

PROTECTING JOURNALISTS FROM COMPELLED DISCLOSURE: A PROPOSAL FOR A FEDERAL STATUTE

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I.

INTRODUCTION

Held in contempt for her refusal to obey several grand jury subpoenas, Vanessa Leggett remained in federal detention for 168 days—nearly six months.¹ Hers was the longest incarceration of a journalist in the United States.² Numerous news organizations, publications, and journalists championed Leggett's case,³ insisting that the public interest required protecting journalists in Leggett's situation.⁴ Otherwise, cautioned members of the press, journalists would be little more than investigators serving individuals and agencies with the power to issue subpoenas to the media.⁵

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1. See Alan Bernstein, *Leggett Free—For Now*, Hous. Chron., Jan. 5, 2002, at 1A; Paul Duggan, *Writer Freed After Five Months in Jail, but New Subpoena Likely*, WASH. POST, Jan. 5, 2002, at A7.

2. Duggan, *supra* note 1. Leggett regained her freedom on January 4, 2002, when the federal grand jury's term came to a close in Houston, Texas. See Bernstein, *supra* note 1. Although the grand jury's term was scheduled to end almost three months earlier, federal prosecutors received an extension that increased Leggett's incarceration. *The Ticker*, TEX. LAW., Nov. 26, 2001, at 4, WL 11/26/2001 TEXLAW 4.

3. Leggett's supporters included the Reporters Committee for Freedom of the Press, American Society of Newspaper Editors, Radio-Television News Directors Association, and Society of Professional Journalists. See Brief of Amici Curiae at 1, *Caveman Adventures Unlimited v. Press-Citizen Co.*, 2001 WL 940433 (5th Cir. 2001) (No. 01-20745), 2001 WL 34113130.

4. See *id.* at *ii–*iii.

5. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001 12–14 (2003), <http://www.rcfp.org/agents/> [hereinafter RCFP, AGENTS OF DISCOVERY] (on file with *The New York University Journal of Legislation and Public Policy*).

A self-declared freelance journalist and fledgling writer, Leggett was called before a Texas grand jury in 1997 because she had looked into the murder of Doris Angleton, a Houston socialite and the estranged wife of Robert Angleton. Doris's body had been discovered in the Angleton home on the evening of April 16, 1997.⁶ She had died of multiple gunshot wounds.⁷ At the time of Doris's murder, Robert Angleton and the couple's twin daughters were not at home.⁸

For two months prior to the shooting, Doris and Robert Angleton had been engaged in reportedly amicable divorce proceedings that Doris had initiated.⁹ During that litigation, Doris alleged that Robert kept large sums of cash in a number of Houston area banks. Doris had obtained a court order freezing those funds.¹⁰ According to investigators, Robert's liquid assets, which accounted for the majority of his income, came from his lucrative Houston bookmaking operations.¹¹ He was, at the same time, a confidential informant for the Vice Squad of the Houston Police Department (HPD).¹² The nature, extent, and propriety of the relationship between HPD and Robert Angleton raised serious concerns among some members of the police department and others.¹³

In August 1997, state prosecutors charged Robert Angleton and his brother, Roger Angleton, with the murder of Doris Angleton.¹⁴ The charges stemmed largely from evidence discovered in Roger Angleton's briefcase following an arrest in Las Vegas earlier in the summer on an unrelated matter.¹⁵ Among the items in Roger's possession were an audio cassette tape containing conversations between Roger and Robert planning a murder, more than \$64,000 in cash, notes about the code for the security alarm at the Houston home of Robert and Doris Angleton, and other incriminating information related to Doris's

6. S.K. Bardwell, *Woman Slain in River Oaks Home Had Filed for Divorce*, HOUS. CHRON., Apr. 18, 1997, at 37A.

7. See S.K. Bardwell, *Husband Sweetens Reward: Suspect Sought in River Oaks Killing*, HOUS. CHRON., Apr. 29, 1997, at 13A.

8. See Bardwell, *supra* note 6.

9. See *id.*

10. See *id.*

11. S.K. Bardwell, *Brothers Nabbed in River Oaks Killing*, HOUS. CHRON., Aug. 2, 1997, at 1A.

12. S.K. Bardwell, *Shooting Inquiry Reveals Husband's Dealings: River Oaks Homicide Calls into Question the Use of Confidential Police Informants*, HOUS. CHRON., May 25, 1997, at 1A.

13. See *id.*; S.K. Bardwell, *Study Calls for Changes in HPD's Informant Policy*, HOUS. CHRON., Nov. 6, 1997, at 37A.

14. See Bardwell, *supra* note 11.

15. See Eric Hanson, *Anatomy of a Grisly Homicide: Affidavit Details Case in River Oaks Killing*, HOUS. CHRON., Aug. 3, 1997, at 1A.

murder.¹⁶ The prosecution's theory was that Robert hired Roger to kill Doris so that she would not expose his bookmaking operation and name his famous clients during their divorce proceedings.¹⁷

While incarcerated and awaiting trial in February 1998, Roger committed suicide,¹⁸ leaving a note stating that he had killed Doris and had framed his brother, Robert.¹⁹ Before his suicide, however, Roger had been interviewed a number of times during a four-month period by Vanessa Leggett, who was planning to write a true-crime book about the murder.²⁰ During the course of its preparation for trial, the prosecution subpoenaed Leggett's tape-recordings of her interviews with Roger.²¹ Leggett complied and turned over her tapes.²²

16. *Id.* Also found in Roger Angleton's possession were money wrappers with Robert's fingerprints on one of them. *Id.* According to local police officers, the audio cassette contained the voices of Robert and Roger Angleton discussing aspects of the murder. *Id.* One voice on the tape spoke of "my house" and detailed Doris Angleton's daily routine; prosecutors were certain that this voice was that of Robert Angleton. Guillermo X. Garcia, *The Vanessa Leggett Saga*, 24 AM. JOURNALISM REV. 20, 23 (2003).

17. See Garcia, *supra* note 16, at 23–24. The state also seized from Robert Angleton nearly \$2 million, which prosecutors claimed were the proceeds from Angleton's gambling and bookmaking operations. George Flynn, *Suits Seek Forfeiture of \$2 Million in Cash: Alleged Bookmaker Kept Money in Deposit Boxes*, HOUS. CHRON., Jan. 14, 1998, at 17A. The state seized additional monies later that year. See Ron Nissimov, *More Money Seized from Suspect in Killing*, HOUS. CHRON., May 6, 1998, at 34A.

18. Eric Hanson, *River Oaks Murder Suspect Apparently Kills Self in Jail*, HOUS. CHRON., Feb. 8, 1998, at 1A ("Three identical notes were discovered in the cell that [Roger] had addressed to the Sheriff's Department, his attorney and his brother . . .").

19. Roger's note claimed that he had acted on his own when he killed Doris and that he was blackmailing his brother, Robert. See *Bookmaker Accused of Hiring Brother to Kill Wife Goes on Trial: Roger Angleton Suicide Note Confession*, LAS VEGAS REV.-J., July 27, 1998, at 8A, available at 1998 WL 7221275; Garcia, *supra* note 16, at 23–24.

20. See Vanessa Leggett, *My Principles Have Landed Me in Jail*, NEWSWEEK, Sept. 3, 2001, at 12. Leggett obtained access to Roger at the county jail through Roger's attorney. See Daniel Scardino, *Vanessa Leggett Serves Maximum Jail Time, First Amendment-Based Reporter's Privilege Under Siege*, 19 COMM. LAW. 1, 15 (Winter 2002), available at <http://articles.corporate.findlaw.com/articles/file/00970/008942> (on file with *The New York University Journal of Legislation and Public Policy*).

21. Lisa Teachey, *Writer Served with Subpoena in Slaying Case*, HOUS. CHRON., Apr. 25, 1998, at 31A. Through her counsel, Leggett had worked out an agreement with state prosecutors. See Garcia, *supra* note 16, at 23. She had handed over copies of her taped conversations with Roger Angleton with the explicit understanding that all copies would be returned to her and no copies would be shared with any other agency. See *id.* At trial, the judge did not permit the Texas prosecutors to introduce Leggett's taped conversations with Roger, deeming them inadmissible hearsay. *Id.* The Leggett tapes contained Roger's admission that he had killed Doris and had done so at the behest of and with payment from Robert. See *id.*

The State tried Robert Angleton for Doris's murder in August 1998.²³ The prosecution, however, was precluded from entering into evidence Roger's suicide note and the tapes of Leggett's conversations with Roger. Thus, the State never called Leggett to the stand to testify about the content of her interviews with Roger.²⁴ Robert was acquitted on all charges even though not all jurors believed that he was innocent; rather, the defense had successfully raised enough doubt in the minds of a few jurors who said that they were not able to convict on the evidence presented to them.²⁵

There has been speculation that Leggett's subsequent problems were prompted in part by the state prosecutor's failure to convict Robert Angleton—speculation that the state prosecutor, angered and embarrassed by the loss, turned to the U.S. Attorney for vindication.²⁶

22. See Garcia, *supra* note 16, at 23. Roger Angleton had provided extensive details concerning the murder plot during more than 50 hours of taped interviews with Leggett. *Id.* Although the tapes were handed back to her, Leggett later learned that copies had been turned over to the U.S. Attorney's Office in Houston in violation of her agreement with the state prosecutors. See *id.*

23. Steve Brewer, *Prosecutor Tells How Brothers Plotted Murder: Defense: Ex-Bookie Was Victim*, HOUS. CHRON., July 29, 1998, at 19A. For additional coverage of Robert Angleton's trial, see Steve Brewer, *Jury Told of Angleton's Life as a Tattletale Bookie*, HOUS. CHRON., July 30, 1998, at 29A; Steve Brewer, *Angleton Case Jury May Hear Audiotape*, HOUS. CHRON., July 31, 1998, at 33A; Steve Brewer, *Testimony Centers on Writings: Notes Playing a Big Role for Both Sides in River Oaks Slaying Trial*, HOUS. CHRON., Aug. 1, 1998, at 29A; Steve Brewer, *'Boom! Boom! Boom!': Jurors Hear Death-Plot Tape: Witnesses Say Voice Are Those of Robert Angleton and Brother*, HOUS. CHRON., Aug. 4, 1998; Steve Brewer, *Angleton's Girls Take the Stand at Slaying Trial*, HOUS. CHRON., Aug. 7, 1998, at 37A; Steve Brewer, *Deliberations to Resume in Angleton Slaying Case*, HOUS. CHRON., Aug. 11, 1998, at 1A.

24. Steve Brewer, *Seen and Unseen: The Angleton Trial: Defense, Prosecution Had Evidence that the Jurors Never Got to Hear*, HOUS. CHRON., Aug. 16, 1998, at 33A. The author noted that:

If the suicide notes had been admitted prosecutors were prepared to call Vanessa Leggett to testify. She's writing a book on the case and spent hours interviewing Roger Angleton. The jailhouse interviews were taped, and prosecutors say Leggett was prepared to testify that Roger Angleton had told her of [his] brother's involvement in the murder plot.

Id.

25. Stefanie Asin, *Poor Recording Created Enough Doubt, Jurors Say*, HOUS. CHRON., Aug. 13, 1998, at 29A. Two jurors, Sharon Mantzel and Johnnie Davis, felt "the reasonable doubt issue centered around a scratchy audiotape that purportedly incriminated Angleton and his brother, Roger Angleton." *Id.* Mantzel said that she suspected the voice on the tape was Robert Angleton's, but that she was not convinced, noting that she believed that the jury "did not have the proof to say it was him." *Id.* Davis said he "wasn't sure" whether it was Angleton's voice on the tape. *Id.* See also Steve Brewer, *Jury Hands an Acquittal to Angleton: Wealthy Ex-Bookie Cleared of Role in Wife's '97 Slaying*, HOUS. CHRON., Aug. 13, 1998, at 1A.

26. See Paul H. Blackman & Dave Kopel, *Redefining Justice*, NAT'L REV. ONLINE, Aug. 27, 2001, at www.nationalreview.com/kopel/kopelprint082701.html ("Politically ambitious prosecutor Chuck Rosenthal was dissatisfied with the result. His wife

By this time, Leggett had developed close contacts with several Federal Bureau of Investigation (FBI) agents in the Houston field office. Commentators have suggested that the agents may have been concerned about how much information Leggett had gleaned from them in the course of their investigation of Robert Angleton.²⁷

In 2000, federal prosecutors began their own investigation of Robert Angleton.²⁸ As part of the government's efforts to discover all relevant materials, FBI agents were sent to speak with Vanessa Leggett.²⁹ During their meeting with her, they offered her a standard "confidential-informant contract."³⁰ Under its terms, the contract would have entitled the government to any and all of Leggett's research, including the materials she had gathered as part of her investigation of the Doris Angleton murder.³¹

According to Leggett, she declined the government's offer on two grounds: first, that her information was not for sale, and second, that allowing the government to determine the nature and extent of the information that she would be permitted to reveal would interfere with her First Amendment rights as a journalist.³² Upon Leggett's rejection of the informant contract, the FBI agents handed her a grand jury sub-

Cindy is a Houston FBI agent and the feds started investigating Angleton."'). Blackman and Kopel note that Cindy Rosenthal personally served Leggett with a FBI subpoena for Leggett's notes. *See id.* *See also* Skip Hollandsworth, *The Inmate*, TEX. MONTHLY, Dec. 2001, at 42, 44 (suggesting that federal agents in Houston were worried about what Leggett would say about them in writing about Angleton case).

27. *See* Garcia, *supra* note 16, at 26.

28. Robert Angleton was arrested on January 25, 2002, on federal charges including conspiracy, murder-for-hire, and firearms violations. *See* Rosanna Ruiz & Susan Bardwell, *Angleton Arrested, This Time by Feds: Indictment Lists Murder for Hire*, HOUS. CHRON., Jan. 26, 2002, at 1A. *See also* Rosanna Ruiz, *Judge Sets \$1 Million Bail for Angleton in Wife's Death*, HOUS. CHRON., Jan. 29, 2002, at 15A; Rosanna Ruiz, *Angleton Released from Jail After Federal Judge Cuts Bail*, HOUS. CHRON., Feb. 14, 2002, at 36A.

29. *See* Leggett, *supra* note 20, at 12. Leggett had been developing a number of relationships with various individuals in connection with her investigation of the murder of Doris Angleton. Among these sources were four FBI agents from Houston, including the lead investigator on the case. *See* Garcia, *supra* note 16, at 24.

30. They did so because the Department of Justice did not view Leggett as a journalist. *See* Letter from the Reporters Comm. for Freedom of the Press, to Attorney General John Ashcroft, about a News Subpoena for Vanessa Leggett (Jan. 14, 2002), available at <http://rcfp.org/news/documents/20020114Leggett.html> [hereinafter RCFP letter] ("Officials in your Department have acknowledged that they did not consider Ms. Leggett to be a journalist when they issued the initial subpoena and did not apply the [Department's] guidelines for subpoenas of the news media to her.") (on file with *The New York University Journal of Legislation and Public Policy*).

31. Leggett, *supra* note 20, at 12.

32. *Id.*

poena.³³ The subpoena demanded far more than Leggett's tape-recorded interviews of Roger Angleton; it would have given the government control over the dissemination of any or all of her materials.³⁴ Over the course of several months, the government served additional subpoenas on Leggett, demanding all of her audio tapes (original and copies), transcripts, and notes related to the Angleton case.³⁵

When Leggett refused to comply with the various government subpoenas, the federal prosecutors headed to court.³⁶ On July 20, 2001, she appeared before a federal trial judge in Houston, Texas. Upon her refusal to obey the government's subpoenas, the judge held Leggett in contempt and ordered that she be jailed immediately.³⁷ Leggett appealed. On August 17, 2001, the Fifth Circuit found that

33. See RCFP Letter, *supra* note 30 ("The breadth of the initial subpoena—requesting all originals and copies, including transcripts, of interviews Ms. Leggett conducted during four years of research—could not have met the requirements of the Department's guidelines.").

34. The reach of the subpoenas was sweeping; they encompassed more than simply the tapes Leggett made during her interviews with Roger Angleton. *Id.* The subpoenas demanded all of her confidential sources. See Leggett, *supra* note 20, at 12. One commentator has said that the federal prosecutor "figured that [Leggett's] notes might save him a good deal of trouble." See James J. Kilpatrick, *Writer Not Free to Be Above the Law*, *AUGUSTA CHRON.*, Mar. 10, 2002, at A4.

35. The federal subpoenas were very broad in contrast to the agreement worked out between state prosecutors and Leggett's attorney. The state's request was limited to the taped conversations between Leggett and Roger Angleton. See Garcia, *supra* note 16, at 23. The agreement allowed for return of the tapes to Leggett if they were not introduced at trial, and no additional agencies or personnel were to have access to or copies of the tapes. *Id.* Leggett's attorney, Mike DeGeurin, has speculated that the tapes were copied and handed over to federal prosecutors. See *id.*

36. Leggett appeared before a federal grand jury on December 7, 2000, and testified about a number of matters. See Scardino, *supra* note 20, at 15. She declined, however, to reveal the names of any of her confidential sources. See *id.* In June 2001, she was served with another subpoena requiring her not only to testify but also to produce all of her research, originals and copies. *Id.* She refused and made a motion to quash the subpoena, which was denied on July 6, 2001 by a federal judge. *Id.* On July 18, 2001, the government served Leggett with another subpoena that made the same requests as the June subpoena. *Id.* Again, Leggett made a motion to quash, which was again denied. *Id.*

37. Mary Flood, *Writer Will Remain Behind Bars: Appellate Panel Says Enforcing Law Outweighs Press Privilege*, *HOUS. CHRON.*, Aug. 18, 2001, at 1A. The purpose of civil contempt is to force an individual to obey the court's order by fining or imprisoning the contemnor for an indefinite period. See JAMES M. FISCHER, *UNDERSTANDING REMEDIES* § 312[b] (1999). By contrast, the purpose of criminal contempt is to punish the contemnor's refusal to obey the court's directive. *Id.* § 312[a]. Ironically, the civil contemnor may be imprisoned longer than the criminal contemnor; while criminal contempt is punishable by a finite term of jail, civil contemnors may be imprisoned indefinitely so long as they remain in violation of the court order. See *id.* § 312[c][i].

the trial judge had not exceeded her discretion and refused to lift Leggett's citation for contempt or release her on bond pending appeal.³⁸ Leggett's request for reconsideration was also rejected.³⁹

On January 4, 2002, Leggett was released from custody,⁴⁰ but federal prosecutors may again subpoena her materials concerning the Doris Angleton murder. Leggett has stated publicly that should she be served with another demand, she will refuse to turn over any of her research to the government.⁴¹

Later in January, the federal government indicted Robert Angleton on several charges, including murder-for-hire.⁴² And in April 2002, the United States Supreme Court denied Leggett's petition for *certiorari*.⁴³

The last word on this matter may, however, belong to Vanessa Leggett. In late April 2002, she signed a book contract with a major publisher.⁴⁴ Leggett has indicated that her upcoming book will discuss both her sources and the detailed information she obtained through her investigative efforts regarding the murder of Doris Angleton.⁴⁵

The struggle between Vanessa Leggett and the federal government over Leggett's confidential materials offers an excellent introduction to the complicated issues surrounding compelled disclosure. This article explores those issues as a means of illustrating why a journalist's privilege, an important subset of the First Amendment's freedom of the press, should be codified by Congress.

38. See Flood, *supra* note 37. It is difficult to parse through the facts and proceedings in this matter because the trial judge conducted the relevant hearings in secret, barring both the public and the media. Although Robert Angleton has been indicted, federal prosecutors could subpoena Leggett for testimony at Angleton's trial. If she refuses to testify, prosecutors could then seek criminal contempt charges against Leggett.

39. See *Appeals Court Rejects Bond, Rehearing for Jailed Reporter*, NEWS MEDIA UPDATE (Reporters Comm. for Freedom of the Press, Arlington, Va.), Nov. 13, 2001, at <http://www.rcfp.org/news/2001/1113inregr.html> (on file with *The New York University Journal of Legislation and Public Policy*).

40. See Erica Lehrer Goldman, *Free At Last, But Will It Last? Writer Vanessa Leggett's Legal Troubles May Not Be Over*, TEX. LAW., Jan. 14, 2002, at 12.

41. See Bernstein, *supra* note 1.

42. Ruiz & Bardwell, *supra* note 28.

43. See 535 U.S. 1011 (2002). See also Linda Greenhouse, *Supreme Court Roundup*, N.Y. TIMES, Apr. 16, 2002, at A25; Mike Tolson, *High Court Refuses to Hear Writer's Case*, HOUS. CHRON., Apr. 16, 2002, at 1A.

44. David D. Kirkpatrick, *Book Contract for Writer Jailed for Contempt*, N.Y. TIMES, Apr. 30, 2002, at A26.

45. See *id.* Leggett said her book would draw on several of the confidential interviews prosecutors sought, including interviews conducted with a priest and a psychologist who had worked with Roger Angleton. *Id.*

The need to protect journalists against forced disclosure is more urgent than ever in the wake of the horrific events of September 11, 2001 and the ensuing War on Terror.⁴⁶ The challenge facing this nation, its decision makers, and its citizens is how best to tighten security and prevent attacks without needlessly eroding civil liberties.⁴⁷ The difficulty is that ordinary citizens are limited to the information that the media makes available.⁴⁸ Recent headlines and editorials illustrate that civil liberties are at risk. For example, the government has refused to provide the media with pertinent information regarding people detained in the United States in connection with the September 11 terrorist attacks, including the number of detainees, the locations of the facilities in which they are being confined, and the names of those being held.⁴⁹

46. See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700–11 (6th Cir. 2002) (declaring unconstitutional government's practice of conducting closed-door deportation hearings involving alleged terrorists); Adam Liptak, *A Court Backs Open Hearings on Deportation: Secrecy May Be Sought Case by Case, It Says*, N.Y. TIMES, Aug. 27, 2002, at A1.

47. See, e.g., Michael Duffy & Nancy Gibbs, *How Far Do We Want the FBI to Go?*, TIME, June 10, 2002, at 24, 26, 28 (describing difficulty of balancing concern for public safety with privacy concerns as FBI and Justice Department work to prevent future terrorist attacks). This country has faced other situations in which national security was a heightened concern, such as the Vietnam War era. See, e.g., N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (rejecting government's attempt to stop *The New York Times* and *Washington Post* from publishing the *Pentagon Papers*, "a classified study entitled 'History of U.S. Decision-Making Process on Viet Nam Policy'").

48. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)

The predominant purpose of [the press clause] was to preserve an untrammelled press as a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; . . . informed public opinion is the most potent of all restraints upon misgovernment. . . .

Id.

49. See, e.g., REPORTERS COMM. FOR FREEDOM OF THE PRESS, HOMEFRONT CONFIDENTIAL: HOW THE WAR ON TERRORISM AFFECTS ACCESS TO INFORMATION AND THE PUBLIC'S RIGHT TO KNOW 61–67 (4th ed. 2003), available at www.rcfp.org/homefrontconfidential; *Access to Terrorism Proceedings*, SECRET JUSTICE (Reporters Comm. for Freedom of the Press, Arlington, Va.), Winter 2002, at <http://www.rcfp.org/secretjustice/terrorism/index.html>; William F. Schulz, *The Torturers Among Us*, N.Y. REV. BOOKS, Apr. 25, 2002, at 22

Since the attacks of September 11, the U.S. government has been assiduous in rounding up people it suspects of some connection with terrorism. At least 1,200 immigrants living in the United States were taken into custody in the days and weeks following the attack. Many of them have been held for months without knowing the reasons why they have been detained

Id. (on file with *The New York University Journal of Legislation and Public Policy*).

This is troubling from a civil liberties perspective. The media has been seeking that information, but has met resistance from potential sources.⁵⁰ Because meaningful protection for journalists and their sources is lacking, individuals with relevant information will not reveal it for fear of losing their jobs or facing other negative repercussions.⁵¹ In turn, the press will be incapable of fulfilling two of its primary roles in our democracy: serving the public as a watchdog over the government and as a critic of the government's actions.⁵²

The United States Supreme Court has squarely addressed the issue of a journalist's privilege only once. In *Branzburg v. Hayes*, a majority of five rejected the concept of a constitutional rule as the source of a shield for journalists, saying that the fair administration of justice outweighed the journalists' claim of a special privilege.⁵³ The four dissenting justices argued that a qualified privilege for journalists was critical to enable the press to meet the public's need for information from a broad and diverse range of news media.⁵⁴

50. For purposes of this article, the process of newsgathering is distinguished from access. Newsgathering is the journalist's act of finding, receiving, and investigating facts and information from sources for later dissemination to the public. Access is the process by which a journalist seeks entrée to a particular proceeding, forum, or records. In some instances, journalists have been denied access to places, persons, or proceedings. See, e.g., *Pell v. Procunier*, 417 U.S. 817, 835 (1974) (stating press may be denied access to prisons and inmates without violating First Amendment); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (stating press may be denied face-to-face interviews with prison inmates where sources of information are available publicly). In judicial proceedings, there are potential conflicts between the defendant's Sixth Amendment rights and the desires of the press. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 355–62 (1966) (assessing damage from highly prejudicial pre-trial publicity and suggesting remedies). There is also a limited right of access to both the executive and legislative branches of government. The Court has crafted a two-part standard to assess whether a location is one that has been traditionally available to both the press and the public and whether such access plays a large and positive role in the process at issue. See *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8–10 (1986).

51. See *Branzburg v. Hayes*, 408 U.S. 665, 729 (1972) (Stewart, J., dissenting) (“[A source] may have information valuable to the public discourse, yet [] may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure . . .”).

52. See *N.Y. Times Co.*, 403 U.S. at 717 (Black, J., concurring) (“In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. . . . The press was protected so that it could bare the secrets of government and inform the people.”).

53. 408 U.S. at 695–99.

54. See *id.* at 726–27 (Stewart, J., dissenting). Justice Stewart was joined by Justices Brennan and Marshall and argued for a qualified privilege for journalists' confidential sources. Justice Douglas also dissented, but wrote separately to urge an absolute privilege for journalists. See *id.* at 711–25 (Douglas, J., dissenting).

A number of lower federal courts have attempted to circumvent or distinguish *Branzburg*'s holding. Beginning in the early 1970s and continuing to the present, most of the Circuit Courts of Appeals have applied the principles from Justice Stewart's *Branzburg* dissent to cases raising the issue of compelled disclosure on the part of journalists.⁵⁵ However, the Sixth Circuit and, more recently, the Fifth Circuit, have adhered to the majority's position as articulated in *Branzburg*.⁵⁶

The *Branzburg* majority invited Congress and the states to create their own rules.⁵⁷ Although Congress has made several attempts, it has been unable to pass legislation to shield journalists and their sources.⁵⁸ Federal courts have interpreted *Branzburg* in varying ways, but have generally adhered to the principles set forth in Justice Stewart's dissent. For example, immediately after *Branzburg*, the Second Circuit found that in civil cases "the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony."⁵⁹ The policy driving the protection for journalists was the "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment."⁶⁰

Many states have enacted shield laws of their own, resulting in a series of contradictory and conflicting statutes that vary widely in the

55. See, e.g., *LaRouche v. Nat'l Broad. Corp.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983); *Zerilli v. Smith*, 656 F.2d 705, 711-12 (D.C. Cir. 1981); *Miller v. Transamerican Press*, 621 F.2d 721, 725 (5th Cir. 1980); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594-95 (1st Cir. 1980); *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *Farr v. Pitchess*, 522 F.2d 464, 468-69 (9th Cir. 1975); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 (8th Cir. 1972). But see *Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 584-85 (6th Cir. 1987) (criticizing other circuits' recognition of journalist's privilege).

56. See *Storer Communications, Inc.*, 810 F.2d at 584-86 (rejecting concept of journalist's privilege in grand jury proceedings); *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (concluding that fair administration of justice outweighs other interests).

57. See *Branzburg*, 408 U.S. at 706.

58. Congress has attempted on several occasions to draft legislation but has failed to produce a federal shield law. See, e.g., H.R. 215, 94th Cong. (1975); H.R. 2015, 93d Cong. (1973); H.R. 837, 92d Cong. (1971); S. 1311, 92d Cong. (1971); S. 3552, 91st Cong. (1970).

59. See *Baker v. F & F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972).

60. *Id.* at 782 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

protection they provide.⁶¹ Some states grant nearly complete protection for a reporter's sources and information, while others provide little or none.⁶² The outcome of a journalist's motion to quash a subpoena turns on a particular court's interpretation of *Branzburg* or a legislative enactment.⁶³ This is so on both the state and federal levels.⁶⁴ The resulting patchwork of rules regarding a journalist's privilege has led to contrasting and unpredictable results.⁶⁵ Whether disclosure will be compelled, and how much must be disclosed, also

61. To date, thirty-one states and the District of Columbia have shield laws. *See* ALA. CODE § 12-21-142 (1995); ALASKA STAT. §§ 09.25.300–.390 (Michie 2002); ARIZ. REV. STAT. ANN. §§ 12-2214, 12-2237 (West 2003); ARK. CODE ANN. § 16-85-510 (Michie 1987); CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070 (West 1995); COLO. REV. STAT. §§ 13-90-119, 24-72.5-101 to -106 (2002); DEL. CODE ANN. tit. 10, §§ 4320–4326 (Michie 1999); D.C. CODE ANN. §§ 16-4701 to -4704 (2001); FLA. STAT. ANN. § 90.505 (West 1999); GA. CODE ANN. § 24-9-30 (1995); 735 ILL. COMP. STAT. 5/8-901 to -909 (1992); IND. CODE ANN. §§ 34-46-4-1 to -2 (Michie 1998); KY. REV. STAT. ANN. § 421.100 (Michie 1992); LA. REV. STAT. ANN. §§ 45:1451–1459 (West 2002); MD. CODE ANN., CTS & JUD. PROC. § 9-112 (2002); MICH. COMP. LAWS ANN. § 767.5a (West 2000); MINN. STAT. ANN. §§ 595.021–.025 (West 2000); MONT. CODE ANN. §§ 26-1-901 to -903 (2001); NEB. REV. STAT. §§ 20-144 to -147 (1997); NEV. REV. STAT. 49.275, 49.385 (2001); N.J. STAT. ANN. §§ 2A:84A-21 to -21.9, 2A:84A-29 (West 1994); N.M. STAT. ANN. § 38-6-7 (Michie 1978); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2001); N.C. GEN. STAT. § 8-53.11 (2000); N.D. CENT. CODE § 31-01-06.2 (1996); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Anderson 1992); OKLA. STAT. ANN. tit. 12, § 2506 (West 1981); OR. REV. STAT. §§ 44.510–.540 (2001); 42 PA. CONS. STAT. ANN. § 5942 (West 2000); R.I. GEN. LAWS §§ 9-19.1-1 to .1-3 (1997); S.C. CODE ANN. § 19-11-100 (Law. Co-op. 1976); TENN. CODE ANN. § 24-1-208 (2000). In some states without shield laws, the courts have relied on language within the state's constitution for a journalist's privilege. *See, e.g.,* State v. Siel, 444 A.2d 499, 503 (N.H. 1982); Zelenka v. State, 266 N.W.2d 279, 286 (Wis. 1978). *But see* Texas *ex rel.* Healey v. McMeans, 884 S.W.2d 772, 775 (Tex. Crim. App. 1994) (finding no state or federal privilege for journalists). Washington has found a common law basis for a reporters' privilege. *See* Senear v. Daily J.-Am., 641 P.2d 1180, 1182–83 (Wash. 1980).

62. *See* Laurence B. Alexander & Leah G. Cooper, *Words That Shield: A Textual Analysis of the Journalist's Privilege*, 18 NEWSPAPER RES. J. 51, 60–64 (1997) (describing wide variations afforded by state shield laws gleaned from textual reading).

63. *See id.* at 53–54 (“[L]awmakers were concerned about the increases in news-related subpoenas, the confusion in interpreting the holding in *Branzburg* and the need to protect the public interest in the free flow of information as a matter of public policy.”).

64. The lower courts' interpretations of *Branzburg* demonstrate that the decision was either discounted or misunderstood. *See id.* at 53–54 (asserting that *Branzburg* has confused courts).

65. *See* Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 130 (2002) (proposing, as remedy for wide variations in state shield laws, state statute that would reach journalists engaged in newsgathering and dissemination by means of traditional news media and “online news services, or any other regularly published news outlet”).

depends upon the particular state in which the journalist is pursuing a story when she is subpoenaed by the government, a criminal defendant, or a private litigant.⁶⁶ The disparate nature of the outcomes affects reporters' practices, the flow of information, the stories told—or *not* told—in various forms of media, and, ultimately, the public's ability to learn about matters of interest and importance.

Another outcome-skewing factor that courts consider is whether a person is deemed a journalist in the traditional sense, which generally limits the field to those who are employed by newspapers, magazines, television networks, or radio stations. This is far too narrow. A more appropriate inquiry would be based upon the purpose of the individual's newsgathering efforts and her intent to disseminate the information to the public.

Therefore, I propose the Journalist's Communication Act (JCA) as a remedy for the multiple problems that exist in the current patchwork of state and federal rules and rulings regarding forced disclosure.⁶⁷ A uniform standard for courts, litigants, and journalists is necessary to promote regularity, to provide consistency of outcomes, to assure more certainty in this important area of the law, and to enable the free press to serve as agents of the public interest. Additionally, a federal statute would provide a floor—not a ceiling—to determine how journalists' communications are treated when disclosure is sought.

Within the area of newsgathering, there is no general agreement as to minimum standards or definitions. The JCA, therefore, would address a number of concerns, including: 1) which principles and doctrines should be considered in order to balance the interests of the press and those of the party seeking disclosure; 2) who can claim the title of journalist and how that determination should be made; 3) whether non-traditional journalists should fall within the definition of "journalists"; 4) what entities fall within the term "news media"; 5) what is news; and 6) when, if at all, disclosure should be compelled, and what factors a court should utilize in determining whether materials and sources should be revealed.⁶⁸

66. See, e.g., *Texas ex rel Healey v. McMeans*, 884 S.W.2d at 775 (finding no federal or state shield for journalists). But see *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 595–96 (1st Cir. 1980) (finding qualified reporter's privilege).

67. See discussion *infra* Part II.

68. Congressional drafters have faced these same questions. The challenge of defining which journalists were covered—that is, how broad or narrow the definition should be—was a primary concern. Second, the extent of coverage was an issue. Another was whether the coverage should be limited to particular proceedings—such as those before a grand jury, trials, or legislative investigations—or whether coverage

If newsgathering is to have not only a bark but also a bite, then the legal system must provide even-handed protection to all journalists who gather news and information for dissemination to the public. Principles of journalistic integrity—those which drive the act and craft of newsgathering, the Press Clause, and the public's need to be informed on a wide variety of matters—should be grounded in sound policy considerations and carefully weighed and expressed in a federal statute, and not dependent upon the exigencies of a reporter's particular geographic location or varying judicial interpretations of *Branzburg*.

II.

THE JOURNALIST'S COMMUNICATION ACT

The proposed JCA addresses the policies and values underlying the freedom of the press by providing journalists with a qualified privilege against compelled disclosure. Under the terms of the JCA, the journalist, not the source, holds the privilege. She may withhold information or the identity of a source as described below unless the moving party demonstrates that Section 7 applies. After setting out the proposed statute in its entirety, I will analyze and discuss each section to explicate its relevant policies and values.

The Journalist's Communication Act

Section 1: Purpose. In keeping with the mandate of the Press Clause of the First Amendment of a free and untrammelled press, journalists' communications are protected from compelled disclosure in federal or state judicial, legislative, and administrative proceedings, except as set forth under Section 7.

Section 2: Journalists.

- a) A journalist is a person who is regularly engaged in newsgathering for the purpose of disseminating the information gathered from sources and communications and is, or has been, associated with a news entity as described in Section 4.
- b) Those individuals regularly engaged in newsgathering include reporters, editors, and photojournalists.

Section 3: Non-traditional Journalists. Individuals who do not come within the definition of Section 2 may be deemed to be journalists for purposes of this Act:

should extend to certain types of proceedings—such as investigatory or adjudicative proceedings. See, e.g., Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 262 (1974) (describing process within Congress to draft federal statute in early 1970s). The Supreme Court grappled with the same questions in *Branzburg v. Hayes*, 408 U.S. 665 (1972).

a) Upon demonstrating, by clear and convincing evidence, that at the inception of the newsgathering project at issue, the individual's motivation and intent focused on the dissemination of the final work product to the public.

b) For purposes of this section those who may seek protection include, but are not limited to, book authors, photographers, documentary film makers, and scholars.

Section 4: News media. News media are those entities that are regularly engaged in the dissemination of news and information to the public through a variety of fora, including:

a) Newspapers, magazines, periodicals, radio, television (broadcast, cable, and satellite);

b) Online magazines, online periodicals, online news services and online broadcasts, including radio and real-time video newscasts.

Section 5: Communications. Communications include information that the journalist, with intent to disseminate it to the public, has obtained in the course of newsgathering.

a) Communications include, but are not limited to, notes, documents, photographs, audio and videotapes, digitally recorded materials, and outtakes from broadcast materials.

b) Communications that have been disseminated publicly by the journalist or the news media are not protected under this act.

Section 6: Source or sources. A source, or sources, of information include(s) those individuals who have provided the journalist with communications that are to be held in confidence by the journalist.

Section 7: Disclosure. Disclosure of a source or sources of information and communications may be required where the moving party demonstrates, by clear and convincing evidence, that:

a) The communication to the journalist goes to the central issue(s) in the movant's case, and

b) The movant cannot obtain the requested information through alternative means and after reasonable efforts have been exhausted, and

c) There is a heightened need for the communication; or

d) The journalist was a participant in a crime based upon a showing of probable cause.

A. Section 1: Purpose

1. Policies and Values

The underlying values of a proscription against compelled disclosure by a journalist, broadly described, are the free flow of information and the public's need for a wide range of information in order to

make informed decisions. The First Amendment mandates, among other things, that Congress not enact laws that abridge "the freedom of Speech, or of the Press."⁶⁹ On its face, the Press Clause appears to provide protection to an institution, rather than to an individual.⁷⁰ Indeed, a number of judges and commentators have argued that the Press Clause is merely an extension of the Speech Clause, offering no greater protection to the press than is afforded to speech in general.⁷¹

Others, however, suggest that the Press Clause is unique in its own right.⁷² One of the leading proponents of this latter view, Justice

69. U.S. CONST. amend. I. See also JEFFERY A. SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* (1988) (examining philosophical, political, and historical background of press in eighteenth-century America); David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455 (1983) (providing in-depth discussion and analysis of history and meaning of Press Clause). Compare LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985) with David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985) (challenging Levy's interpretation of historical background of freedom of press).

70. Most of the amendments in the Bill of Rights, such as the right to be free from unreasonable searches and seizures, the right against self-incrimination, and the right to a public trial, provide protections to the individual. See U.S. CONST. amends. IV, V, VI. Justice Potter Stewart raised the notion of institutional protection in the 1970s, arguing that the press, as an institution, was protected by its own constitutional clause. See Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975) ("The publishing business is, in short, the only organized private business that is given explicit constitutional protection."). Justice Stewart did not, however, mention that the Establishment and Free Exercise Clauses may also be viewed as having provided First Amendment protections to institutions.

71. See, for example, Chief Justice Burger's view in *First National Bank v. Bellotti*, 435 U.S. 765, 798–801 (1978) (Burger, C.J., concurring)

I perceive two fundamental difficulties with a narrow reading of the Press Clause. First, although certainty on this point is not possible, the history of the Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege. . . . The second fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition.

Id.

See also Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 737 (1977) ("It is by no means clear exactly what [colonial Americans] had in mind, or just what they expected from the guarantee of freedom of speech, press, assembly, and petition."); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979) (rejecting claim that press clause affords distinct protection to press).

72. See, e.g., Stewart, *supra* note 70, at 633; Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979) (proposing that Press Clause affords different protection than does Speech Clause); Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 740–54 (1977); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 647–58 (1975) (proposing that Press Clause affords different protection than does Speech Clause).

Potter Stewart, took the position that the Press Clause offers a different protection for the press. Under his analysis, the Press Clause is a separate and distinct protection for that particular institution. According to Justice Stewart, the chief function of the press is to serve as the fourth branch of government that checks the other three while remaining wholly separate and apart from the legislature, the executive, and the judiciary.⁷³ The free flow of information that enables journalists to collect, sort, and disseminate news to the public is essential in order for the press to fulfill its duty of checking the other branches.

The act of newsgathering—defined as the process by which journalists obtain information that becomes newsworthy, such as a series of facts, a document, a story, an event, or an article⁷⁴—is directly tied to the free flow of information. Those engaged in gathering, synthesizing, and reporting the news must have some latitude in seeking and obtaining both the information and the sources of those materials.⁷⁵

The first step in newsgathering is the process of discovering people with relevant information. Often this requires journalists to cultivate relationships with individuals who have pertinent knowledge. This process necessitates both time and repeated efforts on the part of the reporter, since an individual source may be reluctant to provide certain information and materials for fear of reprisals or public scrutiny. The source may also be concerned about potential damage to her personal or economic well-being if her identity is made public.

Adding complexity to this gathering process is the fact that news is not always susceptible of easy or quick discovery.⁷⁶ Indeed, signifi-

73. See Stewart, *supra* note 70, at 634.

74. For the purposes of this article, “news” is defined broadly to encompass not only hard news but also gossip, to enable an expansive flow of shared information. Newsworthy stories often develop from gossip; recall the relationship between President William Clinton and Monica Lewinsky, which first came to light as gossip but ended with impeachment proceedings against the President. See Gerald Walpin, *Clinton’s Future: Can He Polish His Image and Keep His License to Practice Law?*, 28 HOFSTRA L. REV. 473 (1999). Journalists often define the term “news” quite broadly. See BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* 10 (2001) (“We need news to live our lives, to protect ourselves, bond with each other, identify friends and enemies. Journalism is simply the system societies generate to supply this news.”).

75. See LEONARD DOWNIE JR. & ROBERT G. KAISER, *THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL* 32–51 (2002) (describing lengthy investigations of local and national stories undertaken by *Washington Post* and *The New York Times* reporters).

76. See KOVACH & ROSENSTIEL, *supra* note 74, at 43 (“It is actually more helpful, and more realistic, to understand journalistic truth as a process—or continuing journey toward understanding—which begins with the first-day stories and builds over time.”); *id.* at 47–48 (“[T]he press needs to concentrate on *synthesis and verification*. Sift out the rumor, innuendo, the insignificant, and the spin and concentrate on what is

cant time, effort, and analysis may be required before the depth and breadth of an event or a story can be fully explored and analyzed by newsgatherers. Often, multiple articles covering different angles, published over a period of time, may be needed before a comprehensive treatment of a subject is disseminated to the public.⁷⁷

When judges, scholars, legislators, and journalists discuss the freedom of the press, the importance of a free flow of information emerges as a central theme.⁷⁸ The Supreme Court has recognized that both expression and information are necessary elements to a democratic society such as ours, describing, in numerous opinions, how these components of democracy are linked to citizens and governance.

For example, in *Whitney v. California*,⁷⁹ Justice Brandeis elaborated on three central principles at the core of the freedom of speech.⁸⁰ The first tenet concerns governance and the citizen's role in that process.⁸¹ For citizens to participate effectively and intelligently in matters of public concern and governance, they must have access to a broad spectrum of views on a particular topic. Justice Brandeis's sec-

true and important about a story."). See also DOWNIE & KAISER, *supra* note 75, at 32–51 (describing lengthy process of investigating potential stories).

77. The Watergate Scandal, in which the Democratic National Committee offices in Washington, D.C., were burglarized by a band of men whose ties reached into the highest levels of the Nixon White House, is an example of this type of complex story. The story led ultimately to the resignation of President Richard M. Nixon in 1974. See generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974) (describing complex and difficult trail of Watergate burglars and their connections to upper level White House officials). See also *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976).

78. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 723–24 (1971) (Douglas, J., concurring) ("The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information Secrecy in government is fundamentally anti-democratic Open debate and discussion of public issues are vital to our national health.").

79. 274 U.S. 357 (1927).

80. *Id.* at 375 (Brandeis, J., concurring)

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies

Id.

81. *Id.* (positing liberty as end and means, and as secret of happiness, and positing courage as secret of liberty).

ond principle relates to the individual citizen. A person's expression of views, ideas, and opinions is directly linked to the notion of self-fulfillment and a sense of autonomy.⁸² More specifically, a person must be able to speak freely about her opinions and perspectives. Justice Brandeis's third tenet is the safety-valve principle.⁸³ When a society seeks to stifle or suppress individual speakers, they are more likely to act out their anger or frustrations; in contrast, when citizens are allowed to express opinions and ideas, they are less likely to vent their frustration or anger in a violent manner.⁸⁴ Thus, a system that encourages the expression of thoughts and beliefs of an individual, including those that may be nasty or mean-spirited or irritating, will serve as a mechanism that allows a person to blow off steam rather than act out against others or society.⁸⁵

These three themes—the citizen participant, the autonomy of the individual, and the safety valve—are also implicated in Justice Stewart's position with regard to the Press Clause.⁸⁶ As noted above, information and its flow are critical to people's lives and to the role they play as active citizen-participants.

It is well-established that a vibrant democracy requires an informed citizenry.⁸⁷ Voters cannot make well-considered decisions on matters concerning governance without relevant information.⁸⁸ This requires more than just government press conferences, press releases, and strategic leaks. The public should receive information from current government actors about a variety of topics that have an impact on society. At the same time, citizens require more. To make thoughtful decisions on a matter of governance, voters must be in-

82. *Id.* (positing freedom to speak and think as fundamental to political truth).

83. *See id.*

84. *See id.*

85. *Id.* *See also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (describing "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

86. *See* Stewart, *supra* note 70.

87. DOWNIE & KAISER, *supra* note 75, at 6

Citizens cannot function together as a community unless they share a common body of information about their surroundings, their neighbors, their governing bodies, their sports teams, even their weather. Those are all the stuff of the news. The best journalism digs into it, makes sense of it and makes it accessible to everyone.

Id.

88. *See generally* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. (forthcoming 2004) (describing centrality of robust debate in democratic governance) (on file with *The New York University Journal of Legislation and Public Policy*).

formed and educated by multiple perspectives both favoring and opposing the particular issue.⁸⁹ Additionally, the public needs information on a wide range of matters involving business and corporate entities.⁹⁰ The activities of private sector businesses can have a major impact on the lives of ordinary citizens, as demonstrated by the multiple corporate scandals of 2002.⁹¹

The media in its various forms serves a key function: it informs and educates the citizenry on important matters. Of course, large mainstream mass media outlets can and do play a significant role. The smaller or independent media, however, may provide a greater variety of diverse perspectives on particular issues. And under some circumstances, the most critical views will be advanced by one lone pamphleteer.⁹²

Underlying the principle of the active citizen-participant is the individual's autonomy. A person who speaks out on various matters is a crucial component of a vibrant, diverse society. Individuals who are able to discuss, debate, challenge, differ, and dissent are more likely to arrive at decisions that are the result of a thoughtful and deliberative process rather than as the product of a reactive, uninformed, spur-of-the-moment response. As Professor Thomas Emerson has suggested, debate and discussion may provide those well-informed individuals with a sense that they have a stake in society and its institutions.⁹³ Those who believe that their participation in governance is necessary and important will likely sustain their commitment to the process.

89. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977) [hereinafter Blasi, *The Checking Value*]. Professor Blasi has suggested that mass media is more suited than the individual citizen to the task of checking the government and potential abuses of power, given the time, effort, and resources required to perform the task of checking. See *id.* at 538–39.

90. See, e.g., Jon Swartz, *WorldCom Woes Ripple Throughout Economies: From Small Towns to Cities Abroad, Telecom's Fallout Rains Down*, USA TODAY, Aug. 9, 2002, at 1B (“From small towns in Mississippi to cities in India, the pain of WorldCom’s Chapter 11 filing—nearly twice the size of Enron’s and four times that of Global Crossing’s—will be felt.”).

91. See, e.g., Verne Kopytoff, *Enmeshed in Scandal*, S.F. CHRON., Dec. 29, 2002, at G3 (noting that corporate scandals of 2002 included Adelphia Communications, Arthur Andersen, E-Trade, Enron, General Electric, ImClone/Martha Stewart, Rite Aid, Tyco, and WorldCom).

92. See *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (stating press freedom includes pamphleteer and leafletter). See also discussion *infra* Part II.B (suggesting that pamphleteer should not ordinarily fall within definition of journalist under Section 2 of JCA); Part II.C (asserting that pamphleteer may fall within definition of non-traditional journalist under Section 3 of JCA). See also *infra* note 211.

93. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–11 (1970).

In the context of the Press Clause, there is a parallel between the autonomous individuals' stake in the process and that of those who are editorialists, writers, photojournalists, columnists, and authors. Journalists who undertake to investigate and disseminate facts, news, and analysis are central actors in the process of maintaining an independent press based on the free flow of information. Indeed, they have been described as the agents of the public.⁹⁴ In turn, an independent press serves as the fourth branch of government, keeping watch on the other three.⁹⁵ In part, journalists see themselves as the finders, the verifiers, and the synthesizers of facts.⁹⁶ Journalists' contributions to the information flow to the public is essential in our system of democratic governance,⁹⁷ and journalists' autonomy is central to their ability to investigate and disseminate information.⁹⁸

Free expression can also act as a safety valve in an open society. Under this theory, allowing individuals to vent their opinions—both positive and negative—makes those individuals less likely to act out violently, because they have been afforded an opportunity to speak, debate, persuade, and disagree. In the media, editorials, opinion pieces, letters to the editor, and featured columns function as a safety valve, airing multiple perspectives on many topics. The same can be

94. *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863–64 (1974) (Powell, J., dissenting) For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government.

Id. See also Blasi, *The Checking Value*, *supra* note 89.

95. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (“[W]ithout an informed and free press there cannot be an enlightened people.”). See also DOWNIE & KAISER, *supra* note 75, at 7–8 (“Journalists have a special role in preserving one of America’s greatest assets, our culture of accountability. Americans expect their leaders to behave responsibly, and usually take remedial action when they don’t.”).

96. See KOVACH & ROSENSTIEL, *supra* note 74, at 71–79.

97. See *N.Y. Times Co.*, 403 U.S. at 728 (Stewart, J., concurring).

98. See, e.g., RCFP, AGENTS OF DISCOVERY, *supra* note 5, at 4 (“Journalists object to subpoenas because they want to maintain their independence from government or from a particular side in a dispute.”). See also ASSOCIATED PRESS MANAGING EDITORS, APME CODE OF ETHICS (1995), available at http://www.apme.com/about/code_ethics.shtml (describing good newspaper as “fair, accurate, honest, responsible, [and] independent The newspaper should serve as a constructive critic of all segments of society.”) (on file with *The New York University Journal of Legislation and Public Policy*). AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASNE STATEMENT OF PRINCIPLES (2002), available at <http://www.asne.org/index.cfm?ID=888> (“Freedom of the press belongs to the people. It must be free against encroachment or assault from any quarter, public or private.”) (on file with *The New York University Journal of Legislation and Public Policy*).

said for books, periodicals, and electronic media, including the internet and its multitude of Web logs.⁹⁹

In terms of the Press Clause, the direct link between newsgathering and these three Brandeisian principles implicates the First Amendment. Without the press in all its manifestations, the flow of information to and from the public would be diminished or severely distorted, which could skew or impede the transmission of democratic values underlying our political system. Such a reduction or distortion would have a direct and negative impact upon citizens' ability to obtain information that can be useful in understanding political, social, and economic issues. Since political, social, and economic institutions are inextricably interconnected, there is a strong need for citizens to glean as much news and information as possible in order to make decisions that are well-informed rather than haphazard or impulsive.¹⁰⁰ Furthermore, a strong sense of autonomy among individuals may promote a sense of civic and social responsibility, as each citizen realizes the potential impact of her participation in the democratic process. Thus, information must flow freely, or with as few encumbrances as possible, in order for individuals to experience and exercise their decision-making abilities and to participate actively in democratic governance.

99. Web logs, known as "blogs," are created by professionals and ordinary citizens as a way to inform and comment on a variety of matters. See, e.g., James Wolcott, *Blog Nation*, BUSINESS 2.0, May 2002, at 76 (noting that bloggers represent full spectrum of opinion from right to left); Staci D. Kramer, *The Perfect News Incubator*, U.S.C. ANNENBERG ONLINE JOURNALISM REV. (Dec. 20, 2002), at <http://www.ojr.org/ojr/kramer/1040251665.php> (discussing role of blogs in Sen. Trent Lott's resignation as majority leader of U.S. Senate) (on file with *The New York University Journal of Legislation and Public Policy*); Robert J. Ambrogi, *The Best of the Web in 2002*, L. TECH. NEWS (Dec. 19, 2002), at <http://www.lawtechnews.com/r5/home.asp> ("The explosion in blogging has been felt within the legal field, with lawyers, academics, pundits and even judges introducing blogs of their own. Many of these blogs are interesting, some quite good, and a handful truly useful.") (on file with *The New York University Journal of Legislation and Public Policy*). See also REBECCA BLOOD, *THE WEBLOG HANDBOOK: PRACTICAL ADVICE FOR CREATING AND MAINTAINING YOUR BLOG* (2002).

100. See ROBERT W. MCCHESENEY & JOHN NICHOLS, *OUR MEDIA, NOT THEIRS: THE DEMOCRATIC STRUGGLE AGAINST CORPORATE MEDIA* 62 (2002)

Democratic journalism should provide a ruthless accounting of the powers-that-be and the powers-that-want-to-be, both in government and politics and in the extremely powerful corporate sector. Democratic journalism should also provide background information and a full range of viewpoints on the main social and political issues of the day. We cannot expect each news medium to provide all of these elements of a quality journalism, but in combination, a democratic media system should make this caliber of journalism available to the entire population.

Id.

Within the context of the flow of information, the issue of a journalist's privilege takes center stage. The existence of such a shield implicates a series of important freedoms, rights, and values. In the first instance, it involves the individual reporter's role with regard to her contribution to newsgathering and the dissemination of information.

Journalists have at least two significant roles. First, they serve as a conduit for the flow of information to and from the public.¹⁰¹ This can cut both ways; it is either a torrent or a trickle. At the same time, journalists are more than simply a pipeline. In their second role, they are also the gatherers, analyzers, and synthesizers of facts and events, the distillers of information to be presented to the public. Their knowledge, experiences, and skills as synthesizers are key to the process of gathering and disseminating news. Without journalists, the facts or events of a particular story would not be transformed into a meaningful, coherent form—such as an article—for the benefit of the public.¹⁰²

Although it is common to conceptualize a reporter as a writer who is employed by a major daily newspaper, a television network, or other large media entity, a much broader range of people engage in the work of journalism. Many journalists, for example, work for smaller publications or are freelance reporters.¹⁰³ Many are students, responsible for writing and editing college newspapers.¹⁰⁴ Also, various po-

101. See, e.g., DOWNIE & KAISER, *supra* note 75, at 42–51 (describing *Washington Post's* investigation of and reporting on inordinately high number of civilian deaths at hands of Washington, D.C., police department in 1998).

102. It should be noted that many actors, including government actors, seek to have information placed before the public. Stories containing anonymous attributions appear frequently in print and broadcast media. See William B. Blankenburg, *The Utility of Anonymous Attribution*, 13 NEWSPAPER RES. J. 10 (1992); K. Tim Wulfemeyer & Lori L. McFadden, *Anonymous Attribution in Network News*, 63 JOURNALISM Q. 468 (1986); K. Tim Wulfemeyer, *How and Why Anonymous Attribution Is Used by Time and Newsweek*, 62 JOURNALISM Q. 81 (1985). But see Bruce M. Swain & J. Michael Robertson, *The Washington Post and the Woodward Problem*, 16 NEWSPAPER RES. J. 2 (1995) (discussing why continual reliance on unnamed sources by *Post* reporter Bob Woodward raises questions about credibility and veracity of Woodward's work).

103. For an example, see *Diary of a Mad Law Professor*, a bimonthly column for *The Nation* written by Patricia J. Williams, available at <http://www.thenation.com> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*).

104. See, e.g., THE CHRONICLE (Duke Univ.), available at <http://www.chronicle.duke.edu> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*); COLUMBIA DAILY SPECTATOR, available at <http://www.columbiaspectator.com> (last visited Oct. 22, 2003); THE DAILY CALIFORNIAN (Univ. of Cal. at Berkeley), available at <http://dailycal.org> (last visited Oct. 22, 2003)

litical groups, professional organizations, and other individuals or entities—ranging from the far right to the far left—produce a multitude of non-traditional or non-mainstream publications.¹⁰⁵ Finally, many journalists utilize the internet as a means of disseminating their news and views.¹⁰⁶

The degree of protection, if any, afforded to journalists is a concern for a number of other actors and institutions.¹⁰⁷ In a criminal case, for example, the accused's right to a fair trial and to protect herself against self-incrimination have been said to take precedence over other claimed rights.¹⁰⁸ In their efforts to investigate and prosecute criminal behavior and activities, prosecutors often look to journalists to assist them with procurement of sources and materials that government investigators have not been able to obtain through other means. Prosecutors sometimes seek names, information, video tapes, photographs, and other materials from reporters or others connected to the media to facilitate investigations and prosecutions. Private litigants may also seek materials and sources from journalists as part of the process of pre-trial discovery.

To counter demands by various actors in both the civil and criminal contexts, journalists assert that such forced disclosures have a chil-

(on file with *The New York University Journal of Legislation and Public Policy*); THE HARVARD CRIMSON, available at <http://www.thecrimson.harvard.edu> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*).

105. See, e.g., ALTERNATIVE PRESS REVIEW, available at <http://www.altpr.org/> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*); EXTRA, available at <http://www.fair.org/extra/index.html> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*); IN THESE TIMES, available at <http://inthesetimes.com> (last visited Oct. 22, 2003); POZ, available at <http://www.poz.com> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*); THE PROGRESSIVE, available at <http://www.progressive.org> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*); Z MAGAZINE, available at <http://www.zmag.org> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*).

106. See *infra* notes 220–228 and accompanying text (discussing importance of extending shield to journalists whose medium is internet).

107. This article discusses the subject of the reporter's privilege in criminal proceedings—that is, grand jury proceedings and criminal trials—for reasons of length and manageability. However, my proposed statute also applies to civil matters. See discussion *infra* Part II.G (addressing factors which must be met for disclosure to be required). Of note is that the reporter's privilege may also be at issue in defamation actions. See, e.g., Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097 (1999) (analyzing relationship between privacy, torts, and newsgathering).

108. See, e.g., John N. Mitchell, *Free Press and Fair Trial: The Subpoena Controversy*, 59 ILL. B.J. 282, 292 (1970).

ling effect on their future efforts to gather information. Without the promise of confidentiality, a source might refuse to come forward and divulge important or relevant information.¹⁰⁹ Indeed, in situations where a qualified privilege exists, a source cannot be assured that her identity will never be revealed. The source may decide that this is a risk that is too fraught with danger—personal and professional—and, therefore, she will refuse to speak about her knowledge of a particular event or to divulge important facts or information.¹¹⁰ Although the Reporters Committee for Freedom of the Press has repeatedly urged that more attention be paid to the impact of chilling,¹¹¹ the issue does not generate much in the way of commentary, even among the ranks of reporters. There is a perception on the part of some judges and others that the chilling effect is negligible or not susceptible of meaningful measurement.¹¹²

109. See Blankenburg, *supra* note 102, at 17 (“[Anonymity] is integral to newsgathering in a variety of settings and vital in some circumstances. . . . The source-reporter relationship is a set of transactions, and one of the coins is attribution.”); *id.* at 19 (“[A]nonymity permits not just more information but more antagonistic information. . . . [It] can enhance diversity and competition of viewpoints in a mass communication system that tends to value authority and ‘responsibility.’”); Wulfemeyer & McFadden, *supra* note 102, at 471 (noting that in 1982 study of broadcast media, 55% of news stories contained anonymous quotes); Wulfemeyer, *supra* note 102, at 82–83, 86 (reporting that more than 80% of stories in *Time* and *Newsweek* contained anonymous attribution, according to study of 388 stories in twelve issues of each magazine in 1982).

110. See Blankenburg, *supra* note 102, at 14–17. In his study of three major dailies—*The New York Times*, *Washington Post*, and *L.A. Times*—Professor Blankenburg determined that in a one-month period in 1990, anonymous sources were used in more than 2,539 stories, including stories on politics, foreign affairs, crime, vice, war, higher education, finance, religion, and sports. *Id.* at 12. In February 1991, the number of stories with anonymous attribution was 2,677. *Id.*

111. See RCFP, AGENTS OF DISCOVERY, *supra* note 5, at 4
[M]anaging editors and news directors . . . almost unanimously agreed that responding to subpoenas from investigators and litigants is a burdensome, and often aggravating, task. Each subpoena drains time and money from a new organization’s budget—resources that should be spent on newsgathering Some news outlets . . . have developed policies and strategies [including avoiding coverage of certain matters and regularly destroying data] for avoiding unnecessary requests The fact that newsrooms are forced, by the threat of overburdensome subpoenas, to modify their newsgathering processes in this manner represents an intrusion on their First Amendment right to gather and disseminate the news.

Id.

112. See, e.g., *Branzburg v. United States*, 408 U.S. 665, 693 (1972) (“The available data indicate that some newsmen rely a great deal on confidential sources . . . but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public [if newsmen are generally required to provide grand jury testimony when subpoenaed].”). But see *id.* at 732–33 (Stewart, J., dissenting) (“Surveys have verified that an unbridled subpoena power will substantially impair the flow of

A journalist may place less emphasis on the chilling effect for several reasons. First, she may unknowingly self-censor by shifting her newsgathering efforts from situations that might lead to a controversial subject, prompting a subpoena, to news stories less likely to become a subject of notoriety. Second, she may knowingly self-censor, yet not express that position publicly for fear of personal or professional embarrassment. Third, and most importantly, studying the chilling effect may require considerable time and resources.¹¹³ This specific limitation will diminish or even eliminate the researcher's ability to quantify chilling effects on reporters.¹¹⁴ Moreover, if journalists actively or passively self-censor, then data gathered from them will not accurately reflect the extent of self-censorship; it is impossible to study stories that were never investigated.¹¹⁵

In some instances, journalists will comply with subpoenas. In other situations, they will provide neither sources nor information. In this latter scenario, journalists will argue that as newsgatherers and

news to the public, especially in sensitive areas involving governmental officials, financial affairs, political figures, dissidents, or minority groups that require in-depth, investigative reporting.”).

113. *Newsmen's Privilege: Hearings on Bills to Create a Testimonial Privilege for Newsmen Before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary*, 93d Cong. 3 (1973) (statement of Sen. Sam J. Ervin, Jr.) [hereinafter *Senate Privilege Hearings*]

[W]e will never know how much we might have known had not this threat of a press subpoena [sic] and ultimate exposure been hanging over the sources of confidential information. It does stand to reason that sources would be more reluctant to come forward and reporters more reluctant to publish, when to do so may subject them to subpoena [sic] and an indeterminate jail sentence.

Id.

See also Vince Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 235–39 (1971) [hereinafter, Blasi, *The Newsmen's Privilege*] (describing complicated research methodology involved in devising empirical study of this subject).

114. See Blasi, *The Newsmen's Privilege*, *supra* note 113, at 266–67. Professor Blasi's study revealed that only eight percent of reporters surveyed were certain that their coverage of any story had been adversely affected by the threat of a subpoena. *Id.* at 270. By contrast, only eleven percent said they were uncertain that such a threat had a negative impact on their reporting. *Id.* But see *Senate Privilege Hearings*, *supra* note 113, at 3 (suggesting difficulty of discovering negative impact on journalists' sources). Among the many important points of Professor Blasi's study, two significant facts should be noted. First, experienced journalists were most often the ones who used confidential informants. Blasi, *The Newsmen's Privilege*, *supra* note 113, at 248. Second, journalists who were engaged in assignments involving government, finance, radical groups, or investigative matters relied on confidential informants in a greater percentage of their stories than did journalists engaged in covering areas such as sports and education. *Id.* at 251.

115. See *Senate Privilege Hearings*, *supra* note 113, at 3.

disseminators of information, they must remain independent to assure sources that their identities, and some of the identifying details in their stories, will remain confidential.¹¹⁶ Without the ability to assure confidentiality, journalists claim that their sources will evaporate and that the flow of information will dry up.¹¹⁷ Thus, from the journalist's perspective, the public's need to receive information and the necessity of the free flow of information are two core interests at stake.

Many other actors often seek information or sources from journalists. For example, prosecutors argue that the public interest in apprehending and punishing criminals must trump journalists' concerns in circumstances involving the penal law. Where necessary, state and federal prosecutors will subpoena journalists and their materials in order to serve the fair administration of justice both at the investigative and adjudicatory stages.

When reporters believe they are manipulated into serving as investigators or agents of the government, tension increases.¹¹⁸ Journalists insist that such a role compromises their integrity, their independence, and their ability to gather information.¹¹⁹

For criminal defendants, the defense may issue subpoenas to acquire a reporter's confidential information because it believes that such material or an individual source may exonerate the defendant. Alternatively, the defendant may be unable or unwilling to hire an investigator and may believe that a journalist can supply the necessary witnesses and documents.¹²⁰

Finally, civil litigants on both sides serve subpoenas on journalists and media entities, because they seek information that will help them ferret out the truth. These litigants might also find it more cost effective or efficient to make discovery demands upon reporters.

116. See Blasi, *The Newsman's Privilege*, *supra* note 113, at 241 ("In covering some of the polarized elements of society—radicals, minority groups, police—it is virtually impossible for the reporter to establish [a] feeling of confidence unless the source is convinced that the reporter is actually 'on his side.'").

117. See *id.* at 262.

118. See *Senate Privilege Hearings*, *supra* note 113, at 5. During the Kennedy, Johnson, and Nixon presidencies, the relationship between these administrations and the press deteriorated significantly. For example, in thirty months of the Nixon administration, 121 federal subpoenas were served on CBS and NBC. *Id.*

119. See *Branzburg v. Hayes*, 408 U.S. 665, 730–31 (1972) (Stewart, J., dissenting) (finding confidential relationships indispensable in gathering and disseminating news and information to public, as surveys among reporters demonstrated).

120. See RCFP, *AGENTS OF DISCOVERY*, *supra* note 5, at 7 ("Criminal defendants served more subpoenas on the news media than anyone else.").

2. *The Administration of Justice*

Analysis of a journalist's shield for sources necessitates an examination of the values and policies of the federal grand jury and its role within the legal system¹²¹ because the issue of a journalist's privilege often arises when a reporter finds herself drawn into a process involving allegations of criminal activity. She is caught between the government and a defendant, both seeking information and sources that she may possess or that either side believes she has acquired. The demand for information from journalists occurs both in the grand jury process and at trial.

In the grand jury setting, the government's investigation has greater breadth and scope than at the trial stage. At the front end of the process, the grand jury functions as an investigatory body.¹²² The Federal Rules of Evidence and other formal trial-type rules have not attached, so more information, witnesses, and documentation may be reviewed to determine the existence of wrongdoing.¹²³ In the course of performing its investigatory function, the grand jury seeks to uncover as many facts as possible about a particular matter. The grand jury then uses subpoenas to collect this evidence and testimony.¹²⁴

121. Only about half of the states use a grand jury system to indict wrongdoers. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 423 (2001). Critics of the grand jury system abound. See, e.g., *id.*; Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995); Ovid C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33 (1979). The grand jury system also has supporters. See, e.g., Thomas P. Sullivan & Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047 (1984).

122. The grand jury also has a charging function; it must indict a defendant for wrongdoing or the case against her will not go forward. See Note, *The Grand Jury As An Investigatory Body*, 74 HARV. L. REV. 590, 593-94 (1961) (describing difference between criminal and antisocial conduct that prompts indictment in former case). The author also asserts that courts will permit broad investigations by grand jurors because the secrecy of the proceedings insulates a person from serious harm until an indictment is handed down. *Id.* at 593.

123. See Leipold, *supra* note 121, at 267

By traditional trial standards, a grand jury is allowed to consider a surprising, even shocking, mix of evidence. The prosecutor is not required to inform the grand jury of evidence that favors the suspect, even if that evidence is exculpatory. Jurors are allowed to consider hearsay, illegally obtained evidence, tips, rumors, or their own knowledge of the alleged crime.

Id.

124. 3 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 8.1(c) (2d ed. 1999). See also Note, *supra* note 122, at 593 ("Under ordinary circumstances subpoenas are issued without question . . . [R]equirements of materiality and reasonableness generally seem not to have significantly restricted the availability of the subpoena.").

Although often described as an independent body, the grand jury has also been viewed as “an appendage of the court, powerless to perform its investigative function without the court’s aid,” since it cannot compel witnesses to provide testimony and the court must step in.¹²⁵ Until that occurs, however, the court remains at an arm’s length from the jurors,¹²⁶ and it is the prosecutor who has the direct relationship with the grand jury. The determination of what evidence and which witnesses appear before the grand jurors and against whom charges may be brought falls within the prosecutor’s discretion.¹²⁷

The federal grand jury’s investigations, including transcripts, the identity of witnesses, the substance of witnesses’ testimony, and related outside matters remain veiled in secrecy.¹²⁸ In theory, secrecy protects information and witnesses’ identities from being revealed before such matters are, if ever, made public through the indictment and trial processes.¹²⁹ A breach can hamper the investigatory efforts of the government and the grand jury.¹³⁰ In practice, however, leaks cause this protection to evaporate, as illustrated by numerous court

125. See, e.g., *Brown v. United States*, 359 U.S. 41, 49 (1959), *overruled on other grounds by Harris v. United States*, 382 U.S. 162 (1965).

126. See *United States v. Williams*, 504 U.S. 36, 47–50 (1992).

127. See Leipold, *supra* note 121, at 268

Prosecutors have nearly unlimited authority to decide whom to charge and what charges to bring [This] broad discretion offers great potential for abuse: overwork, political pressure, laziness, and malice can prompt a prosecutor to bring ill-conceived charges against innocent people or excessive charges against those who have committed lesser crimes.

Id. See also Note, *supra* note 122, at 593 (“Because of the general nature of the grand jury’s investigation, ‘materiality’ is defined more broadly than it would be at an actual trial”).

128. See Leipold, *supra* note 121, at 266.

129. Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 22 (1996) (“The rule of secrecy . . . was designed for the protection of witnesses who appear and for the purpose of allowing a wider and freer scope to the grand jury itself, and was never intended as a safeguard for the interests of the accused or of any third person.”).

130. See Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 346 (1999)

Notwithstanding [the] compelling arguments for secrecy, there are corresponding reasons why enforcers might want to leak or otherwise disclose investigative data in particular cases Sometimes, disclosure—whether through the press or through more targeted means—will actually further an investigation Information can even serve as a sort of currency. Leaks to the media in one case can help foster the sort of ‘working relationship’ that leads reporters to reciprocate with information in another case.

Id.

challenges involving the Office of the Independent Counsel during the Clinton Presidency.¹³¹

The grand jury's two central functions have been described as a shield and a sword. As a shield, it protects against malicious, unfounded, or unnecessary prosecutions by investigating and reviewing documents and hearing testimony provided by witnesses to determine the need for an indictment.¹³² Simultaneously, the grand jury acts as a sword, investigating and ferreting out crimes and their perpetrators. However, critics charge that the grand jury process is not a meaningful safeguard, as it places too much power and discretion in the hands of federal prosecutors.¹³³

3. Testimonial Privileges

Within both the civil and criminal legal process, the law recognizes a series of privileges—exemptions from or protections against providing testimony—based on policy reasons gleaned from social tradition, common law, and legislative enactments.¹³⁴ For example, the U.S. Constitution provides individuals with a right against self-incrimination.¹³⁵ A person may invoke this right during investigatory and adjudicatory proceedings regardless of whether these are conducted by grand juries, legislatures, or other entities such as administrative agencies. Likewise, other privileges, such as those covering a range of communications, derive from statutes.¹³⁶

131. See, e.g., *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1001–02 (D.C. Cir. 1999); *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1070–72 (D.C. Cir. 1998). See also Davis, *supra* note 121, at 424–28 (describing alleged abuse of grand jury process by Kenneth Starr, including grand jury leaks and abuse of subpoena power in investigation of President Clinton and Monica Lewinsky).

132. See Leipold, *supra* note 121, at 262–63.

133. See, e.g., *id.* at 260 n.5 (collecting critiques of grand jury system); Davis, *supra* note 121, at 410–28 (criticizing abuses within grand jury system); Richman, *supra* note 130, at 345–52 (describing reasons why institutional actors divulge grand jury information and problems associated with attempt to regulate secrecy within grand jury process).

134. See 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5572 (1989) (discussing marital privileges and underlying policy rationales as products of social tradition and common law that were later codified).

135. See U.S. CONST. amend. V.

136. See, e.g., N.Y. C.P.L.R. 4503 (McKinney 1992) (attorney-client privilege); N.Y. C.P.L.R. 4504 (McKinney 1992) (physician-patient privilege); N.Y. C.P.L.R. 4505 (McKinney 1992) (clergy-penitent privilege); N.Y. C.P.L.R. 4507 (McKinney 1992) (psychologist-patient privilege); N.Y. C.P.L.R. 4508 (McKinney 1992) (social worker-client privilege); N.Y. C.P.L.R. 4509 (McKinney 1992) (library record privilege); N.Y. C.P.L.R. 4510 (McKinney 1992) (rape crisis counselor-counselee privilege).

The common law recognized a limited number of privileges, such as the marital exception: spouses were exempt from providing testimony against each other.¹³⁷ Subsequently, state legislatures codified these common law privileges, providing testimonial exceptions in a number of professional and personal relationships, including attorney-client, husband-wife, and clergy-penitent.¹³⁸ Interestingly, Congress has never codified specific privileges under the Federal Rules of Evidence.¹³⁹ Finally, with regard to a journalist's privilege, the source is often stated to be the First Amendment or the common law.¹⁴⁰

A core value of the husband-wife privilege is the recognition that communications within the marriage should be accorded confidentiality¹⁴¹ because such secrecy encourages—even promotes—marital unity and harmony.¹⁴² In this context, a codified social practice prevents many relevant facts from becoming public in the course of an investigation or at trial.

Some commentators contend that the marital privilege rests more upon “emotion and sentiment” than on hard empirical evidence or a

137. See WRIGHT & GRAHAM, *supra* note 134, § 5572. See also N.Y. C.P.L.R. 4502 (McKinney 1992).

138. See *supra* note 136 and accompanying text.

139. See FED. R. EVID. 501 (“[P]rivilege . . . shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience.”). See also MCCORMICK ON EVIDENCE § 76 (John W. Strong ed., 5th ed. 1999) (suggesting that absence of specific privileges “perpetuates a fluid situation in the federal law of privilege and affords the states little inducement to adopt identical or similar schemes of privilege. The variegated pattern of privilege in both federal and state courts . . . seems likely to remain the case for the foreseeable future.”).

140. See MCCORMICK ON EVIDENCE, *supra* note 139, § 76.2 (“Though occasionally referred to as a common law creation, the privilege has generally been said to derive from the First Amendment.”).

141. In a minority of states, the marital privilege has been expanded to create a qualified familial privilege that applies to parent-child communications as well. See, e.g., *People v. Harrell*, 450 N.Y.S.2d 501 (App. Div. 1982), *aff'd*, 449 N.E.2d 1263 (N.Y. 1983); *State v. Doe*, 403 N.Y.S.2d 375 (App. Div. 1978). See also MINN. STAT. ANN. § 595.02(1)(j) (West 2000); *State v. Stevens*, 580 N.W.2d 75 (Minn. Ct. App. 1998). See generally Kelly Korell, Annotation, *Testimonial Privilege for Confidential Communications Between Relatives Other than Husband and Wife—State Cases*, 62 A.L.R.5th 629 (1998); Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910 (1987).

142. See MCCORMICK ON EVIDENCE, *supra* note 139, § 84. The marital privilege will not apply (1) where one spouse commits a crime against the other; (2) where one spouse intentionally harms a third person because that party purposely harmed the marriage; (3) where one spouse pursues a civil action, such as a divorce, against the other; and (4) where, in a criminal case, a confidential declaration has been made by one spouse to the other which could provide justification for, or reduce the level of, the crime of which the spouse has been accused. *Id.*

legal rationale such as a privacy principle.¹⁴³ Nonetheless, the marital privilege between husband and wife has been looked upon favorably by judges and legislators, and it enjoys continued vitality within our legal system.

Cases and statutes have also recognized the importance of confidentiality involving certain professional relationships. Perhaps the most well known example is the lawyer-client privilege, which arguably stands on firmer policy ground than the husband-wife privilege.

According to Professor Charles McCormick, three premises underlie the attorney-client privilege.¹⁴⁴ The average person cannot successfully navigate the complexities of the legal system without a skilled lawyer to whom she can fully disclose any relevant facts.¹⁴⁵ An individual may not speak openly and completely, however, without being able to rely on the confidentiality of such communications; the attorney-client privilege promotes this necessary openness of communication between a lawyer and her client.¹⁴⁶ The privilege is driven by the principles underlying our adversarial legal system, under the theory that disclosures by a client will enable the attorney to fight for her client's position.¹⁴⁷ Frank conversations with the client will make the attorney aware of the potential problems in her client's case, and she will be in a better position to counter those troublesome facts or issues.¹⁴⁸

Driving this policy is the principle that frank, full, and open communication between attorney and client is more important than the promotion of justice. As a result of the privilege, some potentially

143. See MCCORMICK ON EVIDENCE, *supra* note 139, § 86 ("Probably the policy of encouraging [marital] confidences is not the prime influence in creating and maintaining the privilege It is a matter of emotion and sentiment. All of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife."); WRIGHT & GRAHAM, *supra* note 134, § 5572.

144. See MCCORMICK ON EVIDENCE, *supra* note 139, § 87.

145. *Id.*

146. *Id.*

The tendency of the client in giving his story to his counsel to omit all that he suspects will work against him is a matter of every day professional observation. It makes it necessary for the prudent lawyer to cross-examine his client searchingly about possible unfavorable facts. In criminal cases the difficulty of obtaining full disclosure from the accused is well known, and would certainly become an absolute impossibility if the defendant knew that the lawyer could be compelled to repeat what he had been told.

Id.

147. *Id.* Professor McCormick also asserts that the lawyer's professional norms contribute to the relationship. *Id.*

148. *Id.*

relevant information and facts will never be made public in depositions or court settings.¹⁴⁹ This exemption is one that policy makers and others have decided is valuable and necessary, despite the trade-off that may adversely affect the search for truth.

A number of observations can be drawn from this brief review of privileges. First, there are instances where societal norms drive privileges, as is the case with the clergy-penitent privilege; in other cases, such as the marital privilege, it is sentiment that propels the exemption. Second, the structure and adversarial nature of our legal system and professional norms underlie other privileges, such as attorney-client. Third, in all situations involving privileges, a deliberate decision has been made by legislators and judges that testimonial exemptions are valued more highly than the pursuit of justice.

There are parallels between the journalist's privilege and the three themes described above. Societal and professional norms propel the journalist's privilege. In particular, the value of openness and frank discussion between husband and wife or attorney and client is a socio-legal construction. While the marital privilege may foster openness between husband and wife, there is little, if any, empirical proof to support this belief. The continued vitality of this exemption, however, demonstrates that it is socially favored. In contrast, ample empirical evidence shows that journalists rely upon confidential sources in order to accomplish their task of gathering and disseminating news.¹⁵⁰ Various studies conducted during the past forty years have demonstrated repeatedly that reporters depend upon confidential sources for facts that cannot be obtained elsewhere.¹⁵¹ Thus, to promote the open flow of information between source and journalist and from journalist to the public, sources and information should be shielded from compelled disclosure.

Parallels also exist between the attorney-client relationship and the relationship of a journalist to her source. The press, for example, is generally viewed by the government and other entities as an adversary or as an actor within an adversarial system.¹⁵² Under such cir-

149. *Id.*

150. See Blasi, *The Newsman's Privilege*, *supra* note 113; John E. Osborne, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57 (1985); Laurence B. Alexander et al., *Branzburg v. Hayes Revisited: A Survey of Journalists Who Become Subpoena Targets*, 15 NEWSPAPER RES. J. 83 (1994); Alexander & Cooper, *supra* note 62; RCFP, *AGENTS OF DISCOVERY*, *supra* note 5.

151. See *supra* note 150 and accompanying text.

152. See, e.g., Ervin, *supra* note 68, at 243–50; Blasi, *The Newsman's Privilege*, *supra* note 113, at 234–35, 240.

cumstances, the journalist's informant must have some assurances that her identity will remain confidential. Without such a promise, it is unlikely that the source will speak openly. Absent the ability to make assurances of confidentiality to her source, the journalist will not be able to obtain the facts and determine whether a matter merits further investigation. Moreover, it will be difficult for the journalist to verify facts if sources are unwilling to speak to her. Finally, the journalist, like the attorney, is a professional, with skills and expertise that her source does not have. This expertise allows the journalist to gather and analyze the various facts she has gleaned, and then synthesize the information for dissemination to the public. Journalists, however, will be unable to make a thorough investigation and provide full information to the public without some measure of protection for their sources.

Finally, in thirty-one states and the District of Columbia, legislators have determined that societal values favor providing a shield for journalists even though the result, in some cases, might be that a reporter is exempted from testifying.¹⁵³ Chief among the justifications for such a privilege is the central role of the institutional press as agents of the public's interest in maintaining democratic governance.¹⁵⁴ In states without a statutory shield, judges have determined that a journalist may not have to provide testimony in certain situations because either the state's constitution or its common law affords protection.¹⁵⁵ Thus, the majority of the states recognize the value of protecting the sources and information of journalists within certain parameters.

4. *Scope of the Statute*

The proposed JCA is a broad statute; its coverage extends to communications between the journalist and her source in civil and criminal proceedings at both the federal and state levels.¹⁵⁶ As discussed above, the central purpose of the JCA is to provide expansive protection for the journalist's sources and communications in order to advance the free flow of information, further the broadest dissemination of news and information, and maintain the independence of the press as an institution. Journalists' communications, including information and sources, would be protected in judicial, legislative, and

153. See *supra* note 61 and accompanying text.

154. See *supra* notes 78–85 and accompanying text.

155. See *supra* note 61 and accompanying text.

156. Under the JCA, as in the other current state shield laws, the journalist holds the privilege. See *supra* note 61 and accompanying text.

administrative settings, because to shield such communications in one setting but not in another would create anomalous results. For example, protecting a journalist's communications in a judicial setting but not in an administrative one would defeat the aim of the statute: to bring regularity and predictability to this area of the law. Without such statutory breadth, an enterprising prosecutor could prevail upon an actor in a legislative or administrative setting to assist the prosecutor in securing disclosure by issuing a subpoena to a particular journalist. Further, the lack of protection in one setting would encourage litigants and other actors to avoid one setting in favor of another as a way to obtain information or sources from journalists. The resulting imbalance could add to the burdens on one system while reducing the burdens on another. Not only would this be inefficient, but it would also defeat the purpose of a statutory shield.

The goal of protecting journalists and the institutional press is straightforward. Government by the people and for the people is the heart of our system of governance; the people are sovereign. Indeed, the design of our governmental structure was premised, in large measure, upon an educated citizenry that could exercise reasoned and reasonable judgments about matters of governance.¹⁵⁷ James Madison recognized this salient point when he stated: "Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power that knowledge gives."¹⁵⁸

What was true in Madison's day still has currency today. Information about a wide range of matters is necessary so that citizens can be afforded the opportunity to make decisions based upon a relatively broad information base. The function of the institutional press is to ensure the free flow of information to the public. As an independent institution, the press is in a position to oversee, criticize, report, expose, and inform citizens with regard to a wide variety of matters that affect their lives and livelihoods.¹⁵⁹ At the same time, both public and private entities and institutions are made aware of the press's functions, including oversight and exposure of wrongdoing.

The JCA is limited to formal proceedings in legislative, administrative, and judicial contexts. This, however, does not foreclose the

157. See Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 BUFF. PUB. INT. L.J. (forthcoming 2004) (describing principles underlying democracy, education, and citizen-participants in governance) (on file with *The New York University Journal of Legislation and Public Policy*).

158. See Ervin, *supra* note 68, at 234.

159. See, e.g., *Grosjean v. Amer. Press Co.*, 297 U.S. 233, 250 (1936) (describing vital need for press to scrutinize and illuminate nation's business and governmental affairs).

opportunity for other actors to obtain information, confidential or unpublished, from journalists in settings that are informal. Indeed, members of the press have provided confidential information to lawyers in civil and criminal cases during telephone interviews or hallway discussions.¹⁶⁰

B. Section 2: Journalists

Defining the term “journalist” has been a stumbling block in previous legislative attempts by Congress.¹⁶¹ The wide variations in state statutes also reflect disagreement on this point.¹⁶² Additionally, the absence of guidance on the federal level is partially responsible for the variations in the definition of the term and the scope of coverage provided within state statutory schemes.¹⁶³

160. See Jane E. Kirtley & Jean K. Sharpe, *The Reporter's Privilege: Vanishing as a Federal Protection, Gaining as a State One*, 605 PLI/Pat 165, 195 (2000) (stating that release of such information can later cause privilege to be waived in formal proceeding). But see Paula D. Salinger, *California's Media Shield Law: Is It Possible to Simultaneously Protect the Free Flow of Information and Due Process Rights?*, 32 McGEORGE L. REV. 801 (2001) (arguing that despite contrary appearance, state's shield law is quite narrow because it provides immunity, not privilege, so journalists must testify when compelled by subpoena).

161. See *supra* note 58 and accompanying text; *Branzburg v. Hayes*, 408 U.S. 665, 689 n.28 (1972); Ervin, *supra* note 68, at 253, 256, 260–78 (describing problems encountered by Congress in early 1970s as it considered reporters' privilege issue).

162. See, e.g., 10 DEL. CODE ANN. tit. 10, § 4320(4) (Michie 1999) (defining “reporter” as “any journalist, scholar, educator, polemicist, or other individual” who derives her principal livelihood from “obtaining or preparing information for dissemination”); D.C. CODE ANN. §§ 16-4701 to -4704 (2001) (“any person who is or has been employed by the news media in a news gathering or news disseminating capacity.”); FLA. STAT. ANN. § 90.5015 (West 1999) (“book authors and others who are not professional journalists, as defined by this paragraph, are not included in the provisions of this section”); 42 PA. CONS. STAT. ANN. tit. 42, § 5942 (West 2000) (providing absolute protection to persons who are “engaged on, connected with, or employed by any newspaper of general circulation”). See also Alexander, *supra* note 65, at 130 (proposing state statute that would reach journalists engaged in newsgathering and dissemination through traditional news media and “online news services, or any other regularly published news outlet”). But see Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411 (1999) (suggesting that determining exact definitions for terms “news” and “journalist” is impossible in wake of blending of news and entertainment, creating “infotainment”).

163. See Laurence B. Alexander & Ellen M. Bush, *Shield Laws On Trial: State Court Interpretation of the Journalist's Statutory Privilege*, 23 J. LEGIS. 215, 227 (1997) (“There are many reasons why the disparity in state protections exist [sic]. For a simple explanation, one can look to the absence of a federal shield law. The state courts and legislatures thus cannot look to federal law for guidance.”).

Although the *Branzburg* Court was presented with the opportunity to address this issue and to provide guidance, the majority side-stepped it.¹⁶⁴ According to the Court:

The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.¹⁶⁵

Instead of grappling with this important concern, then, the Court narrowed the issue before it to "the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime."¹⁶⁶ The Court was unmoved by journalists' claims of a chilling effect on their ability to gather information if their confidential sources were not protected.¹⁶⁷ It deemed any constraint upon the newsgathering process as uncertain and lacking in empirical proof.¹⁶⁸ Moreover, in the Court's view, "[t]here is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters."¹⁶⁹

The policy interest in effective grand jury proceedings, as part of the larger task of the government's function of "providing security for the person and property of the individual," was the linchpin of the

164. *Branzburg v. Hayes*, 408 U.S. 665, 702–08 (1972).

165. *Id.* at 703–04. The Court, however, invites both Congress and the states to engage in this complicated conceptual undertaking. *Id.* at 706.

166. *Id.* at 682.

167. *Id.* at 698–99.

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

Id. But see *id.* at 731 (Stewart, J., dissenting)

[W]hen governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to 'self-censorship.'

Id.

168. *Id.* at 693.

169. *Id.* at 695.

Court's analysis.¹⁷⁰ In its view, the confidential informants in the four underlying cases were criminal wrongdoers who were simply trying to escape punishment for their illegal acts.¹⁷¹ Thus, in either a grand jury proceeding or a criminal trial, the interest in effective law enforcement trumped the principles driving a journalist's refusal to disclose confidential information or the identity of a source.¹⁷²

The majority's position gave short shrift to the documented claims by reporters that compelled disclosure would diminish the free flow of information because informants would be reluctant or unwilling to speak to journalists in the absence of a guarantee of confidentiality.¹⁷³ According to Justice Stewart:

The right to gather news implies, in turn, a right to a confidential relationship between reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality—the promise or understanding that names or certain aspects of communications will be kept off the record—is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power—the absence of a constitutional right protecting, in *any* way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.¹⁷⁴

Additionally, the *Branzburg* majority approved of the Department of Justice Guidelines promulgated by then-Attorney General John Mitchell.¹⁷⁵ These rules, according to the Court, were sufficient to resolve most of the subpoena conflicts arising between journalists and the Department of Justice.¹⁷⁶ As for any grand jury proceedings brought or carried out in bad faith, the majority said that such occurrences would yield a different result.¹⁷⁷ However, none of the journalists in *Branzburg* had asserted such claims. Justice Powell, in his concurrence, echoed the concern about bad faith investigations and noted that

170. *Id.* at 690.

171. *Id.* at 691–92. *But see id.* at 731 (Stewart, J., dissenting) (“[S]urveys among reporters and editors indicate that the promise of nondisclosure is necessary for many types of news gathering.”).

172. *Id.* at 682–83 (“It is clear 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.”).

173. *Id.* at 728 (Stewart, J., dissenting).

174. *Id.*

175. *Id.* at 706–07.

176. *Id.* *See also infra* notes 191–209 and accompanying text (discussing Guidelines).

177. *Id.* at 707.

a motion to quash or a protective order would be the appropriate recourse for a journalist.¹⁷⁸ “The asserted claim to privilege should be judged on its facts by striking a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”¹⁷⁹ This would, of course, necessitate a judicial hearing. It also would appear to be inconsistent with the majority’s position that a reporter’s shield would require the judiciary to engage in factual and legal determinations at a very early stage and would be burdened by having to make these decisions.¹⁸⁰

As Justice Stewart recognized in his dissent, the majority had discounted journalists’ documented claims that compelled disclosure would reduce significantly the free flow of information.¹⁸¹ His main concern was the promotion of an independent press, which could effectively carry out its constitutional mandate: ensuring the free and full flow of information to the public.¹⁸² A societal value, rather than a personal interest of either the journalist or a confidential source, was at the center of a press privilege.¹⁸³ Moreover, this interest went directly to the heart of democratic governance; without information from the broadest possible range of sources, delivered through an independent press, the public could not make informed choices.¹⁸⁴ A free and independent press is essential to a free society and integral to the maintenance of our political institutions. A broad range of diverse opinion, criticism, and information disseminated by the media is central to the vitality of our democracy.

The JCA strikes a balance between the concerns for effective law enforcement and for the independence of the press by setting out definitions of both traditional and non-traditional journalists.¹⁸⁵ By defining who may be deemed a journalist, the statute applies to a limited

178. *Id.* at 709–10 (Powell, J., concurring).

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

180. *Id.* at 705 (“In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter’s appearance.”).

181. *Id.* at 731–32 (Stewart, J., dissenting) (describing reluctance of both informants and reporters to discuss matters that cannot be held in confidence and risks to both in light of majority’s decision).

182. *Id.* at 726 n.1 (Stewart, J., dissenting) (“We have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press.”).

183. *Id.* at 726 n.2 (Stewart, J., dissenting) (“[I]n the case of the reporter-informer relationship, society’s interest is not in the welfare of the informant per se, but rather in creating conditions in which information possessed by news sources can reach public attention.”) (citation omitted).

184. *Id.* at 726–27 (Stewart, J., dissenting).

185. See discussion *infra* Part II.C.

range of individuals. This definition affords protection to those engaged in what has been viewed as the traditional media, such as the journalists in *Branzburg*.¹⁸⁶ By its express language, the JCA limits the definition of journalists to those who are “regularly engaged in newsgathering.” Thus, persons who fall within this definition will, most likely, be journalists who are employed by various mainstream and alternative news entities.

The purpose of providing a definitional parameter serves to promote regularity and uniformity in this context. By crafting a definition based on the role or function of the journalist, the category is expansive enough to encompass both those reporters who work within mainstream media and also those who are participants in alternative or non-traditional media. At the same time, the statute eliminates the lone pamphleteer from this definitional category, because it is unlikely that this individual is engaged in the dissemination of pamphlets on a regular basis as the statute requires. This reflects the policy determination that a limited category serves the interests not only of the institutional press under the Press Clause, but also the interests of other actors who may be affected by such a law.

A further limitation in the scope of the statute is imposed by Section 7, which allows for compelled disclosure under certain circumstances.¹⁸⁷ The JCA is, therefore, a qualified shield, providing ample but limited protection. The statute would permit the revelation of sources and information from journalists where the requirements for disclosure have been met. Disclosure, however, would be the exception, rather than the rule.¹⁸⁸ Section 7 also addresses the important policy interest in effective law enforcement;¹⁸⁹ it permits the government to show the need for a journalist’s disclosure by demonstrating that all alternative sources have been exhausted and the communication or information sought is central to the issue to be resolved. This test derives from the factors set forth in Justice Stewart’s dissent in *Branzburg*.¹⁹⁰ More importantly, Section 7 recognizes that a journalist must provide identities and information to the government upon the government’s demonstration that it has conducted its own investiga-

186. See *Branzburg*, 408 U.S. at 667–75 (describing petitioners as reporters who were employed by three newspapers and television station). Paul Branzburg was a reporter for the *Louisville Courier-Journal* (Ky.). *Id.* at 667. Paul Pappas was a newsman and photographer for a New Bedford (Mass.) television station. *Id.* at 672. Earl Caldwell was a reporter for *The New York Times* on the West Coast). *Id.* at 675.

187. See discussion *infra* Part II.G (discussing parameters of disclosure).

188. See discussion *infra* Part II.G (discussing when disclosure may be required).

189. See discussion *infra* Part II.G (discussing exclusion of criminal wrongdoing).

190. See *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting).

tion prior to issuing a subpoena to a journalist. At the same time, the government's ability to engage in fishing expeditions will be greatly circumscribed. In addition, Section 7 eliminates the journalist's claim of protection where she is a participant in a crime, based on a determination of probable cause. A journalist who commits a crime is not engaged in newsgathering, but is, and must be treated as, an ordinary criminal.

Although the Department of Justice promulgated Guidelines for prosecutors who subpoena journalists, these rules are not sufficient to protect reporters.¹⁹¹ In the late 1960s, the number of subpoenas issued to reporters increased dramatically.¹⁹² The relationship between the Nixon Administration and the press was becoming increasingly adversarial.¹⁹³ In an attempt to provide guidance to prosecutors and journalists, the Attorney General instituted the Guidelines.¹⁹⁴ They remain in effect today.¹⁹⁵

Under the Guidelines, federal prosecutors are required (1) to weigh the effect of the subpoena against the fair administration of justice; (2) to make reasonable attempts to obtain the particular materials

191. See *Justice Releases Statistics on Subpoenas of Reporters*, NEWS MEDIA UPDATE (Reporters Comm. for Freedom of the Press, Arlington, Va.), Dec. 6, 2001, at <http://www.rcfp.org/news/2001/1206grassl.html> (describing secretive subpoena of home telephone records of John Solomon, reporter who was investigating possible wrongdoing by Sen. Robert Torricelli, noting that Solomon found out about subpoena several months after its issuance) (on file with *The New York University Journal of Legislation and Public Policy*).

192. See, e.g., Blasi, *The Newsman's Privilege*, *supra* note 113, at 229–30 (“Approximately two years ago, however, subpoenas began to issue against reporters in such numbers and circumstances as to generate consternation in virtually all quarters of the journalism profession and a questioning by many reporters of the Government’s motives.”). See also Ervin, *supra* note 68, at 243–46; Comment, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 U.C.L.A. L. REV. 160, 162 n.13 (1976) (noting that between 1968 and 1971, over 250 subpoenas were issued to two television networks and four newspapers); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 317, 331 (1970) (noting increase in issuance of subpoenas by state and federal prosecutors across United States from 1969 to 1970).

193. See Blasi, *The Newsman's Privilege*, *supra* note 113, at 234.

194. See Mitchell, *supra* note 108 (outlining Guidelines). See also Blasi, *The Newsman's Privilege*, *supra* note 113, at 281–82 (describing Attorney General's Guidelines as “exception-riddled” but asserting that they “had surprisingly salutary effect.”); Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press*, 1999 ANN. SURV. AM. L. 227, 227 (1999) (asserting that the Guidelines have operated consistently, balancing competing needs of free dissemination of information and need for effective law enforcement).

195. See 28 C.F.R. § 50.10 (2003). The penalty for violating the Guidelines is either “an administrative reprimand or other appropriate disciplinary action.” *Id.* § 50.10(n). Like any policy, the Guidelines are aspirational rather than mandatory, so the potential exists for deviations from them.

from alternative sources other than the press; and (3) to obtain the Attorney General's authorization on all requests for subpoenas.¹⁹⁶

One commentator has expressed the view that journalists are treated fairly under the Guidelines, while not faring nearly as well in the federal courts.¹⁹⁷ However, the Guidelines, while useful, have not eliminated the problems that journalists encounter when attempting to protect their sources and materials from forced disclosure. According to the Reporters Committee for Freedom of the Press, the difficulties encountered by reporters with regard to subpoenas have continued.¹⁹⁸

Some reporters reject the assertion that the Guidelines can provide them with any meaningful protection. The journalists' chief argument against the Guidelines is their unwillingness to have the Attorney General decide who is a journalist and when exigent circumstances permit circumvention of the Guidelines. In large measure, journalists contend that this affords the Attorney General far too much power over their newsgathering activities, thereby compromising the independence of the institutional press.¹⁹⁹

The Guidelines may be effective at reducing or minimizing the federal government's attempts to obtain information or sources from some journalists, because they contain an express provision for negotiations between the Justice Department and the media.²⁰⁰ However, this negotiation provision is inoperative in situations involving non-traditional, alternative or independent journalists,²⁰¹ who often lack the resources, time and money to engage in negotiations with the Justice Department, and are therefore disproportionately burdened by the

196. See *id.* § 50.10(a), (b), (e). See also *id.* § 50.10(h) (stating that no subpoena may be issued without Attorney General's authorization except in exigent circumstances).

197. Liptak, *supra* note 194, at 227 (stating that Guidelines "have remained stable and consistently enforced even as the journalists' privilege has taken a beating in the federal courts, particularly in criminal proceedings—which is precisely the forum in which the Justice Department might be expected to seek journalists' information most aggressively").

198. See RCFP, AGENTS OF DISCOVERY, *supra* note 5, at 4, 14.

199. This echoes the concern expressed by Justice Stewart in his *Branzburg* dissent, cautioning against the unbridled subpoena power of prosecutors in the absence of meaningful oversight by the courts. See *Branzburg v. Hayes*, 408 U.S. 665, 731 (1972) (Stewart, J., dissenting).

200. See 28 C.F.R. § 50.10(c) ("Negotiations with the media shall be pursued in all cases in which a subpoena to a member of the news media is contemplated.").

201. This is precisely the situation in which Vanessa Leggett found herself. The government's refusal to afford Leggett the title of "journalist" allowed prosecutors to issue multiple subpoenas to her and then ask that she be held in contempt. See *supra* notes 36–39 and accompanying text.

Guidelines.²⁰² Moreover, the Guidelines do not suggest, and do not appear to contemplate, that members of the news media might comprise anyone other than those persons affiliated with the traditional mass media. This omission may leave many alternative or independent journalists without recourse when served with a federal subpoena.²⁰³

The Guidelines may also impose economic burdens on journalists. When a subpoena is issued to a journalist, she must find a lawyer who will negotiate with the Attorney General's Office or take the matter to court.²⁰⁴ This process takes the journalist away from her work of gathering and disseminating news. For the mass media, locating attorneys and paying legal fees are part of the cost of doing business; legal expenses are a budget item that is factored into the organization's fiscal planning.²⁰⁵ Likewise, for the alternative or independent or freelance journalist, legal fees are also a cost of doing business, if a reporter intends to fight a subpoena. Alternative journalists, too, will expend time and effort in finding an attorney, and will be distracted from their task of newsgathering. However, independent or non-traditional journalists may decide that the price is too steep, and they will stop investigating or uncovering stories that may be controversial or of particular significance to the public. Thus, the Guidelines place a heavier economic burden, and, therefore, an enhanced chilling effect, on smaller-market, alternative, or independent journalists.

The Guidelines, moreover, do not contain much in the way of incentives for the prosecutors to confine their requests to those situations where the material or sources are otherwise unobtainable.²⁰⁶ Be-

202. In the view of the federal prosecutors, Vanessa Leggett was not a journalist and, therefore, the Guidelines were not applicable to her. This allowed prosecutors to demand all of her materials related to the Angleton murder. The prosecutors' narrow view of Leggett's status, however, should not have determined whether she could assert a journalist's privilege. See discussion *infra* Part II.C.

203. Where an individual is not viewed as a journalist, she does not have standing to claim the privilege, assuming that the particular federal circuit recognizes such protection for newsgatherers or disseminators.

204. The attorney's fees, court fees, and journalist's diminished productivity are factors that may overwhelm the budget of the individual journalist or the small alternative press.

205. Large media corporations, simply because they have greater resources, are not necessarily more willing to spend money on attorney's fees than are smaller entities or individual journalists. Greater resources do, however, give large media corporations a greater *capacity* to fight subpoenas.

206. See 28 C.F.R. § 50.10(n) (2003) (stating that Guidelines neither create nor recognize any enforceable legal rights); Robert Walters, *Sharing the News with Justice: The Justice Department Has Violated Its Own Guidelines Governing Subpoenas to Journalists*, COLUM. JOURNALISM REV., Sept./Oct. 1975, at 18, 20. In 1975, journal-

cause successful prosecutors are judged by the number of prosecutions they bring, they have an incentive to move their cases to a successful conclusion.²⁰⁷ There may be situations where prosecutors might wish to add to their successes by pushing forward particular investigations through the use of subpoenas to members of the news media in the belief that journalists have information that is useful to the government's case. The Guidelines' malleability may allow overzealous prosecutors to issue subpoenas with little or no difficulty, despite the caveat that subpoenas should be not issued where they "might impair the news gathering function."²⁰⁸ Prosecutors will counter that the fair administration of justice outweighs the importance of the newsgathering function.

A gaping hole in the Guidelines is the absence of a meaningful or relevant definition of the term "journalist." Without a firm or precise definition, prosecutors can, and do, use their own discretion to craft a definition that is convenient to their needs. They can easily overcome any claim of confidentiality by simply rejecting the individual's status as a journalist. In turn, prosecutors can more readily subpoena confidential communications from a writer who is investigating, for example, a crime story or an article about government corruption. The journalist who complies with the government's subpoena becomes an investigator for the government.²⁰⁹

The determination of who qualifies as a journalist should be the province of the legislative process. Neither the Justice Department nor journalists should be the sole definers of the term. Each side is too self-interested in the process to assess and balance the relevant factors that should be evaluated and folded into such a definition. Rather, Congress is the appropriate branch of government to draft such a definition. The legislative branch is in the best position to craft such a statute after reviewing facts, receiving testimony from experts in the field and other interested parties, and hearing comments from the elected officials' constituents. Such legislation would provide clearer

ists complained that the Guidelines were routinely ignored by the attorneys general in the Nixon and Ford Administrations. *Id.* at 18.

207. See Walters, *supra* note 206, at 20 ("[U.S. Attorneys'] short-term goals are to make a name for themselves—in terms of news coverage—in the relatively short time of two, four, or six years. That helps achieve their long-term goals—to run successfully for elective office or to be nominated for a federal judgeship.").

208. See 28 C.F.R. § 50.10 (stating that need to protect media entities where newsgathering function may be impaired must be balanced against Department of Justice's "obligation to the fair administration of justice").

209. See RCFP, AGENTS OF DISCOVERY, *supra* note 5, at 13. Many journalists, if not most, refuse to comply with such subpoenas. *Id.* at 10, 13.

and firmer guidance for federal and state judges whose duty it is to interpret the law.

C. Section 3: Non-traditional Journalists

Not all investigative reports, stories, or books are researched or written by the traditional journalist—that is, a person who regularly engages in newsgathering. The *Branzburg* majority cautioned against the creation of a definitional category so broad that virtually any person who declared herself to be engaged in an “informative function” would be insulated from revealing a confidential source.²¹⁰ In part, this problem has been addressed by limiting the protection of journalists through the language “regularly engaged in newsgathering” in Section 2 of the JCA.²¹¹ However, a number of differently-situated individuals engage in investigations which become the subject of litigation, and thus they seek protection from compelled disclosure.

The JCA’s most significant departure from state shield laws is Section 3. It addresses those individuals who do not fit the traditional definition of a journalist but who are engaged in the process of gathering and disseminating news.²¹² Section 3 is a statutory response to a recurring concern that the definition of “journalist” must be limited so that not everyone can claim protection under the JCA. It is also the most controversial provision, because it allows a writer, for example, to make a showing that she should be entitled to shield information or sources from discovery.²¹³ The most relevant example is the author of

210. *Branzburg v. Hayes*, 408 U.S. 665, 704–05 (1972) (noting that this function “is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists”).

211. See discussion *supra* Part II.B (describing “traditional journalist”). Thus, the problem of the lone pamphleteer is outside the scope of Section 2 because it is highly unlikely that this individual would be engaged in this task on a regular basis. The pamphleteer, however, could seek protection under Section 3, assuming she can make the requisite showing.

212. Two earlier cases are noteworthy because the courts afforded protection from compelled disclosure to non-traditional journalists. See *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436–37 (10th Cir. 1977) (allowing documentary film maker to assert journalist’s privilege); *Apicella v. McNeil Labs., Inc.*, 66 F.R.D. 78, 85–86 (E.D.N.Y. 1975) (permitting chief executive officer of technical medical publication to assert journalist’s privilege).

213. See *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993). In deciding to extend protection to a book author, the panel in *Shoen* declared it “unthinkable” to have a rule extending the privilege to an investigative journalist but not to an investigative book author writing on the same topic. *Id.* at 1293. In this instance, the panel found “no principled basis for denying the protection of the journalist’s privilege to investigative book authors while granting it to more traditional print and broadcast journalists.” *Id.*

an investigative book who is subpoenaed and asserts a claim of journalist's privilege.²¹⁴

The purpose of such statutory protection is two-fold. First, it allows non-traditional journalists to request protection against forced disclosure from the courts. Authors investigating and writing on various topics, including true crime, the environment, and business, are equally deserving of protection; it would be impermissible, in First Amendment terms, to attempt to create a list of legitimate or acceptable subjects of investigative writing. Second, the statute creates a test so that a case-by-case determination may be made as to whether an author can claim protection under the JCA.

Unlike Section 2 of the Act, Section 3 places the burden on the individual seeking protection to demonstrate that from the inception of her project, her intent and her motivation were to gather information for eventual dissemination to the public.²¹⁵ Absent a competent showing, the disclosure of information or sources could be compelled.²¹⁶ By placing the burden on the individual who seeks to be labeled a non-traditional journalist under the JCA, the problem of the unsupported claim of privilege would be significantly reduced or perhaps even eliminated.

If the JCA had been in effect at the time of her appearance before Judge Harmon in July 2001, Vanessa Leggett might have avoided jail.²¹⁷ She could have relied on Section 3 of the JCA to advance her claim of journalist's privilege in the U.S. District Court.²¹⁸ Absent

214. See, e.g., *id.* at 1293–94 (holding that investigative book author could claim privilege regarding his sources and information, based on two-part test requiring intent at project's inception to disseminate information gathered). See also *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987) (rejecting assertion of privilege by Andrea Reynolds, Claus Von Bulow's lover, to prevent disclosure of Reynolds' self-described "worthless doodles" concerning Claus Von Bulow's two trials for attempted murder of his wife, Martha Von Bulow).

215. See *Shoen*, 5 F.3d at 1293–94.

216. See, e.g., *Von Bulow*, 811 F.2d at 144; *Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 151 F.3d 125, 128 (3d Cir. 1998) (rejecting claim of privilege by sports broadcaster for allegedly false comments made on 900-number wrestling hotline).

217. See *supra* notes 36–40 and accompanying text (describing circumstances of Leggett's incarceration for civil contempt).

218. Placing Leggett and the relevant facts in another circuit illustrates the degree to which the outcomes of such situations, absent a federal statute, are geography-dependent. Had Leggett been pursuing a murder investigation in the Third Circuit, she would not have been held in contempt; on the contrary, she could have filed a successful motion to quash the government's subpoenas based upon a claim of journalist's privilege. See *United States v. Cuthbertson*, 651 F.2d 189 (3d Cir. 1981), *cert. denied*, 454 U.S. 1056 (1981) (reversing, based on media privilege, district court's order that journalists' interviews with potential trial witnesses be released). The same result would have obtained in the state courts of Pennsylvania. See *In re Taylor*, 193 A.2d

such a law, Leggett was held in contempt and jailed for nearly six months.²¹⁹

D. Section 4: News Media

The news media is defined under the JCA to encompass more traditional media, such as newspapers, magazines, periodicals, radio, and television, including cable and satellite. One problem with state shield laws has been the difficulty of keeping up with advances in technology. Therefore, most state shield laws have not incorporated journalists whose medium is the internet. The JCA addresses this concern by including internet fora among traditional media. One example of the growing use of technology by the media²²⁰ is Matt Drudge, who writes, publishes, and disseminates his popular *Drudge Report* from the comfort of his home computer in Los Angeles.²²¹ Whether Drudge is a journalist or simply a gossip is a matter of some debate,²²² but he reaches a large audience by posting reports on his website and transmitting them to his list of email subscribers.²²³ Even traditional media, like *The New York Times* and the *San Francisco Chronicle* have created web versions of their newspapers.²²⁴ The internet has opened up a vast new medium of communication, which many journalists are using as a means of gathering and disseminating news. An example is the proliferation of Web logs, known as "blogs," which are diary-type commentaries drafted by journalists and ordinary citizens.²²⁵ Eric Alterman, a columnist for *The Nation*, writes a blog,²²⁶ and a number of law professors have blogs in areas of their scholarly

181 (Pa. 1963) (preventing disclosure to grand jury of two reporters' sources and documents based on journalistic privilege).

219. See Bernstein, *supra* note 1; Duggan, *supra* note 1.

220. See, e.g., DOWNIE & KAISER, *supra* note 75, at 206–07.

221. See Blumenthal v. Drudge, 992 F. Supp. 44, 53–54 (D.D.C. 1998).

222. See, e.g., Gloria Borger, "Matt Drudge Is Not My Colleague," HARV. INT'L. J. PRESS/POL., Summer 1998, at 132, 133 (describing Matt Drudge as "the gossip you hear around the watercooler").

223. Blumenthal, 992 F. Supp. at 54.

224. See, e.g., N.Y. TIMES, available at <http://www.nytimes.com> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*); S.F. CHRON., available at <http://www.sfgate.com> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*). Similarly, television networks and radio stations have also created web sites. See, e.g., NAT'L BROAD. CO., available at <http://www.msnbc.com> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*).

225. See, e.g., GLOBE OF BLOGS, at <http://www.globeofblogs.com> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*); BLOGGER, at <http://www.blogger.com> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*).

interests.²²⁷ The discussion generated by blogs has, in some instances, been quite influential; for example, bloggers played a role in the media's coverage of Senator Trent Lott's acceptance of Strom Thurmond's segregationist views by pushing that information onto the national agenda of the mainstream media.²²⁸

The rules affording protection to journalists as defined in Section 2 of the JCA and those individuals who can meet the test under Section 3 of the Act should be applicable to the internet, a medium of growing influence which plays a significant role in the daily lives of citizens.

E. Section 5: Communications

The communications of a journalist with regard to her sources and information are at the center of the JCA. This article takes the position that the term "information" is to be viewed expansively. Everything from gossip or rumor²²⁹ to hard news is part of the information flow that people rely on in order to create a bridge between themselves and society.²³⁰ Information in the form of news serves as a means to transmit the core principles and values of democratic governance, to create connections between and among citizens, to foster common goals and ideals, to educate or inform people about matters or issues of concern, and to entertain people. The dissemination of all types of news also helps citizens learn about important matters that will have an impact politically, economically, or socially, both individually and collectively. In sum, information is an important com-

226. See ALTERCATION, at <http://www.msnbc.com/news/752664.asp?cp1=1> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*).

227. For example, see the blog of Lawrence Lessig, Professor of Law at Stanford Law School, at <http://lessig.org/blog/> (last visited Oct. 22, 2003) (on file with *The New York University Journal of Legislation and Public Policy*).

228. See Noah Shachtman, *Blogs Make the Headlines*, WIRED (Dec. 23, 2002), at <http://www.wired.com/news/culture/0,1284,56978,00.html> (describing efforts of bloggers to keep story of then-Senate Majority Leader Trent Lott's "racist comments during Sen. Strom Thurmond's 100th birthday bash" in headlines) (on file with *The New York University Journal of Legislation and Public Policy*).

229. Gossip is defined as "[r]umor or talk of personal, sensational, or intimate nature." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 783 (3d ed. 1992). Gossip is often at the front edge of a news story. President William J. Clinton's relationship with a White House Intern, Monica Lewinsky, was initially thought to be gossip, until further investigation by reporters and the government proved otherwise. See Walpin, *supra* note 74.

230. See MARIA ELIZABETH GRABE ET AL., *Sourcing and Reporting in News Magazine Programs: 60 Minutes Versus Hard Copy*, 76 JOURNALISM & MASS COMM. Q. 293, 294 n.6 (1999) (noting that *National Enquirer* has two-and-a-half times as many readers as weekday *The New York Times*).

modity that is central to citizens, society, and democratic institutions.²³¹

The concept of “information as a commodity” has further relevance to this essay because of its complex nature. On one level, the concept connotes an economic product—one with value as a good that may be purchased or sold for cash or in exchange for some other good or service.²³² On a second level, information involving matters of public interest, such as health and safety information or the exposure of corruption in government or corporations, can be priceless. For example, no dollar value could represent the cost, to the American public, of information concerning the pervasive corruption in the Nixon White House during the Watergate Scandal. Such information is fundamental to the endurance of democratic governance, but its value, consisting of both tangible and intangible elements, is nonetheless unquantifiable.²³³ This second type of information as a commodity is also relevant to matters involving health, safety, or other issues of interest to the public.

An expansive view of information serves the broader purpose of a free and untrammelled press as watchdog, critic, and disseminator of news. Without such a definition, the protection afforded to journalists would be circumscribed—that is, the narrower the definition, the smaller the coverage. Stated another way, if numerous categories of information fall outside the statutory protection, then the likelihood that a journalist will be forced to disclose is greater. Additionally, a narrow definition will give rise to self-censorship on the part of the journalist, resulting in fewer and fewer stories that are disseminated to the public. In turn, the information pertaining to matters of public importance or concern will be curtailed significantly. “[T]he only effective restraint upon [government] may lie in an enlightened citi-

231. See *infra* notes 232–234 and accompanying text (discussing concept of “information as a commodity”); *infra* notes 254–276 and accompanying text (discussing “information as a commodity” within Commerce Clause context).

232. For example, the daily newspaper is an economic product. It contains stories, facts, and information. In this format, information is a commodity because the paper is sold to purchasers for a set price. Additionally, the information contained within the daily newspaper is also the product of the efforts of the editors, reporters, and other employees who have put out that daily edition. Each of the employees is compensated for his work. Further, advertisers purchase space in the newspaper, on television, and on media web sites in order to sell their goods or services.

233. We can, of course, calculate the tangible costs of holding Congressional hearings, of conducting FBI and other federal investigations, and of prosecuting and incarcerating criminals.

zenry—in an informed and critical public opinion which alone can here protect the values of democratic government.”²³⁴

F. Section 6: Source or Sources of Information

Under its terms, the JCA shields the identity of the source as well as unpublished information.²³⁵ The latter is perhaps the more controversial clause. While a number of courts have upheld a privilege for journalists with regard to confidential materials and sources, there is a circuit split regarding protection for non-confidential materials.²³⁶ The problems engendered by the compelled disclosure of non-confidential materials have a ripple effect that flows outward. First, it is the exception that swallows the rule. The requirement that non-confidential sources be routinely divulged following a subpoena shifts the principle underlying a qualified shield. The rare exception is transformed into the routine practice. This would create a practice that would permit such discovery without hesitation or examination. Rather than looking to the relevant policy interests, these requests would be granted as a matter of course. In turn, the principles underlying the policy would be relegated to the back shelf.²³⁷

Requiring such routine disclosures might cause journalists and news entities to adopt internal practices that would stem or stop the need to divulge. The first and foremost impact would be the shift away from investigative work. This would be prompted by the belief that if such potentially problematic matters were not on a journalist's agenda, then there would be no risk or threat of a subpoena. It would be an avoidance technique on the part of the journalist in the interest

234. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

235. For an example of this type of privilege, see *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (recognizing qualified privilege for confidential and unpublished materials).

236. See, e.g., *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 33, 35–36 (2d Cir. 1999) (extending privilege to non-confidential materials); *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) (extending privilege to non-confidential materials, but noting that non-confidentiality may be “a factor that diminishes the journalist's . . . interest in non-disclosure”); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181–82 (1st Cir. 1988) (refusing to extend privilege to “outtakes” of interview with important witness, but recognizing qualified privilege); *Cuthbertson*, 630 F.2d at 147 (extending privilege to unpublished materials). *But see* *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (concluding that “newsreporters enjoy no qualified privilege not to disclose nonconfidential information” such as unaired portions of videotaped interview, which must be disclosed).

237. *Cuthbertson*, 630 F.2d at 146–47.

of economics, expediency, and self-protection.²³⁸ It is deterrence that prompts—even promotes—such avoidance.

Further, the avoidance technique would have a deleterious impact on both the practice of newsgathering and on the public's need for information. Without journalists who are willing to go after facts that may result in controversial or criminal matters coming to light, such efforts would dwindle. As one commentator has suggested, it would give rise to more superficial or entertainment stories.²³⁹ The real danger of avoidance, however, is that important facts and key information would not reach the public. In turn, what the public does not know or learn of might cause it harm. In any event, a reduced flow of information would certainly distort or skew the public's understanding or knowledge of a particular matter, because the citizens would not have the fullest picture presented to them.

G. Section 7: Disclosure

Although the JCA would function as a shield against disclosure, the privilege it provides would be a qualified one. Under certain circumstances, a journalist might be required to reveal her sources and information. The basic format of Section 7 of the JCA is culled from the language of Justice Stewart's dissent in *Branzburg*, which set out factors that must be met before disclosure from a journalist may be compelled.²⁴⁰ The statute places the burden of proof on the moving party. Before a subpoena can issue, the movant must make the required showing. This differs from placing the onus on the journalist, as contemplated by Justice Powell's concurrence in *Branzburg* and evidenced by the practice of some jurisdictions.²⁴¹ Moreover, under Section 7, the moving party would be required to demonstrate the need and the relevance of the materials sought from the journalist with some degree of particularity.

238. See *supra* notes 113–115 and accompanying text (discussing self-censorship by journalists).

239. See Calvert, *supra* note 162, at 416 n.32 (suggesting trend towards blending news and entertainment, creating “infotainment”).

240. *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting) [T]he government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

Id. (citations omitted).

241. *Id.* at 710 (Powell, J., concurring) (“Indeed, if the newsman is called upon [in bad faith investigations or to provide unrelated or remote information], he will have access to the court on a motion to quash . . .”).

In part, the shift in the burden from the journalist to the moving party operates to limit the issuance of subpoenas to journalists by various actors. In turn, a reduction in the number of demands made upon journalists would likely lighten the cost for the litigants and lessen the burdens on the resources and time of the courts in matters of compelled disclosure involving journalists. More importantly, rather than being free to engage in a series of fishing expeditions, the moving party would be required to make a reasonable showing of its need for the journalist's information or sources. By decreasing the likelihood of broad, ill-defined discovery forays, the statute would encourage those actors seeking information and sources to undertake a more focused investigation of their own before turning to journalists.

Although the Department of Justice's Guidelines for subpoenas involving the press have been in effect for more than thirty years, they have not abated the excessive issuance of subpoenas or the issuance of subpoenas for information that may be of little or no relevance.²⁴² Moreover, the Guidelines are best described as goals rather than rules. Because they are aspirational, they contain no penalties or remedies for violations.²⁴³ Thus, the Guidelines can be disregarded without any consequence to government attorneys.

The statutory shield, as contemplated under the JCA, would add integrity to all sides of the process. It would reduce the number of subpoenas that are not based on a reasonable foundation. It would decrease attempts by various actors to coerce the press to reveal sources and information. At the same time, journalists would have a more realistic understanding of the limitations on their ability to protect their sources. Members of the media and other actors would be educated as to the qualified nature of the shield, understanding that its reach is not unlimited.

The purpose of the JCA's protection against forced disclosure is to maintain the independence of the institutional press, in order to se-

242. See RCFP Letter, *supra* note 3030 (asserting that Department of Justice had not followed its own Guidelines concerning Leggett simply because someone in department had decided that she did not qualify as "journalist").

243. One example is the issuance of a subpoena for the home telephone records of John Solomon, an Associated Press reporter. Although the Department of Justice (DOJ) secured the records from the phone company in May 2001, Solomon did not learn about the subpoena until August 2001, three months after the fact. The DOJ sought to discover the source of an unidentified government official who Solomon reported as stating that the government had recorded conversations between Sen. Robert Torricelli and a Chicago criminal as part of the government's investigation of the Senator. See Dan Eggen, *Grassley Seeks Files on Media Subpoena*, WASH. POST, Sept. 5, 2001, at A13; *Justice Releases Statistics on Subpoenas of Reporters*, *supra* note 191.

cure the free flow of information to the public. To accomplish that goal, compelled disclosure from journalists should be the exception and not the rule. By shifting the burden to the moving party to demonstrate a heightened need for the disclosure, this section of the statute helps to fulfill the dual goals of limiting disclosure and maximizing the flow of information.

III.

FEDERALISM, COMMERCE CLAUSE POWER, AND PREEMPTION

A. *Federalism*

Although the conflict between the circuits as to a journalist's privilege remains, it was not resolved by the Supreme Court, which denied Leggett's petition for *certiorari* in 2002.²⁴⁴ Further, as noted above, the absence of guidance in the form of a federal statute has led to varying outcomes in both federal and state courts where a journalist seeks to quash a subpoena for disclosure of her sources.²⁴⁵ Thus, a federal statute, setting forth a set of standards governing compelled disclosure, would resolve the inconsistencies and uncertainties in this area.

In light of the Supreme Court's current view of federalism,²⁴⁶ it may be idealistic to urge a federal statute to protect journalists' sources and materials. As noted earlier, however, the states, when crafting legislation or interpreting cases touching upon constitutional issues, frequently look for a federal baseline.²⁴⁷ In the absence of a federal guideline—one established by the Court or by a Congressional enactment—for those matters that involve a journalist's privilege, the states have enacted statutes that afford disparate levels of protection.²⁴⁸ Because the press plays a significant and necessary role in legal, political, and social institutions, it is important—even vital—to ensure the on-going presence of the press as an independent institution, by establishing a legal standard to serve as a baseline protection for communications between journalists and their sources.

244. 535 U.S. 1011 (2002).

245. See *supra* notes 57–66 and accompanying text.

246. Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 85–102 (providing insightful summary and analysis of Court's federalism decisions involving Commerce Clause, Morgan Power under Section Five of Fourteenth Amendment, and Anti-Commandeering Principle).

247. See *infra* note 251 and accompanying text.

248. See Alexander, *supra* note 65, at 115–18 (describing wide variations in state shield laws).

B. Source of Congressional Power: The Commerce Clause

During the course of the last twelve years and in a number of decisions, the Supreme Court's federalism jurisprudence has shifted dramatically.²⁴⁹ This can be seen in a number of cases touching on the Commerce Clause, the Anti-Commandeering Principle, the Morgan Enforcement Power²⁵⁰ under Section Five of the Fourteenth Amendment, the Tenth Amendment, and the Eleventh Amendment.²⁵¹ The Court has taken a more restrictive, or narrower, view of Congress' power, while adopting a more expansive view of its own power.²⁵² The question for many federal legislators is how to respond appropriately to the reinvigorated federalism principles announced by the Court.²⁵³

Among the enumerated powers of Congress is the power to regulate commerce among the several states.²⁵⁴ The Court has described

249. A flood of recent scholarly articles have provided in-depth analysis of federalism concerns. See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez, 94 MICH. L. REV. 752 (1995); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001); Jerome McCristal Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597 (1994); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691 (2000); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002); Brent E. Simmons, *The Invincibility of Constitutional Error: The Rehnquist Court's States' Rights Assault on Fourteenth Amendment Protections of Individual Rights*, 11 SETON HALL CONST. L.J. 259 (2001); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1 (1999).

250. See *Katzenbach v. Morgan*, 86 S. Ct. 1717 (1966).

251. See, e.g., *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Reno v. Condon*, 528 U.S. 141 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Fla. Pre-paid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

252. See, e.g., *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that Gun-Free School Zones Act of 1990 exceeded Congress's Commerce Clause authority). See also Dorf & Friedman, *supra* note 246, at 62 (noting that "the Court of late has displayed a self-aggrandizing tendency").

253. See Dorf & Friedman, *supra* note 246, at 62–63 (suggesting that Congress, the Court, and states should each accord each other respect and act with humility towards one another in realm of constitutional interpretation).

254. U.S. CONST. art. I, § 8 (stating that "Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

this power as falling into three broad categories of activities.²⁵⁵ The first category includes the regulation of “the channels of interstate commerce.”²⁵⁶ The second involves the protection and regulation of “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”²⁵⁷ The third category concerns those activities that have a substantial effect on interstate commerce.²⁵⁸

Newspapers, radio and television media (broadcast and cable), and news wire services are commercial enterprises. As a general rule, they are designed to generate and maximize profits, as are other private sector businesses. In addition, the various forms of media are themselves instrumentalities of commerce, crossing many state lines and carrying information, a commodity, throughout the fifty states.²⁵⁹ Information is a commodity, that is, it is either a useful or a serviceable item.²⁶⁰ In terms of the news, information is sought by journalists because it may or does have value. One need only examine the media interest in the Clinton-Lewinsky affair to see that numerous reporters sought to discover “exclusive” information or facts. People like Linda Tripp sought to sell information to the highest bidder and profit from their “knowledge.” However, the fact that a source’s information is not for sale does not make it any less valuable. For example, the whistle blower does not reveal information for profit as much as for the possibility that she can expose a wrong or alert the public to a danger.²⁶¹ Examples of this are numerous.²⁶² Thus, information as a commodity comes within the scope of an instrumentality of commerce under the Court’s second category of congressional Commerce Clause power.

A further point is relevant. Information as a commodity does not exist in isolation in the context of the institutional press. Journalists

255. *Morrison*, 529 U.S. at 608 (citing *Lopez*, 514 U.S. at 558).

256. *Id.* at 609 (citing *Lopez*, 514 U.S. at 558).

257. *Id.* (citing *Lopez*, 514 U.S. at 558).

258. *Id.* at 609 (citing *Lopez*, 514 U.S. at 558–59).

259. For example, wire services transmit news through telephone, digital subscriber lines, and electronic networks. Many newspapers, such as *The New York Times*, are delivered nationally in hard copy form.

260. BLACK’S LAW DICTIONARY 248 (5th ed. 1979) (noting that term “commodity” is “a broader term than merchandise, and, in referring to commerce may include almost any article of movable or personal property”). News articles in hard copy are movable properties.

261. *See, e.g.*, Romesh Ratnesar & Michael Weisskopf, *How The FBI Blew The Case*, TIME, June 3, 2002, at 24.

262. *See, e.g.*, Gail Russell Chaddock, *Enron Changes Climate for Whistle-Blowers*, CHRISTIAN SCIENCE MONITOR, Mar. 1, 2002, at 5 (describing pre-August 2001 warnings by Sherron Watkins of Enron’s impending implosion).

are the gatherers, interpreters, facilitators, producers, and disseminators of this commodity through their investigating, analyzing, and reporting on events, facts, and information. Journalists and information are intertwined. Therefore, journalists also come within the term “instrumentality.” Viewed in this context, the Court would likely agree that Congress was acting within one of its enumerated powers in enacting the JCA.²⁶³

Even assuming that the press did not fall within the “instrumentality of commerce” category, then the third category of power, which requires a substantial effect on commerce, would be relevant to the drafting of a federal statute protecting sources and information. Here, too, the Court has provided guidance in two earlier decisions, *Lopez* and *Morrison*.²⁶⁴

One significant distinction the Court focuses on is the type of statute at issue. In both *Lopez* and *Morrison*, the Court expressly noted that criminal laws were being scrutinized. Neither the Gun Free School Zones Act nor the Violence Against Women Act (VAWA) had a direct and substantial effect on commerce, according to the majority opinions, because no economic enterprise was involved.²⁶⁵ In *Lopez*, the nexus between a substantial effect on interstate commerce and gun possession in or near a school was too attenuated.²⁶⁶ The Court applied the same reasoning in *Morrison* when it examined gender-motivated, non-economic crime and the federal civil remedy statute,²⁶⁷ rejecting VAWA because it was not within Congress’ authority under the third prong of Commerce Clause analysis.²⁶⁸

263. See *Morrison*, 528 U.S. at 608 (“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”); *Lopez*, 514 U.S. at 558.

264. See *Lopez*, 514 U.S. at 560 (“Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”). Accord *Morrison*, 529 U.S. at 612–19 (2000).

265. See *Lopez*, 514 U.S. at 561 (“Section 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”). Accord *Morrison*, 529 U.S. 598, 613 (2000).

266. See *Lopez*, 514 U.S. at 561.

267. *Morrison*, 529 U.S. at 613 (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity . . . [O]ur cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”).

268. *Id.* at 619. The Court found that aggregating violent criminal conduct could not bring the statute within Congress’ authority under the Commerce Clause, rejecting the argument that VAWA came within Congress’ power under Section 5 of the Fourteenth Amendment. *Id.* at 619–21. Section 5 power is limited to state action and state actors, according to the Court; it does not reach private conduct actors in order to preserve the balance of power between the federal government and the states. *Id.* at 619–26.

Although the statutes in *Lopez* and *Morrison* were outside Congress' power under the Commerce Clause,²⁶⁹ the JCA addresses a very different set of circumstances. The news business is a distinctly commercial enterprise, constituting an economic activity that has a substantial impact upon interstate commerce.²⁷⁰ *The New York Times*, for example, publishes editions of its daily paper on the East and West Coasts of the United States, in addition to posting a daily version online. The editorial offices of the paper are located in New York City, but one of its East Coast publishing sites is in New Jersey, and one of its West Coast publishing operations is located in northern California. Its reporters are stationed in various states and the District of Columbia (and outside the U.S.) in their capacities as newsgatherers and disseminators of information. *The New York Times* charges its customers for the various editions of its daily paper, and it also commands advertising revenues from local, national, and international businesses and corporations.

Other economic considerations are involved in the designation of *The New York Times* as a commercial enterprise. The editors and journalists, whether they are full-time employees or free-lancers, are compensated for their work. In addition, both the physical copy of the daily paper published by *The New York Times* and its content have a significant commercial value and a potentially global impact. The paper's business section contains stories that have an impact in a variety of states. The paper's extensive reporting on the Enron Scandal offers an appropriate illustration; the collapse of that business adversely affected a variety of other businesses, states, and individuals in myriad ways.²⁷¹

269. *Id.* at 610 (citing *Lopez*, 514 U.S. at 551) ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.").

270. Another variation is the television network or station. In order to provide programming, a network sells advertising space to generate income. With regard to public broadcasting, the network and individual station support their operations through the donations made by individuals, foundations, and corporate entities. Even those newspapers or publications that self-describe as "free," are commercial in nature, since they are supported, in part or in whole, by their advertising revenues.

271. See, e.g., Felicity Barringer, *10 Months Ago, Questions on Enron Came and Went with Little Notice*, N.Y. TIMES, Jan. 28, 2002, at A11; Alex Berenson, *California May Have Had Big Role in Enron's Fall*, N.Y. TIMES, May 9, 2002, at C1; Alex Berenson & Richard A. Oppel Jr., *Once-Mighty Enron Strains Under Scrutiny*, N.Y. TIMES, Oct. 28, 2001, § 3, at 1; Richard A. Oppel, Jr. & Andrew Ross Sorkin, *Enron Collapses as Suitor Cancels Plans for Merger*, N.Y. TIMES, Nov. 29, 2001, at A1; Don Van Natta, Jr., *Enron or Andersen Made Donations to Almost All Their Congressional Investigators*, N.Y. TIMES, Jan. 25, 2002, at C4; Don Van Natta, Jr., et al., *In*

In *Lopez*, the Court stated that where legislation regulates economic activity with a substantial effect on interstate commerce, Congress' power under the Commerce Clause will likely be upheld.²⁷² This is true for *intrastate* activity that substantially affects *interstate* commerce.²⁷³ Thus, the media, in its various forms, is engaged in a commercial transaction—the dissemination of news and information through the sale of its product both locally and nationally.²⁷⁴

One additional point must be addressed. Because the *Branzburg* Court did not deem a journalist's privilege to be found within the Constitution, protection for journalists' communications does not enjoy the same status that has been accorded to a constitutional rule such as *Miranda*.²⁷⁵ Moreover, with regard to a journalist's shield law, the Court has not spoken favorably in its only decision on point, *Branzburg*. There is, of course, the possibility that the Court could revisit this issue if the appropriate case were presented to it. *Branzburg* held out such a possibility. Justices White and Powell both said the issue and the holding were narrow and limited.²⁷⁶

C. Preemption

Another issue that must be considered is preemption, since the JCA would have an impact upon a number of state laws. The occupation of an entire area of the law by Congressional enactment touches on the overlap of powers of the federal government and the states.²⁷⁷ Preemption raises concerns about the balance of power between federal and state governments.²⁷⁸ Where Congress legislates within one

Houston, the Lines Dividing Politics, Business and Society are Especially Blurry, N.Y. TIMES, Jan. 20, 2002, at A25.

272. *Lopez*, 514 U.S. at 560–61.

273. *See id.* *See also Morrison*, 529 U.S. at 615–16 (rejecting but-for causal chain of reasoning to support tenuous connection between commerce and gun violence or gender-motivated violence).

274. Even if Congress should deem that the media has a substantial impact on commerce, the Court will have the final say. It is “ultimately a judicial rather than a legislative question.” *Morrison*, 529 U.S. at 614.

275. *See Dorf & Friedman, supra* note 246, at 70.

276. *See Branzburg v. Hayes*, 408 U.S. 665, 706–09 (1972); *id.* at 709–10 (Powell, J., concurring).

277. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977)). *See also* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 6-28 (3d ed. 2000).

278. This article does not provide an extensive analysis of the complexities and problems of preemption. Rather, it describes the doctrine and argues that the JCA comes within the scope of implied or field preemption. For thorough discussions of preemption doctrine, see Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000); Patricia L. Donze, *Legislating Comity: Can Congress Enforce Fed-*

of its delegated or enumerated powers, the federal statute will trump state law because the Supremacy Clause requires it.²⁷⁹ With regard to other federal laws that intersect with state enactments, the Court has denominated three categories of preemption: express, implied, and conflict. Preemption analysis always begins with an examination of Congress' intent.²⁸⁰ Under express preemption, Congress states explicitly its intent to overtake a particular area of law.²⁸¹ The language of the JCA provides the expressed intent to take over or displace state law.²⁸² The second category, implied or field preemption, occurs where a federal enactment occupies a specific area of the law so that the Court can make a reasonable inference that Congress intended to occupy it thoroughly. More specifically, where Congress seeks to regulate in a particular area and state law is an obstacle to the objectives of the federal statute, state law is preempted. The third category concerns the conflict between the federal and state law in which there is direct conflict or in which the state law is an obstacle to meeting the federal objectives set forth in the statute.²⁸³

eralism Constraints Through Restrictions On Preemption Doctrine?, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 239 (2001); Barry Freidman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685 (1991); Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149 (1998); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000); Susan Raeker-Jordan, *The Pre-Emption Presumption that Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379 (1998); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125 (1999); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L. Q. 69 (1988). See also TRIBE, *supra* note 277, §§ 6-28 to -31.

279. See U.S. CONST. art. VI, cl. 2.

280. See *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (stating that Congressional purpose is "the ultimate touchstone" of pre-emption analysis.") (citations omitted). See also TRIBE, *supra* note 277, § 6-28 ("Perhaps, the most fundamental point to remember is that preemption analysis is . . . a matter of precise statutory construction rather than an exercise in free-form judicial policymaking.").

281. *Cipollone*, 505 U.S. at 516 (stating that "Congress' intent may be 'explicitly stated in the statute's language'") (citations omitted).

282. See *id.* at 519-20 (stating that express preemption provision is the appropriate starting point for analysis). But see *Boggs v. Boggs*, 520 U.S. 833, 841 (1997) (utilizing conflict analysis, despite express preemption clause, to find that federal statutory scheme under Employee Retirement Income Security Act preempted state community property law). See Jordan, *supra* note 278, at 1182-91, for a discussion of *Boggs*.

283. See TRIBE, *supra* note 277, § 6-28 (arguing that "[t]hese three categories of preemption are anything but analytically air-tight" and suggesting that field preemption "may fall into any of the three categories"); *id.* § 6-30 (observing that "labels like 'conflict' and 'field' preemption rarely offer much real help in the inherently difficult task that lies at the heart of preemption analysis—the task of determining statutory meaning").

For purposes of this essay, the relevant analysis begins with field preemption, because the JCA is intended to occupy a specific but limited area: compulsory disclosure of journalists' communications in formal proceedings.²⁸⁴ Where Congress has not expressly set forth a preemption clause, its intent can be inferred where the statute leaves no room for the states to supplement the federal scheme.²⁸⁵ The JCA, by its terms, can be read to take over or displace this area of law even though it has been occupied by some,²⁸⁶ but not all, of the states.²⁸⁷ To determine the applicable category of preemption, the Court examines the purpose and the structure of the statute.²⁸⁸ Because Congress possesses the enumerated power under the Commerce Clause to enact the JCA, the jurisprudence of preemption allows for this federal law to displace existing state law.²⁸⁹

The downside of the JCA is the concern that the statute could work against or foreclose experimentation at the state and local levels, a value that federalism is designed to protect under the Court's current

284. See discussion *infra* Part II.

285. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

286. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)

[Congressional intent] may be inferred from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'

Id. (citations omitted). See also *TRIBE*, *supra* note 277, § 6-28. With regard to concerns about the federal government stripping away state sovereignty, one commentator states that "specific constitutional provisions and interpretive principles separately address these weighty concerns." Dinh, *supra* note 278, at 2088. Dinh further argues that Article I of the Constitution enumerates and limits Congress's powers in Sections 8 and 9, and limits states' powers in Section 10.

287. See *Texas ex rel. Healey v. McMeans*, 884 S.W.2d 772, 775 (Tex. Crim. App. 1994) (finding no state or federal privilege for journalists).

288. See *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996). The Court offers examples of implicit preemption, such as where a federal statute creates a pervasive scheme of regulation that leaves no room for state supplementation, where a federal statute creates an "irreconcilable conflict" with state law such that compliance with both may be physically impossible, and where a state statute is an obstacle to Congressional purposes and objectives. *Id.*

289. See Dinh, *supra* note 278.

When Congress has legislated consistent with its limited, enumerated powers, the question ceases to be one about the vertical distribution of powers between the federal and state governments Rather, the question becomes one of the horizontal division of federal government functions among the three branches. Specifically, the task for the Court is to discern what Congress has legislated and whether such legislation displaces concurrent state law—in short, the task of statutory construction.

Id.

view.²⁹⁰ In particular, field preemption does not allow for a savings clause to assuage the worry that state-level concerns will be eliminated or overlooked. The Court has not permitted such express clauses in this type of preemption.²⁹¹ Therefore, the JCA will preempt state regulations in this area.²⁹²

At the same time, there must be an assessment of the interests involved. On one side is the notion that state-based experimentation must be allowed to operate. Such experimentation would enable individual states to craft legislation that is more responsive to their particular or local needs. On the other side is the interest of the public on both a local and national level as represented by the institutional press. Mainstream and alternative journalists play an important and integral role in the maintenance of the flow of information to the citizenry through their dissemination of facts, stories, and events across a wide range of subjects. A federal statute that provides a baseline of protection for journalists' sources will create a uniform rule that will promote the values underlying the Press Clause of the First Amendment. Further, a federal law that is the result of the legislative process of discussion, deliberation, and compromise would be more responsive to, and reflective of, a broad range of viewpoints.

IV.

CONCLUSION

The variation among state shield laws and their interpretation by state courts, in combination with varying interpretations of *Branzburg* at the federal and state levels, are important reasons for the enactment of a federal law—the JCA—to protect journalists' communications. If journalists are to participate actively in a free and independent press, to investigate aggressively, to act as watchdogs, and to disseminate fully the information they have gathered and synthesized, then a

290. See, e.g., Dorf & Friedman, *supra* note 246, at 85 (“[C]onsistent with our themes of shared interpretation, experimentation, humility, and respect, we believe Congress should be reluctant to exercise its power in a manner that limits state choices.”).

291. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992) (rejecting savings clause that expressly provided for state laws in which no federal law had been enacted and where statute stated that supplemental state statutes were permissible).

292. Situations involving federal preemption inevitably bear positive and negative results. On the plus side, a federal scheme such as the JCA will afford more predictability in protecting journalists' communications and, in turn, will further the free flow of news to the public on a wide range of issues. The downside of such a statute is the corresponding reduction of state involvement in this area of the law, and the loss of the opportunity for states to engage in variations or experiments with rules involving the treatment of journalists' communications in formal proceedings.

baseline protection with regard to compelled disclosure is essential. The JCA would provide that necessary foundation. By contrast, where journalists and their sources are unprotected because the privilege is limited as to its coverage, is irregular as to its application, or is non-existent, then unpredictability and uncertainty will act as strong disincentives in the process of newsgathering. In turn, this will have an adverse impact on the free flow of information, diminishing the information, the articles, the viewpoints, and the critiques that are offered to the citizenry. The result of such a reduction in the flow of information will be the distortion or elimination of issues of importance to the public.

Journalists should be viewed in terms of the vital function they serve and perform within the broader social and political context of a democratic society. Rather than serving a narrow or singular personal interest, the journalist pursues a professional function: gathering, analyzing, and disseminating information. In her professional capacity, her role is to discover, synthesize, and publish information. She is a conduit for the free flow of information to the public. At the same time, the journalist is an agent for the public and its interest in matters that have an impact on the lives of ordinary citizens. As noted scholar Alexander Bickel observed:

[T]he forced disclosure of reporters' confidences will abort the gathering and analysis of news, and thus, of course, restrain its dissemination. The reporter's access *is* the public's access. He has, as a citizen, his own First Amendment rights to self-expression, to speech and to association activity, but they are not in question here. The issue is the public's right to know. That right is the reporter's by virtue of the proxy which the freedom of the press clause of the First Amendment gives to the press in behalf of the public.²⁹³

Thus, journalists' communications should be protected from compulsory disclosure by a federal statute that will ensure the free flow of news and information to the public.

293. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 84–85 (1975).

