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The Shield and the Sword: The Press Between the Public Interest and the Illegal Interception of Private Communications

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The Shield and the Sword: The Press Between the Public Interest and the Illegal Interception of Private Communications

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Abstract

Journalism is not only under the attack of fake news and post-truth politics. Its main enemy comes from within. Malpractices of journalism such as the fabrication of sources, fake stories, and illegal intrusion in people's privacy, are part of the equation that leads to people's distrust in news organization.

This article addresses two very related topics that, nevertheless, have not been sufficiently studied as part of the same phenomenon: The reporter's privilege to protect his sources' identity and its connection with a journalist's involvement in the illegal hacking or interception of private communications.

After reviewing the most relevant case law from the federal and state level, and all states that have enacted a Shield Law, the author recommends an exception to the reporter's privilege when there is probable cause that the journalist participated in illegal gathering activities of secluded information. With this proposal, the purpose is to reconcile two of the most emblematic legal precedents for freedom of the press by the U.S. Supreme Court: *Branzburg* and *Bartnicki*.

Keywords: Shield Law, Reporter's privilege, Sources, Journalism, Fake News, Hacking, Intrusion, Freedom of the press

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Introduction

Reporter's privilege, i.e., the right of a journalist to refuse to disclose his confidential sources, is based on the idea of giving the press enough breathing space to investigate and communicate events of public interest, which would otherwise remain hidden or unobserved.

But what happens when the reporter's privilege is used not to protect a source but to conceal the ill motivations of the journalist itself? What if there is no real source? Or if there is one who colluded with the reporter in the illegal procurement of private or secluded information? Several scandals, like the News of the World phone hacking case,[1] or the Claas Relotious fabricated stories and interviewees saga,[2] have exacted a heavy toll on journalism, due to the proliferation of fake news and distrust in recent years.

This paper deals with this conflict, between freedom of the press and privacy in the context of two conflicting legal rules: one that allows the press to divulge private information, and one that forbids the illegal interception of private communications.

A paradox can surely arise in some scenarios, in which the reporter's privilege and the prosecution of wrongdoers might conflict. For instance, while public interest would justify the press' disclosure of wiretapped phone conversations between two private parties under the ruling of the U.S. Supreme Court in *Bartnicki v. Vopper*,[3] warrantless phone wiretapping still remains a crime under federal and most state statutes. In this context, the reporter's privilege could work as an obstacle to the prosecution of the wrongdoers responsible for the illegal intrusion and create a vicious circle. Under *Bartnicki*, illegal interceptors would still have a market (i.e., journalists) to "sell" or "donate" the results of their illicit "work," and under a Shield law, their identity would be protected.

Bartnicki involved the disclosure of the content of a wiretapped private phone conversation, an illegal activity under State Law (Pennsylvania) and Federal Law.[4] However, considering that the press was not involved in the illegal interception, and that the recorded conversation was of public concern, the majority of the Supreme Court ruled (6 to 3) that the press' broadcasting of the conversation was protected by the First Amendment.[5]

1. *Phone-hacking trial explained*, BBC NEWS (June 25, 2014), https://www.bbc.com/news/uk-24894403.

2. Kate Conolly, *Der Spiegel says top journalist faked stories for years*, THE GUARDIAN (Dec. 19, 2018), https://www.theguardian.com/world/2018/dec/19/top-der-spiegel-journalist-resigns-over-fake-interviews.

3. *Bartnicki v. Vopper,* 532 U.S. 514 (2001).

4. 18 U.S.C. § 2511(1)(a).

5. *Bartnicki v. Vopper,* 532 U.S. 514 (2001).

In another much-disputed case, *Branzburg v. Hayes*,[6] the Supreme Court refused (5 to 4) to interpret the First Amendment in such a way as to grant reporters a special testimonial privilege preventing them from responding to grand jury subpoenas within an investigation of the commission of a crime. Nevertheless, a general clear-cut rule was not established and several lower courts have recognized a constitutional reporter's privilege, supporting their reasoning in the dissenting votes in *Branzburg*, and the concurring vote of Justice Powell, who asserted that under some circumstances newsmen could succeed in quashing a subpoena under the First Amendment. Furthermore, forty states have already enacted shield laws and several bills with a similar purpose have been filed in the Federal Congress.[7]

Branzburg and *Bartnicki* are two Supreme Court cases that accurately exemplify the pendulous approach that courts have toward the press' role with respect to illegally obtained or disclosed information. The different outcomes from lower courts' case law show that one-size-fits-all solutions may not be adequate for addressing the press' privileges when they involve the interception of private communications. Nevertheless, some basic rules and guidelines would be helpful in a case-by-case analysis.

Taking this into consideration, in this paper I will review the statutory provisions and case law involving these two aspects of the media endeavors and propose a specific exception to the protection from shield laws: When there is probable cause to believe that the journalist took part in the illegal interception of a private or secluded communication. This alternative aims to reconcile the competing interests of newsgathering and privacy protection, by deterring the illegal intrusion into private conversations while maintaining the right of the press to disseminate truthful, legally-obtained, newsworthy information.

In the first part of this paper, I will review the statutory provisions that protect people from illegal interception in their private communications and the *Bartnicki* exception favoring the press' disclosure of its content. The study of part I is also directed to show the incomplete solution that the *Bartnicki* rule provides to the problem of illegal interception and possible involvement of the press in this activity. Part II is dedicated to the study of the reporter's privilege and to the complications that its misuse, from both sources and the press, may present. In part III, I will trace out the connection between the reporter's privilege and the disclosure of information illegally obtained by intercepting private communications in order to propose an

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

7. *Number of states with shield law climbs to 40*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-law-summer-2011/number-states-shield-law-climbs (last visited Sept. 24, 2019).

exception to be included in a model shield law, after reviewing the shield laws from the 40 states that have enacted one and the most relevant case law. This will be followed by a brief conclusion.

It could be argued that press self-regulation could be a more suitable and First-Amendment-deferential approach to address this problem, and that media outlets are in better position to determine whether to disclose or not illegally obtained private information, and when to grant or not confidentiality to a source. The aforementioned scandals, however, show that self-regulation may sometimes be a weak solution for these kinds of cases (and possibly some more cases yet to be uncovered), even less when the press itself is intertwined with the criminals. Therefore, it might still be necessary to pursue a better balance of the interests and incentives in play.

Illegal Interception and the Press' Disclosure

The proliferation of wiretapping devices and bugs has prompted privacy concerns that have been addressed first by the Courts and then by the Congress.

In the seminal case *Olmstead v. United States*,[8] the Supreme Court decided on a case of a warrantless phone wiretapping that was made by federal officers without trespassing the property of the investigated people (the officers had inserted wires along the ordinary telephone wires in the basement of a building, and the taps were made in the street near the residences).[9] Because of the particular circumstances of the wiretapping, the Supreme Court majority ruled that it did not violate the Fourth Amendment. In a dissenting opinion, Justice Brandeis declared that government intrusion with people's privacy may adopt new forms in the future ("The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home").[10] This dynamic view of the Constitution, which should keep pace with technological change, would later prevail. In 1934, the Congress enacted § 605 of the Federal Communications Act, making phone wiretapping a federal crime.[11]

8. *Olmstead v. United States*, 277 U.S. 438 (1928).

9. *Id.* at 456-57.

10. *Id*. at 474.

11. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY, INFORMATION AND TECHNOLOGY 145 (3d ed. 2011).

Later on, in *Katz v. United States*,[12] the Supreme Court would abandon the "physical trespass" doctrine set in *Olmstead* and *Goldman*[13] as a parameter to determine a violation to the Fourth Amendment. In *Katz* the majority opinion of the Court established the illegality of a wiretap over a public telephone booth without a search warrant. Justice Harlan's concurring vote in this case provided with the "reasonable expectation of privacy" test that would be widely cited by the courts in future cases as the bounds of the Fourth Amendment protection.[14]

Section 605 of the Federal Communications Act was the first federal statute limiting the interception and disclosure of private electronic communications, stating that:

> No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.[15]

In 1968, in response to the Supreme Court's rulings in *Katz* and *Berger*,[16] the Congress enacted the Omnibus Crime Control and Safe Streets Act, whose Title III—commonly referred to as the "Federal Wiretap Act"—extended its reach beyond § 605, also criminalizing private wiretaps.[17] This statute, codified as 18 U.S.C. § 2510-2520, makes it a crime to intercept "any wire or oral communication" punishable with up to five years imprisonment and $10,000 fine. However, it is not unlawful when a person, who is a party to the communication, is making the recording.[18]

12. *Katz v. United States*, 389 U.S. 347 (1967).
13. *Goldman v. United States*, 316 U.S. 129 (1942).
14. *Katz*, 389 U.S. at 360-61 (1967).
15. 47 U.S.C. § 605(a)(6).
16. *Berger v. State of New York*, 388 U.S. 41 (1967).
17. Solove & Schwartz, *supra* note 11, at 147.
18. Federal Wiretap Act, 18 U.S.C. § 2511(2)(c) (2018). *See also* DWIGHT L. TEETER & BILL LOVING, LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA 469 (13th ed. 2011); SOLOVE & SCHWARTZ, *supra* note 10, at 151.

The federal statute, as many state laws currently do, forbids not only the actual wiretapping or eavesdropping, but also the use and disclosure of intercepted communication by third parties when the disclosing party knows or has reason to know that it was illegally obtained.[19]

In 1986, Congress made some amendments to the federal wiretap law by passing the Electronic Communications Privacy Act and the Stored Wire Electronic Communications Act, commonly referred together as the Electronic Communications Privacy Act of 1986 (ECPA). The ECPA updated the Federal Wiretap Act of 1968 to protect wire, oral, and electronic communications while those communications are being made, are in transit, and when they are stored on computers. The Act applies to email, telephone conversations, and data stored electronically. Title III of the Federal Wiretap Act of 1968 was then shifted to Title I.[20]

Section 2518 of the 18 U.S.C. sets the general procedure to obtain the authorization from a judge to intercept a wire, oral, or electronic communication. This section also establishes that any aggrieved person may move to suppress the contents of any wire or oral communication intercepted or evidence derived therefrom if the communication was unlawfully intercepted, the authorization was insufficient or if the interception did not follow the procedure and instructions of the order of authorization.[21] This stipulation follows a "fruit of the poisonous tree" norm, banning the use of the intercepted communication even if it would arguably be beneficial for legal social ends.[22]

The federal statute, as well as several state laws, prohibit not only the unauthorized interception of private communications, but also penalize the disclosure of the information contained in those communications, a restriction that has a strong impact on journalistic activities and the First Amendment.

The Supreme Court specifically addressed this matter in its famous *Bartnicki v. Vopper* ruling in 2001.[23] This case dealt with the possibility of imposing liability on the media for publication of an illegally recorded cellular phone conversation, which was not actually recorded by the media.

19. Federal Wiretap Act, 18 U.S.C. § 2511(1)(c) (2018). *See also* FRANKLIN ET AL., MASS MEDIA LAW. CASES AND MATERIALS 416 (8th ed. 2011).

20. *Federal Statutes relevant in the Information Sharing Environment (ISE)*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, http://www.it.ojp.gov/default.aspx?area=privacy&page=1285 (last visited Sept. 24, 2019).

21. 18 U.S.C § 2518(10)(a) (1998).

22. *Cf.* Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking In Speech*, 96 NW. U. L. REV. 1099, 1133 (2002).

23. *Bartnicki v. Vopper,* 532 U.S. 514 (2001).

The conversation was between Anthony F. Kane Jr., president of the West Wyoming Valley Teachers Union and Gloria Bartnicki, the teachers' union chief negotiator. In this conversation, besides critical commentaries about the school board members and their reluctance to give raises to the teachers, Kane made some threatening comments: "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys."[24]

A tape of the recorded conversation was found by Jack Yocum, president of the local taxpayers' association, in his mailbox, who gave it to Frederick W. Vopper, a WILK radio talk show host, who aired the recording in violation of the Federal and the State of Pennsylvania Wiretap Acts.

In its majority opinion, the Supreme Court took into consideration that, despite the fact that the respondents (Vopper and Yocum) had at least reason to know that the recording itself was unlawful, they did not take part in the illegal interception, they lawfully accessed to the information on the tapes and the subject matter of the conversation was of public concern.[25]

The Court properly identified the conflict between allowing the publication of truthful and newsworthy information by the media and the interests served by the Federal Law prohibition, which consisted of removing the incentives for parties to intercept private conversations. Because such information would not be lawfully available for public dissemination, therefore the harm to persons whose conversations were illegally intercepted would be minimized.[26] The Court, however, rejected (6-3) the idea of punishing the person who did not participate in the illegal interception but did disclose the intercepted communication. The Court stated that the normal method for deterrence was to punish the perpetrator of the illegality (i.e., whoever first recorded the conversation), and then took into consideration the absence of empirical evidence to support the argument that punishing the innocent discloser would reduce the number of illegal interceptions.[27]

In this case, the Court held that "privacy concerns give way when balanced against the interest in publishing matters of public importance,"[28] and refused to decide whether the interests protected by the Federal Statute were strong enough to justify punishment in a case in which the disclosure involved trade secrets or information of purely private concern.[29]

24. *Id.* at 518-19.
25. *Id.* at 524-25.
26. *Id.* at 516.
27. *Id.* at 529-32.
28. *Bartnicki,* 532 U.S. at 516.
29. *Id.* at 533-534.

Before *Bartnicki*, the Supreme Court had admitted the right of the press to publish, without punishment, truthful information, with the caveat that the information in those previous cases was not preceded by an illegal intrusion.[30] In *The Florida Star v.B.J.F.,* the Court ruled in favor of a newspaper that had published the name of a rape victim that was inadvertently disclosed by the police.[31] *Cox Broad. Corp. v. Cohn* was a similar case of publication of a rape victim's name obtained from judicial records.[32] In *Smith v. Daily Mail*, the Court held that the West Virginia statute that made it a crime for newspapers to publish the name of any youth charged as a juvenile offender violated the First and Fourteenth Amendments in prohibiting truthful publication of information lawfully obtained by newspapers by monitoring police band radio frequency and interviewing eyewitnesses.[33] Similarly, in *Landmark Communications v. Virginia*, the Court ruled that the First Amendment does not permit criminal punishment of the news media for divulging or publishing truthful information regarding confidential proceedings from the Judicial Inquiry and Review Commission.[34]

But *Bartnicki* was a particular case in which an illegal intrusion was performed, and even though the news media was not the perpetrator, it did know or had reason to know of this illegality. Furthermore, this case presented the Court with the particular interest of the States and of the Federal Government in stopping the illegal interception of private conversations, an activity of permanent interest for media organizations.

The dissenting opinion written by Chief Justice Rehnquist put more weight on the deterrence effect that arises from the prohibition on disseminating the information. The "dry-up-the-market" theory behind the prohibition prevents the wrongdoer from enjoying the fruits of the crime:

> the incidental restriction on alleged First Amendment freedoms is no greater than essential to further the interest of protecting the privacy of individual communications. Were there no prohibition on disclosure, an unlawful eavesdropper who wanted to disclose the conversation could anonymously launder the interception through a third party and thereby avoid detection. Indeed, demand for illegally obtained private information would only increase if it could be disclosed without repercussion. "The law against

30. *Cf.* Smolla, *supra* note 22, at 1128.
31. *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).
32. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).
33. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979).
34. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

> interceptions, which the Court agrees is valid, would be utterly ineffectual without these antidisclosure provisions."[35]

However, the alleged causal link between surreptitious illegal electronic surveillance and the opportunity to sell or donate this information is very difficult to prove. It is unknown how many illegal intrusions go unnoticed and how many of these intrusions end up with the public dissemination of the information contained therein. Nevertheless, it is a reasonable assumption that the complete absence of liability on the media to disclose this illegally obtained material may create the incentives for the invasion.[36]

In *Bartnicki*, the Supreme Court answered positively the question of whether we, as a society, do or do not want a press that publishes truthful and newsworthy information, even if such information was illegally obtained by a third party. Nonetheless, the remaining question was: Do we want to encourage third parties' access to that information by using illegal means? The answer, I would bet, is no, we do not. All of the Justices in *Bartnicki* agreed that there is a compelling interest by the Federal and State Governments to deter this kind of crime; the disagreement was on the tools to achieve that goal.

Notwithstanding the First Amendment argument to protect news media when they choose to disclose this type of information, the courts do not grant this protection to sources who have either illegally obtained or illegally transmitted that information to the press.

For instance, in *Boehner v. McDermott*,[37] the Court of Appeals for the D.C. Circuit refused to grant a Congressman a First Amendment protection for the disclosure of illegally obtained information. In this case, James A. McDermott, a member of the House of Representatives and member of Congressional Ethics Committee, gave to the media a record of a phone conference between fellow Congressman, John A. Boehner, and Newt Gingrich, member of the Republican Party leadership and then Speaker of the House, who was under investigation before the Committee. Citizens John and Alice Martin were responsible for eavesdropping on the conversation using a police radio scanner in violation of 18 U.S.C. § 2511(1)(a) and for delivering the recording to McDermott. The majority opinion of the Court held that even when McDermott did not participate in the interception of the conversation and that the information therein contained had substantial news value (revealing information on whether Gingrich had violated his settlement agreement with the Ethics Committee), he still was subject to the Committee

35. *Bartnicki v. Vopper*, 532 U.S. 514, 551 (2001).

36. *Cf.* Smolla, *supra* note 22, at 1140.

37. *Boehner v. McDermott*, 484 F.3d 573, 581 (D.C. Cir. 2007).

rule prohibiting disclosure of any evidence relating to an investigation to anyone outside the Committee unless authorized: "When Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins' illegal recording. He therefore had no First Amendment right to disclose the tape to the media."[38]

The Court of Appeals followed in *Boehner* the criteria established by the Supreme Court in *United States v. Aguilar*, in which the Court distinguished the impacts on First Amendment coming from voluntary and involuntary nondisclosure obligations: "As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public . . . We think the Government's interest is quite sufficient to justify the construction of the statute as written, without any artificial narrowing because of First Amendment concerns."[39]

This distinction explains why, while the press may lawfully publish leaked information, leakers who violate a voluntary non-disclosure obligation may still be held responsible for breaking their duty of secrecy.

Similarly, in *Landmark*, the Supreme Court declared that the First Amended prevented them from applying criminal punishment to the news media for divulging or publishing truthful information about proceedings of Judicial Inquiry and Review Commission, despite its confidentiality.[40] In that case, instead of holding the press liable, the Supreme Court put the responsibility for disclosing confidential information on the shoulders of the party responsible for safeguarding its secrecy: "Much of the risk can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings."[41]

The irony does not go unnoticed. As a society, we want a free press to publish truthful and newsworthy information, but we still want to reprimand illegal disclosure or acquisition of information. We want to punish the illegal interceptor or the leaking source, but we refuse to punish the reporter who obtains the information from the wrongdoer. Stone et al. recognize this possible contradiction in encouraging a source to provide illegally obtained

38. *Boehner v. McDermott*, 484 F.3d 573, 581 (D.C. Cir. 2007).
39. *United States v. Aguilar*, 515 U.S. 593, 606 (1995).
40. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).
41. *Id.* at 845.

information to a journalist—thanks to the reporter's privilege—and, at the same time, punishing the leak for disclosing confidential information.[42]

An adequate regulation of the reporter's privilege could play a major role in finding a balance between those conflicting interests.

II. Reporter's Privilege and Its Misuse

It is well-known that journalists have a special privilege that prevents them from being subpoenaed in judicial proceedings (civil, criminal and grand juries) and especially from being forced to disclose the identity of their sources. This protection, known as reporter's privilege, is recognized in the vast majority of the states, but its roots are found in common law.

The first time the reporter's privilege was asserted in court was in 1848, when *New York Herald*'s reporter John Nugent refused to disclose who had given him a copy of a proposed treaty to end the Mexican-American War, which was being secretly debated in the Senate at the time. Nugent refused to disclose his source and was cited for contempt. Similar cases arose throughout the 1800s, but courts generally rejected reporters' arguments for the necessity of maintaining confidential the identity of the sources.[43]

While history shows many examples of reporters' defiance to disclose the identity of their sources, it is a historical fact that judges did not use to grant the privilege to journalists, at least not expressly, mainly because of two reasons: The privilege would restrict the flow of evidence at trial, and the idea that this protection would not necessarily improve the free flow of accurate information.[44]

In 1896, Maryland became the first state to offer a protection to journalists after a *Baltimore Sun* reporter was jailed for failing to disclose the identity of a source who leaked information about grand jury proceedings. That case resulted in the adoption of the country's first shield law, which provided an absolute privilege against disclosure of a source's identity in any legal proceeding.[45]

It was not until 1972, however, when the Supreme Court ruled on the most important case concerning the reporter's privilege, *Branzburg v. Hayes*, which arose from four different cases of reporters petitioning to quash subpoenas. The first two cases concerned Branzburg, a staff reporter for the

42. Stone et al., The First Amendment 500 (3d ed. 2008). *See also,* NORMAN PEARLSTINE, OFF THE RECORD: THE PRESS, THE GOVERNMENT, AND THE WAR OVER ANONYMOUS SOURCES 151 (2007).

43. Michelle C. Gabriel, *Plugging Leaks: The Necessity of Distinguishing Whistleblowers and Wrongdoers in the Free Flow of Information Act*, 40 LOY. U. CHI. L.J. 531, 537 (2009).

44. Paul Marcus, The Reporter's Privilege: *An Analysis of the Common Law, Branzberg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 816-18 (1983).

45. *See* Gabriel, *supra* note 43, at 538.

Courier-Journal, a daily newspaper published in Louisville, Kentucky, who was subpoenaed by the Jefferson County grand jury to identify the two residents he had seen making hashish from marihuana and written about. In a later story, Branzburg wrote about the use of drugs in Frankfort, Kentucky, after interviewing several dozen drug users. Branzburg was also subpoenaed to appear before a Franklin County grand jury, and he moved to quash the summons. In a third case, petitioner Pappas, a television newsman-photographer working out of the Providence, Rhode Island, office of a New Bedford, Massachusetts, television station, recorded and photographed a prepared statement read by one of the Black Panther leaders, but after an expected police raid that never occurred, he did not write a story nor did he reveal what had occurred in the Black Panther's headquarters. Two months later, Pappas was summoned before the Bristol County grand jury but refused to answer any questions about what had taken place inside the headquarters while he was in there. In the fourth case, Earl Caldwell, a reporter for the *New York Times*, was also subpoenaed by a federal grand jury in the Northern District of California to testify and to bring with him notes and tape recordings of interviews he had with officers and spokesmen of the Black Panther Party concerning the aims, purposes, and activities of that organization.[46]

The Supreme Court had to decide whether requiring newsmen to appear and testify before state or federal grand juries curtailed the freedom of speech and of the press established in the First Amendment. The majority opinion held it did not.[47]

The majority vote in *Branzburg* stated that the First Amendment did not "invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[48] This was an implication of the general principle that "(t)he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."[49] To the Court, news reporting has no precedence over the interest in identifying criminal activities in which may be engaged the very sources journalists are writing about: "We cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it."[50]

46. *Branzburg v. Hayes*, 408 U.S. 665, 667-82 (1972).
47. *Id.* at 667.
48. *Id.* at 682.
49. *Id.* at 682-83.
50. *Id.* at 692.

The majority of the Supreme Court also acknowledged the possible effects that its ruling could have on the flow of information between journalists and its sources, but was skeptical about a direct negative effect:

But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data indicate that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas, but the evidence fails to demonstrate that there would be a significant construction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative.[51]

It is interesting to note that the Court in *Bartnicki* followed a similar reasoning as it had in *Branzburg* thirty years before. In both *Branzburg* and *Bartnicki*, the Court took into consideration a legitimate specific purpose (to encourage sources to speak freely with reporters and to eliminate the incentives of illegal interceptors of private communications, respectively), but refused to validate one specific solution (a general exception for reporters from testifying before a grand jury and the proscription on the dissemination by the press of the information illegally obtained by a third party, respectively) because of the uncertainty concerning the effectiveness of that alternative.

The dissenting vote written by Justice Stewart in *Branzburg*, joined by Justice Brennan and Justice Marshall, criticized the majority's reliance on empirical studies to protect First Amendment rights, and instead founded the need of special safeguards on common sense.[52] Justice Stewart proposed a balancing test in order to defeat the reporter's privilege. Therefore, in order to have a reporter reveal confidences before a grand jury, the government must:

> (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of

51. *Branzburg v. Hayes*, 408 U.S. 665, 693-94 (1972).

52. *Branzburg*, 408 U.S. 665, 711-52 (1972). Justice Douglas wrote a separate dissenting opinion.

> First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[53]

This test has been followed by a large amount of lower courts and state legislations that have recognized a reporter's privilege, as explained in part III. The majority opinion won, however, with the concurring vote of Justice Powell, who did not reject the claim of a privilege. Instead, the concurring Justice interpreted the majority's opinion not to impede the recognition of a constitutional right for a newsman with respect to the gathering of news and the safeguarding of his sources,[54] which opened a door to the admission of the reporter's privilege under different circumstances.[55] Good faith on the part of the grand jury investigation would play a key role in determining if a newsman's rights are violated or not according to Justice Powell,[56] an assessment that calls for a case-by-case analysis:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.[57]

It is true that all of the Justices agreed on the need for some newsgathering protection for the furtherance of the press' freedom.[58] Despite the fact that the majority opinion held that in the case of *Branzburg* there was not a right of a newsman to refuse to answer to a grand jury's summons, the concurrent vote of Justice Powell has been interpreted by lower courts as a majority (5 votes) on the recognition of a reporter's privilege. In opposition,

53. *Branzburg*, 408 U.S. 665, at 743.

54. *Id.* at 709.

55. *See* David A. Anderson, *Confidential Sources Reconsidered*, 61 FLA. L. REV. 883, 891 (2009).

56. *See* David Abramowicz, *Calculating The Public Interest In Protecting Journalists' Confidential Sources*, 108 COLUM. L. REV. 1949, 1958 (2008) ("The only exception to the rule rejecting the privilege, the *Branzburg* Court said, would arise if grand jury proceedings were instituted in bad faith. (. . .) Thus, if a reporter is subpoenaed to appear before a federal grand jury, and the subpoena is issued in good faith, a federal judge will tip the balance in favor of compelling the reporter to testify.").

57. *Branzburg*, 408 U.S.665, at 710.

58. *See* Anderson, *supra* note 55, at 909.

former judge Richard Posner, writing for the Seventh Circuit, has rejected the idea of a reporter's privilege under the First Amendment and has criticized how lower courts have essentially ignored the majority opinion in *Branzburg* or "audaciously declare that *Branzburg* actually created a reporter's privilege."[59]

This ambiguity has led many lower courts to create the protection as they thought necessary, although most of them have followed the balancing test of Justice Stewart's dissent.[60]

The Reporters Committee for Freedom of the Press (RCFP) shows that currently 40 states, plus the District of Columbia, have enacted a shield law to protect a journalist from mandatory disclosure of information before a judicial proceeding, in some fashion.[61] After reviewing the information pertaining to each individual state, I found that 48 states, plus D.C., recognize some kind of reporter's privilege either by state law, common law, or under the First Amendment.

Notwithstanding the widespread protection of journalists' sources, several jurisdictions also recognize exceptions to the privilege and on many occasions journalists have been subpoenaed in the course of civil and criminal proceedings and before grand juries as well. In a five-year study on the incidence of subpoenas served on the news media, Agents of Discovery, the RCFP reported that 1,326 subpoenas were served on 440 news

59. *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003). *See also* Anderson, *supra* note 55, at 894.

60. *See* Anderson, *supra* note 55, at 889-890; Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form*, 63 FED. COMM. L.J. 667, 674 (2010-2011). In an opposite direction, *see* the decision of the Court of Appeals for the Fourth Circuit in *United States v. Sterling.* The Court ruled that there was not a reporter's privilege under First Amendment, State or Common Law "from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated." *United States v. Sterling*, 724 F.3d 482, 492 (4th Cir. 2013). The case was about the motion of a reporter, James Risen, to quash a subpoena requiring his testimony about the identity of a confidential source that had revealed to him national defense information in violation of the Espionage Act. The subpoena was issued in the criminal case in which Jeffrey Sterling, a former CIA agent, was indicted for revealing information regarding a covert CIA operation pertaining to the Iranian nuclear weapons operation to the journalist James Risen.

The Court established that there was a "compelling public interest in effective criminal investigation and prosecution" (*United States v. Sterling*, 724 F.3d 482, 498 (4th Cir. 2013)) of higher weight than in civil cases, and read *Branzburg* as not creating a reporter's immunity. Furthermore, the Court stated that like the *Branzburg* reporters, "Risen has 'direct information . . . concerning the commission of serious crimes' and that "he can provide the only first-hand account of the commission of a most serious crime indicted by the grand jury—the illegal disclosure of classified, national security information by one who was entrusted by our government to protect national security, but who is charged with having endangered it instead." *United States v. Sterling*, 724 F.3d 482, 498 (4th Cir. 2013). Consequently, the Court reversed the district court's decision and refused to grant Risen a qualified First Amendment reporter's privilege.

61. *Number of states with shield law climbs to 40*, *supra* note 7.

organizations in 1999, and forty-six percent of all news media responding said they received at least one subpoena during 1999.[62]

A more recent study conducted by Andersen revealed that 761 responding news organizations participating in the study reported that their "reporters, editors or other news employees" received a total of 3,062 "subpoenas seeking information or material relating to newsgathering" in 2006. The study made an estimate of 7,244 subpoenas received by all daily newspapers and network-affiliated television news operations in the United States that year.[63]

The RCFP has also drafted a list of all 1,778 cases (until May 2019) in which a federal entity (from the Executive branch, Congress or the courts) has formally investigated or prosecuted someone for the unauthorized disclosure of government information to the news media.[64] Leak cases are the archetype of confidential sources that should be protected by the reporter's privilege.

When required to reveal their confidential sources, most journalists acknowledge their obligation to protect them, even if threatened with jail time. The RCFP itself recognizes this is a question of journalism ethics that presents the additional complication of having a confidential source suing a reporter or his news organization if they do not live up to their confidentiality promise.[65] The survey conducted by Andersen is also revealing in this regard: Only 29 newspapers and 20 broadcasters declared that the threat or use of subpoenas against their news organization affected their policy on the use of confidential sources. When generalized to the wider population, the data collected by Andersen suggests that only an estimated 6.1% of news organizations in the country are affected in their confidential-source policy by the threat or use of subpoenas.[66]

The media industry has been campaigning for a federal shield law for several years, but in the meantime it is a general practice that journalists will refuse to comply with subpoenas seeking to disclose their confidential sources and even spend some time in jail when they are found in contempt with a court order.

62. *The Reporter's Privilege Compendium: An Introduction*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, https://www.rcfp.org/introduction-to-the-reporters-privilege-compendium/ (last visited Sept. 24, 2019).

63. RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 626 (2008).

64. Katie Beth Nichols*, Federal Cases Involving Unauthorized Disclosures to the News Media, 1778 to the Present*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (May 21, 2019), https://www.rcfp.org/resources/leak-investigations-chart/.

65. *See The Reporter's Privilege Compendium: An Introduction*, *supra* note 62.

66. *See* Jones, *supra* note 60, at 650-651.

This particular view, as described before, has been rejected by the Supreme Court in *Branzburg* and also in subsequent cases. *Cohen v. Cowles Media*[67] is a clear example of general applicability of rules to the press.[68] The Supreme Court held that the First Amendment did not prevent a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information.[69] As has been correctly expressed by Fargo, the First Amendment applies to the institutional press in the same way that it applies to all persons.[70] Even when the scope of the First Amendment protection may reach newsgathering activities, it is not a valid defense for violation of the law, whether this violation consists of trespassing,[71] intrusion into a space of reasonable expectation of privacy,[72] or secret recording after getting access to a person's house or office using deceptive methods.[73] "The

67. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

68. *See also Associated Press v. Nat'l Labor Relations Bd.*, 301 U.S. 103, 132-33 (1937) ("It is, therefore, beyond dispute that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.")

69. *Cohen*, 501 U.S. 663, 665 (1991).

70. *Cf.* Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL'Y 241, 244 (2002).

71. *See* Teeter & Loving, *supra* note 18, at 457 (using the example of trespass, the authors remind that when a member of the news media enters a property without the owner's consent, trespass occurs, and newsgathering is not a defense, not matter how relevant was the matter).

72. In the famous case of *Shulman v. Group W*, the Supreme Court of California ruled that while there was no expectation of privacy from Ruth Shulman and her son Wayne at the scene of her car accident in a highly traveled interstate highway, once inside the rescue helicopter, they did have a reasonable expectation of privacy. Therefore, the use of a hidden microphone by the nurse in the helicopter, with the collaboration and purpose to broadcast the recording on a documentary television show, was conduct that could be considered as an actionable intrusion. *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 494 (Cal. 1998). "The mere fact the intruder was in pursuit of a 'story' does not, however, generally justify an otherwise offensive intrusion; offensiveness depends as well on the particular method of investigation used. At one extreme, "'routine . . . reporting techniques,'" such as asking questions of people with information ("including those with confidential or restricted information") could rarely, if ever, be deemed an actionable intrusion. [citation and internal quotation marks omitted]. At the other extreme, violation of well-established legal areas of physical or sensory privacy—trespass into a home or tapping a personal telephone line, for example—could rarely, if ever, be justified by a reporter's need to get the story. Such acts would be deemed highly offensive even if the information sought was of weighty public concern; they would also be outside any protection the Constitution provides to newsgathering." *Id.*
The California Supreme Court has also found there is a reasonable expectation of privacy in the work place. In *Sanders v. American Broadcasting Companies*, ABC reporter Stacy Lescht, who had obtained employment as a "telepsychic" with the Psychic Marketing Group (PMG) secretly recorded her coworker, tele-psychic Mark Sanders, using a small video camera hidden in her hat. Although, this conversation could be seen or overheard by coworkers, the California Supreme Court found that nevertheless, Sanders had a reasonable expectation of limited privacy, that his conversation with a coworker was not being videotaped. *Sanders v. Am. Broad. Companies, Inc.*, 978 P.2d 67, 68-80 (Cal. 1999).

73. In *Dietemann v. Time,* the 9th Circuit established that the media did not have a special right to break laws during its newsgathering activities. In this case that involved a couple of

First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."[74]

Norman Pearlstine, former editor in chief of *Time* magazine, sees the time journalists serve in prison as a reflection of the fact that they are not above the law, beyond what some might believe.[75] For Pearlstine, the importance of civil disobedience is not properly understood by all journalists. This case of conflict between the ethical obligations of their profession and the Law should be extremely exceptional,[76] but as a general rule, most journalists would refuse to comply with a subpoena.

Pearlstine was harshly criticized by the majority of the media outlets because of his decision to comply when he was the editor of *Time* with the District Court's order to turn over Matt Cooper's notes that revealed the identity of his source in the Valerie Plame case. Pearlstine and *Time* were accused of diminishing the value of their journalist's vow of secrecy to a source.[77] In opposition, fewer people supported the message behind that decision, arguing that the long-term harm to public respect for journalism would have been greater if *Time* had declared that the press is above the law.[78]

The Valerie Plame story was probably the most publicized case involving a reporter's confidential source. On July 6, 2003, former Ambassador Joseph Wilson's op-ed piece "What I Didn't Find in Africa"

reporters posing as patients to enter the home of A.A. Dietemann, a journeyman plumberman who performed medical services without a diploma or state licenses. The reporters surreptitiously took photos and recorded the conversations using a hidden transmitter with the collaboration of the Los Angeles County district attorney and the California State Department of Public Health. The Judge Shirley Hufstedler writing the majority opinion for the 9th Circuit Court established that: a person "does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select." *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). *But see* the 7th Circuit ruling in *Desnick v. American Broadcasting Companies*. In this case, Dr J. H. Desnick allowed the videotaping by ABC reporters for the PrimeTime Live program of a cataract operation in his clinic's Chicago office. However, there were also hidden cameras and people posing as patients, who were secretly videotaped.The broadcast showed that Desnick told some patients to get cataract surgery even though they did not need it in order to charge more. But Desnick claims of trespass, fraud and violation of federal and state statutes regulating electronic surveillance were dismissed. The Court of Appeals did not value negatively the role of investigative journalists breaking their promise to treat their subjects with "kid gloves." The Court said: "If that is 'fraud,' it is the kind against which potential victims can arm themselves by maintaining a minimum of skepticism about journalistic goals and methods." *Desnick v. American Broadcasting Companies*, 44 F.3d 1345, 1354-1355 (7th Cir. 1995).

74. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

75. *See* Pearlstine, *supra* note 42, at 137 (making reference to this attitude from the press, which he calls arrogant, and that has contributed to public resentment toward the news media).

76. *Id.* at 94.

77. *Id.* at 114-24.

78. *Id.* at 139-40.

appeared in *The New York Times*, criticizing President Bush's arguments and evidences to support the war with Iraq in his State of the Union speech. In response, a couple of governmental officials leaked to the press the name of Wilson's wife, Valerie Plame, identifying her as an undercover agent working for the CIA, in an attempt to discredit Wilson's selection to his mission to Niger to investigate the alleged intents from Iraq to buy significant quantities of uranium from Africa. The *New York Times*'s reporter and Pulitzer award winner, Judith Miller, and *Time*'s reporter Matt Cooper, both of whom obtained Plame's name from governmental leaks,[79] were subpoenaed by a grand jury at the request of Patrick Fitzgerald, the appointed special counsel to investigate the leak of Plame's identity. *Time* and Cooper were held in contempt for their refusal to testify or produce Cooper's notes arguing for the recognition of a reporter's privilege, and after losing the appeal before the D.C. Court of Appeals and having their petition to the Supreme Court to review its ruling in *Branzburg* denied, Time announced that it would comply with the district court order to turn over Cooper's notes. *The New York Times* and Judith Miller followed a different path and refused to testify before the grand jury, which led to Miller's imprisonment for 85 days. After that period, Miller agreed to testify after speaking and receiving a waiver of confidentiality from her source, I. Lewis Libby, who claimed to have given Miller the waiver before she was first imprisoned. In the midst of the scandal and criticism about the way Miller and *The New York Times* had played the public opinion about the apparently unneeded protection of a confidential source, Miller resigned from *The New York Times*. On March 6, 2007, Libby was sentenced to 30 months in prison for lying to investigators when he denied that he had told the reporters about Plame, but his prison sentence was later commuted by President Bush.[80]

It is worth noting that then-*Time* editor in chief, Norman Pearlstine, at one point changed his mind about complying with the order of the Court. In the beginning, as he acknowledged in his book "Off the Record," he was willing to have Matt Copper be imprisoned and Time Inc. pay the fines for being in contempt with the district court's order. *Time*'s Editorial Guidelines even prescribed the possibility of serving a jail time for contempt of court.[81] Arguably, the final decision was the result of an assessment on whether this case really called for a strong defense of the reporter's privilege.

Time's sources in the Valerie Plame leak, as recognized by Pearlstine, did not fit the classical profile of a whistle-blower, who was jeopardizing his

79. Only Matt Cooper wrote a piece about the story naming Valerie Plame.

80. Franklin et al., *supra* note 19, at 486.

81. Pearlstine, *supra* note 42, at xii.

livelihood, his reputation or his life, to expose wrongdoings to the press.[82] Concordantly, Patrick J. Fitzgerald, the appointed special counsel in charge of the investigation, stated before Judge Hogan: "We need to step back and realize this case is not about a whistle-blower. This case is about potential retaliation against a whistle-blower." In fact, it was later discovered that Vice President Cheney got President Bush to declassify intelligence information that enabled Libby to use that information (regarding Valerie Plame's identity) when he met Judith Miller.[83]

The Valerie Plame leak reveals the excesses that journalists could perpetrate. In this kind of cases the protection of sources' identity not only fails to serve a public interest in encouraging the free flow from information between whistle-blowers and reporters, but it also damages the reputation of the press.

The case of Dr. Wen Ho Lee is also illustrative of the excesses committed by ill-intentioned sources and negligent or overconfident—to say the least—journalists. Wen Ho Lee is a Taiwanese-born American citizen who worked for the Department of Energy at the Los Alamos National Laboratory until March of 1999. He was later investigated for allegedly stealing American weaponry secrets for China. Details about this investigation, as well as information about Lee covered under the Federal Privacy Act, were leaked to the media. Although Lee was never charged with espionage, he was indicted on fifty-nine counts of mishandling computer files at Los Alamos, and pleaded guilty to only one felony charge of downloading nuclear weapons data to portable tapes. The leaks aimed to damage Wen Ho Lee lacked of substance, and were mainly based on racial prejudice.

In September 2000, during Wen Ho Lee's plea hearing, Judge Parker of the U.S. New Mexico District Court, apologized to Lee for the way his case had been handled: "[T]he top decision makers in the executive branch, especially the Department of Justice and the Department of Energy . . . have caused embarrassment by the way this case began and was handled . . . and have embarrassed our entire nation."[84]

Later on, Lee sued the Government for violation of his rights under the Privacy Act. Lee's defense took several depositions from governmental officials or their agents to find the leak of his private information, but only obtained denials, vague and evasive answers. None of the deponents

82. *Id.* at 100.

83. *Id.* at 241.

84. *Statement by Judge in Los Alamos Case, With Apology for Abuse of Power*, N.Y. TIMES, Sept. 14, 2000, at A25.

admitted to have personal knowledge of the source of any disclosures.[85] Hence, Lee issued subpoenas duces tecum for the depositions of five journalists known to be the authors of published articles containing the information about him allegedly disclosed unlawfully by defendants. The District Court rejected the request from the journalists to quash the subpoenas under Federal Law, ruling that the journalists' First Amendment interest in protecting their confidential news sources was outweighed by Lee's interest in compelling disclosure of sources. Soon after, Lee settled with the U.S. Government and major media outlets for more than $1.6 million.[86]

In this case, the absence of a federal shield law and, consequently, the absence of a reporter's privilege, allowed Lee to obtain some compensation. But cases like this one are of little help to journalist's claim of an absolute privilege to protect the confidentiality of their sources. Anthony Lewis, Pulitzer Prize-winning journalist and First Amendment scholar, commented on the topic: "Suppose that a federal shield law had existed when Wen Ho Lee sued to seek some compensation for his nightmare ordeal. The journalists who wrote the damaging stories would have had their subpoenas dismissed, and without the names of the leakers Lee would probably have had to give up his lawsuit. Is that what a decent society should want? Would that have really benefited the press? Or would it have added to the evident public feeling that the press is arrogant, demanding special treatment?"[87]

The cases of Valerie Plame and Dr. Wen Ho Lee show how confidentiality could be used by sources to achieve an evil purpose of attacking a person, without evidence to support it. Anonymity granted by journalists is the perfect shield. In absence of some limitations, the confidentiality rule turns into the perfect channel to perpetrate that kind of assaults. This is especially true in defamation cases, when journalists grant confidentiality to sources who use it to damage a suspect without any proof to back their claims.[88]

Confidentiality is a shield to protect whistle-blowers, to help a free flow of information between the press and their sources in the search of truth, for instance, when exposing government or corporate corruption;[89] it is not a

85. *Lee v. U.S. Dept. of Justice*, 287 F. Supp. 2d 15, 22 (D.D.C. 2003) aff'd sub nom. *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005).

86. *News Firms Settle with Wen Ho Lee*, CBS NEWS (June 2, 2006), https://www.cbsnews.com/news/news-firms-settle-with-wen-ho-lee/.

87. ANTHONY LEWIS, FREEDOM FOR THE THOUGHT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 93 (2007), quoted by Randall D. Eliason, *The Problems with the Reporter's Privilege*, 57 AM. U. L. REV. 1341, 1376 (2008).

88. *See* Pearlstine, *supra* note 42, at 236.

89. *Cf.* Abramowicz, supra note 56, at 1954. *See also* Gabriel, *supra* note 43, at 531.

privilege that comes from the mere conversation between a person and a journalist. Sources who attempt to make defamatory claims do not deserve the same protection given to a whistle-blower.

While confidentiality may serve the public interest, this is only possible on the notion that the source protected is an honest whistleblower. But sometimes, as the cases described above, confidentiality is used to shield the powerful from accountability, which also provides sources with a false confidence to engage in dangerous speculation,[90] and in worse scenarios, to disseminate trivial gossip, baseless rumors or malicious assaults.[91] Some authorities are concerned that sources can learn to "game the system" and in fact are more information spinners than actual whistle-blowers.[92]

The press also has a big share of responsibility in the misuse of sources' confidentiality. In some cases, negligence or over-confidence lead journalists to indiscriminately grant confidential status to some sources in not-deserving cases.[93] This is especially true in cases of beat reporting, when journalists rely on the same sources for story after story and face the risk of losing perspective.[94]

Pearlstine depicts a journalistic practice in Washington, where reporters would often assume the confidentiality of their sources in the Government, which seems to show the improper order of interests: In first place, the protection afforded to the source, and the protection of the public interest in second place.[95] The confidentiality condition is normally requested by the source and a journalist should normally try to get their sources on the record; confidentiality is a circumstance that should not be presumed.[96]

Anderson has also shed doubt on the amount of protection journalists claim, but recognizes that some cases of confidential sources do present

90. Abramowicz, *supra* note 56, at 1950, 1975.

91. Anderson, *supra* note 55, at 900.

92. Lillian R. BeVier, *The Journalist's Privilege-A Skeptic's View*, 32 OHIO N.U. L. REV. 467, 478 (2006) (quoting Jeffrey Toobin, *Name that Source,* THE NEW YORKER, Jan. 16, 2006, who quoted Martin Kaplan, Associate Dean of the University of Southern California's Annenberg School for Communication).

93. *See* Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1119 (2006) (arguing for more self-restraint in the press to grant confidentiality condition to sources: "Journalists can go a long way toward winning public support to that effort if they stick to their pledges to stop promising anonymity freely. The combination of shield legislation and a stronger journalistic commitment to naming news sources might go a long way toward encouraging future Deep Throats while discouraging people who want to hide their names out of shame, not fear").

94. *See* Pearlstine, *supra* note 42, at 175.

95. *Id.* at 243.

96. *Id.* at 102.

concerns of the highest order, as the only means to maintain democratic accountability.[97]

Nevertheless, the misuse of sources' protection may not only occur due to negligence from the press, or manipulation from the sources. Recent scandals have shown that journalists might also look to shield themselves behind a reporter's privilege for illegitimate purposes.

Some "confidential sources" might in fact be a fabrication of a reporter to fool the public. This was the case of Jayson Blair,[98] the *New York Times* reporter who plagiarized and fabricated articles attributing some of his biggest "scoops" to unnamed sources. A similar case was the one of Jack Kelly,[99] the once-highly regarded *USA Today* reporter whose lies were uncovered in 2004. More recently, we can find the case of Liane Membis,[100] former intern for the *Wall Street Journal*, who was fired after evidence of fabrication of quotes[101] and, of course, the very recent scandal of award-winning journalist Claas Relotious,[102] who invented stories and protagonists in at least 14 articles.

Going back to the Valerie Plame case, a *Los Angeles Times* (LAT) editorial strongly criticized the role of *The New York Times* and of its reporter Judith Miller, who refused to reveal the identity of her source, went to jail, changed her mind after 85 days of imprisonment after obtaining a waiver of confidentiality by her source, Libby, who claimed to have given the waiver before Miller's imprisonment. LAT stated that it was becoming clear that Miller had "abused the public's trust by manufacturing a showdown with the government."[103] In a more general way, LAT recognized the role of anonymous sources but also highlighted the need to be careful in their treatment: "the credibility of such sources—and, by extension, of the

97. *Cf.* Anderson, *supra* note 55, at 890.

98. David Barstow, Jonathan D. Glater, Adam Liptak & Jacques Steinberg, *Correcting the Record; Times Reporter Who Resigned Leaves Long Trial of Deception*, N.Y. TIMES (May 11, 2003), https://www.nytimes.com/2003/05/11/us/correcting-the-record-times-reporter-who-resigned-leaves-long-trail-of-deception.html.

99. Jacques Steinberg, *USA Today Finds Top Writer Lied*, N.Y. TIMES (Mar. 20, 2004), https://www.nytimes.com/2004/03/20/us/usa-today-finds-top-writer-lied.html.

100. Tyler Kingkade & Liane Membis, *Fired Wall Street Journal Intern, Had Journalism Problems at Yale*, HUFFPOST (July 18, 2012), https://www.huffpost.com/entry/liane-membis-fired-wall-street-journal-intern_n_1680915?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAASmRfOKM3ITCbmz6HhuMJOSqsP50Luv6DME6kJFktESbhhHnSkIXVc4rzroAWQUPWwm5a4-ohxZIl4_ic0tZucNjSaUx0_fQAk3sNqDAurkaMIbftznYS6j0elhA6Iygt3PPyvDRwMPCMeoy1PDVmwT9AR689K_pTB9ZHR9BG0V.

101. Andrew Beaujon, Wall Street Journal *intern fired for fabricating sources*, POYNTER (June 26, 2012), https://www.poynter.org/reporting-editing/2012/wall-street-journal-intern-fired-for-making-up-sources/.

102. Conolly, supra note 2.

103. *See* Pearlstine, *supra* note 42, at 155.

newspapers that use them—can be hard to measure. Leakers are almost always motivated by something other than a commitment to the truth. When reporters agree to withhold a source's name, they have an obligation to place the information they receive from that source in context. If journalists expect the public to take their work seriously, then they must be more careful about how they go about it."[104]

Although some would argue that a journalist must respect the source's confidentiality even if the source uses that confidentiality for devious purposes,[105] the damage of an improper grant of confidentiality reaches not only the source or the particular reporter, but also the journalistic profession and the media industry as a whole, which are regarded as incapable of being cautious and putting the public's interest on top.

The lack of accountability from the press might even push for more stringent regulations that could diminish its freedom.[106] In this regard, BeVier argues that if the press has a constitutional conferred power to act on the public's behalf, the public should then have a mechanism to hold the press accountable for the consequences of its performance.[107] It is also possible that the quality of the information that the public receives is reduced when the press relies on confidential sources.[108] The public has fewer opportunities to judge for itself the trustworthiness of the press reports.[109]

Generally, state shield laws and the Free Flow of Information Act[110]—the most recent federal shield legislation bill presented before the House of Representative—do not distinguish between the types of sources, between

104. Editorial, *Source of Frustration*, L.A. TIMES, Oct. 18, 2005.

105. *See* Pearlstine, *supra* note 42, at 96 (referring to the case in which Marine colonel Oliver North accused members of the Congress of leaking classified information about the 1985 apprehension of Arab terrorist, despite the fact that he was the leak himself. In this case, *Newsweek*'s journalist, Jonathan Alter revealed North as the leak, and this brought him criticism from investigative reporter Seymour Hersh).

106. *See* Abramowicz, *supra* note 56, at 1978, 1984-85. Abramowicz suggests a hybrid solution to the lack of accountability. He proposes to use compliance of a news organization with its own guidelines on confidential sources as a mark of when to concede confidentiality or when to compel the disclosure of the source's identity: "A journalist's adherence to guidelines would weigh in favor of preserving a source's confidentiality; an indifference to guidelines would weigh in favor of compelling disclosure of the source's identity." This approach, believes Abramowicz, solves the race-to-the-bottom problem. If the press fails to follow their own guidelines, they would be forced to disclose confidential sources' identities. In the same manner, sources would only rely on guidelines-abiding newspapers. My objection to that proposal is that the race to the bottom might turn into the draft of the guidelines. Flexible guidelines might be the choice of the irresponsible and unaccountable press.

107. BeVier, *supra* note 92, at 467.

108. *Id. at* 478.

109. *Id.*

110. *See infra* note 144.

whistleblowers and wrongdoers, and do not make exceptions to sources' protection in connection with the devious motives explored above.

III. Illegal Interception, Acquisition or Disclosure: An Exception to Shield Law to Make it Stronger

Either under State Law, the First Amendment or Common Law, almost every state in the U.S., with the exception of Mississippi and Wyoming, recognizes a reporter's privilege. Most states have also established, via statutory provisions or jurisprudence, some sort of balancing test, following—or very similar to: the one set in the dissenting opinion of Justice Stewart in *Branzburg,* in order to determine whether the privilege is outweighed by other public interests. In other words, in order to defeat the reporter's privilege, the requesting party must show: (1) That the reporter's information is relevant to the litigation (or "goes to the heart of the party's claim"); (2) that the information cannot be obtained by alternative means (or "the party has unsuccessfully exhausted all alternatives"); and (3) that there is a compelling interest in obtaining the information.

State Shield Laws and the case law present some differences in the regulation of the reporter's privilege concerning confidential or non-confidential sources, published or unpublished information, and subpoenas in civil or criminal proceedings, or requested by a grand jury, that vary from state to state. But none of the State Shield Laws has considered the specific problem addressed by this paper, the case in which the confidentiality granted by a journalist protects a source who is also the perpetrator of an illegal interception in private communications.

This is a very complicated situation that should be addressed by the statutes or the courts, especially in light of recent cases in which the press has been found to be actively taking part in the illegal interceptions.

For instance, the *News of the World* phone-hacking scandal was initially believed to be the act of a rogue reporter, Glenn Mulcaire, then Royal Editor at the *News of the World*, in association with Clive Goodman, a private investigator who was paid to hack the phone of several celebrities and public figures, including employees of the royal household, and get the information needed to write his stories.[111] However, after years of police investigation and news coverage, it was discovered that Rupert Murdoch's tabloid had

111. *See* HOUSE OF COMMONS. CULTURE, MEDIA AND SPORT COMMITTEE, I NEWS INTERNATIONAL AND PHONE-HACKING. ELEVENTH REPORT OF SESSION 2010-12 (2012), at 15 (Mulcaire and Goodman were jointly charged with accessing the voicemails of three employees of the royal household. Mulcaire alone faced charges of accessing the voicemails of five further people: the publicist Max Clifford, sports agent Skylet Andrew, Professional Footballers' Association Chief Executive Gordon Taylor, politician Simon Hughes MP, and model Elle MacPherson).

settled several cases with the people hacked, and also made a settlement with Mulcaire after his dismissal from *News of the World*. The tabloid even continued to pay Goodman. All these payments and settlements started to resemble a cover-up operation.

In September 2010, a *New York Times* article quoted an ex-*News of the World* reporter, Sean Hoare, who said that phone-hacking was encouraged at the paper.[112]

Between April and July 2011, more former employees of *News of the World* were arrested on suspicion of unlawfully intercepting voicemail messages and on suspicion of corruption to cover up the scandal, among them: reporters Ian Edmondson and Neville Thrulbeck (who worked for the *News of the World* for 21 years and was the newspaper's Chief Reporter), James Weatherup, Andy Coulson (Editor of the *News of the World* from 2003 until his resignation in January 2007, following the conviction of Clive Goodman),[113] Neil Wallis (former *News of the World* editor) and Rebekah Brooks (former CEO of News International between September 2009 and July 2011, when she resigned; before that, she was Editor of the *Sun* from 2003 and Editor of the *News of the World* from 2000).[114]

All this led to Murdoch publicly announcing the closure of *News of the World* on July 2011, and admitting that the wrongdoing was not confined to one reporter.[115]

In 2012, Sky News admitted that it authorized one of its reporters, Gerarad Tubb, to hack into the email account of John Darwin, a canoeist who "came back from the dead" and was jailed in 2008 for faking his death in a scheme to obtain £500,000 in pension and life insurance payouts.[116]

The Chiquita Brands International case is another example of reporter's misconduct. The *Cincinnati Enquirer* had published an 18-page special section about Chiquita's "secrets," accusing Chiquita Brands of improperly avoiding foreign laws that would limit the size of its banana plantation holdings, among other wrongdoings. The article was written by the investigative reporter Michael Gallagher. Although Gallagher first claimed that the sources for this reportage were leaked to him, later, Chiquita showed

112. Don Van Natta Jr. et al., *Tabloid hack attack on royals, and beyond*, N. Y. TIMES (Sept. 5, 2010).

113. He was later named Director of Communications for the Conservative Party in July 2007 and in May 2010 was made Director of Communications for the Prime Minister, David Cameron. He resigned in January 2011.

114. *See* HOUSE OF COMMONS. CULTURE, MEDIA AND SPORT COMMITTEE, I NEWS INTERNATIONAL AND PHONE-HACKING. ELEVENTH REPORT OF SESSION 2010-12 (2012).

115. *Id.*

116. *Sky News Gave Reporters Permission to Hack Computer of 'Canoe Man' John Darwin*, DAILY MAIL (Apr. 5, 2012), http://www.dailymail.co.uk/news/article-2125622/Sky-News-admits-gave-reporters-permission-hack-computers.html#ixzz2IldLz1ac.

evidence that persuaded the newspaper that Gallagher had illegally penetrated the corporation's voice mail system, a crime he finally confessed.[117]

These cases are different from *Bartnicki,* in which the journalist was not involved in any form in the illegal interception of a private phone or electronic communication. It is also worth distinguishing that in *Bartnicki*, the source of the media, Yokum, was known to the police, although there was no information about the person responsible for the illegal wiretapping. What would have happened if the source in *Bartnicki* was unknown? Even though the Supreme Court held the press could not be punished for disclosing private and newsworthy information, would that have changed if the press did participate in the illegal procurement of the information? Would the press have a privilege to conceal its confidential source in that scenario?

Only a few lower courts have addressed these concerns. *Pearson v. Dodd* is a case that predates *Bartnicki*. Sensational columnists Drew Pearson and Jack Anderson published papers taken from Senator Thomas Dodd's office. The documentation showed an appropriation of campaign funds for personal use. Two then-current employees and two other former employees of Senator Dodd had taken the documents, photocopied them and turned them over to Anderson, who knew how they had been obtained. Senator Dodd sued for invasion of privacy, but Judge Wright in the U.S. Court of Appeals of the D.C. Circuit declared: "If we were to hold appellants [Pearson and Anderson] liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder knowing it has been obtained by improper intrusion is guilty of a tort. In an untried and developing area of tort law, we are not prepared to go so far."[118]

In a similar analysis and outcome than in *Bartinicki*, the Court in *Pearson* reasoned that journalists can publish such information, provided that they do not take part on its illegal acquisition. However, this case was a close call because of the complicity between the journalists and the sources responsible for the intrusion. The previous knowledge and especially the previous contacts between the journalists and the intruding sources cast some doubts on whether the newsmen influenced the sources in procuring the information.

The line was less blurry in *Peavy v. WFAA-TV et al*. Carver Dan Peavy was a trustee elected for the Dallas Independent School District (DISD). His phone conversations with third parties were intercepted by his neighbors, the Harmans, who met with a reporter and a news director from WFAA station,

117. *Cf.* Teeter & Loving, supra note 18, at 486-87.

118. *Pearson v. Dodd*, 410 F.2d 701, 705 (D.C. Cir. 1969). *See also* Teeter & Loving, *supra* note 18, at 481-482.

and agreed that the Harmans would record the phone conversations and hand WFAA the tapes. Later, WFAA returned the tapes to Harman, but still broadcasted three reports on Peavy's alleged wrongdoing in connection with DISD insurance, although the tapes were not played. The Court of Appeals for the Fifth Circuit ruled that a reasonable jury could find that WFAA's conduct (including meetings with the Harmans and instructions on how to record the conversations) constituted "obtaining" the Harmans to intercept Peavy's conversations, in violation of the Texas Wiretap Act.[119]

Beyond the cases in which a journalist or media outlet participated in the illegal intrusion of private communications, some courts have considered other risks associated with an absolute reporter's privilege. For instance: How to prove actual malice in a defamation case in which a journalist claims that his remarks are supported by a confidential source?

Zerilli v. Smith is a case in which the plaintiff attempted to obtain the deposition from reporters of Detroit News, who wrote an article depicting them as members of the mafia. Allegedly, the reporters had obtained this information from leaks within the Government. In spite of the plaintiff's request, the D.C. District Court and the D.C. Court of Appeals refused to suppress the reporter's privilege because the plaintiff had not exhausted all the resources to obtain the information about the alleged leaks. In *dicta*, the Court of Appeals shed light on the treatment of the reporter's privilege when the reporter is a party to the litigation: "A distinction can also be drawn between civil cases in which the reporter is a party, as in a libel action, and cases in which the reporter is not a party. When the journalist is a party, and successful assertion of the privilege will effectively shield him from liability, the equities weigh somewhat more heavily in favor of disclosure. As we suggested in *Carey v. Hume* [internal citation omitted] this will be particularly true in libel cases involving public officials or public figures where the rule of *New York Times Co. v. Sullivan*, [internal citation omitted], applies. Plaintiffs in those cases must prove both that the allegedly defamatory publication was false, and that it was made with 'actual malice.' Proof of actual malice will frequently depend on knowing the identity of the newspaper's informant, since a plaintiff will have to demonstrate that the informant was unreliable and that the journalist failed to take adequate steps to verify his story. Protecting the identity of the source would effectively prevent recovery in many Times-type libel cases."[120]

The Court of Appeals made an important argument in *Zerilli.* Source's anonymity can be deeply detrimental for a public official acting as a plaintiff in a defamation case, inasmuch as the malice requirement in some of those

119. *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 171-72 (5th Cir. 2000).

120. *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981).

cases might only be proved by having access to the source of the journalist's defamatory publication. But even in that context, the Court stated that disclosure would not be immediate, insofar as other factors suggest that disclosure would be inappropriate, for example, when the information sought is not crucial.[121]

In the *Carey v. Hume* case, referred in *Zerilli*, the concurring opinion by Judge MacKinnon highlighted the risks of a broad reporter's immunity that would allow a journalist to hide "behind anonymous sources whenever sued." By doing so, "an injured plaintiff attempting to prove his case would face a blank wall, with practically no opportunity to discover the identity of the alleged source upon which the defense claims reliance." According to Judge MacKinnon, such immunity would be contrary to the public interest and against a responsible press.[122]

A similar approach has been followed by the Georgia Court of Appeals at the state level, establishing in a defamation case that the language of the state shield law only provides the reporter's privilege "where the one asserting the privilege is not a party."[123] The Supreme Court of Iowa has also ruled that the reporter's privilege could be overridden in criminal matters and in civil cases "where a reporter asserting the privilege is a party to the lawsuit and his actions, motivations or thought processes are integral elements of the claim."[124]

Some courts like the California Supreme Court have also taken into consideration the special condition of the media as a defendant in civil cases to assess that the reporter's privilege may be weaker than in criminal proceedings.[125] The RCFP's Reporter's Privilege Guide also includes information of other states like Kansas, Massachussets, Michigan, Minnesota, South Carolina, Tennesse, and West Virginia, where the participation of a journalist as a party in a civil or criminal litigation, may tip the balance against the reporter's privilege.[126]

Another relevant case in which a Court made the "party distinction" is *Mgmt Info. Techonologies v. Alyeska Pipeline*. The case consisted of a lawsuit filed by Charles and Kathleen Hamel against the Alyseka Pipeline

121. *See also Driscoll v. Morris*, 111 F.R.D. 459, 462 (D. Conn. 1986) ("A narrower application of the privilege, however, is appropriate in libel cases in order not to frustrate the policy of denying first amendment protection to libelous reports. Allowing defendant journalists to protect their sources (or their lack of sources) from judicial scrutiny simply by asserting that they based their stories on information from a reliable confidential source would undermine the role of libel liability as a check against media abuses.").

122. *Carey v. Hume*, 492 F.2d 631, 640 (D.C. Cir. 1974).

123. *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 180 (Ga. App. 2001).

124. *Lamberto v. Bown*, 326 N.W.2d 305, 307 (Iowa 1982).

125. *Mitchell v. Superior Court*, 690 P.2d 625, 631 (Cal. 1984).

126. *The Reporter's Privilege Compendium: An Introduction*, *supra* note 62.

Corporation and others, for diverse violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Fair Credit Reporting Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and other claims including invasion of privacy, trespass, intentional infliction of emotional distress. Plaintiffs alleged that, as a result of Mr. Hamel's reporting of Alyeska's environmental abuses, Alyeska and the other defendants embarked on a scheme "to obtain information and documents in the Hamels' possession and to prevent, through intimidation, Charles Hamel and his sources from reporting serious environmental wrongdoing by Alyeska" to the respective governmental entities.

The ruling that is of interest for the present study concerns the protective order requested by Patti Epler, a reporter for the *Tacoma News* in Tacoma, who got in touched and allegedly handed confidential information to Charles Hamel concerning Alyeska. Alyeska then sought to depose Ms. Epler to determine the content of that information.[127]

The Court granted the protective order preventing the deposition of Ms. Epler after recognizing a reporter's privilege. In doing so, the Court distinguished between cases in which the reporter is a party from others in which the reporter is not. Thus, following the criteria established in *Zerilli*, the Court found no justification for requiring Ms. Espler to provide the requested documents or to testify in deposition, as she was not a party in the case and the information requested did not involve the heart of the matter of the case.[128]

In this case, it was also discussed whether a reporter presumably involved in illegal acquisition of information would impede the application of the reporter's privilege. Even though the Court did not set a clear rule on whether that exception would apply, the Court found that there was no evidence of the presumed illegality on the side of Ms. Epler. The Court, relying on *FMC Corp. v. Capital Cities/ABC, Inc.*,[129] held that simple possession of copies of documents—as opposed to the documents themselves—does not amount to an interference with the owner's property sufficient to constitute conversion, absent evidence that the news organization has deprived the document's owner of use of the document.[130]

In all of the cases reviewed so far, the Courts failed to find a connection between the press and the illegal intruders strong enough to establish some degree of responsibility on the press or any limitations on the reporter's privilege. A more recent case, *Jean v. Massachusetts State Police*, shows that

127. *Mgmt. Info. Technologies, Inc. v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 471, 473-74 (D.D.C. 1993).

128. *Id.* at 477.

129. *FMC Corp. v. Capital Cities/ABC*, 915 F.2d 300, 303 (7th Cir.1990).

130. *Mgmt. Info. Technologies*, 151 F.R.D. 471, 475 (D.D.C. 1993).

unless a special level of involvement from the press is showed, the *Bartincki* rule would stand. In *Jean*, a man recorded a warrantless search conducted in his house by the police and gave it to Jean who posted the recording on her website. The state police threatened to prosecute Jean under the State's eavesdropping statue. The First Circuit recognized that Jean, unlike Yocum in *Bartnicki*, knew who made the allegedly illegal recording, but this fact only made the State's interest in prosecuting a subsequent publisher (Jean and Vopper in the respective cases) even weaker, because when the existence of an interceptor is known, he can be directly prosecuted by the State.[131] In other words, according to the court, there would be no need to establish responsibility on the press when the alleged criminal source (or at least its existence) is known.

Anti-Defamation League of B'nai B'rith v. Superior Court[132] is one of the few cases in which a court has made the connection between the reporter's privilege and the involvement of a reporter in unlawful newsgathering.

This case presents the petition of ADL and others to vacate the discovery ordered by the Superior Court pertaining to non-public information obtained by ADL from public agents regarding real parties (plaintiffs). ADL was an organization dedicated to several activities including journalism. Real parties had sued them for gathering and disclosing personal information about them, 17 individuals, in violation of Civil Code section 1798.53, in reprisal to their expressed views in opposition to the apartheid policy of the then-government of South Africa and/or Israeli policies vis-à-vis the Palestinians.[133]

Real parties argued that ADL's claim of First Amendment immunity (reporter's privilege) did not apply because their newsgathering techniques were unlawful and fell outside the scope of First Amendment protection. However, the Court rejected this argument, stating: "We do not believe the alleged unlawfulness of petitioners' information-gathering activities is dispositive of their right to the protection of the First Amendment. Petitioners would be entitled to that protection even if they did violate the statute, but only if they obtained, used and disseminated the information at issue as journalists."[134]

This statement would appear to indicate that the Court believed that unlawful newsgathering would not trump the reporter's privilege. However, when determining the kind of newsgathering techniques that would not be

131. *See Jean v. Massachusetts State Police*, 492 F.3d 24, 31-33 (1st Cir. 2007). *See also* Franklin et al., *supra* note 19, at 424.

132. *Anti-Defamation League of B'nai B'rith v. Superior Court*, 67 Cal. App. 4th 1072 (1998).

133. *Id.* at 1078.

134. *Id.* at 1091.

protected by the First Amendment, the Court went back to cases like *Dietemann*, in which the use of a hidden camera and electronic devices was held not to be protected by the First Amendment.[135] Therefore, the Court's reasoning in *Anti-Defamation League of B'nai B'rith* is itself contradictory because *Dietemann* is precisely a case of unlawful newsgathering.[136] In other words, for the Court, unlawful newsgathering would indeed trump the reporter's privilege.

The Court also considered the manner in which petitioners used and disseminated the information, stating that such activity could fall off the typical journalistic practice, and therefore, would not qualify for the First Amendment protection. For that reason, the Court partially limited the discovery order in favor of the real parties specifically to learn whether any information gathered about them by ADL and its agents in violation of Civil Code section 1798.53 was disclosed to the government of Israel or South Africa, or to any other agency or individual not a member of or employed by ADL, or to any individual who was then a member or employee of ADL, but for a non-journalistic purpose.[137]

Despite the Court's highlighted contradictions, its ruling is one of the very few that truly reflects the importance of proper journalistic activities in order to maintain the reporter's privilege. When there is evidence of improper journalistic methods, like involvement in the illegal intrusion or acquisition of information contained in private communications, the reporter's privilege would have to give way to the interest of other parties or the Government in investigating illegal conducts.

As stated before, there is a growing number of cases in which the media is found to be engaged in improper newsgathering that involve illegal activities performed by third parties, who ended up being the journalists' sources. Despite this trend, the case law is very limited in showing a limitation to the reporter's privilege in this scenario, which would help governmental investigators and civil parties to prosecute illegal intruders.

From a statutory perspective, very few State Shield Laws have addressed, even indirectly, this problem. The Oregon State Shield Law, for instance, establishes that the reporter's privilege does not apply when there is probable cause to believe that the reporter has committed, is committing or will commit a crime.[138] Similarly, in New Jersey the exception to the privilege would take place when a reporter has been an eyewitness or has been a participant in an act involving physical violence or property

135. *See supra* note 72, and accompanying text.

136. *Anti-Defamation League of B'nai B'rith*, 67 Cal. App. 4th 1072 (1998).

137. *Id.* at 1094.

138. Or. Rev. Stat. Ann. § 44.520 (LexisNexis).

damage.[139] However, there is no specification on whether the act of violence or property damage has to be connected with newsgathering activities.

Texas Shield Law also contemplates a similar exception to the privilege based on three situations:[140] (i) When a journalist was an eyewitness to a felony; (ii) when the journalist received a confession of the commission a felony; and (iii) when probable causes exists that the source committed a felony, which could include the illegal interception of private communications. On a similar note, Louisiana's Supreme Court established an exception to the reporter's privilege in the event that a reporter has witnessed a criminal activity or has physical evidence of a crime.[141] Likewise, North Carolina has stated that a journalist has no privilege when he was an eye-witness to criminal or tortious conduct.[142]

Virginia State establishes two exceptions regarding reporters privilege:[143] (i) When a reporter has personally witnessed a crime or (ii) when a reporter has participated in a crime, regardless of the promise of confidentiality to the source.

At the federal level, a new bill was introduced into the House of Representatives by Congressman Jamie Raskin on December 13, 2017.[144] The Federal Free Flow of Information Act (FFIA) of 2017 is basically the same legislation that Mike Pence co-sponsored in 2005, 2007, 2009 and 2011.[145]

The FFIA, however, advances on addressing a possible exception for the cases in which the press' sources may be involved in illegal acquisition or disclosure of private information. According to the bill, a compelled disclosure may occur if it is necessary to identify a person who has disclosed: A trade secret;[146] individually identifiable health information;[147] nonpublic personal information;[148] properly classified information, in which such unauthorized disclosure has caused or will cause significant and articulable harm to the national security.[149] Additionally, Section 2(e) includes an exception to the reporter's privilege when a criminal or tortious conduct is

139. N.J. Stat. § 2A:84A-21a (LexisNexis, Lexis Advance through New Jersey 218th Second Annual Session, L. 2019, c. 240, and J.R. 19). This exception is narrowly constructed: a reporter cannot be compelled to testify if there are other witnesses to the crime.

140. Tex. Code Crim. Proc. Art. 38.11.

141. In re Grand Jury Proceedings, 520 So. 2d 372, 373 (La. February 29, 1988).

142. N.C. Gen. Stat. § 8-53.11.

143. *United States v. Sterling*, 724 F.3d 482, 492, (4th Cir. 2013).

144. Free Flow of Information Act of 2017, H.R. 4382, 115th Cong. (2017-2018).

145. Free Flow of Information Act of 2005, H.R. 2932, 112th Cong. (2011).

146. H.R. 4382, §2(a)(3)(C)(i).

147. *Id.* at §2(a)(3)(C)(ii).

148. *Id.* at §2(a)(3)(C)(iii).

149. *Id.* at §2(a)(3)(D)(i).

committed by the reporter himself, provided that the party seeking the disclosure has exhausted all reasonable alternatives for obtaining the required information. Although this last provision does not make an explicit specification, it could be applicable to the cases in which the media has participated in the illegal interception or acquisition of private information (a criminal act under Federal Law and most State Laws).

The FFIA is troubling inasmuch as it establishes a large number of exceptions to the reporter's privilege, many of which would chill a source from actually talking to a reporter. Much of the information that is revealed to a journalist under a promise of confidentiality involves a breach of secrecy, but under FFIA, the reporter would be compelled to reveal the source's identity.

While it is true that there is an important public interest in discovering and eventually prosecuting the people who intruded in a private communication or violated a confidentiality obligation, the costs of doing so by not protecting the conversation between a journalist and his source would be too burdensome. The role of the free press should not be affected by the State's interest in discovering illegal activities, nor should we charge the press with a quasi-official investigative role that is incompatible to its core.

The only case in which it would be justifiable to trump the reporter's privilege is when that privilege has been used by the journalist to engage—himself—in an illegal practice and then conceal it under the "shield" of said privilege. This is precisely the type of ill incentives that a broad reporter's immunity could cause: Journalists and illegal intruders working together in the illegal hacking or interception of private communications under the protection of a legal immunity that would prevent the authorities from discovering the origin of the invasion of the victim's privacy.

Conclusion

Reporters should not carry the burden of the illegalities executed by their sources, but neither should they enjoy a *carte blanche* to engage in illegal intrusions in someone's privacy for the purpose of newsgathering. We can accept reporters as involuntary beneficiaries of illegally obtained information but we do not want them to participate in both sides of the supply and demand market for that information. If a journalist actively participated in the illegal interception of private communications, he is no longer acting as an innocent reporter deserving of a protection for his sources.

If we want to properly defend the press' freedom and to protect the correct use of the reporter's privilege, it is fundamental to exclude the cases in which reporters disregard its legal (and ethical) obligations.

Reporters should be given enough space to gather news but not at any cost. Total immunity and lack of accountability has been damaging the image

of the press. By putting more weight on the side of those who are harmed by illegal intruders and by putting some limitations and exposing journalists that engage in malpractice, we are preventing journalists from future stricter regulations, and guaranteeing more freedom for a responsible press.