

**Privileging the Press
Confidential Sources, Journalism Ethics and
the First Amendment**

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Preface

The first time I was leaked federal grand jury documents for a newspaper story, I had no idea of the peritious legal environment I was entering. As a young police reporter for *The Capital Times*, a metro afternoon daily in Madison, Wis., I was eager to get my byline on the front page, please my editors and force my competition at the larger morning daily to cite my reporting in their follow-up to our scoops. Little did I know that my investigation into cocaine purchases at Jocko's Rocket Ship, a seedy downtown bar just off State Street on the edge of the University of Wisconsin-Madison campus, would eventually spark a book about the ethics and laws of journalists and their confidential sources.

The initial hints of a big story came when I got tipped off about a secret police raid of Jocko's in which a number of patrons were injured by more than two dozen heavily armed cops. Official police sources wouldn't tell me anything, but eventually through ambulance and 911 records I tracked down a man who was sent to the hospital. He gave me some tantalizing details about the raid before calling back and leaving me a voice mail threatening to kill me if I reported his name in the paper. The intrigue continued. At a press conference announcing that the bar owner and eight others were indicted for operating an "indoor open-air drug market" for a decade, federal prosecutors stated that a number of city firefighters were among the regular clientele. Among Madison's chattering political class, rumors also implicated other prominent people, including high-profile attorneys and even members of the Police Department. Some of the police reports from the investigation were provided to the Fire Department, which then had no choice but to launch its own investigation into how widespread cocaine use was in its ranks. Secret suspensions fueled criticism about the investigation, and my newspaper's editorial board crusaded against the

secrecy and the rising costs associated with the investigations. Provocatively, the editors even ran a box on the front-page each day tallying the amount of taxpayer money being spent on the salaries of suspended employees and exorbitating the mayor for the secrecy surrounding the case. The city's legal fees alone eventually topped \$500,000. The official streams of information – the police, the mayor, the district attorney, and the U.S. attorney's office – were maddeningly silent. So when a source connected with the case offered to let me read the case file (thanks in part to the source's connections with a senior columnist whose desk was next to mine), I leapt at the opportunity to learn more about the investigation. It was, frankly, a journalist's dream come true: shedding light on the secrets of government and holding public officials accountable for their actions.

I was given two days to read more than 2,000 pages of investigative reports, and subsequent stories reconstructed the roots of the drug investigation, discussed the elaborate operations of the bar owner and his associates, named for the first time the firefighters who were suspended, and documented admissions of regular cocaine use by a number of additional firefighters. There were also racial overtones: all of the suspended firefighters were black while the other drug users still on the job were all white. Hours after the initial story based on the documents was published, city officials pledged to investigate its firefighting ranks and later went to court seeking access to the documents as part of their own internal investigation. Later, I sat in a federal courtroom and listened to a judge condemn the leak and encourage the U.S. attorney to investigate my source. "There is no excuse for anyone who had legitimate access to the grand jury's materials to pass them to the media. The breach of (federal rules) by someone connected with this federal prosecution was egregious and this court expects the U.S. attorney actively to pursue this matter," Magistrate Judge Stephen Crocker said.

At the time, I did not realize how perilously close I came to be confronted with the choice of facing serious jail time or breaking my promise of confidentiality to my source. I avoided a subpoena in the city's attempt to get the documents released by a federal judge, but I did receive a subpoena to testify before the city's Police and Fire Commission, a quasi-judicial body that was holding hearings about the discipline and firing of several firefighters. Thankfully, our newspaper's attorney, Bob Dreps, was able to get the subpoena tossed

out, and nothing, to my knowledge, ever came of the U.S. Attorney's investigation into the leak.

The U.S. magistrate judge had a point when he said my reporting was a result of a breach of federal rules. Should I have been allowed to read the grand jury documents? No. Did I do what good journalists do? Yes. I was a 23-year-old reporter who with hard work and some luck got a major scoop about *the* major local news event of the day. But what I did not know then was that the law generally wasn't on my side.

The Jocko's story wasn't the first, nor was it the last, that required promises of confidentiality. My first real investigative coup – while I was an intern at *The Capital Times* – was a report about the University of Wisconsin's secret use of monkeys that were born at the local zoo but subsequently used in invasive and often deadly research projects, in violation of written agreements not to use zoo-born monkeys in such projects. The university denied such practices until they learned that I was provided with internal monkey birth and transport records, something I received from an employee who demanded anonymity. University officials almost got away with it but for a courageous employee who leaked evidence of malfeasance to a reporter.

I can still recall working the initial story on deadline, rushing to a hotel bar on the east side of Madison to receive a stash of critical documents. I agreed to the meeting spot before realizing that I was not yet 21 years old and therefore couldn't legally get into the bar. I was too embarrassed to admit this to my source, fearing that the source would rethink trusting someone so green. I skirted by the doorman, found my source, got the documents, and raced back to the newsroom to add some new details to the story. The city editor had cancelled his to add some new details to the story. The city editor had cancelled his Friday night dinner plans to vet the story and edit the copy. "Zoo monkeys secretly killed" screamed across Saturday morning's front page, and the competition the next day ran a big Sunday story quoting extensively from mine. It was the first of more than 50 news stories I wrote about the university's killing of monkeys born at the local zoo and its cover-up and subsequent fallout.

As a police and crime reporter, there were many law enforcement stories I wrote that were the result of unauthorized disclosures of information. A police source upset with preferential treatment provided me with details about an assistant district attorney's husband who wasn't arrested after being found drunk, with a loaded gun in his car, after threatening to kill a cop. The A.D.A. had called the cops after the

husband threatened to kill a male officer who danced with her at a wedding earlier in the night. The sergeant who oversaw the incident took the man to a detox center instead of jail, didn't file any charges, and subsequently lied about the incident to supervisors. I also spent months unraveling a missing-persons case that cops believed was a drug homicide. My stories based on leaked police records provided a grieving mother for the first time with new facts about what might have happened to her son. Amos Mortier is still missing more than four years later.

But perhaps my most important pieces of reporting to stem from a confidential source came in 2008 when I reported that a murder victim called 911 as she was being attacked but the 911 dispatcher never sent her any help. Brittany Zimmermann was a pre-med student at the University of Wisconsin-Madison when she walked home to her campus-area apartment around noontime after an exam. Hours later, her fiancé came home to discover her dead, having been brutally beaten and stabbed multiple times. Police worked on the theory that she was killed by a stranger, but no suspect was identified. Hers was the third unsolved campus-area murder within a year, and the cops were under tremendous public pressure to solve the case. Several weeks after her murder, I was provided a tip by a familiar source that Brittany had called 911 as she was being attacked and that the 911 center botched the handling of the call. I tried to confirm this through routine methods, including reviewing a 911 dispatch log that was routinely available to reporters. The call was not there. I also filed public-records requests for basic 911 call information, which were denied. Interviews with officials went nowhere, and the 911 center director dodged all my queries. I went back to my original source, pieced a few things together from other sources, and then presented two other police sources with a draft of my story. Those subsequent sources knew more than I did and provided some key confirming details and also corrected an error. The story, under the headline "Brittany Zimmermann called 911, but no one came," sparked immediate outrage. The police chief and the 911 center director held dueling news conferences and provided contradictory facts, while the county executive was busy defusing criticism about short staffing and mismanagement inside the 911 center. Eventually, the story and several follow-ups resulted in the resignation of the 911 center director, several lawsuits, and significant budget increases to the center. None of this would have happened but for confidential sources trusting journalists.

I relay these stories to show that my interest and experience in journalists' uses of confidential sources originated in my own practices over a decade as a journalist. Confidential sources were crucial to some of my most important pieces of public-service journalism. Some of these tips and leaks were the result of luck and happenstance; others took weeks and months to develop. Some came from sources who I knew for years, while others took a chance in trusting a journalist to blow the whistle on perceived malfeasance or injustice. Almost all of my sources violated some kind of law or policy by providing me with information. They risked a lot in talking to me. Despite their lawlessness, I view them as courageous and important. What does that say about me and my view of journalism? These were among the questions I often thought about when I transitioned from life as a journalist to life as an academic.

This book is a result of that transition. It examines how confidential sources in journalism have long presented ethical and legal problems. Today, 49 states and the District of Columbia recognize some form of a journalist's privilege, a legal right to protect the identity of confidential sources and newsgathering information. Protections of confidential sources and newsgathering information. Protections under federal law remain murkier, which is one of the reasons why I, in retrospect, could have been in deep trouble with my Jocko's Rocket Ship stories. The Supreme Court's 1972 decision in *Branzburg v. Hayes* rejected a First Amendment-based journalist's privilege, although dozens of lower courts subsequently reinterpreted *Branzburg* and recognized a qualified privilege in common law.

While scholars have examined the journalist's privilege from a legal doctrinal perspective, problems of ethical practice have garnered little attention. Those ethical questions are crucial in understanding the justifications of the privilege and in thinking about appropriate limits and exceptions, as matters of law and of ethics. This book dissects the relationship between the ethics and laws of confidential source protection and places the concept of journalistic duty to protect sources in the broader historical context of the development of the journalism profession and journalism ethics discourse.

This book began as a Ph.D. dissertation that set out to answer four primary research questions: (1) How did it come to be that journalists believe they are morally and ethically justified to go to jail to protect the identity of confidential sources? (2) How did this professional duty develop in American journalism? (3) How have journalists' ethical and

legal arguments changed over time? and (4) Why is confidential-source protection a continuing problem in journalism ethical practice and law?

In examining these questions, I found a dynamic interaction between journalism ethics, free-press theory and legal jurisprudence. Over time, journalists developed ethical doctrines rooted in their developing practices and the emerging values of the profession. Journalists transformed these ethical principles and values into free-press arguments, and the law has responded, in terms of First Amendment theory, judicial doctrine and statutory rules, to both reject and embrace the ethical claims as legal rules. This book tells the story of this evolution.

By providing a historical study of an important journalistic practice, this research contributes to a small field of scholarship on the history of journalistic ethics, practices and professionalization. Professor Hazel Dicken-Garcia noted in her groundbreaking 1989 book *Journalistic Standards in Nineteenth-Century America* that “no literature deals to a significant degree with the history of journalism ethics,” and calls this scholarship gap “conspicuous and limiting.” Writing in 2005, Professor Patrick Lee Plaisance asserted that “documentation of the evolution of how ethics came to be applied within American journalism remains sketchy.” Professor Stephen J.A. Ward’s *The Invention of Journalism Ethics*, published in 2004, is a recent significant contribution to filling this gap, positioning the philosophy of journalism ethics in the context of several distinct historical periods. The concept of source protection, however, is absent from Ward’s history. This work fills that gap and also contributes to the law and society scholarship by showing the complex relationship among professional ethics, constitutional theory and positive law.

This research shows how the practice of cultivating and protecting confidential sources was an essential element of the journalism professionalism movement that emerged in the late 19th century, and it remains a central tenet of journalism practice 150 years later. It is important to understand that the ethical claims of journalistic duty predated much of the modern understanding of the First Amendment and journalism ethics. In tracing the history of this professional ethic from its ideological roots in the practices of colonial newspaper editors through the most recent confrontations between the press and the government in the George W. Bush and Barack Obama administrations, this research examines the core values and beliefs that have given rise to the journalist’s privilege. The history of this ethical discourse reveals

that journalists have emphasized that their moral obligations to uncover truth and expose corruption, misconduct and incompetence sometimes require them to make promises of confidentiality and subsequently deal with difficult consequences. The study emphasizes the dynamic relationship between law and ethics in the context of the journalist’s privilege and the ways in which different legal mechanisms have changed in response to pressures from the journalism profession. By tracing the privilege from the 19th century, when it had no acceptance in law, through its statutory, constitutional and common law incarnations of the 20th century, the research reveals how journalists successfully “legalized” one of their key ethical canons, at least in part. The legal debates over the privilege’s purposes, standards and limits also show how social and political concerns affect legal development and views of the constitutional free-press doctrine. And the debates over the legal foundation of the privilege – in constitutional, common or legislative law – show that principles and policies can take multiple legal shapes.

In sum, this book argues that journalistic duty to protect confidential sources has been a central ethical norm in the professional development of journalism with roots as far back as the colonial era; that this ethical norm has been transformed into legal principles of statutory, constitutional and common law to varying degrees; and that these ethical norms support the basis for a broadly recognized journalist’s privilege in law, although one that is less than absolute. The historical development of these ethical norms also provide guidance for resolving modern legal problems, including the limits of the privilege, how judges might conduct “public-interest” balancing, and in determining who should be recognized as a journalist eligible for the privilege.

Methodologically, this research utilizes traditional legal history methods and analyzes and explains how and why the law has changed in social and political context. The study draws on a diverse range of primary and secondary sources. More than 100 court decisions were analyzed, showing how judges apply legal theory and rules to cases. Legal briefs and affidavits showcase the arguments journalists advanced. Transcripts of hearings and depositions offer further insights into the thinking of journalists and those seeking material from journalists. Murray Waas’s 584-page compilation of primary documents is an important source for the Valerie Plame case. Editions

of James Franklin's *New England Courant* from the 1720s were analyzed at the Wisconsin Historical Society to understand the content and practices of the first truly defiant colonial newspaper editor. The *New York Times* database provided access to articles about several privilege cases beginning in the late 19th century. *Editor & Publisher* was a key source regarding privilege cases in the early 20th century, at a time when the law reports were largely void of discussions of the issue. Legislative documents were helpful. A 1949 report by the New York Law Revision Commission provided a definitive account of early privilege cases and legislative proposals. An examination of the congressional hearings of the 1970s draws from thousands of pages of congressional hearing transcripts and the archives of Robert Kasenmeier, the U.S. Representative who chaired a series of hearings debating shield legislation, housed at the Wisconsin Historical Society. More than a hundred law review articles were also reviewed to assess the evolution of the judicial doctrine.

Personal interviews were conducted with several journalists and media lawyers, including Floyd Abrams, the attorney for Judith Miller and Matt Cooper often described as the most respected First Amendment attorney in the United States; attorney James Goodale, described as the "father" of the modern journalist's privilege; Josh Wolf, the videoblogger who spent 226 days in jail; Lance Williams of the *San Francisco Chronicle*, who narrowly avoided jail in 2006 after his source was identified; Tom Robbins of the *Village Voice*, who came forward about a key witness's potential perjury, based on discrepancies in his confidential interview with her, in the middle of a murder trial; Dave McGraw, deputy general counsel of the *New York Times*; Robin Bierstedt, deputy general counsel for Time Inc.; Lee Levine, a distinguished Washington, D.C. media lawyer and adjunct professor at Georgetown University Law Center; and Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press. Personal and institutional accounts also provided context to these and other cases.

The book is divided into three parts. Part one, comprising the first three chapters, explains the modern journalist-subpoena problem and includes several case studies of recent controversies. Part two constructs the historical development of the journalist's privilege in the profession and in law. Part three proposes solutions to several contemporary ethical and legal problems.