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# The Problems with the Reporter's Privilege

**Keywords**

Reporter's Privilege, Shield law, H.R 2012, First Amendment, Privacy, Confidential Information

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# THE PROBLEMS WITH THE REPORTER'S PRIVILEGE

RANDALL D. ELIASON\*

## INTRODUCTION

At this writing, the United States Congress is closer than ever to passing a federal reporter's privilege or shield law.<sup>1</sup> The law would, with some exceptions, shield journalists from being compelled to testify concerning the identity of their confidential sources and other information gathered during the course of their work. Privilege advocates frame their arguments with lofty rhetoric about the free press and the First Amendment, implying that support for the privilege ranks right up there with support for baseball and apple pie.<sup>2</sup> But it is important to look beyond the rhetoric and examine

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\* Professorial Lecturer in Law, *American University, Washington College of Law* and *George Washington University Law School*. The author was an Assistant United States Attorney for the District of Columbia for twelve years and served as Chief of the Public Corruption/Government Fraud Section from 1999–2001. This Article is a compilation and elaboration of points made during the Symposium by both myself and Professor Steven Clymer—points that each of us has made elsewhere. See *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 52–63 (2007) (testimony of Randall Eliason, Professorial Lecturer in Law, George Washington University Law School); *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 16–18, 85–93 (2006) (testimony of Steven D. Clymer, Professor, Cornell Law School); Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 *CARDOZO ARTS & ENT. L.J.* 385 (2006).

1. The House of Representatives passed the federal shield law, the Free Flow of Information Act of 2007, H.R. 2102, on October 16, 2007 by a vote of 398 to 21. The Senate Judiciary Committee approved the Senate version of the law, S. 2035, on October 22, 2007, and sent it to the full Senate for consideration.

2. Quotes from the founding fathers are always popular to demonstrate the fundamental rightness of one's cause. For example, privilege advocates Dr. James Tucker and Professor Stephen Wermiel quote Thomas Jefferson as saying that "our liberty . . . cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it." James Thomas Tucker & Stephen Wermiel, *Enacting a*

exactly what a shield law would and would not accomplish. Contrary to popular belief, it is possible to cherish the First Amendment and the free press and still think the reporter's privilege is a bad idea.

Underlying the arguments in favor of the shield law are a number of claims about the current legal landscape involving subpoenas to journalists, the potential effect of a shield law, and the behavior of reporters and confidential sources. Repeated uncritically and widely assumed to be true, these claims are an accepted part of the narrative surrounding the supposed need for a privilege. Closer examination, however, reveals that these claims rest on a shaky or even non-existent foundation. I would like to discuss what I believe are eight myths surrounding the need for, and effect of, a reporter's privilege. Once these myths are exposed, the privilege is revealed for what it is: a flawed, unnecessary piece of legislation that will not accomplish its goals.

#### MYTH #1: THERE IS CURRENTLY AN INTOLERABLE FLOOD OF SUBPOENAS BEING ISSUED TO JOURNALISTS

There is one fact that almost everyone involved in the privilege debate seems to accept as a given: reporters today are being subpoenaed at an unprecedented clip, resulting in a crisis within the journalism community. As far back as 1999, the Reporters Committee for Freedom of the Press was lamenting that journalists were "drowning in a sea of subpoenas."<sup>3</sup> A witness before the House Judiciary Committee in 2007 declared that there has been a "deluge" of subpoenas to reporters in recent years.<sup>4</sup> But despite the watery metaphors, one searching for evidence of this crisis will come up dry.

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*Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 Am. U. L. Rev. 1291, 1294 [hereinafter Tucker & Wermiel]. But the issue is not whether freedom of the press is a fundamental cornerstone of our democracy. We can all agree that it is. The issue is whether a reporter's shield law is really important to the free press, and whether the arguments in favor of the law stand up to critical scrutiny.

And just to show that the founding fathers are not taking sides, I note that Jefferson also said, "Advertisements . . . contain the only truths to be relied on in a newspaper," and "The man who reads nothing at all is better educated than the man who reads nothing but newspapers." See The Quotations Page: Journalism, <http://www.quotationspage.com/subjects/journalism> (last visited May 16, 2008). It's probably hard to say how Mr. Jefferson would have come down on the question of a special legal privilege for reporters.

3. REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1997, at 1 (1999).

4. See *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 32 (2007) [hereinafter *H.R. 2102 Hearing*] (testimony of Lee Levine, Levine Sullivan Koch & Schulz, LLP).

Indeed, it is remarkable how little factual support there is for this claim, given how widely it is assumed to be true.<sup>5</sup>

It is true that there has been a handful of high-profile cases in the past few years involving subpoenas to reporters. These include the Central Intelligence Agency ("CIA") leak/Valerie Plame investigation where former *New York Times* reporter Judith Miller went to jail for refusing to identify a source;<sup>6</sup> the case involving grand jury subpoenas to two reporters from the *San Francisco Chronicle* for information concerning their source for stories on the Bay Area Laboratory Co-

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5. Thirty-six years ago in the landmark case of *Branzburg v. Hayes* reporters made the same argument, claiming that the number of subpoenas to the press was increasing and that the privilege was needed more than ever. 408 U.S. 665, 699 (1972). In *Branzburg*, a closely divided Supreme Court held that reporters do not have a privilege under the First Amendment to refuse to testify in grand jury proceedings concerning their confidential sources. *Id.* at 667.

*Branzburg* was a 5-4 decision, with the majority opinion written by Justice White. Justice Powell, who joined Justice White's opinion, also wrote what his dissenting colleagues called an "enigmatic" concurrence, *id.* at 725 (Stewart, J., dissenting), suggesting that there might be some protection for reporters if a grand jury investigation was being conducted in bad faith. *Id.* at 709-10 (Powell, J., concurring).

Over the years, privilege advocates have often mischaracterized the *Branzburg* holding as a plurality opinion, and have urged courts to recognize a privilege based on Justice Powell's concurrence. See *Frontline: News War: Interview with James Goodale* (PBS television broadcast Oct. 21, 2006), available at <http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/goodale.html> (describing litigation strategy of using Justice Powell's concurrence to argue that *Branzburg* actually upheld the privilege). Unfortunately, Dr. Tucker and Professor Wermiel have repeated this mischaracterization. See Tucker & Wermiel, *supra* note 2, at 1299 (arguing that Justice White was "[w]riting for a plurality in *Branzburg*"); see also *id.* at 1293, 1298; Stephen Wermiel, Professor, Washington College of Law, Remarks at the American University Law Review Symposium: Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America (Sept. 20, 2007), available at <http://www.wcl.american.edu/journal/lawrev/symposia.cfm#> (follow "webcast" hyperlink next to "Censoring and prosecuting the press: The growing use of subpoenas and Reporters' Shield legislation") (last visited Apr. 26, 2008) (characterizing *Branzburg* as a plurality opinion). Whatever Justice Powell intended by his brief concurrence, it is beyond dispute that he fully joined Justice White's opinion, and that it was the opinion of a five-Justice majority, not a plurality. See, e.g., *In re Grand Jury Subpoena (Miller)* 438 F.3d 1141, 1148 (D.C. Cir. 2005) ("Justice White's opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court."); *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004) (noting that in *Branzburg* Justice Powell "wrote separately but joined in the majority opinion as the necessary fifth vote"). The majority opinion squarely rejects the claim that there is a First Amendment-based reporter's privilege, at least in the grand jury context. *Branzburg*, 408 U.S. at 667.

6. See *In re Grand Jury Subpoena (Miller)*, 438 F.3d at 1142. The CIA leak case involved an investigation into which government officials may have improperly disclosed to the press the fact that Valerie Plame worked for the CIA. Plame is the wife of former Ambassador Joseph Wilson, who had criticized the Bush administration over the Iraq war. For a detailed discussion of the CIA leak case, see Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 387-91 (2006).

operative (“BALCO”) steroids investigation;<sup>7</sup> the case in Rhode Island where television reporter Jim Taricani was sentenced to six months of home confinement for contempt after refusing to identify a source;<sup>8</sup> and the Privacy Act<sup>9</sup> lawsuits filed by Dr. Wen Ho Lee<sup>10</sup> and by Dr. Steven Hatfill.<sup>11</sup> Recent calls for a shield law have been largely spurred by these cases, particularly by the jailing of Judith Miller. Virtually every article or argument in support of the privilege cites these same few cases as evidence of the supposed crisis.<sup>12</sup>

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7. See *In re Grand Jury Subpoenas (BALCO)*, 438 F. Supp. 2d 1111, 1115 (N.D. Cal. 2006). The BALCO case involved four individuals charged with the illegal distribution of anabolic steroids and other performance enhancing drugs to a number of professional athletes. *Id.* Two reporters for the *San Francisco Chronicle* wrote stories that contained the confidential grand jury testimony of several prominent athletes. Because the grand jury information had been subject to a protective order, the judge asked the government to investigate who had leaked the information to the press. The reporters refused to testify in the grand jury concerning their sources, and the judge denied their claim of reporter’s privilege. *See id.* They were held in contempt, but while their appeal was pending before the Ninth Circuit their source was identified by other means and the government dropped the subpoenas of the reporters. *See* Bob Egelko, *Lawyer Admits Leaking BALCO Testimony*, SAN FRAN. CHRONICLE, Feb. 15, 2007, at A1.

8. See *In re Special Proceedings (Taricani)*, 373 F.3d 37, 41 (1st Cir. 2004). Acting in violation of a federal judge’s protective order, a source gave Taricani a copy of an undercover surveillance tape that was evidence in an upcoming corruption trial. Taricani aired the tape, and the judge ordered an investigation into the leak. *Id.* at 40–41. When Taricani refused to identify his source, he was found guilty of contempt and sentenced to six months home confinement. *H.R. 2102 Hearing, supra* note 4, at 63 (testimony of James Taricani); *see* Peter Johnson, *Reporter Confined to Home for Refusal to Identify Source*, USA TODAY, Dec. 10, 2004, at 6A.

9. Privacy Act of 1974, 5 U.S.C. § 552a (2002).

10. See *Lee v. U.S. Dep’t of Justice*, 413 F.3d 53, 55 (D.C. Cir. 2005). Dr. Wen Ho Lee is a scientist who was employed by the Department of Energy. From 1996 to 1999 he was investigated on suspicion of spying for China. He was indicted on fifty-nine counts of mishandling classified information but was later allowed to plead guilty to a single count. He filed a civil suit alleging that government agents had violated the Privacy Act by improperly disclosing to the press personal information about him and his status as a suspect. *Id.* at 55–56. After losing on their claims of reporter’s privilege, *id.* at 64, the media companies whose reporters were subpoenaed joined with the government to settle Dr. Lee’s case for more than \$1.6 million. Paul Farhi, *U.S. Media Settle with Wen Ho Lee, News Organizations Pay to Keep Sources Secret*, WASH. POST, June 3, 2006, at A01. Five media organizations paid \$750,000 of this amount, even though they were not defendants in the case. *Id.*

11. See *Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 36 (D.D.C. 2007). Dr. Steven Hatfill was named in the press as a suspect in the 2001 anthrax attacks in Washington D.C., although he was never charged. *See Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 108–09 (D.D.C. 2005). He has filed a Privacy Act suit alleging that FBI and other government officials improperly leaked information about him to the press. *Id.* Dr. Hatfill has subpoenaed a number of reporters and news organizations to identify their sources, and as this Article goes to press the litigation over their claims of reporter’s privilege is ongoing. *See Hatfill v. Gonzales*, 505 F. Supp. 2d at 36.

12. Two other recent significant cases generated less publicity and did not involve compelling reporters to reveal the identities of confidential sources. In San Francisco, freelance videographer Josh Wolf was held in contempt and jailed for refusing to comply with a grand jury subpoena for video footage that he shot of a group of G-8 protestors. *See In re Grand Jury Subpoena (Wolf)*, No. 06-16403, 2006

These cases did generate a good deal of publicity, in part because it is so rare for reporters to be subpoenaed. But despite the level of publicity, they remain only a few cases. A handful of cases over several years is more a trickle than a deluge, given the countless thousands of newspaper, television, radio, and Internet news reports filed every day. Walter Pincus, a veteran investigative reporter for the *Washington Post* who was subpoenaed in both the Valerie Plame and Wen Ho Lee cases, was closer to the mark when he wrote that these recent high-profile cases represent merely a “blip” in the number of subpoenas issued to reporters.<sup>13</sup>

Privilege advocates who repeatedly invoke these same few cases as proof of the flood of subpoenas are committing a common logical fallacy known as “hasty generalization.” The error lies in generalizing to an entire population based upon a sample that is too small to be meaningful. Examples would include arguing, “Joe, the Australian, stole my wallet. I guess all Australians are thieves,” or “The plane that crashed was being flown by a woman. I guess women don’t make very good pilots.”<sup>14</sup>

By way of analogy, consider that there are more than a dozen shark attacks on swimmers in the United States each year.<sup>15</sup> Each attack may generate some publicity, and no doubt each is an important event to those involved. Nevertheless, we don’t conclude there is a crisis because everyone recognizes that, relative to the total number of swimmers each year, the number of shark attacks is very small. By the same token, a couple dozen federal subpoenas to journalists over

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WL 2631398 (9th Cir. Sept. 8, 2006). In the other case, the U.S. Court of Appeals for the Second Circuit denied a claim of privilege and held that prosecutors could subpoena the telephone records of two *New York Times* reporters, including Judith Miller, to investigate who in the government may have improperly leaked confidential law enforcement information to the press. See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 163 (2d Cir. 2006).

As this Article goes to press, a new subpoena controversy has arisen. James Risen, a reporter for the *New York Times*, received a subpoena from a grand jury in Alexandria, Virginia, apparently seeking information about his confidential sources for a book he wrote in 2006 about the CIA, *State of War*. This case will have the added wrinkle that although Risen works for the *Times*, the subpoena relates to his book, not to any reporting he did for the newspaper. Risen’s attorney has said he intends to fight the subpoena. See Philip Shenon, *Times Reporter Subpoenaed Over Source for Book Chapter*, N.Y. TIMES, Feb. 1, 2008, at A17.

13. Walter Pincus, Commentary, *Walter Pincus Sees Shield Law as ‘a Bad Misstep’*, NIEMAN WATCHDOG, Dec. 3, 2007, <http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=218>.

14. See NICHOLAS CAPALDI, *THE ART OF DECEPTION: AN INTRODUCTION TO CRITICAL THINKING* 118–19 (1987) (describing the hasty generalization fallacy).

15. See Brian Handwerk, *Shark Facts: Attack Stats, Record Swims, More*, NAT’L GEOGRAPHIC NEWS, June 13, 2005, [http://news.nationalgeographic.com/news/2005/06/0613\\_050613\\_sharkfacts.html](http://news.nationalgeographic.com/news/2005/06/0613_050613_sharkfacts.html).

the past few years do not, without more, signify a crisis, given the enormous number of stories being reported every day.

Privilege proponent and former Solicitor General Ted Olson provided a recent example of this fallacy in an op-ed piece in the *Washington Post*.<sup>16</sup> Olson claimed that it has become “almost routine” for journalists to be subpoenaed: “From the Valerie Plame imbroglio to the Wen Ho Lee case, it is now *de rigueur* to round up reporters, haul them before a court and threaten them with fines and jail sentences unless they reveal their sources.”<sup>17</sup> Citing only two recent well-known cases, therefore, Olson concludes that the extraordinary circumstances of those cases are now “routine” around the country. This makes for fine rhetorical flourishes, but it is a flawed argument. These cases attracted so much attention precisely because they were so unusual. It is simply false to claim that the exceptional is now the norm.

There is surprisingly little data on exactly how frequently reporters are subpoenaed.<sup>18</sup> Indeed, at the same time press representatives were testifying before Congress that journalists were facing an unprecedented flood of subpoenas that had reached “epidemic” proportions,<sup>19</sup> the Reporters Committee for Freedom of the Press was admitting on its website that “we simply cannot know for certain” how many subpoenas journalists receive, or whether that number is on the rise.<sup>20</sup> Given this admitted uncertainty, it’s remarkable that journalists would claim they are facing a crisis requiring congressional intervention. One can only imagine how the press would react if, for example, the Bush Administration claimed publicly that we were

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16. Theodore B. Olson, Op-Ed, . . . *Or Safeguards?*, WASH. POST, Oct. 4, 2007, at A25.

17. *Id.*

18. It’s also important to recognize that the existence of a shield law will not mean that federal subpoenas to the media will stop. The media still receive state level subpoenas, despite some degree of statutory or judicial reporter’s privilege protection in almost every state. See Kevin Rector, *A Flurry of Subpoenas*, AM. JOURNALISM REV., Apr./May 2008, <http://www.ajr.org/Article.asp?id=4511> (noting that an upcoming University of Arizona study documents that state subpoenas to the media are nearly ten times more common than federal subpoenas, even though reporters have some legal protection in forty-nine states and Washington D.C.). A federal shield law as shot through with exceptions and qualifications as the one proposed will invite litigants to continue to serve subpoenas and argue that the privilege does not apply in their case. At best, the law will mean that journalists will be somewhat more likely to prevail at the end of such litigation than they are today. The media will not be relieved of the burden of fighting such subpoenas altogether.

19. See *H.R. 2102 Hearing*, *supra* note 4, at 32 (testimony of Lee Levine, Levine Sullivan Koch & Schulz, LLP).

20. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, SHIELDS AND SUBPOENAS: THE REPORTERS’ PRIVILEGE IN FEDERAL COURTS, [http://www.rcfp.org/shields\\_and\\_subpoenas.html](http://www.rcfp.org/shields_and_subpoenas.html) (last visited Apr. 10, 2008) [hereinafter SHIELDS AND SUBPOENAS].

facing a “deluge” of new terrorists in our midst, while admitting in other documents that it really had no idea whether or not this was true.

Department of Justice (“DOJ”) attorneys are required by regulation to seek the Attorney General’s approval for subpoenas to the media, and to demonstrate that the information is essential and all reasonable alternatives have been exhausted.<sup>21</sup> Data from the DOJ indicates that, on average, there have been about a dozen DOJ-approved subpoenas to journalists each year over the past six years, and that number has been declining.<sup>22</sup> DOJ subpoenas that actually seek confidential source information are even more rare, averaging only about one a year since 1991.<sup>23</sup> As far as the DOJ is concerned, therefore, evidence of a deluge is lacking.<sup>24</sup>

Other information concerning the number of subpoenas to reporters is largely anecdotal and potentially misleading.<sup>25</sup> For

21. See 28 C.F.R. § 50.10 (2007).

22. See SHIELDS AND SUBPOENAS, *supra* note 20.

23. See H.R. 2102 Hearing, *supra* note 4, at 18 (testimony of Rachel L. Brand, Assistant Att’y Gen. for the Office of Legal Policy, U.S. Department of Justice) (testifying that only nineteen DOJ subpoenas to the press for confidential source information have been approved since 1991).

24. Dr. Tucker and Professor Wermiel argue that these numbers might be misleading because the DOJ regulations supposedly do not apply to special prosecutors, and “[m]any of the most widely reported cases of press subpoenas involved special prosecutors.” Tucker & Wermiel, *supra* note 2, at 1306, *see id.* at 1320. They don’t list the “many” cases to which they are referring. I am aware of two: the CIA leak case, and the case involving the subpoena to Rhode Island reporter Jim Taricani. In both of those cases, the courts found that even under the DOJ regulations the subpoenas would have been proper. See *In re* Special Proceedings (*Taricani*), 373 F.3d 37, 43 (1st Cir. 2004) (“[T]he short answer is that a government prosecutor could have subpoenaed Taricani consistent with the [Attorney General’s] regulations.”); *In re* Special Counsel Investigation, 332 F. Supp. 2d 26, 32 (D.D.C. 2004) (“Assuming, *arguendo*, that the DOJ guidelines did vest a right in the movants in these cases, this Court holds that the DOJ guidelines are fully satisfied by the facts of this case . . .”). Special prosecutors are rare, and those who need to subpoena a reporter are even more so. It is wrong to suggest that there are large numbers of special prosecutors roaming the country and subpoenaing reporters in disregard of the DOJ guidelines.

25. One number that is often heard is that there have been more than forty federal court subpoenas to reporters in the past few years. See Editorial, *Shielding Sources*, WASH. POST, Aug. 1, 2007, at A16; Tucker & Wermiel, *supra* note 2, at 1319–20; see also Lucy Dalglish, Executive Dir., Reporters Comm. for Freedom of the Press, Remarks at the American University Law Review Symposium: Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America (Sept. 20, 2007), available at <http://www.wcl.american.edu/journal/lawrev/symposia.cfm#> (follow “webcast” hyperlink next to “Censoring and prosecuting the press: The growing use of subpoenas and Reporters’ Shield legislation”) (last visited Apr. 26, 2008). Even if accurate, this number is potentially misleading because more than twenty of those subpoenas stem from only two cases: the Privacy Act suits filed by Wen Ho Lee and Steven Hatfill. Other cases, such as the Valerie Plame investigation, similarly involved subpoenas to a number of different reporters. Thus the total

example, Eve Burton, general counsel to the Hearst Corporation, has claimed that Hearst news organizations received about one hundred subpoenas during a thirty-two-month period from 2005–2007.<sup>26</sup> It would be a simple matter for Hearst to compile a list of those subpoenas in order to bolster its arguments in favor of the privilege, but no such list has been forthcoming. If we had such a list, we could answer a few key questions. For example, how many of those subpoenas were from state or local tribunals? The vast majority of litigation occurs at the state level, and it is fair to assume that most of the one hundred subpoenas were also from the state level.<sup>27</sup> A federal privilege statute would not affect state subpoenas, and so the presence of such subpoenas does not support the need for a federal law.<sup>28</sup> Claiming there have been a hundred subpoenas likewise tells us nothing about the circumstances underlying each subpoena. For example, how many were really serious attempts that resulted in a court battle, and how many were half-hearted or impulsive efforts by an attorney who backed down as soon as the journalist's lawyers objected?<sup>29</sup> How many of these subpoenas sought the identity of a source or other truly confidential information, and how many merely sought peripheral information or material that had already been published and was not confidential?<sup>30</sup> Finally, given that Hearst is one

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number of *cases* where subpoenas to the press are an issue is far smaller than the total number of *subpoenas*.

26. See Lori Robertson, *Kind of Confidential*, AM. JOURNALISM REV., June/July 2007, 1, 28 (quoting Eve Burton); see also Eve Burton, Gen. Counsel, Hearst Corp., Remarks at American Society of Newspaper Editors First Amendment Summit (Jan. 18, 2007), available at <http://www.asne.org/files/mpeg/fas/propanel11.mov> (last visited Apr. 10, 2008) (noting that Hearst media companies received about eighty subpoenas over a two-year period).

27. See Rector, *supra* note 18 (discussing University of Arizona study's finding that state subpoenas to the media are vastly more common than federal subpoenas).

28. Some might argue that a federal shield law would still be important in state cases because it would demonstrate a national policy and commitment that might have persuasive force in such cases. This assumes that a litigant, who was not deterred from subpoenaing a reporter by state shield laws or court decisions that *would* actually apply, would somehow be deterred by the moral force of a federal statute that *would not* apply. This seems very unlikely.

29. For example, in a recent case in Seattle, a lawyer in the City Attorney's office issued three subpoenas to reporters for the *Seattle Times* asking them to identify confidential sources in stories about police misconduct. When the paper objected, the City Attorney withdrew the subpoenas a week later, saying he had not approved their issuance. These three subpoenas would no doubt appear on a list compiled of subpoenas issued to the media, even though they were quickly withdrawn, led to no litigation, and did not result in the press being required to reveal any information. See Gene Johnson, *Seattle Drops Subpoenas for Newspaper*, ASSOCIATED PRESS, Dec. 5, 2007.

30. For example, litigants or prosecutors may occasionally subpoena a television station for a copy of a report that was aired on the station, in order to help them in an investigation or trial. This is material that was publicly aired and is not

of the largest media companies in the world, one can legitimately question whether an average of less than one subpoena a week nationwide is really as staggering a number as Burton appears to believe.<sup>31</sup>

Even if one could establish that the overall number of subpoenas to the media has increased in recent years, this would have to be considered in light of the changed media environment. At the time *Branzburg v. Hayes*<sup>32</sup> was decided in 1972, the media consisted largely of three television networks, local newspapers, and radio. There has been an explosion of new media outlets since that time. We now live in an era of 24/7 non-stop news coverage streaming from the Internet, cable television, and satellite transmissions, in addition to the more traditional print and broadcast formats. The media is more pervasive and more intertwined with our lives than ever before. Given the huge growth in the number of media outlets and formats, as well as in the number of proclaimed journalists,<sup>33</sup> it would be remarkable if the overall number of subpoenas to the media was *not* rising. However, such an increase in the number of subpoenas would not necessarily indicate a change in the legal landscape. If there are ten times as many journalists as there were thirty years ago, then even if there are ten times as many subpoenas, things are simply staying about the same.<sup>34</sup>

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confidential, but will likely still require a subpoena, which presumably would show up on a tally of the total number of subpoenas received.

31. According to the Hearst website, the company publishes twelve newspapers and nineteen U.S. magazine titles, owns twenty-six television stations, and is also involved in numerous other media and entertainment activities in the United States and overseas. Hearst Corporate Site, <http://www.hearstcorp.com> (last visited Apr. 10, 2008). If forty subpoenas a year were evenly spread among the Hearst companies, that would be less than one subpoena a year per domestic newspaper, magazine, or station. Again, not much of a deluge.

32. 408 U.S. 665 (1972).

33. This is particularly true in light of the explosive growth of the Internet, and of the huge number of bloggers and ordinary citizens who may now have a right to call themselves journalists in a medium that barely existed only a decade ago. See *infra* notes 92–109 and accompanying text (discussing the rise of the Internet and definition of a journalist).

34. There was reference at the Symposium to an upcoming study by a University of Arizona law professor that will purport to document the number of subpoenas received by the media in 2006. Remarks at the American University Law Review Symposium: Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America (Sept. 20, 2007), *available at* <http://www.wcl.american.edu/journal/lawrev/symposia.cfm#> (follow “webcast” hyperlink next to “Censoring and prosecuting the press: The growing use of subpoenas and Reporters’ Shield legislation”) (last visited Apr. 26, 2008); see Rector, *supra* note 18 (discussing the forthcoming study). It remains to be seen how useful the data from this study will be. A potential problem is that the study apparently relied upon media organizations voluntarily to return a questionnaire about any subpoenas received, and the response rate was about thirty-eight percent. The study then apparently

As columnist Jack Shafer recently noted in *Slate*, “The First Amendment lobby would have you believe that journalists are being buried alive in [subpoenas], but that’s not the case.”<sup>35</sup> The widely held belief about the epic flood of subpoenas to the press appears to be a myth.

MYTH #2: REPORTERS ARE ROUTINELY SUBPOENAED AS A FIRST CHOICE OR EASY SHORTCUT TO OBTAIN INFORMATION

Another popular claim by those who support the federal shield law is that it is now common for lazy prosecutors or litigants to subpoena journalists as a quick and easy way to obtain information and shortcut the need to investigate a case themselves. For example, Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) recently argued that the federal privilege is needed because “the press has become the first stop, rather than the last resort, for our government and private litigants when it comes to seeking information.”<sup>36</sup> The facts suggest otherwise.

In general, it is nonsense to suggest that subpoenaing a reporter can be a shortcut to obtaining anything. Far from being quick and easy, subpoenaing a reporter is almost certain to slow down a case dramatically, with no guarantee that the relevant information will even be discovered in the end.<sup>37</sup> The party issuing the subpoena can

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extrapolates from the number of subpoenas received by the respondents to assume that the nearly two-thirds of media organizations that did not respond also received subpoenas at the same rate. Rector, *supra*. This is a flawed methodology, for it is at least as likely that those who actually received a subpoena were more motivated to return the questionnaire, and many of those who failed to return it did so because they had received no subpoenas and did not feel it was important to respond. It’s also unclear what information the study will contain concerning such issues as whether the subpoenas called for confidential source information or merely for non-confidential information or material that had already been published or broadcast. Finally, because the study apparently considers only one year, it is unclear whether it will be able to document whether or not the number of subpoenas received by the media has been on the rise.

35. Jack Shafer, *We Don’t Need No Stinkin’ Shield Law, Part 1*, SLATE, Apr. 16, 2008, <http://www.slate.com/id/2189186/> [hereinafter Shafer, *Part 1*].

36. Press Release, U.S. Senator Patrick Leahy (D-Vt.), Judiciary Committee Chairman Urges Passage of Reporters’ Shield Law (Nov. 8, 2007), <http://leahy.senate.gov/press/200711/110807c.html>; see Editorial, *Shield Law is Crucial for Information Flow*, SAN ANTONIO EXPRESS-NEWS, Apr. 24, 2008, at 6B (“In too many instances, the subpoenas [to the press] are spawned by lawyers attempting to take shortcuts in the discovery process to routine cases.”).

37. Privilege proponents Dr. Tucker and Professor Wermiel agree with this point. See Tucker & Wermiel, *supra* note 2, at 1336 (“Even today, a prosecutor or civil litigant cannot run to the courthouse and expect to get a subpoena directing a journalist to reveal their source without substantial cost and delay.”). To cite just one example, Special Prosecutor Patrick Fitzgerald’s investigation of the CIA leak case was held up for more than a year while he battled with the *New York Times* and *Time* over whether their reporters should have to testify concerning their conversations

expect a lengthy and expensive legal battle as the journalist fights the subpoena on various grounds.<sup>38</sup> This battle may be financed by a large media corporation, which can and will hire some of the best First Amendment lawyers from the best law firms in the country. And at the end of that long, expensive battle, even if the party seeking the information prevails, there is a good chance the reporter will refuse to testify anyway and will choose instead to be held in contempt of court. Given any remotely hopeful alternative, a prosecutor or litigant with any sense at all will pursue that alternative rather than subpoenaing a reporter.

Department of Justice attorneys are required by internal regulations to seek to subpoena a journalist only when they can demonstrate to senior DOJ officials that the information is essential to their case and that they have exhausted all other reasonable alternatives.<sup>39</sup> For a DOJ attorney, attempting to subpoena a

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with White House officials. It was widely reported that Fitzgerald's investigation was complete but for resolving the question of the reporters' testimony. Once the privilege dispute was resolved and Judith Miller finally testified, the grand jury returned the indictment of Scooter Libby in about a month.

38. Although there is no federal shield law, journalists in federal cases routinely oppose subpoenas by arguing that they have a common-law reporter's privilege or, despite *Branzburg*, that there is a privilege based on the First Amendment. These arguments have met with varying degrees of success depending on the type of case involved and which court is hearing the case. See C. THOMAS DIENES, LEE LEVINE & ROBERT C. LIND, *NEWSGATHERING AND THE LAW* § 16-2, 16-3 (2d ed. 1999) (discussing the status of the First Amendment and common-law privilege in federal court); Eliason, *supra* note 6, at 392-99 (same).

39. See 28 C.F.R. § 50.10 (2007). In response to a Freedom of Information Act ("FOIA") request, the DOJ informed the Reporters Committee for Freedom of the Press that in recent years the Civil Division and Civil Rights Divisions have made no requests to subpoena journalists, and that the only requests came from the Criminal Division. See SHIELDS AND SUBPOENAS, *supra* note 20. This suggests that the DOJ is not making such requests lightly, and is generally limiting them to the most serious types of cases.

The ACLU has claimed that the DOJ regularly "ignores its regulations in a calculated effort to gag the press." AM. CIVIL LIBERTIES UNION, *PUBLISH AND PERISH: THE NEED FOR A FEDERAL REPORTERS' SHIELD LAW* 12 (2007), available at [http://www.aclu.org/pdfs/freespeech/publishperish\\_20070314.pdf](http://www.aclu.org/pdfs/freespeech/publishperish_20070314.pdf) [hereinafter *PUBLISH AND PERISH*]. The ACLU cites no evidence to back up this charge, and I am not aware of any that exists. The only case discussed by the ACLU where they apparently believe the DOJ guidelines were not followed is the BALCO case. See *id.* at 13-14. Dr. Tucker and Professor Wermiel also criticize the subpoenas in the BALCO case as failing to follow the DOJ regulations. See Tucker & Wermiel, *supra* note 2, at 1305-06. They cite Mark Carallo, former press secretary to Attorney General John Ashcroft, as calling the BALCO subpoenas "the most reckless abuse of power I have seen in years." *Id.* at 1306. This is a truly remarkable statement, coming from a member of the Administration that gave us Abu Ghraib, secret CIA prisons, "torture memos," unlawful domestic surveillance, and other events that most would consider to be just slightly more egregious abuses of power than issuing a subpoena to a reporter.

In any event, the federal judge in the BALCO case—who, unlike the ACLU, Mr. Carallo, and other critics, had access to the full record, including confidential grand

journalist and complying with those regulations means additional time, paperwork, levels of review and approval, and jumping through various hoops to seek authorization from Washington. As a former federal prosecutor, I can assure you that busy DOJ attorneys do not eagerly seek out opportunities to complete additional paperwork and seek approvals from Main Justice. If there are other avenues to the information, they will be pursued, not only because the regulations require it, but because any alternative means will almost always be faster, easier, and more productive than trying to get the information from a reporter.<sup>40</sup>

There is another reason prosecutors will hesitate to subpoena a reporter. As former Attorney General Richard Thornburgh once noted, “Most prosecutors are very wary for a practical reason: You don’t want to get the media mad at you.”<sup>41</sup> Prosecutors have a strong interest in maintaining good will and a reputation for fairness in the community in which they work and from which their jury pools are drawn. The media are hardly powerless to defend themselves if they feel a prosecutor has stepped out of line. One need only recall the savaging that distinguished career prosecutor Patrick Fitzgerald received at the hands of the media when he subpoenaed reporters in the CIA leak case.<sup>42</sup> This calls to mind the wisdom of the old adage attributed to Mark Twain: “Never pick a fight with a man who buys his ink by the barrel.” Prosecutors have little to gain, and much to lose, by antagonizing the press with unnecessary subpoenas.

Private litigants who are not bound by the DOJ regulations are similarly unlikely to subpoena a reporter except as a last resort. For a civil litigant, just as for a DOJ attorney, trying to obtain information from a reporter will not be quick and easy. Just ask Dr. Steven Hatfill, who has been fighting for years to discover which government

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jury materials—ruled that the prosecutors had complied with the DOJ guidelines. *In re Grand Jury Subpoenas (BALCO)*, 438 F. Supp. 2d 1111, 1121 n.9 (N.D. Cal. 2006). Likewise, although the subpoenas to the reporters in the Valerie Plame case are often criticized, the judge in that case also ruled that the Special Counsel had satisfied the DOJ guidelines. *See In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 32 (D.D.C. 2004).

The ACLU may not agree with the way the DOJ and federal judges interpret the DOJ guidelines, but there is no evidence the regulations are being violated or ignored.

40. *See H.R. 2102 Hearing, supra* note 4, at 18 (testimony of Rachel L. Brand, Assistant Att’y Gen. for the Office of Legal Policy, U.S. Department of Justice) (noting the rigorous requirements of the DOJ approval process and that it is designed to deter prosecutors from seeking to subpoena journalists unless it is absolutely necessary).

41. Shafer, *Part I, supra* note 35.

42. *See* Eliason, *supra* note 6, at 412–13 & n.155 (discussing media criticism of Fitzgerald).

employees wrongfully leaked private information about him that caused him to be accused in the press of the anthrax attacks in Washington, D.C., in 2001.<sup>43</sup> In addition, in those jurisdictions that do recognize a qualified reporter's privilege in civil or some criminal cases, the courts generally require a litigant to demonstrate that all other reasonable alternatives have been exhausted before the court will consider whether to override the privilege.<sup>44</sup> Thus, private litigants, for both practical and legal reasons, generally will subpoena a reporter only when there is no reasonable alternative.

As evidence that the "shortcut" claim is a myth, we need only look at the recent high-profile cases that have largely fueled the drive for a federal shield law. In every one of those cases, without exception, journalists were subpoenaed not as an easy first choice, but only when, according to a federal judge, the party seeking the information had exhausted all other reasonable options. This was true in the CIA leak/Valerie Plame case,<sup>45</sup> the BALCO case,<sup>46</sup> the Jim Taricani case,<sup>47</sup> the Wen Ho Lee case,<sup>48</sup> the Hatfill case,<sup>49</sup> and others.<sup>50</sup>

There is simply no evidence that prosecutors or litigants are now seeing journalists as "the first stop, rather than the last resort," as Senator Leahy claimed. Most litigants are barred by regulation, statute, or court rulings from pursuing such a course. Even those who are not barred will, if they have any sense, look for alternative means of obtaining information before picking a fight with a reporter. Arguing that one should subpoena a reporter as a shortcut to obtain information is akin to arguing that when driving from Washington, D.C., to New York City one should take a shortcut

43. See *Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 33 (D.D.C. 2007). Some four years after filing his lawsuit, Dr. Hatfill recently learned the identities of some of the government officials allegedly responsible for leaking information about him to the press. This apparently was possible only because the officials released the reporters they spoke to from their earlier pledges of confidentiality after the court ruled that there was no privilege protecting the sources' identities. See David Willman, *Lawyers Name 3 Officials as Leakers of Hatfill's Name*, WASH. POST, Jan. 12, 2008, at A7. Hatfill's privilege battles with other reporters continue as of this writing; former USA Today reporter Toni Locy was found in contempt by the judge for refusing to testify about her sources and is appealing that order. *Hatfill v. Mukasey*, 539 F. Supp. 2d 96 (D.D.C. 2008); see Eric Lichtblau, *Reporter Held in Contempt in Anthrax Case*, N.Y. TIMES, Feb. 20, 2008, at A15 (describing the imposition of increasing fines if Locy continued to violate the court order).

44. See DIENES, ET AL., *supra* note 38, § 16-2(e)(3) (discussing the standards applied by courts that recognize the privilege).

45. See *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 32 (D.D.C. 2004).

46. See *BALCO*, 438 F. Supp. 2d 1111, 1120 (N.D. Cal. 2006).

47. See *In re Special Proceedings (Taricani)*, 373 F.3d 37, 44 (1st Cir. 2004).

48. See *Lee v. U.S. Dep't of Justice*, 413 F.3d 53, 60-61 (D.C. Cir. 2005).

49. See *Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 42-43 (D.D.C. 2007).

50. See, e.g., *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 170-71 (2d Cir. 2006).

through Los Angeles. Once again, the facts don't match up with the rhetoric of privilege advocates.

MYTH #3: THE PRIVILEGE IS NECESSARY TO ENCOURAGE CONFIDENTIAL SOURCES TO SPEAK TO REPORTERS

The key factual claim in support of the reporter's privilege is that the privilege is necessary to encourage confidential sources to come forward and speak to reporters. This will, in turn, increase the flow of information to the public and ensure a robust free press. In the absence of a privilege, the argument runs, there will be a "chilling effect" on confidential sources, and the flow of information to reporters and to the public will dry up.<sup>51</sup> Privilege advocates speak in apocalyptic terms about this alleged chilling effect, claiming that without a privilege reporters will be reduced to "spoon feeding the public the 'official' statements of public relations officers."<sup>52</sup> This claim is the very *raison d'être* for the privilege; indeed, the proposed federal legislation—the Free Flow of Information Act—embodies this concept in its title.

In *Branzburg*, the Supreme Court was skeptical of this factual premise. The Court observed that the lessons of history suggested the free press had always flourished without a privilege.<sup>53</sup> Claims about "chilling effects" and harm to the press, the Court noted, were largely speculative and consisted primarily of the opinions of reporters themselves, and so "must be viewed in the light of the professional self-interest" of those making the claims.<sup>54</sup> Overall, the Court concluded it was "unclear how often and to what extent informers are actually deterred from furnishing information" when reporters are compelled to testify.<sup>55</sup> This skepticism seems as fully justified today as it was thirty-six years ago.<sup>56</sup>

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51. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 728–36 (1972) (Stewart, J., dissenting); *In re Grand Jury Subpoena (Miller)*, 438 F.3d 1141, 1168 (D.C. Cir. 2005) (Tatel, J., concurring in the judgment); *Reporters' Shield Legislation: Issues and Implications, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *Shield Hearing*] (statement of the Honorable Richard Lugar, U.S. Senate); *id.* (testimony of the Honorable Mike Pence, U.S. House of Representatives).

52. *Shield Hearing*, *supra* note 51 (testimony of Lee Levine, Levine Sullivan Koch & Schulz, LLP).

53. *Branzburg*, 408 U.S. at 668–69 (majority opinion).

54. *Id.* at 694.

55. *Id.* at 693.

56. Not all reporters agree that the alleged "chilling effect" is real. Walter Pincus, an investigative reporter for the *Washington Post* who was subpoenaed in the Valerie Plame and Wen Ho Lee cases, told reporter Jeffrey Toobin that he was skeptical of the chilling effect argument and that "[m]y sources are not drying up . . .

The strongest argument against the supposed chilling effect is simply the argument of history. There has never been a federal shield law, and investigative journalism in this country has flourished, with no shortage of confidential sources. Watergate, Iran-Contra, Abu Ghraib, secret CIA prisons, domestic National Security Agency (“NSA”) surveillance—all of these stories and countless others were reported through the use of confidential sources, and all without a federal shield law.<sup>57</sup> Even the images of Judith Miller being jailed and forced to testify had no discernable effect on investigative reporting or on the number of stories relying upon confidential sources.<sup>58</sup>

One can grant that confidential sources are important to journalism without agreeing that a shield law is necessary or appropriate. In other words, it is a myth to suggest that reporters can't promise confidentiality without a shield law. It is important to distinguish between a reporter's promise of confidentiality to a source and the existence of a legal privilege. As history makes clear, reporters may promise sufficient confidentiality to encourage sources to speak even in the absence of a privilege, simply by promising not to name the source in a story and never to identify the source voluntarily. In fact, if this were not the case and if the alleged chilling effect were real, investigative journalism would have foundered long ago for want of a federal privilege.<sup>59</sup>

It's reasonable to assume that most sources who wish to remain anonymous are concerned primarily with not having their names in the paper in a story the reporter writes the next day. They are not

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[i]t hasn't hurt me.” Jeffrey Toobin, *Name That Source*, NEW YORKER, Jan. 16, 2006, at 35.

57. Testifying before the House Judiciary Committee, media lawyer Lee Levine recited a long list of reporting that would not have been possible without confidential sources: stories on the Pentagon Papers, the neutron bomb, Walter Reed Medical Center, Enron, Abu Ghraib, and many others. The irony is that all of these stories were reported in the absence of a federal shield law—and thus they would not seem to provide much support for the argument that the shield law is necessary. See *H.R. 2102 Hearing*, *supra* note 4, at 33, 41–46 (testimony of Lee Levine, Levine Sullivan Koch & Schulz, LLP).

58. Press reports about Abu Ghraib, secret overseas CIA prisons, and potentially unlawful domestic surveillance by the National Security Agency all relied on confidential sources, and all appeared while the Valerie Plame/Judith Miller saga was ongoing.

59. Dr. Tucker and Professor Wermiel argue that only sources “dumb enough or reckless enough to talk to a reporter without regard for his or her safety or well-being” would speak to a reporter in the absence of a shield law. Tucker & Wermiel, *supra* note 2, at 1325. Every confidential source to speak to a reporter in the last thirty-six years—including Woodard and Bernstein's Watergate source “Deep Throat,” Mark Felt—has done so despite the lack of a federal privilege. Either every single confidential source since 1972 has been dumb or reckless, or Dr. Tucker and Professor Wermiel are wrong about the need for a shield law to encourage sources to come forward.

very likely to be looking down the road and trying to evaluate whether, two years from now, a judge might weigh the various terms and exceptions of a shield law and compel the reporter to identify them. To the extent they do consider that possibility, a reporter can truthfully tell a source that, historically speaking, the chance that the reporter will ever be compelled to testify is extremely remote. Any reasonable concern for confidentiality may therefore be satisfied simply by a reporter's promise never to identify the source voluntarily.<sup>60</sup>

A perfectly reasonable and effective approach, in the absence of a shield law, is for a reporter to promise a source that he will protect the source's identity to the extent legally possible, but will have to comply if a court orders him to identify the source and all appeals of that order are unsuccessful.<sup>61</sup> Rhode Island reporter Jim Taricani, who was convicted of contempt of court for refusing to identify a source,<sup>62</sup> recently described the types of promises he and his employer now make to confidential sources. They essentially agree that they will fight to protect a source as far as the U.S. Court of Appeals for the First Circuit, but if they lose at that level they want the source to agree that he or she may then be identified.<sup>63</sup> Although Taricani believes this is a terrible state of affairs, actually it is a very reasonable agreement and should be all that any source can rightfully expect.<sup>64</sup> After all, the source is really doing no more than agreeing that the reporter should obey the law by using all legal means to protect the source, but complying with lawful court orders in the end

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60. See *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 86 (2006) (statement of Steven D. Clymer, Professor, Cornell Law School) ("Information flows to journalists despite the absence of a federal statutory journalists' privilege because sources rightly perceive that there is only a very small risk that the government or a private litigant will seek and a court will compel disclosure of their identity, or because they have reasons for making disclosure that outweigh perceived risks.").

61. I take issue with Dr. Tucker and Professor Wermiel's characterization of my proposal as an "empty promise of confidentiality." Tucker & Wermiel, *supra* note 2, at 1327. Such a promise actually provides a very high degree of confidentiality, given the relatively miniscule number of confidential sources who are ever revealed due to litigation. The history of investigative journalism has shown that, far from being empty, such promises of confidentiality are in fact more than adequate to encourage sources to speak. Dr. Tucker and Professor Wermiel also falsely frame the issue when they say that a source in such a situation would "know that a journalist's assurance of anonymity will never be honored." *Id.* at 1325. As history has shown, in the overwhelming majority of cases the journalist's assurance of confidentiality will still be honored, even in the absence of a shield law.

62. *In re Special Proceedings (Taricani)*, 373 F.3d 37, 44-46 (1st Cir. 2004).

63. See Robertson, *supra* note 26, at 27.

64. Taricani also reports that so far his sources have had no problem with this agreement. See *id.* It appears, therefore, that the arrangement troubles Taricani much more than it troubles his sources.

if that effort is unsuccessful. Again, this agreement guarantees a great deal of confidentiality because the chances of the reporter actually being compelled to testify are very small.

Dr. Tucker and Professor Wermiel argue that I am being unrealistic when I say that sources will agree to talk to reporters even in the absence of a shield law. They use the example of a hypothetical government employee who learns of the Bush Administration's unlawful warrantless surveillance program, and calls *New York Times* reporters Eric Lichtblau and James Risen to tell them about it.<sup>65</sup> In the absence of a federal shield law, they argue, the reporters would not be able to assure the source of adequate confidentiality and the source would refuse to talk to them. The problem with this argument is that, in reality, such a source apparently *did* contact those reporters, there *was* no federal shield law, the source talked anyway, and the story was reported—and to my knowledge, despite the grumblings of the Bush Administration, the reporters have not been subpoenaed to reveal their sources for those stories. It's hard to see how this story supports the argument that a shield law is necessary. What's more, the proposed federal shield law favored by Dr. Tucker and Professor Wermiel contains an exception for leaks of information that have harmed or will harm national security, which the government would certainly argue was true of these leaks.<sup>66</sup> If sources are truly as skittish as Dr. Tucker and Professor Wermiel claim, they could not feel comfortable that their identities would be protected even if the federal shield law were enacted.

According to an article by Lori Robertson in the *American Journalism Review*, the *Dallas Morning News* requires reporters to tell anonymous sources that in rare instances the reporter may be forced to identify them if efforts to protect them are exhausted in a legal dispute.<sup>67</sup> Similarly, *New York Times* Executive Editor Bill Keller has said that some reporters now agree with sources they will protect them to the extent legally possible, but if they lose a court fight they are not going to go to jail to protect the source.<sup>68</sup> There is no indication that reporters at those papers have suffered from a lack of confidential sources. Robertson also describes the experience of Fred Schulte, an investigative reporter for the *Baltimore Sun* for twenty-five years. Schulte reports that he tells his sources he will

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65. See Tucker & Wermiel, *supra* note 2, at 1326–27.

66. See *id.* at 1335–37.

67. See Robertson, *supra* note 26.

68. See *id.*

protect them up to the point of a grand jury investigation, but if he is called before a grand jury he will have to testify. All of his sources have agreed to these terms.<sup>69</sup> Again, the purported evidence that the chilling effect exists is largely anecdotal and unreliable, consisting of a few reports of self-interested journalists. Most evidence is in the form of affidavits of journalists submitted in various lawsuits, affirming the importance of confidential sources and citing examples where such sources were essential to their work.<sup>70</sup> But considering that all of the sources in these past stories agreed to come forward *without* a federal shield law, such examples do not provide much support for the argument that a shield law is needed. Such affidavits may demonstrate that confidential sources are important to journalism, but they also demonstrate, albeit unintentionally, that reporters can develop confidential sources without a federal shield law.

As evidence of the supposed chilling effect, privilege supporters also like to cite a claim by the editor of Cleveland's *Plain Dealer* that the paper has withheld publication of two stories of "profound importance" due to the fear of a leak investigation because the stories rely on confidential sources.<sup>71</sup> The trouble with this "evidence," of course, is that its veracity can't be tested because the editor will refuse to reveal the information necessary to evaluate his claim. Relevant questions would include: What efforts has the paper made to go back to the sources to probe how concerned they are about confidentiality? What efforts have been made to develop additional sources who may be willing to go on the record? And is the editor really saying that if a federal shield law with its various exceptions and qualifications were enacted, that would make all the difference?<sup>72</sup>

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69. *See id.*

70. *See, e.g., In re Grand Jury Subpoena (Miller)*, 438 F.3d 1141, 1168–69 (D.C. Cir. 2006) (Tatel, J., concurring in the judgment) (citing affidavits of Judith Miller and Matt Cooper); *In re Grand Jury Subpoenas (BALCO)*, 438 F. Supp. 2d 1111, 1114 (N.D. Cal. 2006) (listing affidavits submitted by journalists).

71. *See* NORMAN PEARLSTINE, OFF THE RECORD: THE PRESS, THE GOVERNMENT, AND THE WAR OVER ANONYMOUS SOURCES 131 (2007); *see also H.R. 2102 Hearing, supra* note 4, at 33 (testimony of Lee Levine, Levine Sullivan Koch & Schulz, LLP) (citing the same *Plain Dealer* anecdote); Tucker & Wermiel, *supra* note 2, at 1323.

72. When the *Plain Dealer* anecdote is told, the editor of the paper is not reported as claiming that if there were a federal shield law he would go ahead and publish the stories—although that clearly is supposed to be the implication. Given the many other ways that a source may be exposed, the exceptions in any proposed federal shield law, and the uncertainty about whether any investigation would even take place in a federal forum, it seems unlikely that the absence of a federal shield law was critical to the alleged withholding of these stories. It is also interesting to note that the claim with regard to the *Plain Dealer* was not that sources were "chilled" from coming forward due to the lack of a shield law. The sources *did* come forward, but the paper reportedly self-censored and refused to run the story out of fear of some

Untested assertions such as those by the *Plain Dealer* editor may be the stuff of lore within the journalism community, but such unsubstantiated, isolated anecdotes provide a poor factual foundation for proposed federal legislation.

Dr. Tucker and Professor Wermiel essentially concede that this supposed chilling effect cannot be established. They conclude that it is “unnecessary to resolve the question of whether the lack of a shield law causes a chilling effect” because “that is a policy decision left to the legislative branch” and if Congress passes the shield law, the courts will enforce it.<sup>73</sup> This may be true, but it leaves unanswered the question of just what Congress is supposed to rely upon when making this policy decision, other than the desires of the large media corporations lobbying for the law. The argument essentially boils down to this: “We can’t really demonstrate that this law is necessary, but the press wants it, and if we can convince Congress to pass it then we’ll be home free.” This is hardly a ringing endorsement of the legal merits of the shield law.

History demonstrates that reporters are able to guarantee sufficient confidentiality without a federal shield law. As argued below concerning Myth #4, of all of the risks of exposure that a source faces, the danger that the reporter will be subpoenaed and compelled to testify is probably the most remote. Privilege advocates are therefore necessarily arguing that there are a substantial number of sources who would willingly assume all of the greater and more immediate risks of exposure by leaking information, but will be deterred from coming forward solely by the most remote risk of all—the risk of the reporter being forced to testify. Common sense and the historical record suggest this is not the case. Some sources may well be afraid of exposure, and may seek assurances of confidentiality. But these assurances may be given without a privilege and, considering the basket of risks a source faces, the presence or absence of a legal privilege is unlikely to weigh heavily in a source’s decision about whether to speak to a reporter.

MYTH #4: IF THERE WERE A SHIELD LAW, REPORTERS COULD  
GUARANTEE SOURCES THEY WOULD REMAIN ANONYMOUS

A corollary of the argument that sources are chilled by the lack of a privilege is the suggestion that, if we only had a federal shield law,

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imagined future litigation—arguably an abdication of the paper’s responsibility to inform the public.

73. Tucker & Wermiel, *supra* note 2, at 1324.

reporters could guarantee sources they would remain anonymous and thus sources would never be deterred from coming forward. This is another myth. Leaking can never be made risk-free, and reporters—at least if they were being honest—could never guarantee sources that they would not be identified, even if there were an ironclad, absolute privilege law.

A confidential source who decides to leak information to a reporter faces a number of risks that she will be exposed. The source's company or agency may conduct an internal investigation to discover the source of the leaks.<sup>74</sup> Private lawsuits or government investigations may lead to the discovery of the source's identity without testimony from the reporter. Others who know of the leaks may come forward to expose the leaker.<sup>75</sup> The reporter may decide that the public interest requires that the source be disclosed,<sup>76</sup> or may identify the source inadvertently.<sup>77</sup> Information in the story may allow others to guess the identity of the source.

All of these risks exist whether or not there is a shield law, and whether or not the reporter is ever compelled to testify. A reporter simply cannot assure a source that he or she will never be identified. There are too many ways for a source to be revealed that are out of the reporter's hands. This would be true even if there were an absolute, ironclad privilege with no exceptions. In reality, of course,

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74. In one recent case, a career intelligence officer was fired by the Central Intelligence Agency for leaking classified information to reporters that ended up in press reports about secret overseas CIA prisons. Her identity was discovered not by subpoenaing reporters, but through an internal CIA investigation that included polygraphing employees. See Dafna Linzer, *CIA Officer Is Fired for Media Leaks*, WASH. POST, Apr. 22, 2006, at A1.

75. In the BALCO case, for example, another individual who knew about the source's contacts with the *San Francisco Chronicle* reporters decided to go to the authorities and disclose those contacts. Thus the source's identity was revealed without testimony from the reporters themselves. See Bob Egelko, *Lawyer Admits Leaking BALCO Testimony*, S.F. CHRON., Feb. 15, 2007, at A1.

76. In a recent case in Virginia, a reporter revealed that a prosecutor had improperly leaked to him damaging information about a state senate candidate, in an apparent attempt to damage the candidate's election prospects. The reporter who revealed his source said he had decided that it was the "moral thing to do." See Jerry Markon, *Prosecutor Accused in Tate Case*, WASH. POST, Sept. 1, 2007, at B3; see also Kathryn M. Kase, *When a Promise Is Not a Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources*, 12 HASTINGS COMM. & ENT. L.J. 565, 575-77 (1990) (discussing cases where journalists chose to expose their sources); cf. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (upholding a civil lawsuit brought by a source against newspaper publishers who broke a promise to keep the source's identity confidential).

77. For example, reporter Jim Taricani, who was held in contempt for refusing to testify and identify a source, later inadvertently identified his source when a comment he made to an FBI agent allowed the agent to deduce the source's identity. Associated Press, *Prosecutors Eye Contempt Charges Against Reporter's Lawyer*, BOSTON GLOBE, Dec. 11, 2004, at B4.

any shield law passed by Congress will not be absolute; the proposed Free Flow of Information Act is full of exceptions, qualifications, and balancing tests.<sup>78</sup> Even if that law were in place, therefore, reporters still could not guarantee their sources that a judge would not someday find that one of the many exceptions applied and the privilege had to give way.

There is no doubt that some sources are worried about being exposed. The fallacy is believing that the presence of a federal shield law could ease those worries in any substantial way. A source has far more serious and immediate risks to think about than the remote chance that the reporter might be compelled to testify a year or two down the road. It is a myth to suggest that a federal shield law would allow reporters to put a source's mind at ease and would thereby increase the flow of information to the public.

#### MYTH #5: THE PRIVILEGE PRIMARILY PROTECTS INNOCENT WHISTLEBLOWERS

Supporters of the reporter's privilege argue that the privilege is necessary in order to protect innocent whistleblowers and ensure they will reveal important information they may have about government or private misconduct. The reality, however, is that innocent whistleblowers are seldom the ones who end up being protected by a shield law.<sup>79</sup> The privilege is much more likely to end up protecting a source who is breaking the law by talking to the reporter. The shield law thus ends up encouraging and sheltering conduct that society has already determined should be unlawful.

Consider a classic whistleblower example: a Pentagon employee calls a reporter to reveal information the employee has about criminal conduct being engaged in by a defense contractor, with the assistance of certain officials within the Pentagon. After talking to the source and investigating further, the reporter writes the story, indicating that a confidential source inside the Pentagon provided much of the information. After reading the story, the U.S. Attorney's Office decides to open an investigation.

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78. See Tucker & Wermiel, *supra* note 2, at 1316–18 (arguing that an absolute privilege would be “unworkable” and describing the exceptions to the privilege in the proposed federal law).

79. The other flaw in this argument, of course, is the assumption that going to the press is the only option for a whistleblower. Whistleblowers may report information to law enforcement officers, agency inspectors general, or congressional committees, and there are many statutory protections for whistleblowers. See, e.g., Intelligence Community Whistleblower Protection Act of 1998, 5 U.S.C. app. § 8H, 50 U.S.C. § 403q (2006) (providing protection to employees of the various intelligence agencies who report wrongdoing to the relevant Inspector General).

To hear privilege advocates tell it, one of the prosecutor's first steps would be to subpoena the reporter and try to compel her to reveal her source. In truth, however, the DOJ regulations would not allow the prosecutor to do that, and in any event it would be unnecessary. Armed with the information in the story, the prosecutor, through the use of the grand jury, has tremendous power to investigate the case. She may subpoena documents, and subpoena and examine witnesses under oath. There is no need to subpoena the reporter or to identify the source because the source was simply conveying information about the conduct of others, which may be investigated directly. The same would be true of a private litigant who filed a lawsuit based on the allegations in the story. Through the discovery process, lawyers may obtain documents, depose witnesses, and use other methods to investigate.<sup>80</sup> As already discussed, for both legal and practical reasons, prosecutors and litigants are extremely unlikely to subpoena a reporter when there are reasonable alternative ways to obtain the information. In a true whistleblower situation, those alternatives will almost always exist.

Now contrast the case of an innocent whistleblower with that of a source who is himself breaking the law by the very act of providing information to the reporter. Such a source is not simply passing along information about the misconduct of others, which may be independently investigated. The misconduct is the conversation with the reporter itself. There are likely only two witnesses to that misconduct: the parties to the conversation, namely, the source and the reporter. Even if the identity of the source is suspected, the source may lie, or may assert a Fifth Amendment privilege not to testify. That leaves the reporter as potentially the only witness to a crime or other misconduct. There often will be no reasonable alternative way to obtain the information, which, as discussed above, makes it more likely that a party will be forced to undertake the burden of subpoenaing the reporter. If the reporter cannot be compelled to testify, then the crime will go unpunished or civil wrongs, such as Privacy Act violations, will go unredressed, and wrongdoers effectively will be immunized by the privilege.<sup>81</sup>

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80. See FED. R. CIV. P. 27-31, 33.

81. Dr. Tucker and Professor Wermiel take me to task for this argument, noting that no one is legally immunized by the shield law and that I should be "more precise in [my] use of terms." Tucker & Wermiel, *supra* note 2, at 1333. It is, of course, self-evident that formal legal immunity is not granted by the shield law. That is why—to be precise—I have consistently said only that a shield law *effectively* immunizes some wrongdoers, by making it impossible to obtain evidence from the only likely witness to the misconduct—the reporter. See *H.R. 2102 Hearing*, *supra* note 4, at 52-63

For evidence regarding who is protected by a shield law, we again need only look to the recent high-profile cases involving reporters. In every one of these cases, a reporter's privilege would have protected an alleged lawbreaker, not an innocent whistleblower. In the CIA leak/Valerie Plame case, reporters would have been allowed to protect White House officials who improperly leaked classified information concerning the identity of a CIA agent and lied to cover it up.<sup>82</sup> In the BALCO case, the reporters would have been allowed to continue to protect a defense attorney who committed perjury, obstructed justice, and attempted a fraud on the court.<sup>83</sup> In the Jim Taricani case, the privilege would have shielded a source who violated

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(testimony of Randall Eliason, Professorial Lecturer in Law, George Washington University Law School). If a law operates to make it virtually impossible to investigate or charge someone, then they have been effectively immunized. I am not alone in reaching this conclusion. See *Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 45 (D.D.C. 2007) (noting that granting the privilege in Privacy Act cases "would effectively leave Privacy Act violations immune from judicial condemnation, while leaving potential leakers virtually undeterred from engaging in such misbehavior when the communications are made to reporters"); Gabriel Schoenfeld, *A License to Leak*, WKLY. STANDARD, Oct. 22, 2007, at 20 (arguing that a shield law would effectively immunize from prosecution those who unlawfully leak classified information to the press).

82. See, e.g., Richard Leiby, *Valerie Plame, the Spy Who Got Shoved Out into the Cold*, WASH. POST, Oct. 29, 2005, at C1.

83. See Randall D. Eliason, *Striking Out*, LEGAL TIMES, Mar. 19, 2007, at 68. Dr. Tucker and Professor Wermiel take issue with my criticism of the reporters in the BALCO case. See Tucker & Wermiel, *supra* note 2, at 1329–31. I have discussed BALCO at length elsewhere and won't repeat all of my arguments here. See Eliason, *supra*, at 68; *H.R. 2102 Hearing*, *supra* note 4, at 52–63. The BALCO reporters allowed their source to use them and their reporting as part of a scheme to obstruct justice, and continued to protect and work with the source even after his scheme became clear and after the public already had all of the relevant information published by the reporters. Contrary to Dr. Tucker and Professor Wermiel's suggestion, Tucker & Wermiel, *supra* note 2, at 1330, I have never argued that the privilege is inappropriate because reporters may profit from their stories or advance their careers. I have, however, argued that the particular actions of the BALCO reporters demonstrate that application of a reporter's privilege definitely does not always serve the public interest.

One additional point about BALCO: Dr. Tucker and Professor Wermiel repeat the argument made by many privilege supporters that the reporters were sentenced to up to eighteen months in prison, which was a longer sentence than any of the BALCO defendants received. Tucker & Wermiel, *supra* note 2, at 1306. This is incorrect. The reporters were not convicted of a crime, and thus were not sentenced to anything. They were found in contempt for refusing to testify in the grand jury. The typical sanction in such a case is to incarcerate the witness until either he agrees to testify or the term of the grand jury expires. A grand jury typically sits for a term of eighteen months, so any witness jailed for contempt could theoretically be incarcerated for up to eighteen months if he continued to refuse to testify (depending on when during the grand jury's term the incarceration began). This is not a "sentence," because the witness would not have to serve a day in jail if he simply complied with the judge's order. Like all witnesses held in contempt, the BALCO reporters would have held the keys to their own jail cell; any time spent in jail would have been a result of their own choice. The BALCO defendants were not so fortunate.

a court order and acted in contempt by improperly leaking evidence that was potentially damaging to the defendant in an upcoming criminal trial.<sup>84</sup> In the Wen Ho Lee and Hatfill cases, the privilege would have protected government officials who allegedly violated the Privacy Act by leaking personal information about suspects in a criminal investigation, causing them to be tried and convicted in the press and damaging their reputations.<sup>85</sup>

Privilege supporters usually invoke the icon of the source as a virtuous, innocent whistleblower motivated by a noble desire to inform the public through the media. The reality, of course, is that many sources are anything but noble, and anything but innocent. Leaks to the press may be motivated by a desire for personal gain, revenge, or to attack or smear an opponent. This is particularly true in the nation's capital: "Anonymous sourcing in Washington exists today much more to protect government spinners than it does actual whistleblowers."<sup>86</sup> The CIA leak/Valerie Plame case is just the most famous recent example. Many sources are seeking to manipulate the media and plant a story to further their own ends or attack an opponent, and their journalistic enablers, eager for information, help them along by freely promising them confidentiality.<sup>87</sup> A reporter's privilege would encourage and shield such conduct.<sup>88</sup>

Journalists argue, of course, that even if some misconduct is shielded by the privilege, this is a necessary cost of protecting the public's "right to know."<sup>89</sup> But simply invoking this talisman does not resolve the issue; the fact that information exists does not necessarily mean that the public has a "right to know" it. My private medical and financial information appears in a number of databases, but the public does not have a right to see it. Similarly, many of these reporter's privilege cases actually involve information that the public *does not* have a right to know. For example, the public has no right to know the sort of confidential grand jury information that was leaked to the press and published in the BALCO case. That is the whole

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84. See *In re* Special Proceedings (*Taricani*), 373 F.3d 37, 40–43 (1st Cir. 2004).

85. See *Lee v. U.S. Dep't of Justice*, 413 F.3d 53, 55–56 (D.C. Cir. 2005); *Hatfill*, 505 F. Supp. 2d at 33.

86. Toobin, *supra* note 56, at 35 (quoting Martin Kaplan, associate dean of the Annenberg School for Communication at the University of Southern California).

87. See Howard Kurtz, *Lashing Out from Under Cover: Hey, Play Fair!*, WASH. POST, Dec. 17, 2007, at C1 (criticizing the practice of political reporters allowing campaign aides to attack other candidates while remaining anonymous).

88. Cf. John D. Castiglione, *A Structuralist Critique of the Journalist's Privilege*, 23 J.L. & POL. 115, 118 (2007) (arguing that the privilege would be bad policy because it would leave executive branch officials free to leak, smear, or even lie without fear of accountability).

89. See, e.g., Editorial, *Time for a Shield Law*, WASH. POST, Mar. 3, 2008, at A16.

point of grand jury secrecy, which exists for a number of good reasons, including to protect the privacy of witnesses and the rights of those being investigated. The public did not have a right to know that Valerie Plame was a covert CIA operative because that information was classified to protect both her and the operations in which she was involved. And, by definition, the public does not have a right to know the type of private information that was leaked in the Wen Ho Lee and Steven Hatfill cases, which is protected from public disclosure by a federal statute, the Privacy Act.

Even if we assume for the sake of argument that some sources may be chilled by the lack of a privilege, therefore, we must consider what kinds of sources are most likely to be affected. True innocent whistleblowers are almost never revealed through subpoenas to the press and thus have the least reason to be concerned. Those who are breaking the law by talking to the press are another matter. They do run a slightly greater risk of exposure, and face more grave consequences if they are discovered. Such sources might be marginally more likely to be deterred by fear of exposure—which means they would end up abiding by the law. In the Judith Miller case, Judge Tatel, the judge most sympathetic to the reporters' claims, observed that if those contemplating illegal leaks of classified information are deterred by the fear of a reporter testifying, then that is precisely what the public interest requires.<sup>90</sup> Put another way, if the Judith Miller case means that a senior White House official stops and thinks twice when planning to attack a political opponent by leaking classified information—that's a good thing.

A shield law is most likely to be employed in cases where the source is breaking the law, and thus ends up encouraging and protecting conduct that society has already determined to be illegal and undesirable. As a matter of policy, this makes no sense. As the Supreme Court noted in *Branzburg*, sources engaged in criminal conduct might prefer that there be a reporter's privilege so they may avoid detection, but that desire, "while understandable, is hardly worthy of constitutional protection."<sup>91</sup> Nor is it worthy of statutory protection.

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90. See *In re Grand Jury Subpoena (Miller)*, 438 F.3d 1141, 1183 (D.C. Cir. 2006) (Tatel, J., concurring in the judgment).

91. 408 U.S. 665, 691 (1972).

MYTH #6: THE LAW CAN ADEQUATELY DEFINE WHO IS A JOURNALIST  
ENTITLED TO INVOKE THE PRIVILEGE

Any proposed shield law faces the challenge of defining who is a journalist entitled to invoke the law's protections. Given the rapidly changing nature of journalism, this is a daunting task. Attorneys, doctors, psychotherapists, clergy, and other professionals whose communications are sometimes protected by a privilege all have particular educational and licensing requirements that define the members of the group, but anyone can call himself or herself a journalist. There are no particular educational requirements and no licensing exams.<sup>92</sup> Indeed, some would argue that journalism is not so much a profession as a process—the act of gathering information to transmit it to the public.<sup>93</sup>

Technology has broken down the practical barriers that once existed between the professional media and the public. Thirty years ago, in order to reach a mass audience one needed a job with a major newspaper or network, or perhaps a book contract. Today, one needs only an Internet connection, which is free at the local library. Internet journalists or “bloggers” have exploded onto the journalism scene. Many people now obtain their news from the Internet, and many major stories are first reported on websites.<sup>94</sup> Internet journalists are increasingly a part of the established media. For example, during the recent trial of Scooter Libby, a portion of the courtroom seats reserved for the media were allocated to bloggers.<sup>95</sup> Recent cases have also recognized that there is no legitimate basis for distinguishing bloggers from more traditional journalists.<sup>96</sup>

Another important development is the rise of so-called citizen journalists. With the Internet, individual blogs, and sites such as MySpace, Facebook, and YouTube, literally anyone can post information of public concern and make the information available to

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92. See *Lee v. U.S. Dep't of Justice*, 401 F. Supp. 2d 123, 140 (D.D.C. 2005) (“Reporters cannot be readily identified. They do not have special courses of study or special degrees. They are not licensed. They are not subject to any form of organized oversight or discipline.”); see also *Miller*, 438 F.3d at 1156–58 (Sentelle, J., concurring) (discussing practical and constitutional difficulties involved in defining who is a journalist).

93. See SCOTT GANT, *WE'RE ALL JOURNALISTS NOW* 6 (Free Press 2007).

94. See, e.g., Press Release, MSNBC.com, Internet Growing as News Medium, at Times Exceeding Traditional Media Usage, <http://www.msnbc.com/m/info/press/02/0107.asp> (last visited Apr. 10, 2008).

95. See Alan Sipress, *Too Casual to Sit on Press Row?*, WASH. POST, Jan. 11, 2007, at D1; see also PUBLISH AND PERISH, *supra* note 39, at 16 (citing other examples of bloggers being treated as journalists).

96. See *Lee*, 401 F. Supp. 2d at 139–40; *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006).

millions. Cable news networks such as CNN and MSNBC actively solicit viewers to send in stories or video reports to be aired on the networks or posted on the news organizations' websites.<sup>97</sup> A private citizen who films an event with his cell phone and posts it on his MySpace page is engaged in the essence of journalism. Given the current state of technology, it is no exaggeration to claim, as does the title of a recent book, that "we're all journalists now."<sup>98</sup>

Even more than thirty years ago in *Branzburg*, the Supreme Court noted that trying to define who was a "newsman" entitled to invoke the privilege "would present practical and conceptual difficulties of a high order" and would be a "questionable procedure."<sup>99</sup> A definition that focuses on the function of journalism will, given today's technology, be extremely broad and will allow any individual, under the right circumstances, to claim to be a journalist entitled to invoke the privilege. Any such self-proclaimed journalist could unilaterally decide to place certain information off-limits simply by agreeing to promise confidentiality to a source. This would potentially exclude a huge amount of information from the legal system, and would result in substantial litigation costs as parties battled over the applicability of the virtually boundless privilege. But a narrower definition of "journalist" will result in legislative line drawing between different First Amendment speakers, and will raise troubling constitutional questions. Freedom of the press is an individual right, and a fundamental purpose of the First Amendment is to protect all speakers—not only the institutional, so-called "mainstream media" but also the lowly street-corner pamphleteer (or, perhaps more appropriate today, the lowly pajama-clad blogger).<sup>100</sup>

The Senate version of the proposed federal legislation contains a sweeping, functional definition of a journalist: the privilege may be invoked by anyone engaged in journalism, which is defined as the "regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that

97. CNN refers to these citizen stories as "I-reports", see <http://www.cnn.com/ireport/> (last visited Apr. 10, 2008); MSNBC calls them "First Person" reports, see <http://www.msnbc.msn.com/id/16712587/> (last visited Apr. 10, 2008); and on Fox News, the citizen journalist submissions are called "U-Reports," see <http://www.foxnews.com/us/ureport/index.html> (last visited Apr. 10, 2008); see also Howard Kurtz, *Got a Camera? You, Too, Can Be a Network Reporter*, WASH. POST, Sept. 24, 2007, at C1 (discussing the use of citizen journalists by the cable news networks and concluding that "it sends a signal that anyone, not just well-dressed professionals with good hair and a resonant voice, can be a journalist").

98. GANT, *supra* note 93.

99. *Branzburg v. Hayes*, 408 U.S. 665, 703–04 (1972).

100. See *id.* at 703–05; *In re Grand Jury Subpoena (Miller)*, 438 F.3d 1141, 1156–57 (D.C. Cir. 2006) (Sentelle, J., concurring) (quoting *Branzburg*).

concerns local, national, or international events or other matters of public interest for dissemination to the public.”<sup>101</sup> This definition would appear to include most bloggers and other non-traditional journalists, at least those who are “regularly” engaged in such activities and are not one-time reporters. As such, it has the potential for very broad application and for the shielding of a great deal of information from the legal system.

The House version of the bill initially contained a similarly sweeping definition.<sup>102</sup> Following hearings on the bill, the House amended the definition of journalist to require that a person be engaged in journalism for “a substantial portion of the person’s livelihood or for substantial financial gain.”<sup>103</sup> This is a valiant effort to reign in the scope of the privilege, but what principle motivates this definition? In terms of encouraging the flow of information to the public, does it make sense to grant the privilege to a full-time reporter for a small local paper with a few hundred readers, but to deny it to a blogger who reaches millions but does so for little or no compensation? The definition also invites additional litigation over what constitutes a “substantial” financial gain or portion of a person’s livelihood. What dollar figure or percentage of income is required before Congress considers one a real journalist?

Any definition that attempts to separate the “real” journalists from the others immediately faces constitutional difficulty. Such a definition will create two classes of First Amendment speakers: those whose work Congress considers important or serious enough to merit legal protection, and those whose work it does not. Any such definition is likely to favor the traditional, established media at the expense of lesser-known, and perhaps more daring or controversial, upstarts. This congressional blessing of certain types of journalists is difficult to square with First Amendment principles. Walter Pincus, investigative reporter for the *Washington Post*, has argued that allowing Congress to define who qualifies as a journalist means “journalists are in effect allowing Congress to regulate them.”<sup>104</sup> This

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101. Free Flow of Information Act of 2007, S. 2035, 110th Cong. § 8(5) (2007).

102. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 4(2) (as introduced in the House, May 2, 2007) (covering “a person engaged in journalism”).

103. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 4(2) (as passed by the House, Oct. 16, 2007).

104. Pincus, *supra* note 13; *see also* First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring) (“The very task of including some entities within the ‘institutional press’ while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country.”); *Miller*, 438 F.3d at 1158 (Sentelle, J., concurring) (arguing

also carries with it the risk that the political tides of the moment may result in a definition that places certain types of speakers or viewpoints at a disadvantage by denying them the privilege.

The proposed federal legislation lists a number of categories of people and entities that will not qualify as “covered persons” deemed to be journalists under the law. This includes those who are a “foreign power or agent of a foreign power” (I guess Al-Jazeera is out of luck? How about the BBC?) as well as those who appear on certain government lists of suspected terrorists or terrorist organizations.<sup>105</sup>

As Pincus aptly notes:

If this bill had been proposed in the 1950s, I guarantee “covered persons” would not have included anyone associated with the Communist Party or liberal organizations designated as fellow travelers. In the 1960s and 1970s it probably would not have included those associated with anti-Vietnam war groups or radical civil rights organizations. . . . Think who could be added to that list of uncovered persons by a future Congress when you talk about depending on Congress to approve the shield law.<sup>106</sup>

I find it very surprising that privilege supporters are apparently so sanguine about handing over to the government the power to determine who qualifies as a legitimate journalist and effectively to “blacklist” certain speakers and exclude them from the privilege.<sup>107</sup>

Large media companies, which are lobbying hard for the federal shield law, have little interest in ensuring that the privilege applies to bloggers or other non-traditional journalists, many of whom are their competitors. They may well succeed in persuading Congress to adopt a definition of journalism that grants the privilege primarily to the traditional mainstream media or “professional” journalists. But such a definition is constitutionally suspect and runs counter to all current technological trends—it is a twentieth-century definition for a twenty-first century world. It ignores the revolution that has fundamentally altered the way the world receives and distributes information.

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that extending the privilege only to a defined group of reporters risks the danger of creating a licensed or established press).

105. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 4(2) (as passed by the House, Oct. 16, 2007).

106. Pincus, *supra* note 13.

107. See Jack Shafer, *We Don't Need No Stinkin' Shield Law, Part 2*, SLATE, Apr. 16, 2008, <http://www.slate.com/id/2189279/> (“Although the language [in the proposed federal shield law defining a journalist] doesn't sound onerous, journalists from Third World and former Soviet bloc countries know all about the dangers of letting governments define who is a journalist. I'm not paranoid enough to believe that the clause in this bill will automatically lead to the mandatory licensing of journalists by the federal government, but it is an excellent foundation upon which to build such a card-issuing ministry of journalism.”).

Indeed, the efforts of the mainstream media to enact a shield law may be seen as an attempt to cling to power by obtaining legal recognition for their rapidly disappearing “special” status.<sup>108</sup> It’s as though horse-and-buggy operators were seeking legal protections in the early twentieth century, unaware that the world was passing them by.<sup>109</sup>

MYTH #7: A SHIELD LAW WILL KEEP REPORTERS FROM GOING TO JAIL

A major rallying cry in support of the privilege is the claim that it is a disgrace to see reporters in the United States behind bars. The jailing of Judith Miller in the CIA leak case was a significant factor behind the current push for a federal shield law. Privilege proponents cite the jailing of journalists in nations such as Burma and China and criticize the United States government for behaving the same way.<sup>110</sup> Testifying before the Senate in support of the shield law, Judith Miller piously concluded with a request that Congress “help ensure that no other reporter will have to choose between doing her small bit to protect the First Amendment and her liberty.”<sup>111</sup> But the claim that passage of a federal shield law will keep reporters from going to jail is another myth. It reflects a fundamental misunderstanding both of the operation of a shield law and of the reason that journalists go to jail in these disputes.

Imagine a lawsuit filed by a former prisoner at Guantanamo Bay, alleging that American agents tortured him. A senior administration official is called to testify concerning government policies on torture. He refuses to testify, citing executive privilege. The court rules that there is no applicable privilege, and orders the official to testify. The official responds that, in order to preserve the constitutional authority of the executive branch and to safeguard national security, he will continue to refuse to testify, and is willing to go to jail if necessary. How would most reporters react? Would they praise the official as a hero bravely standing up for his principles through civil disobedience? Or would they insist that the official follow the rule of

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108. *See id.* (“Of the many flaws in the shield law, the most glaring is that it imagines that the highest wattage of the First Amendment belongs only to the guild that makes up the media industry.”).

109. *Cf.* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 529 (2002) (arguing that changing technology may necessarily “put an end to special legal treatment of the press”).

110. *See, e.g.*, 152 CONG. REC. S4800–01 (daily ed. May 18, 2006) (remarks of Sen. Lugar in support of the Free Flow of Information Act); PUBLISH AND PERISH, *supra* note 39, at 1.

111. *Reporter’s Privilege Legislation: An Additional Investigation of Issues and Implications: Hearing on S. 1419 before the S. Comm. on the Judiciary*, 109th Cong. (2006) (testimony of Judith Miller).

law and obey the court's order, and that he be jailed if necessary in order to persuade him to testify?

Or imagine a civil suit filed against a newspaper for libel. A witness called by the newspaper has evidence critical to the paper's defense but refuses to testify, claiming that the information was given to her by her husband and is protected by the spousal communications privilege. After a hearing, the judge rules that the claim of privilege has no basis, and orders her to testify. She continues to refuse, claiming that important privacy principles compel her to defy the court's order and she is concerned that, if she testifies, spouses in the future may be afraid to confide in each other. Would the newspaper praise her principled stand and agree that she should not have to testify? Or would it seek to enforce the court's order by having the witness held in contempt and fined or jailed until she complies, or seek some other sanction such as dismissal of the case?

The rule of law in this country means that courts, not self-interested individuals, decide questions of constitutional law and privilege. It requires that the final orders of the courts be respected and adhered to by all citizens. This principle is fundamental to our justice system. Even President Richard Nixon, hardly a poster child for law and order,<sup>112</sup> recognized the primacy of the rule of law. When the Supreme Court ruled against him on his claim of executive privilege and ordered that the Watergate tapes be turned over, Nixon complied and resigned the presidency rather than defy the courts.<sup>113</sup> Journalists rightly expect that both government officials and private citizens will obey lawful court orders, and justly criticize them when they do not. The media rely on the courts and on respect for the rule of law to protect them from unjustified libel suits, to prevent prior restraints on publication, and otherwise to safeguard their legal rights.

When it comes to the reporter's privilege, however, many journalists' respect for the rule of law seems to take a back seat. If a reporter asserts a privilege and a court rules that the reporter must testify, many reporters will defy the court's order, choose to be held in contempt, and even go to jail, as did Judith Miller. And the rest of

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112. This was aptly pointed out by Professor Wermiel during the Symposium. See Stephen Wermiel, Professor, Washington College of Law, Remarks at the American University Law Review Symposium: Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America (Sept. 20, 2007), available at <http://www.wcl.american.edu/journal/lawrev/symposia.cfm#> (follow "webcast" hyperlink next to "Censoring and prosecuting the press: The growing use of subpoenas and Reporters' Shield legislation") (last visited Apr. 26, 2008).

113. See *United States v. Nixon*, 418 U.S. 683 (1974).

the media, rather than criticizing the reporter, will hail her as a hero, give her journalism awards, raise money for her legal bills, and claim that the press is under assault because they are being asked to abide by the law like everyone else.

The CIA leak/Valerie Plame case provided a useful illustration of this point. Two journalists and their employers—Judith Miller and the *New York Times*, and Matt Cooper and Time Inc.—fought all the way to the Supreme Court to argue that they should not have to reveal their White House sources to the Special Prosecutor.<sup>114</sup> Every federal judge to hear their arguments ruled against them.<sup>115</sup> After the Supreme Court declined to hear the case,<sup>116</sup> Time Inc. chose to comply with the court's order and to turn over Cooper's notes and materials.<sup>117</sup> The company issued a statement noting that "[t]he same Constitution that protects the freedom of the press requires obedience to final decisions of the courts and respect for their rulings and judgments . . . . [O]ur nation lives by the rule of law and . . . none of us is above it."<sup>118</sup> For this responsible course of action, *Time* was roundly condemned by Cooper and by others in the journalism community.<sup>119</sup> The editorial page of the *New York Times* pronounced itself "deeply disappointed" with Time Inc.'s decision to abide by the law.<sup>120</sup> For her part, Miller chose to defy the court's order, and went to jail for nearly three months before relenting and

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114. See *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005).

115. *Id.*; *In re Special Counsel Investigation*, 332 F. Supp. 2d 26 (D.D.C. 2004); *In re Special Counsel Investigation*, 338 F. Supp. 2d 16 (D.D.C. 2004).

116. *Miller v. United States*, 545 U.S. 1150 (2005); *Cooper v. United States*, 545 U.S. 1150 (2005).

117. See PEARLSTINE, *supra* note 71, at 113. Norman Pearlstine was at the time editor-in-chief of Time, Inc., and made the decision to turn over Cooper's materials.

118. *Id.*

119. See *id.* at 110–36. To their credit, Dr. Tucker and Professor Wermiel appear to endorse the actions of *Time* magazine in turning over Cooper's notes, and note that reporters who violate lawful court orders should have to face the consequences. See Tucker & Wermiel, *supra* note 2, at 1332. This is a commendable position. Unfortunately, though, Dr. Tucker and Professor Wermiel are decidedly in the minority among privilege advocates on this question. The overwhelming majority of the journalism community condemned *Time's* decision to obey the law, applauded Judith Miller's defiance of the court, and argued that the press was being unfairly persecuted. See Pearlstine, *supra* note 71, at 110–36. Therefore I cannot agree with Dr. Tucker and Professor Wermiel that "[n]ews organizations . . . need to be given more credit for their willingness to comply with lawful orders after they have exhausted all appeals." Tucker & Wermiel, *supra* note 2, at 1332. As Time, Inc.'s experience shows, such willingness is extremely hard to come by in the journalism community.

120. See Editorial, *Judith Miller Goes to Jail*, N.Y. TIMES, July 7, 2005, at A22.

agreeing to testify.<sup>121</sup> The *New York Times* and most other newspapers hailed Miller as a hero.<sup>122</sup>

This double standard is indefensible. Reporters have every right to claim a reporter's privilege and to appeal any adverse court decisions as far as they can. They do not have the right to decide that, once their legal appeals are exhausted, they will place themselves above the law and refuse to honor court rulings. Michael Kinsley, former editorial page editor of the *Los Angeles Times*, has pointed out that journalists are quick to criticize others who defy the law, and yet many "believe passionately that it is not merely okay but profoundly noble to follow their own interpretation [of the First Amendment] and ignore the Supreme Court's."<sup>123</sup> As the former editor-in-chief of *Time* put it, "[h]ow . . . could we, as journalists, criticize others who ignored the courts if we did so ourselves?"<sup>124</sup> The irony was best summed up by Gregg Easterbrook, who wrote that the reaction of the journalism community to Time Inc.'s decision to turn over Cooper's notes could be headlined: "BIG CORPORATION OBEYS LAW, JOURNALISTS OUTRAGED."<sup>125</sup>

Journalists argue that they have an ethical obligation not to identify their sources, and that court orders compelling them to testify place them in an impossible dilemma.<sup>126</sup> If that is true, it is a dilemma entirely of journalism's own making. Reporters claim it is unjust to ask them to break promises to sources that they will never identify them under any circumstances. What they fail to recognize is that they have no legal right to make such a promise in the first place.<sup>127</sup> It's fine if journalists believe that their professional ethics require them to maintain the confidences of sources. But in other professions, such as law and medicine, requirements of confidentiality include the express or implied qualification that

121. See PEARLSTINE, *supra* note 71, at 121–48.

122. See Editorial, *supra* note 120.

123. Michael Kinsley, *Constitutional Cafeteria*, WASH. POST, May 5, 2006, at A19.

124. PEARLSTINE, *supra* note 71, at 98.

125. *Id.* at 139–40. For more examples of the few journalists who supported Time Inc.'s decision, see *id.* at 137–40.

126. For example, Lance Williams, one of the BALCO reporters subpoenaed to identify his sources, said that by asking him to do so the government was "demand[ing] that I throw over my most deeply held ethical and moral beliefs, both as a journalist and as a man." Posting of Teri Thompson & T.J. Quinn to N.Y. Daily News Sports Investigative Team Blog, *Chronicle Reporters: We'll Go to Prison if Necessary*, <http://www.nydailynews.com/blogs/iteam/2006/09/chronicle-reporters-well-go-to.html> (Sept. 21, 2006, 22:45 EST).

127. See PEARLSTINE, *supra* note 71, at 122 (noting the argument of the Special Prosecutor in the Plame case that "neither [Judith] Miller nor anyone in government can promise confidentiality when the law doesn't allow it").

confidences may be protected only to the extent legally possible.<sup>128</sup> In other words, there is a recognition that while engaging in one's profession and adhering to one's ethical obligations, one must still abide by the law—which includes obeying lawful, final court orders finding there is no privilege in a given case. Journalism appears to be the only profession that believes adherence to its own ethics may include a duty to violate the law. Journalists cannot create an ethics code that includes a requirement to violate the law and then act surprised when the law objects.

Journalists in this country are not jailed for what they write, and are not being censored when they are jailed for refusing to testify.<sup>129</sup> This is why arguments comparing journalists jailed in the United States to journalists jailed in countries such as China, Burma, or Cuba are off the mark.<sup>130</sup> In totalitarian countries, reporters are jailed for the content of their work. In this country, if a reporter is jailed it is not for what he or she has written but for refusing to abide by a lawful court order, entered after due process of law and a full and fair hearing. Rather than demonstrating that the United States is akin to a totalitarian country, cases like Judith Miller's demonstrate just the opposite: that we are a society governed by the rule of law, and that no one has a right to decide for herself what laws she will obey.<sup>131</sup>

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128. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003) (requiring confidentiality, but allowing lawyers to reveal information "to comply with other law or a court order").

129. As Professor Clymer and I both noted during the Symposium, the title of our panel, "Censoring and Prosecuting the Press—An Assessment of Reporters' Shield Legislation," was a misnomer. Censorship—the control of media content—is not an issue in these cases. Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press, agreed that these cases are not about censorship. See Steven D. Clymer, Symposium Transcripts, *Panel: The Role of Whistleblowers to Facilitate Government Accountability*, 57 AM. U. L. REV. 1220, 1220 (2008) (. . . [T]he issues about the reporters' privilege have nothing to do with either press censorship or with prosecuting the members of the press."); Randall D. Eliason, Professorial Lecturer in Law at American University, Washington College of Law and George Washington University Law School, Remarks at the American University Law Review Symposium: Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America (Sept. 20, 2007), available at <http://www.wcl.american.edu/journal/lawrev/symposia.cfm#> (follow "webcast" hyperlink next to "Censoring and prosecuting the press: The growing use of subpoenas and Reporters' Shield legislation") (last visited Apr. 26, 2008); see also Dalglish, *supra* note 25.

130. See, e.g., 152 Cong. Rec. S4800-01 (daily ed. May 18, 2006) (remarks of Senator Lugar in support of the Free Flow of Information Act); PUBLISH AND PERISH, *supra* note 39, at 1.

131. For the same reason, comparing reporters who are held in contempt for refusing to testify to individuals prosecuted 200 years ago under the Sedition Act of 1798 is comparing apples and oranges. See, e.g., PUBLISH AND PERISH, *supra* note 39, at 3-5 (comparing recent subpoenas of reporters to prosecutions under the Sedition Act). Those prosecuted under the Sedition Act were prosecuted for the content of what they wrote. See ANTHONY LEWIS, FREEDOM FOR THE THOUGHT WE HATE: A

A shield law will not keep journalists out of jail. Any shield law will have exceptions, which means there will be cases in which a court finds that the privilege does not apply and orders a reporter to testify.<sup>132</sup> If history is a guide, in many such cases the journalist will refuse to testify, will be held in contempt, and will be sent to jail. Given this history, one has to question why Congress should grant a legal privilege to a group that will happily accept the benefits of that privilege when they win but will defy the law when they lose.<sup>133</sup>

Journalists go to jail not because of the lack of a privilege, but because of their unique and arrogant notion that journalists, not the Congress and not the courts, should decide what the law requires. As long as that notion persists, journalists will continue to be found in contempt and will continue to be locked up, even if the shield law is passed. With or without a shield law, journalists can stop going to jail tomorrow. All they have to do is obey the law.<sup>134</sup>

MYTH #8: THE SHIELD LAW WILL PROTECT CIVIL LIBERTIES AND INCREASE THE FLOW OF INFORMATION TO THE PUBLIC<sup>135</sup>

Consider the following cases:

- White House officials, in an attempt to punish a political opponent, improperly disclose classified information concerning his wife's CIA employment, thus destroying her career and possibly damaging a number of covert CIA operations. Prosecutors and the

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BIOGRAPHY OF THE FIRST AMENDMENT 11–21 (2007). This is not true for reporters who are held in contempt for refusing to testify.

132. See Tucker & Wermiel, *supra* note 2, at 1316–18 (discussing the exceptions in the proposed federal shield law).

133. Patrick Fitzgerald, the special prosecutor in the CIA leak/Valerie Plame case, has suggested that any privilege Congress enacts should require that any person seeking the protection of the privilege first submit the subpoenaed information under seal to the court, to be turned over if the claim of privilege fails. Patrick J. Fitzgerald, *Shield Law Perils . . .*, WASH. POST, Oct. 4, 2007, at A25.

134. Journalists often claim that when they defy court orders to testify, they are engaged in civil disobedience. See Editorial, *supra* note 120, at A22 (praising Judith Miller's "civil disobedience" and comparing her to Rosa Parks and Martin Luther King Jr.). But journalists who work for powerful media companies are hardly disenfranchised victims of an unjust legal system. They simply don't like the result the legal system has reached when it comes to the privilege. It is not true civil disobedience to litigate within the court system with some of the best lawyers in the country, expect your opponents to abide by the rulings of that system, and then defy the rulings if you lose. That's just gaming the court system and placing yourself above the law. As Michael Kinsley has argued, if what Judith Miller and the *New York Times* did can be justified as civil disobedience, then "almost any law anyone does not care for is up for grabs." Michael Kinsley, Op-Ed, *Reporters Aren't Above the Law*, L.A. TIMES, July 10, 2005, at M5.

135. Particular credit for the structure of the argument in this section goes to Professor Clymer, who used a similar formulation during his remarks at the Symposium.

individuals harmed by these disclosures seek to discover who was responsible.

- To protect the rights of defendants in a criminal case to a fair trial, the judge places certain confidential case information under a protective order. In violation of that order, someone in the case discloses secret grand jury information, resulting in a storm of negative publicity about the defendants and making it difficult for them to get a fair trial. The judge who issued the protective order wants to find out who is responsible.

- Government agents conducting a criminal investigation improperly disclose information about a suspect that is protected by the Privacy Act. As a result, the suspect is essentially tried and convicted in the press of committing a heinous crime and his reputation is destroyed, although he is never actually charged. He wants to find out which government agents were responsible.

In these disputes, most would expect those dedicated to preserving civil liberties to weigh in on the side of the criminal defendants or private individuals who were damaged by the improper acts of government agents. But of course, just the opposite is true. The first example is the CIA leak/Valerie Plame case, the second is BALCO, and the third is the case involving Dr. Steven Hatfill (or Dr. Wen Ho Lee). In each case, civil liberties groups weighed in against the interests of the individuals seeking to vindicate their rights and discover which government agents had wronged them, and in favor of allowing government officials and large corporations to keep that information secret.

Pulitzer Prize-winning journalist and First Amendment scholar Anthony Lewis recently noted the injustice that could result from the application of a shield law in a case like Dr. Wen Ho Lee's:

Suppose that a federal shield law had existed when Wen Ho Lee sued to seek some compensation for his nightmare ordeal. The journalists who wrote the damaging stories would have had their subpoenas dismissed, and without the names of the leakers Lee would probably have had to give up his lawsuit. Is that what a decent society should want? Would that have really benefited the press? Or would it have added to the evident public feeling that the press is arrogant, demanding special treatment?<sup>136</sup>

Many appear willing to sacrifice the civil liberties of those who are injured by government officials or others in these cases, due to a reflexive opposition to any subpoena to the press at any time, no matter what the circumstances. As a result, in these privilege cases,

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136. LEWIS, *supra* note 131, at 93.

civil liberties groups side with large corporations such as the New York Times Co. and Hearst, rather than supporting the individuals who were harmed. But as Lewis points out, the press “is not always the good guy.”<sup>137</sup> What about a little consideration for the civil rights of those who were injured? Why should Valerie Plame not be able to learn who in the White House destroyed her career? Why should people such as Dr. Lee or Dr. Hatfill be prevented from finding out who injured them? Do we really want to encourage and protect such improper and harmful actions of government agents?

Dr. Tucker and Professor Wermiel argue that prosecutors and litigants in cases such as Valerie Plame or Wen Ho Lee seek the identity of sources not from an altruistic desire to inform the public, but because they want to prosecute the wrongdoers or seek legal damages from them.<sup>138</sup> That may be largely true, but it seems to me beside the point. Regardless of motivation, the issue, according to privilege advocates, should be whether the flow of information to the public is enhanced. The position advocated by Professor Clymer and me results in wrongdoers being punished, those who are injured being able to recover for their injuries, and the public receiving important information concerning unlawful acts by government officials. The position advocated by shield law proponents results in wrongdoers being protected and encouraged to commit illegal acts, no remedy for those who are injured, and the public being denied access to information about government misconduct.

The primary rationale for the shield law is that it will increase the “free flow of information” to the public. In fact, just the opposite is more likely to be true. As discussed above, the shield law is unlikely to play any significant role in determining whether or not a source comes forward. Without a shield law, investigative journalism using confidential sources will continue to thrive as it has for decades. The effect of the law, therefore, will more likely be to prevent the public from learning additional information, particularly about individuals engaged in wrongdoing through improper leaks to the press. The privilege thus acts to slow or stop the flow of information to the public, not increase it.

In the Plame case, the effect of a shield law would have been to prevent the public from learning which White House officials had improperly leaked classified information to the press and lied to cover it up, and Scooter Libby would never have been brought to

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137. *Id.*

138. Tucker & Wermiel, *supra* note 2, at 1325.

trial. In BALCO, the privilege would have prevented the public from learning that a defense attorney had improperly disclosed secret grand jury testimony, had lied to a judge about it, and had tried to get his client's case dismissed by blaming the government for the leaks. In the Wen Ho Lee and Hatfill cases, the privilege would have prevented the public—and the injured plaintiffs—from discovering which government officials had wrongfully disclosed information about them that was subject to the Privacy Act. In each case, rather than providing the public with more information, the privilege would act to allow journalists to *deny* important information to the public.

This is perhaps the ultimate irony of the proposed shield law. As Michael Kinsley wrote about the Plame case, for all the grand talk about the First Amendment, “This isn’t about the press’s right to publish information. It is about a right to keep information secret.”<sup>139</sup> The law purports to ensure that the public will receive the greatest amount of information possible concerning matters of public importance. What it does instead is create a favored and privileged class of unelected, unaccountable, journalistic arbiters of the public interest, with the power to decide for themselves what the public should and should not know.

#### CONCLUSION

Evidentiary privileges do have costs. Every privilege keeps potentially relevant information from finders of fact in a legal proceeding, and has the potential to result in injustice. A law such as the proposed federal reporter’s privilege, with its many exceptions and qualifications, will also result in substantial litigation costs as parties battle over its applicability. Before enacting such a law, Congress should take care to ensure that it rests upon a solid factual and legal foundation, and that the benefits of the privilege would outweigh the costs. Privilege advocates have not met their burden of demonstrating that the federal reporter’s shield law is needed or will be effective.

The shield law continues to move through Congress, resting in large part on the myths discussed above. Newspapers around the country—which of course have a conflict of interest<sup>140</sup>—editorialize in

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139. Michael Kinsley, Op-Ed, *Right Principle, Wrong Context*, WASH. POST, July 10, 2005, at B7.

140. See Ryan Grim, *WH Pushes Senators on Shield Law*, POLITICO, Apr. 29, 2008, available at <http://www.politico.com/news/stories/0408/9937.html> (noting that some congressional staffers “refer to the shield bill as the Reporters’ Conflict of Interest Act, since the same group that is reporting on its progress through Congress could benefit from its passage”).

favor of the bill, creating their own impression of a groundswell of support. Members of Congress see a chance for an easy vote that will please their local editorial boards and will allow them to paint themselves as champions of the First Amendment. There is not much of a constituency speaking out against the shield law. But it is a bad and unnecessary law, based on false assumptions and sloppy arguments, and will do more harm than good. Wrapping it in the banner of the First Amendment and the free press won't change that.