or stifle error-avoiding procedures. *See id.* at 174.

90 418 U.S. 683 (1974).

91 *Herbert*, 441 U.S. at 175-77; *see also id.* at 165 ("Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant . . . . The rules are applicable to the press and to other defendants alike.") In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, Justice Brennan wrote that six members of the Court "agree today that,

Most importantly, in *Cohen v. Cowles Media Co.*,[92] the Court held that promissory estoppel was applicable to a newspaper's breach of its promise of confidentiality to a source. Justice White wrote that *Cohen* was not governed by a line of cases protecting the publication of truthful information that has been acquired lawfully.[93] Instead, the case was controlled by the "equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[94] Justice White cited a variety of cases, such as *Branzburg*, to emphasize that the press, like all citizens, is subject to generally applicable content-neutral laws. If the application of promissory estoppel to the press inhibited the publication of a source's identity, even when newsworthy, this was "no more than the incidental, and constitutionally insignificant consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them."[95]

Also noteworthy is *University of Pennsylvania v. EEOC*,[96] in which the Court unanimously rejected a university's claim that the First Amendment protected tenure review materials from disclosure.[97] Prior academic freedom cases involved content-based

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in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 784 (1985) (Brennan, J., dissenting).

92 501 U.S. 663 (1991).

93 *Id.* at 669; *see, e.g.*, Fla. Star v. B.J.F., 491 U.S. 524 (1989).

94 *Cohen*, 501 U.S. at 669.

95 *Id.* at 672. Justice Blackmun believed liability in *Cohen* was based on the content of truthful speech. *Id.* at 676 (Blackmun, J., dissenting). Thus, the question was not whether the press was exempt from promissory estoppel, but whether publication of truthful speech, regardless of its source, could be punished. *Id.* at 673-76. Justice White countered that under promissory estoppel "the parties themselves . . . determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed." *Id.* at 671.

96 493 U.S. 182 (1990).

97 The University also raised common law claims of privilege. The Court was "especially reluctant" to recognize a privilege where Congress had declined to do so. *Id.* at 189. The Court perceived that acceptance of the University's claim would lead to "similar privilege claims by other employers." *Id.* at 194.

A federal common law privilege was also asserted in *Miller*. *See* Brief for Appellants at 33-42, *In re* Grand Jury Subpoenas, 397 F.3d 964 (D.C. Cir. 2005) (Nos. 04-3138, 04-3139 and 04-3140). The Court of Appeals ruled that if there were a common law privilege, it was not absolute and was overcome by the special prosecutor. Separately, Judge Sentelle's concurring opinion argued against recognition of a common law privilege. Judge Henderson, arguing for judicial restraint, said the court need not "decide anything more than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect." *In re* Grand Jury Subpoena, 397 F.3d 964, 982 (D.C. Cir. 2005) (Henderson, J., concurring). Judge Tatel's concurring opinion

regulations, but the obligation to disclose tenure materials was content neutral; consequently, the Court found the University's claim of harm to academic freedom to be extremely attenuated and speculative.[98] Justice Blackmun's opinion for the Court regarded this case as similar to *Branzburg*, which also involved a content-neutral law, the burden of which the Court believed to be uncertain. "We were unwilling then, as we are today, 'to embark the judiciary on a long and difficult journey to . . . an uncertain destination,'"[99] Justice Blackmun wrote.

B. *Right of Access*

In *Pell v. Procunier*,[100] the press claimed it had a constitutional right to interview prison inmates, a right of access broader than available to members of the public. Relying on *Branzburg*, the Court ruled that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."[101] Similarly, in *Houchins v. KQED, Inc.*,[102] Chief Justice Burger wrote that press freedom meant freedom to communicate information once it is obtained; there was no constitutional right of access to information, especially on terms different from the public.[103]

Shortly after *Houchins*, the Court held that the right to speak or publish information about criminal trials necessarily meant that trials could not be closed arbitrarily. Chief Justice Burger's opinion announcing the Court's judgment in *Richmond Newspapers*,

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recognized a common law privilege, but employed a balancing test to show that the harm of the leak overwhelmed the news value of the leak. Whether courts should recognize a federal common law reporter's privilege is outside the scope of this Article. However, since the privilege advocated by Judge Tatel rests upon an ad hoc balancing test similar to that employed by courts recognizing a First Amendment-based privilege, that test is critiqued below. *See infra* text and accompanying notes 179-193.

Recently, "[l]awyers for *Washington Post* journalist Walter Pincus urged a federal district judge" to follow Judge Tatel's opinion and recognize a federal common law reporter's privilege. *See* Carol D. Leonnig, *Lawyers Seek New Legal Protections for Reporters; Attorney for Post Journalist Liken Link with Sources to that of Therapist, Patient*, WASH. POST, Aug. 3, 2005, at A2. The district court refused to recognize a common law privilege and found Judge Tatel's ad hoc balancing approach to be troubling. Lee v. Dept. of Justice, No. 99-3380 (D.D.C. Nov. 16, 2005).

98 *Univ. of Pennsylvania*, 493 U.S. at 197-201. If the University's claim were accepted, Justice Blackmun feared that "many other generally applicable laws might also be said to infringe the First Amendment." *Id.* at 200.

99 *Id.* at 201 (quoting Branzburg v. Hayes, 408 U.S. 665, 703 (1972)).

100 417 U.S. 817 (1974).

101 *Id.* at 834; *see also* Saxbe v. Wash. Post Co., 417 U.S. 843 (1974) (finding prison access policy treating the press and public alike constitutional).

102 438 U.S. 1 (1978).

103 *Id.* at 9-11.

Inc. v. Virginia[104] repeatedly referred to criminal trials as places "traditionally open to the public" and emphasized that the presence of the public—including the press—enhanced the integrity of the proceedings.[105] In subsequent cases, the Court extended the First Amendment-based right of access to other aspects of criminal proceedings, such as preliminary hearings.[106] In each instance, the Court described the right of access as a public right, rather than a press right. For example, in *Press-Enterprise I*, Chief Justice Burger wrote that open proceedings promoted public confidence; "the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known."[107] Whatever uncertainty may exist about the contours of a First Amendment-based right of access to information,[108] it is clear that the rights of the press are coextensive with those of the public.

C. *The Equal Importance of Speech and Press Activities*

In their petition for certiorari, Time Inc. and Matthew Cooper claimed that the Court's recent First Amendment decisions "demonstrate that the law has developed in a way that strongly supports recognition of some form of privilege today."[109] As an example, the petitioners cited *Bartnicki v. Vopper*,[110] in which the Court ruled that federal and state laws punishing disclosure of telephone conversations were unconstitutional as applied to a radio commentator and his source. Rather than support judicial recognition of a reporter's privilege, *Bartnicki* cuts against distinct treatment for the press.

During a contentious contract dispute between a teacher's union and a Pennsylvania school district, an unknown person tape-recorded a telephone conversation between the union's chief negotiator, Gloria Bartnicki, and the union president, Anthony Kane. During the conversation, Kane stated: "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . . To blow off their front porches, we'll have to do some

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104 448 U.S. 555 (1980).

105 *Id.* at 577-78.

106 Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*) (voir dire); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*) (preliminary hearing).

107 464 U.S. at 508.

108 *See, e.g.*, DIENES, *supra* note 10, at 15 (describing the dimensions of the newsgathering right as "decidedly uncertain").

109 Petition for Certiorari at 24, Cooper v. United States, 397 F.3d 964 (D.C. Circ.), *cert. denied*, 125 S. Ct. 2977 (2005) (No. 04-1508).

110 532 U.S. 514 (2001).

work on some of those guys."[111] A copy of the recording was left in the mailbox of Jack Yocum, president of a taxpayer's association that opposed the union. Yocum played the tape for some members of the school board and also gave the tape to Frederick Vopper, a local radio commentator. After the teachers got a favorable settlement, Vopper played the recording on his radio program. Under the Federal Wiretapping Act and the analogous Pennsylvania statute,[112] Bartnicki and Kane sued Yocum, Vopper, and the radio stations carrying Vopper's program.

Vopper's actions were clearly expressive and entitled to First Amendment analysis. But what of Yocum's act of providing the tape to Vopper? Writing for the majority, Justice Stevens stated that Yocum's actions were "speech," not "conduct." He explained:

> It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or pamphlet, and as such, it is the kind of "speech" that the First Amendment protects.[113]

Consequently, in assessing whether the statutes could be constitutionally applied to Yocum, Vopper and the radio stations, the Court noted that it "drew no distinction" between the media respondents and Yocum.[114]

As support for the proposition that the First Amendment applied equally to Yocum and Vopper, the Court cited *New York Times Co. v. Sullivan*[115] and *First National Bank of Boston v. Bellotti.*[116] *Sullivan* involved a public official's defamation suit against four clergymen and the *New York Times*; the newspaper published an editorial advertisement prepared by a group concerned with the struggle for civil rights in the South. At the time, commercial advertising was unprotected by the First Amendment,[117] but the Court held the editorial advertisement was not commercial speech. Justice Brennan added:

> Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have

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111 *Id* at 518-19.
112 18 U.S.C. § 2511(1) (2005); 18 PA. CONS. STAT. § 5703(2) (2005).
113 *Bartnicki*, 532 U.S. at 527.
114 *Id.* at 525 n.8.
115 376 U.S. 254 (1964).
116 435 U.S. 765 (1978).
117 *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

> access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.[118]

To promote the "freedoms of expression," the Court ruled that the "citizen-critic" and the newspaper were both protected by the actual malice standard.

In *Bellotti*, the Court confronted a restriction on the speech of certain business corporations. Media corporations were exempt from this restriction. In finding the law to be unconstitutional, the Court noted that the "inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . ."[119] Accordingly, the Court stated that the press "does not have a monopoly on either the First Amendment or the ability to enlighten"[120] and added that conferring special protection to expression by the press would not be "responsive to the informational purpose of the First Amendment."[121] Read together, *Bartnicki*, *Sullivan* and *Bellotti* show that as a matter of constitutional policy, public dialogue is equally enriched by street corner speakers and the establishment press.

D. *Legislative Exemptions for the Press*

Even when the Court finds the press is not entitled to a First Amendment-based exemption from generally applicable laws, it acknowledges that legislatures are free to craft special protections for the press.[122] Legislatures have done so in a wide variety of contexts. Consider the following: newspaper publishers have a limited exemption from the antitrust laws;[123] newsrooms are subject to searches only in narrow circumstances;[124] the majority of states have shield laws permitting journalists to resist subpoenas;[125] and, federal and state election laws prohibit corporations from supporting or opposing candidates, but allow press corporations to do so.[126] The extensive array of legislative exemptions for the press caused one scholar to observe, the "freedom that the press enjoys

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118 *Sullivan*, 376 U.S. at 266.
119 435 U.S. at 777.
120 *Id.* at 782 (footnote omitted).
121 *Id.* at 783 n.18.
122 *See, e.g*, Zurcher v. Stanford Daily, 436 U.S. 547, 567 (1978) (stating the Constitution did not prevent "legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure . . . .").
123 15 U.S.C. §§ 1801-1804 (2005).
124 42 U.S.C. § 2000aa (2005).
125 *See supra* text and accompanying note 80.
126 *See e.g.*, 2 U.S.C. § 431(9)(B)(i) (2005).

has very little to do with the Press Clause."[127]

In *Austin v. Michigan Chamber of Commerce*[128] the Court found a legislative distinction between the press and nonpress corporations was allowable under the Equal Protection Clause. In its equal protection analysis, the Court erroneously claimed that it was permissible, but not mandatory, for the press to be exempt from a law requiring that corporations channel political expression through political action committees. The idea that the press could be required to channel political commentary through political action committees is transparently invalid. Had the *Austin* Court analyzed the exemption as a First Amendment issue, it would have recognized that the law could not be applied to the press.[129] And, because *Bellotti* teaches that press expression is no more valuable than expression by other speakers, the law should not have been applied to nonmedia corporations.

Significantly, the Michigan press exemption applied to all of the state's broadcasters, newspaper publishers, and magazine publishers. More troublesome issues would have been presented by a law that only exempted newspapers with a circulation of at least 200,000, an exemption applicable to just two Michigan newspapers.[130] Such a narrowly crafted exemption is constitutionally suspect, as shown in *Minneapolis Star & Tribune Co.*

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127 David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 528 (2002). For more examples of nonconstitutionally-based press exemptions, see *id.* at 485-89.

128 494 U.S. 652 (1990). Michigan election law, like federal election law, prohibits corporate expenditures in support of or in opposition to candidates. Instead, corporations may establish political action committees (PACs) to receive contributions from a class of donors associated with the corporation. PACs may use donated funds to make contributions to candidates or to make expenditures relating to candidates. Corporations operating broadcasting stations, newspapers, magazines or other periodicals are permitted to make expenditures for news stories, commentaries, and editorials concerning candidates.

By a 6-3 vote, the Court upheld that PAC requirement, concluding it was necessary to prevent the "corrosive and distorting effects of immense aggregations of wealth." *Id.* at 660. The law did not violate the First Amendment rights of corporations because corporations were able to express their political views through PACs. *Id.* Turning to the press exemption, the Court analyzed the distinct treatment solely under the Fourteenth Amendment's Equal Protection Clause. Press corporations were distinct from other corporations because "their resources are devoted to the collection of information and its dissemination to the public." *Id.* at 667. Moreover, the press plays a unique role in informing the public. *Id.* Neither distinction was discussed in relation to the state's interest in preventing distortion of the political process. As Justice Scalia noted in dissent, the role of the press provides an "especially strong reason" for including the press in the law's restrictions. *Id.* at 691 (Scalia, J. dissenting).

129 As I wrote in an earlier article, "[o]ne cannot reconcile the answer to the equal protection question in *Austin* with First Amendment doctrine." William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U.L.Q. 637, 675 (1993).

130 BURRELLE'S/LUCE MEDIA DIRECTORY: NEWSPAPERS AND RELATED MEDIA 493-525 (2004 ed.) (listing circulation of Michigan newspapers).

v. Minnesota Commissioner of Revenue.[131]

Minnesota exempted newspapers from sales tax but imposed a use tax on paper and ink used to produce publications. Due to an exemption for the first $100,000 worth of ink and paper used annually, the tax fell hardest on large newspapers. The Court found the law invalid. Justice O'Connor's opinion emphasized the importance of treating the press like other businesses. This prophylactic rule was based on two concerns. First, Justice O'Connor feared the power to tax the press differently than other businesses might cause the press to engage in self-censorship to avoid antagonizing the legislature.[132] Second, Justice O'Connor doubted the ability of courts to evaluate the relative burdens of different methods of taxation.[133] The Court also found the law's impact on a small number of newspapers to be problematic. Justice O'Connor feared that the power to "tailor a tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme."[134]

Justice Rehnquist's dissenting opinion emphasized the importance of a law's burden, rather than the lines drawn by the law. He argued that the use tax actually imposed a lesser burden on the press than a generally applicable sales tax.[135] Thus, the Court's action was "akin to protecting something so overzealously that in the end it is smothered."[136] Given the complexity of the issues the Court regularly resolves, the claim of judicial inability to examine the effects of tax schemes was "incomprehensible."[137]

Justice O'Connor's concern for a prophylactic rule was short-lived. In *Leathers v. Medlock,*[138] the Court upheld an Arkansas tax scheme imposing a sales tax on cable systems but exempting the print media. Justice O'Connor's opinion for the Court found *Leathers* to be controlled by *Regan v. Taxation with Representation*[139] which held that tax schemes discriminating among speakers are permissible as long as there is no content discrimination. Because the Arkansas tax applied to all cable systems, and treated those

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131 460 U.S. 575 (1983).
132 *Id.* at 588.
133 *Id.* at 589-90.
134 *Id.* at 592. Justice White found this feature by itself was sufficient to invalidate the law. *Id.* at 593 (White, J., concurring in part and dissenting in part).
135 *Id.* at 597-98 (Rehnquist, J., dissenting).
136 *Id.* at 596.
137 *Id.* at 601. He also believed the Court had the ability to examine changes in tax schemes that are intended to penalize the press. *Id.*
138 499 U.S. 439 (1991).
139 461 U.S. 540 (1983).

systems like other businesses, it did not resemble "a penalty for particular speakers or ideas."[140] The Court was uninterested in any justifications for the disparate treatment of the cable and newspaper industries. And, it was uninterested in exploring the possibility that the newspaper industry would engage in self-censorship to preserve its tax exemption.[141]

Finally, in *Los Angeles Police Department v. United Reporting Publishing Corp.*,[142] the Court rejected a facial challenge to a California law allowing access to the addresses of arrestees for purposes such as journalism,[143] but denying access to companies that sell the information to customers such as attorneys, insurance companies, and driving schools. Chief Justice Rehnquist's opinion for the Court held the law was not a regulation of speech; it was "nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment."[144] Justice Ginsburg's concurring opinion, joined by Justices O'Connor, Souter, and Breyer, treated the selective access to information as a subsidy of certain types of speech. Consequently, under *Regan*, the state was free to support "some speech without supporting other speech" as long as the subsidy was not based on an "illegitimate criterion such as viewpoint . . . ."[145]

Given the varied ways in which the Court has approached legislation conferring special status upon the press, such legislation is not automatically constitutionally suspect. Obviously, viewpoint-based distinctions are illegitimate, as are distinctions among members of the same media class that affect a small group, as in *Minneapolis Star* and similar cases.[146] Conversely, the Court has accepted broad exemptions, such as the Michigan press exemption that applied to all of the state's broadcasters, newspaper publishers, and magazine publishers, or the Arkansas sales tax scheme that exempted all of the state's newspapers. Beyond the concerns for viewpoint discrimination and narrow classes, however, the issues become more open and complex.

One overriding touchstone, derived from Justice O'Connor's *Minneapolis Star* opinion, is the prospect that the press, as a

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140 *Leathers*, 499 U.S. at 449.
141 *See* Lee, *supra* note 129, at 672-75.
142 528 U.S. 32 (1999).
143 CAL. GOV'T CODE § 6254(f)(3) (Deering 2005).
144 *Los Angeles Police Department*, 528 U.S. at 40.
145 *Id.* at 43 (Ginsburg, J., concurring).
146 *See also* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding content-based tax affecting a small number of magazines to be invalid).

beneficiary of government favors, will engage in self-censorship to avoid jeopardizing its exemptions. Upon close examination, this fear is subject to significant qualifications. First, Justice O'Connor was writing in the context of a tax case; exemptions from taxes and other business regulations have an impact on the bottom line of news organizations. For example, the Newspaper Preservation Act[147] affects the viability of a small number of newspaper publishers. Its repeal would jeopardize the existence of some newspapers currently publishing under joint-operating agreements. In contrast, repeal of the Privacy Protection Act of 1980,[148] which protects a comprehensive set of public communicators from searches, is unlikely to cause the demise of any publication. Second, Justice O'Connor was writing in the context of a law targeting a small group of newspapers. The likelihood of a viewpoint-based chilling effect seems greatest when the class of beneficiaries is narrow. In contrast, a broad-based exemption, say for all newspaper publishers, magazine publishers, broadcasters, and cable programming services, reaches public communicators with a wide array of viewpoints, interests and motivations. The prospect of a viewpoint-based chilling effect is attenuated when the exempt class is broadly defined. Besides, the government would face widespread discontent if it sought to discontinue the special treatment of a broadly defined class of communicators.

What if a modern Huey Long[149] attempted to punish press critics by repealing an exemption from a generally applicable law? Consider a hypothetical case in which all newspapers are exempt from state sales tax and the largest newspapers vehemently oppose the governor. The governor faces two alternatives. First, a total repeal of the tax exemption would affect her newspaper supporters as well as opponents, not a palatable prospect. Second, a selective repeal of the tax exemption for the largest newspapers would be

147 15 U.S.C. § 1801 (2005), enacted in response to the Court's opinion in Citizen Publ'g Co. v. United States, 394 U.S. 131 (1969).

148 42 U.S.C. § 2000aa (2005).

149 Long, governor of Louisiana in the 1930s, was opposed by the state's largest newspapers; Long advocated, and the legislature passed, a two percent gross receipts tax on the sale of advertising in newspapers and magazines with a circulation of more than 20,000 copies per week. While the legislature was debating the tax, Long provided legislators with a circular stating "these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, 2 cents per lie." Brief for Appellee at 9, Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (No. 35-303). The Supreme Court found the tax to be unconstitutional because it was a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled . . . ." Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

hard to justify and its retaliatory character should be readily apparent. Justice Rehnquist's comment in *Minneapolis Star* is apt: "this Court is quite capable of dealing with changes in state taxing laws which are intended to penalize newspapers."[150]

III. THE POLICY QUESTIONS

Shortly after *Branzburg* was decided, both the House and Senate held extensive hearings on proposed federal shield legislation.[151] Initially, the hearings revealed deep divisions among press entities and organizations over whether the privilege should be qualified or absolute. As the hearings progressed, press representatives moved toward an absolute privilege,[152] arguing that the risks of a qualified privilege were such that they would prefer none at all.[153] The Department of Justice opposed an absolute privilege, as well as a privilege applicable to both state and federal proceedings.[154] At the conclusion of the House hearings, Representative Kastenmeier noted the "evolution" of a position that preferred a First Amendment-based case-by-case narrowing of *Branzburg*.[155] Congress did not enact the proposed shield legislation in 1973; by 1975 the sense of urgency had passed as lower courts began recognizing a qualified First Amendment privilege.[156] The case-by-case approach, though, has contributed to the mess that now characterizes journalist's privilege.

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150 *Minneapolis Star*, 460 U.S. at 601 (Rehnquist, J., dissenting).

151 *Newsmen's Privilege: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong. (1973) [hereinafter *Senate Hearings*]; *Newsmen's Privilege: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 93d Cong. (1973) [hereinafter *House Hearings*]; *Newsmen's Privilege: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong. (1972). For Sen. Sam Ervin's perspective on the hearings and the problems of drafting a reporter's privilege statute, see Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233 (1974).

152 *See, e.g., House Hearings, supra* note 151, at 536 (statement of Elmer W. Lower, president of ABC News) (stating that ABC News has changed its position in favor of an absolute privilege).

153 *See, e.g., id.* at 538 (statement of Robert G. Fichenberg, Chairman, Freedom of Information Committee, American Society of Newspaper Editors) (claiming that "it is becoming increasingly more obvious that a qualified shield law will not provide the protection that is needed.")

154 *See, e.g., Senate Hearings, supra* note 151, at 330-34 (testimony of Robert G. Dixon, Asst. Att'y Gen.) (an absolute privilege would "unduly subordinate" the interest in the effective administration of justice; Congress should not "hamstring" states in the operation of their judicial proceedings).

155 *House Hearings, supra* note 151, at 483 (statement of Rep. Kastenmeier); *see also Senate Hearings, supra* note 151, at 3 (statement of Sen. Ervin) (stating that this is a problem "better approached through case-by-case litigation rather than through inflexible statutory words.").

156 *See House Hearings, 1975, supra* note 66, at 95 (testimony of Jack Nelson) (*Branzburg* has not proved to be the disaster some feared it would be).

Shield legislation has been introduced in Congress again.[157] With Judith Miller's eighty-five day incarceration and contempt proceedings continuing against journalists in the Wen Ho Lee case, prominent news organizations and journalists have recently begun advocating enactment of a federal shield law.[158] As one author recently wrote in a journalism magazine:

> We have tiptoed around the issue of reporter privilege in the United States for more than 30 years. Now, too much is at stake and the dangers to integrity of the journalistic process are too real to rely on what many believe is a phantom privilege that has existed only in the minds of some journalists.[159]

Crafting a journalist's privilege is not simple.[160] The primary issues involve determining who is a journalist, and what qualifications, if any, should be placed on the privilege.[161] Secondary issues include the following: Should protection extend only to the identity of a confidential source, or should the privilege also protect unpublished information provided by the source? Does the privilege protect a reporter's notes, outtakes, and similar unpublished materials? Does the privilege protect information possessed by third parties, such as telephone companies? What procedural mechanisms should be put in place for asserting or overcoming the privilege? Can the privilege be waived by the source?[162]

This section of the Article discusses the issues of a qualified privilege and the definition of journalists to illustrate three key points. First, a privilege resting on ad hoc judicial analysis of factors such as the value of a leak is deeply flawed. Second, the types and variety of choices needed to fashion a coherent journalist's privilege doctrine are policy matters for legislative bodies. Third, a legislatively-crafted journalist's privilege is not "licensing" of the press.

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157 S. 1419, 109th Cong. (2005); H.R. 3323, 109th Cong. (2005).

158 *See, e.g., Reporters' Shield Legislation: Issues and Implications: Hearing before U.S. Senate Comm. on Judiciary*, 109th Cong. 1 (July 20, 2005) (testimony of Norman Pearlstine) (on file with author).

159 Tony Pederson, *Warming Up To the Idea of A Shield Law*, NEWS MEDIA & LAW, Winter 2005, at 8.

160 Senator Ervin stated that drafting a shield law involves "a number of tough, complex issues." *Senate Hearings*, *supra* note 151, at 6; *see also House Hearings*, *supra* note 151, at 23 (statement of the Association of the Bar of the City of New York Committee on Federal Legislation) (outlining policy questions presented by proposals to create a journalist's privilege).

161 At the federal level, another primary question is whether the privilege should be applicable to both state and federal proceedings.

162 For a discussion of the many different issues addressed in state shield laws, see DIENES, *supra* note 10, at 648-703.

A. *The Need for Clarity*

> [R]eporters need certainty when dealing with informants. A source wants to know with precision whether or not the reporter can be forced to reveal his identity.
>
> —Paul Branzburg, 1973[163]

At the time the reporter and source enter into a confidential relationship, the reporter may not know the exact nature of the information the source is willing to disclose.[164] Nor can a source anticipate how the information will be used; information provided to a reporter on a confidential basis is often a small piece of a puzzle the reporter has not yet assembled.[165] Neither party can accurately anticipate the mixture of variables—both legal and extralegal—that will determine whether their relationship remains confidential.[166] As Matthew Cooper recently told the Senate Judiciary Committee, when a source asks for confidentiality, "I can't really know what I'm getting myself into assuming what follows is important and controversial enough to rise to the level of litigation."[167] This uncertainty is caused by the varying privilege

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163 *Senate Hearings, supra* note 151, at 362 (testimony of Paul Branzburg).

164 *See, e.g,* Cohen v. Cowles Media Co., 457 N.W.2d 199, 200 (Minn. 1990), in which Dan Cohen approached reporters with the following:

> I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents.

Matthew Cooper of *Time* recently told Congress "no reporter knows whether what follows after the ground rules are established will be useless drivel or important information that will benefit the public." *Reporters' Shield Legislation: Issues and Implications: Hearing Before the U.S. Senate Comm. on Judiciary*, 109th Cong. 2 (July 20, 2005) (testimony of Matthew Cooper) (on file with author).

165 The Minnesota Supreme Court in *Cohen* described this process:

> The reporter can only evaluate the information after receiving it, which is after the promise is given; and the editor can only make a reasonable, informed judgment after the information received is put in the larger context of the news. The durability and duration of the confidence is usually left unsaid, dependent on unfolding developments; and none of the parties can safely predict the consequences of publication.

Cohen, 457 N.W.2d at 203.

166 Consider some of the following legal and extralegal variables affecting reporters and their confidential sources. If state law covers their relationship, which state's law is applicable? Is a First Amendment privilege recognized in that jurisdiction? If the reporter's notes are the news organization's property, will the news organization comply with a subpoena? Will editors override a reporter's promise of confidentiality and publish the identity of the source? Will the conversation yield information relevant to a criminal or civil proceeding? If a court employs a balancing test, what is the likely outcome of that balancing?

167 *Testimony of Matthew Cooper, supra* note 164, at 2. Norman Pearlstine added that because of the "contradictory privilege rules that vary widely depending on the

protections available in different jurisdictions as well as the unpredictable outcomes when judges engage in ad hoc balancing to implement a qualified privilege.

In 1973, press organizations argued for absolute shield protection on the grounds that qualified protection would place both sources and reporters in an uncertain situation and this would deter the flow of information. For example, an association of small newspaper publishers made the following statement:

> Who can say with any degree of certainty how a court would interpret a qualified law? Lawyers, judges, indeed the members of this committee will not be able to give assurance to any reporter or to news sources that what is said in confidence can be protected from compulsory disclosure before courts and grand juries if Congress approves only a qualified law.[168]

One possible way to eliminate this uncertainty is the enactment of an absolute privilege, as several states have done. The contours of state shield laws granting an absolute privilege, however, vary widely. Some states provide an absolute protection for the identity of sources.[169] Other states provide absolute protection to the identity of sources and unpublished information.[170] Some jurisdictions provide absolute protection to the identity of sources, but only a qualified protection for unpublished materials such as notes.[171] In some states, the privilege is tailored to the type of proceeding. For example, New Jersey's generally absolute privilege[172] can be overcome in criminal proceedings.[173] Oregon does not allow its privilege to be asserted in defamation suits where the defendant offers a defense based on information obtained from a confidential source.[174]

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jurisdiction," sources faced with uncertain protections will hesitate to communicate with reporters. *Testimony of Norman Pearlstine, supra* note 158, at 10-11.

168 *House Hearings, supra* note 151, at 208 (statement of Walter E. Gleason on behalf of the National Newspaper Association). As Justice Scalia told Congress in 1975 when he was an Assistant Attorney General,

> If one were to adopt an absolute, ironclad immunity, it would seem theoretically likely that the willingness of informants to provide information to newsmen might be increased. But once any substantial doubt is cast upon the certainty of that immunity, it seems to me the effect upon potential informants is reduced to the level where it is almost negligible.

House Hearings, 1975, supra note 66, at 8 (testimony of Ass't Att'y Gen. Antonin Scalia).

169 *See, e.g.*, IND. CODE ANN. § 34-46-4-2 (2002); ALA. CODE § 12-21-142 (2005).

170 *See, e.g.*, OR. REV. STAT. § 44.520 (1) (a)-(b) (2003); NEV. REV. STAT. § 49.275 (2004).

171 *See, e.g.*, D.C. CODE ANN. § 16-4702, 16-4703 (2005); *see also* N.Y. CIV. RIGHTS § 79-h (b)-(c) (2005) (providing absolute privilege to information received from confidential sources and source identities; qualified privilege to nonconfidential information).

172 N.J. STAT. ANN. § 2A:84A-21 (2005).

173 *Id.* at § 2A:84A-21.3 (2005); *see also* N.J. R. EVID. 508 (2004).

174 OR. REV. STAT. § 44.530 (3) (2003).

The majority of state shield laws offer qualified protection; many of the state shield laws enacted after *Branzburg* use a three-part test, derived from Justice Stewart's dissenting opinion,[175] to define when the privilege can be overcome. For example, Tennessee's shield law allows the privilege to be defeated if the party seeking information shows by "clear and convincing evidence" the following:

> (A) There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law;
> (B) The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and
> (C) The person has demonstrated a compelling and overriding public interest of the people of the state of Tennessee in the information.[176]

The problem with this statute, like similarly qualified First Amendment or federal common law privileges, is that it focuses on the "wrong moment in time."[177] To be effective, a privilege must be understandable to the reporter and source at the time they are entering into a confidential relationship. Sources and journalists are unable to predict in advance, for example, whether a court will find a prosecutor has reasonably sought to obtain the information elsewhere. Professor Stone posits the following scenario for a source facing a qualified privilege:

> At the moment you speak with the reporter, it is impossible for you to know whether, four months hence, some prosecutor will or will not be able to make the requisite showing to pierce the privilege. This puts you in a craps-shoot. But the very purpose of the privilege is to encourage sources to disclose useful information to the public. The uncertainty surrounding the application of the qualified privilege directly undercuts this purpose and is grossly unfair to sources, whose disclosures we are attempting to induce.[178]

The unpredictable outcomes produced by a qualified privilege are shown in two cases involving Judith Miller of the *New York Times*. Patrick Fitzgerald, a special prosecutor investigating the

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175 *See supra* note 75.

176 TENN. CODE ANN. § 24-1-208 (2004); *see also* FLA. STAT. § 90.5015 (2) (2005) (using a similar three-part test).

177 *Reporters' Shield Legislation: Issues and Implications: Hearing before the U.S. Senate Comm. on Judiciary*, 109th Cong. 10 (July 20, 2005) (testimony of Geoffrey R. Stone) (on file with author).

178 *Id.*

leak of Valerie Plame's identity as a CIA agent, sought to question Miller about conversations with her confidential source. The District of Columbia Court of Appeals ruled against Miller's First Amendment claim, but Judge Tatel claimed in a concurring opinion that Miller had a qualified federal common law privilege. Consequently, Tatel applied a balancing test that examined the government's need for the information, exhaustion of alternative sources, and weighed the harm caused by the leak against the leaked information's value.[179] To Judge Tatel, the harmful effects of disclosure of a CIA agent's identity, recognized by Congress in a statute punishing such actions,[180] outweighed the "marginal news value" of disclosing Plame's employment.[181] Apart from the assertion that Plame's identity was of marginal value, Tatel offered no explanation or analysis to explain this conclusion. Nor is it apparent whether Tatel was examining the newsworthiness of Robert Novak's column disclosing that Plame suggested sending her husband, Joseph Wilson, to Africa on a fact-finding trip,[182] or subsequent coverage revealing that White House officials sought to undermine Wilson's credibility by leaking information about Plame.[183]

Judge Tatel then examined the special prosecutor's filings to determine if the information was both critical and unobtainable from any other source. To preserve grand jury secrecy, this analysis was redacted. In the conclusion that was published, Tatel wrote that the special prosecutor's "exhaustive" investigation established the need for Miller's testimony.[184] Judge Henderson charitably

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179 *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 997-98 (2005) (Tatel, J., concurring).

180 50 U.S.C. § 421 (2005). When the court of appeals was considering rehearing the case en banc, a group of journalism organizations filed an amicus brief arguing that the CIA did little to conceal Plame's identity nor did it actively seek to prevent disclosure of her employment. Thus, it was questionable that the Intelligence Identities Protection Act was violated. *See* Motion of 36 Major News Organizations and Reporters' Groups for Leave to File a Brief *Amici Curiae* and Brief *Amici Curiae* at 5-12, *In re* Grand Jury Subpoenas, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005) (Nos. 04-3138, 04-3139, and 04-3140). *See infra* note 292.

181 *Miller*, 397 F.3d at 1002 (Tatel, J., concurring).

182 Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31. Novak subsequently wrote that he was not the recipient of a planned leak, the CIA never warned him that disclosure of Plame's CIA employment would endanger her anyone else, and it was well-known in Washington that Plame worked at the CIA. Robert Novak, *Columnist Wasn't Pawn for Leak*, CHI. SUN-TIMES, Oct. 1, 2003, at 49.

183 Matthew Cooper, Massimo Calabresi & John Dickerson, *A War on Wilson?* TIME.COM, July 17, 2003, http://www.time.com/time/nation/article/0,8599,465270,00.html; *see also* Mike Allen & Dana Priest, *Bush Administration Is Focus of Inquiry: CIA Agent's Identity Was Leaked to Media*, WASH. POST, Sept. 28, 2003, at A1.

184 *Miller*, 397 F.3d at 1002. In concluding remarks, Tatel said he would have supported the motion to quash the subpoena "[w]ere the leak at issue . . . less harmful to national

described Judge Tatel's balancing test as lacking "analytical rigor . . . ."[185]

In a separate inquiry also led by Fitzgerald, a grand jury is investigating leaks to Miller and Philip Shenon, another *Times* reporter, concerning the timing of the government's seizure of assets and searches of the offices of two Islamic charities. To identify the source of the leaks, Fitzgerald sought the telephone records of Miller and Shenon. The United States District Court for the Southern District of New York concluded that the telephone records, which would reveal the identities of the reporters' confidential sources, were protected by a qualified First Amendment and federal common law privilege.[186] To overcome this privilege, the government must establish the relevance and necessity of the documents, as well as their unavailability from other sources. Because the subpoena would capture a substantial number of records of confidential communications that were not relevant to the investigation, the district court ruled the government failed to establish relevance and necessity of the records.[187] Nor had the government established that it had taken steps to acquire the information from other sources, such as examining the phone records of government officials with access to the leaked information.[188] Referring to Judge Tatel's concurring opinion in *Miller*, Judge Sweet said that due to the prosecutor's failure to establish matters such as relevance, it was unnecessary to balance the competing interests of the parties. Nonetheless, the court did so, concluding the journalists relied upon confidential sources to gather information "concerning issues of paramount national importance" and the government had not shown its interests outweighed those of the press.[189]

What is the likely impact on source behavior of these wildly differing results? Judge Tatel asserted that the "point of a qualified privilege is to create disincentives for the source" and believed that these disincentives would only prevent sources from revealing

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security or more vital to public debate, or had the special counsel failed to demonstrate the grand jury's need for the reporters' evidence . . . ." *Id.* at 1004.

185 *Id.* at 984 (Henderson, J., concurring). *See also* Lee v. Dept. of Justice, No. 99-3380, slip op. at 25 (D.D.C. Nov. 16, 2005) (stating that judicial determination of the newsworthiness of a leak "would create a subjective and elastic standard" with unpredictable outcomes).

186 "The application of the privilege (i.e., the weight to be afforded to the interests militating for and against compelled disclosure) depends on the legal context in which the disclosure is sought." N.Y. Times v. Gonzales, 382 F. Supp. 2d 457, 510 (S.D.N.Y. 2005).

187 *Id.* at 511.

188 *Id.* at 511-12.

189 *Id.* at 513.

information that lacks significant news value.[190] But news value is purely subjective and a source would have to be clairvoyant to anticipate how a court would later balance the newsworthiness of a leak against its harmful effects.[191] In this light, the Supreme Court's comments from other privilege cases are apt. In the context of a patient-psychotherapist privilege, the Court said "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."[192] In another case involving attorney-client privilege, the Court said if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[193]

This is not to say that a privilege law must be absolute. It is possible to design a privilege statute with narrow qualifications that do not involve judicial balancing of elusive factors such as the news value of a leak. For example, Senator Ervin proposed in 1973 a "small qualification" to a generally absolute statutory privilege. Only where a source had committed a crime in the presence of the journalist would the journalist have to reveal the source's identity. Ervin stated, "[t]his provides a clear standard which puts both newsmen and sources on notice that where the newsmen has [sic] viewed a criminal act . . . he may later be compelled to identify the perpetrator of that act."[194]

A qualified shield law resting on an ad hoc judicial evaluation

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190 *Miller*, 397 F.3d at 1000-01 (Tatel, J., concurring).

191 Professor Nimmer's critique of ad hoc balancing is pertinent. He wrote, "ad hoc balancing means that there is no rule to be applied, but only interests to be weighted." Thus, prior to a judicial decision, "a given speaker has no standard by which he can measure whether his interest in speaking will be held of greater or lesser weight than the competing interest which opposes his speech." MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH 2-10 (1984).

192 Jaffee v. Redmond, 518 U.S. 1, 17 (1996).

193 Upjohn v. United States, 449 U.S. 383, 393 (1981).

194 *Senate Hearings, supra* note 151, at 315 (statement of Sen. Ervin). Senator Ervin's reference to a reporter witnessing a crime was tied to that era's events, such as Paul Branzburg watching his sources make hashish. Today, a reporter may witness a crime when a source discloses classified information to the reporter. This common event in Washington has rarely been prosecuted. The Plame case, however, may be a harbinger of future leak investigations. *See, e.g.*, Jonathan Weisman, *GOP Leaders Urge Probe in Prisons Leak*, WASH. POST, Nov. 9, 2005, at A1 (describing request for investigation of leak of classified information to the *Washington Post*). A key issue for Congress in crafting a federal shield law is defining which unauthorized disclosures are subject to confidentiality.

of the value of a leak is likely to discourage all but the most highly motivated sources. These are not necessarily the most noble, for sources leak for a variety of motives, some of which are not particularly worthy.[195] As in any chilling effect scenario, the fear is that an ad hoc qualified privilege will adversely affect potential sources who are easily intimidated.[196] Precise qualifications for a privilege create incentives for potential sources who otherwise would not speak to journalists.

B. *Defining Journalists*

> The term "freedom of the press" in the Constitution does not use the term "press" in the institutional sense. It does not mean freedom for newspapers and publishing houses, but rather freedom to publish.
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> —Antonin Scalia, 1975[197]

The beneficiaries of state shield laws vary substantially. Generally, book authors, freelancers, and academic researchers are excluded. Some states exclude magazine writers, but allow protection for reporters working for newspapers, radio, and television stations.[198] Other states provide protection for "any medium of communication . . . ."[199] Some states cover only "reporters,"[200] while other states protect editors, reporters, writers,

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195 Michael Kinsley says that sometimes leakers "are truth-tellers exposing institutional lies. Sometimes they are promoting an institutional agenda and want anonymity because they are spreading lies." He refers to the "cult of the anonymous source" where "worshipers visualize the object of their adoration as a noble dissident, courageously revealing malfeasance by a powerful institution that will wreak a horrible revenge if the source is uncovered." But most leaks, he claims are like the leak of Valerie Plame's name, an apparent effort to discredit her husband who was critical of the Bush Administration. Kinsley adds, "This was a leak plotted by the powerful institution itself—the White House—for the purpose of stomping exactly the kind of dissident who plays the hero's role in the generic leak fantasy." Kinsley, *supra* note 26.

196 Professor Nimmer captured this dynamic in his critique of ad hoc balancing: "The absence of certainty in the law is always unfortunate, but it is particularly pernicious where speech is concerned because it tends to deter all but the most courageous (not necessarily the most rational) from entering the marketplace of ideas." NIMMER, *supra* note 191, at 2-10.

197 *House Hearings, 1975*, *supra* note 66, at 8.

198 *See, e.g.*, ALA. CODE §12-21-142 (2005).

199 NEB. REV. STAT. ANN. § 20-144 (2005). The Nebraska Free Flow of Information Act states that a medium of communication "shall include, but not be limited to, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system . . . ." *Id.* at § 20-145(2).

200 ALASKA STAT. § 09.25.300 (2005). Reporter is defined as "a person regularly engaged in the business of collecting or writing news for publication, or presentation to the public, through a news organization; it includes persons who were reporters at the time of the communication, though not at the time of the claim of privilege." *Id.* at § 09.25.390 (2005).

and publishers.[201] Some states specify the amount of time that must be spent working on newsgathering to qualify as a reporter,[202] while other states protect "regular employees" of the news media and freelancers.[203] Among the states providing the broadest coverage is Minnesota; its shield law does not specify employment with any particular news medium. Instead, it protects 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 . . . ."[204] Conceivably, public relations practitioners would qualify under the Minnesota statute.

At the federal level, the Department of Justice guidelines relating to the issuance of subpoenas to members of the news media do not define the terms "news media" or "reporter."[205] In contrast, the Privacy Protection Act was specifically designed to apply to more than the news media. The Act provides protection against searches "of the press *and others* involved in First Amendment activities."[206] The Act limits the use of searches and

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201 ARK. CODE ANN. § 16-85-510 (2005). The Arkansas statute also applies to radio station reporters, managers, and owners, but not to those holding similar positions at television stations.

202 DEL. CODE ANN. tit. 10 § 4320(4) (2005) specifies that a "reporter" earned "his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination" to the public.

203 TENN. CODE. ANN. § 24-1-208 (2004) (protecting news media employees or a person "who is independently engaged in gathering information for publication or broadcast"); *see also* N.Y. CIV. RIGHTS § 79-h (a)(6) (2005). New York defines a "professional journalist" as a "regular employee" of a "newspaper, magazine, news agency, press association or wire service or other professional medium" who is "engaged in gathering, preparing, collecting, writing, editing, filming, taping, or photographing of news" or "as one otherwise professionally affiliated for gain or livelihood with such medium of communication." *Id.*

204 MINN. STAT. § 595.023 (2004).

205 28 C.F.R. § 50.10 (2005). Nonetheless, Department of Justice officials make distinctions about the people subject to the guidelines. For example, aspiring book author Vanessa Leggett was not considered to be a journalist. *See* Letter from Lucy A. Dalglish, Executive Dir., Reporters Committee for Freedom of the Press, to Att'y Gen. John Ashcroft (Jan. 14, 2002) (on file with author) (criticizing decision to treat Leggett as a non-journalist). Leggett spent 168 days in jail for refusing to cooperate with a grand jury. *See In re* Grand Jury Subpoenas, 29 Media L. Rep. 2301 (5th Cir. 2001), *cert. denied*, 535 U.S. 1011 (2002).

206 THE PRIVACY PROTECTION ACT OF 1980, S. REP. NO. 96-874, at 4 (1980) (emphasis added). The Act was designed to "avoid the chilling effects of disruptive searches on the ability to obtain and publish information for all those who have a purpose to disseminate information to the public." *Id.* at 9. In response to a request by President Carter, the Department of Justice drafted a legislative proposal that was refined into the Privacy Protection Act. The Department of Justice rejected the idea of a press-only bill "partially because of the extreme difficulties of arriving at a workable definition of the press, but more importantly because we thought it was appropriate to have a first amendment bill, not a press bill." *Zurcher v. Stanford Daily: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong. 17 (1979) (testimony of Ass't Att'y Gen. Philip Heymann). Authors, filmmakers and academicians

seizures to obtain materials possessed "by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce . . . ."[207] The protections of the Act are not limited to media forms in existence in 1980. It has been held to be applicable to the operator of a computer bulletin board.[208] Nor is the Act tied to news or investigative reporting, however those terms might be defined.

Like the Privacy Act, the First Amendment-based privilege developed by lower courts has not been limited to the establishment media. These courts are guided by the Supreme Court's statement in *Lovell v. Griffin* that the press "comprehends every sort of publication which affords a vehicle of information and opinion."[209] Thus, documentary filmmakers,[210] authors and reviewers of articles for a medical newsletter,[211] and Wall Street investment analysts[212] have been included within the First Amendment-based privilege.

An influential test for defining who is entitled to a First Amendment-based privilege was developed by the Court of Appeals for the Second Circuit in *von Bulow v. von Bulow*.[213] This test focuses on the activity and intent of the party claiming the privilege; the Second Circuit defined journalists as those who were involved "in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press."[214] Additionally, at the inception of the information-gathering process, there must be intent to disseminate information to the public.[215] The Court of

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"who are not members of the press establishment" are equally as susceptible to the chilling effect of governmental searches as members of the news media. *Id.*

207 42 U.S.C. § 2000aa (a) (2005).

208 Steve Jackson Games, Inc. v. United States Secret Serv., 816 F. Supp. 432 (W.D. Tex. 1993), *aff'd*, 36 F.3d 457 (5th Cir. 1994). In addition to operating a computer bulletin board, the company also published books, magazines, and video games. The district court commented that "[w]hile the content of these publications are not similar to those of daily newspapers, news magazines, or other publications usually thought of by this Court as disseminating information to the public, these products come within the literal language of the Privacy Protection Act." *Id.* at 434 n.1.

209 303 U.S. 444, 452 (1938).

210 Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

211 Apicella v. McNeil Labs., Inc., 66 F.R.D. 78 (E.D.N.Y. 1975).

212 Summit Tech. Inc. v. Healthcare Capital Group, Inc., 141 F.R.D. 381, 384 (D. Mass. 1992) ("Whether or not Roberts is a member of the 'organized press' per se, it appears that he is engaged in the dissemination of investigative information to the investing business community.")

213 811 F.2d 136 (2d Cir. 1987).

214 *Id.* at 142.

215 *Id.*

Appeals for the Ninth Circuit used the activity and intent test in *Shoen v. Shoen*,[216] finding that a book author under contract with a publisher was gathering news with intent to disseminate the information to the public. The Ninth Circuit commented that the reporter's privilege protects investigative reporting, regardless of the medium used to report the news to the public. Consequently, there was no principled basis for including newspaper and broadcast journalists within the privilege, yet denying the privilege to investigative book authors. The Ninth Circuit added, "What makes journalism journalism is not its format but its content."[217]

Both the Second and Ninth circuits believed the reporter's privilege protected a particular type of journalism—investigative reporting.[218] And, implicitly both courts require that the information must be news although neither court defined that term.[219] The Ninth Circuit hinted at the meaning of that term by referring to "newsworthy" facts on "topical and controversial matters of great public importance"[220] and commenting that books about historical figures were arguably not the dissemination of news, but the "writing of history."[221]

The Third Circuit expanded on the investigative reporting and news concepts in *In re Madden*,[222] a case involving Mark Madden, an employee of World Championship Wrestling who prepared tape-recorded commentaries about wrestling for the WCW's 900-number hotline. The Third Circuit found that Madden was not entitled to a First Amendment-based reporter's privilege because he was not involved in investigative activities; all

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216 5 F.3d 1289 (9th Cir. 1993).

217 *Id.* at 1293. The Ninth Circuit claimed it would be "unthinkable to have a rule that an investigative journalist, such as Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing about Watergate, but not as the author of a book on the same topic." *Id.*

218 The Second Circuit added emphasis to the terms investigative report, investigative reporting or investigative journalist at four places in its opinion. *See von Bulow*, 811 F.2d at 142-44. The Ninth Circuit stressed the importance of "investigative" book authors such as Lincoln Steffens, Upton Sinclair, Rachel Carson, Ralph Nader, and Jessica Mitford who "played a vital role in bringing to light 'newsworthy' facts on topical and controversial matters of great public importance." *Shoen*, 5 F.3d at 1293.

219 State shield laws generally require that covered persons gather news, but rarely define the term news. Those statutes defining news offer vague generalities. Florida's statute defines news as "information of public concern relating to local, statewide, national, or worldwide issues or events." FLA. STAT. § 90.5015 (1) (b) (2005). New York's statute defines 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." N.Y. CIV. RIGHTS § 79-h (a) (8) (2005).

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

221 *Id.* at 1294 n.9.

222 151 F.3d. 125 (3d Cir. 1998).

of the information he disseminated was given to him solely by WCW executives. "He uncovered no story on his own nor did he independently investigate any of the information given to him by WCW executives."[223] Also, the Third Circuit described Madden's commentaries as "hype, not news."[224] The court of appeals observed,

> Madden's work amounts to little more than creative fiction about admittedly fictional wrestling characters who have dramatic and ferocious-sounding pseudonyms like "Razor Ramon" and "Diesel." As a creative fiction author, Madden's primary goal is to provide advertisement and entertainment—not to gather news or disseminate information. It is clear from the record that Mr. Madden was not investigating "news," even were we to apply a generous definition of the word.[225]

Further, as a creative fiction author, Madden was able to change the chronology of events and "even fill in factual gaps with fictitious events—license a journalist does not have."[226]

The Third Circuit was trying to limit the scope of the journalist's privilege,[227] but its distinction between "news" and "entertainment" presents a false dichotomy. News coverage is a product often produced with an eye toward entertaining the audience. Also, the distinction between "fact" and "fiction" does not acknowledge that some styles of reporting and commentary blend the two. For example, Upton Sinclair's *The Jungle*,[228] regarded by the Ninth Circuit as a prime example of investigative reporting,[229] provided a highly detailed factual account of the horrific conditions in the meat-packing industry in the early 1900s. Yet, Sinclair also told the story of Jurgis Rudkis, a fictional character who was a composite of many people Sinclair had observed.[230] Other forms of journalism also depart from the strictly factual. Sensationalism, which has a long history in American journalism, emphasizes storytelling over factual

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223 *Id.* at 130.

224 *Id.*

225 *Id.*

226 *Id.* For analysis of the Madden test, see Clay Calvert, *And You Call Yourself a Journalist?: Wrestling With a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411 (1999).

227 "This test does not grant status to any person with a manuscript, a web page or a film, but requires an intent at the inception of the newsgathering process to disseminate investigative news to the public." *Madden*, 151 F.3d. at 129.

228 UPTON SINCLAIR, THE JUNGLE (1906).

229 Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993); *see supra* note 218.

230 James R. Barrett described Sinclair's style as "neither effective naturalist literature nor objective muckraking journalism, but rather a sometimes clumsy fusion of the two." UPTON SINCLAIR, THE JUNGLE xi (James R. Barrett, ed., Univ. of Ill. Press 1988).

accuracy.[231] Likewise, political cartoons and parodies, a rich part of our political discourse, involve deliberate distortion and exaggeration.[232]

While a distinction between writers of fact-based "news" reporting and writers of "entertaining" fictional narratives or parodies may be sensible as a matter of statutory policy, this distinction is highly questionable as a matter of constitutional policy. As the Supreme Court stated in *Winters v. New York*, the "line between the informing and the entertaining is too elusive" to be used in defining press freedom. "What is one man's amusement, teaches another's doctrine," the Court added.[233] Tom Wolfe's fictional writing, such as *I Am Charlotte Simmons*,[234] reveals that works of fiction can be thinly veiled accounts of contemporary people, events and trends; Wolfe's piercing social commentary is no less valuable to public discourse because it is entertaining fiction. If a fictional writer acquires information from a confidential source, why should that relationship receive less constitutional protection than the relationship between an investigative reporter and a source? The *Madden* decision is an example of the type of content discrimination the *Branzburg* Court feared would occur if courts were to fashion a First Amendment-based privilege.[235]

In *Branzburg*, Justice White commented on the difficulty of administering a "*constitutional* newsman's privilege . . . ."[236] Given the Court's view of press freedom as a "fundamental personal right" which is "not confined to newspapers and periodicals,"[237] White emphasized that defining the privilege for only "newsmen" ran counter to the constitutional 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 who utilizes the latest photocomposition methods."[238] White

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231 *See* MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS (1978) (describing changing conceptions of news and the functions of newspapers).

232 *See* Hustler Magazine v. Falwell, 485 U.S. 46, 53-55 (1988) (describing political cartoons and their contribution to political discourse).

233 333 U.S. 507, 510 (1948); *see also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (stating that the "importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.").

234 TOM WOLFE, I AM CHARLOTTE SIMMONS (2004).

235 Branzburg v. Hayes, 408 U.S. 665, 705 n.40 (2005).

236 *Id.* at 703-04; *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring) (a fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition).

237 *Branzburg*, 408 U.S. at 704 (quoting Lovell v. Griffin, 303 U.S. 444, 450, 452 (1938)).

238 *Id.* at 704.

observed that the informative function asserted by the "organized press" was also performed by a wide array of public communicators, each of whom could assert a reliance on confidential sources.[239] Plainly, Justice White was concerned that a judicially-created reporter's privilege would be underinclusive and that any distinctions, say between a professional journalist and the lonely pamphleteer, would be arbitrary and content discriminatory.[240]

But just as Justice White was sounding a cautionary note about a judicially-created privilege, he was inviting legislatures to "fashion standards and rules as narrow or broad as deemed necessary . . . ."[241] In crafting statutes, legislatures are given latitude in approaching problems one step at a time.[242] Thus, a legislature may examine the problem of confidential sources and conclude that reporters for newspaper, broadcast, cable, magazine outlets, and book authors have the most pressing need for a privilege. As long as the statute is not tied to impermissible factors, such as viewpoint, its exclusion of web bloggers is permissible.[243]

A broadly crafted statutory privilege which includes web bloggers has potential to hamper the legitimate investigation of crimes.[244] On the other hand, a narrower definition may hamper

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239 *Id.* at 705.

240 *Id.* at 705 n.40.

241 *Id.* at 706.

242 The classic statement is from Williamson v. Lee Optical Inc., 348 U.S. 483 (1955) in which the Court announced that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Id.* at 489 (citation omitted).

243 *See House Hearings*, *supra* note 151, at 23 (statement of Association of the Bar of the City of New York Committee on Federal Legislation) (stating that as long as Congress does not discriminate on the basis of content, it is free to limit a reporter's privilege to those classes of persons Congress regards as most in need of legislative protection); *Testimony of Geoffrey Stone*, *supra* note 177, at 7 ("Whereas the Court is wisely reluctant to define 'the press' for purposes of the First Amendment, it will grant Congress considerable deference in deciding who, as a matter of sound public policy, should be covered by the journalist-source privilege.").

The Sixth Circuit rejected a television reporter's equal protection challenge to a Michigan shield law that applied only to print media reporters. *In re* Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987). The Sixth Circuit read *Branzburg* as rejecting a First Amendment testimonial privilege; thus the Michigan statute did not interfere with a fundamental right of broadcast journalists. *Id.* at 587. One commentator argues that in other jurisdictions recognizing a constitutional privilege, courts "would be obliged to accept such an equal protection claim, at least in the face of an 'as applied' challenge by a broadcast journalist." DIENES, *supra* note 10, at 652 n.26. After the Michigan courts ruled that broadcast journalists were not covered by the state's shield law, *In re* Contempt of Stone, 397 N.W.2d 244, 246 (Mich. Ct. App. 1986), the legislature amended the statute to protect those involved in the broadcast or publication of news. *See* MICH. COMP. LAWS § 767.5a (2005).

244 In *Branzburg*, Justice White feared that a broadly-defined constitutional privilege would be abused by criminals setting up "sham" newspapers so their criminal activities

the development of new forms of journalism, especially those forms of interest to specialized audiences, such as computer aficionados.[245] These are precisely the broad social issues legislatures commonly examine and resolve. In contrast, judicial decision making, which is heavily influenced by the facts and parties in a particular controversy, is an unwieldy way of creating uniform social policy. Deciding who is entitled to a privilege, what qualifications should exist, and where the privilege is applicable are difficult policy questions that require the unique perspective and fact-finding ability of legislatures. As the Court has noted on many occasions, legislatures are far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing on complex social issues.[246] Most importantly, the balancing necessary to answer these policy questions can be done by the legislature at the definitional level, rather than at the ad hoc level currently employed by the judiciary.[247] An ad hoc approach places journalists and their sources in a guessing game.

Legislative bodies are also uniquely situated to examine and adjust the interplay among laws. For example, disclosure of official misconduct can be encouraged by shield laws and whistleblower protection statutes. The latter generally protect disclosures only

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would be insulated from grand jury inquiries. 408 U.S. at 705 n.40. In *Miller,* Judge Sentelle feared that web blogs would be used to shield criminal activity. *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 979-80 (D.C. Cir. 2005) (Sentelle, J., concurring). Deputy Attorney General James Comey recently told the Senate Judiciary Committee that a broad definition of "covered persons" in proposed shield legislation would "cover criminal or terrorist organizations that also have media operations . . . ." *Statement of James Comey, supra* note 32, at 6. This would "create serious impediments to the Department's ability to effectively enforce the law and fight terrorism." *Id.* at 1.

245 The increasing importance of Web-based communication is illustrated by Apple Computer's lawsuits relating to the disclosure of trade secrets on sites focusing on Apple news. Jason O'Grady posted a detailed drawing of "Asteroid," an Apple product under development, on his site www.powerpage.com. Apple claimed its trade secret information was illegally leaked to O'Grady; Apple directed a discovery request at Nfox, the email service provider for PowerPage, in an effort to discover the identity of the source of this information. O'Grady claimed to be a journalist, a claim the Superior Court for the County of Santa Clara, California did not decide because the court ruled that no one, including journalists, has a license to violate trade secret laws. Apple Computer, Inc. v. Does 1-25, Case No. 1-04-CV-032178 (Sup. Ct. Santa Clara County, Mar. 11, 2005) (on file with author). Apple has also sued Nicholas Ciarelli, who operates the web site www.thinksecret.com., for attempting to induce Apple employees to violate their confidentiality agreements. Apple Computer, Inc. v. Nick DePlume, Case No. 1-05-CV-033341 (Sup. Ct. Santa Clara County, Jan. 14, 2005). Ciarelli claims to be a journalist. *See generally* John Markoff, *To Cut Online Chatter, Apple Goes to Court,* N.Y. TIMES, Mar. 21, 2005, at C2.

246 Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 330 n.12 (1985).

247 Of course, the Supreme Court has used definitional balancing in defining the nature and extent of First Amendment freedoms, but the ad hoc approach is almost universally used by lower courts in cases involving a constitutionally-based reporter's privilege. For a discussion of definitional balancing and its advantages over ad hoc balancing, see NIMMER, *supra* note 191, at 2-15-24.

through official channels;[248] amending these laws to protect disclosures to the press increases the incentives for potential sources. Conversely, because the overzealous classification of national security information is arguably a cause of confidential leaks by government employees,[249] unauthorized disclosures can be affected by a tightening of classification standards and the enactment of a federal shield law offering limited protection for sources who leak classified information. Unlike the judiciary, legislatures can craft a shield law while also enacting or amending other laws to create a comprehensive approach to the flow of information.

In his concurring opinion in *Miller*, Judge Sentelle noted the difficult questions the judiciary must address in crafting a First Amendment-based journalist's privilege, such as whether bloggers are included or excluded in such a privilege and how the privilege should be limited. After reviewing the varied ways in which states have answered these questions, he wrote the following:

> [I]f such a decision requires the resolution of so many difficult policy questions, many of them beyond the normal compass of a single case or controversy such as those with which the courts regularly deal, doesn't that decision smack of legislation more than adjudication? Here I think the experience of the states is most instructive. The creation of a reporter's privilege, if it is to be done at all, looks more like a legislative than an adjudicative decision. I suggest that the media as a whole, or at least those elements of the media concerned about this privilege, would better address those concerns to the Article I legislative branch for presentment to the Article II executive branch than to the Article III courts.[250]

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248 Congress has enacted a variety of whistleblower statutes offering protection to employees who expose wrongdoing through specified non-media channels. *See, e.g.*, 42 U.S.C. § 5851 (2005) (nuclear energy employees); 49 U.S.C. § 42121 (2005) (airline employees); 18 U.S.C. § 1514A (2005) (employees of publicly-traded companies). Only the False Claims Act offers protection to whistleblowers who disclose wrongdoing to the media. *See* 31 U.S.C. § 3730 (e)(4)(A) (2005). Although every state has enacted some form of whistleblower protection, none of these statutes authorizes or encourages disclosure to the media. Elletta S. Callahan & Terry M. Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 108 (2000).

249 Recently the House Permanent Select Committee on Intelligence began a series of hearings on the unauthorized disclosure of classified information. Representative Peter Hoekstra, chair of the committee, believes that examination of statutes barring release of classified information should accompany the discussion of the shield-law bills currently before Congress. *See* Walter Pincus, *House Hearings Target Leakers; Committee's Goal Is More Effective Prosecution of Offenders*, WASH. POST. Sept. 24, 2005, at A8.

250 *Miller*, 397 F.3d at 981 (Sentelle, J., concurring).

C. *Licensing*

A persistent theme raised by journalists opposed to shield legislation is that a definition of journalists is "tantamount to government licensing of reporters"[251] and "in the long run shield laws could become the instrumentality for government control of the press."[252] Shield laws have existed since 1896,[253] and have been enacted by the majority of states; if these laws had been used to control the press, there would surely be a record of abuse. There is no such record. Shield laws contain protections against disclosure of sources; these laws lack any mechanisms to affect what the press publishes. To claim that shield laws "license" the press misapprehends that term.

Lawyers, physicians, and psychotherapists are licensed.[254] This means that no one without a license may lawfully offer services reserved for those professions. A hallmark of American free expression, however, is that every citizen may publish without seeking permission from the government. There are some notable exceptions to this general rule. Use of certain public properties, such as streets for large assemblies, requires permits, but these must be issued on content-neutral grounds.[255] Licenses are required before broadcasting stations and cable systems are operated. Even in the heavily-regulated broadcast industry, though, there is no government review of program content prior to its dissemination.[256] Nor is there any licensing of the journalists who work for broadcast or cable companies.

The history of press licensing in England forms an important backdrop for the adoption and interpretation of the First

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251 *Senate Hearings*, *supra* note 151, at 643 (reprinting Vermont Royster's *Wall Street Journal* column of Feb. 28, 1973). Don Wycliff, ombudsman for the *Chicago Tribune*, recently stated that defining who is included in a privilege statute "means separating sheep from goats, which is another way of saying licensing." Joe Hagan & Brody Mullins, *Federal Shield For Journalists Is No Panacea*, WALL ST. J., July 11, 2005, at B1. Chief Justice Burger also suggested that the "very task of including some entities within the 'institutional press' while excluding others . . . is reminiscent of the abhorred licensing system of Tudor and Stuart England . . . ." First Nat'l Bank v. Bellotti, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring).

252 *House Hearings*, *supra* note 151, at 358 (statement of Clark Mollenhoff).

253 Maryland was the first state to enact a shield law. *See* State v. Sheridan, 236 A.2d 18, 19 n.1 (Md. 1967).

254 *See, e.g.*, GA. CODE ANN. § 43-34-27 (2004) (physicians). Statutes providing a privilege to communication between certain professionals and clients require that the professional be licensed. *See, e.g.*, FLA. STAT. § 90.502 (2005) (lawyer-client privilege).

255 For a discussion of the genesis of this doctrine, *see* Lee, *supra* note 44.

256 47 U.S.C. § 326 (2005). Special sanctions await broadcasters who broadcast proscribed material, such as indecency. The Supreme Court ruled that FCC review of past programming, and the imposition of sanctions, did not violate Section 326's ban on censorship, nor did it violate the First Amendment. FCC v. Pacifica Found., 438 U.S. 726 (1978).

Amendment. The Printing Act of 1662, for example, strictly limited who could print, import, or sell printed matter. Printed matter that was offensive to the Church of England, to any officer of government, or to corporations and private persons was specifically forbidden. Finally, nothing could be printed unless it "shall be first lawfully licensed and authorized to be printed" by government licensors.[257] As Professor Siebert described the process, manuscripts were presented to the official censor and authorization to print was contingent on the printer implementing the censor's required changes or amendments.[258] Licensing of who could print went hand in hand with government control of what was printed. This system ended in England in the 1690s and was replaced with a legal structure featuring the freedom to publish, but leaving open the possibility of post-publication penalties. William Blackstone, a prominent English jurist, described this system:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[259]

At the time of its adoption, the First Amendment's phrase "freedom of the press" was commonly understood to mean that Congress was "powerless to authorize restraints in advance of publication."[260] State constitutional provisions protecting the press were also understood as prohibiting prior restraints.[261]

One of the cornerstones of modern interpretation of the First Amendment is Chief Justice Hughes' opinion for the Court in *Near v. Minnesota*.[262] A state law authorized injunctions against "malicious, scandalous, and defamatory" newspapers. After the

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257 FREDERICK SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776 242 (1952).

258 *Id.*

259 Near v. Minnesota, 283 U.S. 697, 713-14 (1931) (quoting 4 WILLIAM BLACKSTONE'S COMMENTARIES 151-52).

260 *Freedom of the Press: Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong. 191 (1972) (statement of Leonard W. Levy). Levy adds that on this point, "the evidence for the period from 1787 to 1791 is uniform and nonpartisan." *Id.*

261 *See, e.g.*, Commonwealth v. Blanding, 20 Mass. 304, 313-14 (1825) (stating that the Massachusetts Constitution was intended to "prevent all such *previous restraints* as had been practised [sic] by other governments . . . .").

262 283 U.S. 697 (1931).

Saturday Press published a series of articles raising serious accusations against government officials, the County Attorney of Hennepin County sought to enjoin further publication of the *Saturday Press.* The district court concluded the newspaper was a public nuisance and perpetually enjoined further publication of malicious, scandalous, or defamatory matter. As Near's attorneys observed in their brief before the United States Supreme Court, the statute "makes the chancellor who has issued an injunction under the Act a censor of that which may be published in the future; for no defendant would dare take the chance of being imprisoned for contempt by publishing a newspaper not submitted to the chancellor in advance of publication."[263]

In finding the statute unconstitutional, Chief Justice Hughes described the historic conception of liberty of the press as principally meaning "immunity from previous restraints or censorship."[264] Among the statute's flaws was its requirement that an injunction would be issued unless a publisher could convince a judge that the material complained of was true and published with good motives. Once a newspaper was suppressed, its resumption would depend upon convincing the court as to the character of the new publication. This, Hughes commented, is "the essence of censorship."[265] Hughes feared that if the Minnesota law were constitutional, then the "legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship."[266]

Technically, the Minnesota system differed from seventeenth century licensing because Minnesota was not granting licenses to a limited number of printers, nor was a government official reviewing all newspaper content prior to its original dissemination.[267] The Court did not define prior restraint in a purely historical manner. Instead, the Court looked at matters of substance, not "mere matters of form" and said "the statute must

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263 Brief for Appellants at 20; Near v. Minnesota, 283 U.S. 697 (1931) (No. 30-91).

264 *Near*, 283 U.S. at 716.

265 *Id.* at 713.

266 *Id.* at 721.

267 However, as Professor Emerson wrote, punishment was "dispensed by a single official, without jury trial or the other protections of criminal procedure, for infraction of a loose and illusive mandate." Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 654 (1955). And, once an injunction was issued, a publisher would "have to clear in advance any doubtful matter with the official wielding such direct, immediate, an unimpeded power to sentence. The judge would, in effect, become a censor." *Id.*

be tested by its operation and effect."[268] Following this approach in *Grosjean v. American Press Co.*, the Hughes Court labeled as a prior restraint a special tax imposed on a small group of newspapers.[269] Although the tax did not involve government review of content prior to its dissemination, the Court defined the First Amendment's protection as not limited "to any particular way of abridging it."[270] The tax was "a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled . . . ."[271]

After *Near* and *Grosjean*, the Hughes Court confronted a variety of municipal ordinances giving local officials the discretion to control forms of public expression such as leafleting. This type of restraint most closely resembled the English licensing system because speech could not occur without governmental consent.[272] For example, in *Schneider v. State*,[273] the Court invalidated a municipal ordinance requiring a license to engage in door-to-door canvassing, solicitation, and leaflet distribution. Justice Roberts wrote that the ordinance gave the police censorial power "to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house."[274] Referring to the aversion to licensing embodied in the First Amendment, Roberts wrote that "a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees."[275] Accordingly, permit schemes for certain methods of public expression affecting public order,[276] such as parades, must contain narrow, objective, and definite standards.[277]

Central to the Court's aversion to subjective "licensing," whatever form and procedure it might take, is the concern that government officials have the ability to restrain publication of particular viewpoints.[278] None of the state shield laws have any

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268 *Id.* at 708.
269 297 U.S. 233 (1936).
270 *Id.* at 249.
271 *Id.* at 250.
272 Motion picture licensing, commonplace until the late 1960s, also involved subjective evaluations by government officials. *See, e.g.*, Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) (film licensing standard unconstitutionally vague).
273 308 U.S. 147 (1939).
274 *Id.* at 164.
275 *Id.*
276 Cox v. New Hampshire, 312 U.S. 569, 574 (1941).
277 Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).
278 *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981). Subjective licensing schemes may be challenged on their face because the Court believes

mechanism allowing government officials to control what is published. Defining who qualifies for coverage under a shield law does not limit, in any meaningful sense, the freedom to publish.[279]

Consider, for example, the distinct status of newspaper and magazine reporters under the Alabama shield law, which protects the former but not the latter.[280] No reporter is required to obtain government permission to practice journalism, nor does any government official review newspaper or magazine content prior to its publication. At the point at which an Alabama legal entity such as a grand jury sought to interrogate reporters about their sources, the statutory protection of newspaper and magazine reporters would diverge. A magazine reporter could be found in contempt for refusal to testify, but a newspaper reporter is absolutely immunized from contempt. This privileged status for newspaper reporters is not contingent upon the surrender of some other legal protection. Nor does it require surrendering the opportunity to exercise a constitutional right, such as criticizing government officials. In context, shield laws currently in existence are quite limited in their scope. They promote, rather than abridge, press freedom.

IV. CONCLUSION

> The rules of the road as I try to do my job are chaotic at best.
> —Matthew Cooper, 2005[281]

In the absence of a uniform First Amendment-based journalist's privilege, reporters and sources can only guess how the mix of state shield laws and lower court privilege rulings will affect their relationships. Given the interstate nature of modern communications, Congress has the authority, through the

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"the danger of censorship . . . is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law." Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

279 The press is defined for a variety of laws, such as second-class mailing privileges, that do not result in violations of constitutional rights. *See* Anderson, *supra* note 127, at 426, 437, 443. *See also House Hearings*, *supra* note 151, at 139 (testimony of Vince Blasi) (the creation of a shield law "is not an invitation to wholesale regulation").

280 ALA. CODE §12-21-142 (2005). Even though the Alabama statute does not protect magazine reporters, the Eleventh Circuit recently ruled that a *Sports Illustrated* reporter was entitled to a qualified First Amendment privilege. *See* Price v. Time, Inc., 416 F.3d 1327 (11th Cir. 2005) (due to a qualified First Amendment privilege, the plaintiff must conduct additional discovery before the reporter is compelled to identify which "exotic" dancer was his source). *See generally* Stefan Fatsis, *Playing Defense: A Coach's Lawsuit Poses Challenge for Time Inc.*, WALL ST. J., July 13, 2005, at A1. The parties recently settled the suit. Steven Fatsis, *Football Coach and Time Inc. Settle Libel Suit*, WALL ST. J., Oct. 11, 2005, at B4.

281 *Testimony of Matthew Cooper*, *supra* note 164, at 2.

Commerce Clause, to enact a uniform statutory privilege applicable to both state and federal proceedings.[282] States remain free to supplement any federally-conferred protection with even greater protection.[283]

A useful template is found in the Privacy Protection Act, which restricts the searches of those engaged in First Amendment activities. The Act creates national policy, applicable to both state and federal actors. Since the Act covers a broad class of public communicators, it avoids the problem of an overly narrow category of covered persons, which poses constitutional problems. Nor is the Act tied to particular media forms; its terms are broad enough to encompass new forms of communication, such as computer bulletin boards. In crafting a shield law, Congress has the latitude to protect only the establishment media. Such a policy, however, will retard the growth of new journalism outlets, such as Web-based communication. Unfortunately, the current political climate is not conducive to the enactment of a shield law with a broad class of covered persons.[284]

Nor is the current political environment favorable to the creation of an absolute privilege.[285] Hence, the crafting of exceptions is critical to the usefulness of a national shield law. To guide journalists and sources, exceptions should be understandable rather than capricious. Again, the Privacy Protection Act provides a useful template. The Act's exceptions, such as allowing searches in cases involving possession of restricted atomic energy data or child pornography, are defined by other federal statutes, rather by ad hoc judicial assessments of elusive factors such as the value of the information. Regrettably, shield legislation pending in the House and Senate borrows from Judge Tatel's concurring opinion in *Miller.* For example, in cases involving imminent harm to national security, journalists can be compelled to identify confidential sources if "the harm sought to be redressed by requiring disclosure clearly outweighs the public

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282 For a discussion of Congressional authority to enact a federal shield law, see Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for A Federal Statute,* 7 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 166-74 (2003/2004).

283 *See, e.g.,* TEX. CODE CRIM. PROC. art. 18.01 (e) (2004) (augmenting federal restrictions on newsroom searches).

284 *See Statement of James Comey, supra* note 32, at 6 (criticizing definition of "covered person" in pending legislation).

285 *See, e.g.,* Joe Hagan & Brody Mullins, *Federal Shield For Journalists Is No Panacea,* WALL ST. J., July 11, 2005, at B1 (stating that the authors of shield legislation are "facing the reality" that an absolute privilege will never be accepted).

interest in protecting the free flow of information."[286] The term national security is not defined and as the *Pentagon Papers* case illustrates, executive branch claims about harm to national security can be expansive.[287] As previously discussed, use of an ad hoc balancing test requires reporters and sources to be clairvoyants. Coverage of national security is an area where confidential sources are especially vital.[288] Instead of promoting the free flow of information, the proposed shield laws may actually achieve the opposite effect.

V. POSTSCRIPT

> I was not looking for a First Amendment showdown.
>
> —Patrick Fitzgerald[289]

Shortly before this Article went to the printer, I. Lewis Libby was indicted on obstruction of justice, false statement, and perjury charges for allegedly lying to FBI agents and the grand jury investigating the leaking of Valerie Plame's CIA employment to reporters.[290] Libby claimed that he learned of Plame's CIA affiliation from reporters; the indictment, though, alleges that Libby learned of Plame's CIA status from other government officials and shared this information with journalists such as Judith Miller. The indictment would not have been possible without the testimony of journalists whose descriptions of their conversations with Libby differ dramatically from his recollections. Although Fitzgerald publicly professed his reluctance to question journalists,[291] this case shows that where a conversation between a source and a reporter may be a crime,[292] a determined prosecutor armed with waivers can bring the press to its knees.

There is nothing unique about Bush Administration efforts to use the press to gain advantage over its political opponents; it is a daily part of the interaction between the government and the

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286 H.R. 3323, 109th Cong. § 2(a)(3)(C) (2005); S. 1419, 109th Cong. § 2(a)(3)(C) (2005).

287 N.Y. Times v. United States, 403 U.S. 713 (1971) (rejecting government claims that publication of leaked information would be harmful to national security).

288 *See supra* text and accompanying notes 33-34.

289 Transcript of Fitzgerald Press Conference at 6, (Oct. 28, 2005) (on file with author).

290 Indictment at 1-22, United States v. Libby, (D.D.C. Oct. 28, 2005).

291 Fitzgerald stated, "I do not think that a reporter should be subpoenaed anything close to routinely. It should be an extraordinary case." Transcript of Fitzgerald Press Conference, *supra* note 289, at 6.

292 Significantly, Libby was not charged with violating the statute protecting "covert" CIA operatives, or with unauthorized disclosure of classified information. For the argument that revelation of Plame's CIA affiliation was a public service, see David Rivkin, Jr., & Lee Casey, *Neither Criminal Nor Unethical*, WALL ST. J., Nov. 4, 2005, at A14.

press. Some Democrats, however, regard the Plame affair as an opportunity to revisit the reasons for the war in Iraq.[293] Consequently, Libby's confidential relationships with reporters undercut bi-partisan support for a federal shield law. In the current political environment, the need to protect sources in general has been overshadowed by the politics of the Iraq war.

Libby pleaded not guilty at his arraignment and his attorneys signaled that at trial they intend to vigorously cross-examine journalists such as Miller.[294] The dissection of Miller's credibility and practices, already questioned at the *New York Times*,[295] will be an extraordinary spectacle. The press will need a new poster child if it hopes to gain a federal shield law.

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293 As Senate Minority Leader Henry Reid stated, "This case is bigger than the leak of highly classified information. It is about how the Bush White House manufactured and manipulated intelligence in order to bolster its case for the war in Iraq." Anne Marie Squeo & John McKinnon, *Top Cheney Aide Charged in Leak Inquiry*, WALL ST. J., Oct. 29, 2005, at A1.

294 Anne Marie Squeo, *Reporters May Get Hottest Seats at Cheney Aide's Trial*, WALL ST. J., Nov. 7, 2005, at B1. Bob Woodward recently revealed that he learned of Plame's CIA affiliation in a "casual and offhand manner" from a White House official other than Libby. Bob Woodward, *Testifying in the CIA Leak Case*, WASH. POST, Nov. 16, 2005, at A8. One of Libby's lawyers described Woodward's statement as a "bombshell" and reiterated that the defense intends to call a number of journalists to testify. Carol Leonig & Jim VandeHei, *Woodward Could Be a Boon to Libby*, WASH. POST, Nov. 17, 2005, at A15.

295 *See* Joe Hagan, *Support Wanes for Reporter In CIA Case*, WALL ST. J., Oct. 24, 2005, at B1; Byron Calame, *The Miller Mess: Lingering Issues Among the Answers*, N.Y. TIMES, Oct. 23, 2005, § 4, at 12; Maureen Dowd, *Woman of Mass Destruction*, N.Y. TIMES, Oct. 22, 2005, at A17. Miller recently agreed to retire from the *Times*. Joe Hagan, *Miller Retires From Times, But Not Quietly*, WALL ST. J., Nov. 10, 2005, at B11.