

Ohio Northern University Law Review

Symposium Articles

The Journalist's Privilege—A Skeptic's View

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In 1972, in *Branzburg v Hayes*,¹ the Supreme Court decided that, just as the Constitution does not protect the average citizen from disclosing information that he has received in confidence to a grand jury, it also does not protect journalists from responding to grand jury subpoenas. To all the participants in this Symposium, the holding in *Branzburg* is familiar. To nearly all of them, the holding was ill-conceived. They regard, or they seem to regard, the wisdom and necessity of granting a testimonial privilege of confidentiality to journalists as practically self-evident. I have reached a different conclusion, and in what follows I will seek to defend the proposition that *Branzburg* was rightly decided. It was right in principle, as a matter of constitutional law, and I think it was probably also correct as a matter of policy. Recognizing the privilege would inevitably entail the necessity of resolving difficult definitional issues, as courts would be forced to decide which claimants were legitimately entitled to call themselves “journalists” and which were not. The definitional problems are indeed formidable. However, if recognizing the privilege were warranted *in principle* then surely the principle that dictated the privilege’s recognition would similarly dictate its

* David and Mary Harrison Distinguished Professor, University of Virginia Law School. Thanks to Jane Kirtley, Vince Blasi and Geoffrey Stone whose questions and comments helped me clarify my thinking, though it is still not to their liking, I’m sure. Thanks also to Kristy Byrd, University of Virginia Law School Class of 2006, for research assistance. This essay is a slightly revised version of my remarks at the Ohio Northern Law Review Symposium on March 24, 2006, at which event I cast myself as *provocateur*. I have made little attempt to incorporate into this essay references to events that have transpired since the Symposium.

1. 408 U.S. 665 (1972).

beneficiaries. Thus, the definitional problem does not, in principle, present an insurmountable barrier to recognition of the privilege.

My conclusion that a testimonial privilege for reporters is not required by the First Amendment arises from teasing out what I will refer to as the institutional aspect of the privilege claim that is embedded in the affirmation that “[i]n seeking out the news the press . . . acts as an agent of the public at large. . . . The underlying right is the right of the public generally. The press is the necessary representative of the public’s interest in this context and the instrumentality which effects the public’s right.”² The implication that the Constitution empowers the press—just as it empowers elected officials—to act as the public’s agent raises troubling issues of accountability. If it is correct to conceive of the press as having the constitutionally conferred power to act on the public’s behalf as government agents do, then it is important to determine how the public is to hold the press accountable for the consequences of its performance. On the issue of accountability, I have been able to discern questions, but not answers.

My policy objection to the journalist privilege is based on what I perceive to be weak empirical foundations for the claim that the privilege is necessary in the ordinary course of newsgathering in order to entice sources to reveal information to journalists. The reasonable empirical premise that underlies all evidentiary privileges is that an inverse relationship exists between the amount of information that will be disclosed only on a promise of confidentiality, on the one hand, and the fear that the confidential relationship will be breached on the other. The less likely it is that a confidence will be respected by the person to whom it is entrusted, the less information is likely to be disclosed to the confidant. Conversely, the more likely it is that a confidence will be respected, the more information will be forthcoming.

The inferences that the press draws from this common sense empirical premise seem wildly overblown. The press claims that its ability to gather news will be significantly and systematically impaired and confidential sources will dry up if journalists cannot credibly promise to refuse to reveal sources’ identity in the course of litigation or pursuant to a grand jury subpoena. No matter how often or how confidently press advocates make this prediction, the extreme consequences they forecast were the privilege to be denied seem most unlikely to eventuate. Moreover, the scope of the privilege they demand greatly exceeds what might actually be necessary to keep information flowing freely.

The renewed general interest in the reporter’s privilege and my own thinking about the topic reflect a particular contemporary context of which it is well to take note. The context is the New York Times’ and the Washington

2. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-64 (1974) (Powell, J., dissenting).

Post's revelation of the existence of a classified National Security Agency warrantless telephone surveillance program. Once the information about the program had been disclosed, the value it had that resided in the very fact of its secrecy could be neither retrieved nor restored. The issue I am concerned with in this essay is not whether the Post or the Times could themselves be held criminally liable for disclosing information they knew to be classified. The issue here is more narrow. It is whether the reporters whose sources for the information were (presumably) government employees would have a First Amendment privilege to refuse to disclose their sources' identities if called upon to do so by a grand jury. I turn first to the institutional source of my skepticism about the reporter's privilege.

The supposed *constitutional* pedigree of the privilege derives from the claim that the press is analogous to a "fourth branch" of government, and journalists are "agents" of the public at large. Supreme Court justices have occasionally explicitly championed these ideas. In 1974, Justice Lewis Powell was the one who declared that "[i]n seeking out the news the press . . . acts as an agent of the public at large. . . . The underlying right is the right of the public generally. The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right."³ And in 1975, Justice Potter Stewart argued that,

[T]he Free Press guarantee is, in essence, a *structural* provision of the Constitution. . . . [It] extends protection to an institution. . . . The primary purpose [of the Press clause was] to create a fourth institution outside the Government as an additional check on the three official branches. . . . The relevant metaphor . . . [is that] of the Fourth Estate. . . . [The First Amendment protects] the institutional autonomy of the press.⁴

Admittedly, affirmations such as these have considerable resonance. It is undoubtedly true that press freedom is central to the preservation of representative democracy—government control of the press would be utterly incompatible with a representative democracy like ours. By investigating and reporting on the activities of government, the press provides vital information to citizens about what their elected officials are doing and the justifications they offer for their actions. The notion that the press is constitutionally anointed to "check government"⁵ lends rhetorical momentum to the argument that the First Amendment itself mandates recognition of the reporter's privilege.

3. *Id.* at 863-64.

4. Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 633-34 (1975).

5. Vince Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B.F. RES. J. 521 (1977).

One ought not be seduced by the thought that such affirmations are anything other than rhetoric or that they are meant to describe legal reality. To take seriously the implications of the idea that the press is the public's *constitutionally designated agent* would require us to make heroic—and quite unjustified—assumptions about the press's information-gathering and reporting capacity. More importantly, perhaps, it would require that we give different answers than our legal system presently does to some nagging questions about how the public, whose agent the press claims to be, can fix responsibility on it for decisions it makes when it claims to act on the public's behalf. It is to these questions I now turn.

The press in recent years has exhibited a consistent tendency to answer questions about its accountability for harms its publications cause to individuals by asserting that it should not be legally accountable. The reporter's privilege claim is another manifestation of this assertion of legal immunity. Journalists seemingly hold the view that they should not "be treated like any other citizen who is asked to testify."⁶ As reported by Vince Blasi more than thirty years ago, "The prevalent attitude of newsmen can be described as a rather vehement belief that they—not the courts—should decide when cooperation with fact-finding tribunals is appropriate."⁷ The press' view that it should be the final arbiter of its public duties, as well as its pervasive resistance to being treated like other citizens or to being held legally accountable in *any* context, suggests that the press has succumbed to a troubling, if unconscious, inclination to regard itself as above the law.

While the Supreme Court has generally rejected the press' claims that it should enjoy extraordinary legal privileges to engage in "newsgathering" activities,⁸ the Court has largely sustained the press' claim to be immune from liability for what it publishes. The Court rejected a media defendant's claim that, although it was entitled to *maintain* confidentiality if *it* chose to do so, it ought to be free from liability when it decided to breach a promise of confidentiality. In *Cohen v. Cowles Media*,⁹ the Court declared that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."¹⁰ In other cases, however, the Court has been sympathetic to

6. Jeffrey Toobin, *Name that Source*, THE NEW YORKER, Jan. 16, 2006.

7. Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 258 (1972).

8. *See, e.g.*, *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (holding that reporters have no right of access to prisons beyond that afforded to the public); *see also* *Saxbe, v. Washington Post Co.*, 417 U.S. 843 (1974) (holding that the First Amendment does not require government to accord the press greater access to information than it accords to the general public).

9. 501 U.S. 663 (1991) (holding that the First Amendment does not bar a state court action for promissory estoppel against a newspaper that breached its promise of confidentiality to a source).

10. *Id.* at 669.

the press' assertions of immunity from legal liability for harms its publications cause to individuals.

The press has claimed, for example, that it should not be accountable for printing false statements of fact about individuals, and the Supreme Court has in large part agreed. The press now has a privilege to print false statements of fact about public officials in the conduct of their public duties, as well as false statements of fact about public figures, so long as the false statements were made without actual knowledge of their falsity or in reckless disregard of their truth.¹¹ The press has claimed that it should not be accountable for publishing the names of rape victims, even when a specific statute made such publication unlawful. The Supreme Court agreed.¹² It should not be accountable for publishing the contents of illegally intercepted telephone conversations when the contents are "matters of public interest." The Court agreed.¹³ It should not be accountable for publishing material that intentionally inflicts emotional distress on particular individuals. The Court agreed.¹⁴ When the press is acting as a private actor in the economic marketplace, as it was in all the cases noted above where individuals sought to impose liability upon it for harms caused them by what it published, one can make a plausible—even if not wholly convincing—case that immunity from liability is justified by certain characteristics of the market for information. Indeed, I myself have made precisely such an argument.¹⁵

Thus, when the press acts as a private actor subject to market competition and the preferences of its readers and advertisers, its immunity from legal accountability for harms its publications cause to individuals is perhaps defensible. Though claims of special legal privileges have the potential to backfire on those who make them, claims of legal immunity may in fact serve

11. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that public official may not recover damages for defamatory falsehood relating to his official conduct unless he proves that the publication was made with "actual malice," *i.e.*, knowledge of falsehood or reckless disregard of the truth).

12. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (overturning a state court judgment, based on a state statute, against a newspaper awarding damages for invasion of privacy to the victim of a sexual offense for having published her name).

13. *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (holding that the First Amendment limits the application of federal eavesdropping statute, designed to protect the privacy of electronic communications, where prohibited disclosure was about a matter of public significance).

14. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (holding that the First Amendment requires that public figures and public officials may not recover for the tort of intentional infliction of emotional distress on account of a publication unless they can show that the publication contains a false statement of fact made with "actual malice," *i.e.*, knowledge of falsity or reckless disregard of the truth").

15. Lillian BeVier, *The Invisible Hand of the Marketplace of Ideas*, in LEE C. BOLLINGER & GEOFFREY R. STONE, *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 232 (University of Chicago Press) (2002) (arguing that the press's relative lack of legal accountability for the harms to individuals caused by defects in the information it produces do not have consequences that are on the whole perverse).

the interests of the press and the public when they are put forward by press defendants in the course of ordinary civil litigation. The argument for immunity from legal accountability loses force, however, when disclosures by the press irreversibly *preempt* or effectively reverse—and thus in effect become—the decisions of government officials, which is what happens when the press publishes classified information.

In recent months, influential representatives of the press have claimed what amounts to constitutional authority, to publish, without fear of liability, information they know to have been duly classified and, by implication, to refuse to disclose to a grand jury the identity of government employees who revealed the information in violation of a clearly drawn federal statute.¹⁶ Leonard Downey, the Executive Editor of the Washington Post, for example, asserted that “it’s important . . . *in our constitutional system* that . . . final decisions [about whether classified material should be published and whether publication will in fact threaten the safety of the nation] *be made by newspaper editors and not the government.*”¹⁷

The claim that it is newspaper editors and not government officials that should make final decisions about whether the publication of classified material will threaten the nation’s safety is of a different order and stands on an entirely different normative footing from the press’ claim of immunity from tort liability for causing harm to individuals. The claim suggests that something has gone seriously awry with the press’ understanding of how our constitutional system works and of the press’s own role within it. It suggests that certain influential members of the press believe that they have the constitutional authority not merely to regard their own judgment about how to protect the national security as superior to that of the government officials who have been charged with the task and, by their publication decisions, to effectuate their own judgment and thus irreversibly to countermand the contrary judgments of those officials. The obvious flaw in this position is that “our constitutional system” grants the authority and imposes the duty to ensure the safety of the nation on its elected government officials and not on newspaper editors. If the Constitution granted that authority and imposed that duty upon newspaper editors then the claim of decision-making power conferred by “our constitutional system” would make sense. But it does not. Moreover, if, having claimed the power to make final decisions about whether classified information should be published, the newspaper editors prove to have been wrong about whether publication will be harmful to national security, and if the editors decide to publish information which *does* endanger

16. 18 U.S.C. § 798 (Disclosure of Classified Information).

17. Dan Eggen, *White House Trains Efforts on Media Leaks*, WASH. POST, Mar. 5, 2006, at A1 (emphasis added).

the nation, there is no way that the citizens whose security they put at risk—and who had no say in granting them the power they claim—can hold them accountable for their mistake.

When members of the press *claim that it is legitimate for them to exercise the constitutional power of the government*, the fact that their readers and advertisers hold them accountable *in the marketplace* is irrelevant. The reason is that government actors are not, and ought never to be understood to be, accountable in the same way and to the same kinds of market forces that drive the decisions of actors in the private marketplace. It is the constitutional duty of *government* to guard the nation's safety, it is *elected officials* to whom the Constitution delegates the power and the responsibility to make and to effectuate the difficult policy choices that must be made about how best to do that job, and it is *elected officials*—and only elected officials—that we hold accountable if by their choices the nation ends up imperiled.

The press is free to criticize, to analyze, and to report on the activities of government. However, from the fact that the Constitution does not empower the press either to legislate, to administer the laws, or to exercise judicial power, we can infer that it simply does not empower the press actually to make the kinds of decisions or to exercise the kind of authority that government actors do. And when citizens decide to buy (or not to buy) newspapers, and advertisers decide to advertise (or not to advertise) in them, they are not holding their *government* accountable. They are merely making private choices in the marketplace. The only place where they can hold their government accountable is at the polls on election day.

Readers ought not to mistake my doubts about the legitimacy of the press' claim to be constitutionally authorized to reveal classified information for a conviction that the government is always right. When government officials classify information, they will not always act from pure or public-regarding motives. Even if their motives are pure, their judgment about what is required to protect us and what information ought to be kept secret is likely often to be flawed. Then too, of course, when information is classified and remains classified, the public will never learn of it. The information might concern illegal, unauthorized or simply ill-conceived government initiatives—or it might have to do with legal, authorized, and prudent ones. The existence and details of secret government programs will be unknown and the elected officials who implement them may never be called to account—or claim credit for—their consequences.

Though it is probably the case that the classification system is an imperfect filter, it is also the case that no one knows whether the government

classifies too much, too little, or just the right amount of information.¹⁸ Whether the classification system works well or poorly, and how government officials make particular classification decisions are questions beyond the scope of this comment. But if there are indeed systematic flaws in the classification process, systematic reforms need to be implemented. Recognizing a journalist's privilege of confidentiality, would not represent a systematic reform. Still, to raise doubts about the press' claims to privilege is not to portray the decisions of elected officials as infallible. Elected officials and their delegates will not always make good decisions. My point is only that certain decisions are *theirs to make*. (Of course if the press *were* the appropriate decision-maker with reference to disclosure *vel non* of classified information, its judgment would not be infallible either. This fact, too, is beside the point.)

It bears emphasis that I am addressing press claims that arise in a particular context, namely that in which the press defends its claim of testimonial privilege to protect the anonymity of its sources of classified information on the ground that it has constitutional authority to decide what disclosures will and will not harm national security. In this context, talk of the press as an "agent of the public" is not merely just rhetoric, but it is rhetoric of a peculiarly empty and perverse kind. To speak of agency is to invoke a legal relationship in which one person undertakes to act in behalf and in the interest not of himself but of someone else. Agents undertake to act on behalf of and are accountable to their principals. Thus, if the press were the "agent of the public," it would be legally required to act in the public's interest and not in its own.¹⁹

18. The U.S. classification system, established under Executive Order 13292, has three levels of classification and provides specific criteria for each. The Information Security Oversight Office is responsible to the President for policy and oversight of the government-wide security classification system. The Information Security Oversight Office's 2003 Report to the President under Executive Order 12958 describes the difficulty of assessing the effectiveness of the system:

Many senior officials will candidly acknowledge that the government classifies too much information, although oftentimes the observation is made with respect to the activities of agencies other than their own. [Individual agencies] have no real idea how much of the information they generate is classified; whether the overall quantity is increasing or decreasing; what the explanations are for such changes; which elements within their organizations are most responsible for the changes; and, most important, whether the changes are appropriate. . . . The absence of such rudimentary baseline information makes it difficult for agencies to ascertain the effectiveness of their classification efforts.

Information Security Oversight Office, Report to the President 2003 under Executive Order 12958, amended Mar. 25, 2003, at 6.

19. The Restatement of Agency (2d) defines "agency" as follows: "The fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. RESTATEMENT OF AGENCY, SECOND, § 1(1) (1958) (quoted in WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 3d ed. (West Group 2001))."

While it is useful to conceive of the relationship of government actors to the private citizens who comprise the public as a true agency relationship, it is misleading to describe the relationship of the press in such terms. By definition, in fact and in law, government actors are agents of the citizens they serve; citizens—the public—are their principals. Government actors are prohibited from acting to further their own interests; they must act in the interests of their citizen-principals. They are accountable to their principals in regularly scheduled, free elections. The press, by contrast, is a private actor free to act in its own interest and be held accountable, not in elections by the electorate as a whole, but by competition in the private market. For a variety of reasons too complicated to recount in the present discussion (but mostly having to do with collective action problems), elections are relatively clumsy methods of holding government actors accountable, no matter how free or regularly scheduled they are. Imperfect as elections are, however, the central premise of the representative democracy that the Constitution establishes is that *elected officials* and not the press are the agents of the public. Elections, not market competition, hold them accountable.

This is why it is relevant to note that newspaper editors like Leonard Downie are not elected. Thus, while they are free to report on and criticize government, they do not possess constitutional authority to make and implement official government policy. In the particular context of Mr. Downie's claim that newspaper editors should have final authority to decide what disclosures will harm national security, that is precisely my point. When the press claims that, *as agent of the public*, it must enjoy a privilege of confidentiality to protect sources who have disclosed classified information to it—it is claiming a constitutional authority it does not possess.

I turn now from an argument of principle to one of policy, and to an examination of the empirical case for the journalist privilege of confidentiality. First, however, with regard to the skepticism I will express about the need for the privilege *and* the press' rather extravagant assertions of its indispensability, I would emphasize that we are simply *awash* in indeterminacy about *the impact that recognizing or not recognizing a reporter's privilege would actually have.*²⁰ We do not know what confidential sources *think* they are asking for, nor do we know what they *care about*, when they ask for assurances of confidentiality. We think we can be fairly certain that much of the information the press reports about government comes from “confidential sources,” but we do not know how much of that information is from sources

20. The indeterminacy of the impact of the reporter's privilege is not dispelled by the privilege statutes that have been enacted by many state legislatures. We do not know and cannot measure what the “flow of news” was like before such statutes were enacted, nor do we know, nor can we measure, how or even whether the flow of news has been affected by them.

who would not have disclosed it without a credible promise of confidentiality that included information sought in the course of litigation. We know, or think we know, that a source who values anonymity will be less likely to disclose information in confidence if he genuinely fears disclosure of his identity, but we do not know how much sources value their anonymity, nor do we know what kind of or how much information is actually threatened by the failure to recognize the privilege, nor do we know how much sources discount the probability of the journalist receiving a subpoena when deciding to disclose information.

We are swamped in confident assertions about the urgent need of journalists to promise confidentiality and the dire consequences to the flow of information if the judiciary will not honor journalists' promises. A case in point is Judge Tatel's concurring opinion in the Judith Miller case:

If litigants and investigators could easily discover journalists' sources, the press's truth-seeking function would be severely impaired. *Reporters could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions but would have great difficulty getting potential whistleblowers to talk about government misdeeds; they could report arrest statistics, but not garner first-hand information about the criminal underworld.*²¹

We would do well, I think, to take assertions such as these with a grain of salt. The implication of such a parade of horrors, with its reference to "litigants and investigators," is that sources rely on promises that their identities will not be revealed *in the course of litigation*. It seems more likely that sources are primarily concerned that their identity will not be *published*, not that it will never be disclosed in the course of litigation. This is one of the inferences I draw from Professor Blasi's study performed 30 years ago. Though he asserted that "the practice of subpoenaing reporters has, in several instances, had a significant detrimental effect on the quality of news coverage,"²² Professor Blasi reported that "reporters . . . may be unsure whether the *subpoena threat* is a primary, or even a partial, cause" of sources' unwillingness to disclose information.²³ Blasi also reported that "within the broad range of situations for which future legal proceedings are a possible contingency, the impact of the subpoena threat is primarily a function not of

21. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 991 (D.C. Cir. 2005) (Tatel, J., concurring) (emphasis added).

22. Blasi, *supra* note 7, at 270.

23. *Id.* at 267 (emphasis added).

the subject matter of the story so much as the approach of the reporter;²⁴ and, finally, that “reporters commonly make promises of confidentiality and sources commonly refuse to believe the promises, often because they fear that the reporter’s editors and publishers will force him to cooperate with official requests for information.”²⁵

Judge Tatel’s opinion affirms that “reporters *routinely* rely on sources speaking on condition of anonymity.”²⁶ This suggests that he thinks *routine* news stories in which reporters have relied on confidential sources carry with them the potential to become the subject of litigation, even those which only purport to disclose “underlying disagreements among officials.”²⁷ But such an eventuality seems unlikely since very few stories, even those which rely heavily on disclosures by confidential sources, become the subject of litigation in which “litigators and investigators” become involved.

To be sure, especially in the context of a debate about whether a privilege should be recognized in a particular situation, journalists often declare unequivocally that their sources will “dry up” if they cannot be guaranteed confidentiality. Not all journalists make such claims of course. Walter Pincus, who covers national security for the Washington Post, is described by Jeffrey Toobin in a recent New Yorker article as having an “idiosyncratic view” of the matter.²⁸ Though under subpoena to reveal his sources in the Wen Ho Lee litigation, Toobin reported Pincus saying, “My sources are not drying up . . . It hasn’t hurt me.”²⁹

As the excerpt from Judge Tatel’s opinion which echoes them reveals, the press’ predictions of what will happen if journalists are not granted a privilege of confidentiality are apocalyptic indeed. Their sources will “dry up,” their ability to serve as the agent of the public’s right to know will be dangerously compromised, their ability to gather news will be seriously impaired, the information about government that they provide will be woefully incomplete and government wrong-doing will go systematically undetected and unpunished.

Before I outline additional reasons for thinking predictions such as these overblown and needlessly dire, let me say something about the press’ heavy reliance on confidential sources for the information they report about

24. *Id.* at 271.

25. *Id.* at 274.

26. *In re* Judith Miller, 397 F.3d at 993 (emphasis added).

27. *Id.* at 991.

28. Toobin, *supra* note 6.

29. *Id.*; see also Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979) (speculating that confidential sources will, moved by reasons of conscience or ideology or personal animus, continue to disclose matters to journalists even in the face of an occasional subpoena requiring a journalist to name her sources).

government. Privilege advocates and those who are persuaded by them have in common a shared confidence that the public receives better information about government when the press publishes information without being required or even expected to attribute its source than it would receive if attribution were required or expected. Perhaps this confidence is justified, but there is a possible and often neglected downside to the quality of information that the public receives when the press relies on confidential sources.

Most importantly, when the consumers of the information that the press provides—*i.e.*, the public—do not know its source, they are completely dependent on the press' assessment and implicit guarantee of the source's reliability, trustworthiness, and appropriate motivation. It strikes me that there are a lot of reasons for people to give information to the press in exchange for a promise of confidentiality. In the *New Yorker* piece mentioned above, Jeffrey Toobin implied that sources act from *either* a whistle-blowing motive *or* from motives that he characterized as “amount[ing] to an almost precise inversion of the whistle-blower model.”³⁰ The problem he saw is that “the powerful have learned to game the system.”³¹ “Anonymous sourcing in Washington exists today much more to protect government spinners than it does actual whistle-blowers.”³²

No doubt the notion that the dichotomy between (good guy) whistle-blowers and (bad guy) spinners represents an overly simple version of reality, but surely there is truth in the observation that not every source acts from either pure or wholly disinterested motives. Few indeed do so, I would guess. Not every source lacks political biases, not every source is truthful, and not every source has the kind of genuine insight that would render his view of events reliable or accurate in fact. The press insists that we must trust reporters and editors to assess the credibility of their confidential sources. They imply that we do not need to know who has provided the information they report, nor ought we to insist on assessing for ourselves the quality of the information they provide. Whether or not we “need” to know where the information comes from, and whether or not we “ought” to insist on assessing its quality for ourselves, it is true that in the world we live in we are not *going* to know, nor are we going to be able to assess its quality for ourselves. And the more journalists are able to protect the identity of their sources, the less opportunity the public will have to judge for itself whether the information the press reports is biased or trustworthy, or whether the sources providing it are

30. Toobin, *supra* note 6.

31. *Id.* (quoting Martin Kaplan, Associate Dean of the University of Southern California's Annenberg School for Communication).

32. *Id.* (quoting Martin Kaplan).

genuine insiders who are truly knowledgeable or peripheral players likely to be relatively ignorant.

Another note with respect to the quality of information that the press provides and its supposed relationship to the privilege of confidentiality is that the press implicitly claims that when journalists are able to protect their sources, they are then able to gather and report information that is full, complete, and trustworthy. Jeffrey Toobin quoted from a New York Times editorial that makes this claim:

'Inside sources trust reporters to protect their identities so they can reveal *more than the official line*. . . . Without that agreement and that trust between reporter and source, *the real news simply dries up, and the whole truth steadily recedes behind a wall of image-mongering, denial and even outright lies*.'³³

The Times editors seem to be suggesting that journalists are *wholly dependent* on confidential sources for the information they gather. But it cannot be true that confidential sources represent journalists' *only* means of penetrating the "wall of image-mongering." The editors seem also to be suggesting that either the news will consist solely of "image-mongering, denial and . . . outright lies" *or* it will be "real" and consist of the "whole truth." Even allowing for editorial hyperbole, the suggestion is absurd on its face.

Whether or not the press is granted a privilege of confidentiality, and whether or not the privilege is absolute or qualified, the press will continue to provide information, journalists will continue to rely on confidential sources, and the information that is provided about government will continue to be partial. The press will never report the whole truth, it will never paint the complete picture. No matter how diligent and persevering they are in their newsgathering activities, no matter how forthcoming the confidential sources on whom they rely, journalists cannot possibly learn everything about the issues they cover.

In addition, they will inevitably disclose only a portion of the incomplete knowledge that they do possess. For example, when it was revealed that Bob Woodward had been the first reporter to learn about Valerie Plame in mid-June of 2003 (before Bob Novak's column ran), Woodward defended his previous months-long silence about this fact to Larry King as follows: "[E]very time somebody appears on your show talking about the news or giving some sort of analysis there are going to be things that they can't [won't? will decide not to] talk about."³⁴

33. *Id.*, (quoting Editorial, *Shielding a Basic Freedom*, N.Y. TIMES, Sept. 12, 2005, at A20) (emphasis added).

34. CNN.com, CNN Larry King Live—Interview with Bob Woodward (Nov. 21, 2005), <http://transcripts.cnn.com/TRANSCRIPTS/0511/21/lk1.01.html> (last visited April 21, 2006).

The press is bound by neither a moral nor a legal obligation to publish either “the whole truth” or even everything they themselves know. Moreover, who is to say, and how can it be known even were the legal system to grant them an absolute privilege of confidentiality, that what they know and publish is enough of the truth to represent a reliable snapshot or a fair representation of the whole picture. Who besides themselves can assess the possible bias, the reliability, the disinterestedness of their sources? And who besides themselves is to judge whether the information they choose to disclose is after all the most relevant, the least misleading, part. The point is that, to the extent that the press portrays the stakes with respect to the reporter’s privilege as representing a choice between having news that consists of complete, reliable, and unbiased information or having news that is incomplete, biased, or the product merely of “image-mongering,” the portrait is misleading in the extreme.

But the issue for the moment is whether the predictions about what will happen if the courts do not recognize a journalist’s privilege of confidentiality in the context of litigation are unreasonably gloomy. I have acknowledged the skepticism that leads me to conclude that they are. Among other reasons for my conclusion, the predictions seem to rest on a simplistic model of the reporter-source relationship. The implicit model is of a relationship between a journalist and a source that is a one-shot deal, that the journalist’s promise not to reveal the source’s identity (to a grand jury? in the context of litigation? to anyone?) is explicit, that it forms the sole consideration in exchange for which the source agrees to reveal information to the journalist and that the source knows and relies upon the fact that the journalist will be able to invoke the privilege of confidentiality should she ever be called upon *in court* to reveal the source’s identity.

It seems likely, however, that those who report on the government have much more complicated relationships with their confidential sources than those that are implied by the simple model sketched above. James Toobin’s *New Yorker* piece suggested as much, as did Professor Blasi’s study, to mention just two possible bits of evidence to this effect. The reporter-source relationships that are the most fruitful seem to be premised on reciprocal need, and to be characterized by considerable mutual trust developed only after repeated interactions. Much, indeed, has been written about the “symbiotic relationship” between the media and government officials.³⁵ Government officials, knowing the importance of the media’s role in setting the public agenda and in shoring up or undermining public support for particular

35. See, e.g., SUSAN WELCH ET AL., UNDERSTANDING AMERICAN GOVERNMENT (8th ed. 2006); Susan Allison Weifert, *Cohen v. Cowles Media Co.: Bad News for Newsgatherers; Worse News for the Public*, 25 U.C. DAVIS L. REV. 1099, 1122 (1992); John J. Oslund, *The Media and Government Regulation: Guarding the Hen House*, KAN. J. L. & PUB. POL’Y 559, 561 (2002).

decisions, cultivate relationships with journalists who will understand, sympathize with, and be able to portray “their side” of complicated issues. Journalists, for their part, value access to powerful officials inside government who are “in the know” about and willing to share their inside information. Despite the fact that the information that is the subject of these exchanges is often “confidential,” it is a good guess that few journalist-source transactions involve disclosure of classified information or other information that is subject to specific statutory duties of non-disclosure.

It thus seems unlikely that most of the information that the majority of sources disclose to journalists will, if published, become the subject of either a grand jury probe or of civil litigation, but it is *only* in the context of *compelled disclosure in the course of litigation* that the recognition *vel non* of the privilege matters. Thus, because reporters and their editors nearly always respect their promises of confidentiality when it comes to *publication*, and because grand jury subpoenas and other compelled disclosures are infrequent and occasioned by the revelation of only certain types of information, it appears doubtful that significant numbers of these mutually advantageous reporter-source relationships will be seriously disrupted if it turns out that journalists are on occasion required to testify before grand juries about their sources’ identities or to go to jail if they refuse.

But what if this prediction turns out to be wrong, and journalists suddenly find themselves subjected to a spate of subpoenas in both criminal investigations and civil lawsuits? Such an eventuality might indeed cause sources to become far less forthcoming, and journalists might find it harder to come by the kind of inside information that their sources previously provided. This would indeed be cause for concern. But there are two reasons to worry less than we otherwise might about this “what if” scenario. The first reason is that, as Judge Posner pointed out in the *McKevitt* case, even without granting the press a special privilege not to testify, courts have the authority to make sure that “subpoena[s] . . . directed to the media [are] . . . reasonable in the circumstances.”³⁶ Even the *Branzburg* opinion noted that “[g]rand juries are subject to judicial control and subpoenas to motions to quash.”³⁷

The second reason to be less concerned than we otherwise might is that the press has an uncommon ability to protect itself by giving wide publicity to, and pouring outraged editorial comment upon, the subpoenas. If history is a guide, the pressure that the press can put on public officials—from prosecutors to jail officials to legislators and even, one speculates, to judges—is often extraordinarily effective in motivating them to change a course of action that

36. *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

37. *Branzburg*, 408 U.S. at 708.

the press trumpets as unacceptable, outrageous or a threat to the First Amendment.

But if a credible promise of confidentiality cannot be made to certain confidential sources, they might very well “dry up.” If a source is legitimately worried about consequences more severe than possible embarrassment at being exposed as having been the source of a leak or the prospect of being sanctioned by her employer, if the source is worried about the possibility (or perhaps even the probability) that she will be criminally prosecuted for revealing the information that she divulges because she knows the information that she is disclosing is classified and that she is in breach of his own promise not to disclose it, the source might very well insist on receiving a credible promise of confidentiality in exchange for disclosing it. And unless the journalist to whom the source discloses the information can credibly promise not to disclose her identity even in the face of a grand jury subpoena, the source’s concern to minimize her own risk of criminal punishment will impel her to keep silent—to dry up.

This scenario raises a serious normative issue: Is it a good thing or a bad thing that government employees trusted with access to classified information disclose it to journalists in violation of both their own promises of nondisclosure and of relevant federal statutes? In my view, the argument that journalists who publish such classified information should have a privilege to guard the identity of the government employees who disclose it to them rests on the shaky ethical premise that such employees systematically ought not to be held legally accountable.

One reason a government employee might give for disclosing classified information might be that the employee is a whistleblower, exposing illegal behavior by other government officials. Such an employee might insist on confidentiality out of a legitimate fear of retaliation at the hands of the officials implicated. Thus, one argument for recognizing the reporter’s privilege rests on the importance of uncovering possibly illegal action by the government itself and the role that whistleblower-sources play in exposing it. The argument would be that employees who disclose classified information to journalists may well be revealing illegal government behavior that would otherwise not be detected. Unless the journalists to whom the whistleblower discloses classified information along with the illegal government activity are able credibly to promise them confidentiality, the whistleblower will not blow her whistle, the press will not be able to perform its “checking function,” and the government’s misdeeds will go undetected and unpunished.

The problem with this argument is not that whistleblowers do not indeed perform an important service, for of course it is very important that illegal official actions be exposed. And it is not that the law should just hang whistleblowers out to dry, leaving them to take their chances while offering them no legal protection from retaliation, for the sure result of doing that

would be fewer whistleblowers and fewer occasions to hold official wrongdoers accountable. The problem with the “encourage and protect whistleblowers” argument for the reporter’s privilege is that the press is far from the only—and indeed it is itself the least accountable—means by which government wrongdoing can be reported and corrected at the same time that legal protection is given to whistleblowers.

Statutory protections for whistleblowers abound. They provide whistleblowers with avenues for reporting and correcting government wrongdoing and they protect them from retaliation. The Intelligence Community Whistleblower Protection Act of 1998³⁸ is particularly pertinent in this regard, at least it seems so at the moment. Passed to “encourage . . . reporting [to the intelligence committees of Congress by employees of the executive branch of classified information about wrongdoing within the Intelligence Community],”³⁹ the act establishes a procedure that “provides a means for such employees and contractors to report to Congress while [importantly] safeguarding the classified information involved in such reporting.”⁴⁰ Statutory protections for whistleblowers do not, of course, guarantee that all government wrongdoing will be detected and punished. The existence of such protections, however, considerably undermines the press’ claim that government wrongdoing is sure to go undetected and unreported if the press cannot protect the identity of whistleblowers who disclose classified information.

A second reason a government employee might have for disclosing classified information while insisting on confidentiality might be that the employee is deeply and sincerely opposed to the policy judgment that the information embodies. Less benignly, the employee may be a civil-service employee whose loyalty is not to the administration and who is therefore opposed to the policy, and the officials who are implementing it, on political grounds. Unable to persuade his superiors to reverse course, or perhaps unwilling even to try, the employee might decide that exposing their decision by revealing classified information about it will bring appropriate public pressure to bear. This reason for disclosure while insisting on confidentiality seems even less ethically defensible than does the whistleblower’s, for it represents an unspoken but fundamental challenge to the basic premise of democracy, which is that those who are elected have the duty, the responsibility, *and the authority* to govern. Policy differences there may well be within any administration, but authority to resolve them rests with those higher up in the chain of command. Within a chain of command, neither a government employee’s sincere convictions, nor his deep political instinct that

38. Intelligence Authorization Act, Pub. L. No. 105-272, 112 Stat. 2396 (Oct 20, 1998).

39. *Id.* at § 701.

40. *Id.*

the higher-ups are making a mistake, miscalculating, or exercising bad judgment and acting on faulty information, to my mind, offers a legitimate reason for the employee to try to undermine or reverse the decision by leaking classified information about it.

Thus, my empirical skepticism about the necessity for the reporter's privilege is a product of two factors: One is my sense that advocates of the privilege overclaim the amount of work it does or would do in enabling journalists to gather information from sources who wish to remain anonymous. And the second is my sense that on the occasions when the privilege might actually be crucial in enticing sources to disclose information, the disclosure itself is normatively problematic. Add my empirical skepticism to my unease about the privilege's constitutional pedigree and you have my reasons for thinking that *Branzburg* was rightly decided.