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RECONSTRUCTING JOURNALISTS' PRIVILEGE

*Eric M. Freedman**

In responding from a law professor's perspective to the views of the other participants in this discussion—to whom I am grateful for many valuable interchanges stretching back decades—it is not my purpose to essay a comprehensive discussion of the vast academic literature on journalistic privilege, nor to provide a full survey of the judicial landscape, nor yet to assess the details of the various current proposals for a federal shield law.¹

My hope instead is to suggest concisely a few general thoughts that may be helpful to future efforts in all three areas.

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For the reasons indicated in the first two paragraphs of the text, all of the citations in the footnotes that accompany these comments aim to be illustrative only.

¹ See generally Bree Nordenson, *The Shield Bearer*, COLUM. JOURNALISM REV., May/June 2007, at 48 (describing legislative efforts since 2004). I would note, however, that this is not the first time Congress has considered the problem, see *The Question of Federal "Newsmen's Shield Legislation"—Past Legislative Actions and Court Cases Cited*, 52 CONG. DIG. 132 (1973) (reporting that first federal shield legislation was introduced by Republican Senator Arthur Kapper of Kansas in 1929), and that it has in the past collected a considerable amount of information bearing on the problem. See, e.g., *Newsmen's Privilege: Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary of the United States Senate*, on S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 917, S. 1128 and S.J. Res. 8, *Bills to Create a Testimonial Privilege for Newsmen*, 93d Cong. 1 (1973) [hereinafter *Testimonial Privilege*]; *Newsmen's Privilege, Hearings Before Subcomm. No. 3 of the Comm. on the Judiciary of the House of Representatives on H.R. 717, To Assure the Free Flow of Information to the Public and Related Measures*, 93d Cong. 1 (1973) [hereinafter *Free Flow*]; *Freedom of the Press, Hearing before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary, United States Senate*, 92d Cong. 1-2 (1972). As suggested *infra* in notes 49-53, 61 and accompanying text, this material would repay careful re-reading.

I. DEFINING THE PROBLEM

The problem centers upon a source who "is unwilling to disclose his information except to a reporter under a promise of confidentiality."²

If the promise is honored, the source's information, but not his or her name, will enrich public dialogue.³ If it is not, there may perhaps be a present gain, but future sources will simply remain silent "and the public dialogue will inevitably be impoverished."⁴ Notwithstanding the distorting effect of a short-term focus on the individual case—which offers the glittering illusion of a full rather than a half loaf—the true long-term choice is between half a loaf and none.

In its nature this negative proposition cannot be proven decisively.⁵ But a good deal of constitutional law designed to keep speech from being chilled⁶—including doctrines protecting anonymous speech⁷—has

² Eric M. Freedman, *Freedom of Information and the First Amendment in a Bureaucratic Age*, 49 BROOK. L. REV. 835, 850 (1983); see also *infra* note 18 (discussing non-confidential sources).

³ As indicated *infra* in the text accompanying notes 52-54, this is not an abstract statement. Once revealed, the information is available to be acted upon by a variety of public and private actors in our flourishing civil society—including members of Congress, who may learn of abuses that would otherwise remain unknown to them. See, e.g., *infra* note 25 (listing recent examples of such revelations).

⁴ *Branzburg v. Hayes*, 408 U.S. 665, 736 (1972) (Stewart, J., dissenting).

⁵ But cf. Doug Clifton, *Jailing Reporters, Silencing the Whistleblowers*, CLEVELAND PLAIN DEALER, June 30, 2005, at B9 (revealing that the paper was withholding "two stories of profound importance" that the "public would be well served to know" since it could not assure sources of protection). For a description of the subsequent events, see Ted Diadun, *To Print or Not to Print: A Difficult Question*, CLEVELAND PLAIN DEALER, July 24, 2005, at A2. See also Bill Shuford, Jr., Note, *Newsman-Source Privilege: A Foundation in Policy for Recognition at Common Law*, 26 U. FLA. L. REV. 453, 454, 477 (1974) (describing stories not pursued by press due to inability to grant confidentiality, and proposing recognition of an "unqualified" common law privilege).

⁶ See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101-02 (1982) (holding that the First Amendment shields minor party from forced disclosure of its contributions and expenses if it shows a "reasonable probability of threats, harassment, or reprisals"); *NAACP v. Alabama*, 357 U.S. 449, 461-63 (1958) (unanimous) (Harlan, J.) (noting that the Court has been alert to scrutinize all forms of government action that may have effect, whether or not intended, of curtailing First Amendment liberties, and holding that the state could not compel production of association's membership lists since this was "likely to affect adversely" its advocacy activities by exposing members to community pressures).

⁷ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (invalidating a statute prohibiting distribution of anonymous campaign literature: "Under our Constitution, anonymous pamphleteering is not a pernicious fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. . . . The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse"); *Talley v. California*, 362 U.S. 60, 64 (1960) (invalidating a statute prohibiting distribution of anonymous handbills: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. . . . Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.").

been formulated in the face of frank recognition that “demanding empirical evidence of deterrence is impractical because it will often be impossible to produce.”⁸ Indeed, the First Amendment itself rests upon premises whose validity “has never been proved or disproved, and probably could not be.”⁹

II. WHERE WE HAVE BEEN

In *Branzburg v. Hayes*,¹⁰ the parties’ counsel argued, as Victor Kovner does here,¹¹ for a qualified privilege based upon a three part test of relevancy, unavailability, and materiality.¹² But several amicus briefs filed on behalf of press organizations argued forcefully that “newsmen must be accorded a privilege, absolute and unqualified, to refuse in all circumstances and without penalty to divulge to anyone any information or source, confidential or otherwise, obtained in the course of their professional newsgathering activities” in light of the “inhibiting impact of anything less—whether no privilege at all or a privilege which in any circumstance is subject to defeasance.”¹³

⁸ Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 155 (2007). The points made in this sentence of text are canvassed at length in *Branzburg*, 408 U.S. at 731-36 (Stewart, J., dissenting).

⁹ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970). Moreover, as suggested *infra* in notes 46-47 and accompanying text, there might be structural reasons to adopt a reportorial privilege even if the empirical premise were false.

¹⁰ *Branzburg*, 408 U.S. 665. In addition to the lead case (whose Supreme Court docket number was 70-85), the opinion also disposed of the appeals in *In re Pappas* (No. 70-94) and *United States v. Caldwell* (No. 70-57). See James C. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 710-13 (1975) (describing procedural history of the cases).

¹¹ Victor Kovner, Panel Discussion at Cardozo Law School: Are Journalists Privileged? (Apr. 23, 2007), in 29 CARDOZO L. REV. 1364 (2008).

¹² See *Branzburg*, 408 U.S. at 680 (“Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure.”).

¹³ Brief of the Washington Post Company and Newsweek, Inc., as Amici Curiae in Support of Respondent at 35-36, *Caldwell*, 408 U.S. 665. (Sept. 13, 1971) (No. 70-57); see Brief of American Society of Newspaper Editors, Sigma Delta Chi and Dow Jones & Company, Inc., as Amici Curiae, in Support of Earl Caldwell at 24-33, *id.* (Sept. 17, 1971) (arguing that “journalists must be accorded an absolute and unqualified right to protection from compulsory process”); Brief for Amicus Curiae, The American Newspaper Publishers Association at 11, *id.* (Sept. 20, 1971) (filed in *Branzburg*, *Caldwell*, and *Pappas*) (supporting “the absolute privilege urged herein and in the brief of the amici, the Washington Post Company and Newsweek, Inc.”).

Interestingly, the Managing Editor of The New York Times, A.M. Rosenthal, subsequently testified to the same effect to Congress, see *Free Flow*, *supra* note 1, at 241-51, notwithstanding the much weaker position The Times had taken in its *Branzburg* briefing. See *infra* note 15.

The parties' lawyers apparently took the position they did because they thought it was the maximum they could achieve, and that perception was almost certainly right. Having recently reviewed the relevant portions of the papers of Justices Blackmun, Brennan, Douglas, Marshall, and Powell (which include Conference notes by Justices Blackmun, Douglas, and Powell), I have seen nothing suggesting that the notion of an absolute privilege had any more appeal inside the Court than would appear from the published opinions.¹⁴

Of those, it was the pivotal concurring opinion of Justice Powell that shaped the subsequent evolution of the field. He wrote immediately following Conference, in a handwritten note that has recently been uncovered, "I will make clear in an opinion—unless the Court's opinion is clear—that there is a *privilege* analogous to an evidentiary one, which courts should recognize and apply on case by case [sic] to protect confidential information."¹⁵

While Justice Powell's published opinion describing a constitutional privilege to be adjudicated "on a case-by-case basis"¹⁶ was arguably not quite as clear as he intended—in fact it has been

¹⁴ A more detailed analysis of the papers that comes to the same conclusion is to be found, in Sean W. Kelly, Note, *Black and White and Read All Over: Press Protection After Branzburg*, 57 DUKE L.J. 199 (2007).

As the opinions appeared in print, the principal dissent would have held that: when a reporter is asked to appear before a grand jury and reveal confidences . . . 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.

Branzburg, 408 U.S. at 743 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting) (footnotes omitted).

Justice Douglas in a lone dissent wrote that a reporter has complete immunity from appearing before a grand jury because:

absent his involvement in a crime, the First Amendment protects him . . . and if he is involved in a crime, the Fifth Amendment stands as a barrier. . . . The New York Times . . . takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government. My belief is that all of the 'balancing' was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in the case.

Id. at 712-13 (Douglas, J., dissenting) (footnote omitted). Regrettably Justice Douglas failed to make the tightly-focused policy-based arguments applicable to the specific context at hand that had been so well made by the amici briefs arguing for an absolute privilege. As a result, his views have had little subsequent influence.

¹⁵ Lewis F. Powell, Jr., Notes on Conference of February 25, 1972, *Branzburg v. Hayes* (No. 70-57), in Lewis F. Powell, Jr. Papers, Washington and Lee University School of Law. A reproduction of the document accompanies Adam Liptak, *A Justice's Scribbles on Journalists' Rights*, N.Y. TIMES, Oct. 7, 2007, at WK5 and it is noted in Kelly, *supra* note 14, at 210.

¹⁶ *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

described as “singularly opaque”¹⁷—the combined effects of the vote line-up in *Branzburg*, the efforts of the press to make lemonade out of the dicta in a decision whose holdings were First Amendment lemons, and a widespread receptivity in the state and lower federal courts to those efforts were that the “case-by-case” approach has dominated subsequent thinking.¹⁸

III. WHERE WE ARE

There is widespread concern that, although the experience of the last thirty-five years or so has been tolerable as a pragmatic matter,¹⁹

¹⁷ Goodale, *supra* note 10, at 709.

¹⁸ See generally Freedman, *supra* note 2, at 849 n.44 (describing *Branzburg* as an “unpromising beginning . . . from which the field may never fully recover” while noting that the privilege had since been widely recognized by the lower federal courts and in the states).

Judge Richard Posner, in the course of an opinion that rejected a claim for protection of non-confidential journalistic sources without seriously grappling with the underlying policy concerns, *see, e.g., In re Woodhaven Lumber & Mill Work*, 589 A.2d 135, 141-43 (N.J. 1991) (construing shield law based on “protection of editorial judgment rather than the guarding of confidential sources,” in order “to prevent the State from continually and increasingly calling on press resources in its investigations”); *O’Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277, 279-80 (N.Y. 1988) (recognizing State and federal constitutional protection against discovery of non-confidential materials in interests of autonomy of press and protection against disruption of its operations), used the ambiguity of the published Powell opinion as the launching point for a tendentious history of its subsequent treatment by the courts. See *McKevitt v. Pallasch*, 339 F.3d 530, 531-33 (7th Cir. 2003). Whatever the merits of his appraisals might have been, they should now be re-assessed in light of Justice Powell’s note quoted *supra* in the text accompanying note 15, which describes the privilege as one “which courts should recognize and apply.” In this spirit I abjure my 1983 statement, Freedman, *supra* note 2, at 850 n.45, that obtaining non-confidential information from the press raises no First Amendment difficulties.

¹⁹ Anthony Lewis, Panel Discussion at Cardozo Law School: Are Journalists Privileged? (Apr. 23, 2007), in 29 CARDOZO L. REV. 1354-55 (2008). Libel cases are an area in which workable results have been achieved during the period. Instead of woodenly applying the three part-test described *supra* in the text accompanying note 12—a test that, because of its inherent bias in favor of disclosure, *see infra* text accompanying note 30, the press will necessarily lose in this context, *see, e.g., Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1972) (ordering discovery of source’s identity because “the information sought appears to go to the heart of appellee’s libel action”); *Hatfill v. N.Y. Times Co.*, 459 F. Supp. 2d 462, 466-67 (E.D. Va. 2006), unless plaintiff’s lawyer is sloppy, *see, e.g., LaRouche v. Nat’l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986)—a number of courts have crafted procedures that preserve the confidentiality of the source while enabling the plaintiff to make out his or her claim. *See, e.g., Laxalt v. McClatchy*, 116 F.R.D. 438, 452-53 (D. Nev. 1987); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 582-85 (S.D.N.Y. 1984); *Dowd v. Calabrese*, 577 F. Supp. 238, 244 (D.D.C. 1983). The more significant problem for the press in the libel area is that, with relatively few exceptions, *see, e.g., Edwards v. Nat’l Audubon Soc’y*, 556 F.2d 113, 120 (2d Cir. 1977) (rejecting liability for news story reporting newsworthy charges made by reputable disputants over public policy), the substantive law of the tort has not adequately recognized a defense of neutral reportage. *See Keith C. Buell, Note, “Start Spreading the News”: Why Republishing Material from “Disreputable” News Reports Must Be Constitutionally Protected*, 75 N.Y.U. L. REV. 966, 982-85 (2000) (surveying subsequent cases and arguing for expansion of neutral reportage doctrine).

Thus it is possible for press organizations to report quite accurately that law enforcement

continuing to muddle through is no longer viable. Against a background of intense competition for legitimacy, credibility, and profitability in information marketplaces, the rough and ready constraints on demanding information from journalists appear to be breaking down.²⁰

The mainstream press has suffered multiple blows including:

- the self-inflicted damage to its reputation caused by spectacular journalistic malpractice;²¹
- the rising levels both of criticism by alternative information sources,²² and of self-criticism,²³ which have combined to contribute

agencies suspect someone of a crime and find the result to be enervating libel litigation. See, e.g., *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 369 (S.D.N.Y. 1998) (holding that defense of truth unavailable for correct statements that plaintiff was suspected of planting bomb and was being actively investigated by authorities); Jeffery Scott & Mike Morris, *Richard Jewell Found Dead at 44*, ATLANTA J.-CONST., Aug. 30, 2007, at 1B (describing how an Olympic Park security guard, initially wrongly suspected in bombing, sued CNN and NBC for libel and obtained settlements; Atlanta Journal-Constitution did not settle, contending “that at the time it published its reports Jewell was a suspect, so the articles were accurate.”); see also Janet L. Conley, *AJC Wins*, Also Satisfies Jewell’s Lawyer, http://www.dailyreportonline.com/Editorial/News/singleEdit.asp?individual_SQL=12%2F14%2F2007%4020089 (reporting that as of December 2007 Jewell’s final libel claim against the Atlanta-Journal Constitution had been dismissed and the estate was appealing “a host of issues to higher courts”). See generally *Developments in the Law—The Law of Media: VI. Media Liability for Reporting Suspects’ Identities: A Comparative Analysis*, 120 HARV. L. REV. 1043, 1045-46 (2007).

The real point of Mr. Lewis’s example seems not to be protection of the plaintiff’s reputation (which can be dealt with as indicated in the first paragraph of this note), but rather that one should sympathize with the plaintiff’s efforts to find the identity of the malevolent government source of the leak—an approach which is antithetical to the very purpose of the privilege and which, indeed, has helped bring about the present crisis in the field. See *infra* text accompanying notes 38-44.

²⁰ See, e.g., Kelli L. Sager & Rochelle L. Wilcox, *Protecting Confidential Sources*, LITIG., Winter 2007, at 36, 41 (“Journalists are more threatened today than at any time in American history. Never before have prosecutors, defendants, and civil litigants felt such freedom to demand that journalists produce confidential information. Never before have so many journalists been faced with the prospect of going to jail for refusing to comply with a disclosure order.”); Douglas McCollam & Leah Nelson, *The End of Ambiguity*, COLUM. JOURNALISM REV., July-Aug. 2006, at 20.

²¹ See Dan Barry et al., *Correcting the Record; Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, at A1 (detailing dozens of fabrications over a period of nearly four years by national reporter Jason Blair).

²² See generally Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 680-88 (2007).

²³ See, e.g., *From the Editors: The Times and Wen Ho Lee*, N.Y. TIMES, Sept. 26, 2000, at A2; *From the Editors: The Times and Iraq*, N.Y. TIMES, May 26, 2004, at A10; see also Rachel Smolkin, *Justice Delayed*, AM. JOURNALISM REV., Aug.-Sept. 2007, at 18 (criticizing press coverage of rape allegations against members of Duke lacrosse team); Richard Perez-Pena, *Court Papers Said to Show Added Payments by Reporter*, N.Y. TIMES, Aug. 8, 2007, at A14 (quoting executive editor of Times as saying reporter Kurt Eichenwald violated its standards in making payments to subject of articles concerning online pornography).

In response to the Jason Blair scandal, see *supra* note 21, The New York Times created the position of “public editor,” an ombudsman who solicits readers’ criticisms of the paper’s journalism and publishes regular columns addressing it. See Jacques Steinberg, *Times Editor to*

to a perception—whose accuracy has yet to be determined—that the journalistic performance of the established organizations in the last two decades or so has been worse than in prior historical periods;

– the unprecedented and much-publicized testimony of a string of prominent journalists in the Scooter Libby trial following a profoundly unedifying series of prevarications, compromises, and surrenders which deeply stained the image of both the privilege and its champions;²⁴ and

– post-9/11 pushback from the federal government and supporters of its security policies against journalists doing precisely the sort of excellent investigative work that brings them into inevitable conflict with the authorities.²⁵

In this environment the prospects that the courts will expand a First Amendment based privilege are, as Mr. Lewis suggests,²⁶ remote.²⁷ But that is not the most pressing practical concern: after all, the very purpose of obtaining a statute (or a judge-made common law privilege)

Select Reader Representative, N.Y. TIMES, July 31, 2003, at A22; Byron Calame, *The Public Editor: The Miller Mess: Lingering Issues Among the Answers*, N.Y. TIMES, Oct. 23, 2005, Sec. 4, at 12 (discussing adequacy of paper's reporting on itself contained in Don Van Natta, Jr. et al, *infra* note 24).

²⁴ See Max Frankel, *The Washington Back Channel*, N.Y. TIMES, Mar. 25, 2007, § 6 (Magazine) at 40; Adam Liptak, *After Libby Trial, New Era for Government and Press*, N.Y. TIMES, March 8, 2007, at A18; Neil A. Lewis & Scott Shane, *Libby Lawyers Open Case With Denials by Reporters*, N.Y. TIMES, Feb. 13, 2007, at A15; Scott Shane, *Many Witnesses, Many Timelines*, N.Y. TIMES, Feb. 4, 2007, § 4, at 18; Neil A. Lewis & David Johnston, *At Libby Trial, Russett of NBC Gives and Gets*, N.Y. TIMES, Feb. 8, 2007, at A1; Neil A. Lewis, *Former Times Reporter Testimony is Challenged*, N.Y. TIMES, Feb. 1, 2007, at A16; Neil A. Lewis & Scott Shane, *Reporter Who Was Jailed Testifies in Libby Case*, N.Y. TIMES, Jan. 31, 2007, at A1; Katherine Q. Seelye, *Times Editor Expresses Regrets Over Handling of Leak Case*, N.Y. TIMES, Oct. 22, 2005, at A13; Don Van Natta, Jr. et al., *The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal*, N.Y. TIMES, Oct. 16, 2005, at A1; Lorne Manly, *Editors at Time Inc. Offer Reassurances to Reporters*, N.Y. TIMES, July 13, 2005, at A18; see also NORMAN PEARLSTINE, *OFF THE RECORD: THE PRESS, THE GOVERNMENT AND THE WAR OVER ANONYMOUS SOURCES* 152-55 (2007); Joel Cohen, *Blame the Lawyer!*, N.Y. L.J., Aug. 21, 2007, at 2; Adam Liptak, *Editor's Charge: His Lawyer Fell Short*, N.Y. TIMES, June 18, 2007, at A12.

²⁵ Examples include the reporting of the *New Yorker* concerning the CIA's secret detention program, see, e.g., Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.'s Secret Interrogation Program*, NEW YORKER, Aug. 13, 2007, at 46, of the *New York Times* regarding electronic surveillance by the National Security Administration, see, e.g., James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, of the *Washington Post* respecting secret CIA prisons abroad, see, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1, and of *Time Magazine* about interrogation practices at Guantanamo, see, e.g., Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME, June 12, 2005, at 26. See generally *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (recounting argument of Justice Department in defending detentions of "enemy combatants" at Guantanamo that "the Executive has the authority to detain until the conclusion of the war on terrorism . . . a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source"); Adam Liptak, *Cheney's To-Do Lists, Then and Now*, N.Y. TIMES, Feb. 11, 2007, § 4, at 5.

²⁶ Lewis, *supra* note 19, at 1356.

²⁷ See generally Susan M. Gilles, *The Image of "Good Journalism" in Privilege, Tort Law, and Constitutional Law*, 32 OHIO N.U. L. REV. 485, 500 (2006).

is to gain more stringent protection than the courts are willing to acknowledge already exists under the Constitution.

The most important current task is to learn the right lesson from the present pressures: any qualified reportorial privilege which depends on judicial balancing of the importance of disclosure in individual cases is inherently structurally defective.

First, it provides no predictable standard for when disclosure will occur—a flaw that is fatally inconsistent with the purpose for creating the privilege in the first place. A reporter's promise, "I will not reveal your name unless it meets a three-part legal test that has been subject to varying judicial interpretations" is hardly calculated to inspire a source's confidence.²⁸

Second, it sets up a biased framework for decision-making. Asking a judge presiding over a case whether the needs of information to adjudicate it meet the standards of a qualified privilege is like asking a restaurant patron to choose between the tempting dessert on the table and the weight gain to be avoided by sending it back.²⁹ Actually, it's worse than that. The restaurant patron will at least bear the ultimate cost of making a short-sighted decision; the judge will not. To be sure, judges sometimes overcome these limitations, just as dieters sometimes send desserts back to the kitchen, but success in the underlying enterprise is much more likely if the temptation never arrives at the table in the first place.

Third, the judge is being asked the wrong question: how reasonable it is to make the reporter provide the requested information in this case. That focus simply ignores the good the privilege seeks to protect: disclosure to a journalist in the next case, not this one.

²⁸ Of course, if what the source is really relying upon is the statement, "I will not reveal your name even if ordered by a court to do so and will remain in jail indefinitely to vindicate this promise," then the legal test utilized by the court makes no difference. In that case, preserving the public interest by maintaining confidentiality will depend entirely on (a) the belief of the source in the promise and (b) the fortitude of the reporter in keeping it. Although Mr. Lewis has argued that the system should work this way—and thus he would combine a qualified common law privilege with civil disobedience by journalists—that is a through-the-looking-glass method for achieving the desired goal. Surely it makes more sense to safeguard sources by announcing and enforcing a legal rule of strict protection than by announcing a weak one and expecting sources to trust reporters to defy it. Compare Anthony Lewis, *Abroad at Home: First Amendment Hubris*, N.Y. TIMES, April 19, 1981, at E15 (arguing that "the battle is better fought" in a system in which interests are balanced in the courtroom and then "a few brave journalists go to prison for their promise") with Floyd Abrams, Letter to the Editor, *Protecting Sources is No Special Privilege*, N.Y. TIMES, Apr. 26, 1981, at E22 (responding to this column in a letter to the editor: "The Law is not usually so foolish as to require a 'few brave' individuals to be jailed to give effect to promises which are essential to the functioning of our society").

²⁹ See, e.g., *Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667, 694-97 (Mass. 2005); cf. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROBS. 648, 659 (1955) (focusing on the single problem before him, the censor "is often acutely responsive to interests which demand suppression—interests which he himself represents—and not so well attuned to the more scattered and less aggressive forces which support free expression.").

Fourth, even if the test is formulated so as to ask the right question,³⁰ a qualified privilege calls upon judges to perform a predictive task that requires more foresight than can realistically be expected.³¹

IV. WHERE WE NEED TO GO

As the birds come home to roost, it's time to rebuild the rookery. To achieve the public policy goals of a shield statute requires discarding the "case-by-case" model of the qualified privilege.³² Advocates need

³⁰ Under the version of common-law journalist's privilege adopted by Judge David Tatel in *In re Miller*, 397 F.3d 964, 998 (D.C. Cir. 2005) (Tatel, J., concurring), a court in a leak case "must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value." This is the wrong question because "the public interest in newsgathering" relates to the ability of reporters to obtain such information in the future, not to "the leaked information's value."

Moreover, that metric is itself constitutionally problematic. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974), the Court rejected the view of the plurality in *Rosenbloom v. Metromedia*, 403 U.S. 29, 43 (1971), that the degree of First Amendment protection of allegedly libelous statements should turn on whether they involve "a subject of public or general interest," and instead accepted the criticisms that Justice Marshall had expressed for the dissenters. *Rosenbloom*, 403 U.S. at 79 (arguing that the plurality's test would require courts both to be endowed with "extraordinary prescience" and "to somehow pass on the legitimacy of interest in a particular event or subject: what information is relevant to self-government"); cf. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (rejecting legislature's "highly paternalistic approach" based on an assessment of whether it was in public's best interests to have price information regarding prescription drugs).

Other criticisms of this portion of Judge Tatel's test are noted at *Hatfill v. Gonzales*, Civ. Action No. 03-1793 (RBW), 2007 WL 2296767, at *11-12 (D.D.C. Aug. 13, 2007).

In *Miller* Judge Tatel correctly perceives that leak investigations pose a special problem because in those contexts the standard three part formulation of the existing rule of qualified privilege, *see supra* text accompanying note 12, is unlikely to provide meaningful protection, 397 F.3d at 996; *see, e.g., In re Grand Jury Subpoenas*, 438 F. Supp.2d 1111, 1120 (N.D. Cal. 2006) (holding reporters must disclose source of grand jury leak regarding Barry Bonds' steroid use because only they knew leaker's identity). But, as indicated *infra* note 37, the right solution is to apply an appropriate rule of absolute privilege rather than to attempt to shore up the qualified privilege by adding yet more balancing.

If, however, there is to be a qualified privilege that includes this additional balancing component then a distinctly preferable version is the one offered by Judge Robert D. Sack in *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 186 (2d Cir. 2006) (Sack, J., dissenting) (suggesting phrasing, drawn from a pending bill, as a balancing between "the public interest in compelling disclosure and the public interest in newsgathering and maintaining a free flow of information to citizens"). This formulation focuses on the underlying First Amendment concern and at least does ask the right question.

³¹ *See supra* notes 5-9 and accompanying text.

³² At the time of *Branzburg*, press lawyers might reflexively have considered reporters' notes to be in the same category as their own, and the applicable analogy therefore to be the qualified protection afforded attorney work product rather than the absolute shield of attorney-client privilege. That, however, was before *Upjohn v. United States*, 449 U.S. 383 (1981), held that the privilege extended to questionnaires returned to a lawyer by corporate employees in order to enable the lawyer to give legal advice to the corporation. The relevance of these doctrines to the present problem is discussed *infra* in the text accompanying notes 36-44.

to pick up, rather than continuing to attempt to duck, the gauntlet thrown into their faces by Justice White: "If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them, it would appear that only an absolute privilege would suffice."³³

A federal shield law should mandate an absolute privilege, ideally one embracing the territory described in the amicus briefs in *Branzburg* but in any event one that has no exceptions³⁴ within whatever clearly-defined area it does cover.³⁵

A. *The Idea*

The appropriate model is that of communications between attorney and client. When a client confesses a past crime to a lawyer, it makes no difference to the applicability of the privilege that the client is a slimy scuzzball, nor that the client is the only available source respecting the facts of the crime that the criminal trial is supposed to determine.³⁶ The communication is protected because in the context of the adversary system there are more important values than complete

³³ *Branzburg v. Hayes*, 408 U.S. 665, 702 (1972). In the omitted footnote to this passage, Justice White notes at length the inhibiting effect on sources of a case-by-case balancing approach.

³⁴ Various proposals confusingly incorporating the term "absolute," each with its own exceptions, have been made over the years. See, e.g., Leslye DeRoos Rood & Ann K. Grossman, *The Case for a Federal Journalist's Testimonial Shield Statute*, 18 HASTINGS CONST. L.Q. 779, 802-03 (1991) ("[P]ropos[ing] an absolute privilege, except in the grand jury or criminal trial context when confidential information held by a reporter is necessary to the indictment or prosecution of a person who, if guilty of the crime charged, is likely to cause the death or serious bodily injury of another person upon release from custody."); Leslie Siegel, Note, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469, 513 (2006) (arguing for absolute privilege except for "any source, news, or information procured through illegal means"); see also *The Question of Federal "Newsmen's Shield Legislation"—Action in the 92nd and 93d Congresses*, 52 CONG. DIG. 138, 138-39 (1973) (noting that the terms "absolute" and "qualified" are "imprecise" and "somewhat misleading" as descriptions of degree of protection afforded by various statutory proposals); cf. Alexander Meikeljohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (in disputing whether the First Amendment is absolute "the contending parties have not been able to agree on the sense in which the word 'absolute' shall be used").

³⁵ Representative Wilson's bill described *infra* note 61, is an example of such a statute. See generally Brian M. Cullen, Note, *Circumventing Branzburg: Absolute Protection for Confidential News Sources*, 18 SUFFOLK U. L. REV. 615 (1984).

³⁶ This is true whether the party seeking the information is the prosecutor or the defendant, notwithstanding the latter's Sixth Amendment right to compulsory process. See generally Mark Hansen, *The Toughest Call*, A.B.A. J., Aug. 2007, at 28 (reprising 1973 case of New York lawyers whose client confessed to undiscovered murders and whose withholding of the information led to widespread professional acclaim).

disclosure. These include (a) the maintenance of an appropriate balance between the individual and the government—not just in this case, but in the cases of all other clients who would not confide in their lawyers (the rationale for the attorney client privilege)—and (b) the preservation of a private mental sphere within which lawyers make the autonomous decisions that enable them to perform their socially valuable functions (the rationale for the work product doctrine).³⁷

Both values are fully applicable in the journalistic context.

1. Trusting the Press

According to Mr. Lewis, it should make a difference in the case of the subpoenas served on the reporters covering Barry Bonds' alleged use of steroids whether "the leaker was a lawyer who had represented defendants indicted by the grand jury"—in which event protecting the source would be "protecting trickery"³⁸—or, say, a fresh-faced baseball fan who had come by the information while attending an enthusiasts'

³⁷ See *In re Green*, 492 F.3d 976, 980 (8th Cir. 2007). The protection extends to the point at which the lawyer becomes a co-participant in the client's criminal activity. See *id.* at 981-82 (attorney notes of interviews with client immune from production as work product unless attorney is "complicit in his client's wrongdoing").

The same paradigm is generally applicable in the journalistic context, with one key refinement: the absolute reporter's privilege, if it is to be of any practical use, see *supra* note 30, must be applicable even in situations in which the government claims that the source acted illegally by leaking the information and/or the journalist did so by receiving it. This problem has been raised recently by the Espionage Act prosecution of two lobbyists for the American Israel Public Affairs Committee, see *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), a case cogently criticized by *Recent Case*, 120 HARV. L. REV. 821 (2007); see also Norman Pearlstine, *A Test for Mr. Mukasey*, WALL ST. J., Nov. 12, 2007, at A17 (calling on the Attorney General to drop the case). See generally Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y R. 219 (2007); *Developments in the Law—The Law of Media, Prosecuting the Press: Criminal Liability for the Act of Publishing*, 120 HARV. L. REV. 1007 (2007); *Receiving Stolen Property*, EDITOR & PUBLISHER, Feb. 24, 1973, at 4 (noting editorially that if government can charge journalists who receive leaked information with criminal activity as well as "use the contempt power to force reporters to divulge confidential sources and information," then "the impact on the investigative efforts of the press to disclose wrongdoing in government could be devastating").

To date, the Supreme Court has uniformly rejected claims that the press should be liable in damages for publishing information because the source acted unlawfully in disclosing it. See *Bartnicki v. Vopper*, 532 U.S. 514, 528-29 (2001). But the applicability of that principle to situations in which discovery is sought from the press in such contexts is in sufficient doubt that, as Mr. Lewis notes, five major media entities decided to make monetary contributions totaling \$750,000 to the government's settlement of Privacy Act litigation brought by Dr. Wen Ho Lee rather than continuing to pursue in the Supreme Court privilege claims that had been rejected in *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005). Lewis, *supra* note 19, at 1357; see Adam Liptak, *News Media Pay in Scientist Suit*, N.Y. TIMES, June 3, 2006, at A1. To consider this outcome "fair," as Mr. Lewis does, one has to ignore the possibility that it was the very publication of the details of the false allegations against Dr. Lee that provided the raw materials for his ultimate vindication.

³⁸ Lewis, *supra* note 19, at 1358.

convention but feared social reprisals for the disclosure.³⁹ Thus to determine whether the privilege applied one would have to know the source and his or her motive. This would both destroy anonymity at the outset and relegate applicability of the privilege to a murky judicial calculation of social utility—effectually repudiating the initial premises for the creation of the privilege, viz. that public knowledge of information which the source is only willing to disclose in confidence and to a reporter is itself a public benefit.⁴⁰

The difficulties of Mr. Lewis's approach have been highlighted by the Scooter Libby case.⁴¹ The undoubted fact that Libby's original leaks were sordidly motivated⁴² should, as a matter of good journalistic practice, have been a factor in whatever agreements reporters reached with him.⁴³

But decisions regarding First Amendment protections do not and should not turn upon the good character of the speaker or the high quality of the journalism involved.⁴⁴

³⁹ See *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002) ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995))).

⁴⁰ See Lori Robertson, *Kind of Confidential*, AM. JOURNALISM REV., May-June 2007, at 27, 32-33 (quoting one of the reporters involved in the Bonds case: "you make a decision on what to do with the information, separate from the motives of the sources"); cf. *supra* notes 30 (describing District Court decision in Bonds case) and 37 (discussing Wen Ho Lee case).

⁴¹ See Douglas McCollam, *Attack at the Source*, COLUM. JOURNALISM REV., March-April 2005, at 29, 34 (noting fear among journalists and lawyers that privilege would be destroyed because, "Like the porno king who must be transformed into a First Amendment martyr, there is a sense that the Plame outing through Novak by his sources was the kind of sleazy Beltway maneuver that represents the worst use of confidential information.").

⁴² See Frankel, *supra* note 24; Murray Waas, *Cheney's Call*, NAT'L J., Feb. 17, 2007, at 38, 41, 43.

⁴³ Moreover, as a matter of law as well as good practice, whatever agreements were reached should have been kept. See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (rejecting argument that First Amendment precluded imposition of damages on newspaper for breaching promise of confidentiality).

⁴⁴ See, e.g., *Hustler v. Falwell*, 485 U.S. 46, 52 (1988) (noting in course of extending protection to Hustler magazine that "in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment"); *Terminiello v. City of Chicago*, 337 U.S. 1, 17-24 (1949) (Jackson, J., dissenting) (observing that Terminiello's anti-Semitic speech, protected by the majority opinion, "followed, with fidelity that is more than coincidental, the pattern of European fascist leaders"); *Near v. Minnesota*, 283 U.S. 697, 709, 720 (1931) (invalidating statute permitting injunction against publishing scandalous matter unless defendant showed it was true and published with good motive even though "the liberty of the press may be abused by miscreant purveyors of scandal"); see also FRED W. FRIENDLY & MARTHA J. H. ELLIOTT, *THE CONSTITUTION: THAT DELICATE BALANCE* 30 (1984) (describing defendant newspaper as "an anti-Semitic, anti-black, anti-establishment rag").

2. Mistrusting the Government

Similarly under the First Amendment, decisions on what should or should not be published are left to the independent judgment of the press even though elected officials believe themselves to have sounder views.⁴⁵ Objectively, the officials may be right in any particular case. But the aggregate social costs of moving the decision-making power from private actors to public ones outweigh the benefits. The government officials may be wrong as well as right in the specific instance, and, in any event, the resulting centralization of power would be dangerous.⁴⁶ Hence, there is no system of case-by-case balancing; there is an absolute rule of autonomous private decision-making.⁴⁷

B. *The Implementation*

To be sure, enacting a federal shield law based on these principles may not be politically feasible at this moment.⁴⁸ But the task at hand is not to pass a statute; it is to solve a problem.

In the immediate wake of *Branzburg*, Senator Alan Cranston introduced a federal shield statute providing an absolute privilege in federal and state proceedings,⁴⁹ explaining:

⁴⁵ See, e.g., *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

⁴⁶ James Madison articulated both concerns in *Federalist No. 10*. Making the slightly counter-intuitive point that a "faction" could consist of a majority, he explained that this could occur if the majority's decisions were contrary "to the permanent and aggregate interests of the community" (that is, substantively wrong) or "adverse to the rights of other citizens" (that is, tyrannical). See *THE FEDERALIST* No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961); cf. *People v. Huss*, 51 Cal. Rptr. 56, 61 (Dist. Ct. App. 1966) (suggesting that "[s]peech is free under the First Amendment, not so much because free speech is inherently good as because its suppression is inherently bad").

⁴⁷ Analogously, there is absolute prohibition on the use at a criminal trial of evidence obtained by coercion—not a rule under which the reliability of the evidence is considered on a case by case basis. See *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

⁴⁸ Moreover, any real-world legislation needs to tackle a plethora of important practical and conceptual problems beyond those involving the scope of the privilege itself, including, as Mr. Lewis suggests, Lewis, *supra* note 19, at 1356, the definition of journalists and journalism in the contemporary media environment, see *Developments in the Law—The Law of Media, Protecting the New Media: Application of the Journalist's Privilege to Bloggers*, 120 HARV. L. REV. 996 (2007), and the growing salience of the long-latent issue of potential conflicts between individual reporters and their communications-conglomerate employers. See Matthew Cooper, *Valerie, Scooter, and Me*, PORTFOLIO, May 2007, at 206, 210. See generally Reporters Comm. for Freedom of the Press, *Confidentiality Complications: How New Rules, Technologies and Corporate Practices Affect the Reporter's Privilege and Further Demonstrate the Need for a Federal Shield Law* (2007), available at <http://www.rcfp.org/news/documents/20070613-whitepaper.pdf>.

⁴⁹ His proposal, S. 158, 93d Cong., 1st Sess., is reprinted in *Testimonial Privilege*, *supra* note

I believe strongly that Congress should give newsmen an absolute and unqualified privilege to refuse under all circumstances and without penalty to divulge to anyone any confidential information or confidential source obtained in the course of their professional newsgathering activities. An attorney cannot violate the canons of ethics and break a confidence with his client even to prevent the conviction of an innocent man or to disclose a breach in national security. Yet we don't hear demands that the attorney-client privilege be "qualified" to compel a lawyer to testify when he has that kind of information. Nor do we hear that either our system of justice or the survival of our nation is in jeopardy because that privilege isn't qualified.⁵⁰

Responding to the perfectly accurate criticism that his proposal went beyond what was then politically possible, he warned the press that in yielding to "reasons of pragmatism" and supporting bills containing "a string of compromises" they were making "a serious error"—not because one of the bills might not pass (though in fact none did), but rather because such legislation would not provide sources with any reliable assurance of non-disclosure and therefore would fail to achieve its basic purpose of getting the underlying information before the public.⁵¹

Senator Cranston was right and the formation of sound public policy (as opposed to the mere passage of legislation) is not advanced by pretending otherwise. All public and private mechanisms of accountability depend for their effectiveness upon the availability of information. Those who utilize such mechanisms—including lawmakers, business executives who need to know about malfeasance in their organizations sooner rather than later, environmental and consumer advocates, and, yes, prosecutors⁵²—will be worse off with flawed shield legislation than none.

1, at 412. The National Association of Broadcasters supported this bill, noting that it had previously supported a qualified privilege but that "it is now clear that Federal legislation dealing with newsmen's privilege must be absolute and must apply to all governmental proceedings, both State and Federal," *Testimonial Privilege*, *supra* note 1, at 587 (March 9, 1973) (Statement of John B. Summers, General Counsel, National Association of Broadcasters) [hereinafter NAB Statement]. For a very valuable articulation of Senator Cranston's views, see *id.* at 45-59 (Feb. 20, 1973) (Statement of Hon. Alan Cranston, A U.S. Senator from the State of California).

⁵⁰ Alan Cranston, *First Means First*, TRIAL MAG., May-June 1973, at 31, 34.

⁵¹ *Id.* at 32-33; see also Luther A. Huston, *Split Views on Immunity Bill Dim Hope for a Full Shield*, EDITOR & PUBLISHER, Feb. 24, 1973, at 7 (summarizing numerous then-pending bills and witnesses' views); *supra* note 49 (noting change of position of National Association of Broadcasters).

⁵² See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 182 (2d Cir. 2006) (Sack, J., dissenting) (observing that experience of over thirty years shows the privilege "serves the needs of law enforcement"); *In re Taylor*, 193 A.2d 181, 185 (Pa. 1963) (explaining that disclosure of criminal activity that would otherwise go unrevealed is far more beneficial to public welfare than occasionally uncovering identity of source in context of specific prosecution).

To take the paradigmatic (and of course wholly unrealistic)⁵³ situation of the present day, suppose a reporter broadcasts a news alert that, according to a reliable, confidential source, a major terrorist attack will strike New York the next day, and law enforcement authorities want the reporter to reveal the name of the source so they can attempt to track him down and possibly prevent the attack.

Is a position insisting on an absolute privilege in these circumstances possibly defensible? Yes. "Public officials are better off knowing that a threat exists, even if they do not know the identity of the source than knowing nothing at all. Thus, breaching the privilege in even this seemingly compelling situation may prove counterproductive in the long run."⁵⁴

It is symptomatic of the extent of the needed re-thinking that Professor Stone, a devoted civil libertarian, who recognizes throughout the article from which this example is drawn, the need to look beyond the current case in the interests of the future flow of information and the inimical effect of uncertain legal standards on achieving this goal⁵⁵ flees the cogent logic of his own position and concludes by endorsing a statutory "rule that limits the privilege (a) when the government can convincingly demonstrate it needs the information to prevent an imminent and grave crime or threat to the national security or (b) when the disclosure is unlawful and does not substantially contribute to public debate."⁵⁶

The sole merit of this proposal, whose exceptions are as expansive as they are nebulous, is that it might be possible to enact. That is faint praise indeed. The goal of passing a statute is to improve upon the status quo. The public welfare will hardly be advanced if Congress acts, as it commonly does, by passing a statute whose only utility is enabling legislators to announce that the problem has been solved.⁵⁷

⁵³ See NAB Statement, *supra* note 49, at 587 ("The parade of horrors which can be assembled under the absolute approach is long and imposing, but it is largely conjectural. We know of no cases where newsmen have impeded justice by withholding information relative to serious crimes, national security, or other matters of paramount public concern. In effect, the opposite is true. Newsmen, where able to protect confidential sources, have been instrumental in ferreting out crime."); *Testimonial Privilege*, *supra* note 1, at 217, 221-22 (Feb. 27, 1973) (testimony of Hon. Charles H. Percy, Senator from the State of Illinois) (citing numerous instances where press disclosures facilitated prosecutions while noting that studies reveal no reported miscarriages of justice resulting from failure of innocent defendant to obtain necessary information).

⁵⁴ Geoffrey R. Stone, *The Merits of the Proposed Journalist-Source Privilege*, 1 ADVANCE 67, 75 (2007); see also Brief of the Washington Post Co., *supra* note 13, at 28 n.* (suggesting that if authorities' security fears were genuine, publication of Caldwell's story could have enabled them to avert a threat to the life of President Nixon of which they would otherwise have been unaware).

⁵⁵ See, e.g., Stone, *supra* note 54, at 74.

⁵⁶ *Id.* at 77.

⁵⁷ A recent example is contained in the U.S.A. Patriot Act, as previously: "After the courts

Of course the best is the enemy of the good. But it is also the enemy of the bad. Just before leaving for its August 2007 recess, the House Judiciary Committee cleared legislation that would allow compulsory disclosure of a source in a range of cases, including when:

necessary to identify a person who has disclosed—

(i) a trade secret of significant value in violation of a State or Federal law;

(ii) individually identifiable health information, as such term is defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), in violation of Federal law; or

(iii) nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Bliley Act (15 U.S.C. 6809(4)), of any consumer in violation of Federal law.⁵⁸

This bill is worse than useless. It is harmful. Not only would it not have helped the press in most of the high profile battles of recent years,⁵⁹ but its passage could leave sources with even less protection than at present. In most federal circuits there is a judicially-created privilege that might provide more protection than this statute does.⁶⁰ That “might” is a black hole—powerful but invisible—into which information of public benefit will disappear if a poorly-considered statute is enacted. To surrender to the view that something is better than nothing is to subordinate the ends to the means and to let Congress off the hook, free to ignore the area for decades to come.

The fact that the current prospects of enacting even this federal

had repeatedly found that the states were not providing competent defense representation in capital cases, Congress decided to solve the problem by the simple device of having the attorney general announce that it did not exist.” Adam Liptak, *Greasing the Wheels on the Machinery of Death*, N.Y. TIMES, Aug. 20, 2007, at A8

⁵⁸ H.R. 2102, 110th Cong. §2(a)(3)(C)(i) (2007); see John Diaz, “Code Orange” for Press Freedom, S.F. CHRON., July 15, 2007, at D6 (article by paper’s editorial page editor supporting this legislation as vindicating “the public’s right to know”).

⁵⁹ The bill permits compelled disclosure of a source when “necessary to prevent imminent and actual harm to national security with the objective to prevent such harm.” H.R. 2102 § 2(a)(3)(A). If identifying an executive branch official who has leaked the identity of an undercover CIA agent is “necessary to prevent imminent and actual harm to national security with the objective to prevent such harm” then the entire Libby fiasco, see *supra* text accompanying note 24, would have played out exactly as it did even if this statute had been enforced. And one must certainly be blessed with an active imagination to believe that potential sources for future stories like the ones described *supra* note 25, would feel secure behind a shield like this one. See Lewis, *supra* note 19, at 1357 (“The trouble with that proposed exception is that it could easily become as wide as the barn door. The most important press disclosures have had to do with what the government says is national security: the Pentagon Papers case, warrantless wiretapping, secret C.I.A. prisons. The government so often sounds as if the fate of the nation were imminently at stake, and judges tend to be uneasy about differing with official claims of national security.”).

⁶⁰ See James Goodale et al., *Reporter’s Privilege*, in 3 COMM. LAW 2006, at 715, 773-943 (2006) (surveying federal decisions); Reporters Comm. for Freedom of the Press, *Privilege Compendium*, <http://www.rcfp.org/privilege/index.php> (last visited Sept. 14, 2007) (same).

sieve law are dubious should be welcomed by shield law proponents as a blessing in disguise. It is an opportunity to rethink their legislative strategy. They should adopt a position like the one that was taken by the *Branzburg* amici and by the mainstream press before Congress at the time,⁶¹ broaden the coalition of supporters so that the journalistic privilege overcomes its current image as simply a legislative break for a favored industry⁶² and re-place the issue where it rightly belongs—on the pedestal of public empowerment.

⁶¹ See, e.g., *Free Flow*, *supra* note 1, at 252-56 (statement of Stanford Smith, President, American Newspaper Publishers Association supporting H.R. 2200, introduced by Rep. Charles H. Wilson of California, flatly prohibiting compelled disclosure in any federal or state proceeding of the source or content of any published or “unpublished information obtained or prepared in gathering, receiving or processing of information for any medium of communication to the public”); *id.* at 241-51 (testimony of A.M. Rosenthal discussed *supra* note 13). In a draft bill that it submitted, the Newspaper Guild proposed a similarly absolute privilege. See *id.* at 573-75.

⁶² See Diaz, *supra* note 58 (reporting this view among business executives).

