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## MEDIA INCENTIVES AND NATIONAL SECURITY SECRETS

Alexander Bickel characterized the American approach to protecting national security secrets as an “unruly contest” between government and the press.<sup>1</sup> On this view, the government’s role is to classify information that ought be kept secret and to stop leaks at the source, but not to take action against the media.<sup>2</sup> The “presumptive duty of the press,” meanwhile, “is to publish.”<sup>3</sup> A news outlet that discovers a government secret decides on its own whether publishing that secret is in the public interest.

Bickel’s view is descriptively quite accurate. In recent years, journalists have exposed many stories that the government claims will imperil efforts in the war on terrorism, including the Bush Administration’s secret domestic surveillance of al Qaeda affiliates<sup>4</sup> and its efforts to track terrorist financing.<sup>5</sup> And while some statutes criminalize the publication of classified information, the government has never used them against a journalist.<sup>6</sup> The prevailing paradigm is thus one of self-regulation: the press checks itself.

Whether this approach is normatively as well as descriptively best is a more difficult question. The basic dilemma is familiar. Some secrecy is essential to both national security and democracy,<sup>7</sup> but excessive secrecy undermines democratic accountability and decisionmaking, and sometimes national security itself. Disclosure decisions in a democracy thus must balance the importance of public knowledge and deliberation against the risk of exposing and undermining desirable policies or damaging national security. But neither the government nor the press can be trusted to strike that balance, for both have asymmetric incentives. The government risks public criticism when it announces a policy but risks little when it is secretive. Likewise, journalists have much to gain from publishing a classified secret, and little to lose. They almost fully internalize the benefits of publication, but may discount or inaccurately assess national security harms, which are dispersed across society.

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<sup>1</sup> See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 87 (1975).

<sup>2</sup> See *id.* at 79–80. Bickel excepts stories that would demonstrably cause immediate and catastrophic injury. See *id.*

<sup>3</sup> *Id.* at 81.

<sup>4</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>5</sup> Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. To Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

<sup>6</sup> See *infra* Part I, pp. 2230–34. The government has occasionally attempted to enjoin publication of national security secrets. See *infra* p. 2230 and note 112.

<sup>7</sup> See Dennis F. Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181, 182 (1999).

Scholars and policymakers have proposed many ways to moderate the government's tendency to excessive secrecy.<sup>8</sup> But they have largely ignored the parallel question of how law might incentivize journalists to make disclosure decisions that benefit democracy rather than the press itself. The problem is far from academic. A bipartisan report recently concluded that “[h]undreds of serious press leaks have significantly impaired U.S. capabilities against our hardest targets,” costing “hundreds of millions of dollars.”<sup>9</sup> A free press is essential to informing the public, but critics urge that reporters are less accountable than the government they seek to check.<sup>10</sup> The press wields vast power to undercut desirable classified programs and to communicate the nation's capabilities and vulnerabilities to the enemy, and its publication decisions are ad hoc.<sup>11</sup> The self-regulation status quo, critics suggest, thus “raises the ancient question of who is guarding the guardians.”<sup>12</sup>

This Note aims to make two principal contributions to the literature on the publication of national security secrets. The primary goal is to flesh out the press's motivations and incentives in publishing classified information, drawing on historical accounts and memoirs. Those incentives, the Note suggests, have led reporters to engage in a series of consistent procedural errors when making publication decisions: they consider factors that are irrelevant to whether publication is democratically desirable, and ignore factors that are relevant. In laying out the incentives and errors, the Note both questions the dominant paradigm of self-regulation and suggests that focusing on decision processes might provide an opportunity for reform. Substantive judgments about whether publication properly balances public knowledge and security will be subject to irremediable contestation in this context, but sanctioning errant procedures might more effectively align journalistic incentives to democratic desiderata. The Note's secondary and somewhat more speculative goal is to consider how a system that tied liability to procedural errors might be enforced consistent with the Constitution and practical realities.

Part I describes and critiques current approaches to the problem of classified disclosures, suggesting they largely ignore media incentives.

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<sup>8</sup> See sources cited *infra* note 61.

<sup>9</sup> See THE COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE U.S. 381 (2005) [hereinafter WMD REPORT], available at <http://www.gpoaccess.gov/wmd/>.

<sup>10</sup> See Gabriel Schoenfeld, *Has the “New York Times” Violated the Espionage Act?*, COMMENTARY, Mar. 2006, at 23, 31 (asking if the public “can afford to permit the [Times] to become the unelected authority that determines for all of us what is a legitimate secret and what is not”).

<sup>11</sup> Many journalists acknowledge this point. See, e.g., MAX FRANKEL, THE TIMES OF MY LIFE AND MY LIFE WITH *THE TIMES* 222 (1999); JAMES RESTON, DEADLINE 323 (1991).

<sup>12</sup> Jack Goldsmith, *Secrecy and Safety*, NEW REPUBLIC, Aug. 13, 2008, at 31, 34 (reviewing ERIC LICHTBLAU, *BUSH'S LAW* (2008)).

Part II argues that misaligned incentives lead journalists to make a series of procedural errors when deciding to publish, and explains why focusing on decision process might improve outcomes. Finally, Part III explores how the government might design a system of legal sanctions that targets procedural mistakes.

### I. CURRENT APPROACHES

Media self-regulation is the de facto approach to the problem of leaks. The many statutes that provide for criminal punishment of journalists who print classified information have turned out to be all but unenforceable. Indeed, no media outlet has ever been prosecuted for publishing a classified secret.<sup>13</sup> This Part first overviews the constitutional and statutory framework and explains why criminal prosecution has failed as a workable alternative to the self-regulation status quo. It then argues that the status quo is flawed in important ways.

Supreme Court dicta suggests that laws criminalizing the disclosure of classified secrets can constitutionally apply to journalists. The *Pentagon Papers*<sup>14</sup> case set a high standard for efforts to enjoin publication, at least in the absence of specific congressional authorization.<sup>15</sup> One opinion would have barred prior restraints unless a story would “surely result in direct, immediate, and irreparable damage to our Nation or its people.”<sup>16</sup> But at least five Justices suggested that criminal prosecutions would be perfectly permissible and might not need to meet such a standard.<sup>17</sup>

The Espionage Act of 1917<sup>18</sup> is the broadest set of relevant criminal provisions, targeting among other things the unauthorized possession and disclosure of documents or information “relating to the national defense.”<sup>19</sup> While a leading study concluded that such prohibitions were intended to apply to leakers and spies, not to the press,<sup>20</sup> several *Pentagon Papers* opinions suggested otherwise.<sup>21</sup> And the government

<sup>13</sup> See Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 185–86 (2007).

<sup>14</sup> N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713 (1971) (per curiam).

<sup>15</sup> See *id.* at 714; see also *id.* at 731–32 & n.1 (White, J., concurring).

<sup>16</sup> See *id.* at 730 (Stewart, J., concurring).

<sup>17</sup> See *id.*; *id.* at 733–40 (White, J., concurring); *id.* at 741–48 (Marshall, J., concurring); *id.* at 752 (Burger, C.J., dissenting); *id.* at 759 (Blackmun, J., dissenting). Justice Harlan did not consider criminal penalties but would have upheld even a prior restraint upon an *executive* determination that publication would do great damage. See *id.* at 757–58 (Harlan, J., dissenting).

<sup>18</sup> Ch. 30, 40 Stat. 217 (codified as amended in scattered sections of 18, 22, and 50 U.S.C.).

<sup>19</sup> See 18 U.S.C. § 793(e) (2006). See generally *id.* § 793(a)–(h).

<sup>20</sup> See Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 996–98, 1058 (1973).

<sup>21</sup> See, e.g., *Pentagon Papers*, 403 U.S. at 737–39 (White, J., concurring); *id.* at 745–46 (Marshall, J., concurring).

has recently maintained that the broader provisions of the Act do indeed apply to the press.<sup>22</sup>

Other laws — some enacted in response to the perceived failures of self-regulation — explicitly target press disclosures. A 1950 addition to the Espionage Act bans the publication of classified information about “communication intelligence activities.”<sup>23</sup> The bill was largely the result of a 1942 *Chicago Tribune* story suggesting that the military had broken Japanese codes.<sup>24</sup> A 1982 statute criminalizes the disclosure of the identities of covert agents; it was enacted after the assassination of a CIA station chief whose name had appeared in print.<sup>25</sup> Another law bars disclosure of secrets related to atomic energy when made with “reason to believe” they will harm the United States.<sup>26</sup>

These statutes have been used against government employees who leak classified information to the media, and recently in an abortive effort to prosecute private lobbyists who received such leaks.<sup>27</sup> And government officials sometimes threaten enforcement in order to prevent journalists from publishing classified material, with mixed success.<sup>28</sup> But even when stories appear to fall squarely within existing criminal prohibitions,<sup>29</sup> the government has never followed through.

Some urge that the failure to enforce these laws presents powerful evidence of a national consensus in favor of media self-regulation.<sup>30</sup> On this view, classified disclosures are actually “authorized” by the political branches.<sup>31</sup> This is not a meritless argument, since the executive branch declines to prosecute in part because of concern about political legitimacy and the prospect that a jury might refuse to convict.<sup>32</sup> But democratic consensus is not the driving factor here. The absence of prosecutions may simply mean that criminal liability is an undesirable

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<sup>22</sup> See Government’s Consolidated Responses to Defendants’ Pretrial Motion at 15, *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006) (Crim. No. 1:05cr225) (“There plainly is no exemption in the [Espionage Act] statutes for the press . . .”).

<sup>23</sup> See Pub. L. No. 81-513, 64 Stat. 159 (1950) (codified as amended at 18 U.S.C. § 798).

<sup>24</sup> See Schoenfeld, *supra* note 10, at 24, 28.

<sup>25</sup> See Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421–426 (2006); Note, *Plugging the Leak: The Case for a Legislative Resolution of the Conflict Between the Demands of Secrecy and the Need for an Open Government*, 71 VA. L. REV. 801, 802 n.10, 812–13 (1985).

<sup>26</sup> See 42 U.S.C. § 2274 (2006).

<sup>27</sup> See *Rosen*, 445 F. Supp. 2d at 637–39; Evan Perez & Jay Solomon, *U.S. Drops Pro-Israel Spying Case*, WALL ST. J., May 2–3, 2009, at A3.

<sup>28</sup> In 1986, officials threatened the *Washington Post* with prosecution if it published a story on the “Ivy Bells” surveillance program. The *Post* and other papers held off as a result, but NBC subsequently mentioned the program in a broadcast. See BOB WOODWARD, *VEIL* 457–63 (1987).

<sup>29</sup> See, e.g., Goldsmith, *supra* note 12, at 32–33 (suggesting that 18 U.S.C. § 798 criminalizes the *Times*’s terrorist surveillance reporting); Schoenfeld, *supra* note 10 (same).

<sup>30</sup> See, e.g., L.A. Powe, Jr., *Mass Communications and the First Amendment: An Overview*, LAW & CONTEMP. PROBS., Winter 1992, at 53, 57–59.

<sup>31</sup> See *id.* at 58–59.

<sup>32</sup> See Goldsmith, *supra* note 12, at 33.

sanction in this context, not that there is consensus favoring no sanction at all. And there is ample evidence of political dissatisfaction with the status quo. In 2006, for example, the House passed a resolution condemning newspapers that published the terrorist financing story,<sup>33</sup> and other politicians accused the *New York Times* of treason<sup>34</sup> and floated the possibility of prosecution.<sup>35</sup> After the 1942 *Tribune* story indicating that the Navy had broken Japan's codes, President Roosevelt reportedly threatened to "send Marines to occupy Tribune Tower,"<sup>36</sup> and he nearly brought criminal charges.<sup>37</sup> He did not for one of the main reasons the statutes are not enforced, indeed the same reason the government dropped charges against the lobbyists: prosecutions risk revealing even more classified secrets and alerting the enemy to the gravity of the initial disclosure.<sup>38</sup>

Scholars and journalists offer several additional defenses of the media self-regulation paradigm. First, some argue government regulation is unwarranted because classified disclosures do not really damage national security.<sup>39</sup> Reporters say they carefully consider government claims about security risks and generally make the right calls.<sup>40</sup> But a lot of evidence suggests that leaks cause significant damage.<sup>41</sup> Detailed assessments are generally themselves classified,<sup>42</sup> but a bipartisan report found that pre-9/11 press reports led al Qaeda to stop communicating via a channel the NSA could intercept.<sup>43</sup> The CIA claims that terrorist groups closely monitor the American press and change practices in response to leaks.<sup>44</sup> The Soviets apparently did so too.<sup>45</sup>

<sup>33</sup> See H.R. Res. 895, 109th Cong. (2006).

<sup>34</sup> See Devlin Barrett, *Lawmaker Wants Times Prosecuted*, WASH. POST, June 26, 2006, at A2.

<sup>35</sup> See Walter Pincus, *Prosecution of Journalists Is Possible in NSA Leaks*, WASH. POST, May 22, 2006, at A4.

<sup>36</sup> RICHARD NORTON SMITH, *THE COLONEL* 433 (1997).

<sup>37</sup> See *id.* at 430-40.

<sup>38</sup> FDR appointed a special prosecutor to investigate the *Tribune*, and he convened a grand jury. Fearing prosecution would alert the Japanese that the codes had been cracked, however, the government refused to allow military officials to testify, dooming the charges. See *id.* at 437-38. Similar concerns drove the decision in the lobbyist case. See Perez & Solomon, *supra* note 27.

<sup>39</sup> Professor Geoffrey Stone, for example, has asserted that "there has not been a single instance in the history of the United States in which the press's publication of a 'legitimate but newsworthy' government secret has gravely harmed the national interest." See Geoffrey R. Stone, *The Lessons of History*, A.B.A. NAT'L SECURITY L. REP., Sept. 2006, at 1, 3.

<sup>40</sup> See, e.g., LICHTBLAU, *supra* note 12, at 251, 262-63. Others say the real problem is actually excessive deference to government. See, e.g., TOM WICKER, *ON PRESS* 212 (1978).

<sup>41</sup> See WMD REPORT, *supra* note 9, at 381.

<sup>42</sup> See *id.*

<sup>43</sup> See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 127 (2004), available at <http://www.gpoaccess.gov/911/index.html>.

<sup>44</sup> See Memorandum from Cent. Intelligence Agency (June 14, 2002), available at <http://www.fas.org/sfp/bush/dodo71202.pdf>.

<sup>45</sup> See James B. Bruce, *The Consequences of Permissive Neglect*, 47 *STUD. INTELLIGENCE* No. 1, at 39, 41 (2003) (citing sources).

Other damage is inchoate or hard to tie causally to a particular leak. For example, allies may be unwilling to cooperate on sensitive matters when they fear press exposure.<sup>46</sup> And academic literature too suggests a correlation between press disclosures and security risks.<sup>47</sup>

Second, advocates of Bickel's "contest" theory argue that a system in which leakers can be prosecuted but journalists cannot "balance[s]" the relative harms of excessive disclosure and excessive secrecy.<sup>48</sup> The suggestion is often that this status quo of competition between government and the press has generally worked in the past; it has "stood the test of time."<sup>49</sup> But the contest theory has been powerfully criticized on the grounds that it does not consider the actual incentives or abilities of the press and the government.<sup>50</sup> Further, critics say, it is difficult to judge whether the theory works, because it lacks an account of how much disclosure and how much secrecy are appropriate in a democratic society.<sup>51</sup> It is hard to know whether the executive's ability to classify and to punish leakers has deprived the public of the knowledge necessary for informed self-governance,<sup>52</sup> or whether press self-regulation has led to "too much" harm to national security; the contest approach simply assumes without evidence that the clash of government and press incentives results in the right balance, or even an acceptable balance. It offers no theoretical mechanism that could possibly lead the two sets of self-regarding incentives to somehow cancel out into good outcomes.<sup>53</sup> The contest approach sometimes relies

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<sup>46</sup> See Memorandum from Cent. Intelligence Agency, *supra* note 44.

<sup>47</sup> See, e.g., Quan Li, *Does Democracy Promote or Reduce Transnational Terrorist Incidents?*, 49 J. CONFLICT RESOL. 278, 290–91 (2005) (finding a correlation between press freedom and terrorist attacks, but one mostly driven by institutional constraints on democratic government more generally); Radha Iyengar & Jonathan Monten, *Is There an "Emboldenment" Effect? Evidence from the Insurgency in Iraq* (Nat'l Bureau of Econ. Research, Working Paper No. 13839, 2008), available at <http://www.nber.org/papers/w13839> (finding a positive relationship between Iraqi insurgent attacks and press disclosures about U.S. sensitivity to costs).

<sup>48</sup> See BICKEL, *supra* note 1, at 81–82; Powe, *supra* note 30, at 58–59; see also FRANKEL, *supra* note 11, at 222; Barton Gellman, *Revealing a Reporter's Relationship with Secrecy and Sources*, NIEMAN REP., Summer 2004, at 41 (arguing that "the flow of information is regulated by a process of struggle," and this creates a "fine balance").

<sup>49</sup> See GEOFFREY R. STONE, TOP SECRET 22 (2007).

<sup>50</sup> See Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 898–902 (1986); see also Louis Henkin, Commentary, *The Right To Know and the Duty To Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 278 (1971). Both Professors Cass Sunstein and Louis Henkin seem primarily concerned that the press cannot hold up its end of the contest, leading to excessive secrecy.

<sup>51</sup> Sunstein, *supra* note 50, at 903.

<sup>52</sup> See Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 514 (1980) (acknowledging this problem for the contest theory but discounting it on the grounds that the contest is implicit in the Constitution).

<sup>53</sup> See Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1032–33 (2008) (explaining that in the absence of a market mechanism like the price system, there

on media forbearance — “regard for . . . danger to innocent lives, for human decencies, and even, if cautiously, for nonpartisan considerations of the national interest”<sup>54</sup> — but has no account for whether that forbearance happens in the right cases or in the right way. And indeed forbearance by media or by government might be intrinsically undesirable in the contest system, for it undermines the clashes of self-interest that purportedly establish equilibrium.

Finally, some suggest intervention is simply too dangerous, because the press must be left free to check government abuse and inform the public.<sup>55</sup> The government is singularly unqualified to decide what information citizens need to hold it accountable, the argument goes, and thus there are no viable alternatives to self-regulation.<sup>56</sup> The comparative danger of regulation and self-regulation on some level just cannot be known for sure, but Part II suggests that targeting self-regarding incentives and decision processes might at least offer a less contested and more effective means of regulation than focusing on the content of disclosures.

## II. MEDIA DECISIONMAKING

Scholars and policymakers have long recognized that clashes between press and government fail to prevent excessive secrecy.<sup>57</sup> Congressional investigations find persistent overclassification.<sup>58</sup> Government officials often classify “to deny the public an understanding of the policymaking process”<sup>59</sup> or to conceal abuses of internal civil liberties, without real national security justification.<sup>60</sup> And this recognition has prompted extensive inquiry into how to reduce excessive secrecy.<sup>61</sup>

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is no theoretical reason to think that individuals or institutions who pursue opposing self-interested objectives will cancel each other out and create socially optimal results).

<sup>54</sup> BICKEL, *supra* note 1, at 81.

<sup>55</sup> See BeVier, *supra* note 52, at 513–15 (the Constitution requires “that the press remain[] insulated from all attempts by the government to control the content of its publications,” *id.* at 515).

<sup>56</sup> See, e.g., Gellman, *supra* note 48, at 40, 41; Katharine Graham, Op-Ed., *Safeguarding Our Freedoms As We Cover Terrorist Acts*, WASH. POST, Apr. 20, 1986, at C1 (“[T]he harm of restricting coverage far surpasses the evils of broadcasting even erroneous or damaging information.”).

<sup>57</sup> Indeed the contest theory might itself contribute to excessive secrecy, by providing the government with no real remedy anytime the press does manage to obtain classified information. See Edgar & Schmidt, *supra* note 20, at 1078.

<sup>58</sup> See Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 894–96 (discussing examples and citing sources).

<sup>59</sup> COMM’N ON PROTECTING & REDUCING GOV’T SECRECY, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. Doc. No. 105-2, at xxi (1997) [hereinafter MOYNIHAN COMMISSION REPORT], available at <http://www.gpo.gov/congress/commissions/secrecy/index.html>.

<sup>60</sup> See generally DANIEL PATRICK MOYNIHAN, SECRECY (1998).

<sup>61</sup> See, e.g., MOYNIHAN COMMISSION REPORT, *supra* note 59; MORTON H. HALPERIN & DANIEL N. HOFFMAN, TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW 25–40 (1977); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 945–49 (2006); Adam

Reform proposals often focus on the incentives of government actors,<sup>62</sup> attempting to shift oversight of classification and disclosure to independent bodies that might have less pathological incentives.<sup>63</sup>

But commentators have given little systematic attention to journalists' incentives in the national security context,<sup>64</sup> and especially to how those incentives cash out into decisions to publish classified secrets. Such attention is central to determining whether regulation of media disclosures is necessary alongside regulation of government classification. Part I suggests that self-regulation has led to many disclosures that damage national security, but such evidence cannot by itself demonstrate a problem, for some risk to security is the price of democracy.

This Part thus first analyzes press incentives and abilities in the abstract. It suggests that journalists are unlikely to internalize or accurately assess many considerations a democracy would consider relevant to decisions to publish classified secrets, and are likely to be motivated by many considerations that are irrelevant. Having concluded there is reason to worry about the outcomes of media self-regulation, it then suggests a possible avenue for reform. Judging substantive outcomes is nearly impossible in this context, it argues, but judging procedures may be a viable second-best solution. Drawing on historical accounts and memoirs, it describes a series of characteristic procedural errors that journalists commit when printing national security secrets. Those errors could provide a more workable basis for regulation.

#### A. *Incentives and Capabilities*

What motivates a reporter to publish a national security secret? Journalists enjoy significant personal gain when they break major stories, gain that is mostly independent of whether a story harms national security. Pulitzers and other professional rewards go to reporters who bring down important people or influence policy, not to those who sit on stories after properly balancing national security concerns.<sup>65</sup> Such

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M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 *UCLA L. REV.* 909, 919–22 (2006); Note, *Mechanisms of Secrecy*, 121 *HARV. L. REV.* 1556 (2008).

<sup>62</sup> See, e.g., MOYNIHAN COMMISSION REPORT, *supra* note 59, at 19; Kitrosser, *supra* note 58, at 894–96.

<sup>63</sup> See sources cited *supra* note 61. There is also a literature detailing the incentives of government leakers and offering proposals for reform. On incentives, see STEPHEN HESS, *THE GOVERNMENT/PRESS CONNECTION* 77–78 (1984); and Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795–2005*, 43 *SAN DIEGO L. REV.* 425, 468–83 (2006). On reforms, see REPORT OF THE INTERDEPARTMENTAL GROUP ON UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION (1982), available at [www.fas.org/sgp/library/willard.pdf](http://www.fas.org/sgp/library/willard.pdf); and WMD REPORT, *supra* note 9, at 381–84.

<sup>64</sup> For a brief discussion, see Goldsmith, *supra* note 12, at 31.

<sup>65</sup> See WICKER, *supra* note 40, at 185 (“[R]eporters want to be first with the story, distinguished among their colleagues, well paid, influences or checks upon the mighty, giant-killers perhaps, iconoclasts always.”); see also Goldsmith, *supra* note 12, at 31.



motivations may sometimes produce democratically desirable stories, but the journalistic establishment and its readership may not mirror the democracy as a whole. Further, reporters have incentives to report secrets that generate short-term scandal and public attention, even though upon reflection the public might have preferred the secret to be kept.<sup>66</sup> Newspapers themselves are driven in part by financial profit, a concern that need not favor stories that benefit the public.<sup>67</sup>

Against these claims, some suggest the competition and personal gain account is seriously incomplete. Reporters feel special responsibilities as stewards of the national interest and take seriously their power to harm national security.<sup>68</sup> Concern about inability to assess prospective damage may even lead them to excessively defer to government.<sup>69</sup> Journalists may also fear angering public officials,<sup>70</sup> though it is not clear such fears promote forbearance when it would be in the public interest. Reader or advertiser protest is an arguable check but is unlikely to be effective short of a large coordinated effort. Finally, reporters are citizens themselves, concerned about damaging the country. But they likely lack the knowledge or ability to make accurate predictions. Further, national security harm is a negative externality: most harm accrues to society in general or to other people, not to reporters themselves, who thus may systematically discount it.

Other incentives undoubtedly also factor in. The key point is that there is little reason to be confident that journalists will accurately assess, internalize, or balance the public harms and public benefits of publishing secrets. And there is reason to think they will sometimes print secrets that endanger security partially or wholly on grounds of private rather than public gain.

### B. Procedural Errors

In the abstract, a decision to disclose a national security secret ought to balance the benefit to public knowledge against the national security harm of disclosure. A journalist thus would commit a proce-

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<sup>66</sup> The *Times*'s Terrorist Surveillance Program (TSP) story drew many readers, but subsequent polls showed a small majority supported the program, suggesting the public might in the end have preferred secrecy (since the act of publication can undermine secret projects). See Frank Newport, *Where Do Americans Stand on the Wiretapping Issue?*, Feb. 24, 2006, GALLUP, <http://www.gallup.com/poll/21628/Where-Americans-Stand-Wiretapping-Issue.aspx>.

<sup>67</sup> See Owen M. Fiss, *Why The State?*, 100 HARV. L. REV. 781, 788 (1987) ("[T]here is no necessary, or even probabilistic, relationship between making a profit (or allocating resources efficiently) and supplying the electorate with the information they need to make free and intelligent choices about government policy, the structure of government, or the nature of society.").

<sup>68</sup> See, e.g., LICHTBLAU, *supra* note 12, at 251.

<sup>69</sup> See, e.g., WICKER, *supra* note 40, at 183.

<sup>70</sup> See DANIEL SCHORR, *STAYING TUNED: A LIFE IN JOURNALISM* 281–82 (2001); see also BEN BRADLEE, *A GOOD LIFE: NEWSPAPERING AND OTHER ADVENTURES* 314–16 (1995). This is especially true in regulated industries, like television.

dural error if he considered factors that were irrelevant to that balance or if he failed to take reasonable steps to obtain information that was relevant. This section details how misaligned incentives lead the media to commit several such errors. It considers how the errors — often very intuitive — might be policed and what impact such policing might have, and concludes that shifting focus from substantive balancing of harms to policing process might improve outcomes.

1. *Fear of being scooped by other journalists.* — Journalists often worry, rightly or wrongly, that another media outlet will publish first and get the glory or profit that attends an important national security scoop. Editors themselves sometimes admit that competition can lead papers to discount competing national security considerations — to publish inaccurate stories or stories that “[w]ithout fierce competitive pressure . . . might never have been published.”<sup>71</sup>

A recent example is the *New York Times*’s decision to disclose an effort to track terrorist financing known as the SWIFT program. *Times* editors were still debating what to do when they learned another paper “had almost caught” them; they then published the very day the competitor’s editors met with the Bush Administration about the story.<sup>72</sup> The *Times*’s public editor later criticized the decision, noting that the program appeared to be perfectly legal and that there was no evidence of abuse of private financial data, and thus that disclosure was unwarranted because it might permit terrorists to evade tracking.<sup>73</sup> Competition has been an important or decisive motivation in many other famous classified disclosures as well.<sup>74</sup>

Concern about being scooped is not a factor that bears any relationship to whether a story promotes public knowledge and accountability; it is a purely self-regarding concern. Some journalists even agree that it is an illegitimate motivation for publishing classified secrets.<sup>75</sup> Indeed, when competition enters the calculus it seems likely to

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<sup>71</sup> WICKER, *supra* note 40, at 169.

<sup>72</sup> See LICHTBLAU, *supra* note 12, at 255.

<sup>73</sup> Byron Calame, Op-Ed., *Can ‘Magazines’ of the Times Subsidize News Coverage?*, N.Y. TIMES, Oct. 22, 2006, § 4, at 12.

<sup>74</sup> For example, concern about being scooped sped publication of stories describing and compromising the CIA’s secret efforts to recover warheads and codebooks from a downed Soviet submarine. See WICKER, *supra* note 40, at 213–20; Seymour Hersh, *C.I.A. Salvage Ship Brought Up Part of Soviet Sub Lost in 1968, Failed To Raise Atom Missiles*, N.Y. TIMES, Mar. 19, 1975, at 1. The *Washington Post* reversed a decision to hold off on a story detailing U.S. efforts to eavesdrop on Iraqi officials through U.N. arms inspectors after learning that other papers were investigating. See Gellman, *supra* note 48, at 43. And the *Chicago Tribune*’s famous decision to publish FDR’s war plans prior to Pearl Harbor was largely motivated by worry that the newcomer *Chicago Sun* would cut into its market share. See SMITH, *supra* note 36, at 417.

<sup>75</sup> The *Times* held off on stories about the Cuban Missile Crisis — notwithstanding its concern about being scooped — on the grounds that it “had to be responsible for its own conduct.” FRANKEL, *supra* note 11, at 248.

lead journalists to discount other important factors that might have caused them to hold off in the first place — like national security.

Tying liability to competitive motives could have important benefits. One might think that the legal system should be unconcerned with penalizing decisions in cases where the news is going to come out anyway and it is just a matter of who discloses it. But this view is mistaken. First, a newspaper that learns that competitors are looking into a story may be mistaken as to both whether the competitors will publish and how much information they will publish.<sup>76</sup> Second, two newspapers that have correct information about each other's initial decision might end up in a kind of prisoner's dilemma. Both have decided publication is not warranted on grounds of democratic accountability but are worried about losing a scoop if the other defects. The optimal position from the perspective of democracy is that both stick with their original decision; the prospect of a sanction discourages both from publishing on the grounds that the story will get out anyway.

It might be hard to determine who within a newspaper was motivated by a concern about being scooped and how big a role that concern played. But the law frequently premises liability on divining the role played by a particular motive in a situation where motives are mixed.<sup>77</sup> Further, often the existence of this kind of motivation will be obvious: a newspaper will worry about being scooped because another newspaper is asking government officials about the story.

2. *Fear of being scooped by a reporter for the same institution.* — Journalists often argue that they are especially likely to make responsible choices about national security disclosures because editors and publishers are a backstop against rash decisions, an internal “check and balance.”<sup>78</sup> Disclosure decisions are often preceded by lengthy internal deliberation. Yet just as the prospect of being scooped by another paper sometimes overcomes a decision against publication, so too does the prospect of internal defection. The *Times*, for example, reversed its initial decision against publishing the Terrorist Surveillance Program story at least in part because its own reporter threatened to describe the program in a book.<sup>79</sup> Such threats are not uncommon,<sup>80</sup>

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<sup>76</sup> In February 1975, for example, the *Los Angeles Times* reported on the CIA's efforts to recover information from a sunken Soviet sub, *see supra* note 74, in part because it mistakenly believed that the *New York Times* was about to expose the project. In fact, the *New York Times* story was related but did not disclose the relevant secrets. *See WICKER, supra* note 40, at 215–17.

<sup>77</sup> An example is employment discrimination.

<sup>78</sup> *See LICHTBLAU, supra* note 12, at 196; *see also WICKER, supra* note 40, at 183.

<sup>79</sup> The story was originally nixed on national security grounds, but editors reopened discussion in response to the threat. *See LICHTBLAU, supra* note 12, at 196–211.

<sup>80</sup> *See, e.g., SANFORD J. UNGAR, THE PAPERS & THE PAPERS* 100 (rev. ed. 1989) (reporting that during the *Times*'s contentious internal debate about the Pentagon Papers, one reporter threatened to publish them in the newspaper he had recently purchased on Martha's Vineyard).

and as with external scoops it is hard to see how factoring in concern about internal scoops makes it much more likely that publication would serve the public interest.<sup>81</sup>

Concerns about efficacy in this context may seem greater than in the external scoop context. Information problems are unlikely, as is the prospect of a prisoner's dilemma. But preventing a newspaper from publishing because a reporter threatens to defect does not just mean the reporter will defect, for his calculus might change too. He might now worry about being punished for disloyalty or disobedience, for example.<sup>82</sup> Policing in this context would also be more difficult, as the relevant information might not leave the newspaper. But it would not be impossible: many people within the paper might know about the threat, and reporters like to gossip.<sup>83</sup> And even a small prospect of detection might provide some small incentive against including fear of internal scoops in a decision calculus.

3. *Publishing details only to signal the credibility of the reporter or newspaper.* — The government often asks journalists who have decided to publish classified information to withhold particularly sensitive details, with variable success.<sup>84</sup> Although journalists may simply have made a different calculation of the importance of those details to public knowledge or security, they sometimes include details to signal that a story is credible<sup>85</sup> or to prove they did not “withhold . . . evidence.”<sup>86</sup> Reporters withhold evidence all the time, and yet the concern is not unjustified.<sup>87</sup> Legitimate publication spurs democratic debate, but if details are sufficiently sketchy readers might

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<sup>81</sup> Such a threat does offer additional information about the intensity of the reporter's support for the story, support that might be predicated on concern for democracy. But the argument that the press is able to balance national security and the public interest depends in large part on the notion that the balancer is an institutional press, not a random individual, and so the public should be less confident, not more confident, that a defector's decision was democracy-promoting.

<sup>82</sup> For example, a CBS reporter who gave the *Village Voice* a classified report the network would not air was forced to leave his position. See SCHORR, *supra* note 70, at 280–300.

<sup>83</sup> See, e.g., *id.* at 267 (noting that in cases of internal disagreement about publishing national security secrets, the “inevitable result” is that word gets around to other journalists).

<sup>84</sup> Compare Gellman, *supra* note 48, at 42–43 (describing the *Post*'s decision to withhold the precise reasons why a Pentagon defense system failed in 2002), with FRANKEL, *supra* note 11, at 317–18 (describing the *Times*'s decision not to withhold the number of airplanes involved in bombings in North Vietnam in the spring of 1970).

<sup>85</sup> See FRANKEL, *supra* note 11, at 330 (noting that the *Times*'s publisher wanted to print the findings of the Pentagon Papers but not the documents themselves, but editors refused because of concerns about credibility); Gellman, *supra* note 48, at 42 (“Details are vital in a story like this. . . . If [the *Post* is] going to break something big, we need to show readers we know it's true.”).

<sup>86</sup> FRANKEL, *supra* note 11, at 330 (emphasis omitted).

<sup>87</sup> This might be framed as a kind of bonding cost that the agent (here the media) is expending to attempt to demonstrate to the principal (the public) that the agent is acting in the principal's best interest. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

not believe the story or might not be able to deliberate productively if they did believe it. Many details will have a small but tangible value to deliberation; there is bound to be debate at the margins.

Yet it would still be valuable to require reporters to offer at least a specific, colorable argument as to why each particular classified detail is justified with regard to a baseline of public deliberation. The following example illustrates why. The *Times* recently reported on the interrogation of al Qaeda leader Khalid Sheikh Mohammed, and named a CIA agent involved in the interrogation because “editors judged that the name was necessary for the credibility and completeness of the article,” though the agent had not participated in torture and indeed had refused to be trained in waterboarding.<sup>88</sup> The CIA had warned the paper that publishing the name would endanger the agent.<sup>89</sup> The concern with such a vague assertion about credibility or completeness is that it could apply to *any* detail. In the *Times* case, it thus masks the possibility that the paper printed the name because it did not believe the CIA’s danger assessment — which it did not<sup>90</sup> — and not because it thought the name was actually important to the story for anything other than aesthetic reasons. To avoid excessive intrusion and to encourage predictability, the baseline should be very low, something like plausibility. But forcing even that limited articulation could encourage reporters to engage in real balancing with respect to each part of the story, rather than to take the public interest seriously only when making an initial decision about publication.

The three problems described so far are errors of commission, that is, situations where journalists allow self-regarding incentives to enter their decisionmaking calculus. Journalists also make errors of omission, such as failing to collect information that is relevant to whether a disclosure promotes deliberation or endangers national security. The next three subparts describe the latter kind of error.

4. *Failing to check with administration officials.* — It seems unlikely that major news organizations would publish information that is classified or plausibly a threat to national security without offering the government an opportunity to detail why publication is harmful or unwarranted. But sometimes they do.<sup>91</sup> Well-intentioned journalists might not realize the danger of printing particular pieces of classified

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<sup>88</sup> Editors’ Note, N.Y. TIMES, June 22, 2008, <http://www.nytimes.com/2008/06/22/washington/web22ksmnote.html>.

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> When the *Tribune* published its story suggesting the Navy had broken Japan’s codes, editors apparently were simply unaware of its implications, for they had failed to run it by the military. See SMITH, *supra* note 36, at 430–37. Similarly, the *Times* did not check with the government before publishing the Pentagon Papers. Instead newspaper executives read “each installment to satisfy themselves” that there was no cause for concern. FRANKEL, *supra* note 11, at 331.

information. The law could guard against this problem by imposing liability for the publication of any classified information if journalists had not at least conferred with the relevant officials. Such discussion would only improve a decision about the security harms or deliberative benefits of disclosure, because it might offer reporters more information about relevant factors, like multibranch vetting. The press usually does consult with the government and simply disagrees, and so a consultation requirement would provide only marginal improvement, but not none, and its costs would be minor or nonexistent.

5. *Failing to monitor internally.* — Newspapers occasionally fail to regulate employees acting on behalf of the institution. In some cases of internal disagreement, the ultimate decisionmakers might decide against publication but might be unable to prevent reporters or editors from including the sensitive information.<sup>92</sup> This is unlikely on the level of a story but quite possible on the level of details. Allowing individual reporters basically to veto the conclusion of the newspaper's top brass disturbs the explicit many-minds argument upon which self-regulation often relies and thus seems unlikely to lead to beneficial disclosures. The law might thus hold institutions liable when they decide against publication but fail to monitor employees to ensure that they do not slip banned information into a story.

6. *Failing to engage in a good faith investigation of the legality of the action being exposed.* — Journalists sometimes cite the lawfulness of a secret action as a consideration relevant to their decision to publish.<sup>93</sup> During the Cuban Missile Crisis, the *Times* apparently negotiated a deal with President Kennedy: it would withhold certain information from publication if he pledged not to start a war without informing Congress and the public, a move reporters and editors believed would have exceeded his legal authority.<sup>94</sup>

Reporters sometimes get these questions right<sup>95</sup> but other times get them wrong, publishing on grounds of illegality when in fact there is not much colorable evidence to that effect.<sup>96</sup> But illegality is not like truth in a libel case: publication is not presumptively unprotected by

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<sup>92</sup> For example, top brass at the *Times* worried about undermining the planned Bay of Pigs invasion, and so decided to write the story but to withhold mention of the CIA's involvement and the time of attack. Reporters and lower-level editors believed the decision reflected "misplaced patriotism" and thus surreptitiously included information about timing. FRANKEL, *supra* note 11, at 209. In subsequent stories, they "virtually thumb[ed] their noses at their own publisher" by printing more forbidden information. *Id.* at 210; *see also id.* at 208–10.

<sup>93</sup> *See* RESTON, *supra* note 11, at 326. *See generally* LICHTBLAU, *supra* note 12.

<sup>94</sup> *See* FRANKEL, *supra* note 11, at 246–48.

<sup>95</sup> The *Times* reported on the TSP in part because of concerns about illegality that were widely shared in the executive branch. *See* LICHTBLAU, *supra* note 12, at 203.

<sup>96</sup> The *Times* believed the SWIFT program was "arguably extralegal," *see* LICHTBLAU, *supra* note 12, at 253, but its public editor later concluded that it was not, *see* Calame, *supra* note 73.

the First Amendment just because the secret being disclosed does not involve illegality.<sup>97</sup> The public might benefit from learning of certain secret but legal actions; in other cases it might be preferable for democratic reasons to keep illegality concealed. Yet it is safe to say that having *accurate* information about legality will improve decisions as to whether a disclosure would promote deliberation. Of course legality will be contested, and so the relevant standard might simply be good faith investigation: liability could attach to the release of classified information when the government could show a lack of good faith effort to determine legality (or the presumption might be reversed).

7. *The promise and limits of a process-oriented approach.* — An approach that targets decision errors is no panacea. It will not force journalists to internalize national security harms. It is geared largely to the institutional press.<sup>98</sup> It might create perverse incentives, like encouraging immediate publication to avoid increased potential for liability if a paper waits and another catches up. It may not prevent disclosure decisions from operating like a one-way ratchet, in which “[t]he least responsible [journalists] involved in the process could determine the level of coverage.”<sup>99</sup> Often the government convinces most papers to hold off but one simply disagrees with the majority.<sup>100</sup>

Further, a process-based approach might not track other common measures of whether public deliberation is warranted, like whether a secret was vetted on a bipartisan, multibranch basis. Reporters often justify disclosures by claiming the secret was not vetted,<sup>101</sup> but other times ignore bipartisan entreaties against publication.<sup>102</sup> The *Village Voice* printed a classified report on the CIA even though the House had voted by nearly a 2-1 margin to withhold the report until it was cleared of potentially damaging information.<sup>103</sup> But this consideration

<sup>97</sup> Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”).

<sup>98</sup> This is especially true if the liability system is civil rather than criminal, as Part III will suggest; individual journalists are more likely to be judgment-proof.

<sup>99</sup> Graham, *supra* note 56.

<sup>100</sup> See, e.g., WOODWARD, *supra* note 28, at 457–63 (noting that the *Post* and other news outlets held off on publishing details of a CIA surveillance project that NBC subsequently exposed). Similarly, several papers received FDR’s war plans in 1941; some decided not to publish. Frank C. Waldrop, *A ‘Scoop’ Gave Axis Our World War II Plans*, WASH. POST, Jan. 6, 1963, at E5.

<sup>101</sup> See LICHTBLAU, *supra* note 12, at 250, 256–57; see also Byron Calame, Op-Ed., *Bill Keller Responds to Column on Swift Mea Culpa*, N.Y. TIMES, Nov. 6, 2006, <http://publiceditor.blogs.nytimes.com/2006/11/06/bill-keller-responds-to-column-on-swift-mea-culpa>.

<sup>102</sup> See LICHTBLAU, *supra* note 12, at 199–200 (noting that the ranking member of the House Intelligence Committee, a Democrat, begged the *Times* not to disclose the Terrorist Surveillance Program); see also BURTON K. WHEELER WITH PAUL F. HEALY, *YANKEE FROM THE WEST* 32–33 (1962) (explaining that the legislator who leaked FDR’s war plans to the *Tribune* rather than to the Senate Foreign Relations Committee did so because he believed the Committee would not want to publicize them).

<sup>103</sup> See *Schorr Threatened with Contempt Citation*, CHI. TRIB., Feb. 15, 1976, at 3.

is a poor candidate for liability, for there would likely be extreme dispute about what constitutes multibranch and bipartisan participation.

Despite these and other problems, focusing on process still may improve outcomes. While optimally we might judge a publication decision by identifying the disclosure's potential for harm to national security and its potential for benefit to public knowledge or accountability and balancing the two, such bottom-line balancing is basically unworkable.<sup>104</sup> Balancing tests are often unpredictable, but particularly so in the national security context.<sup>105</sup> First, the value of any particular disclosure to democratic deliberation will be subject to irremediable contestation, probably on the basis of individual policy views. Impact on national security may be prospective and impossible to measure. Second, even if both factors could be measured, it is not clear they could be coherently balanced. And even if they could be balanced in theory, in practice no single potential decisionmaker can do the balancing. Government cannot evaluate what the public ought to know, and judges may be incompetent to measure national security harms.

Some scholars have responded to the impossibility of balancing and the potential for journalistic mistakes by suggesting that criminal liability ought to be available in the rare case where damage to national security is extremely "serious" or "grave," a standard that is sometimes paired with a requirement that the reporter (or leaker) intended the damage.<sup>106</sup> But these standards are unlikely to deter undesirable publications. Intent to cause harm is largely inapt here, as it can bear little correlation to the harm actually caused. Moreover, it is not the relevant culpable intent. Reporters will rarely intend to damage national security, but they might discount it because they hope to win a Pulitzer. Seriousness of damage does correlate with undesirable publication, but it is especially difficult to evaluate *ex ante*. As a standard of liability, it might lead some journalists to underreport from excessive caution due to unpredictable outcomes and others to overreport because of poor judgment, insufficient information, or the diffuse and prospective costs of national security damage. Even if judges could

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<sup>104</sup> See STONE, *supra* note 49, at 2–3.

<sup>105</sup> The Court's oft-criticized approach to judging Communist speech in the Cold War involved just such a test. See *Dennis v. United States*, 341 U.S. 494, 510 (1951).

<sup>106</sup> See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 645 (permitting prosecution "only upon detailed proof that the disclosure of classified information in fact caused serious harm to . . . a legitimate and authorized policy"); Kitrosser, *supra* note 58, at 928 (permitting prosecution only if the "revelation is directed toward causing, and is likely to cause, grave damage to national security that is specific, identifiable, and imminent"); see also Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 332 (1974); Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 298 (2008). Others pair intent and harm with a requirement that the publisher "knew" the story "would not meaningfully contribute to public debate." STONE, *supra* note 49, at 26.



evaluate the gravity of damage, the executive may be unable to prove it without endangering additional classified secrets.

Regulating outcomes is nearly impossible. Focusing on procedures — attempting at least to ensure that journalists deliberate properly before printing secrets — represents a kind of second-best solution, one that does not require compliance with unpredictable and immeasurable substantive standards. Such a system might be likened to the liability regime for libel, which in practice sometimes penalizes reporters for behaviors that are likely to produce falsehood, like failing to check with multiple sources or relying on sources known to dislike the subject of the story.<sup>107</sup> Here too, isolating and sanctioning procedural errors that almost always point in the wrong direction will encourage the media to internalize the public harms and benefits of publication. These errors are judicially manageable, are predictable enough to generate compliance, do not focus on content and thus might avoid concern about stifling debate, and correlate to whether publication is warranted. Part III now turns to the more speculative question of how to design a system that effectively ties liability to these errors.

### III. IMPLEMENTATION

In one sense, prior restraints might be the best way to check self-serving incentives on the part of the press. A democracy needs journalists who are driven to uncover secrets and whose professional incentives reward publication, but these very characteristics make them likely to discount competing considerations. Mirroring proposals to give declassification authority to more independent bodies, the law might permit some court-like entity to review media decisions prospectively, on the basis of classified submissions, rather than waiting until the damage is done. This could avoid the hindsight bias that pervades *ex post* negligence determinations<sup>108</sup> and so would avoid overdeterrence.<sup>109</sup> Further, injunctions are generally favored when harm is potentially irreparable,<sup>110</sup> as it is in the national security context. But such a solution would run afoul of the First Amendment's special hos-

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<sup>107</sup> See Brian C. Murchison et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 29 (1994); see also *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (plurality opinion) (permitting liability on a "showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers").

<sup>108</sup> See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1523–27 (1998).

<sup>109</sup> One scholar has suggested that recharacterizing prior restraints as liability rules might help avoid overdeterrence: government could ban speech but would be financially liable if the speech turned out to be protected. See Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1184–92 (2005).

<sup>110</sup> See, e.g., Douglas Lichtman, *Irreparable Benefits*, 116 YALE L.J. 1284, 1286 (2007).

tility to prior restraints,<sup>111</sup> and regardless is likely to be so controversial that the secret would get out as a result of the effort.<sup>112</sup>

Accordingly, this Part considers how to structure a system of ex post sanctions that would discourage publication in cases of procedural error. Policing the internal operations of the press would be costly and difficult, as would navigating the constitutional and political hurdles attendant on any liability system that applies to the media. Advocating a precise framework is well beyond the ambition of this Note, but some general thoughts on design considerations may help elucidate how a process-based system would work best in theory.

#### A. Systemic and Substantive Considerations

Tying liability to procedural errors avoids the impossibility of balancing the harm and benefit of publishing any individual secret. But the overall desirability of regulation must depend on the gravity of the problem and the costs of the solution. Even if the contest theory does not convincingly justify self-regulation, change might be too risky. Intuitive and systemic assessments about the relative dangers posed by disclosure and excessive secrecy will thus necessarily drive decisions about how and even whether the errors identified in Part II should shape press liability. This Note focuses mainly on policing journalistic error because there is comparatively more literature on government error, but the problems are related, and any regulatory effort must be considered in light of the system as a whole. If procedural (or other) regulation of classification decisions could force government to fully internalize the public interest, we might be unconcerned about secrecy and thus might not permit the press to disclose any classified secrets at all. Conversely, if a system were sufficiently good at policing media decisions, we might forbid government from keeping anything from the press. More likely, neither system will be perfectly effective, and so a system targeting press processes would work in tandem with one targeting government. Decisions about imposing stringent procedural requirements that risk excessively deterring the press would depend on the efficacy of the system regulating classification, and vice versa.<sup>113</sup>

The substance of any law targeting media decision errors will follow from these assessments. And the system could easily be calibrated

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<sup>111</sup> See *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 714 (1971) (per curiam); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). But see John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 *YALE L.J.* 409 (1983) (arguing that the distinction between prior restraint and subsequent punishment is constitutionally irrelevant).

<sup>112</sup> In 1979, a federal district court enjoined a story describing how to make a hydrogen bomb, but the case became moot after another media outlet published the same information. See Powe, *supra* note 30, at 56. Similarly, many other press outlets published the Pentagon Papers during the injunction proceedings against the *Post* and the *Times*. See UNGAR, *supra* note 80, at 175–92.

<sup>113</sup> Comparative costs of each regime would of course be important as well.

to obtain different levels of protection for security on the one hand and public deliberation on the other. One method might involve imposing more (or fewer) procedural requirements; another would involve setting presumptions. The government might be forced to prove that a newspaper's primary motivation in publishing was fear of being scooped. Or the burden might shift to the media after the government made a *prima facie* case — a showing that a paper held off on a story, learned a rival was pursuing it, and then published. A system that provided total immunity unless the government could show bad faith in complying with all relevant procedures would be highly protective of speech but would still encourage better decisionmaking. An alternative, less protective system might make it presumptively illegal to publish validly classified information, subject to defenses that might involve showing good faith compliance with procedural requirements.

### B. *Criminal vs. Civil Sanctions*

The law currently imposes criminal penalties for the publication of some classified information, at least in theory. A process-based standard for criminal liability might deter unwanted disclosures more effectively than criminal standards that would require difficult showings about harm and possibly the release of even more classified information. But prosecution has been a nonstarter historically and seems too controversial to ever be consistently effective. On standard economic analysis, the infrequency of prosecution might suggest that the only way to deter wrongdoing would be to set a high penalty, like a stiff prison term, to offset the low chance of detection.<sup>114</sup> But there is a good chance juries might refuse to convict in such circumstances.<sup>115</sup>

The government's options for regulating national security disclosures are sometimes characterized as bipolar — criminal liability or prior restraint.<sup>116</sup> But a third option, civil sanctions, offers a number of advantages.<sup>117</sup> First, civil sanctions may better match intuitions about journalistic conduct. They are useful when the aim is to deter

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<sup>114</sup> See, e.g., A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887–91 (1998).

<sup>115</sup> See Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 (2000) (finding that hypothetical jurors refuse to impose heavy penalties on a few people to discourage violations, even where doing so is optimally deterrent).

<sup>116</sup> See, e.g., Powe, *supra* note 30, at 57.

<sup>117</sup> A fourth possibility is informal sanctions. Cf. HALPERIN & HOFFMAN, *supra* note 61, at 37. The government might (and sometimes does) punish newspapers that publish classified information by attempting to cut off access, such as interviews with officials or perhaps seats on Air Force One. While access is generally not protected by the First Amendment, see Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992), the executive branch would necessarily implement any sanctions, and thus the regime would run into legitimacy problems. Moreover, it might be ineffective: the basic problem is that papers are able to publish classified news despite current access restrictions.

harmful behavior without the public condemnation or assignment of moral culpability that accompanies a finding of criminality.<sup>118</sup> Some people undoubtedly feel that journalists who expose national secrets are morally culpable. But journalists are engaged in an enterprise that is broadly beneficial to the public; there is consensus that the publication of *some* classified information is in the public's best interest, and so it may be inappropriate to criminalize well-intentioned mistakes.

Second, in general "civil remedies are easier to use, more efficient, and less costly than criminal prosecutions."<sup>119</sup> Such benefits are central in this context, where it is already inherently difficult to bring legal action. But the law has lots of practice with making newspapers pay for erroneous publication decisions. Concern might even shift from underenforcement by government to overenforcement by juries. In the case of libel, for example, some scholars have argued that juries find against journalists even in cases when evidence is "dubious."<sup>120</sup>

Third, courts may be more willing to protect classified information from disclosure in a noncriminal context,<sup>121</sup> an important advantage given that concerns about causing additional national security damage have prevented prosecutions in the past.<sup>122</sup> Secret information is less central to a finding of fault in a process-based inquiry, because courts would not need to assess levels of damage. But such information might still be required to show a secret was not improperly classified.

Fourth, in a civil regime journalists could be required to testify about their decisionmaking process, a key advantage given that some of the information relevant to a process-based liability standard would be known only to the reporters themselves.

### C. Decisionmakers and Penalties

A regime that imposed ex post civil liability on newspapers would face questions about who would initiate actions for sanction and who would judge them. The Department of Justice might bring actions but could be perceived as too political; an alternative is to lodge that au-

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<sup>118</sup> See Henry M. Hart, Jr., *The Aims of the Criminal Law*, LAW & CONTEMP. PROBS., Summer 1958, at 401, 404-05.

<sup>119</sup> Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1345 (1991).

<sup>120</sup> See Benjamin Barron, *A Proposal To Rescue New York Times v. Sullivan by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 74 (2007).

<sup>121</sup> In the *Pentagon Papers* proceedings, both district courts permitted in camera hearings on national security dangers, see *United States v. Wash. Post Co.*, 446 F.2d 1327, 1331 (D.C. Cir. 1971); *United States v. N.Y. Times*, 328 F. Supp. 324, 326 (S.D.N.Y. 1971), although one refused government requests to exclude the defendants as well. See KATHARINE GRAHAM, *PERSONAL HISTORY* 452 (1997).

<sup>122</sup> See, e.g., *supra* note 38.

thority in an independent agency, just as the SEC and other agencies often initiate civil enforcement actions. Scholars have explored the possibility of granting greater authority to curb excessive classification to an independent agency;<sup>123</sup> it might make sense on grounds of efficiency or expertise to give that same agency the ability to bring suits against the media, though it might also raise the costs of agency capture. A second question is who would judge such actions, at least in the first instance. The judiciary is the most obvious and likely most legitimate choice. Though judges and juries are often accused of excessive deference in national security matters, a process-based system invites more independent oversight because it avoids issues courts feel incompetent to evaluate, like levels of harm. An alternative would be to give initial adjudicatory power to an independent agency, of course with the possibility of appeal. Such a system might provide greater expertise and secrecy, but could face due process roadblocks.

Whether the courts or an agency were involved, the constitutionality of imposing penalties outside the criminal process could turn on how such penalties were set, and whether they were considered remedial or punitive.<sup>124</sup> Gauging actual damage is difficult and might compromise more secrets, and so a truly compensatory remedy is not viable. An appealing option is disgorgement: a fine might track the revenue a paper or network earned the day the classified information was revealed, just as the government has recovered profits from employees who disclose classified secrets in books.<sup>125</sup> This might help deter publication for the purpose of profit. A third possibility is simply to set the penalty at whatever level would ensure compliance.

#### D. First Amendment Concerns

Some scholars argue that the prior restraint standard applies to *any* effort to sanction the publication of classified information.<sup>126</sup> They would consider unconstitutional any regime that did not require proof of the gravity of national security risk. But the Supreme Court has not decided the question. The *Pentagon Papers* standard explicitly relied on the special nature of prior restraint and the lack of statutory authorization for injunction proceedings.<sup>127</sup> The most relevant judicial decision came recently in the lobbyist case described above, which was

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<sup>123</sup> See, e.g., Fenster, *supra* note 61, at 945–49.

<sup>124</sup> See, e.g., *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 834–38 (1994); *United States v. Halper*, 490 U.S. 435, 452 (1989).

<sup>125</sup> See *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam).

<sup>126</sup> See, e.g., STONE, *supra* note 49, at 24; David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in LEE C. BOLLINGER & GEOFFREY R. STONE, *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 32, 58 (2002).

<sup>127</sup> See *supra* p. 2230.

the government's first effort to sanction private citizens for publicly disclosing leaked classified information.<sup>128</sup> Relying on *Pentagon Papers*, a federal court in Virginia found no First Amendment violation where the disclosure involved information that was validly classified — closely held and “potentially harmful” to the national defense — and where the defendant knew the information was potentially harmful and that disclosure violated classification orders.<sup>129</sup> A process-based standard is more protective than that, as it would require additional showings by the government (or would provide defenses that are not constitutionally mandated). As a matter of statutory interpretation, the court held that disclosures of certain types of information were not criminal unless made with the bad faith intent to harm the United States or help a foreign nation,<sup>130</sup> a standard partly responsible for the government's decision to drop the charges.<sup>131</sup> A clearer statutory regime, however, might obviate such a requirement. As a doctrinal matter, there is thus no clear bar to a process-based approach.

#### CONCLUSION

The merits of a decision to publish classified information will inevitably be subject to deep contestation, but this Note has aimed to show that improving on the status quo is not impossible. Such improvement may take on special urgency today. Many have decried the government's increasingly aggressive efforts to force reporters to disclose sources in national security cases.<sup>132</sup> The lobbyist prosecution led many reporters to worry that they were next,<sup>133</sup> and it was dropped primarily because of the dangers of proof under the current, contingent statutory regime. These efforts may signal that journalists who print classified information are in a more precarious position than they might like to think. If so, a system that offers a little certainty — that “extend[s] the legal reality of freedom at some cost in its limitless appearance”<sup>134</sup> — might be worth considering after all.

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<sup>128</sup> See *United States v. Rosen*, 445 F. Supp. 2d 602, 631 (E.D. Va. 2006). The disclosures were aimed at influencing foreign policy. *Id.*

<sup>129</sup> See *id.* at 640–41, 643.

<sup>130</sup> See *id.* at 643; see also *Gorin v. United States*, 312 U.S. 19, 27–28 (1941).

<sup>131</sup> See Neil A. Lewis & David Johnston, *U.S. Moves To End Secrets Case Against Israel Lobbyists*, N.Y. TIMES, May 2, 2009, at A11.

<sup>132</sup> See, e.g., Theodore B. Olson, Op-Ed., . . . *Or Safeguards?*, WASH. POST, Oct. 4, 2007, at A25 (“[I]t is now de rigueur to round up reporters, haul them before a court and threaten them with fines and jail sentences unless they reveal their sources.”).

<sup>133</sup> See, e.g., Fred Kaplan, *You're a Spy*, SLATE, Feb. 15, 2006, <http://www.slate.com/id/2136324> (“An espionage trial about to begin in Alexandria, Va., could threaten the whole enterprise of investigative journalism.”); see also Papandrea, *supra* note 106, at 234–36.

<sup>134</sup> See Alexander M. Bickel, *The “Uninhibited, Robust, and Wide-Open” First Amendment*, COMMENTARY, Nov. 1972, at 60, 61.