

# WHY WE NEED A FEDERAL REPORTER'S PRIVILEGE

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Over the past year, I have publicly criticized members of the press for overstating their First Amendment rights and *New York Times* reporter Judith Miller for refusing to abide by the rule of law. When journalists disregard lawful court orders because they are serving a “higher” purpose, they endanger the freedom of the press itself. At the same time, though, the rule of law must respect the legitimate needs of a free press. A strong and effective journalist-source privilege is essential to a robust and independent press and to a well-functioning democratic society.

## I. THE NATURE OF A PRIVILEGE

The goal of most legal privileges is to promote open communication in circumstances in which society wants to encourage such communication. There are many such privileges, including the attorney-client privilege,<sup>1</sup> the doctor-patient privilege,<sup>2</sup> the psychotherapist-patient privilege,<sup>3</sup> the privilege for confidential spousal communications,<sup>4</sup> the priest-penitent privilege,<sup>5</sup> the executive privilege,<sup>6</sup> the “Speech or Debate Clause” privilege for members of Congress,<sup>7</sup> and so on.

In each of these instances, three judgments implicitly support recognition of the privilege: (1) the relationship is one in which open communication is important to society; (2) in the absence of a privilege, such communication will be inhibited; and (3) the cost to the legal system of losing access to the privileged information is outweighed by the benefit to society of open communication in the protected

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1. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1980).
2. *See, e.g.*, *Trammel v. United States*, 445 U.S. 40, 51 (1980) (contrasting spousal privilege with other categories of testimonial privilege, including that applicable to physician-patient relationships).
3. *See, e.g.*, *Jaffe v. Redmond*, 518 U.S. 1, 15 (1996).
4. *See, e.g.*, *Trammel*, 445 U.S. at 53.
5. *See* *New York v. Phillips* (N.Y. Ct. Gen. Sess. 1813), *reprinted in Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 199-209 (1955).
6. *See generally* *United States v. Nixon*, 418 U.S. 683 (1973).
7. U.S. CONST. art. I, § 6, cl. 1; *see, e.g.*, *United States v. Johnson*, 383 U.S. 169, 179 (1966).

relationship.

Consider, for example, the psychotherapist-patient privilege. If patients know that their psychotherapists could routinely disclose or be compelled to disclose their confidential communications made for the purpose of treatment, they would naturally be more reluctant to reveal intimate or embarrassing facts about their experiences, thoughts, and beliefs. But without those revelations, psychotherapists would be hindered in their ability to offer appropriate advice and treatment to their patients. To facilitate treatment, we might create a privilege that prohibits psychotherapists from disclosing confidential matters revealed to them by their patients, unless the patient elects to waive the privilege.

Suppose, for example, Patient tells Psychotherapist that he was sexually abused by Teacher several years earlier. Teacher is now under investigation for sexual abuse of his students, and Psychotherapist is called to testify before the grand jury. Psychotherapist is asked, "Did Patient tell you he had been sexually abused by Teacher?" If a psychotherapist-patient privilege exists in the jurisdiction, Psychotherapist will be barred from answering the question without Patient's permission. The effect of the privilege is to deprive the investigation of relevant evidence in order to promote open communication in the treatment setting.

At this point, it is important to note a critical feature of privileges. If Patient would not have disclosed this information to Psychotherapist in the absence of a psychotherapist-patient privilege, then the criminal investigation loses *nothing* because of the privilege. This is so because, without the privilege, Psychotherapist would not have learned about Teacher's abuse of Patient in the first place. In that circumstance, the privilege creates the best of all possible outcomes: it promotes effective treatment at no cost to the legal system.

Of course, it is not that simple. It is impossible to measure precisely the cost of privileges to the legal process. If Patient would have revealed the information to Psychotherapist *even without the privilege*, then the privilege imposes a cost because it shields from disclosure a communication that would have been made even in the absence of a privilege. The ideal rule would privilege only those communications that would not have been made without the privilege.

This highlights another important feature of privileges: the privilege "belongs" to the person whose communication society wants to encourage (i.e., the client or patient), not to the attorney or doctor.<sup>8</sup> If the

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8. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983); see also N.Y. STATE BAR ASS'N, *Statement of Client's Rights* (2005) (adopting the standards suggested by the ABA).

client or patient is indifferent to the confidentiality of the communication at the time it is made, or elects to waive the privilege at any time, the attorney or doctor has no authority to assert the privilege.<sup>9</sup> The attorney or doctor is merely the agent of the client or patient.<sup>10</sup>

## II. THE JOURNALIST-SOURCE PRIVILEGE

The logic of the journalist-source privilege is similar to that described above. Public policy certainly supports the idea that individuals who possess information of significant value to the public should ordinarily be encouraged to convey that information to the public. We acknowledge and act upon this policy in many ways, including, for example, by providing copyright protection.<sup>11</sup>

Sometimes, though, individuals who possess such information are reluctant to have it known that they are the source. They may fear retaliation, gaining a reputation as a “snitch,” losing their privacy, or simply getting “involved.” A congressional staffer, for example, may have reason to believe that a Senator has taken a bribe. She may want someone to investigate, but may not want to get personally involved. Or, an employee of a corporation may know that his employer is manufacturing an unsafe product, but may not want coworkers to know he was the source of the leak.

In such circumstances, individuals may refuse to disclose the information unless they have some way to protect their confidentiality. In our society, often the best way to reveal such information is through the press. But without a journalist-source privilege, such sources may decide silence is the better part of wisdom.

A journalist-source privilege thus makes sense for the same reason as the attorney-client privilege, the doctor-patient privilege, and the psychotherapist-patient privilege. It is in society's interest to encourage the communication, and without a privilege the communication will often be chilled. Moreover, in many instances the privilege will impose no cost on the legal system, because without the privilege the source may never disclose the information at all. Consider the congressional staffer example. Without a privilege, the staffer may never report the bribe and the crime will remain undetected. With the privilege, the source will speak with the journalist, who may publish the story, leading

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9. See *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967); 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2321 (John T. McNaughton ed., 1961).

10. The attorney-client privilege is recognized in every jurisdiction in the United States. Other privileges are recognized in varying forms in different jurisdictions.

11. See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

to an investigation that may uncover the bribe. In this situation, law enforcement is actually better with the privilege than without it, and this puts to one side the benefit to society of learning of the alleged bribe independent of any criminal investigation.

For this reason, forty-nine states and the District of Columbia recognize some version of the journalist-source privilege either by statute or common law.<sup>12</sup> It is long past time for the federal government to enact such a privilege as well. There is no sensible reason for the federal system not to recognize a journalist-source privilege to deal with situations like the whistleblower examples of the congressional staffer and the corporate employee. In these circumstances, the absence of a journalist-source privilege *harms* the public interest. There are, of course, more difficult cases, and I will return to them later. But some form of journalist-source privilege is essential to foster the fundamental value of an informed citizenry.

Moreover, the absence of a federal privilege creates an intolerable situation for both journalists and sources. Consider a reporter who works in New York whose source is willing to tell her about an unsafe product, but only if the reporter promises him confidentiality. New York has a shield law, but the federal government does not. If the disclosure results in litigation or prosecution in the state courts of New York, the reporter can protect the source, but if the litigation or prosecution is in federal court, the reporter cannot invoke the privilege. This generates uncertainty, and uncertainty breeds silence. The absence of a federal privilege directly undermines the policies of forty-nine states and the

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12. Thirty-one states have recognized the privilege by statute. *See*, ALA. CODE § 12-21-142 (2005); ALASKA STAT. § 09.25.320 (2005); ARIZ. REV. STAT. § 12-2214 (LexisNexis 2005); ARK. CODE ANN. § 16-85-510 (2005); CAL. EVID. CODE § 1070 (Deering 2005); COLO. REV. STAT. § 13-90-119 (2005); DEL. CODE ANN. tit. 10 § 4321 (2005); FLA. STAT. ANN. § 90.5015 (LexisNexis 2005); GA. CODE ANN. § 24-9-30 (2005); 735 ILL. COMP. STAT. ANN. 5/8-901 (LexisNexis 2005); IND. CODE ANN. § 34-46-4-2 (LexisNexis 2005); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005); LA. REV. STAT. ANN. § 45:1452 (2005); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2005); MICH. COMP. LAWS SERV. § 767.5a (LexisNexis 2005); MINN. STAT. § 595.022 (2004); MONT. CODE ANN. § 26-1-902 (2005); NEB. REV. STAT. ANN. § 20-144 (LexisNexis 2005); NEV. REV. STAT. ANN. § 49.275 (LexisNexis 2005); N.J. STAT. ANN. § 2A:84A-21.9 (West 2005); N.M. STAT. ANN. § 38-6-7 (LexisNexis 2005); N.Y. CIV. RIGHTS LAW § 79-h (2005); N.C. GEN. STAT. § 8-53.11 (2005); N.D. CENT. CODE § 31-01-06.2 (2005); OHIO REV. CODE ANN. § 2739.12 (LexisNexis 2005); OKLA. STAT. ANN. tit. 12, § 2506 (West 2004); OR. REV. STAT. § 44.520 (2003); 42 PA. CONS. STAT. § 5942 (2005); R.I. GEN. LAWS § 9-19.1-2 (2005); S.C. CODE ANN. § 19-11-100 (2004); TENN. CODE ANN. § 24-1-208 (2005). Eighteen states have recognized it by judicial decision. *See, e.g.*, Jean-Paul Jassy, *The Prosecutor's Subpoena and the Reporter's Privilege*, COMM'C'N. LAW., Winter 2000, at n.25, available at <http://www.abanet.org/forums/communication/comlawyer/winter00/jassy.html> (citing to case law of eight states that have recognized the privilege via judicial decision). The only state that has not recognized the privilege in any form is Wyoming.

District of Columbia and wreaks havoc on the legitimate and good-faith understandings and expectations of sources and reporters throughout the nation. This is an unnecessary, intolerable and, indeed, irresponsible state of affairs.

### III. THE FIRST AMENDMENT

One response to the call for federal legislation in this area is that such a law is unnecessary because the First Amendment should solve the problem. This is wrong at many levels.<sup>13</sup> Most obviously, constitutional law sets a minimum baseline for the protection of individual liberties. It does not define the ceiling of such liberties.<sup>14</sup> That a particular practice or policy does not violate the Constitution does not mean it is good policy. This is evident in an endless list of laws that go far beyond constitutional requirements in supporting individual rights, ranging from the Civil Rights Act of 1964,<sup>15</sup> to legislative restrictions on certain surveillance practices,<sup>16</sup> to tax exemptions for religious organizations,<sup>17</sup> to regulations of the electoral process.<sup>18</sup>

Moreover, the journalist-source privilege poses not only a question of individual liberties, but also an important public policy issue about how best to support and strengthen the marketplace of ideas. Just as the non-constitutional attorney-client privilege is about promoting a healthy legal system,<sup>19</sup> the non-constitutional journalist-source privilege is about fostering a healthy political system.

Returning to the First Amendment, in 1972 the Supreme Court, in *Branzburg v. Hayes*,<sup>20</sup> addressed the question of whether the First Amendment embodies a journalist-source privilege.<sup>21</sup> The four dissenting justices concluded that “when a reporter is asked to appear before a grand jury and reveal confidences,” the government should be required to:

- (1) show that there is probable cause to believe that the newsman has

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13. See *Branzburg v. Hayes*, 408 U.S. 665, 697 (1972).

14. See, e.g., *United States v. Hammad*, 846 F.2d 854, 859 (2d Cir. 1988) (citing *McNabb v. United States*, 318 U.S. 332, 340 (1943)).

15. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of the U.S.C.).

16. See, e.g., 18 U.S.C. § 2511(1) (2000).

17. See, e.g., 26 U.S.C. § 501(c)(3) (2000).

18. See, e.g., 22 U.S.C. § 4086 (2000).

19. See, e.g., Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 356 (1988) (noting that the attorney-client privilege “protects clients and benefits society by enabling the legal system to work”).

20. 408 U.S. 665 (1972).

21. See *id.* at 667.

information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>22</sup>

The opinion of the Court, however, rejected this conclusion and held that, as long as an investigation is conducted in good faith and not for the purpose of disrupting “a reporter’s relationship with his news sources,” the First Amendment does not protect either the source or the reporter from having to disclose relevant information to a grand jury.<sup>23</sup>

If this were all there were to *Branzburg*, it clearly would seem to have settled the First Amendment issue. But Justice Powell did something quite puzzling, for he not only joined the opinion of the Court, but also filed a separate concurring opinion that seemed directly at odds with the Court’s opinion.<sup>24</sup> Specifically, Powell stated that in each case the “asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”<sup>25</sup>

Thus, Justice Powell seemed to embrace an approach between that of the four justices in dissent and the four other justices in the majority. Had he not joined the majority opinion, his concurring opinion, as the “swing” opinion, would clearly have stated the “law,” even though no other justice agreed with him. But because he joined the opinion of the Court, no one has ever been quite sure what to make of his position. The result has been chaos in the lower federal courts about the extent to which the First Amendment embodies a journalist-source privilege.<sup>26</sup> Is there essentially no privilege, as suggested in the majority opinion, or is Powell’s balancing approach the constitutional test? For more than thirty years, the Court has allowed this confusion to percolate in the lower federal courts.

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22. *Id.* at 743 (Stewart, J., dissenting) (citation omitted).

23. *Id.* at 707-08.

24. *See id.* at 709 (Powell, J., concurring).

25. *Id.* at 710.

26. Building upon Justice Powell’s concurring opinion in *Branzburg*, most federal courts of appeals have held that the First Amendment protects some form of journalist-source privilege. *See, e.g.,* *LaRouche v. Nat’l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Zerilli v. Smith*, 656 F.2d 705, 711-12 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594-95 (1st Cir. 1980); *United States v. Criden*, 633 F.2d 346, 357 (3d Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975); *Baker v. F & F Investment*, 470 F.2d 778, 784 (2d Cir. 1972).

This is another reason why a federal statute is necessary. We have lived too long with this uncertainty. The current state of affairs leaves sources, journalists, prosecutors, and lower federal courts without any clear guidance, and the scope of the First Amendment-based journalist-source privilege differs significantly from one part of the nation to another.<sup>27</sup> A federal law recognizing a journalist-source privilege would eliminate this confusion and offer much-needed guidance about the degree of confidentiality participants in the federal system may and may not expect. Especially in situations like these, where individuals are making difficult decisions about whether to put themselves at risk by revealing information of significant value to the public, clear rules are *essential*.

This brings me back to the relationship between constitutional law and federal legislation. If a robust journalist-source privilege is not required by the First Amendment, why (apart from considerations of uniformity) should Congress enact a privilege that goes beyond whatever the Court held in *Branzburg*? Beyond the point made earlier that the Constitution does not exhaust sound public policy, the Court in *Branzburg* relied heavily on two important First Amendment doctrines to justify its decision, neither of which is relevant to the issue of federal legislation.<sup>28</sup> Indeed, that is why, despite *Branzburg*, forty-nine states and the District of Columbia have felt comfortable recognizing some form of the journalist-source privilege.

First, as a general matter of First Amendment interpretation, the Court is reluctant to invalidate a law merely because it has an *incidental* effect on First Amendment freedoms.<sup>29</sup> Laws that *directly* regulate expression (e.g., “No one may criticize the government” or “No one may distribute leaflets at the Mall”) are the central concern of the First Amendment.<sup>30</sup> Laws that only incidentally affect free expression (e.g., a speed limit as applied to someone who speeds to get to a demonstration or to express his opposition to speed limits) will almost never violate the

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27. Compare OHIO REV. CODE ANN. § 2739.04 (LexisNexis 2005) (protecting the source of the information), with OKLA. STAT. ANN. tit. 12, § 2506 (2004) (protecting unpublished information, as well as the source).

28. See *Branzburg*, 408 U.S. at 684 (providing “that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally”); see also *id.* at 682 (noting “that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability”).

29. See *id.* at 682.

30. See generally *Cohen v. California*, 403 U.S. 15 (1971); *Terminiello v. City of Chicago*, 337 U.S. 1, 2-3 (1949).

First Amendment.<sup>31</sup> Except in highly unusual circumstances, in which the application of such a law would have a devastating effect on these freedoms,<sup>32</sup> the Court routinely rejects such First Amendment challenges.<sup>33</sup>

The reason for this doctrine is not that such laws cannot dampen First Amendment freedoms, but that the implementation of a constitutional analysis that allowed *every* law to be challenged whenever it allegedly impinged even indirectly on someone's freedom of expression would be a judicial nightmare. Does an individual have a First Amendment right not to pay taxes, because taxes reduce the amount of money she has available to support political causes? Does an individual have a First Amendment right to violate a law against public urination, because he wants to urinate on a public building to express his hostility to government policy? Does a reporter have a First Amendment right to violate laws against burglary or wiretapping, because burglary and wiretapping will enable him to get an important story?

To avoid such intractable and ad hoc line-drawing, the Court simply *presumes* that laws of general application are constitutional, even as applied to speakers and journalists, except in extraordinary circumstances.<sup>34</sup> Predictably, the Court invoked this principle in *Branzburg*: “[T]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”<sup>35</sup>

This is a sound basis for the Court to be wary of constitutionalizing a strong journalist-source privilege, but it has no weight in the *legislative*

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31. See generally *Texas v. Johnson*, 491 U.S. 397, 402-06 (1989); *United States v. O'Brien*, 391 U.S. 367, 385 (1968).

32. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958) (holding that for the state to require the NAACP to disclose its membership lists in Alabama at the height of the civil rights movement would effectively destroy the NAACP's ability to operate).

33. See, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (upholding as an “incidental” restriction on speech a law requiring the closing of any building used for prostitution, as applied to an “adult” bookstore); *Wayte v. United States*, 470 U.S. 598, 614 (1985) (upholding as an “incidental” restriction on speech the government's policy of enforcing the selective service registration requirement only against those men who advised the government that they had failed to register or who were reported by others as having failed to register); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969) (upholding the Sherman Antitrust Act, as applied to the press); *O'Brien*, 391 U.S. at 385 (upholding as an “incidental” restriction on speech a federal law prohibiting any individual to destroy a draft card, as applied to an individual who burned a draft card to protest the Vietnam War); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 193 (1946) (upholding the Fair Labor Standards Act, as applied to the press); see generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 99-114 (1987).

34. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937).

35. *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972).



context. Courts necessarily proceed on the basis of precedent, and they are quite sensitive to the dangers of “slippery slopes.” Legislation, however, properly considers problems “one step at a time” and legislators need not reconcile each law with every other law in order to meet their responsibilities.

For the Court to recognize a journalist-source privilege but not, for example, a privilege of journalists to commit burglary or wiretapping, would pose a serious challenge to the judicial process. But for Congress to address the privilege issue without fretting over journalistic burglary or wiretapping is simply not a problem. This is a fundamental difference between the judicial and legislative processes.

Second, recognition of a journalist-source privilege necessarily requires someone to determine who, exactly, is a “journalist.” For the Court to decide this question *as a matter of First Amendment interpretation* would fly in the face of more than two hundred years of constitutional wisdom. The idea of defining or “licensing” the press in this manner is anathema to our constitutional traditions. The Court has never gone down this road, and with good reason. As the Court observed in *Branzburg*, if the Court recognized a First Amendment privilege “it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher . . . .”<sup>36</sup>

Although this was a serious constraint on the Court in *Branzburg*, it poses a much more manageable issue in the context of legislation. Government often treats different speakers and publishers differently from one another. Which reporters are allowed to attend a White House press briefing? Which are eligible to be embedded with the military? Broadcasting is regulated,<sup>37</sup> but print journalism is not. Legislation treats the cable medium differently from both broadcasting and print journalism. These categories need not conform perfectly to the undefined phrase “the press” in the First Amendment. Differentiation among different elements of the media is constitutional, as long as it is not based on viewpoint or any other invidious consideration, and as long as the differentiation is reasonable.<sup>38</sup> Whereas the Court is wisely

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36. *Id.* at 704.

37. *See, e.g.*, 47 U.S.C. § 151 (2000).

38. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643-45 (1994) (upholding “must carry” provisions that favored broadcast over cable programmers); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (upholding a state law exempting newspapers and magazines but not cable television from a gross receipts tax); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-87 (1969)

reluctant to define “the press” for purposes of the First Amendment, it will grant Congress considerable deference in deciding who, as a matter of sound public policy, should be covered by the journalist-source privilege.

Thus, the primary reasons relied upon by the Court in *Branzburg* for its reluctance to recognize a robust First Amendment journalist-source privilege do not stand in the way of legislation to address the issue. To the contrary, the very weaknesses of the judicial process that make it difficult for a court to address this problem as a constitutional matter are precisely the strengths of Congress to address it well as a legislative matter.

#### IV. THE COSTS OF A JOURNALIST-SOURCE PRIVILEGE

The primary argument against *any* privilege is that it deprives the judicial or other investigative process of relevant evidence. Of course, there is nothing novel about that. Almost all rules of evidence deprive the fact-finder of relevant evidence. This is true not only of privileges, but also of rules against hearsay and opinion evidence, rules excluding proof of repairs and compromises, the exclusionary rule, the privilege against compelled self-incrimination, and rules protecting trade secrets and the identity of confidential government agents. This is so because the law of evidence inherently involves trade-offs between the needs of the judicial process and competing societal interests. But it is important to recognize that there is nothing unique about this feature of privileges.

A central question in assessing any such rule is how much relevant evidence will be lost if the rule is enacted. It is impossible to know this with any exactitude, because this inquiry invariably involves unprovable counter-factuals. But, as noted earlier, privileges have a distinctive feature in this regard that must be carefully considered.<sup>39</sup>

If, in any given situation, we focus on the moment the privilege is invoked (for example, when the reporter refuses to disclose a source to a grand jury), the cost of the privilege will seem high, because we appear to be “losing” something quite tangible because of the privilege. But if we focus on the moment the source speaks with the reporter, we will see the matter quite differently.

Assume a particular source will not disclose confidential information to a reporter in the absence of a privilege. If there is no privilege, the source will not reveal the information, the reporter will not be able to publish the information, the reporter will not be called to

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(upholding regulations for broadcasting that would be unconstitutional for print media).

39. See *supra* Part I.

testify before the grand jury, and the grand jury will not learn the source's identity. Thus, in this situation, the absence of the privilege will deprive the grand jury of the *exact same evidence* as the privilege. But at least with the privilege, the public and law enforcement will gain access to the underlying information through the newspaper report. In this situation, the privilege is *costless* to the legal system, and at the same time provides significant benefits both to law enforcement and the public.

Of course, some, perhaps many, sources will reveal information to a reporter even without a privilege. It is the evidentiary loss of *those* disclosures that is the true measure of the cost of the privilege. The same analysis holds for other privileges as well, such as attorney-client and doctor-patient. It is essential to examine the privilege in this manner in order to understand the actual impact of the journalist-source privilege.

Here are two ways to assess the relative costs and benefits. (1) On balance, it is probably the case that the most important confidential communications, the ones that are of greatest value to the public, are those that would get the source in the most "trouble." Thus, the absence of a privilege is most likely to chill the most valuable disclosures. (2) If one compares criminal prosecutions in states with an absolute privilege with those in states with only a qualified privilege, there is almost certainly no measurable difference in the effectiveness of law enforcement. Even though there may be a difference in the outcomes of a few idiosyncratic cases, the existence of even an absolute privilege probably has no discernable effect on the legal system *as a whole*. If we focus, as we should, on these large-scale effects, rather than on a few highly unusual cases when the issue captures the public's attention, it seems clear that the benefits we derive from the privilege significantly outweigh its negative effects on law enforcement. This is so because the percentage of cases in which the issue actually arises is vanishingly small<sup>40</sup> and because, in serious cases, prosecutors are almost always able to use alternative ways to investigate the crime.

My conclusion, then, like that of forty-nine states and the District of Columbia, is that public policy strongly supports the recognition of a

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40. For example, a Lexis-Nexis search for cases in New York state—a state with a statutory shield law—using the terms "confidential and OVERVIEW (§ 79-h)" during the time period spanning January 1975 and January 1990, produces sixteen results. LEXISNEXIS: NY STATE CASES, COMBINED Database (last searched Nov. 1, 2005), *available at* LEXISNEXIS:NYCTS/search: "confidential and overview (sec 79-h) and date(geq (1/1/1975) and leq (1/1/1990))". However, a search for cases during the subsequent fifteen-year period, January 1990 through January 2005, produces only seven results. LEXISNEXIS: NY STATE CASES, COMBINED Database (last searched Nov. 1, 2005), *available at* LEXISNEXIS:NYCTS/search: "confidential and overview (sec 79-h) and date(geq (1/1/1990) and leq (1/1/2005))".

journalist-source privilege. Indeed, the absence of a federal journalist-source privilege seems inexplicable.

## V. FRAMING A FEDERAL JOURNALIST-SOURCE PRIVILEGE

Many issues arise in framing such a privilege. I will address three of them here: Who can invoke the privilege? Should the privilege be absolute? What if the disclosure by the source is itself a crime?

### A. *Who Can Invoke the Privilege?*

At the outset, it must be recalled that the privilege belongs to the source, not to the reporter. When the reporter invokes the privilege, she is merely acting as the agent of the source.<sup>41</sup> With that in mind, the question should properly be rephrased as follows: To whom may a source properly disclose information in reasonable reliance on the belief that the disclosure will be protected by the journalist-source privilege?

The answer should be a functional one. The focus should not be on whether the reporter fits within any particular category. Rather, the source should be protected whenever he makes a confidential disclosure

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41. In several cases, courts have held that the journalist-source privilege belongs to the reporter and cannot be waived by the source. *See, e.g.*, *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984); *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 89 F.R.D. 489, 494 (C.D. Cal. 1981). This view of the privilege seems to assume that the primary purpose of the privilege is to maintain the independence of the press rather than to encourage open communication by sources. This view makes sense insofar as the issue is whether journalists should enjoy a "work product" privilege analogous to the attorney's work product doctrine. To the extent such a doctrine applies to journalists, it would then be necessary to define precisely who is a journalist. Proposals for a "work product" doctrine for journalists generally assume that a qualified privilege would be adequate to protect this interest, as it is in the attorney work product situation. *See, e.g.*, *Free Speech Protection Act of 2005*, S. 369, 109th Cong. (2005) (proposed by Senator Dodd).

On the attorney work product doctrine, see *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways. . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

*Id.*

to an individual, reasonably believing that that individual regularly disseminates information to the general public, when the source's purpose is to enable that individual to disseminate the information to the general public.

Such a definition does not resolve every possible problem of interpretation. "General public," for example, should include specific communities, such as a university or a specialized set of readers. But the essence of the definition is clear. What we should be most concerned about are the *reasonable* expectations of the source, rather than the formal credentials of the recipient of the information.

### B. *Absolute or Qualified Privilege?*

Thirty-six states have some form of qualified journalist-source privilege.<sup>42</sup> In these states, the government can require the journalist to reveal the confidential information if the government can show that it has exhausted alternative ways of obtaining the information and that the information is necessary to serve a substantial government interest.<sup>43</sup> There are many different variations of this formulation, but this is the essence of it. The logic of the qualified privilege is that it appears never to deny the government access to information that the government really "needs." Correlatively, it appears to protect the privilege when breaching it would serve no substantial government interest. As such, it appears to be a sensible compromise. Nothing could be farther from the truth.

Although the qualified privilege has a superficial appeal, it is deeply misguided. It purports to achieve the best of both worlds, but probably achieves the opposite. For quite persuasive reasons, other privileges, such as the attorney-client, doctor-patient, psychotherapist-patient, and priest-penitent privileges, which are deeply rooted in our national experience, do *not* allow such ad hoc determinations of "need" to override the privilege.<sup>44</sup>

The qualified privilege rests on the illusion that the costs and benefits of the privilege can properly be assessed at the moment the privilege is asserted.<sup>45</sup> But as I have indicated earlier, this is false. It

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42. Eighteen states have a qualified statutory privilege, including Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Louisiana, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, and Tennessee. Another eighteen states have a qualified judicial privilege. *See supra* note 12.

43. *See, e.g.*, COLO. REV. STAT. § 13-90-119 (2005); FLA. STAT. ANN. § 90.5015 (LexisNexis 2005).

44. *See, e.g.*, *Jaffee v. Redmond*, 518 U.S. 1, 2, 17-18 (1995).

45. *See id.* at 2, 17-18; Anne W. Robinson, *Evidentiary Privileges and the Exclusionary Rule: Dual Justifications for an Absolute Rape Victim Counselor Privilege*, 31 NEW ENG. J. CRIM. & CIV.

blinks the reality that the real impact of the privilege must be assessed, not when the privilege is asserted, but when the source speaks with the reporter. By focusing on the wrong moment in time, the qualified privilege ignores the disclosures it *prevents* from ever occurring. That is, it disregards the cost to society of all the disclosures that sources *do not make* because they are chilled by the uncertainty of the qualified privilege. It is thus premised on a distorted “balancing” of the competing societal interests.

Moreover, the qualified privilege undermines the very purpose of the journalist-source privilege. Imagine yourself in the position of a source. You are a congressional staffer who has reason to believe a Senator has taken a bribe. You want to reveal this to a journalist, but you do not want to be known as “loose-lipped” or “disloyal.” You face the prospect of a qualified privilege. At the moment you speak with the reporter, it is impossible for you to know whether, four months hence, some prosecutor will or will not be able to make the requisite showing to pierce the privilege. This puts you in a craps-shoot.

But the very purpose of the privilege is to *encourage* sources to disclose useful information to the public. The uncertainty surrounding the application of the qualified privilege directly undercuts this purpose and is grossly unfair to sources, whose disclosures we are attempting to induce. In short, the qualified privilege is a bad business all around. And that is precisely why other privileges are not framed in this manner.

Does this mean the journalist-source privilege must be *absolute*? Thirteen states and the District of Columbia have reached this conclusion.<sup>46</sup> And, indeed, there is considerable virtue in a simple, straightforward, unambiguous privilege. At the same time, however, there may be *some* narrowly-defined circumstances in which it may seem quite sensible to breach the privilege.

For example, if a journalist broadcasts information, obtained from a confidential source, about a grave crime or serious breach of national security that is likely to be committed imminently, it may seem irresponsible to privilege the identity of the source. More concretely, suppose a reporter broadcasts a news alert that, according to a reliable, confidential source, a major terrorist attack will strike New York the next day, and law enforcement authorities want the reporter to reveal the name of the source so they can attempt to track him down to possibly prevent the attack. Is this a sufficiently compelling justification to

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CONFINEMENT 331, 338 (2005).

46. The thirteen states with an absolute privilege are Alaska, Delaware, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oregon, and Pennsylvania.

override the privilege? It would certainly seem so, and this would be analogous to the rule in the psychotherapist-patient context that voids the privilege if the psychotherapist learns that her patient intends imminently to inflict serious harm on himself or others.<sup>47</sup>

But even in this situation the matter is not free from doubt. It must be borne in mind that, as a practical matter, without an absolute privilege the source might not be willing to disclose this information. Thus, in the long-run, this exception could well hinder rather than support law enforcement. Public officials are better off knowing that a threat exists, even if they do not know the identity of the source, than knowing nothing at all. Thus, breaching the privilege in even this seemingly compelling situation may actually prove counterproductive. It is for this reason that the attorney-client privilege generally provides that no showing of need is sufficient to pierce the privilege.<sup>48</sup> Apart from this very narrowly-defined exception, however, an absolute privilege will best serve the *overall* interests of society.

### C. *What if the Source's Disclosure is Itself Unlawful?*

A relatively rare, but interesting twist occurs when the source's disclosure is itself a criminal act. Suppose, for example, a government employee unlawfully reveals to a reporter classified information that the United States has broken a terrorist code or confidential information about a private individual's tax return. As we have seen, the primary purpose of the privilege is to encourage sources to disclose information to journalists because such disclosures promote the public interest. But when the act of disclosure is itself unlawful, the law has already determined that the public interest cuts *against* disclosure. It would thus seem perverse to allow a journalist to shield the identity of a source whose disclosure is itself punishable as a criminal act. The goal of the privilege is to foster whistle-blowing and other lawful disclosures, not to encourage individuals to use the press to commit criminal acts.<sup>49</sup>

A rule that excluded all unlawful disclosures from the scope of the

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47. See, e.g., *United States v. Chase*, 340 F.3d 978, 984 (9th Cir. 2003) (noting that "[m]ost states have a dangerous-patient exception to their psychotherapist-patient confidentiality laws").

48. See, e.g., *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1495 (9th Cir. 1989) (opining that the attorney-client privilege cannot be vitiated by a claim that the information sought is unavailable from any other source, for "[s]uch an exception either would destroy the privilege or render it so tenuous and uncertain that it would be 'little better than no privilege at all'").

49. An interesting question is whether the same principle should apply when the leak is not a crime, but a tort. For example, suppose a confidential source makes a false statement of fact to a newspaper, which publishes the statement, attributing it to a confidential source. Can the newspaper be compelled to reveal the identity of the source on the theory that there is no public policy to encourage people to make false statements of fact to newspapers?

journalist-source privilege would be consistent with other privileges. A client who consults an attorney in order to figure out how to commit the perfect murder is not protected by the attorney-client privilege,<sup>50</sup> and a patient who consults a doctor in order to learn how best to defraud an insurance company is not protected by the doctor-patient privilege. And this is so regardless of whether the attorney or doctor knew of the client's or patient's intent at the time of the conversation.<sup>51</sup> Such use of doctors and lawyers is not what those privileges are designed to encourage.

By the same reasoning, a source whose disclosure is unlawful is not engaging in conduct that society intends to encourage. To the contrary, the very purpose of prohibiting the disclosure is to *discourage* such conduct. It would therefore seem sensible to conclude that such a source is not entitled to the protection of the journalist-source privilege.

There are, however, several objections to such a limitation on the privilege. In some circumstances, it may not be clear to the reporter, or even to the source, whether the disclosure is unlawful. Because of the complexity of the relevant criminal statute, this may have been the case in the Lewis Libby/Matt Cooper situation.<sup>52</sup> If the privilege does not cover unlawful disclosures, but it is unclear whether a particular disclosure is unlawful, how is the reporter to know whether to promise confidentiality?

The answer is simple. As in all privilege situations, a promise of confidentiality should be understood as binding *only to the extent allowed by law*. A similar question may arise in the imminent crime/national security situation. Ultimately, it is for the court, not the reporter, to resolve these issues. In the unlawful disclosure context, the court should protect the privilege unless it finds that the source knew or should have known that the disclosure was unlawful.

A second objection to an unlawful disclosure limitation is that some unlawful disclosures involve information of substantial public value. The *Pentagon Papers* case<sup>53</sup> is a classic illustration. Although the

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50. See, e.g., *Clark v. United States*, 289 U.S. 1, 15 (1933); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1113-17 (1985).

51. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 167 (1986) (noting that professional standards for attorneys prohibit assisting conduct they *know* to be illegal).

52. See Jim VandeHei & Mike Allen, *Bush Raises Threshold for Firing Aides in Leak Probe*, WASH. POST, July 19, 2005, at A01; see also Michael Duffy, *Let's Make a Deal*, TIME, Oct. 10, 2005, at 15; Diedra Henderson, *Reporter Ties Cheney Aide to CIA Story*, BOSTON GLOBE, July 18, 2005, at A1; Anne E. Kornblut, *At Milestone in Inquiry, Rove, and the G.O.P., Breathe a Bit Easier*, N.Y. TIMES, Oct. 29, 2005, at A1.

53. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).



government can ordinarily punish an employee who unlawfully leaks classified information,<sup>54</sup> it does not *necessarily* follow that the privilege should be breached if the information revealed is of substantial value to the public. This is a difficult and tricky question.

In the context of unlawful leaks, the journalist-source privilege may be seen as an intermediate case. On the one hand, government employees ordinarily can be punished for violating reasonable confidentiality restrictions with respect to information they learn during the course of their employment.<sup>55</sup> On the other hand, the media ordinarily may publish information they learn from an unlawful leak, unless the publication creates a clear and present danger of a grave harm to the nation.<sup>56</sup> The journalist-source privilege falls between these two rules. Because the leak is unlawful, it seems perverse to shield the source's identity. But because the press has a constitutional right to publish the information, it seems perverse to require the press to identify the source.

The best resolution is to uphold the privilege if the unlawful leak discloses information of substantial public value. This strikes a reasonable balance between full protection of the source's identity and no protection of his identity, based on the contribution of the leak to public debate. To illustrate what I mean by "substantial public value," I would place the Pentagon Papers and the leak of the Abu Ghraib scandal<sup>57</sup> on one side of the line, and Lewis Libby's conversation with Matt Cooper about Valerie Plame<sup>58</sup> and James Taricani's leak of grand jury evidence in Rhode Island,<sup>59</sup> on the other.<sup>60</sup> Although this rule will

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54. It is important to note that if the leaker cannot constitutionally be punished for the leak, then the leak is not unlawful, and this entire analysis is irrelevant.

55. See, e.g., *Snepp v. United States*, 444 U.S. 507, 507-08, 510 (1980) (per curiam) (upholding a restriction on the publication by a former CIA agent of information learned during the course of his employment by the CIA).

56. See, e.g., *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (holding that the government cannot prohibit the publication of confidential information); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (holding that the government cannot prohibit the publication of confessions and other facts strongly implicative of the accused in a criminal case); *New York Times Co.*, 403 U.S. at 714 (holding that the government could not enjoin publication of the Pentagon Papers).

57. See, e.g., Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation*, WASH. POST, May 11, 2004, at A1.

58. See *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 966-67 (D.C. Cir. 2005); David Johnston & Richard W. Stevenson, *Prosecutor Narrows Focus on Rove Role in C.I.A. Leak*, N.Y. TIMES, Nov. 4, 2005, at A1.

59. See *In re Special Proceedings*, 373 F.3d 37, 40-41 (1st Cir. 2004).

60. This is a higher standard of newsworthiness than the Supreme Court has applied in deciding when the press has a First Amendment right to publish or broadcast information obtained from unlawful sources. See *Bartnicki v. Vopper*, 532 U.S. 514, 534-35 (2001) (holding that a radio commentator could not constitutionally be held liable for damages for broadcasting an unlawfully

inevitably involve some uncertainty in marginal cases, it would apply only in cases in which the leak is itself unlawful, so any chilling effect would be of relatively minor concern.

## VI. CONCLUSION

I will conclude with a few specific observations. First, when is a communication between a source and a journalist “confidential”? Not every conversation is confidential. To meet this standard, the journalist must either expressly promise confidentiality, or the circumstances and content of the conversation must be such that the source would reasonably assume confidentiality. Needless to say, journalists should promise confidentiality only when necessary, only when such a promise is consistent with the law, and only according to prevailing professional standards.

Second, to reiterate a point I made earlier, reporters have no legal or moral right to promise confidentiality beyond what is recognized in the law. Such promises should always be interpreted as “subject to the rule of law.” It is the responsibility of the source as well as the reporter to understand that the reporter cannot legally promise more than the law allows. If a reporter expressly promises more than the law allows, that promise is legally ineffective, like any other promise that is contrary to public policy. A reporter who knowingly deceives a source by promising more than the law authorizes is properly subject to professional discipline and civil liability to the source.

Third, supporters of an absolute journalist-source privilege argue that anything less than an absolute privilege will “chill” free expression. Certainly, this is true. Some disclosures that should not occur will be chilled, and some disclosures that should occur will be chilled. The former is the reason for a less than absolute privilege; the latter is the cost of a less than absolute privilege.

It is in the nature of free speech that it is easily discouraged. Most people know that their decision to participate in public debate by attending a demonstration, signing a petition, or disclosing information to the press is unlikely to change the world in any measurable way. Except in extraordinary circumstances, any one person’s participation will have no discernable impact. As a consequence, any risk of penalty for speech will often cause individuals to forego their right of free expression. This is a serious concern whenever we shape rules about public discourse.

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recorded telephone call, where the broadcast involved “truthful information of public concern”).

But this argument can be made against *any* restriction of free expression. Taken to its logical conclusion, it means that no restriction of speech is ever permissible, because every restriction will chill some speech that should not be chilled. The chilling effect argument must be used with some restraint. As I have already suggested, in my view, in part because of chilling effect concerns, the complete absence of a federal journalist-source privilege is indefensible and the qualified journalist-source privilege strikes the wrong balance. But an absolute privilege may go too far.

A rule that limits the privilege (a) when the government can convincingly demonstrate it needs the information to prevent an imminent and grave crime or threat to the national security or (b) when the disclosure is unlawful and does not substantially contribute to public debate seems to me to strike the right balance. It unduly sacrifices neither compelling law enforcement interests nor the equally compelling interests in promoting a free and independent press and a robust public discourse.

Finally, in light of the substantial interstate effects of the media, it seems appropriate and sensible for Congress to enact a shield law that governs not only federal proceedings, but state and local proceedings as well. Because of the interstate nature of modern communications, a common set of expectations among sources, journalists, law enforcement officials, and courts is essential, and federal legislation is the best way to achieve this result.<sup>61</sup>

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61. Under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, states could not offer a weaker journalist-source privilege than that provided in such federal legislation, but they could of course offer a more protective privilege for state and local proceedings. *See, e.g., Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985) (holding that state laws are only preempted when in conflict with federal law or regulations). Thus, such a law would not interfere with the thirteen states that currently recognize an absolute journalist-source privilege.