Starting from Scratch: The First Amendment Reporter-Source Privilege and the Doctrine of Incidental Restrictions

Marcus A. Asner
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Communications Law Commons, First Amendment Commons, and the Supreme Court of the United States Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol26/iss3/4

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
STARTING FROM SCRATCH: THE FIRST AMENDMENT REPORTER-SOURCE PRIVILEGE AND THE DOCTRINE OF INCIDENTAL RESTRICTIONS

Marcus A. Asner*

In the fall of 1991, University of Oklahoma Law Professor Anita Hill submitted a confidential affidavit to the Senate Judiciary Committee in which she accused Supreme Court nominee Clarence Thomas of sexually harassing her when the two had worked together at the Equal Employment Opportunity Commission. Her accusation did not remain secret for long. Two reporters, Nina Totenberg of National Public Radio and Timothy Phelps of Newsday, learned of Hill’s charges shortly after she made them. When Totenberg and Phelps broke the story two days before the Senate was scheduled to vote on Thomas’s nomination, a national debate erupted over both the truth of Hill’s allegations and sexual harassment in general. The substance of Hill’s accusations was not the only source of controversy, however. Several senators also expressed outrage that Hill’s confidential statements had made their way to the press. These senators demanded that the reporters’ sources be uncovered and, presumably, disciplined.4


2. Id. at A14.
3. Glenn R. Simpson, Senators May Meet This Week to Pick Leak Counsel, ROLL CALL, Oct. 28, 1991, at 1. Senators John Seymour (R-Cal.) and Hank Brown (R-Colo.) led the charge for an investigation of the leak. Id. at 21. Democratic leaders also claimed credit for beginning the inquiry. Id.

Attorney Floyd Abrams, who represented Nina Totenberg in the case, argued that even if a Senate employee had leaked the information, it was neither a crime nor a violation of Senate rules for a Senate employee to pass the information on to a reporter. Id.
The Senate appointed Peter E. Fleming Jr. as a special counsel to investigate how Totenberg and Phelps obtained the confidential information. Both reporters refused to cooperate with Fleming's investigation, and claimed a First Amendment right to keep the identities of their informants secret. Because the standoff between these reporters and the Senate ended when the Senate Rules Committee refused to enforce Fleming's subpoenas, the Senate avoided addressing squarely Totenberg's and Phelps's claim of privilege. Nonetheless, this confrontation once again raised the controversial issue of whether reporters should enjoy a First Amendment privilege not to reveal a source's identity.

This Note examines reporters' claims to a First Amendment reporter-source privilege in light of First Amendment doctrine as a whole. Part I briefly explains the current state of reporter-source privileges and the policies behind them. Part II then attempts to identify doctrinal support for the press's claim to a First Amendment privilege. Part II rejects the notion that the First Amendment affords special protection to the press as an institution. A reporter's status as a member of the institutional media is not irrelevant, however, and the well-established principle that the government may not target or single out the press for discriminatory treatment becomes the first cornerstone of the privilege proposed in Part V. Part II then analyzes claims to a reporter-source privilege in light of the incidental restrictions doctrine set forth in *Arcara v. Cloud Books, Inc.*

8. See Lewis, Constitutional Test, supra note 4, at B8.
privilege may be justified where reporters can show that compelling the disclosure of sources' identities (1) has a high impact on their First Amendment rights or (2) penalizes communicative activity.

Part III focuses on the first prong of the Cloud Books test and concludes that reporters will be unable to prove that compelling disclosure of their sources has a "high impact" on their First Amendment rights. Although reporters claim that the possibility of compelled disclosure will have a chilling effect on their activities, Part III argues that reporters probably will not be able to establish this claimed chilling effect with enough certainty to meet the requirements of the first part of the Cloud Books test.

Part IV considers the second prong of the Cloud Books test and argues that although the "penalization" prong may be difficult to apply on a case-by-case basis, this prong should protect the reporter-source relationship when it is the reporter's speech that is singled out for punishment rather than the reporter's knowledge of the source's identity. The principle that the government may not penalize a reporter's speech is the second cornerstone of the privilege proposed in Part V.

Part V draws upon the two principles distilled from First Amendment doctrine in Parts II and IV to propose an analytical framework in which to evaluate claims to a First Amendment reporter-source privilege. Part V rejects the idea of an ad hoc application of these principles because a clearer test would save judicial time and avoid inconsistent results. Part V then demonstrates how the proposed test modifies and improves on the analysis favored by the circuit courts. Finally, Part V argues that a reporter should be protected by a qualified privilege only when the government moves to compel her source's identity.

I. THE CURRENT STATUS OF REPORTER-SOURCE PRIVILEGES

Journalists tend to hold their vows of confidentiality sacred, claiming that confidential sources are vital to the

10. See, e.g., American Newspaper Guild Code of Ethics, reprinted in THE PRESS AND SOCIETY 591-92 (George L. Bird & Frederic E. Merwin eds., 1951) (stating that "newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies").

11. There are various reasons why sources might desire anonymity. See, e.g.,
process of gathering and reporting the news. Many reporters have chosen to defy court-ordered disclosure and go to jail rather than to reveal their sources' identities. A journalist's desire for confidentiality, however, sometimes can conflict with a litigant's need to discover and present all relevant evidence in court. The general rule is that litigants have "a right to every man's evidence." Testimonial privileges are an

Branzburg v. Hayes, 408 U.S. 665, 693 (1972) ("Such informants presumably desire anonymity in order to avoid being entangled as a witness in a criminal trial or grand jury investigation. They may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarrassment."). For example, in Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991), an informant was fired from his job on the same day that the newspapers revealed his identity. Id. at 2516. See also Paul Marcus, The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments, 25 ARIZ. L. REV. 815, 815 (1983); Lisa Kloppenberg, Note, Disclosure of Confidential Sources in International Reporting, 60 S. CAL. L. REV. 1631, 1636 (1987); Marian E. Lindberg, Note, Source Protection in Libel Suits After Herbert v. Lando, 81 COLUM. L. REV. 338, 341 & n.25 (1981).


13. Marcus, supra note 11, at 816–18; Lindberg, supra note 11, at 338 & n.1. Press lore is replete with stories of reporters willing to pay fines, face contempt citations, or spend time in jail rather than reveal the names of their sources. Marcus, supra note 11, at 817–18; Kloppenberg, supra note 11, at 1639; Lindberg, supra note 11, at 338–39. In 1990, reporter Brian Karem was found in contempt for failing to reveal a source's identity and spent time in jail. Karem v. Priest, 744 F. Supp. 136, 137 (W.D. Tex. 1990); Reporter Tells Source, Is Freed, L.A. TIMES, June 10, 1990, at 1 [hereinafter Reporter]. Karem was released two weeks into his six-month sentence after his source allowed him to reveal her identity. Id. Both Nina Totenberg and Timothy Phelps also expressed a willingness to face jail rather than reveal their source's identity. Lewis, Second Reporter, supra note 4, at A13; Eaton, supra note 4, at A20.

exception because they deny the trier of fact access to possibly relevant information.¹⁵ Privileges exist, however, because the values supporting the confidentiality of a relationship can outweigh the need to present the secret information.¹⁶ Advocates of a new privilege, therefore, must show why the confidential relationship that they wish to protect deserves special treatment.

To protect the confidentiality of reporter-source relationships, many state legislatures have enacted either absolute¹⁷ or qualified¹⁸ press-shield laws. Other states have recognized reporter-source testimonial privileges in their state constitutions.¹⁹ Many reporters contend, however, that the reporter-source relationship warrants more than state-law protection. These reporters believe that a reporter-source testimonial privilege is firmly rooted in the First Amendment to the United States Constitution.²⁰


¹⁵. See generally Richard Lempert & Stephen A. Saltzburg, A Modern Approach to Evidence 645 (2d ed. 1982) (discussing the basic concept of exclusionary rules and privileges and how they affect the "search for the truth"); McCORMICK, supra note 14, § 72 (noting that privileges "rather than facilitating the illumination of truth, . . . shut out the light").


¹⁸. If the reporter enjoys only a qualified privilege, courts can order the reporter to reveal the source's identity under certain conditions. See, e.g., Minn. Stat. Ann. §§ 595.021-025 (West 1992) (providing that a court shall grant disclosure only if it finds, by clear and convincing evidence, that the information is relevant to a specific violation of the law, cannot be obtained by alternative means, and must be disclosed to prevent injustice).


²⁰. See, e.g., Eaton, supra note 4, at A20. Timothy Phelps repeatedly invoked
The Supreme Court has addressed whether the First Amendment mandates a reporter-source privilege once before. In *Branzburg v. Hayes*,\(^2\) reporters argued that forcing journalists to reveal their sources' identities both inhibits sources from talking to reporters and forces reporters to censor their own reporting.\(^2\) This chilling effect, the reporters claimed, prevents journalists from exercising fully their First Amendment rights to gather and report the news.\(^2\)

Justice White, writing for the *Branzburg* majority, rejected the reporters' claim, dismissing the alleged chilling effect as both "speculative"\(^2\) and "uncertain."\(^2\) In two dissents, four members of the Court, Justices Douglas, Stewart, Brennan, and Marshall, accepted the chilling effect argument outright,\(^2\) and called for at least a qualified privilege.\(^2\) Justice Powell's "enigmatic"\(^2\) concurring opinion advocated an ad hoc approach which arguably would allow litigants to present evidence of a chilling effect in each particular case.\(^2\)

Although the *Branzburg* Court ruled against the reporters, these four opinions left aspects of the issue unresolved. For example, the *Branzburg* Court addressed only whether reporters are obligated to comply with grand jury subpoenas.\(^2\)

\(^{21}\) 408 U.S. 665 (1972).
\(^{22}\) *Id.* at 682, 693–94.
\(^{23}\) *Id.* at 682.
\(^{24}\) *Id.* at 694.
\(^{25}\) *Id.* at 690.
\(^{26}\) *See id.* at 736 (Stewart, J., dissenting); *id.* at 720–22 (Douglas, J., dissenting).
\(^{27}\) *Id.* at 736.
\(^{28}\) Justice Stewart's dissent dubbed Justice Powell's concurring opinion "enigmatic." *Id.* at 725. Nevertheless, Justice Stewart noted that the concurrence "gives some hope of a more flexible view in the future." *Id.*
\(^{29}\) Justice Powell argued that

[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony... The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

*Id.* at 710.

\(^{30}\) *Id.* at 667 (noting that the issue was "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of press guaranteed by the First Amendment").
were left to wonder whether the Court would accept their claim to a First Amendment privilege under different circumstances.\textsuperscript{31}

Further, although the \textit{Branzburg} majority remained unconvinced by the argument that forced disclosure chills sources from talking to reporters and forces reporters to censor their own reporting,\textsuperscript{32} it was unclear whether a more substantial showing of a chilling effect might trigger First Amendment reporter-source protection.\textsuperscript{33} Finally, although the majority rejected the reporters' claim to a qualified First Amendment privilege in all circumstances, Justice Powell refrained from doing so. Although Justice Powell joined the five-justice majority opinion, he also filed a concurring opinion which emphasized the "limited nature of the Court's holding" and quizzically argued that courts should evaluate reporters' claims to a First Amendment privilege on a case-by-case basis.\textsuperscript{34}

Much of the debate about a possible First Amendment reporter-source privilege has revolved around the proper interpretation of the various \textit{Branzburg} opinions.\textsuperscript{35} The

\begin{quote}
\textsuperscript{31} See Marcus, \textit{supra} note 11, at 836–39 (noting that linking the opinions of Justice Powell and Justice Stewart implies that \textit{Branzburg} adopted a case-by-case balancing approach and did not reject a First Amendment privilege in all circumstances). Dean Marcus claims that

\[
\text{the now widely accepted view of} \textit{Branzburg} \ldots \text{is that it was limited by the specific facts presented to the Justices} \ldots \text{and that the case-by-case analysis must be used by trial judges in "balancing freedom of the press against a compelling and overriding public interest in the information sought."}
\]


\textsuperscript{32} After noting that the press's claim to a privilege conflicts with the strong public interest in law enforcement, Justice White's majority opinion stated that "[e]stimates of the inhibiting effect \ldots \text{are widely divergent and to a great extent speculative,}" \textit{id.} at 693–94, and that the reporters had failed "to demonstrate that there would be a significant constriction of the flow of news to the public." \textit{Id.} at 693. The existence of an alleged chilling effect was held too "uncertain" to overcome society's interest in effective law enforcement. \textit{Id.} at 690.

\textsuperscript{33} Much of the post-\textit{Branzburg} commentary criticizes the Court for its failure to appreciate the claimed chilling effect, at least in particular situations. \textit{See}, e.g., Lindberg, \textit{supra} note 11, at 342–44 (emphasizing the chilling effect in libel suits); Malheiro, \textit{supra} note 12, at 100–01 (arguing that the chilling effect warrants a First Amendment privilege); David J. Onorato, Note, \textit{A Press Privilege for the Worst of Times}, 75 GEO. L.J. 361, 382–84, 386 (1986) (arguing that compelled discovery inevitably chills sources and that this chilling effect in part justifies a privilege in criminal libel cases).

\textsuperscript{34} \textit{Branzburg}, 408 U.S. at 709.

\textsuperscript{35} See Marcus, \textit{supra} note 11, at 839–41.
earliest post-Branzburg cases tended to draw from the majority opinion, holding that the First Amendment affords the reporter-source relationship absolutely no protection.\(^3\)

Beginning in 1974,\(^37\) however, most federal courts and many state courts began to find that the Branzburg dissents of Justices Douglas and Stewart, patched together with Justice Powell’s concurring opinion, permitted a qualified privilege in certain types of cases.\(^38\) By 1983, a qualified privilege was recognized so generally that one commentator found that only a few judges rejected a First Amendment privilege outright.\(^39\)

A qualified privilege currently exists in nine of the twelve circuits.\(^40\)

Recent developments have put these circuit-developed qualified privileges on shaky ground. In 1987, the Sixth Circuit rejected any claim that the reporter-source relationship warrants a First Amendment privilege.\(^41\)

Recognizing that the

---

36. See In re Lewis, 501 F.2d 418 (9th Cir. 1974), cert. denied, 420 U.S. 913 (1975); In re Farber, 394 A.2d 330, 334 (N.J.) (holding that in a criminal prosecution, the First Amendment does not allow reporters to refuse to comply with subpoenas requesting either information obtained from confidential sources or the identity of those sources), cert. denied, 439 U.S. 997 (1978). See generally, Marcus, supra note 11, at 839; Browne, supra note 19, at 747.


40. See, e.g., LaRouche, 780 F.2d at 1139 (the Fourth Circuit); Burke, 700 F.2d at 76-77 (the Second Circuit); Zerilli, 656 F.2d at 711-12 (the District of Columbia Circuit); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 594-96 (1st Cir. 1980); Cuthbertson, 630 F.2d at 146 (the Third Circuit); Miller, 621 F.2d at 725-26 (the Fifth Circuit); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977); Cervantes v. Time, Inc., 464 F.2d 986, 992-93 & n.9 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973). In addition, the Eleventh Circuit inherited the privilege that had been recognized previously by the Fifth Circuit in Miller. See Bonner v. City of Prichard, 661 F.2d 1206, 1211 (11th Cir. 1981) (ruling that the Eleventh Circuit is bound by Fifth Circuit opinions handed down before the creation of the Eleventh Circuit). The privilege also has been recognized at a district court level in the Seventh Circuit. Gulliver’s Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F. Supp. 1197, 1201-04 (N.D. Ill. 1978). The Seventh Circuit Court of Appeals has yet to address the issue.

other circuits have adopted a qualified privilege, the Sixth Circuit nevertheless maintained that *Branzburg* had rejected the press's chilling-effect argument in all circumstances.\(^{42}\) Recent Supreme Court dicta also seem to undermine the reporter-source privilege developed by the circuit courts. In *University of Pennsylvania v. EEOC*,\(^{43}\) for example, the Court explicitly noted that *Branzburg* had "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary."\(^{44}\) These recent developments began a rash of cases in which the courts have read *Branzburg* narrowly and have rejected any claim to a First Amendment reporter-source privilege.\(^{45}\) In particular, these recent interpretations argue that *Branzburg* rejected the press's claim to a qualified privilege in all circumstances.\(^{46}\) This threat to the circuit-developed privileges compels yet another look at whether the reporter-source relationship warrants a First Amendment privilege.

---

42. *Id.* at 585. Further, the Sixth Circuit refused to follow the lead of other circuits which had limited *Branzburg* to criminal cases. *Id.* at 584 n.6 (discussing Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (holding that *Branzburg* does not control in civil cases)).


44. *Id.* at 201; see also Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2518 (1991) (noting that under *Branzburg* the First Amendment does not "relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source"). At least one court has referred to *University of Pennsylvania* in holding that reporters may not avail themselves of a First Amendment privilege. In Karem v. Priest, 744 F. Supp. 136 (W.D. Tex. 1990), reporter Brian Karem used confidential sources to arrange an interview with an alleged murderer awaiting trial in a jail in San Antonio. Karem later refused to divulge the names of the sources who had arranged the interview and, although Karem alleged that their identities were not relevant to the case, the state court found Karem in contempt. *Id.* at 137–38. The court denied Karem's writ of habeas corpus, relying in part upon the *University of Pennsylvania* Court's reasoning that *Branzburg* precluded reporters from claiming a First Amendment privilege. *Id.* at 137, 142. Karem was released from jail after serving two weeks of his sentence when his source agreed to let him reveal her identity. *Reporter*, supra note 13, at 1.

At least one commentator likewise suggests that the *University of Pennsylvania* dictum threatens the status of the circuit-created privileges. Tofel, *supra* note 19, at 9.


46. See, e.g., Karem, 744 F. Supp. at 138 (noting that the "precise holding of the Supreme Court in *Branzburg* was that there is no First Amendment newsman's testimonial privilege, either qualified or absolute, arising from the receipt of confidential information, to refuse to answer relevant and material questions asked during a good faith grand jury investigation"); Capuano, 579 A.2d at 474.
II. THE DOCTRINAL LANDSCAPE: PRIVILEGES AND THE DOCTRINE OF GENERAL APPLICABILITY

Rather than restricting its analysis to an interpretation of Branzburg and the subsequent cases building upon it, this Note takes a broader look at the relevant First Amendment doctrine as a whole. This Part identifies three potential theories for a constitutionally grounded reporter-source privilege and evaluates one of them—the theory that the government may not single out the press for discriminatory treatment. The other two possible justifications for a reporter-source privilege are evaluated in Parts III and IV.

A. The Press as an Institution

One popular strategy for advocates of a First Amendment reporter-source privilege is to claim that the media is a "Fourth Estate" which plays a constitutionally-designated role as the guardian of the democracy. Therefore, the argument goes, the press as an institution merits special protections beyond the free speech protection enjoyed by all citizens. Advocates claim that confidential sources play an integral part in the day-to-day activity of the institutional press and that the First Amendment's Press Clause should protect the reporter-source relationship accordingly.

47. See Justice Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 633-35 (1975) (discussing the press's role as a fourth institution outside of the government which operates as an additional check on the three official branches, and adopting Thomas Carlyle's metaphor of the Fourth Estate, which suggests that the British Press is the Fourth and most important Estate in Parliament).

48. See Langley & Levine, supra note 12, at 34-40; Lindberg, supra note 11 at 340-44; Malheiro, supra note 12, at 83-84; Onorato, supra note 33, at 366-72. Justice Stewart, the leading judicial advocate of this position, see generally Branzburg v. Hayes, 408 U.S. 665, 725-31 (1972) (Stewart, J., dissenting), once argued that "the Free Press guarantee is, in essence, a structural provision of the Constitution. . . . [It] extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection." Stewart, supra note 47, at 633. Timothy Dyk recently argued that the institutional press serves an instrumental role as a "surrogate for the general public," and therefore should be allowed greater access to the workings of government than the public at large. Timothy B. Dyk, Newsagathering, Press Access, and the First Amendment, 44 Stan. L. Rev. 927, 935 (1992).

49. See, e.g., Langley & Levine, supra note 12, at 41-50 (arguing for a broad privilege whenever a source provides information about the government); Browne,
Despite its rhetorical appeal, this approach suffers from a serious practical weakness: laws compelling testimony are generally applicable, and the Supreme Court usually rejects the notion that the First Amendment's Press Clause affords professional reporters any special protection from generally applicable laws. Members of the press, like everyone else, are subject to the doctrine of promissory estoppel, and must obey the copyright laws, the National Labor Relations Act, and the Fair Labor Standards Act. The press also may not restrain trade in violation of the antitrust laws, and must pay nondiscriminatory taxes.

---

supra note 19, at 741-42; Malheiro, supra note 12, at 84; Onorato, supra note 33, at 384-85.

50. See, e.g., Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) (holding that the institutional press must obey the National Labor Relations Act because it is a general law); see also Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2518-19 (1991) (holding that the press can be held liable under the doctrine of promissory estoppel); Branzburg v. Hayes, 408 U.S. 665, 682-85 (1972). As one commentator put it, "the prevailing law sharply rejects . . . the claimed right of press secrecy . . . . The high court has consistently ruled that members of the fourth estate do not enjoy immunity from legal obligations applicable to others." Bruce Fein, Turning Off Congress' Faucets?, LEGAL TIMES, Mar. 2, 1992, at 22.

That the Court generally has rejected the argument that the Press Clause gives the institutional press any special substantive First Amendment immunity does not mean that the Court has written the Press Clause out of the Constitution. As then-Chief Justice Burger explained in dictum, "the Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and 'comprehends every sort of publication which affords a vehicle of information and opinion.'" First Nat. Bank v. Bellotti, 435 U.S. 765, 799-800 (1978) (quoting Lovell v. Griffin, 303 U.S. 444, 452 (1938)) (Burger, C.J., concurring). Justice Burger continued, stating that "the liberty encompassed by the Press Clause, although complementary to and a natural extension of the Speech Clause liberty, merited special mention simply because it had been more often the object of official restraints." Id. at 800.

51. Cohen, 111 S. Ct. at 2516.
56. Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943). The press's claim for special treatment arguably has received some support from the Supreme Court. As one commentator recently noted, members of the institutional press seem to enjoy some special treatment in cases involving prior restraints, Dyk, supra note 48, at 927 & n.3 (referring to Freedman v. Maryland, 380 U.S. 51 (1965)), and defamation. Id. at 927 & n.6 (referring to Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69 (1986)). Still, these cases of "special treatment" seem to have more to do with the type of speech or publication involved than with the press's status as an institution. In Freedman, denying motion pictures the same protection from prior restraints as newspapers perhaps had more to do with the Court's determination that movies involve lower-value speech than with the press's status as an
Of course, this means only that members of the institutional press, for the most part, enjoy the same First Amendment freedoms to speak and publish as all Americans. As Justice White remarked in *Branzburg*, "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals.'" Individual reporters enjoy First Amendment protection not because they are members of the institutional press, but because they are citizens.

**B. Basing a Privilege on the Freedom of Speech**

Journalists and their supporters must base their claims to a reporter-source privilege on something other than institutional protection. By briefly surveying the relevant free speech doctrine, doctrinal support can be pinpointed for reporters' claims that a First Amendment reporter-source privilege is necessary to protect journalists' freedoms to publish and speak.

1. The Content-Based/Content-Neutral Distinction—The Supreme Court traditionally begins its free speech analysis by drawing a distinction between "content-based" and "content-neutral" restrictions. Content-based laws are those that expressly restrict communication because of its meaning; a

---

*Freedman*, 380 U.S. at 60–61 (Douglas, J., concurring) (noting that "films differ from other forms of expression"). Similarly, the Court's statement in *Hepps* that "where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements are false," 475 U.S. at 768–69, seemingly has more to do with the fact that the publication concerned a matter of public interest than with the publisher's status as a member of the institutional media. Both holdings would protect the "lonely pamphleteer . . . as much as . . . the large metropolitan publisher." *Branzburg* v. Hayes, 408 U.S. 665, 704 (1972).

57. The notion that reporters cannot be targeted merely because they are members of the institutional press will be discussed *infra* at notes 71–74 and accompanying text.


59. See, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992) (holding that a Minnesota ordinance that prohibited speech based on its content was unconstitutional because the content discrimination was not reasonably necessary to achieve the municipality's compelling interests); see also Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & Mary L. Rev. 779, 785 (1985) (discussing the different standards applied to incidental and intentional restrictions in speech); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 47–48 (1987) (differentiating the Court's content-based and content-neutral restrictions on speech).
typical example is a law that expressly prohibits the burning of the American flag in order to "preserv[e] the flag as a symbol of nationhood and national unity." Content-based restrictions ordinarily receive the highest First Amendment scrutiny. As Justice Brennan wrote, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

By contrast, laws that explicitly regulate conduct and not meaning are dubbed content-neutral. For example, a law that prohibits noise near a hospital is content-neutral because it regulates an activity, making noise. Such a law certainly would restrict loud speeches, but not because of the messages that they convey. Instead, the speeches—along with other loud noises—are restricted because of their noise. Similarly, a law that compels witnesses to reveal the sources of their information does not explicitly regulate the content of the witnesses' testimony, and therefore is content-neutral. Most content-neutral restrictions do not raise First Amendment concerns.

Content-neutral restrictions do implicate free speech concerns, however, if the regulated conduct has both speech and non-speech elements. A classic example of this type of regulation would be a law that prohibits the intentional destruction of a draft card. The nonspeech conduct prohibited is the destruction of an identification card issued by the government. The regulation also implicates speech because the government arguably is attempting to prohibit a certain type of protest, namely, the burning of a draft card to protest the draft. Under an approach first described in United States

60. Texas v. Johnson, 491 U.S. 397, 410 (1989). In contrast, a law that prohibits burning anything in a public place would not violate the First Amendment. The problem with the law in Johnson was that it was "not aimed at protecting the physical integrity of the flag in all circumstances, but was designed instead to protect it only against impairments that would cause serious offense to others." Id. at 411; see generally Stone, supra note 59, at 47–48.

61. Johnson, 491 U.S. at 414.


63. Id. at 47 (noting that content-based restrictions limit a communication because of the message conveyed by the communication).

64. Id. at 48.


v. O'Brien,68 courts faced with a First Amendment challenge to a content-neutral law must examine whether the government's motive in passing the regulation is "unrelated to the suppression of free expression," that is, courts must determine whether the law is designed expressly to restrict communicative activities.69 A content-neutral law designed to suppress communications (for example, a law that bans the use of sound trucks in residential neighborhoods), theoretically receives the same searching scrutiny as a content-based restriction.70

That content-neutral laws designed to suppress communications receive the highest First Amendment scrutiny provides the first cornerstone for the reporter-source privilege that this Note proposes in Part V. A law in which the government specifically "target[s] or single[s] out the press"71 for discriminatory treatment probably was passed to suppress communications and accordingly should raise serious First Amendment concerns.72 As a result, the government may not compel a

68. Id. See also Schauer, supra note 59, at 785; Stone, supra note 59, at 51. Although O'Brien specifically involved symbolic speech, the O'Brien approach now is employed more generally to evaluate claims that content-neutral regulations impact free speech. See, e.g., Cloud Books, 478 U.S. at 702-05.

69. O'Brien, 391 U.S. at 377. For good discussions of the First Amendment treatment of incidental restrictions on free speech, see Schauer, supra note 59, at 785; Stone, supra note 59, at 48.

70. As noted supra text accompanying note 61, this means that the law will receive the highest First Amendment scrutiny. See Schauer, supra note 59, at 785-87 & n.24. Professor Stone observes that content-neutral laws having a communicative impact actually are subject to three distinct standards of review: deferential, intermediate, and strict review. Stone, supra note 59, at 48-54.


72. Id. at 2518-19. It is tempting to analogize the Court's approach to the Press Clause with its approach to the equal protection doctrine: generally applicable laws impacting the press as an institution (as opposed to the press as a speaker) do not violate the First Amendment, but the First Amendment is violated once the press proves some sort of intentional discrimination. Similarly, generally applicable laws that incidentally impact a suspect class ordinarily fail to violate equal protection, while laws that specifically target a suspect class warrant the highest equal protection scrutiny. Washington v. Davis, 426 U.S. 229, 242 (1975); cf. Douglas Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 1, 17 (arguing that the Court in Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), effectively applied equal protection analysis in the Free Exercise context); Schauer, supra note 59, at 788 (analogizing the doctrine of incidental restrictions to equal protection analysis). The problem with this approach is that it essentially conveys constitutional status to the institutional press, something that the Court has been reluctant to do. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 704-05 (1972). A better approach, perhaps, is to view a statute that specifically singles out the institutional press for unfair treatment as a facially neutral law motivated by a
reporter to reveal the identity of a confidential source merely to punish the reporter for being a member of the institutional press.\textsuperscript{73} The Court acknowledged this principle in \textit{Branzburg} when it stated that "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no [First Amendment] justification."\textsuperscript{74}

2. \textbf{Incidental Restrictions on Free Speech: The Cloud Books Test}—The principle that the government may not harass a reporter merely for being a member of the institutional press will not alone justify a reporter-source privilege because compelling a reporter to reveal her source's identity need not always raise the specter of a government motivated by antipress animus. A regulation or court order compelling a reporter to reveal her source's identity ordinarily is a second type of content-neutral restriction, one that directly regulates mere conduct and impacts free speech only incidentally.\textsuperscript{75} For example, discovery laws and laws authorizing a court to compel testimony are generally applicable.\textsuperscript{76} The rule that litigants have "a right to every man's evidence"\textsuperscript{77} is benignly motivated to serve the public interest by having litigants present all relevant truthful information in court and not by a governmental quest to suppress either the press or

desire to suppress speech. Targeting the press therefore is analogous to a redistricting plan that, while neutral on its face, clearly is racially motivated. See \textit{Gomillion v. Lightfoot}, 364 U.S. 339 (1960); see also \textit{Schauer}, supra note 59, at 781 n.15. In \textit{Gomillion}, the city of Tuskegee, Alabama had changed its districting plan "from a square to an uncouth twenty-eight-sided figure," 364 U.S. at 340, which excluded all but four or five of Tuskegee's 400 black voters from the redrawn voting district without eliminating a single white voter. The Court found that the only reasonable explanation for the redrawing of the boundaries was impermissible gerrymandering. \textit{Id.} at 341. Similarly, a law that specifically targets the press most likely is motivated by the desire to suppress speech and therefore violates the First Amendment.

\begin{itemize}
\item \textsuperscript{73} See \textit{Cohen}, 111 S. Ct. at 2518 (noting that the government may not target or single out the press for discriminatory treatment); see also \textit{Branzburg}, 408 U.S. at 707–08 (prohibiting official harassment intended to disrupt a reporter's relationship with her sources).
\item \textsuperscript{74} \textit{Branzburg}, 408 U.S. at 707–08.
\item \textsuperscript{75} \textit{Id.} at 681 (stating that cases compelling reporters to respond to grand jury subpoenas "involve no intrusion upon speech"); see also \textit{Schauer}, supra note 59, at 781 & n.27.
\item \textsuperscript{76} \textit{See, e.g.}, \textit{Branzburg}, 408 U.S. at 682 (noting that grand jury subpoenas apply to citizens generally).
\end{itemize}
speech. Unintended "incidental restrictions"—like the ones occasioned by this rule—usually fail to raise First Amendment concerns at all.\textsuperscript{78}

For the most part, the Court's emphasis on the government's motive and its reluctance to scrutinize unintended or incidental restrictions on free speech are sensible.\textsuperscript{79} As the Supreme Court noted in \textit{Arcara v. Cloud Books, Inc.}:\textsuperscript{80}

\begin{quote}
[E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim. Similarly, a thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed because of the confinement, but we have explicitly rejected a prisoner's claim to a prison environment least restrictive of his desire to speak to outsiders.\textsuperscript{81}
\end{quote}

\textsuperscript{78} Stone, \textit{supra} note 59, at 108.

\textsuperscript{79} As Professor Schauer points out, it is troubling to think "that every owner of a movie theater, concert hall, bookstore, magazine stand, or newspaper dispensing machine would have a first amendment-inspired claim for a special exemption from otherwise generally applicable zoning laws." Schauer, \textit{supra} note 59, at 787; \textit{see also} Stone, \textit{supra} note 59, at 107 (noting that extending the balancing test to all laws with only an incidental effect on speech "would open up a Pandora's box of judicial review").

\textsuperscript{80} 478 U.S. 697 (1986) (upholding New York's decision to close a bookstore because of prostitution on the premises).

\textsuperscript{81} \textit{Id.} at 706 (citation omitted). Commentators generally have agreed that the distinction the Court draws between incidental and purposeful restrictions makes some sense. Professor Schauer argues that the viability of the distinction between regulations having a direct communicative impact and regulations having only an incidental effect on speech boils down to the distinction between the "positive" and "negative" conceptions of the First Amendment. Schauer, \textit{supra} note 59, at 783. The positive conception accents the positive values of speech; it concentrates on "the particular advantages, beauties, and purposes served by certain communicative acts." \textit{Id.} at 782–83. The negative perspective, on the other hand, focuses less on the values served by speech and more on the dangers of governmental regulation. \textit{Id.} at 781. Under a positive approach, "a reduction in the quantity of speech is a substantial and primary constitutional harm." \textit{Id.} at 783. As a result, the distinction between a law designed to suppress communication and a law having only an incidental effect on speech is by itself irrelevant. A positive approach focuses on the effects of a regulation. The negative approach focuses more on governmental motivation. "Only the intentional restriction calls into question the state's motives, and if our aim is specifically to prevent the government from having certain motives, then the intentional restriction involves dangers of a different order." \textit{Id.}
Forcing courts to evaluate all of the effects of every generally applicable law would create an administrative nightmare. Given the impossibility of evaluating the free speech implications of every governmental action, the Court wisely concentrates its limited judicial resources on situations that pose the greatest threat to free speech: intentional restrictions.82

Nevertheless, as the Court has acknowledged,83 a blanket refusal to evaluate the unintended effects of generally applicable laws can pose serious dangers to free speech. Some incidental restrictions impair opportunities for expression just as thoroughly as laws that specifically target communications.84 A law zoning a certain area for residential use, for example, restricts speech just as thoroughly as a law prohibiting all bookstores in the same area.85 Aware of this threat and of the administrative need to limit the scope of judicial review, the Court has carved out two situations in which content-neutral laws that incidentally restrict free speech warrant First Amendment review: (1) where “a statute based on a nonexpressive activity has the inevitable effect of

at 783. Professor Schauer considers himself an adherent to the negative view. Id. at 783 n.19.

Professor Stone, although admitting that the distinction between regulations having direct communicative impact and regulations having only an incidental effect has “some force,” Stone, supra note 59, at 107, nevertheless seems to be an adherent to the positive view of the First Amendment. As he notes, “the central concern of content-neutral analysis is the extent to which content-neutral restrictions limit the opportunities for free expression.” Id. at 106. To Professor Stone, “[t]he potential restrictive effect of . . . [laws having only an incidental effect on free speech] is simply too great to disregard them entirely.” Id. at 107.

82. Incidental side effects certainly could restrict the quantity or quality of speech. The intentional restriction of free speech, however, simply “involves dangers of a different order.” Schauer, supra note 59, at 783.


85. Stone, supra note 59, at 105. Professor Stone provides several examples of pairs of laws in which the effects of both laws are the same, but the first law directly restricts communicative activity, whereas the second law has only an incidental effect. Two of Stone's examples are:

A law that prohibits all parades in order to prevent obstruction of traffic, and a law that prohibits obstruction of traffic by any means, including parades;
A law that prohibits sound trucks in order to prevent excessive noise, and a law that prohibits excessive noise, which in practice bans among other things cars with defective mufflers, jackhammers, and sound trucks . . . .

Id.
singling out those engaged in expressive activity, or (2) "where it was conduct with a significant expressive element that drew the legal remedy in the first place ..." As Professor Stone has rephrased this Cloud Books test, incidental restrictions are subject to a more exacting First Amendment review only when they either (1) "have a highly disproportionate impact on groups or individuals engaged in first amendment activity," or (2) "penalize expressive activity."

Although no cases as yet have applied the Cloud Books test to the issue of reporter-source privileges, the Cloud Books analysis of incidental restrictions conceivably could be used to support a reporter-source privilege grounded in the First Amendment. First Amendment protection would be triggered if advocates of a reporter-source privilege could show that forcing reporters to disclose their sources' identities either (1) has a high impact on the press's First Amendment rights or (2) penalizes the press for reporting the news.

III. INCIDENTAL RESTRICTIONS THAT HAVE A HIGH IMPACT ON FREE SPEECH: THE CHILLING EFFECT ARGUMENT

This Part evaluates whether the first prong of the Cloud Books test—the "high impact" analysis—justifies a First Amendment reporter-source privilege. The most popular strategy for advocating a First Amendment reporter-source privilege is to argue that compelling reporters to reveal their sources' identities inevitably singles out the press, or, in other words, that compelled disclosure has a "high impact" on the First Amendment right of reporters to report the news. Journalists long have claimed that compelling a reporter to reveal the identity of a confidential source chills the news-gathering process and therefore hinders the press's ability to report the news. Were the courts routinely to compel disclosure of

87. Id. at 706 (citing United States v. O'Brien, 391 U.S. 367 (1968)).
88. Stone, supra note 59, at 108–09.
89. Id. at 109.
90. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 682, 693–94 (1972); Kloppenberg, supra note 11, at 1636; Lindberg, supra note 11, at 341–43; Malheiro, supra note 12, at 84; Onorato, supra note 33, at 386–87.
sources' identities, the argument goes, no source would risk divulging information to a reporter and the public would be deprived of newsworthy information.91 Further, a reporter, knowing that a court may order disclosure, might decide to suppress newsworthy information either to protect the source and the reporter-source relationship or to avoid the consequences of not revealing the identity of the source.92 Many journalists, courts, and commentators have argued that the claimed chilling effect warrants the creation of a First Amendment confidential reporter-source privilege.93

There are two main strategic hurdles to successfully basing a First Amendment reporter-source privilege on the claimed chilling effect.94 The first issue is whether a chilling effect exists at all. The second concern is whether any such chilling effect would be sufficiently severe to warrant First Amendment protection.

I. The Empirical Evidence—Two empirical studies, one published in 197195 and the other published in 1985,96 have

91. Branzburg, 408 U.S. at 682, 693–94.
92. Id. at 731–32 (Stewart, J., dissenting); Lindberg, supra note 11, at 342–43; Malheiro, supra note 12, at 100.
93. Branzburg, 408 U.S. at 693–95; Langley & Levine, supra note 12, at 41 (arguing that “meaningful reporting about government would be effectively crippled in the absence of confidential relationships [and that] constitutional protection [should be] afforded those relationships”); Marcus, supra note 11, at 815–17; Tofel, supra note 19, at 9; Browne, supra note 19, at 742; Kloppenberg, supra note 11, at 1636; Malheiro, supra note 12, at 84; Onorato, supra note 33, at 391. Reporter Timothy Phelps invoked the claimed chilling effect to justify his refusal to reveal the source of his story about Anita Hill's allegations against Clarence Thomas. Eaton, supra note 4, at A20. Senate Rules Committee Chairman Wendell H. Ford expressed similar concerns over a chilling effect to explain why the Committee refused to enforce Special Counsel Fleming's subpoena. The Senate Shows Some Sense, N.Y. Times, Mar. 27, 1992, at A34.
94. Although the “impact branch” of the Cloud Books test seemingly would open the door to arguments that forced disclosure creates a “chilling effect,” it is important to note that the “impact branch” is unlike a straight balancing-of-effects approach. Under a straight balancing-of-effects approach, courts attempt to articulate, measure, and compare the competing interests involved in a particular case to determine the legitimacy of burdening constitutional interests. See, e.g., Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2522 (Souter, J., dissenting). The “impact branch” does not permit such balancing; a court will subject an incidental restriction to First Amendment scrutiny only after it first determines that the restrictive effect on free speech is large enough to be called “severe.” Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986); see also supra notes 86–89 and accompanying text. Further, once a court finds the required “severe” burden on free speech, it still does not engage in a balancing test. Instead, the court purportedly applies a “least restrictive means” test to determine if the restriction violates the First Amendment. Cloud Books, 478 U.S. at 706–07.
95. Blasi, supra note 12.
96. Osborn, supra note 12.
attempted to measure whether compelled disclosure under present law in fact chills speech. Both studies surveyed reporters regarding their use of confidential sources. Neither study provides much support for the argument that compelled disclosure chills speech. The 1971 study, for example, noted that the "subpoena threat really hinders only a certain subpopulation of reporters" and has caused only "some losses" of stories. The 1985 study reported that most of its research subjects felt that sources were unaffected by changes in the press shield laws. Fewer than one-third of the reporters surveyed in the 1985 study thought that shield laws were helpful in gathering news.

The failure of these studies to demonstrate that compelled disclosure deters sources from revealing confidential information is not surprising. When deciding whether to reveal information to a reporter, a confidential source probably is more concerned with whether she can trust the reporter personally than with whether her relationship with the reporter enjoys a First Amendment privilege. Members of the press have shown themselves to be worthy of a source's trust; reporters have a long tradition of being willing to endure jail terms rather than reveal their sources' identities.

97. For a discussion of the methodological problems inherent in measuring such an effect, see Branzburg, 408 U.S. at 693-95 & n.33.
98. Blasi, supra note 12, at 274.
100. Id. at 74-75. In fact, less than 20% of the respondents thought that their coverage was affected adversely by the threat of possible disclosure. Id. However, "[n]early all the respondents [felt] threatened by the potential diminution of the present limited and uncertain protection" available to reporters. Id. at 77.
101. Id. at 75-76.
102. See supra note 13 and accompanying text. As one of the reporters surveyed by Osborn stated, "A reporter's willingness to withstand all pressure to force disclosure—even at the risk of jail—is worth more in developing such confidence than any shield law. Episodes [where reporters go to jail rather than reveal a source's identity] do not lessen the confidence of sources in reporters. They heighten it." Osborn, supra note 12, at 76.

This admittedly leads to a rather anomalous result. As noted previously, no privilege is warranted unless forced disclosure of the source's identity produces a rather large chilling effect. See supra text accompanying notes 86-89. Arguably, one of the reasons we fail to observe a chilling effect is because reporters gain sources' trust by their willingness to go to jail. But it certainly is conceivable that we would begin to see a pronounced chilling effect were reporters as a group to comply with court orders to reveal their sources' identities. This produces the bizarre result that the First Amendment reporter-source privilege conceivably turns on the reporters' willingness as a group to break the law.
Further, from a source’s standpoint, little difference exists between a qualified privilege and no privilege at all. In either situation, even assuming that the source knows the law, she enters into the confidential relationship knowing that a court someday may compel the reporter to reveal her identity.\textsuperscript{103}

Under this analysis, the lack of a First Amendment privilege does little, if anything, to affect the source’s willingness to talk.\textsuperscript{104}

It is perhaps more surprising that the studies failed to establish that the threat of compelled disclosure inspires reporters to censor their own reporting. This is particularly surprising because the penalty for refusing to reveal a source’s identity often involves spending time in jail.\textsuperscript{105} In addition, reporters in libel cases might face the dilemma of either revealing a source’s identity or losing a defamation suit.\textsuperscript{106}

The fear of these penalties seemingly would cause journalists to think twice before printing newsworthy information. The

\begin{itemize}
  \item \textsuperscript{103} With a qualified, as opposed to an absolute, privilege, a source can never be sure whether a court will compel disclosure. A source truly fearing disclosure would settle only for an absolute privilege. See Branzburg v. Hayes, 408 U.S. 665, 702 (1972) (explaining that a rule of conditional privilege would “reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult”). The Court made a similar observation in University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) (rejecting the University of Pennsylvania’s claim to an academic privilege not to reveal peer-review materials). The Court reasoned that the chilling effect of forced disclosure on the quality of peer review evaluations would be only slightly greater without a privilege; as the Court pointed out, some peer evaluations would be disclosed anyway under a qualified privilege. \textit{Id.} at 200.
  \item \textsuperscript{104} See, \textit{e.g.}, \textit{Branzburg}, 408 U.S. at 694–95. The Court has suggested other reasons why a reporter-source privilege is not crucial to newsgathering. For example, the Court asserted that “quite often, 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,” \textit{id.}, suggesting that informants will provide information to members of the media regardless of the existence of a privilege. Additionally, the Court pointed out that informants interested in avoiding exposure probably would rely upon the secrecy of the grand jury and would trust law enforcement and public officials as much as they would trust reporters. \textit{Id.} at 695.
  \item \textsuperscript{105} \textit{See supra} notes 13, 44; \textit{see, e.g.}, Karem v. Priest, 744 F. Supp. 136 (W.D. Tex. 1990).
  \item \textsuperscript{106} \textit{See Lindberg, supra} note 11, at 354.
\end{itemize}
1985 survey nevertheless revealed that fewer than twenty percent of the journalists surveyed felt that their coverage of news events suffered because present law permits litigants to compel disclosure.\footnote{107} Several factors might help to explain why the threats of jail time or losing libel suits fail to force reporters to censor their own reporting. First, news stories most often are derived from numerous sources; reporters, for reasons of journalistic integrity, tend to avoid relying exclusively on confidential sources.\footnote{108} Only a third of the reporters surveyed in the 1985 study claimed that they based a significant portion of an article solely on information derived from confidential sources.\footnote{109} That reporters have multiple sources enables courts to force litigants to get the relevant information from these other, nonsecret sources.\footnote{110} Moreover, authorities with the power to compel disclosure traditionally have been sensitive to reporters' needs to maintain the confidentiality of their relationships to their sources and often are reluctant to compel discovery.\footnote{111} Thus, courts might be reluctant to compel disclosure where the source's identity is relatively unimportant to the issue being litigated.\footnote{112} Finally, going to jail for

\footnote{107} Osborn, supra note 12, at 74–75.
\footnote{108} Id. at 73. As one commentator notes:

> Journalists have other [nonlegal] incentives to be extremely hesitant before printing a story using confidential sources, and often censor material of their own accord. The formal rules and informal checks now present in newsrooms reflect this caution. The public does not trust stories attributed to anonymous sources and editors are thus cautious about their use.

Kloppenberg, supra note 11, at 1657.
\footnote{109} Osborn, supra note 12, at 73.
\footnote{110} Courts have a great deal of discretion to deny disclosure when the informant's identity is of little probative value. See, e.g., Fed. R. Civ. P. 26(b)(1) & 26(c); Fed. R. Evid. 403.
\footnote{111} Marcus, supra note 11, at 820. Dean Marcus notes that common law judges, while rejecting claims to a reporter's privilege, often would find "technical reasons" for refusing disclosure. Id. Judges who did order disclosure often would impose weak penalties for failure to comply. Id.

> Further, prosecutors might not press a reporter who refuses to testify. Branzburg v. Hayes, 408 U.S. 665, 694 (1972). A reluctance to take action against the press was shown most dramatically during the recent Nina Totenberg/Timothy Phelps case where the Senate Rules Committee refused to compel Totenberg and Phelps to reveal how they learned of Anita Hill's accusations against Clarence Thomas. See supra notes 1–7 and accompanying text.

\footnote{112} For example, one commentator has argued that the source's identity often plays only a minor role in a plaintiff's attempt to meet the New York Times Co. v. Sullivan, 376 U.S. 254 (1964), actual malice requirements in libel cases. See
refusing to reveal the identity of a confidential source simply does not carry the usual stigma of imprisonment. In fact, jailed reporters usually enjoy the celebrity status that accompanies *cause célèbre*.

This is not to say that compelling reporters to disclose their sources' identities never chills their ability to report the news. It certainly is possible that subsequent studies will document a significant chilling effect after all. But even establishing the existence of a chilling effect would not end the inquiry. As Professor Blasi wrote, whether "'some' [effect] is 'enough' to justify a newsman's privilege is a legal rather than empirical question."114

2. *The Elements of “High Impact”*—Were journalists to establish that compelling discovery actually chills their attempts to report the news, they still would have to establish that the impact is severe enough to warrant First Amendment scrutiny.115 This limitation reflects the administrative needs of courts to avoid the feared avalanche of cases.116 Of course, the severity requirement has its own problem: whether the type or degree of a particular effect is "severe" largely depends upon whom you ask.

The Supreme Court has considered a number of factors when evaluating whether the impact of an incidental restriction invokes First Amendment concerns. Incidental restrictions on historically open avenues of free expression constitute one type of effect that the Court regards as severe. For example, in the public forum cases,117 the Court found that the


113. The publicity surrounding the Brian Karem and the Totenberg/Phelps cases provide good examples. *See supra* notes 1–7, 13, 44 and accompanying text. Admittedly, there is something very disturbing in this reasoning. As attorney Floyd Abrams wrote:

> What kind of legal system is it which would totally deny legal protection to promises which "must" be made and "must" be kept? The law is not usually so foolish as to require a "few brave" individuals to be jailed to give effect to promises which are essential to the functioning of our society.


115. *See supra* note 94 and accompanying text.

116. *See supra* notes 79–82 and accompanying text.

117. *See, e.g.*, Hague v. CIO, 307 U.S. 496, 515 (1939) (holding unconstitutional an ordinance which prohibited public assembly in streets or parks without a permit from the Director of Safety).
First Amendment is implicated when a generally applicable law affects free expression in "streets, sidewalks, parks and other similar public places [which] are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." Unlike the litigants in public-forum cases, however, the press cannot claim that the government is taking away something that it historically has permitted. The position that the reporter-source privilege is somehow "historically associated with the exercise of First Amendment rights" is untenable. In fact, as the Branzburg majority noted, history reveals precisely the opposite; in the past, neither the common law nor the Constitution has afforded reporters a testimonial privilege.

Another factor in the Court's severity calculation is the availability of alternative channels of communication. In
University of Pennsylvania v. EEOC,\(^\text{123}\) for example, the Court rejected the University of Pennsylvania's claim that it enjoyed a First Amendment academic privilege against disclosure of peer review materials used in making tenure decisions.\(^\text{124}\) The Court emphasized that confidentiality of the peer review process was not the norm at other universities, indicating that confidentiality was not vital to the tenure decision-making process.\(^\text{125}\) In other words, the Court found that "the injury to academic freedom" was "speculative" because universities have alternative, nonsecret ways of making tenure decisions.\(^\text{126}\) Similarly, reporters need not rely exclusively on confidential sources to help gather the news; alternative channels of information are available. As noted previously, a 1985 study revealed that although most of the reporters surveyed do, in fact, rely on confidential sources, only one third of the reporters used information obtained from a confidential source "as the basis for a significant portion of the article."\(^\text{127}\)

Whether an effect qualifies as "severe" also depends on the directness of the causal link between the government's action and its impact on free speech.\(^\text{128}\) In University of Pennsylvania,\(^\text{129}\) the Court rejected the University's claim that forced disclosure of confidential peer evaluations would have a "chilling effect" leading to a decline in the quality of peer evaluations, in part because the causal link between the EEOC's subpoena requiring disclosure and the burden to the University's asserted First Amendment academic freedom claim was "extremely attenuated."\(^\text{130}\) The Court, seemingly

\(^{124}\) Id. at 197, 201–02.
\(^{125}\) Id. at 200.
\(^{126}\) Id.
\(^{127}\) Osborn, supra note 12, at 73.
\(^{128}\) See University of Pennsylvania, 493 U.S. at 199.
\(^{130}\) Id. at 199. As Justice Blackmun explained:

[The University] argues that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which in turn is the means by which petitioner seeks to exercise its asserted academic-freedom right of choosing who will teach. To verbalize the claim is to recognize how distant the burden is from the asserted right.

Id. at 199–200. The problem with accepting the University's attenuated claim, the Court continued, is that the University had failed to distinguish the burden that it claimed it would suffer from compelled disclosure from the burden that it and
influenced by the tort-law idea of proximate causation, required the government action to be closely connected to the impact on First Amendment rights.\(^{131}\) Thus, to be entitled to First Amendment protection, a reporter would have to demonstrate that the causal link between the claimed chilling effect on free speech and the government's action in compelling discovery of a reporter's confidential source was not "attenuated."

Applying the *University of Pennsylvania* Court's analysis to the reporter-source relationship demonstrates that the claimed chilling effect would be quite attenuated from the government's actions. The press argues that compelling discovery of a source's identity would undermine the willingness of other sources to enter into confidential relationships with reporters. A potential source would fear retaliation from third parties, possibly including private parties. The reporter-source relationship, the argument continues, is central to the newsgathering process, which in turn is central to free speech. Thus, to inhibit the reporter-source relationship is to harm free speech. As the *University of Pennsylvania* Court noted, "[t]o verbalize the claim is to recognize how distant the burden is from the asserted right."\(^{132}\)

Others must bear under other generally applicable laws. A generally applicable tax law, for example, while raising no First Amendment concerns, nevertheless has the potential to deprive a university of a significant amount of money that it could have used to bid for prospective professors. The Court doubted whether "the peer review process is any more essential in effectuating the [University's] right to determine 'who may teach' than is the availability of money." *Id.* at 200.\(^{131}\)

The Court also found the injury to academic freedom to be "speculative" as well as "remote and attenuated." *Id.* The Court indicated a reluctance to recognize a constitutional privilege because of the uncertainty of the magnitude of the chilling effect. *Id.*

A finding of attenuation, however, does not necessarily eliminate the need for First Amendment review. The Court has recognized that burdens that "are less than direct may sometimes pose First Amendment concerns." *Id.* at 199. In *NAACP v. Alabama*, 377 U.S. 288 (1964), for example, an Alabama statute required out-of-state corporations doing business in Alabama to provide the names and addresses of its members. Although the Court concluded that the impact on an NAACP member's First Amendment right to freedom of association was attenuated or indirect, compelled disclosure of the members' identities warranted First Amendment scrutiny because disclosure would have an actual, substantial deterrent effect on membership. *Id.* at 308.

The Court reached a similar conclusion in *Brown v. Socialist Workers '74 Campaign Comm.* 459 U.S. 87 (1982). The Court found that in light of the history of private and public harassment of Socialist Party members, campaign contribution disclosure requirements instituted by the State of Ohio violated the First Amendment when applied to the Socialist Party. *Id.* at 97–98. The Court reached this result despite the fact that the chilling effect on the members' First Amendment
Finally, advocates of a privilege must address the argument that a chilling effect actually might be beneficial in some contexts. Arguably, secrecy is essential to the deliberations of certain organizations, such as Congressional committees and appellate court panels. A First Amendment reporter-source privilege is undesirable in contexts where secrecy is important because the privilege would shield leakers and accordingly would chill the speech of those involved in secret communications. The Totenberg/Phelps case, for example, arose because someone violated Professor Hill's request that her allegations remain secret. Presumably, Hill might not have offered her information had she known that it would be leaked.

The debate about the existence of a chilling effect no doubt will continue. Nevertheless, the press to date has failed to establish clearly that compelled disclosure has a severe impact on First Amendment rights. An analysis of University of Pennsylvania indicates that meeting the severity requirement will not be easy. Reporters wishing to base a reporter-source First Amendment privilege on the claimed chilling effect face a difficult challenge.

IV. INCIDENTAL RESTRICTIONS THAT PENALIZE SPEECH

Part III found it unlikely that a reporter-source privilege could be based successfully on the argument that the claimed right of freedom of association did not come directly from the government actor. Instead, the Court emphasized that "the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." In short, the Court was concerned that "[c]ompelled disclosure . . . could . . . cripple . . . [the] party's ability to operate effectively and thereby reduce 'the free circulation of ideas both within and without the political arena.'" After the contents of preliminary drafts of an appellate opinion had been leaked to the press, Judge Buckley commented that secrecy is crucial to the workings of appellate panels. When Professor Hill contacted the Judiciary Committee, she insisted that her name not be used. Statement of Senator Joseph Biden, quoted in Lewis, supra note 1, at A14.

"Professor Anita Hill . . . would never have offered her affidavit charging Judge Thomas with sexual harassment without the promise of confidentiality." Fein, supra note 50, at 22.
chilling effect qualifies as a "severe" impact under the first prong of the *Cloud Books* test. This Part, looking to the second prong of the *Cloud Books* test, observes that compelled disclosure of a source's identity should receive First Amendment scrutiny whenever the reporter's speech "[draws] the legal remedy in the first place." This Part examines what it means to "draw the legal remedy."

On its face, applying the "penalizing speech" branch of the *Cloud Books* test appears relatively simple. A court is to subject regulations to a more searching scrutiny whenever government officials invoke a content-neutral regulation to penalize expressive activity. In *United States v. O'Brien*, for example, the arguably expressive act of burning a draft card had drawn the legal remedy. In *Cloud Books*, however, the Court ruled that New York's decision to close a bookstore did not implicate the First Amendment because the government was penalizing the nonexpressive activity of prostitution. New York's decision to close the bookstore certainly affected an expressive activity, but a nonexpressive activity, prostitution, had drawn the legal remedy.

*O'Brien* and *Cloud Books* notwithstanding, deciding whether expressive or nonexpressive activity drew the legal remedy often proves difficult. When reporters are compelled to testify, has their speech or has their knowledge of the source's identity drawn the legal remedy?

A recent case, *Cohen v. Cowles Media Co.*, helps illuminate the penalization branch of the *Cloud Books* test. In *Cohen*, two newspapers broke their promises of confidentiality to the plaintiff Dan Cohen by publishing his name as the source of information relating to a candidate in an upcoming

137. *Id.* at 706–07 & n.3 (referring to Justice Blackmun's dissenting opinion).
139. *Id.* at 376–77 (acknowledging that draft card burning has both "'speech' and 'nonspeech' elements"); see also Stone, *supra* note 59, at 109. Professor Stone argues that the "least restrictive means" test actually amounts to little more than a rubber stamp. *Id.* at 50–52. In fact, as Professor Stone remarks, the *O'Brien* standard has never resulted in the Court striking down a regulation for failing the least restrictive means test. *Id.* at 110–11.
140. In *Cloud Books*, New York closed down a bookstore because of prostitution on the premises. In upholding New York's action, the Court concluded that "the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." 478 U.S. at 707.
141. *Id.*
gubernatorial election. The Minnesota Supreme Court held that the First Amendment barred Cohen's promissory estoppel claim against the newspapers.143

The United States Supreme Court reversed. Justice Blackmun, writing in dissent, agreed with the Minnesota Supreme Court and argued that allowing Cohen a cause of action and awarding damages under a promissory estoppel theory effectively would penalize the press for publishing Cohen's identity.144 To Justice Blackmun, Cohen was indistinguishable from Hustler Magazine, Inc. v. Falwell,145 in which the Supreme Court prohibited a trial court from imposing liability for the publication of a satirical critique of Jerry Falwell where actual malice had not been proven.146 In both cases, Justice Blackmun was unconcerned with the government's motive, and, focusing strictly on the government's action, perceived what he thought was an impermissible causal link—there was speech, and the government acted to restrict it. That the speech in Cohen was merely incidental to the underlying breach of a promise was inconsequential.147 To Justice Blackmun, applying promissory estoppel in response to

143. Id. at 2516-17.

144. Id. at 2521-22 (Blackmun, J., dissenting). The newspapers argued that enforcing the doctrine of promissory estoppel would conflict with the First Amendment principle that the government constitutionally may not punish a newspaper for publishing lawfully obtained "truthful information about a matter of public significance ... absent a need to further a state interest of the highest order." Id. at 2518 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)). Although Justice Blackmun agreed with the majority that the identity of the speaker as a member of the press is irrelevant, id. at 2520, he argued that restricting "truthful speech may [never be sanctioned consistent with the First Amendment [unless doing so is] in furtherance of a state interest 'of the highest order.' " Id. at 2522 (quoting Smith, 443 U.S. at 103). Writing for the majority, Justice White dismissed Justice Blackmun's Daily Mail argument because the restrictions in that case had been content-based restrictions instead of content-neutral rules of general applicability. The constitutional problem with Daily Mail, he noted, was that "the State itself [had] defined the content of [the] publications that would trigger liability." Id. at 2519. Under the Cloud Books analysis, such distinctions fall into the upper tier of the O'Brien test and automatically receive the highest First Amendment scrutiny. Stone, supra note 59, at 47.


146. Id. at 56.

147. To Justice Blackmun, "the publication of important political speech" is the claimed violation. Thus, as in Hustler, the law "may not be enforced to punish the expression of truthful information or opinion." Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2521–22 (Blackmun, J., dissenting). Although Justice Blackmun seemed unconcerned about governmental motive, he nevertheless would require a fairly direct causal link between the government actor and the suppression of speech. See, e.g., University of Pennsylvania v. EEOC, 493 U.S. 182, 199–200 (1990).
the publication was the same as punishing, or at least sanctioning, the newspapers in violation of the First Amendment.\textsuperscript{148}

Justice White, writing for the Cohen majority, argued that Hustler was distinguishable because Dan Cohen, unlike Jerry Falwell, was complaining primarily about a broken promise and not about the newspaper's publication.\textsuperscript{149} Rejecting Justice Blackmun's mechanical cause-and-effect method, Justice White's approach instead focused on whether the government action was motivated by the speech itself. Justice White seemed to ask: "What is it that bothered the government enough to take action?" In his Hustler concurrence, for example, Justice White found that the government impermissibly "penalized the publication of the parody."\textsuperscript{150} In Cohen, the private parties rather than the government had determined what expressive elements could not be published.\textsuperscript{151} First Amendment scrutiny was not warranted because it was the breach of this self-imposed agreement, not the fact of publication, that had bothered the government actor and therefore had drawn the legal remedy.\textsuperscript{152}

\begin{itemize}
\item \textsuperscript{148} Cohen, 111 S. Ct. at 2520–22.
\item \textsuperscript{149} As Justice White stated, "Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of $50,000 for a breach of a promise that caused him to lose his job and lowered his earning capacity." \textit{Id.} at 2519.
\item \textsuperscript{150} Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (White, J., concurring).
\item \textsuperscript{151} Cohen, 111 S. Ct. at 2519. Justice White contrasted the situation in Cohen, where "Minnesota law simply require[d] those making promises to keep them" with cases where "the State itself defined the content of publications that would trigger liability." \textit{Id.}
\item \textsuperscript{152} Justice White accordingly seemed to adopt what Professor Schauer calls a "negative perspective on the first amendment." Schauer, \textit{supra} note 59, at 783. "Under a negative view, the focus is not so much on the particular values that are served by speech as on the particular dangers of its regulation." \textit{Id.} Under this negative perspective, courts are primarily concerned with preventing "the government from having certain motives." \textit{Id.} Incidental and unintended effects are not irrelevant; the negative conception merely holds that the intentional restriction of free speech "involves dangers of a different order." \textit{Id.}
\end{itemize}

Historically, the distinction Cloud Books draws between restrictions on conduct with a significant expressive element that "drew the legal remedy in the first place," and those that do not, has made little difference. Schauer, \textit{supra} note 59, at 787–88; Stone, \textit{supra} note 59, at 109–11. Despite the pains the Court went through to distinguish Cloud Books from O'Brien and its progeny, the Court never has used the "least restrictive means" test to rule an incidental restriction unconstitutional. Stone, \textit{supra} note 59, at 110–11. Nevertheless, the Hustler decision, particularly Justice White's concurrence, coupled with both Justice Blackmun's and Justice White's Cohen decisions, shows that whether or not an expressive element drew the legal remedy indeed may be important. Despite their disagreement, both Justice
Justice White's majority opinion in *Cohen* thus clarifies at least one aspect of the "penalization" branch of the *Cloud Books* test: the penalization branch requires a court to make a determination of governmental motive. A mere link between speech and governmental action alone will not warrant First Amendment scrutiny.

The following two examples illustrate Justice White's approach. In the first situation, a source reveals to a reporter some highly classified yet unembarrassing information which the reporter then publishes. In this situation, the reporter actually has witnessed a crime—the source's crime of disclosing classified information. As the courts have made clear, members of the press are not immune from testifying as witnesses to criminal acts. It is true that the government learned of the source's crime through the reporter's speech. Yet, the information's unembarrassing content seems to indicate that the crime of revealing classified material, and not the reporter's speech itself, motivated the government to compel the reporter to testify. Compelling the reporter to reveal her source's identity would not implicate the penalization branch of the *Cloud Books* test.

In the second example, the information that the source leaks is unclassified, but its publication nevertheless causes great embarrassment to a government official. If the government tries to compel the reporter to reveal her source's identity, it seems more likely now, although we cannot be certain, that it is the reporter's speech and not the source's identity that has drawn the remedy. At a heuristic level, the case now begins to look less like *Cohen v. Cowles Media Co.* and more like *Hustler Magazine, Inc. v. Falwell*.

The first example represents one end of a spectrum. As in *Cohen*, we can be fairly sure that the source's underlying conduct, and not the reporter's speech, has drawn the legal remedy. The second example represents the other end of the spectrum. It looks more like *Hustler* because, arguably, the reporter's speech and not the source's conduct has drawn the remedy.

These examples emphasize the procedure courts would have to follow were they to apply this part of the *Cloud Books* test

---

White, *Cohen*, 111 S. Ct. at 2519, and Justice Blackmun, *id.* at 2521, agree that in situations like *Hustler*, where the State defines the context of the publication that triggers liability, generally applicable, content-neutral laws having only an incidental effect on free speech do in fact warrant First Amendment review.

on a case-by-case basis. The crucial question will be whether it is the particular reporter's knowledge of the source's identity or the publication of the source's information that bothered the government enough to compel disclosure of the source's identity. Only the latter will warrant First Amendment review.

V. A PROPOSED TEST

Thus far, two key concepts have been distilled from this overview of First Amendment principles. As discussed in Part II, government action that targets or singles out the press for discriminatory treatment raises serious First Amendment concerns. Laws compelling testimony, however, usually pose only incidental restrictions on free speech, and under the doctrine described in Cloud Books, such restrictions receive First Amendment scrutiny only (1) when the press can show that compelled discovery will have a significant impact on First Amendment rights or (2) whenever a significant expressive element provoked the government into taking action or drew the legal remedy in the first place. Although the first prong of the Cloud Books test probably cannot support a reporter-source privilege, the second prong does provide a theoretical basis for protecting the reporter-source relationship. As discussed in Part IV, the reporter-source relationship could warrant protection under the "penalization" branch of the Cloud Books test whenever it is the reporter's speech, not his knowledge of the source's identity, that draws the legal remedy.

A. Rejecting the Ad Hoc Approach

Acknowledging that the reporter-source relationship warrants First Amendment protection does not necessarily imply that courts should adopt a reporter-source privilege in

154. Or, as Professor Stone has stated, incidental restrictions receive First Amendment scrutiny whenever the government uses such content-neutral laws to penalize expressive activity. Stone, supra note 59, at 109; see also supra notes 86–89 and accompanying text.
all circumstances. In theory, at least, courts could apply the principles developed in Parts II and IV on a case-by-case basis.

There are, however, practical reasons for rejecting this ad hoc approach in favor of a per se privilege. In practice, it will be far from easy to determine in a given situation whether it is the reporter's speech or something else that has provoked the government into taking action. Currently, the only guidance for the courts is a rather inscrutable, and therefore unhelpful, rule of thumb: whenever the situation looks more like that in *Hustler*, the reporter-source relationship receives First Amendment protection; whenever the situation looks more like that in *Cohen*, the reporter-source relationship receives no protection at all. With no guidance beyond the *Cohen/Hustler* distinction, applying the penalization branch of the *Cloud Books* test every time a litigant attempts to discover the identity of a reporter's source would waste judicial resources and lead to inconsistent results.

A better approach is to examine more closely the various situations where litigants will attempt to compel reporters to reveal their sources' identities. The task then will be to describe the kinds of cases in which there is the greatest danger that either the reporter's status as a journalist or her speech, rather than the source's identity, has provoked the government to take action. Any proposed test will be evaluated by how well it captures the rather vexing distinction that *Cloud Books* draws between situations where it is the reporter's speech and not his knowledge of the source's identity that draws the legal remedy.

**B. The Proposed Test**

This Note proposes that the greatest danger to free speech arises when the government—as opposed to other litigants—moves to compel disclosure. The test described in this Part proposes that courts adopt a per se approach invoking a higher level of scrutiny whenever the government moves for disclosure of a reporter's sources.

Many courts adopting a qualified privilege have employed a variant of the test developed by the Second Circuit in *Garland*

---

155. See, e.g., *Branzburg*, 408 U.S. at 707-08 (rejecting reporters' claims of a First Amendment privilege not to testify in front of a grand jury despite acknowledging that the First Amendment prohibits "[o]fficial harassment of the press").
v. Torre. To compel disclosure under Garland, a court must determine that

1. the information is clearly relevant to the purpose for which the movant seeks disclosure;
2. the information cannot be obtained by reasonable alternative means, and
3. there is a compelling interest in the information.

In Garland, actress Judy Garland sued CBS for libel over allegedly defamatory statements appearing in columnist Marie Torre's gossip column. Torre, not a party to the original litigation, refused to reveal her source. Although the suit was ultimately dropped, then-Judge Potter Stewart, writing for the Second Circuit, established what has come to be known as the Garland test to determine when a court should compel disclosure of a source's identity. This test has been employed or approvingly discussed in Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974); Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973).

When determining whether to compel disclosure, it is worthwhile to consider relevance in order to prevent a "fishing expedition." Marcus, supra note 11, at 847-48. The relevance branch of the Garland test reflects Justice White's concern over "official harassment of the press undertaken . . . to disrupt a reporter's relationship with his news sources," Branzburg, 408 U.S. at 707-08, as well as Justice Powell's finding that a reporter may not have to reveal his source's identity if "called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation." Id. at 710; see also id. at 707 n.41 (noting that a consideration in authorizing a subpoena pursuant to the Guidelines for Subpoenas to the News Media is whether the information sought from the journalist is believed to be "essential to a successful investigation"). Even if the information given by the source is relevant, the identity of the source often is irrelevant to the issue being litigated. See, e.g., Bruno, 633 F.2d at 599; Lindberg, supra note 11, at 347 (arguing that even in defamation cases, the identity of a source often has little relevance).

The second branch of the Garland test requires a court to decide whether the information could be obtained by alternative means. Generally, courts have required litigants to find the necessary information elsewhere when at all possible. See, e.g., Zerilli v. Smith, 656 F.2d 705, 713 (D.C. Cir. 1981) (noting that "reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information"); United States v. Cuthbertson, 630 F.2d 139, 148 (3d Cir. 1980) (noting that if the information "is available from a nonjournalistic source, the defendants can obtain the information they seek without intruding on the first amendment interests of CBS"), cert. denied, 449 U.S. 1126 (1981); see also Marcus, supra note 11, at 850 (stating that "virtually all judges are in agreement that the moving party cannot seek the reporter's information or source as a first step."). Courts correctly recognize, however, that there are limits to the exhaustion principle. In Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974), for example, where a reporter being sued revealed that his source was an employee of the United Mine Workers of America (UMWA), the court did not require the plaintiff to depose every UMWA employee. The Carey court nevertheless suggested that deposing 60 employees might have been a reasonable prerequisite to compelling disclosure. Id. at 639.

The third branch of the Garland test requires the courts to determine
The Garland test certainly protects the journalist-source relationship where the journalist's speech draws the legal remedy. The problem with the Garland test, however, is that it overprotects the journalist by affording the journalist-source relationship First Amendment protection in all situations. For example, Garland will protect the journalist-source relationship even when a movant is a nongovernment party who is genuinely motivated to discover information necessary for her case. This outcome is undesirable because it infringes upon a litigant's attempt to present relevant information in court, even when the reporter's claim of privilege is not supported by the First Amendment doctrine discussed in Parts II and IV. The test proposed by this Note better reflects the principle that the Supreme Court drew in the penalization branch of the Cloud Books test, namely that the government may not use content-neutral laws to penalize speech.

This Note therefore proposes the following modification to the Garland test. Assuming relevance, a court should compel a reporter to reveal her confidential source's identity unless:

(1) a government actor (or a proxy) is moving to compel the reporter to reveal the source's identity, and;

whether there is a compelling interest in revealing the information. The court must determine whether the source's identity is of "great importance to the disposition of the case," Marcus, supra note 11, at 849, or "essential to a fair trial." Id. at 849 (quoting Brown v. Commonwealth, 204 S.E.2d 429, 430–31 (Va.), cert. denied, 419 U.S. 996 (1974)). Naturally, the most compelling cases arise in the criminal context, particularly when a reporter's privilege interferes with a defendant's Sixth Amendment right to a fair trial. See generally Romualdo P. Eclavea, Annotation, Privilege of Newsgatherer Against Disclosure of Confidential Sources or Information, 99 A.L.R.3d 37, 60–61 (1980) (noting that courts generally will deny or uphold reporters' claims of privilege based on whether the disclosure of the source is essential to a criminal defendant's defense). Courts have found the need for the source's identity sufficiently compelling to warrant disclosure in civil cases as well. See, e.g., Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980) (holding that plaintiff in a libel suit could compel discovery of the identity of a journalist's source where the identity of the source was necessary for the plaintiff to prove the defendant's malice), cert. denied, 450 U.S. 1041 (1981); Carey v. Hume, 492 F.2d 631 (D.C. Cir.) (holding that the identities of the appellant's sources are critical to the appellee's claim where the plaintiff in a libel case had the burden of proving the defendant's malice), cert. dismissed, 417 U.S. 938 (1974).

Other courts have developed more complicated variations of the Garland test. Dean Marcus notes that one judge describes a five-part analysis in the criminal context examining (1) the potential chilling effect on future news stories, (2) the public interest served by disclosure, (3) the existence of alternative sources of information, (4) the relevance of the inquiry, and (5) the impact of the process on the rights of others. Marcus, supra note 11, at 847–48 (citing Rosato v. Superior Court, 51 Cal. App. 3d 190, 238–39 (1975) (dissenting opinion), cert denied, 427 U.S. 912 (1976)).
(2) the reporter’s speech (instead of her knowledge of the source's identity) or the reporter's status as a member of the media is a motivating factor in the government’s decision to move for disclosure.

If either (1) or (2) is not satisfied, the court should reject the reporter’s request for a special reporter-source privilege. Only if both (1) and (2) are satisfied should the court proceed to apply the Garland test.\(^{160}\)

\section*{C. The Government/Nongovernment Distinction}

The first part of the proposed modification attempts to exclude a category of cases where the government is not a party, because these cases are unlikely to implicate the penalization branch of the Cloud Books test. As the debate between Justices White and Blackmun in Cohen\(^{161}\) made clear, under the penalization branch of the Cloud Books test, the First Amendment is implicated only if it is speech that provoked the government into action.\(^{162}\) The government in Cohen merely had enforced the parties' self-imposed agreement; the court's action was motivated by a breach of a promise and not by the speech itself.\(^{163}\)

\begin{footnotesize}
\begin{enumerate}
\item An argument against the proposed test is that although it affords the press less protection than it enjoys under the Garland test, the proposed test nevertheless affords the press more protection than is warranted under Cloud Books. There are numerous possible situations in which a reporter would enjoy a qualified privilege even though her source's identity should be discoverable under the principles outlined in Cloud Books. One example is where a reporter publishes classified military secrets received from a confidential source. A prosecutor attempting to investigate the leak and prosecute the leaker would have to overcome the reporter's qualified privilege not to reveal the source's identity. It is important to remember, however, that the privilege advocated is not absolute. The government ordinarily would have no trouble meeting the requirements of the proposed test in this situation. The prosecutor accordingly would be permitted to discover the leaker's identity and the crime could be prosecuted.


\item See supra text accompanying notes 142–54.

\item Of course, there may be some cases where the government is not a party and the "penalization" branch of the Cloud Books test is implicated nonetheless. Situations could arise where the court itself, as a government actor, is motivated primarily by the reporter’s speech to compel the source’s identity. Such situations, although raising First Amendment concerns, would fail to receive heightened scrutiny were courts to adopt the per se approach advocated in this Note. This, of course, is merely one example of the more general problem with employing bright-line rules rather than examining all of the First Amendment implications on a case-by-case basis.
\end{enumerate}
\end{footnotesize}
The first modification accordingly proposes that courts refuse to subject motions to compel a source's identity to higher First Amendment scrutiny unless the government attempts to force a reporter to reveal his source's identity. If Cloud Books directs courts to ferret out cases where speech provokes the government to take action, then those cases are most likely relevant. Although nongovernment litigants certainly could attempt to compel disclosure as a way of retaliating against a reporter for her speech, the debate between Justices White and Blackmun in Cohen makes clear that the penalization branch of the Cloud Books test applies only when the government penalizes speech.164

This is not to say that it is the reporter's speech that draws the government's remedy every time, or even most of the time, that the government moves to compel a source's identity. Part 2 of the proposed modification reflects the need to permit the government to compel discovery when it is motivated primarily by the source's identity and not by the reporter's speech or status as a member of the institutional press. Nevertheless, the proposed test reflects the reality, as the Nina Totenberg/Timothy Phelps episode arguably reveals, that whenever the government moves for disclosure there is a very real danger that the government is motivated by a desire to punish the reporter, either because he is a reporter or because of his speech.165 As two commentators observed recently, "[i]t can reasonably be presumed that once the law affords a public official a mechanism to invoke for such improper purposes, it will be so invoked, at least on some occasions."166 The courts should focus their attention on these occasions.

Nevertheless, this Note advocates a legal test and therefore must presume tacitly that judges will apply the test in good faith. Even in cases where a judge is biased against the media, reporters will not be without a remedy because judges may not compel disclosure as a means of harassing the litigants or the witness. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 707-08 (1972).

164. Cohen, 111 S. Ct. at 2517.

165. See, e.g., Leaks Nobody Needs to Find, N.Y. TIMES, Feb. 13, 1992, at A26 (suggesting that although the government knows that journalists will not reveal their sources, the government still might try to force journalists to reveal them anyway, simply to "harass and haze").

166. Langley & Levine, supra note 12, at 46.
D. The Reporter/Nonreporter Distinction

Drawing a line between government and nongovernment movants fails to explain why only reporters and not ordinary citizens should benefit from First Amendment protections. It certainly is conceivable that the desire to "penalize" the speech of an ordinary citizen could prompt the government to invade an ordinary citizen's confidential relationships. Nonetheless, several factors support the distinction that the proposed modification draws between reporters and others.

First, compelling someone to reveal the source of her information usually will be more burdensome to a reporter than to a nonreporter. Nonreporters faced with a court order to compel the identity of a source most likely will reveal the source's identity. That the journalists' creed prohibits reporters from disclosing their sources makes it more likely that a reporter will decide to face the personal consequences, including spending time in jail, of not disclosing the source's identity. Further, because journalists are willing to face the consequences of nondisclosure, attempts to compel disclosure more likely will be mere pretexts designed to send the reporter to jail.

The second reason to distinguish between reporters and nonreporters is that the speech of members of the institutional press usually reaches a much wider audience than the speech of nonreporters. Government officials accordingly are much more likely to be angered or embarrassed by disfavorable speech broadcast nationwide than they are by an individual's speech before a small group. As the recent Totenberg/Phelps case arguably revealed, the government's decision to compel a reporter to testify is more likely to be motivated out of the government's embarrassment or anger over the reporter's speech.

The final reason to distinguish between reporters and nonreporters comports with the well-established notion that

---

167. For example, a government official might wish to punish a whistle-blower who passes damaging information to a consumer group, or the government might wish to punish a spy who passes confidential information to a foreign official.

168. See, e.g., Marcus, supra note 11, at 815–16 (noting that the American Newspaper Guild Code of Ethics prohibits reporters from disclosing the identities of confidential sources).

169. See, e.g., Lewis, supra note 7, at A18 (claiming that the investigation "was begun by the Senate in response to the anger, largely from Republicans" over Totenberg's and Phelps's news reports).

170. See supra Part II.
the government may not compel a reporter to disclose the identity of his confidential source merely because of the reporter's status as a member of the institutional press. As Justice White noted in *Branzburg*, rulings that specifically target the press for harassment would raise serious First Amendment concerns. Although he rejected the press's chilling effect argument, Justice White did note that "grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."  

**CONCLUSION**

Reporters long have invoked a claimed chilling effect to justify their claims that the reporter-source relationship warrants a First Amendment privilege. This strategy suffers from many serious weaknesses, but the main weakness is that its success depends on an empirically unsupported assertion. This Note accordingly rejects the chilling-effect approach and instead focuses on the government's motive in compelling a reporter to reveal the sources of her information. The proposed qualified privilege has the advantage of being based on two well-established principles: (1) that the government may not target or single out the press for discriminatory treatment, and (2) that the government may not use content-neutral laws to penalize speech.

The test proposed in this Note does not entirely avoid the problems involved with basing a privilege on empirical facts. It is grounded in the assumption that, left unbridled, government officials will compel disclosure for impermissible reasons often enough to warrant the creation of a prophylactic rule. That assumption, however, at least comports with the notion inherent in our constitutional framework that those in control of the coercive mechanisms of government pose the greatest threat to individual liberty. It also comports with the notion that although otherwise innocuous government action can have the unintended effect of restricting opportunities for free speech, the dangers to free speech are greatest when the government acts intentionally.

171. *See supra* notes 71–74 and accompanying text.