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# PROTECTION OF CONFIDENTIAL SOURCES: A MORAL, LEGAL, AND CIVIC DUTY

LAURA R. HANDMAN\*

## INTRODUCTION

As this Essay is being written, two prize-winning reporters from major news organizations are facing imprisonment for doing their jobs and one reporter has served four months home detention. They are facing imprisonment for reporting on matters of utmost public concern: in one case, the corruption of a local public official and, in the case of the other two reporters, allegations that a top administration official revealed the identity of a covert CIA agent in order to impugn or intimidate a critic of the administration's basis for going to war in Iraq.<sup>1</sup> They are facing imprisonment not for what they wrote, but because they insist on keeping their promise of confidentiality to their sources, rather than tell a grand jury who gave them the information. They face imprisonment, not because they did anything illegal in obtaining the information, but because their sources may have done something unlawful in disclosing the information—wholly

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1. Jim Taricani of WJAR in Providence, Rhode Island refused to reveal the identity of the person who leaked him an FBI videotape of a politician taking a bribe and was found by a district court judge to be in civil contempt, a ruling upheld by the First Circuit. *In re Special Proceedings*, Nos. 03-2052 & 04-1383 (1st Cir. June 21, 2004). The trial judge suspended the fine in November, after WJAR had paid \$85,000 in fines, holding that the penalty had not achieved its goal. On November 18, 2004, Mr. Taricani was convicted of criminal contempt. He was sentenced to six months home detention on December 9, 2004. Taricani was released after four months, on April 9, 2005, after petitioning the judge for early release.

In October 2004, a federal district court held reporters Matt Cooper of *Time* magazine and Judith Miller of the *New York Times* in contempt for not complying with a court order to reveal the name of the confidential source who exposed Valerie Plame as a CIA agent and sentenced the reporters to up to eighteen months imprisonment. The ruling was affirmed on appeal to the D.C. Circuit and a petition for rehearing en banc was denied on April 19, 2005. *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964 (D.C. Cir. 2005), *reh'g denied*, No. 04-3138 (D.C. Cir. Apr. 19, 2005). The reporters are likely to seek review by the United States Supreme Court.

truthful information the source believed was important for the public to know.

This Essay will reflect on the inherent tension between the legitimate needs of law enforcement and the legitimate needs in a democracy of citizens for information about their government. There are moral, ethical, civic, and legal consequences if reporters can rely on confidential sources only at peril of their own liberty. Such an outcome will greatly reduce the information available to make wise social and political decisions and to be an effective watchdog against government and corporate abuse. The balance set by the First Amendment argues against such a result, albeit at some cost to law enforcement. This Essay argues for a federal shield law to join those of thirty-one states and the District of Columbia to protect journalists from being forced to choose between their obligations to their sources to keep promises of confidentiality, their obligation as citizens to provide evidence for legitimate investigation of unlawful activity, and their obligation as members of the Fourth Estate to inform the public of matters of public concern.

### I. REPORTERS' CORE ETHICAL OBLIGATION: CONFIDENTIALITY

It is a sacred tenet of journalistic ethics that reporters "[r]ecognize the need to protect confidential sources"<sup>2</sup> and "promise confidentiality only with the intention of keeping that promise."<sup>3</sup> The promise of confidentiality has legal, as well as moral, force.<sup>4</sup>

Some of our country's most significant political stories have come to light through the efforts of confidential sources. In the Pentagon Papers case, for example, the press published highly

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2. RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, CODE OF BROADCAST ETHICS ¶ 4 (1987), reprinted in JAY BLACK ET AL., DOING ETHICS IN JOURNALISM 10-11 (2d ed. 1995).

3. *Id.*; see also AMERICAN SOCIETY OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES art. VI (1975 ed.) ("Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly."); SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS, art. III(5) (1987 ed.), reprinted in BLACK ET AL., *supra* note 2, at 6-8 ("Journalists acknowledge the newsman's ethic of protecting confidential sources of information."); *id.* at 199 ("Once you promise confidentiality, keep your promise," even if it requires "go[ing] to jail."). Indeed, "[t]he reputation of a reporter or newspaper or television station has for protecting sources who provide sensitive information is part of the continuing dynamic of successful journalism." *Id.* at 197; JACK FULLER, NEWS VALUES 65 (1996) (arguing that a newspaper must "protect[ ] the integrity of its promises" of confidentiality).

4. *Cowles v. Cohen Media Co.*, 501 U.S. 663 (1991) (holding that a source can enforce promise of confidentiality).

classified documents concerning the governmental policies that entangled the United States in Vietnam, despite the fact that the documents were “feloniously acquired” by an unnamed source.<sup>5</sup> In the Watergate investigation, reporters Woodward and Bernstein received and relied upon information regarding the misuse of presidential campaign funds from a confidential source known as “Deep Throat.”<sup>6</sup>

In the years since Watergate, some of the biggest stories involving government corruption or deception have resulted from information provided by confidential sources, involving such topics as how the FBI’s Surreptitious Entry Program routinely broke into people’s homes and offices; how the United States masterminded a 1953 coup d’etat in Iran; how a sitting U.S. senator was potentially abusing his authority,<sup>7</sup> the Iran-Contra “arms for hostages” deal; and the Anita Hill story that almost derailed a Supreme Court nomination.<sup>8</sup> One empirical study found that forty-two percent of former federal officials who occupied policymaking positions stated that they had provided confidential information to the press during their tenure in office.<sup>9</sup>

More recently, the reporters who broke the Abu Ghraib prison scandal received photographs and other information from unidentified sources.<sup>10</sup> After the initial stories were published, other soldiers, who also requested anonymity, came forward with more evidence.<sup>11</sup> Later, unidentified sources within the military provided a reporter with internal records from the Pentagon indicating investigations in some seventy-five cases of detainee abuse, including twenty-seven abuse cases involving

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5. *New York Times Co. v. United States*, 403 U.S. 713, 754 (1971) (Harlan, J., dissenting).

6. CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* 69–70 (1974).

7. See DAVID BURNHAM, *ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES, AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE* 130–34, n.1 (1996); James Risen, *Special Report: The C.I.A. in Iran—How a Plot Convulsed Iran in '53 (and in '79)*, N.Y. TIMES, Apr. 16, 2000, at A1; *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969).

8. See *American Notes: Investigations—Getting to the Source*, TIME, Feb. 17, 1992, at 37.

9. MARTIN LINSKY, *IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING* 172 (1986).

10. See Seymour Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42.

11. See Todd Richissin, *Soldiers’ Warnings Ignored—Failures: The Blame for What Happened at Abu Ghraib Goes Far Beyond the Military Police, Intelligence Soldiers Say*, BALT. SUN, May 9, 2004, at A1.

deaths; at least eight believed to be homicides.<sup>12</sup> Without the press's reliance on anonymous sources, the Abu Ghraib prison abuses would not have been reported to the public.

Reporters also rely upon confidential sources to investigate important stories outside the political arena. For example, reporters relied upon confidential sources in their investigation of the Enron accounting fraud scandal.<sup>13</sup> Recent stories detailing how cigarette companies manipulate nicotine delivery in their products and how such companies have suppressed information regarding the health risks of tobacco were made possible only by the transmission of stolen documents that the companies claimed were subject to a judicial protective order.<sup>14</sup> A Pulitzer Prize-winning series of articles reported on more than 230 fertility fraud stories, exposing cover-ups, intimidation of clinic employees, and hush money payments. As a result, the clinic in question closed, families learned the true biological origins of their children, and the American Medical Association issued new guidelines for fertility clinics. Although all of the individuals quoted in the stories were identified, the reporter relied upon clinic records she had obtained from unidentified sources.<sup>15</sup> Reporters may not have been able to provide the public with these kinds of groundbreaking stories without the ability to promise confidentiality to their sources.<sup>16</sup>

## II. COURTS RECOGNIZE REPORTER'S PRIVILEGE GROUNDED IN FIRST AMENDMENT

The Supreme Court has long recognized that "[t]he constitutional guarantee of a free press . . . secures 'the paramount public interest in a free flow of information to the people concerning public officials.'"<sup>17</sup> Accordingly, "news gathering is not

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12. Miles Mofeit, *Brutal Interrogation in Iraq: Five Detainees' Deaths Probed*, DENVER POST, May 19, 2004, at A1.

13. See REBECCA SMITH & JOHN EMSCHWILLER, 24 DAYS: HOW TWO WALL STREET JOURNAL REPORTERS UNCOVERED THE LIES THAT DESTROYED FAITH IN CORPORATE AMERICA 47-56, 70-75, 258-60 (2003).

14. See Alix M. Freedman, *Inside the Soul of Marlboro*, WALL ST. J., Oct. 18, 1995, at A1; Philip J. Hiltz, *Tobacco Company Was Silent on Hazards*, N.Y. TIMES, May 7, 1994, at A1.

15. Susan Kelleher's series, titled "Fertility Fraud," was published in the *Orange County Register* between March and November 1995.

16. See, e.g., Affidavits of Matthew Cooper, Scott Armstrong, Jack Nelson, and Anna Nelson, Attached as Appendices to Brief of Appellants, *In re Grand Jury Subpoenas* (D.C. Cir. 2004) (Nos. 04-3138, 04-3139 & 04-3140).

17. *Pell v. Procunier*, 417 U.S. 817, 832 (1974) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)).

without its First Amendment protections."<sup>18</sup> As numerous courts of appeals have observed, routinely compelling "disclosure of . . . confidential [sources] would clearly jeopardize the ability of journalists and the media to gather information and, therefore, have a chilling effect on speech."<sup>19</sup> This is especially so with respect to "reporting on governmental affairs," and "the axiom is almost always: the more important a story, the more likely the need for confidentiality."<sup>20</sup>

Federal courts have recognized a reporter's privilege grounded in the First Amendment that provides journalists with a qualified right to resist efforts to compel testimony about their confidential sources or about unpublished information gained in the course of researching a story. In *Branzburg v. Hayes*,<sup>21</sup> four members of the Supreme Court held that there is no privilege on the part of the media to refuse to testify before the grand jury. Justice Powell's concurring opinion, however, held that courts should strike "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."<sup>22</sup> In the three decades since, many courts interpreting *Branzburg* have held that Justice Powell's opinion, prescribing a balance of First Amendment and law enforcement interests, is controlling.<sup>23</sup> Other courts have more recently held that, at least in the grand jury context, *Branzburg*

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18. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

19. *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988); see also *Ashcroft v. Conoco Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) ("If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic."); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability.").

20. John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 73-74 (1985) (quotation omitted) (noting that the journalists nominated for a Pulitzer Prize used confidential sources in about one-third of their stories, but in a much higher percentage of stories involving governmental affairs or other "major" issues).

21. 408 U.S. at 710.

22. *Id.* (Powell, J., concurring).

23. See, e.g., *Bruno v. Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583, 595-96 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Miller v. Transamerican Press*, 621 F.2d 721, 725 (5th Cir. 1980); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992 & n. 9 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975); *Silkwood v. Kerr-McGee*, 563 F.2d 433, 436-37 (10th Cir. 1977); *Zerilli*, 656 F.2d at 711-12.

provided no privilege to refuse to disclose confidential sources.<sup>24</sup> The very existence of reporter's privilege is currently before appellate courts and may reach the United States Supreme Court this term.

However the privilege is ultimately interpreted, the First Amendment clearly does not relieve a reporter of all civic duty to provide testimony concerning a crime that he witnesses.<sup>25</sup> Every citizen—including a reporter—has an obligation to give evidence. The law has long recognized a “general duty” on the part of citizens called before official proceedings to “give what testimony one is capable of giving.”<sup>26</sup>

The law recognizes numerous exceptions to this obligation, however, such as the privilege against self-incrimination, the lawyer-client privilege, spousal privileges, physician-patient privilege, the clergy-penitent privilege, and, most recently, the psychotherapist-patient privilege recognized in *Jaffee v. Redmond*.<sup>27</sup> These privileges reflect a societal value placed on the ability to withhold evidence, no matter how probative, no matter if available from no other source, in order to “promote[ ] sufficiently important interests”<sup>28</sup> which “outweigh the need for probative evidence.”<sup>29</sup>

While the legal duty to answer a subpoena and supply a grand jury or a court with relevant information does not target the press, that legal duty has a particularly devastating effect on reporters' ability to gain the confidence of sources who can provide them with the information crucial to investigating important and newsworthy stories. If potential informants believe that a subpoena can convert the media into “an investigative arm of the government,” they will be far less likely to share controversial

24. *E.g.*, *In re Grand Jury Subpoena* (Miller), 397 F.3d 964 (D.C. Cir. 2005); *McKevitt v. Pallasch*, 339 F.3d 530, 531–32 (7th Cir. 2003); *Storer Commun. v. Giovan*, 810 F.2d 580, 584–85 (6th Cir. 1987); *In re Shain*, 978 F.2d 850, 852–53 (4th Cir. 1992); *Burse v. United States*, 466 F.2d 1059, 1090–92 (9th Cir. 1972); *In re Special Counsel Investigations*, Nos. 04-MS-407, 04-MS-461 & 04-MS-460 (D.D.C. Sept. 9, 2004 and Nov. 10, 2004) (orders); *Lee v. United States Dept. of Justice*, 287 F. Supp. 2d 15, 17–18 (D.D.C. 2003).

25. *See Branzburg*, 408 U.S. at 700–01 (finding that the government has an interest “in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property” and “the grand jury called these reporters as they would others—because it was likely that they could supply information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment”).

26. 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961).

27. 518 U.S. 1, 9–10 (1996) (summarizing other evidentiary privileges).

28. *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

29. *Id.*

information.<sup>30</sup> Because of their investigative activities, reporters are more likely to be targets of subpoenas.<sup>31</sup> Sources seek confidentiality usually out of a well-grounded fear of retaliation and will be less likely to provide information if they risk disclosure. Reporters may be forced to decline to print newsworthy items from confidential sources if they believe that courts will not respect the need to preserve confidentiality. Reporters must now also factor in the potential consequences of publishing stories based on information from confidential sources, consequences that currently include substantial fines and jail time.<sup>32</sup>

Curbing an over-reliance on confidential sources may not be all bad where confidentiality is not truly vital to get the information, where the source does not want to be identified because of risk of embarrassment rather than retaliation, where the source, hiding behind anonymity, provides deliberately false information, or where the story itself does not involve disclosure of serious abuse. Unfortunately, refusal of any kind of protection would likely quash the important whistleblower stories that will not otherwise be told as well as celebrity gossip or other stories of less public moment.

### III. WEIGHING NEED FOR CONFIDENTIALITY AGAINST NEED FOR EVIDENCE

Courts must balance the needs of the reporter's privilege against the needs of the litigant seeking the information. In some situations the need for the information will be much more compelling than in others. For example, the situation in which confidential sources are most likely to be protected is one in which a reporter is merely a third-party witness in a civil lawsuit:

In general, when striking the balance between the civil litigant's interest in compelled disclosure and the public interest in protecting a newspaper's confidential sources,

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30. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring) (internal quotation marks omitted); see also Osborn, *supra* note 20, at 66, 74.

31. The Second Circuit recently held that "permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties." *Gonzales v. NBC*, 194 F.3d 29, 35 (2d Cir. 1999).

32. See *Today Show* (NBC television broadcast, Nov. 25, 2004). Jim Taricani reported in an interview that other reporters have told him that, in view of his potential jail term, they will back away from relying on confidential sources. See also Affidavits of Matthew Cooper, Scott Armstrong, Jack Nelson, and Anna Nelson, Attached as Appendices to Brief of Appellants, *In re Grand Jury Subpoena* (Miller) (D.C. Cir. 2004) (Nos. 04-3138, 04-3139 & 04-3140).

we will be mindful of the preferred position of the First Amendment and the importance of a vigorous press . . . . Thus in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished.<sup>33</sup>

Even in civil cases where the reporters are merely third-party witnesses, these cautions have been recently dismissed. In the Privacy Act civil claim against the government for leaking details of the investigation of Wen Ho Lee, five reporters from four major news organizations have been ordered to reveal their sources.<sup>34</sup> They have refused and have been found in contempt.<sup>35</sup> The order requiring disclosure did not first determine, as a threshold matter, whether the identity of the agency or individual source was necessary to establish an otherwise meritorious claim, instead finding no reporter's privilege and, if there was one, it had been overcome.<sup>36</sup> Reporters have also been subpoenaed in the Privacy Act claim brought against the United States by Stephen Hatfill, the scientist named by the Attorney General as a "person of interest" in the anthrax investigation. Before a single government agent has been questioned, the testimony of reporters has been sought as a first resort, not a last resort.<sup>37</sup>

Further along the continuum is a situation in which a reporter is himself a defendant in a civil defamation suit. In *Herbert v. Lando*,<sup>38</sup> the Supreme Court held that there is no First Amendment privilege barring a plaintiff in a defamation lawsuit from inquiring into the editorial process because of the burden on the plaintiff to prove actual malice. Courts must evaluate how critical or necessary the information is, whether available from other sources, and whether the claim has substantial merit if the confidential information were disclosed.<sup>39</sup> In addition, the con-

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33. *Zerilli v. Smith*, 656 F.2d 705, 712 (1981).

34. *Lee v. United States Dept. of Justice*, 287 F. Supp. 2d 15, 17-18 (D.D.C. 2003); *Lee v. United States Dept. of Justice*, 327 F. Supp. 2d 26, 29 (D.D.C. 2004).

35. *Lee*, 287 F. Supp. 2d at 17-18. The appeal is scheduled for argument on May 9, 2005.

36. *Id.*

37. *Hatfill v. Ashcroft et al.*, No. 1:03cv1793 (D.D.C. motions to quash filed Jan. 28, 2005).

38. 441 U.S. 153, 175 (1979).

39. *See, e.g., Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *modified*, 628 F.2d 932, 932 (5th Cir. 1980) (holding that plaintiff must show "substantial evidence that the challenged statement . . . is both factually untrue and defamatory"); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1980) (describing this threshold requirement); *Bruno & Stillman v. Globe Newspapers Co.*, 633 F.2d 583,

sequences of non-disclosure in a defamation case need not be jail or a fine but can result in an evidentiary presumption against the news organization or allow the jury to draw an inference from the reporter's non-disclosure.<sup>40</sup>

In a suit against the *Boston Globe* arising out of stories about experimental chemotherapy treatments that resulted in a fatal overdose at a leading cancer clinic, the consequences for the news organization were carried to a new extreme.<sup>41</sup> A default judgment was entered against the *Globe* for its refusal to disclose a confidential source which the plaintiff, the doctor involved in the fatal treatment, said was necessary in her claims, not against the *Globe*, but against the clinic. A jury awarded damages against the *Globe* and its reporter in the amount of \$2.1 million, absent any finding of falsity or actual malice, as constitutionally required for liability against the press for stories involving matters of public concern.<sup>42</sup> The award was affirmed on appeal to the Supreme Judicial Court of Massachusetts, although that Court observed that with "the clarity granted by hindsight," the identity of the *Globe's* sources was "peripheral at best."<sup>43</sup>

At the far end of the continuum is the situation in which the confidential sources would not have provided the information to the reporter absent the promise of confidentiality, but where either a criminal defendant or a prosecutor is seeking the information. Typically, a reporter has interviewed the criminal defendant, on or off the record, and the prosecution believes that the interview may provide incriminating evidence for use at trial.<sup>44</sup> In a number of recent notorious cases, such as: the marine pilot

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597 (1st Cir. 1980) (same); see also *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 181 (Ga. Ct. App. 2001) (holding in case arising from newspaper's coverage of investigation of Olympic bombing that "if Jewell cannot succeed on a specific allegation of libel as a matter of law, or if Jewell is able to prove his specific allegation through the use of available alternative means, then the trial court's balancing test should favor nondisclosure of confidential sources").

40. See *Sharon v. Time, Inc.*, 599 F. Supp. 538, 583 (S.D.N.Y. 1984); *Dowd v. Calabrese*, 577 F. Supp. 238, 244 (D.D.C. 1983); *DeRoburt v. Gannett Co.*, 507 F. Supp. 880, 886-87 (D. Haw. 1981).

41. *Ayash v. Dana-Farber Cancer Inst.*, 13 Mass. L. Rep. 1 (Mass. Super. Ct. 2001).

42. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

43. *Ayash v. Dana-Farber Cancer Inst.*, 2005 Mass. LEXIS 14 (Mass. Feb. 9, 2005). The *Globe* defendants are considering seeking certiorari in the United States Supreme Court.

44. See, e.g., *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998); *In re Shain*, 978 F.2d 850 (4th Cir. 1992).

whose plane struck a ski lift cable, killing twenty people;<sup>45</sup> a defendant in the police sodomization of Abner Louima; the criminal defense lawyer accused of transmitting terrorist information in messages from her jailed client, the Blind Sheik;<sup>46</sup> and the lawyer who, in the course of defending Mafia don John Gotti, was accused of violating a gag order<sup>47</sup>—the defendants all gave interviews to the press resulting in subpoenas for unpublished portions of the interviews. One person gathering information for a book recently served time in jail for refusing to disclose the off-the-record portions of her interview with an accused murderer.<sup>48</sup> Where the information is merely cumulative or the use is for impeachment or other more incidental purposes, the balance will not likely shift in favor of the prosecution, particularly if provided on a confidential basis.<sup>49</sup>

Where the criminal defendant, rather than the prosecutor, is seeking what he believes to be exculpatory information for use at trial, the conflict between two interests of constitutional dimension—the First and Sixth Amendments—requires a delicate and difficult balance.<sup>50</sup> Again, particularly where disclosure of confidential sources is threatened, a compelling showing by the criminal defendant that his defense rises or falls on the information is required. An *in camera* review by the trial court of the evidence to make that determination may be necessary.

Where the reporter is an eyewitness to criminal activity, the reporter's duty to give evidence, like any other citizen who has witnessed a crime, is perhaps the most compelling. Of course,

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45. *United States v. Ashby*, General Court-Martial, United States Marine Corps, Navy-Marine Corps Trial Judiciary, Piedmont Judicial Circuit.

46. *United States v. Sattar*, 314 F. Supp. 2d 279 (S.D.N.Y. 2004).

47. *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993).

48. See Howard Kurtz, *A Question of Naming Names*, WASH. POST, Oct. 5, 2003, at A01 (noting a Fifth Circuit order affirming contempt citation was unreported).

49. *United States v. Burke*, 700 F.2d 70, 76 (1983) (holding where principal evidentiary purpose of evidence sought from subpoena of reporter is to impeach credibility, information is cumulative and does not defeat reporter's First Amendment privilege).

50. See *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) ("A defendant's Sixth Amendment and due process rights certainly are not irrelevant when a journalists' privilege is asserted. But rather than affecting the existence of the qualified privilege, we think that these rights are important factors that must be considered in deciding whether, in the circumstances of an individual case, the privilege must yield to the defendant's need for the information."); see also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.").

the reporter is often only a witness because he was given access as a reporter, as were the situations in *Branzburg*, and that access is conditioned on non-disclosure of identities of those committing the crimes. In other situations, the reporter is present in his newsgathering capacity but without confidentiality as a pre-condition. The reporter who witnesses or videotapes a riot scene or an illegal arrest may be required to hand over notes or footage, despite the potentially chilling effect on future coverage.

The reporter faces an acute ethical dilemma if his confidential source has disclosed information of an impending crime where disclosure to law enforcement of the source might result in preventing harm. A reporter is likely to provide the information necessary to prevent the crime but continue to withhold the source of the information if disclosure of the source is not necessary in order to prevent bodily harm. These dilemmas are known and similarly resolved by psychiatrists and lawyers in possession of patient or client information, not about past crimes, but future crimes yet to be committed.

Finally, the tension between reporters' need to keep the confidences of their sources and law enforcement's need to investigate crimes is perhaps most acute in a leak inquiry, where the reporter is the eyewitness to the crime of leaking, i.e., where the communication with the reporter itself is allegedly a crime. The reporter's information about his confidential source in a leak inquiry does go to the heart of the criminal investigation and, presumably, is being sought only after all the potential sources have been questioned and have denied leaking. But the "crime," if any, itself is one of disclosure of important information of public concern about potential government abuse.

In the case of the two reporters currently held in contempt for their refusal to reveal to the grand jury their confidential sources, the inquiry involves whether someone leaked the fact that Valerie Plame was a covert CIA agent in order to intimidate her husband, Ambassador Joseph Wilson, who had been sent by the administration to Niger to investigate a potential sale of yellowcake uranium to Saddam Hussein.<sup>51</sup> Ambassador Wilson had published an op-ed column openly critical of the reference in the President's State of the Union message as overstating the evidence of such a transaction. This evidence was part of the administration's case for going to war in Iraq.

Both the President and Vice President, along with other White House officials, had been interviewed by the special prosecutor before subpoenas to reporters were issued. The only peo-

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51. See *supra* note 1.

ple currently facing imprisonment, however, are the *New York Times* reporter who did not even write an article and the *Time* magazine reporter who published only an online item intended more to highlight the misuse of this leak to intimidate an Administration critic, than to further the leaker's possible agenda of intimidation. Neither reporter was the original recipient of the leak who first published Plame's CIA status. Nor is it at all clear that the demanding elements for criminal disclosure of a covert agent's identity, which is the subject of the underlying investigation, can or will otherwise be established. At a minimum, forcing disclosure of confidential sources should only be considered *after* a sufficient showing on the merits of the civil or criminal case.

All three judges of the D.C. Circuit found that *Branzburg* was not distinguishable and that, despite what one judge described as the decision's "internal confusion," *Branzburg* did not recognize any constitutionally based reporter's privilege that required any heightened showing before enforcement of a grand jury subpoena issued to a reporter.<sup>52</sup> Two judges believed *Branzburg* did not close the door to a reporter's privilege derived from common law with one judge finding the existence of that privilege based on "reason and experience," as evidenced by the laws of forty-nine states and the District of Columbia.<sup>53</sup> The common law privilege articulated by Judge Tatel would require in a leak case, in addition to a showing of critical necessity and exhaustion of other sources, a balance between "the public interest in compelling disclosure, measured by the harm that the leak caused, against the public interest in newsgathering, measured by the leaked information's value."<sup>54</sup> This calculus did not favor the journalists in the *Plame* case because of what Judge Tatel believed

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52. A few weeks later, in the context of a grand jury investigation into alleged leaks regarding the investigation into charities accused of funding terrorism, a judge of the Southern District of New York reviewed the long history in the Second Circuit recognizing a reporter's privilege in both civil and criminal cases. While the Second Circuit has had no occasion to rule on the grand jury context, the court did not find any persuasive distinction between a criminal trial and a grand jury investigation. Basing the privilege on both the First Amendment and common law, the court applied the privilege to phone records of reporters in the custody of third party phone companies and held that the government must first exhaust other avenues of inquiry, including questioning government personnel and reviewing their phone records, before compelling the release of the records. *The New York Times Company v. Gonzales*, No. 04 Civ. 7677 (S.D.N.Y. Feb. 24, 2005).

53. *In re Grand Jury Subpoena* (Miller), 397 F.3d at 989 (Tatel, C.J., concurring).

54. *Id.* at 998 (Tatel, C.J., concurring).

was the "slight news value" of the leak compared to its potential harm.<sup>55</sup>

Whatever the merits of that particular leak, the "crime" of leaking, as a general matter, goes to the heart of the role of the press in our democracy. The Supreme Court has repeatedly stressed that "[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."<sup>56</sup> "The press was protected"<sup>57</sup> by the Constitution's Framers "so that it could bare the secrets of the government and inform the people."<sup>58</sup> The Supreme Court has recognized that there is and must be a First Amendment protection for newsgathering in order to fulfill that watchdog function.<sup>59</sup> Forcing reporters to make the choice "would invite timidity and self-censorship and very likely lead to the suppression of information that would otherwise be published and that should be made available to the public."<sup>60</sup>

The balance set by the First Amendment requires protection of confidential sources, even if it is at some cost to the enforcement of the law. Anonymous speech has long been identified as central to democracy, with a lineage dating back to pre-Revolutionary days.<sup>61</sup> These First Amendment protections extend even when, as in a leak inquiry, the anonymous speaker has committed a criminal act in disclosing the information to the press where the disclosure is of information of compelling public interest.<sup>62</sup>

#### IV. ARGUMENT FOR FEDERAL SHIELD LAW

Despite three decades of federal courts recognizing a First Amendment privilege for reporters, the recent cases in which federal courts have held reporters in contempt for refusing to

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55. *Id.* at 1002 (Tatel, C.J., concurring).

56. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-76 (1980).

57. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

58. *Id.*

59. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

60. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975).

61. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring) ("[B]oth Anti-Federalists and Federalists believed that the freedom of the press included the right to publish without revealing the author's name.")

62. *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (holding that punishment for press disclosure of illegally intercepted conversation violated the First Amendment where the reporter did not participate in the illegal interception and the matter was of compelling public concern).

reveal their confidential sources suggest a troubling trend, unless corrected by the Supreme Court. If courts continue to conclude that uniform First Amendment protection does not already exist, or is easily overcome, even when the confidential sources are involved, Congress should pass a federal shield law to protect reporters from being forced to choose between revealing their confidential sources or facing jail time.

Forty-nine states plus the District of Columbia offer some form of protection to journalists who refuse to disclose confidential sources.<sup>63</sup> These protections are in the form of either court decisions or statutes, commonly known as "shield laws," which recognize the reporter's privilege.<sup>64</sup> Foreign jurisdictions have also recognized that protecting confidential sources is vital to maintaining a free press.<sup>65</sup> Further, since 1972, in the wake of *Branzburg*, the Justice Department has had a policy guideline applicable to federal prosecutors respecting a reporter's privilege.<sup>66</sup> The current guideline admonishes:

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function.<sup>67</sup>

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63. Charles Lane, *In Leak Case, Reporters Lack Shield for Sources*, WASH. POST, Nov. 29, 2004, at A01.

64. *Id.*

65. The countries that are party to the European Convention on Human Rights recognize qualified protection for confidential sources. See European Convention on Human Rights, Nov. 4, 1950, art. 10, 213 U.N.T.S. 222. In December 2002, the Appeals Chamber of the International Criminal Tribunal set aside a subpoena issued to *Washington Post* reporter Jonathan Randall. The Appeals Chamber ruled that a two-part test must be satisfied before any war correspondent can be subpoenaed: "The petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case" and "that the evidence sought cannot reasonably be obtained elsewhere." *Prosecutor v. Brdjanin*, Case No. IT-99-36-AR73.9 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Dec. 11, 2002) (decision on interlocutory appeal), available at <http://www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

66. See 28 C.F.R. § 50.10.

67. 28 C.F.R. § 50.10. The policy guideline provides, inter alia: (1) "[a]ll reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media"

Congress is currently considering whether to pass a federal shield law. Representatives Mike Pence (R. Ind.) and Rick Boucher (D. Va.) in the House and Senator Richard Lugar (R. Ind.) in the Senate have proposed the Free Flow of Information Act of 2005 that would:

- Prohibit testimony to be compelled from a journalist in criminal cases unless the testimony is “essential to the investigation, prosecution or defense” of a criminal case;
- Prohibit testimony to be compelled from a journalist in civil cases unless the testimony sought is “essential to a dispositive issue of substantial importance”; and
- Provide absolute protection of the identity of confidential sources and prohibit disclosure of information that would lead to the discovery of the identity of such sources, including information from third parties.

The shield law proposed could provide absolute protection for the identity of confidential sources. Anything less would still leave reporters and sources no real way to know in advance which sources would be protected and which sources would not.

A federal shield law is not a political issue, as the need to have an informed citizenry does not fall on either side of the partisan divide. The events of the past few months have shown that a federal shield law is needed to protect reporters from harsh penalties for merely doing their jobs. A federal shield law will provide the certainty that a reporter’s promise can be kept without fear of civil or criminal sanctions, independent of the happenstance of whether the subpoena issues from a state or federal court.

#### CONCLUSION

The stakes, as the great Professor Alexander Bickel noted, could not be higher:

Although the direct censorship of newspapers or broadcasts would constitute a more blatant—because historically more familiar and, of course, differently motivated—violation of the First Amendment [than forcing reporters to divulge confidential sources], the forcing of disclosure of

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(*id.* § 50.10(b)); (2) “[i]n criminal cases, there should be reasonable grounds to believe . . . that the information sought is essential to a successful investigation” (*id.* § 50.10(f)(1)); and (3) “[t]he use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information” (*id.* § 50.10(f)(4)).

reporters' confidences is not very different in effect. It is a form of indirect, and perhaps random, but highly effective censorship . . . [f]or the forced disclosure of reporters' confidences will abort the gathering and analysis of news, and thus, of course, restrain its dissemination.<sup>68</sup>

Just as prior restraint of the press is an anathema to the First Amendment and democratic principle, so is compelled disclosure of confidential sources which, as Professor Bickel predicts, would have the same censoring effect, with the specter of jail discouraging sources and reporters from disclosing information about matters of vital public concern.

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68. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 84-85 (1975).