

The Case for a Federal Journalist's Testimonial Shield Statute

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*A popular Government, without popular information, or the means
of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps
both.¹*

James Madison

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1. 9 WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910).

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Introduction

Writing for the majority in *New York Times Co. v. Sullivan*,² an important first amendment case, Justice Brennan proclaimed a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."³ This commitment is evidenced in the First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁴

First Amendment theory is discussed within the framework of two competing models: the speech/individualist model and the structural/utilitarian model. The speech/individualist model stems from the idea that freedom of expression is basic to every individual, not as a means to some higher end, but as an end in itself. Justices Black and Douglas, who believed that the First Amendment was an absolute command forbidding any restraint on speech and press, subscribed to this view. Under the second model, claims for freedom of the press are weighed against competing societal interests.⁵

The First Amendment has been described as basic to the existence of constitutional democracy,⁶ essential to the nature of a free state,⁷ and the primary instrument of self-governance.⁸ The citizen's ability to monitor and direct government depend on the free speech right. To protect this right and strengthen the First Amendment, we propose a federal Reporter's Privilege that would protect a reporter from being forced to disclose confidential sources or any unpublished information gathered for the purpose of public dissemination.

2. 376 U.S. 254 (1964).

3. *Id.* at 270.

4. U.S. CONST. amend. I.

5. See NELSON, LAW OF MASS COMMUNICATIONS 2-14 (5th ed. 1986).

6. *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting) (referring to "the right to publish").

7. 4 W. BLACKSTONE, COMMENTARIES *151-152 (referring to "liberty of the press").

8. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (referring to "free speech, free press and free assembly").

The primary objective of a reporter's testimonial privilege or shield law is to strengthen first amendment rights in times when intolerance of unorthodox views is most prevalent and when governments are most popular and/or most likely and able to stifle dissent.⁹ Those are the times when the danger of majoritarian and authoritarian tyranny over ideas, expression of ideas, and individual development are greatest. To protect against such tyranny, the standards governing the application of the First Amendment should be so specific that a decision-maker's range of discretion will be narrow.¹⁰ Constitutional standards that limit the discretion of the decision maker are preferred to balancing tests, which are unpredictable and arbitrary.¹¹ We therefore advocate a privilege that, with one narrow and easily identified exception, is absolute.¹²

In order for the proposed Reporter's Testimonial Privilege to provide the protection it promises, it must be a federal law.¹³ The uniformity and universality of a federal statute will most effectively protect the reception of important local, national, and international news. Without a national statute or a dispositive Supreme Court decision on this issue,

9. See Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985). In Professor Blasi's view, portions of the Constitution, such as the Equal Protection Clause and the Cruel and Unusual Punishment Clause, were intended to institutionalize or channel progressive social and political change, but the speech, press, and assembly clauses were intended to preserve dissent in times of intolerance.

10. See Note, *Circumventing Branzburg: Absolute Protection for Confidential News Sources*, 18 SUFFOLK U.L. REV. 615 (1984). The author of the note argues that any qualified newsgatherer's privilege is unpredictable and, consequently, the efficacy of the privilege is negligible. *Id.* at 635-37. To provide a "minimum of constitutional protection" and predictability, he urges that courts recognize an absolute privilege against forced disclosure of the identity of confidential sources. *Id.* at 615.

11. *Id.* at 638-39.

12. For a discussion arguing that no privilege is appropriate, see Bulger, *Reporter's Privilege by Rule of Court: New Approach Fails . . . Or Does It?*, 19 SUFFOLK U.L. REV. 513 (1985). Bulger's analysis concludes that a shield law would frustrate an individual's interest in protecting his or her reputation, the right to summon witnesses and to face his or her accusers, the effectiveness of the grand jury system, and what Dean Wigmore calls the people's "'right to every man's evidence.'" *Id.* at 513 (quoting 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton's rev. 1961)). Bulger further states that, according to opponents of the shield law, societal and individual rights must be protected from an industry which seeks, in at least some important respects, to operate above the law. *Id.* at 513-14.

13. See Note, *Disclosure of Confidential Sources in International Reporting*, 60 S. CAL. L. REV. 1631 (1987). The note, which focuses on libel suits brought by foreign plaintiffs, advocates the enactment of a federal statute, because many controversies involving the disclosure of confidential sources involve national and international organs of the news media. It is concerned with the chilling effect on international reporting that results from the *Branzburg* balancing test. The three-prong test consists of these criteria: (1) relevance of the information sought; (2) alternative means of obtaining the information; and (3) whether the need for the information is compelling. *Id.* at 1648. Under the *Branzburg* test, reporters can promise confidentiality only with the caution that a court, in unpredictable circumstances, might compel disclosure.

great threats to the independence and effectiveness of the press will remain and increase in what are essentially national newsgathering media. These barriers to an effective press will hinder the ability to make informed personal and community decisions.¹⁴ Uniformity of the protection afforded is essential to the free flow of information to the public.

It is important that the legislature and not the judiciary establish this privilege. The Reporter's Testimonial Privilege is essentially a substantive law; the creation of testimonial privilege entails the weighing of competing policy interests, which is a legislative and not a judicial function.¹⁵ The Supremacy Clause and the constitutional scheme as a whole recognize that the legislature is more competent to balance such policy interests. In addition to the myriad of personal benefits that emanate from a free press, three other goals are served by a congressionally enacted reporter's privilege: (1) the continued independence of the judiciary from the influences of the political fray;¹⁶ (2) the maintenance of the system of checks and balances and the separation of powers;¹⁷ and (3) the efficiency of government that would be promoted by the uniformity and clarity of the statute. The privilege we propose protects the essential right of freedom of speech, provides plaintiffs, defendants, and sources alike with greater predictability of the law, and reflects the principle of separation of powers.

Section I of this Article is an exposition of the importance of the First Amendment in democratic society, its role in individual development, and the validity of the currently unfashionable theory of the marketplace of ideas. The question of the meaning of the Press Clause of the First Amendment has been raised since the early 1800s. Therefore, Sec-

14. There is a need for news about international events. International reporting, especially in countries with authoritarian regimes, relies heavily on sources who demand confidentiality. The validity of this statement rests in significant part on the belief that the "truth" is best discovered by the flourishing of a "marketplace of ideas."

15. See Day, *Shield Laws and the Separation of Powers Doctrine*, 2 *COM. & L.* 1 (1980). Day concludes that shield statutes creating a reporter's privilege are substantive or quasi-substantive. *Id.* at 14. These statutes entail legislative balancing of the public interest in protecting a confidential relationship and promoting fair judicial proceedings based on all existing evidence. He believes that qualified shield statutes are likely to avoid separation of powers problems because the courts retain some control over source disclosure. *Id.* at 15.

16. *Id.* at 5.

17. Although the reporter's privilege is a substantive rule, it does have procedural effects. Some might argue, therefore, that it implicates the separation of powers doctrine to some extent. Our proposed privilege, although nearly absolute, would not interfere with the courts' ability to compel testimony in the cases concerning the rights to life, life-long liberty, and freedom of speech. No separation of powers problem exists in these areas because Congress would merely be following the constitutionally and democratically established hierarchy of rights. Nearly absolute and predictable though it may be, the proposed privilege is not devoid of the flexibility needed by the courts to effectively carry out their constitutional obligations.

tion II is a brief history of the case law surrounding the privilege. Section III outlines how various states have grappled with the tensions between the First Amendment, the press' use of confidential sources, and the individual's interests in privacy, reputation, due process, and life itself. The Model Reporter's Testimonial Privilege legislation is contained in Section IV. The four sections that follow the proposal discuss the authors' rationales for various portions of the privilege: Section V discusses the absolute nature of the privilege; Section VI discusses why the privilege may be held only by those affiliated with the institutional news media; Section VII discusses the scope of the model legislation; and Section VIII discusses the application of the model legislation to criminal and civil cases and administrative proceedings.

I. The Primacy of the First Amendment

Though men be much governed by interest, yet interest itself, and all human affairs, are entirely governed by opinion.¹⁸

David Hume

The Constitution . . . does not give equal status to the duty of self-preservation and the duty of maintaining political freedom. On the contrary, experiment in self-government makes freedom of speech the primary freedom to be protected.¹⁹

Alexander Meiklejohn

The objective of a newsperson's privilege, which protects the confidentiality of the relationship and information exchanged between a reporter and his source, is the protection of the free flow of information to the public. The relationship between the press and its confidential sources provides a means for the fulfillment of human potential—democracy—which requires an educated and informed populace.²⁰

History indicates that the First Amendment was intended to be more than a codification of Blackstone's famous statement that "[t]he liberty of the press . . . consists in laying no *previous* restraint upon publications, and not in freedom from censure for criminal matter [once the information is] published."²¹ The freedoms of speech, press, and association were narrow freedoms in eighteenth century England. It was, wrote Justice Black, the desire to give the people of America greater protection

18. Hume, *Of the First Principles of Government*, in *ESSAYS: MORAL, POLITICAL & LITERARY* 32 (E. Miller ed. 1985).

19. Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 479 (1953).

20. See generally J. DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (1916).

21. W. BLACKSTONE, *supra* note 7, at *151-52.

against the powerful federal government than the English had against their government that caused the Framers to put these freedoms into the Constitution.²² The evils the Framers sought to protect against were those resulting from governmental action that might “pervert such free and general discussion of public matters as seem absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.”²³

The Framers sought to use the same instrument which empowered the government to limit and control that government. The First Amendment, without which the Constitution might not have been ratified,²⁴ was an expression of that value, commonly held by liberal thinkers of the day.²⁵ Unlike the authors of the French Declaration of the Rights of Man, who extolled “free communication of thoughts and opinions,”²⁶ the Framers wrote as lawyers, not as speculative philosophers. They were more concerned with posting an enforceable legal rule than enunciating an ideal. Hence, they wrote in terms of specific prohibitions.²⁷ Through these prohibitions, the Founders elevated to a constitutional plane the rights encompassed by the First Amendment. Thus, the free speech and free press guarantees of the First Amendment are not merely expressions of political ideals but limits on governmental action.²⁸ These protections and this view of freedom of the press have enabled us to avoid the great deprivations of liberty that followed the French Revolution.²⁹

It is thus evident “that the First Amendment is the keystone of our Government,”³⁰ because the rights it guarantees are “basic and fundamental . . . to the preservation of the freedoms treasured in a democratic society.”³¹ The primacy of the First Amendment rights of freedom of speech and press was expounded by Justice Black, who wrote:

Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is

22. *Bridges v. California*, 314 U.S. 252, 264-65 (1941).

23. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 421 (1868).

24. F. McDONALD, *NOVUS ORDO SECLORUM* 143-83 (1985).

25. *Id.*

26. P. MIGUEL, *HISTOIRE DE LA FRANCE* 248-49 (1976).

27. *See, e.g.*, U.S. CONST. arts. I, III, IV, and XIV.

28. J.R. CHAFEE, *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION* 48 (1952).

29. *Id.* at 51.

30. *Dennis v. United States*, 341 U.S. 494 (1951).

31. *Cox v. Louisiana*, 379 U.S. 559, 574 (1965).

death.³²

Without a free and fearless press the well-informed and sensible opinions upon which democracy depends are impossible. Thus, the press is the chief democratic instrument of freedom.³³ Without it, the heart of democracy is imperiled. Meiklejohn emphasized the primacy of political speech when he stated that this freedom must be absolute in order for us to maintain our political freedom.³⁴ What is political speech is to be determined by the individual as he or she faces the exigencies of his or her times; what is significant information to one person may seem banal or trivial to another. Thus, in order to allow each person to decide for himself or herself what is significant, almost all speech must be absolutely protected. Likewise, an ill-informed democracy may in fact do injury to itself, for it may take actions repugnant to the principles of liberalism and human fulfillment.

To say that the primary value of a free press is its service to democracy, however, is misleading. Democracy itself exists to facilitate the maximum fulfillment of the individual who lives in a society. Therefore, the primary value of a free press and of free speech in general must be the facilitation of individual fulfillment. Thomas Jefferson expressed this when he wrote: "Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."³⁵

The impetus for suppression does not always come from the government. Giving power to the people through judges and juries who impose popularly supported sanctions against certain speech or publishers may enable tyranny by the majority and thus discourage individual development. Such tyranny destroys the marketplace of ideas and does a disservice to the very end it aims to serve. Defamation is an example of a difficult question involving popular control of speech because of the unpredictability of what the group or jury may choose to impose on the publisher. The protection of a free press is therefore a tool to restrain the doctrinaire democratic and protect the rights of those not in the majority.³⁶ The press and the people act as competing members of the same team to prevent democracy, "originally intended to prevent all arbitrary

32. *MilkWagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 301-02 (1941) (Black, J., dissenting).

33. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 181-90 (1941).

34. Meiklejohn, *supra* note 19.

35. T. JEFFERSON, *FOUR WRITINGS OF THOMAS JEFFERSON* 359-60 (P. Ford ed. 1894).

36. For a description of the dogmatic democrat and the true liberal, see F. HAYEK, *THE CONSTITUTION OF LIBERTY* 106-17 (1960).

power," from becoming "the justification for a new arbitrary power."³⁷ Democracy and human life are, above all, processes of forming opinions and making decisions, and the new information used to form those opinions must first appear somewhere. That somewhere is often in the institutional news media.

In some constitutional provisions, such as those governing privacy³⁸ and takings,³⁹ the Framers literally attempted to strike a balance between authority and liberty. By contrast, in matters concerning the First Amendment, the Framers emphasized individual liberty. Although the First Amendment does not explicitly say that the press may refuse to disclose information or the identity of the source of information, the Constitution's scheme reveals how the press and its confidential relationships should be viewed.

Within the structure of representative government, the citizen's need for secrecy and confidentiality is, in some circumstances, as compelling as his or her need for information. But the matter is not as simple as balancing the interests of one individual against those of another or the many. Consider the example of an informant who wants to keep his or her identity confidential. Here one must balance the individual's interests in secrecy with others' interest in the information. The focus in striking the balance is not on the informant's personal interest in anonymity. Rather, the focus is on the interests of the community in assuring the anonymity of informants in order to facilitate the gathering of information with which to make decisions and form opinions, thereby promoting individual fulfillment and social harmony.⁴⁰ In the constitutional balancing of these interests, the First Amendment should play a dominant if not decisive role.

Despite their essential contribution to individual fulfillment, neither freedom of the press nor freedom of speech can be absolute. Because we live in communities, the exercise of freedom of the press, like freedom of speech and religion, must be compatible with the preservation of other rights essential to democracy and the pursuit of human fulfillment. Justice Frankfurter was correct when he wrote that the demands of the First

37. *Id.* at 106.

38. *See* U.S. CONST. amends. III, IV, IX, XIV.

39. *See* U.S. CONST. amend. XIV.

40. It is logical to conclude that inhibition of newsgathering is related to the risk of harm assumed by sources. Of course sources face risks, such as exposure through extra-legal means, that a shield law cannot mitigate. Shield laws that explicitly consider harm to the source, however, will lower the risk. In order to provide maximum protection of the public's interest in receiving important international news, explicit consideration of source harm should be a part of the federal shield statute.

Amendment freedoms, as well as the competing claims of governmental authority to secure other recognized interests, are “better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.”⁴¹ Justice Holmes’ famous example of the man falsely shouting “fire” in a crowded theater is the most obvious example of speech that can be controlled.⁴² These controls on this most essential liberty are necessary if we view first amendment freedoms not as ends in themselves, but as the means to a free society and individual fulfillment.

Although some balancing needs to be done, it is dangerous to assume that the balance should be struck between private rights and public rights. The weights assigned to public and private rights cannot be equal if we accept the premise that democracy exists for the fulfillment of the individuals’ potentialities. If this premise be accepted, then only when private rights compete against other private rights or public rights compete against public rights is balancing appropriate. Therefore, public rights like the rights to free speech and a free press are superior to all private rights, except, necessarily, the right to life itself.

The Privilege Statute we propose is premised on the assumptions that an open marketplace of ideas will lead to increased knowledge and that increased knowledge serves the welfare of the individual and the society. The First Amendment was ratified in order to disable ephemeral majorities from hurting themselves and their heirs by cutting off the means to search for the truth—free speech and a free press.⁴³

Under the marketplace of ideas theory, no special prominence nor protection need be given to speech related to public or political matters because the marketplace, the individual, decides not only the truth of the ideas, but their importance.⁴⁴ The marketplace of ideas is a valuable tool for individual development. This development, rather than *public* participation in self-government, is the transcendent good that militates for an absolute privilege for reporters.

41. *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

42. *Schenck v. United States*, 249 U.S. 47 (1919).

43. See Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 46 (1985).

44. See *Leading Cases: Constitutional Law: Freedom of Speech, Press and Association: Restrictions on Prisoners’ Rights to Receive Publications*, 103 HARV. L. REV. 239 (1989); but see Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, which argues that the marketplace of ideas theory is bankrupt because markets can be bought by advertising and the like.

The issue, then, is who makes the rules about what can and cannot be said in a society in which the people are taken to be sovereign. If one believes that it is the individual and not the majority who should decide in what and in whom to trust, then the individual's attainment of knowledge transcends the value of popular decision-making, and it follows that speech is more important than the other values underpinning the structure of popular decision-making. Preventing the people from banning "Carnal Knowledge"⁴⁵ or forcing the disclosure of the identities of members of dissident groups cannot be done in the name of democracy per se. It must be done in the name of the individual. Speech is protected by the Constitution precisely because the individual is the arbiter of ideas.⁴⁶

Speech, wrote Thomas Mann, is civilization itself.⁴⁷ Free civilizations and democratic government rely upon and require the exercise of well-informed and sensible opinions by the great bulk of the citizens. The people in turn rely on the free institutional press for much of the information with which to form those opinions.

II. History

Conflict over disclosure of confidential information has existed since colonial times.⁴⁸ In 1722, James Franklin, a publisher, and his apprentice brother Benjamin were brought before the assembly to answer questions about an article that allegedly libeled the government.⁴⁹ Because the elder Franklin refused to reveal the source of the article, he was jailed for one month.⁵⁰ A New York journalist was jailed for nine months in 1734 after refusing to reveal the sources of a story that was uncomplimentary toward the colonial governor.⁵¹ In 1848, a reporter for the *New York Herald* was held in contempt for refusing to answer questions at a secret Senate proceeding about the source of a confidential document

45. *Jenkins v. Georgia*, 418 U.S. 153 (1974).

46. See F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 47-72 (1982); see also Ingeber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

47. THOMAS MANN, *THE BUDDENBROOKS* (1984).

48. See Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 234-35 (1974). Senator Sam Ervin, Jr., of North Carolina presents a stimulating historical and political analysis of the reporter's privilege. Senator Ervin introduced S. 1128, one of several bills addressing the reporter's privilege during the 92nd and 93rd Congressional Sessions. *Id.* at 256, 261, 269.

49. Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 229 n.1 (1971) (citing B. FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 69 (1964)).

50. *Id.*

51. Note, *Disclosure of Confidential Sources in International Reporting*, 60 S. CAL. L. REV. 1631, 1639 n.52 (1987).

containing the treaty marking the end of the Mexican-American War.⁵² The Georgia Supreme Court, in 1887, held that if a newspaper publisher did not reveal the author of a libelous article, he would be considered the author and, in addition, punished for contempt.⁵³ A *New York American* reporter, who in 1935 declined to give grand jury testimony concerning the names of persons and places on which a gambling article was based, unsuccessfully claimed the communications were privileged.⁵⁴ The reporter was held in contempt and jailed.⁵⁵ Although the press-government conflict over disclosure continues into modern times, until the 1960s the issue received little attention.⁵⁶

Increased attention to the reporter's privilege issue in the 1960s and 1970s was a direct result of the huge increase in press subpoenas during that time.⁵⁷ This tremendous growth in press subpoenas is attributable to several factors. First, institutional dissatisfaction and opposition to the Vietnam War found expression through various dissident groups.⁵⁸ Reporting about these groups was made possible through confidentiality guarantees given by reporters to their sources.⁵⁹ Second, government investigation of radical activity collided with these confidentiality guarantees,⁶⁰ and police were often not willing to negotiate with the press over

52. *Ex parte Nugent*, 18 F. Cas. 471 (D.C. Cir. 1848) (No. 10,375); see also Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1, 18 (1986).

53. *Pledger v. State*, 77 Ga. 242, 3 S.E. 320 (1887).

54. *In re Mooney*, 269 N.Y. 291, 199 N.E. 415 (1936). The *Mooney* court refused to extend a common law testimonial privilege to confidential communications between a reporter and source, noting the agreement of "every state which has passed on the subject." *Id.* at 291, 199 N.E. at 415.

55. *Id.*

56. Ervin, *supra* note 48, at 241. In 1934, the American Newspaper Guild adopted a canon in its Code of Ethics that required reporters to "refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigatory bodies." Geraghty & Raphael, *Reporter's Privilege and Juvenile Anonymity: Two Confidentiality Policies on a Collision Course*, 16 LOY. U. CHI. L.J. 43, 51 n.47 (1984) (quoting J. BARRON & C. DIENES, *HANDBOOK OF FREE SPEECH AND FREE PRESS* 414 (1979)). Courts have, however, refused to rank this ethical obligation above evidentiary needs. See D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. ON LEGIS. 307, 315-16 (1969). Until 1972, the reporter's privilege issue did not receive serious attention from the national legislature. See Ervin, *supra* note 48, at 241.

57. See Geraghty & Raphael, *supra* note 56, at 51 n.47; Ervin, *supra* note 48, at 241-46; Note, *The Newsmen's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 UCLA L. REV. 160, 162 n.13 (1976).

58. Ervin, *supra* note 48, at 244.

59. *Newsmen's Privilege: Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 93d Cong., 1st Sess. 645 (1973).

60. See Suhrheinrich, *Newsperson's Privilege: An Extra-Constitutional Right*, 4 DET. C.L. REV. 1013, 1014-17 (1986) (recounting incident in which confidential information held by a reporter would have aided police investigation of slaying of an off-duty state trooper).

disclosure of confidential sources.⁶¹ Finally, investigative reporting was reborn as a reaction to secrecy and perceived manipulation of the press by the Nixon Administration.⁶² Thus, the 1960s heralded a change in the press-government relationship from accommodating and cooperative to adversarial.

A great deal of judicial activity was generated by the press-government confidential source clash in the 1960s.⁶³ Following longstanding precedent, the courts consistently refused to recognize a common law privilege shielding journalists from disclosing confidential information.⁶⁴ This refusal was based on the presumption against the creation of privileges.⁶⁵ As stated by John Henry Wigmore in his renowned treatise on Evidence, "No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice."⁶⁶

According to Professor Wigmore, a communication must meet four fundamental conditions in order to warrant a nondisclosure privilege:

61. M. CULLEN, *MASS MEDIA & THE FIRST AMENDMENT* 212 (1981); *see also* text accompanying notes 92-98 *infra*.

62. *See* Ervin, *supra* note 48, at 246-50; Blasi, *supra* note 49, at 234 (1971).

63. *See* Cepeda v. Cohane, 233 F. Supp. 465 (S.D.N.Y. 1964) (magazine writer unsuccessfully asserted reporter's privilege and was ordered to answer deposition questions about source of an article concerning a professional baseball player); Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969), *cert. denied*, 402 U.S. 901 (1970) (reporter compelled to answer oral interrogatory as to source of story about marijuana use by children of elected officials, despite claim of constitutional and common law privilege); *In re* Grand Jury Proceedings, 315 F. Supp. 681 (Md. 1970) (no constitutional privilege recognized when newspaper published proposed indictments sealed by the court); *In re* Goodfader's Appeal, 45 Haw. 317, 367 P.2d 472 (1961) (daily newspaper reporter ordered to divulge confidential source of information concerning firing of personnel director of Civil Service Commission); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963) (contempt order against manager and city editor who refused to produce information used in articles on government corruption vacated); Beecroft v. Point Pleasant Print & Publishing Co., 82 N.J. Super. 269, 197 A.2d 416 (1964) (defendant newspaper in libel action based on allegedly defamatory editorial ordered to disclose source because statutory privilege waived); State v. Buchanan, 250 Or. 244, 436 P.2d 729 (1967), *cert. denied*, 392 U.S. 905 (1968) (student newspaper reporter held in contempt for refusing to disclose identities of persons interviewed for story concerning marijuana use on campus); State v. Sheridan, 248 Md. 320, 236 A.2d 18 (1967) (construing shield law statute for the first time since its enactment in 1896, appellate court dismissed as moot an appeal from circuit court order sustaining privilege claim).

64. Branzburg v. Hayes, 408 U.S. 665, 685 (1972); Lewis v. United States, 517 F.2d 236, 238 (9th Cir. 1975); People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 291-92, 199 N.E. 415, 415-16 (1936). *But see* Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) (recognizing federal common law privilege); United States v. Lopez, No. 86 CR 513, Lexis 11095 (N.D. Ill. 1987) (adopting federal common law privilege against compelled disclosure of a reporter's work product); Note, *supra* note 57, at 161 n.9 (1976) (referencing unreported cases allowing the privilege).

65. United States v. Bryan, 399 U.S. 323, 331-32 (1950); J. WIGMORE, *EVIDENCE* § 2286 (McNaughton rev. 1961).

66. J. WIGMORE, *supra* note 65, § 2286.

- 1) The communication must originate in a confidence that it will not be disclosed;
- 2) Confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
- 3) The relation must be one which in the opinion of the community must be sedulously fostered; and
- 4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.⁶⁷

Arguments that a reporter's confidential communications do not merit protection under Wigmore's criteria focus on the fourth requirement and posit that there is no conclusive evidence that, without a privilege, investigative reporting would be hampered.⁶⁸ At least one commentator has pointed out that the establishment of existing common law testimonial privileges has been based on conclusions about harm to privileged relationships that are founded on speculation about human behavior, not on hard evidence.⁶⁹ Vincent Blasi's empirical study, however, revealed that experienced reporters rely on confidential sources for twenty-five percent of their stories.⁷⁰ The average member of the population Blasi surveyed⁷¹ reported reliance on confidential sources from 22.2 percent to 34.4 percent of the time.⁷² Government reporters depended on regular confidential sources in 28.5 percent of their stories.⁷³ Reliance on confidential sources was also high in police, financial, trial, minority, and radical group reporting.⁷⁴ In addition to showing that confidential sources are an important facet of news dissemination, Blasi demonstrated that

67. *Id.* § 2285.

68. *See Branzburg*, 408 U.S. at 690-91; Monk, *supra* note 52, at 9 (1986).

69. Monk, *supra* note 52, at 51; *see also Branzburg*, 408 U.S. at 707-08 (1972) (Stewart, J., dissenting).

70. Blasi, *supra* note 49, at 248.

71. *Id.* at 235-39. Blasi's study consisted of three components. First, 47 reporters and editors were personally interviewed. The interviewees were chosen on the basis of (1) expressed willingness to cooperate, (2) achievements in the profession, (3) the kind of reporting or editing engaged in, (4) prominence, and (5) familiarity with the subpoena problem. Second, a qualitative questionnaire was mailed to 67 reporters believed to be especially familiar with the subpoena problem. Third, quantitative questionnaires were mailed to reporters from 208 newspapers with a minimum circulation of 50,000, and to editors of 95 underground newspapers. The return rate for the quantitative questionnaires was 66%. Blasi acknowledges the non-random selection of his population and the possibility of bias. He contends, however, that the study's findings are useful because the respondents provide a significant portion of news to the public.

72. *Id.* at 247.

73. *Id.* at 251.

74. *Id.*

important sources have been lost due to the fear of being revealed.⁷⁵

Thus, the community has a great interest in fostering relationships between reporters and confidential sources. Given the primary position of the First Amendment, this interest is even greater than the interest in the fair administration of justice. Despite convincing arguments supporting common law recognition of a reporter's privilege, however, the judicial branch has not reversed its position.

First amendment protection for a reporter's confidentiality promises was first claimed in *Garland v. Torre*,⁷⁶ in which the Second Circuit accepted the "hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news."⁷⁷ However, the court subordinated these first amendment values to the "paramount public interest in the fair administration of justice."⁷⁸ Because the identity of the confidential source was material, relevant, and "went to the heart of the plaintiff's claim," the reporter was ordered to disclose her source.⁷⁹ The first and only time⁸⁰ the full Supreme Court addressed the reporter's privilege issue was in 1972, when it decided *Branzburg v. Hayes*.⁸¹ In a five to four decision, the Court held that the First Amendment did not release journalists from the obligation to give grand jury testimony implicating confidential sources.⁸² Writing for the majority, Justice White recognized that, while newsgathering is a protected activity under the First Amendment,⁸³ this protection is subject to restraints in-

75. *Id.* at 262-74. For example, Blasi describes the "paradigm" example of Anthony Ripley, a *Times Detroit* reporter assigned to cover an SDS national convention in East Lansing, Michigan. After covering the convention, which he was allowed to attend in exchange for a confidentiality guarantee, Ripley was subpoenaed by and appeared before the House Committee on Un-American Activities (HUAC) to answer questions about the convention. Several months later, a radical source refused an interview with Ripley, whom he called the "fink who testified before the HUAC." See also Note, *Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 20, 43-44 (1969).

76. 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

77. *Id.* at 548.

78. *Id.* at 549.

79. *Id.* at 550.

80. Langley and Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 13 (1988).

81. 408 U.S. 665 (1972).

82. *Id.* at 667.

83. *Id.* at 681. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court recognized the right to gather information, noting that "without some protection for seeking out the news, freedom of the press could be eviscerated." 448 U.S. at 576 (quoting *Branzburg*, 408 U.S. at 681). In a concurring opinion, Justice Stevens declared *Richmond Newspapers* a watershed case, because the Court had "never before . . . squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever." *Id.* at 582.

cluding the reporter's duty to appear before a grand jury and answer questions relevant to criminal investigations.⁸⁴ Justice White gave more weight to the public interest in law enforcement and effective grand jury proceedings than to the "uncertain[] burden on news gathering . . . said to result from insisting that reporters, like other citizens, respond to relevant questions . . . in the course of a valid grand jury investigation or criminal trial."⁸⁵

Branzburg has been subject to varying interpretations, ranging from the determination that neither an absolute or qualified reporter's privilege survived *Branzburg*⁸⁶ to the ruling that the majority and concurring opinions in *Branzburg* "recognize a privilege which protects information given in confidence to a reporter."⁸⁷ Thus, the degree of constitutional

84. 408 U.S. at 685.

85. *Id.* at 690-91. Justice White further disparaged the qualified privilege claimed by the petitioner, reasoning that the unpredictability that would flow from such a privilege would deter confidential sources. According to Justice White, "if confidential sources are as sensitive as they are claimed to be, . . . only an absolute privilege would suffice." 408 U.S. at 702.

86. *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 297, 562 P.2d 791, 797, *cert. denied*, 430 U.S. 930 (1977) ("[O]ur reading of *Branzburg v. Hayes* . . . is to the effect that no newsman's privilege against disclosure of confidential sources founded on the First Amendment exists in an absolute or qualified version."); *see also* *United States v. Liddy*, 354 F. Supp. 208, 215 (D.C. 1972) (First Amendment does not extend to a reporter the privilege to refuse to disclose confidential information subpoenaed by defendant in a criminal trial); *Hurst v. State*, 160 Ga. App. 830, 832, 287 S.E.2d 677, 678 (1982) (*Branzburg* requires subordination of First Amendment to criminal defendant's right to compulsory process); *Lewis v. United States*, 501 F.2d 418, 423 (9th Cir. 1974), *cert. denied*, 420 U.S. 913 (1975) (*Branzburg* teaches that reporter's need to keep sources and information confidential may not override the authority of a grand jury); *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987) (*Branzburg* declined to recognize either an absolute or qualified reporter's privilege); *The Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 378-79 (Ky. 1984) (same); *Gagnon v. District Court*, 632 P.2d 567, 569 n.2 (Colo. 1981) (*Branzburg* refused to create a reporter's privilege); *In re Farber*, 78 N.J. 259, 267, 394 A.2d 330, 334, *cert. denied*, 439 U.S. 997 (1978) (*Branzburg* forecloses first amendment protection of confidential information when a criminal defendant enforces his sixth amendment rights); *Georgia Communications Corp. v. Horne*, 164 Ga. App. 227, 228, 294 S.E.2d 725, 726 (1982) (reading *Branzburg* to find no constitutional basis for a reporter's testimonial privilege in any context, including defamation).

Courts that read *Branzburg* as foreclosing a reporter's testimonial privilege quote the following language from Justice White's majority opinion:

Until now the only testimonial privilege for unofficial witnesses that is rooted in the federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.

Branzburg v. Hayes, 408 U.S. 665, 689-90 (1972).

87. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *see also* *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975) ("It is clear that *Branzburg* recognizes some First Amendment protection of news sources. The language of the case likewise indicates that the privilege is a limited or conditional one."); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (*Branzburg* court indicated a "qualified privilege would be available in some circumstances

protection available for a reporter's confidential sources remains uncertain.

The *Branzburg* majority opinion expressly invited the federal and state legislatures to create reporter's shield laws, emphasizing that making value judgments concerning the importance of enforcing criminal laws was a legislative function.⁸⁸ Seventeen states had reporter's shield laws when *Branzburg* was decided.⁸⁹ Nine additional states enacted shield laws after *Branzburg*.⁹⁰

Congressional reaction to *Branzburg* was quick and intensive. On the day following the decision, Senator Alan Cranston of California introduced a bill that would have extended an absolute privilege to report-

even where a reporter is called before a grand jury to testify"); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594 (1st Cir. 1980) (a conditional privilege is consistent with Justice Powell's concurring opinion, necessary to make a majority in *Branzburg*); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (*Branzburg* created a qualified first amendment privilege); *Mitchell v. Superior Court*, 37 Cal. 3d 268, 276-77, 690 P.2d 625, 630, 208 Cal. Rptr. 152, 157 (1984) (*Branzburg* does not preclude recognition of a qualified privilege); *Miami Herald Publishing Co. v. Morejon*, 529 So. 2d 1204 (Fla. Dist. Ct. App. 1988) (Florida Supreme Court has held, based on *Branzburg*, that reporters have a qualified privilege).

Courts that believe a qualified privilege survived *Branzburg v. Hayes* have relied on Justice Powell's concurring opinion, which clarified that "[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Branzburg*, 408 U.S. at 709 (Powell, J., concurring). *See, e.g.*, *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594 (1st Cir. 1980).

88. 408 U.S. at 706. Justice White opined that

[a]t the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.

Id.

89. 408 U.S. at 689 n.27. *See* ALA. CODE § 12-21-142 (1988); ALASKA STAT. §§ 09.25.150-220 (1983); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1977); ARK. STAT. ANN. § 43-917 (1987 Supp.); CAL. EVID. CODE § 1070 (West Supp. 1989); IND. CODE 34-3-5-1 (1988); KY. REV. STAT. ANN. § 421-100 (1988); LA. REV. STAT. ANN. §§ 45:1451-1454 (West Supp. 1988); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1988); MICH. STAT. ANN. § 767.5a (Callaghan 1988); MONT. CODE ANN. §§ 26-1-901 to 26-1-903 (1987); NEV. REV. STAT. ANN. § 49.275 (Michie 1986); N.J. STAT. ANN. §§ 24A.84A-21 to 21.13 (West 1988); N.M. STAT. ANN. § 38-6-7 (1987); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1989); OHIO REV. CODE ANN. §§ 2739.04, .11-.12 (Anderson 1981); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1982).

90. *See* Geraghty & Raphael, *supra* note 56, at 51 n.48. Statutes enacted after *Branzburg* include DEL. CODE ANN. tit. 10, §§ 4320-26 (1988); ILL. ANN. STAT. ch. 110, paras. 8-901 to 909 (1985); MINN. STAT. ANN. §§ 595.021-.025 (West 1988); NEB. REV. STAT. §§ 20-144 to 20-147 (1987); N.D. CENT. CODE §§ 31-01 to 06.2 (1976); OKLA. STAT. ANN. tit. 12, § 25.06 (West 1980); OR. REV. STAT. §§ 44.510-.540 (1988); R.I. GEN. LAWS §§ 9-19.1-1 to 1-3 (1985); TENN. CODE ANN. § 24-1-208 (1988).

ers.⁹¹ Twenty-eight reporter's privilege bills were introduced during the 92nd Congress.⁹² At least twenty-four bills were introduced in 1973, when the 93rd Congress convened.⁹³ Despite the number of reporter's privilege bills which were introduced, Congress failed to enact legislation.⁹⁴ Senator Sam Ervin, Jr., of South Carolina who presided over subcommittee hearings concerning the reporter's privilege, suggests four reasons for congressional inaction. First, press support for privilege legislation subsided when it appeared that an absolute privilege was politically impossible.⁹⁵ The press believed that qualification of the privilege would destroy predictability.⁹⁶ Additionally, the press feared that protective legislation would lead to legislative regulation of the press.⁹⁷ In the words of columnist James J. Kilpatrick:

The Lord giveth, we are told, and the Lord taketh away. The statute that is passed is the statute that subsequently may be repealed. If we of the press yield to temptation—if we ask and get a statutory shield law, make such law our chief protection—we will find ourselves mousetrapped one of these days. We ought not to rely upon a statute which may prove as ephemeral as the winds.⁹⁸

The second reason legislation was not enacted, according to Senator Ervin, was the willingness of courts to read *Branzburg* as conferring a qualified reporter's privilege.⁹⁹ Third, new restraint demonstrated by prosecutors "served to muffle the hue and cry in Congress."¹⁰⁰ Fourth and finally, according to Senator Ervin, activity surrounding the Watergate incident in 1973 and 1974 took congressional attention away from the reporter's privilege controversy.¹⁰¹

At least some of the self-imposed restraint by prosecutors and the broad interpretation by lower courts of *Branzburg* are attributable to congressional fervor over the reporter's privilege issue in 1972 and 1973. The question remains whether the public's right to an unfettered press is

91. Ervin, *supra* note 48, at 255. Senator Cranston's bill would have provided an absolute testimonial privilege for journalists. *Id.*

92. *Newsmen's Privilege*, *supra* note 59, at 76 (statement of Jack C. Landau and Fred P. Graham, Members of the Executive Committee of the Reporters Committee for Freedom of the Press).

93. *Id.*

94. Ervin, *supra* note 48, at 275.

95. *Id.* at 262.

96. *Id.* at 271.

97. *Id.*

98. *Newsmen's Privilege*, *supra* note 59, at 81 (statement of James J. Kilpatrick, columnist, Washington Star Syndicate).

99. Ervin, *supra* note 48, at 273; see also *supra* note 87 and accompanying text.

100. Ervin, *supra* note 48, at 273-74.

101. *Id.* at 274-75.

sufficiently protected by prosecutorial restraint and an unpredictable qualified privilege.

III. The Diversity of Protection Provided by State Reporter's Shield Laws

[I]f confidential sources are as sensitive as they are claimed to be, . . . only an absolute privilege would suffice.¹⁰²

Many states have adopted the three-pronged *Branzburg* test¹⁰³ or some modification. Twenty-six states¹⁰⁴ have adopted by statute some form of reporter's shield law.¹⁰⁵ The nature and the scope of the privileges provided vary widely from state to state.¹⁰⁶

Twelve states protect a source's identity, but not the information conveyed.¹⁰⁷ Those states base their laws on the rationale that unpub-

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

103. In arguing that the Court should adopt a qualified privilege for journalists faced with subpoenas, Justice Stewart also stated a test for determining when such a qualified privilege should be denied: the government must (1) show that there is probable cause to believe that the newsman [sic] 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. *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972).

104. ALA. CODE § 12-21-142 (1986); ALASKA STAT. §§ 09.25.150 - .220 (1987); ARIZ. REV. STAT. ANN. § 12-2237 (1982); ARK. STAT. ANN. § 16-85-510 (1987); CAL. EVID. CODE § 1070 (West 1988) and CAL. CONST. art. I, § 2(b); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1975); ILL. ANN. STAT. ch. 110, paras. 8-901 to 8-909 (Smith-Hurd 1984 & Supp. 1987); IND. CODE ANN. § 34-3-5-1 (Burnes 1986); KY. REV. STAT. ANN. § 421.100 (Bobbs-Merrill 1972); LA. REV. STAT. ANN. §§ 45:1451-1454 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1987); MICH. COMP. LAWS ANN. § 767.5a (West 1982); MINN. STAT. ANN. §§ 595.021-.025 (West 1988); MONT. CODE ANN. §§ 26-1-901 to 26-1-903 (1983); NEB. REV. STAT. §§ 20-144 to 20-147 (1983); NEV. REV. STAT. § 49.275 (1985); N.J. STAT. ANN. §§ 2A:84A-21 to 21.13 (West 1987); N.M. STAT. ANN. § 38-6-7 (1984); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1988); N.D. CENT. CODE § 31-01-06.2 (1986); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Anderson 1981); OKLA. STAT. tit. 12, § 2506 (1980); OR. REV. STAT. §§ 44.510 - 44.540 (1987); 42 PA. CONS. STAT. ANN. § 4942 (Purdon 1982); R.I. GEN. LAWS § 9-19.1-1 to 9-19.1-3 (1985); TENN. CODE ANN. § 24-1-208 (1980).

105. For a detailed analysis of the language of the above statutes, see Monk, *supra* note 52, at 26-34.

106. Some states have incorporated an absolute privilege into their constitutions. California amended its constitution to include a shield law provision in order to curb anti-shield law decisions. See CAL. CONST. art I, § 2; see also Monk, *supra* note 52, at 45-47. Other states have interpreted the United States Constitution as well as their own constitutions as providing a qualified privilege. See, e.g., *Wright v. Kiss (In re Contempt of Wright)*, 108 Idaho 418, 706 P.2d 40 (1985).

107. ALA. CODE § 12-21-142 (1986); ALASKA STAT. §§ 09.25.150 - .220 (1987) (no reporter may be compelled to disclose the source of information); ARIZ. REV. STAT. ANN. § 12-2237 (1982) (the source of information); ARK. STAT. ANN. § 16-85-510 (1987) (the source of information used); IND. CODE ANN. § 34-3-5-1 (Burnes 1986) (the source of any information procured); KY. REV. STAT. ANN. § 421.100 (Bobbs-Merrill 1972) (the source of any informa-

lished news or information should not be protected. Courts in some of these jurisdictions, however, have construed these laws to protect at least information that might lead to disclosure of the source's identity.¹⁰⁸ In Arizona, the legislature enacted additional legislation that appears to broaden the shield statute's scope to include information, as well as the source, within its protection.¹⁰⁹ In thirteen states, statutes specifically protect both the source and the information he or she conveys.¹¹⁰ Michigan's statute is the most expansive of these. It provides that all communications between reporters of newspapers or other publications and their informants are declared to be privileged and confidential.¹¹¹

Traditionally, the law of privilege covers only communications in situations where a confidential relationship exists. At common law, for a confidential relationship to exist, four basic requirements had to be satisfied: (1) the communications must originate in a *confidence* that they will not be disclosed; (2) this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) the *injury* that would inure to the relation by the disclosure must be greater than the benefit thereby gained for the direct disposal of litigation.¹¹² Nonetheless, of the twenty-six state reporter's shield laws, only three expressly require proof of confidentiality as a prerequisite to the newsperson's invocation of the privi-

tion procured); LA. REV. STAT. ANN. §§ 45:1451-50, 1454 (West 1982) (the identity of any informant or any source of information obtained); MD. CTS. & JUD. PROC. CODE ANN. § 9-112(c)(7) (Supp. 1987) (the source of any news or information obtained); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Page 1981) (any information procured); 42 PA. CONS. STAT. ANN. § 4942 (Purdon 1982) (the source of any information procured); R.I. GEN. LAWS § 9-19.1-1 to 9-19.1-3 (1985); TENN. CODE ANN. § 24-1-208 (1980).

108. See, e.g., *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 279 (3d Cir. 1980) (Pennsylvania shield law held to protect out-takes even though the identity of the source was known).

109. See Monk, *supra* note 52, at 51 n.268. Monk points out that Arizona's shield statute, which protects only the source of the information and not the information itself, appears to be broader when read in conjunction with ARIZ. REV. STAT. ANN. § 12-2214(a)(1987), which requires that six stringent criteria be met before a subpoena to compel disclosure will be issued.

110. CAL. EVID. CODE § 1070 (West 1988); MICH. COMP. LAWS ANN. § 767.5a (West 1982); MINN. STAT. ANN. §§ 595.021 to .025 (West 1988); MONT. CODE ANN. §§ 26-1-901 to 26-1-903 (1983); NEB. REV. STAT. §§ 20-144 to 20-147 (1983); N.J. STAT. ANN. §§ 2A:84A-21 to 21.13 (West 1987); N.M. STAT. ANN. § 38-6-7 (1984); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1988); N.D. CENT. CODE § 31-01-06.2 (1986); OKLA. STAT. tit. 12, § 2506 (1980); OR. REV. STAT. §§ 44.510 to 44.540 (1987); R.I. GEN. LAWS § 9-19.1-1 to 9-19.1-3 (1985); TENN. CODE ANN. § 24-1-208 (1980).

111. MICH. COMP. LAWS ANN. § 767.5a (West 1982). The statute presumes that any relationship between reporter and source is confidential.

112. 8 J. WIGMORE, *supra* note 65, § 2285.

lege.¹¹³ Delaware, one of the three states to require confidentiality as a prerequisite to the invocation of the privilege, requires a statement, made under oath, that an express or implied understanding of confidentiality existed between the reporter and his source.¹¹⁴ Rhode Island, similarly, places great emphasis on the confidential relationship by designating confidential relationships or confidential information¹¹⁵ as alone within the scope of the statute's protection. The Rhode Island statute further reinforces the confidentiality requirement by providing for the waiver of the privilege when the information obtained is made public.¹¹⁶ In contrast, while the statement of public policy preceding Minnesota's shield law indicates that its purpose is to ensure and perpetuate the confidential relationship between the news media and its sources,¹¹⁷ an explicit or implied understanding of confidentiality is not a prerequisite to invoking the statute's protection.

Of the twenty-six states with reporter's testimonial shield statutes, seven specifically qualified the broad language of their statutes by adopting either the *Branzburg* test¹¹⁸ or some modification of that test.¹¹⁹ The *Branzburg* three-pronged test for denial of the privilege requires a showing of the relevancy to a probable violation of law, the unavailability of the information from alternative sources, and a compelling and overriding interest in the information.¹²⁰ The test or its modification is generally applied when the subpoenaing party seeks to discover material that the newsperson claims is protected by the privilege. It is then up to the discretion of the judge to determine whether the party seeking the information has met its burden by making the requisite showing.¹²¹

113. See, e.g., DEL. CODE ANN. tit. 10, § 4322 (1980); N.M. R. EVID. 524; R.I. GEN. LAWS § 9-19.1-2 (1985).

114. DEL. CODE ANN. tit. 10, § 4322 (1980). No such understanding is required, however, to evoke the privilege in non-adjudicative proceedings in the state. *Id.* § 4321.

115. R.I. GEN. LAWS § 9-19.1-3(a) (1985): "[N]o person shall be required . . . to reveal confidential association, to disclose any confidential information or to disclose the source of any confidential information received"

116. R.I. GEN. LAWS § 9.19.1-3(a) (1985): "The privilege conferred by § 9-19.1-2 shall not apply to any information which has at any time been published, broadcast, or otherwise made public by the person claiming the privilege."

117. MINN. STAT. ANN. § 595.022 (West 1988).

118. *Branzburg v. Hayes*, 408 U.S. 665, 680 (1972).

119. See, e.g., ARIZ. REV. STAT. ANN. § 12-2214(A)(2), (4) (1985); DEL. CODE ANN. tit. 10, § 4323(a) (1975); MINN. STAT. ANN. § 595.024 (West 1988); N.J. STAT. ANN. §§ 2A:84A-21.3(b) (West 1987); OKLA. STAT. tit. 12, § 2506(B)(2) (1980); R.I. GEN. LAWS § 9-19.1-3(c) (1985); TENN. CODE ANN. § 24-1-208(c) (1980).

120. *Branzburg*, 408 U.S. at 680.

121. See TENN. CODE ANN. § 24-1-208(c) (1980).

A. *Branzburg* Test States

Four states, Delaware, Minnesota, New Jersey, and Tennessee, have adopted the *Branzburg* three-pronged test.¹²² Tennessee, for example, requires a showing by clear and convincing evidence. Minnesota also requires that the party seeking production demonstrate that the three *Branzburg* criteria are satisfied.¹²³ New Jersey incorporates the three-pronged *Branzburg* test and allows a newsmen's privilege to be overcome by a showing by a preponderance of the evidence.¹²⁴ This weighting was chosen by the New Jersey legislature because of its concern for balancing first amendment and sixth amendment rights.¹²⁵ The other states use some modified form of the *Branzburg* test and limit the application of the three-pronged test to adjudicative proceedings.¹²⁶ The Delaware statute, however, provides an unqualified privilege to protect the reporter from testifying as to his or her source, and only a qualified privilege as to unpublished information.¹²⁷ Under this statute, the judge determines whether the public interest in having the reporter's testimony outweighs the public interest in keeping the information confidential.¹²⁸ In making the determination, the judge employs the *Branzburg* test, examining such factors as the relevance of the information, the efforts made by the seeking party to obtain the information from other sources, and the possible effect disclosure will have on the future flow of information to the public.¹²⁹ Minnesota's statute is similar to the Delaware statute except that it does not distinguish between sources and the information itself.

B. Modified *Branzburg* Test States

Four states¹³⁰ employ a modification of the *Branzburg* test. For example, Oklahoma requires that the party seeking disclosure of the infor-

122. DEL. CODE ANN. tit. 10, §§ 4320-25 (1975); MINN. STAT. ANN. § 595.021-25 (West Supp. 1988); N.J. STAT. ANN. §§ 2A:84A-21 to 21.13 (West Supp. 1987); TENN. CODE ANN. § 24-1-20811 (1980).

123. The Minnesota statute does not distinguish between the sources and the information itself. MINN. STAT. ANN. § 595.024 (West Supp. 1988).

124. N.J. STAT. ANN. §§ 2A:84A-21 to 21.13 (West Supp. 1987).

125. *Id.*

126. DEL. CODE ANN. tit. 10, § 4320-26 (1974). There is an unqualified privilege in non-adjudicative proceedings. *Id.* § 4321.

127. *Id.* § 4323. "The privilege provided by § 4321 shall not prevent a reporter from being required in an adjudicative proceeding to testify concerning the content, but not the source, of the information that he obtained" *Id.*

128. *Id.*

129. *Id.*

130. Arizona, Delaware, Oklahoma, and Rhode Island.

mation or the source's identity establish by clear and convincing evidence the relevance of the information to a significant issue of law and the use of due diligence in seeking an alternative source of the information.¹³¹ Rhode Island employs a two-pronged test that requires the person seeking the information or its source to establish the relevance of the information to the prosecution of a specific felony or to "prevent a threat to human life," as well as its unavailability from other witnesses.¹³² The Arizona statute similarly requires the seeking party to provide affidavits attesting to the relevance of the information sought to the action and the exhaustion of alternative sources.¹³³

C. Near-Absolute and Absolute Privilege States

Eleven states have enacted reporter's shield laws granting newsmen's sources and unpublished information absolute or nearly-absolute confidentiality.¹³⁴ In these states' statutes there is neither qualifying language as to confidentiality, nor a test as to when disclosure of either reporter's sources or information is required. The Nevada shield law, for example, provides:

No reporter . . . of any newspaper . . . radio or television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving, or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceedings, trial, or investigation¹³⁵

The statute provides for this privilege to be accorded in such proceedings as trials, grand jury investigations, legislative or committee investigations or hearings, or department, agency, or commission proceedings.¹³⁶

Because the language of the Nevada statute is specific and absolute, it is more predictable and broad in its application than, for example, the

131. OKLA. STAT. ANN. tit. 12, § 2506(B)(2) (West 1980).

132. R.I. GEN. LAWS § 9-19.1-3(c) (1985).

133. ARIZ. REV. STAT. ANN. § 12-2214(A)(2) (Supp. 1987).

134. ALA. CODE § 12-21-142 (1988); ARIZ. REV. STAT. ANN. § 12-2237 (1977); IND. CODE § 34-3-5-1 (1988); KY. REV. STAT. ANN. § 421.100 (Bobbs-Merrill 1988) (absolute as to confidential sources, qualified concerning information obtained from confidential sources); MD. CTS. & JUD. PROC. CODE ANN. § 9-112(c) (1988); MONT. CODE ANN. § 26-1-901 (1987); NEB. REV. STAT. § 20-146 (1987); NEV. REV. STAT. ANN. § 49.275 (Michie 1986); N.J. STAT. ANN. §§ 2A:84A-21 to 21.13 (West 1988); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1989); OHIO REV. CODE ANN. § 2739.04, .11-.12 (Anderson 1981); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1982).

135. NEV. REV. STAT. § 49.275 (1985).

136. *Id.*

Delaware and Minnesota statutes.¹³⁷ The Delaware statute grants reporters an absolute privilege against mandatory disclosure of information or of the identity of source in non-adjudicative proceedings.¹³⁸ The meaning of "non-adjudicative" proceedings, however, is ambiguous. For example, it is unclear whether Delaware characterizes grand jury proceedings as adjudicative.¹³⁹ Only if grand juries were treated as non-adjudicative proceedings would there truly be an absolute privilege. The ambiguity of the Delaware statute makes it less predictable and thus less effective than the Nevada statute.

The wide spectrum of statutory protections afforded the institutional press do the individual and the community a disservice.¹⁴⁰ Local, national, and international information is necessary for the individual and the society to make educated choices. Clear and absolute reporter's shield statutes are undermined by the presence of other vague and conditional statutes; although a reporter's source might be protected by Michigan law, the source's identity might be unprotected in Minnesota. It is entirely likely that the party seeking disclosure by a national news organ would shop for the forum with the least protective reporter's shield law. Thus the protection afforded our news media may well be only as strong as the weakest of state reporter's shield laws.

Empirical studies concerning reporters' confidential communications support the conclusion that some important information will not become news without a predictable reporter's privilege.¹⁴¹ This information is vital to the primary first amendment value—self-fulfillment—and to the primary societal means to that end—self-governance.¹⁴² While the correct disposition of litigation is an important goal, failure to fully meet this goal would not severely undermine our ability to self-govern. It is therefore necessary to eliminate the diversity of standards and privileges afforded the newsperson and offer national absolute protection to the local, national, and international news media.

137. DEL. CODE ANN. tit. 10, §§ 4320-25 (1975); MINN. STAT. ANN. §§ 595.021-25 (West Supp. 1988).

138. DEL. CODE ANN. tit. 10, § 4321 (1980).

139. *Id.*

140. See *Newsmen's Privilege*, *supra* note 59, at 249-52 (statement of Robert G. Fichenberg Chairman, Freedom of Information Committee, American Society of Newspaper Editors, Executive Editor, The Knickerbocker News-Union Star).

141. Blasi, *supra* note 49, at 270.

142. See *Newsmen's Privilege*, *supra* note 59, at 249-52 (statement of Robert G. Fichenberg).

IV. Proposed Model Statute: Reporter's Testimonial Privilege

Sec. 1. *Purpose.* The purpose of this statute is to protect the constitutional right of freedom of speech by encouraging the free and vigorous gathering of information by reporters so that the public can be fully informed.

Sec. 2. *Definitions.* For the purposes of this statute:

(a) "reporter" means a person who is or, at the time the information in issue was obtained, was employed by or connected with the institutional press for the purpose of gathering or editing news;

(b) "institutional press" means any pamphlet or newspaper, radio station, television station, press association, news agency, or wire service with a general circulation, regardless of its size, regularly engaged in the gathering and disseminating of news and information to the public;

(c) "federal or state proceeding" means any proceeding or investigation before any federal or state judicial, legislative, executive, or administrative body.

Sec. 3. *Privileged communication.* Except as provided in section 5, no reporter shall be required to disclose in any federal or state proceeding:

(a) the source of any published or unpublished information obtained in the course of his or her employment or connection with the institutional press; or

(b) any unpublished information obtained or prepared in the course of his or her employment or connection with the institutional press.

Sec. 4. *Criminal defendants.* If, based on a showing by a criminal defendant, the judge finds that it is more likely than not that a reporter's testimony, privileged under section 3, is necessary to the fair determination of guilt or innocence, the judge, on motion of the criminal defendant, shall dismiss the charges to which the testimony would relate.

Sec. 5. *Evidence Necessary to the Prosecution.* If, based on evidence in the case or from other showing by the prosecution, the judge determines that it is more likely than not that a reporter's testimony, privileged under section 3, is necessary to the conviction of a criminal defendant who, if not confined, is likely to directly cause death or personal injury, the reporter shall be compelled to testify. This exception to the absolute privilege set forth in section 3 is to be interpreted narrowly and applied only when the threatened danger is both serious and imminent.

V. Nature of Privilege

The model statute proposes an absolute privilege, except in the grand jury or criminal trial context when confidential information held by a reporter is necessary to the indictment or prosecution of a person

who, if guilty of the crime charged, is likely to cause the death or serious bodily injury of another person upon release from custody.¹⁴³ An absolute privilege, rather than a qualified privilege, is necessary to effectively promote the purpose for a reporter's privilege: protection of the free flow of information between the media and their sources.¹⁴⁴ This free flow of information promotes individual fulfillment by providing resources necessary to a well-informed public.¹⁴⁵

Central to the effectiveness of a reporter's privilege is outcome predictability.¹⁴⁶ Unless sources can predict that their identities will be protected under the law, they will be unwilling to risk communications with reporters. A qualified privilege, no matter how structured, requires balancing of interests at the point the privilege is asserted.¹⁴⁷ Because even lawyers are unable to predict accurately the outcome of judicial balancing efforts, it is unlikely that sources who need confidentiality will feel secure enough to come forward.¹⁴⁸ Only an absolute privilege is capable of the predictability essential to the effective protection of newsgathering.¹⁴⁹

Speaking in hearings before the 93rd Congress with regard to qualified reporters' privileges enacted in numerous states, reporter Fred Graham of CBS News noted:

It has seemed to us that where there are exceptions, the exception tends to swallow the rule. Where there is an exception to the privi-

143. The exception to the absolute privilege is discussed *infra* notes 178-190 and accompanying text. This discussion includes definition of the exception, justifications for the exception, and consideration of the effect of the exception on the outcome predictability of the privilege created by the model statute.

144. *Sprague v. Walter*, 518 Pa. 425, 435, 543 A.2d 1078, 1082 (1988) ("strong societal purpose in fostering uninhibited disclosure between individuals and the media"); see also *D'Alemberte*, *supra* note 56, at 317; *Monk*, *supra* note 52, at 10.

145. *Branzburg v. Hayes*, 408 U.S. 665, 715 (1972) (Douglas, J., dissenting) ("Effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal and re-examination.").

146. *Branzburg*, 408 U.S. at 702. In his majority opinion, Justice White criticized the conditional privilege asserted by the plaintiffs:

If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them, it would appear that only an absolute privilege will suffice.

Id. (Citations omitted).

147. See Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 340-42 (1970).

148. *Id.* at 341; see also *Newsmen's Privilege*, *supra* note 59, at 48-49 (testimony of Senator Alan Cranston arguing that potential informers will be deterred from talking to the press unless the law is broad and simple to understand).

149. See Note, *supra* note 10, at 630; *Monk*, *supra* note 52, at 62.

leges, judges have proved ingenious in finding that in any particular case the privilege doesn't apply because of some qualification. And it boggles the nonlegal brain, some of the cases that don't fall in the privilege. But judges quite often are able to do that so we feel if you have an absolute privilege, then there is no question. If the source believes that his identity is not going to be disclosed, he will help disseminate information to the press, but he is not going to study the language of these qualifications. If he hears a judge can say the privilege doesn't apply in some instances, he is going to be shy.¹⁵⁰

The choice presented to lawmakers is an absolute privilege or an ineffective privilege. In light of the paramount interest in preserving self-governance, the better alternative is the absolute privilege reflected in the model statute.

VI. The Privilege Holder

Under the model statute, only persons who are or, at the time the information in issue was obtained, were employed by or connected with the institutional press can invoke the privilege. This narrow definition of persons entitled to claim the absolute reporter's privilege is necessary to protect the public interest in fair and effective justice, which must be balanced against interests served by a reporter's privilege.¹⁵¹ Extending the protection of an absolute privilege beyond the institutional press would create an unacceptable level of interference with the administration of fair and effective justice.¹⁵²

Justice White, in his majority opinion in *Branzburg v. Hayes*, stated that defining the parameters of a reporter's privilege "would present practical and conceptual difficulties of a high order."¹⁵³ In reference to the holder of the privilege, he stated:

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

150. *Newsmen's Privilege*, *supra* note 59, at 62 (statement of Fred Graham, on behalf of The Reporters Committee on Freedom of the Press).

151. See *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) (the administration of justice, a fundamental function of government, is hindered by testimonial privileges); *Bulow by Auer-sperg v. Bulow*, 811 F.2d 136, 141 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987) (testimonial privileges are not favored because "they contravene a fundamental principle of our jurisprudence that 'the public has a right to every man's evidence.'" (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950))).

152. *Branzburg*, 408 U.S. at 690.

153. *Id.* at 703-04.

utilizes the latest photocomposition methods.¹⁵⁴

There is no question that freedoms guaranteed by the First Amendment apply to the lonely pamphleteer as well as to large metropolitan newspapers. If the scholar or lonely pamphleteer meets the definition of institutional press, he or she too would be protected for his or her efforts to keep the public informed.¹⁵⁵ The public's interest in maintaining a vigorous, aggressive, and *independent* press capable of participating in robust unfettered debate over controversial matters is paramount.¹⁵⁶ An absolute privilege, however, interferes with the fair administration of justice.¹⁵⁷ For example, a libel suit may be lost because a reporter is not required to disclose a source necessary to the plaintiff's case;¹⁵⁸ criminals may go free because a reporter withholds incriminating evidence.¹⁵⁹ The importance of justice in our society is so weighty as to justify an absolute reporter's privilege only when self-governance by the public is seriously threatened. Restriction of information available to and disseminated by the institutional press presents a threat of this magnitude. In order to justify the obstacle to administration of justice caused by an absolute testimonial privilege, a limit must exist on who may invoke the privilege. Of the twenty-six states that have enacted a reporter's privilege, only six allow persons employed by or connected with the institutional press to invoke the privilege.¹⁶⁰ In all but two of these states,¹⁶¹ the reporter's privilege is absolute. Of the fourteen states that extend the class of per-

154. *Id.* at 704.

155. *See generally* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 n.2 (1980) ("As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the "agent" of interested citizens, and funnels information about trials to a large number of individuals.").

156. *See New York Times v. Sullivan*, 376 U.S. 254, 296-97 (1964) (Black, J., concurring) (stating the First Amendment was primarily designed to protect public self-governance); *Baker v. F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972).

157. Monk, *supra* note 52, at 10 n.43 (theorizing that an absolute privilege would create "at least isolated instances in which correct disposal of the immediate litigation will be sacrificed").

158. *See, e.g., Coughlin v. Westinghouse Broadcasting and Cable Inc.*, 780 F.2d 340 (3d Cir. 1985) (motion to compel discovery denied under Pennsylvania shield law; defendant broadcast company's motion for summary judgment granted).

159. *See, e.g., Suhrheinrich, supra* note 60, at 1016-17 (discussing *In re Grand Jury Proceedings: Storer Communications, Inc.*, No. 86-1787 (E.D. Mich. filed Sept. 9, 1986), *aff'd*, 810 F.2d 580 (6th Cir. 1987) and reflecting that an armed murderer's freedom to cause additional harm was "a tremendous price to pay" for a reporter's privilege).

160. ALA. CODE. § 12-21-142 (1988); ARIZ. REV. STAT. ANN. § 12-2237 (1977); KY. REV. STAT. ANN. § 421-100 (Michie/Bobbs-Merrill 1988); OHIO REV. CODE ANN. §§ 2739.04, .11-.12 (Anderson 1981); TENN. CODE ANN. § 24-1-208 (1988).

161. MD. CTS. & JUD. PROC. CODE ANN. § 24-1-208 (1988 & Supp. 1990) (disclosure of a source cannot be compelled, but disclosure of information can be compelled); TENN CODE ANN. § 24-1-208 (1988).

sons who can claim the privilege to those connected with or employed by magazines,¹⁶² only five provide an absolute privilege.¹⁶³ Six other states have broadly defined the class of persons who can invoke the reporter's privilege,¹⁶⁴ and only two of these create an absolute privilege.¹⁶⁵ This demonstrates the recognition by state legislatures that in order to properly balance an absolute reporter's privilege against the fair administration of justice, the class of persons eligible to claim the privilege must be well-defined, as in our proposed statute.

VII. The Scope of the Privilege

The Supreme Court stated in *Roth v. United States*¹⁶⁶ that the First Amendment fosters unfettered interchange of ideas, and the press plays a constitutionally prescribed role in that interchange.¹⁶⁷ To provide for that free exchange of ideas, an absolute privilege against forced disclosure of the identities of confidential sources and unpublished information gathered for news dissemination must exist.

The model statute proposes that all unpublished information and the identity of any sources be privileged. The mere perception, whether or not substantiated, that the government exerts control over the news media through subpoenas and the like necessitates adoption of a uniform federal shield statute. The public relies on the press to act as its major source of surveillance of the government—the role of the proverbial “watchdog.” If it appears that the press cannot perform its watchdog function, the public may lose confidence in their own ability peacefully to

162. ALASKA STAT. §§ 09.25.150-220 (1983); ARK. STAT. ANN. § 16-85-510 (1987); CAL. EVID. CODE § 1070 (West 1989); ILL. REV. STAT. ch. 110, paras. 8-901 to 909 (1985); IND. CODE ANN. § 34-3-5-1 (Burns 1988); LA. REV. STAT. ANN. §§ 45:1451-54 (West 1988); MONT. CODE ANN. §§ 26-1-901 to 903 (1987); NEV. REV. STAT. ANN. § 49.275 (Michie 1986); N.J. STAT. ANN. §§ 2A:84A-21 to 21.13 (West 1988); N.M. STAT. ANN. § 38-6-7 (1987); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1989); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1982); R.I. GEN. LAWS §§ 9-19.1-1 to 1.3 (1985).

163. IND. CODE ANN. § 34-3-5-1 (Burns 1988); MONT. CODE ANN. §§ 26-1-901 to 903 (1987); NEV. REV. STAT. ANN. § 49.275 (Michie 1986); N.J. STAT. ANN. §§ 2A:84A-21 to 21.13 (West Supp. 1988); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1982).

164. DEL. CODE ANN. tit. 10, §§ 4320-26 (1988); MICH. COMP. LAWS ANN. § 767.5a (West 1988); MINN. STAT. ANN. §§ 595.021-025 (West 1988); NEB. REV. STAT. §§ 20-144 to 147 (1987); N.D. CENT. CODE § 31-01-06.2 (1976); OR. REV. STAT. § 44.510 (1988). As an example of the broad coverage extended by these statutes, the Delaware reporters' privilege can be invoked by journalists, scholars, educators, polemicists, or others who earn their livelihood by disseminated words, sounds, or images.

165. MICH. COMP. LAWS ANN. § 767.5a (West 1988); NEB. REV. STAT. §§ 20-144 to 147 (1987).

166. 354 U.S. 476 (1957).

167. *Id.* at 484.

prevent government usurpation of their rights. This erosion of confidence could lessen the legitimacy of the government and threaten the premise that peaceful change can be accomplished through the exercise of democracy.

Most statutory privileges protect only the source's identity and information that might reveal the source's identity.¹⁶⁸ Such protection is unpredictable because the court must determine what information might tend to reveal a source's identity. Therefore, in order for the privilege to be predictable and effective, it must cover all unpublished information as well as the identity of the source. A privilege that is absolute, given to all members of the institutional news media, but of undefined scope remains unpredictable. Consequently, the efficacy of such a privilege is negligible.

Many courts have attempted to provide adequate protection using variants of the standards suggested by Justice Powell in his *Branzburg* concurrence.¹⁶⁹ In *Bruno & Stillman, Inc. v. Globe Newspaper Co.*,¹⁷⁰ a series of articles had been published that criticized the quality of construction of boats built by Bruno & Stillman. At deposition, the reporter refused to disclose the identities of three sources who had been promised confidentiality. The *Globe* court applied a number of standards, based on Justice Powell's opinion in *Branzburg*, including the following:

- (1) the party seeking disclosure must establish the relevance of the information;
- (2) the reporter must show the need for preserving confidentiality;
- (3) the party seeking disclosure must prove that it is not using the request as a pretense for "discovery by fishing expedition";
- (4) the court must determine the need for confidentiality; and
- (5) if the court is in doubt, it may make an *in camera* inspection of the reporter's notes and, if still in doubt, may require that nonconfidential sources be exhausted before disclosure is compelled.¹⁷¹

The new standard formulated in *Globe* is now commonplace. The second *Globe* criterion, requiring consideration of the First Amendment, makes explicit what is merely implicit in the balancing test advocated by Justice Stewart in *Branzburg*. Because first amendment interests are critical to the balancing approach, it is proper that these interests be explicitly reflected in any balancing. The First Amendment is weakened, however, if the confidentiality of the information or identity is dependent upon the value judgment of an unknown judge or jury. The determination of relevance necessarily calls for a subjective determination by the

168. See *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 279 (3d Cir. 1980).

169. *Branzburg v. Hayes*, 408 U.S. 665, 709-10 (1972) (Powell, J., concurring).

170. 633 F.2d 583 (1st Cir. 1980).

171. *Id.* at 597-98.

judge. The second requirement places the burden on the reporter to prove the need for confidentiality, thus putting the reporter's judgment and service relationships before the judge for approval. The third requirement, the plaintiff's demonstration that he or she is not merely on a fishing expedition, is subjective. Finally, both the court's determination of the need for the confidential information and its *in camera* review are subjective processes, unpredictable and thus destructive of the trust needed by the confidential source when revealing information to a reporter.

Such criteria can easily be abused for the purpose of exposure or harassment.¹⁷² Such abuses must be made nearly impossible. The individual motives of anonymous informants are irrelevant to the constitutional interest in maximizing the flow of information to the public. The mere possibility of forced disclosure of the source's identity or confidential information is similar to a prior restraint in that it precludes the dissemination of information that the public might find newsworthy.¹⁷³

Common experience suggests that the specter of search warrants is likely to be more threatening to potential confidential sources than the isolated attempts to compel disclosure described above.¹⁷⁴ "Warrants . . . will almost always result . . . in unannounced searches."¹⁷⁵ Once confidential materials are in the control of the police, the judge, or the grand jury, a reporter's willingness to advocate freedom of speech and of the press has no practical significance.¹⁷⁶ As Justice Stewart noted in his *Branzburg* dissent, when a grand jury exercises unbridled subpoena power the sources knowledgeable of sensitive matters are afraid to disclose information, and newsmen cease to be both useful grand jury witnesses and useful reporters and investigators of important public issues.¹⁷⁷

The dispute over disclosure between the press and a private litigant is substantially different from the dispute between the press and the government. The latter dispute more strongly demands a nearly absolute

172. See *In re Roche*, 381 Mass. 624, 411 N.E.2d 466 (1980).

173. See Note, *supra* note 10, at 620. The author advocates that courts recognize an absolute privilege against forced disclosure of the identities of confidential sources.

174. See *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978).

175. Eckhardt & McKey, *The Reporter's Privilege: An Update*, 19 PUB. ENT. ADVERT. & ALLIED FIELD L.Q. 109, 123 (1980).

176. See *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). The majority in *Branzburg* asserted that subpoenaed reporters will be sufficiently protected by traditional limitations of the grand jury and that even a qualified privilege would unduly interfere with the grand jury function. 408 U.S. 665, 690-91 (1972). The results of an empirical study conducted by Professor Blasi implicitly refute this assertion. See Blasi, *supra* note 49, at 259-84.

177. *Branzburg*, 408 U.S. at 725-52 (Stewart, J., dissenting).

privilege. Some grand jury investigations focus upon a confidential source who revealed information that the government wanted kept secret.¹⁷⁸ In such cases, the purpose of the subpoena is to identify the source so that authorities can silence him or her. This is constitutionally impermissible. As Justice Black wrote, "the press was protected so that it could bare the secrets of the government and inform the people."¹⁷⁹ Sources and unpublished information of institutional journalists must have the protection of an absolute privilege necessary to ensure the flow of information that is critical of the government.

VIII. Operation of the Privilege in Criminal, Civil, and Administrative Proceedings

The purpose of a reporter's privilege is to protect the press from subpoenas or other legal process compelling testimony. The privilege would apply in both criminal and civil judicial proceedings as well as legislative investigatory hearings. This section explains the operation of the proposed model privilege in each of these contexts.

A. Criminal Proceedings

1. Evidence Necessary to the Prosecution

An absolute reporter's privilege, applicable to all proceedings through which the press is subject to subpoena, is appropriate given the paramount importance of the First Amendment. Only the imminent threat of death or serious bodily injury should defeat the privilege. The model statute recognizes that in rare cases, conviction of a criminal defendant is necessary to protect members of society from death or serious injury. Examples of proceedings in which the exemption could apply include grand jury investigations of bombings, and criminal trials of persons accused of murder or rape, provided the court believes it is more likely than not that, if released, the accused will repeat the crime. Courts have ordered disclosure by reporters in such cases.¹⁸⁰ This exception is

178. See, e.g., *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1981); *Ealy v. Littlejohn*, 569 F.2d 219 (5th Cir. 1978).

179. *New York Times v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring); see also Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 900-01 (1986). The First Amendment and a free press assure that the emperor's nakedness will be pointed out when government falsely claims to be clothed in the public interest.

180. *Burse v. United States*, 466 F.2d 1059, 1087 (9th Cir. 1972) (reporter ordered to disclose information concerning threat on President Nixon's life during televised speech by member of the Black Panthers); *Lewis v. United States*, 517 F.2d 236, 239 (9th Cir. 1975) (radio station manager held in contempt for refusal to disclose information about the terrorist bombing of a Los Angeles hotel).

justified because it protects individuals whose lives are endangered. It also promotes continued public acceptance of the reporter's privilege. If a serial killer or terrorist were to gain acquittal in a case in which a reporter refused to disclose condemning information, public outrage would likely result in repeal of the shield law. Stated in terms of a balancing test, a greater than fifty percent chance that death or serious bodily injury of another person will be the direct result of the acquittal of a criminal defendant represents a law enforcement interest even weightier than the public's right to information under the First Amendment. This exception is based on the clear and present danger test which permits the suppression of speech only if the "incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."¹⁸¹

This exemption to the model statute does not destroy predictability because it is narrow and well-defined.¹⁸² Only in rare cases when the court believes it is more likely than not that a criminal defendant, if not confined, will directly cause death or personal injury, is the exemption properly invoked.¹⁸³

2. *Criminal Defendant's Constitutional Rights*

The rights of criminal defendants should not be overlooked. First amendment rights collide with the sixth amendment right to compulsory process and a fair trial when the reporter's privilege is claimed in response to a discovery request by a criminal defendant.¹⁸⁴ Due to the constitutional dimension of the criminal defendant's rights in these cases, some courts have ordered disclosure and declared an absolute reporter's privilege unconstitutional in the criminal defendant context.¹⁸⁵ Other

181. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

182. Senator Alan Cranston's opinion on the effect of qualifications are based on their ambiguous language and the resulting difficulty in predicting their reach. *Newsmen's Privilege*, *supra* note 59, at 45-59. For example, in discussing an exception to the privilege when nondisclosure would constitute a threat to human life, he said:

Moreover, what constitutes a threat to human life? Is bad meat sold to the public a threat to human life? . . . Similarly, this in turn could extend to product safety of any kind: automobiles, flammable clothes, or unsafe power tools used in the home. A worker in a factory might not dare reveal to a newsman that the powersaws his plant produces are defective for fear that his identity would be revealed in court and he'd lose his job.

Id. at 49.

183. The requirement of a greater than 50% chance of harm to human life directly caused by the criminal defendant is not subject to the criticisms voiced by Senator Cranston in the congressional hearings on the reporter's privilege. *See Note, supra* note 10, at 625-26.

184. *See Monk, supra* note 52, at 43.

185. *See, e.g., In re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), *cert. denied*, 439 U.S. 997 (1978).

courts recognize a qualified privilege in this context, and reach a determination by balancing the defendant's need for confidential information against the interests underlying the reporter's privilege.¹⁸⁶

The interests that are affected and must be balanced in cases in which a criminal defendant seeks discovery of a reporter's confidential sources include more than the public's first amendment rights and the sixth amendment rights of criminal defendants. Another important interest implicated is the public's interest in law enforcement and the fair administration of justice. Of the four interests involved, two are protected by the Constitution, and as a result carry much weight in the balancing process. The solution when the First and Sixth Amendments collide is to sacrifice the nonconstitutional interests so that the interests based in the Constitution can stand.

The Federal Rules of Evidence provide an approach that would effect this solution. Rule 510 provides the privilege to refuse to disclose the identity of a government informer.¹⁸⁷ An informer is defined as "a person who has furnished information relating to or assisting in an investigation of a possible violation of law."¹⁸⁸ The privilege is held by the government.¹⁸⁹ Under Rule 510, if the judge determines that an informer may be able to give testimony necessary to a fair determination of the defendant's guilt or innocence, and the government invokes the privilege, charges against the defendant are dropped.¹⁹⁰ The model statute adopts the approach outlined in Rule 510. The result is that the public's interest in law enforcement is subordinated to protect and preserve constitutional rights that are basic to our democratic society.

186. See *People v. Troiano*, 127 Misc. 2d 738, 486 N.Y.S.2d 991 (1985).

187. FED. R. EVID. 510. None of the proposed privilege rules was enacted by Congress. Instead, Rule 501 prescribes common law privileges "as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.* Congress substituted Rule 501 for all of the specific privilege rules that were proposed in the belief that federal law should not supersede state law in substantive areas such as privilege. SALTZBURG & McMARTIN, FEDERAL RULES OF EVIDENCE MANUAL 403 (5th ed. 1990). The value of the proposed rules has been explained as follows:

What more accurate expression of the principles of the common law and of the application of reason and experience could exist than a draft that was developed by a representative committee of bench, bar and scholars, twice published and commented on by the bench and bar, adopted by the Judicial Conference and finally forwarded by the Supreme Court to Congress for promulgation.

In re Grand Jury Proceedings, 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977).

188. FED. R. EVID. 510(a).

189. FED. R. EVID. 510(b).

190. FED. R. EVID. 510(c)(2).

B. Defamation and Other Civil Suits

The public's interest in an unfettered institutional press outweighs the important interest in the fair administration of justice.¹⁹¹ These interests of the individual and the public are paramount,¹⁹² and thus they should defeat individual and collective interests in recovery for civil harms. In order to secure the primacy of this paramount right, an absolute privilege in all civil suits is necessary.¹⁹³ Free speech advocates frequently call for a greater use of trial-avoiding devices in civil cases¹⁹⁴ because they distrust juries' judgments in first amendment cases, particularly cases involving the media.

Traditionally, tort actions have achieved two basic goals:

(1) compensating (usually innocent) plaintiffs who have suffered cognizable harm; and (2) imposing costs on defendants to make them aware that their conduct has fallen below the socially acceptable level. When damage awards achieve both goals at the same time, the system works fairly well. There is tension, however, when a damage award achieves only one of the goals, as is often the case in libel law.¹⁹⁵

In libel law we are concerned about the chilling effect unwarranted liability may have upon potential speakers.¹⁹⁶ Resolution of a libel suit against the media may turn upon the disclosure of the source or unpublished information.¹⁹⁷ The decision in the action brought by Ariel Sharon against *Time*¹⁹⁸ is an example in which forced disclosures of outtakes, earlier drafts, and research and the like have resulted in substantial awards against the media—cases in which popular, democratic jury determinations have had a chilling effect upon the media.¹⁹⁹ “[M]edia libel law has developed into a high-stakes game that serves the [legitimate]

191. See *DeJonge v. Oregon*, 299 U.S. 353, 364-65 (1937).

192. *Id.*

193. Monk, *supra* note 52, at 10 (theorizing that an absolute privilege would create at least isolated instances in which correct disposal of the immediate litigation would be sacrificed).

194. See Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U.L. REV. 3 (1985).

195. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809, 811 (1986).

196. See Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 13-22; see also Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847 (1986); Schauer, *Fear, Risk, and the First Amendment: Unraveling the Chilling Effect*, 58 B.U.L. REV. 685 (1978).

197. See, e.g., *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 780 F.2d 340 (3d Cir. 1985) (motion to compel discovery denied under Pennsylvania shield law; defendant broadcast company's motion for summary judgment granted).

198. *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984).

199. See FRANKLIN, *THE FINANCIAL IMPACT OF LIBEL REFORM ON REPEAT PLAYERS, THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS* (E. Dennis & E. Noam eds.).

purposes of neither the parties nor the public.”²⁰⁰ Under the current standard used in defamation cases,²⁰¹ a news organ that should have or did know the falsity of the information it published may be forced to reveal some of the material it received in confidence. To compel such disclosure is destructive of the independence of the press²⁰² and often not truly probative.²⁰³ To compel such disclosure is to declare erroneously that the reputation interest is equal to or may be balanced against the interest in freedom of information and speech.

The right of free speech, however, is more essential to individual and democratic fulfillment than is the right to preserve the sanctity of one’s name. People often speak of the reputation interest in terms that focus on the individual,²⁰⁴ yet reputation is, by its very nature, public. Indeed, reputation derives from the fundamental act of recognition in which the individual “moves beyond interest and takes on the role of another.”²⁰⁵ Reputation is the extension and elaboration of that recognition which lies at the basis of our social interaction.²⁰⁶ Freedom to speak is a private interest based right; interest in reputation is other-based. Because reputation is a social interest rather than a private right, it is far less important to the process of individual fulfillment and the vitality of democratic society than is free speech. Thus, when balancing the two rights, the scales necessarily must fall in favor of protection of free speech over protection of the individual right.

Fortunately, in libel law, the injuries suffered by innocent plaintiffs often can be redressed in large part by remedies other than damages. If they had a direct way to restore their reputations, they might not be as quick to “trigger this expensive remedy, which is generally unsuccessful for plaintiffs and poses great danger for defendants”²⁰⁷ and for society.

Retractions are a possible method to restore reputations. An appropriate retraction not only establishes the falsity of the challenged state-

200. Franklin, *A Declaratory Judgment Alternative*, *supra* note 195, at 810.

201. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

202. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (right of the press to attend trials). The Court declared that the acquisition of newsworthy matter is entitled to constitutional protection. *Id.* at 582.

203. *Sharon v. Time Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984) (press immunity from libel for statements made about high government officials).

204. *See* *Gertz v. Robert Welch Publishing Co.*, 418 U.S. 323, 350 (1974); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 261-62 (1974) (White, J., concurring).

205. G. MEAD, *MIND, SELF & SOCIETY* 141 (1934).

206. *Id.*

207. Franklin, *A Declaratory Judgment Alternative*, *supra* note 195, at 811.

ment, but also includes publication of the correct facts.²⁰⁸ According to a study performed by the University of Iowa, more than half of the plaintiffs in libel suits approach the media before they contact their attorneys.²⁰⁹ Furthermore, the study found that three-quarters of the plaintiffs contacted the media on their own or through their attorneys *before* filing their libel suits.²¹⁰ Because most plaintiffs seek corrections immediately after the appearance of the claimed error²¹¹ and state that they would be satisfied with a correction,²¹² evidence of the statement's falsity will likely be presented to the media prior to suit. Retractions are appropriate, however, only in cases when the evidence of falsity is clear to the media. This remedy should not require proof of the defendant's intent or state of mind when it published the allegedly false and defamatory information.

A declaratory judgment approach offers a promising remedy for libel²¹³ and would make an appropriate complement to the Model Reporter's Testimonial Privilege. Like the retraction, the declaratory judgment does not concern itself with the publisher's intent or state of mind, yet it seeks to make a harmed plaintiff whole. A declaratory judgment, however, resolves cases in which the statements do not lend themselves to retraction because the facts are uncertain.²¹⁴ Furthermore, initiating a declaratory judgment action should itself help restore the plaintiff's reputation, just as would the act of initiating a damage suit.²¹⁵

Professor Franklin has proposed a statute providing for a declaratory judgment remedy for libel.²¹⁶ His proposal could be incorporated into the proposed Reporter's Testimonial Shield Statute. His proposal extends to non-media defendants as well, and should be appropriately

208. The adequacy of a retraction is a question within the traditional purview of the jury. *see, e.g., Boswell v. Superior Court*, 125 Ariz. 307, 609 P.2d 577, 578 (1980); *see also Annotation, Libel and Slander: Who Is Protected by Statute Restricting Recovery Unless Retraction Is Demanded*, 84 A.L.R. 3d 1249 (1978) (discussing who is eligible to take advantage of a retraction statute). Once a defendant provides an appropriate retraction, a declaratory judgment action is foreclosed. Damages, however, are not foreclosed.

209. Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 219 (1985).

210. *See id.* at 209 (summarizing the results of the Iowa study, which was based on interviews with 164 libel plaintiffs).

211. *Id.*

212. *Id.*

213. *See Franklin, A Declaratory Judgment Alternative*, *supra* note 195, at 810.

214. An appropriate retraction not only establishes the falsity of the challenged statement, but also includes publication of the correct facts.

215. *See Franklin, A Declaratory Judgment Alternative*, *supra* note 195, at 828.

216. *Id.*

modified before inclusion in the shield statute. As modified it would read:

SECTION 1. ACTION FOR DECLARATORY JUDGMENT THAT STATEMENT IS FALSE AND DEFAMATORY

(a) CAUSE OF ACTION.

(1) Any person who is the subject of any defamation may bring an action in any court of competent jurisdiction for a declaratory judgment that such publication or broadcast was false and defamatory.

(2) Paragraph (1) shall not be construed to require proof of the state of mind of the defendant.

(3) No damages shall be awarded in such an action.

(b) BURDEN OF PROOF. The plaintiff seeking a declaratory judgment under subsection (a) shall bear the burden of proving by clear and convincing evidence each element of the cause of action described in subsection (a). In an action under subsection (a), a report of a statement made by an identified source not associated with the defendant shall not be deemed false if it is accurately reported.

(c) DEFENSES. Privileges that already exist at common law or by statute, including but not limited to the privilege of fair and accurate reporting, shall apply to actions brought under this section.

(d) BAR TO CERTAIN CLAIMS. A plaintiff who brings an action for a declaratory judgment under subsection (a) shall be forever barred from asserting any other claim or cause of action arising out of a publication or broadcast which is the subject of such action.

SECTION 2. LIMITATION ON ACTION.

(a) Any action arising out of a publication or broadcast which is alleged to be false and defamatory must be commenced not later than one year after the first date of such publication or broadcast.

(b) It shall be a complete defense to an action brought under Section 1 that the defendant published or broadcast an appropriate retraction before the action was filed.

(c) No pretrial discovery of any sort shall be allowed in any action brought under Section 1.

SECTION 3. PROOF AND RECOVERY IN DAMAGE ACTIONS.

(a) In any action for damages for libel or slander or false-light invasion of privacy, the plaintiff may recover no damages unless the plaintiff proves both falsity and actual malice by clear and convincing evidence.

(b) Punitive damages may not be awarded in any action for libel or slander or false-light invasion of privacy.

(c) A plaintiff who brings an action for damages for libel or slander or false-light invasion of privacy shall be forever barred from asserting any other claim or cause of action arising out of a publication or broadcast which is the subject of such action.

SECTION 4. ATTORNEY'S FEES.

(a) **GENERAL RULE.** Except as provided in subsection (b), in any action arising out of a publication or broadcast which is alleged to be false and defamatory, the court shall award reasonable attorney's fees to the prevailing party.

(b) **EXCEPTIONS:**

(1) In an action for damages, a prevailing defendant shall not be awarded attorney's fees if the plaintiff sustained special damages and the action is found to have been brought and maintained with a reasonable chance of success.

(2) In an action brought under Section 1, a prevailing plaintiff shall not be awarded attorney's fees if the plaintiff has prevailed on the basis of evidence that it did not present, or formally try to present, to the defendant before the action was filed.

(3) In any action brought under Section 1 in which the defendant has made an appropriate retraction after the filing of suit, the plaintiff shall be treated as the prevailing party up to that point and the defendant shall be treated as the prevailing party after that point.²¹⁷

It is likely that the creation of a declaratory judgment action and the elimination of most damages for libel will cause the number of libel suits to decrease and the percentage of retractions issued by libel defendants to increase. A quick determination of falsity might appeal to both sides. Defendants would be less threatened due to the reduction of available damages and the likelihood that defendants themselves may recover if plaintiff fails to prove its case. The public's awareness of the availability of non-monetary recovery will make the public and juries suspicious of plaintiffs who sue for absurdly high damage awards.

Any retraction the defendant publishes after the plaintiff begins a declaratory judgment action is not a complete defense. Instead, the defendant is treated as the prevailing party after the retraction and may recover attorney's fees. This provision encourages the plaintiff to settle once the defendant issues a retraction. Awarding fees to the prevailing party discourages abuse of the law and encourages good-faith discussions. This is particularly true because the rule establishes that a winning plaintiff can not obtain fees if he or she has not disclosed his or her essential evidence of falsity to the defendant prior to seeking a declaratory judgment.

This privilege would also protect defendants from being sued merely for publishing statements made by another, because they never vouched for the truth of the statements. Otherwise, the declaratory judgment action could be used to put the defendant in the position of having to de-

217. *Id.* at 812-13. Franklin would extend these protections to non-media defendants as well. *Id.* at 815.

fend the truth of another's statement. Furthermore, when the originator of the statement is unknown, the press should be protected. The underlying rationale of the doctrine is to diminish the chill on media defendants while preserving the interest in protecting the individual's reputation.²¹⁸

The retraction, although important, is not the prime benefit of the declaratory judgment action. The declaratory judgment approach serves first amendment interests because it relies on an authoritative and unintrusive determination of the truth of the plaintiff's allegation, vindicating the plaintiff's reputation without intruding into the newsroom. Reputation can be restored without assessing exorbitant money damages that restrict the press and free speech.

The adoption of both the Model Reporter's Testimonial Privilege and the declaratory judgment response to libel would protect the First Amendment and heed the Supreme Court's admonition about the dangers of an absolute privilege for falsehood:

[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . ." Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.²¹⁹

C. Legislative and Executive Investigatory Hearings

In contrast to judicial proceedings, the function of executive and legislative investigatory hearings is not to administer justice, but to obtain information related to legislative matters.²²⁰

The information gained at legislative and executive hearings may facilitate better decision-making and serve as a public first amendment resource. The institutional press, however, is the primary source of in-

218. See *Dunn & Bradstreet, Inc., v. Greenmoss Builders, Inc.* 472 U.S. 749 (1985). In *Greenmoss* the Court held that *Gertz* did not apply to a case between a company and a credit reporting agency. The agency falsely reported to five subscribers that the plaintiff had filed for bankruptcy. The Court held that the private plaintiff did not have to show actual malice in order to recover presumed damages or punitive damages because the false report was not a matter of public concern.

219. See *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (citation omitted).

220. H. NELSON & D. TECTER, *LAW OF MASS COMMUNICATIONS* 418 (1986).

formation to the public whereas executive and legislative hearings are secondary. Also, confidential sources, so important to government reporting, would dry up if potential sources could not predict with certainty whether their identities would be revealed at hearings conducted by the government.

In two cases concerning reporters who refused to disclose information, Congress declined to hold the reporters in contempt.²²¹ This action reveals that Congress itself considers the First Amendment to be more sacred than its own investigatory abilities. For the same reason, the model statute proposes an absolute reporter's privilege in the context of legislative hearings.

Conclusion

Given the central importance of the First Amendment to the individual and to our polity, it is important that we act to protect the ability of the media to disseminate a broad spectrum of information. Confidential sources are an important source of news, especially news concerning the government, minority views, and international matters. Sources will not confide in reporters unless they are assured by the law that the communication will remain confidential.

In order to encourage communications of confidential information to the press, we urge Congress to enact the legislation proposed in this paper: a uniform federal reporter's testimonial privilege that is near absolute. Qualified privileges require balancing, and thus do not insure that a reporter's sources will be protected. The need for outcome predictability is the foundation of the Proposed Privilege.

221. In 1966, the House of Representatives Commerce Committee investigated charges that the CBS television documentary, "The Selling of the Pentagon," distorted military management and operations. When CBS president Frank Stanton refused to cooperate by providing information, the committee voted 25 to 13 to recommend to Congress that a contempt citation be issued to him. Congress, however, refused the recommendation. A 1987 Congressional investigation focused on Daniel Schorr's broadcast of some of the contents of a secret House Intelligence Committee report on CIA operations. Although Schorr refused to disclose the source of the report, the investigating committee did not recommend a contempt citation. *Id.* at 416-18.