



2006

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Recommended Citation

Susan Webber Wright, *A Trial Judge's Ruminations on the Reporter's Privilege*, 29 U. ARK. LITTLE ROCK L. REV. 103 (2006).

Available at: <https://lawrepository.ualr.edu/lawreview/vol29/iss1/5>

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A TRIAL JUDGE'S RUMINATIONS ON THE REPORTER'S PRIVILEGE

*Susan Webber Wright**

I once heard an experienced judge tell a group of lawyers something to this effect: "If anyone is going to jail, make sure it is your client, not you."

In recent months the press has focused on the matter of a reporter's privilege or a reporter's qualified privilege to refuse to give testimony in court,¹ and reporters have gone to jail for refusal to testify. Even though this is not a new issue, it has gained prominence lately because of recent well-publicized events that include a federal grand jury indictment of an aide to the Vice President of the United States and a reporter's refusal to testify or hand over her notes. Congress is considering enacting a law that would insulate news reporters from compelled testimony,² and a number of state legislatures have enacted similar laws.³

From the perspective of a trial court judge, I will take a look at the reporter's privilege or qualified privilege by comparing it with other privileges established by common law or legislative enactment. I will focus on what interest or interests testimonial privileges protect and on limitations courts have placed on such privileges. Next I will examine the principles recited in *Branzburg v. Hayes*⁴ and the First Amendment interests that reporters have sought to protect in decisions issued after *Branzburg*, many of which recognize what is called a "qualified privilege." Finally, I conclude that any testimonial privilege extended to news reporters should be statutory and should be limited to civil cases for the protection of confidential sources who are not revealing confidential information in violation of law or court order.

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1. The issue of protecting confidential sources dates at least to colonial times. See Kara A. Larsen, Note, *The Demise of the First Amendment-Based Reporter's Privilege: Why This Current Trend Should Not Surprise the Media*, 37 CONN. L. REV. 1235, 1238 (2005).

2. See Free Flow of Information Act, S. 1419, 109th Cong. (1st Sess. 2005).

3. See Jeffrey S. Nestler, Note, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 225 n.120 (2005) (listing thirty-two state reporter's privilege statutes).

4. 408 U.S. 665 (1972).

I. PRIVILEGES AS EXCLUSIONARY RULES OF EVIDENCE

I believe that judges are acutely aware that privileges keep evidence from the finder of fact. The evidence excluded by privilege might be very trustworthy and highly relevant. Privileges "are in derogation of the search for the truth."⁵ Almost all other rules that exclude evidence do so because the evidence is either irrelevant or untrustworthy.⁶ The most obvious examples of such rules are the rules excluding hearsay because hearsay by definition is untrustworthy and cannot be cross-examined. But, privileges protect interests that are so important that they outweigh the public's interest in having all available relevant and trustworthy evidence before the finder of fact.

In the area of reporter's qualified privileges, commentators often discuss a "balancing" of interests to determine the extent of the reporter's qualified privilege. Needless to say, much of the case law on a reporter's qualified testimonial privilege discusses weighing one interest against another, such as freedom of the press against the need for a reporter's testimony. The balancing is really the reason that the privilege is said to be "qualified." I submit that the traditional laws governing privileges are based on a type of balancing test that has already been done for persons in certain relationships and that is ordinarily not done on a case-by-case basis: the ability to learn the truth is outweighed by another interest, which is the preservation of a confidential relationship.

As a federal judge, I have had occasion to apply both federal and state law to questions of privilege. To a large extent, exclusionary rules of evidence that developed at common law have been codified in one form or another. Rule 501 of the Federal Rules of Evidence governs a federal court's application of privilege. It does not refer to specific privileges, but states the following:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a wit-

5. *United States v. Nixon*, 418 U.S. 683, 710 (1974) (noting that the public has a right to "every man's evidence" and that exceptions are not lightly created or expansively construed).

6. *See, e.g.*, FED. R. EVID. 401-15, 801-07. However, in criminal cases the "Exclusionary Rule" keeps out what is likely very trustworthy evidence on grounds that it was unlawfully obtained. *See generally Weeks v. United States*, 232 U.S. 383 (1914).

ness, person, government, State or political subdivision thereof shall be determined in accordance with State law.⁷

Congress specifically chose this rule over a rule that enumerated certain privileges founded in common law and in the Constitution.⁸ A reporter's privilege was not among them.⁹ However, the reference to application of state law would apply not only in diversity cases, but also in cases "to which State law supplies the rule of decision."¹⁰ The comments to this rule make it clear that federal courts will frequently be required to look at two bodies of law on issues of privilege.¹¹

The State of Arkansas has adopted what are essentially the Uniform Rules of Evidence, and there are specific provisions governing areas of privilege, most of which had their genesis in the common law.¹² There is no specific provision governing a reporter's privilege. However, as you probably know by now, the Arkansas legislature some years ago passed what might be called a privilege law for reporters. It reads as follows:

Before any editor, reporter, or other writer for any newspaper, periodical or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station shall be required to disclose to any grand jury or other authority the source of information used as the basis for any article he or she may have written, published, or broadcast, it must be shown that the article was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare.¹³

This statute does not apply to federal grand jury subpoenas.¹⁴ There remain interesting questions concerning this statute. One is whether it would apply to information obtained in confidence but never published, written, or

7. FED. R. EVID. 501.

8. In 1972, the Chief Justice for the United States Supreme Court sent Congress proposed rules of evidence formulated by the Judicial Conference Advisory Committee on the Rules of Evidence and approved by the Judicial Conference of the United States and by the Supreme Court. The proposed rules contained nine rules governing specific privileges, all of which had existed at common law. *See* RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (Proposed Draft), 56 F.R.D. 183, 230-61 (1972) [hereinafter Proposed Rules]; *see also* FED. R. EVID. 501 advisory committee's note (detailing history of Article V of the Federal Rules of Evidence).

9. The specific privileges included in the proposed rules were privileges for required reports, communications between lawyer and client, communications between psychotherapist and patient, spousal testimony, communications to clergymen, political vote, trade secrets, secrets of state, and identity of an informer. *See* Proposed Rules, 56 F.R.D. at 230-61.

10. FED. R. EVID. 501 advisory committee's note.

11. *See id.*

12. *See* ARK R. EVID. 501-12.

13. ARK. CODE ANN. § 16-85-510 (LEXIS 2005).

14. *In re Grand Jury Subpoena Am. Broad. Co.*, 947 F. Supp. 1314 (E.D. Ark. 1996).

broadcast. Another question is whether it would apply to a newsman who is a personal witness to a crime, when that newsman has promised whoever gave him access to the crime that his identity would remain confidential. For example, in *Branzburg*, discussed below, the reporter had promised to keep confidential the identity of those he observed violating the law.¹⁵ The lower court, in interpreting a state reporter's shield statute, found that the statute did not shield a reporter who had personally witnessed alleged criminal activity.¹⁶ I mention this statute only to acknowledge that Arkansas, along with many other states, has extended statutory protection to certain persons in the media.

II. COMMON-LAW AND STATUTORY PRIVILEGES AND THE QUESTION OF A COMMON LAW REPORTER'S PRIVILEGE

A brief examination of the marital, priest-penitent, lawyer-client, and doctor-patient privileges is helpful in defining the policies they protect. The historical development of these privileges is complex, but they all arguably stem from "a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the states' coercive or supervisory powers and from the nuisance of its eavesdropping."¹⁷ In other words, these privileges protect the "free flow of information" between those in certain relationships.

Wigmore, perhaps the foremost authority on the rules of evidence, has outlined situations in which a testimonial privilege should apply:

- (1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. (3) The relation must be one [that] in the opinion of the community ought to be sedulously fostered. (4) 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.¹⁸

15. 408 U.S. 665, 667-71 (1972).

16. See *Branzburg v. Pount*, 461 S.W.2d 345, 347 (Ky. Ct. App. 1971) *rev'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

17. Walter J. Walsh, *The Priest-Penitent Privilege: An Hibernocentric Essay in Post-Colonial Jurisprudence*, 80 IND. L.J. 1037, 1039 (2005) (citing David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110-11 (1956)).

18. Anthony L. Fargo, *Reconsidering the Federal Journalist's Privilege for Non-Confidential Information*: *Gonzales v. NBC*, 19 CARDOZO ARTS & ENT. L.J., 355, 362 (2001) (citing 8 J. WIGMORE, EVIDENCE 2192, at 70 (John T. McNaughton ed., Little Brown & Co. 1961)).

For the most part, the jurisprudence on testimonial privileges other than a reporter's privilege respects the limitations endorsed by Wigmore. For example, the traditional marital privilege is limited to *confidential* communications between spouses.¹⁹ I emphasize the word "confidential." The privilege may be asserted, in a criminal proceeding, by either the accused or the spouse of the accused.²⁰ It meets the Wigmore requirements in that (1) it originates in confidence; (2) the element of confidentiality is essential to the satisfactory maintenance of the marriage; (3) the marriage relationship is one sedulously fostered by the community; and (4) the common law has established that the injury to the marriage relationship would be greater than the benefits that would inure to our system of justice were the privilege not honored.

In some jurisdictions, the marital privilege can extend beyond confidential communications between spouses. In *Trammel v. United States*,²¹ the United States Supreme Court recognized a broader spousal testimonial privilege, the "adverse spousal testimonial privilege," which permits a spouse to refuse to testify against the other spouse and is not confined to confidential communications but extends to conversations or actions with other parties.²² The privilege belongs to the witness-spouse.²³ The policy supporting the privilege is the prospective preservation of the marriage in question.²⁴ In other words, if the testimony would jeopardize the future relationship of the parties, the Court should enforce the privilege. In *Trammel*, the Supreme Court looked at the particular marriage in question and determined that there was little to be salvaged, as the wife willingly testified against her husband.²⁵ The Court reasoned that vesting the privilege in the witness-spouse promoted the policy of protecting the marriage on a going-forward basis.²⁶

19. See ARK. R. EVID. 504.

20. *Id.*

21. 445 U.S. 40 (1980).

22. See *id.* at 51 ("The . . . privilege is invoked, not to exclude private marital communications, but rather to exclude evidence of criminal acts and of communications made in the presence of third persons."); see also Katherine O. Eldred, "Every Spouse's Evidence": Availability of the Adverse Spousal Testimonial Privilege in Federal Civil Trials, 69 U. CHI. L. REV. 1319, 1321 (2002) (discussing the adverse spousal testimonial privilege as modified in *Trammel*).

23. See *Trammel*, 445 U.S. at 53.

24. See *id.* (explaining that vesting the privilege in the witness-spouse furthers the goal of preserving marital harmony).

25. *Id.* at 52 ("When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.").

26. Eldred, *supra* note 22, at 1323 (explaining that, under *Trammel*, the policy justifying the adverse spousal testimonial privilege focuses on whether compelled testimony will harm the marriage on a "going-forward basis, regardless of whether the testimonial information was received in confidence").

The *Trammel* case shows that the policy supporting a spousal testimonial privilege is to protect the specific marriage, and it does not apply across the board.

Courts have refused to apply both the confidential communication privilege and the adverse spousal testimonial privilege in cases involving crimes against a spouse and crimes against children.²⁷ In Arkansas, there is also no privilege when a spouse is charged with a crime against "a person residing in the household of either [spouse], or . . . a third person committed in the course of committing a crime against any of them."²⁸

The attorney-client privilege is the privilege most familiar to those in the legal profession. It protects communications between the parties that take place for the sake of legal advice. It is waived, sometimes without intent, when the communication is made in the presence of a third party.²⁹ More importantly, it does not apply when the communication reveals to the attorney the fact that the client seeks legal advice in aid of a crime or fraud.³⁰ The privilege belongs to the client and may be waived by the client.³¹ At the risk of sounding redundant, I submit that the nature of the lawyer-client relationship is such that the Wigmore factors support the privilege, as Wigmore himself concluded.³²

The clergy or priest-penitent privilege, called a "religious privilege" in Arkansas, is another privilege that covers confidential communications. The communication must be made to the "clergyman in his professional character as spiritual adviser."³³ Justifications for it are similar to those protecting the confidential communications between spouses and between lawyer and client: the privilege protects the free flow of information and meets the parties' expectations of privacy and confidentiality.³⁴ However, some authorities have found this privilege to be grounded in the free exercise of religion,³⁵ which would make it a constitutional privilege.

27. See *id.* at 1322.

28. ARK. R. EVID. 504(d).

29. See, e.g., *Shankle v. State*, 309 Ark. 40, 47–48, 827 S.W.2d 642, 645–46 (1992).

30. ARK. R. EVID. 502(d)(1).

31. See, e.g., *Poyner v. State*, 288 Ark. 402, 406, 705 S.W.2d 882, 885 (1986).

32. See *Fargo*, *supra* note 18, at 361.

33. ARK. R. EVID. 505(b).

34. See *Trammel v. United States*, 445 U.S. 40, 51 (1980) ("The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.").

35. See *Mullen v. United States*, 263 F.2d 275, 280 (D.C. Cir. 1958) (Fahy, J., concurring) ("[S]ound policy—reason and experience—concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession . . ."); see also Taylor L. Anderson, *The Priest-Penitent Privilege: A Mormon Perspective*, 41 IDAHO L. REV. 55, 62 (2004) (discussing free exercise of religion as a rationale for the priest-penitent privilege).

The traditional physician-patient privilege applies to confidential communications relating to the diagnosis and treatment of the patient.³⁶ The privilege does not apply in proceedings to determine whether the patient should be hospitalized for a mental illness, and it does not apply when a court orders the examination.³⁷ The privilege applies to medical records, as well as to confidential communications,³⁸ and belongs to the patient.³⁹

All of the aforementioned privileges protect a confidential relationship with very specific limitations. These privileges operate to protect the relationship and to encourage communication. It is clear that our society places such a high value on these confidential relationships that we are willing to forego truthful, relevant testimony in a court of law in order to preserve the relationship. One aspect of all of these relationships is that the parties to them are known to the court and to the party seeking the testimony. It is ordinarily possible for a judicial officer to hear, *in camera*, the substance of the communication to determine whether it is in fact subject to the privilege. For example, on rare occasion, I have actually heard the content of such communications so that I could rule on their admissibility over a claim of privilege. The rules of evidence and precedent from both federal and state courts provide very helpful guidance.

Any reporter's common-law privilege might differ from the aforementioned common-law privileges in several respects. First, if a reporter has a privilege to refrain from testifying concerning the identity of a confidential source, the finder of fact does not know the source or its reliability, and the information itself might have been published far and wide. In other words, the substance of the communication might be known, but the source remains a secret. With traditional privileges, the substance remains secret, but the source of the communication is known.

Second, to a large extent, the common-law privileges do not exclude testimony about ongoing or future criminal activity, but sometimes reporters argue that their privilege should extend to just that. In fact, sometimes the very communication is itself a crime or a violation of a court order, yet a reporter might claim the privilege.⁴⁰

Third, common-law privileges may be waived by the party who is receiving the benefit of the confidential communication. For example, the client may waive the attorney-client privilege, and the penitent may waive the priest-penitent privilege. But, sometimes reporters claim that the power to waive is the reporters', even when their "confidential" sources have

36. ARK. R. EVID. at 503(a)(4).

37. *Id.* at 503(d)(1)-(2).

38. *Id.* at 503(b).

39. *Id.* at 503(c).

40. See *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1143 (D.C. Cir. 2005); see also *In re Special Proceedings*, 373 F.3d 37, 40-41 (1st Cir. 2004).

agreed to release them from any confidentiality agreement. Fourth, common-law privileges are limited to confidential communications, while the reporter's privilege has been applied to non-confidential communications.

Therefore, I conclude that any reporter's privilege is so different from the privileges recognized at common law that there really should be no reporter's privilege at common law.⁴¹

III. THE QUESTION OF A FIRST AMENDMENT REPORTER'S PRIVILEGE

It is often said that reporters are the fourth estate in our system of government because they are the watch dog for the other branches. They help keep the rest of us clean and honest. It is rare that secrecy in government can be condoned, and no one can seriously deny that freedom of the press is one of the bulwarks of our democracy. Similarly, it is clear that policies that protect the free flow of information to the press are necessary.⁴² Without a free press, our political parties, our public institutions, and our private lives would not be the same. It is so much a part of our culture that we reacted with shock when political cartoons mocking Muslims caused riots in other parts of the world.⁴³

I have read that more and more reporters are the subject of subpoenas to reveal information they have gathered in performing their jobs.⁴⁴ Reporters have sought protection from testifying, asserting the important roles they play in our system of government and arguing that the First Amendment requires that they be allowed unfettered access to gather information. It is helpful to take a closer look at some of the cases.

In *Branzburg v. Hayes*,⁴⁵ the United States Supreme Court considered reporters' claims of privilege in three cases.⁴⁶ In all three, the reporters were

41. In the recent high-profile grand jury investigation into alleged leaks by government officials regarding the identity of CIA agent Valerie Plame, the United States Court of Appeals for the District of Columbia affirmed contempt citations against journalists and a publisher who refused to disclose their confidential sources, claiming right to a reporter's privilege. See *In re Miller*, 438 F.3d at 1143. All members of the three-judge panel agreed that if a federal, common-law reporter's privilege existed, it had been overcome under the facts of the case. *Id.* at 1141. However, Judges Sentelle and Tatel filed separate, concurring opinions that highlight the issues and arguments surrounding the question of a federal, common-law reporter's privilege. *Id.* at 1153-83.

42. See generally Heather Stamp, Note and Comment, *McKevitt v. Pallasch: How the Ghosts of the Branzburg Decision Are Haunting Journalists in the Seventh Circuit*, DEPAUL-LCA J. ART & ENT. L. & POL'Y 363 (2004) (discussing the special role of the press in American society).

43. Jeffrey Stinson & Rick Hampson, *Cartoon Crisis Frames Europe's Conflict Within*, USA TODAY, Feb. 14, 2006, at 1A.

44. See generally Wendy N. Davis, *The Squeeze on the Press*, 91 A.B.A.J. 22 (2005).

45. 408 U.S. 665 (1972).

46. *Id.* at 667-79.

investigating criminal activities, and they were subpoenaed to testify before grand juries.⁴⁷ The issue before the Supreme Court was whether the reporters could refuse to testify on First Amendment grounds, as they argued that their compelled testimony would inhibit their access to the free flow of information.⁴⁸ In all three cases, the reporter had knowledge, obtained on a promise of confidentiality, of suspected criminal activity.⁴⁹ The Court, in a five-four decision written by Justice White, ruled that reporters do not enjoy any special privileges over those of average citizens and that grand juries are entitled to a reporter's testimony.⁵⁰ In a footnote, Justice White, writing for the majority, emphasized the value placed on the right of the grand jury to "every man's evidence" with a quote from Jeremy Bentham, which also addressed the newsmen's arguments that the grand jury subpoena constitutes an undue burden:

Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody. . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.⁵¹

The opinion points out that "it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy"⁵² and that those who fail to report a crime can be guilty of misprision.⁵³ Justice White wrote the following: "We cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it."⁵⁴ Justice White noted the difficulties of expanding the First Amendment by extending a constitutional testimonial privilege to

47. *Id.* at 667, 672, 675.

48. *Id.* at 679–81.

49. *Id.* at 667–71, 672–79.

50. *Id.* at 702.

51. *Branzburg*, 408 U.S. at 688 n.26 (quoting 4 THE WORKS OF JEREMY BENTHAM 320–21 (J. Bowring ed. 1843)).

52. *Id.* at 696.

53. *Id.*

54. *Id.* at 692 (quoted in *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1147 (D.C. Cir. 2005)).

newsmen, explaining that the "traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph[,] just as much as of the large[,] metropolitan publisher who utilizes the latest photocomposition methods."⁵⁵ Despite its ruling, the majority left open the possibility of First Amendment infringement for "grand jury investigations . . . instituted or conducted other than in good faith."⁵⁶ The Court stated that "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."⁵⁷

Justice Powell, in a concurring opinion, reiterated that the government may not use grand jury subpoenas to harass reporters.⁵⁸ He wrote that the issue of whether a court should quash a grand jury subpoena to a reporter should be decided by balancing the "freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."⁵⁹

Justice Stewart wrote a dissent, in which Justices Brennan and Marshall joined.⁶⁰ Justice Douglas wrote a separate dissent.⁶¹ Justice Stewart wrote that the majority was inviting "state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government."⁶² He also reasoned that the right to keep a source confidential is "bottomed on the constitutional guarantee of a full flow of information to the public"⁶³ and that "[a] corollary of the right to publish must be the right to gather news."⁶⁴ He also advocated a balancing test to determine whether a reporter should testify:

Governmental officials must . . . demonstrate that the information sought is *clearly* relevant to a *precisely* defined subject of governmental inquiry. They must demonstrate that it is reasonable to think the witness in question has that information. And they must show that there is not any

55. *Id.* at 704. I cannot resist mentioning that in 1970 the Supreme Court, along with the rest of us, could not have predicted the use of the internet and blogs as a means of exercising fundamental, individual First Amendment rights.

56. *Id.* at 707-08.

57. *Branzburg*, 408 U.S. at 707-08.

58. *Id.* at 709-10 (Powell, J., concurring); *see also* *Garland v. Torre*, 259 F.2d 545, 548-51 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958) (indicating that compelling a journalist to reveal a confidential news source would violate the First Amendment if the source's identity was not relevant and material and not sought in good faith).

59. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

60. *Id.* at 725.

61. *Id.* at 711.

62. *Id.* at 725 (Stewart, J., dissenting).

63. *Id.* at 726 n.2.

64. *Id.* at 727.

means of obtaining the information less destructive of First Amendment liberties.⁶⁵

As most of you probably know by now, the development of the law following *Branzburg* has been confusing. Because the *Branzburg* majority was writing specifically about reporters who had been subpoenaed by grand juries, it is understandable that some courts would take the position that *Branzburg* arguably leaves open the question of whether reporters enjoy a qualified testimonial privilege outside a grand jury. There is little doubt that Justice Powell's concurring opinion influenced many courts to hold that the press enjoys a qualified testimonial privilege based on the First Amendment. I do not believe that it would be productive to give a digest of all of the cases, but I can safely conclude that most circuits have recognized some sort of constitutionally based, qualified privilege for reporters, although there is absolutely no uniformity with respect to several factors, including (1) whether a qualified privilege applies in both civil and criminal cases,⁶⁶ (2) whether the privilege should apply only to confidential information or to non-confidential information as well,⁶⁷ and (3) how to "balance" the interests at stake.⁶⁸ I did find two recent law review articles that helpfully digest the cases,⁶⁹ and a 2003 judicial opinion that does the same.⁷⁰

I will give a couple of examples concerning how courts have applied *Branzburg*. The District of Columbia Circuit, as you undoubtedly know, applied the rule in *Branzburg* to the grand jury subpoena received by Judith Miller, who possessed information she claimed to be confidential.⁷¹ But, this court took an entirely different approach in a civil case in which Wen Ho

65. *Branzburg*, 408 U.S. at 740 (citations omitted) (emphasis in original).

66. See *Lee v. Dep't of Justice*, 413 F.3d 53, 58 (D.C. Cir. 2005) (limiting *Branzburg* to criminal cases involving grand jury subpoenas and finding a qualified First Amendment reporter's privilege available in civil cases); *Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir. 1993) (holding that *Branzburg* provides a qualified reporter's privilege that applies in criminal and civil proceedings); *von Bulow v. von Bulow*, 811 F.2d 136, 145 (2d Cir. 1987) (holding that the reporter's privilege applies only when the individual claiming the privilege acquires confidential information with the intent to disseminate the information to the public).

67. See *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35-36 (2d Cir. 1999) (holding that a qualified reporter's privilege applies to non-confidential as well as confidential information, but the test for overcoming the privilege for non-confidential information is less demanding); *Loadholtz v. Fields*, 389 F. Supp. 1299, 1302 (M.D. Fla. 1975) (holding that the privilege shields a reporter's non-confidential resource materials, as well as the identity of confidential informants).

68. See *Larsen*, *supra* note 1, at 1246-47.

69. See generally *Fargo*, *supra* note 18; *Larsen*, *supra* note 1.

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

71. See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1144-45 (D.C. Cir. 2005).

Lee complained that a government informer had leaked personal information about Lee and his wife to a reporter.⁷²

Following earlier precedent,⁷³ the District of Columbia Circuit in *Lee v. Department of Justice*⁷⁴ applied a two-part balancing test: (1) the testimony sought must go to the "heart of the matter and must not be merely marginally relevant" and (2) the party seeking the testimony "must have exhausted 'every reasonable alternative source of information' so that journalists are not simply a default source of information for plaintiffs."⁷⁵ The court determined that there was no privilege, pointing out that "the protections of the Privacy Act do not disappear when the illegally disclosed information is leaked to a journalist, no matter how newsworthy the government official may feel the information is."⁷⁶

The Fourth Circuit provides a more interesting case study of the reporter's qualified privilege. In two cases, *United States v. Steelhammer (Steelhammer I)*⁷⁷ and *In re Shain*,⁷⁸ the court's opinions seem to conclude that there is no privilege absent a showing of confidentiality, harassment of reporters, or bad faith on the part of the government.⁷⁹ But, in the 1993 case of *Church of Scientology International v. Daniels*,⁸⁰ the Fourth Circuit recognized a privilege for subpoenaed materials relating to an editorial board meeting of *USA Today* in a libel suit.⁸¹ Assuming, without discussion, that the materials were privileged, the court concluded that the appellant failed to show that the lower court abused its discretion in denying these materials, and it cited earlier authority adopting a test that considered the following factors: whether the information sought is relevant, whether it can be obtained by other means, and whether there is a compelling interest in the in-

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

73. See *id.* at 58-59 (applying *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974)).

74. 413 F.3d 53 (D.C. Cir. 2005).

75. *Id.* at 57 (citing *Zerilli*, 656 F.2d at 713).

76. *Id.* at 60.

77. 539 F.2d 373 (4th Cir. 1976), *aff'd on reh'g*, 561 F.2d 539 (4th Cir. 1977).

78. 978 F.2d 850 (4th Cir. 1992).

79. See *id.* at 853 ("We conclude, therefore, that the absence of confidentiality or vindictiveness in the facts of this case fatally undermines the reporters' claim to a First Amendment privilege."). In *Steelhammer I*, 539 F.2d at 376-78, Judge Winter filed a dissenting opinion that was subsequently adopted by the court sitting en banc. See *United States v. Steelhammer (Steelhammer II)*, 561 F.2d 539, 540 (4th Cir. 1977). Judge Winter observed that the reporters invoking the reporter's privilege had not acquired the information at issue on a confidential basis, and they were not subpoenaed in an effort to harass them or to embarrass their news-gathering abilities. *Steelhammer I*, 539 F.2d at 376.

80. 992 F.2d 1329 (4th Cir. 1993), *cert. denied*, 510 U.S. 869 (1993).

81. *Id.* at 1335.

formation.⁸² The court pointed out that the defendant admitted to making the offending statement exactly as it had been quoted, so the plaintiff did not really need the information sought,⁸³ and the court affirmed the lower court's determination that summary judgment was appropriate for the appellant's failure to present evidence of malice.⁸⁴

In 2003, a Seventh Circuit opinion in *McKevitt v. Pallasch*,⁸⁵ written by Judge Posner, upset those who advocate a reporter's privilege.⁸⁶ Judge Posner criticized much of the post-*Branzburg* jurisprudence and asserted that *Branzburg* leaves no room for a reporter's privilege.⁸⁷ Posner correctly observed that "[t]he cases that extend the privilege to nonconfidential sources express concern with harassment, burden, using the press as an investigative arm of government, and so forth."⁸⁸ He concluded that "[s]ince these considerations were rejected by *Branzburg* even in the context of a confidential source, these courts may be skating on thin ice."⁸⁹ Even though Judge Posner offered up all this criticism, he went on to find that the witness who sought to quash the subpoena in question was attempting to protect his own intellectual property interests and was improperly invoking the First Amendment.⁹⁰

There are other interesting cases from other circuits that I could include here. But, I believe that I have given a sample of the various approaches taken to the matter of a reporter's qualified privilege. As a trial judge, I feel safe in following *Branzburg* in the case of a grand jury subpoena to a reporter, unless it is for purposes of harassment or otherwise in bad faith. But I am unsure concerning the law of a qualified privilege for reporters in civil cases. I question the wisdom of applying a constitutionally based, qualified privilege that is as fluid as this one appears to be. Even though the *Branzburg* majority acknowledged that "news gathering is not without its First Amendment protections,"⁹¹ I am at a loss concerning the extent of those protections into matters of testimonial privilege beyond the *Branzburg* holding. Furthermore, the First Amendment applies to each and every one of

82. *Id.* The balancing factors considered in *Church of Scientology International* are those recommended in Justice Stewart's dissent in *Branzburg*. See *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting).

83. *Church of Scientology Int'l*, 992 F.2d at 1335.

84. *Id.*

85. 339 F.3d 530 (7th Cir. 2003).

86. See Larsen, *supra* note 1, at 1254.

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

88. *Id.* at 533 (citing *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29 (2d Cir. 1999); *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980)).

89. *Id.*

90. *Id.* at 534.

91. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

us, and I find it difficult to take an individual right and apply it more favorably to one group, that is, reporters, over another, not to mention the difficulty in determining, with benefit of a statute, just who is in this special "reporter class."⁹²

Because privileges are in derogation of the truth, prudence and precedent require that a court decide cases on grounds other than the Constitution when possible.⁹³ I would try to decide the issue of whether to quash a reporter's subpoena on grounds other than a questionable constitutional privilege. In an Eighth Circuit libel case, the court found it unnecessary to decide the issue of a reporter's privilege because the reporter's testimony concerning his confidential sources was unnecessary to decide the case, as the court concluded that there was no malice as a matter of law and affirmed summary judgment for the defendant.⁹⁴ Another example is the Fourth Circuit's decision in *Church of Scientology International v. Daniels*,⁹⁵ in which the court acknowledged that the information sought was privileged and then applied a balancing test in which the privilege prevailed.⁹⁶ The court might have been able to reach the same result without deciding the issue because in that case, too, the court affirmed summary judgment on the ground that there was no malice.⁹⁷ Another possibility: Could the court have reached the same result by quashing the subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure? I cannot answer this, but subsection (c)(3)(A)(iv) allows a court to quash a subpoena that "subjects a person to undue burden." I concede that a subpoena burdens just about anyone who is served one. But, many of the factors reporters argue concerning the First Amendment in regard to subpoenas sound like "burdens" that might be recognized under this rule. Furthermore, subsection (c)(3)(B) allows a court to modify or quash a subpoena if it "requires disclosure of a trade secret or other confidential research, development, or commercial information, or . . . requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party."⁹⁸ It is conceivable that non-party reporters, at times, could try to use these rules and others to modify or quash at least some subpoenas. Keep in mind that federal judges have discretion under the rules of evidence with respect to the evidence.

92. See Larsen, *supra* note 1, at 1247 n.107 (listing cases extending the privilege to others such as book authors and filmmakers).

93. See *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1154 (D.C. Cir. 2005) (Sentelle, J., concurring).

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

95. 992 F.2d 1329 (4th Cir. 1993).

96. *Id.* at 1335.

97. *Id.*

98. FED. R. CIV. P. 45(c)(3)(B)(i)-(ii).

IV. STATUTORY PROTECTIONS

Public policy is most clearly enunciated by Congress, and if it is the will of the public that members of the press be shielded from testifying, Congress should pass a law so stating. I believe that such a law should protect reporters in civil cases from revealing confidential information, as long as that information is not essential to the resolution of the case and as long as the communication of such confidential information was not itself a violation of law or court order. There may even be situations in which a law is consistent with keeping information confidential. For example, surely it would be against public policy to reveal the confidences of whistleblowers, solely for the sake of exposure, when we have laws enacted for the purpose of protecting whistleblowers.

However, I do not believe that any statutory reporter's privilege should be used to defeat other interests that are important to our constitutional form of government. It is true that freedom of the press is essential to our form of government. But, equally essential are the constitutional rights to indictment by a grand jury and a fair trial, in both criminal and civil cases.

I know that we lawyers have trouble with our public image because we have had a few scoundrels and crooks among our ranks, and their bad image has tarnished all of us. Similarly, the press has been tarnished by a few bad reporters, including those who have quoted confidential sources who are not telling the truth, or even non-existent, "confidential" sources. Some members of the public also believe that news is slanted, and that the news media are really not interested in the truth. If journalists want the citizens of the United States to shield members of the media from testifying, journalists should keep in mind the following from the Code of Ethics of the United States Society of Professional Journalists: "We believe in public enlightenment as the forerunner of justice and in our constitutional role to seek the truth as part of the public's right to know the truth."⁹⁹

Courts and grand juries also seek the truth. And, a testimonial privilege, once again, is in derogation of the truth.

99. The (United States) Society of Professional Journalists Code of Ethics, *available at* <http://www.hkbu.edu.hk/~jour/documents/ethics5.html>.

