# SepOct 2018 – Case Turns

Omitted some generics

## Generics

### Circumvention

#### Judicial efforts to protect confidentiality of sources at the federal level fail - rules aren’t uniformly enforced and are circumvented.

Robinson 17 Elizabeth L. Robinson (, Post-Sterling Developments: The Mootness of the Federal Reporter's Privilege Debate, 95 N.C. L. Rev. 1314 (2017). Available at: <http://scholarship.law.unc.edu/nclr/vol95/iss4/9>, KS

And yet, while the clear judicial or legislative adoption—or even rejection—of a federal reporter’s privilege is traditionally seen as the ideal solution to the Branzburg inconsistency, this Recent Development suggests that this proposed remedy may ultimately be futile. Congress and the Supreme Court’s continued unwillingness to recognize a uniform federal reporter’s privilege has adversely affected reporters and their sources by facilitating inconsistent and unfair treatment of reporters across jurisdictional lines. Meanwhile, technological advancements that allow the government to obtain the same confidential information without a subpoena13 and the recently leaked guidelines governing the Federal Bureau of Investigation’s (“FBI”) use of National Security Letters (“NSLs”) in the news media14 indicate that the central threat to newsgathering is no longer the existence or lack of federal testimonial protection. Rather, because these developments hinge solely on government behavior outside the subpoena process, increased testimonial protection for reporters is no longer capable of remedying the negative effects on the newsgathering and news dissemination processes. Therefore, the more significant danger is now found in the government’s ability to gather information regarding a reporter’s source of confidential information through means other than judicial subpoenas. Consequently, an effective solution to the modern reporter’s privilege debate must take this concern into account. This Recent Development proceeds in three parts. Part I examines the Branzburg opinion, discusses the widely divergent treatment of Branzburg among federal and state courts, and analyzes the holding of and facts surrounding Sterling. Part II assesses the concerns resulting from the conflicting interpretations of Branzburg and surveys proposed solutions, specifically a federal shield law, the creation of a common-law privilege pursuant to Rule 501 of the Federal Rules of Evidence, and the Department of Justice (“DOJ”) guidelines for subpoenaing reporters. Finally, Part III argues that the proposed solutions to the reporter’s privilege debate fall short by failing to consider two recent developments. First, technological advancements now allow the government to readily access confidential reporter-source communications, which ultimately provide them with the same information that they would gain through a reporter’s testimony in court. Second, the government’s use of NSLs allows them to bypass the DOJ guidelines and subpoena authorization process altogether. These developments indicate that the newsgathering concerns regarding the lack of uniform journalist-source protections can no longer be remedied solely by providing a First Amendment testimonial privilege to reporters, effectively rendering the post-Branzburg reporter’s privilege debate moot.

### AT Chilling Effect

#### Chilling effect is a myth – empirics flow neg.

**Eliason 08** “The Problems with the Reporter's Privilege” by Eliason D. Eliason, published in the American University Law Review Volume 57 | Issue 5 Article 5 // OHS-AT

The key factual claim in support of the reporter’s privilege is that the privilege is necessary to encourage confidential sources to come forward and speak to reporters. This will, in turn, increase the flow of information to the public and ensure a robust free press. In the absence of a privilege, the argument runs, there will be a “chilling effect” on confidential sources, and the flow of information to reporters and to the public will dry up.51 Privilege advocates speak in apocalyptic terms about this alleged chilling effect, claiming that without a privilege reporters will be reduced to “spoon feeding the public the ‘official’ statements of public relations officers.”52 This claim is the very raison d’être for the privilege; indeed, the proposed federal legislation—the Free Flow of Information Act—embodies this concept in its title. In Branzburg, the Supreme Court was skeptical of this factual premise. The Court observed that the lessons of history suggested the free press had always flourished without a privilege.53 Claims about “chilling effects” and harm to the press, the Court noted, were largely speculative and consisted primarily of the opinions of reporters themselves, and so “must be viewed in the light of the professional self-interest” of those making the claims.54 Overall, the Court concluded it was “unclear how often and to what extent informers are actually deterred from furnishing information” when reporters are compelled to testify.55 This skepticism seems as fully justified today as it was thirty-six years ago. The strongest argument against the supposed chilling effect is simply the argument of history. There has never been a federal shield law, and investigative journalism in this country has flourished, with no shortage of confidential sources. Watergate, Iran-Contra, Abu Ghraib, secret CIA prisons, domestic National Security Agency (“NSA”) surveillance—all of these stories and countless others were reported through the use of confidential sources, and all without a federal shield law.57 Even the images of Judith Miller being jailed and forced to testify had no discernable effect on investigative reporting or on the number of stories relying upon confidential sources.58 One can grant that confidential sources are important to journalism without agreeing that a shield law is necessary or appropriate. In other words, it is a myth to suggest that reporters can’t promise confidentiality without a shield law. It is important to distinguish between a reporter’s promise of confidentiality to a source and the existence of a legal privilege. As history makes clear, reporters may promise sufficient confidentiality to encourage sources to speak even in the absence of a privilege, simply by promising not to name the source in a story and never to identify the source voluntarily. In fact, if this were not the case and if the alleged chilling effect were real, investigative journalism would have foundered long ago for want of a federal privilege.59 It’s reasonable to assume that most sources who wish to remain anonymous are concerned primarily with not having their names in the paper in a story the reporter writes the next day. They are not very likely to be looking down the road and trying to evaluate whether, two years from now, a judge might weigh the various terms and exceptions of a shield law and compel the reporter to identify them. To the extent they do consider that possibility, a reporter can truthfully tell a source that, historically speaking, the chance that the reporter will ever be compelled to testify is extremely remote. Any reasonable concern for confidentiality may therefore be satisfied simply by a reporter’s promise never to identify the source voluntarily.60

### Alt Cause - Mass Surveillance

#### Mass surveillance kills anonymity – guts solvency

Association for Progressive Communications APC 18 APC. "The Protection Of Sources And Whistleblowers". Ohchr.Org, 2015, https://www.ohchr.org/Documents/Issues/Opinion/Protection/AssociationProgressiveCommunications.pdf. Accessed 9 Aug 2018.

3.1 Electronic Surveillance and Protection of Sources With the proliferation of electronic surveillance over the previous decade, the safety of anonymous sources and whistleblowers no longer depends only on ethical and legal protections, but also on information security. Even if ethical and legal protections are in place, mass surveillance risks rendering them meaningless. The Snowden revelations in 2013, themselves a proof of the importance of whistleblowing, have revealed the extent of electronic surveillance and the prevalence of such practices across all electronic communications platforms. However, the majority of journalists and civil society organisations still exchange confidential information over regular phone lines, text messages and unencrypted email. This is a significant challenge especially within the context of state or corporate surveillance, as the relevant actors can sidestep the legal protection of sources and whistleblowers, and identify their identities by other means. The UNESCO global study on freedom of expression, access, privacy and ethics online13 posed this challenge, asking: “…whether the protection of the confidentiality of journalistic sources should be similar to, or dramatically different, in the online digital media environment, where it is possible to technically track networks of communication. In this light, should there be greater or different kinds of protections for journalists in protecting the confidentiality of their sources?”

### Fake News DA

#### Confidentiality is unreliable and hinders truth telling – that’s a solvency deficit and a fake news DA to the aff.

Edward Wasserman 05 [A Critique of Source Confidentiality, 19 Notre Dame J.L. Ethics & Pub. Pol'y 553 (2005).]

III. CONFIDENTIALITY SCRUTINIZED

PROTECTING SOURCES: Source confidentiality's most obvious function is to shield informants from potential harm. "Source protection" has an ethical ring to it, but journalists do not, by and large, recognize any generalized obligation to look out for the well-being of their sources. I think the silence of journalism ethics in this regard is regrettable. After all, many people who come forward with information are apprehensive, naive, and ripe for exploitation. Unsophisticated sources may unwittingly say things that expose them to ridicule, trusting the amiable and knowledgeable reporter who is encouraging their candor to warn them when they cross the line. 7 Too, a source may be vulnerable, and the relationship may develop in ways similar to some lawyer-client and doctor-patient relationships, with the informant susceptible to improper, extra-curricular approaches from the reporter. 28 Nevertheless, the boundary of journalistic solicitude for the well-being of sources is defined by the reporter's desire to preserve the conditions under which accurate information can be gathered. It follows that a reporter is more protective of an informant's interests if the source seems likely to be useful in the future. That implies greater consideration for officials and other consistently valuable informants. Sources are awarded protection based not on their needs, but on their abilities. CONFIDENTIALITY AS SOURCE PROTECTION: It follows that although confidentiality may protect a source, journalists accept no freestanding obligation to withhold an informant's identity even if they believed-or would believe, if they gave it any thought-that secrecy would be in the source's best interests. A reporter would not, for example, urge a source to demand concealment if the reporter understood-and the source did notthat exposure could be perilous. Confidentiality is nothing more than a valuable information-gathering technique; its claim to ethical standing derives solely from the enhanced information its judicious use brings to the public. It does not reflect an obliga- tion owed to the source, unless the source insists on it as a condition of providing that information. In that regard it is a technique of source self-defense, which the reporter accedes to and does not proffer.2 9 If instead the journalist did recognize an independent ethical duty to the informant to withhold the source's name if disclosure might be harmful, the source would not need to demand anonymity. That is not the case. In fact, journalists are typically admonished to grant confidentiality only if necessary.3" Confidentiality is part of a negotiation over the release of information and owes its ethical standing to the quality of the information it makes public-and to its being secured by a promise. In a moment we will look at the curious ethical status of that promise. CONFIDENTIALITY AS INCONSISTENT WITH OTHER OBLIGATIONS: Certain kinds of reporting routinely incorporate routine reliance on informants who will not talk unless they are assured of anonymity.3 1 Although sensitive political and governmental stories are the areas that first come to mind, business and financial news-especially coverage of closely-held companies, professional firms and the like-would be difficult if not impossible to assemble without source concealment. Yet confidentiality poses ethical conflicts, chiefly because it may clash with two professional norms: accountability and verifiability. 2 The result may impede truth-telling. Accountability involves an obligation to ensure that the ledger of significant actions and assertions be reported publicly in such a way that their authors are linked to them. Confidentiality enhances accountability when it helps expose subterranean agreements, decisions, and actions that would otherwise go unreported. But secrecy may also hinder accountability by interposing the journalist between informant and public, and preventing third-parties from challenging sources over inaccuracies, indiscretions, or lies. It may also scrub the record clean of grudges and personal agendas that have bearing on the information, and thereby prevent dishonest or tainted informants from being exposed as such. Verifiability, which is the closest journalism comes to offering a functional equivalent to the standards of social science, usually is premised on associating information with the person who provides it. That enables third-parties to determine that the words were spoken, just as reported, by the person who was said to have uttered them. Here again, confidentiality may impair accuracy. It can impede testing the truthfulness of information; nobody else can phone the reporter's secret source to confirm, refute, or modify the original information. Anonymity, USA Today founder Al Neuharth observed, enables sources to say more than they know and reporters to write more than they hear.33 THE ETHICS OF THE CONFIDENTIALITY PROMISE: It is understandable that press commentators should be adamant about the importance of journalists' honoring their word. After all, promise-keeping is a square-sounding maxim that seems to go to the white-hot core of truth-telling that is journalism's noblest mission-and to the credibility that is its greatest contemporary challenge. Still, the morality of keeping a promise is logically dependent on the morality of the conduct that the promise is meant to secure. It would be hard to defend a promise to commit murder as an ethical one unless the murder itself was warranted. The morality of that promise could not rest solely on the notion that failing to honor it might cause others to doubt one's resolve to keep non-homicidal commitments. Imagining confidentiality agreements that a journalist ought to break is not hard. Suppose exposing an informant would save a life, prevent a serious crime, or free an innocent prisoner. The argument for guarding those secrets seems grounded largely in concern for the reputational harm the journalist might sustain by burning the source, and whether that might cripple his or her future effectiveness. That is not chiefly an ethical calculation, however; it is an operational one.3 4 There is, in short, nothing about promise-keeping in itself that privileges it above such maxims as telling the truth, avoiding unnecessary harm, respecting privacy, and other imperatives that journalists embrace as professional norms. Breaking a promise might simply make it difficult for the journalist to continue practicing a certain kind of journalism. What if the source is breaking the law? Is the confidentiality promise still binding? There is a tradition of judicial reluctance, under certain circumstances, to enforce contracts that are contrary to law or public policy.3 5 It might be argued that the alleged illegality of the Plame disclosure thus trumps any other question about its ethical status.3 6 Under that logic Novak should not have made the agreement because he thereby colluded in-indeed, was the instrument of-an illegal act. While that might be valid as a matter of law, it is not helpful as a question of ethics which, in part, is in the business of sorting out what the law should be.3 7 This reasoning also would have barred Neil Sheehan of the New York Times from helping Daniel Ellsberg release the in-house history of the Vietnam War known as the Pentagon Papers in 1971.38 It would leave us unable to distinguish genuinely toxic disclosures from unauthorized releases of vital information that expose important governmental wrongdoing, and which violate only ill-founded secrecy laws intended to save officials from embarrassment. Plus, as a practical matter, basing moral judgments on apparent legalities would reduce ethics to speculating about how judges, juries, and appeals courts may eventually rule. In this case, as noted, outing Valerie Plame may not have broken any law, in that her exposure was not intended to subvert U.S. intelligence operations but to illuminate the reasons behind an act of non-classified, public agency decision-making. CONFIDENTIALITY AS A TOOL OF PROMISE-BREAKING: The paradox of the journalist's confidentiality agreement is that it often represents not only a promise, but a critique of promise-keeping. That is because it is frequently a device to provide cover for informants so they can break prior agreements of their own with impunity. Its claim to superior ethical standing rests on a presumption that all promises do not have equivalent moral weight. Why do reporters promise confidentiality? Informants may sometimes insist on anonymity simply to avoid the awkwardness that may come with notoriety. They may have personal reasons to keep out of the news. They may not want to spend time fending off other reporters once they are named publicly. Perhaps they are settling scores and do not want their targets to know the origin of the attack. Sometimes they are sharing painful and intimate experiences-sickness, poverty, the death of loved onesand would not do so if they were to be identified. But often, especially when the stories involve insider news from powerful institutions, sources insist on confidentiality because they are betraying prior commitments by giving away information that they have agreed, sometimes explicitly, to keep private. The journalist's secrecy pledge is, in this respect, an offer to shelter the informant from the consequences of dishonoring agreements of his or her own. It is a promise meant to induce promise-breaking. So, implicit in the confidentiality agreement is the insight that not all promises are equal. The conscience-stricken executive decides that his or her duties to the corporation, which certainly involve discretion and may also oblige silence, are less important than disclosing accounting chicanery or environmental felonies. The whistle-blower demands one promise from the reporter to enable him or her to break another to the corporation. The ethics of that exchange have much to do with the weight attached to such maxims as truth-telling and affirming community norms, as compared with employee loyalty and, yes, promise-keeping. CONFIDENTIALITY PRIVILEGES SOURCE RELATIONS: Source confidentiality necessarily privileges the relationship of reporter to informant over the relationship of reporter to public. That is not only because reporter and source agree-conspire, really-to keep to themselves, for reasons internal to their transaction, information that would normally be made public. It is also because the journalist-instead of presenting supporting information to authenticate a report and maintaining the usual professional stance as skeptical interlocutor-lines up alongside the unnamed source in asserting the information's truthfulness, while denying the public any independent way to evaluate whether that truth claim is valid. The reporter invests reputation in the information; correcting it if it proves inaccurate becomes especially awkward, since that correction involves repudiating a source who has never been identified and may require the jour-nalist to admit to having been taken.3 9 That makes fixing mistakes harder, which impedes truth-telling. Still, those risks may be worthwhile if the pledge creates a protected refuge for individuals who otherwise would not come forward with sensitive and publicly important information. The test, when confidentiality is analyzed by which relations it privileges, is whether the flow of significant news is facilitated. Is the journalist empowered or neutered? Is the main beneficiary the public-in which case the reporter is functioning as its goodfaith proxy-or the shielded source? These are qualitative assessments, which require looking at the information sought, obtained, and withheld. As noted earlier, confidentiality means some information is kept back so that other information can be published. The rightness of the arrangement cannot be appraised withoutjudging whether the bargain between concealment and publication has been struck so as to benefit public enlightenment-rather than, say, easing access to news outlets for powerful insiders who have intrigues to pursue, or burnishing the credential of a particular reporter as a trustworthy courtier in the demimonde of palace politics. CONFIDENTIALITY AND TRUST: Finally, I suggested earlier that confidentiality can be examined in terms borrowed from Annette Baier's thoughtful analysis of trust relationships. The relationship between journalist and public seems to comport more satisfactorily with Baier's description of trust than with a more contractarian model. That is, the relationship is one of a generalized reliance that is not formal or explicit and is not specific as to what particular behavior it covers; nor is it between parties of roughly equivalent power. Here it is built on the public's expectation that journalists will use their best judgment to gather and present an honest rendering of information that they believe the public needs to have. Baier suggests that the morality of a trust relationship can be assessed by applying what she terms the expressibility test: Would the relationship withstand having its foundations laid bare? The hard-charging executive who trusts her chief aide without reservation because she secretly believes the assistant is too unimaginative to pose a threat-that is not a morally robust trust relationship and would crumble if its premises were articulated. Similarly, Baier's expressibility test is a promising way to examine a confidentiality agreement. A source who bases his reliance on the courage and honesty of a reporter enters into a morally different relationship than does one who relies on an avowedly partisan journalist's gullibility and blind loyalty. Suppose you, the reporter, are agreeing to withhold the name of the politician who is giving you a self-serving leak because you wish to endear yourself to the office-holder and get preferential access to information in the future. Is that something you would be comfortable disclosing to your readers, or would it undermine the trust they confer on you? Naturally, applying this test raises problems. After the fact, either party to the agreement can buff his or her view of the relationship to make it morally pristine. Just as Kant could not prescribe precisely how the maxim underlying a given action might be framed as a universalized imperative,4" so this formulation is slippery and subject to abuse. But expressibility offers a place to stand in examining the ethics of confidentiality arrangements, and post-facto explanations can be scrutinized for their plausibility and reasonableness.

### AT: Qualified Privilege

#### The qualified privilege doesn’t solve – it still deters sources who are uncertain about whether their information’s secrecy is key.

**Stone 05** Geoffrey Stone, “Why We Need a Federal Reporter’s Privilege,” University of Chicago Law School, 2005.

Thirty-six states have some form of qualified journalist-source privilege. In these states, the government can require the journalist to reveal the confidential information if the government can show that it has exhausted alternative ways of obtaining the information and that the information is necessary to serve a substantial government interest. There are many different variations of this formulation, but this is the essence of it. The logic of the qualified privilege is that it appears never to deny the government access to information that the government really "needs." Correlatively, it appears to protect the privilege when breaching it would serve no substantial government interest. As such, it appears to be a sensible compromise. Nothing could be farther from the truth. Although the qualified privilege has a superficial appeal, it is deeply misguided. It purports to achieve the best of both worlds, but probably achieves the opposite. For quite persuasive reasons, other privileges, such as the attorney-client, doctor-patient, psychotherapistpatient, and priest-penitent privileges, which are deeply rooted in our national experience, do not allow such ad hoc determinations of "need" to override the privilege. The qualified privilege rests on the illusion that the costs and benefits of the privilege can properly be assessed at the moment the privilege is asserted. 45 But as I have indicated earlier, this is false. it blinks the reality that the real impact of the privilege must be assessed, not when the privilege is asserted, but when the source speaks with the reporter. By focusing on the wrong moment in time, the qualified privilege ignores the disclosures it prevents from ever occurring. That is, it disregards the cost to society of all the disclosures that sources do not make because they are chilled by the uncertainty of the qualified privilege. It is thus premised on a distorted "balancing" of the competing societal interests. Moreover, the qualified privilege undermines the very purpose of the journalist-source privilege. Imagine yourself in the position of a source. You are a congressional staffer who has reason to believe a Senator has taken a bribe. You want to reveal this to a journalist, but you do not want to be known as "loose-lipped" or "disloyal." You face the prospect of a qualified privilege. At the moment you speak with the reporter, it is impossible for you to know whether, four months hence, some prosecutor will or will not be able to make the requisite showing to pierce the privilege. This puts you in a craps-shoot. But the very purpose of the privilege is to encourage sources to disclose useful information to the public. The uncertainty surrounding the application of the qualified privilege directly undercuts this purpose and is grossly unfair to sources, whose disclosures we are attempting to induce. In short, the qualified privilege is a bad business all around. And that is precisely why other privileges are not framed in this manner.

# Util

## Democracy

### N/Q – Sources Increasing

#### Non unique – it also causes more false information, leading to democratic failure

Foley, Michael [Dublin Institute of Technology] (2004) Absolutism and the Confidentiality Debate: Confidentiality and Journalists Sources, Ethical Space: the International Journal of Communications Ethics, Vol 1 Number 2

One of the problems for the absolutist case is that the use of anonymous sources appears to be increasing. Day after day the media, especially newspapers, are full of quotes from “sources close to the prime minister”, “industry sources” or “intelligence sources” (particularly in the reporting of the Iraq crisis) and so-called “friends” who tell all. No names are given, often only one source is quoted. Is the public to believe that the journalist is to risk imprisonment to keep the anonymity of the ubiquitous friend in celebrity news? And if they do are they to be admired as doing something central to democracy and journalism? How can the public, those who are to be informed by journalism so that they can make the decision necessary in a democracy, trust journalists who offer so much information without any meaningful indication where it came from? In many, possibly most, cases the anonymous source is not a fearless whistleblower, but a manipulating spin doctor, working for the rich and powerful and hiding behind a journalist’s promise of anonymity. And if that is the case, who gains most by the journalists’ willingness to go to prison rather than reveal a source, the source or the public? As the philosopher, Onora O’Neill (2002: 98), commented in her BBC Reith Lecture: “I am still looking for ways to ensure that journalists do not publish stories for which there is no source at all, while pretending that there is a source to be protected.”

### N/Q – Advisors Checking Now

#### Professional advisors coming out anonymously to expose Trump now – vowed to check him.

**NYT 9/5 (source is anonymous senior official in Trump administration)** “I Am Part of the Resistance Inside the Trump Administration” NYT <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html> OHS-AT

President Trump is facing a test to his presidency unlike any faced by a modern American leader.

It’s not just that the special counsel looms large. Or that the country is bitterly divided over Mr. Trump’s leadership. Or even that his party might well lose the House to an opposition hellbent on his downfall.

The dilemma — which he does not fully grasp — is that many of the senior officials in his own administration are working diligently from within to frustrate parts of his agenda and his worst inclinations.

I would know. I am one of them.

To be clear, ours is not the popular “resistance” of the left. We want the administration to succeed and think that many of its policies have already made America safer and more prosperous.

But we believe our first duty is to this country, and the president continues to act in a manner that is detrimental to the health of our republic.

That is why many Trump appointees have vowed to do what we can to preserve our democratic institutions while thwarting Mr. Trump’s more misguided impulses until he is out of office.

### Turn – Journalist Licensing

#### Federal shield laws lead to journalist licensing – turns case.

**Apelis 8** [Markus E. Apelis, Fit to Print - Consequences of Implementing a Federal Reporter's Privilege, 58 Cas. W. Res. L. Rev. 1369 (2008) Available at: http://scholarlycommons.law.case.edu/caselrev/vol58/iss4/21] WJ

Creating a federal reporter's privilege, especially by enacting a federal shield law, however, would create the danger of undue regulation of the media. Assuming the existence of a federal reporter's privilege, whether statutory or judicially created, as the above discussion illustrates, deciding who is a journalist (and, as such, could invoke the privilege) is a question that ultimately remains largely unanswered. It is likely, given the historic practice in the states and general public acceptance, that traditional media would be entitled to the protections of a reporter's privilege. A cogent argument may be advanced in favor of extending such protections to independent journalists and nontraditional media as well. It is at this margin where the question becomes most difficult, particularly where non-media entities are involved. At some point, however, a policy decision is required in order to define the limits of the reporter's privilege. Justice White deferred engaging in such analysis whose time had not yet come:

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege.

Yet the question remains squarely at the forefront of First Amendment jurisprudence. It is the inability or unwillingness of courts to fashion a satisfactory answer to this question in which one of the great dangers of a reporter's privilege arises. When the legislature enacts a privilege, the legislature inherently also regulates the privilege's holders. Should Congress pass a federal shield law, whether because of judicial refusal or as a legislative response, enacting a federal reporter's privilege opens a Pandora's box to increased federal media regulation, including licensure of journalists.

Upon careful examination, federal regulation of journalists through licensing provisions is not as remote a possibility as Orwellian fiction might suggest. Despite the admonition of the First Amendment, the media business is a heavily regulated industry, and courts have often grappled with the limitations on press freedoms. 132 Despite the judiciary's perpetual concerns for the First Amendment, media regulation is commonplace. In 1934, Congress created the Federal Communications Commission "[f]or the purpose of regulating interstate and foreign commerce in communication" and charged the FCC with administering and enforcing broadcast media regulations. These requirements concern not only the format of communications, but also the substance of communications, with an increasingly close eye to content. Moreover, the expansive authority of the FCC evidences the very real existence of federal licensing requirements. Federal regulations already require licenses for the operation of amateur and commercial radio stations, television studios, cable outfits, and satellite broadcasters. 135 As a result, radio and television broadcast journalists fall within the reach of FCC licensure. FCC regulations governing radio and television content cover myriad issues, including the truthfulness, objectivity, equality, and decency of broadcasts, including news.136 The agency also regulates the character of license applicants. 1

Given the prolixity of federal broadcast rules, it is clear that continued congressional intervention in the media industry would breed further regulation. It is very likely that enacting a federal statutory reporter's privilege would lead to the licensing of individual journalists. However, states with similar shield laws have not experienced this phenomenon. While no state shield law includes specific licensing provisions, many do narrowly circumscribe the limits of the privilege, extending protection only to traditional journalists or in particular circumstances.138 Given the potential preemptive force of federal regulations and the interstate nature of the media business, state legislatures are without authority to impose the type of sweeping regulations that the federal government is able to promulgate. Finally, because the federal district and appellate courts have had little occasion to construe state shield laws,139 the federal judiciary would be left to develop its own body of precedent concerning the specifics of a federal shield law.

Finally, licensing as it relates to other federal evidentiary privileges is not a foreign concept. The Federal Rules of Evidence do not expressly recognize any privileges; however, the federal courts have enumerated several vocational privileges over time. 140 Each of these professional privileges, irrespective of whether recognized by the federal courts or created by state statute, requires the trustee of the privilege to be a licensed practitioner in his or her respective field. 41 Given this licensing requirement for other recognized vocational privileges, it would not be extraordinary for a reporter's privilege to require licensure of journalists. And so Justice White's remark in Branzburg that eventually journalists would be categorized becomes a prophetic insight. 42 Regulation of journalists by virtue of a federal shield law no longer raises the specter of licensing-that possibility becomes a distinct reality.

Some commentators believe that licensure of journalists is an appropriate means of ensuring effective administration of a federal reporter's privilege. 143 However, numerous inherent dangers accompany the government licensure of journalists. The most prominent of these pitfalls is the risk of limited protection for journalists. As the above discussion demonstrates, the difficulties in defining who exactly qualifies as a journalist makes the question not a simple one to answer. As a result, statutory privileges often trade licensing requirements for limited protection. This is illustrated in numerous states whose legislatures have enacted statutory privileges. Many state shield laws grant the protections of the reporter's privilege only to traditional media outlets,144 the alternative being a privilege the limits of which are defined by a functional journalistic approach. The functional approach extends protection to anyone engaged in the gathering and public dissemination of news. However, the possibility of government licensure attaches to this broader protection.145 Thus, in hopes of avoiding unwanted-and, possibly, unconstitutional, under the First Amendment-licensing requirements, a federal shield law could unduly limit the very protections a reporter's privilege means to provide.

Licensing requirements could also impose hefty financial burdens on journalists seeking to invoke the privilege. Government-issued licenses necessarily carry licensing fees, including issuance, renewal, taxes, and other special assessments.146 The FCC already imposes substantial licensing requirements for obtaining broadcast licenses. 147 For new commercial radio or television stations, such fees can range upwards of five thousand dollars. 148 While established, commercial (or mainstream) broadcasters can afford to bear the costs of these licenses, independent journalists are unlikely to be in a similar financial position. And while independent journalists are utilizing new (and relatively affordable) technology, such as the Internet, to expand their media presence, should the government institute licensing requirements, these media could eventually suffer the same fate as conventional broadcasters. Imposing high financial burdens on journalists also creates an implicit, often overlooked, danger-the homogenization of media. Levying substantial licensing inherently stratifies journalists into two classes: those who can afford to pay, and those who cannot. Eventually, market forces allow only the former class to continue practicing journalism, while the latter class must fold under the financial pressures. Media homogenization is already evident in all traditional media.149 As individual media voices submit to financial constraints; the surviving media elite swallow the market share that this vacuum creates. 50

Licensing journalists may also bring with it a host of ancillary requirements. For example, FCC regulations already require broadcast licensees to meet certain standards and criteria in order for licensees to retain their broadcast privileges. 15' Licensing journalists creates the possibility of similar requirements. Journalists could be required to keep formal records of conversations with sources. Although most journalists already keep detailed notes, licensing regulations could allow the government access to confidential work-product (essentially circumventing the reporter's privilege). Similarly, as is the case with other licensed professions, journalists could be required to undergo formal continued training. While continuing education is a worthy obligation for some professions, it would be superfluous in most of media practice. The work of attorneys and healthcare professionals, for example, requires practitioners to keep up with substantive and procedural developments in their respective fields. By contrast, most core journalistic practices are unchanging, firmly rooted in the traditions of the profession. While journalists are wise to keep up with developing trends, formal training is not required to accomplish this end.152

Finally, journalists would not bear the burdens of licensing requirements alone. Instituting federal regulations of journalists would create the need for a new bureaucratic infrastructure. Federal agencies would be responsible for administering regulations and enforcing compliance. Each of these dangers inherent in licensing leads to an unwelcome chilling effect on free press. Throughout the history of First Amendment jurisprudence, courts have condemned such impositions on firmly established rights. The Supreme Court has described this chilling effect as "antithetical to the First Amendment's protection[s.]"'' 53 The Court's frequent encomia on the necessity of adequately protecting First Amendment freedoms is more than mere puffing, however; the Court is genuinely concerned with the preservation of fundamental individual American liberties. In one of the most eloquent expositions on the primacy of First Amendment freedoms, the Supreme Court noted that "these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. 154 The paramount danger of government licensure of journalists is that it will lead to censorship based on content. The Supreme Court, in striking down regulations targeting specific media, recognized this threat, noting that "law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.' 55 The government, as the gatekeeper of journalists' licenses, would also become the gatekeeper of editorial content. Should the licensor dislike or disagree with the views that the licensee expresses, irrespective of the truth or necessity of such views, the government could easily refuse to grant, refuse to renew, or revoke outright a dissenting journalist's license to report. 56 This would, in turn, essentially create a state-run media and destroy important institutional autonomy. The press serves as essential a function today as the Fourth Estate served in Nineteenth Century England and pre-revolutionary France, 5 7 insofar as it provides for crucial checks and balances on otherwise coordinate branches of government. The chilling effect of licensing requirements would also carry with it more concrete, practical impacts for journalists. Concerns about compliance with licensing regulations could impede an increasingly rapid news cycle. In a world where immediate access to twenty-four-hour news is the norm, journalists who constantly find themselves constrained by asking whether certain actions will cost them their license will limit their ability to function properly. Moreover, noncompliance with licensing requirements could lead to criminal and civil penalties. These penalties would functionally limit the free conduct ofjournalists, effectively eliminating the free flow of information.

### Turn – More Subpoenas

#### The affirmative expands the legal protections for the executive to employ frivolous subpoenas.

Pozen ’13 [David Pozen (Associate Professor of Law at Columbia Law School, Former Special Advisor to the U.S. Department of State’s Legal Adviser, Former Special Assistant to Senator Edward M. Kennedy on the Senate Judiciary Committee), 10-21-2013, "Why a Media Shield Law May Be a Sieve," Just Security, <https://www.justsecurity.org/2232/media-shield-law-sieve-david-pozen/>] KD

These assumptions are dubious. More than that, this framing of the debate is dangerously narrow. The most fundamental concern with a media shield law, for the end of investigative reporting, is not that it may cover too few actors or too few cases. Those issues (while significant) could be addressed by tinkering with a clause here or there. The most fundamental concern is that simply by enacting such a law, Congress will validate—and normalize—the practice of subpoenaing journalists. We might call this the paradox of legitimation through judicialization. Under certain conditions, requiring judges to supervise a worrisome government activity can produce more, not less, discretion for officials to engage in that activity. The marginal value of the additional courtroom scrutiny is outweighed by the diminishment of extra-judicial forms of oversight and constraint. In our current system, the Justice Department largely determines on its own whether a journalist’s secrets will be sought. And it is therefore the Justice Department that receives the lion’s share of pushback whenever a particular maneuver is seen as going too far. For instance, after media groups blasted the department for seizing Associated Press reporters’ phone records in a leak investigation last May, the President directed the Attorney General to conduct a review that led to a tightening of internal procedures. Accusations of overreach would have less bite within a legal framework that had been blessed by all three branches of government plus the Fourth Estate. The Attorney General would always be able to respond, in effect: “Don’t yell at me for trampling on press freedoms. My department was just following a statute that Congress passed, federal judges help administer, and the media overwhelmingly endorsed.” No longer the principal guardian of First Amendment values in this realm, the Attorney General may find herself more constrained bureaucratically even as she is liberated psychologically. The Federal Bureau of Investigation has consistently declined to pursue most leak cases brought to its attention. Within the executive branch, a shield law may well strengthen the hand of Intelligence Community hawks who want prosecutors to pursue these cases more aggressively. Members of the media could afford to overlook these dynamics if their losses in the court of public opinion were offset by gains in a court of law. That seems unlikely to happen in critical contexts. Judges typically defer to the executive on national security matters. And Congress has never seriously considered a bill that would give journalists an absolute privilege to receive advance notice of the executive’s snooping or to protect their sources in criminal cases involving leaks of classified information. These are the very sorts of cases in which the Justice Department has allegedly been pushing too far and in which vigorous investigative reporting may be most needed. Had the Senate’s shield legislation been on the books, it might have trimmed but almost certainly would not have derailed any of the recent subpoenas that caused so much controversy. Rather, it would have quieted the controversy. The paradox of legitimation through judicialization might also be discounted if journalists who cover national security and foreign affairs were being hounded by the feds in circuits that take a narrow view of reporter’s privilege. They are not. Although these journalists face serious professional challenges right now, the government has largely avoided direct confrontations with them. According to Justice Department figures from 2007, prosecutors have been issuing fewer than two subpoenas per year seeking source-related information under the department’s internal guidelines, which Times correspondent Adam Liptak once described as “a shadow federal shield law” that is “sensible, rigorous, and predictable.” A few high-profile incidents, however troubling, should not obscure the overall record. At the state level, one occasionally hears, journalists fare better in jurisdictions with media shield laws. But the differences observed are generally minor, and the relevant extra-judicial checks on state officials may be substantially weaker than the checks on their federal counterparts, inasmuch as major news outlets and watchdog groups tend to fixate on the latter. In short, while a new law might usefully shield some reporters from some forms of overreach, it would also shield the executive branch from public accountability for the pursuit of reporters’ records. It is not at all clear that this tradeoff would amount to a victory for investigative journalism or open government. To the contrary, it may amount to more media subpoenas.

### AT: Gov Whistleblowers

#### Plan fails—the government can trace communications

OHCHR 15 [“The protection of sources and whistleblowers” 29 June 2015, OCHCR, <https://www.ohchr.org/Documents/Issues/Opinion/Protection/AssociationProgressiveCommunications.pdf>] whs-ee

With the proliferation of electronic surveillance over the previous decade, the safety of anonymous sources and whistleblowers no longer depends only on ethical and legal protections, but also on information security. Even if ethical and legal protections are in place, mass surveillance risks rendering them meaningless. The Snowden revelations in 2013, themselves a proof of the importance of whistleblowing, have revealed the extent of electronic surveillance and the prevalence of such practices across all electronic communications platforms. However, the majority of journalists and civil society organisations still exchange confidential information over regular phone lines, text messages and unencrypted email. This is a significant challenge especially within the context of state or corporate surveillance, as the relevant actors can sidestep the legal protection of sources and whistleblowers, and identify their identities by other means.

#### Leakers won’t leak to the news—anonymous encrypted leak sites like RevenueWatch don’t filter content—vagueness of the Espionage Act discourages any identification.

* Leakers can leak to wikileaks which is safer – encryption and untracable
* Gov’t will pursue employees
* Espionage act = gov’t can arrest journalists who have the documents even if they don’t publish
* Disincentive to meet in person / email / over the phone with journalists – can get caught

Papandrea 11 [[(Mary-Rose Papandrea came to the University of North Carolina School of Law from Boston College Law School in 2015. JD with high honors from UC hiccago) "The Publication of National Security Information in the Digital Age." Journal of National Security Law & Policy 5, no.1 (2011): 119-130.] whs ee

Prior to the Internet, those in possession of national security information who wanted to reveal it to the public had to go through a traditional media outlet to accomplish that goal. Thus, when Daniel Ellsberg was in possession of the Pentagon Papers, he went to several major newspapers as well as the three major television networks in an effort to find an outlet.21 Today’s leakers can deposit a treasure trove of information on any number of websites around the world designed to receive confidential information. Admittedly, Julian Assange of WikiLeaks cooperated with some of the world’s most influential newspapers in order to assure that the information he had collected would be noticed. Nevertheless, the government has good reason to be concerned that its enemies will not limit their reading to The New York Times and The Washington Post and instead will be searching the Internet for valuable information. The Internet makes it easy to search vast databases with little effort. The government has never prosecuted the press for publishing national security information and has instead traditionally pursued the government employees or contractors who leaked the information in the first place.22 Although the government has arrested Bradley Manning, the person identified as primarily responsible for the leak of U.S. classified information to WikiLeaks, it may not be so easy to identify leakers in the future. Technology has developed to make it possible for individuals to exchange information anonymously, making it impossible for the government to subpoena the identity of leakers from the website that received the information. Technology has given rise to the development of intermediaries like WikiLeaks that can serve as a conduit of information between the original sources and the public. As Jay Rosen has noted, sources no longer have to meet a reporter in a dark parking garage.23 Although new technology threatens the old way of doing things, we have to keep in mind that the traditional media outlets do not have a monopoly on the ability to inform the public in a responsible way. Nonprofessional journalists have provided valuable information to the public debate that the mainstream media either missed or ignored.24 WikiLeaks itself has uncovered valuable information about human rights abuses and other atrocities in countries around the globe; in fact, in 2009, WikiLeaks won an award from Amnesty International for its release of documents concerning the extra-judicial killings and disappearances in Kenya.25 Rather than condemning non-traditional media websites, we need to begin to recognize that new technology allows non-professionals to play an important role in informing the public. One common justification for distinguishing WikiLeaks from the traditional media is that it does not engage in the traditional journalistic practice of carefully analyzing and giving context to the material that it publishes.26 As a factual matter, it is inaccurate to argue that WikiLeaks does not engage in any editorial practices. Although initially WikiLeaks did not filter the electronic files it obtained, it no longer simply publishes every bit of information it receives.27 In addition, it has sought government guidance on what names and identifying information it should redact from its materials in order to avoid a significant risk of harm to individuals.28 Furthermore, regardless of how WikiLeaks itself operates, it certainly is not the case that every website would function in the same way. WikiLeaks was not the first website committed to transparency, and it is almost certainly not the last.29 It is also true that the traditional media is capable of making irresponsible publication decisions and publishing national security information without due care and consideration. Indeed, during the debates leading to the passage of the Espionage Act of 1917, Congress was concerned about “disloyal papers” that had loyalties to Germany or other enemies.30 In 1973, long before the Internet was developed, Harold Edgar and Benno Schmidt noted in their seminal article on the Espionage Act that “some underground newspaper stands ready to publish anything that the Times deems too sensitive to reveal.”31 Outrage over the publication of the identities of American operatives in books and magazines prompted the passage of the Intelligence Identities Protection Act of 1982.32 In other words, concerns about publications with bad motives existed long before WikiLeaks came on the scene; these concerns do not depend on the medium of communication or whether “professional” journalists are the ones making the publication decisions. Another common argument for distinguishing WikiLeaks from the traditional media is that WikiLeaks stole its information, or solicited or encouraged sources to leak sensitive information. In her speech on Internet freedom, Secretary of State Clinton maintained that “the WikiLeaks incident began with a theft, just as if it had been executed by smuggling papers in a briefcase.”33 The problem is that there is no evidence that WikiLeaks stole any documents. Vice President Joseph Biden similarly argued that there was a difference between WikiLeaks’ solicitation of classified information and the manner in which the traditional press acquires its information.34 This distinction does not hold up, especially given the absence of any public evidence that WikiLeaks or Julian Assange actively solicited classified information. Indeed, it appears that The New York Times, taking a page from WikiLeaks’ playbook, is considering establishing a virtual “drop box” where members of the public could deposit documents anonymously.35 Several other organizations have already established portals for leaked information, including The Wall Street Journal36 and Al Jazeera. 37 The publication of national security secrets in a newspaper, magazine, or website may be as damaging to our national security interests as the transfer of secrets in the traditional espionage setting.38 We must assume that our enemies consume our public media just as we do theirs; given this, publication of a national security secret in a newspaper might cause even more harm because the whole world potentially can learn about it. Nevertheless, Congress has traditionally been concerned with the dilemma of protecting legitimate national security secrets without undermining the sort of public debate that is essential in a democracy. Thus, when it was debating legislation that would become the Espionage Act of 1917, Congress rejected President Wilson’s proposal for broad authority to punish the publication of national defense information.39 The legislative history of the Espionage Act of 1917 “is replete with concern that these criminal statutes make use of appropriate standards of culpability to distinguish the morally innocent from the guilty.”40 Congress has repeatedly recognized the importance of protecting legitimate criticism and examination of government actions every time it has amended the Espionage Act and related statutes.41 Although recognizing the need to protect national security secrets, Congress has been concerned about passing laws that would unduly restrict the media’s well-intentioned disclosures.42 Thus, for example, in the debates surrounding the passage of the Intelligence Identities Protection Act of 1982, Congress repeatedly expressed concerns that any prohibitions on the disclosure of the identities of American agents should not cover academic studies of government programs and policies, or news media reporting of intelligence failures.43 Recognizing that even the disclosure of an agent’s identity could be valuable, Congress provided that such disclosures are not actionable unless made with “reason to believe” that the disclosure would harm the United States, and that the disclosures were part of a “pattern or practice” of disclosure.44 Although Congress has historically appeared interested in protecting the freedom of the press and limiting executive power to control the debate on national security and military affairs, the plain language of the Espionage Act points a “loaded gun” at those who report on such topics.45 For example, Section 793(e) prohibits the dissemination or retention of national security information by those in “unauthorized possession” of it, and the only applicable mens rea requirement in cases involving tangible materials is that the dissemination or retention be “willful.”46 With respect to the dissemination or retention of nontangible “information pertaining to the national defense,” the government must prove that the offender has “reason to believe [the information] could be used to the injury of the United States or advantage a foreign nation.”47 Exactly what this provision requires is unclear. Some lower courts have held that the government must show that the offender had a “bad faith purpose either to harm the United States or aid a foreign government,”48 but this construction is difficult to derive from the actual statutory language and arises from concerns that the phrase “national security information” would be unconstitutionally vague without it.

#### Sources won’t get protection—they’re outsiders

Wasserman 17 [(Edward Wasserman is professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley.) (2017) Safeguarding the News in the Era of Disruptive Sources, Journal of Media Ethics, 32:2, 72-85, DOI: 10.1080/23736992.2017.1294020] whs-ee

Because the source is an outsider, not a member of the usual social nexus of relied-upon informants, it isn’t likely [they] he or she will receive much in the way of protection or indulgence if the information provokes official displeasure. Instead, the recent class of disruptive sources has been greeted with disquieting ambivalence by the same news media that benefit from their information. Typically coverage praises, in passing, the public value of the material the informants disclose, while foregrounding questions about their motives, psychological makeup, personal integrity, and the harm they might be doing to legitimate security interests of the state. Whatever actual protection the media might offer their sources is generally confined to the terms of reporter privilege, contained in various shield laws that enable journalists, under limited circumstances, to resist legal pressure to disclose the names of informants with whom they have confidentiality agreements. The reporter’s silence, even if upheld by increasingly skeptical courts, won’t necessarily protect the source. In only one of the current crop of cases in which news sources were charged under the Espionage Act during the George W. Bush and Barack Obama administrations—the case of former Central Intelligence Agency employee Jeffrey Sterling—have prosecutors pushed hard to force a reporter to break a confidentiality pledge and identify a defendant.

#### DOJ breaks *legal procedure* to obtain information

Walden 7/27 [(Shelley Walden, researcher for PEN America’s 2015 report, “Secret Sources: Whistleblowers, National Security and Free Expression.”) “THE TRUMP ADMINISTRATION’S WAR ON SOURCES”, PEN America, 7/27/18] TS

In an alarming twist, the administration recently expanded its war on leakers to encompass Congress and reporters. In early June, former Senate Intelligence Committee aide James A. Wolfe was arrested on charges of making false statements to FBI agents about his contacts with several reporters in an inquiry into leaks of classified information. As part of this investigation, the DOJ [secretly seized](https://www.nytimes.com/2018/06/07/us/politics/times-reporter-phone-records-seized.html) the phone and email records of The New York Times reporter Ali Watkins, with whom Wolfe was in a relationship. Although the FBI was supposedly looking for only one of Watkins’s sources, they seized years of her email records. This was despite [DOJ regulations](https://www.law.cornell.edu/cfr/text/28/50.10) that require investigators to clear several hurdles before seeking reporters’ records—including first making “all reasonable attempts to obtain the information from alternative, non-media sources,” and generally notifying reporters first to negotiate the scope of the demand (though the attorney general is allowed to make exceptions for compelling reasons). According to the The New York Times, “It is not clear whether investigators exhausted all of their avenues of information before confiscating Ms. Watkins’s information. She was not notified before they gained access to her information from the telecommunications companies.” As Suzanne Nossel, chief executive officer of PEN America, said in [PEN America’s statement on this matter](https://pen.org/press-release/fbi-seizure-journalist-records-investigation-troubing/), “The fact that the FBI seized a journalist’s personal and professional phone and email records going back years, will cast an inevitable chill on newsgathering at a time when the role of the press in holding government accountable is critically important. This is particularly the case given that the alleged leaks in question relate to allegations of inappropriate and potentially unlawful conduct on the part of a major presidential political campaign.” Most recently, on June 18, federal prosecutors charged former software engineer Joshua A. Schulte with multiple crimes, including violating the Espionage Act by allegedly stealing and disseminating national defense information. Schulte is the suspected leaker of the CIA Vault 7 documents, which were released to WikiLeaks in March 2017 and detailed the CIA’s hacking operations, including its ability to hack Apple and Android phones. Schulte has plead not guilty and claims he was a whistleblower who first reported “[incompetent management and bureaucracy](https://www.washingtonpost.com/world/national-security/ex-cia-employee-charged-in-major-leak-of-agency-hacking-tools/2018/06/18/dadd40ac-7352-11e8-b4b7-308400242c2e_story.html?noredirect=on&utm_term=.b2246318c8c0)” at the CIA to the agency’s inspector general and the House Intelligence Committee. If this is true, then Schulte’s case could highlight how the internal government channels for intelligence community whistleblowers are broken. This is supported by the fact that a [2017 draft government report](https://www.thedailybeast.com/us-intelligence-shut-downs-damning-report-on-whistleblower-retaliation) that reviewed 190 whistleblower reprisal complaints in six national security agencies found that the agencies ruled in favor of only one whistleblower who used internal government channels. In other words, the government ruled against 99 percent of intelligence community employees who claimed they were retaliated against for blowing the whistle.

### AT: Wikileaks – 1st Amendment

#### Wikileaks can’t qualify for reporters’ privilege under the 1st amendment – doesn’t meet the “investigative reporting” standard. Attempts to meet it destroy story quality to the point of incoherence.

**Peters 11** Jonathan Peters, 5-2011, "WikiLeaks Would Not Qualify to Claim Federal Reporter’s Privilege in Any Form," Digital Repository @ Maurer Law, <https://www.repository.law.indiana.edu/fclj/vol63/iss3/5/> // OHS-AT

From those leading cases emerge four general principles: (1) the medium alone does not determine whether a person is a journalist; (2) the intent of the person asserting the privilege is pivotal, because she must intend to disseminate information to the public; (3) the activity is pivotal, too, because the person must be engaged in investigative reporting; and (4) the content disseminated must be news.68

Applying those principles here, they are hurdles for WikiLeaks to jump and they are subparts of the threshold question: Would WikiLeaks have standing to raise the First Amendment-based privilege? The answer is no, because it is not engaged in investigative reporting, a process that involves more than the mere dumping of documents and requires the minimization of harm.

B. Investigative Reporting Involves More Than the Mere Dumping of Documents

WikiLeaks could clear hurdles one and two because the medium (here, the Internet) is not dispositive, and the intent of the website always has been to disseminate information to the public.69 Hurdle three, the requirement that the person asserting the privilege be engaged in investigative reporting, is the problem. WikiLeaks describes itself as a “not-for-profit media organisation”70 that has adopted “journalism and ethical principles”71 to guide its operations, characterized on the site as journalistic in nature:

When information comes in, our journalists analyse the material, verify it and write a news piece about it describing its significance to society. We then publish both the news story and the original material in order to enable readers to analyse the story in the context of the original source material themselves. Our news stories are in the comfortable presentation style of Wikipedia . . . .72

Not only is journalism a big part of the site’s brand, it is also a reference point, a way for the site to put itself in context. First, “[l]ike other media outlets conducting investigative journalism,” it says it accepts information from anonymous sources.73 Second, it says a “healthy, vibrant and inquisitive journalistic media plays a vital role in achieving these goals,” before adding, “We are part of that media.”74 Finally, WikiLeaks says it “has provided a new model of journalism. . . . We don’t hoard our information; we make the original documents available with our news stories. . . . Like a wire service, WikiLeaks reports stories that are often picked up by other media outlets.”75

Taking stock, then, WikiLeaks sees in its reflection a media organization filled with journalists who do journalism, guided by journalistic principles. That self-perception, however, is not conclusive. It is also a bit off. WikiLeaks may be a media organization. It may even have adopted some journalistic principles. But it is not engaged in investigative reporting, the activity protected by the First Amendment-based privilege.

Investigative reporting involves more than the mere dumping of documents. It is a “watchdog journalistic process of investigating wrongdoing . . . with the goal of holding power-wielders accountable for their actions. [It] often involves in-depth, long-term research and multiarticle reporting revealing new information. It is based on documentary research, extensive interviewing, and undercover reporting and surveillance.”76 The “great temptation in investigative reporting is to lay out the facts and let the reader draw the conclusions.”77 But the process demands more. Investigative reporters “must make an understandable story out of the mountain of information that they have gathered . . . . They must judge the story material in a detached manner and then organize and write a story for persons who have no prior knowledge of the subject.”78 They must “lay out the facts,” but also “tell the reader what they add up to.”79 “[I]n his or her simplest and most complex tasks . . . [the reporter] adopts words and metaphors, solves a narrative puzzle and assesses and interprets.”80 Accordingly, investigative reporting is a process— “storytelling with a purpose.”81

The elements of that process are evident in decisions of the federal courts that have recognized the privilege. In Cusamano v. Microsoft, the First Circuit extended the privilege to two business professors who conducted a number of interviews before writing a book about the rivalry between two large corporations.82 The court said the interviews were protected because their “sole purpose” was “to gather data so that [the professors] could compile, analyze, and report their findings [about] management practices in the internet technology industry.”83 In Summit Technology, Inc. v. Healthcare Capital Group, Inc., the District of Massachusetts held that the privilege protected the reports of a financial advisor who performed independent research on publicly traded companies for institutional investors.84 The court noted that the reports, based partly on interviews, contained analysis and recommendations and conclusions.85 Meanwhile, the Western District of New York in Blum v. Schlegel found that the privilege applied to a student journalist who interviewed the associate dean of his school for a newspaper article.86 The article exposed and described, in the journalist’s own words, a controversy at the school, quoting some of the people involved.87

Ten years later, in Tripp v. Department of Defense, the District Court for the District of Columbia extended the privilege to a writer for the military publication Stars and Stripes. 88 Concluding that the writer had “engaged in newsgathering,” the court said “[t]he article itself indicates that [the writer] interviewed a number of individuals while researching [the article], an activity which is a ‘fundamental aspect’ of investigative journalism.”89 The court also noted that the “plaintiff’s own document request suggests that [the writer] engaged in traditional newsgathering activities such as keeping notes.”90

In U.S. Commodity Futures Trading Commission v. McGraw-Hill Co., the District Court for the District of Columbia applied the privilege to a publisher that produced regular indices and price ranges in the natural gas market.91 Stating that the “reporter’s privilege is available only to reporters,” and referring in that respect to the importance of “engaging in editorial judgments,” the court emphasized that the reports took into account extra-market factors affecting “supply and demand, such as severe weather or recent legislative activity. . . . As such, [the publisher] engages in journalistic analysis and judgment in addition to simply reporting data.”92

Those cases illustrate the nature of investigative reporting: interviews that allowed professors to compile, analyze, and publish their findings in a book; reports about publicly traded companies containing analysis, recommendations, and conclusions; a newspaper article describing a controversy in the journalist’s own words and through quotes; a writer who “engaged in traditional newsgathering activities,” and a “‘fundamental aspect’ of investigative journalism,” by interviewing people and keeping notes; a publisher that “engaged in editorial judgments” and in “journalistic analysis and judgment.” Those cases show that the process of investigative reporting involves more than the mere dumping of documents—that the person asserting the privilege “adopts words and metaphors, solves a narrative puzzle and assesses and interprets,” all by his or her own effort.93

In contrast, the backbone of WikiLeaks is a high-security drop box that allows people anonymously to submit documents for the site’s staff to review.94 As noted above, when a document comes in, WikiLeaks verifies the authenticity of the document as follows:

We assess all news stories and test their veracity. We send a submitted document through a very detailed examination a (sic) procedure. Is it real? What elements prove it is real? Who would have the motive to fake such a document and why? We use traditional investigative journalism techniques as well as more modern rtechnology-based (sic) methods. Typically we will do a forensic analysis of the document, determine the cost of forgery, means, motive, opportunity, the claims of the apparent authoring organisation, and answer a set of other detailed questions about the document. We may also seek external verification of the document.95

Once the document is verified, it is posted on the website with a related news story. Although that process may look a little like journalism, investigative or otherwise, it is no such thing. WikiLeaks does not engage in multi-article reporting. It does not do extensive interviewing for its news stories. It does not provide meaningful context or journalistic analysis. It does not, in short, “make an understandable story out of the mountain of information” it has gathered.

Rather, the modus operandi of the website is to dump documents, sometimes hundreds of thousands of them, on the world; and to those dumps it appends a news story that truly is a press release,96 announcing what the site has done, to enable an outside reporter to write about it. For example, when WikiLeaks released the Iraq War Logs, nearly 400,000 classified U.S. documents about the war in Iraq, it posted a news story only three paragraphs in length, totaling 202 words.97 It featured no quotes, no storytelling, and the third paragraph in its entirety was an eight-word plea for money: “Please donate to WikiLeaks to defend this information.”98

The rest of the story appeared to be directed at the news media and designed to generate publicity for the website: “At 5pm EST Friday 22nd October 2010 WikiLeaks released the largest classified military leak in history. . . . [The reports] detail events as seen and heard by the US military troops on the ground in Iraq . . . . [They] detail 109,032 deaths in Iraq . . . . The majority of the deaths (66,000, over 60%) of these are civilian deaths.”99 In fairness, the story did provide some context (“For comparison, the ‘Afghan War Diaries’, previously released by WikiLeaks, covering the same period, detail the deaths of some 20,000 people”).100 But it also editorialized, suggesting that the U.S. has not prosecuted the war transparently (the leaked reports “are the first real glimpse into the secret history of the war that the United States government has been privy to throughout”).101

Needless to say, that is neither a fair nor a comprehensive account of the narratives told by the documents.102 The story posted by WikiLeaks, in other words, was not thorough.103 It did not feature any response from the U.S. government,104 it did not chronicle the life-and-death decisions lurking in the documents, or offer color or texture, or illuminate the human condition, other than the death toll.105 In addition, it failed to distinguish between opinion and news,106 not the first time the website had blurred that line.107

Similarly, when WikiLeaks began to release the U.S. diplomatic cables in November 2010, it posted a 329-word “editorial” containing no quotes and no meaningful analysis or context.108 It contained no government response, either. The piece simply announced, in the spirit of a press release, the number of cables that would be published and that they would come out “in stages over the next few months.”109 It also commented on their “importance” and accused the U.S. government of lying to the public.110

A week later, the website posted a few hundred words about PayPal’s decision to discontinue its relationship with WikiLeaks.111 The story quoted Assange, who said, “What we are seeing here are dangerous moves towards a digital McCarthyism.”112 The sub-headline was a variation on that theme: “Digital McCarthism [sic] in the United States?”113 Most notably, though, in perhaps a Freudian slip, WikiLeaks labeled the post as both an “editorial” and a “press release.”114

Admittedly, a few of the WikiLeaks stories did provide some context and analysis,115 but even those did not quote anyone other than a WikiLeaks spokesperson, nor did they include responses from the governments and people accused in the stories of committing various bad acts or of harboring ignoble views. Two newspaper columnists, commenting on the release of the Afghanistan war documents, made the point that WikiLeaks actually has affirmed the value of journalism

First, Anne Applebaum of The Washington Post wrote:

By releasing . . . intelligence documents . . . onto the laptops of an unsuspecting public, the proprietor of WikiLeaks has made an ironclad case for the mainstream media . . . .

To see what I mean, try reading this: “At 1850Z, TF 2-2 using PREDATOR (UAV) PID insurgents emplacing IEDs at 41R PR 9243 0202, 2.7km NW of FOB Hutal, Kandahar . . . .”

Did you get that? I didn’t, at least not at first. I understand it somewhat better now, however, because the New York Times helpfully explains on its Web site that this excerpt from one of the WikiLeaks documents describes a Predator drone firing a missile at men who were planting roadside bombs.116

Second, Dick Polman of the Philadelphia Inquirer wrote:

WikiLeaks could have simply posted all that raw military data online, straight to your laptop. But [Julian Assange] instead decided to share most of his material . . . with three key Western newspapers . . . Assange wanted the papers to translate the military jargon for the lay reader. They did. He wanted the papers to vet, analyze, and contextualize the material. They did.117

Generally, then, it is clear that WikiLeaks has passed on to the mainstream media the burden of investigative reporting—of adding value to the leaked documents by examining them and explaining their meaning and significance. Therefore, for privilege purposes the website is not engaged in investigative reporting, a process that involves more than the mere dumping of documents.

C. WikiLeaks Has Not Taken Steps Consistently to Minimize Harm

Proceeding again from the premise that investigative reporting is a process, WikiLeaks deviates from it in one other significant way. The website has not taken steps consistently to minimize harm to people who could be affected by its actions.118 This is deviant because it is common (indeed, expected) for those involved in investigative reporting to ask and answer a number of ethics questions before publishing any story or series. “Two of the most important are: Who will be hurt, and how many? Who will be helped, and how many?”119 The idea is to “[b]e wary of treating people as a means”120 and to “[w]eigh the harms and the benefits of publication . . . .”121 The harm-versus-benefit concept is derived from philosophers, and journalists tend to rely on John Stuart Mill’s version of it.122 That is,

[i]f Mill were editor, he would ask his staff to (1) list all persons likely to be affected; (2) decide the likely consequences of each option; (3) weigh the benefit or harm that would result, giving added weight to the major benefit or harm; and (4) choose the consequence that provides the most benefit to the largest number of people or the least harm to the smallest number of people.123

It is unclear how WikiLeaks strikes that balance. On the one hand, Assange “has placed a doomsday card on the table: he has said that if [the site’s] existence is threatened, the organization would be willing to spill all the documents in its possession out into the public domain, ignoring the potentially mortal consequences.”124 Assange’s lawyer called this the “thermonuclear device,”125 and at least one commentator has argued that such an act “is something no journalistic organization would ever do, or threaten to do.”126 On the other hand, WikiLeaks has said it follows “journalism and ethical principles”127 and that it is “developing and improving a harm minimisation procedure.”128 That procedure would require the site in special cases to “remove or significantly delay the publication of some identifying details from original documents to protect life and limb of innocent people.”129 But as of this writing, the nuts and bolts of the procedure, like much of the site’s operations,130 are unknown.

When WikiLeaks released the Afghanistan war documents in July 2010, it withheld roughly 15,000 said to be particularly sensitive, but it did not remove the names of Afghan intelligence sources from the documents it did release.131 U.S. Secretary of Defense Robert Gates accused the website of endangering lives, and Admiral Mike Mullen, chairman of the Joint Chiefs of Staff, said WikiLeaks “might already have on their hands the blood of some young soldier or that of an Afghan family.”132 A Taliban spokesman, after the release, told the New York Times it had formed a ninemember commission to review the documents and “find about people who are spying.”133

In response, Assange said the “grounds of Iraq and Afghanistan are covered with real blood,” and that “Secretary Gates has overseen the killings of thousands of children and adults in these two countries.”134 He also blamed the U.S. military for putting its own Afghan sources at risk: “This material was available to every soldier and contractor in Afghanistan . . . . It’s the US military that deserves the blame for not giving due diligence to its informers. We are appalled that the US military was so lackadaisical with its Afghan sources. Just appalled.”135 Further, Assange said that since the launch of WikiLeaks, as far as he knew, nobody ever had been harmed because of any post on the site.136

Shortly thereafter, however, a coalition of leading human rights groups sent a letter to Assange criticizing his decision not to redact the names and saying that the Afghans identified in the documents would be targets of the Taliban.137 Among those who signed the letter were Amnesty International, the Campaign for Innocent Victims in Conflict, the Open Society Institute, the Afghanistan Independent Human Rights Commission, and the International Crisis Group.138 Reporters Without Borders released a statement, too, castigating WikiLeaks for its “incredible irresponsibility.”139

This time, Assange fired back through Twitter, insinuating that the human rights groups, namely Amnesty International, had refused to help WikiLeaks by underwriting the cost of editing the documents: “Pentagon wants to bankrupt us by refusing to assist review. Media won’t take responsibility. Amnesty won’t. What to do?”140 In a separate tweet, he estimated the cost of the “harm minimization review,” ostensibly the effort to edit the 15,000 documents WikiLeaks withheld from the initial release, at $700,000.141 It is unclear how Assange arrived at that figure.142

In contrast, the New York Times, the Guardian, and Der Spiegel, the newspapers that jointly published stories about the Afghanistan leak,143 took steps to minimize harm and to remove from the documents the names of any Afghan sources.144 Guardian editor Alan Rusbridger said, “We were very careful to vet everything we published . . . We also tried to influence Julian Assange to redact names.”145 Nick Davies, the Guardian reporter who brokered the deal to get access to the WikiLeaks documents, said,

The first time I spoke to Julian Assange . . . before I saw the documents, I said there are two issues: one, there may be nothing of interest here, and two, there must be a risk that publication would put people on the ground at risk. . . . Each [document] was read from top to toe with the conscious aim of excluding anything that might harm people on the ground. 146

The New York Times was just as cautious, and, like the Guardian, it encouraged WikiLeaks to withhold potentially harmful material. In a “Note to Readers,” the newspaper said:

The Times and the other news organizations agreed . . . that we would not disclose—either in our articles or any of our online supplementary material—anything that was likely to put lives at risk or jeopardize military or antiterrorist operations. We have, for example, withheld any names of operatives in the field and informants cited in the reports. We have avoided anything that might compromise American or allied intelligence-gathering methods such as communications intercepts. We have not linked to the archives of raw material. At the request of the White House, The Times also urged WikiLeaks to withhold any harmful material from its Web site.147

Eric Schmitt, who reviewed and wrote about the Afghanistan documents for the New York Times, said:

We redacted . . . the names and other identifying details from the incident reports we published in the Times. Before publication, we asked the White House, CIA and Defense Department if they had any objections to specific information being made public. They had a couple of specific requests, which we honoured . . . .148

WikiLeaks said it also contacted the Pentagon for assistance after releasing the first batch of documents, apparently seeking help to review the 15,000 documents the site originally withheld.149 The nature of that contact remains an open question.150

Since the Afghanistan dump, the website appears to be taking more seriously the task of minimizing harm. Indeed, going forward it may have to be more careful, because bills pending in both houses of Congress would make it unlawful to publish the names of military or intelligence informants.151 In any case, besides developing a “harm minimisation procedure,” secret as it is, WikiLeaks did remove potentially harmful information from the diplomatic cables it began releasing in November152 and the Iraq war documents released in October.153 There were, however, a few catches. First, when the website edited the cables, it did so after providing them to various news outlets.154 The U.S. State Department announced in early 2011 that it had “helped relocate a number of people in other countries who . . . could be in danger because their names have appeared in diplomatic cables revealed by Wikileaks.”155 Second, when the site edited the Iraq documents, it removed so much information that one commentator accused the site of redacting “to the point of incoherence” and of using an algorithm to edit the documents, rather than human beings.156

D. Summary

By and large, WikiLeaks has passed on to the mainstream media the burden of investigative reporting—of adding value to the leaked documents by examining them, contextualizing them, and explaining their meaning and significance. That is, the site has not made understandable stories out of the mountain of information it has gathered. Nor has it taken steps consistently to minimize harm, whether it is redacting too little or too much, or making threats about a “thermonuclear device.” For these reasons, WikiLeaks would not survive the threshold inquiry set forth by the federal courts and would not qualify to claim the First Amendment-based privilege.

### Alt Causes – Laundry List

### Doesn’t Solve – Readers Don’t Trust

#### Readers do not trust anonymous sources - it deprives them of the ability to evaluate the credibility of those sources

Spayd 17, Liz Spayd (the sixth public editor appointed by The New York Times. She evaluates journalistic integrity and examines both the quality of the journalism and the standards being applied across the newsroom), "The Risk of Unnamed Sources? Unconvinced Readers", 2-18-2017, New York Times, https://www.nytimes.com/2017/02/18/public-editor/the-risk-of-unnamed-sources-unconvinced-readers.html

There was something else notable about these stories. All of them relied heavily — some entirely — on a reporting tactic many readers despise: the use of anonymous sources. Presumably for fear of losing a job, a security clearance, access or something else, the people interviewed did not want to be named, and so were assigned nebulous titles like “government official” or “congressional aide” or, even more vaguely, those “familiar with” the thing they were talking about. Reporters and editors trust such information, sometimes risking their reputation on it. Readers, on the other hand, couldn’t be more suspicious — and with reason. The descriptions generally tilt far more toward protecting the sources than giving readers confidence in what they said. Gene Gambale of Indio, Calif., is among the readers who wrote to complain in recent weeks. “I have noticed a continuous and disturbing trend of relying upon unnamed sources,” Gambale said. “I believe that is poor journalism and deprives the reader of any way to evaluate, on their own, the credibility of those sources or the accuracy of the statements they make.”

### Impact Turn – Democracy Causes War

### Impact Turn - Econ

### Impact D – No DPT

### Impact D – Backsliding

### Impact D - Democracy Inevitable

## Corporate Crime

### NQ – Decreasing Now

#### Squo - white collar crime decreasing now

Bieri 18 [Bieri, Kate (While at Cronkite, she interned at several local news stations; reported on breaking news for the Arizona Republic; and interned for the CBS News Network in New York, covering the 2016 election. Kate also spent a semester covering Arizona politics in Washington, D.C. for Arizona PBS.), “Child Abuse increased; white collar crime decreased in Dona Ana County”, ABC7 KVIA, 02 January 2018, <http://www.kvia.com/news/new-mexico/child-abuse-increased-white-collar-crime-decreased-in-doa-ana-county/680602856>] IS

While the number of homicides and thefts stayed stagnant from 2016 to 2017 in Doña Ana County, the number of child abuse cases increased and **the number of white collar crimes decreased**, according to data from the Third Judicial District Attorney's office. “For the last two or three years, **we’ve been bucking all crimes statistically in the United States**," said District Attorney Mark D'Antonio. From 2016 to 2017, child abuse cases increased from 97 to 135 reported cases in Doña Ana County, a 39% increase. D'Antonio told ABC-7 that his office has seen more and more children found with meth in their systems. “That’s something that has certainly encountered a spike," D'Antonio said. "That’s serious. That’s a serious event.” Another trend in Doña Ana County's data was **white collar crime, which has decreased from 143 reported incidents in 2016 to 81 reported incidents in 2017: More than a 43% drop.** “The D.A. can’t prosecute the cases in a vacuum," D'Antonio said. "We absolutely need and rely on our **law enforcement officers**. That’s **working so far**.” D'Antonio also said his office will prioritize community initiatives in 2018 to encourage the public to report crimes to law enforcement. “We think it’s important to continue our trend to get the information out to the community," D'Antonio said. "**We have a really stable and good community**, but I think and I believe that more information is needed.”

### Whistleblowing Fails

#### Companies don’t take whistleblowing claims seriously.

**Tippett 16** “Why companies like Wells Fargo ignore their whistleblowers – at their peril” Elizabeth C. Tippett [Assistant Professor, School of Law, University of Oregon] [https://theconversation.com/why-companies-like-wells-fargo-ignore-their-whistleblowers-at-their-peril-67501 //](https://theconversation.com/why-companies-like-wells-fargo-ignore-their-whistleblowers-at-their-peril-67501%20//) OHS-AT

High-profile corporate frauds like these all seem to follow the same pattern. First the misconduct is discovered, and then we learn about all of the whistleblowers who tried to stop the fraud much earlier. Congress then tries to enhance whistleblower protections, with varying success.

The Sarbanes-Oxley Act, passed in 2002 after the Enron and Worlcom scandals, was supposed to protect whistleblowers who uncovered accounting frauds, but judges typically rejected their retaliation claims. The Dodd Frank Act, approved in 2010, provides financial rewards for certain whistleblowers. Its success is still unclear.

While these laws may protect employees who expose wrongdoing from retaliation and encourage more to do the same, nothing requires employers to take their disclosures seriously. And as we saw with the latest scandal involving Wells Fargo, several former employees say they tried to get the company’s attention in 2005 and 2006, to no avail.

Their ineffectiveness is hardly unique. The 2011 National Business Ethics Survey found that 40 percent of employees who reported misconduct believed that their report had not been investigated. When an investigation did take place, over half thought the process was unfair.

### Turn – Innocents Harmed

#### **Corporate criminal liability pushes the most innocent to be responsible**

Procaccia and Winter 17, Uriel (Professor Emeritus of Corporate Law, The Hebrew University), and Eyal Winter (Silverzweig Professor of Economics a, The Hebrew University). "Corporate Crime and Plea Bargains." *The Law & Ethics of Human Rights* 11.1 (2017): 119-133. IS

Clearly**, corporate criminal liability entails some externalities** that mutilate against the concept. The **corporate entity, as such, does not mind the severity of the sanction, simply because it does not possess the potential of suffering**. **The sufferers are often innocent agents, like stockholders and other stakeholders whose personal fortunes are tapped to foot the bill.** But externalities of this nature are perennial both in the non- corporate world and in corporate law. Outside of corporate law, if a **suspect is found guilty and sanctioned, a multitude of innocents, like family members, creditors or business associates might be unintentionally but unavoidably penalized.** In corporate law proper, stakeholders pay the consequences of corporate contract breaches, tort malfeasance or other violations of the law, not less than say, when a company pays a criminal fine. The added element of criminal sanctions, the stigma resulting from conviction, normally does not attach to innocent corporate agents, because stigma is a moral response to turpitude, and innocent stakeholders are often as clean as a whistle. In an imperfect world, these necessary externalities are treated as collateral damage and dismissed with a nod.

### Alt Cause – Plea Bargaining lol

#### Can’t solve crime – corporations can bargain out of punishment and attorneys are reluctant to prosecute.

Keefe 17 [Patrick Radden Keefe, a staff writer, has been contributing to The New Yorker since 2006. He has written about the chef turned world traveller Anthony Bourdain, the capture of the Mexican drug baron Joaquín (El Chapo) Guzmán Loera, and allegations of corruption against the tycoon Beny Steinmetz over a lucrative mining concession in Guinea. His story “A Loaded Gun,” about the troubled history of the mass shooter Amy Bishop, received the National Magazine Award for Feature Writing in 2014; he was also a finalist for the National Magazine Award for Reporting in 2015 and 2016. He is the author of two books: “The Snakehead: An Epic Tale of the Chinatown Underworld and the American Dream,” which grew out of an article published in the magazine, and “Chatter: Uncovering the Echelon Surveillance Network and the Secret World of Global Eavesdropping.” He is the recipient of a Guggenheim Fellowship and fellowships at the Woodrow Wilson International Center for Scholars, the New America Foundation, and the Cullman Center for Scholars and Writers at the New York Public Library. 7-31-2017, "Why Corrupt Bankers Avoid Jail," New Yorker, https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail] JS

What Breuer delivered, however, was the sort of velvet accountability to which large banks have grown accustomed: no criminal charges were filed, and no executives or employees were prosecuted for trafficking in dirty money. Instead, HSBC pledged to clean up its institutional culture, and to pay a fine of nearly two billion dollars: a penalty that sounded hefty but was only the equivalent of four weeks’ profit for the bank. The U.S. criminal-justice system might be famously unyielding in its prosecution of retail drug crimes and terrorism, but a bank that facilitated such activity could get away with a rap on the knuckles. A headline in the Guardian tartly distilled the absurdity: “HSBC ‘Sorry’ for Aiding Mexican Drug Lords, Rogue States and Terrorists.” In the years since the mortgage crisis of 2008, it has become common to observe that certain financial institutions and other large corporations may be “too big to jail.” The Financial Crisis Inquiry Commission, which investigated the causes of the meltdown, concluded that the mortgage-lending industry was rife with “predatory and fraudulent practices.” In 2011, Ray Brescia, a professor at Albany Law School who had studied foreclosure procedures, told Reuters, “I think it’s difficult to find a fraud of this size . . . in U.S. history.” Yet federal prosecutors filed no criminal indictments against major banks or senior bankers related to the mortgage crisis. Even when the authorities uncovered less esoteric, easier-to-prosecute crimes—such as those committed by HSBC—they routinely declined to press charges. This regime, in which corporate executives have essentially been granted immunity, is relatively new. After the savings-and-loan crisis of the nineteen-eighties, prosecutors convicted nearly nine hundred people, and the chief executives of several banks went to jail. When Rudy Giuliani was the top federal prosecutor in the Southern District of New York, he liked to march financiers off the trading floor in handcuffs. If the rules applied to mobsters like Fat Tony Salerno, Giuliani once observed, they should apply “to big shots at Goldman Sachs, too.” As recently as 2006, when Enron imploded, such titans as Jeffrey Skilling and Kenneth Lay were convicted of conspiracy and fraud. Something has changed in the past decade, however, and federal prosecutions of white-collar crime are now at a twenty-year low. As Jesse Eisinger, a reporter for ProPublica, explains in a new book, “The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives” (Simon & Schuster), a financial crisis has traditionally been followed by a legal crackdown, because a market contraction reveals all the wishful accounting and outright fraud that were hidden when the going was good. In Warren Buffett’s memorable formulation, “You only find out who is swimming naked when the tide goes out.” After the mortgage crisis, people in Washington and on Wall Street expected prosecutions. Eisinger reels off a list of potential candidates for criminal charges: Countrywide, Washington Mutual, Lehman Brothers, Citigroup, A.I.G., Bank of America, Merrill Lynch, Morgan Stanley. Although fines were paid, and the Financial Crisis Inquiry Commission referred dozens of cases to prosecutors, there were no indictments, no trials, no jail time. As Eisinger writes, “Passing on one investigation is understandable; passing on every single one starts to speak to something else.” “Due to an earlier incident, this train is being held in the station. Please be patient—we will be moving shortly.” One morning in February, 1975, a fifty-three-year-old businessman named Eli Black took the elevator to the forty-fourth floor of the Pan Am Building, in Manhattan. When he was alone in his corner office, Black slammed his attaché case into one of the big windows overlooking the city until the glass broke. Then he jumped out. Black was the chairman of United Brands, a multibillion-dollar conglomerate. After his death, friends speculated that he had been working too hard, but an alert investigator at the Securities and Exchange Commission, Stanley Sporkin, grew suspicious, noting that people don’t just “drop out of windows for no reason.” Black, it emerged, had become embroiled in a bribery scheme. United Brands owned Chiquita, and in exchange for a reduction of the export tax on bananas Black had authorized a two-and-a-half-million-dollar bribe to the President of Honduras. “White-collar crime,” in the definition of the sociologist who coined the term in the nineteen-thirties, is “committed by a person of respectability and high social status in the course of his occupation.” Eli Black fit the criteria. But he was dead. Sporkin, determined to secure justice, enlisted a young federal prosecutor in New York, Jed Rakoff, who devised a clever work-around: charge the whole company. Under U.S. law, it was technically possible to hold a company responsible for the actions of a single employee. With their inventive legal minds and their tenacious pursuit of malefactors, Sporkin and Rakoff are two of the heroes in Eisinger’s deeply reported account. United Brands ended up pleading guilty to conspiracy and wire fraud, and though it got off with a token fine of fifteen thousand dollars, Congress later cited the case when it passed the Foreign Corrupt Practices Act, in 1977. Before the United Brands scandal, prosecutors tended to go after white-collar crimes by indicting the executives who committed them; now they charged the firms themselves. But the notion of prosecuting a corporation raises a number of tricky questions. A company, as an eighteenth-century British jurist once remarked, has “no soul to be damned, and no body to be kicked.” Corporations can own property, sue people and be sued, even assert First Amendment rights. But you can’t put a corporation in jail. So you impose a fine. The trouble is that the employees responsible don’t pay the fine: if the company is publicly traded, the shareholders do. These individuals may have benefitted from the felonious conduct if it inflated the value of their stock, but they are innocent of any crime. The very conception of the modern corporation is that it limits individual liability. Yet, in the decades after the United Brands case, prosecutors often pursued both errant executives and the companies they worked for. When the investment firm Drexel Burnham Lambert was suspected of engaging in stock manipulation and insider trading, in the nineteen-eighties, prosecutors levelled charges not just against financiers at the firm, including Michael Milken, but also against the firm itself. (Drexel Burnham pleaded guilty, and eventually shut down.) After the immense fraud at Enron was exposed, federal authorities pursued its accounting company, Arthur Andersen, for helping to cook the books. Arthur Andersen executives, desperate to cover their tracks, deleted tens of thousands of e-mails and shredded documents by the ton. In 2002, Arthur Andersen was convicted of obstruction of justice, and lost its accounting license. The corporation, which had tens of thousands of employees, was effectively put out of business. Eisinger describes the demise of Arthur Andersen as a turning point. Many lawyers, particularly in the well-financed realm of white-collar criminal defense, regarded the case as a flagrant instance of government overreach: the problem with convicting a company was that it could have “collateral consequences” that would be borne by employees, shareholders, and other innocent parties. “The Andersen case ushered in an era of prosecutorial timidity,” Eisinger writes. “Andersen had to die so that all other big corporations might live.” With plenty of encouragement from high-end lobbyists, a new orthodoxy soon took hold that some corporations were so colossal—and so instrumental to the national economy—that even filing criminal charges against them would be reckless. In 2013, Eric Holder, then the Attorney General, acknowledged that decades of deregulation and mergers had left the U.S. economy heavily consolidated. It was therefore “difficult to prosecute” the major banks, because indictments could “have a negative impact on the national economy, perhaps even the world economy.” Prosecutors came to rely instead on a type of deal, known as a deferred-prosecution agreement, in which the company would acknowledge wrongdoing, pay a fine, and pledge to improve its corporate culture. From 2002 to 2016, the Department of Justice entered into more than four hundred of these arrangements. Having spent a trillion dollars to bail out the banks in 2008 and 2009, the federal government may have been loath to jeopardize the fortunes of those banks by prosecuting them just a few years later. But fears of collateral consequences also inhibited the administration of justice in more run-of-the-mill instances of criminal money laundering. Some officials in the Department of Justice wanted to indict HSBC, according to e-mails unearthed by a subsequent congressional investigation. But Britain’s Chancellor of the Exchequer warned U.S. authorities that a prosecution could lead to “very serious implications for financial and economic stability.” HSBC was granted a deferred-prosecution agreement. Numerous explanations have been offered for the failure of the Obama Justice Department to hold the big banks accountable: corporate lobbying in Washington, appeals-court rulings that tightened the definitions of certain types of corporate crime, the redirecting of investigative resources after 9/11. But Eisinger homes in on a subtler factor: the professional psychology of élite federal prosecutors. “The Chickenshit Club” is about a specific vocational temperament. When James Comey took over as the U.S. Attorney for the Southern District of New York, in 2002, Eisinger tells us, he summoned his young prosecutors for a pep talk. For graduates of top law schools, a job as a federal prosecutor is a brass ring, and the Southern District of New York, which has jurisdiction over Wall Street, is the most selective office of them all. Addressing this ferociously competitive cohort, Comey asked, “Who here has never had an acquittal or a hung jury?” Several go-getters, proud of their unblemished records, raised their hands. But Comey, with his trademark altar-boy probity, had a surprise for them. “You are members of what we like to call the Chickenshit Club,” he said. Most people who go to law school are risk-averse types. With their unalloyed drive to excel, the élite young attorneys who ascend to the Southern District have a lifetime of good grades to show for it. Once they become prosecutors, they are invested with extraordinary powers. In a world of limited public resources and unlimited wrongdoing, prosecutors make decisions every day about who should be charged and tried, who should be allowed to plead, and who should be let go. This is the front line of criminal justice, and decisions are made unilaterally, with no review by a judge. Even in the American system of checks and balances, there are few fetters on a prosecutor’s discretion. A perfect record of convictions and guilty pleas might signal simply that you’re a crackerjack attorney. But, as Comey implied, it could also mean that you’re taking only those cases you’re sure you’ll win—the lawyerly equivalent of enrolling in a gut class for the easy A. You might suppose that the glory of convicting a blue-chip C.E.O. would be irresistible. But taking such a case to trial entails serious risk. In contemporary corporations, the decision-making process is so diffuse that it can be difficult to establish criminal culpability beyond a reasonable doubt. In the United Brands case, Eli Black directly authorized the bribe, but these days the precise author of corporate wrongdoing is seldom so clear. Even after a provision in the Sarbanes-Oxley Act, of 2002, began requiring C.E.O.s and C.F.O.s to certify the accuracy of corporate financial reports, few executives were charged with violating the law, because the companies threw up a thicket of subcertifications to buffer accountability. As Samuel Buell, who helped prosecute the Enron and Andersen cases and is now a law professor at Duke, points out in his recent book, “Capital Offenses: Business Crime and Punishment in America’s Corporate Age,” an executive’s claim that he believed he was following the rules often poses “a severe, even disabling, obstacle to prosecution.” That is doubly so in instances where the alleged crime is abstruse. Even the professionals who bought and sold the dodgy mortgage-backed instruments that led to the financial crisis often didn’t understand exactly how they worked. How do you explicate such transactions—and prove criminal intent—to a jury? Even with an airtight case, going to trial is always a gamble. Lose a white-collar criminal trial and you become a symbol of prosecutorial overreach. You might even set back the cause of corporate accountability. Plus, you’ll have a ding on your record. Eisinger quotes one of Lanny Breuer’s deputies in Washington telling a prosecutor, “If you lose this case, Lanny will have egg on his face.” Such fears can deter the most ambitious and scrupulous of young attorneys. The deferred-prosecution agreement, by contrast, is a sure thing. Companies will happily enter into such an agreement, and even pay an enormous fine, if it means avoiding prosecution. “That rewards laziness,” David Ogden, a Deputy Attorney General in the Obama Administration, tells Eisinger. “The department gets publicity, stats, and big money. But the enormous settlements may or may not reflect that they could actually prove the case.” When companies agree to pay fines for misconduct, the agreements they sign are often conspicuously stinting in details about what they did wrong. Many agreements acknowledge criminal conduct by the corporation but do not name a single executive or officer who was responsible. “The Justice Department argued that the large fines signaled just how tough it had been,” Eisinger writes. “But since these settlements lacked transparency, the public didn’t receive basic information about why the agreement had been reached, how the fine had been determined, what the scale of the wrongdoing was and which cases prosecutors never took up.” These pas de deux between prosecutors and corporate chieftains came to feel “stage-managed, rather than punitive.” White-collar crime is not the only area in which prosecutors show reluctance to risk a trial. By the time Comey issued his Chickenshit Club admonition, a deeper shift in the administration of justice was already under way. Faced with the challenges of entrusting any criminal case to a jury, prosecutors were increasingly skipping trial altogether, negotiating a plea bargain instead. With the introduction of stiff sentencing guidelines, prosecutors routinely “up charged” crimes, requesting maximal prison sentences in the event of a conviction at trial. Defendants can be risk-averse, too. Offered the choice between, say, pleading guilty and serving three to five years, or going to trial and serving ten if convicted, many opt for the former. But, as with corporate deferred-prosecution agreements, these arrangements grant prosecutors a victory without testing their evidence in court. Rachel Barkow, a law professor at N.Y.U., has pointed out that when you threaten defendants with Draconian sentences if they refuse to plead guilty “you penalize people who have the nerve to go to trial.” Some scholars argue that such prosecutorial bullying may violate the Sixth Amendment right to a trial by jury. (In 2014, a federal judge in Colorado declared that, for most Americans, this constitutional right is now “a myth.”) The criminal trial is increasingly becoming a relic. More than ninety-five per cent of all criminal cases at both the state and the federal level are now resolved in plea bargains. A recent article in the Times described vacant courtrooms, out-of-work stenographers, and New York judges who can go a year or more without hearing a single criminal case. It may be no accident that the vanishing of the criminal trial has coincided with Eisinger’s story of vanishing corporate accountability. Presenting a case to a jury is a skill, and prosecutors now have fewer opportunities to hone it. The less adept you are in the courtroom, the more intimidated you will be by the prospect of going to trial, making you more likely to opt for a plea agreement instead. This phenomenon has broader societal consequences. As John Pfaff demonstrates in his recent book, “Locked In,” one grave result of the tremendous leverage that prosecutors exert is the rise of mass incarceration. As judges and juries are written out of the criminal-justice equation, an awful paradox has emerged: the poor sign plea bargains and go to jail; the privileged sign deferred-prosecution agreements and avoid it. This is a curious state of affairs, given that the notion of deferring criminal prosecution was originally introduced to benefit individuals, not corporations. During the nineteen-sixties, pilot programs in New York and Washington, D.C., demonstrated that when charges were suspended for ninety days, so that low-income defendants who had been arrested for nonviolent crimes could obtain counselling and job-placement services, offenders often turned their lives around to a point where the charges were dropped. This approach was both humane and efficient, in that it diverted people from the costly prison system. Among those who completed the program, few were arrested again. In 1974, following the success of such initiatives, the deferred-prosecution agreement was incorporated into federal law. It is a pernicious irony that a progressive legal instrument designed to help working-class defendants stay out of jail has been repurposed as a vehicle for facilitating corporate impunity. As the federal judge Emmet Sullivan noted in 2015, “Drug conspiracy defendants are no less deserving of a second chance than bribery conspiracy defendants.” Yet these days the Department of Justice seldom offers this form of clemency to the kinds of individuals for whom the practice was conceived. Perhaps, as Eric Holder has argued, there is simply more at stake when the defendant is a major bank. But what about the collateral consequences of showing less mercy when prosecuting low-income individuals? When you charge someone with a felony and send him to prison, the repercussions radiate outward, through his family and his community. Nearly three million American children have a parent in prison. According to the Rutgers criminologist Todd Clear, low-income neighborhoods in which a large proportion of the population cycles in and out of confinement experience greater familial dysfunction, warped labor markets, and a general lack of “mental and physical health.” Entire communities bear the brunt of our zealous approach to less rarefied varieties of crime. Prosecutors and judges seldom regard those collateral costs as a rationale for leniency. One day in the nineteen-sixties, the economist Gary Becker was late for an appointment, and parked on the street illegally, rather than pay for a garage. Calculating the cost of a potential ticket against the likelihood that he would get one, Becker chose to take the risk. He didn’t get a ticket, and from that experience he extrapolated the insight that “criminal behavior is rational”: people who commit crimes often do so after weighing the relevant variables and deciding that the potential benefits outweigh the potential costs. Not everyone agrees with Becker’s thesis, but it holds a certain allure, because if crime is rational, then it should, at least in theory, be deterrable. The failure to prosecute white-collar executives might be more justifiable if there were any indication that fines and deferred-prosecution agreements deterred corporate wrongdoing. The evidence, however, is not promising. Pfizer has been hit with three successive deferred-prosecution agreements, for illegal marketing, bribing doctors, and other crimes. On each occasion, the company paid a substantial fine and pledged to change—then returned to the same type of behavior. You might think that the price for flouting a deferred-prosecution agreement would be prosecution. But after offering Pfizer a second chance, only to have misconduct continue, the government was apparently happy to offer a third. Jed Rakoff, the prosecutor who indicted United Brands, became a judge, and he has emerged as an outspoken critic of the prevailing approach to corporate crime. He has argued that companies may come to view even billion-dollar fines as a “cost of doing business.” In an article in The New York Review of Books, titled “The Financial Crisis: Why Have No High Level Executives Been Prosecuted?,” he highlights the farce of obliging a corporation to acknowledge criminal wrongdoing without identifying or prosecuting the managers who were responsible. Rakoff is dubious of obligatory promises from companies to change their corporate culture, and suspects that “sending a few guilty executives to prison for orchestrating corporate crimes might have a far greater effect.” In recent years, the Department of Justice, sensitive to criticism of its kid-glove approach to corporations, did actually indict a string of banks, including Credit Suisse, BNP Paribas, J. P. Morgan, and Barclays. The banks pleaded guilty and, despite all the alarmism about “collateral consequences,” they all stayed in business, and there were no major shocks to the global economy. In “Why They Do It: Inside the Mind of the White-Collar Criminal,” the Harvard Business School professor Eugene Soltes points out that, in the 2015-16 academic year, ten companies recruiting for new hires at Harvard had recently been convicted of a federal crime or entered into a deferred-prosecution agreement. By now, Soltes suggests, corporate deviance may have become so routine that even pleading guilty to a felony is no big deal. What had once been described as a badge of ignominy that could put a company out of business was now just a bit of unpleasantness: a passing hassle, like a parking ticket.

#### Even with crackdowns, expert investigations, and public pressure, corporations just shell out money and get off without punishment.

**Park 17** “The endless cycle of corporate crime and why it’s so hard to stop” January 13, 2017 Duke Law News <https://law.duke.edu/news/endless-cycle-corporate-crime-and-why-its-so-hard-stop/> OHS-AT

More signiﬁcantly, Congress and the Obama administration have beefed up the investigative and enforcement capabilities of regulatory bodies addressing violations of environmental, product safety, securities, anti-bribery, and banking laws, including the new Consumer Financial Protection Bureau, which led the charge against Wells Fargo. The result: record numbers of enforcement actions, unprecedented ﬁnes, and greatly expanded payouts to whistleblowers. Yet as Hensarling noted, this crackdown seems to have done little to stem the tide of bad behavior in American business. In scandal after scandal, going back at least to the insider trading wave of the 1980s, big corporations or their employees are found to be ﬂouting laws, often at the expense of consumers or investors, and the government vows to come down hard on the perpetrators. But despite public pressure and ever-expanding tools and powers to go after corporate wrongdoing, in most cases, the company pays a large ﬁne and promises to clean up its act while top executives escape punishment. Most notable among them have been the Wall Street CEOs at the center of the subprime mortgage market. (Stumpf, for his part, resigned on Oct. 12.) Indeed, despite recent reforms implemented since the crisis, such as the DoddFrank Wall Street Reform and Consumer Protection Act, which imposed new regulatory requirements on ﬁnancial institutions and gave new tools to the Securities and Exchange Commission and other federal agencies to go after wrongdoers, the government is still constrained in its ability to ﬁght business crime. (For more on a new Dodd-Frank rule, see page 41.) Prosecutors have limited resources and generally only bring cases they believe they can win. Even then, the high evidentiary standards in federal criminal court make establishing culpability a challenge, particularly in large, complex corporations where decisions are often made by committee. And in industries such as ﬁnance, innovation has stayed a step ahead of the law, with managers incentivized to ﬁnd new ways to take risks without running afoul of authorities, even if they cause societal harm (such as the cross-selling push that appears to have inspired the fraudulent accounts at Wells Fargo). With fewer white-collar perp walks than many in the public would like to see, there is a widespread perception that the government hasn’t been willing to take on the real bad guys. For many lawyers and legal scholars, this state of affairs represents a conundrum that is actually more confounding: Why does business crime continue to ﬂourish despite ever-expanding efforts to ﬁght it? “We look across the major industries and we’ve got some example in almost every one of them of a ﬁasco that results not from Enron-style corrupt management but from ineffective management and incentives that operate at lower levels of the company that in retrospect seemed almost inevitable to produce wrongdoing,” says Samuel W. Buell, the Bernard M. Fishman Professor of Law. Before entering academia, Buell was the lead prosecutor on the U.S. Department of Justice’s Enron Task Force, which brought charges against more than 30 individuals following the energy company’s collapse, including its top two executives. As the 2008 ﬁnancial crisis unfolded and details emerged about the wrongdoing that precipitated it, which Buell describes as a “risk ﬁesta,” he was struck by the fact that the investment bank Lehman Brothers had used an accounting trick to hide its mounting debt as it spiraled towards bankruptcy, just as Enron had a decade earlier. “The unprecedented vanishing of America’s seventh-largest company in 2001,” he writes in his new book, Capital Offenses: Business Crime and Punishment in America’s Corporate Age (W.W. Norton & Co. 2016), “the severe prosecutions with long prison times, the bitter congressional hearings, the regulatory reforms — none of it did anything to stop this. Enron was only a single canary in the cavernous coal mine of America’s ﬁnancial markets. From the bird’s death, nobody had learned a thing.” The limits of the law Buell has focused his teaching and scholarship on criminal law and the regulatory system, recently emphasizing how the criminal justice system treats corporations and white-collar offenders. To him, a key limitation that prosecutors face in cracking down on business crime is the law itself, speciﬁcally how society applies criminal law to business, an activity that is not inherently in conﬂict with our morals or values (unlike, say, robbery). In the zeal to prevent and punish wrongdoers across the economy, Congress has enacted many laws and regulations, he says. But there are still many unseemly behaviors that are tolerated in business, sometimes because they are not deemed harmful enough to outlaw, sometimes because they are considered an acceptable by-product of a desired behavior, sometimes because the law hasn’t yet caught up with them. And companies often incentivize their employees to get as close to the legal lines that exist as they can — without stepping over them. Consider a “run-of-the-mill” white-collar crime, such as bribery or collusion. In a large corporation, it isn’t always easy to establish the fundamental requirement for culpability in our legal system, intention, particularly among managers or executives whose decision-making is far removed from the criminal act. And, Buell says, monitoring business actively closely enough to ensure blame can be established when wrongdoing happens would require an intrusion in the economy that our capitalist system would not abide. Add to that the higher standards for evidence in criminal court than in private lawsuits, the fear of the systemic impacts of dealing a blow to a company’s reputation or taking it down altogether, and the substantial discretion that federal prosecutors enjoy to pass on cases that they don’t think they can win, and the limitations of the law to address corporate malfeasance become apparent. Buell cites fraud, which he calls “a simple idea with endlessly complex manifestations,” as the classic example of the challenges in prosecuting business crime that are inherent in the law itself. We all know what fraud is at its heart, he says: deception with the intent to gain something that doesn’t belong to us. But the law of fraud leaves it to the courts to decide what constitutes intentional deception and what, in the context of business, is just aggressive marketing. And while fraud can be applied to all manner of business activities, actually proving it can be quite difﬁcult, even in cases where it seems all but certain to an outsider. An area of law that is both ﬂexible and unstable can cause problems for those tasked with applying it. In the notorious mortgage-backed securities transactions that helped create the ﬁnancial crisis, banks sold ﬁnancial products based on subprime home loans despite knowing that a crash in the housing market was imminent and would render many of those loans insolvent. While that might look like deception to an outsider, Buell points out that prosecutors have uncovered little hard evidence that banks intended to deceive customers regarding securitizations. And, he argues, the traders who bought those securities were sophisticated enough to have known the risks they were taking, that they could lose a lot of money, and that big losses might threaten the stability of their banks. “Unless the seller of the security lied about the nature or quality of the mortgages underlying the product, even the late-in-the-game player who was still buying when the rest of the world was selling is dumb but not defrauded,” he says. For Buell, the crash of that market, and its ultimate cratering of the global economy, was not the result of widespread criminal fraud, as many allege. Instead, he says, it was banks taking on too much risk and operating under too little regulation in their marketing of complex products that, while difficult for ordinary investors to understand, were not on their own illegal (not unlike Enron’s obscuring of its indebtedness, which also wasn’t deemed criminally fraudulent). Many in the government and private practice agree, which is why the suggestion of locking up Wall Street CEOs for defrauding investors is so often met with eye rolls. The evidence simply doesn’t support such a proposition, and in at least one recent case, a civil mortgage-fraud suit the Justice Department brought against Bank of America and one of its executives, an appellate court agreed, throwing out a judgment in May. “In my experience over the 30 years of my practice, I think that fraud really plays a much smaller role in financial crises than people like to think,” says Michael H. Krimminger ’82, a partner at Cleary Gottlieb in Washington who served as general counsel of the Federal Deposit Insurance Corporation from 2010 to 2012 and earlier was a deputy to the chairman for policy. “This crisis was based upon a combination of factors and a failure of the market, failures of the regulators, failure of some of the market structures, and failures of some of the types of securitization structures. It was principally a product of the usual things that create crises: too much risk and the failure to accurately price the risk. As a result, people aren’t paying enough for the risk and therefore things continue to get riskier and riskier and riskier and eventually it collapses. That to me is the much bigger story rather than fraud.” Placing blame Of course, that hasn’t stopped the banks from paying massive settlements to the government to put probes of their crisis-related activities behind them. Krimminger, who spent 21 years at the FDIC and now helps large U.S. and international banks navigate the post-crisis legal and regulatory landscape, says the proliferation of fines and penalties has had an enormous impact on the conduct of management and employees within financial institutions. These include $16.65 billion paid by Bank of America, $5 billion paid by Goldman Sachs, and more than $23 billion paid together by Citigroup, J.P. Morgan Chase, and Morgan Stanley. In September, the Justice Department announced its opening bid in talks to settle its claims against Deutsche Bank: $14 billion. “I think many, many institutions have made tremendous progress both in the way they compensate people as well as in the way they train people, because frankly, it’s become an enormous, expensive tax,” Krimminger says. “Some of the fines and penalties that have been imposed on institutions in the last five years are so much greater than any fines and penalties that have ever been imposed in the past, that it has gotten people’s attention, as it should.” Increasingly, the government is settling criminal claims through deferred prosecution agreements (DPAs). Once a way for low-level drug offenders to avoid incarceration by accepting probation, in the early 1990s, corporations began negotiating DPAs that allowed them to escape conviction by accepting liability, paying a hefty ﬁne, and cooperating with the government. Typically, “cooperation” has meant the company conducts a wide-ranging internal investigation to ascertain what went wrong and who was at fault, sets forth a plan of reform, and submits to a government-designated monitor to ensure compliance. DPAs have become a staple of white-collar cases and the vehicle by which the government has settled cases against many of the major banks as well as giants in the auto, pharmaceutical, energy, technology, and aviation industries. A Manhattan Institute report found that the government negotiated 303 DPAs and NPAs (non-prosecution agreements) between 2004 and 2014, and 16 of the Fortune 100 were under one in 2015. But defense attorneys complain that they represent nothing short of a threat — cooperate or die — and invite prosecutors into the executive suite to dictate how their clients reform. And scholars have noted that their proliferation has put prosecutors into the role of regulator, with little oversight. “They can be frankly life-threatening and not always advantageous to shareholders either,” says Tom Hanusik ’90, an Enron prosecutor at DOJ and senior counsel in the SEC’s Division of Enforcement who is now co-chair of the white-collar and regulatory enforcement group at Crowell & Moring in Washington. “When DPAs get challenged, which has happened a few times, there are a few judges who really put the government to the task of demonstrating why certain types of agreements are in the public interest and I think when you see a little more of that we’ll see the government being more careful in how and when it applies them.” But to others, the deals the government cuts are too often toothless and inefﬁcient, overly friendly to business, and a “get-out-of-jail-free” card for penitent CEOs. It would be better, say critics such as Judge Jed Rakoff of the U.S. District Court for the Southern District of New York, to limit criminal charges to individuals and corporate liability to civil claims.

## Modeling

### Trump Kills Cred

#### No modeling – Trump isn’t respected.

Roberts 17 (June 5th, 2017, William Roberts is a staff writer at Al Jazeera, “Decoding Donald Trump's foreign policy,” http://www.aljazeera.com/news/2017/06/decoding-donald-trumps-foreign-policy-170605220035165.html)

Washington, DC - In the opening foreign policy acts of Donald Trump's presidency, he is defining American interests much more narrowly than past US leaders and is championing economic nationalism over international cooperation, drawing sharp and mocking criticisms both at home and abroad. Following a blundering first trip overseas trip, Trump announced a unilateral decision to withdraw from the US-sponsored Paris climate accord. He criticised the mayor of London on Twitter following the attack over the weekend, and in the US renewed his call for a controversial ban on travel to the United States from six Muslim countries. "We have never really seen from a Republican leader in the modern era anybody as completely isolationist and anti-cooperation as Donald Trump," said David Victor, professor of international relations at the University of California, San Diego. "There is no question that the Trump presidency is going to accelerate the American exit from its international leadership, institution-building role. That is a more dangerous world where it's harder for any individual country to muster the incentives to go off and build effective international institutions. It's a world that is going to be a whole lot less cooperative," Victor told Al Jazeera. Analysts see a president who is deeply unpopular in the US. To remain in power, Trump needs to secure his right-wing political base. That means delivering on campaign promises. Trump's chief political strategist in the White House, his campaign adviser Steve Bannon, is an ardent advocate for Trump's "America First" approach. It's a winning message among disenfranchised workers in the rural US who provided Trump with his margin of victory in 2016. Add to that, Trump appears to have a highly narcissistic personality that drives him to invite constant ratification of the legitimacy of the election, credit and respect from the people around him. That makes it difficult for cabinet secretaries to tell him he's wrong. "It's troublesome. You can't talk about it in any quantifiable, definitive sort of way, but we have to be honest with ourselves, this is an unusual leader. He does have authoritarian instincts. This level of narcissism colours his behaviour and his choices," said Jeffrey Gemin, a senior fellow The Atlantic Council and an expert on the Trans-Atlantic relationship. The pressure on Trump to deliver for his voters is amplified because in many respects he has failed so far to produce real results in a number of key political initiatives. His push to repeal and replace Obamacare, the US' health insurance exchange markets established under former President Barack Obama, failed early tests in Congress. Tax reform legislation is delayed. His executive orders, particularly the Muslim travel ban, are tied up in litigation. Worse for the White House, the FBI and Congress are investigating his campaign ties to Russia. This week, former FBI Director James Comey will testify before a Senate committee for the first time since Trump fired him in an ill-advised move to ease pressure from the Russia investigation. Democrats in Congress will use the scandal to stymie Trump's policy agenda. "None of Trump's foreign policy moves seem to hook up much together other than he seems to be checking off some of his campaign promises," said Richard Longworth, a distinguished fellow at the Chicago Council on Global Affairs and an expert on the Cold War, NATO and globalisation. Trump's speech at the new NATO headquarters in Brussels was not well received. It was an opportunity for the new American president to thank NATO members for their support following the September 11 attacks and speak to NATO's loftier goals of peace and stability. Instead, Trump chose that moment to pressure allies to increase their defence budgets. "That was really a problematic speech. It just displayed bad manners. The entire speech was inappropriate," said Cecile Shea, a former US Department of State Foreign Service officer in the Asia Pacific who specialises in international communications. "You could see it, watching the other leaders standing around, how uncomfortable and embarrassed they were that he was saying those things in this setting," Shea told Al Jazeera. Trump was unprepared to engage in substantive discussions at the G-7 summit in Taormina. Behind closed doors, he signalled an unwillingness to commit to a declaration on climate action and said he was still undecided. German Chancellor Angela Merkel expressed her distress afterwards. "We have to know that we must fight for our future on our own, for our destiny as Europeans," Merkel said in remarks describing the G-7 talks with Trump as "difficult and unsatisfactory". Upon his return to Washington, Trump and his White House team organised a grandiose Rose Garden event to announce his decision to withdraw from the Paris accord. "The rest of the world is actually looking at this and wondering, you know, what's leaked in the water supply at the White House," Victor said.

## Student Journalists

### N/Q

#### No inherency – there already is a precedent for student journalists receiving reporter privilege in cases of confidential sources

Peters et al ’17 Peters, Jonathan. [University of Kansas]. Belmas, Genelle. [University of Kansas]. Bobkowski, Piotr. [University of Kansas]. “A Paper Shield? Whether State Privilege Protections Apply to Student Journalists.” Fordham Intellectual Property. Vol 27, No 4, Article 2. 2017. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1667&context=iplj>. TG

It is worth noting that there are federal cases involving student journalists that could enable other people similarly situated to claim a privilege in those jurisdictions, despite the lack of a federal statute. These cases could be used as persuasive authority, even in state courts. For example, in Silkwood v. Kerr-McGee Corp., the Court of Appeals for the Tenth Circuit recognized a reporter’s privilege for a former freelance journalist who enrolled in the University of California, Los Angeles, film department, where he investi- gated the death of activist Karen Silkwood for a documentary.184 The company accused of causing Silwood’s death subpoenaed the student journalist to compel him to produce his notes related to the investigation. After considering whether the privilege extended to someone who is not a “regular newsman,” the court applied a First Amendment-based privilege, concluding that the student undertook investigative reporting for the preparation of a documentary film.186 The court recognized that, though the student was not a salaried reporter, he had a legitimate interest in protecting the fruits of his labor.187 The court also noted the irony of the company’s argument that the student should be denied the privilege because he lacked journalistic qualifications, in the face of the great efforts the company expended to obtain his work product.188 Additionally, the District Court for the Western District of New York granted a qualified privilege to a law student writing for a law school newspaper on a volunteer basis who was subpoenaed by a former law professor challenging his termination.189 In Blum v. Schlegel, the terminated professor sought the recording of an interview that the student had conducted with the associate dean.190 Though New York has a shield law,191 the court ruled that the evidence sought was relevant to federal constitutional violations alleged in the professor’s complaint, and thus the privilege would be governed instead by federal common law.192 Considering the plaintiff’s argument that the privilege does not apply to a law student because he does not qualify as a “professional journalist,” the court stated that this point is irrelevant because the federal privi-lege is broader than the state shield law.193 Instead, the proper inquiry is “how the person asserting the privilege intended to use the information gathered.”194 If the information was gathered for the purpose of dissemination, the court said, the privilege should be available.195 In another federal case in New York, Persky v. Yeshiva University, the Southern District applied a First Amendment-based privilege to a student journalist who reported on a university employee’s claim that the institution had discriminated against her on the basis of religion.196 The plaintiff tried to compel the student journalist to reveal their confidential sources and notes,197 but the court applied the privilege to the student based on the Second Circuit’s von Bulow opinion and the Western District of New York’s Blum opinion.198 The court said the student journalist promised his sources confidentiality and gathered all of the relevant information with the intent to disseminate it.199 Thus, he could claim the privilege.

### Alt Cause

#### Can’t solve - administrators model Trump’s anti-press platform and censor specifically political and socially controversial student journalism.

Peters 17 [Jonathan Peters,, 1-23-2017, "Student journalists especially vulnerable to Trump's press-as-enemy rhetoric," Columbia Journalism Review, <http://www.cjr.org/united_states_project/trump_students_press_media.php?Newsletter&ct=t(Top_Stories_CJR_new_Jan_26_1_25_2017)>] hw ee lol

In some ways, student journalists will face the same challenges as professionals. First, through executive orders and the Department of Justice, Trump will be able to shape the Freedom of Information Act’s implementation and the substantive arguments the government makes in FOIA litigation. Professionals may be heavier FOIA users than students, but the burdens of any FOIA changes will fall on both groups. Second, Trump could crack down on public affairs reporting, most likely in the national security area—if the DOJ, for example, prosecuted leakers under the Espionage Act and subpoenaed journalists to supply information. This would disparately impact professional journalists, easily the primary source of US national security reporting. But these efforts, along with Trump’s ceaseless condemnation of the press as the enemy, could create or feed an environment in which press and speech restrictions are seen as acceptable or even desirable, eroding the legal and cultural independence the press needs to play its democratic role. The student press is especially vulnerable to that kind of erosion. In public schools at the K-12 level, it’s settled law that student journalists have lesser First Amendment protection than, say, adults in non-school settings. The 1988 case Hazelwood v. Kuhlmeier is the main reason. The Supreme Court ruled in Hazelwood that a school newspaper produced as part of a class may be regulated by administrators if three conditions are met: the regulation is neutral with regard to viewpoint, there is a reasonable educational justification for it, and there’s no policy/practice establishing the paper as a public forum for student expression, which effectively means that administrators have allowed students to make unrestricted use of the paper for journalistic and expressive purposes. Since Hazelwood was handed down, schools have used it to legitimize all manner of press restrictions, and it’s not hard at all to imagine an administrator finding inspiration in Trump’s anti-press rhetoric—and lo, here’s a case readymade to restrict student press coverage of controversial issues. That’s a big problem because student journalists have filled in gaps created by the traditional media’s decline, playing a vital role in meeting their communities’ news needs. Just last week, Michigan high schoolers pressed Gov. Rick Snyder about his endorsement of Betsy DeVos for education secretary. And looking back, to note a few other examples, New Jersey high schoolers once revealed serious misconduct complaints against a superintendent, and national outlets at first relied on coverage by student journalists during the Mizzou protests. At the college level, the headache here is that as student journalists are making increasingly important contributions through their reporting (in at least four states, there are more students covering state legislatures than professionals), the federal courts are curtailing their speech and press rights. And, once again, Hazelwood is the main reason. Although it involved high school student speech, recently it has been applied to college student speech as well. Four federal appeals courts, covering 16 states, have extended Hazelwood to college campuses. Meanwhile, the Supreme Court hasn’t clarified whether it’s proper to apply Hazelwood to college journalists, and it’s unclear how Trump’s yet-to-be-named nominee, expected to be highly conservative, will affect the vote in student-speech cases generally. On the one hand, the nominee will replace Scalia, who supported school authority in such cases, and the rest of the conservative bloc is unchanged from the court’s last student-speech case, in 2007, in which the bloc voted together. On the other hand, that case involved speech at a school-supervised event that allegedly promoted the use of illegal drugs. In a case involving speech of a higher order, there’s a chance of winning over certain justices, perhaps Roberts, whose free speech record is otherwise strong, or Alito, who wrote a concurring opinion in the 2007 case stressing that it didn’t apply to broader social or political speech. The same thinking would apply to the court’s new member, who might be reachable in the right case. At any rate, fulfilling a community’s news needs means covering a range of public issues that might upset university administrators, and Hazelwood is a complicating factor. The case says that administrators may censor articles that “associate the school with any position other than neutrality on matters of political controversy.” That’s clearly irreconcilable with much of public affairs reporting and commentary. But the problems don’t stop with Hazelwood. There’s another reason the student press is especially vulnerable to erosions of independence: the reporter’s privilege. A recent study I conducted with my University of Kansas colleagues Genelle Belmas and Peter Bobkowski found that most states do allow journalists to shield confidential sources and unpublished information in some circumstances, but those protections usually do not apply to student journalists—either because students don’t qualify for them, or because the qualifying criteria are unclear enough that student journalists couldn’t claim protection with any confidence. All told, we have a student press being asked to do more with less—to produce stories that inform their communities, while hamstrung by Hazelwood and lacking privilege protections—at a time when the president talks about journalists as if they’re incarnations of Kylo Ren. That’s untenable, but what can be done? If student journalists are to continue making significant contributions, federal courts must stop curtailing their First Amendment rights, and state legislatures need to repair damage already done by the courts. They should follow the lead of states that have enacted laws, some of them long ago, to protect student journalists by granting them rights beyond those guaranteed in Hazelwood. Right now, in fact, the Student Press Law Center campaign New Voices USA is lobbying nationwide for such legislation, and four state bills have been filed just since the start of 2017. (Disclosure: I occasionally represent student journalists through the SPLC, but I’m not involved in the New Voices campaign.)

## Reactors

### Impact D

## ILaw

### Impact Defense

## Rape Victims

### Victim Risk

#### Giving the reporter power over the victim’s identity puts the victim at risk of having to deal with harmful publications they don’t consent to.

Fishbein ’85 (Ellen B.. “Identifying the Rape Victim: A Constitutional Clash between the First Amendment and the Right to Privacy, 18 J. Marshall L. Rev. 987 (1985).” The John Marshall Law Review Volume 18 | Issue 4 Article 10 Summer 1985. https://repository.jmls.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2220&context=lawreview)

Since 1963, the unwarranted publication of a rape victim's name has constituted the basis of a tort action for invasion of personal privacy, namely, the public disclosure of a private fact.6 Beginning in 1975, however, where the reported rape is of public record, the victim's right to anonymity is foreclosed. 7 Thus, based on the Supreme Court's holding in Cox Broadcasting Corp. v. Cohn,8 the rape victim is twice assaulted: once as the victim of a sex crime and then as the victim of a callous and impractical press.9 Although courts generally recognize the rape victim's right to be free from humiliating and harmful publications of her name, it is a right of privacy that often goes unprotected because of the first amendment guarantee of freedom of the press.10 Moreover, the Constitution does not mandate media responsibility." In light of the media's power to exercise its constitutional privilege to publish facts of public record, the rape victim must frequently rely on the discretion and judgment of those persons who decide what information to print or broadcast.12 The rape victim should be afforded a premium of protection because of the adverse impact that ensues when her identity is disclosed. 13 It is evident that there is a need to reconcile the constitutional privilege afforded the press with the privacy rights afforded the rape victim.

# Phil

## Civic Repub

### FW

### FW – Util

### Turn – Constitutionality

#### Attempting to have the Court delineate who counts as a reporter guts aff solvency and violates the First Amendment – it’s the “single strongest objection” to reporter’s privilege

Jones, 13 -- Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University [Ronnell Andersen Jones, “RETHINKING REPORTER'S PRIVILEGE,” Michigan Law Review, Vol. 111, No. 7 (May 2013), pp. 1221-1282, <https://www.jstor.org/stable/23812857>]

By its very designation, a constitutional reporter's privilege applies only to a "reporter," and thus mandates a threshold showing that the party seeking the constitutional protection qualifies occupationally for the privilege. Even assuming that this determination was one that could have fairly been made four decades ago—an assumption the Branzburg majority flatly reject ed111—it is a task that has now become complicated to a degree of near impossibility,112 especially as technological changes have altered the primary mechanisms for gathering and disseminating news.113 Because "[preferential treatment of the press requires some definition of the intended beneficiaries," it seems clear that "[i]n a world in which many, if not most, business entities are information providers, it [will not be] easy to determine which of them are press."114 As "[established news media are disappearing or morphing into forms indistinguishable from new media that are anything but established,"115 the Branzburg focus on the journalist has "led to a kind of definitional football over whether ... it is possible to define the press with sufficient specificity and whether it is prudent for one class of speaker to be preferred over another."116 These concerns of prudence and specificity resonate throughout the case law and scholarship on this topic. On the question of prudence, our most basic constitutional principles seem to dictate that we avoid differentiating between categories of similarly situated speakers, particularly on less than clear bases.117 Even assuming that factors such as the social or democracy-enhancing value of the disseminated information could be used to limit the privilege,118 these content-based determinations run the real risk of themselves violating the First Amendment.119 More to the point, a Court-declared delineation of this sort "as a matter of First Amendment interpretation would fly in the face of more than two hundred years of constitutional wisdom," because "[t]he idea of defining or 'licensing' the press in this manner is anathema to our constitutional traditions."120 Thus, while perhaps expected and even appropriate when de signing the contours of a reporter's privilege as a statutory matter,121 this definitional line drawing is at best knotty as a basis for a constitutional doctrine. On the question of specificity, judges faced with applications of the reporter's privilege have repeatedly bemoaned the "vexing nature of [the] question" of who would be entitled to a reporter's privilege.122 Judges have noted, in particular, that "[t]he proliferation of communications media in the modern world makes it impossible to construct a reasonable or useful definition of' a reporter.123 Judge Sentelle of the D.C. Circuit outlined the conundrum: Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not?124 Faced with this technological moving target, scholars and jurists have spilt gallons of ink setting forth proposed definitional approaches, ranging from exceptionally narrow classifications that would essentially include only professional journalists at established traditional media outlets,125 to very broad ones that would extend the privilege to any person performing the basic functions of a reporter.126 Some courts addressing the definitional issue in "cases involving traditional media entities have been so worried about the expansive scope of the privilege that they have been throwing the baby out with the bathwater and refusing to recognize the privilege at all."127 It is no exaggeration to say that the "futility of trying to decide as a matter of constitutional law who should have the right to protect confidential sources" is "[t]he most compelling objection to" a constitutional reporter's privilege with a Branzburg journalist focus.128 All told if the only constitutional framework available for assessing the flow of confidential information to the public is one that focuses on the reporter, the doctrine is destined to be mired in definitional difficulties in at least some cases, and likely in a growing number of them.

#### Constitutionality turns the AC—the aff author agrees

Pettit 12

Pettit, Philip (Professor at Princeton). “On the People’s Terms,” 2012, 352.

The first idea, unsurprisingly, is that the equal freedom of its citizens, in particular their freedom as non-domination – the freedom that goes with not having to live under the potentially harmful power of another – is the primary concern of the state or republic. The second is that if the republic is to secure the freedom of its citizens then it must satisfy a range of constitutional constraints associated broadly with the mixed constitution. And the third idea is that if the citizens are to keep the republic to its proper business then they had better have the collective and individual virtue to track and contest public policies and initiatives: the price of liberty, in the old republican adage, is eternal vigilance.∂ The mixed constitution was meant to guarantee a rule of law – a constitutional order – under which each citizen would be equal with others and a separation and sharing of powers – a mixed order – that would deny control over the law to any one individual or body. The contestatory citizenry was the civic complement to this constitutional ideal: it was to be a citizenry committed to interrogating all the elements of government and imposing itself in the determination of law and policy. These institutional measures were taken to be essential for organizing a government that would promote the equal freedom of citizens without itself becoming a master in their lives – in other words, that would protect against private forms of domination without perpetrating public forms.2

### Turn – Balancing Powers

#### Journalist’s privilege gives the executive branch significant power over other branches.

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Given the potential for abuse, providing any federal official with an indirect testimonial privilege is grounds enough for a structuralist critique of a federal statutory journalist’s privilege. Such a privilege necessarily expands the power of the federal government by shielding, in many cases, its officials from effective investigation and accountability in the courts. n126 But an equally compelling case can be made that, should a federal statutory journalist’s privilege be adopted, the executive department would almost ex- clusively benefit, thus giving even more power to an already powerful branch. This is undesirable from a structuralist perspective, given the modern executive’s existing ad- vantages over the coordinate branches of government with respect to media relations and message dissemination.

#### That links to the standard – civic republicanism requires an equal system of checks and balances.

**Pettit 13** “Two Republication Traditions” by Philip N. Pettit in Andreas Niederberger and Philipp Schink, Eds, Republican Democracy: Liberty, Law and Politics, Edinburgh University Press, Edinburgh, 2013, 169-204 // OHS-AT

The first idea is that the equal freedom of its citizens, in particular their freedom as nondomination – the freedom that goes with not having to live under the power of another – is the primary concern of the state or republic. The second is that if the republic is to secure the freedom of its citizens then it must satisfy a range of constitutional constraints associated broadly with the mixed constitution. And the third idea is that if the citizens are to keep the republic to its proper business then they had better have the collective and individual virtue to track and, if necessary, contest public policies and initiatives: The price of liberty is eternal vigilance. The mixed constitution was meant to guarantee a rule of law under which each citizen would be equal with others, a separation and sharing of powers that denied control to any one governing individual or body, and a degree of representation, whether by rotation or lottery or election, that gave each sector a presence in government. The contestatory citizenry was the civic complement to this constitutional ideal: It was to be a citizenry committed to interrogating the other elements of government and having its own say in the determination of law and policy. These institutional measures were taken to be essential for organizing a government that would promote the equal freedom of citizens without itself becoming a master in their live – in other words, that would protect against private domination without perpetrating public. Freedom as nondomination, the mixed constitution and the contestatory citizenry were all represented in Roman republican thought and practice, and they were articulated in different ways among the many writers who identified with Roman institutions (Wirszubski 1968). These authors included the Greek historian, Polybius, the orator and lawyer, Marcus Tullius Cicero, and the native Roman historian, Titus Livius or, as we know him, Livy. While they drew on earlier Greek sources, including Plato and Aristotle, they were united in the belief that it was Rome that first gave life and recognition to the key republican ideas.

### A2 State Secrecy Contention

#### 1] Turn – confidentiality is unreliable and hinders truth telling

Edward Wasserman 05 [A Critique of Source Confidentiality, 19 Notre Dame J.L. Ethics & Pub. Pol'y 553 (2005).]

III. CONFIDENTIALITY SCRUTINIZED

PROTECTING SOURCES: Source confidentiality's most obvious function is to shield informants from potential harm. "Source protection" has an ethical ring to it, but journalists do not, by and large, recognize any generalized obligation to look out for the well-being of their sources. I think the silence of journalism ethics in this regard is regrettable. After all, many people who come forward with information are apprehensive, naive, and ripe for exploitation. Unsophisticated sources may unwittingly say things that expose them to ridicule, trusting the amiable and knowledgeable reporter who is encouraging their candor to warn them when they cross the line. 7 Too, a source may be vulnerable, and the relationship may develop in ways similar to some lawyer-client and doctor-patient relationships, with the informant susceptible to improper, extra-curricular approaches from the reporter. 28 Nevertheless, the boundary of journalistic solicitude for the well-being of sources is defined by the reporter's desire to preserve the conditions under which accurate information can be gathered. It follows that a reporter is more protective of an informant's interests if the source seems likely to be useful in the future. That implies greater consideration for officials and other consistently valuable informants. Sources are awarded protection based not on their needs, but on their abilities. CONFIDENTIALITY AS SOURCE PROTECTION: It follows that although confidentiality may protect a source, journalists accept no freestanding obligation to withhold an informant's identity even if they believed-or would believe, if they gave it any thought-that secrecy would be in the source's best interests. A reporter would not, for example, urge a source to demand concealment if the reporter understood-and the source did notthat exposure could be perilous. Confidentiality is nothing more than a valuable information-gathering technique; its claim to ethical standing derives solely from the enhanced information its judicious use brings to the public. It does not reflect an obliga- tion owed to the source, unless the source insists on it as a condition of providing that information. In that regard it is a technique of source self-defense, which the reporter accedes to and does not proffer.2 9 If instead the journalist did recognize an independent ethical duty to the informant to withhold the source's name if disclosure might be harmful, the source would not need to demand anonymity. That is not the case. In fact, journalists are typically admonished to grant confidentiality only if necessary.3" Confidentiality is part of a negotiation over the release of information and owes its ethical standing to the quality of the information it makes public-and to its being secured by a promise. In a moment we will look at the curious ethical status of that promise. CONFIDENTIALITY AS INCONSISTENT WITH OTHER OBLIGATIONS: Certain kinds of reporting routinely incorporate routine reliance on informants who will not talk unless they are assured of anonymity.3 1 Although sensitive political and governmental stories are the areas that first come to mind, business and financial news-especially coverage of closely-held companies, professional firms and the like-would be difficult if not impossible to assemble without source concealment. Yet confidentiality poses ethical conflicts, chiefly because it may clash with two professional norms: accountability and verifiability. 2 The result may impede truth-telling. Accountability involves an obligation to ensure that the ledger of significant actions and assertions be reported publicly in such a way that their authors are linked to them. Confidentiality enhances accountability when it helps expose subterranean agreements, decisions, and actions that would otherwise go unreported. But secrecy may also hinder accountability by interposing the journalist between informant and public, and preventing third-parties from challenging sources over inaccuracies, indiscretions, or lies. It may also scrub the record clean of grudges and personal agendas that have bearing on the information, and thereby prevent dishonest or tainted informants from being exposed as such. Verifiability, which is the closest journalism comes to offering a functional equivalent to the standards of social science, usually is premised on associating information with the person who provides it. That enables third-parties to determine that the words were spoken, just as reported, by the person who was said to have uttered them. Here again, confidentiality may impair accuracy. It can impede testing the truthfulness of information; nobody else can phone the reporter's secret source to confirm, refute, or modify the original information. Anonymity, USA Today founder Al Neuharth observed, enables sources to say more than they know and reporters to write more than they hear.33 THE ETHICS OF THE CONFIDENTIALITY PROMISE: It is understandable that press commentators should be adamant about the importance of journalists' honoring their word. After all, promise-keeping is a square-sounding maxim that seems to go to the white-hot core of truth-telling that is journalism's noblest mission-and to the credibility that is its greatest contemporary challenge. Still, the morality of keeping a promise is logically dependent on the morality of the conduct that the promise is meant to secure. It would be hard to defend a promise to commit murder as an ethical one unless the murder itself was warranted. The morality of that promise could not rest solely on the notion that failing to honor it might cause others to doubt one's resolve to keep non-homicidal commitments. Imagining confidentiality agreements that a journalist ought to break is not hard. Suppose exposing an informant would save a life, prevent a serious crime, or free an innocent prisoner. The argument for guarding those secrets seems grounded largely in concern for the reputational harm the journalist might sustain by burning the source, and whether that might cripple his or her future effectiveness. That is not chiefly an ethical calculation, however; it is an operational one.3 4 There is, in short, nothing about promise-keeping in itself that privileges it above such maxims as telling the truth, avoiding unnecessary harm, respecting privacy, and other imperatives that journalists embrace as professional norms. Breaking a promise might simply make it difficult for the journalist to continue practicing a certain kind of journalism. What if the source is breaking the law? Is the confidentiality promise still binding? There is a tradition of judicial reluctance, under certain circumstances, to enforce contracts that are contrary to law or public policy.3 5 It might be argued that the alleged illegality of the Plame disclosure thus trumps any other question about its ethical status.3 6 Under that logic Novak should not have made the agreement because he thereby colluded in-indeed, was the instrument of-an illegal act. While that might be valid as a matter of law, it is not helpful as a question of ethics which, in part, is in the business of sorting out what the law should be.3 7 This reasoning also would have barred Neil Sheehan of the New York Times from helping Daniel Ellsberg release the in-house history of the Vietnam War known as the Pentagon Papers in 1971.38 It would leave us unable to distinguish genuinely toxic disclosures from unauthorized releases of vital information that expose important governmental wrongdoing, and which violate only ill-founded secrecy laws intended to save officials from embarrassment. Plus, as a practical matter, basing moral judgments on apparent legalities would reduce ethics to speculating about how judges, juries, and appeals courts may eventually rule. In this case, as noted, outing Valerie Plame may not have broken any law, in that her exposure was not intended to subvert U.S. intelligence operations but to illuminate the reasons behind an act of non-classified, public agency decision-making. CONFIDENTIALITY AS A TOOL OF PROMISE-BREAKING: The paradox of the journalist's confidentiality agreement is that it often represents not only a promise, but a critique of promise-keeping. That is because it is frequently a device to provide cover for informants so they can break prior agreements of their own with impunity. Its claim to superior ethical standing rests on a presumption that all promises do not have equivalent moral weight. Why do reporters promise confidentiality? Informants may sometimes insist on anonymity simply to avoid the awkwardness that may come with notoriety. They may have personal reasons to keep out of the news. They may not want to spend time fending off other reporters once they are named publicly. Perhaps they are settling scores and do not want their targets to know the origin of the attack. Sometimes they are sharing painful and intimate experiences-sickness, poverty, the death of loved onesand would not do so if they were to be identified. But often, especially when the stories involve insider news from powerful institutions, sources insist on confidentiality because they are betraying prior commitments by giving away information that they have agreed, sometimes explicitly, to keep private. The journalist's secrecy pledge is, in this respect, an offer to shelter the informant from the consequences of dishonoring agreements of his or her own. It is a promise meant to induce promise-breaking. So, implicit in the confidentiality agreement is the insight that not all promises are equal. The conscience-stricken executive decides that his or her duties to the corporation, which certainly involve discretion and may also oblige silence, are less important than disclosing accounting chicanery or environmental felonies. The whistle-blower demands one promise from the reporter to enable him or her to break another to the corporation. The ethics of that exchange have much to do with the weight attached to such maxims as truth-telling and affirming community norms, as compared with employee loyalty and, yes, promise-keeping. CONFIDENTIALITY PRIVILEGES SOURCE RELATIONS: Source confidentiality necessarily privileges the relationship of reporter to informant over the relationship of reporter to public. That is not only because reporter and source agree-conspire, really-to keep to themselves, for reasons internal to their transaction, information that would normally be made public. It is also because the journalist-instead of presenting supporting information to authenticate a report and maintaining the usual professional stance as skeptical interlocutor-lines up alongside the unnamed source in asserting the information's truthfulness, while denying the public any independent way to evaluate whether that truth claim is valid. The reporter invests reputation in the information; correcting it if it proves inaccurate becomes especially awkward, since that correction involves repudiating a source who has never been identified and may require the jour-nalist to admit to having been taken.3 9 That makes fixing mistakes harder, which impedes truth-telling. Still, those risks may be worthwhile if the pledge creates a protected refuge for individuals who otherwise would not come forward with sensitive and publicly important information. The test, when confidentiality is analyzed by which relations it privileges, is whether the flow of significant news is facilitated. Is the journalist empowered or neutered? Is the main beneficiary the public-in which case the reporter is functioning as its goodfaith proxy-or the shielded source? These are qualitative assessments, which require looking at the information sought, obtained, and withheld. As noted earlier, confidentiality means some information is kept back so that other information can be published. The rightness of the arrangement cannot be appraised withoutjudging whether the bargain between concealment and publication has been struck so as to benefit public enlightenment-rather than, say, easing access to news outlets for powerful insiders who have intrigues to pursue, or burnishing the credential of a particular reporter as a trustworthy courtier in the demimonde of palace politics. CONFIDENTIALITY AND TRUST: Finally, I suggested earlier that confidentiality can be examined in terms borrowed from Annette Baier's thoughtful analysis of trust relationships. The relationship between journalist and public seems to comport more satisfactorily with Baier's description of trust than with a more contractarian model. That is, the relationship is one of a generalized reliance that is not formal or explicit and is not specific as to what particular behavior it covers; nor is it between parties of roughly equivalent power. Here it is built on the public's expectation that journalists will use their best judgment to gather and present an honest rendering of information that they believe the public needs to have. Baier suggests that the morality of a trust relationship can be assessed by applying what she terms the expressibility test: Would the relationship withstand having its foundations laid bare? The hard-charging executive who trusts her chief aide without reservation because she secretly believes the assistant is too unimaginative to pose a threat-that is not a morally robust trust relationship and would crumble if its premises were articulated. Similarly, Baier's expressibility test is a promising way to examine a confidentiality agreement. A source who bases his reliance on the courage and honesty of a reporter enters into a morally different relationship than does one who relies on an avowedly partisan journalist's gullibility and blind loyalty. Suppose you, the reporter, are agreeing to withhold the name of the politician who is giving you a self-serving leak because you wish to endear yourself to the office-holder and get preferential access to information in the future. Is that something you would be comfortable disclosing to your readers, or would it undermine the trust they confer on you? Naturally, applying this test raises problems. After the fact, either party to the agreement can buff his or her view of the relationship to make it morally pristine. Just as Kant could not prescribe precisely how the maxim underlying a given action might be framed as a universalized imperative,4" so this formulation is slippery and subject to abuse. But expressibility offers a place to stand in examining the ethics of confidentiality arrangements, and post-facto explanations can be scrutinized for their plausibility and reasonableness.

#### 2] The impact on info-gathering is speculative, and multiple other factors check

White 72 Byron Raymond "Whizzer" White (Supreme Court Justice; Naval intelligence officer; professional football player for the Detroit Lions; 1937 Heisman runner-up; received Rhodes scholarship to Oxford and studied at Yale Law). Branzburg v Hayes Majority Opinion. United States Supreme Court. 408 U.S. 665, 92 S. Ct. 2646, 33 L.Ed. 2d 626 (1972). JDN. https://caselaw.findlaw.com/us-supreme-court/408/665.html

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. 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 constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. 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. It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees. Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. The reporter may never be called and if he objects to testifying, the prosecution may not insist. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public. Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers, and have their own methods for protecting them without interference with the effective administration of justice. There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.

### A2 Public Mistrust Contention

#### 1] There’s tons of alt causes to mistrust in media – a) Partisanship—post-plan, people will still only trust news that confirms their political views, b) Fake news—the rise of ‘alternative’ news like Breitbart as well as deliberate disinformation campaigns means the public can’t tell what’s true even if they have access to the info, c) Smear campaigns—Trump’s already going after mainstream media like CNN for reasons entirely unrelated to confidentiality, d) Past abuse—the damage is done. The aff has no reverse causal evidence that changing the law can restore credibility.

#### 2] Turn – the aff increases state domination—it creates a shield for corrupt officials to abuse with impunity AND subverts separation of powers

Castiglione 7 John D. Castiglione (Assistant Attorney General in the Investor Protection Bureau of the New York State Attorney General; Former senior litigation associate at the New York office of Latham & Watkins LLP). "A Structuralist Critique of the Journalist's Privilege." JL & Pol. 23 (2007): 115.

Apart from the common criticisms outlined above, a more fundamental argument can be made that the adoption of a federal shield law risks shielding government officials who use confidential sourcing to effect illegal or unethical goals from accountability in the courts or by the public. In addition, a federal journalist's privilege would work almost exclusively to the benefit of the executive branch, and would fundamentally alter the balance of power between the branches. Given the existing advantages of the modern executive vis-a-vis the coordinate branches in three crucial areas related to the dissemination of information to the public (access to classified or sensitive information, access to the media, and unified message dissemination) further aggrandizement of executive power in this regard should be resisted 1. A Federal Shield Law Would Give Federal Officials an Indirect Testimonial Privilege [\*133] The Constitution, aside from Article I, section six, n118 provides for no special testimonial privileges for employees or officials of the federal government. n119 While complex issues have arisen recently as to the scope of the grand jury subpoena power over a sitting President or Vice-President, n120 it is clear that for most of the individuals comprising the staff of the White House, Cabinet departments, Congressional offices, Congressional committees, no testimonial privileges, constitutional or statutory, currently exist. A federal statutory journalist's privilege would change that. While federal officials would still be directly vulnerable to subpoena, assuming the grand jury is aware of that official's identity, reporters could no longer be compelled to produce the names of their anonymous governmental sources. This would effectively shield such officials from having to testify in cases where, in the absence of the privilege, they would have been called before the grand jury (because their identities would have become known to the grand jury through a reporter's testimony). In a situation where the source was independently called to testify - where the grand jury is not aware of (or cannot prove) the relationship between the reporter and the source (like in the situation of Scooter Libby) - a journalist's privilege would provide incentive for a government official to omit from his testimony any conversations he had with the reporter, because he could be sure that the reporter would not be forced to testify as to the content (or even the existence) of any prior conversations. This is obviously undesirable; while most government officials undoubtedly endeavor to use their confidential media communications in good faith, n121 and would probably testify voluntarily anyway, it is clear that many such communications would never see the light of day if a journalist's privilege existed. The Scooter Libby-Judith Miller affair vividly illustrated the potential for abuse of the privilege. The only information the grand jury had was that [\*134] Ms. Miller had spoken with someone in the White House about Valerie Plame, in potential violation of Section 793 of the Espionage Act. n122 Mr. Libby testified, apparently falsely, that he had not shared Ms. Plame's identity with Ms. Miller. n123 Of course, this ruse would work only if Ms. Miller testified falsely in accordance with Mr. Libby's story, or did not testify at all, in violation of the subpoena. As it turned out, Ms. Miller went to jail in lieu of testifying, keeping Mr. Libby's secrets her own. Mr. Libby later released Ms. Miller from her promise of confidentiality, after which she testified as to the identity of her source. n124 Had a journalist's privilege existed, though, things might have been quite different. Ms. Miller could have safely refused to testify as to the identity of her source, and Mr. Libby could have persisted indefinitely in insisting that he had not leaked Ms. Plame's name, without fear of Ms. Miller going to jail. It is quite possible that Mr. Libby's ruse (if indeed that is what it was) would have worked. The true nature of his conversations with Ms. Miller never would have been revealed, and a CIA agent would have been neatly outed in retaliation for her husband's criticism of the President. n125 Clearly, it is undesirable to create a vehicle for federal officials to hide behind assured anonymity in order to spread rumors, attack political enemies, hinder legitimate investigations, and potentially break the law. Of course, compelling arguments can be made that this is a necessary tradeoff for a vigorous free press. That argument will be explored in further detail in Part IV of this article. But as the Libby-Miller affair clearly showed, a journalist's privilege is potentially a very powerful tool for abuse, and one that high-level federal officials would not be afraid to use. [\*135] 2. The Executive Branch Would Almost Exclusively Benefit from a Federal Shield Law Given the potential for abuse, providing any federal official with an indirect testimonial privilege is grounds enough for a structuralist critique of a federal statutory journalist's privilege. Such a privilege necessarily expands the power of the federal government by shielding, in many cases, its officials from effective investigation and accountability in the courts. n126 But an equally compelling case can be made that, should a federal statutory journalist's privilege be adopted, the executive department would almost exclusively benefit, thus giving even more power to an already powerful branch. This is undesirable from a structuralist perspective, given the modern executive's existing advantages over the coordinate branches of government with respect to media relations and message dissemination. A. The White House Media Machine There is little debate that the modern presidency, famously dubbed "the imperial presidency" by historian Arthur Schlesinger Jr., n127 is perhaps more powerful today than at any point in the pre-World War II era. One could argue that, in the last few years, the presidency has reached a zenith of relative power in the post-Watergate era. Most recently, President Bush has asserted an even more vigorous role for the executive branch, ostensibly to effectively prosecute the "War on Terror" and the concomitant need to adjust "pre-9/11" conceptions of the separation of powers. n128 The aggrandizement of executive power is especially acute vis-a-vis the legislative and judicial branches when it comes to using the media to meet the White House's political goals of agenda setting and message dissemination. A journalist's privilege would, in a sense, lengthen the executive's already substantial lead over Congress in dealing with and controlling the media. The modern White House employs hundreds of staffers, aides, and other workers, many of whom deal extensively (some, exclusively) with the media. This, of course, pales in comparison with the millions-strong size of the executive branch as a whole, n129 which contains thousands of political appointees, and media liaisons and spokesmen at all major [\*136] departments. At each department, and at the White House in particular, contact between important executive officials and members of the mainstream media about matters large and small, important and apparently insignificant, occurs everyday. n130 Many, if not most, of these conversations are either on background, off the record, without attribution, or by moniker. n131 As we all know, "senior administration officials" and other such vaguely-defined individuals are quoted every day in newspapers across the country. n132 By sheer numbers alone, the executive branch has more to gain from the journalist's privilege; more contacts with executive branch officials will result in more confidential sourcing, which in turn will result in more protection for those sources vis-a-vis a journalist's privilege. Another reason the White House enjoys such a media advantage over Congress is the structural nature of the branches themselves. Whereas Congress is a disjointed conglomeration of 535 separate members (often working at cross-purposes), the White House is, in theory at least, a single entity able to control its image and message through coordinated media strategy. The very nature of the President as head-of-state means that presidency has been, and will continue to be, the focal point of media coverage of government. n133 In addition, the ability of the President to fire any member of his staff or any of his political appointments--at any time and for any reason - solidifies the White Houses' ability to control its media messages. Every White House presents, or attempts to present, a coordinated media "message" concerning the issues of its choosing, and implements that strategy in part through confidential communications to members of the media. It is through these confidential conversations that the executive branch has the ability to distribute its coordinated message, circulate rumors of dubious veracity, smear opponents, or make communications of questionable legality. The Scooter Libby-Judith Miller affair, irrespective of the legality of Mr. Libby's actions, is a prime example. Whether or not Mr. Libby did anything illegal, it appears that a coordinated White House [\*137] effort existed to release Valerie Plame's name in order to retaliate against her husband, Joseph Wilson. n134 A federal journalist's privilege, by offering an indirect testimonial privilege to government officials, would disproportionately benefit the executive (specifically the White House) as an institution. Knowing that the reporters with whom it spoke could not be compelled to testify, and would likely be extremely reluctant to do so voluntarily, n135 the White House (or other executive agency) could be confident that it could leak, smear, or simply lie without fear of accountability. On the other hand, Congress, given its decentralized nature, and the disparate messages that result from decentralization, could not exploit the privilege as effectively. From a structuralist perspective, this is an undesirable outcome, since it puts the executive at a relative advantage to the other branches - one that would remain unchecked, since meaningful judicial review or legislative oversight of executive behavior in this arena would be unavailable due to the very existence of the privilege. b. The Executive Has Access to Information Highly Coveted by the Media Further, the executive branch has control over, or access to, information that is of greatest interest to journalists and the media. Highly-coveted information regarding national security, international affairs, domestic federal law enforcement, disaster relief, etc., resides almost solely in the executive branch. Especially with regard to national security, this type of information is the most closely-guarded information controlled by the government, and in turn is the most sought after by reporters. Of course, the greater the interest in information controlled by members of the executive branch, the greater the ability of government officials to exploit the desire for access to it. This naturally leads to a greater willingness by reporters to allow confidential sourcing in order to get at the information. n136 Reporters need government officials for stories, and those officials can exploit that need by demanding confidentiality. Demands for confidentiality, in turn, increase the risk that, a journalist's privilege could mask unethical or illegal behavior. This is exactly what happened in the Valerie Plame affair. [\*138] The structural implications are obvious; because the executive branch controls the most desirable information, it would have the most to gain from the imposition of the privilege, because reporters would be (indeed, they already are) much more likely to offer anonymity in order to gain access to desirable information. Congress, in contrast, often would have less desirable information to offer the media, and thus would not be in a position to enjoy the protections of confidential sourcing and the journalist's privilege as much as the executive. n137 This would put the executive in a relatively stronger position than the legislature, and exacerbate an already considerable power imbalance in this regard. In addition, the decentralized and disjointed nature of Congress blunts, to some degree, the structural advantage to be gained in the application of a journalist's privilege. Because members of Congress and their associates are often working at cross-purposes, there is less inherent risk that a guarantee of anonymity could be used effectively for any period of time to accomplish an illegal or unethical goal. Whereas the centralized nature of an administration works to ensure (or at least promote) unified message dissemination, n138 the disjointed nature of Congress makes it less likely that a coordinated campaign of smearing or leaking can be accomplished, and thus makes it less likely that Congress as an institution would enjoy the protection from accountability that a reporter's privilege would offer. In sum, the executive branch (in particular the White House), by virtue of its unique structural attributes in the federal system, already retains a number of very powerful tools for disseminating its message and using the media to its advantage. Instituting a federal statutory journalist's privilege would be yet another weapon in the executive's arsenal - one that would, given the prevalence of administration officials as confidential sources, fundamentally alter the balance of power between the branches. This [\*139] outcome is undesirable in the current climate, and should be seriously considered before a federal statutory or judicial privilege is implemented.

#### 3] Political exclusion is inevitable. Factors like gerrymandering, lobbying, the electoral college, and the first-past-the-post system all ensure politics will never truly include people’s voices.

## Contractarianism

#### The Journalist-public relationship cannot be represented by a contractarian model

Wasserman 05 Wasserman, Edward. Professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley. A Critique of Source Confidentiality. Notre Dame Journal of Law, Ethics & Public Policy <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> [Premier]

CONFIDENTIALITY AND TRUST: Finally, I suggested earlier that confidentiality can be examined in terms borrowed from Annette Baier's thoughtful analysis of trust relationships. The relationship between journalist and public seems to comport more satisfactorily with Baier's description of trust than with a more contractarian model. That is, the relationship is one of a generalized reliance that is not formal or explicit and is not specific as to what particular behavior it covers; nor is it between parties of roughly equivalent power. Here it is built on the public's expectation that journalists will use their best judgment to gather and present an honest rendering of information that they believe the public needs to have.

## Kant

### Equal Freedom

#### Transparency in media is key to maintaining a system of equal freedom and respecting the rationality of other agents

**Plaisance 7:** Plaisance, Patrick Lee. Transparency: An Assessment of the Kantian Roots of a Key Element in Media Ethics Practice, Journal of Mass Media Ethics, 2007. 22:2-3, 187-207, DOI: <https://www.tandfonline.com/doi/pdf/10.1080/08900520701315855>. [Premier]

The concept of transparency is critical to anyone concerned with ethics in communication because it does not simply address the content of our messages to other people, but it requires us to think about the form and nature of our interaction with others. Not only is transparency an issue regarding what we say, but regarding why we say it and even how we talk. Transparency has become a term of cachet, a buzzword used to trumpet integrity in government, business, and media. The annual international ‘‘bribery survey’’ conducted by Berlin-based Transparency International receives prominent news coverage around the globe every year. Public relations officials and other corporate officers point with pride at their efforts to achieve transparency with customers, clients, and investors. A rash of business and marketing books have recently been published that trumpet the usefulness of transparency as a smart business strategy (see Ind, 2005; Oliver, 2004; Pagano, 2004). Business leaders are recognizing that the concept is an effective ‘‘means’’ toward success. One American newspaper received industry praise by webcasting its daily news meet- ings as part of its ‘‘transparent newsroom’’ initiative (Smith, 2006). Transparent interaction is what allows us as rational, autonomous beings to assess each other’s behavior. Our motivations, aspirations, and intents are fully set forth for examination. ‘‘Moral communication,’’ Robert McShea wrote, ‘‘is possible among us to the extent to which we share: : : a common view of the facts’’ (1990, p. 221). Sissela Bok (1999) argued that when we use deception or stop short of full disclosure, we fail to treat others with the requisite dignity and respect. We fail as moral beings, in effect. Drawing from a range of theorists, transparent behavior can be defined as conduct that presumes an openness in communication and serves a reasonable expectation of forthright exchange when parties have a legitimate stake in the possible outcomes or effects of the communicative act. It is an attitude of proactive moral engagement that manifests an express concern for the persons-as-ends principle when a degree of deception or omission can reasonably be said to risk thwarting the receiver’s due dig- nity or the ability to exercise reason. This duty requires us to acknowledge the moral dimension of all communicative acts, yet does not require the sacrifice of autonomous agency when opacity or evasion serve legitimate privacy interests. Autonomy requires privacy, as several theorists have pointed out (Bok, 1982; Goff- man, 1963; Rosen, 2000). In her essay on the science of deception detection, Henig (2006) noted that learning to lie is an important step in human maturation. ‘‘What makes a child able to start telling lies, usually at about age 3 or 4, is that he has begun developing a theory of mind, the idea that what goes on in his head is different from what goes on in other people’s heads: : : : After a while, the ability to lie becomes just another part of his emotional landscape’’ (p. 76). Philosopher Thomas Nagel eloquently stated how neither individuals nor society can survive and flourish without secrecy: Each of our inner lives is such a jungle of thoughts, feelings, fantasies and impulses, that civilization would be impossible if we expressed them all, or if we could all read each other’s minds, just as social life would be impossible if we expressed all our lustful, aggressive, greedy, anxious or self-possessed feelings, and private behavior could be safely exposed to public view. (1998, p. 15)

#### Confidentiality treats people as a means to an end

Wasserman 05 Wasserman, Edward. Professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley. A Critique of Source Confidentiality. Notre Dame Journal of Law, Ethics & Public Policy <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> [Premier]

CONFIDENTIALITY AS SOURCE PROTECTION: It follows that although confidentiality may protect a source, journalists accept no freestanding obligation to withhold an informant's identity even if they believed-or would believe, if they gave it any thought-that secrecy would be in the source's best interests. A reporter would not, for example, urge a source to demand concealment if the reporter understood-and the source did not that exposure could be perilous. Confidentiality is nothing more than a valuable information-gathering technique; its claim to ethical standing derives solely from the enhanced information its judicious use brings to the public. It does not reflect an obliga- tion owed to the source, unless the source insists on it as a condition of providing that information. In that regard it is a technique of source self-defense, which the reporter accedes to and does not proffer.2 9 If instead the journalist did recognize an independent ethical duty to the informant to withhold the source's name if disclosure might be harmful, the source would not need to demand anonymity. That is not the case. In fact, journalists are typically admonished to grant confidentiality only if necessary.3" Confidentiality is part of a negotiation over the release of information and owes its ethical standing to the quality of the information it makes public-and to its being secured by a promise. In a moment we will look at the curious ethical status of that promise.

### Promises

#### Keeping promise for the sake of being a promise leads to unintuitive results

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Still, the morality of keeping a promise is logically dependent on the morality of the conduct that the promise is meant to secure. It would be hard to defend a promise to commit murder as an ethical one unless the murder itself was warranted. The morality of that promise could not rest solely on the notion that failing to honor it might cause others to doubt one's resolve to keep non-homicidal commitments. Imagining confidentiality agreements that a journalist ought to break is not hard. Suppose exposing an informant would save a life, prevent a serious crime, or free an innocent prisoner. The argument for guarding those secrets seems grounded largely in concern for the reputational harm the journalist might sustain by burning the source, and whether that might cripple his or her future effectiveness. That is not chiefly an ethical calculation, however; it is an operational one.3 4 There is, in short, nothing about promise-keeping in itself that privileges it above such maxims as telling the truth, avoiding unnecessary harm, respecting privacy, and other imperatives that journalists embrace as professional norms. Breaking a promise might simply make it difficult for the journalist to continue practicing a certain kind of journalism.

#### Confidentiality as a promise is used to break other promises

Wasserman 05 Wasserman, Edward. Professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley. A Critique of Source Confidentiality. Notre Dame Journal of Law, Ethics & Public Policy <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> [Premier]

CONFIDENTIALITY AS A TOOL OF PROMISE-BREAKING: The paradox of the journalist's confidentiality agreement is that it often represents not only a promise, but a critique of promise-keeping. That is because it is frequently a device to provide cover for informants so they can break prior agreements of their own with impunity. Its claim to superior ethical standing rests on a presumption that all promises do not have equivalent moral weight. Why do reporters promise confidentiality? Informants may sometimes insist on anonymity simply to avoid the awkwardness that may come with notoriety. They may have personal reasons to keep out of the news. They may not want to spend time fending off other reporters once they are named publicly. Perhaps they are settling scores and do not want their targets to know the origin of the attack. Sometimes they are sharing painful and intimate experiences-sickness, poverty, the death of loved onesand would not do so if they were to be identified. But often, especially when the stories involve insider news from powerful institutions, sources insist on confidentiality because they are betraying prior commitments by giving away information that they have agreed, sometimes explicitly, to keep private. The journalist's secrecy pledge is, in this respect, an offer to shelter the informant from the consequences of dishonoring agreements of his or her own. It is a promise meant to induce promise-breaking. So, implicit in the confidentiality agreement is the insight that not all promises are equal. The conscience-stricken executive decides that his or her duties to the corporation, which certainly involve discretion and may also oblige silence, are less important than disclosing accounting chicanery or environmental felonies. The whistle-blower demands one promise from the reporter to enable him or her to break another to the corporation. The ethics of that exchange have much to do with the weight attached to such maxims as truth-telling and affirming community norms, as compared with employee loyalty and, yes, promise-keeping.

## Rousseau

### Privacy Bad

#### The desire to hide ourselves and keep confidentiality is rooted in a desire for uniformity that lets all vices loose

Rousseau 1750 Jean – Jacques, Social Contract Theorist, Discourse on the Arts and Sciences 1750, <https://www.stmarys-ca.edu/sites/default/files/attachments/files/arts.pdf> [Premier]

Nowadays, when more subtle studies and more refined taste have reduced the art of pleasing into principles, a vile and misleading uniformity governs our customs, and all minds seem to have been cast in the same mould: incessantly politeness makes demands, propriety issues orders, and incessantly people follow customary usage, never their own inclinations. One does not dare to appear as what one is. And in this perpetual constraint, men who make up this herd we call society, placed in the same circumstances, will all do the same things, unless more powerful motives prevent them. Thus, one will never know well the person one is dealing with. For to get to know one's friend it will be necessary to wait for critical occasions, that is to say, to wait until too late, because it is to deal with these very emergencies that one needed to know him in the first place. What a parade of vices will accompany this uncertainty? No more sincere friendships, no more real esteem, no more wellfounded trust. Suspicions, offences, fears, coldness, reserve, hatred, and betrayal will always be hiding under this uniform and perfidious veil of politeness, under that urbanity which is so praised and which we owe to our century's enlightenment. We will no longer profane the name of the master of the universe by swearing, but we will insult it with blasphemies, and our scrupulous ears will not be offended. People will not boast of their own merit, but they will demean that of others. No man will grossly abuse his enemy, but he will slander him with skill. National hatreds will expand, but that will be for love of one's country. In place of contemptible ignorance, we will substitute a dangerous Pyrrhonism.\* There will be some forbidden excesses, dishonourable vices, but others will be decorated with the name of virtues. It will be necessary to have them or to affect them. Let anyone who wishes boast about the wise men of our time. As for me, I see nothing there but a refinement of intemperance every bit as unworthy of my praise as their artificial simplicity (2)

## Virtue Ethics

### Contention

#### 1] Even if [whistleblowers, ppl speaking out] is good that doesn’t affirm – it just proves why those practices are virtuous, not why having reporters privilege is.

#### 2] T – having reporters privilege is dishonest since people can fabricate info.

#### 3] T – Confidentiality lets bad virtues such as dishonesty go unchecked

Wasserman 05 Wasserman, Edward. Professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley. A Critique of Source Confidentiality. Notre Dame Journal of Law, Ethics & Public Policy <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> [Premier]

Accountability involves an obligation to ensure that the ledger of significant actions and assertions be reported publicly in such a way that their authors are linked to them. Confidentiality enhances accountability when it helps expose subterranean agreements, decisions, and actions that would otherwise go unreported. But secrecy may also hinder accountability by interposing the journalist between informant and public, and preventing third-parties from challenging sources over inaccuracies, indiscretions, or lies. It may also scrub the record clean of grudges and personal agendas that have bearing on the information, and thereby prevent dishonest or tainted informants from being exposed as such. Verifiability, which is the closest journalism comes to offering a functional equivalent to the standards of social science, usually is premised on associating information with the person who provides it. That enables third-parties to determine that the words were spoken, just as reported, by the person who was said to have uttered them. Here again, confidentiality may impair accuracy. It can impede testing the truthfulness of information; nobody else can phone the reporter's secret source to confirm, refute, or modify the original information. Anonymity, USA Today founder Al Neuharth observed, enables sources to say more than they know and reporters to write more than they hear.33

#### 4] Expressibility test shows bad virtues arise

Wasserman 05 [Wasserman, Edward. Professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley. A Critique of Source Confidentiality. Notre Dame Journal of Law, Ethics & Public Policy <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> [Premier]

Baier suggests that the morality of a trust relationship can be assessed by applying what she terms the expressibility test: Would the relationship withstand having its foundations laid bare? The hard-charging executive who trusts her chief aide without reservation because she secretly believes the assistant is too unimaginative to pose a threat-that is not a morally robust trust relationship and would crumble if its premises were articulated. Similarly, Baier's expressibility test is a promising way to examine a confidentiality agreement. A source who bases his reliance on the courage and honesty of a reporter enters into a morally different relationship than does one who relies on an avowedly partisan journalist's gullibility and blind loyalty. Suppose you, the reporter, are agreeing to withhold the name of the politician who is giving you a self-serving leak because you wish to endear yourself to the office-holder and get preferential access to information in the future. Is that something you would be comfortable disclosing to your readers, or would it undermine the trust they confer on you?

# K

## Moten

### No Solvency

### Turns

### AT: Ontology

# Older/Additional Stuff

### Notes

Everything here is readable but just not the best. Ask me if you want to know why.

## Generics

### Congress Checks

#### Congress checks back Trump’s anti press sentiments- they’re already proposing a bill to protect journalists

Swalwell Press Release 2/5 [Press release for rep Eric Swalwell, 2/5/18, Eric Swalwell, “Swalwell Introduces the Journalist Protection Act,” <https://swalwell.house.gov/media-center/press-releases/swalwell-introduces-journalist-protection-act> //BWSKR]

WASHINGTON, DC – Rep. Eric Swalwell (CA-15), a member of the House Intelligence and Judiciary committees, on Monday introduced the Journalist Protection Act to make a federal crime of certain attacks on those reporting the news. During his campaign and since taking office, President Trump has created a climate of extreme hostility to the press by describing mainstream media outlets as “a stain on America,” “trying to take away our history and our heritage,” and “the enemy of the American People.” He tweeted a GIF video of himself body-slamming a person with the CNN logo superimposed on that person’s face, and retweeted a cartoon of a “Trump Train” running over a person with a CNN logo as its head. Such antagonistic communications help encourage others to think, regardless of their views, that violence against people engaged in journalism is more acceptable. In April, the international organization Reporters Without Borders lowered the United States’ ranking in its annual World Press Freedom Index, citing President Trump’s rhetoric. “President Donald Trump’s campaign and administration have created a toxic atmosphere,” Swalwell said. “It’s not just about labelling reports of his constant falsehoods as #FakeNews – it’s his casting of media personalities and outlets as anti-American targets, and encouraging people to engage in violence.” Last March, OC Weekly journalists said they were assaulted by demonstrators at a Make America Great Again rally in Huntington Beach, Calif. In August, a reporter was punched in the face for filming anti-racism counter-protestors in Charlottesville, Va. And in September, a Joplin, Mo. blogger was similarly attacked for his providing information about the community. “Not all attacks on journalists this year have been committed by Trump supporters, but the fact remains that rhetoric emanating from the world’s most powerful office is stoking an environment in which these attacks proliferate,” Swalwell said. “We must send a loud, clear message that such violence won’t be tolerated.” The Journalist Protection Act makes it a federal crime to intentionally cause bodily injury to a journalist affecting interstate or foreign commerce in the course of reporting or in a manner designed to intimidate him or her from newsgathering for a media organization. It represents a clear statement that assaults against people engaged in reporting is unacceptable, and helps ensure law enforcement is able to punish those who interfere with newsgathering. The bill is supported by the Communications Workers of America (CWA) and by News Media for Open Government, a broad coalition of news media and journalism organizations working to ensure that laws, policies and practices preserve and protect freedom of the press, open government and the free flow of information in our democratic society. “This is a dangerous time to be a journalist,” said Bernie Lunzer, president of The NewsGuild, a division of the CWA. “At least 44 reporters were physically attacked in the U.S. last year and angry rhetoric that demonizes reporters persists. The threatening atmosphere is palpable. The Journalist Protection Act deserves the support of everyone who believes our democracy depends on a free and vibrant press.” “Broadcast employees assigned to newsgathering in the field often work alone, or in two-person crews,” said Charlie Braico, president of the National Association of Broadcast Employees and Technicians, also a CWA division. “With their expensive and cumbersome equipment, they are easy and tempting prey for anti-media extremists and thieves. The Journalist Protection Act will permit the authorities to properly punish people who attempt to interfere with our members as they work in dynamic and challenging situations.” "Dozens of physical assaults on journalists doing their jobs were documented by the U.S. Press Freedom Tracker in 2017,” said Rick Blum, director of News Media for Open Government. “Online harassment of journalists has included death threats and threats of sexual and other physical violence. Taken together, it is clear that not only is the role of the news media in our democracy under attack, but the safety of individual journalists is threatened. It's time to reverse course. Physical violence and intimidation should never get in the way of covering police, protesters, presidents and other public matters.” The Journalist Protection Act’s original co-sponsors include Steve Cohen (TN-9), David Cicilline (RI-1), Grace Napolitano (CA-32), Eleanor Holmes Norton (DC), Andre Carson (IN-7), Debbie Dingell (MI-12), Darren Soto (FL-9), Ro Khanna (CA-17), Jose Serrano (NY-15), Bobby Rush (IL-1), Maxine Waters (CA-43), and Gwen Moore (WI-4).

### Checks in Squo

#### No reason why Aff is key now. Journalism is doing well now and the status quo checks abuses by the government – Trump revoked his executive order separating families after attacks by the press.

Shear et al 6/20 Michael D. Shear (White House correspondent in the Washington bureau, where he covers President Trump, with a focus on domestic policy), Abby Goodnough (cover health care for The New York Times, former bureau chief in Boston and Miami), and Maggie Haberman (American journalist who is a White House correspondent for The New York Times and a political analyst for CNN), 6-20-2018, "Trump Retreats on Separating Families, but Thousands May Remain Apart," No Publication, <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html>, KS

Stories of children being taken from their parents, audio of wailing toddlers and images of teenagers in cagelike detention facilities had exploded into a full-blown political crisis for Mr. Trump and congressional Republicans, who were desperate for a response to those who have called the practice “inhumane,” “cruel” and “evil.” The president’s four-page order says that officials will continue to criminally prosecute everyone who crosses the border illegally, but will seek to find or build facilities that can hold families — parents and children together — instead of separating them while their legal cases are considered by the courts. But the action raised new questions that White House officials did not immediately answer. The order does not say where the families would be detained. And it does not say whether children will continue to be separated from their parents while the facilities to hold them are located or built. Officials on a White House conference call said they could not answer those questions. Justice Department officials said the legal authority to end family separation relies on a request they will make in the coming days to Judge Dolly M. Gee of the Federal District Court in Los Angeles, the daughter of immigrants from China who was appointed by President Barack Obama. She oversees a 1997 consent decree, known as the Flores settlement, which prohibits immigration authorities from keeping children in detention, even if they are with their parents, for more than 20 days. The 1997 case imposes legal constraints on the proper treatment of children in government custody, which stopped Mr. Obama after his administration began detaining families together during a similar flood of illegal immigration several years ago. “It’s on Judge Gee,” said Gene Hamilton, the counselor to Attorney General Jeff Sessions. “Are we going to be able to detain alien families together or are we not?” Mr. Hamilton said the judge’s previous rulings prohibiting extended detentions of families has “put this executive branch into an untenable position.” He said that the president’s order is a stopgap measure that could be fixed permanently if Congress passes legislation to overhaul the immigration system. While the House is scheduled to vote Thursday on two competing immigration bills, the president’s decision appeared to lessen the urgency for lawmakers to address the issue. With Republicans in the House and Senate pursuing different approaches to put a stop to the heart-wrenching scenes at the border, no legislative breakthrough seemed imminent. Republicans in the Senate have proposed narrow legislation that would end the practice, while House Republican leaders are focused on a broader bill, though its passage was in doubt on the eve of Thursday’s vote. In the meantime, legal experts said it seems highly unlikely that the courts will agree to the request by the Trump administration. That would mean the president is almost certain to face an immediate legal challenge from immigration activists if the government tries to detain families for more than the 20-day limit. “I don’t think anyone wants to see little children detained for long periods of time,” said Lee Gelernt of the American Civil Liberties Union, which challenged the Trump administration’s separation of families. “If they start detaining families and kids in tents or other places, I think you will see immediate lawsuits.” Kevin Appleby, a senior director at the Center for Migration Studies, predicted such a challenge. Advocates said officials should jail only those immigrants who have committed other crimes, are a flight risk or pose a danger to others. “It is outrageous that the president is pushing the criminal detention of innocent children as a solution to his own evil act,” Mr. Appleby said. “The best solution would be releasing families to sponsors or placing them in community-based alternatives to detention programs, which are less expensive and much more humane.” Until Wednesday, Mr. Trump had refused to simply end his government’s zero-tolerance policy that was announced last month and led to the separation of more than 2,300 children from their parents, saying that the alternative would be to fling open the country’s borders and allow immigrants who cross the border illegally to remain in the United States. But the president, furious about the pummeling he has taken in the news media in recent days, began casting about for a solution to the politically damaging situation, people familiar with his thinking said. He made his announcement flanked by Vice President Mike Pence and Kirstjen Nielsen, the secretary of homeland security, and vowed not to relent in his administration’s prosecution of people trying to enter the country illegally. “We are keeping a very powerful border, and it continues to be a zero tolerance,” Mr. Trump said. “We have zero tolerance for people that enter our country illegally.” But he added, “The border’s just as tough, but we do want to keep families together.” In signing the order to end the separation of families, Mr. Trump also abandoned the positions that he and his allies had stuck to for weeks: that Democrats were to blame for the wrenching scenes of kids being torn from their parents, and that the administration was helpless to fix the problem without action by Congress to overhaul immigration laws.

### Distrust

#### Citizens reluctant to believe sources now because of anonymity.

Phillips 17 Kristine Phillips (member of The Washington Post's general assignment team, previously covered criminal justice, courts and legal affairs at the Indianapolis Star), June 17, 2017, “CNN’s Russia story retraction and the danger of relying on one anonymous source”, <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/06/27/the-cnn-retraction-and-the-danger-of-relying-on-one-anonymous-source/?noredirect=on&utm_term=.c04f3c519b9e>, KS

Just a day after publishing an exclusive story, CNN found itself in a position no news organization wants to be in. It reported last Thursday that the Senate Intelligence Committee was investigating a Russian investment fund whose head met with an official of President Trump’s transition team four days before the inauguration. The story, which relied on one unnamed source, prompted questions about its validity, including from the transition team official, Anthony Scaramucci, who said on Twitter that he had done nothing wrong. CNN issued a retraction late Friday night, saying the story “did not meet CNN’s editorial standards and has been retracted.” By Monday, three journalists involved in the story, the reporter and two editors, had resigned, The Washington Post reported. The retraction, which comes at a time of unprecedented anonymous leaks and significant public distrust of the media, renews questions about the use of confidential informants. The Post spoke with Andrew Seaman, ethics committee chair of the Society of Professional Journalists and a health reporter for Reuters, about anonymous sources, specifically the practice of relying on just one in stories that try to expose wrongdoing by government officials. He discusses when a single anonymous source is acceptable and when it’s not, what questions journalists should ask before granting anonymity, and how Bob Woodward and Carl Bernstein needed more than just Deep Throat.

### Trump Blasts Anonymous Sources

#### Trump utilizes anonymous news to make his case against the media.

**Yilek 17** “Trump claims anonymous sources 'made up' by 'fake news writers'” by Caitlin Yilek May 28, 2017 08:55 AM [https://www.washingtonexaminer.com/trump-claims-anonymous-sources-made-up-by-fake-news-writers //](https://www.washingtonexaminer.com/trump-claims-anonymous-sources-made-up-by-fake-news-writers%20//) OHS-AT

"It is my opinion that many of the leaks coming out of the White House are fabricated lies made up by the #FakeNews media," Trump tweeted Sunday morning. "Whenever you see the words ‘sources say' in the fake news media, and they don't mention names it is very possible that those sources don't exist but are made up by fake news writers," he continued. "#FakeNews is the enemy!" In February, Trump accused reporters of making up stories and sources that were critical of him. "They shouldn't be allowed to use sources unless they use somebody's name," he told the Conservative Political Action Conference. "Let their name be put out there." Trump's attacks on the media come as his campaign team faces increased scrutiny over its contacts with Russia. Members of Trump's White House have regularly requested anonymity when speaking to the press.