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Your Secret's Safe with Me…or So You Think: How States Have Cashed in on Branzburg's "Blank Check"

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YOUR SECRET'S SAFE WITH ME . . . OR SO YOU THINK: HOW THE STATES HAVE CASHED IN ON *BRANZBURG'S* "BLANK CHECK"

I. INTRODUCTION

Reporter's shield laws are statutes that protect a newsgatherer from compulsory disclosure of confidential information.[1] Since the 1970s, thirty-five states and the District of Columbia have enacted reporter's shield laws.[2] During this wave of legislation, states adopted different types of reporter's shield laws, each offering varying degrees of protection to journalists.[3] This Note explores these assorted approaches and examines which type of privilege reporter's shield laws should give to a newsgatherer to resist compulsory disclosure of his confidential sources and information. Consider the following scenario.[4]

It is three days before Christmas. You come home from work and your two children greet you at the door. You look at them and see the excitement of the approaching visit from Old Saint Nick. Then, at that very moment, you feel your heart rate quicken and your eyes well up with tears. This sickening feeling comes from the knowledge that in a few moments you will have to ruin your children's Christmas. You must tell them that you will not be able to spend the holidays with them this year because a federal judge has sentenced you to serve eighteen months in prison for refusing to disclose the identity of your confidential sources and information.[5] Unfortunately, in 2006, this is how San Francisco

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1 Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445, 446–47, 451–52 (2002/2003) (explaining that a journalist's confidential information often includes the identity of confidential sources, the information gained from confidential sources, and the journalist's own work product). Further, the term "reporter's privilege" is also known as a "journalist's privilege," a "reportorial privilege," or a "newsmen's privilege." *Id.* at 447 n.3.

2 Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35, 46–49 (2006) (discussing shield laws at the state level and how they developed from the common law). *See infra* note 31 (outlining the jurisdictions that have adopted reporter's shield laws and recent developments at the state level).

3 *See generally Reporter's Privilege*, 919 PLI/Pat 9, 69–480 (Nov. 2007) (extensively detailing the extent of the split among state and federal jurisdictions as to the scope of protection of newsgatherers through either the common law or reporter's shield laws).

4 This anecdote was modified from Professor RonNell Andersen Jones's law review article, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 585 (2008).

5 *See* Bob Egelko, *Silence Means Prison, Judge Tells Reporters*, S.F. CHRON., Sept. 22, 2006, at A1 (detailing Fainaru-Wada's ordeal and prison sentence). *See generally In re* Grand Jury Subpoenas, Fairanu-Wada &Williams, 438 F. Supp. 2d 1111, 1113–14 (N.D. Cal. 2006).

Chronicle reporter Mark Fainaru-Wada and his family spent the holiday season.[6]

The fate of Mark Fainaru-Wada is one he shares with countless other journalists.[7] For centuries judges have held reporters in contempt and thrown them in jail for refusing to reveal confidential sources and information.[8] The practice of jailing journalists for resisting compulsory disclosure is traceable to seventeenth century England and appeared in the American colonies as early as the 1700s.[9] In the past three decades, however, the effort to protect newsgatherers from compulsory disclosure and incarceration has been the subject of legislative proposals and court decisions.[10] Until now, protection for newsgatherers has been steady, but it has occurred only at the state level through the enactment of reporter's shield laws by state legislatures.[11] Reporter's shield laws offer journalists a safe-haven and grant them a privilege to resist compliance with a subpoena or a court order requiring him to testify about his

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Mark Fainaru-Wada and his partner at the San Francisco Chronicle, Lance Williams, refused to comply with federal grand jury subpoenas ordering them to testify about information they had gained concerning the use of steroids by professional athletes. *Id.* The Court denied Fainaru-Wada and Williams's motion to quash the subpoenas because compliance with the subpoenas was not unreasonable and ordered them to testify before a grand jury. *See id.* at 1121–22. *See also* Joe Garofoli, *2 Chronicle Reporters at Center of Media, Government Standoff*, S.F. CHRON., Sept 20, 2006, at A1.

6 *See* Egelko, *supra* note 5, at A1.

7 *See* Jones, *supra* note 4, at 626 (stating that in 2006, a national survey of 761 news and media organizations reported their newsgatherers had received over three thousand subpoenas).

8 *See* 23 CHARLES ALLEN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5426 (2008).

9 *See*, *e.g.*, *id*. (discussing the practice of Seventeenth Century English courts pertaining to when a reporter refused to reveal confidential information to a judge on the King's Bench and the typical result being a short period of incarceration). *See also* Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1384 (2003) (discussing the jailing of reporters in post-revolutionary America, including Benjamin Franklin's brother, James Franklin, and John Peter Zenger).

10 *See* Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 107–11 (2002) (giving an overview of the increased awareness and litigation concerning reporter's shield laws since the early 1970s). For further discussion see *infra* Part II.A (outlining the history of reporter's shield laws, how they have developed among the states, and the public policies supporting reporter's shield laws).

11 *See* 2 ANDREW B. ULMER, MEDIA, ADVERTISING, & ENTERTAINMENT LAW THROUGHOUT THE WORLD § 37:3 (Westlaw 2009), *available on Westlaw at* MEDIAWORLD § 37:3 (noting that the states, not the federal government, have been the catalyst for developing and reforming statutory schemes that safeguard journalists); Alexander, *supra* note 10, at 107–11.

confidential sources and information.[12] This Note focuses on the various types of privileges that state legislatures grant to newsgatherers through reporter's shield laws and determines which privilege is the most effective.[13]

To date, nearly forty jurisdictions in the United States have adopted reporter's shield laws.[14] None of these shield laws are the same, however, and states are not in agreement as to what type of privilege newsgatherers need to be able to best resist compulsory disclosure.[15] Nevertheless, each state's privilege can be classified into one of four general categories: (i) an absolute privilege; (ii) a qualified privilege; (iii) a blended privilege; or (iv) immunity from contempt.[16] This Note addresses the various state approaches and proposes a resolution.[17]

Part II of this Note explains the composition of a reporter's shield law and discusses the root of the current state split: the U.S. Supreme Court's decision in *Branzburg v. Hayes*.[18] Further, Part II describes and illustrates the four types of privileges incorporated into reporter's shield laws and examines the public policy considerations supporting each type of legislation.[19] Next, Part III of this Note conducts a cost-benefit analysis of each of the four privileges to determine which privilege is the most effective.[20] Finally, Part IV of this Note contributes "The

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12 *See* 81 AM. JUR. 2D *Witnesses* § 526 (2004) (explaining what a reporter's shield law is and how it functions as a device to guard against compulsory disclosure).

13 *See infra* Parts II–III (giving background information on reporter's shield laws and the types of privileges incorporated into reporter's shield laws and conducting a cost-benefit analysis to ascertain which of these privileges is the most practical and effective).

14 *See* Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, *supra* note 2, at 46–49. *See also infra* note 31 (listing the states that have enacted a reporter's shield law and giving the citations to the corresponding state statutes).

15 *See* Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Court Interpretation of the Journalist's Statutory Privilege*, 23 J. LEGIS. 215, 216–18 (1997). *See infra* Part II.C (examining the split among the states in further detail).

16 *See* Anthony L. Fargo & Paul McAdoo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist's Privilege Problem*, 33 WM. MITCHELL L. REV. 1347, 1355–65 (2007) (explaining the privileges adopted by reporter's shield laws and the privileges the state and federal judicial systems have developed through the common law). *See infra* Part II.C (defining the privileges and illustrating how they apply).

17 *See infra* Parts II–IV (discussing reporter's shield laws and the different privileges incorporated by the states, conducting a cost-benefit analysis of the privileges, and proposing a model statute to resolve the state split).

18 408 U.S. 665 (1972). *See infra* Parts II.A–B (defining what a reporter's shield law is, examining the policies that justify reporter's shield laws, and discussing the U.S. Supreme Court's decision in *Branzburg*).

19 *See infra* Part II.C (discussing the differences between each privilege and using the reporter's shield laws of Indiana, Florida, Illinois, New York, the District of Columbia, and California to illustrate the application of each privilege).

20 *See infra* Part III (examining the costs and benefits of the application of each privilege, the interests of the parties concerned, and the public policies underlying each privilege).

Newsgatherer's Protection Act," which is a model reporter's shield law that incorporates what the cost-benefit analysis determines is the most practical privilege: the blended privilege.[21]

II. BACKGROUND: THE NUISANCE OF CHOICE

The state split this Note addresses is the product of a single catalyst: unfettered choice.[22] Part II of this Note offers an introduction to state reporter's shield laws and explains what reporter's shield laws are, traces their development, and explores the purposes and policies they serve.[23] Next, Part II discusses the Supreme Court's decision in *Branzburg* and identifies this decision as the source of the current state split.[24] Finally, Part II addresses the problem at the state level and provides examples of the privileges that state shield laws grant to reporters to resist compulsory disclosure.[25]

A. State Reporter's Shield Laws: An Introduction

First, this Section answers the question, "What is a reporter's shield law?"[26] Next, it describes the underlying purposes and policy considerations of state shield laws.[27] Additionally, this Section addresses why shield laws are needed to protect newsgatherers.[28]

Reporter's shield laws protect members of the media by granting newsgatherers a privilege to refuse to reveal confidential sources and

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21 *See infra* Part IV (offering a model statute with full commentary to resolve the state split as to which privilege is the most effective and practical).

22 *See Branzburg*, 408 U.S. at 706 (stating that the states are free to enact any kind of law granting journalists a privilege to resist compulsory disclosure, so long as the law falls within the limits of the Constitution). *See also* Part II.B (explaining that the *Branzburg* decision is the root of the state split addressed by this Note).

23 *See infra* Part II.A (discussing the development of state reporter's shield laws, how and why they operate, and the controversy they spark).

24 *See infra* Part II.B (reviewing the holding, opinions, and reasoning of the Court, and outlining the principles of the decision).

25 *See infra* Part II.C (summarizing where the states agree with respect to reporter's shield laws and then charting the various privileges incorporated by the states using as models the shield laws of Indiana, Florida, Illinois, New York, California, and the District of Columbia).

26 *See infra* notes 29–31 and accompanying text (explaining that a reporter's shield law is a statutory privilege granted to newsgatherers to refuse to comply with court orders or subpoenas to testify about or reveal confidential sources or information).

27 *See infra* notes 32–35 and accompanying text (focusing on the policy rationales and underlying purposes of reporter's shield laws).

28 *See infra*, notes 36–40 and accompanying text (discussing the need for reporter's shield laws due to the tension that exists between the press, sources of information, litigants, the government, law enforcement, and the courts).

information when subpoenaed or ordered by a court to do so.[29] There is no uniformly accepted privilege at the state level; rather, states have implemented a variety of privileges that come in one of four generic forms: (i) an absolute privilege; (ii) a qualified privilege; (iii) a blended privilege that combines the absolute and qualified privileges; or (iv) immunity from contempt for noncompliance with a court order or subpoena.[30] Currently, thirty-five states and the District of Columbia have enacted reporter's shield laws and several more have recently proposed legislation.[31]

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[29] *See* 81 AM. JUR. 2D *Witnesses* § 526 (2004) (giving a brief definition of what a reporter's shield law is and the effect shield laws have on journalists); ULMER, *supra* note 11, at § 37:3 (defining reporter's shield laws and the common law reporter's privilege and comparing the two).

[30] *See* Noah Goldstein, *An International Assessment of Journalist Privileges and Source Confidentiality*, 14 NEW ENG. INT'L COMP. L. ANN. 103, 110 (2007) ("the various state statutes range in scope, from broad protections that provide an absolute journalistic privilege, to shield laws that offer a qualified privilege," to those that offer everything in between). *See also infra* Part II.C (exploring the four generic types of privileges that the states grant members of the media to be free from compelled disclosure).

[31] *See* ALA. CODE § 12-21-142 (1986); ALASKA STAT. §§ 09.25.300–09.25.390 (1992); ARIZ. REV. STAT. ANN. § 12-2237 (1982) & ARIZ. REV. STAT. ANN. § 12-2214 (1993); ARK. CODE ANN. § 16-85-510 (West 1987); CAL. CONST. ART. 1, § 2 (1993); CAL. EVID. CODE § 1070 (West 1993); CAL. CIV. PROC. CODE § 1986.1 (West 2001); COLO. REV. STAT. ANN. § 13-90-119 & COLO. STAT. ANN. §§ 24-72.5-101 to 24-72.5-106 (West 1993); CONN. GEN. STAT. § 52-146T (2006); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1992); D.C. CODE §§ 16-4701–16-4704 (1992); FLA. STAT. § 90.5015 (1998); GA. CODE ANN. § 24-9-30 (West 1993); 2008 HAW. SESS. LAWS ch. 240 § 1 (effective July 2, 2008); 735 ILL. COMP. STAT. 5/8-901 (West 1985); IND. CODE § 34-46-4-1, 34-46-4-2 (1998); KY. REV. STAT. ANN. § 421.100 (West 1990); LA. REV. STAT. ANN. §§ 45:1451–45:1459 (West 1992); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 1992); ME. PUB. L. CH. 654, signed into law on April 18, 2008; MICH. COMP. LAWS § 767.5A (1982); MINN. STAT. §§ 595.021–595.025 (1998); MONT. CODE ANN. §§ 26-1-901–26-1-903 (1992); NEB. REV. STAT. §§ 20-144–20-147 (1992); NEV. REV. STAT. §§ 49.275–49.385 (1986); N.J. REV. STAT. §§ 2A:84A-21–2A:84A-21.13 (1996); N.M. STAT. § 38-6-7 (1987); N.Y. CIV. RIGHTS LAW § 79-H (McKinney 1996); N.C. GEN. STAT. § 8-53.11 (1999); N.D. CENT. CODE § 31-01-06.2 (1991); OHIO REV. CODE ANN. §§ 2739.04 & 2739.11–2739.12 (West 1990); OKLA. STAT. tit. 12, § 2506 (1996); OR. REV. STAT., §§ 44.510–44.540 (1995); 42 PA. CONS. STAT. § 5942 (1993); R.I. GEN. LAWS §§ 9-19.1-1 to 9-19.1-3 (1995); S.C. CODE ANN. § 19-11-100 (1995); TENN. CODE ANN. § 24-1-208 (1996); WASH. REV. CODE § 5.68.010 (2007).

The states that have enacted reporter's shield laws are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, The District of Columbia, Florida, Hawaii, Georgia, Indiana, Illinois, Kentucky, Louisiana, Maryland, Michigan, Maine, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Washington. For a breakdown of the privileges to which the states adhere see *infra* notes 67–70. In addition, several states without reporter's shield laws have recently considered legislation to enact a shield law. Several states have bills before their legislatures, including Kansas, Massachusetts, Missouri, West Virginia, and Wisconsin. *See* S.R. 211, 2009 Reg. Sess. (Kan. 2009); H.R. 1672, 2008 Reg. Sess. (Mass. 2008); H.R. 1539, 2008 Reg. Sess. (Mo. 2008); H.R. 2735, 2008 Reg. Sess. (W. Va. 2008); S.R. 235, 2008 Reg. Sess.

Reporter's shield laws address several public policy concerns.[32] First, reporter's shield laws facilitate the free flow of information to the public and promote freedom of the press.[33] Next, shield laws aid law enforcement and litigants where necessary, and prevent the disclosure of information that is contrary to the public interest.[34] Moreover, shield laws prevent "fishing expeditions" by litigants and government officials

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(Wis. 2008). Also, a bill proposing a shield law was actually passed by the Texas State Senate before being rejected by the State House of Representatives. *See* S.B. 966, 2008 Reg. Sess. (Tex. 2008). Finally, Utah's Supreme Court recently handed down a model evidentiary rule that would create a shield law. *See* UTAH RULE OF EVIDENCE 509, PROPOSED (2008). *See also* Media Law Resource Center, Proposed State Shield Law Bills, http://www.medialaw.org/Template.cfm?Section=Proposed_State_Shield_Law_Bills (last visited August 3, 2009).

[32] Susan M. Gilles, *The Image of "Good Journalism" in Privilege, Tort Law, and Constitutional Law*, 32 OHIO N.U. L. REV. 485, 486–90 (2006). Curiously, however, nearly all reporter's shield laws are silent as to any kind of legislative intent or purpose. *Id.* at 487 n.12 (citing Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, *supra* note 2, at 69–70). In fact, the only legislatures to include a statement of legislative purpose in their reporter's shield law are Minnesota and Nebraska. *Id.*

[33] *See* Joel G. Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law*, 31 SETON HALL LEGIS. J. 149, 175 (2006) (noting that enacting a shield law serves two purposes: assuring the free flow of information to the public and that journalists are free to report that information, and preventing disclosure of confidential information that is not in the public's best interest); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 535 (2007) (explaining the purpose of shield laws is to preserve the dissemination of information into the public discourse); Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1072–73 (2006) (same); Leslye DeRoos Rood & Ann K. Grossman, *The Case for a Federal Journalist's Testimonial Shield Statute*, 18 HASTINGS CONST. L.Q. 779, 781 (1991) (the primary objective of a shield law is to strengthen a reporter's First Amendment rights).

[34] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 696–97, 700 (1972) (discussing the important need for law enforcement officers to have access to all available information related to crimes or criminal investigations); Campagnolo, *supra* note 1, at 451–52 (explaining that shield laws serve to prevent the so-called "chilling effect," which refers to the theory that if source confidentiality was not protected then confidential sources would be reluctant to give information to journalists; hence, the newsgathering process and the dissemination of information would be "chilled"); Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L. J. 385, 428–37 (2006) (suggesting that certain journalists who operate independently and are not connected with an official news or media organization often are able to obtain sensitive information relating to criminal investigations and national security); John T. White, Comment, *Smoke Screen: Are State Shield Laws Really Protecting Speech or Simply Providing Cover for Criminals Like the Serial Arsonist?*, 33 ARIZ. ST. L.J. 909, 911–12 (2001) (describing how reporter's shield laws aid, but also hinder police investigations). *But see Branzburg*, 408 U.S. at 693–94 (downplaying the plausibility of the "chilling effect" as being too speculative because only twenty percent of reporters who relied on confidential sources forecasted any kind of possible adverse effect if their sources were to be disclosed). For an analysis of the chilling effect and how it influences the type of privilege a state adopts, see *infra* Part III.

who attempt to obtain a journalist's confidential information for their own use, which allows a reporter's communications and relationships with their sources to remain privileged and confidential.[35]

Generally, the objectives of the media and the newsgathering community are to gather information and to relay that information to the public.[36] To accomplish these goals, journalists must often use confidential sources—sources of information that have a confidentiality agreement with a reporter—because these sources have access to sensitive facts and materials.[37] Further, information gained from a

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[35] *See Branzburg*, 408 U.S. at 744 n.34 (Stewart, J., dissenting) (recognizing the threat fishing expeditions pose to a journalist's ability to maintain the confidentiality of sources and information). *See also* Edward L. Carter, Note, *Reporter's Privilege in Utah*, 18 BYU J. PUB. L. 163, 183 (2003) (citing Theodore J. Boutrous & Seth M.M. Stodder, *Retooling the Federal Common-Law Reporter's Privilege*, 17 COMM. LAW. 1, 23 (Spring 1999)) (stating that a reporter's shield law eliminates unnecessary subpoenas served upon newsgatherers by litigants that are on fishing expeditions); Sharon K. Malheiro, Note, *The Journalist's Reportorial Privilege—What Does it Protect and What are its Limits?*, 38 DRAKE L. REV. 79, 90–91 (1988/1989) (citing Grand Forks Herald v. District Court, 322 N.W.2d 850, 856 (N.D. 1982)) (arguing that the protections of a shield law should prevail over fishing expeditions into a journalist's files); Shelley R. Halber, Note, Knight-Ridder Broadcasting v. Greenberg*: is the Judiciary Making Policy?*, 8 PACE L. REV. 427, 455–56 n.169 (citing People v. Iannaccone, 447 N.Y.S.2d 996, 997 (N.Y. Sup. Ct. 1982)) (clarifying that the clear language of New York's shield law indicated the legislature intended to prevent fishing expeditions); *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1601 (1985) (stating that compulsory disclosure inhibits confidential communications between journalists and their sources). *See also* MAURICE VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS: THE CITIZEN'S RIGHT TO KNOW VERSUS THE LAW'S RIGHT TO CONFIDENTIAL NEWS SOURCE EVIDENCE 58–103 (1979) (arguing that a reporter's privilege is similar to other privileges, such as the attorney/client, pastor/parishioner, and doctor/patient, but operates in a different manner because the information is usually known but the source's identity is not).

[36] Robert T. Sherwin, Comment, "*Source" of Protection: The Status of the Reporter's Privilege in Texas and a Call to Arms for the State's Legislators and Journalists*, 32 TEX. TECH L. REV. 137, 139 (2000). In disseminating information to readers or viewers, the media presents the information in the form of what is more commonly known as a "story." *Id*. *See* Richard Rosen, Comment, *A Call for Legislative Response to New York's Narrow Interpretation of the Newsperson's Privilege:* Knight-Ridder Broadcasting Inc. v. Greenberg, 54 BROOK. L. REV. 285, 285 (1988). Typically, in an effort to present the most accurate information to the public at large, newsgatherers tend to accumulate a surplus of information, the bulk of which is never used in the actual story. *Id.*

[37] Alexander, *supra* note 10, at 102. Confidential sources have facilitated newsgathering in several ways: (i) they help journalists acquire information that is otherwise inaccessible; (ii) they cultivate sources by burrowing deeper than reporters are able to; (iii) they build trust; and, (iv) they give confidence and protection to apprehensive sources. *Id*. *See* William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1462–64 (2008). In the context of national and international news, confidential sources tend to be current and former high-level government agency officials and members of the President's administration. *See id*.; John D. Castiglione, *A Structuralist Critique of the Journalist's Privilege*, 23 J. L. & POL. 115, 137–39 (2007); Louis J. Capocasale, Comment, *Using the Shield as a Sword: An Analysis of How the Current Congressional Proposals for a Reporter's Shield Law Wound the Fifth Amendment*, 20 ST. JOHN'S J. LEGAL COMMENT. 339, 349 n.47

confidential source, including the source's identity, is valuable in many legal proceedings or investigations.[38] Thus, the interests of third parties, such as a criminal defendant, a civil litigant, or the government, compete with the media's interest in maintaining confidentiality.[39] This creates a natural tension between journalists, litigants, and the government, which is usually broken by the issuance of a subpoena or court order requiring a journalist to testify about his confidential sources or confidential information.[40] Such a scenario places the journalist in a difficult position where he must weigh the legal ramifications of refusing to testify against the ethical consequences of testifying and disclosing a source or confidential information.[41] This problem has caused the media to turn to

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(2006) (citing Olga Puerto, *When Reporters Break Their Promises to Sources: Towards a Workable Standard in Confidential Source/Breach of Contract Cases*, 47 U. MIAMI L. REV. 501, 512 (1992)) (same).

38 *See generally* Randall D. Eliason, *The Problems with the Reporter's Privilege*, 57 AM. U. L. REV. 1341, 1350–54 (2008) (noting the value that a journalist's confidential information could have to a party during criminal and civil litigation).

39 *See Branzburg*, 408 U.S. at 688 (stressing that grand juries must be able to hear every man's evidence and should have the right to subpoena any and all witnesses); Watkins v. United States, 354 U.S. 178, 206 (1957) (concluding that Congress has the power to require compulsory disclosure of any information that falls within its legislative sphere); Papandrea, *supra* note 33, at 541–42 (suggesting that shield laws aid and hinder law enforcement's efforts to prevent crime); Eliason, *The Problems with the Reporter's Privilege*, *supra* note 38, at 1350–54 (discussing the practice of prosecutors and litigants to subpoena journalists to gain access to information pertaining to a case); Eliason, *Leakers, Bloggers, and Fourth Estate Inmates*, *supra* note 34, at 444–45 (stating that in cases concerning the reporter's privilege criminal defendants and litigants have the right to confront the evidence against them).

40 *See generally* Alexander & Bush, *supra* note 15, at 219–24 (describing that subpoenas are the way in which most litigants or government officials attempt to access a reporter's confidential information and conducting a study of which type of sources and information were more likely to be the target of a subpoena). Timothy L. Alger, Comment, *Promises Not to be Kept: The Illusory Newsgatherer's Privilege in California*, 25 LOY. L.A. L. REV. 155, 167 (1991). Aside from the journalist's testimony, the targets of these subpoenas and court orders are the documents, notes, films, tapes, and other discovery materials that the reporter has compiled and organized from the source. *Id*. This secondary evidence, which is usually the reporter's own work product and thought-process, can be invaluable and highly credible because of a journalist's tendency to take copious "notes and photographs . . . to seek out controversies, and their independence of the disputing parties" which also "makes journalists attractive and particularly credible witnesses." *Id.*

41 *See* Alger, *supra* note 40, at 166–67. With respect to legal punishment, the news organizations are generally subject to civil penalties for those reporters they employ; however, "[f]or uncooperative reporters . . . the courts favor imprisonment." *Id.* at 166. The most common punishment for a noncompliant reporter is being cited for contempt, which can lead to jail time or monetary fines. *Id.* at 166–67. *See also* David G. Savage, *Ex-Reporter Told to Reveal Sources or Pay Daily Fines*, L.A. TIMES, Mar. 11, 2008, at 8, *available at* 2008 WLNR 4748486. An example of such a fine occurred in March 2008 when, in response to a former USA Today reporter's refusal to disclose her sources, a court ordered the payment of a fine starting out at five hundred dollars per day for one week, then rising to

state legislatures and ask that the legislatures grant a reporter's privilege via the enactment of a state reporter's shield law.[42]

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one thousand dollars per day the next week, and finally capping out at five thousand dollars per day until she complied with her subpoena. *Id.* Additionally, the court barred her former publisher, family, friends, or any anonymous supporters from paying her fines. *Id.*

A journalist's predicament as to revealing his confidential sources is compounded by the sacred tenet of journalism to protect one's source. Alger, *supra* note 40, at 169 n.78 (quoting DONALD M. GILLMOR ET AL., FUNDAMENTALS OF MASS COMMUNICATION LAW 358 (5th ed. 1990)). Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, *supra* note 33, at 1068. "There is a long history of journalists claiming they should not have to reveal the identities of their sources for news stories." *Id.* Michael Dicke, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN L. REV. 1553, 1565 n.64 (1989) (citing AMERICAN NEWSPAPER GUILD, CODE OF ETHICS (1934)). This history can be traced to when the American Newspaper Guild (A.N.G.) adopted and published its Code of Ethics in 1934. *Id.* Specifically, the A.N.G. adopted a canon in its Code of Ethics which provided that "[n]ewspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigating bodies." *Id. See also* Joseph W. Ragusa, Comment, *Biting the Hand That Feeds You: The Reporter-Confidential Source Relationship in the Wake of* Cohen v. Cowles Media Company, 67 ST. JOHNS L. REV. 125, 142 n.85 (1993) (citing Dicke, *supra*, at 1565 n.64) (stressing the significance in the journalistic profession of protecting sources and information from discovery).

[42] *See* Elizabeth A. Graham, Comment, *Uncertainty Leads to Jail Time: The Status of the Common-Law Reporter's Privilege*, 56 DEPAUL L. REV 723, 751–52 (2007) (noting the importance that state legislatures have played in the development of reporter's shield laws). ULMER, *supra* note 11, at § 37:3. The press is resorting to state legislatures because the federal government has been unable to pass legislation creating protection for reporters in this regard, and the federal courts lack consensus on whether a reporter's privilege exists under the First Amendment. *Id. See* WRIGHT & GRAHAM, *supra* note 8, at § 5426. Reporter's shield laws codify the common law reporter's privilege, which has its origins in English common law. *See id.* (noting that in Eighteenth Century England a journalist's refusal to reveal confidential information often resulted in an ineffectual short-term jailing, which yielded, in effect, a de facto reporter's privilege because journalists could keep the confidentiality of their sources if they were willing to spend a few days in jail).

See Paul Allee Curtis, Comment, *New Limits on Freedom of the Press: Newsperson's Qualified Privilege Fails to Protect Nonconfidential Videotape Outtakes* – State v. Salisbury, 34 IDAHO L. REV. 191, 194–95 n.21 (1997). Also, the theory of a reporter's privilege has been found under the First Amendment to the federal constitution, albeit not by the U.S. Supreme Court, state constitutions, and the common law. *Id.*; Sherwin, *supra* note 36, at 149. *But see*, *Branzburg*, 408 U.S. at 667 (declaring that there is no reporter's privilege under the Constitution or at the common law). Nevertheless, several federal circuits do recognize a reporter's privilege under the First Amendment. *See* Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995); United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986); United States v. Burke, 700 F.2d 70 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126; Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1978), *opinion supplemented, reh'g denied*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S 1041 (1981); United States v. Steelhammer, 561 F.2d 539 (4th Cir. 1977); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977). *See also* 28 C.F.R. § 50.10 (2008). Furthermore,

The competing interests involved in the creation of shield laws have fueled a deep-seated rift at the state level.[43] Although the controversy lies at the state level, its origin is found in the federal system with the Supreme Court's decision in *Branzburg*.[44]

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regulations promulgated by the Department of Justice also give credence to the notion of a qualified reporter's privilege. *Id.* (establishing requirements for when a newsgatherer can be compelled to testify). Campagnolo, *supra* note 1, at 478–79. Another persuasive argument for finding some form of a reporter's privilege is found under the Federal Rules of Evidence, specifically Rule 501 which pertains to privileges based on state law. *Id.* For compelling discussions and arguments advocating Supreme Court recognition of a reporter's privilege via Rule 501 see Fargo & McAdoo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist's Privilege Problem*,, *supra* note 16; Graham, *supra*, at 725–27; Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 250–55 (2005).

Weinberg, *supra* note 33, at 174–75. Furthermore, fourteen states have recognized a common law reporter's privilege under either the United States Constitution or their corresponding state constitution. *Id.* Wyoming is the only state that has not adopted a common law reporter's privilege or a shield law. *Id. See also* William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 651 n.80 (2006) (explaining the same). The state courts that have adopted a common law reporter's privilege and the leading cases from those states are as follows: Idaho, *In re* Contempt of Wright, 700 P.2d 40 (Idaho 1985); Iowa, Bell v. City of Des Moines, 412 N.W.2d 585 (Iowa 1987); Kansas, State v. Sandstrom, 581 P.2d 812 (Kan. 1978), *cert. denied*, 440 U.S. 929 (1979); Massachusetts, *In re* John Doe Grand Jury Investigation, 574 N.E.2d 373 (Mass. 1991); Mississippi, Pierce v. The Clarion Ledger, 433 F. Supp. 2d 754 (S.D. Miss. 2006); Missouri, Classic III, Inc. v. Ely, 954 S.W.2d 650 (Mo. Ct. App. 1997); New Hampshire, New Hampshire v. Siel, 444 A.2d 499 (N.H. 1982); South Dakota, Hopewell v. Midcontinent Broadcasting Corp., 538 N.W.2d 780 (S.D. 1995); Texas, Channel Two Television Co. v. Dickerson, 725 S.W.2d 470 (Tex. Ct. App. 1987); Vermont, State v. St. Peter, 315 A.2d 254 (Vt. 1974); Virginia, Brown v. Commonwealth, 204 S.E.2d 429 (Va. 1974); West Virginia, State *ex rel*. Hudok v. Henry, 389 S.E.2d 188 (W. Va. 1989); Wisconsin, Zelenka v. State, 266 N.W.2d 279 (Wis. 1978).

[43] *See* Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL'Y 241, 257–58 (2002) (the journalist's privilege has developed in an ad hoc manner in state jurisdictions, thus sparking widespread disagreement about protection for nonconfidential sources and information); Graham, *supra* note 42, at 751 ("State shield laws provide various levels of protection for reporters . . . . [F]rom near-complete protection to protection only in very specific situations.").

[44] *See*, *e.g.*, *Branzburg*, 408 U.S. at 706 (stating that the federal constitution does not include a common law reporter's privilege, but the states are free to enact legislation that gives protection to journalists). *See also* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 487 (2002) (explaining how the confusion at the federal level quickly transcended to the states). For a summary of *Branzburg's* effect on the actions of state legislatures and the reporter's shield laws they have enacted, see *infra* Part II.B (explaining the Supreme Court's decision in *Branzburg* and how its "blank check" to the states has created the state-split that is the focus of this Note).

B. A Beautiful Disaster

In *Branzburg*, the Supreme Court addressed the issue of whether a privilege existed under the First Amendment that exempted a reporter from being compelled to testify about or disclose confidential sources and information to grand juries.[45] In *Branzburg*, reporters were subpoenaed to testify about articles based on information gained from confidential sources.[46] In a five-to-four decision, the Court held that no common law reporter's privilege existed under the First Amendment, and journalists could not refuse to testify before a state or federal grand jury.[47] Justice White's majority opinion rejected the claim that the decision would have a "chilling effect" on the gathering and reporting of news because the argument was "widely divergent and to a great extent speculative."[48] Therefore, the majority concluded that newsgatherers did

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[45] *Branzburg*, 408 U.S. at 667. The *Branzburg* decision consolidated four separate cases, each of which involved newspaper and television reporters who had been subpoenaed to testify before state or federal grand juries about stories they had written pertaining to illegal drug usage and subversive political groups. *Id*. at 667–79. Justice White delivered the majority opinion, which was joined by Chief Justice Burger, Justice Blackmun and Justice Rehnquist. *Id.* at 667. Also, Justice Powell wrote a concurring opinion and Justices Douglas and Stewart dissented. *Id*. at 709, 711, 725. Justice Stewart's dissent was joined by Justices Brennan and Marshall. *Id*. at 725.

[46] *Id*. at 667–79. In each of the cases, the lower courts denied the journalists' motions to quash the subpoenas. *See id.* The Kentucky and Massachusetts state courts concluded that a reporter did not have a common law privilege to refuse to testify before a grand jury. *See Id*. The Ninth Circuit Court of Appeals, however, did recognize that a reporter could keep their source's confidentiality if the government was unable to show a compelling need. *Id.* at 679.

[47] *Id*. at 667. Even though Justice White conceded that newsgatherers were entitled to some constitutional protection, he emphasized that a journalist's duty to comply with a grand jury subpoena was no different than that of any other citizen. *Id.* at 702–03. Justice White adamantly announced that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. Justice White explained, however, that absent prior restraints or restrictions on the press's speech, a simple grand jury subpoena did not amount to an infringement of free speech or press. *Id*. Further substantiating his conclusion, Justice White looked to the historical significance of the grand jury, as well as the indispensable tasks which it performs, and emphasized that "[a]t common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury." *Id*. at 685. The rationale, in Justice White's eyes, was that the grand jury required that "every man's evidence" be heard. *Id*. at 687. Moreover, Justice White voiced the important public policy interests in efficient grand jury proceedings and successful law enforcement investigations and opined that the secrecy surrounding a grand jury's work would provide sufficient protection for a reporter's confidential sources and information. *Id*. at 687–88. *See also infra* note 50 (explaining that due to the somewhat ambiguous wording of Justice Powell's concurrence, several of the federal circuits have concluded that *Branzburg* was a plurality).

[48] *Id*. at 693–94. Campagnolo, *supra* note 1, at 451–53. The "chilling effect" is an extremely important concern, however, because news organizations rely heavily on

not have a privilege to resist compelled disclosure of confidential sources and information in the context of a grand jury subpoena.[49]

Justice Powell filed an "enigmatic" concurrence which limited the majority's holding.[50] Justice Powell highlighted that journalists were not

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confidential sources. *Id.* For instance, in a recent study, the *Wall Street Journal* determined that around fifteen percent of its articles in the 1970s were based on confidential information. *Id.* at 453. *See* Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, *supra* note 33, at 1073. This chilling effect could have dire ramifications for the public because the free flow of information creates an educated and well-informed citizenry that supports our elected officials in their decision-making process. *Id.* at 1073 (citing generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)). James Thomas Tucker & Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 AM. U. L. REV. 1291, 1326 (2008). Confidential sources are essential to the workings of our Republic, for without them the news media would be "reduced to simply regurgitating official versions of news events, versions that may be incomplete or inadequate." *Id.*

[49] *Branzburg*, 405 U.S. at 702–04. In addition, at the conclusion of his opinion, Justice White wrote the states a "blank check" when he observed that state legislatures were "free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press." *Id.* at 706. Thus, the Court was "powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." *Id.*

[50] *Id.* at 725 (Stewart, J., dissenting). *See* Rodney A. Smolla, *The First Amendment, Journalists, and Sources: A Curious Study in "Reverse Federalism,"* 29 CARDOZO L. REV. 1423, 1426 (2008). Justice Powell's concurrence has become the centerpiece of controversy and uncertainty swirling around the Court's decision in *Branzburg* and has been characterized as ambiguous, opaque, cryptic, and a model of muddle. *Id. See Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring). Though Justice Powell's concurrence was brief, composed of just two paragraphs and a footnote, it placed a substantial limitation on the holding of the majority. *See id.*; Laura Durity, Note, *Shielding Journalist-"Bloggers": The Need to Protect Newsgathering Despite the Distributing Medium*, 2006 DUKE L. & TECH. REV. 11, 14 n.35 (citing Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press*, 1999 ANN. SURV. AM. L. 227, 231). Moreover, the limitation was so severe that the practical effect of Justice Powell's concurrence has been to erode *Branzburg's* five-to-four majority decision into a four-one-four plurality. *Id.*; Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1102 n.18 (1999) (judging *Branzburg* to be a four-one-four plurality). *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1165 (D.C. Cir. 2006). Hence, numerous federal circuits have seized upon this limiting language and used it to interpret *Branzburg* as a plurality, thus allowing for the finding of a reporter's privilege under the First Amendment or the common law. *Id.* The D.C. Circuit has acknowledged that several federal circuits interpret *Branzburg* as a plurality and hence recognize a reporter's privilege under the First Amendment. *Id. See also* Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995) (finding *Branzburg* to be a plurality and employing Justice Powell's concurrence to find a common law reporter's privilege under the First Amendment); United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986) (same); United States v. Burke, 700 F.2d 70 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983) (same); Bruno & Stillman, Inc. v. Globe Newspaper Co., 663 F.2d 583 (1st Cir. 1980) (same); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (same); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir.

without constitutional rights to gather news and protect their sources.[51] Further, Justice Powell made it explicitly clear that the appropriate protection for newsgatherers was not a shield law, but was a motion to quash the grand jury's subpoena or a motion for a protective order.[52] In contrast, Justice Douglas dissented and vigorously advocated for an absolute privilege that allowed journalists to keep the confidentiality of their sources and information indefinitely.[53] Justice Stewart dissented as well and argued the majority's holding would annex the media as an investigative arm of government, which chilled the dissemination of information to the public.[54] Hence, Justice Stewart determined that a

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1978), *opinion supplemented, reh'g denied*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (same); United States v. Steelhammer, 561 F.2d 539 (4th Cir. 1977) (same); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (same).

51 *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring). Justice Powell stressed that a grand jury's good faith operation requires that the relationship between a reporter's information and the grand jury's own investigation must not be too remote and tenuous. *Id*. at 710.

52 *Id*. The main reason Justice Powell opposed the recognition of any kind of privilege, particularly a qualified privilege, was because it would necessitate the creation and implementation of a balancing test. *Id*. Justice Powell argued the interests of the newsgatherer could be properly judged and balanced in the context of a motion to quash or requesting a protective order. *Id*. As he explained, any claimed 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." *Id*. (emphasis added). *See* Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law,* Branzburg v. Hayes*, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 837–39 (1984). The glaring flaw in Justice Powell's concurrence, and undoubtedly the source of the current circuit split at the federal level, was that Justice Powell's usage of the terms "proper balance" and "balance" implies a balancing test, and thus something along the lines of a qualified privilege was appropriate under certain factual conditions. *Id.*

53 *See Branzburg*, 408 U.S. at 713 (Douglas, J., dissenting). A qualified privilege, in Justice Douglas' eyes, was not necessary because "all of the 'balancing' was done by those who wrote the Bill of Rights." *Id*. (emphasis omitted). Justice Douglas reasoned that the First Amendment affords people an absolute freedom to their opinions, beliefs, and to the information they generate in the course of testing their opinions and beliefs. *Id*. at 714–15. Thus, the majority's decision would "have two retarding effects upon the ear and the pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens." *Id.* at 721. As such, the public's right to know and the free flow of information would be rendered nonexistent. *See id*. Furthermore, Justice Douglas relied heavily on conclusion that "[t]he First and Tenth Amendments protect the governing 'powers' of the people from abridgment by the agencies which are established as their servants." *Id*. at 714 (quoting Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 254 (1961)) (emphasis omitted).

54 *Id.* at 725. Justice Stewart argued that these concerns effectuated a constitutional right for a reporter to protect his sources and forced disclosure could only be enforced if there was a compelling interest at stake. *See id.* Justice Stewart believed that if newsgatherers had no protection the media's role as a watchdog would be severely curtailed. *Id*. at 727. Further, Justice Stewart emphasized the necessity of confidential sources to maintain the

qualified privilege was needed to balance the interests of the reporter with those of third parties in order to bring about the most judicious and equitable result.[55]

There is much confusion and difficulty regarding precisely what *Branzburg* means.[56] First, Justice Douglas was the only Justice who supported the recognition of an absolute reporter's privilege under the First Amendment.[57] Also, Justice Powell and the four dissenting Justices agreed that newsgatherers were entitled to some measure of protection from compulsory disclosure.[58] Three justices, and possibly Justice Powell, approved of a qualified privilege that would balance the interests of the parties concerned when a court determines whether to compel disclosure of a journalist's confidential sources or information.[59]

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effectiveness of the newsgathering process. *See id*. at 726–29. In support of his cause, Justice Stewart pointed out that although the grand jury played an important role in the administration of justice, the Fourth and Fifth Amendments already limited the power of the grand jury, so an additional limitation to maintain the free flow of information under the First Amendment was practical and logical. *Id*. at 737.

[55] *See id*. at 736–44. To balance these interests, Justice Stewart explained and proposed a balance test that required the government to demonstrate: (1) probable cause the reporter has information that is relevant to a probable violation of law; (2) the information sought cannot be obtained through any alternative means; and, (3) the defendant has a compelling and overriding interest in accessing the information. *Id*. at 743.

[56] Lucy A. Dalglish & Casey Murray, *Déjà vu All Over Again: How a Generation of Gains in Federal Reporter's Privilege Law is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13, 20–21 (2006). *See* Campagnolo, *supra* note 1, at 469–70. There are three generally recognized exceptions to *Branzburg*: civil litigation, the Sixth Amendment, and reporters who witness the crime. *Id.*

[57] *See* Tucker & Wermiel, *supra* note 48, at 1301. Also, "[a]ll nine Justices agreed that journalists were protected from bad faith grand jury investigations," yet the majority failed to specify what circumstances rendered a grand jury's actions to be in bad faith. *Id*. On a different note, no federal circuit has sided with Justice Douglas' opinion and recognized an absolute privilege. *Id.* at 1304. Several state supreme courts, on the other hand, have followed Justice Douglas' reasoning and established an absolute privilege under the federal constitution, their corresponding state constitution, or the common law. *See id.* at 1302–03.

[58] *See* Michele Bush Kimball, *The Intent Behind the Cryptic Concurrence That Provided a Reporter's Privilege*, 13 COMM. L. & POL'Y 379, 380 (2008) (describing the decision not as a five to four majority, but as a four-and-a-half to four-and-a-half plurality, due to the wording of Justice Powell's concurrence).

[59] *See id.* at 379–81. Justice Powell's concurrence has been interpreted as creating a plurality by the federal courts and also as advocating the use of some kind of balancing test because of the repeated use of the word "balance" and the phrase "case-by-case basis" in his opinion. *Id.* at 393–94. Justice Powell, however, never provided a specific test; rather he alluded to a broader test that would fairly balance the interests of the journalist and the government. *Id.* Indeed it appears that Justice Powell may have favored a qualified privilege but simply disagreed with Justice Stewart's requirement that the government demonstrate a compelling interest to obtain the journalist's information. *Id.* at 402 (conducting a historical analysis of Justice Powell's concurrence in *Branzburg* by comparing his opinion to his personal papers and memoirs). *See Branzburg*, 408 U.S. at 710 n* (Powell, J., concurring). Such is evident in the final sentence of Justice Powell's footnote that "[t]he

Overall, *Branzburg* and its "blank check" to the states have been nothing more than a model of muddle because the decision failed to give the states any guidance as to what type of privilege a reporter's shield law should grant to newsgatherers.[60] Hence, *Branzburg's* blank check has allowed the states to cash in.[61]

C. How the States Have Cashed in on the Blank Check

This Section focuses on the state split as to which type of privilege a reporter's shield law should grant to journalists.[62] First, this Section furnishes a brief survey of the states and the privileges their shield laws provide to reporters.[63] Next, this Section delineates those provisions of reporter's shield laws upon which the states agree.[64] Finally, it considers the contemporary issue that has sparked widespread disagreement among the states: the scope of the privilege that reporter's shield laws should grant to journalists to resist compulsory disclosure.[65]

1. A Brief Survey: The Split at a Glance

Thirty-six jurisdictions in the United States have reporter's shield laws in place.[66] Twenty-three states grant a newsgatherer a qualified privilege to be free from compulsory disclosure except where a court is

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new constitutional rule endorsed by that dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated." *Id.*

60 *See* Smolla, *The First Amendment, Journalists, and Sources*, *supra* note 50, at 1426 (referring to the Supreme Court's opinion in *Branzburg* as a model of muddle due to the controversy that still surrounds the decision to this day). *See also infra* Part II.C (examining the state split in great detail).

61 *See infra* Part II.C (describing the four types of privileges that states employ in reporter's shield laws).

62 *See infra* Part II.C.3 (describing the four generic privileges that are employed by the states: (1) an absolute privilege; (2) a qualified privilege; (3) a blended privilege; and, (4) immunity from contempt).

63 *See infra* Part II.C.1 (offering a short assessment as to which states adhere to which privilege).

64 *See infra* Part II.C.2 (discussing the two portions of reporter's shield laws upon which the states concur: those newsgatherers who are protected by shield laws and the proceedings in which the shield laws apply).

65 *See infra* Part II.C.3 (outlining the four privileges granted to journalists by state reporter's shield laws and elaborating on the scope of protection they grant to members of the media, how they apply, and the public policy concerns that underlie the different privileges).

66 *See* Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, *supra* note 2, 46–48 (listing the states that have enacted reporter's shield laws). *See also supra* note 31 (listing the states, as well as the corresponding citations to their shield laws, that have enacted such legislation).

convinced that the privilege should be divested.[67] Alternatively, ten states provide journalists an absolute privilege to resist compulsory disclosure in all situations.[68] Further, two jurisdictions, New York and the District of Columbia, use a blended privilege granting journalists an absolute privilege to keep the confidentiality of their sources and a modified qualified privilege to maintain the confidentiality of the information obtained from those sources.[69] Finally, California is the only state that grants journalists immunity from being held in contempt for refusing to reveal confidential sources and information.[70]

2. States in Agreement

Despite inconsistencies, states tend to agree on two main aspects of shield laws: the proceedings in which they apply and the types of newsgatherers protected.[71] With respect to proceedings, even though

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[67] *See* ALASKA STAT. §§ 09.25.300–09.25.390 (1992); ARIZ. REV. STAT. ANN. § 12-2237 (1982) & ARIZ. REV. STAT. ANN. § 12-2214 (1993); ARK. CODE ANN. § 16-85-510 (West 1987); COLO. REV. STAT. ANN. § 13-90-119 & COLO. STAT. ANN. §§ 24-72.5-101 to 24-72.5-106 (West 1993); CONN. GEN. STAT. § 52-146T (2006); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1992); FLA. STAT. § 90.5015 (1998); GA. CODE ANN. § 24-9-30 (West 1993); 735 ILL. COMP. STAT. 5/8-901 (West 1985); LA. REV. STAT. ANN. §§ 45:1451–45:1459 (West 1992); ME. PUB. L. CH. 654, signed into law on April 18, 2008; MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 1992); MICH. COMP. LAWS § 767.5A (1982); MINN. STAT. §§ 595.021–595.025 (1998); N.J. REV. STAT. §§ 2A:84A-21–2A:84A-21.13 (1996); N.M. STAT. § 38-6-7 (1987); N.C. GEN. STAT. § 8-53.11 (1999); N.D. CENT. CODE § 31-01-06.2 (1991); OKLA. STAT. tit. 12, § 2506 (1996); R.I. GEN. LAWS §§ 9-19.1-1 to 9-19.1-3 (1995); S.C. CODE ANN. § 19-11-100 (1995); TENN. CODE ANN. § 24-1-208 (1996); WASH. REV. CODE § 5.68.010 (2007). The states that have enacted shield laws bestowing journalists with qualified privileges include: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, and Washington.

[68] *See* ALA. CODE § 12-21-142 (1986); 2008 HAW. SESS. LAWS ch. 240 § 1 (effective July 2, 2008); IND. CODE § 34-46-4-1–34-46-4-2 (1998); KY. REV. STAT. ANN. § 421.100 (West 1990); MONT. CODE ANN. §§ 26-1-901 to 26-1-903 (1992); NEB. REV. STAT. §§ 20-144 to 20-147 (1992); NEV. REV. STAT. §§ 49.275–49.385 (1986); OHIO REV. CODE ANN. §§ 2739.04 & 2739.11–2739.12 (West 1990); OR. REV. STAT., §§ 44.510–44.540 (1995); 42 PA. CONS. STAT. § 5942 (1993). Those states employing absolute privileges are: Alabama, Hawaii, Indiana, Kentucky, Montana, Nebraska, Nevada, Ohio, Oregon, and Pennsylvania.

[69] *See*, *e.g*, D.C. CODE §§ 16-4701 to 16-4704 (1992) (providing an absolute privilege to a reporter to keep confidential the identity of a confidential source and a modified qualified privilege to maintain the confidence of certain information); N.Y. CIV. RIGHTS LAW § 79-H (McKinney 1996) (same).

[70] CAL. CONST. ART. 1, § 2 (1993). *See also* CAL. EVID. CODE § 1070 (West 1993) (codifying California's reporter's shield law into the state's rules of evidence); CAL. CIV. PROC. CODE § 1986.1 (West 2001) (codifying California's shield law into the state's rules of civil procedure).

[71] *See* Douglas H. Frazer, Comment, *The Newsperson's Privilege in Grand Jury Proceedings: An Argument for Uniform Recognition and Application*, 75 J. CRIM. L. & CRIMINOLOGY 413, 413

Branzburg took place in a grand jury setting, states have designed their shield laws to apply in grand jury, criminal, civil, and other judicial proceedings and law enforcement investigations.[72] Generally speaking, however, shield laws have a greater impact in criminal proceedings and investigations than in civil litigation.[73]

The types of newsgatherers protected by shield laws vary from state to state.[74] As a general proposition, states have adopted very broad definitions of what constitutes a journalist for the purpose of invoking a shield law's privilege.[75] Practically every state's shield law protects any

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(1984) (stating that state reporter's shield laws are applied in grand jury proceedings and investigations, criminal trials, and civil proceedings). *See generally* Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions From 1973 to 1999*, 39 AM. CRIM. L. REV. 1441 (2002) (discussing how state reporter's shield laws have been applied in state criminal proceedings and investigations and how these applications have been challenged and interpreted in federal court). For discussions considering how state reporter's shield laws have been interpreted in the federal courts through Federal Rule of Evidence 501 see Fargo & McAdoo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist's Privilege Problem*,, *supra* note 16; Graham, *supra* note 42, at 725–27; Nestler, *supra* note 42, at 250–55.

72 *See, e.g.*, IND. CODE § 34-46-4-2 (1998) (requiring the shield law's absolute privilege apply in any legal proceedings or elsewhere); FLA. STAT. § 90.5015 (1998) (stating the state's qualified privilege gives a newsgatherer the privilege not to be a witness concerning their confidential sources and information); 735 ILL. COMP. STAT. 5/8-907 (1985) (providing the shield law's qualified privilege will order disclosure only if a court finds after a hearing that divestment of the privilege is justified); D.C. CODE § 16-4702 (1992) (stating that the shield law applies to any judicial, legislative, administrative, or other body with the power to issue a subpoena); N.Y. CIV. RIGHTS LAW § 79-H (McKinney 1996) (stating the shield law applies "in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers").

73 *See, e.g.*, Rosato v. Superior Court, 124 Cal. Rptr. 427, 444 n.14 (Cal. Ct. App. 1975) ("[I]n a civil discovery proceeding there is not a sufficient compelling state or public interest to outweigh the conditional First Amendment right not to disclose sources."); Papandrea, *supra* note 33, at 557 n.234 (citing Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981)) ("[I]n the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege.").

74 *See* Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, *supra* note 43, at 257–58 (emphasizing the different approaches that states adhere to in their reporter's shield laws and noting that the varying definition of a reporter results in journalists being protected under one jurisdiction's shield law but not under another). *See also infra* notes 75–76 and accompanying text (discussing the generally broad definition of a newsgatherer that nearly all states have adopted).

75 *See* IND. CODE § 34-46-4-1 (1998) ((1) anyone "connected with . . . or employed by: (A) a newspaper or other periodical . . . ; or (B) recognized press association or wire service" or (2) with a licensed radio or television); FLA. STAT. § 90.5015 (1998) ("[P]erson regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine.").

employee who is affiliated with any kind of news medium that broadcasts or publishes at regular intervals.[76] Today, however, the only journalists most states exclude from protection are independent reporters; namely, those who use the Internet as their medium of dissemination, such as bloggers and e-journalists.[77]

3. The Current Controversy

Presently, states are at odds as to the extent of protection a shield law's privilege should grant to members of the media.[78] The privileges offered by state reporter's shield laws can be placed into four general categories: (i) an absolute privilege; (ii) a qualified privilege; (iii) a blended privilege; and (iv) immunity from contempt.[79]

a. The Absolute Privilege

An example of a state with a shield law that guarantees an absolute privilege is Indiana.[80] In 1999, Indiana's legislature recodified the state's

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[76] *See supra* note 75; *infra* notes 84, 91, 102 (stating the broad definitions of the term journalist that are often incorporated into state reporter's shield laws).

[77] *See* Durity, *supra* note 50, at 36–38 (discussing the need for reporter's shield laws to draw a line between legitimate journalists and independent journalists who post directly to the Internet). *See also* Nathan Fennessy, Comment, *Bringing Bloggers into the Journalistic Privilege Fold*, 55 CATH. U. L. REV. 1059, 1075–78 (2006) (arguing that bloggers should be included under the definition of journalist because most bloggers post pursuant to an agreement of some kind with a legitimate news or media organization); Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 VAND. J. ENT. L. & PRAC. 609, 625–31 (2006) (contending that all bloggers and e-journalists whose objective is to disseminate legitimate news should be protected under reporter's shield laws).

[78] *See* Alexander & Bush, *supra* note 15, at 216–18 (discussing the split among the states as to the type of privilege to incorporate in a reporter's shield law); Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, *supra* note 2, 46–49 (same). *See infra* Part II.C.3 (detailing the state split in depth). For a complete survey of the states and case law regarding reporter's shield laws, see, *supra* note 3 (providing a thorough outline of the states that have adopted reporter's shield laws as well as those states and federal circuits that have opted to adopt a common law reporter's privilege); Reporters Committee for Freedom of the Press, Privilege Compendium, http://www.rcfp.org/privilege/ (last visited Aug. 6, 2009) (listing information concerning current state reporter's shield laws, the scope of each law, the privilege it grants, and the cases interpreting the shield law).

[79] *See infra* Part II.C.3 (explaining the various privileges and using as illustrations Indiana's shield law as an example of the absolute privilege, Florida's and Illinois' shield laws as models of the qualified privilege, New York's and the District of Columbia's shield laws exemplifies the blended approach, and California's demonstrates immunity from contempt).

[80] *See* IND. CODE § 34-46-4-2 (1998) (stating that a person falling under the provisions of the Indiana reporter's shield law would be free from compulsory disclosure in any legal proceedings or elsewhere). *See also supra* note 68 (listing the other states that have adopted

previous shield law, which gave newsgatherers an absolute privilege.[81] The recodification attempted to limit the effect of case law that had developed in the Indiana courts that appeared to support a qualified privilege.[82] Since the inception of the current shield law, however, the

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shield laws that grant an absolute privilege to newsgatherers to resist compelled disclosure).

[81] *See* Jamerson v. Anderson Newspapers, Inc, 469 N.E.2d 1243, 1246 (Ind. Ct. App. 1984), *overruled on different grounds*, McIntosh v. Melroe Co., 729 N.E.2d 972 (Ind. 2000) (concluding the 1973 version of Indiana's shield law conferred, without a doubt, an absolute privilege to newsgatherers); Hestand v. State, 273 N.E.2d 282, 283 (Ind. 1971). The only limitation that the courts placed on the absolute privilege was that it was personal to newsmen and others could not invoke its protections. *Id.* (emphasizing that Indiana's reporter's shield law creates a personal right for the reporter that cannot be invoked by the any other person regardless of whether he is connected to the litigation). *See also* Lipps v. State, 258 N.E.2d 622, 626 (Ind. 1970) (same).

See Hestand, 273 N.E.2d at 283. Indiana, which has changed or altered its reporter's shield law several times, was one of seventeen states to have enacted a reporter's shield law prior to the U.S. Supreme Court's decision in *Branzburg*. *Id.* (listing the legislative history of the Indiana shield law: "Acts of 1941, Ch. 44, § 1, p. 128, Acts of 1949, Ch. 201, § 1, p. 673, 1968 Repl. Burns' Ind.Stat.Ann. § 2-1733, IC 1971, 34-3-5-1," amended by § 34-3-5-1 (1993)). *See also* Northside Sanitary Landfill, Inc. v. Bradley, 462 N.E.2d 1321, 1324 (Ind. Ct. App. 1984) (giving the 1973 version of Indiana's shield law and accompanying legislative history); *Jamerson*, 469 N.E.2d at 1247 n.2 (explaining the 1941 version of Indiana's shield law "afforded the news media an absolute privilege; however, it included particular requirements as to the size and circulation of the newspaper").

[82] *See*, *e.g.*, *In re* WTHR-TV, 693 N.E.2d 1, 10–16 (Ind. 1998) (discussing the conflicting interpretations of *Branzburg* and iterating that generally the Indiana courts have followed the absolute privilege that was enacted by the state's legislature); WTHR-TV v. Milam, 690 N.E.2d 1174, 1176–77 (Ind. 1998) (concluding that even for a litigant to attempt to access a newsgatherer's information he must show some potential materiality, which is reasoning consistent with a qualified privilege). *See In re* WTHR-TV, 693 N.E.2d at 4. *In re* WTHR-TV involved a criminal defendant who had given an interview to a reporter. *Id.* Subsequent to the interview and the beginning of the defendant's criminal proceedings, the defendant's attorney subpoenaed the television station to obtain the uncut and unedited videotapes of the interview. *Id*. at 5. The Indiana Supreme Court concluded that the videotapes could be discovered subject to in camera review. *Id.* at 10. The Court discussed the methods of discovery under Indiana Trial Rules 24(B)(1), 34(B) and 26(C), as well as how the *Branzburg* decision factored into whether the station could be compelled to disclose the videotapes of the interview. *Id.* at 5–8, 10–12. The Court concluded that in this situation, compulsory disclosure would not infringe the station's or the reporter's First Amendment rights, and that the inquiry in determining whether disclosure could be compelled was if the information consisted of particularity, relevance, and a paramount interest in nondisclosure. *See id*. at 5–8, 10–15. *See Milam*, 690 N.E.2d 1174 at 1175. Along those same lines, *Milam*, which was decided on the very same day as *In re* WTHR-TV, involved an interview conducted with a criminal defendant before trial, which the defendant's lawyer subsequently attempted to discover. *Id.* In this case, however, the defendant's counsel simply asked for the material because it was related to the defendant's case. *Id*. The Court concluded that discovery of the videotapes should not be compelled in this instance because the request for disclosure was not pleaded with particularity, was not material, and failed to indicate any possible use of the videotapes at the trial. *Id*. at 1176.

Indiana judiciary appears to have acquiesced to the judgment of the legislature, as evidenced by the fact that no cases have interpreted Section 34-46-4-1 or Section 34-46-4-2 of the Indiana Code.[83] Indiana's shield law provides that those individuals who fall within the scope of the statute:[84]

> shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of the person's employment or representation . . . whether:
> (1) published or not published:
> (A) in the newspaper or periodical; or
> (b) by the press association or wire service; or
> (2) broadcast or not broadcast by the radio station or television station.[85]

As shown, the absolute privilege grants complete protection to journalists. The qualified privilege, on the other hand, is not as broad as the absolute privilege—it requires a reporter to disclose information if certain conditions are met.[86]

b. The Qualified Privilege

Florida's shield law expressly grants a qualified privilege that extends to both confidential and non-confidential information gathered in the course of a journalist's employment.[87] The Florida Supreme Court

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[83] *See, e.g, In re WTHR-TV*, 693 N.E.2d at 10–16 (discussing *Branzburg* and stressing the importance and reasoning of Justice Powell's concurrence). The deference given by the Indiana courts is surprising because the courts appeared to disapprove of the absolute privilege, yet the absolute privilege remains the law in Indiana. *See id.*

[84] *See* IND. CODE § 34-46-4-1 (1998) (defining a journalist to be: "(1) any person connected with, or any person who has been connected with or employed by: (A) a newspaper or other periodical . . .; or (B) a recognized press association or wire service" or "(2) any person connected with a licensed radio or television station").

[85] IND. CODE § 34-46-4-2 (1998). *See In re WTHR-TV*, 693 N.E.2d at 13 n.14. The Indiana Supreme Court clarified in *In re WTHR-TV*, that "[t]he General Assembly has provided that a reporter 'shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information,' whether published or not." *Id. See* Slone v. State, 496 N.E.2d 401, 405 (Ind. 1986). In addition, the shield law has also been characterized as protecting "media representatives from being forced to give the sources of their news articles." *Id.*

[86] *See infra* Part II.C.3.b (exploring the application and public policy considerations supporting the adoption of a reporter's shield law that incorporates a qualified privilege to resist compulsory disclosure).

[87] *See* FLA. STAT. § 90.5015 (1998) (enacting a qualified privilege for journalists to maintain the confidence of their information, but providing for divestment of the privilege

has held that if a reporter established that the qualified privilege attached, "a court must apply the three-prong balancing test used by an overwhelming majority of other states to determine whether the privilege will act to prevent the disclosure of the reporter's information."[88] Also, the Florida Supreme Court pronounced the proper determination must be whether the party attempting to access the information "has established that: (1) the reporter possesses relevant information; (2) the same information is not available from alternative sources; and (3) the movant has a compelling need for any information the reporter may have."[89] Interestingly, Florida's law contains several instances where the shield law does not apply, including to physical evidence, eyewitness observations, and recordings of crimes.[90] Further,

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under certain conditions). *See also* State v. Davis, 720 So. 2d 220, 227 (Fla. 1998) (affirming the application of Florida's reporter's shield law as giving journalists a qualified privilege).

[88] *Davis*, 720 So. 2d at 227. The Court reasoned that the development of state reporter's shield laws post-*Branzburg*, as well as the varying state and federal court decisions recognizing a common law reporter's privilege, proved that a balancing test was the best method of determining when a journalist should be compelled to disclose confidential information or the identity of any confidential source. *Id.* at 227–28.

[89] *Id.* at 227. The Court also gave examples of such situations, the first of which was in the context of a criminal prosecution, if the government was seeking compelled disclosure "it would have to establish that the information was relevant to the crime being investigated; that the government could not obtain the information from another source; and that the government has a compelling need to obtain the information to adequately prosecute the crime at issue." *Id*. In weighing the compelling need of the party, however, a court must not only consider the need for the press to be free and unfettered and the obligation for courts to hear every man's evidence, but also to "factor into the equation the federal and Florida constitutional rights to compulsory and due process so as to ensure that the defendant receives a fair trial." *Id*. Interestingly, in supporting its rationale, the Court noted that Justice Powell's concurrence in *Branzburg* advocating an approach which would balance the interests of the parties furthered Florida's emulation of Justice Stewart's dissent. *Id.* at 223–24.

See 735 ILL. COMP. STAT. 5/8-907 (1985). Other jurisdictions that adhere to the use of a qualified privilege, such as Illinois, favor a less stringent balancing test which requires disclosure only if: "(1) . . . the information sought does not concern matters, or details in any proceeding, required to be kept secret . . .; and (2) . . . all other available sources of information have been exhausted and, either, disclosure of the information sought is essential to the protection of the public interest involved." *Id.* Thus, under Illinois' shield law information only needs to be unprotected as a state secret in order for a party to attempt to divest the privilege by showing it is essential to protecting the public interest or all other sources have been exhausted. *See id*. *See also* People v. Pawlaczyk, 724 N.E.2d 901, 912–13 (Ill. 2000) (emphasizing that Illinois' reporter's shield law reduces the burden on litigants trying to obtain information that a newsgatherer possesses and that litigants need not show a compelling need for the information).

[90] *See* FLA. STAT. § 90.5015 (1998); *Davis*, 720 So. 2d at 227 (holding consistent with the reporter's shield law that "the privilege *does not* apply to eyewitness observations or physical evidence, including recordings, of a crime") (emphasis in original). *Compare id.*, *with* Campagnolo, *supra* note 1, at 469–70 (explaining that there are three general exceptions

Florida's shield law provides journalists with a qualified privilege not to testify about or to disclose information obtained while actively gathering news unless a party seeking to overcome this privilege can show by clear and specific evidence that: "(a) The information is relevant and material to unresolved issues that have been raised . . .; (b) The information cannot be obtained from alternative sources; and (c) A compelling interest exists for requiring disclosure."[91]

Moreover, the legislative history supporting Florida's shield law expressly states that the Florida Legislature intended to provide a qualified privilege to members of the media who fell within the definition of a professional journalist.[92] Also, the summary of the bill indicates that a journalist has the power to refuse to be a witness concerning any information he obtained while actively gathering news.[93] According to the Florida Senate Staff's analysis, the bill would enhance the media's ability to collect news by promoting and protecting confidentiality while at the same time reducing the number of subpoenas served upon newsgatherers.[94] Additionally, in support of the qualified privilege, the Staff's analysis stressed the economic impact of the number of subpoenas served on members of the media and the increased costs to

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to the doctrinal framework of *Branzburg* when its reasoning is made inoperable: civil litigation, the Sixth Amendment, and reporters who witness the crime).

91 FLA. STAT. § 90.5015 (defining professional journalist to encompass any person involved in "collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine").

92 Act of May 12, 1998, S.B. 150, 1998 Fla. Acts 22-150-98, at 2, *available at* http://www.flsenate.gov/data/session/1998/senate/bills/billtext/pdf/s0150.pdf (outlining the intentions of the Florida Legislature and the public policy considerations justifying the Legislature's intentions).

93 *Id.* The summary of the bill also provided for compulsory disclosure only when the conditions of the qualified privilege have been met. *Id. See* SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, JOURNALISM: QUALIFIED PRIVILEGE, S.B. 150, at 3 (Fla. 1998), *available at* http://www.flsenate.gov/data/session/1998/Senate/bills/analysis/pdf/SB0150.go.pdf (citing Morgan v. State, 337 So. 2d 951 (Fla. 1976); Kidwell v. State, 696 So. 2d 399 (Fla. Dist. Ct. App. 1997)). Similarly, the legislative history endorses the adoption of the qualified privilege because Florida's courts had already recognized a common law reporter's privilege and had implemented a balancing test to make the privilege qualified. *Id.* Also, the legislative history agrees with Justice Stewart's dissent in *Branzburg* and explained that the adoption of a qualified privilege was pivotal to the interests of litigants, the public as a whole, and the media. *Id.* at 4.

94 SENATE STAFF ANALYSIS, *supra* note 93, at 1. In addition, the analysis found that the qualified privilege could possibly impede the discovery of certain evidence held by reporters in both criminal and civil proceedings. *Id.* In essence, Florida's qualified privilege operates to exclude evidence that could otherwise be admissible and discoverable at trial, which is similar in some respects to the absolute privilege. *Id.* at 2.

litigants to access the information collected by journalists.[95] Finally, the Staff's analysis recognized that advocates for an absolute privilege relied too heavily on the argument that the public has a right to know certain information because no such right is present under either the state or federal constitutions.[96]

c. The Blended Privilege

In recent years, two jurisdictions have developed a new statutory model by enacting contemporary and flexible shield laws that accommodate the interests of all parties.[97] The District of Columbia's shield law grants newsgatherers an absolute privilege to keep sources confidential, but only a qualified privilege for information a journalist acquires from confidential sources.[98] The D.C. shield law "accords total protection to news sources, whether confidential or not, and whether disclosed to others or not."[99] Additionally, the D.C. shield law "prohibits compulsory disclosure of 'the source of any news or information' procured by a journalist 'acting in an official news-gathering capacity.'"[100] Moreover, the protection conferred to unpublished news or information may be divested if three requirements are satisfied.[101]

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95 *Id.* at 5. A problem that the Analysis identified was that the bill did not establish an explicit standard or burden of proof that challengers must meet to obtain the information in question. *Id*. at 4. Additionally, the Analysis noted that the qualified privilege would likely cause additional hearings in the cases in which it was invoked and would slow down the adjudicatory process. *Id.* at 5. This increased burden would be offset, however, by the reductions in the number of petitions for injunctions to protect reporters. *Id.*

96 *Id*. at 6. The balance that Florida's shield law strikes, according to the Staff Analysis, causes sources and information to be revealed only in limited instances and would not hinder the forthcoming of sources with newsworthy information. *Id*.

97 *See infra* Part II.C.3.c (explaining that the privilege these two jurisdictions have created actually blends the absolute privilege with the qualified privilege in order to accommodate a wide variety of interests).

98 *See* Lee v. U.S. Dept. of Justice, 287 F. Supp. 2d 15, 17 (D.D.C. 2003). *See* D.C. CODE § 16-4702 (1992). Additionally, the D.C. shield law applies to sources, whether or not the source is confidential, and to any published or unpublished information including: notes, outtakes, photographs, photographic negatives, video tapes, sound tapes, film, or other data. *Id*.

99 Grunseth v. Marriott Corp., 868 F. Supp. 333, 336 (D.D.C. 1994). *See* Joel Kurtzberg & Karen Kaiser, *First Amendment Reporter's Privilege Challenged in Privacy Act Case*, 22 COMM. LAW. 14, 15 (2004) (stating that the scope of the District of Columbia's provision extends to undisclosed information collected during the newsgathering process).

100 *Lee*, 287 F. Supp. 2d at 17 (citing D.C. CODE § 16-4702(1)) (emphasizing the need for a journalist to be acting in his reportorial capacity in order for the D.C. reporter's shield law to apply, otherwise journalists and litigants could find ways to circumvent the shield law).

101 *Grunseth*, 868 F. Supp. at 336. The court iterated that the criteria for applying the shield law's conditional privilege for maintaining the confidentiality of news or information closely tracked the analytical framework set forth in *Zerilli v. Smith*, 656 F.2d

The District of Columbia's shield law provides a modified qualified privilege which requires disclosure if:

> (1) The news or information is relevant to a significant legal issue before a judicial, legislative, administrative, or other body that has the power to issue a subpoena;
> (2) The news or information could not, with due diligence, be obtained by any alternative means; and
> (3) There is an overriding public interest in the disclosure.[102]

A court may not, however, compel the disclosure of the identity of a source of any information that falls within the shield law's protection.[103]

Along these same lines, the New York Legislature enacted a similar reporter's shield law that incorporates the blended privilege.[104] In

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705 (D.C. Cir. 1981). *Grunseth*, 868 F. Supp. at 336–37. *See Zerilli*, 656 F.2d at 712. In *Zerilli*, the D.C. Circuit Court of Appeals reasoned that "when striking the balance between the civil litigant's interest in compelled disclosure and the public interest in protecting a newspaper's confidential sources, we will be mindful of the preferred position of the First Amendment and the importance of a vigorous press." *Id.* The court emphasized that in striking this balance the need a litigant has for the information is of central importance, especially if "the information sought goes to 'the heart of the matter,' that is, if it is crucial" to the case. *Id.* at 713 (citation omitted). Also, the court imposed a limitation by requiring that "reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information." *Id.*

[102] D.C. CODE § 16-4703. *See* N.Y. CIV. RIGHTS LAW § 79-H (McKinney 1996). Similarly, New York's shield law mirrors the District of Columbia's balancing test. *See id.* (requiring the moving party to prove the need for the reporter's information "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source". *Id.* § 79-H(c). Moreover, New York's shield law defines a "Professional journalist" as anyone involved in the "gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public." *Id.* § 79-H(a)(6). *Contra* D.C. CODE § 16-4701 (opting instead to structure its shield law to protect "news media" which encompasses: "(1) Newspapers; (2) Magazines; (3) Journals; (4) Press associations; (5) News agencies; (6) Wire services; (7) Radio; (8) Television; or (9) Any printed, photographic, mechanical, or electronic means of disseminating news and information to the public").

[103] D.C. CODE § 16-4703. *Accord*, N.Y. CIV. RIGHTS LAW § 79-H (giving journalists an absolute privilege to resist compelled disclosure of the identity of confidential sources).

[104] *See, e.g.*, N.Y. CIV. RIGHTS LAW § 79-H (granting newsgatherers an absolute privilege to maintain the confidentiality of sources and a qualified privilege to keep information gained from those sources confidential under certain circumstances). *See also supra* note 102 (describing New York's reporter's shield law, the qualified privilege it gives to newsgatherers to resist disclosure of confidential information, and the shield law's definition of journalist).

commenting on the legislative history of New York's shield law, the state's highest court explained in *Knight-Ridder Broadcasting, Inc., v. Greenberg*[105] that the "thrust of the Shield Law was aimed at encouraging a free press by shielding those communications given to the news media in confidence."[106] In addition, the court made clear that the legislature did not intend to create an absolute privilege against compelled disclosure because the legislature had not adopted it in any previous legislation.[107]

d. Immunity Rather than Privilege

The fourth and final option is to simply grant reporters immunity from being held in contempt for refusing to disclose a confidential source or confidential information pursuant to a subpoena or court order.[108] Although a reporter's immunity under the California shield law has been characterized as absolute, it may be overcome under certain circumstances.[109] For example, in *Delaney v. Superior Court*, the California

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[105] 70 N.Y.2d 151 (N.Y. 1987) (concluding that the New York reporter's shield law did not extend to non-confidential sources or information acquired by a news media organizations because without an expectation of confidentiality there cannot be an expectation that the communication or relationship between source and reporter is to remain privileged).

[106] *Id.* at 156 (citing Governor's Memorandum, 1970 N.Y. Legis. Ann., at 508) (emphasizing that the Governor made clear in his memorandum to the legislature regarding New York's reporter's shield law that the shield law was enacted to combat the real and imminent threat of requiring a journalist to disclose his confidential information).

[107] *Id*. at 158. *See id*. at 163–67 (Bellacosa, J., dissenting) (focusing in great detail as to the evolution of the legislative history of New York's shield law and arguing that the drafters of the legislation intended for non-confidential information and non-confidential sources to be protected by the shield law).

[108] *See* CAL. CONST. ART. I. § 2 (1993). Delaney v. Superior Court, 789 P.2d 934, 939 n.6 (Cal. 1990). To clarify, California's shield law does not grant any kind of privilege to members of the media, rather it grants them immunity from being held in contempt by any judicial or legislative body that has the power to issue a subpoena or compel a witness' testimony. *Id. See also* Nora Linda Rousso, Comment, *California's Newsgatherer's Shield: Inconsistent Interpretation Means Inadequate Protection*, 19 GOLDEN GATE U. L. REV. 347, 351–55 (1989) (explaining that California's shield law grants immunity to members of the media by preventing a journalist from being prosecuted for failing to comply with a subpoena or court order requiring him to testify about confidential sources or information).

New York Times Co. v. Superior Court, 796 P.2d 811, 816 (Cal. 1990) (citing Mitchell v. Superior Court, 690 P.2d 625 (Cal. 1984)). Also, the scope of protection offered by California's shield law is absolute, not qualified, which allows the shield law to apply to a journalist's unpublished and non-confidential information. *Id.* A journalist's immunity does not mean, however, that a court is forbidden from imposing other sanctions if a reporter refuses to comply with a subpoena or court-ordered testimony. *Id.* at 817–18.

[109] *See, e.g.*, *Delaney*, 789 P.2d at 947–50. The California Supreme Court stressed that *Delaney* constituted a narrow qualification that was to be implemented exclusively in criminal proceedings where a criminal defendant's state or federal constitutional rights are imperiled. *Id*. at 947.

Supreme Court held that in a criminal proceeding the shield law's immunity can be surpassed if a criminal defendant shows an acceptable need for the information.[110] For a newsgatherer to be granted immunity under the California shield law he must prove all of the requirements of the shield law.[111] If such a showing is made, the burden of proof then shifts to the criminal defendant to establish a reasonable possibility that the evidence could result in his exoneration.[112]

Even if the defendant submits enough evidence to divest a reporter of his immunity, according to the *Delaney* court a journalist's unpublished information is not necessarily subject to disclosure; rather, a

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[110] *See id*. at 948. *See also* O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1457 (Cal. Dist. Ct. App. 2006) (stressing that the burden of proof is on the journalist seeking to invoke immunity to establish that the requirements of the shield law have been met, but that a criminal defendant must carry his own burden of showing the reporter has evidence in his possession that is important to the defendant's case). *See also* People v. Ramos, 101 P.3d 478, 526 (Cal. 2004), *cert. denied*, 546 U.S. 844 (2005) (stressing that the California reporter's shield law requires that before the burden shifts to the journalist to demonstrate the requirements of the shield law have been established the criminal defendant must first prove that the information in the journalist's possession must have a material effect on his case); People v. Vasco, 31 Cal. Rptr. 3d 643, 654 (Cal. Dist. Ct. App. 2005) (same). *See also Delaney*, 789 P.2d at 948. This does not, however, require that the information that the journalist possesses go to the heart of the defendant's case. *Id*. In explaining the basis for the rule, the court explained the inquiry must measure the threat to a criminal defendants' right to a fair trial particularly if he has "demonstrated a reasonable possibility that evidence sought to be discovered might result in his exoneration, he is entitled to its discovery." *Id*. at 947 (citing CBS, Inc. v. Superior Court, 85 Cal. App. 3d 241, 251 (Cal. Dist. Ct. App. 1978) (emphasis omitted). Moreover, the court emphasized that allowing a criminal defendant "to discover is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." *Id*. at 947–48 (emphasis omitted).

[111] *Delaney*, 789 P.2d at 946 n.20 (citing Hammarley v. Superior Court, 89 Cal. App. 3d 388, 399 (Cal. Ct. App. 1979)). The burden that the journalist must satisfy in this situation is minimal in that *Delaney* only requires a "prima facie showing by a newsperson that he is entitled to withhold information under the shield law." *Id*. at 948. Thus, in order to shift the burden to the criminal defendant to prove that immunity should not be granted, a newsgatherer must initially prove he falls within the shield law's definition of a journalist, he has been lawfully subpoenaed, and he does not wish to testify about particular information. *Id*. at 948–50. Moreover, this initial requirement, according to the court, serves the shield law's primary propose: the protection of the media's "ability to gather and report the news." *Id.* at 946 n.20.

[112] *Id.* at 948. Yet, the court limited this requirement because it determined that exoneration was too high of a standard; rather, the court clarified that a defendant must "show a reasonable possibility the information will materially assist his defense." *Id.* at 948 n.24. The distinction between exoneration and assisting the defense is significant. *Id.* at 948. "'Exoneration' means 'the removal of a burden, charge, responsibility, or duty.'" *Id*. at 948 (quoting BLACK'S LAW DICTIONARY 516, col.2 (5th ed. 1979)) (emphasis omitted). The court further explained that the burden was on the defendant to make the required showing, but that the showing need not be specific and it could not rest on mere speculation. *Id.* at 948.

balancing test should be employed to properly determine whether a reporter's unpublished information could be discovered.[113] Hence, for unpublished information to be disclosed, a court must consider: "(a) Whether the unpublished information is confidential or sensitive . . . (b) The interests sought to be protected by the shield law . . . (c) The importance of the information to the criminal defendant . . . [and] (d) Whether there is an alternative source for the unpublished information."[114] These criteria suggest that the California shield law more closely resembles a qualified privilege than simply a grant of immunity; nonetheless, as it is worded in the California Constitution, the shield law makes reporters immune from being held in contempt for noncompliance with compulsory disclosure.

Specifically, California's shield law provides that those newsgatherers falling within the scope of the shield law:

> (b) . . . shall not be adjudged in contempt . . . for refusing to disclose the source of any information procured . . . for publication . . . or for refusing to disclose any unpublished information . . . .
>
> Nor . . . adjudged in contempt for refusing to disclose the source of any information procured . . . for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information . . . .[115]

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[113] *Id*. at 949–50. *See* CAL. CONST. art. 1, § 2(b). Further, the California shield law defines "unpublished information" as including but "not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated." *Id.*

[114] *Delaney*, 789 P.2d at 949–50 (emphasis omitted). The court refused to place any weight on the enumerated factors that would militate in favor of disclosure in one instance and not in another. *Id.* Hence, none of the factors named by the court is determinative because such "[a] mechanistic, checklist approach would not in the long run (nor perhaps even in a particular case) serve the best interests of either newspersons or criminal defendants." *Id*. at 951. Furthermore, the court extensively distinguished its holding in *Delaney* from that of *Mitchell v. Superior Court*, which was a civil case involving a claim of libel. *Id.* at 949–51. *See* Mitchell v. Superior Court, 690 P.2d 625, 632–34 (Cal. 1984). In *Mitchell*, the California Supreme Court set forth a balancing test to resolve when a journalist must disclose confidential information during the course of civil proceedings. *Id*. at 632–35. The test devised by the court to be used in libel cases involved the contemplation of four factors: (i) the nature of the proceeding; (ii) the desired information must go to the heart of the party's case, not simply relevant; (iii) alternative sources have been exhausted; and (iv) the truth of the statements. *Id*.

[115] CAL. CONST. art. 1, § 2(b). *See Delaney*, 789 P.2d at 942–44. California's Constitution was amended by a referendum vote in which the voters approved the measure. *Id. See*

Because the citizens of California voted to incorporate California's shield law into the state's Constitution, the court examined the intent of the voters as opposed the legislature's.[116] The California Supreme Court has recognized that the intent of the voters can be determined by looking to the ballot argument supporting the proposed amendment.[117] The ballot argument supporting the California shield law emphasized the extreme importance of the free flow of information to the public.[118] The ballot argument contended that the free flow of information depended on a reporter's ability to protect his sources.[119] Justice Eagleson stated that "if this right is not protected, the real losers will be all Californians who rely on the unrestrained dissemination of information by the news media."[120] Supporters of the shield law argued that the amendment would require the state's judges to give greater protection to journalists before

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CAL. CODE EVID. § 1070 (West 1984); CAL. CIV. PROC. CODE § 1986.1 (West 2001). There are additional sources of the immunity that have been codified by California's Legislature. *See* CAL. CODE EVID. § 1070 (West 1984); CAL. CIV. PROC. CODE § 1986.1 (West 2001). *Delaney*, 789 P.2d at 939 n.5. These sections "are identical except for minor and insignificant differences in wording" and the minimal legislative history of the provisions were mooted when the constitutional amendment was passed by the voters. *Id. See also*, *id*. at 958–60 (Broussard, J., concurring) (commenting on the minimal legislative history of Section 1070 of the Code of Evidence and how it relates to Article 1, Section 2(b) of the California Constitution). For an in-depth analysis of the development, amendments, and practical scope of § 1070 of California's Code of Evidence, see Rousso, *supra* note 108, at 351–57 (discussing the complexities of California's three shield laws and how they relate to one another); Alger, *supra* note 40, at 177–209 (same).

116 *Delaney*, 789 P.2d at 942. California's shield law originally existed in the state's code of evidence and civil procedure; however, in 1980 the citizens of California amended the State's Constitution to incorporate California's shield law. *See id.* at 942–43. In essence, the passage of the amendment was similar to a recodification, but it also had the effect of negating the legislative history supporting the original shield law. *See id*.

117 *Id.* at 942–43. The *Delaney* Court explained that although it was difficult to discern the intent of the voters in adopting a measure to amend the State's Constitution, an acceptable and relevant source from which to ascertain the intent of the voters was the ballot argument that accompanied the proposition which enacted the amendment. *Id*. at 943.

118 *Id.* at 943 n.13. The ballot argument outlined that the free flow of information was being threatened due to certain exceptions which the California judiciary had carved out to the shield law set out in Section 1070 of the Code of Evidence. *Id.* The ballot argument premised this proposition on the fact that at least six reporters had been imprisoned for refusing to reveal their confidential sources. *Id.*

119 *Id.* The ballot argument specifically stated that if a confidential source felt that a reporter would be forced to break his confidentiality, then a source would simply not come forward in the first place. *Id*. As such, the media's usage of confidential sources was critical to the gathering and dissemination of news and must be protected. *Id*.

120 *Id.* (emphasis omitted). The ballot argument also stressed that for democracy to work the citizenry must be informed, and to do so required the presence of a free press to serve as the watchdogs over our liberties and our nation. *Id*.

compelling them to breach their confidentiality agreements with sources.[121]

In sum, the state split illustrates that a newgatherer's confidential sources and information are protected in one jurisdiction, but not in another.[122] The inconsistencies among the states encumber the newsgathering process and endanger all of the benefits that flow from an informed society.[123] Part III of this Note conducts a cost-benefit analysis of the four approaches to shield laws and arrives at the conclusion that the most practical and effective privilege to incorporate into a reporter's shield law is the blended privilege.[124]

III. ANALYSIS: THE TROUBLES AND TRIUMPHS OF *BRANZBURG'S* "BLANK CHECK"

To determine which type of privilege states should incorporate into a reporter's shield law, Part III conducts a cost-benefit analysis of each privilege.[125] Section A analyzes the costs and benefits of the absolute

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121 *Id.* The ballot argument disclaimed that there was already a shield law on the books, Section 1070, which provided that reporters could not be held in contempt of court for declining to disclose sources when compelled to do so. *Id.*

122 *See* Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, *supra* note 43, at 257–58 (stating that the state split was created because the states enacted their reporter's shield laws in an ad hoc manner). JOSEPH W. GLANNON, EXAMPLES & EXPLANATIONS: CIVIL PROCEDURE 168 (5th ed. 2007). Thus, in these federalists tendencies illustrate a hallmark of the American legal system: "the law could be one thing in Rome and another in Athens, if the legislature so declared it." *Id.* This reflects the fundamental precept that underlies this jurisdictional conflict: Indianans are different from Floridians, just as New Yorkers are different from Californians. *See id.* The citizens of each state have different concerns and challenges that they face; therefore, it is only logical that the states tailor their approach accordingly so as to perpetuate the lives of its citizens. *Id.*

123 *See* Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, *supra* note 43, at 257–59.

124 *See infra* Part III (conducting a cost-benefit analysis of each type of privilege implemented by state reporter's shield laws).

125 *See infra* Part III (analyzing the different privileges by outlining the costs and benefits associated with each methodology as derived from three criteria: the application of the privilege, the parties and interests each privilege serves, and the public policy considerations underlying each privilege). *See* Myrna S. Raeder, *Cost-Benefit Analysis, Unintended Consequences, and Evidentiary Policy: A Critique and a Rethinking of the Application of a Single Set of Evidence Rules to Civil and Criminal Cases*, 19 CARDOZO L. REV. 1585, 1585 (1998). Basically, a cost-benefit analysis is a technique that quantitatively evaluates whether to follow a particular course of action or make a change in approaching an action, method, or conduct. *See id.* Traditionally, the cost-benefit analysis is used in financial decisions; however, it can be molded to study a vast array of situations and has been widely used in the field of law and economics. *See id.* at 1599.

privilege, while Section B examines the qualified privilege.[126] Next, Section C considers the blended privilege developed by New York and the District of Columbia.[127] Finally, Section D evaluates California's method that grants journalists immunity from being held in contempt.[128] Part III concludes that, as a whole, the most practical and effective privilege to incorporate into a reporter's shield law is the blended privilege.[129]

A. The Absolute Privilege: An Inherently Flawed Approach

This Section scrutinizes the costs and benefits of a shield law granting newsgatherers an absolute privilege to resist compulsory disclosure.[130] First, this Section outlines the benefits created by the implementation of an absolute privilege.[131] Second, this Section examines the costs associated with the absolute privilege.[132] Finally, this Section examines the costs and benefits of the absolute privilege and concludes that the absolute privilege is inherently flawed.[133]

Three primary benefits flow from a reporter's shield law that incorporates an absolute privilege.[134] The first is that the absolute

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126 *See infra* Parts III.A–B (evaluating the costs and benefits associated with the absolute privilege and the qualified privilege and determining that the costs of both privileges outweigh their benefits).

127 *See infra* Part III.C (considering the costs and benefits of the blended approach and finding that the benefits outweigh the costs).

128 *See infra* Part III.D (exploring the costs and benefits of granting immunity to newsgatherers and concluding that this approach is altogether inadequate).

129 *See infra* Part III.E (determining that the blended privilege is the only privilege whose benefits outweigh its costs, thus making the blended privilege an optimal methodology for state shield laws).

130 *See infra* Part III.A (conducting a cost-benefit analysis of the absolute privilege by espousing the positive and negative aspects of the absolute privilege).

131 *See infra* Part III.A (highlighting the benefits connected to the absolute privilege: (i) combating the chilling effect compulsory disclosure has on the dissemination of news to the public; (ii) directly protecting confidential sources and information, which allows the media to be the citizenry's watchdog over government action; and (iii) inhibiting the use of fishing expeditions by litigants and government agencies).

132 *See infra* Part III.A (explaining the costs of the absolute privilege, which include preventing otherwise material and admissible evidence from being introduced, inhibiting law enforcement from fully performing their job, and hindering the efficiency, effectiveness, and credibility of the judicial system).

133 *See infra* Part III.A (finding that the absolute privilege is inherently flawed because it provides comprehensive protection for newsgatherers and confidential sources and completely neglects the interests of litigants, government agencies and law enforcement, and the judicial system).

134 *See, e.g*, *infra* notes 135–38, 140, 145 and accompanying text (discussing the benefits stemming from an absolute privilege: combating the chilling effect; creating an educated and informed citizenry; guaranteeing the free flow of information and the public's right to know; allowing professional journalists to adhere to the ethical obligations of

privilege directly combats the chilling effect that compulsory disclosure could have on the dissemination of news to the public.[135] By tackling the chilling effect head-on, the absolute privilege advances the public policy concern of having information flow as freely as possible to the public.[136] An unfettered press and unrestricted stream of information enhances the public's right to know and fosters an informed and educated public.[137] Perhaps more significant, however, is that fighting the chilling effect directly protects a reporter's confidential source and confidential information.[138] Hence, by striving to prevent the chilling effect, the

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newsgathering; having the press to serve as a the public's watchdog; and, prohibiting fishing expeditions).

135 Branzburg v. Hayes, 408 U.S. 665, 714–15 (1972) (Douglas, J., dissenting) (arguing that the newsgathering process would be severely impeded if confidential sources were left unprotected, which would hasten the onset of the chilling effect). *See* Campagnolo, *supra* note 1, at 452 (stressing that the chilling effect is not only a grave concern, but also a probable likelihood if reporter's shield laws do not ensure protection for confidential sources); Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, *supra* note 33, at 1073 (stating that protecting confidential sources helps to guarantee the free flow of information and the public's right to know by facilitating the quick collection and dissemination of news); Papandrea, *supra* note 33, at 535–36 (the purpose of shield laws is to preserve the dissemination of information into the public discourse); Weinberg, *supra* note 33, at 175 (stating that a reporter's shield law assures the free flow of information to the public so that citizens and leaders can make well-informed and educated decisions). *See also supra* notes 48, 54 (explaining the theory of the chilling effect: if source confidentiality was not protected then sources would be reluctant to come forward and give newsworthy information to journalists, which in turn could have adverse repercussions for the public).

136 *E.g.*, NEB. REV. STAT. § 20-144 (1992) (stating that the legislative intent behind the enactment of Nebraska's absolute privilege was to guarantee the uninhibited flow of information to the public, which was supported by the policy rationale that compelling reporters to disclose sources runs contrary to the public interest). *But see* SENATE STAFF ANALYSIS, *supra* note 93, at 6 (emphasizing that the legislative history supporting Florida's reporter's shield law concluded that those jurisdictions that grant absolute privileges to journalists as opposed to qualified privileges place too much emphasis on the argument that the public has a right to know); *supra* note 96 and accompanying text (same).

137 *See Branzburg*, 408 U.S. at 712–14 (Douglas, J., dissenting) (arguing for an absolute privilege and reasoning that the fundamental right of the press to remain free from government intrusion also means the citizenry has a substantial right to know the information upon which the media reports). *See also* Meiklejohn, *supra* note 53, at 254 (stating that the First Amendment is designed to protect the people and freedom of the press helps to secure this protection).

138 *See Developments in the Law*, *supra* note 35, at 1601 (stating that disclosure inhibits confidential communications between journalists and their sources); GERPEN, *supra* note 35, at 58–103 (arguing that compulsory disclosure, which the absolute privilege combats, inhibits a source from communicating with a journalist and should be offered protection since the source/journalist relationship is similar to other types of privileged relationships). *See also* Dicke, *supra* note 41, at 1565 n.64 (noting that sheltering a source's agreement of confidentiality with a newsgatherer spawns a correlated benefit of the absolute privilege: it lets members of the media act in accordance with their own canons of professional ethics);

absolute privilege not only bolsters the interests of the press and the public at large, but also secures a source's confidentiality.[139]

A second and related benefit is that the absolute privilege allows the media to be the public's watchdog over the government.[140] The underlying theory is that the absolute privilege creates a truly free press that acts as an unofficial check on the power and actions of the branches of state and federal government.[141] As Alexander Meiklejohn suggests, a free press is essential to the Bill of Rights, and the Bill of Rights is essential to our democratic values of freedom and independence because open lines of communication and the quick dissemination of information facilitate a republican form of government.[142] Hence, this watchdog role gives the media greater latitude to examine the actions of the government, which provides the public with an extra measure of security from improper government conduct.[143]

A final benefit of the absolute privilege is that it inhibits the use of fishing expeditions by litigants and the government.[144] The prevention

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Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, *supra* note 33, at 1068 (discussing the journalistic tradition of unabashedly protecting a source of information).

139 *See supra* notes 135–38 and accompanying text (reasoning that the first benefit of the absolute privilege is that it prevents the dissemination of news from being chilled because it completely protects the interests of a newsgatherer's confidential sources).

140 *See Branzburg*, 408 U.S. at 727 (Stewart, J., dissenting) (opining that the media performs a critical function in our society by acting as the people's watchdog over the government; hence, the media is an unofficial check on the power of government). *See also* Alexander, *supra* note 10, at 105–06 (tracing the history of the watchdog concept and explaining that the notion of the media as the watchdog of the people is essential to the functioning of our own self-government).

141 *See Branzburg*, 408 U.S. at 727–28 (Stewart, J., dissenting) (stressing that the media's true role in America is not simply to keep citizens informed and educated about the news and events, but to keep government, at all levels, as honest as possible so as to effectuate the interests of the people).

142 *See generally* Meiklejohn, *supra* note 53, at 254 (arguing that the Bill of Rights established that government exists because the people allow it to do so, therefore the freedom the First Amendment guarantees the press is in furtherance of the Framers' intentions for the people to govern themselves).

143 *See* Alexander, *supra* note 10, at 106–07, 109 (stating that one of the most valuable services the media provides is facilitating the public's right to know by acquiring information and news that is typically otherwise inaccessible to the general public). *See also supra* notes 140–42 and accompanying text (analyzing that a benefit of the absolute privilege is that it allows the press to be the people's watchdog, in order to ensure their interests are secure).

144 *See Branzburg*, 408 U.S. at 744 n.34 (Stewart, J., dissenting) (arguing that fishing expeditions cause injury to a reporter's First Amendment rights because they are not based on probable cause nor on any sufficient evidence that the reporter possesses information would aid a litigant's case). *See* Jones, *supra* note 4, at 626. The need to prevent the use of fishing expeditions is critical, as is illustrated by a 2006 national survey conducted by Professor RonNell Jones which found that in 2006 alone 761 responding news and media

of fishing expeditions requires litigants to conduct their own discovery and develop their own case, as opposed to simply relying on the information and evidence gathered by journalists.[145] Furthermore, combating fishing expeditions not only prevents disclosure of the information gained from a reporter's source, but more importantly, insulates the reporter's own work product and thought process from compulsory disclosure.[146] Granting members of the press the ability to maintain the secrecy of their own work product, which is more often than not the target of these fishing expeditions, undoubtedly serves the professional interests of the individual journalist.[147] Nevertheless, the general public also benefits from the absolute privilege's prohibition on fishing expeditions because it requires government officials to efficiently allocate government resources and prohibits litigants from clogging the courts with needless discovery requests.[148]

In sum, the policy considerations and reasoning supporting the absolute privilege predominantly furthers the interests of the press.[149]

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organizations reported that its newsgatherers had received nearly three thousand five hundred subpoenas. *Id.* *See also supra* note 35 and accompanying text (explaining that a recent trend has been that litigants and branches or agencies of the government attempting to access a reporter's confidential information do so in order to avoid taking the time to develop their own case or investigation, thus relying entirely on the journalist to do the work for them).

145 *See* Carter, *supra* note 35, at 183 (citing Boutrous & Stodder, *supra* note 35, at 23) (stating that a one of the primary purposes of reporter's shield laws and the privileges they grant to journalists is to eliminate unnecessary subpoenas served upon newsgatherers by litigants that are on fishing expeditions).

146 *See*, *e.g.*, Alexander & Bush, *supra* note 15, at 215 (noting that newsgatherers are often subpoenaed not just to testify in court, but to turn over any and all confidential and/or unpublished information the journalist has accumulated); Alger, *supra* note 40, at 167 (highlighting that journalists tend to make particularly qualified and effective witnesses because they are typically very well-organized and take copious notes of the interviews, events, and stories that they cover).

147 *See* Dicke, *supra* note 41, at 1565 n.64 (citing AMERICAN NEWSPAPER GUILD, CODE OF ETHICS (1934)) (discussing the professional responsibilities imposed on journalists and the importance to the profession of a newsgatherer being able to maintain the confidentiality of his work product).

148 *See* Carter, *supra* note 35, at 183 (citing Boutrous & Stodder, *supra* note 35, at 23) (explaining that shield laws prevent fishing expeditions by litigants and government officials and agencies by deterring unnecessary subpoena applications and discovery requests). *See also supra* notes 144–47 and accompanying text (giving rise to the inference that sources of information and the public at large are indirectly protected from the absolute privilege's direct insulation of newsgatherers from needless fishing expeditions).

149 *See generally* Part III.A (asserting that the benefits of the absolute privilege, taken as a whole, show that the parties whose interests are by far best served under the absolute privilege are those of the media and confidential sources).

The general public benefits as well, albeit to a lesser extent.[150] The greatest benefit of the absolute privilege, however, is that it offers complete protection for confidential sources.[151] Nevertheless, the implementation of a reporter's shield law granting newsgatherers an absolute privilege does not come without costs.[152] The interests of three parties are affected by the absolute privilege: individual litigants, the government and its law enforcement agencies, and the judicial system.[153]

The first and most significant cost of the absolute privilege is that it prevents litigants from obtaining information that could otherwise be admitted as evidence in court.[154] Some of the information and evidence journalists acquire is not only advantageous to a litigant, but is often critical to the merits and disposition of a litigant's case.[155] This is particularly so in criminal proceedings where convictions or acquittals depend upon the ability of the parties to access sensitive or confidential information that a newsgatherer has in his possession.[156] Similarly, this

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[150] *See supra* notes 135–39 and accompanying text (arguing that the interests of the public and of confidential sources are furthered by the fact that the absolute privilege facilitates the free flow of information to the public and precludes the chilling effect from occurring by totally safeguarding the confidentiality of sources).

[151] *See*, *e.g.*, note 138 and accompanying text (describing that a significant aspect of the absolute privilege is that it grants comprehensive protection to confidential sources, which combats the collection and dissemination of news from being chilled, facilitates the free flow of information, and serves the public's right to know; all of which results in a well-educated citizenry that can make intelligent decisions).

[152] *See infra* Part III.A (the three primary costs of the absolute privilege are as follows: (1) it disregards the interests that litigants may have in accessing certain information; (2) it impedes the ability of law enforcement to fully investigate criminal matters; and, (3) it hinders the judicial process by not allowing courts to obtain evidence that would otherwise be admissible).

[153] *See* Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (holding that grand juries must have the right to subpoena witnesses and hear every man's evidence); Watkins v. United States, 354 U.S. 178, 206 (1957) (concluding that congress has the power to require compulsory disclosure of any information that falls within its legislative sphere). *See also* Papandrea, *supra* note 33, at 535, 541–42 (stating that shield laws can aid in the prevention of crime by giving law enforcement access to sensitive information).

[154] *See Branzburg*, 408 U.S. at 688 (emphasizing the importance that every man's evidence has in the administration of justice); State v. Davis, 720 So. 2d 220, 225 (Fla. 1998) (reasoning that every man's evidence is necessary for courts to be effective).

[155] *See In re* WTHR-TV, 693 N.E.2d 1, 4, 10 (Ind. 1998) (ruling that Indiana's reporter's shield law, which gives journalists an absolute privilege to resist compulsory disclosure, prevented a defendant who was on trial for murder from accessing video tapes of an interview he had with a television reporter about his crime before he had the opportunity to consult with his attorney); WTHR-TV v. Milam, 690 N.E.2d 1174, 1175 (Ind. 1998) (holding that Indiana's reporter's shield law precluded a criminal defendant's ability to discover video tapes that consisted of outtakes from a television interview the defendant gave before the start of his trial).

[156] *See generally* Papandrea, *supra* note 33, at 584–85 (explaining that in jurisdictions that do not have absolute privileges, it is often very difficult, if not impossible, for a litigant in

raises the concern that because a criminal defendant's liberty is at stake, he should have access to all of the evidence that could have a bearing upon the disposition of his case.[157] Thus, a considerable cost of the absolute privilege is that it is inequitable because it divests the rights of litigants to resort to the courts and have their cases decided on the basis of all relevant and material evidence.[158]

A second detriment of the absolute privilege is that it hinders the ability of government and law enforcement agencies to fully perform their duties, by prohibiting access to certain information.[159] This creates evidentiary gaps that cause errors to occur in the criminal justice system, which can lead to faulty convictions or acquittals.[160] The growing need for law enforcement and the courts to access relevant material that a journalist may have in his possession is evidenced by the increasing number of subpoenas issued to news and media organizations, which was more than three thousand in 2006.[161] This gives rise to a third and costly detriment of the absolute privilege: it impedes the effectiveness

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civil proceedings to access a newsgatherer's confidential information because he must show a compelling or overriding need for the information). *See also supra* note 73 and accompanying text (explaining that parties in civil proceedings typically cannot divest a journalist's protection from compulsory disclosure even in jurisdictions not employing the absolute privilege, because litigants are often required to satisfy enhanced burdens of proof).

157 *See* Schmid, *supra* note 71, at 1473 (discussing the detrimental effect a criminal defendant faces in court, particularly in federal court, if he is not allowed to access certain information or evidence in a journalist's possession simply because of a state's reporter's shield law).

158 *See supra* notes 154–57 (explaining a significant cost of the absolute privilege is its rigidity in that a litigant, whether civil or criminal, faces the simple truth that no matter how much need he may have for obtaining information in a journalist's possession, a reporter's shield law that incorporates an absolute privilege will bar his every attempt to access that information).

159 *See* Papandrea, *supra* note 33, at 541–43 (noting that reporter's shield laws can both help law enforcement with crime prevention and undercut their efforts to do so, particularly those shield laws that incorporate the use of an absolute privilege, because the absolute privilege acts as a barrier to all information that could potentially aid law enforcement).

160 *See* Peter Meyer, *BALCO, the Steroids Scandal, and What the Already Fragile Secrecy of Federal Grand Juries Means to the Debate Over a Potential Federal Media Shield Law*, 83 IND. L.J. 1671, 1672 (2008) (discussing that shield laws can prevent a grand jury, prosecutor, or defendant from accessing information in a reporter's possession that would otherwise be discoverable; thus, the structure of the Federal Rules of Evidence could possibly cause a state reporter's shield law to be outcome-determinative).

161 *See* Jones, *supra* note 4, at 626 (discussing an extensive national survey conducted in 2006 of over seven hundred news and media organizations pertaining to the growing number of subpoenas being issued to newsgatherers).

and credibility of the justice system.[162] As more subpoenas are requested and issued, the judicial process slows down because more resources are allocated to applying for, investigating, and granting subpoenas and court orders requesting a newsgatherer to disclose information.[163] Even more troubling, as the interests of reporters are given more deference, the public's confidence in the judicial process begins to diminish, which causes the judicial system to lose its reliability.[164] Therefore, two serious costs of the absolute privilege are that it places an undue burden on law enforcement and puts the trustworthiness of our judicial system in peril.[165]

The cost-benefit analysis of the absolute privilege shows that the costs of the absolute privilege outweigh its benefits.[166] This result is premised on the finding that the absolute privilege places emphasis solely on the interests of the media, and does not accommodate litigants, law enforcement, or the court system.[167] In effect, the absolute privilege makes the rights and interests of litigants and the government subordinate to those of the press.[168] The preeminent benefit of the absolute privilege is that it prevents the dissemination of news from

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[162] *See* SENATE STAFF ANALYSIS, *supra* note 93, at 5–6 (Fla. 1998), *available at* http://www.flsenate.gov/ data/session/1998/Senate/bills/analysis/pdf/SB0150.go.pdf (suggesting that an absolute privilege detrimentally affects the judicial system because the scope of the privilege is unclear and causes more judicial resources to be allocated to resolving disputes).

[163] *See* Jones, *supra* note 4, at 626–27 (emphasizing that the thousands of subpoena requests and applications for reporters to divulge certain information that flood the court system each year place a heavy burden on scarce judicial resources).

[164] *See supra* notes 160, 162–163 (stating that placing too much weight on protecting the media and confidential sources has the adverse effect of jeopardizing the integrity of the judicial system).

[165] *See supra* notes 159–64 and accompanying text (determining that the absolute privilege's inflexible deference to the media and confidential sources hinders law enforcement efforts to investigate crimes and negatively affects the judicial system).

[166] *See infra* notes 167–71 (concluding that the costs of the absolute privilege outweigh its benefits because the costs demonstrate that the absolute privilege is stubbornly uncompromising in the way it prefers the interests of the media and confidential sources over those of litigants, law enforcement, government agencies, and the courts).

[167] *See* Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (emphasizing the importance that every man's evidence has in the administration of justice and the need for litigants, especially a criminal defendant, to be able to access information that goes to the heart of his case); State v. Davis, 720 So. 2d 220, 225 (Fla. 1998) (reasoning that every man's evidence is essential for the judicial process to be effective). *See also supra* note 154 and accompanying text (observing that a detrimental cost of the absolute privilege is that it excludes otherwise admissible evidence from discovery and introduction at trial).

[168] *See* Sherwin, *supra* note 36, at 139 (citing DONALD M. GILLMOR ET AL., FUNDAMENTALS OF MASS COMMUNICATION LAW 121 (1996)) (discussing the natural tension that exists between journalists, confidential sources, litigants, law enforcement, and the judicial system).

being chilled, by guaranteeing protection for a reporter's confidential sources, yet the other benefits come at too great a cost.[169] Although the press must be free, the rights that litigants and the government have to access critical information and evidence are at the very least equal to those of the media.[170] Hence, the absolute privilege, standing alone, is an inherently flawed approach to reporter's shield laws.[171]

B. The Qualified Privilege: Reasonable, But Not Entirely Practical

This Section evaluates the costs and benefits that follow the implementation of a qualified privilege in a reporter's shield law.[172] This Section begins by highlighting the benefits of the qualified privilege.[173] Next, this Section explores the costs of the qualified privilege.[174] Finally, this Section weighs the costs and benefits of the qualified privilege and determines that the qualified privilege is reasonable, but not entirely practical in its application.[175]

The benefits of the qualified privilege are three-fold: (1) it advances the fair and equitable administration of justice; (2) it cuts down the transaction costs associated with litigation; and (3) it makes the courts operate more efficiently and effectively.[176] First, the qualified privilege addresses the public policy concern of ensuring the fair and equitable

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169 *See infra* note 170 (concluding that the tension between the media, confidential sources, litigants, government and law enforcement agencies, and courts demands a less rigid approach than the absolute privilege).

170 *See generally Davis*, 720 So. 2d at 227–28 (emphasizing that under the absolute privilege, it would not make a difference whether a reporter's confidential information was material to a litigant's case or could have a bearing on the outcome of a case, it is always excluded from discovery and this result is inequitable and unfair).

171 *See supra* note 170 (emphasizing that the absolute privilege is inherently flawed because it does not accommodate the needs and interest of all parties concerned, rather it clearly gives preference to the interests of the media and confidential sources).

172 *See infra* Part III.B (examining the costs and benefits of the qualified privilege).

173 *See infra* Part III.B (outlining and analyzing the benefits of the qualified privilege).

174 *See infra* Part III.B (identifying and studying the costs of the qualified privilege).

175 *See infra* Part III.B (weighing the costs and benefits of the qualified privilege and determining the qualified privilege is a more reasonable approach than the absolute privilege, but causes impractical and unacceptable results in certain situations).

176 *See generally* Branzburg v. Hayes, 408 U.S. 665, 744, 747–48 (1972) (Stewart, J., dissenting) (arguing that the fairness of the judicial process demands that a reporter's privilege, whether found under common law or codified, must account for the interests of all parties to the litigation on a case-by-case basis); SENATE STAFF ANALYSIS, *supra* note 93, at 1, 5 (explaining that a reporter's shield law with a qualified privilege decreases the transaction costs of litigation, which, in turn, reduces the amount of trials, hearings, motions, and discovery and frees judicial resources, which allows the courts to operate more efficiently).

administration of justice.[177] The qualified privilege achieves this goal because it strikes a balance between the competing interests of the media, the litigants, and the government.[178] The qualified privilege tends, however, to favor a newsgatherer's interest in maintaining confidentiality because the party attempting to obtain the information must meet a high burden of proof in order for a court to force the revelation of the newsgatherer's confidential information.[179] Thus, by balancing the interests of the parties, the qualified privilege arrives at a result that is fair and equitable because it gives litigants the opportunity to access evidence in a journalist's possession.[180]

A second benefit is that the qualified privilege reduces the transaction costs of litigation to litigants and to news organizations as well.[181] Transaction costs are reduced because the qualified privilege offers a framework for analyzing when compelled disclosure is likely to be authorized by a court.[182] The result is a considerable reduction in the

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177 *See generally Branzburg*, 408 U.S. at 744, 747–48 (Stewart, J., dissenting) (stressing the proper inquiry should be to balance the interests of all parties on a case-by-case basis in order to determine whether to divest a newsgatherer's privilege to resist compelled disclosure).

178 *See* FLA. STAT. § 90.5015 (1998) (providing a qualified privilege that requires the moving party to show the confidential information subpoenaed to be material to his claim, unavailable from other reasonable means, and the movant has a compelling need for the information); 735 ILL. COMP. STAT. 5/8-907 (West 1985) (granting journalists a qualified privilege, but, in contrast to the Florida shield law, only requiring the movant to show the information was not a matter of secrecy, all other resources for the information had been exhausted, and disclosure was necessary to protect the *public interest* involved in the case, rather than the litigant) (emphasis added). *But see* N.Y. CIV. RIGHTS LAW § 79-H (McKinney 1996) (modified qualified privilege requiring proof that the need for the reporter's information "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source"; hence, no personal need nor public interest must be served under New York's modified qualified privilege).

179 *See*, *e.g.*, FLA. STAT. § 90.5015 (requiring the litigant to show a compelling need); D.C. CODE § 16-4703 (1999) (although adopting a blended privilege, the modified qualified privilege encapsulated in the District of Columbia's blended privilege requires the showing of an overriding public interest); 735 ILL. COMP. STAT. 5/8-907 (same).

180 *See supra* notes 177–79 and accompanying text (elucidating that the underlying notion of fairness that permeates the qualified privilege, by giving litigants or government agencies the opportunity to access a journalist's confidential information, including the identity of a confidential source, makes the qualified privilege a more equitable approach than the absolute privilege).

181 *See infra* notes 182–83 (explaining that the qualified privilege reduces the transaction costs of litigation by adding stability to the analytical framework of a reporter's shield law, which brings about a corresponding drop in the number of discovery and subpoena requests, hearings, court filings, and attorneys fees).

182 *E.g.*, SENATE STAFF ANALYSIS, *supra* note 93, at 1, 5 (stating that the legislative history supporting Florida's qualified privilege emphasized the belief that the adoption of a

number of subpoenas seeking the discovery of a journalist's information or source and a corresponding drop in the transaction costs of the litigation.[183] The litigants are not the only ones that benefit from the reduced transaction costs, because as costs to the parties decrease, so too do the judicial resources allocated to managing the case.[184] In turn, this creates a third benefit of the qualified privilege: judicial economy and effectiveness.[185] Hence, the qualified privilege creates judicial economy by trimming down the number of subpoenas issued by a court, which frees up judicial resources and allows the courts to work more efficiently and economically.[186]

As a whole, the principal benefit of the qualified privilege is that it produces fair and equitable administration of justice by offering litigants and the government an opportunity to discover information and evidence that is critical to a case or investigation.[187] Also, the qualified privilege gives considerable deference and protection to a reporter's ability to keep his information and sources confidential by requiring an exacting standard to be met before disclosure is compelled.[188] Moreover, the qualified privilege's analytical framework causes a reduction in the transaction costs of litigation and creates greater judicial efficiency and judicial economy.[189]

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qualified privilege would reduce the number of subpoenas filed, which would then drive down transaction costs associated with litigation).

183 *Id.* at 1–5 (explaining that added predictability would cause a decrease in the number of subpoenas issued by courts and would thus reduce other transaction costs of litigation such as attorney's fees, court costs, and filing fees).

184 *Id.* at 5 (noting that the Florida Legislature found further support for adopting a qualified privilege into the state's reporter's shield law because as transaction costs are reduced for litigants there is an analogous drop in the workload of the courts, which frees judicial resources to be allocated elsewhere).

185 *See id.* at 1, 5 (stating that the qualified privilege leads to increased efficiency in the judicial system because less judicial resources would have to be spent on managing cases pertaining to a state's reporter's shield law).

186 *See id*.

187 *See supra* notes 177–79 and accompanying text (explaining that a constructive aspect of the qualified privilege is that it takes into account the needs and interests of all parties and lets litigants and government agencies obtain certain information in a journalist's possession if the circumstances so require).

188 *E.g.*, *supra* note 179 and accompanying text (emphasizing that although the qualified privilege gives litigants the opportunity to divest the journalist's privilege there is still considerable deference granted to a journalist's privilege, which is evident in the fact that the qualified privilege requires a moving party to meet a high burden of proof before a court will deprive a newsgatherer of his right to maintain the confidentiality of information and sources).

189 *See supra* notes 181–86 and accompanying text (stating that other benefits of the qualified privilege include reduced transaction costs for litigants which subsequently leads to a more efficient court system).

On the other hand, two costs follow the qualified privilege.[190] The first and most glaring cost of the qualified privilege is that it imperils a journalist's ability to maintain the confidentiality of his sources.[191] A terrible flaw of the qualified privilege is that it neglects the interests of a critical party in the newsgathering and dissemination process: the confidential source.[192] This stems from the fact that the qualified privilege classifies the identity of a reporter's confidential source as confidential information, which is subject to compulsory disclosure in certain circumstances.[193] The side effect of not granting any protection to confidential sources is the perpetuation of the chilling effect.[194] Once the chilling effect is implicated, then so is the public's interest in the dissemination of news and information, albeit indirectly.[195] Therefore, the two overarching costs of the qualified privilege are that it offers inadequate protection for confidential sources and impinges on the free flow of information.[196]

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190 *See infra* notes 191–96 (describing the two costs of the qualified privilege, which are that it offers minimal protection to confidential sources and limits the free flow of information to the public which could result in the public being less informed).

191 *See Developments in the Law*, *supra* note 35, at 1601 (stating that disclosure, and even the possibility of disclosure, inhibits the communication of news from confidential sources to journalists); Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, *supra* note 33, at 1068 (stressing the importance of the journalistic tradition of defending a source of information who wishes to remain anonymous).

192 *See* Alexander, *supra* note 10, at 102 (stating that the importance of confidential sources and allowing journalists to maintain their confidentiality is imperative to the newsgathering and dissemination process).

193 *See supra* Part II.C.3.b (no qualified privilege that was surveyed has a specific provision protecting the ability of journalists to maintain the confidentiality of their sources). For further discussion, see *infra* Part III.C (discussing the importance of the blended approach's invocation of a separate provision into the privilege, providing for the confidentiality of the source).

194 *See*, *e.g.*, Laura R. Handman, *Protection of Confidential Sources: A Moral, Legal, and Civic Duty*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 573, 583 (2005) (arguing that if a journalist's confidential sources are left unprotected then the newsgathering process would be chilled, and, subsequently, there would be a drop in the amount of news coverage because of the reluctance of sources to come forward and speak to reporters).

195 *E.g.*, Branzburg v. Hayes, 408 U.S. 665, 712–15 (1972) (Douglas, J., dissenting) (reasoning that the fundamental right of the press to remain free from government intrusion means the citizenry has a substantial right to know the information upon which the media reports, hence the public has a legitimate interest in the dissemination of news being chilled).

196 *See supra* notes 190–95 and accompanying text (determining that the drawbacks of the qualified privilege are that it offers nominal protection for confidential sources which can lead to the dissemination of news being chilled, and subsequently, the public's right to know will be infringed).

The cost-benefit analysis reveals that the qualified privilege strikes an appropriate balance between the rights and interests of the litigants, the government, and the press; however, it leaves out the interests of two critical parties: confidential sources and the general public.[197] The potential threat of the chilling effect is too great a cost to justify the qualified privilege.[198] Hence, a qualified privilege, by itself, is reasonable but does not yield the most practical results because it imperils the interests of confidential sources and the public.[199]

C. The Blended Privilege: A Model of Pragmatism

This Section explores the blended approach that has been adopted by New York and the District of Columbia.[200] First, this Section identifies the benefits created by a blended privilege.[201] Next, this Section surveys the costs connected to the blended privilege.[202] Lastly, this Section analyzes the costs and benefits of the blended privilege and concludes that the benefits vastly outweigh the costs.[203]

There are two benefits of the blended privilege.[204] First, the blended privilege completely insulates reporters from being compelled to disclose the identity of confidential sources, which prevents the chilling effect from dissuading the gathering and dissemination of news.[205]

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197 *See supra* notes 191–96 and accompanying text (explaining that although the benefits of the qualified privilege are numerous, yet they are stymied by the lack of protection for sources which could cause the gathering and dissemination of news to be chilled).

198 *Branzburg*, 408 U.S. at 715 (Douglas, J., dissenting) (stressing that a lack of protection for the media will directly impact the public's right to know and the free flow of information to the public). *See* Handman, *supra* note 194, at 585–86 (stating that the chilling effect is a very real possibility if the ability of journalists to protect and keep the confidence of sources is infringed or abrogated).

199 *See supra* Part III.B (concluding from the cost-benefit analysis that even though the qualified privilege is more desirable than the absolute privilege, the costs of the qualified privilege trump the benefits).

200 *See infra* Part III.C (conducting a cost-benefit analysis of the blended privilege, which combines portions from the absolute privilege and qualified privilege).

201 *See infra* Part III.C (outlining the benefits of the blended privilege).

202 *See infra* Part III.C (discussing the costs of the blended privilege).

203 *See infra* Part III.C (analyzing the costs and benefits of the blended privilege and finding that the benefits of the blended privilege vastly prevail over the costs).

204 *See infra* Part III.C (explaining that the first benefit of the blended privilege is that it completely insulates confidential sources, which prevents the chilling effect from occurring; and, secondly, the blended privilege accounts for the interests that litigants, the government, and the judicial system have in obtaining relevant and material evidence and information).

205 *E.g.*, D.C. CODE § 16-4703 (1999); N.Y. CIV. RIGHTS LAWS § 79-H (McKinney 1996). *See* Branzburg v. Hayes, 408 U.S. 665, 726–29 (1972) (Stewart, J., dissenting) (stressing the important role of confidential sources in the newsgathering process and reasoning that leaving confidential sources unprotected would chill the dissemination of news to the

Second, the blended approach implements a modified qualified privilege that gives litigants, the government, and the judicial system the opportunity to access material information and evidence.[206] With respect to the first benefit of the blended privilege, and as previously noted, an overriding cost of the absolute privilege is that it gives too much deference to newsgatherers and elevates their interests above those of other parties, such as litigants, law enforcement, and the courts.[207] A substantial benefit of the blended approach is that it recognizes this error and compensates for it by vesting newsgatherers with the ability to refuse to disclose the identity of a confidential source.[208] In contrast to this approach, the qualified privilege does not grant any protection whatsoever to confidential sources.[209] Thus, one of the blended approach's primary benefits is that it gives absolute protection for journalists to maintain the confidentiality of sources of their information.[210]

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public). *See also Developments in the Law*, *supra* note 35, at 1601 (iterating that the possibility of disclosure of a confidential source's identity retards communications between journalists and sources); *supra* notes 138–39, 192–94 and accompanying text (explaining that the primary benefit of the absolute privilege is that the absolute privilege encompasses protection for a reporter's confidential information, including the identity of confidential sources, and that the most costly flaw of the qualified privilege is that it does not grant enough protection to confidential sources).

[206] *See* D.C. CODE § 16-4703 (adopting in its reporter's shield law a modified qualified privilege that requires a moving party demonstrate the information at issue is relevant to his case, cannot be obtained through other reasonable means, and there is an overriding need for disclosure of the information); N.Y. CIV. RIGHTS LAW § 79-H (enacting a modified qualified privilege that, in order for a divestment of the privilege to occur, requires a litigant to show the information in the reporter's possession is highly material, critical or necessary to his claim, and cannot be obtained from alternative sources). *See also supra* notes 178–80 and accompanying text (illustrating the imperative need for reporter's shield laws to grant some form of qualified privilege to give those litigants and government agencies who legitimately need information a journalist has in his possession a chance to obtain the evidence).

[207] *See supra* notes 154–57 and accompanying text (discussing the prevailing cost of the absolute privilege which is its impractical protection for newsgatherers and sources alone, and concluding that by not even considering the interests of individual litigants, the government, and the courts the absolute privilege, by itself is ineffective).

[208] *See*, *e.g.*, D.C. CODE § 16-4703 (incorporating an absolute privilege for journalists to resist compulsory disclosure of confidential sources); N.Y. CIV. RIGHTS LAW § 79-H (same).

[209] *See* FLA. STAT. § 90.5015 (1998) (providing a qualified privilege for a journalist's confidential information, but with no express provision accommodating the interests of confidential sources); 735 ILL. COMP. STAT. 5/8-907 (1985) (same).

[210] *See supra* notes 205, 208–09 and accompanying text (arguing that a significant benefit of the blended privilege is that it expressly accommodates the interests of confidential sources and provides for their absolute protection, which is necessary to ensure the continuous flow of news and information to the public).

Regarding the second benefit of the blended privilege (the incorporation of a modified qualified privilege), a particularly compelling aspect of the qualified privilege is that it accounts for the interests that litigants, the government, and the judicial system have in obtaining relevant evidence and information from newsgatherers.[211] The blended approach properly tailors the use of the qualified privilege to reach information that could potentially be used as evidence.[212] In addition, the blended privilege implements an appropriate balancing test to determine when a reporter's right to maintain his confidential information should be divested.[213] Moreover, the balancing of interests required by the modified qualified privilege assures the interests of the press are not disregarded or belittled.[214] Thus, the blended approach's modified qualified privilege that provides for compulsory disclosure of a newsgatherer's confidential or unpublished information in certain circumstances is necessary for a shield law to function effectively.[215]

In contrast to the benefits, the sole cost of the blended privilege is that it prevents pure freedom of the press because a journalist could be compelled to disclose unpublished or confidential information if a movant meets his burden of proof.[216] Nevertheless, acceptable

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[211] *See, e.g.*, D.C. CODE § 16-4703 (incorporating a modified qualified privilege that lays out a balance test the requirements of which a movant must satisfy before a journalist's qualified privilege will be divested); N.Y. CIV. RIGHTS LAW § 79-H (same).

[212] *See, e.g.*, *infra* note 213 and accompanying text (stating that New York and the District of Columbia adopted a modified qualified privilege with a balancing test to determine when a litigant can access or discover information or evidence a journalist has in his possession).

[213] *See supra* note 211 and accompanying text (emphasizing that a key aspect of the blended privilege is that it is flexible in that it grants litigants the opportunity to obtain a journalist's confidential information, yet unwavering in its protection for confidential sources).

[214] *See, e.g.*, FLA. STAT. § 90.5015 (requiring the litigant to show a compelling need for the information or evidence for discovery to be compelled); 735 ILL. COMP. STAT. 5/8-907 (requiring the presence of an overriding public interest); D.C. CODE § 16-4703 (although adopting a blended privilege, the modified qualified privilege encapsulated in the District of Columbia's blended privilege requires the showing of an overriding public interest). *See also* note 179 and accompanying text (stating that even though a qualified privilege and even the modified qualified privilege that is incorporated into the blended privilege give litigants the chance to divest a reporter's confidential information, these litigants must satisfy a heavy burden of proof to compel discovery of the evidence; therefore, there exists a strong presumption in favor of allowing a journalist to maintain the confidentiality of certain information).

[215] *See supra* notes 211–14 and accompanying text (stating that a considerable benefit of the blended privilege is that it gives litigants the opportunity to discover a newsgatherer's confidential information).

[216] *See* Branzburg v. Hayes, 408 U.S. 665, 712–15 (1972) (Douglas, J., dissenting) (stressing that an absolute privilege was necessary to protect reporters because it was a command of the First Amendment and essential to the concept of liberty under the Bill of Rights).

safeguards are in place that prohibit a pervasive intrusion into the media's freedom.[217] In all actuality, the press is still free to report whatever news it deems appropriate, and reporters are allowed to maintain the confidentiality of their sources.[218] Therefore, the cost of the blended privilege is fairly minimal.[219]

The foregoing cost-benefit analysis of the blended privilege illustrates that its benefits outweigh its costs.[220] The blended approach offers absolute protection for sources and gives consideration to the interests of the newsgatherer, the litigant, and the government.[221] Thus, the blended privilege provides an advantage that the other types of shield laws do not: it takes into account the interests of *all* parties who could be affected by court-ordered disclosure of confidential information.[222] The only detriment of the blended approach is that it takes away some of the freedom enjoyed by members of the media.[223] This is remedied, however, by the fact that the blended privilege targets the disclosure only of information, as opposed to sources, and gives substantial deference to a reporter's autonomy by requiring litigants to

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[217] *See, e.g.*, *supra* note 179 and accompanying text (emphasizing that sufficient protection for the interests of journalists is evidenced by the elevated burden of proof that is required to be met before any form of the qualified privilege is divested).

[218] *See supra* notes 214, 217 (noting that the only concession which journalists must make under the modified qualified privilege is that they may be required to disclose certain information in specific situations, particularly when a criminal defendant shows a compelling or substantially important need for the information).

[219] *See supra* notes 216–18 and accompanying text (describing that the single cost of the blended privilege, which is that it slightly infringes on a reporter's confidentiality, is only nominal at best).

[220] *See infra* notes 221–25 and accompanying text (concluding that the blended privilege combines the most beneficial aspects of the absolute privilege and qualified privilege, which, in turn, reduces the negative impact of the blended privilege).

[221] *See, e.g.*, *supra* notes 205–06 and accompanying text (outlining the primary benefits of the blended privilege to be that it protects the interests of confidential sources while at the same time balancing the interests of journalists, litigants, government and law enforcement agencies, and the courts).

[222] *See supra* notes 211–15 and accompanying text (discussing how the blended privilege adopts the principal benefit of the qualified privilege in that it balances the rights and interests of the parties concerned in each particular situation) (emphasis added).

[223] *See supra* notes 216–18 and accompanying text (detailing the only cost of the blended privilege: at times it can impair a reporter's ability to maintain the confidentiality of information and evidence).

meet a high burden to trigger compulsory disclosure.[224] Hence, the benefits of the blended approach clearly outweigh the costs.[225]

D. Immunity: A Unique Approach With Generic Results

The final Section of Part III considers California's approach of granting newsgatherers immunity from being held in contempt.[226] This Section explores how California's method is similar to the blended approach that has been enacted by New York and the District of Columbia.[227] It concludes, however, that granting immunity from contempt is inadequate because it actually offers less protection for members of the media and confidential sources than the absolute privilege, qualified privilege, or blended privilege.[228]

California's shield law grants newsgatherers immunity from being held in contempt for refusing to disclose their sources and information.[229] The California Supreme Court carved out an exception that allows the disclosure of a reporter's unpublished information if the requirements of a balancing test are met.[230] The balancing test adopted by the California Supreme Court examines: "(a) Whether the

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[224] *See, e.g., supra* note 214 and accompanying text (explaining that even though the interests of journalists are diminished by the blended privilege their interests are not wholly disregarded due to the enhanced burdens of proof that movants must satisfy when trying to compel discovery of confidential information).

[225] *See supra* notes 220–24 and accompanying text (concluding that the benefits of the blended privilege outweigh the costs because it incorporates the best that the absolute privilege and qualified privilege have to offer: it protects confidential sources and balances the rights of all parties concerned to determine whether to compel disclosure).

[226] *See infra* Part III.D (conducting an analysis of the costs and benefits of California's approach to a reporter's shield law: granting immunity from contempt to newsgatherers for refusing to comply with court-ordered disclosure or subpoenas).

[227] *See infra* Part III.D (noting that the theory behind California's grant of immunity to journalists is comparable to the methodology of the blended privilege because immunity acts in a similar manner to the blended privilege's absolute protection for confidential sources).

[228] *See infra* Part III.D (explaining that although immunity and the blended privilege are similar, immunity actually grants less protection to confidential sources because there is no express provision addressing the interests of confidential sources, and immunity does not proscribe other judicial sanctions from being imposed against a reporter for failure to comply with a subpoena).

[229] CAL. CONST. art. 1, § 2 (granting a newsgatherer immunity from being held in contempt for refusing to disclose any information, whether confidential or not, or the identity of any confidential source). *See* CAL. EVID. CODE § 1070 (West 1993) (providing the same privilege); CAL. CIV. PROC. CODE § 1986.1 (West 2001) (same).

[230] *See* Delaney v. Superior Court, 789 P.2d 934, 948–49 (Cal. 1990) (reasoning that although immunity was critical to a reporter, litigants, particularly criminal defendants and prosecutors, as well as law enforcement agencies should be able to obtain evidence if a sufficient need was demonstrated).

unpublished information is confidential or sensitive . . . (b) The interests sought to be protected by the shield law . . . (c) The importance of the information to the criminal defendant . . . [and] (d) Whether there is an alternative source for the unpublished information."[231] In essence, the application of California's reporter's shield law is similar to the blended approach championed by New York and the District of Columbia.[232] California's approach is unsuitable, however, because immunity actually offers less protection to newsgatherers than an absolute privilege or the absolute provision present in the blended privilege.[233] A reporter does not have to be held in contempt for a judge to sanction the reporter.[234] Thus, the sole cost of granting immunity to journalists is that it offers less protection to newsgatherers and their sources than any other privilege, which renders California's approach entirely unacceptable.[235]

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[231] *Id.* at 949–50 (emphasis omitted). *See also* Part III.B (discussing the benefits and costs of the qualified privilege, and emphasizing the equity and fairness principles advanced by the qualified privilege).

[232] *Compare* CAL. CONST. art. 1, § 2, *and Delaney*, 789 P.2d at 949–51 (granting immunity from contempt and implementing a qualified privilege developed by the California Supreme Court), *with* D.C. CODE § 16-4703 (1992), *and* N.Y. CIV. RIGHTS LAW § 79-H (McKinney 1996) (granting an absolute privilege for reporter's to keep confidential the identity of their sources and also providing a qualified privilege for disclosing a reporter's confidential information).

[233] *See* New York Times Co. v. Superior Court, 796 P.2d 811, 817–18 (Cal. 1990) (emphasizing that just because California's reporter's shield law grants a journalist immunity does not mean that a court is forbidden from imposing other sanctions in order to coerce a reporter's compliance with a subpoena or court-ordered testimony). *See also* Rousso, *supra* note 108, at 353–54 (noting that California's shield law grants immunity to members of the media by preventing a journalist from being prosecuted for failing to comply with a subpoena or court order requiring him to testify about confidential sources or information, but says nothing about other forms of punishment that a court could impose upon a journalist to compel disclosure or testimony).

[234] *See New York Times*, 796 P.2d 811 at 817–18 (Cal. 1984) (stating that courts possess forms of punishment other than simply a finding of contempt and incarceration). *See also* Savage, *supra* note 41, at 8 (reporting that in response to a journalist's refusal to comply with a subpoena and disclose a confidential source, a federal judge ordered the journalist to pay, without any help from her employer, family, or friends, a daily fine of five hundred dollars until she complied with the subpoena).

[235] *See supra* notes 229–234 and accompanying text (determining that granting newsgatherers immunity from being held in contempt for noncompliance with a subpoena is a wholly inappropriate methodology because it not only offers no protection to confidential sources, but it does not even adequately insulate journalists from sanctions other than being held in contempt or incarcerated).

E. Results of the Cost-Benefit Analysis

In summation, a set of principles may be drawn from the foregoing cost-benefit analyses.[236] First, to be viable, a reporter's shield law must protect confidential sources by granting newsgatherers an absolute privilege to maintain the confidentiality of the source's identity.[237] Second, it is essential for a shield law to provide some form of qualified privilege in order to balance the rights and interests of all parties concerned so as to arrive at a fair and equitable result.[238] Third, the absolute privilege and qualified privilege are inadequate models standing alone, but when the two are combined by the blended privilege, they become quite effective.[239] To illustrate these principles, Part IV of this Note contributes an application of these findings by presenting a model reporter's shield law.[240]

IV. A RESOLUTION: THE NEWSGATHERER'S PROTECTION ACT

This Note's cost-benefit analysis demonstrates that the blended approach is the optimal privilege to be incorporated into a reporter's shield law. Thus, any reporter's shield law that is adopted should include the use of a blended privilege. Part IV of this Note contributes a model reporter's shield law, entitled "The Newsgatherer's Protection Act," which implements a blended privilege and provides full commentary.

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[236] *See infra* notes 237–39 and accompanying text (drawing three overarching principles from the cost-benefit analysis conducted in Part III: a reporter's shield law must protect confidential sources, incorporate a form of qualified privilege to give a litigant the opportunity to access certain information if he has a sufficient need, and the absolute privilege and qualified privilege are inadequate by themselves but very effective if combined).

[237] *See supra* notes 138–39 and accompanying text (stressing that the primary benefit of the absolute privilege is that it grants comprehensive protection to confidential sources and is a feature that any reporter's shield law should incorporate).

[238] *See supra* notes 177–79 and accompanying text (explaining that the principle benefit of any form of qualified privilege is that it promotes equity and fairness to all parties concerned).

[239] *See supra* Part III.C (concluding that the blended privilege adopted by the District of Columbia and New York is the most effective and practical approach to reporter's shield laws because it combines the most desirable aspects of the absolute privilege and the qualified privilege).

[240] *See infra* Part IV (contributing a model reporter's shield law that incorporates the blended privilege).

A. The Newsgatherer's Protection Act - Section 1*: Scope*

> *This Section is intended to define the class of persons falling under the protection of this Act. Any person associated, employed, or regularly engaged, connected or affiliated for personal, pecuniary, or financial gain with a newspaper or media organiation that publishes or broadcasts at regular intervals or has a general circulation shall fall under the protection of this Act.*[241]

Commentary

The Newsgatherer's Protection Act incorporates a broad definition of newsgatherer to protect not simply the journalist, but also editors, photographers, administrators, researchers, fact-checkers, and other support staff affiliated with either print or broadcast media organizations.[242] The broad scope of the Act includes such journalists as e-journalists and bloggers, as long as they are associated, employed, or regularly engaged, connected, or affiliated with a news or media organization.[243] More importantly, however, by widening the scope of The Newsgatherer's Protection Act, confidential sources are encompassed under the Act's large umbrella of protection because they are "*associated . . . regularly engaged, connected, or affiliated*" with a protected organization or person.[244]

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[241] The proposed model statute this Note contributes, both the text and commentary, is the product of the author's work and is not an adaptation of any one particular reporter's shield law, but is based on the complete range of the topics discussed and analyzed by this Note. *See* FLA. STAT. § 90.5015 (1998) (employing a broad definition of who is a journalist for the purposes of the state's reporter's shield law); IND. CODE § 34-46-4-1 (1998) (same); N.Y. CIV. RIGHTS LAW § 79-H (McKinney 1996) (same). *See also*, *supra* note 91 (stating the Florida definition of journalist setting forth broad language to extend the shield law's protection anyone who is in any way connected with a news organization); *supra* note 75 (giving the Indiana definition of journalist which includes that any news or media organization be licensed by the state); *supra* note 102 (outlining the New York shield law which defines the terms news or media organization as opposed to a journalist).

[242] *See, e.g.*, FLA. STAT. § 90.5015 (including a broader scope of protection the shield law to those who are support staff).

[243] *See supra* note 77 and accompanying text (explaining that independent journalists such as bloggers and e-journalists are left unprotected by state reporter's shield laws because they are unaffiliated with any legitimate or official news organization).

[244] The quoted material is an excerpt from Section 1 of The Newsgatherer's Protection Act. *See supra* Part III.A; note 237 and accompanying text (concluding from the cost-benefit analysis that protection for confidential sources is essential to the gathering and dissemination of news and information and, therefore, it is necessary for a reporter's shield law to guard the interests of confidential sources).

B. The Newsgatherer's Protection Act - Section 2: *Absolute Privilege for Sources*

> *Section 2 of this act is intended to grant any organization or individual falling under Section 1 of this Act an absolute privilege to keep confidential the identity of confidential sources. No organization or person falling under Section 1 of this Act shall be compelled to disclose in any legal or investigatory proceeding the identity, including any identifying characteristic or description, of any source of news or information who has entered into an agreement of confidentiality with the organization or person falling under Section 1. This absolute privilege applies whether the news or information obtained from the confidential source goes published or unpublished or whether the form of the news or information is given in written, verbal, recorded, photographic, or any other communicable form.*[245]

Commentary

The purpose of Section 2 is to grant newsgatherers an absolute privilege to resist compulsory disclosure of the identity of any and all sources of information that wish for their identity to remain confidential.[246] The intention of Section 2 is to place the decision to remain anonymous with the confidential source and bar a journalist from being forced to divulge the source's identity because of a subpoena or court order.[247] Thus, due to the potentially severe consequences that await confidential sources, The Newsgatherer's Protection Act allows a

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[245] The proposed model statute this Note contributes, both the text and commentary, is the product of the author's work and is not an adaptation of any one particular reporter's shield law, but is based on the complete range of the topics discussed and analyzed by this Note. *See*, *e.g.*, D.C. CODE § 16-4703 (1992) (granting reporter's an absolute privilege to resist compulsory disclosure of the identity of a confidential source; N.Y. CIV. RIGHTS LAW § 79-H (same); IND. CODE § 34-46-4-2 (1998) (same).

[246] *See supra* Part III.A; note 243 and accompanying text (noting the significance of granting newsgatherer's an absolute privilege to maintain the confidentiality of the identity of sources).

[247] *See* Campagnolo, *supra* note 1, at 451–53 (stressing the extreme significance in the journalistic profession of protecting sources and information from discovery or revelation); Dicke, *supra* note 41, at 1565 n.64 (explaining that journalists have a professional duty to refrain from disclosing the identity of confidential sources and to do everything within their power to protect a source of information from judicial or investigating bodies). *See also supra* note 41 and accompanying text (discussing the significance that a source remain confidential if he or she so desires as well as a journalist's professional obligation to protect his source's decision to remain confidential and anonymous).

confidential source to control his own fate by giving him the final decision as to whether his identity will remain confidential.

C. The Newsgatherer's Protection Act - Section 3*: Qualified Privilege for Information*

> *Section 3 of this Act grants any organization or person falling under Section 1 of this Act a qualified privilege to maintain the confidentiality of news and information acquired from sources. No organization or person falling under Section 1 of this Act shall be compelled to disclose in any legal or investigatory proceeding the substance of any news or information, whether it goes published or unpublished, that is obtained from or through the cooperation of a confidential or non-confidential source, except as provided by subsections 1–3 of Section 3.*
>
> *A movant may divest the qualified privilege granted to the organization or person falling under Section 1 of this Act if the movant establishes by clear and convincing evidence that:*
>
> 1) *the news, information, documents, or evidence the newsgatherer has in his possession are relevant and material to the movant's case;*
> 2) *the news, information, documents, or evidence cannot be obtained through any other means, and all other sources of the news, information, documents, or evidence have been exhausted; and*
> 3) *there exists a reasonable need for the news, information, documents, or evidence.*[248]

Commentary

Section 3 of The Newsgatherer's Protection Act grants those organizations and individuals falling under Section 1 of this Act a qualified privilege to maintain the confidentiality of information gained from sources whether that information or the source is confidential or non-confidential. This Section allows a newsgatherer's information,

[248] The proposed model statute this Note contributes, both the text and commentary, is the product of the author's work and is not an adaptation of any one particular reporter's shield law, but is based on the complete range of the topics discussed and analyzed by this Note. *See supra* text accompanying notes 91, 101 (stating that Florida's qualified privilege can be overcome if a movant meets the burden of proving through clear and specific evidence or clear and convincing evidence that he has a compelling need for the information); *supra* note 178 (discussing the reduced burden of proof required by Illinois' reporter's shield law).

whether published or unpublished, to be vulnerable to compelled disclosure.[249] The rationale behind this provision is that it gives litigants the opportunity to divest the qualified privilege, which is consistent with the principles of equity and fairness that permeate the qualified privilege.[250] Hence, the litigants alone must satisfy the three conditions enumerated under Section 3. Section 3's qualified privilege presumes, however, that the newsgatherer's information and work product are privileged until the conditions of Section 3 are met.[251]

Commentary on Section 3, Clause (1)

Clause 1 of Section 3 places the burden of proof on the movant and requires that he or she prove by clear and convincing evidence that the news, information, documents, or evidence in the newsgatherer's possession is relevant and material to the movant's case or claim.[252] The goal of Clause 1 is to eliminate fishing expeditions by litigants, as well as frivolous arguments or attempts to access news or information in a newsgatherer's possession.[253]

Commentary on Section 3, Clause (2)

Clause 2 of Section 3 requires the movant to establish by clear and convincing evidence that the news, information, documents, or evidence that is being sought from the newsgatherer cannot be obtained from any other source.[254] In addition, Clause 2 requires the movant to prove by

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[249] *See supra* note 73 and accompanying (explaining that parties in civil proceedings typically cannot divest a journalist's protection from compulsory disclosure).

[250] *See supra* Part III.B; note 238 and accompanying text (emphasizing that the significance of the qualified privilege is that it allows litigants, government officials, and the judicial system to have access, or at the very least the possibility of access, to as much information as possible to be able to make not only informed decisions on legal issues, but to arrive at a fair and equitable result for all parties concerned).

[251] *See, e.g.*, State v. Davis, 720 So. 2d 220, 227 (Fla. 1998) (finding that the Florida reporter's shield law gave journalists a qualified privilege that was going to apply to protect a reporter's confidential information unless a movant offered sufficient evidence otherwise); Delaney v. Superior Court, 789 P.2d 934, 947–48 (Cal. 1990) (explaining that the California shield law entitled a newsgatherer to immunity from compelled disclosure unless the movant could show the reporter possessed exculpatory evidence).

[252] *See* text accompanying notes 91, 101 (describing the burden of proof Florida incorporates into its reporter's shield law is a requirement that the movant introduce clear and convincing evidence).

[253] *See supra* notes 144–47 and accompanying text (describing how a newsgatherer is abused through the use of fishing expeditions conducted by litigants and law enforcement agencies when he is left unprotected by inadequate shield laws or no shield law at all).

[254] *See* text accompanying notes 91, 101 (describing the burden of proof Florida incorporates into its reporter's shield law is a requirement that the movant introduce clear and convincing evidence).

clear and convincing evidence that he has exhausted all other alternative sources of information.[255] The intent of this Section is to reduce frivolous claims, arguments, and attempts to obtain a newsgatherer's privileged information.

Commentary on Section 3, Clause (3)

Clause 3 requires the movant to prove by clear and convincing evidence that he has only a reasonable need for the news, information, documents, or evidence in the newsgatherer's possession, as opposed to proving a compelling or overriding need.[256] The clause implements the clear and convincing evidence burden of proof in order to allow litigants to have a greater opportunity to access any and all discovery material potentially relevant to his or her case or claim.[257] To this end, Clause 3 of Section 3 facilitates the ability of any party, regardless of the procedural posture or setting of a case, to have an opportunity to access as much evidence as possible, which promotes an equitable and judicious result.

V. CONCLUSION

As a whole, The Newsgatherer's Protection Act illustrates the value of the blended privilege: it is flexible, because it allows parties to access information under particular conditions, but it remains concrete by protecting confidential sources. The ongoing debate as to which privilege to incorporate into reporter's shield laws will continue as more state legislatures, and perhaps even the federal government, grapple with either implementing a reporter's shield law or altering existing shield laws. This Note and The Newsgatherer's Protection Act it contributes hope to offer guidance to legislative bodies that are confronted with the challenges of implementing a reporter's shield law. The cost-benefit analysis conducted by this Note demonstrates that the blended privilege is the most practical and effective privilege to implement in a reporter's shield law. The key facet of the blended privilege that makes it preferable is its flexible rigidity; meaning, that the blended privilege's absolute protection for confidential sources and balancing test for compulsory disclosure of information is an ideal

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[255] *See supra* notes 177–79 and accompanying text (stressing the need for a qualified privilege in order to facilitate the equitable administration of justice).

[256] *See* 735 ILL. COMP. STAT. 5/8-907 (1985) (applying a more manageable burden of proof that only requires the movant to demonstrate the information sought is unavailable from other means, relevant to his claim, and not privileged information as a state secret, which allows the shield law to play a greater role in both criminal and civil proceedings).

[257] *See* text accompanying notes 91, 101 (discussing Florida's requirement of only the introduction of clear and convincing evidence).

framework for a reporter's shield law. Therefore, the blended privilege's breadth and clarity allow it to appeal to newsgatherers, litigants, law enforcement, judges, confidential sources, and the public at large. As this Note has shown, the best way for state legislatures to cash-in on *Branzburg's* "blank check" is to take advantage of the blended privilege.

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