Plugging Leaks: The Necessity of Distinguishing Whistleblowers and Wrongdoers in the Free Flow of Information Act

*By Michelle C. Gabriel**

I. INTRODUCTION

In the world of elite journalism, there is no question that anonymous sources are essential to groundbreaking stories. Under the mask of anonymity, confidential sources have revealed everything from government scandals to steroid use by professional athletes.[1] Some of these sources would lose their jobs if their names were revealed with the stories they leak.[2] Some simply prefer to keep their identity a secret. Regardless of the circumstances, these sources rely on journalists' promises of confidentiality.[3]

* Associate, Sonnenschein Nath & Rosenthal LLP. Thanks to Mike for your support and for always believing in me. Thanks to Mom, Dad, and Lori for your love and encouragement. Thanks to Sam Fifer for your guidance.

1. *See, e.g.*, Joel G. Weinberg, *Supporting The First Amendment: A National Reporter's Shield Law*, 31 SETON HALL LEGIS. J. 149, 160 (2006); Joe Mozingo & James Rainey, *Reporters in BALCO Scandal Criticized*, L.A.TIMES, Feb. 16, 2007, at B-1 (discussing the leaked grand jury testimony regarding steroid use in professional athletes in the BALCO investigation); *see also* Adam Liptak & Peter T. Kilborn, *2 Journalists Subpoenaed Over Source of Disclosure*, N.Y. TIMES, May 23, 2004, § 1, at 22 (discussing the leak of the identity of CIA operative Valerie Plame).

2. For example, W. Mark Felt, or "Deep Throat," was the second-highest ranking official in the FBI when he served as an anonymous informant to *Washington Post* reporters Bob Woodward and Carl Bernstein. The information Felt leaked about President Richard Nixon set off the Watergate Scandal of 1973 and resulted in Nixon's resignation on August 9, 1974. James Thomas Tucker & Stephen Wermiel, *Enacting A Reasonable Federal Shield Law: A Reply To Professors Clymer And Eliason*, 57 AM. U. L. REV. 1291, 1301 (2008). *See also* Rachel Smolkin, *Uncharted Terrain*, AM. JOURNALISM REV., Oct./Nov. 2005, at 32, 32–41 (detailing issues that have arisen when identities and information are leaked in classified investigations).

3. N.Y. Times Co. v. Gonzales, 382 F. Supp. 2d 457, 470 (S.D.N.Y 2005) (quoting Affidavit of Russell Scott Armstrong, 2004 WL 5580503). *See* Noah Goldstein, *An International Assessment of Journalist Privileges And Source Confidentiality*, 14 NEW ENG. J. INT'L & COMP. L. 103, 127 (2007) (discussing the confidential relationship between reporters and their sources); *see also* William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 664 (2006) (statement of Branzburg).

Thirty-two states currently have statutes that offer varying levels of protection for confidential sources.[4] In general, these statutes prevent courts from compelling reporters to reveal the identities of anonymous sources. Nearly all states that do not have shield legislation offer some common law protection for confidential sources.[5] However, efforts to enact a federal shield law have been largely unsuccessful; in thirty years, only one proposed federal shield law passed a House vote.[6]

In 2003, an anonymous government source leaked the name of undercover CIA operative Valerie Plame to Robert Novak, a political columnist for the *Chicago Sun-Times*,[7] and set off a chain of events that reignited the push for a federal shield law.[8] In connection with a 2004 federal investigation into the leak of Plame's identity as a CIA operative, a grand jury subpoenaed reporters Matthew Cooper of *Time*

4. James C. Goodale et al., *Reporter's Privilege*, *in* COMMUNICATIONS LAW 2007, at 9, 19 (PLI Patents, Copyrights, Trademarks, and Literacy Property, Course Handbook Series No. 10921, 2007). *See, e.g.*, ALA. CODE § 12-21-142 (1975); ALASKA STAT. §§ 09.25.300 to .390 (2008); ARIZ. REV. STAT. ANN. § 12-2237 (2003 & Supp. 2006); ARK. CODE ANN. § 16-85-510 (2005); CAL. EVID. CODE § 1070 (1995 & West 2009); COLO. REV. STAT. § 13-90-119 (2005 & Supp. 2006); CONN. GEN. STAT. § 52-146t (Lexis 2007); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1999 & West 2008); D.C. CODE §§ 16-4701 to -4704 (2005); FLA. STAT. § 90.5015 (1999 & Supp. 2009); GA. CODE ANN. § 24-9-30 (1995 & Supp. 2006); 735 ILL. COMP. STAT. 5/8-901 to 909 (2003 & Supp. 2006); IND. CODE ANN. §§ 34-46-4-1 to -2 (1999 & Supp. 2009); KY. REV. STAT. ANN. § 421.100 (West 2005); LA. CODE EVID. ANN. arts. 1451 to 1459 (West 1999 & Supp. 2005); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2006); MICH. COMP. LAWS § 767.5a (2000 & West 2009); MINN. STAT. §§ 595.021 to .025 (2006 & West 2008); MONT. CODE ANN. §§ 26-1-901 to -903 (2006); NEB. REV. STAT. §§ 20-144 to -147 (1999); NEV. REV. STAT. § 49.275 (2006); N.M. RULES ANN. § 11-514 (2005); N.J. STAT. ANN. §§ 2A:84A-21 to -21.13 (1994 & West 2008); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992 & Supp. 2009); N.C. GEN. STAT. § 8-53.11 (2005); N.D. CENT. CODE § 31-01-06.2 (1996); OHIO REV. CODE ANN. §§ 2739.04 to .12 (West 2006); OKLA. STAT. tit. 12, § 2506 (1993 & Supp. 2007); OR. REV. STAT. §§ 44.510 to .540 (2003 & Supp. 2006); 42 PA. CONS. STAT. ANN. § 5942 (West 2000 & Supp. 2006); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (1997 & Supp. 2006); S.C. CODE ANN. § 19-11-100 (Supp. 2006); TENN. CODE ANN. § 24-1-208 (2000 & Supp. 2006).

5. *See, e.g.*, Senear v. Daily Journal-Am. 641 P.2d 1180 (Wash. 1982) (en banc) (holding that there is a common-law reporters' privilege in civil cases in Washington state); The Society of Professional Journalists, *Struggling to Report: Federal Shield Law*, http://www.spj.org/shieldlaw-2102.asp (last visited Jan. 25, 2009). In all, forty-nine states offer some sort of protection to anonymous sources. *Id.*

6. Noam N. Levey, *House Extends Law to Protect Reporters*, L.A. TIMES, Oct. 17, 2007, at A-9.

7. Neil A. Lewis, *First Source of C.I.A. Leak Admits Role, Lawyer Says*, N.Y. TIMES, Aug. 30, 2006, at A12. *See also* Scott Neinas, *A Skinny Shield Is Better: Why Congress Should Propose a Federal Reporters' Shield Statute That Narrowly Defines Journalists*, 40 U. TOL. L. REV. 225, 238 (2008) (explaining that after the Valerie Plame incident, more proposals for shield laws were made).

8. Michael D. Saperstein, Jr., *Federal Shield Law: Protecting Free Speech or Endangering The Nation*, 14 COMMLAW CONSPECTUS 543, 573–74 (2006) (discussing the application of the proposed federal shield law on the Plame case).

magazine and Judith Miller of the *New York Times* for the names of confidential sources who might have leaked Plame's name.[9] Both reporters refused to reveal their sources, claiming that the First Amendment protected their anonymity.[10] In response, the United States Court of Appeals for the D.C. Circuit unanimously held that the First Amendment did not protect the identities of confidential sources when a reporter is subpoenaed by a grand jury.[11] After this decision, Miller refused to comply with the grand jury subpoena and was sent to prison.[12] On the other hand, *Time* magazine complied with the subpoena and Cooper turned over his source information.[13]

"Plamegate" raised concerns among members of the media and First Amendment scholars alike.[14] Many feared that the D.C. Circuit's decision would have a chilling effect on anonymous sources, since it offered them no protection in the event that the story they leaked became of interest to a grand jury.[15] *Time* magazine said it lost at least two confidential sources as a result of the decision to cooperate with the grand jury in the Plame leak case.[16]

Out of this uncertain situation came the Free Flow of Information Act, proposed legislation that would protect the confidentiality of anonymous sources.[17] Shield laws have historically been unsuccessful

9. While both Cooper and Miller were subpoenaed for the names of the sources who might have revealed Plame's identity, only Cooper published an article about the incident. *See* Matthew Cooper, Massimo Calabresi & John F. Dickerson, *A War on Wilson?*, TIME, Jul. 17, 2003, *available at* http://www.time.com/time/nation/article/0,8599,465270,00.html (Cooper's article revealing the identity of Valerie Plame). For more information about Cooper and Miller, see generally Elizabeth Coenia Sims, *Reporters And Their Confidential Sources: How Judith Miller Represents the Continuing Disconnect Between the Courts and the Press*, 5 FIRST AMEND. L. REV. 433, 446–49 (2007) (detailing the battle that Cooper and Miller waged in the courts to avoid revealing confidential sources).

10. Michele Bush Kimball, *The Intent Behind the Cryptic Concurrence That Provided a Reporter's Privilege*, 13 COMM. L. POL'Y 379, 409 (2008); Joel M. Gora, *The Source of the Problem ff Sources: The First Amendment Fails the Fourth Estate*, 29 CARDOZO L. REV. 1399, 1408 (2008); Daniel Joyce, *The Judith Miller Case and the Relationship Between Reporter and Source: Competing Visions of the Media's Role and Function*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555, 559–60 (2007); Sims, *supra* note 9, at 444–45.

11. *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1138, 1141 (D.C. Cir. 2006).

12. Sims, *supra* note 9, at 447.

13. *Id.*

14. Charles Lane, *In Leak Case, Reporters Lack Shield for Sources*, WASH. POST, Nov. 29, 2004, at A01.

15. Nathan Swinton, *Privileging a Privilege: Should the Reporter's Privilege Enjoy the Same Respect as the Attorney-Client Privilege?*, 19 GEO. J. LEGAL ETHICS 979, 988 (2006).

16. Jim VandeHei & Mike Allen, *In Plame Leaks, Long Shadows*, WASH. POST, Jul. 17, 2005, at A01.

17. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007).

in Congress, and the 2007 Act marked the first time a federal shield law has garnered the support to pass the House.[18] However, the current version of the Free Flow of Information Act is not without its critics. Some House Democrats believed the leak was retribution for an op-ed written by Plame's husband that was critical of the Bush Administration's intelligence gathering prior to the war in Iraq, and they worried that the law's passage would free Republicans, particularly the Bush Administration, from accountability in the scandal.[19] Despite those concerns, Democrats welcomed the Republican support that was necessary to pass this bill through the House.[20]

Although the legislation was designed to protect whistleblowers, some feared that the Free Flow of Information Act could be exploited by people with strong personal agendas. In extreme cases, a federal shield law would enable smear campaigns fueled by anonymous sources.[21] Some congressmen discussed adding an exception for those who anonymously leak private facts (so-called "wrongdoers") to prevent the bill from being abused.[22] Typically, critics of a "wrongdoer" exception fear that any exception to confidentiality would have a chilling effect on confidential sources.[23] Concerns that sources

18. Elizabeth Williamson, *House Passes Bill to Protect Confidentiality of Reporters' Sources*, WASH. POST, Oct. 17, 2007, at A03. The measure passed with a vote of 398 to 21, which is strong enough to override a presidential veto. *Id.*

19. *See* Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795–2005*, 43 SAN DIEGO L. REV. 425, 464 (2006) (stating that "[o]bservers surmised that Bush Administration sources had leaked the details about Plame's CIA role to undercut her husband's credibility as a critic of the Iraq war.").

20. Sponsor Rick Boucher's (R-IN) support of the Free Flow of Information Act helped the legislation resonate with House Republicans. The Society of Professional Journalists, *supra* note 5. *See also* Michael Berry, *Libby's Legacy, The Conservative Case for a National Shield Law*, FIRST AMENDMENT CENTER, Jan. 18, 2008, http://www.firstamendmentcenter.org/commentary .aspx?id =19574 (last visited Feb. 28, 2009) (discussing a conservative argument in favor of a national shield law).

21. Randall D. Eliason, *The Problems with the Reporter's Privilege*, 57 AM. U. L. REV. 1341, 1364 (2008). Martin Kaplan, the associate dean of the Annenberg School for Communication, at the University of Southern California stated:

> What I am concerned about is the way in which the powerful have learned to game the system. What they did in the Plame case was to use the press's requirements for observing ground rules with sources as a way of making reporters enablers of a smear campaign. Anonymous sourcing in Washington exists today much more to protect government spinners than it does actual whistle-blowers. It's reasonable to separate the whistle-blower from the garden-variety attempt to float anonymous charges.

Jeffrey Toobin, *Name That Source: Why Are the Courts Leaning on Journalists?*, NEW YORKER, Jan. 16, 2005, at 30, 32.

22. Toobin, *supra* note 21. *See also* Swinton, *supra* note 15, at 987.

23. Swinton, *supra* note 15, at 981 (discussing a "chilling effect" due to lack of protection of confidential sources).

would be determined "wrongdoers," thus stripping them of shield protection, could deter them from talking with journalists at all. Proponents of such an exception believe that it would only deter the confidential sources that are hiding behind a shield law to further their own purposes, or protect their own wrongdoings.[24] They believe that there are certain sources that the federal government should want to discourage.[25]

This Article will explore the concerns about an absolute privilege in cases where an anonymous source leaks private information with garden-variety malicious intent.[26] This Article will also weigh the merits of including an exception to the proposed Free Flow of Information Act to protect victims of malicious leaks.[27] Such an exception would compel disclosure in cases where an anonymous source hides behind a shield law in an attempt to persecute a plaintiff.[28] Because this exception would have the most resonance in violations of the federal Privacy Act,[29] this Article will also explore the application of such an exception to past examples of malicious leaks in Privacy Act cases.[30] It will also include proposed wording for the exception and a discussion of the likely effects of the exception on the federal shield law.[31] Finally, this Article will include a discussion about what kind of behavior lawmakers and journalists would like to encourage in the sources who leak information under the mask of anonymity.[32]

24. James C. Goodale et al., *Reporter's Privilege*, *in* COMMUNICATIONS LAW 2000, at 841, 927–28 (PLI Patents, Copyrights, Trademarks, and Literacy Property, Course Handbook Series No. G0-00BB, 2000), WL 627 PLI/PAT 381 (quoting Pellegrino v. N.Y. Racing Ass'n, Inc., No. 96-CV-2315 (TCP) (E.D.N.Y., Aug. 22, 1996, *modified* Sept. 18, 1996)).

25. *See Reporters' Shield Legislation, Issues and Implication: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Geoffrey R. Stone, Harry Kalven, J. Distinguished Service Professor of Law, University of Chicago Law School) [hereinafter Stone], *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=1579&wit_id=4509 (last visited Jan. 25, 2009) (discussing the nature of First Amendment protection and the source privilege).

26. *Id.*

27. *See infra* Part III (proposing an exception to the Free Flow of Information Act).

28. *See infra* Part III.A (discussing the merits of including an exception to the proposed Free Flow of Information Act to protect victims of malicious leaks).

29. 5 U.S.C. § 552a (2006).

30. *See* Lee v. Dep't of Justice, 401 F. Supp. 2d 123 (D.C. Cir. 2005), discussed *infra* Part III.B.2 (applying the proposed exception to a case where a malicious source leaked information about a nuclear scientist).

31. *See infra* Part III.A (discussing the specifics of the proposed exception).

32. *See infra* Part III.B (discussing the Valerie Plame, Wen Ho Lee, and BALCO cases).

II. BACKGROUND

A. A Historical Look at Free Speech and Anonymous Sources

From the *Federalist Papers*[33] to the Pentagon Papers,[34] some of the greatest pieces of journalism have been the product of anonymous sources and authors. For this reason, freedom of the press has long been linked to journalists' ability to guarantee confidentiality to their sources.[35] One of the first investigations surrounding an anonymous source was a criminal case that took place before the First Amendment was even written. In 1735, printer John Peter Zenger was jailed for refusing to reveal the authors who published criticisms of the Crown Governor of New York in the *New York Weekly Journal*.[36] When the governor could not learn the identities of his critics, Zenger went to jail for eight months for seditious libel.[37] He was eventually acquitted, but his case stands out as an early example of the link between free press and source confidentiality.

During the Revolutionary period, members of the Continental Congress blocked a Massachusetts delegate's attempt to force the printer of the *Pennsylvania Packet* to reveal the identity of an author who criticized the Congress in his newspaper.[38] A representative from Virginia, Merriweather Smith, challenged the efforts of the Massachusetts delegate, saying that "[w]hen the liberty of the Press shall be restrained . . . the liberties of the People will be at an end."[39] Other representatives agreed that source confidentiality was essential to a free press, and neither the printer of the paper nor the author of the article was forced to face Congress.[40] That same year, a similar situation played out in the New Jersey legislature, which voted not to

33. *See, e.g.*, THE FEDERALIST No. 1 (Alexander Hamilton) (penned originally by Hamilton writing as Publius).

34. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam). In *N.Y. Times Co. v. United States*, the Federal government sought to enjoin the *New York Times* and *Washington Post* newspapers from publishing a classified report on the U.S. government's Vietnam War policy, the so-called "Pentagon Papers." *Id.*

35. Tucker & Wermiel, *supra* note 2, at 1292–93 (reviewing case history of reporters refusing to reveal their sources and the reporters focus on the First Amendment as protection).

36. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 9–19 (Stanley Nider Katz ed., 1963).

37. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360–61 (1995) (discussing the Zenger case as an example of anonymous sources).

38. Henry Laurens, Notes of Debates (Jul. 3, 1779), *in* 13 LETTERS OF DELEGATES TO CONGRESS 1774–1789, at 141 n.1 (G. Gawalt & R. Gephart eds., 1986).

39. *McIntyre*, 514 U.S. at 362 (quoting Laurens, *supra* note 38, at 139.

40. *Id.*

force the printer and editor of a newspaper to reveal the identity of an author who anonymously published an attack on the governor.[41]

In the late eighteenth century, countless authors relied on anonymity to publish criticisms of the government, debate current issues, or comment on the ratification of the Constitution.[42] In the late 1780s, however, some people began to worry that not all anonymous speech deserved protection.[43] In 1787, a member of the Federalist Party wrote an article expressing concern that "foreign enemies" would try to thwart the progress toward a Constitution by anonymously printing a barrage of articles opposing the Constitution in the press.[44] In response, two Massachusetts papers announced that they would not print anti-Federalist articles by anonymous sources unless the authors would reveal their identities.[45] This incited backlash from Anti-Federalists, and sparked a widespread debate about the role of anonymous sources in a free press.[46] However, it also marked the earliest point in U.S. history in which people expressed concern that anonymous sources would use their confidentiality to further personal agendas.

The first time the journalist's privilege was asserted in court was in 1848, when *New York Herald* reporter John Nugent refused to disclose who had given him a copy of a proposed treaty to end the Mexican-American War, which was being secretly debated in the Senate at the time.[47] Nugent refused to disclose his source and was cited for contempt.[48] Similar cases arose throughout the 1800s, but courts generally rejected reporters' arguments for the necessity of maintaining source confidentiality.[49]

41. *See* Massachusetts Centinel (Oct. 10, 1787), *in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 315–16 (J. Kaminski & G. Saladino eds., 1981) (commenting that the names of sources became public only if the source so desired); *see also* Massachusetts Gazette (Oct. 16, 1787), *in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, at 317 (editor's request for readers not to request names of sources).

42. *McIntyre*, 514 U.S. at 368–69 (listing examples of papers published anonymously).

43. *Id.* at 363–64.

44. *Id.* (quoting Boston Independent Chronicle, (Oct. 4, 1787), *in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 41, at 315).

45. Massachusetts Centinel, *supra* note 41, at 312, 315–16; Massachusetts Gazette, *supra* note 41, at 317.

46. *McIntyre*, 514 U.S. at 366–67.

47. *Ex parte* Nugent, 18 F. Cas. 471, 493 (C.C.D.C. 1848).

48. *Id.*

49. *See, e.g.*, Plunkett v. Hamilton, 70 S.E. 781, 785 (Ga. 1911) (rejecting a reporter's argument that forcing him to reveal a confidential source would amount to a "forfeiture of an estate"); *see also* People *ex rel.* Phelps v. Fancher, 9 Hun. 226, 230 (N.Y. Sup. Ct. 1875) (stating that "no court could possibly hold that a witness could legally refuse to give the name of the author of an alleged libel, for the reason that the rules of a public journal forbade it").

B. Shield Laws at the State Level

Because information revealed by confidential sources can at times be critical to litigation, journalists are subpoenaed for that information by parties in civil and criminal cases.[50] If journalists refuse to reveal their sources, courts can attempt to compel disclosure by issuing orders or, in more extreme cases, holding reporters in contempt.[51] While courts were historically slow to uphold journalists' rights to shield their sources' identities, state legislatures began adopting shield laws at the turn of the century. Maryland became the first state to offer such protection in 1896, after a *Baltimore Sun* reporter was jailed for failing to disclose the identity of a source who leaked information about grand jury proceedings.[52] That case resulted in the adoption of the country's first shield law, which provided an absolute privilege against disclosure of a source's identity in any legal proceeding.[53]

For almost four decades, Maryland's shield law was the only such law in the country.[54] However, several other states adopted shield laws during the Great Depression after reporters were subpoenaed for the names of sources who leaked stories ranging from government corruption to bootlegging to unrest in the workforce.[55] Today, thirty-two states, the District of Columbia, and Guam all have some form of statutory protection for source anonymity; however, the level of protection varies widely.[56] Some states' laws offer nearly complete

50. *See e.g.*, Tofani v. State, 465 A.2d 413 (Md. 1983) (holding that a reporter had no qualified privilege to refuse to testify in Maryland); *In re* Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act, 472 N.E.2d 450 (Ill. 1984) (holding that all alternative means of gaining information must be used before compelling a reporter to disclose his source); Sprague v. Walter, 543 A.2d 1078 (Pa. 1988) (holding that the Shield Law did not prevent the reporter from offering evidence, even without disclosing his sources); Hatchard v. Westinghouse Broad. Co., 504 A.2d 211 (Pa. 1986) (holding that television broadcasts could not be compelled to produce outtakes or reporter's notes).

51. *See, e.g.*, Watson et al., *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Constitutional Law*, 74 GEO. WASH. L. REV. 676, 715–16 (2006) (discussing a case where contempt actions were brought against five journalists for failure to disclose their sources).

52. Berry, *supra* note 20.

53. *Id.*

54. For instance, Alabama enacted shield legislation in 1935 (codified at ALA. CODE § 12-21-142 (West 2009)); New Jersey enacted shield legislation in 1933 (codified at N.J. STAT. ANN. § 2A:84A-21 (West 2009)); and Pennsylvania enacted shield legislation in 1937 (codified at 42 PA. CONS. STAT. ANN. § 5942(a) (West 2009)).

55. Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 535 (2007).

56. For an analysis of the shield protections offered in different states, see generally Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Court Interpretation of the Journalist's Statutory Privilege*, 23 J. LEGIS. 215 (1997).

protection against compelled disclosure of source identity.[57] Other laws offer highly qualified protection, or protection only in special circumstances.[58]

The laws also vary in what is protected. Some protect only the identity of confidential sources,[59] while others protect all published and unpublished information.[60] Some shield laws apply in both criminal and civil proceedings, while others apply only in civil proceedings.[61] In general, however, to overcome whatever shield protection is offered under the various state laws, the following elements must be asserted: (1) the information is highly material and relevant to the case at issue; (2) the information cannot be obtained by other means; and; (3) a compelling need exists for the information.[62]

C. The Controversy over Constitutional Protection

In 1972 in the case of *Branzburg v. Hayes*, the Supreme Court addressed journalists' privilege to protect anonymous sources.[63] The Court was split 4-4 on the issue of whether journalists should receive protection against compelled disclosure, and Justice Powell's concurrence tipped the scales in favor of a qualified privilege for journalists.[64] Powell advocated a privilege that balanced freedom of the press against public interest in compelled disclosure on a case-by-case basis.[65] Because Powell did not expressly join the majority's opinion,

57. *See, e.g.*, OR. REV. STAT. § 44.520 (2007) (providing protection from compelled disclosure of the source of "any published or unpublished information obtained by the person in the course of gathering, receiving or processing information for any medium of communication to the public").

58. *See, e.g.*, FLA. STAT. ANN. § 90.5015 (1998) ("This privilege applies only to information or eyewitness observations obtained within the normal scope of employment and does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes.").

59. ALASKA STAT. §.09.25.300 (West 2009).

60. CAL. CIV. CODE § 1070 (West 2009) (discussing newsman's refusal to disclose a source). *See also* Douglas Lee, *Shield Laws*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/press/topic.aspx?topic=shield_laws (last visited Feb. 28, 2009) (providing an overview of shield laws in the United States).

61. Lee, *supra* note 60.

62. *See, e.g.*, D.C. CODE § 16-4703 (West 2009) (permitting compelled disclosure). *Cf.* D.C. CODE § 16-4702 (West 2009) (prohibiting compelled disclosure). *See, e.g.*, GA. CODE ANN. § 24-9-30 (West 2009) (qualified privilege for those gathering or disseminating news); ME. REV. STAT. ANN. tit. 16 § 61 (West 2009) (shielding journalists' confidential sources); *see also* Lee, *supra* note 60.

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

64. *Id.* Justice White wrote the opinion of the Court, in which Chief Justice Burger and Justices Blackmun, Rehnquist and Powell (concurring) joined. Douglas, Stewart, Brennan and Marshall dissented.

65. *Id. See also* Note, *Protecting the New Media: Application of the Journalists' Privilege to*

Branzburg failed to create a clear rule about compelled disclosure.[66] As a result, there has been "chaos in the lower federal courts about the extent to which the First Amendment embodies a journalist-source privilege."[67] Difficulty interpreting and applying *Branzburg* has been the source of much confusion about the application of the First Amendment to cases involving journalist-source privilege.[68]

Initially, appellate courts interpreted the decision as protecting reporters against compelled disclosure of confidential sources.[69] However, in recent cases, district courts have increasingly found that public interest outweighs the necessity of protecting source anonymity.[70] Because circuits are split on how Powell's concurrence affects *Branzburg*, many people have called for stronger protection of source confidentiality in the form of a federal shield law.[71]

D. The Case for Federal Protection

Until recently, efforts to enact a federal shield law have been unsuccessful. However, after two journalists were subpoenaed for the identities of their sources in connection with the Valerie Plame case in 2003, the push for a federal shield law started afresh in Congress.[72] In

Bloggers, 120 HARV. L. REV. 996, 999 (2007).

66. Stone, *supra* note 25.

67. *Id.*

68. *See* N.Y. Times Co. v. Gonzales, 382 F. Supp. 2d 457, 484–86 (S.D.N.Y. 2005) (discussing the *Branzburg* case). For a sense of the range of cases, compare Ashcraft v. Conoco, Inc., 218 F.3d 282, 287 (4th Cir. 2000) (recognizing a qualified reporter's privilege), *with In re* Grand Jury Proceedings (Storer Commc'ns, Inc. v. Giovan), 810 F.2d 580, 583 (6th Cir. 1987) (finding that a television reporter had no First Amendment privilege to withhold information sought by a grand jury).

69. Leslie Siegel, *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, 488 (2006).

70. *Id.*

71. All of the Circuit Courts of Appeals have interpreted the First Amendment as mandating a qualified journalist's privilege, except the Sixth Circuit, which has explicitly refused to recognize such a privilege. *See* In re *Grand Jury Proceedings*, 810 F.2d at 584 (rejecting a qualified privilege argument). The Eighth Circuit has characterized the existence of the privilege as an open question. *See* Cervantes v. Time, Inc., 464 F.2d 986, 993 n.9 (8th Cir. 1972) (recognizing that reporter's privilege may apply differently in criminal and civil cases); *see also In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 918 n.8 (8th Cir. 1997) (stating that "[a]lthough the Ninth Circuit in *Shoen* cited our opinion in *Cervantes* for support, we believe this question is an open one in this Circuit"). Recently the Seventh Circuit has expressed concerns about extending the privilege to non-confidential sources. *See* McKevitt v. Pallasch, 339 F.3d 530, 532–33 (7th Cir. 2003) (rejecting other courts' views that permit a reporter's privilege to extend to non-confidential sources).

72. Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 221 (2006).

2005, Representatives Rick Boucher and Mike Pence introduced the Free Flow of Information Act, which would become the first federal shield legislation to pass the House of Representatives.[73]

When he introduced the bill to Congress, Boucher said he supported a federal shield law because:

> I have long believed that the Freedom of the Press provision of the [F]irst [A]mendment should be interpreted by the courts to empower reporters to refrain from revealing their sources. Since the courts have not found this privilege to attend the First Amendment, a statutory grant of the privilege has become necessary.[74]

The current version of the Free Flow of Information Act protects media outlets against compelled disclosure of source identities.[75] The proposed bill also contains a number of notable exceptions. First, it permits disclosure of sources whose identity is critical to an ongoing criminal investigation.[76] The bill also includes exceptions for source disclosure if necessary to prevent an act of terrorism or imminent bodily harm,[77] and exceptions for sources who disclose trade secrets, health information, or personally identifiable financial information.[78] Finally, the bill allows the fact finder to balance the public interest in

73. While there is a significant body of state legislation and common-law reporters' privilege, the Free Flow of Information Act was unique because it was applied to Federal entities that can compel testimony or the production of documents. The Act does not preempt any of the existing state shield laws or the common law privilege that has developed over the years. Robert Lystad, *Anatomy of a Federal Shield Law: The Legislative and Lobbying Process*, 23 COMM. LAW. 3, 8 (2005).

74. 151 CONG. REC. E147 (Feb. 2, 2005) (statement of Rep. Boucher).

75. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007).

76. H.R. 2102. The Act permits source disclosure in cases where the information seeker proves by a preponderance of the evidence that

> (A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person—(i) there are reasonable grounds to believe that a crime has occurred; and (ii) the testimony or document sought is critical to the investigation or prosecution or to the defense against the prosecution; or (B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is critical to the successful completion of the matter . . . .

Id. § 2(a)(2).

77. H.R. 2102. The Act permits disclosure in order to

> (A) . . . prevent, or to identify any perpetrator of, an act of terrorism against the United States or its allies or other significant and specified harm to national security with the objective to prevent such harm; (B) disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively . . . .

Id. § 2(a)(3).

78. H.R. 2102.

compelling identification of sources and the public interest in protecting media outlets.[79]

E. Distinguishing "Whistleblowers" from "Wrongdoers"

In general, shield laws are meant to protect those who have information "of significant value to the public" from retaliation for sharing that information with the press.[80] Anonymous "whistleblowers" have helped expose stories of great importance to the American public; one of the most famous examples of such a source is W. Mark Felt, who broke the Watergate scandal during the Nixon administration.[81] When the Free Flow of Information Act was first introduced, some wondered if the act should distinguish "whistleblowers," anonymous sources who share important information, from "wrongdoers," or sources that use shield laws to cover up their own misdeeds or further their own agendas.[82]

There have been few cases where leaks themselves were crimes, as was the case with Valerie Plame, whose identity as a CIA agent was leaked in violation of a federal law protecting the identity of operatives.[83] However, there have been instances where source confidentiality has helped protect anonymous government leakers who disclosed information with malicious intent, but who were not doing so in violation of federal law (for the purposes of this Article, "wrongdoers"). For example, Los Alamos National Laboratory scientist Wen Ho Lee was unable to learn the identity of the government official who allegedly leaked information about him in violation of the Privacy Act, which stalled his case against the federal government.[84] This prevented him from fully realizing his rights in court and from further investigating concerns that racial profiling was behind the allegations of espionage.[85] Neither the Free Flow of Information Act, nor any state

79. H.R. 2102.

80. Stone, *supra* note 25.

81. CBC News Online, *Watergate: A Timeline*, June 1, 2005, http://www.cbc.ca/news/background/us-politics/watergate-timeline.html.

82. Toobin, *supra* note 21, at 30, 32.

83. 50 U.S.C.A. § 421 (West 2004 & Supp. 2005). It should be noted that, in the Plame case, doubts have been raised about whether Richard Armitage (who leaked Plame's name) knew that he was breaking the law or whether he disclosed her name intentionally. Lynn Sweet, *Richard Armitage, the Accidental Leaker: Patrick Fitzgerald, What Took You So Long?*, CHI. SUN-TIMES, Sept. 8, 2006, *available at* http://blogs.suntimes.com/sweet/2006/09/richard_armitage_the_accidenti.html.

84. Watson et al., *supra* note 51, at 715.

85. James Risen, *Officials Disagree on How Lab Scientist Became Spy Suspect*, N.Y. TIMES, Oct. 4, 2000, at A24.

shield law creates a distinction between protecting anonymous sources who are exposing wrongs, and those who are hiding behind shield laws while committing wrongs.[86] This Article will explore the benefits of including such a distinction in the Free Flow of Information Act and analyze the impact such a distinction would have on journalists and anonymous sources.

III. ANALYSIS

A. Specifics of the Exception

This Article proposes an exception to the Free Flow of Information Act to protect those harmed by malicious disclosures of private facts. Before analyzing the application of a "wrongdoer" exception, we must first discuss the specifics of such an exception. The wording of a "wrongdoer" exception should combine elements of the tort of invasion of privacy and of defamation law.[87] Consider the following wording this Article proposes as an addition to the Free Flow of Information Act:

PROPOSED EXCEPTION TO PREVENT MALICIOUS DISCLOSURE OF PRIVATE FACTS:

(1) Section 2 [of the Free Flow of Information Act][88] shall not apply to any protected information that constitutes private facts about an individual, which was revealed

a) with garden-variety malicious intent;[89]

86. Two states have exceptions to their shield laws requiring disclosure of anonymous sources, if doing so will "prevent injustice," (New Mexico) or stop a "miscarriage of justice" (North Dakota). N.M. STAT. § 38-6-7 (1978); N.D. CENT. CODE § 31-01-06.2 (1996). While these laws come closer to protecting victims of anonymous leaks, they do not provide a cause of action against disclosures by "wrongdoers." *Id.*

87. RESTATEMENT (SECOND) OF TORTS § 652(d) (1977) (stating that one who publicly reveals facts about the private life of another is liable for invasion of privacy if the matter publicized is of the kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public).

88. Section 2, Compelled Disclosure from Covered Persons, of the Free Flow of Information Act states, "(a) Conditions for Compelled Disclosure—In any matter arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to protected information . . . ." Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 2(a) (2007).

89. Black's Law Dictionary defines garden-variety, "general malice" as:

> (1) The intent, without justification or excuse, to commit a wrongful act; (2) Reckless disregard of the law or of a person's legal rights; (3) Ill will; wickedness of heart. This sense is most typical in non-legal contexts. Malice means in law wrongful intention. It includes any intent, which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such intent is, in the language of the law, malicious . . . .

b) with the intent to defame, punish, or otherwise damage the reputation of a private individual; and

c) which is not of legitimate concern to the public.

(2) This section does not apply to leaks that are of substantive value to the public.

Adding this language to the current Free Flow of Information Act would allow victims of leaked information to learn the identity of the anonymous source that shared the information with the media and help them seek justice in a number of ways. For example, victims could file Privacy Act claims against a leaker and would also be able to name the leak in defamation actions. In cases where a leak is unlawful, but the information leaked is of substantial public value (such as in the Pentagon Papers case), the "public value" exception would come into play and protect the whistleblower. Therefore, this exception would prevent Plame-like leaks, while maintaining protection for those who illegally disclose information for the purposes of whistle-blowing, as was the case in the Pentagon Papers.[90]

First Amendment purists will object to the proposed exception, arguing that Congress should literally "make no law . . . abridging the freedom of speech or the press."[91] However, in recent years, malicious leakers have abused journalists' guarantees of anonymity, and some have used journalists' privileges to perpetrate their own wrongdoings.[92] These are far from the intended beneficiaries of federal shield legislation. By including an exception for malicious wrongdoers, the statute would also have a desirable chilling effect on anonymous sources.[93] It would dissuade leakers from sharing information with journalists in an attempt to further their own agendas or perpetrate their own wrongdoings.[94]

BLACK'S LAW DICTIONARY 976 (8th ed. 2004). Garden-variety malice is different from the "actual malice" standard in defamation law, which is defined as "knowledge that was false or reckless disregard of whether it was false or not." *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

90. For a discussion of the Pentagon Papers, see note 34.

91. U.S. CONST. amend. I. First Amendment absolutists believe any law curtailing free speech violates the First Amendment, and that no special circumstances exist that would justify such a restriction. This is in contrast to more moderate viewpoints that certain types of speech, for instance, speech inciting imminent lawless action, do not deserve First Amendment protection.

92. *See, e.g.*, Bob Egelko, *Lawyer Admits Leaking BALCO Testimony*, S.F. CHRONICLE, Feb. 15, 2007, at A1.

93. Swinton, *supra* note 15, at 981.

94. For a discussion about the potential for abuse of a Free Flow of Information Act that does not contain a "wrongdoer" exception, see Toobin, *supra* note 21, at 30, 32.

It is important to note that while this exception addresses the "wrongdoer"/"whistleblower" distinction among anonymous leakers, it is also an imperfect solution. The "public value" exception will require judicial balancing in order to determine whether or not a source will be protected by a shield law, and journalists will only be able to provide uncertain guarantees of anonymity in close cases. A possible solution to this problem would be to compel limited disclosure in cases where there is evidence of "wrongdoing" by the source. By limiting the disclosure to the judge and attorneys in the case, journalists could guarantee that a source's identity would not be revealed to the public, unless a judge finds that the source has been engaged in wrongdoing. Once there has been a determination of wrongdoing, the source would no longer receive protection under the statute. This would deter "wrongdoers;" however, it also would allow journalists to guarantee complete confidentiality in cases where the leak is of clear public value.

Note that the exception applies differently to public figures than it does to private individuals. While the wording calls for "garden-variety" malicious intent, public figures will likely have to show "actual malice" in these cases. In cases involving publication of information about public figures, the Supreme Court has held that a showing of actual malice is required to prevent a chilling effect on reporting.[95]

B. Federal Protection for Famous Leaks

1. Valerie Plame

To analyze the effects of a "wrongdoer" exception to the Free Flow of Information Act, it is useful to consider how the exception would have impacted past cases involving leaks. Analyzing the application of an exception to the proposed law will enable a better understanding of the costs and benefits of such an exception. Distinguishing "wrongdoers" would likely make the law more difficult to apply. Nevertheless, the exception addresses a unique problem in the realm of confidential sources.

This analysis will start with the Valerie Plame incident, which re-ignited congressional interest in a federal shield law.[96] The circumstances surrounding the leak of Plame's name have been debated

95. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (concluding that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true).

96. Ribstein, *supra* note 72, at 221.

in the media, and some believe that it was nothing more than an honest mistake.[97] There is no doubt, however, that Plame's name was revealed in the midst of a major government controversy. In February 2002, when the United States searched for weapons of mass destruction in Iraq, the CIA sent retired diplomat Joseph Wilson to Africa to investigate possible Iraqi purchases of uranium.[98] More than one year after his return, Wilson wrote an op-ed in the *New York Times* claiming that "some of the intelligence related to Iraq's nuclear weapons program was twisted to exaggerate the Iraqi threat."[99] The article suggested that the Bush Administration deliberately ignored reports from Wilson's trip to Niger, which found that it would have been nearly impossible for Iraqi officials to buy uranium from the country. In the article, Wilson suggested, "we went to war under false pretenses."[100]

In the days after Wilson's article, Deputy Secretary of State Richard Armitage revealed Plame's maiden name and CIA undercover status to journalist Robert Novak. On July 13, 2003, Novak's syndicated column outed Plame as an "agency operative on weapons of mass destruction."[101] Three years after the controversy erupted, Armitage confirmed that he was Novak's source, but denied that his leak was malicious. He admitted that he revealed Plame's name as an answer to "just an offhand question," and that he "didn't put any big import on it."[102] While Armitage denied implications that he leaked the name with malicious intent, many believe that Plame's name was leaked as part of a larger White House attempt to discredit Wilson.[103]

Today, opinion remains divided about whether the Plame leak was a calculated character attack or a careless slip of the tongue.[104] Nevertheless, the leak was a criminal offense[105] that ended the career of

97. Sweet, *supra* note 83.

98. Elizabeth A. Graham, *Uncertainty Leads to Jail Time: The Status of the Common-Law Reporter's Privilege*, 56 DEPAUL L. REV. 723, 733 (2007).

99. Joseph C. Wilson, Op-Ed, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9.

100. *Id.*

101. Robert D. Novak, *Mission to Niger*, WASH. POST, July 14, 2003, at A21.

102. Sweet, *supra* note 83.

103. R. Jeffrey Smith, *Ex-Colleague Says Armitage Was Source of CIA Leak*, WASH. POST, Aug. 29, 2006, at A06. *See also* Cooper et. al, *supra* note; CNN.com—Transcripts, *Oval Office Uproar; Viera Makes 'Today Show' Debut*, Sept. 17, 2006, http://transcripts.cnn.com/TRANSCRIPTS/0609/17/rs.01.html. (looking specifically at David Corn's comments and Richard Armitage's statement, "I feel terrible every day. I think I let down . . . Mr. and Mrs. Wilson.").

104. Sweet, *supra* note 83. *See also* Smith, *supra* note 103, at A06.

105. 50 U.S.C.A. § 421 (West 2004 & Supp. 2005).

a CIA operative, and the ensuing investigation commanded the time and resources of the government and federal law enforcement.[106] Because a federal shield law will directly impact future Plame-like investigations, the law's drafters should carefully consider the benefits of a "wrongdoer" exception.

After the Plame leak, some Democrats feared that a strong federal shield law would allow members of the Bush Administration to escape responsibility for their role in the incident. However, Democrats and Republicans alike were concerned that journalists would be deterred from tackling controversial stories, especially after Judith Miller was jailed for refusing to reveal her sources.[107] The exception to the Free Flow of Information Act proposed above harmonizes the two major concerns that arose in the weeks after "Plamegate" broke. It allows journalists to protect the identity of anonymous sources, while ensuring that sources who wrongfully take advantage of journalists' commitments to protecting source anonymity can be held accountable for malicious leaks. While it is unlikely that a strong shield law without a "wrongdoer" exception will actually encourage malicious leaks (journalists have proven time and again that they are willing to go to jail to protect their sources, whether or not there is a federal shield law), adding an exception to the Free Flow of Information Act could discourage malicious leakers in future cases.

Using the Plame case as an example, if the information circulated about the Wilsons was, in fact, part of an attempt to discredit the couple, revealing the identity of their critics could result in richer debate. Giving Plame and Wilson the chance to know the sources who so strongly disagreed with Wilson's article on Niger would have allowed the couple to better defend their positions. Instead, the Wilsons filed a complaint against four high ranking members of the Bush Administration and ten "John Does," representing sources who contributed to the "anonymous 'whispering campaign' designed to discredit and injure [Plame and Wilson] and to deter other critics from publicly speaking out."[108] If the leakers' identity was revealed through a "wrongdoer" exception in the Free Flow of Information Act, then parties on all sides of the issue would have been forced into the marketplace. Knowing the sources' identities would have allowed

106. James Vicini, *CIA Leak Destroyed Plame's Career, Her Lawyer Says*, REUTERS, May 17, 2007, http://www.reuters.com/article/topNews/idUSN1740053420070517?pageNumber=1&virtualBrandChannel=0.

107. Sims, *supra* note 9, at 446.

108. Complaint at 2, Wilson v. Libby, 498 F. Supp. 2d 74 (D.D.C. 2007) (No. 1:06-cv-01258-JDB).

Plame and Wilson to raise more intelligent questions about those sources' motives, and give more thoughtful responses to the debate that played out in the media.

2. Wen Ho Lee

A "malicious leak" exception to the federal shield law may have its greatest use in cases where leaked information constitutes a violation of the Federal Privacy Act.[109] The Federal Privacy Act protects information regarding education, financial, medical, employment, and criminal history that is maintained by an agency (for instance, someone's employer).[110] The Privacy Act states that agencies cannot disclose information on record about an individual unless that individual specifically requests that information.[111] Additionally, agencies must keep an accounting of requests for information that falls under the Privacy Act and make information available to the affected individuals.[112]

The Valerie Plame incident discussed above is unique and not necessarily representative of claims that will likely be brought if the Free Flow of Information Act becomes law. The investigation about Los Alamos nuclear scientist Wen Ho Lee is a case where a strong federal shield law would prevent a victim of an anonymous leak from pursing a Federal Privacy Act claim. This section will explore how a "wrongdoer" exception would help plaintiffs, like Lee, identify who leaked private information about them, and will allow them to vindicate their rights under the Privacy Act.

Dr. Wen Ho Lee is a Taiwanese-born American citizen who worked for the Department of Energy (DOE) at the Los Alamos National Laboratory until March 1999.[113] He became the subject of a federal investigation sparked by fears that he was stealing American weapons secrets for the People's Republic of China.[114] Details about this investigation, as well as information about Lee covered under the Federal Privacy Act, were leaked to the media.[115] Despite claims that the focus on Lee was premature, he was fired from his position for

109. 5 U.S.C.A. § 552(a) (West 2004 & Supp. 2005), *amended* by Pub. L. 110-75, 121 Stat. 2526.

110. 5 U.S.C.A. § 552a(a)(6)(B) (West 2004), *amended* by Pub. L. 110-75, 121 Stat. 2526.

111. 5 U.S.C.A. § 552a(b) (West 2004).

112. 5 U.S.C.A. § 552(a)(3)(B) (West 2004).

113. Lee v. Dep't of Justice, 327 F. Supp. 2d 26, 28 (D.D.C. 2004).

114. Risen, *supra* note 85.

115. *See* Neely Tucker, *Wen Ho Lee Reporters Held in Contempt*, WASH. POST, Aug. 19, 2004, at A02.

"security violations" and was placed in pre-trial solitary confinement for nine months.[116] Lee was never charged with espionage; however, in December 1999, he was indicted on fifty-nine counts of mishandling computer files at Los Alamos.[117] He pleaded guilty to one felony charge of downloading nuclear weapons data to portable tapes and was sentenced to time served.[118] However, Lee served time in solitary confinement in a cell that was lighted twenty-four hours each day and required him to wear shackles around his hands, feet and waist during the hour of exercise he was permitted each day.[119] In September 2000, Judge Parker of the U.S. District Court for the District of New Mexico apologized to Lee for the way his case had been handled: "[T]he top decision makers in the executive branch, especially the Department of Justice and the Department of Energy . . . have caused embarrassment by the way this case began and was handled . . . and have embarrassed our entire nation.[120]

After the investigation and the ensuing media scandal, officials debated the strength of the evidence used to prove that Lee deserved such harsh treatment.[121] Many believe that racial profiling marred the investigation into Lee's work at Los Alamos.[122] Robert Vrooman, the chief of counterintelligence at Los Alamos during Lee's investigation, told the *New York Times* that Lee's ethnicity made him a suspect of espionage after reports surfaced that China was attempting to steal nuclear secrets from the United States. Speaking to a Senate panel about Lee's investigation, he said the federal investigators "had a subtle bias that the perpetrator had to be ethnic Chinese."[123] Vrooman also

116. Risen, *supra* note 85, at A24.

117. Lee v. Dep't of Justice, 401 F. Supp. 2d 123, 126 (D.D.C. 2005).

118. *Id. See also* Tucker, *supra* note 115, at A02. Some reports about Los Alamos indicated that downloading classified files was part of the culture at the lab, and that "intellectually distracted scientists like Lee" could be careless with files they worked with on a daily basis. Robert Scheer, *No Defense: How the 'New York Times' Convicted Wen Ho Lee*, THE NATION, Oct. 5, 2000, *available at* http://www.thenation.com/doc/20001023/scheer. Los Alamos scientists have also disagreed about whether the information Lee recorded on his tapes would pose a threat if obtained by other countries. For a discussion on this, see Risen, *supra* note 85, at A24.

119. Scheer, *supra* note 118.

120. *Lee*, 401 F. Supp. 2d at 126 n.1 (quoting *Statement by Judge in Los Alamos Case, with Apology for Abuse of Power*, N.Y. TIMES, Sept. 14, 2000, at A25).

121. NewsHour with Jim Lehrer: Biased Prosecution? (PBS television broadcast Dec. 14, 1999) (transcript *available at* http://www.pbs.org/newshour/bb/law/july-dec99/wenholee_12-14.html).

122. Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694 (2000).

123. *Continuation of Oversight of the Wen Ho Lee Case Hearing Before the Sen. Judiciary Subcomm. on Admin. Oversight and the Courts of the Comm. on the Judiciary U.S. Sen.*, 106th

said that the only motive ever discussed for Lee's alleged espionage was his ethnicity.[124]

Fueled by anonymous government sources, the investigation against Lee was reported in the country's major news outlets. The first article ran in the *Wall Street Journal* on January 7, 1999.[125] The *New York Times*, *New York Post*, *Los Angeles Times*, television news networks, and other major outlets followed.[126] Despite the questionable motivation behind the investigation, Lee endured what amounted to character assassination in the national news, even though he had yet to be charged with, or stand trial for, any crime.[127]

In December 1999, Lee sued the Departments of Justice (DOJ), DOE, and the Federal Bureau of Investigation (FBI), for disclosing personal information about him in violation of the Privacy Act.[128] Lee claimed that the DOJ, DOE, and FBI had released to the press information identifying him by name, "without obtaining his consent or assuring its accuracy."[129] The information included Lee and his wife's employment histories, financial transactions, information about their trips to China and Hong Kong, details about the government's investigation into Lee's work at Los Alamos, and purported results from polygraph tests.[130]

Lee was ultimately unable to vindicate his rights under the Privacy Act because he could not identify the anonymous sources who had leaked private information to the media.[131] Starting in October 2000, his attorneys deposed twenty government officials who were likely to have relevant information about the leak, but were still unable to learn who revealed Lee's confidential information to the press.[132] Lee's attorneys then tried to learn the sources' identities from the journalists who had reported on his investigation. While the court rejected the

Cong. 49 (Oct. 3, 2000) (statement of Robert S. Vrooman).

124. *Id.*

125. *Lee*, 401 F. Supp. 2d at 126.

126. James Risen & Jeff Gerth, *Breach at Los Alamos: A Special Report; China Stole Nuclear Secrets for Bombs, U.S. Aides Say*, N.Y. TIMES, Mar. 6, 1999, at A1; Michael Dorgan, *China Has Created Vast Spy Network in U.S., Intelligence Officials Say*, FT. WORTH STAR-TELEGRAM, Mar. 10, 1999, at 5; Deborah Orin, *Feds Ax China Spy Suspect at Nuke Lab*, N.Y. POST, Mar. 9, 1999, at 16; Doyle McManus, *GOP Candidates Lay 'Spy Scandal' at Clinton's Feet*, L.A. TIMES, Mar. 10, 1999, at 1.

127. *See* Tucker, *supra* note 115, at A02.

128. Lee v. Dep't. of Justice, 287 F. Supp. 2d 15, 16 (D.D.C. 2003).

129. *Id.* at 16.

130. Lee v. Dep't. of Justice, 413 F.3d 53, 56 (D.C. Cir. 2005).

131. Watson et al., *supra* note 51, at 715.

132. Lee v. Dept of Justice, 401 F. Supp. 2d 123, 127 (D.D.C. 2005). In all, Lee's attorneys deposed six DOE employees, six DOJ employees, and eight FBI employees. *Id.*

journalists' defense that the information was privileged, the journalists nevertheless refused to testify about their sources.[133]

The district court held the reporters in contempt for refusing to reveal their sources, and threatened them with stiff out-of-pocket sanctions.[134] Soon after, Lee settled with the U.S. Government and major media outlets for more than $1.6 million.[135] The media outlets that participated in the settlement said they did so in an effort to protect their sources; however, they expressed concern that the media would be exposed to liability in future Privacy Act cases.[136]

In this case, a federal shield law with a malicious wrongdoer exception would meet the needs of both the victim of the anonymous leak and the reporters trying to protect the identities of their sources. After settling with Lee, members of the media were concerned that they would become liable in future Privacy Act cases against defendants who were also anonymous sources, if only for learning the identities of confidential sources during the reporting process.[137] A malicious wrongdoer exception would allow them to identify the sources of confidential information without breaking their promises of confidentiality. If sources know that they are only protected to the extent required by law, they would know that unlawfully disclosing information covered by the Privacy Act would involve some assumption of risk that their identity would be revealed. Additionally, it would allow media outlets o avoid becoming *de facto* defendants in Privacy Act cases.[138] If a judge finds that the "wrongdoer" exception does not

133. The court found that Lee had met the test in *Zerilli v. Smith*, which held that a journalist must reveal the identity of a confidential source if (1) the information sought goes "to the heart of" the plaintiff's case and (2) the plaintiff has exhausted "every reasonable alternative source of information" before seeking testimony from the journalist. Zerilli v. Smith, 656 F.2d 705, 713, n.47 (D.C.Cir. 1981).

134. Paul Farhi, *U.S., Media Settle With Wen Ho Lee*, WASH. POST, June 3, 2006, at A01.

135. *Id.* (stating that the media outlets included the *Washington Post*, the *New York Times*, the *Los Angeles Times*, ABC News and the Associated Press, though none of their reporting was directly challenged).

136. *Id.* (reasoning that such a settlement potentially could expose the news media in other Privacy Act lawsuits, such as one brought by Steven J. Hatfill, a federal employee who sued the government after he was identified in news media accounts as "a person of interest" in the 2001 anthrax poisonings).

137. *Id.*

138. In the investigation surrounding the leak of Valerie Plame's identity as a CIA agent, Judith Miller of the *New York Times* and Matthew Cooper of *Time* magazine were subpoenaed in the federal investigation, even though neither reporter wrote the column in which Plame was mentioned. *See also* Sims, *supra* note 9, at 446. Knowing that their reporters could be held in contempt for refusing to turn over sources for articles that were never written creates great financial liability for news outlets. *Id.* It also encourages them to settle with plaintiffs in cases where those news outlets are not named as defendants. *Id.*; Farhi, *supra* note 134, at A01.

apply to the leak, then it is covered under the shield law and the media outlet will not be forced into settlement to protect its sources' identities.

In general, members of the media will go to great lengths to protect the anonymity of their sources. In this case, the media outlets showed how far they would go to protect a source by settling with Lee, even though they were not named as co-defendants in Lee's suit against the government.[139] If it becomes law, the Free Flow of Information Act will provide an extra layer of federal protection by preserving source anonymity in federal suits; however, the Act in its current form does not protect individuals whose reputations and lives are harmed by anonymous leaks. A "wrongdoer" exception would have permitted Lee to learn the identities of the sources who leaked his confidential information to the media, as long as a judge determined that the information had been leaked with malicious intent (in this case, racial bias). Lee could have then proceeded with his Privacy Act claim against the proper defendants, saving the court's resources and time. Furthermore, the media outlets subpoenaed in the original lawsuit would have been able to absolve themselves of responsibility earlier in the process.

As discussed above, some will claim that an exception that requires disclosing the identity of anonymous sources will have a chilling effect on the press.[140] However, a federal shield law should not protect information that is leaked with malicious intent that does not meet the "public value" test in the proposed exception. A source that unlawfully discloses information with malicious intent is not engaging in behavior that a shield law would want to encourage and should not receive protection under the law.[141] First Amendment jurisprudence makes exceptions for malicious behavior and there is no reason why sources who engage in such behavior should be protected under a federal shield law. For instance, protection is not afforded for speech that would incite imminent lawless action,[142] or speech that is considered libelous.[143] Not all speech receives protection under the First

139. Farhi, *supra* note 134 (stating that the media's payments, particularly in conjunction with the government's, are "exceptionally" unusual and may well be unprecedented).

140. Swinton, *supra* note 15, at 981.

141. Stone, *supra* note 25.

142. Brandenburg v. Ohio, 395 U.S. 444, 444 (1969) (holding that the Ohio Criminal Syndicalism Act, which by its own words and as applied, purported to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, and which failed to distinguish mere advocacy from incitement to imminent lawless action, violates First and Fourteenth Amendments).

143. R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992) (reasoning that a libelous publication is not protected by the Constitution).

Amendment, and it follows that not all anonymous leaks should receive protection under the Free Flow of Information Act, especially when the information is leaked with malicious intent.

Moreover, including an exception for malicious leaks in the Free Flow of Information Act is consistent with exceptions to other privileges. Clients who consult attorneys about how to commit a "perfect crime" are not protected by attorney-client privilege,[144] and a patient who consults a doctor about how to defraud his or her insurance company is not protected by doctor-patient privilege.[145] This is the case regardless of whether the doctor or the lawyer knew the patient's or client's intent at the time of the consultation.[146] As is the case with doctors' and lawyers' privileges, reporters' privilege is not intended to encourage anonymous sources who leak information with malicious intent.

3. BALCO Investigation

The cases discussed above provide strong examples of the benefits of an exception for malicious leaks in the Free Flow of Information Act. However, in some anonymous leak cases, a malicious leak exception will make little difference to the source of the information, the victim of the leak, or the media outlets that published the information. One such case is the investigation into the Bay Area Laboratory Co-Operative (BALCO) for allegedly providing steroids to baseball superstars Jason Giambi and Barry Bonds.[147] The *San Francisco Chronicle* reporters who broke the story refused to reveal the anonymous source who provided transcripts of grand jury testimony of the incident, even after federal prosecutors subpoenaed the reporters for the documents.[148] The reporters were sentenced to eighteen months in jail for refusing to name their source, and their appeal was one month away from oral argument when Troy Ellerman, a lawyer who once represented top BALCO executives, admitted to leaking the grand jury testimony.[149] Ellerman pled guilty to obstruction of justice and two counts of contempt for leaking the transcripts.[150]

144. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2008).

145. *See, e.g.*, N.Y. Evidence Law § 4504 (2007). *See also* Stone, *supra* note 25.

146. *Id.*

147. Casey Murray & Kirsten B. Mitchell, *Would a shield law matter?*, 30 THE NEWS MEDIA & L. 4 (2006), http://www.rcfp.org/news/mag/30-3/cov-wouldash.html.

148. Bob Egelko, *BALCO Case Has Journalism in a Quandary*, S.F. CHRONICLE, Feb. 18, 2007, at A1.

149. *Id.*

150. *Id.*

Before further analyzing the application of a malicious leaker exception to this case, it is important to note that proceedings in front of a grand jury must not be disclosed to the public or the press.[151] In this case, Ellerman's leak itself was a crime, and his identity would not have been protected under section (2) of the Free Flow of Information Act, which compels source disclosure in cases where testimony of a protected source is necessary to investigate a crime.[152] Therefore, in cases where the leak is itself a crime, the Free Flow of Information Act would make the "malicious leaker" exception proposed in this Article unnecessary.

This does not mean that the exception would never be useful, however; the Plame and Lee cases described above are examples of cases where a leak is malicious without being necessary to a criminal investigation. In those instances, the exception proposed in this Article is necessary in order for the victim of an anonymous leak to learn the identity of the source.

In the BALCO case, the baseball players harmed by the leak would likely not be helped by the malicious leak exception.[153] As public figures, they would have to prove that the information was leaked with actual malice in order to learn the sources' identities.[154] While players like Barry Bonds continue to deny that they knowingly took steroids produced at BALCO, it is clear that Ellerman did not show reckless disregard for the truth when he leaked information about BALCO's famous clientele.[155] Rather, he leaked information presented under oath before a grand jury, and thus had no reason to doubt its veracity. Like Giambi and Bonds in the BALCO case, public figures in future cases would have a difficult time learning the identity of anonymous sources under the malicious leak exception proposed in this Article.

Finally, the BALCO case is interesting because it involves a leak that occurred under unique, but not necessarily malicious, circumstances. If

151. FED. R. CRIM. P. 6(e)(3).

152. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007).

153. It is important to note that since it is illegal to disclose grand jury proceedings to the public or the press, the leak in the BALCO case was, in itself, a crime. Therefore, the Free Flow of Information Act would compel disclosure of Ellerman's identity under Section (2), which compels testimony of a protected source where it is necessary to investigate a crime. H.R. 2102. In this instance, the "malicious leaker" exception would be unnecessary.

154. Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988). *See also* N.Y. Times Co. v. Sullivan, 376 U.S. 254. 279–80 (1964). The "actual malice" standard requires that, in cases involving public figures, the defamatory statements must be made either with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*

155. Lance Williams, *Barry Bonds' Grand Jury Transcript Unsealed*, S.F. CHRONICLE, Mar. 1, 2008, at B1.

Ellerman had not revealed his identity, and if Giambi and Bonds had been private individuals (and therefore not bound by the "actual malice" standard described above), it may have been difficult to prove that the leak was malicious. Unlike the Plame and Lee leaks, there is less clear-cut evidence of malicious intent in the BALCO case. Ellerman may have leaked the information to damage the careers of players, or simply because he had a strong conviction that steroids had no place in baseball. It may be impossible to determine whether the leak was malicious without unintentionally revealing the source's identity.

This problem reveals a greater issue inherent in the "wrongdoer" exception: how judges will apply the exception in future cases. With anonymous sources, particularly those who have close, sustained relationships with journalists, investigating whether the source acted with malicious intent without inadvertently revealing the source could be difficult. Determining the effect on sources' willingness to continue to share information with journalists is equally difficult to determine.

Including an exception to the Free Flow of Information Act is undoubtedly going to create uncertainty in the jurisprudence following the implementation of the new law. However, after loose ends are settled, the exception presented in this Article will make the law better and more effective.[156] While the exception will not eliminate the uncertainty inherent in close cases, such as the BALCO investigation, it will provide necessary relief for plaintiffs harmed by the anonymous sources that leak damaging information at great cost.

IV. CONCLUSION

The Free Flow of Information Act will provide federal protection for the anonymous sources that can be credited with some of the most important stories of our time. However, the current version of the law provides no protection for those harmed by information leaked with malicious intent. At this juncture, it is necessary to seriously consider the types of leaks we want to protect and encourage under the new law. Sources who hide behind journalists' promises of confidentiality in order to perpetrate wrongdoings or further their own agendas should not receive the absolute protection provided to "whistleblowers," the intended beneficiaries of the federal protection. Including an exception to the Free Flow of Information Act for malicious leaks would not only

156. When a new law is created, a "flurry of cases" to clarify loose ends are tried after the initial decision, which is followed by a period of "stable tranquility." Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 783 (1986).

reveal the sources who attempt to abuse the shield law, but also help the victims of malicious leaks bring the leakers to justice.