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DO NOT PASS GO, DO NOT COLLECT \$200: THE REPORTER'S PRIVILEGE TODAY

*Douglas E. Lee**

The compelled production of a reporter's resource materials and testimony . . . constitutes a significant intrusion into the newsgathering and editorial processes and may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the reporter's privilege. Except in the rare instances in which a party can meet the three-part tests established by both the statutory and constitutional privileges, courts should preserve the neutrality of the press and decline to make reporters participants in a judicial proceeding merely because they carry out their constitutionally protected responsibilities.¹

It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas. We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.²

I. INTRODUCTION

Any discussion of the reporter's privilege must begin by recognizing that these diametrically opposed views of the privilege have developed in the same legal environment. The North Carolina trial judge so eloquently defending the privilege and the United States Court of Appeals panel so easily dismissing it had before them the same First Amendment, the same United States Supreme Court precedent, the same federal and state court decisions, and similar state shield laws. Indeed, their opinions were issued fewer than forty days apart. Yet the opinions are irreconcilable, the latter refusing to recognize a public policy that the former holds aloft.

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1. *State v. Peterson*, No. 01-CRS-24821, 2003 WL 22965551, at *3 (N.C. Super. Ct. June 30, 2003).

2. *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (internal citations omitted).

Perhaps better than any study or any complex constitutional analysis, these opinions demonstrate that the extent, if not the existence, of the reporter's privilege is determined by public policy. Judges, legislators, prosecutors, reporters, and the public all play a role in shaping and reshaping this policy to fit current events, trends, and expectations. Thus, the reporter's privilege has not evolved as much as it has swung back and forth, and today we find it unpopular and unsupported. Whether and when it will swing back into popularity will likely depend upon the public's understanding of the privilege and the benefits it is intended to bestow.

II. IS A PRIVILEGE A WEAPON OR A SHIELD?

To understand the privilege and its future, it is necessary to understand the privilege's history, philosophical underpinnings, and relationship to other evidentiary privileges. Traditionally, privileges have been viewed as weapons, tools used by lawyers and witnesses to thwart efforts to ascertain the truth. Professor Wigmore, for example, viewed privileges as exceptional exemptions from the fundamental premise that "the public is entitled to every man's evidence" and, therefore, posited four conditions he believed should be satisfied before a privilege is allowed.³

First, the "communications must originate in a confidence that they will not be disclosed."⁴ Second, "[t]his element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties."⁵ Third, this "relation must be one [that] in the opinion of the community ought to be sedulously fostered."⁶ And fourth, the "injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."⁷

Applying these conditions, Wigmore seemed satisfied that the common law was correct to recognize the attorney-client, priest-penitent, and husband-wife privileges. Wigmore, however, believed the physician-patient relationship failed all but the third condition and, accordingly, argued that privilege should not exist.⁸ He also made no secret of his opinion that privileges should be limited. He wrote that the privilege

remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an

3. 8 WIGMORE, EVIDENCE §§ 2192, 2285 (McNaughton rev. ed. 1961).

4. *Id.* § 2285.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* §§ 2285, 2380a.

obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principal.⁹

Despite the narrowness of Wigmore's conditions, states have relied upon them in determining whether a privilege exists.¹⁰ Without applying the conditions expressly, the United States Supreme Court echoed Wigmore's concern that privilege obstructs the truth when it rejected President Richard M. Nixon's assertion of executive privilege:

The very integrity of the judicial system and public confidence in the system depend on full disclosure of all facts, within the framework of the rules of evidence. . . . [T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.¹¹

Another school of thought, however, views privileges not as weapons to damage the judicial system's ability to divine the truth but as shields to protect freedom and liberty. One author has written that privileges

are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping. Even when thrown into the lap of litigation, they are not the property of the adversaries as such; even in litigation, they may be exclusively the property of perfectly neutral persons who wish to preserve despite litigation, just as they preserved prior to litigation, their right to be left alone in their confidences.¹²

This view seems to be shared by most legislators, who have been much more liberal than judges in recognizing and creating new privileges. Even a cursory review of a few states' statutes finds privileges that undoubtedly would make Wigmore cringe. California, for example, recognizes privileges for psychotherapist-patient communications¹³ and for sexual assault and domestic violence counseling.¹⁴ Illinois recognizes privileges between cli-

9. 8 WIGMORE, *supra* note 3, § 2291.

10. See, e.g., *In re* Petition of Ill. Judicial Inquiry Bd., 471 N.E.2d 601, 603 (Ill. App. Ct. 1984) (holding that bar association can assert privilege to protect members' evaluations of associate judges).

11. *United States v. Nixon*, 418 U.S. 683, 709, 712 (1974).

12. David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110-11 (1956).

13. CAL. EVID. CODE § 1014 (West 2003).

14. *Id.* §§ 1035.8, 1037.5.

ents and public accountants,¹⁵ virtually all communications between a person and his or her “clergyman or practitioner of any religious denomination accredited by the religious body to which he belongs,”¹⁶ discussions between a person and a licensed social worker,¹⁷ and, most recently, communications between a union member and his or her representative.¹⁸ South Carolina, like many other states, protects environmental audits from disclosure.¹⁹ While such privileges are rarely absolute, this myriad of privileges suggests lawmakers are more willing than judges to elevate a person’s “right to be left alone” over the “basic function of the courts.”

III. THE DEVELOPMENT OF THE CONSTITUTIONAL REPORTER’S PRIVILEGE

A. The Privilege Before *Branzburg v. Hayes*

The judicial reluctance to recognize privileges is evident in the history of the reporter’s privilege. One of the first chapters of this history was written in 1957, when Marie Torre, a reporter for the New York *Herald Tribune*, wrote a column in which she attributed unflattering statements about actress and singer Judy Garland to an unnamed CBS executive.²⁰ Garland sued and, during the course of the litigation, sought to compel Torre to reveal her unidentified source.²¹ Torre refused, citing a promise of confidentiality and claiming a privilege under the First Amendment to protect that confidence.²² It is believed that Torre was the first reporter to assert a First Amendment privilege in a civil case.²³

The trial judge hearing Garland’s case rejected Torre’s then-novel claim and held her in criminal contempt.²⁴ On appeal, the United States Court of Appeals for the Second Circuit affirmed, holding that, “[i]f an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.”²⁵

The decision in *Garland* was not surprising, as it was preceded by a number of cases in which courts had rejected reporters’ attempts to avoid providing confidential information to grand juries investigating criminal

15. 225 ILL. COMP. STAT. 450/27 (2006).

16. 735 *id.* 5/8-803 (2006).

17. 225 *id.* 20/16.

18. 735 *id.* 5/8-803.5.

19. S.C. CODE ANN. § 48-57-30 (2005).

20. *Garland v. Torre*, 259 F.2d 545, 547 (2d Cir. 1958).

21. *Id.*

22. *Id.* at 547–48.

23. *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972).

24. *Garland*, 259 F.2d at 547.

25. *Id.* at 549.

matters.²⁶ After *Garland*, almost all other courts facing the issue refused to recognize a constitutional reporter's privilege.²⁷

In 1970, however, the United States Court of Appeals for the Ninth Circuit broke from that precedent. At issue was the government's subpoenaing of Earl Caldwell, "a specialist in the reporting of news concerning the Black Panther Party," to testify before a grand jury investigating possible criminal activity within the party.²⁸ Caldwell asserted a First Amendment privilege against testifying, and the Ninth Circuit embraced it.²⁹ The court stated as follows:

The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference; and that they should be able to protect their investigative processes. To convert news gatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function upon them. To do so where the result is to diminish their future capacity as news gatherers is destructive of their public function.³⁰

Therefore, the court held that Caldwell could not be compelled to testify before the grand jury unless and until the government demonstrated a "compelling need" for his testimony.³¹ The government asked the United States Supreme Court to hear the case, and the Court agreed.

B. *Branzburg v. Hayes*

The Court heard arguments in the case on February 22, 1972.³² The next day, the Court heard arguments in two other cases in which reporters had been subpoenaed to testify before grand juries, *Branzburg v. Hayes* and *In re Pappas*.³³ In *Branzburg*, the Kentucky Court of Appeals refused to recognize a First Amendment reporter's privilege and ordered the reporter to testify before the grand jury.³⁴ In *In re Pappas*, the Supreme Judicial Court of Massachusetts rejected a reporter's reliance on *Caldwell* and ordered the reporter to appear before a state grand jury.³⁵ On June 29, 1972, the Supreme

26. See *Branzburg*, 408 U.S. at 685–86.

27. See *id.* at 686.

28. *Caldwell v. United States*, 434 F.2d 1081–83 (9th Cir. 1970), *rev'd*, 408 U.S. 665 (1972).

29. *Id.* at 1086.

30. *Id.*

31. *Id.* at 1089.

32. *Branzburg*, 408 U.S. at 665.

33. *Id.*

34. *Id.* at 667–68.

35. *Id.* at 674–75.

Court issued a 5-4 decision in which it decided all three cases, affirming the lower court decisions in *Branzburg* and *Pappas* and reversing the Court of Appeals's decision in *Caldwell*.³⁶

Justice White wrote the opinion deciding the cases, an opinion that was joined by Chief Justice Burger and Justices Blackmun, Rehnquist, and Powell.³⁷ While the majority refused to recognize a privilege, it concluded without explanation that "news gathering is not without First Amendment protections" and that reporters must be protected if grand juries attempt to improperly disrupt relationships between reporters and sources.³⁸

The four dissenting Justices—Douglas, Stewart, Brennan, and Marshall—recognized a newsgathering privilege. Justice Douglas interpreted the First Amendment most strongly, declaring that reporters possessed an absolute privilege against revealing confidential information.³⁹ Justices Stewart, Brennan, and Marshall did not recognize an absolute privilege but said the First Amendment entitled news gatherers to protect confidential information unless the government could

- (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law;
- (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.⁴⁰

The portion of the Court's decision that created most of the controversy and confusion that followed, however, was a concurring opinion written by Justice Powell. In his opinion, which many believe reads more like a dissent than a concurrence, Justice Powell recognized a qualified privilege and claimed the majority's decision to require the reporters to testify did not necessarily deprive future news gatherers of First Amendment protection:

If a newsman believes that the grand jury investigation is not being conducted in good faith[,] he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court In short, the courts will be available to newsmen under

36. *Id.* at 708-09.

37. *Id.* at 667.

38. *Branzburg*, 408 U.S. at 707.

39. *Id.* at 711 (Douglas, J., dissenting).

40. *Id.* at 743 (Stewart, J., dissenting).

circumstances where legitimate First Amendment interests require protection.⁴¹

C. The Growing Recognition of a First Amendment Privilege

Whether because or in spite of the decision in *Branzburg*, most of the federal courts subsequently considering the issue began to recognize a First Amendment reporter's privilege, at least in some contexts. Shortly after the decision in *Branzburg*, the United States Court of Appeals for the Eighth Circuit held that *Branzburg* should not be read to prevent the assertion of a privilege in civil cases.⁴² In 1975, the United States Court of Appeals for the Ninth Circuit held that a qualified First Amendment privilege protected confidential sources in criminal cases.⁴³ Two years later, the United States Court of Appeals for the Tenth Circuit held that a filmmaker could assert a First Amendment privilege to protect information he deemed confidential.⁴⁴ During the next twenty years, United States Courts of Appeals in the First, Second, Third, Fourth, Fifth, Eleventh, and District of Columbia Circuits recognized at least a limited, constitutional reporter's privilege.⁴⁵

D. The Rejection of a First Amendment Privilege

Although a few courts after *Branzburg* had refused to recognize a First Amendment reporter's privilege in criminal cases,⁴⁶ that view received widespread attention in 2001 and 2002, when author Vanessa Leggett spent 168 days in jail for refusing to provide tapes of interviews she had conducted to a federal grand jury in Texas. Leggett conducted her interviews

41. *Id.* at 710 (Powell, J., concurring).

42. *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972).

43. *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975).

44. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977).

45. *See, e.g.*, *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (holding that qualified privilege protects disclosure of unpublished information in criminal cases); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986) (holding that qualified privilege protects confidential sources in civil cases); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (holding that qualified privilege protects unpublished information in criminal cases); *United States v. Burke*, 700 F.2d 70, 76–77 (2d Cir. 1983) (same as *LaRouche Campaign*); *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981) (holding that qualified privilege protects confidential sources in civil cases); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (holding that qualified privilege protects confidential sources and unpublished information in criminal cases); *Miller v. Trans-America Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980) (same as *Nat'l Broad. Co.*), *modified on reh'g*, 628 F.2d 932 (5th Cir. 1980).

46. *See, e.g.*, *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *In re Shain*, 978 F.2d 850, 853–54 (4th Cir. 1992); *Storer Commc'ns, Inc. v. Giovan*, 810 F.2d 580, 584–85 (6th Cir. 1987); *Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030, 1049–50 (D.C. Cir. 1978).

over four years in six states for a book she was researching about the murder of socialite Doris Angleton.⁴⁷ Aware of her interviews, Federal Bureau of Investigation agents tried to recruit Leggett to join the investigative team as a paid confidential informant.⁴⁸ When she refused, she was immediately served with her first grand jury subpoena.⁴⁹

After providing non-confidential information to the grand jury in December 2000, Leggett was subpoenaed again six months later, this time to surrender all of her original tape recordings, all copies of those recordings, and all transcripts prepared from those recordings.⁵⁰ Even though she resisted this overly broad subpoena, the Justice Department failed to offer any evidence that it complied with 28 C.F.R. § 50.10, which requires the Department to, among other things, obtain the approval of the United States Attorney General before subpoenaing a reporter.⁵¹ The prosecutor admitted at Leggett's contempt hearing that the subpoena was "unspecific" and that he could not explain why some of the information had been demanded.⁵² Nevertheless, the government was not required to justify the subpoena in any way, and Leggett was found in contempt.⁵³ Unwilling to break her promises of confidentiality, Leggett spent the next 168 days in jail, not being released until the grand jury expired.⁵⁴

In refusing to reverse the trial judge's finding of contempt, the United States Court of Appeals for the Fifth Circuit rejected the notion that anything in *Branzburg* protected Leggett from a grand jury subpoena.⁵⁵ Any reporter's privilege, the court said, was "ineffectual against a grand jury subpoena absent evidence of governmental harassment or oppression."⁵⁶ Because all witnesses are protected against harassment by the Federal Rules of Criminal Procedure,⁵⁷ however, the court essentially refused to recognize any additional protection for reporters.

A little more than a year later, the United States Court of Appeals for the Seventh Circuit issued its decision in *McKevitt v. Pallasch*.⁵⁸ In that

47. Petition for Writ of Certiorari at 3, *Leggett v. United States*, 535 U.S. 1011 (2002) (No. 01-9803).

48. *Id.* at 3-4.

49. *Id.* at 4.

50. *Id.*

51. *Id.* at 5.

52. Petition for Rehearing En Banc at 4, *In re Grand Jury Subpoenas*, No. 01-20745 (5th Cir. Nov. 13, 2001).

53. Writ of Certiorari, *supra* note 47, at 6.

54. Columbia Journalism Review, <http://www.cjr.org/issues/2002/2/qa-leggett.aps> (last visited Dec. 9, 2006).

55. *In re Grand Jury Subpoenas*, No. 01-20745, slip op. at 6 (5th Cir. Aug. 17, 2001).

56. *Id.*

57. FED. R. CRIM. P. 17(c).

58. 339 F.3d 530 (7th Cir. 2003).

case, Michael McKevitt, an alleged Irish Republican Army activist being tried in Ireland for directing terrorism and belonging to a banned organization, asked an Illinois district court to compel journalists writing a book about one of the witnesses against him to turn over tapes of several interviews they conducted during their research.⁵⁹ The authors refused, claiming *Branzburg* protected their unpublished material from disclosure.⁶⁰ After the trial court rejected the journalists' claims, the writers appealed to the Seventh Circuit.⁶¹

In affirming the trial court, influential Judge Richard Posner started with *Branzburg*, which he concluded did not recognize a First Amendment reporter's privilege.⁶² He then chipped away at the decisions of the courts of appeals that had recognized a privilege. Some of those cases, he said, "essentially ignore" *Branzburg*.⁶³ Others, he claimed, misread the case.⁶⁴ And, still others, he complained, "audaciously declare that *Branzburg* actually created a reporter's privilege."⁶⁵ All of these decisions, Posner concluded, "can certainly be questioned."⁶⁶

Even more dubious, Posner said, were the decisions from the four courts of appeals that allowed news gatherers to protect nonconfidential, unpublished information from disclosure.⁶⁷ Because the court in *Branzburg* dealt only with confidential sources, he wrote, the courts extending *Branzburg* to nonconfidential information "may be skating on thin ice."⁶⁸

Unable to overrule these courts, Posner ignored them. Despite the fact that all of the justices in *Branzburg* had agreed that newsgathering was entitled to at least some First Amendment protection, Judge Posner concluded otherwise: "We do not see why there needs to be special criteria merely because the possessor of the documents or other evidence sought is a journalist."⁶⁹ Moreover, he said, in cases involving only unpublished material and not confidential sources, "it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure."⁷⁰ Posner said that the only reason these writers wanted to protect their unpublished information was to protect their material's marketability and profitability.⁷¹

59. *Id.* at 531.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 532.

64. *McKevitt*, 339 F.3d at 532.

65. *Id.*

66. *Id.*

67. *See id.* at 533.

68. *Id.*

69. *Id.*

70. *McKevitt*, 339 F.3d at 533.

71. *Id.*

On the heels of the decision in *McKevitt* came the well-publicized case involving reporters Judith Miller and Matthew Cooper.⁷² In resisting subpoenas served by Special Counsel Patrick Fitzgerald in a grand jury proceeding involving allegations that government officials improperly disclosed the identity of a Central Intelligence Agency operative, the reporters asserted the First Amendment privilege they said was recognized in *Branzburg*.⁷³ In rejecting the reporters' argument, the United States Court of Appeals for the District of Columbia Circuit could not have been more hostile toward them.

In *Branzburg*, the court said, "the Highest Court considered and rejected the same claim of First Amendment privilege on facts materially indistinguishable from those at bar."⁷⁴ According to the appellate court, the Supreme Court rejected the privilege "in no uncertain terms" and in reasoning "transparent and forceful."⁷⁵ "Unquestionably," the circuit court concluded,

the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury[,] regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.⁷⁶

Facing imprisonment, Miller and Cooper offered "the Highest Court" the opportunity to revisit the question.⁷⁷ The Court declined that opportunity,⁷⁸ saying nothing, but leaving many with the impression that the circuit court's analysis of *Branzburg* and its rejection of a First Amendment privilege, indeed, is the end of the matter.

E. The First Amendment Privilege Today

After the decision in the Miller and Cooper case, reliance on *Branzburg* for a reporter's constitutional privilege is problematic at best, especially in criminal cases. Yet, hope still remains for reporters. Less than five months after deciding *Miller*, the District of Columbia Circuit considered the privilege in a civil case brought by Dr. Wen Ho Lee, the Department of Energy

72. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *reh'g en banc denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied*, 125 U.S. 2977 (2005).

73. *Id.* at 965.

74. *Id.* at 968.

75. *Id.* at 969–70.

76. *Id.* at 970.

77. *See generally In re Grand Jury Subpoena*, Judith Miller, 125 S. Ct. 2977 (2005).

78. *Id.*

scientist accused of espionage in 1999. The court's decision was written by Judge David Sentelle, the same judge who wrote its opinion in *Miller*, but Sentelle, in this case, was more generous in describing *Branzburg*, saying, "[n]ot only the breadth of this claimed privilege, but its very existence has long been the subject of substantial controversy."⁷⁹ The court then held that, despite this controversy, a reporter can assert a qualified, constitutional privilege in a civil case, one that can be overcome only if the litigant can demonstrate that the information sought goes to "the heart of the matter" and that he has exhausted "every reasonable alternative source of information."⁸⁰

Also encouraging for reporters is the decision in *New York Times Co. v. Gonzales*, a grand jury case in which a New York federal trial court refused to follow *Miller* and, instead, followed prior Second Circuit precedent recognizing a First Amendment privilege.⁸¹ The court in *Gonzales* also recognized a qualified common law privilege that protects reporters from being required to reveal confidential sources, which the court said applied in all cases, including grand jury proceedings.⁸² To overcome this common law privilege, the court said that the government must show that the identity of the source is "highly material and relevant" to the proceeding, "necessary or critical" to the claim or issue, and not obtainable from other sources.⁸³

Thus, a constitutional reporter's privilege, whether recognized in *Branzburg* or simply rooted in the First Amendment, is alive, in at least some places and in at least some contexts. At best, however, it has been weakened significantly, and one hardly can be optimistic about its prognosis.

IV. ON THE FRONT LINES IN THE BATTLES OVER THE PRIVILEGE

While much of the law relating to *Branzburg* and the reporter's privilege is made in appellate courts across the country, the front lines in these battles are in local trial courts and newsrooms. Trial judges, after all, hear the evidence and arguments, determine the relevancy and importance of requested information, and create the records from which appeals are encouraged or discouraged. Trial judges, of course, also imprison reporters who refuse to comply with orders to identify confidential sources or turn over other unpublished information.

79. *Lee v. Dep't of Justice*, 413 F.3d 53, 57 (D.C. Cir. 2005), *reh'g en banc denied*, 428 F.3d 299 (D.C. Cir. 2005).

80. *Id.* at 59 (quoting *Carey v. Hume*, 492 F.2d 631, 636, 638 (D.C. Cir. 1974)).

81. *N.Y. Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 484–90 (S.D.N.Y. 2005).

82. *Id.* at 494–508.

83. *Id.* at 510 (quoting *In re Petroleum Prods.*, 680 F.2d 5, 7 (2d Cir. 1982)).

Newsrooms, however, are becoming increasingly important battlegrounds over the privilege as well. Editors and even publishers now weigh promises of confidentiality. Media companies claim ownership of subpoenaed notes and video outtakes. Commentators, analysts, and bloggers dissect newsroom decisions to honor or challenge subpoenas. This battle is important because the manner in which newsrooms act and are perceived to act significantly influences judicial and public support for the privilege.

A. The Importance of a Constitutional Privilege

Battles over the privilege typically begin when a reporter receives a subpoena. At that point, the lawyer representing the reporter must first determine what protections are available. This inquiry almost always starts with the extent to which the reporter can claim a constitutional privilege. As battered as it might be, if a constitutional privilege is found to exist, it can serve as a strong shield against compelled disclosure of confidential or unpublished information. Indeed, in cases governed by federal law or in cases in which no state shield law applies, the constitutional privilege might be the only shield available. Even when a state shield law applies, however, the coexistence of a constitutional privilege often increases the seriousness with which the judge approaches the issue. The constitutional privilege also makes relevant scores of federal district and appellate court decisions that a trial judge otherwise might not consider.

Also, a constitutional privilege is important in those cases in which reporting crosses state lines and other legal boundaries. While the federal courts are hardly consistent in recognizing a constitutional privilege, those inconsistencies in many cases are more manageable than attempting to determine, for example, which state's shield law governs a New York reporter interviewing a source in Texas or an Arkansas reporter who receives an e-mail from a confidential source in California.

B. The Federal Common Law Privilege

Additionally, in some cases, a reporter might be able to utilize a second federal shield: a federal common law privilege against testifying. Essentially, the federal courts recognizing this privilege have found that—whatever protections *Branzburg* might or might not offer—the strong public policy supporting the free flow of information requires that reporters be provided with a qualified privilege to protect the identity of their confidential sources.⁸⁴ This qualified privilege requires the entity seeking the identity of the source to “make a clear and specific showing” that the identity is “highly

84. See *id.* at 495–508.

material and relevant” to the proceeding, “necessary or critical” to maintaining the claim within the proceeding, and “not obtainable from other available sources.”⁸⁵

Not all federal courts have recognized this privilege, however, and the District of Columbia Circuit panel in *Miller* recently split over its existence.⁸⁶ Moreover, even when recognized, its applicability is limited to cases governed by the federal rules of procedure, and its protections extend only to the identities of confidential sources and not to other confidential or unpublished information.⁸⁷

C. The Importance and Limits of State Privileges

In light of the uncertainties surrounding the existence and extent of the constitutional and common law privileges, an applicable state privilege in many cases will be a reporter’s best protection against compelled disclosure. As described and identified by the court in *Gonzales*, thirty-one states and the District of Columbia have adopted statutory shield laws offering varying degrees of protection for reporters; six states have provided such protection in their constitutions, and courts in seventeen of the remaining nineteen states have recognized a reporter’s privilege.⁸⁸ Only Wyoming and Hawaii have not recognized at least some privilege.⁸⁹

Unfortunately, it is difficult to make generalizations concerning these state protections. State statutory and common law privileges differ regarding who may assert the privilege, whether the privilege can be asserted in both civil and criminal cases, whether the privilege protects only confidential sources or all unpublished information, and whether the privilege is absolute or qualified.⁹⁰

D. Privilege Battles in Trial Courts

1. *How Subpoena Battles Arise*

How a privilege battle unfolds in a trial court depends both upon the privileges available and the context in which the subpoena arises. The most

85. *Id.* at 510 (quoting *In re Petroleum Prods.*, 680 F.2d at 7) (internal quotations omitted).

86. *In re Grand Jury Subpoena*, Judith Miller, 397 F.2d 964, 972–73, 976–81 (Sentelle, J., concurring), 982–86 (Henderson, J., concurring), 986–1001 (Tatel, J., concurring in judgment) (D.C. Cir. 2005).

87. *N.Y. Times Co.*, 382 F. Supp. 2d at 495–508.

88. *Id.* at 502–04.

89. *Id.* at 503.

90. See Reporters Comm. for Freedom of the Press, <http://www.rcfp.org/privilege/index.html> (last visited Oct. 7, 2006) (summarizing each state’s privilege laws).

sinister and intrusive subpoenas are issued during grand jury or other criminal investigations and demand that reporters identify confidential sources. Reporters, of course, resist these subpoenas vigorously, in part to protect the source to whom they promised confidentiality and in part to demonstrate to future sources that they will honor confidentiality promises. In these cases, reporters almost always argue that important news gathering will be chilled if they are unable to make and maintain promises of confidentiality.

In other cases, subpoenas seek unpublished information, such as video outtakes, unpublished photos, reporters' notes, and recorded interviews. These requests arise in both criminal and civil cases and usually are driven by lawyers' desires to gain additional information about crime or accident scenes or about what parties or witnesses said to reporters. In these cases, reporters often argue that the subpoenas threaten the integrity of their news gathering, interfere with their ability to gather news, and improperly transform them into investigative arms of law enforcement or agents of civil discovery.

In some cases, subpoenas seek only copies of published photographs or television reports or testimony authenticating information in a news story or article. Most media entities do not resist these subpoenas and, instead, agree to provide copies of photographs and video reports for a reasonable cost and to authenticate published material by affidavit.

2. *How Trial Courts Approach and Apply the Reporter's Privilege*

Whether considering the constitutional privilege, a common law privilege, a shield law, or a combination of these protections, a trial judge first should determine whether the subpoena was brought in good faith or whether it, instead, was brought to harass the reporter or to interfere with the reporter's news gathering. Protection from improperly motivated subpoenas was recognized in *Branzburg*,⁹¹ is incorporated into the Federal Rules of Civil and Criminal Procedure,⁹² and was even considered appropriate by Judge Posner in *McKevitt*.⁹³ Still, however, some courts conclude that bad faith by itself is insufficient to block a subpoena. Rather, they say, bad faith only triggers application of the qualified privilege's balancing test.⁹⁴ This approach cannot be correct, because under the federal rules a finding of bad

91. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972); *id.* at 710 (Powell, J., concurring).

92. FED. R. CIV. P. 45(c)(3)(A)(iv); FED. R. CRIM. P. 17(c)(2).

93. *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

94. See, e.g., *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 29 (D.D.C. 2004) ("[T]he balancing test Justice Powell refers to should only be undertaken when a reporter is asked to testify before a grand jury 'without a legitimate need of law enforcement.'"), *aff'd on other grounds*, 397 F.3d 964 (D.C. Cir. 2005).

faith requires that a subpoena be quashed, without resort to a balancing or any other test.⁹⁵

Once a court determines that a subpoena has not been brought for an improper purpose, it typically applies some version of the three-part test initially expressed in Justice Stewart's dissent in *Branzburg*⁹⁶ and subsequently incorporated in some form in most states' qualified reporter's privileges. Application of these tests, however, is hardly uniform and often appears driven by the result the trial judge desires.

In many cases, for example, how courts apply the three-part test appears to depend upon their views as to whether the reporter's privilege serves an important public policy. In *In re Special Proceedings*,⁹⁷ the court was asked to compel an investigative reporter for a Rhode Island television station to identify the person who provided him with a videotape of a public official purportedly accepting a bribe.⁹⁸ The tape, which was to be evidence in a corruption trial, was subject to a court order prohibiting persons with access to it from providing it to third parties.⁹⁹ After the reporter received and aired the tape, the judge who entered the order appointed a special prosecutor to determine whether charges for criminal contempt should be brought against the person who released the tape.¹⁰⁰

Not surprisingly, the trial judge appeared determined to prevent the reporter's privilege from denying the prosecutor access to the name of the person who defied the judge's order. Initially, the judge expressed doubt that the case even came within the Rhode Island shield law, which does not protect sources of information concerning secret grand jury proceedings.¹⁰¹ Although the tape was viewed only as evidence by the grand jury, the judge easily concluded that the tape was a source of information as to what had transpired before the grand jury.¹⁰² The judge then stated that, even if the shield law applied, it could not "trump the strong federal interest in enforcing court orders [and] preserving grand jury secrecy."¹⁰³ Finally, the judge dismissed the notion that requiring disclosure of the source's identity would burden the free flow of information, amazingly stating that "[w]ithout having an opportunity to question the source and without knowing the source's reasons for desiring confidentiality, it is difficult to determine whether the

95. See, e.g., FED. R. CIV. P. 45(c)(3)(A)(iv); FED. R. CRIM. P. 17(c).

96. *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting).

97. 291 F. Supp. 2d 44 (D.R.I. 2003).

98. *Id.* at 46.

99. *Id.*

100. *Id.* at 47.

101. *Id.* at 56 (citing R.I. GEN. LAWS § 9-19.1-3(b)(2)).

102. *Id.*

103. *In re Special Proceedings*, 291 F. Supp. 2d at 56.

source would have provided the tape, either directly or covertly, even in the absence of" an assurance of confidentiality.¹⁰⁴

With this mindset, it is no wonder the judge concluded that the special prosecutor had overcome the privilege.¹⁰⁵ Indeed, in reaching that conclusion, the judge minimized the steps the prosecutor needed to take to demonstrate that the information was not available from other sources.¹⁰⁶ The judge wrote the following:

Requiring the investigating authority in a criminal case to prove that it has exhausted all other means for obtaining relevant information before it can seek that information from a journalist would create serious problems and risks. It would present practical difficulties in determining the point at which alternative sources have been exhausted and whether the evidence available from those sources is as probative as the information in the journalist's possession. Such a requirement also would threaten to compromise the investigation because disclosing the efforts made to otherwise obtain the information could alert potential targets of the investigation thereby enabling them to flee, destroy evidence, and/or attempt to influence witnesses. Finally, as this case aptly illustrates, such a requirement would delay the investigation by forcing the investigating authority to by-pass the most direct evidence available and begin its investigation by eliminating all possible alternative[,] and[] probably less reliable, sources for obtaining that evidence.¹⁰⁷

In another recent case, *United States v. Hale*,¹⁰⁸ a trial judge similarly unimpressed with the reporter's privilege had little difficulty overcoming it.¹⁰⁹ In this case, the government was prosecuting infamous white supremacist Matthew Hale for, among other things, obstruction of justice.¹¹⁰ In its obstruction of justice charge, the government alleged that Hale had influenced his father to testify falsely to a grand jury that Hale had discontinued a CNN interview after starting to cry in reaction to a murder committed by a Hale follower.¹¹¹ Although the government had already received a statement from the CNN producer present during the interview and a copy of the videotape, it sought to subpoena reporter Jeff Flock to testify as to Hale's demeanor.¹¹²

104. *Id.* at 59.

105. *Id.*

106. *See id.* at 58.

107. *Id.*

108. 32 MEDIA L. RPTR. 1606 (N.D. Ind. 2004).

109. *Id.* at 1607-08.

110. *Id.* at 1607.

111. *Id.*

112. *Id.*

Flock asserted a First Amendment privilege under *Branzburg* and argued that his testimony was unnecessary in light of the fact that the government already had the producer's statement and the videotape.¹¹³ While purporting to be "mindful that the press serves an important and necessary function in society," the court, citing *McKevitt* and *Branzburg*, found Flock's privilege arguments unpersuasive.¹¹⁴ Recognizing that the producer could testify to the same facts as Flock and conceding Flock's testimony was not the "lynchpin" of the case against Hale, the court nevertheless ordered Flock to testify, reasoning that, in many cases, numerous witnesses are "called to testify as to the same facts."¹¹⁵

When motivated to do so, trial courts can overcome even absolute privileges. In *Svoboda v. Clear Channel Communications, Inc.*,¹¹⁶ for example, an Ohio trial court judge hearing a defamation action was faced with a radio talk show host and news director who claimed Ohio's shield law absolutely protected her from being compelled to disclose a confidential source.¹¹⁷ The statements at issue involved accusations that the plaintiff, a reporter for a Toledo newspaper, was romantically involved with the newspaper's co-publisher and that she was slanting her articles in accordance with his views.¹¹⁸ During discovery in the case, the news director testified that she based the accusations on information from a confidential source who had provided information to her on other occasions.¹¹⁹ The news director testified that she received the information when the source telephoned her several weeks before she made the statement on the air.¹²⁰

Obviously offended by the broadcast and stymied by the shield law's absolute privilege, the trial judge parsed the statute's definitions to conclude that the news director did not "procure[] or obtain[]" the "information" from a "source" while "in the course" of her employment.¹²¹ First, the judge held that the news director was not acting in a news-related capacity when she spoke with her source because the news director received the information passively and did not, despite knowing the source did not have first-hand knowledge of the alleged relationship, ask the source the basis of the source's information.¹²² Second, the court found that because the source did not have first-hand knowledge of the relationship, he or she did not qualify

113. *Id.* at 1608.

114. *Hale*, 32 MEDIA L. RPTR. at 1608.

115. *Id.* at 1607.

116. 805 N.E.2d 559 (Ohio Ct. App. 2004).

117. *Id.* at 560–61.

118. *Id.* at 560.

119. *Id.* at 560–61.

120. *Id.* at 560.

121. *Id.* at 562–67.

122. *Svoboda*, 805 N.E.2d at 566.

as a "source" under the shield law.¹²³ Finally, the court ruled that the news director was not gathering news at the time she spoke with the source because she did not ask investigatory questions, did not take notes, did not initially consider the information newsworthy, and did not broadcast the information during a news segment.¹²⁴ Despite the fact that these rulings thrust the trial judge into matters of editorial and reportorial discretion in which courts generally do not wade,¹²⁵ the Ohio Court of Appeals affirmed.¹²⁶

Of course, personal views as to the importance of the reporter's privilege do not influence only those who find ways to overcome the privilege. The judge's respect for the public policy advanced by the privilege in *State v. Peterson*,¹²⁷ for example, undoubtedly influenced his finding that, despite the fact that the reporters at issue would be the best sources as to whether police employees lied when they testified they had not spoken to the reporters, "the mere possibility of finding evidence that the officers did not testify truthfully about their contacts with the news media does not warrant requiring the reporters to disclose their confidential sources."¹²⁸ Likewise, an Alabama trial judge favorably cited *Branzburg* and other cases recognizing the privilege when he held that even though a reporter's testimony about a known source's statements was relevant and unavailable from other sources, the testimony could not be compelled because the information was desired only to attack the credibility of a witness, an issue the judge said was "tangential."¹²⁹

Personal views can also induce a trial judge to imaginatively avoid contrary precedent. In *Hobley v. Burge*,¹³⁰ an Illinois federal court judge bound to follow *McKevitt* nevertheless found a way to quash a subpoena directed at a reporter's notes of meetings with a non-confidential source.¹³¹ Although the material at issue in *McKevitt* was unpublished tape recordings and although Judge Posner in *McKevitt* obviously had intended to destroy

123. *Id.*

124. *Id.* at 565–67.

125. *See, e.g.,* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.").

126. *Svoboda*, 805 N.E.2d at 568.

127. *State v. Peterson*, 31 MEDIA L. RPTR. 2501 (Sup. Ct. Durham County 2003).

128. *Id.* at 2504.

129. *Cowan v. Cmty. Home Banc Inc.*, 31 MEDIA L. RPTR. 2498, 2501 (Ala. Cir. Ct. 2003).

130. 223 F.R.D. 499 (N.D. Ill. 2004).

131. *See id.* at 505.

the constitutional reporter's privilege, the judge in *Hobley* distinguished *McKevitt* on the bases that *McKevitt* involved tape recordings, not notes, and that *Hobley* involved notes that resembled trade secrets.¹³² The court thus concluded that notes subpoenaed as part of a "fishing expedition for something that might be helpful" were protected, as disclosure would pose an "unwarranted intrusion" into the reporter's work.¹³³

3. *Baby April Whiteside and America's Most Wanted*

My own experiences before trial judges reinforce my belief that privilege decisions are often result-oriented. In one case, an unidentified baby was found dead along a canal in Whiteside County, Illinois. The client, a journalist for the local newspaper, covered the story extensively and named the child "Baby April Whiteside." Eventually, the baby was identified, and her mother was charged with abandoning the child. The mother's attorney then sought my client's notes of an interview with the baby's father, who defense counsel claimed actually was responsible for the baby's death. These notes, defense counsel argued, might assist him in impeaching the father when he testified.

The Illinois shield law protects unpublished notes, and defense counsel could not establish either of the prongs of the two-part test under Illinois's shield law: that the disclosure of the information was essential to the protection of a public interest or that all other available sources for the information had been exhausted. Because the father had not yet testified, defense counsel could not show that any part of the interview was relevant to or necessary for any impeachment, much less that the contemplated impeachment would be more than tangential to the case. Moreover, because the father's testimony was not yet known, any claim my client was the only source for the impeaching evidence was entirely speculative.

Nevertheless, the trial judge refused to quash the subpoena, holding that the reporter was the only source for the unpublished notes and that these notes might be relevant if the father testified. To his credit, the judge appeared to realize he was not correctly applying the Illinois shield law. In the circumstances before him, however, he said he needed to balance the potentially significant harm to the defendant if she were not able to fully impeach prosecution witnesses against the relatively little harm—as he saw it—in requiring the reporter to produce a few pages of notes of an interview with a non-confidential source.

Faced with the unpleasant options of pursuing an expensive appeal or sacrificing its principles, my client chose neither. Instead, my client pub-

132. *Id.* at 502–03.

133. *Id.* at 505.

lished the entire interview, verbatim, so that the material being provided to the defense counsel would already have been shared with the client's readers.

In a similar case, a trial judge in Henderson County, Illinois, reached a similar result. In *People v. Boyd*,¹³⁴ a reporter for "America's Most Wanted" interviewed a child who was the only witness to the gruesome murder of his father.¹³⁵ After portions of the interview were broadcast, the attorney defending the man charged with the murder subpoenaed the unpublished portions of the interview and the reporter's notes on the theory they might assist him in cross-examining the child.¹³⁶ The reporter resisted, claiming privileges under the First Amendment, the Illinois shield law, and the shield law of the District of Columbia, where he lived and worked.¹³⁷ Of particular relevance in the case was the fact that defense counsel had been able to examine the child under oath twice, both times after the "America's Most Wanted" episode had been broadcast.¹³⁸

Even after reviewing the materials in camera and concluding that they did not contain much, if anything, of significance, the judge refused to quash the subpoena.¹³⁹ In rendering his ruling, he expressed appreciation for the quality of the briefs and the argument and, looking at me, said he fully understood the constitutional and other aspects of my argument. "But counsel," he asked almost pleadingly, "do you and your client understand that I have before me a man facing the death penalty?"

E. Privilege Battles in Newsrooms

1. *Is Reporting Really Chilled?*

Against interests like these and a variety of other interests of parties involved in judicial proceedings, judges must balance the interests being asserted by the reporter. Since the days when a reporter's privilege was first claimed, journalists have argued that the absence of a privilege chills news-gathering by discouraging sources who believe they require confidentiality before providing important information to reporters.¹⁴⁰ In 1979, the United States Court of Appeals for the Third Circuit agreed:

134. No. 01 CF 31 (Henderson County, Ill. 2001).

135. Memorandum in Support of Motion to Stay at 2-3, *People v. Boyd*, No. 01 CF 31 (Henderson County, Ill. May 17, 2002).

136. *Id.* at 4.

137. *Id.* at 6.

138. *Id.* at 3.

139. *Id.* at 6-7.

140. *Branzburg v. Hayes*, 408 U.S. 665, 693-94 (1972).

The interrelationship between newsgathering, news dissemination[,] and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources [he or she] must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern to the public.¹⁴¹

Time Inc. Editor in Chief Norman Pearlstine echoed that sentiment in testimony to the Judiciary Committee of the United States Senate in 2005, when he said that recent stories in *Time* concerning suicide bombings in Iraq, the treatment of a detainee at Guantanamo, and the vulnerability of nuclear plants to terrorist attack could not have been published without information from confidential sources.¹⁴² Pearlstine testified that after *Time* decided to comply with the subpoena in the *Cooper* case, many of the magazine's "valuable sources" said they would no longer cooperate on stories.¹⁴³ He concluded that "[t]he chilling effect is obvious."¹⁴⁴

As Pearlstine also noted during his testimony, however, news organizations in recent decades have successfully relied on confidential sources to expose the Watergate burglary and coverup, probe the controversy that led to President Clinton's impeachment, and reveal the Enron and Abu Ghraib scandals.¹⁴⁵ Yet all of this reporting, including the 2005 *Time* reporting Pearlstine lauded, was performed in a legal and journalistic environment without a clear reporter's privilege—an environment Pearlstine described as marked by "extraordinary chaos," "utter disarray," and "confusion by sources and reporters."¹⁴⁶

These logical inconsistencies in the "chilling effect" argument were identified by the Court in *Branzburg* and have been relied on by other courts to downplay the importance of the reporter's privilege. In *Branzburg*, Justice White explored the argument in detail:

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for

141. *Riley v. Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (internal citations omitted).

142. *Reporters' Shield Legislation: Issues and Implications Before the S. Comm. on the Judiciary*, 109th Cong. 11 (2005) (statement of Norman Pearlstine, Editor in Chief, Time, Inc.) [hereinafter Pearlstine Testimony].

143. *Id.*

144. *Id.* at 12.

145. *Id.* at 9.

146. *Id.* at 2–3.

press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.¹⁴⁷

Justice White said that the chilling effect argument was further weakened by the fact that the privilege advocated was qualified, not absolute.¹⁴⁸ He stated the following:

Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. . . . If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.¹⁴⁹

A similar conclusion was reached by a federal trial court in Rhode Island in 2003:

By definition, such a conditional privilege provides no guarantee of confidentiality because it may be overridden when a court determines that it is outweighed by the need for disclosure. If [the reporter] informed his source of that fact, the source could not have had any justifiable expectation of anonymity. If [the reporter] failed to inform his source of that fact, such failure cannot serve as a basis for refusing to furnish the requested information.¹⁵⁰

This skepticism about whether the lack of a qualified privilege chills reporting—as far as it goes—is probably well placed. This skepticism, however, ignores a source's ultimate and absolute protection: the willingness of the reporter to go to jail in order to protect the reporter's promise of confidentiality. Thus, what occurs in the newsroom is vital to understanding how to protect the free flow of information.

2. *Journalism Ethics and Confidential Sources*

Whether to refuse a court order to name a confidential source or to protect other unpublished information is a question deeply and seriously considered by reporters, editors, and publishers. Some news gatherers, like reporter Judith Miller and book author Vanessa Leggett, are willing to spend months in jail to protect their sources. Others, like *Time*'s Matthew Cooper, are fortunate enough to receive last-minute releases of confidentiality from

147. *Branzburg v. Hayes*, 408 U.S. 665, 698–99 (1972).

148. *Id.* at 702.

149. *Id.*

150. *In re Special Proceedings*, 291 F. Supp. 2d 44, 55–56 (D.R.I. 2003).

their sources.¹⁵¹ And some, like *Time* itself, reluctantly decide to comply with court orders when no other appeal or legal relief is available.¹⁵² While these decisions presumably could be driven by fears of lawsuits by revealed sources who had been promised confidentiality, they appear instead, in almost every case, to be based on journalism ethics.

As unsettled as the law is concerning the reporter's privilege, the state of ethical standards in journalism might be even more confusing. Various media companies and professional associations have their own ethical guidelines, but no uniform industry standard is accepted or enforced outside the company or association. Like reporters wondering about the applicability of multiple states' shield laws, thoughtful sources surely must wonder about the variety of ethical standards governing the reporters in whom they confide.

How long, for example, will the reporter keep his or her notes? For that matter, are the notes owned by the reporter or, as *Time* asserted with Cooper's notes, the company? Are e-mails between sources and reporters regularly backed up and archived? Who inside or outside the company has access to them? To whom within the company has the reporter been required to provide the source's name? Are the recipients of that information bound by the reporter's promise of confidentiality? Under what circumstances will the reporter reveal the source's name? Are there circumstances in which the promise of confidentiality might be dissolved entirely?

No consistent answers to these questions exist. Some reporters and news companies have written policies regarding the destruction of notes and e-mails; others do not. Some newspapers, like the *San Jose Mercury News*, require reporters to provide their editors with the names, backgrounds, and motives of all confidential sources.¹⁵³ Others, like the *Los Angeles Times*, require an editor to pre-approve promises of confidentiality.¹⁵⁴ In cases "of exceptionally sensitive reporting, on crucial issues of law or national security in which sources face dire consequences if exposed," *The New York Times* allows the executive editor to approve a source's promise of "total confidentiality," that is, confidentiality even from lower-ranking editors.¹⁵⁵

151. See Pearlstine Testimony, *supra* note 142, at 8.

152. See *id.*

153. San Jose Mercury News, available at <http://www.mercurynews.com> (last visited Oct. 7, 2006) (follow "Ethics Policy" hyperlink).

154. American Society of Newspaper Editors, available at <http://www.asne.org/ideas/codes/losangelestimes.html> (last visited Oct. 7, 2006) (follow "Archives" and "Codes of Ethics" hyperlinks) [hereinafter ASNE].

155. The New York Times Co., *Confidential News Sources*, available at <http://www.nytimes.com/company-properties-times-sources.html> (last visited Oct. 7, 2006) [hereinafter New York Times].

Many media companies strive to clarify the relationship between reporter and source as much as possible. *The New York Times*, for example, states that when confidentiality is granted, "it should be the subject of energetic negotiation to arrive at phrasing that will tell the reader as much as possible about the placement and motivation of the source."¹⁵⁶ The ethics policy of the *Denver Post* similarly provides that, "[i]n granting confidentiality, the reporter must reach a clear understanding with the source, after consultation with an editor, about how the information and attribution will be presented in the story."¹⁵⁷ The *Post* also seeks an understanding about "what the source's reaction would be if a court orders the newspaper and/or the reporter to divulge its source of information."¹⁵⁸ That reaction, the *Post* says, "might determine whether certain sensitive information is published."¹⁵⁹ The *Miami Herald*, like many newspapers, believes "confidentiality is granted on behalf of the newspaper, not an individual" reporter.¹⁶⁰ If, however, a source "knowingly gives false information for publication, the commitment to confidentiality dissolves."¹⁶¹

3. *Public Policy and Confidential Sources*

One thing most "mainstream" media companies agree on is that promises of confidentiality should not be cavalierly made.¹⁶² The clarity of their statements to this effect and the availability of these statements to the public appear designed to renew public confidence in reporting that utilizes confidential sources and in the reliability of those sources. Renewing this confidence is a necessary first step in building public and judicial support for a reporter's privilege, whether that privilege be recognized in a federal or state constitution, federal or state common law, or a shield statute.

The importance of this public support cannot be underestimated. Despite the challenges of and logical weaknesses within a qualified reporter's

156. *Id.* (emphasis omitted).

157. Denver Post, *The Denver Post Ethics Policy*, available at <http://www.denverpost.com/ethics> (last visited Oct. 7, 2006) [hereinafter Denver Post].

158. *Id.*

159. *Id.*

160. Miami Herald, *Miami Herald Ethics Guidelines*, available at http://www.miami.com/mld/miamiherald/contact_us/about/9057200.html (last visited Oct. 7, 2006) [hereinafter Miami Herald].

161. *Id.*

162. See, e.g., Miami Herald, *supra* note 160 (stating that anonymous sources should be used only in "exceptional cases"); Denver Post, *supra* note 157 ("Anonymous sources are a last resort."); ASNE, *supra* note 154 ("We stand against" practice of routinely granting anonymity "and seek to minimize it."); New York Times, *supra* note 155 ("The use of unidentified sources is reserved for situations in which the newspaper could not otherwise print information it considers reliable and newsworthy.").

privilege, a strong privilege is necessary to encourage the types of investigative reporting we need to effectively govern ourselves. Without a strong privilege, the chilling effect of the most concern is not the one we hear the most about—the reluctance of sources to speak to reporters—but rather the reluctance of reporters to speak to sources. After all, the weaker and more undependable the privilege becomes, the higher the risk that a promise of confidentiality will place the journalist in a position in which the journalist will have to choose between breaking a confidentiality pledge or going to jail. The higher this risk becomes, the more reluctant reporters will be to take it. And, the more hesitant reporters become about using confidential sources, the more the free flow of information to the public will be restricted.

V. CONCLUSION: THE FUTURE OF THE REPORTER'S PRIVILEGE

The future of the reporter's privilege is difficult to predict. Most likely, however, that future will not be shaped by broad legal pronouncements from the United States Supreme Court or by national legislation, but rather by the ability of reporters, editors, station managers, publishers, readers, viewers, and their advocates to influence the ongoing public policy debate concerning the desirability of the privilege. Given the subjectivity involved in applying even the strongest constitutional, common law, or statutory qualified privilege, the public policy biases each judge brings to each subpoena ultimately determine how freely information flows to the public. The surest and best way to maximize this freedom is not to analyze and re-analyze *Branzburg* and its progeny, but rather to persuade judges—and the public they ultimately serve—that a strong reporter's privilege is necessary to protect a flow of information that is vital to an informed and meaningful democracy.

