
**BLOGGERS AS NEWSMEN: EXPANDING THE
TESTIMONIAL PRIVILEGE**

*Anne M. Macrander**

INTRODUCTION	1075
I. THE DEBATE.....	1077
A. <i>Historical Trends</i>	1077
1. Reporters’ Arguments	1078
2. Balancing Test – Chilling Effect	1080
3. Powell’s Concurrence – Lower Court Application	1083
B. <i>Current Trends</i>	1085
1. State Statutory Treatment	1086
a. <i>Strict and Specific</i>	1086
b. <i>Lenient and Open Definitions</i>	1087
2. Categorization	1088
II. PRIVACY	1089
A. <i>Common Law Privacy</i>	1090
B. <i>Internet Anonymity</i>	1091
III. ADAPTING TO NEW MEDIA	1094
A. <i>Rising Influence</i>	1094
B. <i>Current Treatment of Blogs/Bloggers by the Courts</i>	1095
C. <i>Bloggers Versus Journalists</i>	1098
IV. ANALYSIS	1100
A. <i>Common Law</i>	1100
B. <i>A Statutory Privilege</i>	1101
1. Qualifications	1101
2. Exceptions	1103
a. <i>Misprision of Felony</i>	1103
b. <i>Knowledge</i>	1104
c. <i>Whistleblowers</i>	1105
3. Civil Actions.....	1105
4. Structure of the Privilege.....	1107
CONCLUSION.....	1107

INTRODUCTION

The prevalence and influence of Internet users and bloggers has risen exponentially in recent years,¹ even to the extent that “citizen journalism”² can

* J.D. Candidate, Boston University School of Law, 2009; B.A., University of Notre Dame, 2006.

¹ The claimed daily readership of two news blogs – Power Line and Talking Points Memo – is larger than the paid circulation of all but about seventy-five American

cause the downfall of a prominent and respected network news anchor.³ In the flurry of “Memogate,”⁴ anonymous bloggers, unaffiliated with traditional news media organizations, called into question the credibility of the documents Dan Rather revealed in a CBS News broadcast. When the bloggers’ reporting resulted in Rather’s resignation, they were dubbed “the Woodward and Bernstein of Rathergate.”⁵

At a time when an individual sitting in front of a computer can wield enormous political and social influence through his or her journalistic efforts, the traditional concept of what constitutes a journalist or a member of the news media should change. Today, citizens can disseminate news to the public themselves, regardless of their professions, resources or training. The traditional top-down system of the news media and the age of the nightly network news broadcast has transformed into a system of bottom-up newsgathering. Under this system, everyone, “regardless of who they are, why they write or how popular they are,”⁶ can become a journalist.

The increased ease of reporting associated with advancing technology, however, complicates the legal questions surrounding the First Amendment freedom of the press, the logistics of newsgathering, and the state testimonial protections for reporters. This Note argues the federal government should create a testimonial privilege for newsmen, either by statute or common law. This “reporter’s privilege,” consistently claimed by reporters and rejected by common law courts, is essential to an efficient and effective free press. This is especially true in light of the traditional role of the press as the “Fourth Estate”:⁷ a fourth branch in the system of government checks and balances.

This Note examines the complexities of the reporter’s privilege and how it has been interpreted in the context of advancing technology. Part I examines the history of the debate behind the reporter’s privilege, stemming from the

newspapers. Randy Dotinga, *Journalistic Status of Bloggers Contemplated*, USA TODAY ONLINE, Feb. 2, 2005, http://www.usatoday.com/tech/news/techpolicy/2005-02-02-about-a-blog_x.htm.

² Paul O’Grady, *A New Medium Comes of Age*, NEW STATESMAN, Jan. 10, 2005, <http://www.newstatesman.com/200501100006> (defining “citizen journalism” as the creation of a news stream by a large number of everyday Internet users working independently).

³ See generally Corey Pein, *Blog-Gate*, COLUM. JOURNALISM REV., Jan.-Feb. 2005.

⁴ *Id.*

⁵ Chris Weinkopf, *Rather’s Ruin*, THE AMERICAN ENTERPRISE, Dec. 2004, at 48 (likening bloggers to Bob Woodward and Carl Bernstein of *The Washington Post*, whose articles on the Watergate scandal prompted the resignation of President Richard Nixon in 1974).

⁶ Eugene Volokh, Op-Ed., *You Can Blog, but You Can’t Hide*, N.Y. TIMES, Dec. 2, 2004, at A39 (arguing the First Amendment should protect established news media and Weblogs equally).

⁷ Soc’y of Prof’l Journalists v. Sec’y of Labor, 832 F.2d 1180, 1182 n.2 (10th Cir. 1987) (“The coinage of this name has been attributed to Thomas Babington Macaulay . . . who, in 1828, wrote in an essay that ‘[t]he gallery in which the reporters sit has become a fourth estate of the realm.’”).

Supreme Court's decision in *Branzburg v. Hayes*, that the First Amendment does not guarantee an absolute testimonial privilege to journalists.⁸ It then compares examples of the various types of state statutes that grant reporters a shield protection despite the Court's ruling. Part II explores the question of privacy and its unique application to the anonymity that the Internet provides to bloggers and online newsmen. Part III discusses the legal questions surrounding blogs more specifically, including the courts' current rulings that relate to Internet speech and newsgathering.

In Part IV, this Note argues that bloggers should be considered journalists, and calls for a federal shield statute that protects all newsmen from compelled testimony in response to a subpoena. The proposed statute would apply regardless of the medium these reporters employed in the dissemination of news. It further proposes that the criteria for determining who qualifies for the federal privilege should be based on the product an individual produces, rather than professional affiliation or chosen medium. Yet, to address the interests of the justice system and of civil plaintiffs, this Note proposes an exception to the grant of privilege for misprision of felony, an additional statutory protection for whistleblowers, and a balancing test to accommodate the differing priorities of parties to a civil claim.

I. THE DEBATE

A. *Historical Trends*

Under federal common law, most of the discussion regarding a possible reporter's privilege stems from the United States Supreme Court case of *Branzburg v. Hayes*.⁹ In this 1972 case, the Court ruled that there is no First Amendment relief for a reporter's refusal to answer a grand jury's questions relevant to a criminal investigation.¹⁰ The lower court construed the state shield statute at issue¹¹ – which protects a reporter from being compelled to disclose the source of any information procured by him – as creating a distinction between information obtained solely from a third party, and activity witnessed by the reporter himself. The Supreme Court agreed, ruling that the confidentiality of the reporter's sources, who themselves engaged in the illegal activity in the presence of the reporter, was not protected by the First Amendment.¹²

⁸ 408 U.S. 665, 708 (1972) (holding that the First Amendment does not afford a newsman a constitutional testimonial privilege to conceal facts relevant to a grand jury's investigation of a crime).

⁹ *Id.*

¹⁰ *Id.* at 690 (declining to “create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy”).

¹¹ KY. REV. STAT. ANN. § 421.100 (West 2005).

¹² *Branzburg*, 408 U.S. at 697 (“Private restraints on the flow of information are not so favored by the First Amendment that they override all other public interests such as the

1. Reporters' Arguments

Members of the press have asserted the existence of a "reporter's privilege" rooted in the First Amendment for over a century.¹³ Their arguments, though consistently rebuffed, focus on the possible chilling effect on speech that could result from a reporter's inability to guarantee the confidentiality of his or her sources.¹⁴ Press members continue to argue that the role of journalists as purveyors of information and providers of another check on government is necessary to American society.¹⁵ Journalists thus maintain that the confidential relationship between reporter and source must be protected. Some consider this confidential relationship necessary to a reporter's ability to gather news, an essential element of the freedom of the press.¹⁶ As James Madison explained, "[a] popular government without popular information or the means of

prosecution of crimes.").

¹³ See, e.g., *Garland v. Torre*, 259 F.2d 545, 547-48 (2d Cir. 1958) ("[T]o compel newspaper reporters to disclose confidential sources . . . would . . . encroach upon the freedom of the press guaranteed by the First Amendment."); *Ex parte Lawrence*, 48 P. 124, 125 (Cal. 1897) (stating that a news editor and reporter "refused to answer certain interrogatories . . . upon the ground that the information sought . . . was privileged"); *Plunkett v. Hamilton*, 70 S.E. 781, 785 (Ga. 1911) (summarizing a witness' grounds for refusal to testify to be: "by promising to keep the name of his informant a secret, [one] can free himself from the duty of testifying in court"); *People ex rel. Mooney v. Sheriff*, 199 N.E. 415, 415 (N.Y. 1936) ("He refused to answer certain questions on the ground that the source of his information, obtained as a newspaper reporter, was confidential and privileged."). For more cases in which the press has asserted such a privilege, see also *Branzburg*, 408 U.S. at 685-86 (reviewing cases where courts "refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information").

¹⁴ See *Branzburg*, 408 U.S. at 670-71 (explaining the reporter's "fear that his ability to obtain news would be destroyed").

¹⁵ See, e.g., Brief for the Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Petitioners, *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Ct. App. 2006) (No. H028579), 2005 WL 1048317 at *5 ("The result [of denying a privilege to reporters] will be a restriction in the flow of information to the public, inhibiting the public's ability to make informed choices related to government, industry, health and a host of other subjects that affect people's everyday lives.").

¹⁶ Elizabeth Coenia Sims, Note, *Reporters and Their Confidential Sources: How Judith Miller Represents the Continuing Disconnect Between the Courts and the Press*, 5 FIRST AMENDMENT. L. REV. 433, 435 n.9 (2007). Sims's Note explains:

Thomas Jefferson, for example, argued that the flow of information between the people and the government was vital to the success of the government. Jefferson said that "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I mean that every man should receive these papers, and be capable of reading them."

Id. (citing Maurice R. Cullen, Jr., MASS MEDIA & THE FIRST AMENDMENT: AN INTRODUCTION TO THE ISSUES, PROBLEMS, AND PRACTICES 38 (1981)).

acquiring it is but a prologue to a farce or tragedy or perhaps both.”¹⁷

The courts have rejected outright the arguments for an absolute First Amendment privilege guaranteeing confidentiality in the criminal context. In denying this absolute privilege, the Supreme Court held it could not “seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.”¹⁸ The Court demonstrated very little sympathy for sources that hide behind anonymity, and therefore displayed little inclination to offer a testimonial privilege to the journalists who protected them. It claimed, “[t]he preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection.”¹⁹

For the *Branzburg* Court, already unsympathetic to the anonymous sources in the cases before it, the role of the grand jury and its need for access to “every man’s evidence” was paramount.²⁰ The Court held that the role of the grand jury’s function in ensuring effective law enforcement required broad investigatory power that would allow it to determine whether a crime has been committed, and if so, who committed it.²¹ Without such powers, and without the requirement that witnesses appear before the grand jury and provide evidence, the Court concluded that the entire process of prosecuting crimes would be severely hindered.²² The probability of such an undesirable result

¹⁷ Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 328 (1970) [hereinafter *Reporters and Their Sources*] (citing 6 WRITINGS OF JAMES MADISON 398 (Galliard Hunt ed., 1906)).

¹⁸ *Branzburg*, 408 U.S. at 692. The Court also held it could not accept that “the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the 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.” *Id.* at 695.

¹⁹ *Id.* at 691.

²⁰ *See id.* at 688 (citing *In re Pappas*, 266 N.E.2d 297, 299 (Mass. 1971)) (reaffirming that testimonial privileges are the exception); *see also* *United States v. Bryan*, 339 U.S. 323, 330 (1950) (invoking the “fundamental maxim that the public . . . has a right to every man’s evidence” unless that person is protected by a privilege); Jaime M. Porter, Note, *Not Just “Every Man”: Revisiting the Journalist’s Privilege Against Compelled Disclosure of Confidential Sources*, 82 IND. L.J. 549, 549-553 (2007) (discussing the journalistic privilege in the context of the well-established privileges and the countervailing interests in access to evidence).

²¹ *Branzburg*, 408 U.S. at 701; *see also* *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (stating that the grand jury is regarded as a necessary security against hasty or malicious prosecution); *Blair v. United States*, 250 U.S. 273, 279-81 (1919) (recounting the history and importance of the grand jury’s power to subpoena witnesses).

²² *Branzburg*, 408 U.S. at 688.

outweighed the needs and the traditional role of the press, and prompted the Court to deny journalists an absolute testimonial privilege.²³

Focusing thus on the needs of the justice system in obtaining information in order to prosecute crimes,²⁴ and as an alternative to an absolute privilege, the Court – as well as many lower courts applying the *Branzburg* precedent – addressed the reporters’ claims that a balancing test should be created in order to accommodate the many interests at stake. Reporters have argued these interests should include those of the public in gaining access to the information, of the source in keeping his identity confidential, and of the reporter in ensuring the willingness of confidential sources to continue supplying information.²⁵ In the criminal context specifically, reporters have proposed factors courts should consider: the relevance of the source’s identity to the crime being investigated, the possibility of getting the information from other sources, and whether the need for the information is compelling enough to outweigh any First Amendment interests.²⁶

2. Balancing Test – Chilling Effect

One of the main arguments for applying a balancing test (as opposed to a total denial of any privilege) is the reporters’ contention that the court-ordered disclosure of a source’s identity would have a chilling effect on future sources’ willingness to provide information.²⁷ Yet, the *Branzburg* Court had harsh words for this argument, calling such a chilling effect “uncertain.”²⁸ The Court remained “unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury.”²⁹ The Court reasoned that the indeterminacy of any chilling effect stemmed from the fact that the requirement for forced testimony need not be applied to all journalists for all stories. The Court went on to explain that reporters need only give testimony when responding to a validly issued grand jury subpoena, not an indiscriminate request made in bad faith,³⁰ since it would be contrary to the First Amendment to appropriate the press as another

²³ See authorities cited *supra* note 20.

²⁴ See *Branzburg*, 408 U.S. at 686-87 (“The prevailing constitutional view of the newsman’s privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.”).

²⁵ *Id.* at 682.

²⁶ See, e.g., *id.* at 680.

²⁷ *Id.* at 693 (“The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational.”).

²⁸ *Id.* at 690.

²⁹ *Id.* at 693.

³⁰ *Id.* at 682; see also *id.* at 707 n.41 (“In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice.”).

“investigative arm of the government.”³¹

It is only in cases when a crime may have been committed, and the full testimony of the reporter and/or his source is necessary to the prosecution of that crime, that the confidential relationship between reporter and source need be broken.³² The Court also reasoned that compelled testimony involves 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,” nor is it a restriction on the ability of reporters to use confidential sources.³³ The Court’s only testimonial requirement as to reporters was testimony in response to a validly issued subpoena when necessary to prosecute a crime.³⁴ This distinction allowed the Court to deny the reporters’ claim of a chilling effect, and thus support its refusal to find an absolute testimonial privilege under the First Amendment.

Despite the Court’s skepticism about a chilling effect, affidavits presented in the four lower court cases at bar in *Branzburg* presented a different picture from that relied on by the Court for its reasoning. For example, in *Application of Caldwell*,³⁵ a reporter asserted a “marked increase” in the number of his sources, particularly in the government, who were hesitant or even unwilling to speak to him after the lower court ordered the reporter to testify.³⁶ The reporter claimed these particular sources, being government employees, feared losing their jobs due to retribution from on high.³⁷ They were not criminals as the Court had claimed anonymous sources were likely to be. Nor were they simply hiding behind confidentiality as a way to escape punishment for illegal actions.

Instead, all four petitions consolidated into *Branzburg v. Hayes* involved journalists whose sources were themselves the perpetrators of crimes.³⁸

³¹ *Id.* at 707 n.41 (quoting Dep’t of Justice, Memorandum No. 692 (Sept. 2, 1970)).

³² *Id.* at 682 (“The sole issue . . . is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of a crime.”).

³³ *Id.* at 681.

³⁴ *Id.* at 691 (“Only where news sources themselves are implicated in crime or possess information relevant to the grand jury’s task need they or the reporter be concerned about grand jury subpoenas.”).

³⁵ 311 F. Supp. 358, 362 (N.D. Cal. 1970) (holding that reporter would be required to respond to subpoena, but that he would be entitled to a protective order), *vacated*, 434 F.2d 1081 (9th Cir. 1970), *rev’d*, 408 U.S. 665 (1972).

³⁶ *Reporters and Their Sources*, *supra* note 17, at 332 (citing Affidavit of Jon Lowell, accompanying Brief for *Newsweek* as Amicus Curiae Supporting Petitioners, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970) (No. 10426)).

³⁷ *Id.*

³⁸ *Caldwell v. United States*, 434 F.2d 1081, 1082 (9th Cir. 1970) (a reporter refused to submit notes and tape recordings from his interviews with members of the Black Panther Party), *rev’d*, 408 U.S. 665 (1972); *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971) (denying petitioner Branzburg’s attempts to quash a subpoena compelling him to reveal the

Therefore, the Court's rejection of a possible chilling effect as undeserving of real consideration should be interpreted in the context of the unsympathetic nature of the confidential sources.³⁹ For example, the Court held:

[C]oncealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium, and we decline now to afford it First Amendment protection by denigrating the duty of a citizen, whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him.⁴⁰

In contrast, the implications of exposure for whistleblowers – such as the sources described in the *Caldwell* reporter's affidavit – could be serious, and the chilling effect much more pronounced. The *Branzburg* Court only briefly acknowledged this distinction before discounting the fears of these non-criminal sources by dismissing the chilling effect in general.⁴¹ The Court reasoned: "We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his."⁴²

Despite its dismissal of a chilling effect on sources, and its unfavorable attitude to the sources' desire for confidentiality, the *Branzburg* Court turned to the reporters' test to balance the needs of law enforcement and the press. While it refused to adopt the test for which the petitioners asked, the Court implicitly acknowledged the possibility that such a method of determination could be used in the future. The Court explained that previous cases had held "that the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose,"⁴³ implying that the needs of law enforcement and the press should be weighed against

names of drug users that he observed engaging in illegal activities), *aff'd*, 408 U.S. 665 (1972); *Branzburg v. Pound*, 461 S.W.2d 345, 346 (Ky. 1970) ("The story was based upon information acquired by the writer's observation during an interview granted to him upon a pledge that the identity of the two producers of *hashish* would not be revealed."), *aff'd*, 408 U.S. 665 (1972); *In re Pappas*, 266 N.E.2d 297, 298 (Mass. 1971) (a reporter promised confidentiality to gain entrance to the Black Panther headquarters and then refused to answer any grand jury questions about what or who he saw there), *aff'd*, 408 U.S. 665 (1972).

³⁹ See *Branzburg*, 408 U.S. at 692 ("The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.").

⁴⁰ *Id.* at 697.

⁴¹ *Id.* at 693 ("There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others . . . but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen.").

⁴² *Id.* at 695.

⁴³ *Id.* at 699.

each other. It also defended its rejection of a privilege in the cases at bar because there was no claim in any of them that the grand juries were inappropriate or probing in their questions,⁴⁴ nor were the petitioners denied the characteristic secrecy of grand jury proceedings.⁴⁵ In addition, the Court stated that “[t]he requirements of those cases which hold that a State’s interest must be ‘compelling’ or ‘paramount’ to justify even an indirect burden on First Amendment rights, are also met here.”⁴⁶ Thus, while it did not explicitly detail a balancing test to be used in cases of First Amendment rights in the face of grand jury subpoenas, the *Branzburg* Court tipped its hat to the idea, as well as that of a conditional constitutional privilege.

The Court backtracked again, however, when it discussed, in dicta, that a conditional privilege, one that could be overcome upon judicial determination, would serve no purpose for the petitioners. The Court reasoned, “[i]f newsmen’s confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.”⁴⁷ Any chilling effect that would result from no privilege at all would also result from the uncertainty inherent in a case-by-case balancing test.⁴⁸ Unlike with other case-by-case methods, a balancing test in this context would provide reporters and their sources with almost no predictive ability, since the relevance of the source’s information to the crime being investigated, and the ability of law enforcement to find alternative means of acquiring the information, would be extremely difficult to determine before any charges were filed or before the investigation began.⁴⁹ Thus, while the Court did not rule out a conditional privilege in its language about balancing interests, it argued that its creation would be useless.

3. Powell’s Concurrence – Lower Court Application

Many lower courts have interpreted *Branzburg v. Hayes* as providing implicit authorization for a qualified constitutional privilege, despite the majority’s denial of such a right.⁵⁰ The confusion can be traced back to Justice

⁴⁴ *Id.* at 700.

⁴⁵ *Id.*

⁴⁶ *Id.* (citation omitted).

⁴⁷ *Id.* at 702 (citing *Reporters and Their Sources*, *supra* note 17).

⁴⁸ *Id.* at 702 n.39 (noting that the case-by-case analysis of a conditional privilege would make it “difficult for potential informants and reporters to predict whether testimony will be compelled”).

⁴⁹ *Id.* (“[T]he decision will turn on the judge’s ad hoc assessment in different fact settings of ‘importance’ or ‘relevance’ in relation to the free press interest.”); *see also Reporters and Their Sources*, *supra* note 17, at 341 (“Because of the prospect of such ‘general’ deterrence, the approaches to a constitutional right recently adopted by state and lower federal courts fail to provide the journalist and informant with sufficient certainty to safeguard adequately the public’s First Amendment interest in the free flow of information.”).

⁵⁰ *See, e.g., Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (“[T]he Court indicated

Powell's concurring opinion.⁵¹ As the deciding vote for the *Branzburg* Court, Powell's opinion is considered representative of the true opinion of the Court by many commentators and lower court judges.⁵² This influential position has sparked much interest in the additions he made to the Court's majority opinion. Powell made clear that *Branzburg* did not completely prohibit First Amendment protection for journalists confronted with a grand jury subpoena.⁵³ In contrast to the majority's mere tip of the hat, Powell explicitly advocated adopting a balancing test to protect newsmen from "harassment" by the government, and from efforts to appropriate the news media as an investigative team.⁵⁴ Powell argued:

The asserted claim to privilege 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. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.⁵⁵

Yet, the lower courts are uncertain how much authority to glean from the concurrence even while they find authorization for a conditional privilege in Powell's opinion.⁵⁶ In a vast understatement, the D.C. Circuit remarked that "[t]he Court is not of one mind on the existence of a common law privilege."⁵⁷

that a qualified privilege would be available in some circumstances."); *United States v. Criden*, 633 F.2d 346, 356 (3d Cir. 1980) ("[A] journalist does in fact possess a privilege that is deeply rooted in the first amendment. When no countervailing constitutional concerns are at stake, it can be said that the privilege is absolute; when constitutional precepts collide, the absolute gives way to the qualified and a balancing process comes into play to determine its limits."); *Sims*, *supra* note 16, at 441-43 (reviewing the circuits' varied interpretations of the *Branzburg* holding).

⁵¹ *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

⁵² See *McKoy v. North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., dissenting) (arguing that the majority opinion is narrowed and bound when a concurring opinion is required for a majority vote); see also *Sims*, *supra* note 16, at 441 ("Justice Powell, who joined the majority, explicitly recognized the balancing of interests that the court performed in *Branzburg*, and stated that future cases should involve the same case-by-case examination of the facts and competing interests.").

⁵³ *Branzburg*, 408 U.S. at 709 (Powell, J., concurring) ("The Court does not hold that newsmen . . . are without constitutional rights with respect to the gathering of news or in safeguarding their sources.").

⁵⁴ See *supra* text accompanying note 31.

⁵⁵ *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

⁵⁶ For a discussion of the behind-the-scenes deliberations of the *Branzburg* Court and how it has affected lower court interpretations and applications, see Sean W. Kelly, Note, *Black and White and Read All Over: Press Protection After Branzburg*, 57 DUKE L.J. 199, 203-14 (2007) (examining the history behind the *Branzburg* decision including a previously unpublished concurring opinion by Chief Justice Warren Burger).

⁵⁷ *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1150 (D.C. Cir. 2006).

In a concurring opinion, Judge Henderson argued that “both the *Branzburg* majority opinion as well as Justice Powell’s separate concurrence hint ambiguously at the existence of some special protection for reporters stemming from their significant role in sustaining our republican form of government.”⁵⁸ Thus the courts are equally uncertain about how to apply a reporter’s privilege as they are about whether one exists at all. Judge Henderson pointed to Powell’s emphasis on the distinction between grand jury inquiries made in good and bad faith as a possible justification for applying the test differently in different factual circumstances.⁵⁹

In addition to this confusion, Judge Henderson also asserted that while the holding of *Branzburg* is binding upon her decisions, the dicta and commentary surrounding the state of the common law at that time is not.⁶⁰ Further compounding this argument, three years after the Supreme Court’s decision in *Branzburg*, Congress enacted Federal Rule of Evidence 501, which “authorizes federal courts to develop testimonial privileges ‘in the light of reason and experience.’”⁶¹ Thus, Henderson acknowledged that the door to finding a First Amendment privilege for reporters remains open even in the face the court’s decision to deny a testimonial privilege to Judith Miller.⁶²

B. *Current Trends*

Congress has responded neither to the implicit authorization in *Branzburg*, nor to the lower courts’ attempts to rescue the privilege from the Supreme Court’s denial. As a result, courts have had difficulty deciding conclusively on the boundaries (or existence) of any privilege.⁶³ The evolution of technology and the media itself since the 1972 opinion poses additional difficulties beyond those inherent to the application of the privilege in classic situations. The courts’ efforts to fit new types of media and newsmen into the existing legal framework protecting speech have taken significant time to disentangle.⁶⁴ In

⁵⁸ *Id.* at 1160-61 (Henderson, J., concurring).

⁵⁹ *Id.* at 1161 n.4 (“[G]rand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.”).

⁶⁰ *Id.* at 1160.

⁶¹ *Id.* (quoting FED. R. EVID. 501).

⁶² For a detailed discussion of the *Judith Miller* case and its place in an international journalistic privilege context, see Daniel Joyce, Essay, *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, 559 (2007).

⁶³ *In re Judith Miller*, 438 F.3d at 1150 (holding that, even assuming a common law privilege exists, it is not absolute); see also Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter’s Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 395 (2007) (“Despite *Branzburg*’s apparent rejection of a constitutional reporter’s privilege, most federal courts have limited *Branzburg* to its facts and have recognized a qualified federal reporter’s privilege in at least some cases.”).

⁶⁴ Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1465 (2006).

the context of defamation law, “the courts had difficulty fitting telegraph, radio, and television into the traditional . . . framework because their technical workings initially confounded the legal community. Eventually, however, the laws changed to focus on the impact of the transmitted speech and not the utilized medium when evaluating . . . claims.”⁶⁵ The law regarding a newsman’s testimonial privilege, however, has not yet been so clarified.

1. State Statutory Treatment

In the absence of a federal common law privilege, a majority of states have created protections for reporters in the form of individual shield statutes using a variety of definitions to determine what kind of newsman qualifies for the privilege.⁶⁶ Shield laws span a spectrum ranging from extraordinarily lenient to precise and controlled, and their varying protections and attempted classifications are exposed to commendations and criticisms from both sides of the debate. A broad grant of privilege may hinder the functioning of the justice system, while a limited enumeration of qualifications may exclude those engaging in true journalism yet partaking in a new medium.⁶⁷

a. *Strict and Specific*

Alabama⁶⁸ and California,⁶⁹ for example, have strict, enumerated definitions of the type of individual that may claim a privilege. Alabama frees a “person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity” from compelled disclosure of his or her sources used for published information.⁷⁰

The only room the Alabama statute leaves for developing media is in its definition of “newspaper.” It remains unclear whether this definition could be interpreted to include an online publication that approximates the style of a newspaper, and if so, how close that approximation must be. The additional requirement that the information received from the sources be published in order for those sources to be protected likely heavily imposes on the

⁶⁵ *Id.*

⁶⁶ *In re Judith Miller*, 438 F.3d at 1170 (Tartel, J., concurring) (finding that forty-nine states and the District of Columbia offer at least qualified protection to reporters’ sources).

⁶⁷ In addition to the state shield protection statutes discussed below, see also MINN. STAT. § 595.024 (2005) (providing no definition of who qualifies for the reporter’s privilege but detailing a balancing test to be used in determining whether to grant a subpoena for a news source’s identity in a criminal prosecution); N.M. STAT. § 38-6-7 (1978) (strictly defining “journalist” as a person working for “a newspaper, magazine, news agency, news or feature syndicate, press association or wire service”); 42 PA. CONS. STAT. ANN. § 5942 (West 2000) (granting privilege to persons connected with any newspaper or magazine of “general circulation” as well as any press association, radio or television station).

⁶⁸ ALA. CODE § 12-21-142 (2005).

⁶⁹ CAL. EVID. CODE § 1070 (West 2008).

⁷⁰ *See* § 12-21-142.

willingness of sources to come forward. If a source knows that his confidentiality is secure only if the information he provides is published, he may not place enough trust in the editorial process of the news organization to volunteer the information and his identity.

The California statute, in comparison, enumerates more categories in its grant of protection, but still strictly structures the privilege itself. The California statute extends beyond those protected under Alabama law to the employees of, or those connected with, a “periodical publication, . . . press association or wire service”⁷¹ The definition of “periodical publication” has given the courts the opportunity to include blogs and bloggers within the privilege.⁷² The California Superior Court has thus far not done so, but it has decided the cases before it on alternative grounds, declining the opportunity to make a binding decision on the scope of the shield law’s protection.⁷³

The unique structure of California’s statute further narrows its already specifically enumerated protection. In contrast to most state shield statutes which prevent a court from compelling disclosure of news sources, the California statute prevents a court from holding a newsman in contempt for refusing to comply with a validly issued subpoena.⁷⁴ While this protection is functionally equivalent to that of other states in the criminal context, where contempt is the only true enforcement of compliance with a subpoena, the civil context yields many more options for a plaintiff seeking the disclosure of a source’s identity. The potential chilling effect of this statute is just as serious as that arising from Alabama’s statute. Sources are often unable to determine whether their words might lead to civil action, criminal action, or both. If a source’s information is sensitive on multiple levels, the limited protection provided by the California statute could deter a source from sharing his information with reporters.

b. *Lenient and Open Definitions*

Other state statutes include expansive definitions for those covered by the newsman’s testimonial privilege. For example, in the District of Columbia, protection hinges simply on the definition of “news” and “news media.”⁷⁵ This broad definition provides nearly no obstacles to incorporating the expanding technology and mediums of the news media. The privilege extends to sources providing both published and unpublished information, and is structured like

⁷¹ See § 1070.

⁷² See, e.g., *Apple Computer, Inc. v. Doe 1*, No. 1-04-CV-032178, 2005 WL 578641, at *6 (Cal. Super. Ct. Mar. 11, 2005).

⁷³ *Id.* at *7.

⁷⁴ § 1070 (“A [newsman] cannot be adjudged in contempt . . . for refusing to disclose . . . the source of any information procured . . . for publication . . . or for refusing to disclose any unpublished information.”).

⁷⁵ D.C. CODE § 16-4702 (2001) (providing protection to “any person who is or has been employed by the news media in a news gathering or news disseminating capacity”).

most state statutes: to prevent the courts from compelling disclosure.

The far-reaching protection provided by the District of Columbia statute is not explicitly limited to either criminal or civil law. The protection newsmen can provide to their sources even in the face of a validly issued criminal subpoena runs counter to *Branzburg*, and could cause the justice system to suffer as a result.

North Dakota's shield statute also provides a far-reaching grant of privilege to newsmen, but slightly less than that of the District of Columbia. The North Dakota statute enumerates fewer types of individuals that may engage in "news." It prevents forced disclosure from a "person . . . engaged in gathering, writing, photographing, or editing news and was employed by or acting for any organization engaged in publishing or broadcasting news."⁷⁶ As opposed to the expansive District of Columbia statute, North Dakota adds a requirement that the newsman be a legitimate employee of a news organization. In the context of new media, where much information is passed through the Internet on websites that have a staff of one, the privilege could be difficult to expand.

Yet, even though North Dakota provides a detailed definition of the qualifications for protection for newsmen and their sources, it limits that protection in a significant way: with a catch-all provision for judicial discretion. The statute allows a judge to compel disclosure of a source's identity, even if the newsman's activities and employment fit all the statutory qualifications, if the judge finds that a failure to disclose "will cause a miscarriage of justice."⁷⁷ This provision balances the expansive protection of the press against the needs of the justice system – as well as individual tort plaintiffs – for vital information.

2. Categorization

The variety in these state laws raises the important and controversial issue that comes with emerging technology: that of categorizing activities as falling either within or without the shield.⁷⁸ Even in the context of traditional forms of media, determining who qualifies for a constitutional privilege is difficult. *Branzburg* acknowledged this inherent difficulty, explaining that the determination of who qualifies is "a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher . . ."⁷⁹ In the context of the Internet, that "lonely pamphleteer" is the solo blogger, and the difficulties of categorization are just as intricate, if not more so. Judge Sentelle asks:

[D]oes the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer

⁷⁶ N.D. CENT. CODE § 31-01-06.2 (2007).

⁷⁷ *Id.*

⁷⁸ *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1157-58 (D.C. Cir. 2008).

⁷⁹ *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? How could one draw a distinction consistent with the court's vision of a broadly granted personal right? If so, then would it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation in the present controversy to call a trusted friend or a political ally, advise him to set up a web log (which I understand takes about three minutes) and then leak to him under a promise of confidentiality the information which the law forbids the official to disclose?⁸⁰

As these questions illustrate, the many definitions in the existing state shield statutes become more controversial in the context of blogs. The meaning of "publication," "circulation," and even "news"⁸¹ changes in the face of the variety of blogs that exist. Possibilities include: independently run blogs but sponsored by major news organizations; the personal, unauthorized journals of a figure employed by a well-known news organization; or the collected information and commentary of specialists in a particular area (either technical, entertainment, or even gossip) who publish under the cloak of Internet anonymity. The task of defining categories of newsmen who qualify for the privilege is ordinarily complicated, but it is this latter possibility – Internet anonymity and the privacy issues involved – that further heats the debate and obscures the solution.

II. PRIVACY

That even the solo revolutionary or philosopher printing newsletters in his basement deserves the full protection of the First Amendment is fundamental to the Anglo-American concepts of free speech and a free press.⁸² This is true whether or not the speaker signs his name to his words. The Supreme Court has so acknowledged: "[w]hatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."⁸³ The structure and system of the Internet embraces wholeheartedly this idea of anonymity.⁸⁴ The California Court of Appeal explains that, "[t]he use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal," as well as protecting all classes of speakers from retaliation by

⁸⁰ *In re Judith Miller*, 438 F.3d at 1156-57 (Sentelle, J., concurring).

⁸¹ *See id.* at 1157-58.

⁸² *See supra* note 79 and accompanying text.

⁸³ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995).

⁸⁴ *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 234 (Ct. App. 2008) ("Internet bulletin boards, or 'message boards,' have the advantage of allowing users, or 'posters,' to express themselves anonymously.").

corporate media giants.⁸⁵ This unique medium comes close to actually providing the “marketplace of ideas” that scholars have touted for years as the true need for ensuring First Amendment protections.⁸⁶ Thanks to the Internet, “freedom of the press . . . is [no longer] limited to those who own one.”⁸⁷

A. *Common Law Privacy*

In spite of the conceded advantages and public policy interests in safeguarding anonymity for the press, protecting the anonymity of bloggers and Internet posters who desire it is neither easy nor prevalent in the context of traditional laws of privacy and privilege. The basic tenet of Anglo-American privacy common law is the desire “to be let alone.”⁸⁸ However, as many cases involving privacy on the Internet demonstrate, users’ so-called “subscriber information” – which includes the identity behind the pseudonymous screen name – is not protected even for those wishing to remain anonymous. The legitimate business records kept by Internet service providers, like the records kept by telephone carriers,⁸⁹ credit card companies,⁹⁰ and banks,⁹¹ are not private because the individual subscriber voluntarily “gives” the information to the third-party provider.⁹² Even when transactional or subscriber information

⁸⁵ *Id.* at 237; *see also* *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”); *Talley v. California*, 362 U.S. 60, 64 (1960) (“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”). *But see* *State v. Delp*, 178 P.3d 259, 263 (Or. Ct. App. 2008) (finding that although a user creates an “alternate persona” online, such a persona does not necessarily correspond to a protected privacy interest).

⁸⁶ Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 893 (2000).

⁸⁷ *Id.* at 895 (quoting *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999)).

⁸⁸ RAYMOND T. NIMMER, *LAW OF COMPUTER TECHNOLOGY* § 16:10 (1985) (“[M]ost U.S. privacy case law derives from the idea of secrecy or of allowing a person to be let alone.”).

⁸⁹ *Smith v. Maryland*, 442 U.S. 735, 745 (1979) (holding that because a phone subscriber conveyed information to the phone company, the petitioner assumed the risk that this information would be given to the police).

⁹⁰ *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1354 (Ill. App. Ct. 1995) (holding plaintiff had no cause of action for invasion of privacy where the transactional information of credit card purchases was voluntarily given to the credit card company).

⁹¹ *United States v. Miller*, 425 U.S. 435, 443 (1976) (holding respondent had no Fourth Amendment interest in bank records voluntarily submitted to the management of the bank, a third party).

⁹² *See* NIMMER, *supra* note 88, at § 16:10 (“[U]nder the rubric of the ‘reasonable expectation of privacy’ standard often used in general privacy law, one cannot have a reasonable expectation of privacy in information freely given to another party.”); *id.* at § 16:75 (discussing the distinction between privacy law and data protection theory, the latter of which allows individuals to control the disclosure and use of personally identifiable information).

is used for purposes other than record-keeping (such as marketing research) by the organization that keeps it, the government must show that exposure of this information “would inflict specific and significant harm on individuals” in order to prevent the organization from doing so.⁹³ In the context of the Internet specifically, courts have declined to find a reasonable expectation of privacy in transactional and subscriber data given to Internet service providers (“ISP”).⁹⁴ For example, in *United States v. Hambrick*,⁹⁵ the court held an ISP’s release of a user’s personal information was constitutional, even though the user traveled the Internet under a pseudonym.⁹⁶ In essence, as long as an individual user voluntarily submits his personal information to a third-party service provider, that information is not private, and can be obtained by subpoena.⁹⁷ The common law, standing alone, thus makes retaining privacy extremely difficult for all Internet users, since it is almost unthinkable that an ISP would consent to provide service without obtaining an individual user’s personal information.

B. *Internet Anonymity*

This background of common law clashes almost fundamentally with Internet users’ asserted “First Amendment right to speak anonymously on the internet.”⁹⁸ For example, in *Apple Computer, Inc. v. Doe I*,⁹⁹ bloggers, who

⁹³ U.S. West, Inc. v. FCC, 182 F.3d 1224, 1235 (10th Cir. 1999) (laying out the level of scrutiny to be applied in the context of speech restrictions imposed to protect privacy by keeping certain information confidential).

⁹⁴ See, e.g., *United States v. Maxwell*, 45 M.J. 406, 415 (C.A.A.F. 1996); *Hause v. Commonwealth*, 83 S.W.3d 1, 12 (Ky. Ct. App. 2001).

⁹⁵ 55 F. Supp. 2d 504, 508 (W.D. Va. 1999), *aff’d per curiam*, 225 F.3d 656 (4th Cir. 2000) (unpublished table decision).

⁹⁶ *Id.* at 508 (“When the defendant selected his screen name it became tied to his true identity in all [of the ISP’s] records. [The ISP’s] employees had ready access to these records . . . and nothing prevented [them] from revealing this information to nongovernmental actors.”).

⁹⁷ NIMMER, *supra* note 88, at § 16.10. In contrast, the European Union and a few sector-specific laws in the U.S. endorse the opposing theory of “data protection.” As Raymond Nimmer explains:

[P]rivacy law centers on control of disclosures or uses of private information in ways that are embarrassing or harmful to an individual, [while] *data protection* theory deals with setting out a right of an individual to not disclose and, if disclosed, to control the use of personally identifiable information, that is, information traceable to the individual and that person’s behavior.

Id. at § 16:75. For a list of the eight principles of data protection theory in the 1981 guidelines promulgated by the Organization for Economic Cooperation and Development, see *id.*

⁹⁸ *Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231, 234 (Ct. App. 2008) (agreeing with defendant – who asserted a First Amendment right to speak anonymously on the Internet – that his identity should be protected). For further discussion on Internet anonymity, see Victoria A. Cundiff, *Living in a Digital World: How Digital Tools Can Destroy, and Sometimes Protect*,

were the proprietors and authors of websites to whom suspected Apple insiders leaked confidential trade secrets about new Apple products, sought to block Apple's subpoena to reveal the names of their sources.¹⁰⁰ Apple had subpoenaed both bloggers to identify their sources, as well as the ISPs to obtain the identity of the bloggers themselves;¹⁰¹ a necessary endeavor if Apple wanted to name the bloggers and sources as defendants in its trade secret action. Yet, not only did these bloggers seek protection as journalists from revealing their sources under California's shield law,¹⁰² but they also moved to quash the subpoena to their ISP to prevent the revelation of their identities. The California court acknowledged the difficult question inherent in the categorization claim,¹⁰³ but did not accept the challenge of fitting the defendant bloggers into the framework of the shield law. Rather, it decided the case on its distinguishing facts: that, regardless of the category of the websites' proprietors, "there is no license conferred on anyone to violate valid criminal laws."¹⁰⁴ In this way the California court – regardless of the state's shield law protection – followed the common law for both issues at bar: the Supreme Court's *Branzburg* logic denied protection of confidentiality to those who violate the law, and the common law principle demanded that Internet users who volunteer their identities and other information to ISPs do not have protection for their confidentiality.

The California court was not alone in focusing on the violation of criminal law as the distinguishing fact. Other state courts have also adhered to *Branzburg*'s distinction between innocent and criminal sources, despite the public's interest in remaining anonymous on the Internet. An Oregon court held, "[e]ven assuming that some individuals select user names that purposely disguise their identities, and that those individuals do so out of a desire to use the Internet anonymously, those subjective intentions and expectations do not

Trade Secrets and What to Do About It, PRACTICING L. INST., Sept.-Oct., 2007 at 541, 567 (discussing the potential difficulty for trade secret litigation created by a presumption of protected anonymity for Internet posters).

⁹⁹ *Apple Computer, Inc. v. Doe 1*, No. 1-04-CV-032178, 2005 WL 578641 (Cal. App. Dep't Super. Ct. Mar. 11, 2005).

¹⁰⁰ *Id.* at *1-2.

¹⁰¹ *Id.* at *2.

¹⁰² CAL. EVID. CODE §§ 1070(a)-(b) (West 2008) (protecting persons employed by or connected with newspapers, magazines "or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed" from having to divulge the identities of their sources or information obtained).

¹⁰³ *Apple Computer*, 2005 WL 578641, at *5 ("Defining what is a 'journalist' has become more complicated as the variety of media has expanded.").

¹⁰⁴ *Id.* at *7; *see also* Cundiff, *supra* note 98, at 565 ("Equating the blogger who posts trade secrets with a 'fence' of stolen tangible goods, the court found that there is no public interest served by 'publishing private, proprietary public information that was ostensibly stolen and turned over to those with no business reasons for getting it.'" (quoting *Apple Computer*, 2005 WL 578641, at *8)).

necessarily translate into a protected privacy interest”¹⁰⁵ The court affirmed the denial of a motion to suppress evidence of the defendant’s identity, revealed to the government by AOL in response to a subpoena.¹⁰⁶ The court, as many had before it, found no privacy right in subscriber information held by third parties.¹⁰⁷ That third-party role included AOL as an ISP.

The current state of privacy law, even in the face of the asserted First Amendment right to speak anonymously, does not bode well for the bloggers and Internet users who wish to publish under the cloak of Internet anonymity. Whatever constitutional rights anonymous posters claim, those rights must be balanced against the rights of the subjects of the bloggers’ writings. In the civil contexts of defamation and libel, an unpierceable anonymity for Internet users would eliminate any real recourse for the person defamed; therefore the courts deny such an absolute right to Internet users.¹⁰⁸ Yet, despite the courts’ willingness to issue subpoenas seeking such information, plaintiffs wishing to pierce Internet anonymity still face many practical obstacles to asserting their rights. As Stephanie Blumstein explains in the defamation context: “While the judge reserved a person’s right to pursue the original defamer, such pursuit may prove impossible if the publisher used a pseudonym, resides abroad, or is untraceable for other reasons.”¹⁰⁹ Therefore, even given the judicial tools of a balancing test to determine parties’ interests and a validly issued subpoena, the basic function and system of the Internet medium ensures that some users, however criminal, defamatory, or patriotic, nevertheless remain anonymous.

¹⁰⁵ State v. Delp, 178 P.3d 259, 263 (Or. Ct. App. 2008).

¹⁰⁶ *Id.* at 259.

¹⁰⁷ *Id.* at 265 (finding that no source of law established the defendant’s interest in keeping private “noncontent information” held by third parties). The defendant’s argument was that a privacy interest was implicit in the relationship between an individual subscriber and his ISP, because “the Internet service provider creates an alternate persona for the person, so that they may travel the Internet in anonymity, not subjecting their real-life personal data to scrutiny.” *Id.* at 263. The court disagreed. *Id.* (“[The] subjective intentions and expectations [of the anonymous user] do not necessarily translate into a protected privacy interest . . .”).

¹⁰⁸ Stephanie Blumstein, Note, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous “Re-poster,”* 9 B.U. J. SCI. & TECH. L. 407, 423 (2003) (“The ruling [in *Barrett v. Clark*] would allow someone to author libelous statements, either under anonymity or pseudonym, and then re-post their statements throughout the Internet in numerous newsgroups and bulletin boards, thereby effectively injuring the defamed party and evading liability that should otherwise apply.” (citing *Barrett v. Clark*, No. 833021-5, 2001 WL 881259 (Cal. App. Dep’t Super. Ct. July 25, 2001), *rev’d*, *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142 (Ct. App. 2004)).

¹⁰⁹ *Id.*

III. ADAPTING TO NEW MEDIA

A. *Rising Influence*

Maintaining a balance between the anonymity interests of bloggers and the legal recourse interests of the subjects of their publications is becoming more important as blogs, bloggers, and the Internet in general gain influence in society. Internet blogging has become so popular that Merriam-Webster added the word to its dictionary and chose “blog” as its 2004 Word of the Year.¹¹⁰

Yet, as discussed above,¹¹¹ the advancing forms of new media are ever changing. Therefore, courts have often tiptoed around (and sometimes completely avoided) the need to adapt the existing law to cover the Internet and its purveyors. As the court in *In re Zyprexa Injunction* explained:

The internet, with its almost infinitely complex worldwide web of strands and nodes, is a major modern tool of free speech and freedom both here and abroad. Its reach extends as far as, and perhaps exceeds, that of newspapers and other traditional media. The law is rightly hesitant about allowing government – including the courts – to inhibit and restrict the use of such modern instruments of communication.¹¹²

In contrast to the typical claim of journalistic privilege, the parties in *Zyprexa* were not seeking the discovery of any potentially confidential information from the website operators. Rather, they wanted to prevent the further flow of sealed discovery documents that had been leaked to the press and published in violation of a court order.¹¹³ The court extended the preliminary injunction to all journalists who had received the documents, based on the finding that a newspaper reporter was intimately involved in knowingly stealing the sealed documents.¹¹⁴ The court reached the opposite decision, however, regarding the bloggers who had published the information, deciding that extending a preliminary injunction to the sites was not necessary.¹¹⁵ In balancing the harm of an injunction on speech versus the further exposure of the defendant’s confidential documents, the court found the dangers of imposing a prior restriction on Internet speech outweighed any reduction in harm to the defendant. The court explained that “[p]rohibiting five of the internet’s millions of websites from posting the documents will not substantially lower

¹¹⁰ Troiano, *supra* note 64, at 1448 n.2 (citing Merriam-Webster Announces 2004 Words of the Year, <http://www.merriam-webster.com/info/pr/2004-words-of-year.htm> (last visited Sep. 10, 2008)).

¹¹¹ *See supra* Part II.B.

¹¹² *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 393 (E.D.N.Y. 2007).

¹¹³ *Id.*

¹¹⁴ *Id.* at 396 (“Affirmatively inducing the stealing of documents is treated differently from passively accepting stolen documents of public importance for dissemination.”).

¹¹⁵ *Id.* at 426 (finding that, since the bloggers merely linked to the stolen documents without ever having received them, the injunction was not applicable).

the risk of harm posed to [the defendant]. Limiting the fora available [for speech] to would-be disseminators by such an infinitesimal percentage would be a fruitless exercise of the court's equitable power."¹¹⁶ The court also held that "restrictions on speech, even in the context of content neutrality, should be avoided if not essential to promoting an important government interest."¹¹⁷ This decision acknowledges the vastness of the speech that takes place on the Internet,¹¹⁸ but seems to minimize the extreme effect that even one of those pages (and one individual blogger) can have.

In contrast to the latter implication of the *Zyprexa* court – that blogs are simply one page among millions – other courts have been more willing to recognize the growing influence of blogs. For example, companies concerned with trademark infringements are advertising with and policing the activity of blogs and bloggers, in addition to traditional print and broadcast services.¹¹⁹ Likewise, an Alaskan court found the public is increasingly less interested in – and spends less time following – the local news than was the case in the recent past.¹²⁰ It is a reasonable inference that, in turning away from the small-town paper and local news, the public has come to rely on the Internet, making it a much more popular source of modern news with a much wider potential audience than the traditional media.¹²¹

B. *Current Treatment of Blogs/Bloggers by the Courts*

The task of finding a place for new media inside existing law is all the more necessary because of new media's rising influence in general society.¹²² It has

¹¹⁶ *Id.*

¹¹⁷ *Id.* The result of this balancing test seems to suggest the court does not subscribe to the idea that blogs and bloggers hold much influence or reach a large audience. In many cases, depending on the blog or blogger in question, this is likely true. However, the opposite is occurring more and more often, and the influence of blogs, even though they are merely "five of the internet's millions of websites," should not be underestimated. *Id.*

¹¹⁸ *See, e.g.,* Blumenthal v. Drudge, 992 F. Supp. 44, 47-48 (D.D.C. 1998) (holding that there was personal jurisdiction over the defendant, who published an allegedly defamatory statement made by a single blogger, which thereafter spread across the Internet).

¹¹⁹ *See, e.g.,* Instant Media, Inc. v. Microsoft Corp., No. C 07-02639 SBA, 2007 WL 2318948, at *2 (N.D. Cal. Aug. 13, 2007) (discussing how Instant Media used a directed marketing campaign to target bloggers, journalists, and industry analysts to reinforce its trademark).

¹²⁰ *United States v. Kohring*, No. 3:07-cr-00055 JWS, 2007 WL 2949528, at *23 (D. Alaska Oct. 9, 2007) (finding that potentially inflammatory information published in editorial cartoons, letters to the editor, and several opinion pieces published in local newspapers had little effect on potential jurors due to the timing of their publishing and the public's ability to be neutral).

¹²¹ This could imply a shift of influence from traditional offices of "journalists" to alternative voices, including bloggers.

¹²² *See, e.g.,* Lidsky, *supra* note 86, at 896 ("The mainstream media no longer have the power to exclusively define what is 'news.'").

led to increased appearances of cases involving blogs, yet most courts have neglected to comment, even in dictum, about the differing categorization possibilities for blogs and bloggers within traditional law. The question of whether blogs and bloggers can, or should be, considered journalistic remains unresolved, and mostly un-debated in the law.

The courts carefully side-step defining bloggers and journalists. For example, in *Jarvik v. Central Intelligence Agency*,¹²³ the court declined to address whether operating a personal blog qualified as non-commercial, journalistic activity for the plaintiff. The plaintiff, who identified himself as a journalist and asserted that his purpose was non-commercial and journalistic,¹²⁴ appealed the denial of a fee waiver request on a Freedom of Information Act claim for CIA reports.¹²⁵ The CIA contended the plaintiff's stated purposes – writing a book and publishing a personal blog – were primarily commercial, and therefore did not qualify for the waiver of the fee reserved for journalists and those with non-commercial purposes.¹²⁶ The court, in a classic evasion of the blogger issue, found the plaintiff did not meet the pleading requirements for the first prong of the fee waiver requirements, and therefore did not need to reach the question of whether his purpose or activities were journalistic.¹²⁷

The same careful avoidance occurred in the California Superior Court in *Apple Computer*.¹²⁸ As discussed above, the court did not decide if bloggers can or should be considered journalists even when such a categorization is suggested by specific statutory language.¹²⁹ Instead, the court relied on *Branzburg* to emphasize that the journalist privilege is not absolute.¹³⁰ The court assumed, arguendo, that even if bloggers had qualified under the California shield law, the law's application to Apple Computer was

¹²³ 495 F. Supp. 2d 67, 69 (D.D.C. 2007).

¹²⁴ This case also skims the surface of the problems of self-identification of journalistic status for legal purposes. “[T]he courts are loath to instigate ‘a more or less unresolvable inquiry into the value of [a self-described] journalist[’s] private goals.’” *Id.* at 72 n.3 (citing *Nat’l Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C. Cir. 1987)). The court explained that this reticence is manifested in a tipping of scales in favor of the plaintiff’s self-identification. *Id.* In the case of blogs and bloggers, this self-identification, in the absence of any judicially established conclusory factors that could objectively categorize the role of an author, should also play an important role.

¹²⁵ *Id.* at 67.

¹²⁶ *Id.* at 69 (stating that the CIA contended it could only “grant the waiver if the information requested was likely to contribute significantly to the public understanding” of the issue).

¹²⁷ *Id.* at 72 n.3.

¹²⁸ *Apple Computer Co. v. Doe 1*, No. 1-04-CV-032178, 2005 WL 578641 (Cal. App. Dep’t Super. Ct. Mar. 11, 2005).

¹²⁹ *Id.* at *7.

¹³⁰ *Id.* at *5.

unwarranted.¹³¹ The court relied on the unique structure of the California statute, which provides immunity only from a contempt citation, to deny the plaintiff's request of an affirmative block of the subpoena.¹³² Despite the arguable "newsworthiness" of the information the bloggers had published and the technical nature of their website, the California legislature's refusal to let even traditional journalists affirmatively block a subpoena convinced the court that California's law did not create a privilege no matter the category of the author. Since *Apple Computer* involved only civil claims, the statute that addressed only immunity from criminal contempt citations was inapplicable to the journalists in the case at bar, and the court, again, did not need to find a place for bloggers within the shield law.

While the courts have been hesitant to affirmatively rule how bloggers fit into the existing definitions of journalism, California in particular has been more willing to decide what criteria will *not* be used in shaping those definitions. One California court refused, for example, to find a distinction in the shield law between "legitimate" and "illegitimate" news.¹³³ The court decided that news is news, and it is the function of the marketplace, not the judiciary, to distinguish between it.¹³⁴ The court also denied attempts to make editorial function a deciding factor in who the California statute protected: "[a] reporter who uncovers newsworthy documents cannot rationally be denied the protection of the law because the publication for which he works chooses to publish facsimiles of the documents rather than editorial summaries."¹³⁵

One distinction the California courts did decide on was the difference between the publishing of speculation and news, and the publishing of trade secrets.¹³⁶ Not only did it decline to extend any privilege to "journalists" who violate the law, but the court reemphasized that the dissemination of ideas and information to the public is not necessarily always news, and therefore not necessarily protected speech. The court in *Apple Computer* explained, "an interested public is not the same as the public interest."¹³⁷ This makes the people who disseminate such information not necessarily journalists. These distinctions (and the refusal to make them) add obstacles to the task of fitting the authors of new media into the traditional understandings and protections of current law.

¹³¹ *Id.* at *8.

¹³² *Id.* at *6 (holding that the California shield law is narrower in scope than the concept of a "shield law" may suggest).

¹³³ *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 97 (Ct. App. 2006) (finding that "no workable test" existed to aid a court in such a distinction).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Apple Computer*, 2005 WL 578641, at *7 (protecting a company's right to maintain the confidentiality of its proprietary information against claims of journalistic privilege).

¹³⁷ *Id.*

C. *Bloggers Versus Journalists*

In the face of courts' refusals to draw distinctions, the majority of commentary regarding the definitions of bloggers and journalists has come from those bloggers and journalists themselves. One of the deciding factors that underlies most of the arguments on either side is that of reporting facts and the truth, as opposed to opinions, gossip, and speculation. Some bloggers do not consider themselves journalists, because they do not have the time or the inclination to do the necessary fact-checking for accuracy of their stories that major news organizations do.¹³⁸ Yet critics would be hard-pressed to deny that op-ed contributors or general columnists for major print newspapers or magazines are not journalists, and writing opinions is their profession.¹³⁹ As one blogger argues, "opinion and colour are the lifeblood of blogs. And I'd argue, the same is true of commercial television and radio news."¹⁴⁰

Yet when the definition of "journalist" includes an obligation to relate the truth, the classification becomes more difficult. One must ask: "[a]re they journalists with an obligation to check facts, run connections, and disclose conflicts of interest? Or are they ordinary opinion-slingers, like barbers or bartenders, with no special responsibilities – or rights?"¹⁴¹ It is true, however, that the nature of the blog medium, with its continuous stream of postings, is a much more fast-paced, scoop-hungry medium than the traditional print sources. That could explain the tendency of some bloggers to neglect to check their facts as thoroughly as required by the standards of major news organizations. Yet, as evident in the recent "Memogate" scandal that resulted in the resignation of CBS anchor Dan Rather, electronic authors have not been the only culprits of neglected fact-checking:

CBS's [blogger] critics are guilty of many of the very same sins [that they attribute to CBS]. First, much of the bloggers' vaunted fact-checking was seriously warped. Their driving assumptions were often drawn from flawed information or based on faulty logic. Personal attacks passed for analysis. Second, and worse, the reviled [mainstream media] often followed the bloggers' lead. As mainstream media critics of CBS piled

¹³⁸ Jessi Hempel, *Are Bloggers Journalists?*, BUS. WK. ONLINE, Mar. 7, 2005, http://www.businessweek.com/technology/content/mar2005/tc2005037_7877_tc024.htm (Interviewing subject Lockhart Steele, Managing Editor of Gawker Media's portfolio of blogs and author of Curbed.com, who discusses his inability to fact-check because of a lack of resources).

¹³⁹ The Age: Media Blog, http://blogs.theage.com.au/mediablog/archives/2005/05/when_are_blogge_1.html (May 25, 2005, 11:03 EST) ("Where would newspapers be without opinion and analysis – something (some) bloggers are very good at? It's journalism.").

¹⁴⁰ *Id.* This blogger compares the difference between traditional media and new media to the difference between classic broadsheet newspapers and tabloids to argue that, though one may be less sophisticated in tone, both are run by journalists and newsmen. *Id.*

¹⁴¹ Dotina, *supra* note 1.

on, rumors shaped the news and conventions of sourcing and skepticism fell by the wayside. Dan Rather is not alone on this one; respected journalists made mistakes all around.¹⁴²

With the explosion of twenty-four hour news channels and the increasing pressure for major, traditional news organizations to post their stories on the Internet throughout the day – and before the other guy – the duties of thorough fact-checking are falling to the wayside regardless of the type of media or author: online or print, blogger or journalist.¹⁴³

Whatever critics may say about the opinion-slinging or irresponsible bloggers, there are a rising number of blogs gaining recognition as respected and influential news sources. Individuals that start out as bloggers have gone on to positions in the traditional media as pundits and online journalists and were issued press passes to the presidential conventions in 2004.¹⁴⁴ In fact, Joshua Micah Marshall, primary author of the website Talking Points Memo, was the most recent recipient of the George Polk Award for legal reporting.¹⁴⁵ Marshall's coverage of the 2007 firing of eight United States Attorneys made Talking Points Memo the first Internet-only news organization to receive the prestigious award,¹⁴⁶ indicating the wind may be shifting in favor of bloggers toward full recognition as online newsmen.

Yet that wind is not yet very strong. While Long Island University in Brooklyn – the association behind the Polk Awards – recognized a blogger for legal reporting, and has created a category for “Internet reporting,”¹⁴⁷ other authorities have not yet made the leap. For example, The Pulitzer Prize organization has not changed its definitions or criteria for eligibility: if the piece appears online, it must have come from the website of a print newspaper.¹⁴⁸ The United States Supreme Court has also not fully embraced the new media of the Internet, but it is moving towards reconciliation with existing law. For First Amendment purposes, the Court's definition of “media” has been limited to “only the institutional media – broadcasters, newspaper publishers, and so forth . . .”¹⁴⁹ Justice Brennan, however, envisioned that the Court is unlikely to deny equal rights and protections to

¹⁴² Pein, *supra* note 3, at 31.

¹⁴³ *Id.*

¹⁴⁴ Hempel, *supra* note 138.

¹⁴⁵ Noam Cohen, *Blogger, Sans Pajamas, Rakes Muck and a Prize*, N.Y. TIMES, Feb. 25, 2008, at C1.

¹⁴⁶ *Id.*

¹⁴⁷ Press Release, Long Island University, Long Island University Announces Winners of 2003 George Polk Awards (Feb. 17, 2004), <http://www.brooklyn.liu.edu/polk/press/2003.html> (granting the George Polk Award for Internet Reporting, the first award of its kind to The Center for Public Integrity).

¹⁴⁸ Cohen, *supra* note 145.

¹⁴⁹ Lidsky, *supra* note 86, at 906 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

users of new kinds of media due to the escalating number of similarities and overlaps between new and old media.¹⁵⁰ This new media would naturally include the Internet and its users. The way seems primed to officially introduce blogs and bloggers into the current arena of news and the newsman's privilege.

IV. ANALYSIS

A. *Common Law*

Although the Supreme Court denied any First Amendment privilege to reporters in *Branzburg v. Hayes*, it is possible for the Court to create a new privilege in the absence of statutory reform. Federal Rule of Evidence 501, enacted three years after *Branzburg*, provides such authority to federal courts, when "the light of reason and experience" so allows.¹⁵¹ The Court found such reason and experience in *Jaffee v. Redmond*,¹⁵² when it codified a testimonial privilege for psychotherapists. It found that "the fact that all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege" strongly implicated the need for a federal common law counterpart.¹⁵³ The current situation with regard to the reporter's privilege is nearly identical: forty-nine states and the District of Columbia have created some version of protection for newsmen and their sources in the face of the Court's denial of a federal privilege to date.¹⁵⁴ Such circumstances seem to cry out for the Supreme Court to revisit its holding in *Branzburg*.¹⁵⁵ Judge Tatel argues that, even confronted with the myriad definitional complexities such a federal common law privilege would face, the common law has proven highly adept at adjusting to the needs and changes of society and technology.¹⁵⁶

However, the likelihood that the Court will review its decision is very low, since its tendency is to refrain from being overeager in the creation of new privileges.¹⁵⁷ Lower courts also admit that *Jaffee* "sits rather awkwardly

¹⁵⁰ *Id.* at 907 (citing *Dun v. Bradstreet*, 472 U.S. 749, 782 n.7 (1985) (Brennan, J., dissenting)) (discussing that while the majority rejected the media/non-media distinction, he foresaw new media forms would be given similar journalistic protection in the future).

¹⁵¹ FED. R. EVID. 501.

¹⁵² 518 U.S. 1 (1996).

¹⁵³ *Id.* at 13 (citations omitted).

¹⁵⁴ *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1170 (D.C. Cir. 2006) (Tatel, J., concurring).

¹⁵⁵ *See Jaffee*, 518 U.S. at 13 ("Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.").

¹⁵⁶ *In re Judith Miller*, 438 F.3d at 1172 (Tatel, J., concurring) ("[F]uture opinions can elaborate more refined contours of the privilege – a task shown to be manageable by the experience of the fifty jurisdictions with statutory or common law protections.").

¹⁵⁷ *Id.* at 1161 (Henderson, J., concurring) (referencing the hesitance of the judiciary to

within a jurisprudence marked by fairly uniform disinclination to announce new privileges or even expand existing ones.”¹⁵⁸ Justice Scalia’s dissent in *Jaffee* gave a biting argument for this disinclination.¹⁵⁹ He argued that upon the grant of any evidentiary privilege, the “purchase price” is no less than the sacrifice of justice.¹⁶⁰ The need for everyman’s evidence and the integrity of the justice system depend on the unhindered pursuit of the truth, which is severely encumbered by allowing testimonial privileges.¹⁶¹ The Court’s use of a consensus among the states as a justification for creating a federal privilege also troubled Scalia. He pointed to the divergence among the state statutes and the differing scopes of the offered psychotherapist privilege, and argued that creating a uniform federal privilege based upon state judgment “is rather like announcing a new . . . federal common law of torts, based upon the States’ unanimous judgment that some form of tort law is appropriate.”¹⁶² Scalia adamantly argued that it is the role of the courts to devote themselves to the pursuit of truth, and creating a federal testimonial privilege is injurious to that role.¹⁶³

With the majority ruling in *Jaffee* positioned as an outlier in the case law of federal privilege, and in light of Justice Scalia’s fervent reproofs, it is very unlikely the Court will review its decision in *Branzburg*.¹⁶⁴ There is very little chance that a common law newsman’s privilege will arise; therefore the needed federal privilege should be a statutory one.

B. A Statutory Privilege

1. Qualifications

The debate over the very existence of the newsman’s privilege and the

write new rules when Congress is better suited to do so); *see also* *United States v. Nixon*, 418 U.S. 683, 710 (1974) (“Whatever their origins, these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”); *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (“Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”).

¹⁵⁸ *In re Judith Miller*, 438 F.3d at 1161 (Henderson, J., concurring).

¹⁵⁹ *Jaffee*, 518 U.S. at 18 (Scalia, J., dissenting).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 19-20.

¹⁶² *Id.* at 26 (internal quotation marks omitted).

¹⁶³ *Id.* at 36 (“There is no self-interested organization out there devoted to the pursuit of truth in the federal courts . . . [but t]he expectation is . . . that this Court will have that interest prominently – indeed primarily – in mind.”).

¹⁶⁴ *See* Lidsky, *supra* note 86, at 945 (arguing that “lower courts cannot wait for Supreme Court guidance to deal with the complex issues raised” by the Internet and the journalistic privilege).

differences in the various state shield statutes calls to light numerous issues and concerns that should be taken into consideration in the formation of a federal statute. The first troublesome definition is in the title of the privilege itself: who or what qualifies as a “newsman” and therefore has standing to assert the privilege?¹⁶⁵ The definition should be broad enough to include non-traditional media sources and formats.¹⁶⁶ One court has suggested, in order to encompass the traditional reporters working in a new medium as well as self-employed citizen journalists in any medium, granting the privilege to those who “gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience.”¹⁶⁷

A definition like this one makes the application of the privilege turn on newsgathering activities, as opposed to professional affiliation or publishing medium or broadcast format. This definition would assure inclusion of bloggers and online journalists that do not qualify for privilege under the definitions of such strict statutes as Alabama or California, while steering clear of the language of some state statutes that base the application of privilege on such contentious definitions as “news” or “news media.” This language would also prevent the “lonely pamphleteer” – whose audience is surely not “mass” – from claiming the status of a newsman and therefore the benefits of the privilege. The First Amendment rights of freedom of speech for the soapbox orator or the pamphleteer would remain intact, but such language would prevent the testimonial privilege from being applied too liberally and hindering the interests that counter those of the newsman.

¹⁶⁵ Such a concern is expressed by Judge Sentelle:

If the courts extend the privilege only to a defined group of reporters, are we in danger of creating a ‘licensed’ or ‘established’ press? . . . Conversely, if we extend that privilege to the easily created blog, or the ill-defined pamphleteer, have we defeated legitimate investigative ends of grand juries in cases like the leak of intelligence involved in the present investigation?

In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1158 (D.C. Cir. 2006) (Sentelle, J., concurring). Justice Scalia’s solution for these concerns is a licensing system for those wishing to claim the privilege. *Jaffee*, 518 U.S. at 21 (Scalia, J., dissenting) (pointing to the Advisory Committee language for proposed FED. R. EVID. 504, granting a psychotherapist privilege only to those “licensed or certified” in their field). For more discussion of what standards for journalists should be formed so that they are properly inclusive of blogs and bloggers, see Anne Flanagan, *Bloggng: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 403 (2006).

¹⁶⁶ *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 101 (Ct. App. 2006) (“[T]here is no apparent link between the core purpose of the law, which is to shield the gathering of news for dissemination to the public, and the characteristic of appearing in traditional print, on traditional paper.”).

¹⁶⁷ *Id.* at 92.

2. Exceptions

The Supreme Court's rationale in denying an absolute privilege in *Branzburg v. Hayes* turned on concerns about the legitimacy and effectiveness of the adversarial system. Lower courts have echoed these concerns when discussing the needs of the grand jury and the rights of the civil plaintiff to obtain recourse for a wrong. These are legitimate concerns that need to be addressed in any federal shield statute.

One of the most troublesome of these concerns is when the information the journalist publishes or broadcasts was illegally obtained, confidential, or relates to the commission of a crime. In such cases, the government's interest in obtaining everyman's evidence during a grand jury investigation is substantial, since it is clearly in society's interest to see crimes successfully prosecuted. On the other hand, when whistleblowers break confidentiality laws to release classified information to the public, there could also be substantial public interest in having access to that information, as well as encouraging those who would reveal it to continue doing so.¹⁶⁸

a. *Misprision of Felony*

The solution may lie in a significant exception to the privilege, namely a disqualification for committing misprision of felony¹⁶⁹ balanced against the case-by-case determination of whether the public has a substantial interest in the information. This exception would prohibit journalists who know of felony activity and refuse to reveal the information they know from claiming the privilege. It would also serve to prevent sources from collaborating with or manipulating the press into illegally revealing information that has little public interest.

For instance, "if a leaker tries to use a journalist as part of an illegal act – for example, by disclosing a tax return or the name of a CIA agent so that it can be published – then the journalist may be ordered to testify."¹⁷⁰ If the newsman colludes with the source knowing that revealing a piece of information is a crime, and yet persists in publishing that information in order to damage the opposition and then hides behind source confidentiality, the privilege should not apply. With the inclusion of bloggers as qualifying newsmen, the effectiveness of the justice system would be severely hindered if the privilege applied in such a situation. The misprision exception to a federal privilege

¹⁶⁸ Volokh, *supra* note 6 ("[T]ips from confidential sources often help journalists (print or electronic) uncover crime and misconduct [and if] journalists had to reveal such sources, many of these sources would stop talking.")

¹⁶⁹ Misprision of felony is defined as "[c]oncealment or nondisclosure of someone else's felony." BLACK'S LAW DICTIONARY 461 (8th ed. 2004). General misprision is defined as "[c]oncealment or nondisclosure of a serious crime by one who did not participate in the crime." *Id.*; see also *In re Judith Miller*, 438 F.3d at 1158 (Sentelle, J., concurring) (debating whether the Court should create immunity for misprision).

¹⁷⁰ Volokh, *supra* note 6.

would help to prevent it from doing so.

As in the example above, the CIA or IRS operative with access to confidential information – information the public has little legitimate interest in obtaining – could convince his friend to set up a blog, “leak” the confidential information to that friend, and then claim both are protected by journalistic privilege. This abuse of the privilege and the electronic form of media would be discouraged by preventing journalists from claiming the privilege in such a situation. This limitation should pertain to all newsmen who fit the above definition, regardless of the format they use: electronic, broadcast, or print.

b. *Knowledge*

Yet when an exception for misprision of felony spells the difference between protection of source confidentiality and forced testimony of a newsman, the question of whether the newsman had knowledge of his source’s felony becomes an extremely important distinction. When newsmen know or have reason to know the information their sources give them is felonious (either felonious to reveal or feloniously obtained), the misprision exception to claiming the privilege could cause a chilling effect both with the sources’ willingness to reveal the information and newsmen’s willingness to publish it. When the sources are government or corporate whistleblowers, advance knowledge that the newsmen to whom they leak information could be forced to break a promise of confidentiality would likely deter some sources from communicating with the press. Such deterrence would deprive the public of access to information to which it has a legitimate interest.

Hence, an exclusion from the misprision exception should be included in the federal statute. For instance, when the newsman is in no way involved in the illegal activity that relates to the information, whether or not they have knowledge of it, they should still be able to claim the privilege. The Supreme Court has advocated this kind of consideration: when parties disclosing information did not participate in its interception, despite their knowledge that the interception was unlawful, their disclosure of that information was protected by the First Amendment.¹⁷¹ If this ruling extended to reporters, it would protect newsmen who know that the information they publish or broadcast is illegally obtained, but did not perform any illegal act themselves.¹⁷² Yet, an important distinction between different kinds of

¹⁷¹ *Bartnicki v. Vopper*, 532 U.S. 514, 517-18 (2001) (finding that the decision involved a “conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech”).

¹⁷² The Reporter’s Committee for Freedom of the Press advocated such an extension. See Brief for the Reporters Committee for Freedom of the Press, *supra* note 15, at *25. They argued that “publication of illegally disclosed information on a matter of public interest [should be] protected under the First Amendment [and therefore qualify for the

information needs to be preserved; any exclusion to the misprision exception should only be made for information the public has an interest in obtaining, and which outweighs any governmental or corporate desire to keep it confidential. The category of information could be determined on a case-by-case basis.

c. *Whistleblowers*

Congress should, however, protect this information of substantial public interest through separate federal protections for whistleblowers and leakers. In contrast to other case-by-case determinations that allow for the protection of sources, a whistleblower exception is reasonably determinative before the fact. Whether the information he or she has to reveal has substantial public interest, or whether it is simply a means to damage a political or corporate opponent, is fairly clear for the source before the source speaks to reporters. Since sources have no real doubt of their own motives, the factually specific rule would not deter sources from communicating with the press. In this way, whistleblowers could be reasonably secure in their identities being protected by the courts, and the public can remain secure in the effectiveness of the press as a check on government and corporate activity.

3. Civil Actions

The definitions and exceptions discussed above address many of the concerns that the common law and state statutes raise concerning the prosecution of crimes. These include the chilling effect concerns of everyman's evidence before the grand jury and the problem of defining of who qualifies for the privilege.¹⁷³ The remaining concerns that the statute needs to address are Internet anonymity and the difference between civil and criminal circumstances. As discussed above,¹⁷⁴ one of the main attractions of the Internet is that some newsmen – who engage in newsgathering for dissemination to a mass audience and would therefore apply under the expanded qualifications for the privilege – will work and publish under the cloak of anonymity. One court has held there is no common law expectation of privacy in information given to an ISP,¹⁷⁵ but any federal statute should recognize the importance of user and author anonymity for Internet bloggers.

privilege] where the journalist did not participate in the illegal acquisition of the information." *Id.*

¹⁷³ See *supra* text accompanying note 157 (discussing how the creation of a new privilege may hinder the search for truth).

¹⁷⁴ See *supra* Part II.B.

¹⁷⁵ *United States v. Hambrick*, 55 F. Supp. 2d 504, 507 (W.D. Va. 1999) ("For Fourth Amendment purposes, this court does not find that the [statute at issue] has legislatively determined that an individual has a reasonable expectation of privacy in his name, address, social security number, credit card number, and proof of internet connection."), *aff'd per curiam*, 225 F.3d 656 (4th Cir. 2000) (unpublished table decision).

Such a consideration would concern bloggers at the edges of the definition of “newsman,” as well as their sources.

In a civil context, like defamation or the exposure of trade secrets, the identification of the newsman as well as his or her sources is essential in order to ensure the injured party has a chance for judicial recourse. The concerns about whistleblowers and a chilling effect are not as strong for these civil claims, and so the interests of each side shift in favor of revealing the parties’ identities.

Yet, the question of anonymity for Internet users is central to many users’ concerns regarding their activity online. To guard these interests, another balancing test should be included in the federal shield law. In the test’s most basic form, the First Amendment right to speak anonymously on the Internet should weigh against the necessity of the information sought in a civil plaintiff’s claim.¹⁷⁶ A prime example of the factors to be considered in such a determination is the *Mitchell* Standard.¹⁷⁷ In determining whether a subpoena should be issued in response to a misappropriation of trade secrets action, the California Supreme Court held that the factors it needed to consider were: “(1) [the n]ature of the litigation and whether the reporter is a party . . . (2) does [the] discovery sought go to the heart of plaintiff’s claim[?] . . . (3) [h]ave other sources of information been exhausted? . . . [and] (4) [w]hat is the public good served by protecting the misappropriation of trade secrets?”¹⁷⁸ The test is easily adaptable to a variety of civil actions and would protect an injured party’s means of redress.¹⁷⁹ When the plaintiff’s claim depends upon identifying the party that caused the injury – either to seek damages or enjoin them from causing further damage – then the cloak of anonymity may be lifted, and the newsman may be forced to be identified and testify. The kind of speech involved in the circumstances that would give rise to a civil action is distinguishable from the kind that could prompt a criminal subpoena,¹⁸⁰ and

¹⁷⁶ *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 239-40 (Ct. App. 2008).

¹⁷⁷ *Mitchell v. Superior Court*, 690 P.2d 625 (Cal. 1984).

¹⁷⁸ *Apple Computer, Inc. v. Doe 1*, No. 1-04-CV-032178, 2005 WL 578641, at *5-6 (Cal. Super. Ct. Mar. 11, 2005) (citing *Mitchell*, 690 P.2d at 632-634). To see an application of this test to different circumstances, see *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 106-107 (Ct. App. 2006).

¹⁷⁹ See *Krinsky*, 72 Cal. Rptr. 3d at 241 (“To reach a workable standard by which to balance the parties’ competing interests we must . . . focus instead . . . on providing an injured party a means of redress without compromising the legitimate right of the Internet user to communicate freely with others.”).

¹⁸⁰ For example, the circumstances in *O’Grady* that gave rise to a misappropriation of trade secrets claim were: “the open and deliberate publication on a news-oriented Web site of news gathered for that purpose by the site’s operators – with the deposit of information, opinion, or fabrication by a casual visitor to an open forum such as a newsgroup, chatroom, bulletin board system, or discussion group.” *O’Grady*, 44 Cal. Rptr. 3d at 99. The court held that the “[p]osting of the latter type, where it involves ‘confidential’ or otherwise actionable information, may indeed constitute something other than the publication of

therefore a test to balance the difference in the weight of each party's interests is necessary in any federal shield statute.

4. Structure of the Privilege

The last question to consider is what structure the federal statute should take: the majority approach that protects the newsman from compulsory testimony, the California method of protecting journalists from citations for contempt in refusing to comply with a subpoena,¹⁸¹ or the simple mandate of a balancing test such as that employed in Minnesota.¹⁸² Since one of the main benefits of the approach employed by California – that the protection against contempt of court is less protective in civil cases – is addressed in the above suggested balancing test, the ideal federal statute should protect qualifying newsmen from compelled testimony, subject to the exception for misprision of felony, the additional whistleblower protections, and the civil claim balancing test.¹⁸³

CONCLUSION

The First Amendment freedom of the press is one of the foundations of American society,¹⁸⁴ and the economic, political and social influence that newsmen have wielded has a long and colorful history.¹⁸⁵ However, in the face of changing technology, the question of First Amendment freedom of the press, which protects the “lone pamphleteer” as well as the corporate news organization, can apply to an ever increasing number of people. As the influence and prevalence of blogs continue to rise, the top-down system of news continues to change into a news system that is much murkier and harder to define. Bloggers have received press passes to cover presidential nominating conventions,¹⁸⁶ they have forced the resignation of a famous

news.” *Id.*

¹⁸¹ CAL. EVID. CODE § 1070 (West 2008).

¹⁸² MINN. STAT. § 595.024 (2005) (balancing factors such as the relevance of the information sought, its unavailability from alternative sources, and the interest in disclosure to prevent injustice).

¹⁸³ For further discussion of other concerns involved in creating a journalistic privilege or including bloggers in the grant of protection, see Dotinga, *supra* note 1 (questioning whether rights and privileges of journalists should come with reciprocal duties, such as the disclosure of identity); O’Grady, *supra* note 2 (describing an example of the influence of “citizen journalism”); Volokh, *supra* note 6 (“[W]hen everyone is a journalist, a broad journalist’s privilege becomes especially costly.”).

¹⁸⁴ See *supra* text accompanying note 16.

¹⁸⁵ See, e.g., *United States v. Nixon*, 418 U.S. 683, 707 (1974) (denying the President of the United States an absolute executive privilege); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (denying the government’s request for an injunction to stop *The New York Times* from publishing what became known as the “Pentagon Papers”).

¹⁸⁶ Hempel, *supra* note 138.

broadcast news anchor,¹⁸⁷ and some have even received prestigious awards for quality reporting.¹⁸⁸ In this light, there is less and less reason to omit them from the protections that newsmen in the traditional mediums enjoy.

Yet, courts have been understandably reticent to fit bloggers and Internet users into definite categories of existing privacy law, tort law, and state law on testimonial privilege, since the traditional definitions do not clearly address issues brought on by advancing technology. It is in the face of this reticence and uncertainty that this Note calls for a federal statutory newsmen's privilege, defining those who qualify by the information they publish, as opposed to their professional affiliation or the medium they use. This kind of statute would include bloggers who do the work of traditional print and broadcast journalists, protecting them from compelled testimony to reveal confidential sources' identities (as well as their own, if need be).

This Note also calls for the proposed federal statute to address the concerns that have, historically, been part of the debate regarding the reporter's privilege. These concerns include the critical importance of the grand jury's access to everyman's evidence in the prosecution of crimes, as well as civil plaintiffs' interests in obtaining redress for wrongs and the public's interest in whistleblowers' continued communication with the press. A balancing test, in addition to statutory exceptions for misprision of felony and additional protections for whistleblowers, would help secure a satisfactory equilibrium between the various interests at stake: the individual's First Amendment rights to freedom of speech and the press against society's interest in an effective judicial system. With this balance, the free flow of information to the press and therefore the public will remain secure, and ensure that whatever the medium, newsmen can successfully perform their essential role. And with a shift in focus into the blogosphere, the citizen journalist and the anonymous Internet source may "contribute to the development of an informed citizenry capable of deciding its collective fate."¹⁸⁹

¹⁸⁷ Pein, *supra* note 3, at 31.

¹⁸⁸ Cohen, *supra* note 145 (detailing blogger Joshua Micah Marshall's win of the George Polk Award for his coverage of the firing of eight U.S. Attorneys).

¹⁸⁹ Lidsky, *supra* note 86, at 897.