

# NOTES

## CALCULATING THE PUBLIC INTEREST IN PROTECTING JOURNALISTS' CONFIDENTIAL SOURCES

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*Most federal circuits recognize a qualified journalist's privilege not to identify a confidential source. In shielding journalists from some subpoenas, those courts recognize, at least implicitly, a public interest in newsgathering sufficient to overcome its interest in obtaining evidence. But courts pay little attention to the nature or scope of the newsgathering interest. They treat it as fixed, an approach that overlooks the reality that certain uses of confidential sources benefit the public more than others. Some judges and commentators have called for a flexible approach toward measuring the newsgathering interest, but their proposals, which rely on an analysis of the value of a confidential source's information, would yield unpredictable results. These proposals have not gained traction.*

*This Note identifies, for the first time, a procedural analysis, based on guidelines recently championed by journalists and media organizations, that can be used to calculate the newsgathering interest. The new guidelines govern the process by which journalists obtain and report information from confidential sources. The Note argues that courts should afford more or less weight to the newsgathering interest based on whether a journalist's use of information from a confidential source adhered to the guidelines. This approach would align the journalist's privilege with the public interest without requiring a subjective assessment of information's news value. Furthermore, focusing the relevant inquiry on the process by which information flowed from a confidential source to the public would solve the problem of defining who is a "journalist" entitled to invoke the privilege.*

### INTRODUCTION

The United States may soon have its first federal statute recognizing a journalist's qualified privilege not to identify a confidential source. Two similarly worded bills that would codify such a privilege, both titled the "Free Flow of Information Act," are advancing through Congress.<sup>1</sup> But the legislation would not resolve the privilege debate so much as confine it to the courts. Both proposals describe circumstances where courts would need to balance the two public interests that stand in tension in journalist's privilege cases: the interest in obtaining evidence and the in-

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1. See Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007); Free Flow of Information Act of 2007, S. 2035, 110th Cong. (2007). The House approved its bill by an overwhelming margin, 398 to 21. Elizabeth Williamson, House Passes Bill to Protect Confidentiality of Reporters' Sources, Wash. Post, Oct. 17, 2007, at A3. The Senate bill was approved by the Senate Judiciary Committee, but has yet to be voted on by the full Senate.

terest in newsgathering.<sup>2</sup> Neither bill explains how to go about that critical task. Most federal circuits already recognize a qualified journalist's privilege at common law.<sup>3</sup> In affirming a journalist's right to defy some subpoenas, those courts recognize, at least implicitly, an interest in newsgathering sufficient to overcome the interest in obtaining evidence. What courts and commentators have not recognized, however, is the range of doctrinal approaches that can be used to measure the scope of the newsgathering interest.

This Note considers how the manner in which journalists use confidential sources affects the public interest in newsgathering. Recent events have raised concerns that journalists rely on confidential sources to the detriment of the public.<sup>4</sup> Anonymous attribution helped mask a *New York Times* reporter's fabrications<sup>5</sup> and a CBS News source's lies about President George W. Bush's National Guard service.<sup>6</sup> The federal investigation into who leaked covert CIA operative Valerie Plame's name to the press<sup>7</sup> exposed how journalists' confidentiality promises may be used not to protect the weak from retribution, but to protect the powerful from accountability.<sup>8</sup> In response to these and other scandals, journalists and media organizations have championed new procedural guidelines governing the use of confidential sources.<sup>9</sup> The guidelines—which generally require journalists to rely on confidential sources only as a last

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2. The bills differ in when, exactly, they would require balancing. The House bill proposes a test in which the privilege can be overcome when certain circumstances, such as a terrorist threat, are present, see H.R. 2102 § 2(a)(3), and “the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information,” *id.* § 2(a)(4). The Senate version offers journalists narrower protections. In nonenumerated situations, it first requires courts to apply a three-pronged test requiring proof that the information sought from the reporter is material, relevant, and unavailable from outside sources. See S. 2035 § 2(a)(1)–(2). This Note discusses that three-prong test *infra* Part I.B. But the Senate proposal adds one more requirement to overcome the privilege: a judge's determination “that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.” S. 2035 § 2(a)(3).

3. See *infra* Part I.A.4 (describing development of federal common law qualified privilege).

4. See Daniel Joyce, *The Judith Miller Case and the Relationship Between Reporter and Source: Competing Visions of the Media's Role and Function*, 17 *Fordham Intell. Prop. Media & Ent. L.J.* 555, 588 (2007) (“Ultimately we are caught between a vision of the media as watchdog and our suspicion that in certain cases the dog has jumped the fence and may now need watching itself.”).

5. See *infra* note 115 and accompanying text (discussing Jayson Blair).

6. See *infra* notes 117–119 and accompanying text (describing Bill Burkett's role in discredited CBS News report).

7. See *infra* notes 91–95 (discussing investigation into Plame leak).

8. See *infra* Part II.A.2 (showing how those in power may seek promises of confidentiality in order to evade responsibility).

9. See Joe Strupp, *Losing Confidence, Editor & Publisher*, July 1, 2005, at 32, 34, 36 (“Nearly all of the nation's major newspapers and news services have either rewritten their policies on sourcing, or at least reminded journalists of their existence . . .”).

resort,<sup>10</sup> to deliberate with editors before reporting confidentially sourced information,<sup>11</sup> and to explain to the public why a particular source merited confidentiality<sup>12</sup>—are designed to ensure that journalistic uses of confidential sources serve the public interest.

By ignoring these developments, the law of journalist's privilege risks becoming detached from the public interests it aims to protect. A miscalculation of the public interest in newsgathering can tip the scales in the wrong direction. Where the interest in obtaining evidence is relatively low, the privilege may protect a journalist whose promise of confidentiality lent false legitimacy to inaccurate information, even though that journalist's use of a confidential source misled, rather than informed, the public. Where the interest in obtaining evidence is higher, the privilege may fail to protect a journalist who revealed government corruption thanks to information provided by a whistleblower, even though that failure to recognize the privilege may discourage whistleblowers with valuable information from coming forward in the future.

This Note argues that federal courts' fixed treatment of the public interest in newsgathering overlooks evidence that some journalistic uses of confidential sources benefit the public more than others. Drawing upon journalism guidelines, it shows that an inquiry into the process by which a journalist obtains and reports information from a confidential source can inform the public interest calculation. The Note concludes that courts should afford more or less weight to the interest based on the extent to which a journalist's use of a confidential source adhered to procedural guidelines. Part I describes the law of journalist's privilege from the perspective of the competing public interests at stake, illuminating the differences in how federal courts weigh each interest. Part II demonstrates that the courts' treatment of the newsgathering interest as fixed is inconsistent with journalism guidelines, which illustrate that a journalist's adherence to specific procedures enhances the public interest served by the use of a confidential source. Part III sets forth and defends a new paradigm, based on journalism's procedural guidelines, that courts can use to calculate the public interest in newsgathering. In addition to aligning the law of journalist's privilege with public interests, the new approach would solve the problem of defining who, in the age of new media, is a "journalist" entitled to invoke the privilege.

## I. COMPETING INTERESTS IN JOURNALIST'S PRIVILEGE CASES

This Part examines how federal courts balance competing interests in journalist's privilege cases. Part I.A analyzes the opposing interests and explains the legal basis for the development of a qualified journalist's privilege at federal common law. Part I.B shows that courts treat the in-

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10. See *infra* Part II.B.1.

11. See *infra* Part II.B.2.

12. See *infra* Part II.B.3.

terest in obtaining evidence flexibly, adjusting its value based on specific facts. Part I.C shows that courts treat the interest in newsgathering as fixed, so that all journalistic uses of confidential sources are valued as if they benefit the public equally.

### A. *Public Interests Clash in Branzburg*

Part I.A describes the two public interests that fuel the journalist's privilege debate, and shows how those interests came together in the seminal case on the subject, *Branzburg v. Hayes*.<sup>13</sup> The public interest in a justice system that can obtain evidence weighs against recognizing a journalist's privilege; the interest in a press that can gather news freely weighs in favor of the privilege. In *Branzburg*, the Court ruled in favor of the interest in obtaining evidence. But the ruling also enabled a qualified privilege to develop at federal common law.

1. *Arguments Against a Journalist's Privilege.* — A tenet of an efficient and transparent justice system is that the public is entitled to "every man's evidence."<sup>14</sup> Testimonial privileges, including the journalist's privilege, conflict with that principle.<sup>15</sup>

In the short term, at least, a journalist's privilege subordinates law enforcement to newsgathering.<sup>16</sup> If the production of evidence aids law enforcement, and successful law enforcement serves the public interest, then the public has an interest in compelling a reporter's testimony.<sup>17</sup> More information increases the likelihood that the legal system will produce justice.<sup>18</sup> The conflict between a journalist's privilege and the interest in "every man's evidence" becomes more pronounced when the case centers on the source's disclosure itself. A privilege could frustrate efforts to punish and deter leaks of information classified for the good of

13. 408 U.S. 665 (1972).

14. 8 John Henry Wigmore, *Evidence* § 2192 (John T. McNaughton rev. ed. 1961); see also *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting Wigmore); Jaime M. Porter, Note, Not Just "Every Man": Revisiting the Journalist's Privilege Against Compelled Disclosure of Confidential Sources, 82 *Ind. L.J.* 549, 549–50 (2007) (discussing tension between journalist's privilege and "every man's evidence" principle).

15. See *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 54 (2007) [hereinafter *Hearing*] (prepared statement of Randall D. Eliason) ("All evidentiary privileges shield relevant evidence from consideration by a jury or other fact-finder . . ."); Wigmore, *supra* note 14, § 2285 (describing prerequisites for privilege protections).

16. In the long term, however, it may serve law enforcement interests by helping journalists uncover misdeeds that otherwise would not have come to light. See *infra* notes 27–31 and accompanying text.

17. See *Branzburg*, 408 U.S. at 695 (noting "public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future").

18. See *Hearing*, *supra* note 15, at 54 (prepared statement of Randall D. Eliason) ("The exclusion of relevant evidence may directly impact the rights of criminal defendants or civil litigants, or may prevent prosecutors from bringing criminals to justice.").

national security.<sup>19</sup> Similarly, the privilege could protect leakers who improperly disclose trade secrets.<sup>20</sup>

Somewhat counterintuitively, a journalist's privilege also strains the free press ideals it seeks to uphold. Before any balancing of interests occurs, a court deciding whether to recognize a journalist's privilege must first determine whether the party claiming the privilege is, in fact, a journalist.<sup>21</sup> The *Branzburg* Court recognized the dangers of privileging one type of media outlet over another "in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher."<sup>22</sup> This definitional problem casts a shadow on attempts to apply a journalist's privilege.<sup>23</sup> Unlike attorneys and doctors, whose licenses are proof of their eligibility for the attorney-client and doctor-patient privileges, journalists need not acquire licenses to gather news.<sup>24</sup> In the modern media age, efforts to define whom a journalist's privilege should protect become especially complex.<sup>25</sup> Ex-

19. This concern underlies President Bush's vow to veto the proposed federal shield statutes. See Williamson, *supra* note 1 (quoting Bush Administration statement warning that proposed shield statute "could severely frustrate—and in some cases completely eviscerate—the federal government's ability to investigate acts of terrorism and other threats to national security"); see also Michael D. Saperstein, Jr., Comment, Federal Shield Law: Protecting Free Speech or Endangering the Nation?, 14 *CommLaw Conspectus* 543, 565–68 (2006) (discussing national security concerns related to proposed journalist's privilege legislation).

Some proponents of the privilege argue that confidential sources who reveal information about the government's activities in the name of national security merit more protection, not less. See Walter Pincus, *Anonymous Sources: Their Use in a Time of Prosecutorial Interest*, Nieman Rep., Summer 2005, at 28, 28 ("Protecting confidential sources, who provide me with material for many of the intelligence stories I write, is a key factor that enables me to write the stories I do about national security.").

20. See Hearing, *supra* note 15, app. at 100 (letter from Am. Beverage Ass'n et al.) (expressing concern about effect proposed shield legislation "could have on the ability of businesses and individuals to protect information that rightly should be kept confidential").

21. See Susan M. Gilles, *The Image of "Good Journalism" in Privilege, Tort Law, and Constitutional Law*, 32 *Ohio N.U. L. Rev.* 485, 489 (2006) ("By its very nature, indeed by its very name, 'privilege' demands that we accord different and special treatment to some versus others.").

22. *Branzburg*, 408 U.S. at 704.

23. See generally Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 *Dick. L. Rev.* 411 (1998) (discussing difficulty of distinguishing journalists for legal purposes).

24. *Id.* at 411.

25. See Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 *Hous. L. Rev.* 1371, 1373 (2003) ("When anyone can be a journalist, it may be impossible to decide who should be protected by the 'journalist's' privilege . . ."); Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 *Cardozo Arts & Ent. L.J.* 385, 446 (2006) ("As the media and journalism in the modern information age continue to expand and redefine themselves, the notion of a reporter's privilege becomes increasingly unworkable and impractical."); Joyce, *supra* note 4, at 571 (calling definitional problem "an issue with particular poignancy in the present era with

clude bloggers, and the law seems arbitrary; include them, and the privilege risks becoming diluted.<sup>26</sup>

2. *Arguments Favoring a Journalist's Privilege.* — “[T]he basis of the press privilege claim,” journalist and First Amendment scholar Anthony Lewis has said, “is that it is needed to acquire news.”<sup>27</sup> The privilege’s proponents argue that the ability to promise confidentiality facilitates newsgathering.<sup>28</sup> Such newsgathering can serve the public interest, such as when unnamed sources blow the whistle on government or corporate corruption.<sup>29</sup> Compelling testimony in one case could have far-reaching consequences, making potential sources with valuable information skeptical of journalists’ power to mask their identities and thus protect them from retaliation.<sup>30</sup> The more the law depends on journalists’ testimony, the less evidence journalists may have to offer because sources may choose never to release information in the first place.<sup>31</sup>

The availability of journalist witnesses is also subject to abuse. Newsgatherers, almost by definition, are likely to possess information that

the de-professionalization of journalism, the rise of the celebrity blogger and the turn to citizen media”).

26. See Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 *Yale L. & Pol’y Rev.* 97, 101 (2002) (“Most troubling for journalists and others who want to preserve a free press—including this author—is that so many divergent groups of persons could be called journalists that the protection of the privilege would be dissolved.”).

27. Anthony Lewis, *A Public Lecture by Anthony Lewis, The First Amendment in Perspective*, 29 *U. Haw. L. Rev.* 13, 17 (2006) [hereinafter *Lewis, Public Lecture*].

28. See, e.g., *Reply Brief for Petitioner, Paul M. Branzburg at 5, Branzburg v. Hayes*, 408 U.S. 665 (1972) (No. 70-85) [hereinafter *Reply Brief*] (“[M]any stories have reached the press solely due to the fact that anonymity has been promised the source by the newsgatherer.”).

29. See Geoffrey R. Stone, *Why We Need a Federal Reporter’s Privilege*, 34 *Hofstra L. Rev.* 39, 42 (2005) (listing examples in which whistleblowers provide valuable information, and arguing that “[t]here is no sensible reason for the federal system not to recognize a journalist-source privilege to deal with the situations like the whistleblower examples”).

30. See *Reply Brief*, supra note 28, at 15 (“By compelling the appearance and testimony of one reporter, the Petitioner, the State will have crippled the capacity of the entire press to report on news and events of interest and importance to the public.”).

31. The argument that potential sources would withhold information in the absence of a privilege has been the subject of empirical research. Vince Blasi published the best-known study shortly before *Branzburg* was decided. See Vince Blasi, *The Newsman’s Privilege: An Empirical Study*, 70 *Mich. L. Rev.* 229 (1971). From interviews with journalists, Blasi concluded that “the adverse impact of the subpoena threat has been primarily in ‘poisoning the atmosphere’ so as to make insightful, interpretive reporting more difficult rather than in causing sources to ‘dry up’ completely.” *Id.* at 284; see also John E. Osborn, *The Reporter’s Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 *Colum. Hum. Rts. L. Rev.* 57, 77 (1985) (noting, from survey of Pulitzer Prize-winning journalists, that since *Branzburg*, “sources continue to divulge information on a confidential basis only because the reporter has impliedly or explicitly demonstrated a willingness to face incarceration rather than violate a source’s trust”). But see Lillian R. BeVier, *The Journalist’s Privilege—A Sceptic’s View*, 32 *Ohio N.U. L. Rev.* 467, 475–78 (2006) (calling empirical studies into question).

interests courts and the public.<sup>32</sup> Forcing them to divulge that information under subpoena could prove counterproductive if the burden of testifying limits the time journalists spend doing their own jobs.<sup>33</sup> Frequent testimony could also threaten journalists' independence, or at least the perception of their independence.<sup>34</sup>

The previous subsections have described arguments favoring and opposing a journalist's privilege. The next subsection explains how the Supreme Court resolved the debate in *Branzburg v. Hayes*.

3. *Branzburg Overview*. — Branzburg consolidated four cases involving journalists subpoenaed to testify before grand juries. Two involved Paul Branzburg, a Kentucky newspaper reporter who refused to identify the subjects of two articles that carried his byline: one that recounted Branzburg's observations of two men illegally making and selling hashish, and another based on interviews Branzburg conducted with drug users.<sup>35</sup> A third case involved Paul Pappas, a cameraman for a Massachusetts television station who gained access to a local Black Panther group's headquarters hours before it was expected to be raided by police.<sup>36</sup> In return for the access, Pappas promised the Black Panthers that he would report only about the raid.<sup>37</sup> The raid never materialized, and Pappas, when summoned before a Massachusetts grand jury, refused to answer questions about what he saw and heard inside the headquarters.<sup>38</sup> In the fourth case, too, a journalist refused to cooperate with an investigation targeting the Black Panthers. Earl Caldwell, a *New York Times* reporter, resisted a summons to appear before a federal grand jury in California to produce his notes and recordings from on-the-record interviews he had conducted with high-ranking Black Panthers officers.<sup>39</sup>

The reporters argued that the First Amendment granted them at least a partial privilege not to testify before state or federal grand juries.<sup>40</sup> The Supreme Court rejected that claim, ruling that no such privilege ex-

32. Alexander, *supra* note 26, at 102 (“[T]he proximity of reporters to news events and the professional observation, recording, and recall skills they exercise daily as news gatherers have made them . . . easy subpoena targets for their eyewitness testimony, notes, film, documents, and other information.”).

33. See Reply Brief, *supra* note 28, at 37 (“The state, rather than using its own vast resources to investigate alleged criminal activity, is trying to use news reporting bodies as its investigative arms.”).

34. See Jane E. Kirtley, Keeping the Government Out of the Newsroom: A First Amendment Imperative?, *Hum. Rts.*, Fall 2001, at 7, 8 (“Most journalists would say that the most significant threats to their independence occur when the government attempts to use them as its investigators, eroding a line that should be fixed and immutable.”).

35. *Branzburg v. Hayes*, 408 U.S. 665, 667–71 (1972).

36. *Id.* at 672.

37. *Id.*

38. *Id.* at 673.

39. *Id.* at 675.

40. *Id.* at 679–81.

ists.<sup>41</sup> Orders to testify do not violate the First Amendment, the Court reasoned, because they do not restrict journalists' right to gather and report news.<sup>42</sup>

4. *Development of a Qualified Journalist's Privilege Post-Branzburg.* — Even as *Branzburg* ruled out the availability of a journalist's privilege under the facts of the four consolidated cases,<sup>43</sup> it enabled the privilege to flourish in other contexts. In the majority opinion, Justice White wrote that the First Amendment does not excuse journalists from having to "respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial"<sup>44</sup>—language that does not apply to civil cases. White also noted that federal and state statutes and state constitutions could create privileges where the First Amendment had not.<sup>45</sup> States have responded by broadening journalists' privilege protections.<sup>46</sup>

*Branzburg* also left room for federal courts to develop a journalist's privilege at common law. Four justices signed on to Justice White's opinion, giving him a 5-4 majority.<sup>47</sup> But one of the four—Justice Powell—added a brief concurrence<sup>48</sup> that cast doubt on the meaning of *Branzburg's* holding.<sup>49</sup> Powell wrote that "[t]he asserted claim to privilege

41. See *id.* at 667 ("The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.").

42. See *id.* at 681 ("[T]hese cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold.").

43. See *id.* at 667.

44. *Id.* at 690–91.

45. See *id.* at 706.

46. Before *Branzburg*, seventeen states had a statutory journalist's privilege; today, thirty-three states and the District of Columbia have one. For a compilation of shield statutes, see Henry Cohen, Cong. Research Serv., *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes 3–47* (2007) (listing statutes in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Washington). In an additional sixteen states, courts have recognized a constitutional or common law-based privilege. For a jurisdiction-by-jurisdiction review of journalist's privilege laws, see generally Jeremy Feigelson, James C. Goodale & John S. Kiernan, Practising Law Inst., *Reporter's Privilege*, in *Communications Law 2007*, at 9 (2007). In total, then, journalists enjoy some form of privilege in forty-nine states and the District of Columbia. Moreover, the only state not included on that list, Wyoming, has not rejected such a privilege. Rather, Wyoming's courts have not had a chance to rule on the issue. *Id.* at 65.

47. *Branzburg*, 408 U.S. at 665 (listing Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist as joining Justice White's opinion).

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

49. Time has not clarified the confusion. See Adam Liptak, *A Justice's Scribbles on Journalists' Rights*, N.Y. Times, Oct. 7, 2007, § 4, at 4 (describing continuing efforts to decipher Powell's concurrence). One commentator presents Powell's concurrence as Exhibit A in her argument that concurring opinions often lead to confusion. See Sonja R.

should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”<sup>50</sup> This “striking of a proper balance,” Powell wrote, should be conducted “on a case-by-case basis.”<sup>51</sup>

Even if judges forgo Justice Powell’s case-by-case balancing approach, prosecutors remain free to make case-specific decisions. Justice Department guidelines, instituted in 1970 in response to an increase in journalist subpoenas,<sup>52</sup> require prosecutors considering whether to subpoena journalists “to strike the proper balance between the public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement and the fair administration of justice.”<sup>53</sup> Although “not intended to create or recognize any legally enforceable right,”<sup>54</sup> the regulations remain in place to inform government lawyers’ subpoena decisions.<sup>55</sup> That the guidelines have endured may also indicate mainstream acceptance, in the legal community, of a qualified privilege. Meanwhile, Federal Rule of Evidence 501, which states that privileges “shall be governed by the principles of the common law,”<sup>56</sup> proves useful to courts eager to privilege journalists’ testimony. The Supreme Court has interpreted the rule as authorizing federal courts to devise new privileges.<sup>57</sup> Most have done just that: Thirty-six years after *Branzburg*, nearly every federal circuit recognizes some degree of journalist’s privilege.<sup>58</sup>

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West, Concurring in Part & Concurring in the Confusion, 104 Mich. L. Rev. 1951, 1951–53 (2006).

50. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring). This approach bore so little resemblance to the majority opinion that Justice Stewart, who dissented in *Branzburg*, later characterized the ruling as coming by “a vote of four and a half to four and a half.” Potter Stewart, “Or of the Press,” 26 Hastings L.J. 631, 635 (1975).

51. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

52. See Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department’s Regulations Governing Subpoenas to the Press*, 1999 Ann. Surv. Am. L. 227, 232 [hereinafter Liptak, *Hidden Federal Shield*] (describing history of Justice Department guidelines).

53. Policy with Regard to the Issuance of Subpoenas to Members of the News Media, Subpoenas for Telephone Toll Records of Members of the News Media, and the Interrogation, Indictment, or Arrest of, Members of the News Media, 28 C.F.R. § 50.10(a) (2007). For a discussion and analysis of the regulations, see generally Liptak, *Hidden Federal Shield*, supra note 52.

54. 28 C.F.R. § 50.10(n).

55. See Liptak, *Hidden Federal Shield*, supra note 52, at 227 (“[The regulations] have remained stable and consistently enforced even as the journalists’ privilege has taken a beating in the federal courts . . .”).

56. Fed. R. Evid. 501.

57. See *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (“Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting ‘common law principles . . . in the light of reason and experience.’”).

58. See infra note 70 and accompanying text.

### B. *Weighing the Interest in Obtaining Evidence*

Part I.B shows that to calculate the public interest in obtaining evidence, federal courts hearing journalist's privilege cases tend to follow Justice Powell's instruction to "balance . . . vital constitutional and societal interests on a case-by-case basis."<sup>59</sup> The weight courts afford the interest depends first on procedural circumstances, such as whether testimony is sought before a grand jury, in a criminal trial, or during civil litigation. Courts then consider substantive factors, such as the nature of the reporter's information and its relevance to the case. The result is a highly flexible treatment of the public interest in obtaining evidence.

1. *Procedural Consideration: Type of Legal Proceeding.* — The scope of the public's interest in requiring a reporter to testify depends largely on the type of proceeding at issue. Federal courts view the interest as strongest in grand jury contexts and weakest in civil proceedings, with criminal cases in between.

Predictably, *Branzburg's* refusal to recognize a privilege not to testify before grand juries<sup>60</sup> has blocked efforts to recognize a journalist's privilege in grand jury proceedings. Rather than merely rejecting the reporters' argument that a privilege existed under the First Amendment, the Court emphasized grand juries' "important role in fair and effective law enforcement."<sup>61</sup> The Court also highlighted a potential defendant's interest in compelling testimony, as reflected in the Fifth Amendment.<sup>62</sup> The only exception to the rule rejecting the privilege, the *Branzburg* Court said, would arise if grand jury proceedings were instituted in bad faith.<sup>63</sup> Not surprisingly, then, no circuit court of appeals has recognized a journalist's privilege for grand jury testimony.<sup>64</sup> Thus, if a reporter is subpoenaed to appear before a federal grand jury, and the subpoena is issued in good faith, a federal judge will tip the balance in favor of compelling the reporter to testify.<sup>65</sup>

59. *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring); see also *supra* notes 47–51 and accompanying text (discussing Powell's concurrence).

60. *Branzburg*, 408 U.S. at 685 ("[T]he great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation.").

61. *Id.* at 686–88.

62. See *id.* at 687 ("The Fifth Amendment provides that '[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.'" (quoting U.S. Const. amend. V)).

63. See *id.* at 707–08 ("Official harassment of the press undertaken not for the purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.").

64. See Eliason, *supra* note 25, at 395–97 (discussing circuit court approaches to journalist's privilege in grand jury, criminal, and civil contexts). Eliason notes, however, that one *district* court ruling in the Third Circuit recognized a reporter's privilege not to testify before a grand jury. See *id.* at 396 n.53 (discussing *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991)).

65. See, e.g., *United States v. Sanders*, 211 F.3d 711, 721 (2d Cir. 2000) (rejecting privilege where issuance of subpoena "was a legitimate exercise of 'the broad discretion'

In criminal cases, too, federal courts recognize a significant public interest in compelling journalists to testify. *Branzburg* remains relevant in this context. The opinion spoke of the need to protect the public by enabling the government to investigate and prosecute crimes.<sup>66</sup> Where a criminal defendant seeks a reporter's testimony, the privilege, if recognized, also raises Sixth Amendment concerns by affecting the defendant's right "to be informed of the nature and cause of the accusation."<sup>67</sup> Some federal circuits have ruled out recognition of the privilege in criminal proceedings.<sup>68</sup> But the First, Second, Third, and Eleventh Circuits have recognized the privilege in criminal cases,<sup>69</sup> indicating that they do not

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entrusted to the prosecutor" (citation omitted)); *Scarce v. United States* (In re Grand Jury Proceedings), 5 F.3d 397, 402 (9th Cir. 1993) (distinguishing prior case in which court balanced competing interests because "that case—unlike *Branzburg* or the present case—did not involve testimony before a grand jury"); *Storer Commc'ns Inc. v. Giovan* (In re Grand Jury Proceedings), 810 F.2d 580, 585–86 (6th Cir. 1987) (rejecting privilege, but noting that "exclusion" of testimony may apply to "introduction of evidence which is unreliable or calculated to mislead or prejudice"); In re Grand Jury Matter, Gronowicz, 764 F.2d 983, 990 n.2 (3d Cir. 1985) (Garth, J., concurring) ("*Branzburg*; it must be pointed out, did not hold that a First Amendment privilege was available in a grand jury context even where the party subpoenaed was not the target of the investigation."); In re Grand Jury 95-1, 59 F. Supp. 2d 1, 10 (D.D.C. 1996) ("Albeit in dicta, the Supreme Court made clear that no such privilege is available in grand jury investigations unless the grand jury has acted in bad faith.").

66. See *Branzburg*, 408 U.S. at 691–92 ("The [First] Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.").

67. U.S. Const. amend. VI; see also *United States v. Lindh*, 210 F. Supp. 2d 780, 783 (E.D. Va. 2002) (noting "paramount importance" of defendant's Sixth Amendment right relative to First Amendment reporter's privilege).

68. See, e.g., *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998) ("Although some courts have taken from Justice Powell's concurrence a mandate to construct a broad, qualified newsreporters' privilege in criminal cases, we decline to do so." (internal citations omitted)); In re Shain, 978 F.2d 850, 852 (4th Cir. 1992) ("[A]bsent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution.").

69. See, e.g., *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181–82 (1st Cir. 1988) (balancing competing interests before ruling that specific facts merit requiring news organization to turn over material for in camera inspection); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (recognizing journalist's privilege not to testify in criminal trial absent showing that reporter's information "was unavailable from other sources or necessary to the proper presentation of the case"); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (recognizing privilege where defendant "has completely failed to make the clear and specific showing that [reporter's information was] necessary or critical to the maintenance of his defense"); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) ("A defendant's Sixth Amendment and due process rights certainly are not irrelevant when a journalists' privilege is asserted. But rather than affecting the existence of the qualified privilege, we think that these rights are important factors that must be considered in deciding whether . . . the privilege must yield . . ."); see also Eliason, *supra* note 25, at 395–96 & nn.48–49 (discussing circuit approaches to journalist's privilege in civil and criminal cases).

weigh the public's interest in compelling disclosure as heavily outside the grand jury context.

Federal courts consider the interest in compelling a reporter to testify to be at its weakest in civil proceedings. Nearly every circuit has recognized a qualified journalist's privilege not to testify in civil cases.<sup>70</sup> Most courts reason that the interest is diminished when the party seeking the testimony is acting not on behalf of the public, but on behalf of a private party.<sup>71</sup>

2. *Substantive Consideration: Relevance, Availability, and Necessity of Evidence.* — If a journalist seeks the privilege in the type of proceeding where it may be available, federal courts look to case-specific facts to determine whether to recognize it. This part of the courts' analysis is derived, oddly enough, from Justice Stewart's *Branzburg* dissent.<sup>72</sup> Stewart proposed a three-part test requiring the party trying to overcome the privilege to show that the information sought is relevant, unavailable from other sources, and necessary to the claim.<sup>73</sup> Where a qualified privilege is

Within those circuits that recognize a qualified reporter's privilege in criminal cases, the seriousness of the crime at issue appears to play no role in whether the courts ultimately grant the privilege. See Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, 39 *Am. Crim. L. Rev.* 1441, 1497 (2002).

70. The Sixth and Seventh Circuits, where dicta in two holdings indicate that the privilege may be unavailable in all contexts, appear to be exceptions. The Sixth Circuit has argued that other circuits, in recognizing a qualified journalist's privilege, misinterpret Powell's *Branzburg* concurrence. See *Storer Commc'ns*, 810 F.2d at 584–86 (“Justice Powell’s concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands upon its holding . . .”). In the Seventh Circuit, Judge Posner has argued that subpoenas issued to journalists deserve no more scrutiny than subpoenas issued to anyone else. See *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (“[R]ather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas.” (citing Fed. R. Crim. P. 17(c))); see also Eliason, *supra* note 25, at 396 & n.52 (discussing journalist's privilege cases in Sixth and Seventh Circuits).

71. See, e.g., *U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Cos.*, 390 F. Supp. 2d 27, 33 (D.C. Cir. 2005) (“[I]n civil cases, the privilege typically prevails because any interest in overcoming the privilege is by definition a private rather than a public interest.”); *Smith*, 135 F.3d at 972 (“Because the public has much less of an interest in the outcome of civil litigation, in civil cases . . . the interests of the press may weigh far more heavily in favor of some sort of privilege.”). But see *Burke*, 700 F.2d at 77 (“We see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter’s interest in confidentiality should yield to the moving party’s need for probative evidence.”). The *Burke* language shows that not all courts give less weight to the public interest in compelling disclosure in civil proceedings. After all, some civil cases, such as those brought by the government, seek to promote the public interest. No court, however, grants *more* weight to the public interest in compelling disclosure in civil proceedings. On average, then, the privilege is harder to overcome in civil cases.

72. See *Branzburg v. Hayes*, 408 U.S. 665, 725–52 (1972) (Stewart, J., dissenting).

73. The three-part test required the government to

available, courts almost always apply this test.<sup>74</sup> All three steps of Justice Stewart's approach relate to one—and only one—of the public interests at stake in journalist's privilege cases: the interest in obtaining evidence. Thus, in deciding whether to apply a qualified privilege, courts treat the interest in requiring a reporter to testify as flexible: It takes different shapes under different facts.

### C. *Weighing the Interest in Newsgathering*

The fact-specific analysis of the interest in obtaining evidence does not carry over to the interest on the other side of the balancing scale. Part I.C shows that whereas courts treat the interest in obtaining evidence as flexible, they largely treat the interest in newsgathering as fixed. Courts calculate the newsgathering interest differently based on the type of information sought, so that the interest in protecting a reporter's confidentiality promise receives more weight than a reporter's desire to withhold nonconfidential material. In cases where a subpoenaed reporter is asked to name a confidential source, the inquiry ends there: Despite at least one judge's attempt to enhance the analysis,<sup>75</sup> courts do not embark on fact-specific inquiries into whether—and to what extent—different journalistic uses of confidential sources serve the public interest.

1. *Stronger Privilege for Confidential Information.* — The type of information sought from a subpoenaed journalist affects the scope of the in-

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(1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

Id. at 743 (internal footnotes omitted). Justice Stewart foreshadowed this analytical framework in deciding a reporter's privilege case fourteen years earlier. See *Garland v. Torre*, 259 F.2d 545, 551 (2d Cir. 1958) (finding no privilege because information was of "obvious materiality and relevance" and because "reasonable efforts" to learn the information through alternative means had failed).

74. For cases, presented in numerical order by circuit, in which courts embraced the relevance, necessity, and exhaustion requirements, see, e.g., *Zerilli v. Smith*, 656 F.2d 705, 711–14 (D.C. Cir. 1981); *LaRouche Campaign*, 841 F.2d at 1179; *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982); *Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980); *Gulliver's Periodicals, Ltd. v. Charles Levy Circulating Co.*, 455 F. Supp. 1197, 1202–03 (N.D. Ill. 1978); *Shoen v. Shoen (Shoen II)*, 48 F.3d 412, 416 (9th Cir. 1995); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *Caporale*, 806 F.2d at 1504; see also 23 Charles Alan Wright & Kenneth W. Graham, *Federal Practice & Procedure, Evidence*, § 5426, at 789 (1980) (noting Stewart's approach "has gained the support of newsmen, legal writers, statutory draftsmen, and the courts"); Jack Colldeweh & Samuel Pleasants, *Confidential Sources—The Reporter's Privilege Muddle*, *Comm. & L.*, Dec. 1991, at 3, 7 (noting Stewart's test "has been adopted nearly word-for-word by many courts"). The influence of Stewart's dissent is also evident in state shield statutes. See William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 *Cardozo Arts & Ent. L.J.* 635, 666 (2006).

75. See *infra* Part I.C.3 (discussing Judge David Tatel's proposal).

terest in newsgathering at stake. When a subpoena orders a journalist to disclose nonconfidential information, the interest is at its lowest point. Courts reason that one purported benefit of the journalist's privilege—its protection for sources who would not reveal important information without a promise of confidentiality<sup>76</sup>—does not apply in situations where the journalist never made such a promise.<sup>77</sup> Journalists, too, believe the case for recognizing the privilege is strongest when the reporter seeks to avoid naming a confidential source.<sup>78</sup> Within a given circuit, then, courts generally lower the bar that a party seeking to compel a journalist's testimony regarding nonconfidential information must clear in order to overcome a qualified privilege.<sup>79</sup>

2. *Courts' Fixed View of the Interest Across All Cases Involving Confidential Sources.* — Once it becomes clear that the information sought from a subpoenaed journalist would identify a confidential source, federal courts end their inquiry into the scope of the newsgathering interest. In effect, then, the courts treat the interest as fixed, so that all journalistic uses of confidential sources are seen as benefiting the public interest equally.

*Zerilli v. Smith*,<sup>80</sup> a civil case involving a reporter from *The Detroit News*, illustrates this point. The issue was whether the reporter, Seth Kantor, could be forced to identify a confidential source—evidently an FBI or Justice Department employee—who had leaked classified transcripts to him.<sup>81</sup> The two men seeking to compel Kantor's testimony were suspected organized crime figures whom the transcripts appeared to show discussing various crimes.<sup>82</sup> The men sued the government, alleging that the leak violated their Fourth Amendment rights.<sup>83</sup> The *Zerilli* opinion highlighted the reasons a journalist's privilege may serve the public interest. It noted "the important role [the press] can play as 'a

76. See *supra* notes 30–31 and accompanying text.

77. See, e.g., *United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998) ("[C]onfidential sources would be reluctant to approach the media if they knew that the press could be compelled to disclose their identities. . . . Yet there is little reason to fear that on-the-record sources will avoid the press simply because the media might turn over nonconfidential statements to the government."); *LaRouche Campaign*, 841 F.2d at 1181 ("When there is no confidential source or information at stake, the identification of First Amendment interests is a more elusive task.").

78. See *Blasi*, *supra* note 31, at 284 ("[N]ewsmen regard protection for the *identity* of anonymous sources as more important than protection for the *contents* of confidential information given by known sources . . .").

79. See, e.g., *In re Grand Jury Empaneled Feb. 5, 1999*, 99 F. Supp. 2d 496, 501 (D.N.J. 2000) ("The seeker of information is required to prove less where, as here, the information sought is nonconfidential and the source self-avowed."); *NLRB v. Mortensen*, 701 F. Supp. 244, 248 (D.D.C. 1988) ("Before requiring a journalist to testify, courts have examined whether the litigant seeks discovery of a confidential or nonconfidential source. Many conclude that a lesser showing of need and materiality is required for discovery of nonconfidential material than for the identity of confidential sources.").

80. 656 F.2d 705 (D.C. Cir. 1981).

81. *Id.* at 706.

82. *Id.*

83. *Id.*

vital source of public information.’”<sup>84</sup> It quoted a Supreme Court concurrence stating that “[t]he press was protected so that it could bare the secrets of government and inform the people.”<sup>85</sup> And it asserted that “[w]ithout an unfettered press, citizens would be far less able to make informed political, social, and economic choices.”<sup>86</sup>

But the opinion never analyzed whether Kantor’s particular use of a confidential source served the public interest. It did not ask whether the transcripts were “a vital source of public information,”<sup>87</sup> or whether this was an example of the press “bar[ing] the secrets of government and inform[ing] the people,”<sup>88</sup> or whether Kantor’s use of a confidential source helped citizens “make informed political, social, and economic choices.”<sup>89</sup> Instead, the court concluded that “the press’ function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.”<sup>90</sup> In other words, whereas the public interest in compelling a journalist’s testimony is flexible, the public interest in recognizing the privilege is fixed whenever a journalist seeks to protect the identity of a confidential source.

3. *Courts Reject a Proposed Flexible Approach.* — In 2005, Judge David Tatel of the U.S. Court of Appeals for the District of Columbia Circuit recommended a fact-specific approach to calculating the public interest in newsgathering in journalist’s privilege cases involving the potential unmasking of confidential sources. Although Tatel’s proposal has failed to

84. *Id.* at 710–11 (quoting *Grosjean v. Am. Press Co.*, 197 U.S. 233, 250 (1936)).

85. *Id.* at 711 (quoting *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)).

86. *Id.*

87. *Id.* at 710–11 (quoting *Grosjean*, 197 U.S. at 250). If it had analyzed this question, the court might have had trouble deciding whether classified information would ever be considered “public.” By definition, classified information is designed to remain private. On the other hand, just because information is “classified” does not mean its public dissemination would be harmful. Information may be improperly classified, in which case a reporter who receives the information from a confidential source may be seen as serving the public interest by publicizing important information—or by demonstrating that the government classifies information too broadly. See Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 *Minn. L. Rev.* 515, 588 (2007) (“Protecting the identity of the small minority who leak information that does not serve the public interest is a minor price to pay to encourage the majority of government whistleblowers to come forward, especially when so often the information is improperly classified in the first place.”).

88. *Zerilli*, 656 F.2d at 711 (quoting *N.Y. Times Co.*, 403 U.S. at 717). Although the information emanated from the government and could shed light on the federal investigation, it appeared to bare secrets about the nongovernment employees—the plaintiffs in this case—quoted in the transcripts. See *id.* at 706.

89. *Id.* at 711. This point, too, could prove difficult to analyze. The plaintiffs seeking to compel Kantor’s testimony could try to portray the article as mere gossip. But Kantor’s article arguably informs the public to make a social or economic choice not to associate with the potential criminals whose conversations the transcripts recount. Or perhaps the article could be seen as informing a public exasperated with government leaks to seek political change.

90. *Id.*

take hold, it merits discussion because it illustrates the potential complications of a fact-specific calculation of the newsgathering interest.

Tatel presented his proposal in *In re Grand Jury Subpoena, Judith Miller*.<sup>91</sup> An independent prosecutor investigated who had leaked the identity of a covert CIA operative, Valerie Plame, to reporters in an apparent attempt to discredit Plame's husband, Joe Wilson, a Bush Administration critic.<sup>92</sup> The D.C. Circuit reviewed a ruling that refused to recognize the privilege for two reporters, Judith Miller of *The New York Times* and Matthew Cooper of *Time*, who had been subpoenaed to testify before a federal grand jury.<sup>93</sup> The three appellate judges unanimously affirmed the ruling ordering the reporters to testify. Each judge—including David Sentelle, who wrote the court's opinion<sup>94</sup>—filed a separate concurrence.<sup>95</sup>

Tatel interpreted *Zerilli* as requiring an inquiry into how each journalistic use of a confidential source affects the public interest.<sup>96</sup> Even though *Branzburg* refused to recognize a First Amendment privilege, Tatel said, a common law privilege could be carved out under *Jaffee*,<sup>97</sup> under which “the common law analysis starts with the interests that call for recognizing a privilege.”<sup>98</sup> In a case seeking to prosecute the source of a leak, Tatel argued, the government easily fulfills the necessity and unavailability requirements of the traditional three-part test.<sup>99</sup> Tatel proposed a different approach, under which courts consider “the two competing public interests lying at the heart of the balancing test. Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value.”<sup>100</sup> Tatel framed the relevant question as “whether Miller's and Cooper's sources

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91. 397 F.3d 964, 986–1004 (D.C. Cir. 2005) (Tatel, J., concurring).

92. For accounts of the case and the broader scandal it sparked, see generally Robert D. Novak, *The Prince of Darkness* (2007); Norman Pearlstine, *Off the Record: The Press, the Government, and the War over Anonymous Sources* (2007); Valerie Plame Wilson, *Fair Game: My Life as a Spy, My Betrayal by the White House* (2007); Joseph Wilson, *The Politics of Truth: A Diplomat's Memoir* (2005); Max Frankel, *The Washington Back Channel*, N.Y. Times Mag., Mar. 25, 2007, at 40.

93. 397 F.3d at 965–68.

94. See *id.* at 965–76.

95. See *id.* at 976–81 (Sentelle, J., concurring); *id.* at 981–86 (Henderson, J., concurring); *id.* at 986–1004 (Tatel, J., concurring).

96. *Id.* at 997 (Tatel, J., concurring) (“[M]uch as our civil cases balance ‘the public interest in protecting the reporter's sources against the private interest in compelling disclosure,’ . . . so must the reporter privilege account for the varying interests at stake in different source relationships.” (internal citations omitted)).

97. *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996); see *supra* note 57 and accompanying text (discussing *Jaffee*).

98. 397 F.3d at 991 (Tatel, J., concurring).

99. *Id.* at 997 (“[W]hen the government seeks to punish a leak, a test focused on need and exhaustion will almost always be satisfied, leaving the reporter's source unprotected regardless of the information's importance to the public.”).

100. *Id.* at 998.

released information more harmful than newsworthy.”<sup>101</sup> Applying that test, he concluded that the leaked news of Plame’s employment “had marginal news value . . . [that] could bear on her husband’s credibility. . . . Compared to the damage of undermining covert intelligence-gathering, however, this slight news value cannot, in my view, justify privileging the leaker’s identity.”<sup>102</sup>

The balancing approach proposed by Tatel, who is generally regarded as press-friendly,<sup>103</sup> has drawn support from proponents of a journalist’s privilege.<sup>104</sup> But courts have declined to adopt the framework.<sup>105</sup> The Second Circuit Court of Appeals rejected the Tatel test in a case in which the government subpoenaed phone records in an attempt to identify who leaked information to two *New York Times* reporters.<sup>106</sup> And a court in Tatel’s own circuit called his proposal “very troubling.”<sup>107</sup> The ruling criticized the approach as an “elastic standard whose outcome could not be predicted,” and concluded that “[c]ourts are ill-suited to decide the degree to which information is beneficial or unimportant to the common weal.”<sup>108</sup>

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Part I has shown that in erecting bars to efforts to compel a journalist to identify a confidential source, federal courts treat journalistic uses of such sources as though they inherently benefit the public interest. An “elastic” standard would raise or lower the bars on a case-by-case basis to reflect the public interest in maintaining confidentiality; the federal courts’ “inelastic” approach sets the bar at the same height across all cases involving the potential identification of a confidential source. Whether the party seeking to overcome the privilege clears the federal courts’ bar depends solely on the scope of the other interest at stake, the interest in obtaining evidence, which the courts treat flexibly. This approach assumes one of two things: (1) that all journalistic uses of confidential

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101. *Id.* at 1001.

102. *Id.* at 1002.

103. See Pearlstine, *supra* note 92, at 70 (calling Tatel “a Clinton appointee often thought sympathetic to the press”).

104. See, e.g., Anthony Lewis, *Op-Ed, Not All Sources Are Equal*, *N.Y. Times*, Mar. 7, 2007, at A21 (calling Tatel opinion “a wise proposal”). Geoffrey Stone, without mentioning Tatel by name, has urged Congress to incorporate a similar balancing test into its federal shield legislation in cases where the source’s disclosure broke the law, such as because the information was classified. See Stone, *supra* note 29, at 56.

105. As one of three concurrences in a 3-0 ruling, Tatel’s opinion wields little precedential power. See 397 F.3d at 976–81 (Sentelle, J., concurring); *id.* at 981–86 (Henderson, J., concurring); *id.* at 986–1004 (Tatel, J., concurring).

106. See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 163–65 (2d Cir. 2006) (describing factual background). While Judge Robert Sack’s dissent urged the court to adopt a modified version of the Tatel balancing approach, see *id.* at 185–86 (Sack, J., dissenting), the majority rested its ruling solely on the public interest in obtaining the evidence identifying the source of the leak, *id.* at 171 (majority opinion).

107. *Lee v. Dep’t of Justice*, 401 F. Supp. 2d 123, 139 (D.D.C. 2005).

108. *Id.*

sources serve the public interest equally; or (2) that even if some journalistic uses of confidential sources serve the public interest more than others, courts are “ill-suited” to distinguish the good uses from the bad. Part II of this Note describes recent developments that reveal problems with the first assumption. Part III proposes a solution that overcomes the second assumption.

## II. THE PUBLIC INTEREST SERVED BY JOURNALISTIC USES OF CONFIDENTIAL SOURCES

Part II demonstrates that by treating all journalistic uses of confidential sources as if they benefit the public interest equally, federal courts ignore indications that some uses of confidential sources benefit the public more than others—and that some uses even harm the public interest. News organizations have touted procedural guidelines governing the proper use of confidential sources. The emphasis on procedural guidelines casts doubt on the assumption that a flexible treatment of the newsgathering interest requires an assessment of “newsworthiness.” Part II.A describes drawbacks to the media’s reliance on confidential sources. Part II.B assesses procedural safeguards, detailed in ethics codes and editorial guidelines, that journalists say promote the beneficial use—and discourage the harmful use—of confidential sources. Part II.C explains why the competitive media marketplace triggers a race to the bottom that frustrates reform efforts.

### A. *Dangers of Confidentially Sourced Information*

Part II.A reveals flaws in federal courts’ assumption that all journalistic uses of confidential sources serve the public interest by showing how use of such sources can diminish both the quality and quantity of information that flows to the public.

Not all confidential sources are Deep Throat, the FBI insider who helped expose the Watergate scandal.<sup>109</sup> And not all reporters who use confidential sources are Carl Bernstein and Bob Woodward, whose diligent pursuit of their source’s leads earned *The Washington Post* a Pulitzer Prize.<sup>110</sup> Even as they argue in favor of a broad privilege, journalists often

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109. For a first-hand account of Deep Throat’s experience in the Watergate investigation, see generally Mark Felt, *A G-Man’s Life: The FBI, Being “Deep Throat,” and the Struggle for Honor in Washington* (2006); cf. Barry Sussman, *Why Deep Throat Was an Unimportant Source and Other Reflections on Watergate*, Comm. of Concerned Journalists, July 24, 2005, at <http://www.concernedjournalists.org/print/337> (on file with the *Columbia Law Review*) (arguing that Deep Throat played only minimal role in uncovering Watergate scandal).

110. For the reporters’ account of their work on the story, see generally Carl Bernstein & Bob Woodward, *All the President’s Men* (1974).

acknowledge the problems confidential sources pose.<sup>111</sup> Recent developments illustrate those problems. In extreme cases, references to “unnamed sources” mask fabrications. Other times, confidentiality enables sinister sources to abuse a tool designed to protect whistleblowers.<sup>112</sup> Ultimately, confidentiality may even decrease the amount of information flowing to the public.

1. *Hidden Fabrications.* — Recent media scandals demonstrate that some references to unnamed sources damage the public interest by enabling fabricators to fool the public.<sup>113</sup> Some “confidential sources” may be figments of a reporter’s imagination.<sup>114</sup> Jayson Blair, the *New York Times* reporter who plagiarized and fabricated articles until the *Times* caught on in 2003, attributed some of his biggest “scoops” to unnamed sources.<sup>115</sup> So did Jack Kelley, a once-highly regarded *USA Today* reporter whose lies were uncovered in 2004.<sup>116</sup>

Sometimes a source, not the reporter, uses anonymity to disseminate false information. In 2004, Bill Burkett, a vocal critic of George W. Bush, demanded “confidentiality and anonymity” before giving a CBS News producer documents that purported to show President Bush had lied about his National Guard service.<sup>117</sup> CBS’s Dan Rather aired a report based on the documents, then retracted that report weeks later when the

111. See, e.g., Pincus, *supra* note 19, at 28 (“[N]o matter what legal protections exist, journalists should pause before handling information received from people who demand anonymity.”).

112. See *supra* note 29 and accompanying text (justifying confidentiality as tool to shield whistleblowers).

113. See Lee, *supra* note 74, at 640 (“Contemporary journalist’s privilege cases . . . take place against the backdrop of several highly-publicized instances of fraudulent reporting . . .”).

114. See Kara A. Larsen, Note, The Demise of the First Amendment-Based Reporter’s Privilege: Why This Current Trend Should Not Surprise the Media, 37 *Conn. L. Rev.* 1235, 1262 (2005) (noting that confidentiality can “become a crutch for journalists to plagiarize or fabricate stories”).

115. For front-page stories by Blair citing unnamed sources, see, e.g., Jayson Blair, Teenager’s Role Tangles Case Against Sniper Suspect, *N.Y. Times*, Dec. 22, 2002, at A1 (citing sources identifying Washington, D.C. sniper suspect John Muhammad’s 17-year-old accomplice, Lee Malvo, as triggerman in sniper shootings); Jayson Blair, U.S. Sniper Case Seen as a Barrier to a Confession, *N.Y. Times*, Oct. 30, 2002, at A1 (citing sources accusing federal prosecutor of cutting short interrogation of Muhammad even though Muhammad appeared to be about to confess). Both reports have since been revealed to be seriously flawed, if not outright false. See Seth Mnookin, Hard News, The Scandals at *The New York Times* and Their Meaning for American Media 120–25 (2004) (discussing Blair’s reporting on sniper attacks).

116. An independent panel detailed Kelley’s deceptive tactics in a 2004 report commissioned by *USA Today*. See Bill Hilliard et al., The Problems of Jack Kelley and *USA Today* 15 (2004), available at [http://www.usatoday.com/news/2004-04-22-report-one\\_x.htm](http://www.usatoday.com/news/2004-04-22-report-one_x.htm) (on file with the *Columbia Law Review*) (“If there was one aspect of Jack Kelley’s flawed work that too many editors accepted on myopic faith, it was his handling of confidential, or anonymous sources.”).

117. Dick Thornburgh & Louis D. Boccardi, On the September 8, 2004 *60 Minutes Wednesday* Segment “For the Record” Concerning President Bush’s Texas Air National

documents were revealed to be fakes.<sup>118</sup> The confidentiality promise appeared to enable the false report: If CBS had refused to grant Burkett confidentiality, the report may have never materialized; and if Burkett had agreed to be named, then his bias—and his lies—might have been discovered sooner.<sup>119</sup> Fabrications are extreme examples of the problems with confidential sources.<sup>120</sup> But these examples demonstrate how confidentiality can cloak bad information.

2. *Lack of Source Accountability.* — The assumption that confidential sources serve the public interest may be based on the notion of the source as an honest whistleblower. It has recently become clear, however, that although ideally used to protect the weak from retaliation,<sup>121</sup> confidentiality can also be used to shield the powerful from accountability.<sup>122</sup> Commentators express considerable concern about influential sources who “game the system” by demanding confidentiality before releasing information.<sup>123</sup> Indeed, empirical research and anecdotal evidence suggest that unnamed sources are more likely powerful than oppressed.<sup>124</sup>

By liberating sources from the prospect of accountability, confidentiality promises may give those sources false confidence to engage in dan-

Guard Service 78 (2005), available at [http://wwwimage.cbsnews.com/htdocs/pdf/complete\\_report/CBS\\_Report.pdf](http://wwwimage.cbsnews.com/htdocs/pdf/complete_report/CBS_Report.pdf) (on file with the *Columbia Law Review*).

118. See *id.* at 8–28 (describing initial report and subsequent fallout).

119. See *id.* at 14–15 (noting that CBS fact “vetters” told independent panel investigating faulty report “that they did not think they heard the name Bill Burkett as the source of the documents prior to the airing of the Segment”).

120. Papandrea, *supra* note 87, at 539 (noting that fabrications “represent a very small percentage of all journalistic activity”).

121. See *supra* notes 29–30 and accompanying text. But see BeVier, *supra* note 31, at 483 (“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 [while] protecti[ng] . . . whistleblowers.”).

122. See Bryan E. Denham, *Anonymous Attribution During Two Periods of Military Conflict: Using Logistic Regression to Study Veiled Sources in American Newspapers, Journalism & Mass Comm. Q.*, Autumn 1997, at 565, 565 (“While information obtained or reported anonymously can enhance the marketplace of ideas and foster public debate, it also can allow public officials and others to shirk responsibility for controversial information and perpetuate the more ominous practice of journalists or their sources fabricating stories entirely.”).

123. See Jeffrey Toobin, *Name That Source*, *The New Yorker*, Jan. 16, 2006, at 30, 32 (quoting Martin Kaplan, associate dean of Annenberg Sch. for Commc’ns).

124. One study, by Bryan Denham, looked at uses of anonymous attribution in *The Associated Press*, the *Los Angeles Times*, and *The Washington Post*, and found that the *Post* relied on such sources more often than the other two organizations. See Denham, *supra* note 122, at 573. Denham speculated that the *Post*’s emphasis on political coverage, coupled with the paper’s tendency to serve as a source of news leaks, contributed to that result. *Id.* at 574–75. Another study, examining the use of confidential sources in television news reports about the Bill Clinton-Monica Lewinsky scandal, labeled Washington, D.C. “the anonymous-source capital of the world.” Steven A. Esposito, *Anonymous White House Sources: How They Helped Shape Television News Coverage of the Bill Clinton-Monica Lewinsky Investigation*, *Comm. & L.*, Sept. 1995, at 1, 15.

gerous speculation.<sup>125</sup> A blurb that appeared in *Newsweek* in May 2005 stated that U.S. officials would soon report that guards at the detention center in Guantánamo Bay had been accused of desecrating detainees' copies of the Quran, even flushing one copy down a toilet.<sup>126</sup> The information was cited to "sources."<sup>127</sup> The report sparked riots abroad that left at least sixteen people dead.<sup>128</sup> Later that month, *Newsweek* retracted the report, saying that "[o]ur original source later said he couldn't be certain" about his information's accuracy.<sup>129</sup> The dangerous speculation did not damage the source's reputation; although it retracted its report, *Newsweek* maintained its promise of confidentiality.<sup>130</sup> Confidential sources also contributed to the mistaken belief that Saddam Hussein's regime had weapons of mass destruction. *The New York Times*, by its own admission, published a string of articles that helped legitimize the faulty intelligence.<sup>131</sup> A list of those flawed articles compiled by the *Times*<sup>132</sup> reveals journalism heavily reliant on confidential sources, identified with labels such as "[a] senior Bush administration official,"<sup>133</sup> "officials,"<sup>134</sup> and "military officers and weapons experts."<sup>135</sup> Confidentiality protected those sources from accountability.<sup>136</sup>

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125. In some cases, however, confidentiality may lead sources to make more honest assessments. See Pearlstine, *supra* note 92, at 4 ("[M]ost journalists believe information from anonymous sources is more trustworthy than the canned, on-the-record quotes printed in press releases and uttered at news conferences by government officials, executives, and celebrities.").

126. Michael Isikoff & John Barry, *Gitmo: SouthCom Showdown*, *Newsweek*, May 9, 2005, at 10, 10.

127. *Id.*

128. See Carlotta Gall, *Muslims' Anti-American Protests Spread from Afghanistan*, *N.Y. Times*, May 14, 2005, at A3.

129. Mark Whitaker, *The Editor's Desk*, *Newsweek*, May 23, 2005, at 6, 6. The retraction did not explain why the original report cited "sources" even though it was provided by a single source.

130. See *id.* (withholding source's name); see also Jack Shafer, *Down the Toilet at Newsweek*, *Slate*, May 17, 2005, at <http://www.slate.com/id/2118826/> (on file with the *Columbia Law Review*) ("[Newsweek] let its anonymous sources *predict* the contents of a future government document, a journalistic no-no as far as I'm concerned.").

131. See *From the Editors, The Times and Iraq*, *N.Y. Times*, May 26, 2004, at A10 (admitting that much of *Times's* prewar reporting "was not as rigorous as it should have been").

132. See *The Times and Iraq: A Sample of the Coverage*, *N.Y. Times*, May 26, 2004, at <http://nytimes.com/critique> (on file with the *Columbia Law Review*).

133. Patrick E. Tyler & John Tagliabue, *Czechs Confirm Iraqi Agent Met with Terror Ringleader*, *N.Y. Times*, Oct. 27, 2001, at A1.

134. Judith Miller, *Defectors Bolster U.S. Case Against Iraq, Officials Say*, *N.Y. Times*, Jan. 24, 2003, at A11.

135. Judith Miller, *U.S.-Led Forces Occupy Baghdad Complex Filled with Chemical Agents*, *N.Y. Times*, Apr. 24, 2003, at A19.

136. See Edward Wasserman, *A Critique of Source Confidentiality*, 19 *Notre Dame J.L. Ethics & Pub. Pol'y* 553, 563 (2005) ("[S]ecrecy may . . . hinder accountability by interposing the journalist between informant and public, and preventing third-parties from challenging sources over inaccuracies, indiscretions, or lies.").

3. *Decreased Flow of Information.* — Thus far, Part II.A has described concerns about the *quality* of information cited to unnamed sources. But confidentiality may also reduce the *quantity* of information that reaches the public. A journalist's privilege, then, may counteract the public interest in the free flow of information.

Empirical studies have tried to calculate whether an inability to promise confidentiality would hamper journalists' ability to gather news.<sup>137</sup> Lillian BeVier poses a different question: How many unnamed sources would provide information on the record if journalists refused to grant them anonymity?<sup>138</sup> When a source goes unnamed, the information from that source is necessarily incomplete.<sup>139</sup> Confidentiality reduces the impact of information even when that information is accurate. Various motives compel sources to release information, and some of those motives, if revealed, would portray the information in a different light.<sup>140</sup> The public will be more inclined to trust a source motivated by a desire to uncover truth than a source motivated by a desire to smear a political rival.<sup>141</sup> News cited to an unnamed source is more likely to be treated skeptically by a public that, as Part II.A has demonstrated, has too often been burned by confidential sources.

137. See *supra* note 31.

138. See BeVier, *supra* note 31, at 475–76 (“[W]e do not know how much [confidentially sourced] information is from sources *who would not have disclosed it without a credible promise of confidentiality that included information sought in the course of litigation.*”). Researchers have not overlooked this point entirely. See, e.g., Blasi, *supra* note 31, at 241–42 (“Many editors and reporters feel that reporters could get a great deal more information on the record if they pressed their sources more aggressively and were less concerned about really being on the ‘inside.’”).

139. See BeVier, *supra* note 31, at 478 (“[W]hen 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.”).

140. For a discussion of the various motives—pure and impure—that can motivate so-called “whistleblowers,” see generally Terry Morehead Dworkin & Elletta Sangrey Callahan, *Employee Disclosures to the Media: When Is a “Source” a “Sourcerer”?*, 15 *Hastings Comm. & Ent. L.J.* 357 (1992). For one writer's classification of the reasons that motivate someone to leak information to a journalist, see Ryan Grim, *The Art of the Leak*, *Politico*, Nov. 14, 2007, at <http://www.politico.com/news/stories/1107/6895.html> (on file with the *Columbia Law Review*).

141. The disclosure of Valerie Plame's identity, see *supra* notes 92–93 and accompanying text, offers a prime example of how a source's motives can alter how that source's information is perceived. The source whose identity Judith Miller sought to withhold turned out to be Scooter Libby, the chief of staff to Vice President Dick Cheney. See David Johnston & Douglas Jehl, *Times Reporter Free from Jail; She Will Testify*, *N.Y. Times*, Sept. 30, 2005, at A1. Some commentators who believe Miller deserved the protection of a journalist's privilege not to testify also believe that the promise of confidentiality to Libby, who seemed to be motivated by political revenge, failed to serve the public interest. See Lewis, *Public Lecture*, *supra* note 27, at 18 (calling Miller case “not an example of the press performing its vital function as a whistle-blower, exposing official wrongs”). Norman Pearlstine argues that “[t]he source who seeks confidentiality should typically be risking livelihood, life, or reputation.” Pearlstine, *supra* note 92, at 252.

## B. Requirements for the Proper Use of Confidential Sources

News organizations themselves have confronted the problems with confidential sources described in Part II.A. In response, many have reemphasized guidelines governing the proper use of such sources.<sup>142</sup> The media outlets' concern demonstrates acceptance of the notion that, despite federal courts' deferential and fixed treatment of journalistic uses of confidential sources, such uses do not necessarily benefit the public.

Drawing on guidelines in place at major news organizations including The Associated Press, *The New York Times*, the *Los Angeles Times*, and *The Washington Post*, Part II.B describes the procedural mechanisms the journalism literature recommends to maximize the public interest served by the use of information from a confidential source. From those guidelines, this Note distills three basic procedural ideals. First is what can be called the "last resort" rule: Information attributed to a confidential source should be used only when the source cannot be persuaded to go on the record and the source's information cannot be verified by an on-the-record source. Second is the "deliberation" requirement: Before publishing or broadcasting a confidential source's information, reporters and editors should meet to consider the benefits and drawbacks of doing so. And third, journalism that relies on a confidential source must strive to uphold the principle of "transparency": Information attributed to an unnamed source should be accompanied by a thorough explanation of why the news organization believed the source merited confidentiality.

1. *Last Resort*. — Calls to identify sources have echoed through the journalism industry for decades.<sup>143</sup> But following recent controversies caused at least in part by the use of confidential sources,<sup>144</sup> news organizations have renewed their efforts to curtail confidential sourcing.<sup>145</sup>

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142. See Strupp, *supra* note 9, at 34–35 ("Nearly all of the nation's major newspapers and news services have either rewritten their policies on sourcing, or at least reminded journalists of their existence . . .").

143. See, e.g., Comm'n on Freedom of the Press, *A Free and Responsible Press* 25 (1947) ("If the veracity of statements is to be appraised, those who offer them must be known. Identification of source is necessary to a free society."); Gene Foreman, *Confidential Sources: Testing the Readers' Confidence*, *Nieman Rep.*, Summer 1984, reprinted in *Nieman Rep.*, Winter 1999/2000, at 123, 123 ("The use of unnamed sources in a news story should be a last resort, not just an easy alternative to documenting the information from the public record or quoting someone willing to be named.")

144. See *supra* Part II.A (describing problematic uses of anonymous sources).

145. See, e.g., Hilliard et al., *supra* note 116, at 17 (describing new *USA Today* guidelines stating that "[a]nonymous sources must be cited only as a last resort"); Jonathan D. Glater, *Keeping CBS's Eye on Its Own World*, *N.Y. Times*, Jan. 15, 2005, at C1 (describing renewed commitment to sourcing standards by CBS News); David Cay Johnston, *Newsweek Vows to Curb Anonymity*, *N.Y. Times*, May 23, 2005, at C6 (describing *Newsweek* pledge to "tightly limit the use of unnamed sources"); Memorandum from The N.Y. Times Co., *Confidential News Sources* (Feb. 25, 2004), available at <http://www.asne.org/images/nytpolicyonconfidentialnewssources.pdf> (on file with the *Columbia Law Review*) [hereinafter *N.Y. Times, Confidential News Sources*] (restating sourcing policy).

That approach accords with customary journalistic standards.<sup>146</sup> Policies often require reporters to resist requests for confidentiality, even if that costs the reporters a chance to learn new information.<sup>147</sup>

Restrictions on the type of information journalists can attribute to a confidential source help enforce the last-resort rule. Policies seek to limit what journalists cite to confidential sources to information that is “important,” not “trivial, obvious or self-serving.”<sup>148</sup> The journalist should try to verify the information elsewhere.<sup>149</sup> When that is not possible, the information should be within the source’s direct knowledge<sup>150</sup>—a requirement intended to reduce speculation without accountability.<sup>151</sup> Journalistic standards also forbid the use of confidentiality promises to protect a source who launches personal attacks.<sup>152</sup>

2. *Deliberation.* — Guidelines strip reporters of unilateral power to grant confidentiality. The policies respond to concerns that reporters may become “agents” of their confidential sources.<sup>153</sup> At many media organizations, at least one editor must know the identity of a reporter’s

Reform efforts have reached beyond the news organizations linked to recent scandals. See Lorne Manly, *Big News Media Join in Push to Limit Use of Unidentified Sources*, N.Y. Times, May 23, 2005, at C1 (describing industry-wide emphasis on proper use of confidential sources).

146. See, e.g., Am. Soc’y of News Editors, *Statement of Principles* art. VI (Aug. 20, 1996), at <http://www.asne.org/kiosk/archive/principl.htm> (on file with the *Columbia Law Review*) (“Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly. Unless there is clear and pressing need to maintain confidences, sources of information should be identified.”).

147. See, e.g., Wash. Post, *Standards and Ethics* § D (Feb. 16, 1999), at <http://www.asne.org/ideas/codes/washingtonpost.htm> (on file with the *Columbia Law Review*) [hereinafter *Wash. Post Standards*] (“[R]eporters must make every reasonable effort to get it on the record. If that is not possible, reporters should consider seeking the information elsewhere.”).

148. L.A. Times, *Ethics Guidelines* (July 20, 2007), at <http://latimesblogs.latimes.com/readers/2007/07/los-angeles-tim.html> (on file with the *Columbia Law Review*) [hereinafter *L.A. Times Guidelines*].

149. Journalism ideals emphasize the need to verify even facts that seem self-evident. The traditional standard is: “If your mother says she loves you, check it out.” Bill Kovach & Tom Rosenstiel, *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* 90 (2001).

150. See, e.g., N.Y. Times, *Confidential News Sources*, *supra* note 145, at 2 (“Confidential sources must have direct knowledge of the information they are giving us—or they must be the authorized representatives of an authority, known to us, who has such knowledge.”).

151. See, e.g., L.A. Times *Guidelines*, *supra* note 148 (“Sources should never be permitted to use the shield of anonymity to voice speculation . . .”).

152. See, e.g., N.Y. Times, *Confidential News Sources*, *supra* note 145, at 2 (“We do not grant anonymity to people who use it as cover for a personal or partisan attack.”).

153. Ian Ayres raised this issue in criticizing Judith Miller’s reporting for *The New York Times*. See Ian Ayres, *First Amendment Bargains*, 18 *Yale J.L. & Human.* 178, 181–83 (2006) (questioning whether Miller’s loyalties lay with her source or her employer).

confidential source before publication.<sup>154</sup> The general principle is that “[w]hen anonymity is granted, reporter and source must understand that the commitment is undertaken by the newspaper, not alone by an individual journalist.”<sup>155</sup>

The rules intend to ensure that journalists will consider whether “the resulting news story [is] of such vital public interest that its news value outweighs the potential damage to trust and credibility.”<sup>156</sup> Toward that end, a policy may require a reporter to have a “thorough discussion” with an editor about whether a confidential source’s information can be obtained from a nonconfidential source.<sup>157</sup> The reporter and editor would also consider their confidential source’s reliability.<sup>158</sup> Even when reporting relies on corroborating confidential sources, “the reporter and editor must be satisfied that the sources are genuinely independent of one another, not connected behind the scenes in any kind of ‘echo chamber’ that negates the value of a cross-check.”<sup>159</sup>

3. *Transparency.* — Under journalism’s procedural guidelines, the public is the last defense against the improper use of confidential sources. In the interest of transparency,<sup>160</sup> journalists who use confidential sources are urged to provide as much information about sources as possible, a process that entails negotiating for a descriptive form of attribution.<sup>161</sup>

It also requires explaining why a source requested and was granted confidentiality.<sup>162</sup> The requirement serves the public interest not only by providing more information about the source, but also by enabling the public to monitor whether news organizations are adhering to sourcing procedures.<sup>163</sup> Edward Wasserman has described the benefits of an “ex-

154. See, e.g., Associated Press, Statement of News Values and Principles (Feb. 16, 2006), available at <http://www.ap.org/newsvalues/index.html> (on file with the *Columbia Law Review*) [hereinafter A.P. News Values].

155. N.Y. Times, Confidential News Sources, *supra* note 145, at 2.

156. S.F. Chronicle, Ethical News Gathering § 6(a) (Feb. 17, 1999), available at <http://www.asne.org/ideas/codes/sanfranciscochronicle.htm> (on file with the *Columbia Law Review*).

157. See, e.g., San Jose Mercury News, Ethics Policy (May 2004), available at <http://www.mercurynews.com/ethicspolicy> (on file with the *Columbia Law Review*).

158. See, e.g., N.Y. Times, Confidential News Sources, *supra* note 145, at 4 (discussing when corroborating sources may be necessary).

159. *Id.*

160. See Kovach & Rosenstiel, *supra* note 149, at 80–84 (discussing virtues of transparency in journalism).

161. See, e.g., N.Y. Times, Confidential News Sources, *supra* note 145, at 3 (“When we agree to anonymity, the reporter’s duty is to obtain terms that conceal as little as possible of what the reader needs to gauge reliability.”).

162. See, e.g., A.P. News Values, *supra* note 154 (“We must explain in the story why the source requested anonymity.”); Wash. Post Standards, *supra* note 147, § D (“[R]eporters should request an on-the-record reason for concealing the source’s identity and should include the reason in the story.”).

163. Norman Pearlstine, the former editor-in-chief of *Time*, makes this point explicit in the model editorial guidelines he presents as a model for news organizations to follow.

pressibility test”<sup>164</sup> requiring journalists to explain why they relied on a particular confidential source.<sup>165</sup> If the journalist cannot express adequate ethical justification for confidentiality, then perhaps confidentiality should not have been granted.<sup>166</sup> Wasserman acknowledges that the expressibility test is susceptible to journalists’ false assurances of their sources’ motives and reliability.<sup>167</sup> Nonetheless, Wasserman concludes, “expressibility offers a place to stand in examining the ethics of confidentiality arrangements, and post-facto explanations can be scrutinized for their plausibility and reasonableness.”<sup>168</sup>

### C. *The Media’s Race-to-the-Bottom Problem*

Part II.C examines the forces that can counteract journalism’s procedural mechanisms. News organizations’ newfound commitment to the proper use of confidential sources appears to have decreased, but not eliminated, the misuse and overuse of such sources. Procedural rules struggle to resist market pressures, which can tempt news organizations to enforce their guidelines loosely. In this competitive environment, a race to the bottom thwarts attempts to unify media outlets against the haphazard use of confidential sources.

1. *Mixed Success of Sourcing Guidelines.* — The recent emphasis on procedural guidelines appears to have improved the quality of journalism.<sup>169</sup> But problems persist. Blake Morant argues that journalism guidelines yield benefits,<sup>170</sup> but those benefits are limited by the “blatantly amorphous language” of the guidelines’ provisions.<sup>171</sup> Indeed, some journalism produced in the wake of reform efforts stretches the rules. Rather than being used as a last resort,<sup>172</sup> such as to uncover information especially valuable to the public interest, confidentiality still emerges as a

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See Pearlstine, *supra* note 92, app. at 260 (“Readers and viewers should know why we have decided to grant anonymity to a source.”).

164. Wasserman’s “expressibility test” draws upon the work of Annette Baier. See Wasserman, *supra* note 136, at 556 n.6 (citing Annette C. Baier, *Moral Prejudices: Essays on Ethics* 120–25 (1994)).

165. *Id.* at 567.

166. *Id.* at 567–68.

167. See *id.* at 568 (“After the fact, either party to the agreement can buff his or her view of the relationship to make it morally pristine.”).

168. *Id.* That scrutiny sometimes reveals empty explanations. See, e.g., Clark Hoyt, *The Public Editor, Culling the Anonymous Sources*, *N.Y. Times*, June 8, 2008, § 4, at 12 (describing study’s finding that “nearly 80 percent” of anonymous sources cited in *New York Times* “were still not adequately described to readers” despite policy requiring such explanations).

169. See Strupp, *supra* note 9, at 34, 36 (summarizing studies finding decreased dependence on confidential sources).

170. See Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 *Notre Dame J.L. Ethics & Pub. Pol’y* 595, 619 (2005) (“Consciousness-raising produced by ethical codes constitutes a critical component in responsible, journalistic behavior.”).

171. *Id.* at 613–14.

172. See *supra* Part II.B.1 (discussing industry guidelines’ last-resort requirement).

tool to mask sources of political gossip<sup>173</sup> and personal attacks.<sup>174</sup> Although procedures urge journalists to resist requests for confidentiality,<sup>175</sup> some journalists still offer anonymity without being prompted.<sup>176</sup> Furthermore, explanations of why sources were granted anonymity<sup>177</sup> sometimes fail to provide additional context.<sup>178</sup>

2. *Competitive Pressures.* — If vague guidelines open the door to journalism that fails to serve the public interest,<sup>179</sup> competitive pressures may push news outlets across the threshold.<sup>180</sup> The constant hunt for “scoops”—exclusive stories that win the attention of readers, bosses, and awards committees—can lead journalists down a slippery ethical slope.<sup>181</sup> Ideally, the pressure to uncover scoops serves the public interest by increasing the amount of information that flows to the public. In practice, it can harm the public interest by leading to the release of bad information. Stories exposed as downright false probably damage the reputation of the organization that reported them more than they damage the pub-

173. See, e.g., Jack Shafer, *Anonymice Devour Times*, *Slate*, Apr. 21, 2006, at <http://www.slate.com/id/2140423/> (on file with the *Columbia Law Review*) [hereinafter Shafer, *Anonymice*] (describing prevalence of unnamed sources in *New York Times* article about potential personnel changes in White House Counsel’s office).

174. See Jack Shafer, *Lord of the Pigs?*, *Slate*, July 27, 2005, at <http://www.slate.com/id/2121636/> (on file with the *Columbia Law Review*) (criticizing *New York Times* for printing unnamed source’s quote accusing movie director Peter Jackson of “piggishness”). Shafer, the media critic for *Slate*, frequently highlights journalistic uses of what he calls “anonymice,” which he defines as “those pesky, gratuitous, and sometimes misleading unnamed sources I’ve railed about again and again.” Shafer, *Anonymice*, *supra* note 173. For more columns by Shafer addressing confidential sources, see, e.g., Jack Shafer, *Anonymice Infestation!*, *Slate*, Nov. 17, 2004, at <http://www.slate.com/id/2109873/> (on file with the *Columbia Law Review*) (decriing use of twenty-two anonymous quotes in single *New York Times* article); Jack Shafer, *Pampered Anonymice*, *Slate*, Nov. 3, 2003, at <http://www.slate.com/id/2090660/> (on file with the *Columbia Law Review*) (criticizing reliance on “anonymice” to source article on Iraq’s flat tax).

175. See *supra* note 147 and accompanying text.

176. See *Offering Anonymity Too Easily to Sources*, *Nieman Rep.*, Summer 2005, at 42, 43 (quoting Lucy Dalglish, executive director of Reporters Comm. for Freedom of the Press, as saying, “In the past few weeks reporters have called, and the first thing out of their mouth is, ‘You want to go off the record?’”).

177. See *supra* notes 164–168 and accompanying text (discussing “expressibility test”).

178. See Daniel Okrent, *The Public Editor*, *An Electrician from the Ukrainian Town of Lutsk*, *N.Y. Times*, June 13, 2004, § 4, at 2 (highlighting uninformative and misleading descriptions); Daniel Engber, *What’s a Senior Administration Official?*, *Slate*, Nov. 18, 2005, at <http://www.slate.com/id/2130669/> (on file with the *Columbia Law Review*) (same).

179. See *supra* note 171 and accompanying text.

180. See Morant, *supra* note 170, at 614 (“Even if the problems associated with ambiguity were resolved, the natural and somewhat pervasive competition for audience and ratings can overshadow the objectives of ethical codes.”).

181. See Marianne M. Jennings, *Where Are Our Minds and What Are We Thinking? Virtue Ethics for a “Perfidious” Media*, 19 *Notre Dame J.L. Ethics & Pub. Pol’y* 637, 676 (2005) (“The sense that ‘the scoop is everything’ . . . [has] contributed to the clouded judgment of individuals, newsrooms, editors, and their newspapers.”).

lic interest.<sup>182</sup> But misinformation in scoops can be difficult to detect. A reporter may barter for scoops, guaranteeing more favorable coverage to sources who feed them information before releasing it to the reporter's competitors.<sup>183</sup> The emergence of electronic media exacerbates the strain on procedural restrictions. The ability to disseminate news instantly online can tempt the press to release reports hastily, sacrificing verification for exclusivity.<sup>184</sup> With more news outlets, sources also have more opportunities to find a reporter willing to grant them confidentiality.<sup>185</sup>

3. *Failed Attempts to Unite Against Improper Sourcing.* — A news organization can distinguish itself from the competition by adhering more strictly to journalistic standards. But this approach has its limits. In the early 1970s, *The Washington Post's* executive editor, Ben Bradlee, instituted a novel strategy in the fight against confidential sources: He banned them.<sup>186</sup> It was a bold move for a paper based in Washington,

182. The most famous recent example of a false scoop occurred in 2004, when the *New York Post* reported on its front page, without attribution, that Democratic presidential candidate John Kerry had selected Dick Gephardt to be his running mate. See Kerry's Choice: Dem Picks Gephardt as VP Candidate, N.Y. Post, July 6, 2004, at 1. The day the report appeared, Kerry named John Edwards as his running mate. See Kerry's Choice: Dem Picks Edwards as VP Candidate (Really), N.Y. Post, July 7, 2004, at 1.

183. In 2005, for example, Columbia University released the results of an investigation into allegations of anti-Semitism by professors to *The New York Times* one day before the results were to be made public. The *Times* reported the findings, which cleared the professors of wrongdoing, on its front page. See Karen W. Arenson, Columbia Panel Clears Professors of Anti-Semitism, N.Y. Times, Mar. 31, 2005, at A1. It was later revealed that in return for the early access to the information, the *Times* promised Columbia that its article would not "seek reaction from other interested parties," such as those who might cast doubt on the findings. See Daniel Okrent, The Public Editor, EXTRA! EXTRA! Read Not Quite Everything About It!, N.Y. Times, Apr. 10, 2005, § 4, at 12.

184. See Ron F. Smith, Groping for Ethics in Journalism 46–48 (4th ed. 1999) (analyzing electronic media's effect on competitive pressures).

185. Cf. Alicia C. Shepard, Anonymous Sources, Am. Journalism Rev., Dec. 1994, at 18, 18 (discussing 1979 study in which most editors surveyed "said competition forced them to use unnamed sources").

186. See Ben H. Bagdikian, When the *Post* Banned Anonymous Sources, Am. Journalism Rev., Aug.–Sept. 2005, at 33, 33. The lexicon of journalist-source relationships recognizes different degrees of confidentiality. *Off the Record*, the recent book by former Time Inc. editor-in-chief Norman Pearlstine, defines some of the familiar terms. See Pearlstine, *supra* note 92, app. at 261. In order of lowest to highest degree of confidentiality, information may be presented "on the record," meaning "[t]he source can be named and identified by title, rank, job description, or other relevant information"; on "background" or "not for attribution," meaning "[t]he quote or information may be used for publication, provided the source is not identified by name"; on "deep background," meaning "[t]he information can be used in or to inform a story and it can lead a journalist to other sources for confirmation"; or "off the record," meaning "[t]he quote or information from the source may not be used in a story or for further reporting." *Id.* Sometimes, journalists and sources add further nuance to those terms. Matt Cooper, the *Time* reporter subpoenaed to name the source who told him about Valerie Plame, see *supra* note 92 and accompanying text, famously wrote in an email that one source, Karl Rove, had provided information on "double super secret background." See Pearlstine,

D.C., where sources routinely request confidentiality.<sup>187</sup> Too bold, it turned out. Reporters from other organizations did not follow the *Post*'s lead.<sup>188</sup> As a result, they reported news that went unmentioned in the *Post*.<sup>189</sup> Bradlee, stung by the missed stories, ended the experiment after two days.<sup>190</sup>

More recently, Dan Okrent, the first ombudsman at *The New York Times*, tried to rally support for a unified stance against Washington politicians' off-the-record briefings.<sup>191</sup> Okrent implored The Associated Press and the five largest-circulating newspapers in the nation—*USA Today*, *The Wall Street Journal*, *The New York Times*, the *Los Angeles Times*, and *The Washington Post*—to “jointly agree not to cover group briefings conducted by government officials and other political figures who refuse to allow their names to be used.”<sup>192</sup> Weeks later, Okrent reported that only Ken Paulson, the editor of *USA Today*, responded to his proposal—and that was to say that although *USA Today* “has frequently objected to the anonymity rules of background briefings, . . . it nonetheless feels required to report on the briefings because, Paulson said, ‘our primary obligation is to keep our readers fully informed.’”<sup>193</sup>

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Parts I and II of this Note described the disconnect between federal courts' and journalists' treatment of the public interest served by confidential sources. Within Part II, a second disconnect emerged: between journalistic ideals, as expressed in industry guidelines, and journalistic practice. The following Part offers a proposal that seeks to bridge both divides.

### III. TOWARD A MORE PRECISE CALCULATION OF THE NEWSGATHERING INTEREST

Imagine a newspaper reporter named Hamilton who receives a call from a man named Adams.<sup>194</sup> “I have a story,” Adams says. “But I’ll give

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supra note 92, at 102. Cooper later testified that “double super secret background” “was not ‘a journalistic term of art,’ but a reference to the film *Animal House*, in which John Belushi’s wild Delta House fraternity is placed on ‘double secret probation.’” *Id.* at 128. Bradlee’s orders required *Post* reporters to walk out of “background” briefings and to announce that they would not listen to “off the record” briefings. See Bagdikian, *supra*, at 33.

187. See *supra* note 124.

188. See Bagdikian, *supra* note 186, at 33.

189. *Id.*

190. *Id.*

191. See Daniel Okrent, *The Public Editor, The Report, the Review and a Grandstand Play*, *N.Y. Times*, June 27, 2004, § 4, at 2.

192. *Id.*

193. Daniel Okrent, *The Public Editor, Q. How Was Your Vacation? A. Pretty Newsy, Thanks*, *N.Y. Times*, Sept. 12, 2004, § 4, at 2.

194. These names are inspired by Alexander Hamilton and Samuel Adams, Founding Fathers who also each founded a newspaper.

it to you only if you promise not to tell anyone my name.” Hamilton promises. “Last week,” Adams continues, “a terrorism suspect died while being interrogated at Guantanamo Bay.” The next morning, a front-page story published under Hamilton’s byline reports Adams’s tip, but does not identify him. A few months later, Hamilton receives a subpoena ordering her to appear at a federal courthouse to name her source. Determined to keep her promise, Hamilton seeks help from her newspaper’s lawyers, who submit a brief urging the court to recognize a journalist’s privilege protecting Hamilton’s right to withhold her source’s name. This hypothetical scenario will serve as a test case illustrating the mechanics and benefits of a new paradigm this Part proposes.

Part III argues that a journalist’s adherence to professional procedural ideals governing the use of a confidential source should inform how courts hearing journalist’s privilege cases weigh the public interest in newsgathering. A journalist’s adherence to guidelines would weigh in favor of preserving a source’s confidentiality; an indifference to guidelines would weigh in favor of compelling disclosure of the source’s identity. Part III.A proposes and defends a flexible approach, inspired by journalism’s procedural ideals, that courts can use to weigh the newsgathering interest in cases involving confidential sources. Part III.B elaborates two advantages of this approach. Part III.C anticipates and responds to five potential criticisms of this Note’s proposal.

#### A. *Four Decision Points in Designing a New Calculus of the Newsgathering Interest*

Using the Hamilton-Adams hypothetical as a test case, Part III.A recommends a new approach courts should take toward calculating the newsgathering interest in journalist’s privilege cases. The recommendation unfolds in four subsections, with each identifying a decision point between two paths the approach can follow. The new approach should treat the newsgathering interest as flexible, not fixed, to recognize the reality that how a journalist uses a confidential source affects the public interest. Given the need for a flexible approach, a procedural analysis is preferable to a substantive analysis because it would yield more predictable outcomes and because courts would be better suited to conduct the analysis. In adopting a procedural test, courts should look to the journalism literature, which reflects the media’s special expertise, rather than trying to devise their own procedural mechanisms. Finally, the test should be modeled not on journalism practices, but on journalism aspirations.

1. *Flexible vs. Fixed.* — Federal courts’ fixed treatment of the public interest in newsgathering across all cases involving confidential sources<sup>195</sup> overlooks evidence that some journalistic uses of confidential sources

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195. See *supra* Part I.C (describing federal courts’ fixed approach).

benefit the public more than others.<sup>196</sup> Courts should acknowledge that evidence by treating the newsgathering interest as flexible, affording it more or less weight based on the extent to which a journalist's use of a confidential source adhered to procedural guidelines. Under the facts of the Hamilton-Adams hypothetical, the court should be more inclined to recognize a privilege not to identify Adams if Hamilton can produce evidence that she tried to verify Adams's information, deliberated with an editor before publishing her story, and explained to readers why this use of a confidential source served the public interest.

This solution enhances, but does not replace, the current approach. The court would still need to weigh the interest in compelling Hamilton to name her source. Hence, it would consider the procedural context<sup>197</sup> alongside the relevance, availability, and necessity of Hamilton's testimony.<sup>198</sup> The goal of the flexible approach toward calculating both interests is to achieve a result more likely to serve the public interest. Where one side of the scale is weighed lightly, the other side carries a lower burden. For example, if aspects of Hamilton's use of a confidential source breached journalism's procedural standards, then the party seeking to overcome the privilege need not demonstrate the same degree of relevance, unavailability, and necessity of her testimony as it would if Hamilton had adhered to the procedures.

In treating the newsgathering interest as flexible, the court should first consider whether Hamilton made a good faith effort to verify Adams's facts. Journalism procedures emphasize that confidentiality should be offered only as a last resort.<sup>199</sup> Toward that end, those procedures discourage reliance on confidential sources for information that can be verified elsewhere.<sup>200</sup> A timeline chronicling Hamilton's work from the moment Adams called until the story's publication could indicate the extent to which Hamilton sought verification. Hamilton can strengthen her case by showing that after she received Adams's tip, she asked CIA officials to confirm or rebut the allegations. But she may need to explain why she published an article the morning after Adams's call, a timeframe that arguably suggests she was more interested in publishing a scoop than in maximizing the public interest by presenting vetted information.

The court's inquiry should also focus on the role of Hamilton's editors. Guidelines emphasize that where confidential sources are involved, journalism should be a collaborative process.<sup>201</sup> Hamilton's newspaper

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196. See *supra* Part II.A (describing potential harm caused by confidential sourcing).

197. See *supra* Part I.B.1 (showing that courts weigh interest in compelling testimony more heavily in grand jury proceedings than in criminal cases, and more heavily in criminal cases than in civil cases).

198. See *supra* note 73 and accompanying text (describing three-part test).

199. See *supra* Part II.B.1.

200. See *supra* note 149 and accompanying text.

201. See *supra* Part II.B.2.

can strengthen the privilege claim by showing that Hamilton and an editor deliberated before deciding this use of a confidential source was appropriate. Time-stamped notes from such a meeting could prove that they discussed Adams's credibility and motives, the potential availability of the information from an on-the-record source, and the extent to which the information's release might serve the public interest.

The principle of transparency requires justification for any journalistic reliance on a confidential source.<sup>202</sup> Rather than relaying Adams's information in its raw form, Hamilton's article should justify its use of that information. The court considering the privilege claim should scrutinize the explanation for "plausibility and reasonableness."<sup>203</sup> The explanation should first describe why the newspaper granted Adams confidentiality, a description that should address Adams's potential motives<sup>204</sup> and his credibility.<sup>205</sup> Then the explanation should describe why publishing Adams's information serves the public interest.<sup>206</sup>

2. *Procedural vs. Substantive.* — A flexible treatment of the newsgathering interest need not use a substantive test such as the one Judge Tatel proposed.<sup>207</sup> This Note recommends a procedural approach. Our laws have recognized the virtues of focusing on procedural regularity rather than judges' substantive findings. Corporate law embraces a business judgment rule that shields some corporate decisions from judicial review in circumstances where the decisions were made through appro-

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202. See *supra* Part II.B.3.

203. Wasserman, *supra* note 136, at 568; see *supra* notes 164–168 and accompanying text (discussing Wasserman's formulation of "expressibility test" for journalistic uses of confidential sources).

204. The explanation should address Adams's motives both for releasing the information and for requesting confidentiality. An example might read: "The source said he contacted the newspaper because he believed the public had a right to know about interrogation tactics used at Guantanamo Bay. He provided the information on the condition that he not be named because he feared that he would encounter physical harm if his identity were revealed."

205. A good faith attempt to pass the expressibility test might state: "The source has provided information to the newspaper in the past, and that information has always proven to be accurate. Furthermore, the newspaper believes the source is in a position to know about the inner workings of the CIA and interrogations at Guantanamo Bay."

206. In Hamilton's case, such an explanation should address the argument, raised often by the Bush Administration, that disclosures of information related to national security activities endanger the nation. See, e.g., Sheryl Gay Stolberg, *Bush Condemns Report on Sifting of Bank Records*, N.Y. Times, June 27, 2006, at A1 (quoting Vice President Cheney as asserting that "[s]ome in the press, in particular *The New York Times*, have made the job of defending against further terrorist attacks more difficult by insisting on publishing detailed information about vital national security programs"). Hamilton's article should explain why it believes the benefits of disclosure outweigh the harms. One possibility: "The newspaper believes this disclosure serves the public interest by informing citizens of their government's actions. Furthermore, we believe that a disclosure would put the nation at risk only if it revealed vulnerabilities in the national defense system that terrorists might target. This disclosure does not fall into that category."

207. See *supra* notes 96–102 and accompanying text (discussing Tatel's approach).

ropriate procedures.<sup>208</sup> If the substantive decision by the party seeking to invoke the rule was not procedurally sound, such as if the decision was ill-informed or tainted by bias, then the business judgment rule's protections evaporate.<sup>209</sup> The procedural approach this Note proposes functions as a sort of journalism judgment rule. The court, "ill-suited" to assess the substantive value of Adams's information,<sup>210</sup> instead analyzes whether the substantive valuation by Hamilton and her editor was conducted according to proper journalism procedures.

A procedural approach is less susceptible to the types of normative judgments that make the outcome of the *Tatel* test, which measures the news value of particular information,<sup>211</sup> unpredictable.<sup>212</sup> To *Tatel*, the leak of Valerie Plame's identity "had marginal news value."<sup>213</sup> Some commentators echo his conclusion.<sup>214</sup> But others disagree. *The Wall Street Journal's* editorial board, for example, wrote that one person who disclosed the information to a reporter, Karl Rove, "deserves a prize" for "exposing a case of CIA nepotism involving Joseph Wilson and his wife, Valerie Plame."<sup>215</sup> The disagreement proves that news value is highly subjective. *Tatel's* substantive approach also varies depending on the point at which the court calculates information's value. *Tatel* based his conclusion on a measurement taken at the moment the source revealed

208. See *Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985) (discussing business judgment rule under Delaware corporate law); *Auerbach v. Bennett*, 393 N.E.2d 994, 1002 (N.Y. 1979) ("While the court may properly inquire as to the adequacy and appropriateness of the committee's investigative procedures and methodologies, it may not under the guise of consideration of such factors trespass in the domain of business judgment.").

209. See *Auerbach*, 393 N.E.2d at 1003 ("Proof . . . that the investigation has been so restricted in scope, so shallow in execution, or otherwise so *pro forma* or halfhearted as to constitute a pretext or sham . . . would raise questions of good faith or conceivably fraud which would never be shielded by that doctrine.").

210. *Lee v. Dep't of Justice*, 401 F. Supp. 2d 123, 139 (D.D.C. 2005); see also *supra* notes 107–108 and accompanying text (discussing *Lee's* rejection of *Tatel* proposal).

211. See *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 1001 (D.C. Cir. 2005) (*Tatel, J., concurring*) (asking whether "sources released information more harmful than newsworthy"); see also *supra* notes 96–102 (discussing *Tatel* approach).

212. See *Eliason*, *supra* note 25, at 435 ("If the privilege is left to turn on a standard such as 'newsworthiness,' then courts are put in the inevitable position of making normative judgments about the importance to the public of particular reporting, based on its content."); *Lee*, *supra* note 74, at 669 ("[N]ews value is purely subjective and a source would have to be clairvoyant to anticipate how a court would later balance the newsworthiness of a leak against its harmful effects.").

213. 397 F.3d at 1002 (*Tatel, J., concurring*); see also *supra* note 102 and accompanying text (discussing *Tatel's* analysis of information's value).

214. See *Lewis*, Public Lecture, *supra* note 27, at 18 (asking, in reference to Plame disclosure, "What is the public interest in protecting the author of that nasty business?"); *Stone*, *supra* note 29, at 56 (arguing that disclosure of Plame's identity was not "information of substantial value"); see also *supra* note 104 (noting *Lewis's* and *Stone's* opinions toward *Tatel* test).

215. Editorial, *Karl Rove, Whistleblower*, *Wall St. J.*, July 13, 2005, at A13.

the information.<sup>216</sup> He also noted that Matthew Cooper presented the information not as his source intended, but as evidence of Bush Administration misdeeds, in the form of smear tactics against political rivals.<sup>217</sup> One can agree with Tatel's assessment that the information, when leaked, was harmful, yet conclude that the same information, filtered through Cooper, was newsworthy because it exposed the leaker's dirty tricks.<sup>218</sup>

A procedural test asks an objective question: whether the journalist seeking to invoke the privilege followed procedures. This approach increases predictability by giving both news organizations and sources some control over whether a court will recognize a journalist's privilege.<sup>219</sup> In doing so, it rebuts the argument that any qualified privilege hinging on case-specific facts will be unpredictable<sup>220</sup> and thus will destroy the incentives the privilege intends to create.<sup>221</sup> A journalist who follows procedures in using a confidential source knows that doing so increases the likelihood a court will recognize the privilege. Similarly, a source who chooses a reputable journalist can feel more confident that a court will honor the source's confidentiality.<sup>222</sup>

3. *Industry Procedures vs. Judicially Fashioned Procedures.* — Having opted for a procedural rather than substantive approach, the issue becomes whose procedures to follow. This Note's proposal embraces procedures described in journalism guidelines rather than procedures to be created by courts at common law. The law often adopts industry customs

216. 397 F.3d at 1003 (Tatel, J., concurring) ("It thus makes no difference how these reporters responded to the information they received . . .").

217. *Id.* ("[Cooper's] story revealed a suspicious confluence of leaks, contributing to the outcry that led to this investigation.")

218. The Supreme Court has recognized the role that editorial process plays in filtering information. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.")

219. That is not to say this model *eliminates* uncertainty in privilege claims. The model, after all, applies to just one side of the balancing test: the interest in newsgathering. Even if journalist and source could guarantee full compliance with procedural mechanisms, they would remain unable to predict the factors that affect the other interest: whether testimony is sought in a grand jury, criminal, or civil context, and whether the testimony satisfies the relevance, unavailability, and necessity test. Vaguely worded procedural guidelines also lead to uncertainty. See *supra* note 171 and accompanying text (discussing vagueness of journalism guidelines); see also *infra* Part III.C.4 (responding to concerns about approach's reliance on vague provisions).

220. See Eric M. Freedman, *Reconstructing Journalists' Privilege*, 29 *Cardozo L. Rev.* 1381, 1388 (2008) ("[A]ny qualified reportorial privilege which depends on judicial balancing of the importance of disclosure in individual cases . . . provides no predictable standard for when disclosure will occur . . .").

221. See Stone, *supra* note 29, at 52 (arguing that qualified privilege "disregards the cost to society of all the disclosures that sources *do not make* because they are chilled by the uncertainty of the qualified privilege").

222. For a more detailed discussion of the incentivizing effects this Note's recommendation would have, see *infra* Part III.B.1.

in contexts where courts lack specialized knowledge.<sup>223</sup> For all the debate they inspire, journalist's privilege cases remain rare.<sup>224</sup> Hence, a model based on judicially crafted procedures could take decades to develop.<sup>225</sup> Journalism guidelines, however, evolve in response to modern concerns.<sup>226</sup> Existing procedures offer journalists a constantly updating benchmark for how to maximize the chance that a court will recognize a privilege not to identify a confidential source.

4. *Aspirational Practices vs. Actual Practices.* — Having decided to base the model on journalism standards, the question becomes whether to rely on those standards as journalists actually practice them or as journalists aspire to practice them. This Note recommends a model based on aspirations: The requirements for a journalist seeking to invoke the privilege should resemble the procedural mechanisms described in the guidelines,<sup>227</sup> not the procedural mechanisms followed (or ignored) in the competitive media market.<sup>228</sup>

Although this proposal relies on the journalism literature rather than on judicially crafted rules, it is less deferential than the courts' current approach, which assumes that all journalistic uses of confidential sources serve the public interest.<sup>229</sup> Tellingly, an aspirational model would not necessarily please journalists, who would prefer that courts treat all journalistic uses of confidential sources as worthy of protection.<sup>230</sup> As one privilege proponent warns, "By basing the reporter's priv-

223. See Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 Va. L. Rev. 85, 85–86 (1992) ("Reliance upon customary practices reduces many of the problems of knowledge for the legal system.").

224. The U.S. Department of Justice, responding to a Freedom of Information Act request, said it issued "approximately 65" subpoenas to journalists from 2001 through 2006, which works out to an average of about eleven per year. See Reporters Comm. for Freedom of the Press, *Shields and Subpoenas: The Reporter's Privilege in Federal Courts*, at [http://www.rcfp.org/shields\\_and\\_subpoenas.html](http://www.rcfp.org/shields_and_subpoenas.html) (last updated June 27, 2008) (on file with the *Columbia Law Review*).

225. Furthermore, procedures devised from case law may quickly become ill-suited to a fast-moving media environment. An analogy can be drawn here to "regulatory lag," where government regulations fail to keep pace with new developments. See Teresa Moran Schwartz, *Regulatory Standards and Products Liability: Striking the Right Balance Between the Two*, 30 U. Mich. J.L. Reform 431, 444–45 (1997) (explaining that "government standards frequently become outdated" because of time-consuming "administrative rulemaking procedures").

226. See *supra* note 142 and accompanying text (noting renewed emphasis on procedural guidelines in wake of recent scandals).

227. See *supra* Part II.B (discussing procedural mechanisms for use of confidential sources).

228. See *supra* Part II.C.2 (discussing pressures that trigger race to the bottom).

229. See Eliason, *supra* note 25, at 446 ("There is reason to doubt the accepted wisdom that a federal reporter's privilege law would have any real impact on the press or on the willingness of the sources to come forward. Lawmakers should not simply accept at face value the alleged benefits of a privilege.").

230. See BeVier, *supra* note 31, at 470 ("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

ilege on the argument that it promotes the public interest, the press runs the risk that the public will disagree.”<sup>231</sup> The aspirational guidelines reflect a standard that journalists endorse, yet acknowledge they struggle to follow.<sup>232</sup> The beginning of the next section explains how this Note’s model would help journalists realize their aspirations.

B. *Two Additional Benefits of a Flexible Procedural Approach Based on Industry Ideals*

Part III.B highlights two benefits, in addition to those discussed in Part III.A, of a flexible procedural approach to calculating the newsgathering interest in journalist’s privilege cases involving confidential sources. First, this model provides incentives to journalists and sources to present information in a manner that serves the public interest. Second, this model solves the problem of how to define who qualifies as a journalist entitled to seek the privilege.

1. *Solving the Race-to-the-Bottom Problem.* — Basing privilege decisions in part on whether a particular use of a confidential source adhered to journalism procedures would help counteract the race to the bottom that hampers the media’s efforts to enforce procedural guidelines.<sup>233</sup> A news organization’s reputation suffers when one of its journalists violates a promise of confidentiality.<sup>234</sup> Placing some control over the outcome of a privilege claim with the news organization encourages procedural adherence.<sup>235</sup> The temptation to succumb to competitive pressures, which often fail to serve the public interest,<sup>236</sup> now comes with a price: an increased risk of being forced to disclose confidential sources’ identities. A newspaper that emphasizes procedural adherence may miss out on off-the-record briefings and other daily bits of information that appear in its

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citizens or to being held legally accountable in *any* context, suggests that the press . . . regard[s] itself as above the law.”). But see Blasi, *supra* note 31, at 284 (“[N]ewsmen prefer a flexible ad hoc qualified privilege to an inflexible per se qualified privilege.”).

231. Jane Kirtley, *Protecting the Privilege: The Argument that Shielding Sources’ Identities Serves the “Public Interest” Actually Hurts Press Freedom*, *Am. Journalism Rev.*, Dec.–Jan. 2006, at 70, 70.

232. See generally *supra* Parts II.C.2–3 (discussing competitive pressures and race-to-the-bottom problem).

233. See generally *supra* Part II.C (discussing race-to-the-bottom problem).

234. The journalism community does not necessarily recognize a distinction between journalists who break confidentiality promises because they are untrustworthy and journalists who break such promises because a court ordered them to do so. Many believe a court order is not a valid reason to identify a confidential source, even if refusing the order lands the reporter in jail. Norman Pearlstine, the former Time Inc. editor-in-chief, encountered sharp criticism from journalists after he turned over evidence under court order. See Pearlstine, *supra* note 92, at 128–36 (recounting and responding to journalists’ criticism).

235. See *supra* Part III.A.2 (explaining why procedural model gives news organizations more control over outcome of privilege cases).

236. See *supra* Part II.C.2 (discussing how competitive pressures weaken procedural guidelines).

competitors' pages.<sup>237</sup> But when a major story comes along, that paper is more likely to be the one a source seeking confidentiality approaches.

The hypothetical scenario illustrates how the proposal encourages potential sources to seek out good journalists. Adams would have an incentive to disclose his information to a journalist likely to follow proper procedures. Whether he tips off Hamilton depends on whether Hamilton and her newspaper can be trusted to handle the information responsibly. Procedurally sound journalism, then, would beget valuable tips from confidential sources.<sup>238</sup>

2. *Solving the Definitional Problem.* — This Note's proposal would eliminate a growing concern looming over journalist's privilege cases: defining who qualifies as a journalist entitled to invoke the privilege.<sup>239</sup> The procedural test incorporates the definitional question into the primary analysis. In the Hamilton-Adams hypothetical, a court following the current framework would need to determine whether Hamilton is a "journalist" before it could begin balancing competing interests. That inquiry probably would not be difficult in the case of a newspaper reporter. But what if Hamilton's article were published on a blog? That might weaken or destroy her privilege claim even though the difference in medium does not alter the information's value to the public interest.<sup>240</sup> The outcome of the procedural test, meanwhile, hinges solely on the balancing of the interests at stake.<sup>241</sup>

237. See *supra* notes 186–190 and accompanying text (describing consequences of *Washington Post* experiment banning confidential sources).

238. These incentives are stronger than those offered not only by the courts' current fixed treatment of the newsgathering interest, but also by Tatel's substantive model. Under the Tatel approach, once Adams decides that his information is more newsworthy than harmful, he can release it to any journalist he trusts to guard his confidentiality. If he releases it to Hamilton, then whether Hamilton follows journalistic procedures before publication has no bearing on the outcome of a potential privilege claim—even though her adherence to procedures affects the public interest.

Furthermore, it is unclear how sources would conduct the "newsworthiness" balancing test before deciding to release their information. Presumably, sources are less equipped to assess newsworthiness than are journalists and, perhaps, judges. See Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 *Wm. & Mary Bill Rts. J.* 1063, 1110 (2006) ("How does a potential source know whether she will be considered 'bad' or 'good' when the heat is on the reporter to reveal her name?").

239. See *supra* notes 22–26 and accompanying text (discussing definitional problem).

240. See *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.").

241. In practice, the procedural test might nonetheless favor established media organizations. But such organizations might merit some extra protection. One concern in rejecting the privilege is that the duty to provide testimony will burden journalists, taking them away from newsgathering. See *supra* notes 32–34 and accompanying text (discussing government's use of reporters as investigators). If Hamilton reports year-round for a large media organization, then she is more susceptible to burdens of testifying than someone who posts a single blog item and vows never to publish anything again.

Linda Berger has also recognized the potential of a procedural test to solve the definitional problem.<sup>242</sup> She proposes a definition test in which courts ask whether the party invoking the privilege has followed journalistic procedures “on a regular basis.”<sup>243</sup> But that approach reaches the wrong outcome in situations where a respectable news organization publishes a shoddy story, or a shoddy news organization publishes valuable information.<sup>244</sup> This Note’s proposal avoids the over- and under-inclusiveness problem by examining procedural adherence only in the context of the event relevant to the privilege claim. Hamilton’s privilege claim would be more likely to succeed if she followed procedures before publishing her story on a blog than if she ignored procedures before publishing it in a metropolitan newspaper.<sup>245</sup>

### C. *Arguments Against a Flexible Procedural Approach Based on Industry Ideals*

Part III.C addresses five criticisms this Note’s proposal may provoke. It first notes that although the proposal claims to solve the definitional problem, its reliance on industry guidelines seems to favor traditional media outlets. Second, it discusses the difficulty a news organization may face in producing evidence of procedural compliance without producing evidence that identifies a source. Next, it addresses the concern that by enhancing courts’ approach toward adjudicating journalist’s privilege cases, the proposal will increase compliance and litigation costs. It then examines whether the vague phrasing that permeates news guidelines creates opportunities for unscrupulous journalists to feign compliance. Finally, it considers whether a legal approach that favors certain journalistic practices threatens press freedom and independence.

1. *Reliance on Industry Guidelines Favors Traditional Media Outlets.* — Although this Note’s proposal offers a way around the problem of defining who qualifies as a “journalist,”<sup>246</sup> it may not treat new and old media equally. Institutional arrangements may leave traditional news outlets, such as newspapers or TV stations, better equipped to follow procedural guidelines. For example, a blogger who works without an editor, or who

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242. See Berger, *supra* note 25, at 1406–16 (urging courts to analyze whether party invoking privilege has engaged in procedures designed to gather and disseminate “journalistic truth”).

243. *Id.* at 1411.

244. Randall Eliason has noted that a news organization’s reputation may not align with the value of a particular piece of journalism that media outlet produces. See Eliason, *supra* note 25, at 436 (“[I]f a particular CNN report is concerned with the latest romantic escapades of some overpaid movie star, or the most recent developments on *American Idol*, is that report ‘newsworthy’ and deserving of the privilege simply by virtue of its being on CNN?”).

245. The narrower timeframe also makes this Note’s proposal easier to administer than a procedural inquiry that sets no limits on the relevance and amount of evidence a court should consider in assessing whether a journalist follows procedures “on a regular basis.”

246. See *supra* Part III.B.2 (describing how proposal solves definitional problem).

writes for a website that serves readers by churning out reports as soon as it obtains new information, may struggle to comply with the industry guidelines' deliberation requirement.

The inequality, however, is not necessarily unjust. Nonrecognition of the privilege in the case of a blogger who lacks the institutional means to work with an editor would reflect the reality that some journalistic uses of confidential sources serve the public interest more than others. A blogger who cannot deliberate with an editor may not be suited to rely on confidential sources. That said, complex institutional arrangements are not a prerequisite for compliance. A blogger who wants to comply with procedures but who lacks an editor can nonetheless find someone with whom to deliberate before publishing a particular story. One can even envision freelance editors offering their services to bloggers on a per-story basis.

2. *Evidentiary Proceedings May Unmask Sources.* — One challenge in applying this Note's recommendation will be to design evidentiary hearings that examine a news organization's adherence to sourcing procedures without revealing a source's identity. This concern is especially relevant to proof of compliance with the deliberation requirement.<sup>247</sup> In some scenarios, a journalist such as Hamilton may deliberate with an editor, yet be unable to divulge the nature of that deliberation without violating the confidentiality promise. If Hamilton knows that Adams works as, say, a doctor at Guantanamo Bay, then she and her editor may debate the reliability of someone in that position. In the privilege case, Hamilton will want to show proof that the debate took place without revealing the content of that debate, which would narrow the field of potential sources to the limited population of Guantanamo Bay doctors.

With this concern in mind, courts implementing the proposal should be amenable to requests that evidence be submitted in camera.<sup>248</sup> They should also be willing to accept evidence of deliberation with the confidential portions redacted. But the best tools to fix the evidentiary problem lie with the journalists themselves. News organizations will have incentives to compile evidence of procedural compliance. When dealing with a story that seems particularly likely to prompt a subpoena, news organizations can devise their own safeguards. Hamilton and her editor may record a time-stamped video of their discussion to show proof that

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247. It should be easier to show nonidentifying proof of adherence to the last-resort and transparency requirements. For the last-resort requirement, a journalist such as Hamilton may be unwilling to reveal the details of any discussion she had with Adams in which she urged him to speak on the record. But she could produce phone records and other evidence showing that she tried to verify the information from a nonconfidential source. Meanwhile, evidence that she followed the transparency requirement will, by definition, already be available, since that evidence consists of public explanations justifying the reliance on a confidential source.

248. See Ethan D. Wohl, *Confidential Informants in Private Litigation: Balancing Interests in Anonymity and Disclosure*, 12 *Fordham J. Corp. & Fin. L.* 551, 562–65 (2007) (discussing value of in camera review in cases involving confidential informants).

they satisfied the deliberation requirement, and throughout that discussion they can use code words to refer to Adams and to facts that might identify him.

3. *Enhancing the Inquiry Will Increase Costs.* — The above discussion about measures news organizations can take to compile evidence leads naturally to another potential criticism: that by expanding the judicial inquiry into the newsgathering interest, this Note's proposal will exact higher costs on litigants and potential litigants. Hamilton's news organization, for example, may need to invest time and money in its efforts to record and preserve evidence that it complied with procedures governing the use of confidential sources. And when a privilege case arises, that case will take longer to litigate because the court's inquiry will be more rigorous than it is currently.

But the increased costs of complying with procedures and of litigating individual cases may be more than offset by decreased costs for news organizations that follow proper procedures. A media outlet that knows it follows industry guidelines will be less likely to lose a privilege claim and thus also less likely to draw a subpoena in the first place. A small investment in avoiding a losing privilege claim, then, can yield big savings by deterring future litigation.

4. *Vague Guidelines Are Susceptible to Manipulation.* — The vagueness that plagues journalism guidelines<sup>249</sup> undercuts the argument that a standard based on those guidelines could be predictable.<sup>250</sup> Furthermore, vague standards are susceptible to manipulation.<sup>251</sup> After speaking with Adams, Hamilton may place calls to high-profile officials she knows won't call her back merely so she can later claim that she tried to verify Adams's information. Or she and her editor may go through the motions of "deliberating" whether to use Adams's information—even though they've agreed beforehand that the scoop is too juicy to pass up.

Under a deferential standard, the vagueness would pose a problem. But under this Note's proposal, halfhearted compliance efforts will be conducted at a journalist's own risk. Though stripped of the discretion to evaluate newsworthiness, courts retain discretion to evaluate whether a journalist adhered to guidelines in good faith. Under this type of enforcement mechanism, industry insiders—here, the journalists—desire predictability, not plausible deniability. Vague standards governing the use of confidential sources may be a product, in part, of the courts' current approach. As long as courts treat all journalistic uses of confidential sources as if they serve the public interest, news organizations have little

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249. See *supra* notes 170–171 and accompanying text.

250. See *supra* notes 219–222 and accompanying text (discussing predictability).

251. William Simon uses well-known scandals to show why criminal or unethical actors may prefer vague standards. See William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 *Yale J. on Reg.* 1, 3–12 (2005) (discussing "deliberate ignorance and calculated ambiguity" in Watergate and Enron scandals).

incentive to enact clear guidelines that, if breached, could lead courts to reconsider. Once journalists know their use of confidential sources may be evaluated in court, they will have a greater incentive to adhere strictly to procedural guidelines. As a result, news organizations may choose to enact clearer requirements so that no court can question whether a good journalist truly complied.

5. *Courts Should Not Decide What Constitutes Acceptable Journalistic Practice.* — An approach that privileges journalists who adhere to guidelines over those who do not is likely to spark criticism regarding the danger of laws that make merit judgments about journalism.<sup>252</sup> In striking down a state law guaranteeing politicians space in newspapers to respond to criticism, the Supreme Court cautioned against official interference with the editorial process.<sup>253</sup>

But as media law scholar Susan Gilles has noted, courts already make merit judgments about the press in libel law, which punishes bad journalism.<sup>254</sup> Gilles argues that determining what constitutes “good journalism” is a prerequisite to resolving the journalist’s privilege debate.<sup>255</sup> Indeed, distinctions between protected and nonprotected journalism are inevitable when applying a “privilege,” which, by definition, favors some over others. Considering the need for preferences, this Note’s proposal is mild. Any merit judgments derive not from judicial opinions, but from journalists’ own standards. More importantly, the recommended approach does not make it *illegal* to breach procedural guidelines in its use of confidential sources; breaches of procedural guidelines would not lead to damages, which are available under libel laws. This Note’s proposal merely decreases the scope of the available journalist’s privilege to account for any decreased benefit to the public interest.

## CONCLUSION

This Note has argued that the scope of a journalist’s adherence to professional procedural ideals governing the use of confidential sources should inform federal courts’ decisions in journalist’s privilege cases. It

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252. See Freedman, *supra* note 220, at 1392 (“[D]ecisions regarding First Amendment protections do not and should not turn upon the good character of the speaker or the high quality of the journalism involved.”).

253. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . .”).

254. See Gilles, *supra* note 21, at 500 (“One objection to the creation of a journalist/source privilege is that it will allow the courts to regulate journalism. The lesson is that we are too late. The Court’s evolution of libel law has already led to judicial regulation of journalistic practice.”).

255. See *id.* at 502 (arguing that “privilege demands that we craft an image of good journalism” and concluding that “we should favor statute or common law as paths to create such a privilege”).

has shown that the courts' current approach, which offers equal protection to all journalistic uses of confidential sources, disregards evidence that many such uses fail to serve the public interest. It has also shown that the journalism literature provides the framework for a flexible approach courts can follow without having to assess the substantive news value of particular information.

The possibility that federal lawmakers will soon enact a statute codifying a qualified journalist's privilege does not eliminate the need for judicial balancing. This need may please neither the privilege's proponents, who believe that journalists deserve an absolute right to maintain their confidentiality promises, nor the privilege's detractors, who believe that journalists do not deserve any privileges not afforded to the rest of the population. But an approach that aligns the journalist's privilege with public interests more than makes up for that discontent.