
NOTES

Big Dig Confidential: Why Massachusetts Needs a Statutory Journalist’s Shield Law If It Wants to Keep the Big Stories Coming

“A reporter is no better than his source of information. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended . . . [and] the reporter’s main function . . . will be to pass on to the public the press releases which the various departments of government issue.”¹

I. INTRODUCTION

The Central Artery/Tunnel project in Boston, Massachusetts, or “Big Dig” as it came to be known, was intended to reconnect Boston by breaking down barriers caused by a divisive, raised highway between the waterfront and downtown sections of the city.² Instead, the project, which did place the highway beneath the city thereby creating acres of parkland, made Boston the poster child for public construction corruption.³ Reporters worked feverishly to discover time and financial problems with the Big Dig long before a woman lost her life in one of the project’s tunnels because of questionable construction methods.⁴ Using confidential, off-the-record, and nonconfidential sources alike

1. *Branzburg v. Hayes*, 408 U.S. 665, 722 (1972) (Douglas, J., dissenting).

2. See Thanassis Cambanis, *Big Dig to Begin Demolition of Leverett Circle Ramp Today*, BOSTON GLOBE, July 12, 2003, at B3 (noting project would reunite waterfront and downtown neighborhoods long divided by highway).

3. See Peter Demarco, *Park Open. Finally. No Fanfare*, BOSTON GLOBE, Dec. 16, 2007, at B9 (indicating opening of park created by Big Dig); Raphael Lewis & Sean P. Murphy, *Big Dig Leak Exposes Failures, Fuels Debate*, BOSTON GLOBE, Nov. 21, 2004, at B1 (discussing construction problems draining public confidence). By the time leaks were disclosed in the \$14.6 billion project, public support for the project was notably absent. See Lewis & Murphy, *supra* (noting lack of public support; see also Albert B. Southwick, *Don’t Let Big Dig Scandals Obscure Great Achievement*, WORCESTER TELEGRAM & GAZETTE, Dec. 10, 2006, at C3 (discussing benefits and criticisms of project). Although the project decreased traffic, reunited the city, and created a massive park, government officials and the public questioned the project’s benefits in light of cost overruns, poor construction, and “political shenanigans.” Southwick, *supra*. Some “wondered if the project was just a huge mistake” after all. *Id.*

4. See Sean P. Murphy & Raphael Lewis, *Bechtel Blamed for \$65 Million Mistake State Inspector Points to Overrun*, BOSTON GLOBE, Feb. 13, 2003, at A1 (discussing investigation revealing Big Dig construction

to reveal massive cost overruns and multi-year delays, these reporters informed the public where their tax dollars were really going.⁵ Without such reporting it is quite possible that the vast scope of the problem would have never seen the light of day, or more likely would have been overshadowed by grand public ceremonies celebrating accomplishments without acknowledging that promises of cost and time were beyond broken.⁶ This caveat of protection by reporters may have been the only thing standing between disclosing insider knowledge on the factors causing delays and cost overruns and simply taking the safer route by remaining behind the scenes, not risking sources' money, jobs, or worse, by speaking out publicly.⁷

Investigative reporters have often relied on confidential sources to generate some of the most groundbreaking news, including the Pentagon Papers, Watergate, the Iran-Contra scandal, and more recently, the Abu Ghraib prison scandal and the collapse of Enron.⁸ Many influential stories that have

flaws causing cost overruns); *see also* Scott Allen & Sean P. Murphy, *Workmanship, Design Called into Question*, BOSTON GLOBE, July 12, 2006, at A1 (discussing initial investigation into July 10, 2006 ceiling panel collapse killing local woman). A mother of three from Jamaica Plain, a Boston neighborhood, lost her life when concrete ceiling panels in a Big Dig connector tunnel fell on her car. Michael Levenson, *The Real Builder of the Big Dig Tunnel Collapse Focuses Attention on Kerasiotes's Tumultuous Tenure*, BOSTON GLOBE, Aug. 3, 2006, at B1. Repair costs for the connector tunnel, other budget shortfalls, and a federal freeze on funds meant the Big Dig exceeded its \$14.6 billion price tag. Raja Mishra & Andrea Estes, *\$133M Shortfall Cited on Big Dig*, BOSTON GLOBE, Aug. 9, 2006, at A1 (noting financial problems in late stages of Big Dig); *see also* Cosmo Macero, Jr. & Laura Brown, *Cellucci Defends Big Dig \$\$ Hikes*, BOSTON HERALD, Feb. 4, 2000, at 1 (discussing cost overruns and revised predictions for final costs). The Central Artery/Tunnel project cost far more than originally expected and had previously been pushed from \$10.8 billion to \$12.2 billion in 2000, \$1.4 billion of which were cost overruns. *See* Macero & Brown, *supra* (outlining cost overruns).

5. *See generally* Sean P. Murphy, *Big Dig Firm Seen in \$42M Settlement: Supplier Linked to Faulty Concrete*, BOSTON GLOBE, July 27, 2007, at 1A (using unnamed sources in story about faulty supplies used in Big Dig). Reporters investigating settlements concerning the quality of concrete delivered to the project used unnamed sources to get their information. *Id.* Without such anonymous sources the public would not have known about the settlement as early as it did, or perhaps not at all. *See id.*

6. *See id.* (revealing settlement discussions using anonymous sources); *see also* Scott Allen & Sean P. Murphy, *Designer Proposed More Bolts in Big Dig: Managers Cut Numbers in Half*, BOSTON GLOBE, Sept. 17, 2006, at A1 (citing anonymous source defending use of lesser construction standard possibly causing ceiling collapse); Raja Mishra & Scott Allen, *US Agency Eyes Blasting as Reason for Loose Bolts*, BOSTON GLOBE, July 27, 2006, at A1 (offering anonymous lawmakers discussing ongoing ceiling collapse investigation); Casey Ross, *Tunnel Horror: The Bombshell*, BOSTON HERALD, July 23, 2006, at 4 (providing anonymous construction worker source who worked on collapsed tunnel).

7. *See* Ross, *supra* note 6 (discussing Big Dig ceiling collapse with help from confidential source). The source, a Big Dig technician, had taken pictures of certain construction methods used in the Big Dig tunnels that he thought were questionable and later turned out to be related to the ceiling collapse that cost a woman her life. *Id.* The source shared the photos with a reporter and spoke about what he witnessed but requested anonymity. *Id.*; *see also* Interview with Aaron Cahall, former Business Reporter, BALTIMORE EXAMINER (Feb. 16, 2008) [hereinafter Interview with Cahall] (discussing journalists' concerns when using confidential sources). Cahall, a Columbia journalism graduate with experience at newspapers in Pennsylvania, Washington, D.C., and Baltimore, argues that in a media-savvy world regular people are more afraid than ever that talking to reporters will result in a pink slip. *See* Interview with Cahall, *supra*. Cahall noted that "[i]n the shadier areas of the world and on the street, I've gotten the impression that talking to a reporter is only slightly better than talking to the police." *See id.*

8. *See* Laura R. Handman, *Protection of Confidential Sources: A Moral, Legal, and Civic Duty*, 19

generated lasting repercussions may not have been possible without journalists promising their sources absolute confidentiality.⁹

The most recent controversies over confidential sources and reporters refusing to disclose their identity left reporters honoring their confidentiality promises in jail or facing thousands of dollars in fines.¹⁰ A federal judge ordered a former *USA Today* reporter to pay escalating fines when she refused to disclose the identity of sources she promised confidentiality while investigating the anthrax attacks that followed the September 11, 2001, terrorist attacks.¹¹ Despite the reporter's uncertainty regarding who exactly provided her with information that linked the plaintiff to the attacks, given the five-year time lapse between the articles and lawsuit, the judge imposed fines to urge the reporter's compliance.¹² The reporter was personally responsible for the fines and could not rely on any outside sources for assistance, not even the newspaper that published the stories.¹³ In his ruling, the trial judge acknowledged "the importance of the media's ability to report the news" but

NOTRE DAME J.L. ETHICS & PUB. POL'Y 573, 574-76 (2005) (highlighting various significant news stories informed by confidential sources). Use of confidential sources dates back to before the formation of the United States. See Leslie Siegel, Note, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469, 474-75 (2006) (outlining origins of confidential source use). Benjamin Franklin's brother was jailed for refusing to name the source of allegedly libelous articles published about the British government in 1722. *Id.* Instances of reporters using confidential sources are countless and include, for example, the disclosure of sexual misconduct by a Washington Senator in the early 1990s along with corruption in the Rhode Island Supreme Court around the same time. See Leita Walker, Comment, *Saving the Shield with Silkwood: A Compromise to Protect Journalists, Their Sources, and the Public*, 53 U. KAN. L. REV. 1215, 1215 n.3 (2005) (providing examples of reporters using confidential sources); see also Peter Johnson, *Should Reporters Give up a Confidential Source?*, USA TODAY, Aug. 25, 2004, at 14B (noting many examples when confidential sources were crucial to breaking stories).

9. See Handman, *supra* note 8, at 576 (reiterating journalistic reliance on confidential sources). Many reporters argue that keeping a promise of confidentiality is critical for the success of their work. See Johnson, *supra* note 8 (discussing usefulness of confidential sources); see also Interview with Cahall, *supra* note 7 (noting need for confidential sources for breaking news). Cahall argues that "confidential sources have an unprecedented level of power and importance in the newsgathering process" and are "at the heart of almost every *New York Times* or *Wall Street Journal* exclusive scoop." Interview with Cahall, *supra* note 7.

10. See Mark Gomsak, Note, *The Free Flow of Information Act of 2006: Settling the Journalist's Privilege Debate*, 45 BRANDEIS L.J. 597, 598 (2007) (discussing jailed *New York Times* journalist). *Times* reporter Judith Miller was incarcerated after she refused to disclose the identity of the source who provided her with the identity of undercover CIA operative Valerie Plame. *Id.*; see also Kevin Johnson, *Reporter's Lawyers Seek to Delay Fines*, USA TODAY, Mar. 10, 2008, at 3A (noting federal judge required reporter to pay unprecedented fines for not disclosing confidential sources).

11. See Johnson, *supra* note 10 (revealing fines would increase weekly if the reporter refused cooperation). The federal judge ordered the former reporter, Toni Locy, now a journalism professor, to pay \$500 per day for the first week she refused compliance with the court order, \$1,000 per day for the second week, and \$5,000 per day for the third week. See *id.* The judge even scheduled a hearing to determine if future penalties, including jail, were appropriate if the former reporter continued to refuse compliance. *Id.*

12. See *id.* (noting reporter's inability to recall what source identified the plaintiff). In the related lawsuit, a former Army scientist sued the federal government for irreparable damage to his reputation. *Id.* The U.S. Attorney General had classified the scientist as a "person of interest" and various news stories, including Locy's, identified him as a possible source of the anthrax attacks. *Id.*

13. See *id.* (discussing fines imposed and reporter's inability to rely on outside assistance).

deemed the “rule of law” as fundamental as the First Amendment.¹⁴

In a more widely publicized case, *New York Times* reporter Judith Miller was incarcerated after a judge held her in contempt of court for refusing to identify the confidential source who provided her with the identity of an undercover CIA agent, Valerie Plame.¹⁵ Additionally, a judge offered two *San Francisco Chronicle* reporters the choice of disclosing the source who told them about baseball star Barry Bonds’s unknowing use of steroids or facing jail time.¹⁶ These reporters were undoubtedly aware that their groundbreaking stories would not exist without the ability to guarantee anonymity to their sources.¹⁷ Indeed courts have noted that when considering whether to recognize a privilege, the free flow of newsworthy information would be hurt if judges forced reporters to divulge confidential sources.¹⁸

Not surprisingly, the *USA Today* case, the Judith Miller fiasco, and the Barry Bonds story all stoked renewed interest in devising federal legislation that would protect reporters from disclosing their sources.¹⁹ As more instances of

14. See *id.* (describing judge’s reasoning). The judge subpoenaed Locy and five other reporters to uncover the government source(s) naming the plaintiff as the anthrax attacker. *Id.* Four reporters secured waivers from their sources while the fifth reporter may also be subjected to fines. See *id.*; see also Kevin Johnson, *Reporter’s Fines Blocked in Anthrax Case*, USA TODAY, Mar. 12, 2008, at 3A (noting temporary relief for reporter from fines). A federal appeals court found Locy had satisfied the requirements for a stay of the court order and temporarily blocked the imposition of the fines. See Johnson, *supra*.

15. See Gomsak, *supra* note 10, at 597-98 (describing consequences reporter faced for refusing identification of her confidential source). Miller spent twelve weeks in jail after she refused to comply with a subpoena to testify in the inquiry regarding the leak of Valerie Plame’s name. David Johnston & Douglas Jehl, *Times Reporter Free from Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1. Miller was only released after she made an agreement to testify in the case, which she consented to after her source, I. Lewis Libby, Vice President Cheney’s Chief of Staff, personally waived Miller’s guarantee of confidentiality and indicated that he wanted Miller to testify. See *id.* The United States Court of Appeals for the District of Columbia affirmed a finding of contempt for Judith Miller and Matthew Cooper, a *Time* magazine reporter who joined Miller in refusing to testify concerning the scandal, reasoning that the prosecutors had overcome any burden for disclosure in the case, while disagreeing on whether a federal privilege existed. See Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL’Y 35, 43 (2006); see also *In re Grand Jury Subpoena Miller*, 397 F.3d 964, 972-73 (D.C. Cir. 2005) (holding any privilege under federal common law not absolute and was overcome in case).

16. See Bob Egelko, *Judge Rules Chronicle Reporters Must Name Their BALCO Sources*, SAN FRANCISCO CHRONICLE, Aug. 16, 2006, at A1 (discussing court ruling). A federal judge ordered the two reporters, Mark Fainaru-Wada and Lance Williams, to disclose sources of leaked grand jury testimony or face jail time for contempt of court, reasoning there was no balancing test to apply and the reporters’ interests should be subordinate to the grand jury and law enforcement interests. *Id.*

17. See Handman, *supra* note 8, at 576 (asserting that without confidentiality reporters would not have opportunity to report on certain groundbreaking stories). Sources generally seek confidentiality fearing retaliation for their disclosure. *Id.* at 579. If courts refuse to honor promises of confidentiality, reporters may respond by declining to produce stories that would otherwise be printed. *Id.*

18. See, e.g., *Ashcroft v. Conoco Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) (reasoning routine disclosure would hamper public’s access to newsworthy issues); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988) (noting such disclosure would hinder news gathering and free speech); *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981) (indicating disclosure interferes with news gathering process).

19. See Johnson, *supra* note 10 (noting Senate Judiciary chair’s call to consider a federal shield law for reporters); see also Editorial, *Judge Forces Reporter to Pick Between Sources, Bankruptcy: Ruling Sends Chilling Message to Journalists, Whistle-Blowers*, USA TODAY, Mar. 10, 2008, at 10A (arguing federal shield

ordered disclosure have arisen in recent years, various legislators have recognized the “chilling effect” of forced disclosure on freedom of speech.²⁰ Proposed federal legislation would protect reporters seeking to maintain their sources’ confidentiality in certain qualified circumstances.²¹ The proposals that followed the Miller and Barry Bonds cases, however, failed to gather enough support and never reached a vote before Congress in 2006.²² At this time, it is unclear whether the renewed calls for federal legislation in the wake of the *USA Today* case will be enough to overcome previous hurdles.²³

Massachusetts, unlike many other states, does not have a statutory journalist privilege.²⁴ Rather, Massachusetts courts apply a balancing test that weighs the public interest in access to everyone’s information against the public interest in the free flow of information, while acknowledging that confidential sources are crucial for the free flow of information.²⁵ While this test has allowed reporters to keep sources confidential at times,²⁶ its most recent application resulted in massive fines against the *Boston Globe* for refusing to adhere with a court order demanding the identity of sources.²⁷

law best method to prevent judges from penalizing reporters protecting their sources). *But see* Glenn Harlan Reynolds, *No ‘Freedom to Keep Secrets’: If Anyone Can Be a Journalist, Anyone Could Defy a Subpoena*, USA TODAY, Mar. 10, 2008, at 11A (arguing Constitution does not entitle anyone to keep secrets). Reynolds argues that a journalist shield law is problematic because the Constitution only protects free speech and publication—not keeping secrets—and since anyone can engage in journalism, allowing protection from all court-ordered disclosure would overly burden courts’ pursuit of justice. *See id.*

20. *See* Johnson, *supra* note 10 (quoting U.S. Senators Patrick Leahy and Arlen Specter after introduction of proposed shield law).

21. *See* Gomsak, *supra* note 10, at 598 (listing three bills introduced in Congress to create codified journalist’s privilege); *see also* Editorial, *supra* note 19 (discussing renewed efforts in Congress to pass federal shield law).

22. *See* Allison Retka, *Missouri House Bill Resuscitates Shield Law in Diluted Form*, DAILY RECORD, Feb. 8, 2007 (noting federal Free Flow of Information Act of 2006 failed reaching congressional vote). This was not the first attempt at passing a federal statute recognizing some sort of reporter’s privilege. *See* Fargo, *supra* note 15, at 35-36. In the wake of the Supreme Court’s decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), numerous bills were introduced in Congress aimed at shielding journalists from revealing their sources; however, none of these bills ever came to a full vote in either the House or Senate, and the common law has remained the only source of federal protection. *See* Fargo, *supra* note 15, at 36. In February 2005, the Free Speech Protection Act (Senate Bill 369) and the Free Flow of Information Act (Senate Bill 340) were introduced, but neither gained enough support to become law. *See id.* at 49.

23. *See* Editorial, *supra* note 19 (arguing for passage of federal shield law proposed in Congress).

24. *See In re John Doe Grand Jury Investigation*, 574 N.E.2d 373, 375 (Mass. 1991) (stating news reporters have same constitutionally based testimonial privileges as other citizens). Massachusetts courts, however, have utilized common-law principles to justify testimonial privileges for reporters. *Id.*

25. *See id.* at 376 (weighing public interest in access to information against public interest in free flow of information). The court’s first inquiry is whether the individual refusing disclosure showed that damage caused by the confidentiality breach is not merely speculative or theoretical. *Id.* The court here held that damage caused by the breach was in fact neither speculative nor theoretical. *Id.* at 376-77.

26. *See* Sinnott v. Boston Ret. Bd., 524 N.E.2d 100, 104 (Mass. 1988) (refusing to order reporter to reveal source’s identity); Wojcik v. Boston Herald, Inc., 803 N.E.2d 1261, 1266 (Mass. App. Ct. 2004) (declining to uphold order for disclosure); *see also infra* Part II.C (discussing Massachusetts history of privilege recognition with recent case law).

27. *See* Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 696, 699 (Mass. 2005) (ordering disclosure

In light of recent crossroads on past recognitions of some sort of privilege in keeping confidential sources confidential, Massachusetts should join thirty-two other states and the District of Columbia and create a statute that expressly defines a reporter's right to keep unnamed sources confidential.²⁸ Although such proposals have been considered in the Commonwealth before, supporters have been unable to garner enough support in the Massachusetts Legislature to enact protection for journalists from forced source disclosure upon judicial whim.²⁹ Now is the time to seriously consider the merits of such proposals and craft a statute that can best serve journalists and the public.³⁰

This Note advances such an argument by focusing on the various approaches taken by the federal courts, as well as various state courts and state legislatures in recognizing a privilege for reporters to prevent forced disclosure of confidential sources under either limited circumstances or at all times. Part

and imposing \$2.1 million in damages against newspaper).

28. See Devin M. Smith, Comment, *Thin Shields Pierce Easily: A Case for Fortifying the Journalists' Privilege in New Zealand*, 18 PAC. RIM. L. & POL'Y J. 217, 244 (2009) (noting thirty-two states have codified shield laws, including Washington most recently in 2007); see also Anthony Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without a Shield Law*, 7 COMM. L. & POL'Y 241, 256 (2002) (providing list of thirty-one states and District of Columbia with statutory shield laws in March 2002). The foundation of the common-law federal privilege began to weaken in the late 1990's when several decisions in the courts of appeals did not recognize a privilege or held that no First Amendment harm would occur by forcing a newspaper to disclose a source. See generally Fargo, *supra* note 15, at 258-64. For example, in *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998), the Fifth Circuit held that forcing a television station to disclose outtakes of an interview with an arson suspect did not harm any First Amendment values. Then in *Gonzales v. Nat'l Broadcasting Co.*, 194 F.3d 29, 35-36 (2d Cir. 1999), the Second Circuit recognized a privilege for confidential and nonconfidential information but held that the test for overcoming the privilege had been satisfied because it was less stringent when nonconfidential information was in question.

29. See John P. Kelly, *Supporters Declare Reporters' Shield Law Dead; With 3 Days Left in Session, Legislation Stalled in Committee*, THE PATRIOT LEDGER, July 29, 2008, at 14 (discussing failed proposal to enact journalist shield law in Massachusetts). This proposal, called the Massachusetts Free Flow of Information Act, would have provided qualified protection to reporters from forced disclosure of information unless the government could prove the information was critical to resolving a significant legal issue and could not be acquired by alternative means. *Id.* The proposal was another failed attempt by journalists in the state to secure some sort of shield law. *Id.*; see also Mark Jurkowitz, *Journalists Push for a State Shield Law*, BOSTON GLOBE, Dec. 21, 2004, at D1 (noting efforts to obtain state shield law); Ralph Ranalli, *Senate President Proposes a Shield Law: Bill Seeks to Guard Identity of Sources*, BOSTON GLOBE, Oct. 26, 2005, at B2 (detailing 2005 proposal for shield law supported by news executives in Massachusetts). Despite support by Boston's two major newspapers, the *Globe* and *Herald*, shield law supporters did not garner enough support within the legislature. See Jurkowitz, *supra* (discussing lack of legislative support); see also Editorial, *Beacon Hill Grab Bag*, BOSTON GLOBE, July 7, 2008, at A14 (advocating for law protecting sources who "only provide crucial information with the assurance of anonymity"); Editorial, *Docket Is Jammed, and Time Is Short*, BOSTON HERALD, July 7, 2008, at 18 (supporting state journalist shield law for confidential sources). There may be renewed hope for the future, however, as supporters placed some of the blame for the shield law's failure on the then-Speaker who has since left office. See Frank Phillips, *DiMasi Will Resign: Speaker Defends Record, Says Ethics Issues Not Forcing Him Out*, BOSTON GLOBE, Jan. 26, 2009, at 1 (detailing Speaker's recent resignation).

30. See Kelly, *supra* note 29, at 14 (discussing most recent failed state shield law). One member of the Massachusetts Legislature believes a state shield law will eventually pass if the law gets more momentum in 2009. *Id.*; see also *supra* note 29 (discussing change in House leadership that may aid shield law's chance of success).

II.A discusses the federal history of protecting, or not protecting, journalists from compelled disclosure of confidential sources. Part II.B focuses on the approaches taken by states that recognize a privilege, either through shield law or judicial decision. Part II.C discusses the history of Massachusetts's recognition of any sort of privilege, as well as the most recent case, which appears to impede on any past recognition of a right to avoid compelled disclosure. Part II.D outlines some of the benefits from allowing journalist protection from compelled disclosure and delineates who should be protected and how far any statutory shield law should extend. Finally, Part III analyzes the approach Massachusetts should adopt in order to protect the news media's free flow of information from forced disclosure at the whim of judges applying a balancing test in a haphazard manner.

II. HISTORY

A. Federal History

Freedom of the Press dates back to colonial times and is specifically addressed in the First Amendment.³¹ Indeed, before the Revolutionary War colonial leaders defended the press corps's freedom and right to publish articles critical of the British government.³² Yet it was not until 1972, in *Branzburg v. Hayes*,³³ that the Supreme Court considered the implications of the Press Clause on subpoenas calling for the identification of confidential sources.³⁴

The *Branzburg* case consolidated three cases involving reporters who used informants or confidential sources to report stories.³⁵ One of the cases involved a reporter who refused to testify in front of a grand jury about drug use he had observed and written about.³⁶ The other two cases involved reporters who gained access to Black Panther meetings and subsequently refused to disclose what they saw to a grand jury.³⁷

31. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

32. See Siegel, *supra* note 8, at 475 (describing protection given to press). In the face of controversy over an article published in the *Boston Gazette* in 1768 about the royal governor, Samuel Adams led the passage of a resolution stating that "Liberty of the Press is . . . Liberty of the People" and the House would thus "defend and maintain it." *Id.*

33. 408 U.S. 665 (1972).

34. See *id.* at 679-709 (considering impact of Press Clause on grand jury subpoenas); see also Fargo, *supra* note 15 (citing *Branzburg* as first time Court considered Press Clause implications of subjecting journalists to subpoenas).

35. See *Branzburg*, 408 U.S. at 667-80 (noting Court consolidation of three cases with common issue).

36. See *id.* at 667-70 (detailing reporter's refusal to testify about activities observed in Louisville, Kentucky). The Kentucky Court of Appeals held that a state statute allowed the reporter to refuse to identify an informant, but did not permit refusal to testify about events that he witnessed personally. See *id.* at 668-69; see also *Branzburg v. Pound*, 461 S.W.2d 345, 347 (Ky. 1970) (interpreting Kentucky statute).

37. See *Branzburg*, 408 U.S. at 672-79 (detailing facts of other cases). In the second case, arising from

The Court, by a 5-4 vote, declined to recognize a right for reporters to refuse to testify in front of grand juries when doing so would likely force them to reveal confidential sources.³⁸ The majority agreed with the common-law approach, which did not recognize any right for reporters to refuse to disclose confidential information to a grand jury.³⁹ The Court reasoned that such a decision would not “threaten the vast bulk of confidential relationships between reporters and their sources.”⁴⁰

The Court’s decision, however, did not signal the death of any future recognition of a reporter’s privilege, as many lower federal courts interpreted the decision as only applying to grand jury subpoenas and therefore endorsed a privilege to some extent.⁴¹ Lower federal courts have also latched onto the concurring and dissenting opinions in *Branzburg*, which were far more accommodating of some privilege.⁴² Justice Powell’s concurring opinion called for a “proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”⁴³ Justice Stewart’s dissent advanced a qualified privilege to protect the free flow of information and prevent governmental interference with the freedom of the press.⁴⁴ Justice Douglas went even further and called for an absolute privilege,

Massachusetts, the reporter gained access to the Black Panther meeting only after promising not to disclose anything he saw or heard. *Id.* at 672. The Massachusetts Supreme Judicial Court (SJC) rejected any testimonial privilege for the reporter, noting that any adverse effect on the free flow of news was speculative. *Id.* at 674. The third case also dealt with observations from a Black Panther meeting, but the Court of Appeals for the Ninth Circuit recognized a qualified testimonial privilege for the reporter, holding the reporter was therefore privileged to withhold any testimony. *See id.* at 675-79. The lower court reasoned that requiring the reporter to testify could prevent future informants from speaking with the reporter in the future. *See id.* at 679 (explaining Ninth Circuit’s reasoning); *see also* *Caldwell v. United States*, 434 F.2d 1081, 1086 (9th Cir. 1970) (describing potential effects of requiring testimony).

38. *See Branzburg*, 408 U.S. at 686-90 (declining adoption of testimonial privilege for newsman refusing to testify).

39. *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972) (noting common-law standard).

40. *Id.* at 691. The majority felt that an exception was not warranted because reporters would only be forced to testify in front of a grand jury when they possessed information relevant to crimes. *Id.* The Court reasoned that there was no indication that a large percentage of confidential news dealt with identifying criminals and therefore refused to allow an exemption for “newsmen” to refuse to testify before grand juries as a regular citizen would have to do. *See id.* (providing rationale for declining to create exception).

41. *See Fargo*, *supra* note 15, at 39 (noting application of privilege in criminal and civil trials).

42. *See Handman*, *supra* note 8, at 577 (indicating many courts consider Justice Powell’s concurrence as controlling); *see also* *LaRouche v. Nat’l Broadcasting Co.*, 780 F.2d 1134, 1136 (4th Cir. 1986) (applying Justice Powell’s balancing test to determine if journalist’s privilege would protect source); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 & n.13 (1st Cir. 1980) (using Justice Powell’s analysis when considering ordered disclosure of confidential source); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977) (recognizing Justice Powell’s opinion needed consideration when considering if journalist privilege applies); *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975) (reasoning Justice Powell’s opinion necessary to *Branzburg* holding).

43. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring). Powell made clear that a “newsman” should have access to quash a subpoena if a grand jury investigation is not conducted in good faith, such as when requested information bears only a remote link to the subject of the grand jury’s inquiry. *See id.* at 709-10.

44. *See id.* at 725 (Stewart, J., dissenting) (maintaining qualified privilege protects freedom of information by preventing governmental interference with press). Stewart asserted that confidentiality is

arguing that any balancing had already been accomplished by the Bill of Rights.⁴⁵ He argued that any balancing test would eventually become so watered down and twisted that protection would become meaningless.⁴⁶ Such opinions have helped lower federal courts recognize a privilege to some degree.⁴⁷

This level of recognition, however, has begun to decline in recent years and several federal courts questioned why journalists deserve treatment different from the average person who possesses relevant information.⁴⁸ This questioning of differential treatment combined with a spate of recent controversy surrounding reporters jailed for refusing to identify confidential sources has led to calls for federal legislation.⁴⁹ To date, however, these legislative attempts have failed.⁵⁰

B. Other States' Recognition of Reporter's Privilege

While attempts at passing a federal shield law have failed, thirty-two states have enacted shield laws that protect journalists to varying degrees.⁵¹ In the

necessary to the newsgathering process because the promise of nondisclosure protects the informant and reporter's relationship. *See id.* at 729-30. Stewart warned that informants may be unwilling to share valuable information in the future if reporters cannot guarantee confidentiality. *Id.*

45. *Branzburg v. Hayes*, 408 U.S. 665, 712-13 (1972) (Douglas, J., dissenting) (asserting balancing already achieved in Bill of Rights). Douglas believed that the First Amendment is an absolute, and there was thus no need to balance First Amendment rights against governmental needs. *See id.* at 713 & n.2.

46. *See id.* at 720. Douglas maintained that a free press was vital to a successful and intelligent government. *See id.* at 720-21. He further argued that the majority's refusal to consider the First Amendment as an absolute protector of the press would allow those in power to perpetuate their existence by intruding into the formerly free press, therefore adding to "the disease of this society." *See id.* at 724-25.

47. *See Fargo*, *supra* note 15, at 39 (noting that after *Branzburg* most courts have recognized some form of privilege). Courts have also recognized that "routinely compelling 'disclosure of . . . confidential [sources] would clearly jeopardize the ability of journalists and the media to gather information and, therefore, have a chilling effect on speech.'" *See Handman*, *supra* note 8, at 577 & n.19 (quoting *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988)).

48. *See Jane E. Kirtley, Will the Demise of the Reporter's Privilege Mean the End of Investigative Reporting, and Should Judges Care If It Does?*, 32 OHIO N.U. L. REV. 519, 520-21 (2006) (noting several federal appellate courts skeptical, hostile, or plainly reject existence of privilege).

49. *See supra* notes 21-22 and accompanying text (discussing recent attempts at passing federal reporter's shield).

50. *See supra* note 22 and accompanying text (discussing failed 2005 and 2006 attempts to pass shield law); *see also* Editorial, *supra* note 19 (advocating passage of renewed proposals for federal shield law).

51. *See Fargo*, *supra* note 28, at 256 (listing thirty-one States plus the District of Columbia with shield laws); Smith, *supra* note 28, at 244 (revealing Washington joined thirty-one other states with statutory shield laws). Maryland was the first state to pass such a shield law in 1896. *See Fargo*, *supra* note 15, at 46. States with shield laws include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, and Tennessee, plus Washington. *See id.* at 46 & n.70; *see also* Smith, *supra* note 28 (discussing Washington's new shield law in effect since 2007). *See generally* ALA. CODE § 12-21-142 (2005); ALASKA STAT. §§ 09.25.300-09.25.390 (2008); ARIZ. REV. STAT. ANN. § 12-2237 (2003); ARK. CODE ANN. § 16-85-510 (2005); CAL. EVID. CODE § 1070 (West 2008); COLO. REV. STAT. § 13-90-119 (1995); DEL. CODE. ANN. tit. 10, §§ 4320-4326 (1999); D.C. CODE ANN. §§ 16-4701-16-4704 (LexisNexis 2008); FLA.

eighteen states without statutory protection, eleven appellate courts have recognized a privilege protecting confidential information.⁵²

Although forty-three states recognize a privilege by statute or judicial decision, these state laws do not guarantee full protection because the protective mechanisms vary widely.⁵³ Most state shield laws recognize only a qualified privilege, with some, like New Mexico's, stating that the privilege expires when disclosure is necessary to prevent injustice.⁵⁴ Ten states recognize an absolute privilege.⁵⁵ Even absolute shield laws and qualified privileges carrying the most stringent qualifications, however, sometimes contain conditions or limitations and therefore may not be as absolute as they initially appear.⁵⁶ In addition, protection does not extend to all persons who may be engaged in newsgathering, as many states have limited the privilege to members of the traditional media.⁵⁷ In fact, the growth of the electronic media has made defining the term "journalist," and thus who would be protected by a statute, far more difficult.⁵⁸

STAT. ANN. § 90.5015 (West 1999); GA. CODE ANN. § 24-9-30 (2008); ILL. COMP. STAT. ANN. §§ 5/8-901-5/8-909 (West 2004); IND. CODE ANN. §§ 34-46-4-1-34-46-4-2 (West 1999); KY. REV. STAT. ANN. § 421.100 (West 2005); LA. REV. STAT. ANN. §§ 1451-1459 (2007); MD. CODE ANN., CTS. & JUD. PRO. § 9-112 (West 2006); MICH. COMP. LAWS ANN. § 767.5A (West 2000); MINN. STAT. ANN. §§ 595.021-595.025 (West 2002); MONT. CODE ANN. §§ 26-1-901-26-1-902 (2007); NEB. REV. STAT. §§ 20-144-20-147 (2007); NEV. REV. STAT. ANN. § 49.275 (West 2006); N.J. STAT. ANN. §§ 2A:84A-21-2A:84A-21.13 (West 1994); N.M. STAT. ANN. § 38-6-7 (West 2008); N.Y. CIV. RIGHTS LAW § 79h (McKinney 1992); N.C. GEN. STAT. ANN. § 8-53.11 (West 2007); N.D. CENT. CODE § 31-01-06.2 (1996); OHIO REV. CODE ANN. §§ 2739.04 & 2739.12 (West 2008); OKLA. STAT. ANN. tit. 12, § 2506 (West 1993); OR. REV. STAT. ANN. §§ 45.510-44.540 (West 1999); PA. CONS. STAT. ANN. § 5942 (West 2000); R.I. GEN. LAWS §§ 9-19.1-1-9-19.1-3 (1997); S.C. CODE ANN. § 19-11-100 (2008); TENN. CODE ANN. § 24-1-208 (West 2000); WASH. REV. CODE § 5.68.010 (2006).

52. See Fargo, *supra* note 15, at 47 (discussing variations of state law on journalist privilege). The eleven states recognizing a privilege include Idaho, Iowa, Kansas, Massachusetts, Missouri, New Hampshire, South Dakota, Vermont, Virginia, Washington, and Wisconsin. See *id.* at 47 n.74. Three states—Mississippi, Utah, and Wyoming—have not considered whether a privilege exists. See *id.* at 47.

53. See Fargo, *supra* note 15, at 47-49 (arguing a federal shield would ensure equal treatment). Courts differ not only on who is protected and under what circumstances, but also on what basis the privilege is recognized. See Fargo, *supra* note 28, at 264. For instance, courts disagree on whether the privilege is based on the need to protect the free flow of information versus press autonomy. See *id.* States also disagree on whether nonconfidential information is protected as well. See *id.*; see also *infra* Part II.D (discussing need for protecting nonconfidential information under statutory shield).

54. See Siegel, *supra* note 8, at 498-99 (differentiating state approaches on qualified shield laws); see also N.M. STAT. ANN. § 38-6-7 (providing privilege expires if disclosure prevents injustice).

55. See Siegel, *supra* note 8, at 501 (defining absolute privilege as privilege against compelled disclosure).

56. See *id.* at 500-01 (indicating some absolute shield laws not completely absolute in application). For example, Alabama's "absolute" privilege only protects sources of information procured and published. See ALA. CODE § 12-21-142.

57. See Fargo, *supra* note 15, at 56 (noting most statutes only protect traditional media). In contrast, the Free Flow of Information Act of 2006 extends the privilege to journalists, people in contact with journalists, and communication service providers; it defines a journalist as one engaged in the production of news for financial gain. See Gomsak, *supra* note 10, at 618-19. The proposed Free Speech Protection Act, in contrast, extends the privilege to those engaged in newsgathering with the intent to disseminate that information to the public. See *id.* at 620.

58. See Walker, *supra* note 8, at 1234 (discussing difficulty of defining who is protected under privilege

C. Massachusetts History

Massachusetts has declined to adopt a statute or rule recognizing any sort of reporter's privilege and instead has relied on common-law principles when acknowledging any such privilege.⁵⁹ While the Massachusetts Supreme Judicial Court (SJC) rejected a rule creating a reporter's privilege in 1985, it applies a balancing test weighing the public interest in the right to every person's evidence and the public interest in protecting the free flow of information when a party seeks disclosure of a reporter's confidential sources.⁶⁰ The critical inquiry for the court has been whether damage to the free flow of information actually existed, rather than being just "speculative or theoretical."⁶¹ The burden to demonstrate such damage and overcome compelled disclosure, however, is not on the party seeking the information but rather on the party seeking to prevent its disclosure.⁶²

Using this balancing test some Massachusetts courts have recognized that the reporter's interest outweighed the plaintiff's, thereby refusing to order

statute).

59. See *Fargo*, *supra* note 28, at 260 (noting SJC rejected rule in 1985); see also *Pet. for the Promulgation of Rules Regarding the Prot. of Confidential News Sources & Other Info.*, 479 N.E.2d 154, 173 (Mass. 1985) (rejecting rule proposing recognition of privilege). The court reasoned that establishing a reporter's privilege was not appropriate at the time because there was no consensus among lawyers, the media, and the Legislature that such a privilege was needed. See *Pet. for the Promulgation of Rules*, 479 N.E.2d at 156-58. The court also emphasized that continuing the existing common-law approach was advantageous. See *id.* The proposed rule would have protected all private individuals engaged in collecting and distributing news to the public. See *id.* at 155. The proposed privilege would have also prevented compelled disclosure of confidential sources' identities except when the party seeking the information could show that disclosure was necessary to prevent a violation of constitutional rights or injustice and that there was no alternative for obtaining the information. See *id.*

60. See *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373, 375 (Mass. 1991) (recognizing application of balancing test). The balancing test, weighing the public interest in having everyone's evidence against the public interest in the free flow of information, was proposed by the very rule rejected by the court in 1985. See *id.*

61. See *Sinnott v. Boston Ret. Bd.*, 524 N.E.2d 100, 103-04 (Mass. 1988) (recognizing common-law privilege for journalists). *Sinnott* involved an invasion of privacy claim after a *Boston Globe* article described the plaintiff's application for an accidental disability pension using confidential sources. *Id.* at 101. The trial court granted the reporter's motion quashing the plaintiff's motion to compel further testimony on ground that there was no showing that the information the plaintiff sought—the identity of the sources who revealed information about him—could not be discovered if only the plaintiff investigated further as the reporter had. See *id.* at 102. The appeals court reversed, balancing the free flow of information below the plaintiff's need for the information and concluding that the plaintiff had a real need for the identity of the sources. See *id.* at 103. In reversing the decision, the SJC acknowledged the critical inquiry as well as the balancing test while deferring to the trial judge's decision because there was ample basis to conclude there was damage to the free flow of information and that the plaintiff could get his information via alternative means. See *id.* at 104-05. The divergent balancing conducted by the two lower courts, and the SJC's deference to the trial judge, demonstrate the need for more definite standards that are not susceptible to widely divergent approaches based on the same analytic framework. See also *infra* Part III (discussing need for more uniform approach via statute).

62. See *In re John Doe Grand Jury Investigation*, 574 N.E.2d at 376 n.1 (noting burden rests with party seeking to quash a subpoena); see also *In re Pappas*, 266 N.E.2d 297, 303 (Mass. 1971) (stating burden to quash grand jury subpoena rests on witness).

disclosure. In *Sinnott v. Boston Retirement Board*⁶³ and *Wojcik v. Boston Herald, Inc.*,⁶⁴ plaintiffs were unable to convince courts to order disclosure of confidential sources.⁶⁵

Despite some recognition of a privilege, rights for journalists appear to be declining in Massachusetts.⁶⁶ In *Ayash v. Dana-Farber Cancer Institute*,⁶⁷ the court held that damages awarded by the jury could be assessed against the *Boston Globe* for its failure to comply with an order to reveal the identity of a source the plaintiff claimed was necessary to her case.⁶⁸ In reaffirming the two-step analysis governing compelled disclosure of confidential sources, the SJC agreed with the trial court's reasoning that compelled disclosure was proper.⁶⁹

63. 524 N.E.2d 100 (Mass. 1988).

64. 803 N.E.2d 1261 (Mass. App. Ct. 2004).

65. See *Sinnott*, 524 N.E.2d at 103-04 (holding plaintiff not entitled to compel disclosure of confidential source); *Wojcik v. Boston Herald, Inc.*, 803 N.E.2d 1261, 1266 (reversing order to compel disclosure); see also *supra* note 61 (refusing to order compelling disclosure by reporter); *infra* note 66 (discussing *Wojcik*).

66. See Handman, *supra* note 8, at 581 (noting recent Massachusetts case resulting in declining rights for news organizations); see also *Wojcik*, 803 N.E.2d at 1267 (holding plaintiff not entitled to disclosure of source). The trial court in *Wojcik* ordered the *Boston Herald* and several reporters who wrote stories about the plaintiff's dismissal from the Massachusetts Lottery Commission to disclose the identity of confidential sources after the plaintiff was unable to ascertain their identity through numerous depositions of Lottery officials. See *Wojcik*, 803 N.E.2d at 1264 (noting judge's allowance of disclosure). The trial judge reasoned that the plaintiff's need for the identity of the sources outweighed any potential harm to the *Herald's* ability to gather information from confidential sources. *Id.* at 1264-65. Further, the judge reasoned that the plaintiff had no other means to investigate a central element of her defamation case against the paper and its reporters. *Id.* at 1265. Though the appeals court reversed, it still noted that if the facts were slightly different disclosure may have been proper. *Id.* at 1266. In addition, the appellate court reasoned that the plaintiff was entitled to more illuminating answers from the newspaper's interrogatory responses because the plaintiff's claim depends upon the substance of information the sources told the reporters. *Id.*

67. 822 N.E.2d 667 (Mass. 2005).

68. See *id.* at 675 (setting forth the court's holding). The plaintiff in *Ayash*, a doctor at Dana-Farber Cancer Institute, sued the hospital, the hospital's physician-in-chief, the *Boston Globe*, and its reporter after the newspaper published several articles identifying her as one of the doctors responsible for the accidental overdose deaths of two patients enrolled in an experimental breast cancer treatment study. *Id.* at 673. The case involved numerous complaints against each defendant, but the invasion of privacy and breach of the implied covenant of good faith and fair dealing actions against the hospital and the interference with employment relations complaint against the doctor were unsuccessful. *Id.* at 675. The plaintiff, however, was successful in her claims against the hospital for unlawful retaliation and against the *Globe* and its reporter for libel, defamation, intentional interference with contractual relations, and infliction of emotional distress. *Id.* at 673-75. The court imposed default judgments on the *Globe* and its reporter after they refused to comply with an order compelling disclosure of the paper's confidential sources. *Id.* at 674-75. These sources named the plaintiff in connection with stories about the deaths of two patients, one of whom was a *Globe* columnist. *Id.*; see also Handman, *supra* note 8, at 581 (noting assessment of \$2.1 million jury verdict against *Boston Globe*).

69. See *Ayash*, 822 N.E.2d at 696 n.33 (reaffirming balancing test and rejecting recognition of any privilege). The SJC noted that the First Amendment to the United States Constitution and Article 16 of the Amendments to the Massachusetts Constitution provide some basis for a common-law privilege for reporters refusing to reveal confidential sources. *Id.* The SJC concluded, however, that there was "no special constitutional or statutory testimonial privilege, based on [one's] status as a newspaper publisher or reporter, that would justify [the defendant *Globe* and its reporter's] refusal to obey the orders." *Id.* The SJC agreed with the trial judge and compelled disclosure. *Id.* at 696. The court reasoned that the balancing test favored the plaintiff's need to know the identity of the confidential sources more than the *Globe's* interest in protecting the

Despite finding the *Globe* and its reporter liable for over \$2.1 million in damages, the SJC concluded that the judgment was not intended to punish the paper or reporter, but rather the only option available allowing the plaintiff access to the identity of the sources she asserted had caused her harm, both emotionally and professionally.⁷⁰ The court even noted that in hindsight, given that it reversed verdicts for the plaintiff on the invasion of privacy claim against the hospital and the claim against the doctor for intentional interference, access to the identity of the confidential sources was “peripheral at best to the plaintiff’s case.”⁷¹ The *Globe*’s refusal to comply with court orders compelling disclosure and the court’s reasoning that the reporter could no longer justify keeping his sources confidential prompted the SJC to agree with the trial judge that refusing to identify the sources of information behind the newspaper’s articles on the multiple deaths at Dana-Farber, which included a victim who was the reporter’s colleague, was ironic and “not a legacy of which the *Globe* defendants should be proud.”⁷² The SJC and trial court’s refusal to recognize a privilege in *Ayash* stood in contrast to the position of the Appeals Court of Massachusetts, which held a privilege applied to protect against compelled disclosure.⁷³

The *Ayash* court’s order for disclosure was based on claims stemming from articles published identifying the plaintiff as connected to the controversial, though accidental, deaths of the two patients.⁷⁴ Despite the fact that the identity of the confidential source was almost certainly within Dana-Farber, the trial court held, and the SJC affirmed, damages against the newspaper rather than the hospital because the plaintiff asserted that she was unable to ascertain the exact identity of the source without such compelled disclosure.⁷⁵

free flow of information. *See id.* at 696 n.33.

70. *See id.* at 696-99 (discussing great harm newspaper stories caused plaintiff). The *Globe* published almost fifty articles about the accidental overdoses, six of which identified the plaintiff by name. *Id.* at 677 n.12. A *Globe* article published on March 23, 1995, incorrectly identified the plaintiff as leader of the research team that administered one of the overdoses. *Id.* at 677. The plaintiff was essentially forced to leave Dana-Farber and accept a position with less responsibility at a hospital in another state. *Id.* at 698 n.35. As a result of the newspaper articles, the plaintiff regularly visited a psychiatrist, who described the plaintiff as “particularly troubled by *Globe* articles that [she] perceived to be unfair.” *Id.* at 698.

71. *See id.* at 695 (mentioning fact was insufficient to justify reversing default judgment against *Globe* and its reporter).

72. *See id.* The trial judge held that refusal to comply with the disclosure orders constituted an ongoing injustice and harm to the plaintiff resulting from the “unilateral and unnecessary interruption to the free flow of information that may be critical to the plaintiff.” *Id.*

73. *See Ayash v. Dana-Farber Cancer Inst.*, 706 N.E.2d 316, 322 (Mass. App. Ct. 1999) (holding newspaper made threshold showing regarding applicability of privilege against forced disclosure).

74. *See Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667, 674 (Mass. 2005) (discussing court’s disclosure order).

75. *See id.* at 699 (affirming default judgments and damage awards against *Globe* and its reporter). The SJC noted that regardless of the hospital’s continued denials that it or its agents were the source of information forming the basis of the *Globe*’s articles, the jury could have easily concluded that the hospital was in fact responsible for the leaks. *Id.* at 683.

D. Benefits of a Privilege and Who Should Be Protected

State statutory shield laws vary according to who is within their protection.⁷⁶ For example, despite *Branzburg's* holding that the Press Clause of the First Amendment was applicable to all persons—not just those traditionally thought of as members of the institutional media—some states have limited statutory or other protection to those belonging to the traditional media.⁷⁷ Some shield laws also cease protection once the information is deemed nonconfidential, and others do not protect unpublished information.⁷⁸

Various scholars, in advancing the benefits of allowing protection from forced disclosure, have argued that the First Amendment should apply to identities of sources and the information gathered by journalists.⁷⁹ Today, however, defining a journalist as merely someone who works for mainstream institutional media ignores the realities of the Internet and the various bloggers who perform many of the same functions as traditional reporters.⁸⁰ Some even argue that nontraditional media members actually serve in a capacity more in tune with what the Framers envisioned when they wrote the Press Clause, and

76. See Fargo, *supra* note 15, at 56 (setting forth various statutory approaches).

77. See *Branzburg v. Hayes*, 408 U.S. 665, 704-05 (1972) (holding Press Clause applies to all persons). The majority in *Branzburg* reasoned that defining precisely who was included within the Press Clause was inherently tricky and perhaps even unconstitutional because it would force judges to decide who qualified for protection and who did not. See *id.* at 702-05. But see Fargo, *supra* note 15, at 56 (noting statutory approaches involving privilege coverage vary widely following *Branzburg*). States such as Nebraska and Oregon limit the privilege to those engaged in a “medium of communication” and both define medium as “any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system.” NEB. REV. STAT. ANN. § 20-145 (2007); OR. REV. STAT. ANN. § 44.510(2) (West 1999). Oklahoma’s statutory privilege defines journalist in a slightly more restrictive way, requiring the person be “a reporter, photographer, editor, commentator, journalist, correspondent, announcer, or other individual . . . regularly engaged” in production of news. OKLA. STAT. ANN. tit. 12 § 2506(A)(2)-(A)(7) (West 1993). Colorado goes even further and limits the privilege to those employed by a mass medium. COLO. REV. STAT. § 13-90-119(1)(a) (2008).

78. See Fargo, *supra* note 15, at 46-49 (discussing extent of protection in various state shield laws). Compare ALA. CODE § 12-21-142 (2005); ALASKA STAT. §§ 09.25.300-09.25.390 (2008); ARIZ. REV. STAT. ANN. § 12-2237 (2003); ARK. CODE ANN. § 16-85-510 (2005); 735 ILL. COMP. STAT. ANN. §§ 5/8-901-5/8-909 (2004); KY. REV. STAT. ANN. § 421.100 (2005); N.M. STAT. ANN. § 38-6-7 (2008); OHIO REV. CODE ANN. §§ 2739.04 & 2739.12 (2008); PA. CONS. STAT. ANN. § 5942 (2000); R.I. GEN. LAWS §§ 9-19.1-9-19.3 (1997) (limiting protection to confidential sources only), with NEV. REV. STAT. ANN. § 49.275 (2006) (limiting protection to information actually published).

79. See Fargo, *supra* 28, at 250 (discussing arguments raised by First Amendment scholars). One argument supporting broad protection for journalists, however inclusive or exclusive that term may be defined, was that the Framers intended the Press Clause to protect the press as an institution, thereby serving as a check on government. See *id.* at 248. This scholar argued that the press must maintain autonomy so it can learn information and thereafter publish what it learns. See *id.*

80. See Tom Keane, *We're All Journalists Now: Yes, the Media Aren't Winning Public Favor These Days. But When We Limit Their Freedom, We Undermine Everyone's*, BOSTON GLOBE MAG., Dec. 2, 2007, at 16 (noting recent crossroads on First Amendment protections for journalists, traditional or not). Indeed, it is not only traditional journalists that have faced repercussions for refusing to reveal sources, as a blogger was sentenced to seven months in prison after he refused to turn over a videotape of a protest at the G8 Summit in 2006. See *id.*

not including them in discussions concerning protection of the media thus does a disservice to society as a whole.⁸¹

III. ANALYSIS

In light of the *Ayash* holding, if Big Dig contractors or the Commonwealth of Massachusetts sued newspapers or reporters who used confidential sources to reveal the problems with the highway project or subpoenaed reporters in litigation involving the massive construction, it is very likely that a court would order the reporters to disclose the identity of their sources.⁸² If reporters refused to comply with such an order, a court could impose jail time or crippling fines, which might make reporters regret their decision to publish such stories.⁸³ Reporters should not have to regret such publishing decisions or fear potential jail time or fines.⁸⁴ If courts are unwilling to deny subpoenas and other motions seeking to compel disclosure of confidential sources, as the SJC appeared to do in *Ayash*, then the Massachusetts Legislature should pass a statute protecting reporters and their sources. Such a law would erase the haphazard application of the balancing test and bring the Commonwealth into accord with a majority of other states similarly seeking to protect journalists from forced disclosure of confidential sources.⁸⁵ While Massachusetts's balancing test may have been an appropriate structure to analyze whether or not to compel disclosure in certain factual circumstances at one time, it is time for a different approach given that courts are more willing to order disclosure of confidential sources and less willing to recognize a basis for nondisclosure.⁸⁶

81. See *id.* (arguing anyone reporting, investigating, or opining constitutes a journalist deserving protection). But see Interview with Cahall, *supra* note 7 (arguing trained journalists still produce most meaningful news).

82. See *Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667, 674 (Mass. 2005) (imposing default judgments on newspaper and reporter for refusing compliance with disclosure order).

83. See generally Johnson, *supra* note 10 (discussing fines imposed on reporter and possibility of jail time).

84. See Editorial, *supra* note 19 (arguing public interest served by enabling people to speak to press without fearing reprisal). In the *USA Today* case, a former reporter was ordered to pay massive fines for refusing to identify sources that she used in newspaper stories identifying the plaintiff as a possible suspect in anthrax attacks. *Id.* The reporter was faced with the difficult choice of going bankrupt by paying court-imposed fines or selling out sources whom she promised confidentiality. *Id.*

85. See *Ayash*, 822 N.E.2d at 696 (balancing plaintiff's interest over newspaper's interest in free flow of information); *Sinnott v. Boston Ret. Bd.*, 524 N.E.2d 100, 104 (Mass. 1988) (holding newspaper not required to disclose confidential source as balancing test favored paper); *Wojcik v. Boston Herald, Inc.*, 803 N.E.2d 1261, 1267 (Mass. App. Ct. 2004) (balancing in favor of nondisclosure while trial court balanced in favor of disclosure); see also Smith, *supra* note 28, at 244 (noting thirty-two other states have statutory protection for journalists against compelled disclosure).

86. See *Ayash*, 822 N.E.2d at 694 (reaffirming application of balancing test). Both the trial court and the SJC in *Ayash* determined it was ironic that the *Boston Globe* wanted to quash any ordered disclosure of who provided information that led to the series of articles highlighting the accidental deaths of two patients, one of whom was a *Globe* columnist, and named the plaintiff as involved. *Id.* at 695. The trial court thought that nondisclosure served the interests of the hospital allegedly responsible for the *Globe* employee's death and

A. *Absolute v. Qualified Privilege and Who Bears the Burden*

States with absolute shield laws generally do not force disclosure of sources under any circumstances.⁸⁷ While such protection sounds appealing, common sense dictates that there must be either various exceptions to such an absolute privilege or, perhaps better labeled, a qualified privilege where courts can compel disclosure under certain limited circumstances.⁸⁸ A potential shield law should provide that compelled disclosure is never appropriate unless disclosure is necessary to prevent a grave injustice and the party seeking disclosure cannot obtain information critical to their case by any other reasonable means.⁸⁹

Requiring that information be critical to the case of the party seeking disclosure means that courts would only have to analyze whether disclosure is proper in exceptional cases, thereby preventing subpoenas and other requests for information from journalists merely because they are the easiest means of getting the information.⁹⁰ Courts would have to initially determine the critical nature of the information, which would take time and cost money, but would significantly avoid disclosure of information “peripheral at best” to a party’s case.⁹¹ If a reporter could show an alternative medium to ascertain the identity

reasoned that refusing to comply with the disclosure order was “not a legacy of which the *Globe* . . . should be proud.” *Id.* The court did not mention the *Globe*’s general interest in honoring confidentiality promises and in publishing information of public interest, aside from recognizing that the newspaper did have some interest in protecting the free flow of information. *Id.* at 694; *see also Sinnott*, 524 N.E.2d at 103-04 (holding reporter not required to reveal identity of confidential source). The hazards of applying a discretionary balancing test play out well in *Sinnott*, where the trial court reasoned that the privilege should apply, the appeals court reasoned that a privilege should not apply, and the SJC ultimately gave deference to the trial court. *Sinnott*, 524 N.E.2d at 104; *see also supra* note 61 (discussing *Sinnott* procedural history).

87. *See generally supra* notes 54-57 and accompanying text (describing various shield law approaches in other states).

88. *See* ALA. CODE § 12-21-142 (2005) (stating absolute protection only protects sources procured and published).

89. *See* N.M. R. EVID. § 11-514(C) (2008) (providing example of exception allowing disclosure). The New Mexico rule provides an exception to the privilege if there is a reasonable probability that a journalist has information or sources that are material and relevant, the requesting party has exhausted reasonable alternatives to get the information, the information is crucial to the party requesting it, and the need “clearly outweighs the public interest in protecting the news media’s confidential information and sources.” *Id.*; *see also supra* note 61 (discussing *Sinnott* and alternatives to accessing reporter’s information). In *Sinnott* the court did not require disclosure because the party seeking disclosure had not exhausted all available means for obtaining the information from other sources and merely wanted the information from the media outlet because it was the easiest way to obtain the information. *See Sinnott*, 524 N.E.2d at 104.

90. *See Sinnott*, 524 N.E.2d at 102 (declining compelled disclosure as plaintiff could access information via other means). *But see Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667, 695 (Mass. 2005) (noting noncompliance with discovery order caused grave injustice to plaintiff’s case). The grave injustice to the plaintiff’s case was that without access to who revealed the confidential information about her, she would be unable to hold the hospital or doctor she sued liable. *See id.* at 695-96. The court, however, recognized that the jury could have concluded that the hospital was responsible for the leak of confidential information to the newspaper without knowing what information the hospital actually supplied to the reporter. *Id.* at 683. Requiring disclosure, therefore, seems questionable at best. *See id.* at 683.

91. *See Ayash*, 822 N.E.2d at 695 (opining in hindsight identities of confidential sources hardly crucial to plaintiff’s case).

of a confidential source, then the inquiry into whether disclosure is appropriate should end.⁹²

A qualified privilege weighed against disclosure, except in exceptional circumstances, would place the burden of compelling disclosure on the party seeking the information.⁹³ This placement of the burden would help serve the public's interest in a continued free flow of information, which is a critical factor in the current balancing test, and would also highlight the benefits that attach with such a weighted privilege.⁹⁴ Because more serious consequences exist in criminal cases, a criminal defendant should bear a slightly lower burden than a civil litigant in proving a need for disclosure.⁹⁵

B. Who Should Be Protected

If a statute favoring protection from forced disclosure is enacted it should provide protection for a broad group of individuals and media outlets.⁹⁶ Limiting protection to those traditionally thought of as the institutional media ignores the realities of the Internet age, as many nontraditional journalists

92. See *id.* at 695 (noting source identity not crucial to plaintiff). If the plaintiff in *Ayash* absolutely needed the identity of the source used by the newspaper, then perhaps the reporter could merely state that the source came from within the hospital, thus ending the inquiry because the plaintiff could then subpoena hospital staff. Such an option would encourage reporters to label confidential sources in a manner that allows identification of the source, for example 'an unnamed hospital source' as the confidential source. If the actual confidential source lies when subpoenaed, then that would be his or her decision and a court should not then order a journalist to disclose their identity.

93. See *supra* note 62 and accompanying text (explaining burden currently rests on party avoiding disclosure).

94. See *supra* note 17 (discussing why sources seek confidentiality in the first place); see also *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting) (arguing informants necessary to newsgathering). Justice Stewart argued that inability to honor promises of confidentiality would hurt reporters and public discourse. *Id.* at 725-32.

95. See Gomsak, *supra* note 10, at 607-13 (noting civil litigants would have borne greater burden than criminal defendants under proposed federal statute). Likewise, the failed Free Flow of Information Act of 2006 would have imposed greater standards on civil litigants than criminal defendants, as the stakes in criminal cases—loss of liberty or life—are far higher than in civil cases. See *id.* at 612. The proposed 2006 Act contained numerous exceptions to journalist protection, including a different standard when United States Attorneys requested disclosure in criminal matters. See *id.* at 607. To satisfy their burden, criminal defendants would have to show exhaustion of all alternate means of accessing the requested information and reasonable grounds for believing that if disclosure were ordered the information would be "directly relevant to the question of guilt or innocence or to a fact that is critical to enhancement or mitigation of a sentence." See *id.* at 610. For civil litigants, disclosure could only be compelled after showing that all alternatives for accessing the information were exhausted, the requested information was not merely peripheral or speculative to the party's case, and the request was limited with reasonable and timely notice. See *id.* at 612. The 2006 Act also contained a national security exception, which although highly relevant to a federal statute, does not exactly translate to a state statute where national security does not seem as relevant. See *id.* at 615. Any Massachusetts shield law, however, could likely obtain the same result without an explicit national security exception given that those requesting the information could likely satisfy the test for disclosure if national security was truly at stake. See *id.*

96. See *supra* note 77 and accompanying text (discussing inherent trickiness in limiting Press Clause application).

contribute to the dissemination of news to the same extent as traditional media.⁹⁷ Indeed, others argue that discussion of any privilege or other right associated with the media frequently leads the public to think of large media corporations, when in fact bloggers actually serve in a role closer to what the Framers envisioned when they drafted the First Amendment's Press Clause.⁹⁸

Any Massachusetts statute should therefore apply to journalists and broadly define the term to include anyone serving as a reporter or otherwise producing news, regardless of whether it is for profit.⁹⁹ For example, one possibility is extending the privilege to all journalists and defining journalists to include all individuals working for the dissemination of news by newspapers, television news stations, radio stations, the Internet, and a catch-all "other news sources," signaling a clear legislative intent to protect as many types of journalists as possible.¹⁰⁰

In addition to broadly defining who the statute protects, it should also address whether only confidential information will be protected.¹⁰¹ Protecting nonconfidential information along with confidential information does not seem necessary as the primary benefit of any protection is allowing sources to reveal information but go unnamed in doing so, thereby not risking retaliation for disclosure, which is not as applicable when information is not confidential.¹⁰²

97. See Fargo, *supra* note 15, at 72 (discussing advantages and disadvantages to extending protection to both traditional media and internet journalists). Deciding whether to extend a journalist's privilege to bloggers and other Internet journalists proves difficult when discussing the applicability of any shield law. See *id.* at 71. Professor Anthony L. Fargo believes that defining a journalist "too closely to the traditional media" may not result in enough protection. *Id.* He also admits, however, that a broad definition "would risk incurring the wrath of a court system in need of competent witnesses." *Id.* One suggestion at the federal level was to extend protection to journalists and define the term by what the individual intended when he or she began gathering news. See *id.* at 72. The New York shield law takes a different approach by protecting journalists reporting on "local, national, or worldwide events or other matters of public concern or public interest or affecting the public welfare." N.Y. CIV. RIGHTS LAW § 79-h(a)(8) (McKinney 1992) (defining protection for journalists).

98. See Keane, *supra* note 80, at 16 (arguing Founding Fathers envisioned more democratized media).

99. See Siegel, *supra* note 8, at 514 (discussing proposed federal statute's level of protection). The Freedom of the Press Act of 2006 limited protection to professional journalists and bloggers whose sole purpose was disseminating news to the general public. *Id.* at 514-15. Others argue that the First Amendment was never intended to be limited to professional journalists and that anyone serving in a journalist-like role, even if only part-time, should be protected under the shield law. See Keane, *supra* note 80, at 16 (defining journalist broadly).

100. See Keane, *supra* note 80, at 16 (arguing we are all journalists today and calling for broad protection). Despite some concerns over the quality of news that nontraditional mediums produce, a statute endorsing protection for as many journalists as possible would cover any new mediums that develop in the future. See *id.*

101. See Fargo, *supra* note 28, at 264 (noting protection of nonconfidential information varies within states). States without shield laws may or may not protect nonconfidential information, depending on what First Amendment or state constitutional grounds the court relies on. See *id.* Approximately twenty states with shield laws protect nonconfidential information to some extent, either expressly by statute, implicitly inferred, or by subsequent judicial decision. See *id.* at 255-56.

102. See Handman, *supra* note 8, at 579 (suggesting sources seek confidentiality fearing possible retaliation); see also Kirtley, *supra* note 48, at 524 (arguing reporter's privilege benefits public). Secrecy in the name of national security or personal privacy is increasingly frustrating for news organizations attempting to access information that was historically accessible to the public. See Kirtley, *supra* note 48, at 524. By

C. Benefits of Statutory Shield Law

If another Big Dig-like scandal arose in Massachusetts, residents would want to know about it.¹⁰³ Assuming the sources of such information knew that they would not be protected, it is likely that they would choose to keep the information to themselves.¹⁰⁴ Passing and publicizing a statute codifying specific levels of protection for journalists and their confidential sources would signal how highly the Commonwealth viewed potential sources and, hopefully, encourage them to speak.¹⁰⁵

Although some may question why a statute is necessary in light of Massachusetts case law generally supporting recognition of a reporter's privilege, the recent history of the privilege suggests increased erosion of protection.¹⁰⁶ Additionally, specifically articulating when a reporter must reveal sources informs potential sources of the privilege's limits and, therefore, the consequences of revealing potentially groundbreaking information.¹⁰⁷ Defining the circumstances where disclosure would be required would reduce the level of uncertainty resulting from courts haphazardly weighing competing interests and remove the decision of whether to compel disclosure from a given judge.¹⁰⁸

allowing someone with access to such information to bypass traditional mediums, and not merely deliver "the official government line," the public would benefit immensely by accessing the truth, a scenario only available when a reporter's privilege allows the source to disclose information without fear of retaliation. *See id.* at 523-24. *But see* Fargo, *supra* note 28, at 272 (arguing extending protection to nonconfidential sources may broaden stories reporters cover). For example, some reporters fear publishing stories involving nonconfidential sources because of the looming threat of later facing a subpoena. *See id.* at 273. Protecting both nonconfidential and confidential information would enhance the press's autonomy from government and civil litigants, perhaps making reporters more willing to undertake difficult stories because the fear of an oncoming subpoena would not be so present. *See id.*

103. *See generally* notes 2-4 and accompanying text (discussing Big Dig scandal and subsequent fallout).

104. *See generally* Handman, *supra* note 17 (discussing sources' retaliation fears). Sources most frequently seek confidentiality because they fear retaliation for disclosing information that was otherwise private and secret. *Id.*

105. *See* Handman, *supra* note 8, at 579 (noting retaliatory fear major reason for seeking confidentiality). If sources knew under what circumstances their identities would be revealed, they would likely feel more comfortable coming forward under promises of confidentiality. *Id.*

106. *See supra* Part II.C (discussing Massachusetts judicial history recognizing a reporter's privilege); *see also* Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 696 (Mass. 2005) (compelling newspaper to reveal source); Wojcik v. Boston Herald, Inc., 803 N.E.2d 1261, 1269 (Mass. App. Ct. 2004) (reversing trial court's decision to compel disclosure).

107. *See supra* Part II.D (discussing benefits of statutory shield laws); *see also supra* Part II.B (discussing various approaches in state shield laws and benefits attached).

108. *See* Pet. For the Promulgation of Rules Regarding the Prot. of Confidential News Sources and Other Unpublished Info., 479 N.E.2d 154, 155-56 (Mass. 1985) (proposing balancing test for reporter's privilege and explaining benefits of clear standards); *see also* Ayash, 822 N.E.2d at 403-04 (reaffirming balancing test between access to all evidence and free flow of information).

V. CONCLUSION

It would have been easy for people involved with the Big Dig—aware that construction design flaws and massive cost overruns were just the beginning of the vast corruption—to keep quiet. If they knew that speaking to a reporter would eventually lead to being hauled before a court to testify—a situation that would exist without protection from compelled disclosure of confidential sources and could arise in Massachusetts if courts increasingly erode protection—they would probably choose not to speak. It would be far easier for them to remain silent than to face scrutiny in litigation or worse forums.

While compelled disclosure of sources may be necessary in certain specified circumstances, passing a qualified shield law in Massachusetts would narrow the grounds for disclosure and provide a definitive basis for reporters, sources, and potential sources to assess whether going forward with a story or revealing information is worth the risk. Defining the level of protection will allow people with information of pressing public interest to weigh the risks and costs and thus make an informed decision, rather than speculating how a judge may rule and whether a reporter will truly honor a confidentiality promise when faced with serving jail time or paying massive fines. Such defined protection would prompt many sources to come forward off the record and, perhaps, encourage others to contact reporters and reveal important information.

While public interest issues as vast as the Big Dig, Watergate, or the Valerie Plame scandal might eventually have come to light without the aid of confidential sources, it would have been far later and most likely in a diluted form. Pressing issues like these need to be brought to the public's attention so that people can make intelligent decisions. Protecting journalists and sources, especially by promoting and zealously guarding promises of confidentiality, will inform the public and, in turn, enhance the strength of the nation. A statute providing definite guidelines for when protection should be afforded and when it should yield to more pressing needs will discourage courts from arbitrarily enforcing protections. After all, in the end "without the judiciary the press cannot succeed . . . and without the press, neither can our democracy."¹⁰⁹ With a privilege statute in Massachusetts, courts could avoid haphazard application of a journalist's privilege and promote the continued and potentially expanded use of confidential sources in the Commonwealth.

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109. See Kirtley, *supra* note 48, at 527 (discussing need for judicial recognition of some form of reporter's privilege).