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Confidential Sources Reconsidered

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CONFIDENTIAL SOURCES RECONSIDERED

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ABSTRACT

For fifty years, the courts have debated whether the First Amendment guarantee of freedom of the press requires that journalists be allowed to protect confidential sources. Many state and federal courts have answered in the affirmative, creating a First Amendment "reporter's privilege." The Supreme Court has declined to recognize such a privilege, but has not foreclosed the possibility. This Article suggests that the constitutional guarantee can be honored without prescribing a constitutionally defined privilege. Whether freedom of the press requires protection of confidential sources is one question; what means should be chosen to protect them is another. Courts should separate the two questions, deciding the first as a matter of constitutional law while leaving the choice of means largely to legislatures and common law resolution. Concerns about the scope and administration of a First Amendment privilege have deflected attention away from the underlying issue: whether compelled disclosure of sources abridges freedom of the press.

I. ZEAL FOR CONSTITUTIONAL RULES

Constitutional law does not have to solve every problem it identifies. Sometimes it is enough to tell the state that what it has done is unconstitutional, explain why, and invalidate the action, leaving the

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state to decide what to do about correcting the problem. In many instances, courts recognize this. When they hold a statute unconstitutional, they usually do not tell the legislature what it must do to make the measure constitutional. They invalidate the judgment that rests on statute and point out its constitutional flaw, but leave the state free to decide whether to amend the statute, repeal it, ignore it, or reinterpret it. Although their description of the problem often indicates what the appropriate repair would be, courts normally do not try to fix whatever infirmity in state law or practice led to the constitutional violation.

When a First Amendment violation is found, however, courts—particularly, the Supreme Court—seem to feel obliged to provide a solution. The most obvious example is the constitutional law of defamation. When the Supreme Court believes a libel judgment offends the First Amendment, it does not just reverse the judgment; it prescribes a constitutional rule that specifies what the state must do to make its defamation judgments enforceable. Thus, when the Court became convinced that libel recoveries by public officials threatened to chill robust discussion of public issues, it prescribed a test—the actual malice test—that courts must apply to permit such recoveries.[1] Later, the Court added many other substantive and procedural rules—all of constitutional dimension—that states must observe in administering their defamation law: public figures must meet the same constitutional requirements as public officials;[2] private plaintiffs who do not meet those requirements must at least show negligence, and the damages available to them are limited;[3] actual malice must be proved by clear and convincing evidence,[4] and appellate courts must subject that finding to independent judicial review rather than the usual clearly erroneous standard;[5] states must assign defamation plaintiffs the burden of proving falsity, rather than treating truth as a defense as the common law treated it;[6] and states cannot permit recovery for defamation accomplished through hyperbole, satire, or similar nonfactual assertions.[7] All of these rules trump state law. As a result of almost thirty Supreme Court decisions applying constitutional rules in defamation cases,[8] and some

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

2. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155–56 (1967).

3. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348–50 (1974) (holding that private plaintiffs defamed in discussions about matters of public concern need not show actual malice, but must show some level of fault, and may not recover presumed or punitive damages unless they show actual malice).

4. Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 659 (1989).

5. Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 510–11, 514 (1984).

6. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

7. *See* Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14–15 (1970).

8. For a listing of the twenty-eight libel cases decided by the Supreme Court through

lower court decisions creating constitutional rules that go beyond anything required by the Supreme Court,[9] constitutional law plays at least as large a role in the resolution of most libel cases as the common law or state statutory law.

In other media law branches of First Amendment law, courts generally have not created solutions as elaborate as those in defamation, but they apparently do feel compelled to provide solutions. The most broadly applicable solution is one that requires courts to apply a form of strict scrutiny to content-based restrictions on truthful speech about matters of public concern. This solution began with a very general principle that apparently was to be applied to cases ad hoc. In its first application, the Court merely determined that the state interests advanced by a particular restriction "are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom."[10] This evolved, however, into a "test," or at least an analytical prescription. The first statement of the test was just a single sentence, albeit one loaded with pregnant phrases: "[I]f a newspaper [1] lawfully obtains [2] truthful information [3] about a matter of public significance then state officials may not constitutionally punish publication of the information, absent [4] a need to further [5] a state interest of the highest order."[11] Predictably, each of the key phrases developed its own jurisprudence, particularly (1) and (4). More speech turned out to be "lawfully obtained" than might have been expected; even information obtained by illegal eavesdropping can be treated as "lawfully obtained" in the hands of a third party.[12] The "need" requirement came to mean that a restriction cannot suppress more speech than necessary, or at least must be a narrowly tailored means of achieving the state's high-order goal,[13] and little deference is given to the state's determination as to what is necessary.[14]

1991, see David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488 nn.1–2 (1991). The Court's only libel decision since then is *Tory v. Cochran*, 544 U.S. 734, 736–39 (2005), holding that an injunction against future defamatory statements violated the First Amendment.

9. *See, e.g.*, Edwards v. Nat'l Audubon Soc'y, 556 F.2d 113, 120 (2d Cir. 1977) (concluding that the First Amendment requires recognition of a neutral reportage privilege, which protects some speech that is published with actual malice); Cardillo v. Doubleday & Co., 518 F.2d 638, 639 (2d Cir. 1975) (holding that habitual criminal is "libel-proof," i.e., cannot recover anything other than nominal damages even if he can meet all the other requirements imposed by the First Amendment).

10. Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 838 (1978).

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

12. Bartnicki v. Vopper, 532 U.S. 514, 525, 535 (2001).

13. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 812–13 (2000).

14. *See, e.g.*, Fla. Star v. B.J.F., 491 U.S. 524, 537–41 (rejecting explanations for state's decision to prohibit disclosure of rape victims' names by mass media without also prohibiting disclosure by word of mouth).

In some types of cases, the Supreme Court prescribes lists of factors lower courts must consider in deciding whether to restrict speech. For example, a judge contemplating restricting press coverage in the interest of protecting a criminal defendant's right to a fair trial must consider: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[15] This is not just advice to the judge; she must make a record that satisfies the appellate courts that her conclusions on these matters are justified.[16] Similarly, a judge contemplating closing the courtroom to protect an accused's right to a fair trial must first determine whether the proceeding is one that traditionally has been open or is of a sort that benefits from public exposure.[17] If at least one of those conditions is met, the judge must demonstrate that "first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[18]

The Court does not always feel compelled to prescribe remedies for First Amendment problems, however. For example, the Court famously invalidated injunctions against publication of the Pentagon Papers without specifying what the government would have to do to make such prior restraints enforceable.[19] Several Justices wrote separate opinions suggesting what the government would have to show to win their vote to affirm such an injunction,[20] but the Court's holding was only that the government had failed to carry the heavy burden necessary to overcome the presumption that such restraints are unconstitutional.[21] Interestingly, that precedent has proved to be no less durable, and no less effective in

15. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976).

16. *Id.* at 568–69.

17. Press-Enter. Co. v. Superior Court, 478 U.S. 1, 13-14 (1986).

18. *Id.* at 14.

19. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

20. The vote was 6 to 3. Justice Douglas argued that prior restraints on publication are never permissible. *Id.* at 720 (Douglas, J., concurring). Justice Black argued that the injunctions at issue were so clearly unconstitutional that the Court should have vacated them without hearing argument. *Id.* at 714 (Black, J., concurring). Justice Marshall, Justice Stewart, and Justice White argued that the executive had no power to ask the courts to enjoin publication in the absence of statutory authorization. *Id.* at 728–30 (Stewart, J., concurring); *id.* at 732 (White, J., concurring); *id.* at 746–47 (Marshall, J., concurring). Only Justice Brennan offered anything resembling a test to be applied to applications for prior restraints, stating: "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *Id.* at 726–27 (Brennan, J., concurring).

21. *Id.* at 714 (majority opinion). This brief per curiam opinion was the only one agreed to by a majority of the Justices.

protecting free speech, than others in which the Court provided extensive prescriptions of constitutional requisites. In almost forty years since the Pentagon Papers case, only a handful of prior restraints have survived appellate review; many others have been invalidated on the strength of its *result*, not because of any constitutional rules established by that case.[22]

The practice of creating expansive solutions seems to have originated with the Court itself.[23] Herbert Wechsler, arguing for the newspaper in *New York Times Co. v. Sullivan*, did not propose the actual malice rule.[24] He asked the Court to reverse the judgment on the broad ground that allowing public officials to claim they were personally defamed by criticism of their official conduct would revive the discredited notion of seditious libel, or on the narrow ground that the plaintiff had not suffered any injury sufficient to justify the "monstrous" judgment of $500,000 that the Alabama courts had upheld.[25] It was Justice Brennan who initiated the project of using the case to construct a widely applicable constitutional regime to protect speech and press from the chilling effect of the common law of defamation.[26] His opinion for the Court borrowed the actual malice test from a remote state law precedent,[27] strengthened it, and married it to the idea of aggressive judicial review[28]—all without urging from the lawyers. Justice Brennan's boldness in prescribing a solution much broader than necessary to decide the case, and his success in persuading

22. "[T]he Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996). "Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this 'most extraordinary remed[y]' only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994) (internal citations omitted). Presumably the exceptions Justice Blackmun had in mind included prepublication obligations. *See* Snepp v. United States, 444 U.S. 507, 609 (1980) (upholding injunction against disclosures by former CIA agent). In the lower courts, the only prior restraint in the national security area that has survived appellate review was the injunction approved in United States v. Progressive, Inc., 467 F. Supp. 990, 991 (W.D. Wis. 1979) (enjoining publication of details of the hydrogen bomb).

23. 376 U.S. 254 (1964).

24. *Id.* at 262–63; *see also* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 120 (First Vintage Books ed. 1992).

25. *See* LEWIS, *supra* note 24, at 117–22 (describing Herbert Wechsler's arguments).

26. For an account of Justice Brennan's role, reconstructed from his detailed and voluminous official papers, see BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 531–41 (1983).

27. *See* Coleman v. MacLennan, 98 P. 281, 285 (Kan. 1908) (expanding a common law privilege to cover criticism of public officials).

28. "[C]onsiderations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent." *Sullivan*, 376 U.S. at 284–85.

the other Justices to go along, created a model that made First Amendment litigation a far more rewarding enterprise than it would be if courts merely invalidated judgments they found unconstitutional.

Once the Supreme Court revealed its willingness to adopt sweeping solutions to First Amendment problems, the dynamics of advocacy took over and made this model the norm. Media lawyers represent clients who are likely to be repeat players in First Amendment cases. If they can persuade courts not to merely resolve the case at hand, but adopt constitutional rules that will apply to many other cases, they do their clients a great service. A consequence not mentioned in the opinions, but obvious to lawyers and judges alike, was that adopting constitutional rules effectively nationalized areas of law that otherwise would be frustratingly local. To media outlets that operate nationally or at least in multiple states, this uniformity itself is often the biggest benefit, and because most outlets are at least multi-state, lack of uniformity is itself a threat to freedom of the press. Lawyers for different media outlets often collaborate in formulating and advancing expansive principles that could have broad applicability. By establishing a constitutional rule that would benefit all media, a lawyer could win the applause not only of her client but of the wider media law fraternity. If there was any constituency for a more modest constitutional response, it had little chance of being heard.

The resulting zeal for far-reaching constitutional solutions has infected the controversy over protecting the confidentiality of journalists' sources. The basic question—when, if ever, freedom of the press is violated by compelling a journalist to reveal her source—has become complicated if not obfuscated by questions as to what should be the constitutional rules governing such cases. This Article aims to disentangle those questions, suggesting a way to prevent unconstitutional intrusions on the confidentiality of sources without involving courts in a morass of constitutional lawmaking. The heart of the suggestion is that courts can prevent enforcement of subpoenas that would infringe freedom of the press without attempting to design a comprehensive regime for regulating the subject. The latter is better left to legislatures and common law courts, but that does not require courts to ignore unconstitutional infringements.

II. WHY CONFIDENTIAL SOURCES NEED PROTECTION

Courts and legislatures have been debating whether journalists should be compelled to disclose confidential news sources for at least fifty years.[29] Thirty-five states and the District of Columbia have passed

29. Legislation was introduced in Congress as early as 1959. *See* S. 965, 86th Cong. (1st Sess. 1959); H.R. 355, 86th Cong. (1st Sess. 1959). A journalist advanced a First Amendment

shield statutes,[30] and Congress may be poised to enact one at the federal level.[31] Some state courts find in their state constitutions a guaranteed right to keep confidences,[32] and many federal courts find such a right in the First Amendment[33] or federal common law.[34] This patchwork of statutes and judicial precedents makes instances in which journalists are actually compelled to disclose confidential sources remarkably few, and we see plenty of reporting that relies on confidential sources. It would be a huge mistake, however, to believe this state of affairs would continue if there were no constitutional right to protect sources. The constitutional claim that freedom of the press would be compromised if journalists had no right to keep confidences is not mooted by the existence of shield statutes. For one thing, the statutes provide varying degrees of protection, and when the relevant statute fails to protect a journalist, a First Amendment privilege may do so.[35] More importantly, the constitutional guarantee of freedom of the press is a potent background force in the statutory scheme. Legislatures often pass shield statutes in response to arguments that the Constitution requires them, or at least that they serve constitutional values. Similar arguments sometimes influence interpretation of the statutes—for example, inducing courts to interpret statutes expansively to avoid constitutional issues that might otherwise arise. The pervasive presence of constitutional arguments in confidential source controversies is largely the result of uncertainty. The Supreme Court has spoken to the issue

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claim of privilege as early as 1958. *See* Garland v. Torre, 259 F.2d 545, 547–48 (2d Cir. 1958). Even before that, there were numerous controversies over protecting confidential sources, and a number of states had enacted shield statutes, one as early as 1896. *See* JOHN J. WATKINS, THE MASS MEDIA AND THE LAW 299–302 (1990).

30. The Reporter's Committee for Freedom of the Press maintains a compendium of all the shield statutes, which is available at http://www.rcfp.org/privilege (last visited June 29, 2009). This list shows thirty-four shield statutes. It does not include the Texas Free Flow of Information Act; 81st Leg., R.S., H.B. 670, effective May 13, 2009. Two other states recognize a privilege by court rule. Utah R. Evid. 509, West's Utah Code Ann. (2009); N.M. Evid. Rules 11-514 (West's N.M. Stat. Ann. 2009).

31. At this writing, the proposed Free Flow of Information Act has been passed by the House of Representatives and referred to the Senate Judiciary Committee. *See* H.R. 985, 111th Cong. (1st Sess. 2009), 155 CONG. REC. H4204-09 (2009).

32. *See* CAL. CONST. art. I, § 2; O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 279–80 (N.Y. 1988) (recognizing qualified privilege under state constitution and First Amendment).

33. *See, e.g.*, Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595 (1st Cir. 1980); United States v. Cuthbertson, 630 F.2d 139, 146–47 (3d Cir. 1980).

34. *See, e.g.*, Gonzales v. Nat'l Broad. Co., 194 F.3d 29, 32 (2d Cir. 1999) (recognizing a privilege as a matter of non-statutory federal law); *see also* Senear v. Daily Journal-American, 641 P.2d 1180, 1184 (Wash. 1982) (recognizing privilege as matter of state common law).

35. *See, e.g.*, Price v. Time, Inc., 416 F.3d 1327, 1342–44 (11th Cir. 2005) (holding that Alabama's statutory privilege did not cover magazine journalist, but First Amendment privilege did).

only once,[36] and what it said was ambiguous enough to let lower courts create such protections as they thought necessary,[37] and at the same time, to encourage legislatures to pass shield statutes. If the Court were to definitively hold that compelled disclosure of confidential sources raises no constitutional concerns, that background influence on courts and legislatures would vanish, and news reporting that relies on confidential sources would diminish—for better and worse.

If permitting journalists to maintain confidentiality of sources is not essential to freedom of the press, there is, of course, no need to consider what constitutional principles courts should apply in cases seeking to compel disclosure. I doubt freedom of the press requires as much protection as many journalists claim. For example, I do not find persuasive the argument that journalists should have a constitutional right to resist subpoenas for even non-confidential materials, such as outtakes and originals of published photos. Producing such materials may be inconvenient, burdensome, or even threatening to journalistic values, but non-constitutional remedies—shield statutes, protective orders, and motions to quash—can adequately address those concerns. Some confidential source cases, however, raise concerns of a far higher order. In a few instances, protection of confidential sources may be the only way to maintain democratic accountability.

A. *Government Secrecy*

Experiences of the past decade demonstrate the inextricable connections between government secrecy policies and the need for news reporting based on confidential sources. Unauthorized disclosures by anonymous sources—leaks—are the bane of any government determined to control information. At the same time, leaks are an indispensable antidote to the tendency of governments to be unduly secretive. These truisms are in perpetual competition; government does its best to keep secrets, and dissidents, gossips, whistleblowers, troublemakers, and patriots—with the press as their indispensable ally—do their best to expose them. Subpoenas seeking to discover the sources of leaks are an important tool in any government's information-control program.

Of course, not all subpoenas are directed at leaks of government information; many are obtained by lawyers seeking to compel journalists to supply evidence in civil litigation or criminal prosecutions, for example. But suppression of government leaks has

36. *See* Branzburg v. Hayes, 408 U.S. 665, 689–90, 697, 699 (1972).

37. One source lists decisions recognizing a reporter's privilege in all but two of the federal courts of appeals. *See* James C. Goodale, et al., *Reporter's Privilege*, *in* 3 COMM. LAW 373, 382 n.2 (Practising Law Institute, 2004). The same source asserts that "state courts have also generally found that the First Amendment provides a qualified privilege." *Id.* at 382.

never been far from the surface in the controversies over press subpoenas. After a few scattered instances in the first 150 years of the Republic, press subpoenas suddenly multiplied when the Nixon Administration became incensed about leaks to the press. Under Attorney General John Mitchell, the government procured scores of subpoenas. More than fifty were served on CBS and NBC, networks that had particularly angered the administration.[38] The example set by the Justice Department inspired local prosecutors and defense lawyers to also seek journalists' evidence, and soon subpoenas rained down on the press in unprecedented numbers.[39] That eruption led to the Supreme Court's only decision on journalists' claims that compelling them to disclose confidential sources violates the Constitution.[40]

That case, *Branzburg v. Hayes*,[41] decided in 1972, arose from three garden-variety criminal prosecutions. In each case, a prosecutor subpoenaed a journalist to testify before a grand jury investigating suspected criminal activities.[42] The journalists argued that compulsory disclosure of confidences would deter sources from talking to reporters, thereby abridging freedom of the press by hampering news gathering.[43] They urged the Court to adopt, as a matter of constitutional law, a "reporter's privilege" that would prevent a journalist from being forced to appear at a proceeding or testify unless the party seeking the testimony could show grounds to believe that: (1) the reporter has information relevant to the investigation of a crime, (2) the information is unavailable from other sources, and (3) the need for the information is sufficiently compelling to override the invasion of First Amendment interests that would result from compelling disclosure.[44] Deciding the three cases together, the Court rejected the journalists' claims that they had a constitutional right to protect the confidentiality of their sources, but did not foreclose the possibility that in different circumstances the Constitution might limit the use of subpoenas against the press.[45]

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38. *See* Douglas McCollam, *Attack at the Source: Why the Plame Case is so Scary*, COLUM. JOURNALISM REV., Mar.–Apr. 2005, at 29, 36.

39. *See* Fred P. Graham, *Background Paper*, *in* PRESS FREEDOMS UNDER PRESSURE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE GOVERNMENT AND THE PRESS 53, 55, 64 (1972) (reporting that in the first two and one-half years of the Nixon Administration, NBC and CBS and their wholly owned stations received 124 subpoenas obtained by federal and state prosecutors and defense counsel, and during the same period, thirty subpoenas were served on the Chicago newspapers published by Field Enterprises, Inc.).

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

41. *Id.* at 667–79 (including companion cases *United States v. Caldwell* (No. 70-94) and *In re Pappas* (No. 70-57)).

42. *Id.* at 668–69, 672–73, 676.

43. *Id.* at 679–80.

44. *Id.* at 680, 698.

45. *Id.* at 707–09.

In the years since that decision, it has become clear that *Branzburg* did not present the case for constitutional protection of confidential sources in its strongest light, for two reasons not fully recognized at the time. First, *Branzburg* presented the subpoena controversy in an ordinary criminal context rather than in the context of the leak-suppression campaign that had motivated the Justice Department.[46] Governmental hostility might have been at work: one news report in question concerned widespread use of marijuana in the community and the other two involved the Black Panthers, a radical group that inspired a great deal of law enforcement angst at the time.[47] But none of the reports involved threats to governmental information control policies, so the role of confidential sources in combating government secrecy was not implicated. Although the journalists tried to make that connection, the cases themselves did not put that squarely before the Court. Second, the specifics of a constitutional reporters' privilege that the journalists asked the Court to create diverted the Court's attention from the fundamental question—does compelled disclosure of confidential sources threaten freedom of the press? As a result, the Court did not decide that question. Instead, Justice White's majority opinion devoted most of its attention to worries about how the privilege would work: Who would be allowed to claim the privilege? How effective would it be in easing the fears of potential informants? How would courts determine whether the prerequisites for invoking the privilege had been met? How would courts balance the need for disclosure against the interests in confidentiality?[48] Justice White expressed skepticism toward the claim that freedom of the press required protection for confidential sources, but the decision seemed to be based less on doubt about that than on concern about the operation of the proposed privilege.[49]

A series of meliorations averted a major showdown over confidential sources for following thirty years. The Justice Department adopted guidelines that restricted federal prosecutors' use of subpoenas.[50] Moreover, in addition to the seventeen states that had shield statutes when the Court decided *Branzburg*, eighteen more states adopted them, sometimes offering broader protection than the First

46. *Id.* at 667, 672, 675.

47. *Id.*

48. *Id.* at 703–06.

49. *Id.* at 698–99.

50. 28 C.F.R. § 50.10 (2008). For discussion of the history and effectiveness of the guidelines, see Grant Penrod, *A Problem of Interpretation: DOJ Guidelines for Subpoenaing Reporters are Useful, but No Substitute for a Federal Shield Law*, NEWS MEDIA & THE LAW, Fall 2004, at 4, 4–6.

Amendment privilege the Court declined to create in *Branzburg*.[51] Most importantly, most federal courts and a considerable number of state courts recognized some sort of First Amendment privilege.[52] Those courts generally dealt with *Branzbur*g by limiting it to its setting—reporters refusing to testify before grand juries—and adopted, for other types of proceedings such as criminal and civil trials, a privilege like the one rejected in *Branzburg*.[53]

B. *Protection of Confidential Sources is Diminishing*

Hundreds of subpoena controversies were litigated during this period, some under the shield statutes and some under the First Amendment.[54] Because *Branzburg* did not rule out First Amendment protection and encouraged passage of statutes, journalists in most instances continued to believe they had a right to keep their sources confidential, so they continued to promise confidentiality and usually resisted when confronted with a subpoena.[55] Parties contemplating such a subpoena usually realized that the journalist most likely had colorable grounds, under a statute or the First Amendment (or both), for a protracted and costly contest, and this realization undoubtedly prevented a great many subpoenas from ever being issued.

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51. *See, e.g.*, CAL. EVID. CODE § 1070 (West 2009); N.J. STAT. ANN. § 2A:84A-21 (West 2009). Both statutes create a privilege that cannot be defeated by showing a compelling need for disclosure of the source. CAL. EVID. CODE § 1070 (West 2009); N.J. STAT. ANN. § 2A:84A-21 (West 2009). In California, the language recognizing the privilege has been added to the state constitution. *See* CAL. CONST. art. I, § 2.

52. *See supra* note 37.

53. *See, e.g.*, Bruno & Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583, 594 (1st Cir. 1980) (holding that *Branzburg* did not foreclose recognizing privilege in civil case); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) (recognizing privilege in criminal case despite *Branzburg*).

The rationale for recognizing a privilege in trials but denying one in grand juries is not readily apparent. It is true that the Court in *Branzburg* emphasized that the grand jury plays an important role in fair and effective law enforcement and historically enjoys broad powers. *See Branzburg*, 408 U.S. 665, 686–88 (1972). But one might suppose that the dangers of compelled disclosure might also be higher in grand juries, where the subpoenaed reporter usually will not have the benefit of counsel present in the room, and the secrecy of the proceedings conceals what transpires from the source and the public.

54. Goodale, et. al., *supra* note 37 (containing 472 pages of concise summaries of cases in which reporters litigated subpoenas).

55. The Reporters Committee for Freedom of the Press (RCFP) lists nineteen reporters who were jailed for refusing to comply with subpoenas and twenty who were fined. *See* RCFP, Paying the Price, A Recent Census of Reporters Jailed or Fined for Refusing to Testify, http://www.rcfp.org/jail.html (last visited June 29, 2009). Many others, of course, resisted subpoenas and were not held in contempt. *Id.*; *see* Goodale, et al, *supra* note 37 (summarizing cases which indicate that most reporters resisted their subpoenas successfully).

This uneasy accommodation has now come unraveled through a confluence of separate events. One was an influential opinion by Judge Posner, who said some of the decisions in other circuits "essentially ignore *Branzburg*," or "audaciously declare that *Branzburg* actually created a reporter's privilege."[56] Over the years, media lawyers cultivated the idea that a majority of the Justices in *Branzburg* had actually endorsed a First Amendment privilege, and numerous courts embraced that idea. The theory arose from Justice Powell's opinion in *Branzburg*, in which he seemed to share the dissenters' view that the First Amendment requires some protection for journalists' use of confidential sources.[57] The argument was that the four dissenters plus Justice Powell should be treated as the majority in *Branzburg*.[58] But as Judge Posner pointed out, this fiction could be sustained only by ignoring the fact that Justice Powell concurred fully in the majority opinion, not just in the judgment.[59] Judge Posner not only refuted the theory, he scolded judges who accepted it.[60] Posner's criticisms left journalists without a convincing claim of Supreme Court support for their theory that the First Amendment protects their right to keep confidences.

Another unraveling event was the subpoena controversy that arose over the outing of CIA agent Valerie Plame.[61] After Plame's husband published an op-ed article casting doubt on one of President George W. Bush's justifications for the invasion of Iraq, someone leaked to several journalists Plame's name and affiliation.[62] A special prosecutor issued subpoenas to force the reporters to reveal who gave them the information.[63] When the courts rejected the reporters' claims of privilege, one of the journalists, Judith Miller of the *New York Times*, went to jail for eighty-five days for refusing to disclose her source.[64] The other, Matt Cooper of *Time*, kept the confidence and was also held in contempt, but his employer capitulated and named the source.[65] Miller eventually won release by naming her source, explaining that the source had released her from her pledge of confidentiality.[66] The

56. McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003).

57. *See Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring); *id.* at 727–30 (Stewart, J., dissenting).

58. *McKevitt*, 339 F.3d at 531–32.

59. *Id.*

60. *Id.* at 532.

61. *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1143 (D.C. Cir. 2006).

62. *Id.* at 1143.

63. *Id.* at 1143–44.

64. David Johnston, *Leak Revelation Leaves Questions*, N.Y. TIMES, Sept. 6, 2006, at A1.

65. Bill Saporito, *When to Give Up a Source*, TIME, July 11, 2005, at 34, 34.

66. David Johnston, *Rove Ordered to Talk Again in Leak Inquiry*, N.Y. TIMES, Oct. 7, 2005, at A1.

extensive publicity that accompanied the Plame controversy exposed a seamy web of relationships between Washington reporters and high-level government sources, and made it clear that no noble purpose had been served by journalists' reliance on confidential sources in that case. The episode was not likely to convince anyone that confidential sources play a critical role in democracy.[67]

The Plame case did make clear, however, that there is an inescapable connection between leaks and government secrecy policies. The controversy arose during "a draconian clampdown on the free flow of government information to the public,"[68] which greatly increased the press' dependence on leaks for information about important public issues. The Bush Administration closed many channels of authorized disclosure.[69] It reversed the policy of previous administrations that information should be presumed disclosable under the Freedom of Information Act (FOIA), replaced that policy with an instruction to agencies to carefully consider all possibly applicable exemptions before granting FOIA requests, and pledged to defend agency decisions to withhold information.[70] The White House instructed agencies to

67. Lost in the debris of the Plame affair was an important lesson. Had the district court accorded the journalists a privilege of even the weakest sort, a great deal of pain and expense could have been avoided. It eventually became clear that by the time the special prosecutor subpoenaed the journalists, he already knew that the initial source of the leak was Richard Armitage, a former deputy Secretary of State. *See* David Johnston, *Leak Revelation Leaves Questions*, N.Y. TIMES, Sept. 2, 2006, at A1 (reporting that Armitage first told authorities he was the source of the leak two months before the prosecutor began his investigation). If the court had entertained the possibility that a qualified privilege applied, the prosecutor would have been required to show that the information sought from the reporters was not available from other sources—a showing he would have been unable to make. Further, if the reason Armitage was never charged was that no crime was committed, the subpoenas should have been quashed on the additional ground that there was no evidence that the journalists' information was relevant to the investigation of a crime. As is true in many subpoena controversies, the case for compelling disclosure looked far stronger at the outset than it did once some rudimentary facts became known. But if there is no basis for a claim of privilege, there is no mechanism for eliciting those facts.

68. Clint Hendler, *What We Didn't Know* Has *Hurt Us*, COLUM. JOURNALISM. REV., Jan.–Feb. 2009, at 28, 28.

69. *See Reeling from Hurricane "W"*, THE NEWS MEDIA & THE LAW, Fall 2008, at 4, 4.

70. The Department of Justice, under John Ashcroft, instructed heads of federal departments and agencies that

> [a]ny discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. . . . When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

withhold "information that could be misused to harm the security of our nation or threaten public safety" even if the material was not within the national security exception to the FOIA and was not classified.[71] At the behest of the Administration, Congress created a large new exemption to the FOIA, making it a crime for a federal employee to disclose information voluntarily supplied to a federal agency if the entity supplying it has designated it "critical infrastructure information,"[72] and at least one federal employee was sentenced to prison for giving "sensitive but unclassified" information to a reporter.[73] In addition, President Bush issued an executive order allowing the sitting president to prevent the release of papers of the previous presidents and giving all past presidents and vice presidents power to prevent release of their papers.[74] The number of documents classified annually increased greatly,[75] and federal employees were forbidden to disclose even some non-classified documents.[76] The Bush Administration warned officials that it would not tolerate unauthorized disclosures, and employees were asked to sign waivers of any confidentiality agreements they had made, or might make in the future, with reporters.[77] By the time of the Plame

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Memorandum from Attorney Gen. John Ashcroft on The Freedom of Information Act to Heads of all Federal Departments and Agencies (Oct. 12, 2001), *available at* http://www.usdoj.gov/archive/oip/foiapost/2001foiapost19.htm (last visited June 29, 2009).

71. Memorandum from Assistant to the President and Chief of Staff Andrew H. Card, Jr. on Action to Safeguard Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security to Heads of Executive Departments and Agencies (Mar. 19, 2002), *available at* http://www.usdoj.gov/archive/oip/foiapost/2002foiapost 10.htm (last visited June 29, 2009) (forwarding memorandum from Laura L.S. Kimberly, Acting Director of Information Security Oversight Office, Richard L. Huff and Daniel J. Metcalfe, Co-Directors of Office of Information Privacy within the Department of Justice).

72. 6 U.S.C. § 133 (2006). Critics said this provision was used by agencies and businesses to conceal matters that had more to do with environmental and public safety issues than with terrorism risks. *See* Trudy Lieberman, *Homeland Security: What We Don't Know Can Hurt Us: Imagining Evil*, COLUM. JOURNALISM REV., Sept.-Oct. 2004, at 24, 29–30.

73. *See* Lori Robertson, *In Control*, AM. JOURNALISM REV., Feb.–Mar. 2005, at 26, 31.

74. *See* Hendler, *supra* note 68, at 29. This power was extended not only to past presidents and vice presidents during their lifetimes but also to their heirs. *Id.*

75. *See* Rebecca Carr, *Open Government in America: Rise in Secrecy Guards No One, Critics Say*, AUSTIN AM. STATESMAN, Mar. 14, 2005, at A1. The increase was almost 78% from 2001 to 2004. *Id.*

76. *See* John Files, *Security Dept. Eases Its Nondisclosure Rule*, N.Y. TIMES, Jan. 18, 2005, at A17 (reporting that the Department of Homeland Security was revising a six-month-old policy of requiring employees to sign pledges not to disclose "sensitive but unclassified" information, and replacing that policy with a program of training employees to avoid such disclosures).

77. *See* Douglas McCollam, *Why the Plame Case Is So Scary: Attack at the Source*, COLUM. JOURNALISM REV., Mar.-Apr. 2005, at 29, 32, 34 (reporting two instances in which hundreds of government employees were asked to sign such waivers); Adam Liptak, *Reporters Face Scrutiny in C.I.A. Leak Inquiry*, N.Y. TIMES, Sept. 28, 2004, at A18 (reporting that Special Prosecutor Patrick Fitzgerald required White House officials to sign confidentiality waivers).

controversy, the Bush Administration's control of information could not be ignored.[78]

Tighter information-control policies make unauthorized leaks more important to both the government and the press.[79] From the government's point of view, information-control policies will be ineffective if the government cannot control unauthorized disclosures. From the press point of view, when government shuts down authorized avenues of disclosure, leaks become the only source of information. From sources' point of view, when the government increases the peril of leaking, confidentiality becomes even more important to the leakers. It is an escalation that has no natural end as long as the two sides adhere to conflicting views of their responsibilities. Leaks are not always inimical to government information control. The leak of Plame's identity, for example, appeared to be an instrument of the government's information policies; it was an instance of high-level officials clandestinely dispensing information that the government wanted known but was not willing to disclose openly. Many statements attributed to confidential sources fit that description; some journalists say that is the most common use of confidential sources in Washington.[80] But leaks also come from whistleblowers, dissenters, and malcontents who are willing to tell what

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78. Some of the Bush secrecy policies have already been reversed. For example, one of President Barack Obama's earliest acts was to reinstate the presumption in favor of disclosure in FOIA requests. Memorandum from President Barack Obama on Freedom of Information Act to Heads of Executive Departments and Agencies (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/ (last visited June 29, 2009). But White House control over information has been tightening for at least a quarter century, and will no doubt continue. As Lori Robertson explains:

> An emphasis on tighter news management has been building as each successive administration learns from the previous one. A rigid approach to staying on message and a clampdown on access for reporters and the public have been increasingly used by the executive branch, a trend that began to take shape during the Reagan administration, if not earlier. The current Bush administration has shown that the method can be perfected, with little to no downside for the White House.

Robertson, *supra* note 73, at 28.

79. One of the many ironies of the Miller and Cooper cases was that the subpoenas in these cases disserved the government's interests in secrecy. Once the special prosecutor was appointed, the cases took on a life of their own, exposing secrets the White House could not have been happy to see exposed. Had President Bush known the leakers would turn out to be his own people, he no doubt would have preferred to handle the matter internally rather than through a highly publicized legal proceeding.

80. *Cf.* Lorne Manly, *Big News Media Join in Push to Limit Use of Unidentified Sources*, N.Y. TIMES, May 23, 2005, at C1 (reporting that *USA Today*, *The Washington Post*, *The Los Angeles Times*, *NBC News*, and the *New York Times* were taking steps to curtail use of anonymous sources in response to criticism from the White House and others).

they know on condition of anonymity, and these are the principal resources available to the press and public in their perpetual struggle against government secrecy. This does not justify all journalistic uses of confidential sources, nor does it suggest that all should be legally protected, but it does indicate that some of them are important instruments in democratic accountability.

In *Branzburg*, the Court doubted that requiring reporters to disclose their sources to grand juries would "undermine the freedom of the press to collect and disseminate news."[81] Since then, the Court in other contexts has developed more sensitivity to the realities under which the press receives information.[82] The past decade has made it clearer than ever that freedom of the press requires some protection for confidential sources.[83] If there is a case to be made to the contrary, it would be that the need for governmental secrecy is paramount. The ability to compel reporters to identify leakers is a crucial enforcement device to a government that believes secrecy is necessary or at least desirable. If other liberties must be compromised in the interest of combating terror, perhaps we must also be prepared to forego freedom of the press insofar as that includes the ability to rely on confidential sources. But the argument that full freedom of the press is a luxury we can no longer afford is a very different argument from the claim that compelling disclosure of sources does not seriously threaten freedom of the press.[84]

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81. Branzburg v. Hayes, 408 U.S. 665, 698 (1972).

82. For example, the Court has held that the press cannot be punished for, or even made to pay for, injuries resulting from its disclosure of information furnished to it illegally. *See* Fla. Star v. B.J.F., 491 U.S. 524, 527–29, 541 (1989) (holding that state may not award damages to rape victim named as a result of sheriff's unlawful disclosure of victim's name). Wiretap statutes making it a crime to disclose information that the defendant knows was obtained through an illegal interception cannot be enforced against parties not involved in the actual interception, at least when the information is about matters of public concern. *See* Bartnicki v. Vopper, 532 U.S. 514, 517–18, 535 (2001). Because this principle speaks only to *publication*, not the withholding of information, it is not directly applicable to disclosure of confidential sources. But the privacy case described above protects the press' right to use information illegally furnished to it, and the wiretap case protects its use of information illegally obtained by its source. The Court's decision in both cases to treat illegally obtained information as being "lawfully acquired" by the press is at least tacit recognition that acquisition of information cannot be lightly excluded from constitutional protection.

83. A survey of news organizations counted 823 subpoenas directed at news organizations in 2001. *See* Samantha Fredrickson, *A Reporter's Privilege in Tatters*, THE NEWS MEDIA & THE LAW, Fall 2008, at 15, 17. A similar survey counted 3,062 in 2006. *Id.*

84. In *Branzburg*, the Court characterized the reporters' proposal generically as a "First Amendment reporter's privilege," and did not identify the Press Clause specifically as the basis of the claim. 408 U.S. at 698–700. It is difficult to argue with a straight face, however, that the claim does not rest squarely on the Press Clause. If it rested on the Speech Clause, all speakers—which is to say everyone—presumably could claim a right to refuse to disclose confidential sources. That would decimate the fact-finding process, so that a privilege based on the Speech Clause would have to be limited to a subset of speakers. The subset was identified by the claimants in *Branzburg* (and is identified in the many lower court cases recognizing a privilege) as "reporters." *Id.* at 695,

Recognition that it does threaten freedom of the press is widespread today.[85] At the same time, events of the past decade have diminished the likelihood that journalists will be allowed to maintain confidences. Although shield statutes are still in place, the tenuous but widespread consensus that reporters have a constitutional right to protect their sources has all but vanished.

III. OBJECTIONS TO A CONSTITUTIONAL PRIVILEGE

The constitutional response advocated by the press is recognition of a journalists' privilege under the First Amendment, one of the sort rejected by the Court in *Branzburg* but subsequently adopted by many lower courts. This privilege would take the form of a constitutional rule, usually articulated along the following lines: "disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."[86]

Such a rule does not begin to answer the many questions it raises: Who qualifies as a journalist for purposes of the privilege? Does it apply only to the identity of confidential sources, or also to information given in confidence by sources whose identity is known? Does it apply to non-confidential information? Can the privilege be waived by the source? Does it permit a judge to order a journalist to disclose to the judge in-camera so the judge can determine whether the information is critical to the claim? Who has the burden of showing that the information is or is not available from other sources? Such questions can be answered on a case-by-case basis, but the resulting elaboration of the privilege makes it look less like a constitutional rule than a statute—which suggests that perhaps the matter is better suited for statutory resolution in the first place.

703–05. There have been a few cases extending the privilege to scholars and other non-journalists, but it is identified almost universally as a "reporter's privilege" and a number of courts have refused to extend it to claimants not employed by news organizations. *See, e.g.*, *In re* Grand Jury Subpoenas, 29 Med. L. Rptr. 2301, 2304 n.4 (5th Cir. 2001) (per curiam) (unpublished opinion), cert. denied 535 U.S. 1011 (2002). Identifying it as a "reporter's privilege" rather than a "press privilege" may be a tactically useful way of pretending that the beneficiaries are individuals rather than powerful organizations, but it is not an honest way of avoiding reliance on the Press Clause. Under any name, a constitutional rule protecting journalists from compelled disclosure of confidential sources reflects a belief that journalists play a role in the system of freedom of expression that is distinguishable from the roles of other speakers. Ignoring the clause that the Constitution itself uses to identify the subset of speakers to which journalists belong would be perverse.

85. The attorneys general of thirty-four states joined an amicus curiae brief urging the Supreme Court to reconsider *Branzburg*. *See* Brief for States of Oklahoma et al. as Amici Curiae Supporting Petitioners, Miller v. United States, 545 U.S. 1150 (2005) (Nos. 04-1507, 04-1508).

86. McGraw-Hill, Inc. v. Arizona, 680 F.2d 5, 7 (2d Cir. 1982).

Another objection to a constitutional reporter's privilege is that it is a one-size-fits-all solution to an issue that has many dimensions. Sometimes confidential sources shed light on important matters of public policy, political or business misfeasance, or dangers to public safety. But they also can be used to circulate trivial gossip, baseless rumors, or malicious assaults.[87] A subpoena sought by a libel plaintiff seeking to show that the defendant in fact had no source for its defamatory allegation, or one sought by a criminal defendant seeking to show that a reporter has information that could exonerate the defendant, is very different from a subpoena issued by a congressional committee angered by a network's criticism of the Pentagon.[88] Of course, the process of deciding whether the information sought is sufficiently material and necessary to override the privilege will take into account some of those differences, but not all. In the libel context, a public-figure plaintiff may have a strong and legitimate argument for the materiality and necessity of information that might show actual malice. However, a libel suit can also be a tactical maneuver, the objective of which is merely to discover a source. The proposed constitutional rule provides no means of sorting out such cases. Some courts have adopted rules aimed at prescreening the libel suit to require disclosure only when the claim appears to have some merit.[89] But trying to incorporate such procedures in a constitutional rule is an unsatisfactory enterprise. A very different set of problems arises when a criminal defendant seeks to compel disclosure. In that setting, the standard criteria for defeating the privilege are themselves inadequate. Whether the information is critical to the maintenance of the claim is the wrong inquiry; anything that might plant reasonable doubt in the jury's mind can be decisive, regardless of its materiality by civil litigation standards. Again, courts could develop a specific constitutional rule for information sought by criminal defendants, but that too makes the matter look less like one appropriate for constitutional resolution.

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87. *See* Daniel Okrent, *The Public Editor: Briefers and Leakers and the Newspapers Who Enable Them*, N.Y. TIMES, May 8, 2005, at D12 (asserting that "many who cover those twin cesspools of duplicity, self-regard, and back-stabbing—Hollywood and politics—are addicted to the practice" of relying on confidential sources).

88. *See* Corydon B. Dunham, FIGHTING FOR THE FIRST AMENDMENT: STANTON OF CBS VS. CONGRESS AND THE NIXON WHITE HOUSE 1–6 (1997) (describing the ultimately unsuccessful attempt by a congressional committee to hold CBS president Frank Stanton in contempt of Congress for refusing to provide outtakes of a CBS documentary, *The Selling of the Pentagon*).

89. *See, e.g.*, Downing v. Monitor Publ'g Co., 415 A.2d 683, 686 (N.H. 1980) (holding that a libel plaintiff must "satisfy the trial court that he has evidence to establish that there is a genuine issue of fact regarding the falsity of the publication" before disclosure can be compelled); Atlanta Journal Constitution v. Jewell, 555 S.E.2d 175, 181 (Ga. Ct. App. 2001) (holding that libel plaintiff must show viability of claim before disclosure can be compelled).

A. *Leak Cases Pose Special Problems*

In my view, cases in which the reporter's testimony is sought in an attempt to find the source of a government leak also require a particularized response. The main reason is that they pose a special risk of official oppression.[90] The party trying to find the source of the leak is often an official whose hackles are up because of the fact of the leak, or the content of the information leaked, or both. The official is usually a judge trying to find out who defied the judge's gag order, a prosecutor embarrassed that the press has learned something that official investigators failed to uncover, or an executive official who is put under pressure or subjected to criticism because of the disclosure. In *Branzburg*, both Justice White's opinion for the Court and Justice Powell's concurrence acknowledged this possibility, but the response of both was only that reporters should not be required to testify in investigations being conducted in bad faith.[91] That is an inadequate response, because of the well-known reluctance of judges to find that other public officials are acting in bad faith.[92]

In other First Amendment contexts, the Court is far more sensitive to the risk that political pique or retaliation for unfavorable coverage may be at work, even if it cannot be proved. For example, a tax that treats some newspapers differently from others is presumptively unconstitutional because it could potentially be used for censorial purposes, even when no such purpose is even alleged and the evidence indicates that the legislature intended no censorship.[93] An ordinance that gives a city official broad discretion to regulate placement of news

90. For a persuasive documentation of the risk—and reality—of arbitrary, discriminatory, or punitive use of the subpoena power to pursue leakers, see William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453 (2008).

91. *See* Branzburg v. Hayes, 408 U.S. 665, 693–95, 707–08 (1972); *id.* at 709–10 (Powell, J., concurring).

92. For example, a freelance author writing a book about a criminal defendant was asked by the government to become an informant for the FBI. *See* Guillermo X. Garcia, *The Vanessa Leggett* Saga, AM. JOURNALISM REV., Mar. 2002, at 20, 24. She declined, and the United States Attorney then subpoenaed the author's notes of interviews she had with the defendant. *See id.* The prosecutor did not follow Justice Department guidelines for subpoenas to journalists on the ground that the author was not a journalist, and refused to negotiate limits on the material sought or the uses to which it might be put. *See id.* at 25. The interviewee had been in police custody, so there was no apparent reason why the police or the prosecutor's agents could not have asked him the same questions the writer asked. *Id.* A grand jury was able to bring indictments without benefit of the writer's testimony. *See id.* at 21. Nonetheless, a district judge held the writer in contempt and the Fifth Circuit affirmed, rejecting the allegation of bad faith on the ground that the writer had failed to establish that the grand jury bore her malice and ignoring the circumstances mentioned above. *In re* Grand Jury Proceedings, 29 Med. L. Rptr. 2301 (5th Cir. 2001) (unpublished opinion). The writer served 168 days in jail. *See* Garcia, *supra*, at 21.

93. *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585–86, 588 (1983).

racks on public sidewalks is unconstitutional because it creates a risk of "undetectable censorship."[94] There are similar risks of un-provable official oppression when government is allowed to compel reporters to disclose the sources of leaks.

Another constitutional analogy also seems applicable to cases in which the government seeks to compel disclosure to police leaks by its own agents. When a government official improperly makes privacy-invading information about a citizen available to the press, the Court has held that the press cannot be held liable for disclosing the information.[95] This is true even though the agent's disclosure to the press was in violation of a statute.[96] "Where . . . the government has failed to police itself in disseminating information, it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity."[97] Of course, the issue there is whether the press can be punished for *publishing* the information furnished to it by the government agent, not whether it can be punished for refusing to identify the agent. But if the government's responsibility to control its own agents trumps the citizen's right to redress for injuries suffered when it fails to do so, the same reasoning casts doubt on the government's right to enlist the help of the press in discovering leakers.[98]

In these other areas, the Court demonstrates the sensitivity to risks of unprovable censorship and insists the government control its own agents instead of shifting that burden to third parties. Those principles seem to suggest that compelling disclosure to ferret out government sources who leak to the press ought to be viewed with more skepticism than subpoenas in other contexts. Perhaps compulsory disclosure for this purpose ought to be prohibited altogether; maybe courts could devise ways of identifying cases in which the inference of oppressive motive is strong enough to preclude enforcement. My purpose here is not to propose specific solutions for the various types of subpoena controversies, but to show that they are too diverse to admit any single, simple, constitutional solution.

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94. *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 762, 772 (1988).

95. Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989).

96. In *Florida Star*, a sheriff's office made a rape victim's name available to the press despite a statute that made it a crime to cause or allow such information to be published. *Id.* at 526–28. The sheriff's department settled the victim's civil suit against it for violating the statute. *Id.* at 528.

97. *Id.* at 538.

98. It could be argued that this might leave the government with no effective means of preventing unauthorized disclosures by its agents, but in the privacy context, the Court was untroubled by the fact that the government had tried, and failed, to prevent the agent's disclosure by criminalizing it. *See id.* at 540.

B. *Identifying "Reporters"*

The most compelling objection to a comprehensive constitutional solution is the futility of trying to decide as a matter of constitutional law who should have the right to protect confidential sources. The majority in *Branzburg* was concerned that the claims made on behalf of "reporters" could also be made by "lecturers, political pollsters, novelists, academic researchers, and dramatists,"[99] or anyone else who contributes to the flow of information to the public. "Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher . . . ."[100] Justice Stewart's dissent did not address this point; he said variously that the right would belong to reporters or newsmen.[101] A few years later, Justice Stewart indicated that he viewed the press, for purposes of the Press Clause, as "the daily newspapers and other established news media."[102] Presumably, Justice Stewart believed the reporter's privilege required by the Press Clause would belong to those who were employed by such news organizations. Most shield statutes adopt similar definitions of the beneficiaries of the privilege.[103]

Today, such a definition is woefully inadequate. Established news media are disappearing or morphing into forms indistinguishable from new media that are anything but established. Affording the right to protect sources only to journalists who work for daily newspapers or other established news media would deny it to many important news sources. The broadest suggestions propose to give the privilege to anyone engaged in gathering or processing information for any public

99. *Branzburg*, 408 U.S. 665, 702–05 (1972).

100. *Id.* at 704.

101. *See generally id.* at 728–30 (Stewart, J., dissenting) (focusing on confidential relationship between reporter and informant when gathering news).

102. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 631 (1975).

103. *See, e.g.*, CAL. EVID. CODE § 1070(a) (2009) (defining "newsman" as a "publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed" or "a radio or television news reporter or other person connected with or employed by a radio or television station. . . ."); N.Y. CIVIL RIGHTS LAW § 79-h(b) (2009) ("[P]rofessional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public. . . ."); FLA. STAT. § 90.5015(a) (2009) ("'Professional journalist' means a person regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine. . . .").

medium of communications,[104] but today that could include anyone with access to a computer or a handheld wireless internet device. The reality is that distinctions between reporters and the rest of us are disappearing, but no court will be eager to give most everyone a right to refuse to testify on the ground of confidentiality.

That does not mean that no one can be given a reporter's privilege. Freedom of the press can be served without according the same rights to everyone who might be considered press. Just as freedom of the press is served by giving a subset of the press access to the White House, so can it be served by giving the right to protect confidential sources to a subset of the press. But attempting to define that subset as a matter of constitutional law would be foolish. The realities as to who serves the press function in our society are changing rapidly and dramatically. A constitutional answer to that question would almost certainly be obsolete in a few years.

IV. A BETTER ALTERNATIVE

If adoption of a constitutional reporter's privilege is not the right solution, neither is it right to deny that compelled disclosure of sources raises any constitutional issue. However tenable that view may have been in 1972, much has changed since then. As evidence that requiring journalists to disclose their sources was widely believed to be consistent with freedom of the press, Justice White noted that the majority of states did not have shield statutes;[105] today, almost three-fourths do. *Branzburg* was a product of pre-Watergate faith in government (the decision was announced twelve days before the burglary of the Watergate Hotel). Today, much of Justice White's opinion for the Court seems naïve or cavalier. He asserted that compelled disclosure of sources imposed no restraint

> on the type or quality of information reporters may seek to acquire. . . . [W]e cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.[106]

104. *See, e.g.*, Dan Paul, *Why a Shield Law?*, 29 U. MIAMI L. REV. 459, 461 (1975).

105. *Branzburg*, 408 U.S. at 689–90 (majority opinion).

106. *Id.* at 691–92. In a similar vein, Justice White argued,

> [W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the

Since then we have seen many instances in which important information became public only because sources trusted journalists to keep confidences—from the Watergate scandal[107] to the abuses at Abu Ghraib,[108] the existence of secret CIA prisons in Eastern Europe,[109] and the warrantless surveillance of telephone and email communications between U.S. citizens and persons abroad.[110] But it has also become clear that not all disclosures by confidential sources are of equal importance.

The best solution to the confidential source problem would be one that recognizes that compelled disclosure of journalists' sources can threaten freedom of the press seriously enough to be unconstitutional, but leaves the remedy largely to the legislatures or the common law.[111]

> press by informants and in thus deterring the commission of such crimes in the future.

Id. at 695.

107. The role of the Nixon administration in the burglary was disclosed to the *Washington Post* by W. Mark Felt, who for thirty years was identified only as Deep Throat. *See* Todd S. Purdum, *'Deep Throat' Unmasks Himself: Ex-No.2 at F.B.I.*, N.Y. TIMES, June 1, 2005, at A1. Mr. Felt, who was the number two official at the FBI at the time of the scandal, identified himself as the *Washington Post*'s source in 2005. *Id.*

108. The abuse of prisoners by guards at this prison in Iraq was exposed when CBS' *60 Minutes II* broadcasted photos taken by the guards themselves and given to CBS by confidential sources. *See* Seymour M. Hersh, *Chain of Command: How the Department of Defense Mishandled the Disaster at Abu Ghraib*, THE NEW YORKER, May 17, 2004, at 38, 39–40.

109. *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons-Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A01 (quoting unnamed senior intelligence officials).

110. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (quoting unnamed sources to reveal the existence of a National Security Agency program to wiretap conversations between United States citizens and persons overseas). One of the newspaper's sources was eventually revealed to be Thomas M. Tamm, a Justice Department official who discovered the program and believed it to be illegal. *See* Michael Isikoff, *The Fed Who Blew the Whistle; Thomas M. Tamm Was Entrusted with some of the Government's Most Important Secrets. He Had a Sensitive Compartmented Information Security Clearance, a Level Above Top Secret. Government Agents had probed Tamm's Background, his Friends and Associates, and Determined him Trustworthy*, NEWSWEEK, Dec. 13, 2008, at 40.

111. Larry Sager pointed out long ago that there is nothing unusual about constitutional norms that are not judicially enforceable. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–20 (1978) (discussing application of thesis to identifying such norms in Fourteenth Amendment jurisprudence). What I suggest here is slightly different: the norm would be judicially enforced—by refusing to enforce subpoenas that threaten freedom of the press—but the courts would not prescribe a constitutional remedy.

A. *Enforcing the Norm Through Legislation*

If there is no shield statute, or the statute does not preclude enforcement of the subpoena, courts should not attempt to fill the gap by crafting a constitutional reporters' privilege. The only essential *constitutional* question is whether compelling the testimony in the particular case would abridge freedom of the press. In theory, courts are not constitutionally required to say anything more than that. In practice, they give reasons; reasons enable people—in this case, sources and reporters—to make educated guesses as to how future cases will be decided. It does not follow, however, that the reasons must themselves be treated as constitutional rules. The better solution is to identify the sources of the constitutional problem and let the legislature attempt to cure it. If the decision is that enforcing the subpoena would violate the First Amendment for the reason that compulsory disclosure would never be constitutionally permissible on facts like those at bar, that reason, of course, is a constitutional rule. If the court believes ordering disclosure on facts like those at bar could *not* threaten freedom of the press, there is no constitutional issue. In cases between those extremes, the question would be whether the subpoena threatens press freedom seriously enough to violate the First Amendment. In answering that question, the court should consider not only the merits of the case at hand, but also what mechanisms the state provides for protecting press freedom. Compelling disclosure after the need for the information has been weighed against the risk to press freedom, in accordance with a shield statute or a common law privilege, is less likely to threaten freedom of the press than compelling disclosure when the law has provided no (or only an inadequate) mechanism to evaluate the need for the information and the dangers of exposing the source. If the court believes enforcement of the subpoena in question would be unconstitutional, it should simply quash the subpoena. That tells the legislature that similar subpoenas will not be enforceable at least until the legislature provides a better mechanism for deciding which subpoenas are enforceable, but does not create a constitutional rule that forecloses the legislature's options in deciding how to address the problem.

B. *Enforcing the Norm Through Common Law*

In the federal courts and some states, judges have the additional option of developing a common law response.[112] They could craft a

112. Federal courts have undoubted authority to develop common law evidentiary privileges. *See, e.g.*, Baker v. F&F Inv., 470 F.2d 778, 781 (2d. Cir. 1972). In some states, courts are denied such authority except through the formal rule-making process for rules of evidence. *See, e.g.*, TEX. R. EVID. 501 (2009). Even in such states, however, courts sometimes

comprehensive common law privilege intended to cover all press subpoena controversies, or they could proceed in the more usual common law fashion—developing the response incrementally, deciding in each case only as many details of the privilege as are necessary to decide the case at hand. As to whether they should try to create in advance a full-blown common law privilege that will resolve all future cases, there are considerations pressing in both directions. On one hand, that is a bad idea for the same reason that a First Amendment privilege is inadvisable: there are too many disparate kinds of subpoena controversies to admit a single solution. On the other hand, the unpredictability of incremental common law development may seem to counsel against that approach. If the objective is to give sources some assurance that they can talk to journalists in confidence without fear that the reporter will be forced to violate the confidence, any uncertainty as to how much protection the law will provide undermines that objective.

That concern, however, appears to be less convincing in practice than in theory. Even the most elaborate of the existing reporter's privileges—whether First Amendment, statutory, or common law—contain so many variables that it is rarely possible to have complete assurance that the confidence cannot be breached. At the time the source is deciding whether to talk, it is impossible to know the circumstances in which disclosure may be demanded. Where a reporter's privilege exists, it seems to work not so much by providing firm assurance that the law will not permit the particular confidence to be breached, but by leading sources to believe that reporters will refuse to disclose and that anyone seeking to force them to disclose will at least face some legal impediments. Even if the courts reject the incremental approach in favor of a comprehensive common law privilege, that response is still preferable to a constitutional privilege because it can be more easily modified when that seems desirable. Because it is only common law, it can be modified by the legislature, and courts need not accord it the same presumption of immutability that they would extend to a constitutional rule.

C. *Honoring* Branzburg

Treating compulsory disclosure of reporters' confidential sources as a potential constitutional problem but not imposing a constitutionally prescribed solution leaves states with a wide range of options. States can simply abandon the effort to enforce subpoenas of the sort that have been held unconstitutional, the legislature can address the matter by

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create new common law privileges. *See*, *e.g.*, Hobson v. Moore, 734 S.W.2d 340, 340–41 (Tex. 1987) (recognizing common law privilege, not recognized by rules of evidence, for ongoing law enforcement investigations).

statute, or the courts can address it as a matter of common law. This approach seems consistent with *Branzburg*.[113] The *Branzburg* Court did not deny that compelling disclosure *could* violate the First Amendment; the majority opinion acknowledged that "news gathering is not without its First Amendment protections . . . . We do not expect that courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth."[114] Justice Powell added, "In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."[115] The majority also acknowledged the suitability of more flexible nonconstitutional responses.[116] What the Justices were loathe to do was create the First Amendment privilege proposed by the reporters in that case. They were concerned about the details of such a privilege: to whom it would apply, the circumstances in which it could be defeated, the burdens that would fall on judges in administering the privilege.[117] These concerns convinced the Court that "[t]he administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order."[118]

If the parties in *Branzburg* had embraced the approach advocated here, they would not have urged the Court to adopt a constitutional rule applicable to all reporters seeking to protect confidential sources. Instead, they would have argued that the subpoenas in question could not be enforced because compelling the three reporters to reveal their sources when the government had in place no mechanism for resolving conflicts between press freedom and evidentiary needs,[119] would violate

113. *See* Branzburg v. Hayes, 408 U.S. 665, 689–91 (1972).

114. *Id.* at 707–08.

115. *Id.* at 710 (Powell, J., concurring).

116. The majority explained:

> At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.

Id. at 706 (majority opinion).

117. *Id.* at 704.

118. *Id.* at 703–04.

119. Under this approach, the Court might well have reached different decisions in the three cases before it. Two of the reporters had been subpoenaed by federal grand juries, and federal law gave those reporters no recourse. *Id.* at 675, 677. The third, Paul Branzburg, was subpoenaed by a state grand jury in Kentucky, which had a shield statute. *Id.* at 668. The Kentucky courts held the statute inapplicable on the ground that Branzburg was an eyewitness

the Press Clause. It is entirely possible, of course, that the Court would have rejected that proposition too, but the majority seemed open to that sort of incremental, case-by-case approach.[120]

The *Branzburg* opinions have perplexed two generations of lawyers, judges, scholars, and journalists. The skepticism expressed in some parts of the majority opinion as to whether press subpoenas impose any serious burden on press freedom leads some to believe the Court saw no constitutional problem. But that reading is hard to square with other aspects of the opinion. Every Justice accepted the idea that freedom of the press requires some protection for newsgathering, and that compelling reporters to reveal confidences will deter some sources from furnishing information.[121] The majority stated enigmatically that "grand juries must operate within the limits of the First Amendment,"[122] and Justice Powell asserted that "courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."[123] These statements are not consistent with the claim that compelled disclosure of reporters' confidences raises no constitutional issue. At the same time, the majority—which included Powell—rejected the argument that "refusal to provide a First Amendment reporter's

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to crimes, not merely a recipient of information from a confidential source. *Id.* at 669. It might be hard to persuade a court that such a limited exception to an otherwise protective shield statute posed so substantial a threat to press freedom as to violate the Press Clause.

120. *See Branzburg*, 408 U.S. at 706 ("At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute."); *see also id*. at 709 ("Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth."). In another passage, however, the majority suggested that a case-by-case approach would not meet the reporters' claimed need to be able to give assurances of confidentiality. *See id.* at 702 n.39.

121. The majority said, "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. The majority also accepted that some sources will "refuse to talk to newsmen if they fear identification by a reporter in an official investigation." *Id.* at 695. The dissenters thought it obvious that "when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished." *Id*. at 736 (Stewart, J., dissenting).

122. *Id.* at 708 (majority opinion).

123. *Id.* at 710 (Powell, J., concurring).

privilege will undermine the freedom of the press to collect and disseminate news."[124] If we understand the majority as being sympathetic with the end but leery of the means, these positions are reconcilable. After surveying the numerous details that would have to be resolved in administering the constitutional privilege sought by the reporters, the majority said, "We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination."[125] The solution proposed here spares the courts that difficulty. It accounts for the views of all the members of the *Branzburg* majority. Most importantly, it recognizes that confidential source problems may have constitutional dimensions, but it avoids constitutionalizing the entire subject.

124. *Id.* at 698–99 (majority opinion).
125. *Id.* at 703.