RESTORING THE IDEAL MARKETPLACE: HOW RECOGNIZING BLOGGERS AS JOURNALISTS CAN SAVE THE PRESS

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INTRODUCTION

In May 2006, a California state appeals court became the first court to explicitly recognize that Internet journalists are afforded the same journalist's privilege granted to traditional print and broadcast journalists. The defendants in *O'Grady v. Superior Court* maintained individual websites on which they published trade secrets about an unreleased Apple Computer (Apple) product.[1] Unanimously overruling the trial court, the appeals court held that the petitioners were protected by California's reporter's shield law and the constitutional journalist's privilege from being forced to testify about the identity of their sources.[2]

Because they were publishers of websites, and because they had published not news but the fruits of "trade secret misappropriation," Apple argued petitioners were not "engaged in legitimate journalistic activities" and were not part of the class of persons protected by the California's shield law.[3] The court determined, however, that the peti-

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1. O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006).
2. *Id.* at 76.
3. *Id.* at 96–97. As the court explained, the California reporter's shield is comprised of two substantially similar sources of law:

> Article I, section 2, subdivision (b), of the California Constitution provides, "A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication . . . shall not be adjudged in contempt . . . for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." Evidence Code section 1070, subdivision (a), is to substantially the same effect.

Id. at 96.

tioners were engaged in the dissemination of news, which is protected by the shield law.[4] Furthermore, the court found that the websites should be considered "periodical publications" for the purpose of the shield's protections.[5] Finally, the court determined that the website publishers could also avail themselves of the constitutional protections recognized by California based on federal and state guarantees of freedom of the press.[6]

Although California is the only state to provide press protections under its constitution, the journalist's privilege, also referred to as the reporter's privilege, has been adopted in various forms in almost all American state jurisdictions and some federal circuits.[7] This testimonial privilege shields journalists from contempt sanctions and other punishments they would otherwise face due to their refusal to reveal their sources or information learned in the course of their work.[8]

The journalist's privilege is justified by the journalist's role of providing information that the public would otherwise be unable to acquire. Broad availability of information is an essential element of a strong democracy—quality collective decision-making and electoral accountability both depend upon an informed polity. Hence, the benefit of additional information outweighs the cost of the lost testimonial evidence when journalists claim the privilege and refuse to testify. Bloggers and other private Internet publishers who disseminate news fulfill the same function as the mainstream press: informing the public. In addition, bloggers benefit society by providing increased access to the marketplace of ideas and thereby combat the effects of media consolidation.

In light of the ever-broadening consensus among state and federal jurisdictions that a journalist's testimonial privilege exists, this note argues for uniform federal recognition of this privilege, by judicial recognition under Federal Rule of Evidence (FRE) 501[9] and/or by a

4. The court determined that, "like any newspaper or magazine, [petitioners] operated enterprises whose *raison d'etre* was the dissemination of a particular kind of information to an interested readership . . . . In no relevant respect do they appear to differ from a reporter or editor for a traditional business-oriented periodical . . . ." *Id.* at 98.

5. *Id.* at 105.

6. *Id.* at 105–06.

7. *See infra* Part II.

8. *Id.*

9. FRE 501 calls for the recognition of various privileges to 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." FED. R. EVID. 501. Where state law provides the rules of decision, it will also determine the existence of a privilege. *Id.* As discussed *infra* Part II.B, most states recognize a journalist's privilege.

federal shield law passed by Congress. Because of the important functions bloggers serve and their clear similarities to traditional journalists, bloggers who use their blogs to disseminate information to the public should be recognized as journalists and receive the same protections under the journalist's testimonial privilege.[10] Journalists should be defined not by the institution by whom they are employed or the medium through which they communicate, but by the function that they serve. This definition of "journalist" already has been adopted by some federal circuits and should be adopted uniformly across jurisdictions.

I.
INTRODUCTION TO BLOGS

A Web log, or blog, is "a personal website on which an individual records opinions, links to other sites, etc. on a regular basis."[11] Blogs are frequently-updated websites, used by their owners as online journals or as a means of drawing readers' attention to other online sites of interest by hyperlinking to them. Common, but not essential, characteristics include an archive of old posts, permanent lists of hyperlinks to the blog owner's favorite blogs or websites, and a means by which readers can post their comments and feedback.[12] Blogs grew out of Internet newsgroups and online forums in the mid-to-late 1990s.[13] The term "weblog" was first used by Jorn Barger in December 1997.[14] The shorter version, "blog," was coined by Peter Merholz in April or May of 1999.[15]

The weblog search engine Technorati now tracks more than 53 million blogs.[16] About 70,000 new blogs are created every day, and bloggers post about 700,000 new blog entries daily, or about 29,100 per hour—up from 500,000 new entries daily in spring 2005.[17] Web-

10. A common law recognition of such a privilege for bloggers would not be the only available option. State statutes could be amended to recognize journalists according to a functional test that would also include bloggers.

11. OXFORD DICTIONARY OF ENGLISH 1996 (2d ed. rev. 2005).

12. Wikipedia, Blog, http://en.wikipedia.org/wiki/Blog (last visited Sept. 10, 2006).

13. *Id.*

14. *Id.*

15. *Id.*

16. Technorati, About Us, http://www.technorati.com/about/ (last visited Sept. 10, 2006). One caveat to this figure is that many blogs are created and then quickly abandoned. Therefore, when evaluating the prevalence of blogs, it is useful to consider the total number of posts created, in addition to blogs created.

17. State of The Blogosphere, March 2005, Part 2: Posting Volume, http://www.sifry.com/alerts/archives/000299.html (Mar. 15, 2005, 07:56 EST). These figures show not only an increase in the number of blogs, but an increase in the speed

sites such as Blogger, Blog-City and LiveJournal offer easy-to-set-up blogs free to the public.[18] By the end of 2003, top-rated blogs such as Instapundit,[19] Daily Kos,[20] and Eschaton[21] had 75,000 unique visitors per day.[22] According to a Pew Internet study conducted in 2004, eleven percent of American Internet users report visiting blogs.[23]

Blogs are used by everyone from teenagers keeping their friends up to date on their daily lives to political candidates hoping to attract supporters. During Howard Dean's 2004 Democratic presidential candidacy, his campaign and supporters used the power of blogs to organize activities and, most notably, to raise financial support, breaking the record for Democratic primary fundraising.[24]

In addition blogs have been used in recent years to disseminate news—including by traditional journalists themselves.[25] Blogs focusing on news and politics have increasingly become viable alternatives to more traditional media. Because a blog's content can be updated and distributed almost instantly at essentially no cost, bloggers are able to update stories in ways other journalists, particularly newspaper journalists, typically cannot.[26]

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at which they are being created; in the spring of 2005, Technorati data showed about 30,000–40,000 new blogs being created daily. State of The Blogosphere, March 2005, Part 1: The Growth of Blogs, http://www.sifry.com/alerts/archives/000298.html (Mar. 14, 2005, 00:54 EST).

18. Blogger: Create your Blog Now—FREE, http://www.blogger.com/start (last visited Sept. 10, 2006); Free blogging, journaling, publishing at Blog-City.com, http://blog-city.com/bc/ (last visited Sept. 10, 2006); LiveJournal.com, http://www.livejournal.com (last visited Sept. 10, 2006).

19. Instapundit, http://instapundit.com (last visited Feb. 8, 2006).

20. Daily Kos, http://dailykos.com (last visited Feb. 8, 2006).

21. Eschaton, http://atrios.blogspot.com (last visited Feb. 8, 2006).

22. Dennis Faas, Word of the Day: Blog (Sept. 23, 2005), http://www.infopackets.com/channels/en/pause_for_thought/word_of_the_day/2005/20050923_blog.htm.

23. AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT: CONTENT CREATION ONLINE 3 (2004), http://pewinternet.org/pdfs/PIP_Content_Creation_Report.pdf. *But see* Memorandum from Lee Rainie, Dir., PEW Internet Project (Jan. 2005), http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf (noting that, in January 2005, sixty-two percent of American Internet users did not know what a blog was).

24. Wikipedia, Howard Dean, http://en.wikipedia.org/wiki/Howard_Dean#Use_of_the_Internet (last visited Feb. 16, 2006).

25. *See, e.g.*, MSNBC, Bloggermann, http://www.msnbc.msn.com/id/6210240/ (last visited Sept. 10, 2006); MSNBC, The Daily Nightly, http://dailynightly.msnbc.com/ (last visited Sept. 10, 2006); Washington Post, Washingtonpost.blog, http://blog.washingtonpost.com/washpostblog/ (last visited Sept. 10, 2006).

26. *See generally* Steve Outing, *What Journalists Can Learn From Bloggers*, POYNTER ONLINE, Dec. 20, 2004, http://www.poynter.org/content/content_view.asp?id=75383 (discussing examples of how bloggers would have instantly posted various prominent news stories whereas traditional media sources hold stories for further investigation).

Those who use and frequent blogs also have a different perception of the process of journalism. Rather than a media organization—reporter, news editor, copy editor, designer, publisher—working as an institution to ensure a story's accuracy and authenticity, many bloggers post information despite uncertainty about its reliability and depend on their readers to analyze, critique, and correct the entries.[27] Thus blogs provide greater opportunity for public participation and interaction than the traditional media because feedback can be appended to the original work and then viewed and responded to by the author and others. In a sense, comments left by readers become part of the original author's work.

II.
WHAT IS THE CURRENT STATE OF THE JOURNALIST'S PRIVILEGE?

The journalist's privilege is a testimonial privilege which serves to shield journalists from punishment for their refusal to testify about information learned in the course of journalistic work or the sources of that information. The privilege has been explicitly codified in many states,[28] and judges have found it to exist implicitly in state constitutions and the First Amendment.[29] The privilege has been interpreted to apply solely to journalists, and is not a privilege available to all citizens based on principles of free speech.[30]

A. Journalist's Privilege and the First Amendment—Branzburg *and Beyond*

There is some disagreement amongst commentators regarding the existence of a constitutionally based journalist's privilege under the First Amendment. Some commentators insist that the free press clause must mean something beyond the free speech clause, pointing to the strong presumption in interpreting law that any language used is not superfluous.[31] Others argue that at least with regard to the First Amendment, there is essentially no such thing as a journalist's privilege—which is to say, the press is not granted any exemptions from

27. *Id*.
28. *See infra* note 52.
29. *See* New York Times Co. v. Gonzales, 382 F. Supp. 2d 457, 502 & n.36 (S.D.N.Y. 2005).
30. *See infra* Part II.C.
31. *See*, *e.g.*, Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 640 (1974–75).

laws of general applicability. Professor Erwin Chemerinsky states that "The Supreme Court generally has taken the . . . view that the press is not entitled to any special rights or protections under the First Amendment."[32] Judge Kozinski of the Ninth Circuit has speculated that any hint of a separate freedom for the press is outdated and points to blogs themselves as evidence that press freedom separate from free speech is meaningless.[33]

While anonymous sources are an important part of gathering and disseminating news, the Supreme Court has refused to recognize a First Amendment privilege for the press to protect the confidentiality of sources when a reporter is subpoenaed to testify before grand juries or in other judicial proceedings. In the foundational case *Branzburg v. Hayes*, a divided Court found that no First Amendment privilege existed under these circumstances.[34] *Branzburg* consolidated three cases,[35] all of which involved newspaper reporters who objected to being subpoenaed based on their reporting. The reporters argued that enforcement of the subpoenas would create distrust between the reporters and their sources, some of whom were engaged in illicit activity or were the targets of law enforcement investigations. They also argued that their relationships with their sources furthered the public's knowledge of important public issues, and that the subpoenas would be detrimental and perhaps fatal to those efforts.[36] Citing the principle that "the publisher of a newspaper has no special immunity from the application of general laws,"[37] the Court held that "newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation."[38] The ma-

32. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.6.1 (2d ed. 2002). *See also* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 456-58 (1982-83) (noting a number of cases in which journalists' claims to privileges have been rejected by Court).

33. Clay Calvert and Robert D. Richards, *Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press*, 23 LOY. L.A. ENT. L. REV. 259, 273–77 (2003). During an interview with the authors, Judge Kozinski stated, "We have to treat speech and press as equivalent. They are next to each other. There is no suggestion that the Framers meant to have one be more important than the other . . . . In some pragmatic sense, you can look at The New York Times and say it definitely is the press. And you can see some guy shouting on a street corner and say that's definitely speech. But what is it when somebody has a blog? I don't know the answer to that question. It depends, I presume, on how many hits one gets on the blog. . . . I think the distinction is completely disappearing so that even talking about the role of the press is somewhat of a quaint concept." *Id.* at 274, 276.

34. 408 U.S. 665, 667 (1972).

35. The others were *In re* Pappas and United States v. Caldwell. *Id*. at 752.

36. *Id.* at 682.

37. *Id.* at 683 (quoting Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937)).

38. *Id*. at 685.

jority found the evidence of a potential chilling effect on speech, and thus on the press, unconvincing.[39] The Court further noted that it could not "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it."[40] In *Cohen v. Cowles Media Co.*,[41] the Court reiterated this position:

> [G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news . . . . [E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.[42]

The Supreme Court recently had the opportunity to revisit the *Branzburg* decision in a high-profile case involving New York Times reporter Judith Miller.[43] Miller was subpoenaed to testify about the identity of a source who disclosed to her information revealing that Valerie Plame, wife of former U.S. ambassador Joseph Wilson, was a CIA agent.[44] Another reporter, Matthew Cooper, provided his testimony to the grand jury.[45] Miller, backed by the Times,[46] claimed the

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> The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. . . . [T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen.

Id. at 693. This reasoning suggests that the Court may be willing to recognize a journalist's privilege in a case like *Branzburg* if further evidence demonstrated that the absence of a privilege chilled news production.

40. *Id*. at 692. Justice Powell may have had this language in mind when he referred in his concurrence to "the limited nature of the Court's holding." *Id*. at 709 (Powell, J., concurring). Many lower courts have viewed the decision in *Branzburg* as something like a 4-1-4 decision, reading Powell's concurrence as joined with the four dissenters as actually recognizing a journalist's privilege. *See* FRANCIS WILKINSON, *Protecting the Source of Controversial News*, *in* ESSENTIAL LIBERTY: FIRST AMENDMENT BATTLES FOR A FREE PRESS 104 (1992).

41. 501 U.S. 663 (1991).

42. *Id.* at 669–70.

43. *In re* Grand Jury Subpoena, Miller, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005).

44. *Id*. at 967.

45. *See* Matthew Cooper, "*What I Told the Grand Jury*," TIME, July 25, 2005, at 38; Michael Duffy & Viveca Novak, *Let's Make a Deal*, TIME, Oct. 10, 2005 at 24–25 (reporting that Cooper testified to grand jury).

journalist's privilege and refused to testify.[47] The district court judge declared Miller in contempt and ordered her to be jailed until she agreed to testify.[48] Both the district court and the Court of Appeals for the District of Columbia, citing *Branzburg*, held that Miller could not claim the privilege.[49] The Supreme Court declined to grant certiorari, allowing the appeals court decision to stand.[50] Miller was imprisoned until September, when she agreed to testify about the source of her information.[51]

B. Statutory Recognition of Journalist's Privilege

In the broader discussion of journalist's privilege, however, the Court in *Branzburg* left a significant caveat: it noted that Congress and state legislatures were free to fashion a statutory journalist's privilege and that state courts could interpret their respective state constitutions as including such a privilege.[52] In the years since the *Branzburg* decision, there has been a steady trend among states toward recognizing a journalist's privilege to protect the confidentiality of her sources through statutory "shield laws" and judicial decisions. To date, forty-eight states and the District of Columbia have recognized some form of journalist's privilege.[53]

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46. *See, e.g.*, Don Van Natta Jr., Adam Liptak, and Clifford J. Levy, *The Miller Case: A Notebook, A Cause, a Jail Cell and a Deal*, N.Y. TIMES, Oct. 16, 2005, at A1.

47. *In re* Grand Jury Subpoena, Miller, 397 F.3d at 967.

48. *See In re* Special Counsel Investigation, 374 F. Supp. 2d. 238, 239 (D.D.C. 2005).

49. *In re* Grand Jury Subpoena, Miller, 397 F.3d 964, 970–71 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005).

50. Miller v. U.S., 125 S.Ct. 2977, 2977 (2005).

51. *See* David Johnston & Douglas Jehl, *Times Reporter Free From Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1.

52. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

53. *See* New York Times Co. v. Gonzales, 382 F. Supp. 2d 457, 501–03 (S.D.N.Y. 2005) (discussing recognition of journalist's privilege among states). Thirty-one states have adopted shield statutes: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina and Tennessee, along with the District of Columbia. *Id.* at 502. Courts in 17 other states have recognized a journalist's privilege: Connecticut, Idaho, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, New Hampshire, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin. *Id.* at 503–04. This leaves only Wyoming and Hawaii yet to recognize any form of journalist's privilege. *Id.*

C. Defining Journalist: Who Should Get the Privilege?

One problem with expanding the journalist's privilege and other privileges to those outside the establishment media is definitional: Who should get such privileges? Each privilege granted is a cost to society, and if such privileges are interpreted to apply to a broad section of society the cost will become prohibitive. As the Court pointed out in *Branzburg*, "[s]ooner or later, it [will become] necessary to define those categories of newsmen who qualif[y] for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large, metropolitan publisher."[54] Therefore, some way of limiting the definition to a specified subgroup of society is important.

The applicability of the journalist's privilege must be clear. For example, a blogger who is unsure whether she will be able to claim a privilege will likely be deterred from disseminating information. Additionally, if sources are not confident that a blogger can claim the journalist's privilege, they will be less candid in providing information. Thus, the answer to the question of who is a journalist must be capable of being tested in a straightforward manner by courts and being readily understood by laypersons.

The federal circuit courts have provided some guidance on this issue. While noting that the Supreme Court's holding in *Branzburg* established that the First Amendment does not create an absolute testimonial privilege for journalists, the Second Circuit Court of Appeals in *von Bulow v. von Bulow* recognized a qualified journalist's privilege against disclosure of sources consulted pursuant to some newsgathering activities.[55] The court deemed this qualified privilege necessary to protect against "the deterrent effect such disclosure is likely to have upon future 'undercover' *investigative reporting* . . . [, an effect which] threatens freedom of the press and the public's need to be informed."[56]

In *von Bulow*, the Second Circuit adopted a functional test to determine who is eligible to claim the journalist's privilege under FRE 501:

> First, the process of newsgathering is a protected right under the First Amendment, albeit a qualified one. This qualified right, which results in the journalist's privilege, emanates from the strong public policy supporting the unfettered communication of informa-

54. 408 U.S. at 704.
55. *See* von Bulow v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987).
56. *Id*. at 142–43 (quoting Baker v. F & F Inv., 470 F.2d 778, 782 (2d Cir. 1972)).

> tion by the journalist to the public. Second, whether a person is a journalist, and thus protected by the privilege, must be determined by the person's intent at the inception of the information-gathering process. Third, *an individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press*.[57]

The court ultimately held that a person would be granted a qualified journalist's privilege after demonstrating "the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process."[58] This dissemination can be in any form,[59] and the privilege does not require employment as a professional journalist.[60] The court in fact emphasized a second time that the privilege can be availed by "one not traditionally associated with the institutionalized press."[61]

The functional test established by the Second Circuit has since been adopted by other circuits.[62] The Ninth Circuit adopted the test in 1993 and held that an author working on a book did not have to testify or produce records of interviews conducted in preparation for writing the book.[63] The Third Circuit adopted the same test, holding that an employee of World Championship Wrestling who produced commentaries for a 900-number hotline did not meet the test, because the test requires the person seeking the privilege to not only have the intent to

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57. *Id*. at 142 (emphasis added). The court also identified two additional principles: the privilege extends to nonconfidential and confidential sources alike, and "unpublished resource material" is also protected. *Id.*

58. *Id*. at 144.

59. *Id*. The court cited *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), for the proposition that "the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.*

60. *Id.* ("Although prior experience as a professional journalist may be persuasive evidence of present intent to gather for the purpose of dissemination, it is not the sine qua non. The burden indeed may be sustained by one who is a novice in the field.").

61. *Id*. at 144–45. The court in *von Bulow* ultimately determined that because the appellant did not have the intent to disseminate information to the public at the time she began gathering the information in question, she was not a journalist for the purpose of obtaining the privilege. *Id*. at 145–46.

62. *See* Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993) ("We find the Second Circuit's reasoning in *von Bulow* persuasive."); *In re* Madden, 151 F.3d 125, 129 (3d Cir. 1998) ("We find the reasoning of the court in *von Bulow*, and by extension in *Shoen* to be persuasive.").

63. *Shoen*, 5 F.3d at 1291. The court held that the author had met the requirements for the qualified privilege and that the plaintiffs had not exhausted other reasonable alternative methods of obtaining the information. *Id*. at 1296.

disseminate the information, but that the information disseminated be news rather than entertainment.[64]

The Third Circuit's clarification is crucial to the functional test's viability as applied to blogs. That interpretation of the functional test provides an additional limitation on the privilege. Not all bloggers would be able to claim the journalist's privilege. While all blogs disseminate content, most of this content consists of "personal ramblings," not news.[65] Therefore, only a small percentage of bloggers would receive a privilege under the functional test. This would sufficiently limit the privilege to minimize its social cost while protecting those bloggers who legitimately disseminate news.

III.
What Function Should the Press Serve?

In deciding whether bloggers, and journalists generally, should be granted a testimonial privilege, an examination of the role journalists play in society is necessary. Privileges should be granted to journalists only if the journalist's role benefits society and that benefit is sufficiently enhanced by the recognition of privileges to override the cost of the privileges to society.[66] In addition, the question of what a journalist is, and thus who will be granted the privilege, should be considered, as the societal cost will be determined in part by the number of people who may successfully claim the privilege. The two models traditionally used to explain the role of the press in America are the "marketplace of ideas" and the "Fourth Estate."[67]

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64. *In re* Madden, 151 F.3d at 130 ("Madden's activities in this case cannot be considered 'reporting,' let alone 'investigative reporting.' By his own admission, he is an entertainer, not a reporter, disseminating hype, not news.").

65. Fernanda Viégas, *Bloggers' Expectations of Privacy and Accountability: An Initial Survey*, 10 J. of Computer-Mediated Comm., issue 3, art. 12, http://jcmc.indiana.edu/vol10/issue3/viegas.html.

66. *See* Elikins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (noting in discussion of general effects of constricting admissibility of relevant evidence that "limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a good transcending the normally predominant principle of utilizing all rational means for ascertaining truth"). This, of course, is only true as a matter of policy. If it is determined that a privilege is constitutionally required, it must be bestowed notwithstanding this cost-benefit analysis. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 461 (1966) (protecting individual's constitutional privilege against self-incrimination).

67. *See* Roy S. Gutterman, Note, *Chilled Bananas: Why Newsgathering Demands More First Amendment Protection*, 50 Syracuse L. Rev. 197, 207–08 (2000); *see generally* Clay Calvert & Robert D. Richards, *Free Speech and the Right To Offend: Old Wars, New Battles, Different Media*, 18 Ga. St. U. L. Rev. 671, 674 n.17 (2002).

A. The Marketplace of Ideas

The theory of the marketplace of ideas provides that a democracy will best arrive at truth by allowing everyone a voice in the public discourse, and that ultimately market forces will select the ideas most beneficial to society.[68] The theory had its origins in the libertarian philosophies of John Milton[69] and John Stuart Mill.[70] It was perhaps best conceptualized in a 1919 dissent by Justice Holmes:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that *the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[71]

To function, a marketplace of ideas needs at a minimum freedom from government restraints on speech, as provided by the free speech clause of the First Amendment.[72] Fewer restraints will mean greater diversity of ideas in the marketplace, and thus a greater opportunity for truth to emerge.[73] In addition, however, a functioning marketplace requires that access to the channels of public discourse be sufficiently available and open to the public.[74] The market requires that the discussion be not only free—as in free from government intrusion—but also full—as in informed by a wide variety of viewpoints.[75] A lack of

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68. *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984); Scott C. Pugh, Comment, *Checkbook Journalism, Free Speech, and Fair Trials*, 143 U. PA. L. REV. 1739, 1751 (1995).

69. *See* JOHN MILTON, AREOPAGITICA 35 (1644) ("And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?").

70. *See* JOHN STUART MILL, ON LIBERTY 58 (Edward Alexander ed., Broadview Literary Texts 1999) (1869).

71. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added). Justice Douglas expressed a similar idea in a dissenting opinion in 1951: "When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. . . . Full and free discussion has indeed been the first article of our faith." Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting).

72. U.S. CONST. amend. I.

73. Ingber, *supra* note 68, at 3.

74. *Id*. at 9–10.

75. *See Dennis*, 341 U.S. at 584.

public access to the channels of communication will restrict the fullness of voices in the market and inhibit the search for truth.[76]

A model of the press based on the marketplace of ideas would include a large number of media organizations, characterized by decentralized ownership and a wide variety of viewpoints, methods of distribution, and core audiences. The barriers to entry would be low, so that if a private citizen wanted to gain access to the marketplace, that access would be readily obtained. In the last century, however, the marketplace of ideas model has been replaced, both in theory and in the marketplace, by the Fourth Estate model.

B. The Fourth Estate Model

The modern vision of the role of the free press is the Fourth Estate model, first elucidated by Justice Potter Stewart.[77] The goal of the free press clause in protecting the independent, institutional press, Justice Stewart says, is "to create a fourth institution outside the Government as an additional check on the three official branches."[78] Stewart's thesis is that the Founders intended for the press to act as an institutionalized "adversary to the Executive Branch of the Federal Government."[79] The free press clause, unlike the other provisions in the Bill of Rights that protect the specific rights of individuals, "extends protection to an institution."[80] Stewart further asserts that "[t]he publishing business is, in short, the only organized private business that is given explicit constitutional protection."[81] Stewart rejects the theory that the press clause merely provides protection for speech that is printed and distributed.

The press conceived by the Fourth Estate model has been called the "watchdog" press.[82] Its primary function is to investigate government action, deter and expose fraud and corruption, and to inform the public of what it finds out.[83] Because it is the government that the press is intended to check, the press must be free of government regu-

76. *See infra*, Part III.B.
77. *See* Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).
78. *Id*. at 634.
79. *Id*. at 631. For example, Justice Stewart believed that during Watergate and its aftermath the press performed exactly as the Founders intended. *Id.*
80. *Id*. at 633.
81. *Id*.
82. Jed Handelsman Shugeman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 965 (2003) (arguing that "Fourth Estate" serves as best watchdog on national level).
83. *See* Stewart, *supra* note 77, at 634 ("[T]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.").

lations to deter the government's incentive to attack the press in order to protect itself.[84]

Part of the attractiveness of the Fourth Estate model is that it leads to a functional test for determining who qualifies for the journalist's privilege. By defining journalists as members of the institutionalized press, Stewart's model provides both clarity and limitation to its grant of privileges.[85] This clarity is important in that it provides journalists with certainty as to whether they will be able to claim the privilege and gives sources confidence that their identity and the information they provide will be protected.[86] Limiting the potential beneficiaries of the privileges mitigates their societal cost.

C. The Role of the Press in Baker's Four Types of Democracy

Professor C. Edwin Baker considers whether the purpose of the press clause was to "protect a press that adequately serves democracy,"[87] and argues that in making that determination, the proper approach "requires a theory of democracy."[88] In order to determine what role of the press is required, the first thing that must be determined is the kind of democratic society in which the press will operate.[89] Baker then identifies four separate visions of democracy and a separate role for the media corresponding to each.[90]

Elitism is based on the theory that government should be run by experts and that elections are good purely for their legitimizing function and to prevent corruption. Under this system the press serves one function: that of a government watchdog, the same role as under Stewart's Fourth Estate model.[91] Baker asserts that the press's watchdog function is desirable under any of his theories of democracy, but elitism alone requires no further contribution from the press.[92]

Liberal pluralism is based on the theory that the rule of government is justified by the people having an equal right to choose their

84. *See* New York Times Co. v. United States, 403 U.S. 713, 723–24 (1971) ("The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.").

85. *See supra* notes 77–81 and accompanying text.

86. However, this definition also leads to problems regarding opportunities for speech and viewpoint diversity. *See infra* Part III.D.

87. C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 318 (1998–1999).

88. *Id.*

89. *Id*.

90. *Id*. at 318–19.

91. *Id*. at 320–27 (noting elitism does not call for press to encourage political participation, as this will be beyond the capacity or interest of public).

92. *Id*. at 324.

rulers and on the inevitability of conflict between self-interested groups. Liberal pluralism calls for the press to facilitate negotiation among the groups and ensure that all interests are accounted for.[93]

Republicanism shares the pluralist theory's justification of government rule, but also stresses the search for common ground and the overcoming of self-interests, rather than mere compromise between irreconcilable groups.[94] Republicanism calls for the press to serve as a democratic institution, facilitating a deliberative process among individuals and groups to find common values.[95]

Finally, the system for which Baker advocates is called complex democracy. This system combines pluralism and republicanism and calls for numerous public spheres, including some media channels open to everyone and designed to encourage public discourse, and other channels used by individual interest groups to build internal consensus.[96]

With the exception of elitism, all of Baker's theories call for a press that serves two roles—to protect against corruption (the watchdog role) and to promote public dialogue about important issues among interest groups and society generally.[97] The Fourth Estate model is sufficient for protecting against corruption, but public dialogue requires input and participation from the public. This requires publicly accessible channels of communication. The Fourth Estate model, by institutionalizing the press, diminishes the press's capacity to perform this function.

D. Consolidation of Media Ownership

Over the course of the last half-century, the institutionalization of the media through the operation of the Fourth Estate model has led to a trade-off between public participation and more powerful private press organizations. In the twentieth century, the ownership of news organizations has been increasingly concentrated into a small number of large corporations. This has created a "great discrepancy . . . between the drafters' experience with the press and the reality existing

93. *Id*. at 327–30.
94. *Id*. at 332 ("Where the liberal pluralist sees normative legitimacy as the result of fair distributions resulting from fair bargains, the republican sees legitimacy flowing from commitment to, and agreement on, the common good.").
95. *See id*. at 335.
96. *See id*. at 335–40.
97. *See supra* notes 90–94 and accompanying text.

today . . . ."[98] From 1923 to 1973, newspapers in direct competition with other newspapers declined from sixty percent to five percent;[99] as of 1988, fewer than four percent of American cities were served by competing, independently owned newspapers;[100] "In 1910, . . . 689 American cities or towns had competing . . . daily newspapers. In 1940, . . . the number had fallen to 181. By 2002, the number was 14."[101] As of 1967, in seventy-two communities, the only local newspaper owned the only broadcast stations.[102] Amongst the top 100 television markets, which served more than 90% of the population at the time, only three markets consisted of television stations owned by single-station owners, while in twenty-four markets, all the stations were owned by multiple-station owners.[103]

The Telecommunications Act of 1996,[104] which led to loosened ownership restrictions, furthered the trend toward consolidation by "eliminating the national radio ownership cap altogether, extending the length of television licenses from five to eight years, and streamlining renewal procedures."[105] One result was the 2000 merger of America Online and Time Warner into AOL Time Warner, creating what was at the time the largest media company in the world.[106]

These trends have continued to the present day and have expanded to encompass essentially all forms of media, aided in part by corporate mergers and by the Federal Communications Commission's (FCC) loosening of major rules regarding media cross-ownership twice in the last decade.[107] Today, the six largest media companies in

98. PATRICK M. GARRY, THE AMERICAN VISION OF A FREE PRESS 59 (1990). Garry notes that "the drafters of the First Amendment had no reason to anticipate a 'marketplace of ideas' dominated by a few corporations in command of the mass media." *Id*.

99. *Id*. at 59–60 (citing BRUCE OWEN, ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT 49 (1975)).

100. *Id*. (citing MICHAEL PARENTI, DEMOCRACY FOR THE FEW 157 (1988)).

101. C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 841 n.7 (2002) (citing C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 16, 146 n.34 (1994); Walt Brasch, *The Media Monolith: Synergizing America*, COUNTERPUNCH, Feb. 9, 2002, http://www.counterpunch.org/braschmedia.html.

102. Nicholas Johnson & James M. Hoak, Jr., *Media Concentration: Some Observations on the United States' Experience*, 56 IOWA L. REV. 267, 269 (1970–1971).

103. *Id*. at 270.

104. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

105. Victoria F. Phillips, Essay, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U.L. REV. 613, 625 (2004).

106. *See* Tom Johnson, *That's AOL folks. . .*, CNN MONEY, Jan. 10, 2000, http://money.cnn.com/2000/01/10/deals/aol_warner/.

107. *See FCC Changes to Ownership Rules*, ONLINE NEWSHOUR, June 2003, http://www.pbs.org/newshour/media/conglomeration/fcc_report_06-02.html (discussing elimination of newspaper-broadcast cross-ownership ban and television radio cross-ownership ban in certain markets); DAVID DEMERS, MEDIA CONCENTRATION IN THE

America—Viacom, Disney, General Electric, News Corporation, Vivendi Universal, and AOL Time Warner[108]—own an enormous share of the overall media markets in America, including movies, music, television, publishing, and many others.[109] In addition, companies such as Gannett,[110] Hearst,[111] McClatchy (publishing),[112] ClearChannel,[113] and CBS Radio *née* Infinity Broadcasting (radio)[114] have consolidated ownership further within specific types of media.

The primary effect of media consolidation has been a dwindling number of available channels through which private citizens can gain access to the public discourse, either to gather or disseminate content. Ownership concentration and the barriers to entry inherent in the institutionalized press make participation essentially impossible for most private citizens, restricting viewpoint diversity and weakening the marketplace of ideas. This has led some to bemoan that "if ever there were a self-operating marketplace of ideas, it has long ceased to exist."[115]

The control of the channels of communication by fewer and fewer actors has broad First Amendment implications. Before the implications can be discussed, it is important to review the historical intention of the free press clause. Leonard Levy, perhaps the foremost First Amendment historian, argues that while much of the framers' intent in drafting the amendment remains a mystery,[116] some limited

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UNITED STATES 13 (2001), http://www.cem.ulaval.ca/CONCetatsUnis.pdf (noting FCC modifications to radio-TV cross-ownership rules to allow increased consolidation).

108. NOW with Bill Moyers, Local Media Ownership (Oct. 10, 2003), http://www.pbs.org/now/politics/localmedia.html.

109. Mark Crispin Miller, *What's Wrong With This Picture?*, NATION, Jan. 7, 2002, at 18, *available at* http://www.thenation.com/doc/20020107/miller/2.

110. *See* Gannett Co., Inc., Company Profile, http://www.gannett.com/map/gan007.htm (last visited Sept. 10, 2006).

111. *See* Hearst Corporation, About Hearst, http://www.hearst.com/about/ (last visited Sept. 10, 2006).

112. *See* The McClatchy Company, Overview, http://www.mcclatchy.com/100/story/179.html (last visited Sept. 10, 2006). McClatchy purchased Knight-Ridder in 2006 to become the nation's second-largest newspaper publisher. *Id.*

113. *See* ClearChannel, http://www.clearchannel.com (last visited Sept. 10, 2006).

114. *See* CBS Radio, About Us, http://www.cbsradio.com/about/index.php (last visited Sept. 10, 2006).

115. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1966–1967) [hereinafter Barron, *Access*].

116. The Supreme Court has noted this lack of clarity, stating, "we have only limited evidence of exactly how the Framers intended the First Amendment to apply." Minneapolis Star & Tribune v. Minn. Comm'r of Revenue, 460 U.S. 575, 583 n.6 (1983). Justice O'Connor continues, "[t]here are no recorded debates in the Senate or in the States, and the discussion in the House of Representatives was couched in general

information about that intent can be gleaned by looking at the press as it existed in eighteenth-century America:

> When the framers of the First Amendment provided that Congress shall not abridge the freedom of the press they could only have meant to protect the press with which they were familiar and as it operated at the time. They constitutionally guaranteed the *practice* of freedom of the press. They did not adopt its legal definition as found in Blackstone or in the views of libertarian theorists.[117]

At the time of the First Amendment's drafting, the media consisted of many small, independent printers; as a result, gaining entry into the publishing industry, and thus the public channels of communication, was easy for individuals to do.[118] The number of American newspapers increased dramatically around the time of the framing, from thirty-seven at the start of the Revolutionary War to ninety-two in 1790, just fifteen years later; between 1783 to 1801, 450 newspapers were started, though many did not survive.[119] Printers competed for market share in larger cities toward the end of the eighteenth century.[120] In addition, printers generally did not have regular writing staffs and would often publish not their own writings, but the writings of outside contributors and their own readership.[121] This meant that not only professional journalists, but also ordinary citizens, had access to the channels of public communication.

Based on the numerous and diverse array of independent publications, which led to high viewpoint diversity and low barriers to entry, "the early American press constituted a true marketplace of ideas in which there was relatively easy access to the channels of communication."[122] This easy access to the marketplace was an essential assumption behind the First Amendment.[123]

In addition to the difficulty of arriving at a clear, objective determination of what the framers intended, it is important to remember that the framers' intent as to the structural protections of the free press

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terms, perhaps in response to Madison's suggestion that the Representatives not stray from simple acknowledged principles." *Id*.

117. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 272 (1985). James Madison wrote that "the best key to the text of the Constitution, as of a law, is to be found in the contemporary state of things, and the maladies or defects which were to be provided for." Letter from James Madison to William Cabell Rives (Dec. 20, 1828), *in* 3 JAMES MADISON, LETTERS AND OTHER WRITINGS 663–64 (1865).

118. GARRY, *supra* note 98, at 29.

119. *Id*. at 29–30.

120. *Id*. at 30.

121. *Id*. at 19–23.

122. *Id*. at 32–33.

123. *Id*. at 9.

clause is not necessarily binding.[124] The Constitution has often been called a living document, and certainly constitutional law has been adapted to apply to modern realities unforeseeable by the framers.[125] Therefore, while an understanding of the framers' intent may be illustrative, it should not be determinative. Instead, such explorations should be undertaken within the framework of resolving the best way the constitutional language can be applied to society's goals for what the press should be today, "for only by responding to the present reality . . . can the constitutional guarantee of free speech best serve its original purposes."[126] Therefore, an understanding of the legal rights of journalists should be informed not only by the intent of the framers but also by the role journalists play in creating and furthering democratic society.

Increased concentration of media ownership not only undermines the assumptions but also thwarts the goals of the First Amendment.[127] It has also resulted in a shift in the media's role from providing a forum to the community to share and debate ideas in the public channels of communication, to setting the public agenda and controlling the ideas entering the marketplace.[128] This casts doubt upon a key assumption inherent in the First Amendment—that the only protection necessary to ensure the adequate vigor of the marketplace of ideas is the guaranteed freedom from incursion by the government.[129]

Professor Jerome Barron argues that the marketplace of ideas concept was contingent on this assumption.[130] He agrees that government has been restrained by the First Amendment; however, he says, "our constitutional law has been singularly indifferent to the reality and implications of *nongovernmental* obstructions to the spread of political truth."[131] Increased media ownership consolidation means "the marketplace model no longer describes our system of communication;

124. Nimmer, *supra* note 28, at 641 ("[A]s we have seen in other constitutional contexts, the original understanding of the Founders is not necessarily controlling.").
125. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 849 (1997) (applying First Amendment to Internet speech).
126. Barron, *Access*, *supra* note 115, at 1642.
127. GARRY, *supra* note 98, at 61.
128. *See id*. at 61–62.
129. Barron, *Access*, *supra* note 115, at 1642.
130. *Id*. at 1655. Barron quotes Chief Justice Hughes: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press . . . ." *Id.* (quoting *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713–14 (1931)).
131. *Id.* at 1643 (emphasis added). Barron nonetheless notes exceptions to this problem, citing primarily the requirement that cable television companies provide public access channels. Jerome A. Barron, *Rights of Access and Reply to the Media in the United States Today*, 25 COMM. & L. 1, 9 (2003) [hereinafter Barron, *Rights*].

and a simple negative conception of the First Amendment as a protection against government interference no longer ensures diversity of expression."[132]

The Supreme Court recognized the dangers of consolidating media ownership in *Miami Herald Publishing v. Tornillo*.[133] In that case, the Court faced the issue of whether a statute violated the free press guarantee by requiring newspapers that criticize political candidates to provide those candidates with a right to reply to the criticism.[134] The Court balanced two conflicting First Amendment interests: that of the public in having access to a diverse media and to the channels of public discourse, and that of newspaper publishers in controlling the content of their newspapers.[135] The Court recognized the arguments that "government has an obligation to ensure that a wide variety of views reach the public,"[136] that the press "has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events,"[137] and that "[i]n effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues."[138] In essence, the court was balancing the concern about the autonomy of the institutional press and the concern about harm caused to the marketplace of ideas by the increasing consolidation of media ownership.

The historical solution to such a lack of viewpoint diversity and access to the marketplace, the court noted, was simply to create more media outlets—but by the time *Tornillo* was decided, the Court determined that the economics of the market had made that option "almost impossible."[139] Still, the Court found the statute unconstitutional as an intrusion on the freedom of the press.[140]

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132. GARRY, *supra* note 98, at 62–63.

133. 418 U.S. 241, 249–50 (1974).

134. *Id*. at 243.

135. *Id*. at 248, 258. The Court ultimately held that the right of the print media to control the content of its newspapers was the superior right, because the government could not intrude upon editors' exercise of control over content. *Id*. at 258.

136. *Id*. at 248.

137. *Id*. at 249.

138. *Id*. at 250.

139. *Id*. at 251. *See also* GARRY, *supra* note 98, at 6 ("It is doubtful . . . that the framers of the Constitution ever considered that economies of scale would create a monopolistic press or that media conglomerates could become society's gatekeepers of information.").

140. *Tornillo*, 418 U.S. at 258. *See also* Barron, *Rights*, *supra* note 131 (observing that many newspapers adopted practice of offering reply despite *Tornillo*, and that oped pages and ombudsmen became more common features of newspapers). *Id.* at 6.

On the other hand, the Court has previously upheld access rights in the context of broadcast media.[141] The rationale for this is that the airwaves over which broadcasters disseminate their conduct belong to the public, and are a scarce, limited resource.[142] Broadcasters, therefore, are granted licenses on the condition that they must act in the public's interest.[143] However, the economics of advertising and subscriptions are such that newspapers are often natural monopolies in their communities, meaning that "[n]ewspapers are scarce too—although for somewhat different reasons than spectrum space."[144] If scarcity is the only justification we have for distinguishing between print and broadcast media regulations, there should be no distinction.[145] This is especially true because the scarcity that does exist in the broadcast spectrum exists solely because the FCC has restricted the frequencies available for broadcasting,[146] and because technological advances now allow more broadcasters to operate within a given range of frequencies.[147]

Media monopolies tend to ignore the conflict inherent in a liberal pluralist or complex theory of democracy, in favor of the majoritarian view:

> [I]f ideology (or experience) deeply colors perceptions of facts and values, even a "responsible" media entity is likely to effectively or primarily present issues and information relevant to the society's dominant ideological perspective. If conflict and divergent ideological perspectives are and should be central to politics, a monopoly media is likely to be able, at best, to *report* the differences. More likely, a monopoly public-affairs media will suppress differences—claiming objectivity for what is really a partisan vision.[148]

141. Nat'l Broad. Co. v. United States, 319 U.S. 190, 224 (1943); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400–01 (1969).
142. *Nat'l Broad. Co.*, 319 U.S. at 226; *Red Lion*, 395 U.S. at 388–89, 396–97.
143. *See* Judith Lichtenberg, *Introduction*, *in* DEMOCRACY AND THE MASS MEDIA 1, 4 (Judith Lichtenberg ed. 1990).
144. *Id*.
145. *Id*. at 5.
146. Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 L. REV. M.S.U.-D.C.L. 671, 689–90 (2003) ("It is circular logic to hold that the FCC can regulate broadcast content because the FCC has chosen to restrict the spectrum available for broadcasting.").
147. *Id*. at 690.
148. Baker, *supra* note 87, at 352.

IV.
BLOGS AND MODERN JOURNALISM

A. The Role of Blogs in Mainstream Journalism

The institutionalization of the media, combined with the increasing consolidation of media sources, has diminished the ability of people to enter the public discourse. The media today has greater ability than ever before to investigate and criticize other institutions, including government. Fewer people, however, are doing the investigating and criticizing—which means that in some cases, that investigating and criticizing simply does not get done. Blogs help combat this trend by increasing access to the media market, increasing viewpoint diversity in the media, and promoting public participation.

Blogs have demonstrated their relevance through their role in several major news events. Matt Drudge,[149] who has become so well-established that many no longer consider him a blogger, crashed into the national consciousness by breaking the story of President Bill Clinton's affair with White House intern Monica Lewinski.[150] Drudge released the story immediately on his website.[151] When Senate Majority Leader Trent Lott made what some interpreted as pro-segregationist remarks[152] at Strom Thurmond's 100th birthday party in December 2001, the mainstream press considered the story unimportant—until bloggers' repeated postings showed the story had traction.[153] Once the established media realized the story's importance and began covering it, the resulting controversy forced Lott to resign his leadership post.[154] In the summer of 2004, CBS aired a story about President Bush's National Guard service focusing on documents

149. *See* The Drudge Report, http://www.drudgereport.com (last visited Sept. 10, 2006).

150. *See* Newsweek Kills Story on White House Intern, http://www.drudgereport.com/ml.htm (Jan. 17, 1998, 23:32 PST).

151. Lawrence K. Grossman, *Spot News: the Press and the Dress*, COLUM. JOURNALISM REV., Nov./Dec. 1998, at 34, 34.

152. Referring to Thurmond's presidential nomination and campaign on a segregationist party's ticket, Lott said, "I want to say this about my state: When Strom Thurmond ran for president, we voted for him. We're proud of it. And if the rest of the country had followed our lead, we wouldn't have had all these problems over all these years, either." Thomas B. Edsall, *Lott Decried For Part of Salute to Thurmond; GOP Senate Leader Hails Colleague's Run As Segregationist*, WASH. POST, Dec. 7, 2002, at A06.

153. Mark Glaser, *Weblogs Credited for Lott Brouhaha*, ONLINE JOURNALISM REVIEW, Dec. 17, 2002, http://www.ojr.org/ojr/glaser/1040145065.php.

154. *See* Oliver Burkeman, *Bloggers Catch What Washington Post Missed*, THE GUARDIAN, Dec. 21, 2002, http://www.guardian.co.uk/usa/story/0,12271,864036,00.html; Helen Dewab & Mike Allen, *Lott Resigns as Senate GOP Leader: Republicans Say Frist Will Take Over Position*, WASH. POST, Dec. 21, 2002, at Al.

purporting to show he had received preferential treatment.[155] Bloggers on Powerline.com were primarily responsible for discrediting the documents,[156] using variations in font and typeface to show they were not authentic.[157] News anchor Dan Rather eventually issued an on-air apology, and soon afterward announced his retirement.[158] In March 2005, twenty-three year old fishbowlDC blogger Garrett Graff became the first blogger to receive a press pass to the White House daily briefing.[159]

While the increasing prominence of blogs is notable, it is also important to view these events, and the rise of blogs generally, in context. Only a small fraction of blogs are used by journalists, or for the purpose of disseminating news. According to a survey by MIT in 2004, 83 percent of blogs consist of "personal ramblings."[160]

In addition to the important role they have played in several major news stories, blogs have great potential for combating the negative effects of media consolidation. There is some hope that the Internet will improve access to the marketplace—"[a]fter all, access is the mode of the Internet."[161] The concern, however, is that access to the Internet itself is becoming controlled by the same media entities controlling other channels.[162] In addition, one commentator has expressed skepticism about whether the Internet will improve access enough to make any difference in media consolidation's damage to the marketplace, pointing out that previous new technologies have also looked promising but have not delivered such a result.[163]

As their numbers and popularity increase, blogs have the potential to provide at least a partial solution to the problem of media consolidation. Blogs are written and published by individuals who remain outside the control of the major media organizations, and thus serve to

155. Michael Dobbs & Thomas B. Edsall, *Records Say Bush Balked at Order; National Guard Commander Suspended Him From Flying, Papers Show*, WASH. POST, Sept. 9, 2004, at A1.

156. Kurt Opsahl, *Bloggers as Journalists: Why We Fight Apple's Subpoenas*, ELECTRONIC FRONTIER FOUND., Jan. 28, 2005, http://www.eff.org/deeplinks/archives/002242.php.

157. Scott Johnson, *The Sixty-First Minute*, POWERLINE, Sept. 9, 2004, http://www.powerlineblog.com/archives/007760.php.

158. Howard Kurtz, *Dan Rather to Step Down at CBS: Anchor's Decision Comes Amid Probe of Flawed Bush Report*, WASH. POST, Nov. 24, 2004, at A1.

159. *A Blogging First at White House: 'fishbowlDC' Writer Gets a Coveted Press Pass*, MSNBC.COM, Mar. 8, 2005, http://msnbc.msn.com/id/7117260.

160. Viégas, *supra* note 65.

161. Barron, *supra* note 160, at 11.

162. *Id*. at 11–12.

163. C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 894–99 (2002).

decrease consolidation of media ownership. Because blogs are easy to create, free to operate, and available to anyone who uses the Internet, they serve as a barrier-free entryway into the marketplace. Thus, blogs serve to increase the number of voices in the marketplace, by providing individuals the opportunity to access and express themselves within the marketplace of ideas.

Barron argues that the best means of improving freedom of expression in the marketplace is not the creation of new outlets, but provision for "an abundance of opportunities to secure expression in media with the largest impact."[164] Barron calls for either a judicial or statutory provision to protect rights of access to the institutionalized media, arguing that the health of the marketplace generally should supersede the First Amendment rights of individual media owners.[165] Barron, therefore, would likely either be against providing the journalist's privilege to bloggers, or would find this provision insufficient to protect the public's right of access to the channels of public communication.

B. The Legal Status of Bloggers as Journalists

To date, bloggers have not been recognized as journalists for the purpose of obtaining the special legal rights or privileges typically granted to journalists.[166] Privileges granted to a particular group typically convey a benefit specifically to that group and sometimes to society as well, while also imposing a cost on society at large. The journalist's privilege, for example, benefits journalists and their sources by protecting the identity of the sources from being revealed, thus facilitating forthright communication between reporter and source.[167] In addition, this privilege benefits the public, because it allows the public to receive information that the source may not have

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164. Barron, *supra* note 115, at 1653.

165. *Id.* at 1667–77.

166. The *Apple* court pointedly refused to draw distinctions between blogs and other private websites, such as "'e-magazines,' 'e-zines,' or 'webzines.'" 139 Cal. App. 4th at 1464. The court "avoided the term 'blog' here because of its rapidly evolving and currently amorphous meaning." *Id.* Nonetheless, the court's use of a functional test, based on the reporter's shield, provides no need or basis to distinguish among blogs and other private websites. The focus of courts should be on whether a website's publisher and employees, if any, are engaged in newsgathering and dissemination. In addition, traditional journalists have not been granted privileges, especially the testimonial privilege against revealing sources, on a uniform basis. *See supra* Part II.

167. *See* Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1, 4–5 (1986).

provided absent the privilege's protection.[168] However, this privilege also represents a substantial cost to society, as do all testimonial privileges, because it deprives the court of "every man's evidence."[169] In many circumstances, prosecutions and civil discovery will be less efficient and more expensive in time and resources, because the government or plaintiff will have to perform its own investigation, rather than procuring the information it needs from the reporter, who has already gathered the information. At the extreme, criminal cases may not be prosecuted at all, and the verdict in civil cases may be different, due to the loss of evidence only a reporter could provide.[170]

V.
PROPOSED SOLUTIONS

A. *Recognition of a Qualified Privilege Under* FED. R. EVID. 501

Federal courts should construe FRE 501 to include a journalist's privilege and should extend that protection to bloggers. FRE 501 calls for the recognition of various privileges to 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."[171] The Supreme Court has reasoned that Congress adopted FRE 501 to "acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges,"[172] and that the rule "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'"[173]

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168. *See id*.

169. *See* United States v. Nixon, 418 U.S. 683, 710 (1974) ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."). Lord Hardwicke coined this construction, speaking in debate in the House of Lords on May 25, 1742, saying "[t]he public has a right to everyman's evidence." 12 PARL. HIST. ENG. 693 (1742). *See also* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2192 (John T. McNaughton rev., 4th ed.).

170. *See, e.g.,* Branzburg v. Hayes, 408 U.S. 665 (1972) (discussing cases where reporter was only non-member of Black Panther Party to witness meeting, and where reporter was only witness to drug possession).

171. Where state law provides the rules of decision, it will also determine the existence of a privilege. FED. R. EVID. 501. As discussed *supra* Part II.B, most states recognize a journalist's privilege.

172. Trammel v. United States, 445 U.S. 40, 47 (1980).

173. Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quoting *Trammel*, 445 U.S. at 47).

Lower courts have construed *Jaffee v. Redmond* as establishing a four-factor test for determining whether a privilege under FRE 501 should be recognized at common law:

> (1) whether the asserted privilege would serve significant private interests; (2) whether the privilege would serve significant public interests; (3) whether those interests outweigh any evidentiary benefit that would result from rejection of the privilege proposed; and (4) whether the privilege has been widely recognized by the states,[174]

with the fourth factor, state precedent, being of "particular importance."[175]

The recognition of new testimonial privileges under FRE 501 has not been favored by the Supreme Court, because such privileges infringe upon the state's right to "every man's evidence."[176] Rather, it has reasoned, such privileges should only be granted in furtherance of an interest "of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice."[177] Therefore a potential testimonial privilege, such as the journalist's privilege, must as a matter of policy be considered in terms of its potential benefit to society.

Thus, before a journalist's privilege will be recognized, it must be shown that the information journalists gather from sources implicated by the privilege is more valuable to society than the testimonial evidence journalists would provide absent the privilege. The answer to this question will be based on the benefit journalists provide to society through their work. The size of a particular reporter's audience could be relevant, but their employer or the medium through which they provide information should not be. Given a particular audience, it should not matter whether a journalist operates via broadcast media such as radio or television, or print media such as a newspaper or magazine. This common-sense principle is reflected in the numerous state statutes giving the privilege to journalists, be they television, radio, newspaper, or otherwise.[178]

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174. New York Times Co. v. Gonzales, 382 F. Supp. 2d 457, 494 (S.D.N.Y. 2005) (citing *Jaffee*, 518 U.S. at 10–13).

175. *Id*.

176. *See, e.g.*, United States v. Bryan, 339 U.S. 323, 331 (1950). *See also* WIGMORE, *supra* note 169, at § 2192 (noting that "[f]or more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence").

177. Herbert v. Lando, 441 U.S. 153, 183 (1979) (Brennan, J., dissenting) (quoting E. CLEARY, MCCORMICK ON EVIDENCE 152 (2d ed. 1972).

178. For example, the intention of Nebraska's shield law is to provide an environment that insures the free flow of information to those "who gather, write, or edit

The anecdotes about bloggers previously discussed[179] suggest that this principle should also apply to the Internet, and in particular to bloggers. Blogs are becoming more popular, and more people visit blogs as news sources.[180] The more popular blog hosts already attract more unique hits than many established media sources.[181]

In *New York Times v. Gonzales*, the district court applied the *Jaffee* test to an attempt by the New York Times to obtain a declaratory judgment that the phone records of two reporters, Judith Miller and Philip Shenon, were confidential and could not be obtained by a government subpoena.[182] The government sought the records in an attempt to determine the source of a government leak regarding the investigation of two Islamic charities.[183] The court determined there were significant public and private interests in the flow of information from source to reporter to the public, and that the flow would be hindered if reporters could not guarantee anonymity to sources.[184] It also reasoned that the evidentiary value of overriding the privilege would be small, especially in the long run, because sources would simply stop providing important information to reporters.[185] Finally, the judge noted the overwhelming consensus among states in favor of recognizing a journalist's privilege.[186] The district court concluded that a federal common law journalist's privilege existed under FRE 501.[187]

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information for the public or disseminate information to the public . . . through any medium of communication." NEB. REV. STAT. § 20-144. Under the law, a medium of communication includes but is not limited to "any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system." NEB. REV. STAT. § 20-145(2). This broad endowment of the privilege would appear to include bloggers.

179. *See supra* notes 149–159 and accompanying text (discussing role of bloggers in breaking news stories neglected by mainstream media).

180. *See supra* Part I.

181. COMSCORE NETWORKS, BEHAVIORS OF THE BLOGOSPHERE: UNDERSTANDING THE SCALE, COMPOSITION AND ACTIVITIES OF WEBLOG AUDIENCES (2005), http://www.comscore.com/blogreport/comScoreBlogReport.pdf.

182. New York Times Co. v. Gonzales, 382 F. Supp. 2d 457, 494 (S.D.N.Y. 2005).

183. *Id*. at 462.

184. *Id*. at 497–500.

185. *Id*. at 500–01.

186. *Id*. at 502–04.

187. *Id*. at 508. The district court also found a qualified journalist's privilege under the First Amendment, holding that the Second Circuit requires the party seeking disclosure to provide "a clear and specific showing that the sought information is: [1] highly material and relevant, [2] necessary or critical to the maintenance of the claim, and [3] not obtainable from other available sources." *Id*. at 487 (alterations in original) (quoting In re Petroleum Products Antitrust Litig., 680 F.2d 5, 7 (2d Cir. 1982)).

B. *Federal Legislation: The Free Flow of Information Act of 2005*

Congress should enact legislation which not only establishes a journalist's privilege, but allows for the extension of that privilege to bloggers. While previous bills have sought to establish the privilege generally, the bills have effectively excluded bloggers from any protection. In February 2005, U.S. Senator Richard Lugar (R-IN) introduced legislation, entitled the Free Flow of Information Act, that would provide a strong journalist's privilege to the traditional press.[188] The legislation states in part:

> no federal entity may compel a *covered person* to disclose (1) the identity of a source of information (A) from whom the covered person obtained information; and (B) who the covered person believes to be a confidential source; or (2) any information that could reasonably be expected to lead to the discovery of the identity of such a source.[189]

The bill therefore provides absolute protection from the compelled disclosure of confidential sources. Additionally, the legislation states that "no federal entity may compel a *covered person* to testify"[190] in any federal proceeding under any circumstances, "unless a court determines by clear and convincing evidence"[191] that the information sought could not be reasonably obtained from any other source, and that the evidence the covered person's testimony will provide is "essential" to the proceeding.[192]

The problem with the Lugar bill is that the definition of a "covered person" does not incorporate a functional definition of journalist. Covered persons are employees, parents, subsidiaries, or affiliates, of entities that disseminate information and publish "a newspaper, book, magazine, or other periodical; operate[ ] a radio or television broadcast station . . . cable system, or satellite carrier; or operate[ ] a news agency or wire service."[193] Because it employs this definition, rather than one based on the functional test, the legislation has limited effectiveness. The privilege would support the work only of those individuals working for the established institutions of the news media. Explicitly limiting the privilege to such individuals could actually

188. FREE FLOW OF INFORMATION ACT OF 2005, S. 340, 109th Cong. (2005).
189. *Id*. at § 4 (emphasis added).
190. *Id*. at § 2(a) (emphasis added).
191. *Id*.
192. *Id*.
193. *Id.* at § 7(1).

have the perverse effect of making it available to fewer people than some jurisdictions currently recognize.[194]

Rather than defining who will be able to claim the privilege by the particular medium through which an individual disseminates news, Lugar should have used the functional test adopted by the Second, Third, and Ninth Circuits.[195] The group of people eligible to claim the privilege, therefore, would be circumscribed by whether or not they perform that role, not by determining proper and improper media by which the role should be performed.

Altering the Lugar's definition to utilize the functional test would allow courts to recognize bloggers as journalists under the Act and extend bloggers the protections they need. Bloggers who dedicate their sites to disseminating news clearly meet the functional test. A federal shield law that based its granting of a privilege on the role journalists play in society would rightly include bloggers in its definition of journalist. Congress should pass a federal shield law and should define "journalist" to include bloggers.

CONCLUSION

The journalist's privilege increases the amount of information disseminated to the public, and thus serves a benefit that outweighs the cost of lost testimony. Therefore, the privilege should be made available in all American jurisdictions, if not by revisiting the *Branzburg* decision, then by Congressional legislation or judicial action pursuant to FRE 501. In addition, the privilege should be framed in terms of the functional test, because journalists are not effectively defined by their employer or their medium, and the privilege is justified not on these terms but by the function journalists perform in society.

The structure of the mainstream press industry has changed from one that would support a classic marketplace of ideas to one that fulfills the goals of the Fourth Estate model. While the press's watchdog role is important, its role in furthering public discourse is also vital, and the Fourth Estate model is ill-equipped to address this. Because blogs are easy to use, free, and are able to disseminate content in-

194. *See supra* Introduction (discussing *Apple* case and journalist's privilege as it is currently recognized in jurisdictions throughout country). In light of the privilege's already broad recognition, albeit in qualified form, and the *Apple* court's recognition that Internet publishers do qualify as journalists, Lugar's bill has the potential to exclude bloggers from the privilege at the same time it strengthens the privilege for the institutional journalists.

195. *See supra* notes 63–75 and accompanying text.

stantly over the Internet, they have the potential to lower the barriers of entry to the marketplace and reopen the channels of communication to all, thereby fulfilling the right of access without compromising the watchdog power of mainstream media entities or the press as a whole. Therefore, bloggers should be recognized as journalists, and receive the journalist's privilege where applicable.