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THE JOURNALIST'S PRIVILEGE IN ARKANSAS

John J. Watkins*

Ever since the days of John Peter Zenger,1 American journalists have felt obliged as a matter of conscience to protect the identities of their confidential sources of information, even at the cost of a stiff fine or jail term. In one of the more celebrated recent cases, for example, New York Times reporter Myron Farber spent forty days in jail and was fined $2,000 after refusing to honor a defense subpoena in a sensational murder case, and his newspaper was fined $285,000.2 Not surprisingly, journalists have long attempted to secure protection for their

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1. Zenger, the printer, publisher and editor of the New York Weekly Journal, was jailed in 1734 and charged with criminal libel on the basis of articles critical of William Cosby, the colonial governor. Imprisoned for nine months because of his inability to post bond prior to his trial, Zenger steadfastly refused to reveal the names of individuals who wrote for the Journal, even though Cosby had offered a reward of fifty pounds for the identity of the author of the allegedly libelous articles. Zenger was ultimately tried and acquitted, thanks to an emotional appeal to the jury by noted lawyer Andrew Hamilton, and his refusal to "name names" was not an issue at trial. C. Whalen, Your Right to Know 12 (1973).

sources, arguing in court for a “reporter’s privilege” under the common law and the first amendment and lobbying in state legislatures for passage of so-called “shield laws.”

Arkansas is one of twenty-six states which has such a statute, and that provision—one of the oldest in the nation—is the subject of this article. Because only two reported cases provide any guidance with respect to the act’s application, statutes and case law from other jurisdictions will also be examined. Before turning to the legal issues, however, it is appropriate to consider briefly the history of the fight for protection of confidential sources and the circumstances surrounding passage of the Arkansas statute.

I. AN HISTORICAL OVERVIEW

Although John Peter Zenger refused to reveal the authors of allegedly libelous stories published in his newspaper in 1734, he faced no penalty for that refusal; indeed, he was already in jail awaiting a trial on criminal libel charges. It was not until 1848 that a reporter was jailed for protecting his confidential sources. John Nugent of the New York Herald secured and sent to his editor a copy of the confidential draft of a proposed treaty to end the Mexican-American War. The United States Senate, which has been debating the treaty in secret session, subpoenaed Nugent and demanded that he reveal his source. The reporter refused and was jailed. Refusing Nugent’s petition for a writ of habeas corpus, a federal circuit court concluded that it lacked jurisdiction to review the Senate’s contempt order and did not reach the


privilege issue.\textsuperscript{7} More than a dozen similar incidents took place over the next thirty years,\textsuperscript{8} and legislative subpoenas directed at journalists have been fairly common during this century.\textsuperscript{9}

Most of the battles over source confidentiality, however, have been fought in the courts, which have uniformly held that no privilege for journalists existed at common law.\textsuperscript{10} The earliest reported case apparently is People ex rel. Phelps v. Fancher,\textsuperscript{11} decided by a New York court in 1874. There, one Shanks, city editor of the New York Tribune, was subpoenaed by a county grand jury in connection with an allegedly libelous article published by his newspaper. The grand jury sought the name of the article's author, having in mind an indictment against him fore criminal libel, but Shanks refused to answer on the ground that the newspaper's regulations prohibited such disclosure. Shanks was then reported to the local court, which held him in contempt and ordered that he be committed until he saw fit to purge himself of his contumacy by answering the question. Sustaining the contempt citation, the supreme court made plain that the question propounded to Shanks was indeed proper: "As the law now is, and has for ages ex-

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\item \textsuperscript{7} Ex parte Nugent, 18 F. Cas. 471 (D.C. Cir. 1848) (No. 10,375).
\item \textsuperscript{8} C. Whalen, supra note 1, at 21. For example, in 1857 the House of Representatives found in contempt a New York Times reporter who had written a story revealing that bribes were being taken by congressmen for votes on certain land grant measures. James W. Simonton, called before a House committee investigating the charges, explained that he could not answer the committee's questions "without a dishonorable breach of confidence." Cong. Globe, 34th Cong., 3d Sess. 403 (1857). The full House rejected his claim of privilege and ordered him into the custody of the sergeant-at-arms for the remainder of the session. Id. at 411-13, 426. The committee, however, became convinced that Simonton would never reveal his sources and recommended his discharge. The House adopted the committee's recommendation, and the reporter was released after nineteen days in custody. Id. at 630. In addition, the committee determined that the charges were true without relying on Simonton's sources and recommended the expulsion of three House members, who then resigned. C. Whalen, supra note 1, at 21.
\item \textsuperscript{9} For example, in 1951 a Senate subcommittee subpoenaed a Providence Journal reporter who had written articles concerning the subcommittee's investigation of Senator Joseph McCarthy. Twenty years later, a House subcommittee subpoenaed Frank Stanton, president of the Columbia Broadcasting System, and demanded that he produce all materials CBS used in producing the controversial television documentary "The Selling of the Pentagon." C. Whalen, supra note 1, at 27-28.
\item \textsuperscript{10} See, e.g., People ex rel. Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936); Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); In re Wayne, 4 Hawaii 475 (Dist. Ct. 1914); In re Grunow, 84 N.J.L. 235, 85 A. 1011 (1913); Clinton v. Commercial Tribune Co., 11 Ohio Dec. 603 (1901); Ex parte Lawrence, 116 Cal. 298, 48 P. 124 (1897); People v. Durrant, 116 Cal. 179, 48 P. 75 (1897); People ex rel Phelps v. Fancher, 2 Hun. 226 (N.Y. Sup. Ct. 1874). See generally D'Alemberte, Journalists Under the Axe: Protection of Confidential Sources of Information, 6 Harv. J. on Legis. 307 (1969); Note, The Right of a Newsman to Refrain from Divulging the Sources of His Information, 36 Va. L. Rev. 61 (1950); Note, Privilege of Newspapermen to Withhold Sources of Information from the Court, 45 Yale L.J. 357 (1935).
\item \textsuperscript{11} 2 Hun. 226 (N.Y. Sup. Ct. 1874).
\end{itemize}
isted, no court could possibly hold that a witness could legally refuse to give the name of the author of an alleged libel, for the reason that the rules of a public journal forbade it."  

Journalists asserted a variety of additional arguments in other cases but met with the same lack of success. Probably the most frequent defense was based on a “canon of journalistic ethics” prohibiting a newsman from revealing a confidential source. In a 1914 case, an Hawaii court gave short shrift to this contention:

[T]he position of the witness is untenable. Though there is a canon of journalistic ethics forbidding the disclosure of a newspaper's source of information,—a canon worthy of respect and undoubtedly well-founded, it is subject to a qualification: It must yield when in conflict with the interests involved of justice,—the private interests involved must yield to the interests of the public.

The same argument was rejected by a New Jersey court, which observed that “[t]o admit of any such privilege would be to shield the real transgressor and permit him to go unwhipped of justice.” Other defenses were also greeted with hostility in early decisions.

With the courts steadfastly declining to recognize a testimonial privilege for journalists, it was left to the legislatures to provide protection for confidential sources. Maryland became the first state to enact a

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12. *Id.* at 230.
15. *See, e.g.*, Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919) (self-incrimination); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911) (forfeiture of estate). Under the forfeiture argument, a reporter would contend that to reveal a source would cause him to lose his means of earning a living. Obviously, this approach is closely related to the “employer regulations” argument advanced and rejected in *People ex rel. Phelps* v. Fancher, 2 Hun. 226 (N.Y. Sup. Ct. 1874). *See supra* text accompanying notes 11-12. The self-incrimination defense was successful in *Burdick* v. United States, 236 U.S. 79 (1915), in which the city editor of the *New York Tribune* refused to reveal to a grand jury his source of information for a series of articles on customs fraud on the ground that the answer tended to incriminate him. President Wilson granted Burdick a full pardon, but the journalist refused it. After a federal district court held him in contempt for refusing to answer under these circumstances, the Supreme Court reversed, sustaining the editor’s original defense.

In later cases, reporters also raised first amendment and relevancy defenses. The constitutional issue is considered at text accompanying notes 61-94, *infra*. As for the relevancy approach, journalists typically contended that the confidential information sought was irrelevant or immaterial to the proceedings. *See, e.g.*, *In re Goodfader’s Appeal*, 367 P.2d 472 (Hawaii 1961) (holding that information could be considered likely enough to lead to the discovery of admissible evidence); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957) (although identity of writer of memorandum which prompted an editorial might not be admissible in libel action, it was relevant because it might lead to evidence of malice); Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951) (neither information nor its source was relevant to main proceeding).
shield law, passing such a statute in 1896 after a journalist was jailed for refusing to reveal a source. In early 1896, John T. Morris, a reporter for the Baltimore Sun, published an article suggesting that certain elected officials and policemen were being paid by illegal gambling establishments. The article contained information virtually identical to testimony received previously by a grand jury investigating such corruption. Suspecting a leak, the grand jury summoned Morris and demanded that he divulge his source. The reporter refused and was imprisoned. Although he was released from jail five days later when the grand jury’s term expired, the Journalists’ Club, an organization of newsmen, became alarmed at the prospect of reporters having to choose between imprisonment and protection of their confidential sources. The group persuaded the General Assembly to enact protective legislation, which provided:

No person engaged in, connected with or employed on a newspaper or journal shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper on and in which he is engaged, connected with or employed.

To note that the statute was not well received in legal circles would be a considerable understatement. A lawyer wrote in 1897 that Maryland has “a statute making the most irresponsible tramp reporter a privileged person in the matter of communications the same as doctors and lawyers.” Professor Wigmore, in his treatise on evidence, described the Maryland statute “as detestable in substance as it is crude in form,” pointing out that “for more than three centuries, it has been recognized as a fundamental maxim that the public is entitled to every man’s evidence.” He also predicted that the law would “probably remain unique.”

Professor Wigmore’s forecast initially proved accurate, for the Maryland statute stood alone for more than thirty years. During the


19. 5 J. WIGMORE, EVIDENCE § 2286 (2d ed. 1923).
period 1929 to 1935, however, there arose five highly publicized cases in which newsmen were jailed after refusing to reveal confidential sources,20 and these decisions provided the impetus for legislative action. The most significant of the cases was People ex rel. Mooney v. Sheriff,21 decided by the New York Court of Appeals in January 1936. Martin Mooney, a reporter for the New York American, had written a series of articles revealing that illegal gambling was flourishing despite clean-up attempts. Called before a grand jury investigating the numbers racket, Mooney refused to provide the names of his sources for the stories. Affirming a fine of $250 and a prison term of thirty days, the Court of Appeals squarely rejected Mooney's arguments that he was protected by a privilege:

The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. The granting of a privilege from such disclosure constitutes an exception to that general rule. In the administration of justice, the existence of the privilege from disclosure as it now exists often, in particular cases, works a hardship. The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege. On reason and authority, it seems clear that this court should not now depart from the general rule . . . and create a privilege in favor of an additional class. If that is to be done, it should be done by the Legislature. . . .22

20. Only one of the cases is reported. People ex rel. Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936). The other four cases are discussed in Note, The Right of a Newsman to Refrain from Divulging the Sources of His Information, supra note 10, at 71-73. The first of the cases involved three Washington Times reporters who were sentenced to 45 days in jail in 1929 when they refused to reveal to a District of Columbia grand jury the sources of a story about bootlegging. In 1931, a Virginia editor refused to respond to a grand jury's request for the name of a letter writer who had criticized the local corporation court. He was sentenced to 30 days in jail for contempt but was released after serving only five. The other two cases arose in Kentucky in 1934. In the first, the editor of the Louisville Courier-Journal refused to tell a legislative committee the name of a state legislator who had written a letter to the paper satirizing legislative procedure. The second case involved two reporters for the Danville Advocate held in contempt and sentenced to jail for their refusal to provide a court of inquiry with information on the hanging in effigy of a state legislator. Id.


22. 269 N.Y. 291, 199 N.E. at 416. The court's comments echo those made thirty years before in a law review article: "Privilege, the exception of a person or class from the common rule, if not an abuse in its inception is proverbially sure to become one. The less there is of it under a reign of law the better." Purrington, An Abused Privilege, 6 COLUM. L. REV. 388 (1906).
Following this flurry of judicial hostility to the privilege, seven states enacted shield laws during the period 1933 to 1937, and three more passed such statutes by 1943. Arkansas became the sixth state in the nation to offer such statutory protection for journalists when the voters approved an initiated act on November 3, 1936, only ten months after the *Mooney* decision. Unlike the Maryland act, which was prompted by the Morris case, or the Kentucky statute, which followed two widely-publicized cases in that state, the Arkansas law was apparently not the product of a specific incident involving a jailed Arkansas journalist. Instead, it was part of a comprehensive criminal law reform package supported by the Arkansas Bar Association.

The reform movement began at the annual session of the bar association in 1934, when Abe Collins of DeQueen, chairman of the Committee on Law and Law Reform, presented a report recommending a complete overhaul of the state's code of criminal procedure. The report, which was unanimously adopted by the membership, called upon the governor to appoint a committee to redraft the criminal code. On October 29, 1934, Governor J.M. Futrell established the Arkansas Criminal Law Reform Commission, composed of Collins, Professor Robert A. Leflar of the University of Arkansas School of Law, Judge B.E. Isbell of DeQueen, Judge W. J. Waggoner of Lonoke, and W.G. Dinning of Helena. At its initial meeting, the Commission named Collins as chairman and Leflar as secretary.

Having examined a variety of sources, including the American Law Institute's 1931 Model Code of Criminal Procedure, the Commission prepared a constitutional amendment and two lengthy statutes (containing twenty-five and fifty-seven sections) for introduction in the 1935 session of the General Assembly. Among the proposed statutory provisions was a shield law for newspapermen, but the proposals pri-
marily dealt with more fundamental criminal law matters such as sentencing, change of venue, the insanity defense, perjury, habitual offenders, and criminal procedure.\textsuperscript{30} Despite intensive lobbying by Commission members and the editorial support of newspapers throughout the state, none of the statutory measures passed the legislature.\textsuperscript{31} The principal opponents of the reform package were criminal defense lawyers who believed that the interests of their clients would be adversely affected by the changes.\textsuperscript{32}

After this legislature defeat, the Arkansas Bar Association adopted a resolution continuing the Commission and instructing it to prepare an initiated act containing the gist of the proposals that had failed to pass the General Assembly. A year later, at the Association's 1936 meeting, the Commission was directed to proceed with the initiated act so that it might be presented to the voters the following November. Soon thereafter a drive was begun to collect the necessary signatures to place the measure on the ballot, and the effort generated about twenty-five percent more than the 11,000 required names. The act drew the support of Governor Futrell, Governor-designate Carl Bailey, Attorney General-designate Jack Holt, and other state leaders, as well as that of the \textit{Arkansas Gazette} and other newspapers.\textsuperscript{33} Opposition proved negligible, and the initiated act and a related constitutional amendment passed overwhelmingly.\textsuperscript{34}

Section 15 of the new act, entitled "newspaper privilege," provided:

Before any editor, reporter, or other writer for any newspaper or periodical, or publisher of any newspaper or periodical, shall be required to disclose to any grand jury, or to any other authority, the source of the information used as the basis for any article he may have written or published, it must be shown that such article was not written and published in good faith, without malice, and in the interest of the public welfare.

\textit{Id.}

\textsuperscript{30} Leflar, \textit{supra} note 27, at 5, 8-23 (summarizing key provisions of the bills).
\textsuperscript{31} \textit{Id.} at 5, 7-8. However, a constitutional amendment that embodied two of the four provisions drafted by the Commission was passed by both houses and signed by the governor. \textit{Id.} at 5. The amendment, which permitted criminal prosecutions by information as well as indictment and placed prosecuting attorneys on a salary instead of a fee basis, was approved by the voters on November 3, 1936. \textit{See Ark. Const.} amend. 21.
\textsuperscript{32} Leflar, \textit{supra} note 27, at 7.
\textsuperscript{33} \textit{Id.} at 23-24.
\textsuperscript{34} The initiated act passed by a margin of 121,310 to 29,181, while the constitutional amendment, described in note 31, \textit{supra}, passed by a vote of 112,705 to 36, 262. Both measures were approved in 74 of the state's 75 counties. Leflar, \textit{supra} note 27, at 24.
or published, it must be shown that such article was written and published in bad faith, with malice, and not in the interest of the public welfare.\textsuperscript{35}

This provision was drafted for the Commission by Judge Isbell, a former circuit judge then in private practice in DeQueen.\textsuperscript{36} He had prepared a similar version for inclusion in the bill that failed to pass the 1935 General Assembly.\textsuperscript{37} Other members of the Criminal Law Reform Commission were not as enthusiastic about the shield law as Judge Isbell. Commenting upon a proposed draft of the bill to be introduced in the 1935 legislature, Judge W.J. Waggoner of Lonoke wrote Dr. Leflar that "I doubt the wisdom of [the privilege for journalists], but have no special opposition to it."\textsuperscript{38} After the legislature killed the reform package, the Commission resurrected key portions of the bill in the form of the initiated act. Some sections of the bill were eliminated, and Dr. Leflar wrote Commission Chairman Collins suggesting that the shield provision could also be deleted. "I still do not believe that [it] is very important," Dr. Leflar wrote. "It might well be left in if anything could be gained by way of newspaper support of our program by leaving it in."\textsuperscript{39}

The Commission certainly pointed to the privilege section when urging newspapers around the state to endorse the initiated act. A form letter sent to editors over the signature of Chairman Collins solicited their assistance in explaining the proposals to the voters and noted that the initiated act included a provision that "extends the privilege as to confidential communications to include newspaper men on the same ba-


\textsuperscript{36} A memorandum in the files of Dr. Leflar indicates that Judge Isbell drafted the provision to "create priv. for editors, reporters, etc." \textit{See} "Summary of proposals agreed upon by Criminal Procedure Reform Committee, with suggestions for grouping for enactment" (undated), files of Dr. Robert A. Leflar University of Arkansas School of Law, Fayetteville. Material from Dr. Leflar's files—an invaluable research source—is hereinafter identified as from the "Leflar Files."

\textsuperscript{37} The text of the original bill, reproduced \textit{supra} note 29, varies little from that of the initiated act. The major change, apparently made at the behest of Dr. Leflar, was in the final clause. The 1935 bill stated that the privilege is lost if it is shown "that the article was not written and published in good faith, without malice, and in the interest of the public welfare." S. 203, 50th Gen. Assembly § 15 (1935). Dr. Leflar's files contain an undated note with respect to an early draft of the initiated act suggesting that the Commission "[t]ry to re-phrase 'in good faith and without malice, not in the interest of the public welfare.'" Subsequently, Dr. Leflar sent to all members of the Commission a revised draft of the entire act that included a revised privilege provision containing the language as ultimately adopted. Enclosure in letter from Dr. Robert A. Leflar to Abe Collins, B.E. Isbell, W.J. Waggoner and W.G. Dinning (May 7, 1936), Leflar Files.

\textsuperscript{38} Letter from Judge W.J. Waggoner to Dr. Robert A. Leflar (Jan. 7, 1935), Leflar Files.

\textsuperscript{39} Letter from Dr. Robert A. Leflar to Abe Collins (May 18, 1935), Leflar Files.
sis as lawyers, physicians and ministers." Dr. Leflar later observed that "[i]nclusion of the section may also have been influenced by a desire to secure active newspaper support for the reform act as a whole."

There apparently was no single incident in Arkansas that convinced Judge Isbell and the Commission of the need for the reporter's privilege. Indeed, it appears that the group was influenced by two 1934 episodes in Kentucky that resulted in the jailing of journalists. As part of its effort to convince the voters of the need for reform, the Commission prepared a "source book" about the initiated act for distribution to newspapers, lawyers, and others who might support the measure. The source book included a brief summary of each of the act's provisions and an illustration indicating how that particular section would operate in practice. An early draft of the illustration accompanying the explanation of the journalist's privilege told of a "newspaper reporter in Kentucky [who] learned of certain corrupt arrangements between public officials and professional criminals." In the final ver-

40. Form letter from Abe Collins to newspaper editors (Sept. 24, 1936), Leflar Files. In contrast, a pamphlet written by Collins—and published at his own expense—for distribution to the general public did not mention the reporter's privilege in explaining the act's provisions. Enclosure in letter from Abe Collins to Dr. Robert A. Leflar (undated), Leflar Files. See also Arkansas Gazette, Nov. 1, 1936, at 5 (reprinting the pamphlet).


42. See supra note 20.

43. Leflar, supra note 27, at 8. The source book was the idea of J.N. Heiskell, editor of the Arkansas Gazette. Letter from Abe Collins to Dr. Robert A. Leflar (July 8, 1936), Leflar Files. The letter states in part:

[Mr. Heiskell] wants us to get up a kind of "Source Book" designed for use by editors and speakers and suggests that we have it mimeographed. He is anxious to have one of these as soon as possible . . . . It is his idea that the explanation of each of the divisions of our bill should be accompanied by some illustration like Judge Isbell's hog stealing case in this county. He thinks that illustrations like this will do more to grip the attention and convince the voters of the merits of our proposals than anything else. I have asked Judge Isbell to go to work on these illustrations at once. Id.

The Gazette and other newspapers printed a series of columns based on the source book prior to the November election. See, e.g., The Way the Law Now Works, Arkansas Gazette, Oct. 18, 1936, at 1; Arkansas Law and a Hog, Arkansas Gazette, Oct. 19, 1936, at 1. Interestingly, the Gazette, did not include a column on the reporter's privilege provision.

44. Arkansas Criminal Law Reform Commission, Source Book for use of Editors and Speakers (undated), Leflar Files. Substantial portions of the source book are reproduced in Leflar, supra note 27, at 8-23.

45. Draft of "Source Book for use of Editors and Speakers," (undated), Leflar Files. Because Judge Isbell drafted the privilege provision itself, it would be logical to assume that he also provided the accompanying illustration. The matter is not entirely clear, however. The initial plan was to base the source book on the Commission's report to the Governor, which Dr. Leflar had prepared, with Judge Isbell to provide illustrations showing how the changes would work in spe-
sion of the source book, the reference to Kentucky had been changed to simply "another state." Moreover, the illustration sounds very much like it could have been based on the Mooney case in New York, decided in January 1936. It stated:

A newspaper reporter in another state learned of certain corrupt arrangements between public officials and professional criminals. He could not secure full details until he promised his informant not to reveal his name. After making the promise, his newspaper published stories which aroused public opinion against the corruption exposed. In a subsequent grand jury investigation the reporter was called upon to disclose the source of his information and upon his refusal was sent to jail by the court for contempt. Unwilling to promise further secrecy to his informant, he was, of course, unable to secure additional information and the campaign against the corruption had to be dropped. A judge in Arkansas, as the law now stands, however much he may have sympathized with the reporter would have been compelled to have done the same.

The source book also focused on the limited nature of the privilege and its perceived value in assisting the press in investigating criminal activity.

This section would not render newspaper men incompetent to testify concerning communications to them, but would only permit them to refuse to reveal the sources of information upon which articles written or published by them are based in their discretion. Such a change in the law seems to be generally favored, and it is thought would enable newspaper men to secure information of wrong doing that is now specific fact situations. Letter from Abe Collins to Dr. Robert A. Leflar (July 8, 1936), Leflar Files. However, later correspondence makes clear that Dr. Leflar drafted some of the illustrations, although most of these were eliminated by Mr. Collins and Judge Isbell. Letter from Abe Collins to Dr. Robert A. Leflar (Sept. 17, 1936), Leflar Files. In the same letter, Collins also noted: "[Y]ou will find that in the main, we have used the 'Source Book' practically as prepared by you." Id.

With characteristic modesty, Dr. Leflar subsequently attributed the "major part" of the drafting to Collins. Leflar, supra note 27, at 23 n.9a. A draft of the source book suggests that the privilege illustration was prepared by Dr. Leflar, for the illustration was typed on a different typewriter than other portions of the document and was edited, along with the paragraph explaining the privilege, in Dr. Leflar's hand. Draft of "Source Book for use of Editors and Speakers," (undated), Leflar Files. Upon reviewing the draft during the preparation of this article, Dr. Leflar said that the illustration was typed on his typewriter but could not recall whether he had originally drafted the illustration or had merely put it in final form.


47. Id. This illustration does not appear in Dr. Leflar's review of the Commission's work. See Leflar, supra note 27. The reference in the illustration to the then-current Arkansas law was presumably a reference to the prevailing common law view that no reporter's privilege existed, for there are no reported Arkansas cases on the issue.
difficult. This is offered for the public welfare and is not a shield for dishonest newspapers. It recognizes newspaper writing as a profession and places newspaper men in the same position as lawyers, physicians, and ministers.\footnote{48}

Elaborating on this rationale several years later, Dr. Leflar explained that the privilege would tend to increase the number of successful criminal prosecutions. "The Commission was convinced that undercover criminal activities which might have political or economic protection in a community were more likely to be brought to light, and ultimately prosecuted, if news reporters were given the freedom which the section authorizes."\footnote{49}

Thirteen years after the voters approved the initiated act, the General Assembly amended the shield statute to include radio journalists, making Arkansas the first state to so extend the privilege.\footnote{50} Act 254 of 1949 amended the statute to read as follows, and it remains unchanged today:

Before any editor, reporter, or other writer for any newspaper or 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 to any other authority, the source of information used as the basis for any article he may have written, published or broadcast, it must be shown that such article was written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare.\footnote{51}

The legislation, sponsored by Senator J. Pat Garner of Sebastian

\footnote{48} "Source book for use of Editors and Speakers," \textit{supra} note 44, at 12-13. This description of the provision is reproduced in Leflar, \textit{supra} note 27, at 12-13. The Commission's comment that "[s]uch a change in the law seems to be generally favored" seems something of an overstatement. For example, a commentator discussing the \textit{Mooney} decision wrote that "[a] reading of almost any daily newspaper will demonstrate that the additional news such a privilege would admit would be of slight value." Note, 22 \textit{Cornell L.Q.} 115, 118 (1936). Professor Wigmore's views on the subject have already been noted. \textit{See supra} text accompanying note 19. Moreover, Illinois Governor Horner, vetoing a newsman's privilege bill in July 1935, said in his veto message: "I believe that if this bill becomes law it would work a great injury to the administration of justice. It disregards sound legal principles, has no basis in justice and might lead to a great abuse." Steigleman, \textit{supra} note 16, at 234. Although four states had adopted shield laws in the three-year period preceding approval of the Arkansas statute in 1936, \textit{see supra} note 23, an effort to pass a federal statute failed in 1929, as did attempts to pass legislation in New York (1930) and Texas (1931). Steigleman, \textit{supra} note 16, at 234.

\footnote{49} Leflar, \textit{supra} note 41, at 126.

\footnote{50} \textit{Note, The Right of a Newsman to Refrain from Divulging the Sources of His Information, supra} note 10, at 64.

a radio news editor himself, \(^5\) sailed through the Senate 27-0 and the House 73-2. \(^4\) Governor Sid McMath signed the measure into law on March 8, 1949. \(^6\)

By 1950, only one other state, Michigan, had enacted a shield statute, bringing the total to twelve, \(^6\) and the privilege issue was relatively dormant until the 1960's, when the number of subpoenas issued against reporters increased dramatically. During the first two and one-half years of the Nixon administration, for example, 124 subpoenas were served on CBS and NBC, thirty on the Chicago Sun-Times and the Chicago Daily News, and thirty on the Los Angeles Times. \(^7\) The first major use of subpoenas came in connection with the 1969 trial of the so-called "Chicago Seven," \(^8\) the antiwar activists charged with inciting a riot at the 1968 Democratic National Convention in Chicago. The government served subpoenas on all four major Chicago daily newspapers, the three commercial television networks, and Newsweek, Time and Life magazines, demanding all of their notes, film footage, stories, rough drafts and any other materials in their possession relating to the Convention. \(^8\)

Not surprisingly, seven more states passed shield statutes in the period 1964 to 1971. \(^9\) At the same time, however, journalists were turning toward a first amendment argument in support of a privilege to protect confidential sources. Without such a privilege, they contended, sources would be unwilling to provide information to reporters, and this practical restraint on the flow of news to the media would in turn de-

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52. Senator Garner introduced S. 187 on February 7, 1949. \(\text{Ark. Daily Legis. Dig.}, 57\text{th}

53. \(\text{Ark. Daily Legis. Dig.}, 57\text{th}

54. \(\text{Ark. Daily Legis. Dig.}, 57\text{th}
Gen. Assembly 156, 274 (Feb. 10, Mar. 1, 1949). Because the bill amended an initiated act, a two-thirds vote in each house was necessary. See \textit{Ark. Const. amend. 7}.

55. \(\text{Ark. Daily Legis. Dig.}, 57\text{th}
Gen. Assembly 312 (Mar. 8, 1949).

56. \textit{Note, The Right of a Newsman to Refrain from Divulging the Sources of His Information}, \textit{supra} note 10, at 61 n.1. The Michigan Statute was passed in 1949. \textit{Id}.


58. \textit{See United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973).}

59. \textit{Comment, supra} note 57, at 162.

privileged the public of important information. This theory was initially tested in *Garland v. Torre*, a 1958 defamation case in which the Second Circuit Court of Appeals recognized a qualified first amendment privilege for journalists. Justice Potter Stewart, then a circuit judge, wrote for a unanimous court that “compulsory disclosure of a journalist's confidential sources . . . may entail an abridgment of press freedom by imposing some limitation upon the availability of news.” He added, however, that the privilege is not absolute and must be balanced against “the interest to be served by compelling the testimony of the witness. . . .” Because in *Garland* the information sought “went to the heart of the plaintiff's claim,” Justice Stewart concluded that the balance must be struck in favor of disclosure. Other courts, however, took a dim view of *Garland*'s first amendment analysis, holding that the Constitution offered no “shield,” absolute or qualified, to the reporter who sought to protect the identity of a confidential source.

The United States Supreme Court addressed the issue in *Branzburg v. Hayes*, a 1972 decision involving four cases in which journalists who had personally observed potentially criminal activity were subpoenaed to testify before grand juries. The Court, in an opin-

63. *Id.* at 548.
64. *Id.*
65. *Id.* at 550. Justice Stewart emphasized that this case did not involve “the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news” or a news source “of doubtful relevance or materiality.” *Id.* at 549-50.
68. Two of the cases arose when a *Louisville Courier-Journal* reporter's stories on drug use in the area made clear that he had personally observed the making of hashish and had watched drug users smoke marijuana. *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. Ct. App. 1970); *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. Ct. App. 1971). In the third case, a Massachusetts television newsman had recorded and photographed Black Panther officials preparing for an anticipated police raid, although he prepared no story on the matter. *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971). In all three cases, the state courts rejected the journalists' first amendment claims. The fourth case, which attracted the most attention, involved a black *New York Times* reporter who had covered the Black Panthers and other militant groups on the West Coast. He was subpoenaed to appear before a federal grand jury and to bring with him notes and recordings of interviews with Black Panther leaders. Recognizing a qualified first amendment privilege, the
ion by Justice White, held 5-4 that the reporters had no first amend-
ment privilege to refuse to respond to the grand juries' inquiries or to
refuse to appear before such bodies. Although the White opinion
squarely rejected an absolute privilege, it acknowledged in principle
that newsgathering is a protected first amendment activity and left
room for development of a qualified privilege for protection of confiden-
tial sources. The concurring opinion of Justice Powell, who provided
the crucial fifth vote, offered even more hope, as he took pains to em-
phasize the limited nature of the Court's holding and his view that an
"asserted claim to privilege should be judged on its facts by the striking
of a proper balance between freedom of the press and the obligation of
all citizens to give relevant testimony with respect to criminal
conduct."

While the Powell opinion is somewhat opaque, at least five mem-
bers of the Court—Powell plus the four dissenters—recognized a first
amendment privilege in Branzburg. Some commentators thus de-
scribed Justice White's opinion as one for the "plurality" and focused
instead upon Justice Powell's concurrence and Justice Stewart's dissent
for guidance as to the nature and scope of the first amendment protec-
tion for confidential sources. Although Justice Powell was noncom-
mittal in this regard, Justice Stewart was quite specific. He wrote:

[T]he government must (1) show that there is probable cause to be-
lieve that the newsman has information that is clearly relevant to a
specific probable violation of the law; (2) demonstrate that the infor-
mation sought cannot be obtained by alternative means less destruc-

Ninth Circuit Court of Appeals held that absent a compelling showing of need by the government,
the reporter need not even appear before the grand jury, much less answer its question. Caldwell
v. United States, 434 F.2d 1081 (9th Cir. 1970).

69. 408 U.S. at 702.

70. Justice White wrote that "without some protection for seeking out the news, freedom of
the press could be eviscerated," 408 U.S. at 681, and 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. . . ." Id. at 707-08. Moreover, he restricted the Court's
opinion to the grand jury context, stating that the "sole issue before us is the obligation of report-
ners to respond to grand jury subpoenas . . . and to answer questions relevant to an investigation
into the commission of a crime." Id. at 682. Finally, Justice White noted the "uncertainty" of the
effect of confidential relationships on the flow of news, suggesting that newsmen lost their claim of
privilege because of their failure to carry a burden of proof. Id. at 691, 693.

71. Id. at 710 (Powell, J., concurring).

72. Justice Stewart, author of the Garland opinion, wrote the principal dissent, in which
Justices Brennan and Marshall joined. 408 U.S. at 725. Justice Douglas dissented in a separate
opinion, taking the position that the first amendment confers an absolute privilege. Id. at 711.

73. See, e.g., Goodale, Branzburg v. Hayes and the Developing Qualified Privilege for News-
men, 26 Hastings L.J. 709, 715 (1975).
tive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.⁷⁴

Most lower federal courts and many state courts have interpreted Branzburg as creating a qualified first amendment privilege for journalists and have adopted the Stewart test or a variation thereof in applying that privilege.⁷⁵

Although confidential sources were the focus of Branzburg, some of the cases resolved in that opinion involved grand jury attempts to gain access to unpublished material, such as reporter’s notes or “out-takes,” a term generally used to refer to parts of film or videotape that were not broadcast.⁷⁶ As Professor Franklin has observed, this information is sought for two disparate reasons. First, out-takes may provide others with evidence of what occurred at a particular event; for example, a prosecutor who wants to file charges against persons who disrupted an otherwise peaceful protest march might subpoena all film shot by a local television camera crew, including the portions not used in a newscast. Second, out-takes or reporter’s notes could reveal what was not included in the final news story, thereby helping demonstrate that the story was slanted or recklessly false because of the omissions. Such material could prove useful to a defamation plaintiff seeking to show that a news story or broadcast was distorted.⁷⁷

The Supreme Court was faced with the latter situation in Herbert

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⁷⁴ See 408 U.S. at 743 (Stewart, J., dissenting).
⁷⁵ See supra note 68.
⁷⁶ See supra note 2, at 572.
v. Lando, a 1979 decision that caused considerable furor among the
news media. In that case, the plaintiff, a retired army officer and an
admitted public figure, sued CBS and a "60 Minutes" producer and
reporter for allegedly defamatory remarks aired on a segment about
the Vietnam War. During a deposition, the producer refused to answer
questions about why he had made certain investigations and not others,
what he thought about the honesty and credibility of persons he had
interviewed for the program, and what he had discussed with the re-
porter in preparing the program. The producer contended that these
"thought processes" and internal editorial decisions were protected
from disclosure by the first amendment, but the Supreme Court dis-
agreed, holding that the producer had no constitutional grounds for re-
fusing to answer the questions.

Writing for a 6-3 majority, Justice White conceded that the edito-
rial process is entitled to some first amendment protection and asserted
that it could not be subjected to "private or official examination merely
to satisfy curiosity or to serve some general end such as the public in-
terest." However, no constitutional barrier exists to probing that pro-
cess when there is a "specific claim of injury arising from a publication
that is alleged to have been knowingly or recklessly false." To hold
otherwise, Justice White concluded, would "erect an impenetrable bar-
rier" to a libel plaintiff's use of the direct evidence most relevant in
establishing the requisite fault on the part of the defendant.

It seems clear that the Lando decision has no bearing on the confi-
dential source issue, for the privilege for confidential source and that
asserted in Lando for editorial and thought processes are not analo-
gous. Most courts have not read Lando as affecting the qualified priv-
ilege established in Branzburg and have continued to apply the Stewart

80. 441 U.S. at 175.
81. Id. at 174.
82. Id.
83. Id. at 170.
84. As the Fifth Circuit has observed:
   In [Lando] the Supreme Court reasoned that requiring disclosure of journalists'
thought processes would have no chilling effect on the editorial process; the only effect
would be to deter recklessness. However, forced disclosure of journalists' sources might
deret inforants from giving their stories to newsmen. . . ."
Miller v. Transamerican Press, Inc., 621 F.2d 721, 725, modified, 628 F.2d 932 (5th Cir. 1980),
cert. denied, 450 U.S. 1041 (1981). Moreover, while the sort of information sought in Lando will
always be material to a libel plaintiff's case, the identities of confidential sources will frequently be
irrelevant. Note, Source Protection in Libel Suits after Herbert v. Lando, 81 COLUM. L. REV. 338,
test in apply that privilege.\textsuperscript{85} The impact of \textit{Lando} on attempts to obtain non-published information is a bit more clouded, however. As noted previously, a libel plaintiff may desire to review unpublished material in hopes that omitted information would suggest fault on the part of the defendant news organization. These outtakes are plainly part of the editorial process, and their disclosure could reveal to a defamation plaintiff much the same information as an inquiry of the sort in \textit{Lando} calling for the journalist’s “intentions manifested by his decision to include or exclude certain material.”\textsuperscript{86}

Judge Franklin Waters took this approach in \textit{Williams v. American Broadcasting Companies},\textsuperscript{87} a case which also raised issues with respect to the Arkansas shield statute and which is discussed in more detail below. Relying on \textit{Lando}, Judge Waters squarely rejected the defendants’ claim of a privilege from disclosure of its “editorial decisions on which information to publish, regardless of whether the information is derived from confidential or nonconfidential sources.”\textsuperscript{88} He concluded that outtakes would be “highly probative and in many cases the only proof of selective editing,” which would be crucial to a plaintiff’s action for libel or false-light invasion of privacy.\textsuperscript{89} Because the disclosure sought by plaintiffs could not be described as “a matter of mere satisfaction of curiosity,” he held that no privilege existed under \textit{Lando}.\textsuperscript{90}

Of course, Judge Waters could easily have reached the same result in \textit{Williams} had he employed the Stewart test or “heart of the claim” analysis. Most courts have continued to use that approach after \textit{Lando} in cases involving outtakes or other non-published information,\textsuperscript{91} as


\textsuperscript{86} Herbert v. Lando, 441 U.S. 153, 157 n.2 (1979) (quoting lower court’s summary of question posed to CBS producer).

\textsuperscript{87} 96 F.R.D. 658 (W.D. Ark. 1983).

\textsuperscript{88} \textit{Id.} at 669.

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} \textit{Id.}

well as in cases in which confidential sources are implicated. As one court has observed:

The right of a newspaper to determine for itself what it is to publish and how it is to fulfill its mandate of dissemination must be given great respect. . . . To compel the production of a reporter's . . . notes can no doubt constitute a significant intrusion into and, certainly, a chilling effect upon the newsgathering and editorial processes. . . . [C]ompelled production of [materials developed in preparation of a news article] "is equally as invidious as the compelled disclosure of . . . confidential informants."93

Moreover, it is important to note that Lando was uniquely based upon the constitutionalized law of defamation, and its effect—if any—upon Branzburg should be limited to the libel area.94

At least two other developments should be noted. First, in Branzburg itself Justice White issued a clear invitation to the states to adopt shield statutes protecting confidential sources,95 and seven states have responded since that decision.96 Second, while the Congress has not enacted a federal shield statute,97 Rule 501 of the Federal Rules of Evidence provides that in non-diversity cases, privileges "shall be governed by the principles of the common law as they may be interpreted

92. See supra note 85.
94. Libel cases plainly involve considerations different from those raised in other situations in which a reporter is asked to reveal confidential sources or other information. When the journalist (or his employer) is a defendant, as in libel litigation, successful assertion of the reporter's privilege could effectively shield him from liability. On the other hand, when the journalist is not a party to the proceeding, the equities that favor disclosure in the defamation context are not present. Thus, when a nonparty journalist—a "stranger"—is the target of a subpoena in a civil proceeding, the first amendment balance shifts more strongly in favor of nondisclosure, and a more compelling showing is necessary to force revelation of confidential sources or other material. Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981); Baker v. F & F Investment, 470 F.2d 778, 783 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); Los Angeles Memorial Coliseum Comm'n v. National Football League, 89 F.R.D. 489, 494 (C.D. Cal. 1981); In re Consumers Union, 495 F. Supp. 582, 586 (S.D.N.Y. 1980); Clampitt v. Thurston Co., 98 Wash. 2d 638, 658 P.2d 641, 644-45 (1983). But see In re Selcraig, 705 F.2d 789 (5th Cir. 1983) (applying same standard for overcoming qualified privilege in libel litigation and in case where journalist is not a party).
95. 408 U.S. at 706.
97. Ninety-nine bills establishing federal protection were introduced in the Congress between 1973 and 1978, but none passed. Comment, supra note 96, at 310. Nearly half a century earlier, similar legislation was proposed in Congress after two District of Columbia reporters served jail terms rather than reveal the names of some local bootleggers about whom they had written. The bill failed. Steigleman, supra note 16, at 234.
by the courts of the United States in the light of reason and experience."98 Some federal courts have under this rule fashioned a journalist's privilege as a matter of federal common law.99

II. EFFECT OF THE UNIFORM RULES OF EVIDENCE

In February 1976, the Arkansas General Assembly enacted the Uniform Rules of Evidence,100 which became effective on July 1 of that year. The section on privileges includes a variety of specific privileges—such as lawyer-client,101 physician-patient,102 and husband-wife103—and states various general rules with respect to application of the privileges.104 Moreover, Rule 501 provides:

Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to:

(1) refuse to be a witness;
(2) refuse to disclose any matter;
(3) refuse to produce any object or writing; or
(4) prevent another from being a witness or disclosing any matter or producing any object or writing.105

What effect, if any, does this provision have upon the Arkansas shield law?

It is clear that the Uniform Rules of Evidence did not expressly repeal section 43-917 of Arkansas Statutes Annotated. Section 2 of Act No. 1143—the act adopting the rules—specifically repealed a variety

98. Fed. R. Evid. 501. As initially promulgated by the Supreme Court, the rules contained thirteen separate provisions on privilege, and the ensuing furor was primarily responsible for delaying the effective date of the rules for two years as Congress studied the matter. The major objections with the Supreme Court's draft included: the short shift given state law, the implied "usurpation" of Congress' role by the Supreme Court, the handling of some of the traditional privileges, and the provisions respecting governmental privilege. P. Rothstein, Understanding the New Federal Rules of Evidence 199 n.5 (Supp. 1975). The Supreme Court's version did not include a privilege for journalists. Id.


102. Id., Ark. R. Evid. 503.

103. Id., Ark. R. Evid. 504.

104. Id., Ark. R. Evid. 510-12.

of statutes but did not list the shield law among them. However, section 2 also repealed "[a]ll other laws and parts of laws in conflict with this Act," and it could be argued that the legislature, in enacting the Uniform Rules of Evidence, intended to repeal section 43-917. Although the Arkansas Supreme Court has not squarely addressed the question, this argument is untenable in light of the plain language of Rule 501 as well as the case law touching on the issue.

That the legislature did not intend the rules of evidence to be the sole source for testimonial privileges is made plain by the exception in Rule 501 for privileges "provided by constitution or statute or by these or other rules." The effect of this language is to incorporate into the rules of evidence various privileges not found within the rules themselves. Because the journalist's privilege is embodied in a statute, it falls within the exception and remains effective. Judge Waters reached this result in Williams v. American Broadcasting Companies, a federal diversity case applying Arkansas law. As Judge Waters observed, "Rule 501 clearly negates the existence of any privilege not granted by the Arkansas Constitution or by statute or Supreme Court rule." However, he also noted that while the rules of evidence do not mention a newsmen's privilege, section 43-917 is the "statutory authority for such a privilege."

The Williams decision is consistent with the analogous case of Winston v. Robinson, in which the supreme court considered the impact of the rules of evidence upon a provision in the bastardy statutes that allowed the introduction into evidence of blood tests only to estab-

107. Id. at 2(b).
108. The fact that the shield statute was part of an initiated act does not affect the repeal argument, for the rules of evidence were adopted without dissenting vote by both houses of the legislature: 31-0 in the Senate, 85-0 in the House. 1975 ARK. LEGIS. DIG., 70th Gen. Assembly, H-N-40 (extended sess. 1976). Amendment 7 of the Arkansas Constitution requires a two-thirds vote of each house in the legislature for the amendment or repeal of any measure "approved by a vote of the people." Thus, the vote on the rules of evidence would be sufficient to repeal section 43-917. See Townsend v. City of Helena, 244 Ark. 228, 232 n. 7, 424 S.W.2d 856, 859 n.7 (portion of 1936 initiated act regarding insanity defense had been repealed by 1949 statute), cert. denied, 393 U.S. 917 (1968).
111. Id. at 662. Rule 501 also seems to provide for privileges recognized under the federal constitution.
112. Id. In Saxton v. Arkansas Gazette Co., 264 Ark. 133, 569 S.W.2d 115 (1978), the supreme court applied the shield statute in an opinion handed down more than two years after the rules of evidence became effective but did not discuss the relationship between the rules and the statute or consider an implied repeal argument.
113. 270 Ark. 996, 606 S.W.2d 757 (1980).
lish nonpaternity. Despite this statute, the trial court had allowed into evidence two blood tests, which did not exclude the defendant as the father, for purposes of establishing paternity. On appeal, the plaintiff-appellee defended the trial court's action, arguing that the statute had been repealed by the general repealer clause in the act adopting the Uniform Rules of Evidence. The court, in an opinion by Special Justice George Pike, Jr., rejected the argument.

Justice Pike made two key points, both of which are applicable with respect to section 43-917. First, he noted that the rules of evidence expressly repealed one provision of the bastardy statutes but left untouched the blood test provision at issue in Winston. Similarly, the rules of evidence specifically repealed two statutes relating to privilege that appeared in the same title of the statutes as the journalist's privilege provision. Second, he observed that Rule 402 of the rules of evidence—the general admissibility provision—"acknowledges that other statutes may render inadmissible evidence that otherwise would be admissible under the rules." Even with the enactment of the rules of evidence, Justice Pike wrote, "the General Assembly still may have enacted or may later enact specific statutes dealing with the admissibility of evidence." Accordingly, he concluded that there is no conflict between Rule 402 and the blood test statute and that the former did not repeal the latter. Precisely the same analysis should govern the interpretation of Rule 501 and section 43-917.

The fact that the Arkansas Uniform Rules of Evidence were enacted by the General Assembly rather than promulgated by the Supreme Court avoids, at least for the moment, a problem that has arisen in other jurisdictions with respect to the separation of powers doctrine. In Ammerman v. Hubbard Broadcasting, Inc., the New


115. 270 Ark. at 1001, 606 S.W.2d at 760.


118. 270 Ark. at 1002, 606 S.W.2d at 761. He added that such statutes "legitimately express the public policy of the State on the admissibility of evidence, for example, that may be of dubious reliability." Id.

119. The Arkansas Constitution contains explicit separation of powers language, providing for "three distinct departments," none of which "shall exercise any power belonging to . . . the others." Ark. Const. art IV, §§ 1 & 2. As the supreme court has observed, "[n]either of the three separate departments of government is subordinate to the other and neither can arrogate to
Mexico Supreme Court held unconstitutional the state's shield statute, at least insofar as it applied to judicial proceedings, on the ground that it conflicted with the court's inherent authority to prescribe rules of procedure. Concluding that privileges are part and parcel of the rules of evidence and that the latter are procedural in nature, the court held that "under our Constitution the Legislature lacks power to prescribe by statute rules of evidence and procedure, this constitutional power [being] vested exclusively in this court..." The court, which had adopted the uniform rules of evidence in 1973, determined that the shield statute impermissibly expanded the privileges recognized in the New Mexico version of Rule 501.

While Arkansas case law on the nature of inherent judicial power is scant, a handful of illustrative decisions can be found. For example, the supreme court has held that the legislature cannot regulate how the court writes its opinions, force a trial court to grant a continuance, or impair the judicial power to punish for contempt. It also seems clear that the court has inherent authority to supervise the state's judges, including the power to adopt a code of judicial conduct.
While earlier decisions seem to concede the legislature's power to control procedure in "any and all" of the state's courts, more recent cases suggest that the supreme court may promulgate rules of practice and procedure even absent an enabling statute.

For example, in 1975 the supreme court adopted rules of criminal procedure for the state "[p]ursuant to Act 470 of 1971, and in harmony with the Court's constitutional superintending control over all trial courts." Two years later, in *Miller v. State*, the court rejected the argument that the rules were invalid because Act 470 had impermissibly delegated legislative powers to the judiciary. Writing for the majority, Justice Frank Holt explained that the court, in adopting the rules of criminal procedure, "implicitly rejected the argument advanced here that we had no inherent rule making authority absent an enabling statute." Because Act 470 "merely recognizes and is harmonious with this court's inherent powers," the court concluded that there had been no unconstitutional delegation of power to the judicial branch. The court again made the point in *Jennings v. State*, observing that "if we have the inherent power to make the Rules of Criminal Procedure, it follows that we have the inherent power to amend those rules." The court also cited its "constitutional and inherent power to regulate procedure in the courts" as well as enabling legislation in promulgating the Arkansas Rules of Civil Procedure.
Whether the Arkansas Supreme Court possesses the inherent authority to promulgate rules of evidence is therefore an open question, as is the impact of such power upon the statutory newsmen’s privilege. Interestingly, Rule 501 of the Arkansas Rules of Evidence seems to invite the court to adopt its own rules as to privileges, though the rule recognizes that statutes can also create such privileges. Rule 501 states as a general matter that no one has a privilege to refuse to be a witness or to produce documentary material, but notes an exception for other statutes and “these or other rules promulgated by the Supreme Court of this State. . . .”

It would be possible, of course, for the court to hold that the legislative and judicial branches share the power to promulgate evidentiary rules, but this resolution of the problem would suffice only if the court adopted a rule that did not conflict with section 43-917 or another statutory privilege. A direct conflict, as in the Ammerman case, would force the court to determine which branch holds the paramount power.

Faced with that question, the Arkansas Supreme Court should reject Ammerman, which is based on a faulty premise: that testimonial privileges are procedural in nature. Unlike evidentiary rules which govern the reliability and relevance of information presented to the courts, testimonial privileges are enacted to serve social policies wholly unrelated to the needs of the adversarial system of justice. Instead, they are created to foster relationships which society believes worthy of protection, although that protection may interfere with the search for truth in judicial proceedings. For example, the journalist’s privilege is grounded in the notion that the free flow of information to the public is


136. Ark. Stat. Ann. § 28-1001, Ark. R. Evid. 501 (1977). Oddly enough, this apparent dual authority is probably the result of a drafting error, for it seems unlikely that the General Assembly intended to delegate to the supreme court the power to reshape the rule of privilege that had been legislatively adopted. Rule 501 of the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform Laws recognizes an exception for statutes or “these or other rules promulgated by the [Supreme Court of this State]. . . .” Unif. R. Evid. 501; 13 U.L.A. 248 (1980). The bracketed language would be appropriate only if the state supreme court had itself adopted the rules of evidence; otherwise, it seems that the name of the authority that promulgated the rules—in Arkansas, the legislature—should appear in that space.

137. See Jackson v. Ozment, 283 Ark. 100, 101, 671 S.W.2d 736, 738 (1984) (art. VII, §§ 1 & 4 of state constitution, which place in supreme court superintending control over all inferior courts, “do not expressly or by implication confer on this Court exclusive authority to set rules of court procedure”).

enhanced by confidential relationships between reporters and their sources. In deciding that confidential sources should be protected, the General Assembly obviously decided that ensuring an unimpeded flow of news to the public is generally more important than the "search for truth" in a given case. Such an accommodation of competing societal interests is the hallmark of substantive law, and the duty to balance those interests rest with the legislature.

The separation of powers doctrine, however, creates an additional problem with respect to shield statutes, which arguably impair the ability of the courts to perform their constitutionally mandated functions. This question arose in a 1971 California case, Farr v. Superior Court, which stemmed from a reporter's refusal to disclose his sources for a statement released in violation of a judicial "gag order" imposed during the highly publicized murder trial of Charles Manson. The reporter admitted that his sources were two attorneys and another person subject to the gag order but, pointing to the California shield statute, refused to name them. Affirming the trial judge's contempt order, the appellate court held that the shield law impermissibly interfered with the trial court's ability to enforce an order designed to ensure a fair trial for the defendants. Accordingly, the shield law was deemed an unconstitutional infringement on the judicial power and held invalid under the separation of powers doctrine.

The Farr case should not be read as a broad condemnation of all statutes creating testimonial privileges. First, it is safe to say as a general matter that the application of testimonial privileges does not significantly interfere with the exercise of judicial power, although it obviously affects a court's ability to acquire information bearing on a given case. Second, Farr involved a shield statute that not only protected


141. Note, supra note 120, at 503-04. See also Day, Shield Laws and the Separation of Powers Doctrine, 2 Com. and the Law 1, 8 (Fall 1980). As noted previously, the privileges contained in the Federal Rules of Evidence promulgated by the Supreme Court spawned a major controversy in the Congress and led to legislative enactment of different privilege provisions. See supra note 98. One reason for the dispute was congressional sentiment that the Court's privilege rules intruded into the legislative sphere because of their "social policy" implications. Comment, Separation of Powers and the Federal Rules of Evidence, 26 Hastings L.J. 1059, 1060 (1975).


143. Id. at 70, 99 Cal. Rptr. at 348.

144. Note, supra note 138, at 1288. In contrast to privilege statutes stand laws that restrict
confidential sources but also eliminated the court’s power to hold in contempt a reporter who refused to reveal his sources. It has been widely held that the power to punish for contempt is inherent with the judiciary. Finally, the California shield statute was absolute in its protection for confidential sources, and a statute providing only a qualified privilege would avoid the separation of powers problem by leaving to the courts the ultimate decision to compel disclosure. The Arkansas statute, while not entirely clear in terms of when disclosure may be required, creates only a qualified privilege and does not purport to affect the contempt power of the courts. Accordingly, the problem present in Farr should not arise in Arkansas.

III. THE ACT IN OPERATION

In its forty-eight year history, the Arkansas shield statute has been interpreted and applied in only two reported cases, both arising in the past six years. An unreported 1967 case and an attorney general’s opinion also shed some light on the act, but as a practical matter one faced with a problem involving the newsman’s privilege in Arkansas is walking uncharted ground. This portion of the article examines typical questions raised in shield law cases and resolution of those issues under section 43-917 of Arkansas Statutes Annotated.

At the outset, however, it should be noted that shield legislation has had a rather hostile reception in the courts of some states, which have construed some statutes quite narrowly. Noting that the common law afforded no such privilege for journalists, these courts have held judicial control over court operations, attempt to direct what are essentially judicial decisions, or limit court independence. Id. See, e.g., Houston v. Williams, 13 Cal. 24 (1859)(law requiring court to issue opinion in every case); State ex. rel. Buckwalter v. City of Lakeland, 112 Fla. 200, 150 So. 508 (1933) (law interfering with court’s mandamus power); Board of County Comm’rs v. General Sec. Corp., 157 Kan. 64, 138 P.2d 479 (1943) (directing court in the interpretation of an existing law). The Arkansas cases cited supra notes 124-26 also seem to fall into these categories.

145. At the time of the Farr case, the California statute provided:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.

CAL. EVID. CODE § 1070 (West 1966). The statute has been frequently amended since the Farr decision, and in 1980 the voters approved a constitutional amendment prohibiting the courts from holding in contempt reporters who refuse to reveal confidential sources. CAL. CONST. art. I, § 2(b).


147. Note, supra note 138, at 1290. See also Day, supra note 141, at 15.

that shield statutes are to be strictly construed because they are in derogation of the common law.\textsuperscript{149} In contrast, courts in other jurisdictions have held that the statutes must be liberally construed because of the public policy they reflect. The Pennsylvania Supreme Court, for example, adopted a rule of liberal construction because "independent newspapers are today the principal watch-dogs and protectors of honest, as well as good, Government."\textsuperscript{150}

Although it has often applied the rule that statutes in derogation of the common law are to be strictly construed,\textsuperscript{151} the Arkansas Supreme Court has suggested that section 43-917 is to be liberally interpreted. In its only decision involving the statute, Saxton v. Arkansas Gazette Co.,\textsuperscript{152} the court held that the act applies in civil as well as criminal proceedings, despite its history as part of a criminal law reform package and its location in the criminal procedure title of the Arkansas Statutes.\textsuperscript{153} A narrow reading of the act could obviously have led the court to the opposite conclusion. Moreover, in Williams v. American Broadcasting Companies,\textsuperscript{154} a federal diversity case, Judge Waters held that the act applies to television journalists although it specifically mentions only newspapers, periodicals, and radio stations.\textsuperscript{155} In the same case, however, the court cited the rule of strict construction and held that the statute protects only sources of information, not outtakes or unpublished material.\textsuperscript{156}

In construing the shield statute, the Arkansas Supreme Court should adopt the rule of liberal interpretation, as it has done in cases under the state's freedom of information act (FOIA).\textsuperscript{157} In the first


\textsuperscript{152} 264 Ark. 133, 569 S.W.2d 115 (1978).

\textsuperscript{153} Id. at 136, 569 S.W.2d at 117.

\textsuperscript{154} 96 F.R.D. 658 (W.D. Ark. 1983).

\textsuperscript{155} Id. at 665.

\textsuperscript{156} Id.

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FOIA case, *Laman v. Mc Cord*, the court rejected the argument that the statute was a penal provision that must be strictly construed. Justice George Rose Smith wrote for the court that the freedom of information act "was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved." Like the FOIA, the shield statute was enacted to help ensure that the citizens of Arkansas receive a free flow of information about public issues, and the reasoning of the court in *Laman* applies with equal force to section 43-917.

A. Persons Covered by the Statute

In a 1964 defamation case, a federal district court held that the California shield statute, which applied to persons "connected with or employed upon a newspaper, or by a press association or wire service," could not be invoked by a magazine journalist. The court stressed that the statute used the term "newspaper" rather than "periodical" and concluded that the legislature intended to distinguish between the two types of publications. Similarly, another federal court held that the Ohio statute, which provided protection for journalists employed by "any newspaper or any press association," did not extend to the publisher of a bi-monthly business report.


158. 245 Ark. 401, 432 S.W.2d 753 (1968).
160. As a Louisiana court has observed:
   The obvious statutory intent is to encourage the divulgence of news by informants who might otherwise hesitate to disclose matters of public import for fear of unfavorable publicity or the possibility of retribution resulting from their being revealed as the source of a particular news item. In so providing, our statute supports the basic right of the public to be informed by permitting a newspaper reporter to maintain the confidentiality of his news sources.

163. *Id.* at 473. The court also pointed out that the statute, which originally applied only to newspaper reporters, had been amended to include journalists working for press associations, wire services, and radio and television stations. *Id.*
The Arkansas statute avoids some — but not all — definitional problems of this sort. Section 43-917 expressly provides a privilege for any publisher, editor, reporter or other writer for a newspaper or periodical and the owner, manager, editor, reporter or other writer for a radio station.\textsuperscript{166} Accordingly, the magazine writer and newsletter publisher in the two cases discussed above would be protected by the Arkansas act, since both undoubtedly were connected with a “periodical.” Use of the term “periodical” also makes plain that the act is not limited to newspapers that meet requirements set out in other statutes with respect to circulation or frequency of publication.\textsuperscript{167} Even if a newspaper does not fall within such a definition, it is nevertheless a “periodical” within the meaning of the statute.

As noted previously, Judge Waters held in \textit{Williams v. American Broadcasting Companies}\textsuperscript{168} that section 43-917 applies to television journalists,\textsuperscript{169} although the statute itself does not mention the medium. Given the role of television today in the dissemination of news, that construction of the statute is eminently reasonable. If the journalist’s privilege is worthy of protection, it should be extended to persons who work for all forms of media, including wire services, press associations, newspaper syndicates, and cable television operations.\textsuperscript{170} For the same reason, the statute should also be interpreted to include photographers and television cameramen.\textsuperscript{171} The statute is apparently broad enough to cover freelance journalists as well, for it applies to “other writer[s]” for newspapers or radio stations as well as to reporters and editors. In addition, the act is not on its face limited to persons regularly employed by news organizations.\textsuperscript{172} Because the statute was clearly aimed at

\begin{enumerate}
\item[168.] 96 F.R.D. 658 (W.D. Ark. 1983).
\item[169.] \textit{Id.} at 665.
\item[170.] Some state shield statutes contain “laundry lists” of news media whose reporters enjoy the privilege. \textit{See}, \textit{e.g.}, \textsc{Mont. Code Ann.} § 26-1-902(1) (1983) (newspaper, magazine, press association, news service, radio station, television station, cable television system); \textsc{Okla. Stat. Ann.} tit. 12, § 2506(2) (West 1980) (newspaper, magazine, other periodicals, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, cable television system).
\item[171.] The Rhode Island statute, for example, covers reporters, editors, commentators, journalists, writers, correspondents, news photographers or other persons “directly engaged in the gathering or presentation of news. . . .” \textsc{R.I. Gen. Laws} § 9-19.1-2 (1983).
\item[172.] \textit{Cf.} Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977) (first amendment privilege applies to freelance documentary filmmaker). \textit{Compare} \textsc{N.Y. Civ. Rights Law} § 79-h(6) (McKinney Supp. 1983-84) (defining journalist for purposes of shield statute as “regular employee” of news media or person “otherwise professionally affiliated for gain or livelihood” with
journalists, however, it would probably not be construed to include historians, researchers, educators or others who disseminate information as opposed to “news.”\(^{173}\)

It seems clear that journalists are entitled to the statutory privilege only to the extent that they receive information from confidential sources within the course of their newsgathering activities. That is, confidential sources who provide material to the reporter in some capacity other than his role as a journalist would be subject to disclosure. Although the Arkansas statute does not expressly so provide, such a requirement can be implied from the language limiting the privilege to “the source of information used as the basis for any article he may have written, published or broadcast. . . .”\(^{174}\) The “scope of employment” limitation is a reasonable one, for the purpose of the statute—to encourage informants to confide in journalists—is not served when the privilege is applied to communications received outside the course of employment.\(^{175}\) By the same token, however, the statute should be construed to cover former journalists who, during their tenure as members of the working press, were supplied information by confidential sources.\(^{176}\) The privilege is of little value in encouraging the flow of

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\(^{175}\) D'Alemberte, supra note 10, at 336. Cf. Shindler v. State, 335 N.E.2d 638, 644-46 (Ind. App. 1975) (rejecting argument that investigative reporter was acting as agent of law enforcement agency and thus not entitled to invoke privilege). Some courts have interpreted “scope of employment” provisions too rigidly, however. For example, in In re WBAI-FM, 68 Misc. 2d 335, 326 N.Y.S.2d 434 (Cty. Ct. 1971), aff'd, 42 A.D.2d 5, 344 N.Y.S.2d 393 (1973), a radio station received an anonymous telephone call advising that a bomb had been planted. The caller added that a letter containing more details had been placed in a nearby phone booth. A newscaster picked up the letter, called the police, and read the letter over the air. The court held that the state shield statute did not protect the letter because the radio station did not obtain it in the course of newsgathering activities. The mere “passive” receipt of unsolicited information did not, in the court's view, constitute newsgathering. 68 Misc. 2d 335, 326 N.Y.S.2d at 437. The New York legislature subsequently amended the statute to include unsolicited as well as solicited material. See N.Y. Civ. Rights Law § 79-h(b) (McKinney Supp. 1983-84) (privilege applies “notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to him”); People v. Iannacone, 112 Misc.2d 1057, 447 N.Y.S.2d 996, 998 (Sup. Ct. 1982) (discussing the amendment).

\(^{176}\) Several state statutes are expressly applicable to former journalists. See, e.g., Cal.
information from source to reporter if it vanishes for purposes of past communications when the journalist enters a new line of work.

It should also be noted at this point that section 43-917 grants a privilege to the journalist, not to his confidential source. Courts in other jurisdictions have uniformly held that such a statutory privilege may be invoked only by the journalists. For example, in a 1970 decision, the Indiana Supreme Court rejected a criminal defendant’s contention that the trial court had erred in allowing a newspaper reporter to testify, over the defendant’s objection, to a conversation with the reporter while the defendant was in jail awaiting trial. The court held that the Indiana shield statute created a right personal to the reporter, a right that only he could invoke. Since the journalist was willing to testify at trial, there was no problem under the shield statute.

B. Nature of the Privilege

State shield statutes vary widely with respect to the type of material they protect from disclosure. For example, some statutes protect only the identity of a source of information, while others also reach reporter’s notes, outtakes, and unpublished information—that is, virtually any information acquired during the course of the journalist’s news-gathering activities. The Arkansas statute contains two important limitations: (1) on its face, it applies only to sources of information, and (2) it may be invoked only if the source has provided information as the basis for a story that has been published or broadcast.

The only reported decision dealing with either of these limitations is Williams v. American Broadcasting Companies, a federal diver-


179. Id., 258 N.E.2d at 626.


sity case applying Arkansas law.\textsuperscript{183} The case grew out of a report on ABC's "20/20" news program implying that a Harrison doctor routinely performed unnecessary surgery and was generally incompetent to practice medicine. In addition, the report included film of hip surgery performed on a Boone County woman. The patient brought suit against ABC alleging that the operation had been filmed without her knowledge or consent and its broadcast had invaded her privacy. The physician brought a defamation action against the network and also claimed that an "ambush" interview with him that was aired on the broadcast placed him in a "false light" before the public. During discovery, the plaintiffs sought an order compelling ABC to produce the outtakes of all film or video tape produced in connection with the broadcast.\textsuperscript{184}

Judge Waters granted the motions to compel, rejecting first amendment and statutory arguments raised by ABC. With respect to section 43-917, the network had contended that the outtakes were protected from disclosure by the statute. The court, however, refused to bring such unpublished information within the ambit of the shield law, pointing to the statute's plain language and the general rule that statutes at variance with the common law are to be strictly construed.\textsuperscript{185} Judge Waters wrote:

[T]he statute, by its own terms, applies only so as to protect "the source." Further, the source is not protected in the event of bad faith or malice on the part of the reporter. Plaintiffs do not seek any information as to sources. Defendants do not even assert that the out-takes would lead to the discovery of a source. Plaintiffs have alleged, and presumably stand prepared to attempt to prove bad faith or malice on the part of defendants.

. . . .

. . .[w]e conclude that the Arkansas courts, if faced with the precise "out-take" situation present here, would hold that section 43-917 does

\textsuperscript{183} The choice of law issue in the case is also an interesting one, and this problem frequently arises in shield law settings. In Williams, ABC contended that it should be protected by the New York shield statute, since the network and its employees are citizens of that state, all editorial decisions are made there, and all broadcasts originate there. Moreover, they argued that it would be unfair to subject network reporters to the varying shield laws or absence of such statutes in the fifty states. The court, however, concluded that the Arkansas courts would look to Arkansas law under the general rule that the competency and admissibility of evidence are to be determined by the law of the forum state. 96 F.R.D. at 662. See Brotherhood of R.R. Trainmen v. Long, 186 Ark. 320, 53 S.W.2d 433 (1932). Of course, a federal court in a diversity case must apply the choice of law rules of the state in which it sits. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

\textsuperscript{184} 96 F.R.D. at 660.

\textsuperscript{185} Id. at 664-65. For a discussion of the "strict construction" aspect of this case, see supra text accompanying notes 154-56.
not protect out-takes in a libel or privilege case, which would not in any respect reveal a source.\textsuperscript{186}

Most courts have taken this approach in construing statutes which, like section 43-917, mention only sources of information.\textsuperscript{187} The Pennsylvania Supreme Court, however, has held that out-takes and other unpublished material are protected under that state's shield law, although the statute provides express protection only for sources.\textsuperscript{188} Reasoning that "[t]he common and approved meaning of the words 'source of information' includes documents as well as personal informants,"\textsuperscript{189} the court held that the shield statute applied to a reporter's tape recordings, memoranda of interviews, and notes developed in connection with a news story. A more conservative approach is to extend statutory protection for "sources" to unpublished material and background information only if disclosure of these items would tend to reveal the identity of a source.\textsuperscript{190} Although he did not decide the question in \textit{Williams}, Judge Waters intimated that he was willing to protect the ABC out-takes if their disclosure would have revealed a source.\textsuperscript{191}

Because the Arkansas statute has for the moment been construed to protect only the identities of those who furnish information to journalists, it is important to define exactly what is meant by "source" in this context. One of the Kentucky cases that led to the United States Supreme Court's landmark decision in \textit{Branzburg v. Hayes}\textsuperscript{192} offers perhaps the best illustration of the problem. In \textit{Branzburg v. Pound},\textsuperscript{193} a reporter for the \textit{Louisville Courier-Journal} was called by a grand jury and questioned about his reporting of drug abuse in the area. He refused to identify persons he had interviewed for a news story, which

\begin{itemize}
\item \textsuperscript{186} 96 F.R.D. at 665.
\item \textsuperscript{188}  \textit{In re Taylor}, 412 Pa. 32, 193 A.2d 181 (1963).
\item \textsuperscript{191}  96 F.R.D. at 665. \textit{See supra} text accompanying note 186.
\item \textsuperscript{192}  408 U.S. 665 (1972).
\item \textsuperscript{193}  461 S.W.2d 345 (Ky. App. 1971), \textit{aff'd on other grounds}, 408 U.S. 665 (1972).
\end{itemize}
made clear that he had observed two individuals synthesizing hashish from marijuana. Although the state's shield statute protects the "source of information," the Kentucky Court of Appeals concluded that the "source" of this particular article was the reporter's own personal observation and that the identities of the two persons making the drug were part of the "information" that the reporter had obtained. Because the statute covered only the source and not the information itself, the reporter was compelled to identify the persons he had observed producing the hashish.

Although this view has been criticized as an exercise in "verbal gymnastics," it has prevailed in other jurisdictions as well. There is, of course, a contrary approach. As Chief Justice Hill pointed out in his Branzburg dissent, nothing in the statute excepts those situations in which the reporter observes his "sources" committing a criminal act. The chief justice also noted that "the phrase 'source of any information' is a broad, comprehensive one, certainly not a technical phrase." He added: "[W]e have a situation requiring the balance of values and I believe, as apparently did the Legislature, that the benefits to society from thoroughly and correctly reporting current events greater outweighs the probable and highly imaginary possibility of their abuse under the statute." The gist of this position is that shield statutes generally do not distinguish between (1) an informant who observes a crime and then "tips" a reporter, and (2) a reporter who, after gaining the confidence of an individual, observes first-hand that person committing a criminal offense. Since the legislatures have not drawn such a distinction, the argument goes, the courts should refrain from doing so. In either of the two situations, assertion of the privilege would deprive law enforcement officials of access to the wrongdoers, and it arguably matters little that the reporter learned of the violation via

194. KY. REV. STAT. § 421.100 (1972).
195. 461 S.W.2d at 347.
196. Id.
199. 461 S.W.2d at 348.
200. Id.
201. Id.
personal observation of second-hand information. Given the weight of authority to the contrary, however, it seems unlikely that the Arkansas courts would adopt Chief Justice Hill's approach.

It is reasonably clear, however, that the term "source" includes virtually anyone who furnishes information to a news organization. Attorney General Steve Clark, for example, has suggested in an informal opinion that the identity of the author of a "letter to the editor" can be withheld under section 43-917, a result consistent with case law in other jurisdictions. In a recent Louisiana case, Becnel v. Lucia, an intermediate appellate court held that a letter writer is a "source of information" within the state's shield statute, reasoning that a letter writer, like any other source, "might otherwise hesitate to disclose matters of public import for fear of unfavorable publicity or the possibility of retribution resulting from [his] being revealed as the source of a particular news item." Similarly, a New York court concluded that a letter to the editor qualifies as "news" for purposes of the state shield law, which protects "news or the source of any such news. . . ." The court pointed out that the letter in question alleged that tavern owners had contributed to the drunk driving problem by serving liquor to obviously intoxicated persons, a matter of obvious public interest and concern.

Unlike some shield statutes, section 43-917 does not limit the


203. Informal Opinion to Wendel Sloan (May 7, 1979). The Attorney General is authorized by statute to render formal opinions at the request of certain public officials, including members of the General Assembly, all state boards and commissions, the heads of executive departments, and prosecuting attorneys. Ark. Stat. Ann. §§ 12-702, 12-703 (1979). In the past few years, it has also become common for the Attorney General to issue "informal" opinions to persons not authorized by law to request official opinions. These informal opinions do not bear an opinion number and typically include language making plain that they are merely "an informal and unofficial expression of view given with the desire to be helpful" to the person making the request. See, e.g., Informal Opinion to Barry L. Molder (March 25, 1982).

204. 420 So. 2d 1173 (La. App. 1982).


208. 92 A.D.2d 102, 459 N.Y.S.2d at 820.

privilege to confidential sources of information. Accordingly, the Arkansas courts should hold that an express promise of confidentiality is not required under section 43-917 and that the statute reaches the identities of all sources, confidential or otherwise. Courts in other jurisdictions have so held, reasoning that shield statutes which do not specifically restrict the privilege to confidential sources are "broad enough to encompass any source of news or information, without regard to whether the source gave his information in confidence or not." While the primary purpose of the statutes may be to protect confidential reporter-source relationships, most courts have been reluctant to go beyond the plain language of the shield provisions. In contrast, however, the New York courts have found the confidentiality element "implicit" in that state's shield law. The North Dakota Supreme Court has taken a different approach, holding that while the privilege is not by statute limited to confidential sources, confidentiality is a factor that a court may consider in determining whether the privilege has been overcome in a given situation.

The Arkansas requirement that the source must have supplied information for a story that is published or broadcast—a limitation

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\[\text{fidential information" and “the source of any confidential information”)}\].


\[\text{211. As the Tennessee Supreme Court has observed, “no matter how surprising it may be that the Legislature would embrace nonconfidential as well as confidential material, . . . we cannot insert language into the statute to alter that result.” Austin v. Memphis Pub. Co., 655 S.W.2d 146, 150 (Tenn. 1983). See also Lightman v. State, 15 Md. App. 713, 294 A.2d 149, 156, opinion adopted, 266 Md. 550, 295 A.2d 212 (1972), cert. denied, 411 U.S. 951 (1973).} \]


\[\text{214. The shield statute applies only to “the source of information used as the basis for any article [a journalist] may have written, published or broadcast. . . .” Ark. Stat. Ann. § 43-917 (1977).} \]
found in a few other states— is one of the shield statute's major shortcomings. An unreported Arkansas circuit court decision illustrates how the statute works in this regard. In early 1967, reporters Jack Baker of the Arkansas Gazette and Michael B. Smith of the Pine Bluff Commercial were called before the Pulaski County Grand Jury, which was investigating alleged bribe attempts to gain legislative support for a bill to legalize casino gambling in Hot Springs. The investigation began after Representative Gayle Windsor of Little Rock revealed that he had been offered $1,000 to vote for the gambling bill. News reports about Windsor had not implicated any other legislators, but the two newsmen intimated before the grand jury that other members of the General Assembly had been approached with offers of money in exchange for their support. The reporters refused to reveal the names of legislators who had told them of the bribery attempts, and Pulaski Circuit Judge William J. Kirby ordered them to jail. Judge Kirby concluded that section 43-917 was inapplicable because the questions asked of the newsmen did not involve sources for stories that had been published. After the supreme court dismissed their appeal, the reporters agreed to respond to the grand jury's questions, explaining that their sources had relieved them of their confidentiality obligations.

C. Where the Privilege Applies

Like the vast majority of state shield statutes, section 43-917 creates a privilege that may be asserted before any governmental authority in any type of case. In contrast, the Michigan statute applies only in criminal proceedings, and the Illinois statutory privilege is not avail-


216. For example, under the Arkansas statute a reporter who has spent considerable time and effort developing a complex story may have to reveal the identity of his sources simply because the story has yet to be published or broadcast. An informant who provides information to a reporter is not concerned with the ultimate publication of the story, but rather with the assurance of confidentiality. Moreover, a reporter seeking to take advantage of the privilege may rush his story into print without further investigation, perhaps resulting in an incomplete or inaccurate account. See Bortz & Bortz, supra note 16, at 475-76; Comment, The Protection of Confidential News Sources: Enhancing the Utility of Ohio's Shield Law, 42 Ohio St. L.J. 1039, 1048-49 (1982).


able in defamation actions.\textsuperscript{319}

The fact that the Arkansas act was part of a criminal law reform package and was codified in a title of the statutes dealing with criminal procedure may suggest that the privilege is limited to criminal cases. However, the supreme court rejected this reading of the statute in \textit{Saxton v. Arkansas Gazette Co.},\textsuperscript{220} a defamation case in which the plaintiff sought to discover the identities of sources relied upon by a reporter in preparing an article alleged to be libelous. In its only opinion to date construing section 43-917, the court stressed that the statute by its own terms applied to source disclosure before grand juries or "any other authority," a term which "clearly indicates that the privilege . . . is applicable to civil proceedings."\textsuperscript{221} Writing for the court, Justice Frank Holt also noted that the initiated act of which section 43-917 was a part was entitled an "Act to Amend, Modify and Improve Judicial Procedure and the Criminal Law, and for other purposes," and that the act "contain[ed] various provisions dealing with the administration of justice in our courts which are applicable to both criminal and civil proceedings."\textsuperscript{222}

In light of the \textit{Saxton} decision, it is clear that the phrase "any other authority" in section 43-917 is to be given an expansive reading. The privilege should therefore be available to a journalist called before any governmental authority, state or local. For example, the privilege could be asserted in a criminal case in which the journalist is subpoenaed by either the prosecution or the defense, in a civil action regardless of whether the reporter is a defendant (as in \textit{Saxton}) or a non-party, or in hearings conducted by an administrative agency or a legislative committee.

D. \textit{Overcoming the Privilege}

Section 43-917 plainly establishes only a qualified privilege that may be overcome if the article was written or broadcast "in bad faith, with malice, and not in the interest of the public welfare."\textsuperscript{223} No other

\textsuperscript{319} By this act, "i.e., grand jury proceeding). \textit{See} Michigan v. Smith, 4 Med. L. Rptr. 1753, 1760 (Mich. Cir. Ct. 1978).
\textsuperscript{219} ILL. ANN. STAT. ch. 51, § 111 (Smith-Hurd Supp. 1984-85).
\textsuperscript{220} 264 Ark. 133, 569 S.W.2d 115 (1978).
\textsuperscript{221} Id. at 136, 569 S.W.2d at 117.
\textsuperscript{222} Id.
\textsuperscript{223} ARK. STAT. ANN. § 43-917 (1977). About half of the state shield statutes are absolute, the other half qualified. \textit{Compare} ALA. CODE § 12-21-142 (1975); KY. REV. STAT. § 421.100 (1972); PA. STAT. ANN. tit. 42, § 5942 (Purdon 1982) (all creating absolute privilege) with LA. REV. STAT. ANN. art. 45, § 1452 (West 1982); MINN. STAT. ANN. § 595.024 (West Supp. 1984);
state shield statute employs this language, which provides little guidance as to the circumstances under which the privilege must yield. However, the supreme court’s Saxton decision suggests that the Arkansas courts are to use the test that has evolved in cases applying the qualified first amendment or federal common-law privilege: the privilege is overcome only if (1) it is probable that the reporter has the information; (2) the information cannot be obtained by other means, and the party seeking it has exhausted those alternatives; and (3) the information is crucial to the case.

In Saxton, the defamation plaintiff contended that the trial court’s denial of his motion to compel discovery of the reporter’s source virtually eliminated any chance that he could satisfy the constitutional “reckless disregard” requirement in libel cases in which public officials or public figures are plaintiffs. In effect, he argued, the trial court required that he show reckless disregard in order to obtain discovery when the information he sought was necessary to establish such recklessness. The supreme court, however, pointed out that the plaintiff had “fail[ed] to make a reasonable effort to determine the informant’s identity and to make some reasonable showing of publication with malice, bad faith, or reckless disregard of the truth.” Under those circumstances, the court said, “the motion to compel disclosure was properly denied in accordance with our statute.”

In support of its conclusion, the court cited four federal circuit

N.D. CENT. CODE. § 31-01-06.2 (1976) (all creating qualified privilege).

224. Some statutes contain similarly vague terms, however. See, e.g., ALASKA STAT. § 09.25.160(b) (1973) (public interest, interest of fair trial, prevent miscarriage of justice); LA. REV. STAT. ANN. art. 45, § 1453 (West 1982) (public interest); N.D. CENT. CODE § 31-01-06.2 (1976) (miscarriage of justice); R.I. GEN. LAWS § 9-19.1-3 (Supp. 1984) (necessary to felony prosecution).


227. 264 Ark. at 136, 569 S.W.2d at 117.

228. Id.
court decisions recognizing a qualified privilege for journalists.\textsuperscript{229} Three of the cases arose in the defamation context,\textsuperscript{230} and all employed some formulation of the three-part test set forth above, a test based on Justice Stewart's dissenting opinion in \textit{Branzburg}. It seems, therefore, that in \textit{Saxton} the supreme court adopted the analysis used in the first amendment cases for determining when the newsman's privilege must yield to other interests. This approach, which can also be found in other states,\textsuperscript{231} is particularly valuable because it obviates the necessity of construing the rather opaque language of section 43-917 dealing with loss of the privilege. There remains, however, the task of applying the test in a variety of settings in which the privilege issue can arise.

With respect to the first amendment privilege, several courts have suggested that the showing necessary to overcome the privilege varies depending upon the nature of the underlying proceeding.\textsuperscript{232} These courts envision a sliding scale upon which the privilege operates more vigorously in some contexts than in others, even though the formulation of the test itself remains the same. Under this approach, first amendment protection is greater in civil cases than in criminal proceedings, since private litigation interests, rather than the societal interests present in all criminal cases, are involved. As one court observed, "surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure."\textsuperscript{233} By the same token, first amendment protection will be greater in some civil actions than in others, depending upon whether the journalist or his employer is a party. If, as in a defamation suit, the reporter is a defendant, successful assertion of the privilege could effectively shield him or his em-


\textsuperscript{230} Baker \textit{v. F & F Investment}, 470 F.2d 778 (2d Cir. 1972), \textit{cert. denied}, 411 U.S. 966 (1973), was not a defamation case. There a journalist had been subpoenaed in a civil proceeding to which he was not a party.

\textsuperscript{231} \textit{See, e.g.}, Grand Forks Herald \textit{v. Grand Forks County Dist. Court} 322 N.W.2d 850, 855 (N.D. 1982); Matter of McAuley, 63 Ohio App.2d 5, 22-23, 408 N.E.2d 697, 709-10 (1979). In other states, the legislature has adopted the three-part test. \textit{See, e.g.}, MINN. STAT. ANN. § 595.024, 595.025 (West Supp. 1984); TENN. CODE ANN. 24-1-208(c)(2) (1980).


ployer from liability.\textsuperscript{234} When the journalist is not a party to the proceeding, however, the equities that might favor disclosure in the libel context are not present. In cases of this type, courts have held that situations in which the privilege must yield are "few in number" and the interests sufficiently compelling to force disclosure are "rare."\textsuperscript{235}

This "sliding scale" analysis has not been uniformly adopted, however. As the Second Circuit Court of Appeals recently said, "[w]e see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence."\textsuperscript{236} Similarly, the Fifth Circuit has held that the balancing test should operate no differently in a civil action in which the reporter is not a party than in a defamation suit against the journalist or his employer.\textsuperscript{237} Moreover, most state statutes—section 43-917 included—do not differentiate between one type of proceeding and another for purposes of overcoming the qualified statutory privilege.\textsuperscript{238}

Section 43-917, however, contains language that would allow the Arkansas courts to employ the sliding scale analysis described above. To lose the privilege, the journalist must have written or broadcast a story "in bad faith, with malice, and not in the interest of the public welfare."\textsuperscript{239} Use of the term "public welfare" suggests that the privilege may afford greater protection to journalists in certain situations than in others, thus leaving to the courts the option of taking into account the "type of controversy"\textsuperscript{240} in determining whether the privilege must yield. A court could conclude, for example, that the public interest in nondisclosure of a reporter's source is more easily outweighed in the criminal setting than in civil litigation.

A recent North Dakota case offers some guidance in this area, for


\textsuperscript{236} United States v. Burke, 700 F.2d 77, 77 (2d Cir. 1982), cert. denied, 104 S.Ct. 72 (1983). The court also noted, however, that "the evidentiary needs of a criminal defendant may weigh more heavily in the balance," id., thus suggesting that the balance may tip more easily in favor of disclosure in civil case although "the standard of review should remain the same." Id.

\textsuperscript{237} In re Selcraig, 705 F.2d 789, 799 (5th Cir. 1983).


\textsuperscript{240} Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977).
that state's shield statute merely provides that the privilege is overcome if a court finds that "the failure of disclosure of such evidence will cause a miscarriage of justice."\textsuperscript{241} Interpreting this provision in \textit{Grand Forks Herald v. Grand Forks County District Court},\textsuperscript{242} the North Dakota Supreme Court pointed out that the statute applies to "any proceeding or hearing" and "makes no distinction between civil and criminal actions or actions in which the news gatherer is or is not a party."\textsuperscript{248} Nonetheless, the court held that a trial court may consider the nature of the underlying proceeding "in determining whether or not failure to disclose will result in a miscarriage of justice."\textsuperscript{244} The Arkansas courts could easily take the same approach in construing the "public welfare" language of section 43-917.

Even if the sliding scale analysis is not adopted in Arkansas, the state courts will be faced with a problem that occurs only in criminal cases in which the defense attempts to learn the identity of a reporter's sources. Unlike the journalist who seeks to quash a subpoena from the prosecutor, the reporter facing a defense subpoena cannot argue that he is unwillingly being made an agent of the state's law enforcement apparatus.\textsuperscript{245} More significantly, the criminal defendant demanding access to sources can raise a sixth amendment argument, \textit{i.e.}, that disclosure of the reporter's sources is essential to his receiving a fair trial. The

\begin{itemize}
  \item \textsuperscript{241} N.D. Cent. Code § 31-01-06.2 (1976).
  \item \textsuperscript{242} 322 N.W.2d 850 (N.D. 1982).
  \item \textsuperscript{243} Id. at 854.
  \item \textsuperscript{244} Id. at 854-55.
  \item \textsuperscript{245} See Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting) (arguing that state should compile its own evidence and not rely on press as its investigative arm). It has also been argued that the state's need for press testimony is often slight because most of the information that a journalist may have about criminal activity is inadmissible; that admissible information generally concerns victimless crimes, the prosecution of which is less important than the enforcement of other criminal statutes; and that the adverse effects on the prosecution of denying disclosure are not immediate and, at worst, the accused may go free. Murasky, \textit{supra} note 139, at 890. In some cases, the courts have granted motions to quash prosecution subpoenas for reporters to testify at trial. \textit{See}, \textit{e.g.}, United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982); Florida v. Hurston, 3 Med. L. Rptr. 2295 (Fla. Cir. Ct. 1978). However, the courts have required disclosure of sources of information where the information was critical to the prosecution's case. \textit{See}, \textit{e.g.}, \textit{In re} Corsetti, 7 Med. L. Rptr. 1084 (Mass. Super. Ct. 1981) (reporter had written article in which confidential source confessed to murder); Massachusetts v. McDonald, 6 Med. L. Rptr. 2230 (Mass. Super. Ct. 1980) (confidential source was only known eyewitness to a murder); \textit{In re} Dan, 80 Misc. 2d 399, 363 N.Y.S.2d 493 (Sup. Ct. 1975) (reporter had personally observed Attica prison riot). It has been suggested that the societal interest in compelling the testimony of journalists at trial is greater than at the investigative stage of criminal proceedings, such as grand jury hearings, because of the need for more particularized information, the government's high burden of proof, and the higher stakes involved, notably the defendant's liberty. Murasky, \textit{supra} note 139, at 889-890.
\end{itemize}
best-known of the defense subpoena cases is \textit{In re Farber},\footnote{78 N.J. 259, 394 A.2d 330, \textit{cert. denied}, 439 U.S. 997 (1978).} discussed briefly in the introduction to this article. There the New Jersey Supreme Court held that in some circumstances the state’s shield statute, acknowledged to be “as strongly worded as any in the country,”\footnote{Id., 394 A.2d at 335.} must yield to a criminal defendant’s constitutional right to a fair trial.\footnote{Id., 394 A.2d at 336. See also CBS, Inc. v. Santa Clara County Superior Court., 85 Cal. App.3d 241, 149 Cal. Rptr. 421 (1978); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429, \textit{cert. denied}, 419 U.S. 966 (1974). For discussion and criticism of the \textit{Farber} decision, see Hill, \textit{Testimonial Privilege and Fair Trial}, 80 \textit{COLUM. L. REV.} 1173 (1980); Comment, supra note 96.}

E. Waiver


Rule 510 provides that a privilege conferred by “these rules” is waived if its holder “voluntarily discloses or consents to disclosure of any significant part of the privileged matter.”\footnote{Id.} Of course, the journalist’s privilege is conferred by section 43-917, not by the rules of evidence, and Rule 510 is thus by its own terms inapplicable.\footnote{Id. In contrast, the journalist’s privilege in Nevada is found, along with the state’s equivalent of Rule 510, in the “evidence” chapter of the statutes. See \textit{ Nev. Rev. Stat. }\S\S\ 49.275, 49.385 (1981). As the Nevada Supreme Court has held, “[a]ll privileges recognized by NRS Chapter 49 are explicitly subject to the waiver provision of NRS 49.385.” Newburn v. Howard Hughes Medical Inst., 95 Nev. 368, 594 P.2d 1146, 1148 (1979).} Moreover,
the supreme court did not mention rule 510 in the *Saxton* case, although its voluntary disclosure notion was certainly relevant. There the plaintiff in a libel case contended that a reporter for the defendant newspaper had waived the privilege by revealing to her editor and a deputy prosecuting attorney the name of the person she believed to be her anonymous source. The court rejected the waiver argument, pointing out that the reporter later learned her guess as to the source's identity had been incorrect and that the plaintiff had not raised the issue of waiver in the trial court.255

Although *Saxton* has been cited for the proposition that "a reporter's voluntary, informal disclosure of the identity of a source to his editor and a deputy prosecuting attorney [does] not constitute a waiver,"256 it seems clear that the decision's reach is far more limited. The critical elements in *Saxton* were the reporter's initial uncertainty as to her source's identity and her subsequent discovery that the person she assumed to be the source had not in fact played that role. As the reporter pointed out in her brief, "[t]o require appellee to identify the person she 'thought' might be her source would be a useless act resulting in harm to a person having nothing to do with this litigation."257 *Saxton* therefore leaves open the question of whether the "voluntary, informal disclosure" of the identity of a known source would constitute a waiver of the journalist's privilege.

Rule 510 is arguably relevant to this issue, even though the rule is not directly applicable to waivers under section 43-917. Applying Rule 510, the supreme court has held that the voluntary disclosure of information to third persons waives the husband-wife, priest-penitent, and attorney-client privileges.258 However, these privileges deal with confidential communications,259 and nothing in section 43-917 restricts the newsman's privilege to confidential sources of information.260 For the same reason, cases from jurisdictions which limit the journalist's privi-

255. 264 Ark. at 137, 569 S.W.2d at 117.
259. See *Ark. Stat. Ann.* § 28-1001, Rules 502(b), 504(b), 505(b) (1979) (stating applicability of privilege to confidential communications). See also *Sumlin v. State*, 273 Ark. 185, 190, 617 S.W.2d 372, 375 (1981) (describing privilege "for conversations between a husband and wife which involve confidential communications that are not intended for disclosure to any other person").
260. See *supra* text accompanying notes 209-11.
lege to confidential sources or confidential information\textsuperscript{261} are of little use in evaluating the waiver question in Arkansas.

Of more significance are cases from jurisdictions in which shield statutes protect sources or information irrespective of confidentiality. For example, in \textit{People ex rel. Scott v. Silverstein},\textsuperscript{262} an Illinois appellate court held that a journalist had not waived the statutory privilege by revealing some of his sources to an assistant attorney general representing the state in the litigation. The reporter had written a series of articles disclosing alleged wrongdoing at a museum and thereafter provided an assistant attorney general with names of persons he had contacted in the course of researching the stories. The defendant subpoenaed the reporter for deposition purposes, the journalist claimed a statutory and constitutional privilege, and the trial court concluded that any privilege had been waived. The appellate court reversed, pointing out that analogies to the waiver of other privileges were not valid. While these other privileges were designed to protect confidential communications, the shield statute "protects a reporter from being compelled to disclose 'the source of any information obtained . . . during the course of his employment'" and "makes no distinction between confidential and nonconfidential [sources]."\textsuperscript{263} Conceding that the reporter would have waived a privilege limited to confidential sources, the court concluded that "to find that [the reporter had] waived his privilege, simply because he revealed some of his sources to the Special Assistant Attorney General, would defeat the express purpose of [the shield law]."\textsuperscript{264}

To the same effect is \textit{Altemose Construction Co. v. Building & Construction Trades Council},\textsuperscript{265} a federal district court case in which

\textsuperscript{261} The New York courts, for example, have held that confidentiality is necessary under the state shield law, although the statute itself contains no such requirement. See supra note 212. There are a number of waiver cases in New York. See, e.g., \textit{People v. Wolf}, 39 A.D.2d 864, 333 N.Y.S.2d 299 (1972) (waiver occurred where information had already been published and source identified); \textit{People v. Zagarino}, 97 Misc. 2d 181, 411 N.Y.S.2d 494 (Sup. Ct. 1978) (privilege inapplicable where it was expected that the source, an undercover police officer, would be revealed as part of prosecution's case against defendant); \textit{Andrews v. Andreoli}, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977) (privilege waived where source met voluntarily with prosecutor); \textit{People v. Dupree}, 88 Misc. 2d 791, 388 N.Y.S.2d 1000 (Sup. Ct. 1976) (publication of one photograph and related news story waived privilege with respect to unpublished photographs); \textit{In re Dan}, 80 Misc. 2d 399, 363 N.Y.S.2d 493 (Sup. Ct. 1975) (privilege waived where reporter had given statements to investigative bodies).


\textsuperscript{263} \textit{Id.}, 412 N.E.2d at 695.

\textsuperscript{264} \textit{Id.}, 412 N.E.2d at 696.

the plaintiff sought to obtain from the program manager of a television station affidavits and written statements he had collected from certain individuals concerning the underlying litigation. The plaintiff argued that any claim of privilege had been waived by the disclosure of the affidavits to law enforcement officials and numerous references to those affidavits in the course of a broadcast in which the affiants were interviewed. Pointing out that the Pennsylvania shield statute protected sources "without reference to their confidentiality," the court rejected the plaintiff's claim of waiver and quashed the subpoena. The court also noted that under the circumstances present in that case, the desired information would have been available from alternate sources and would not have to be obtained from the newsman.

Although the Saxton case can be distinguished from both Silverstein and Altemose Construction, it nonetheless suggests that the Arkansas Supreme Court will hold that a disclosure of sources to third parties does not automatically waive the privilege created by section 43-917. It must be remembered, however, that the question of whether the Arkansas statute protects nonconfidential as well as confidential sources remains open. If the Arkansas courts interpret section 43-917 in a narrow fashion and hold that it applies only to confidential sources of information, it seems likely that any voluntary disclosure of the identity of such sources would constitute a waiver. Of course, a reporter can be deemed to have waived the privilege even if the statute is construed to reach both confidential and nonconfidential sources. For example, the Maryland Court of Appeals has held that a reporter waived the statutory privilege by publishing the identities of her sources in a news article, despite the fact that confidentiality is not a prerequisite to invoking the protection of the state's shield law.

Apart from the voluntary disclosure issue, it seems clear that the privilege may be waived in at least two additional ways. First, it has been held that although the privilege may be claimed only by the journalist and not the source, it may be waived by the source. Second,

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266. Id. at 491.
267. Id.
268. See supra text accompanying notes 256-57.
269. See supra text accompanying notes 209-11.
271. See supra text accompanying notes 177-79.
the newsman will be deemed to have waived the privilege by interjecting into a lawsuit to which he is a party any claims or defenses to which the source's identity is relevant. For example, in *Anderson v. Nixon*,²⁷³ columnist Jack Anderson sued several officials of the Nixon Administration for conspiring to harass him. During discovery, the defendants asked several questions that would have required disclosure of confidential sources, and Anderson refused to answer. The court ordered him to reveal the sources on the ground that they were central to the defenses raised. The court observed that the "pledge of confidentiality would have remained unchallenged had [Anderson] not invoked the aid of the Court seeking compensatory and punitive damages based on his claim of conspiracy."²⁷⁴ In the more typical case in which the reporter or his employer is a defendant in a libel action, the courts have held that any privilege is waived if the defendant asserts an affirmative defense to which the source's identity is relevant.²⁷⁵

IV. CONCLUSION

It is hardly surprising that a statute adopted nearly fifty years ago and interpreted in only two reported decisions contains various weaknesses and leaves unanswered a variety of questions. Given the Arkansas Supreme Court's sensitivity to issues touching on the first amendment and its understanding of the role of the news media in modern society,²⁷⁶ there is no reason to anticipate that the court will resolve some of those questions by narrowly construing the shield statute so as to frustrate its purposes, an approach that can be found in other jurisdictions.²⁷⁷

Even liberal construction by the courts, however, will not eliminate all of the difficulties arising from the statute, and in some areas remedial action by the General Assembly seems desirable. For example, the privilege should attach regardless of whether a story based on informa-

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²⁷⁴ *Id.* at 1199. The court drew an analogy to the so-called "informer's privilege," which must give way when the government initiates criminal proceedings in which disclosure of the informer's identity would be relevant to the defense of the accused. *Id.* at 1200. *See* Roviaro v. United States, 353 U.S. 53 (1957); United States v. Reynolds, 345 U.S. 1 (1953).
²⁷⁷ *See supra* text accompanying note 149.
tation supplied by sources is published or broadcast, and the statute's protection should extend not only to a source of information, but also to the information itself. Moreover, an effective shield law requires procedural safeguards to ensure consistent and predictable application of the privilege. The New Jersey statute serves as an excellent model in this regard, establishing a two-step process by which the courts must evaluate a journalist's claim that he is entitled to the privilege.\textsuperscript{278} Arkansas would do well to follow suit.

Despite its shortcomings, section 43-917 is an important statute for the press and the public alike, for it evidences the state's policy judgment that a journalist's sources should be protected from forced disclosure in order to ensure the free flow of information to the public. The status of a first amendment privilege remains somewhat clouded, and courts that have recognized such a privilege have at times commented upon its fragility.\textsuperscript{279} Although Congress has enacted legislation protecting the media from "newsroom searches,"\textsuperscript{280} it has yet to produce a federal shield statute. The Arkansas statute thus remains quite important after a half-century, and this state, one of the first to adopt the statutory privilege for journalists, should continue to take a leadership role in this area of the law.

\textsuperscript{278} This is not to imply, however, that the journalist has the burden of proof on the issue, for legislative creation of a privilege shifts the burden to the party seeking to defeat the privilege. Hammarley v. Sacramento County Superior Court, 89 Cal. App. 3d 388, 399, 153 Cal. Rptr. 608, 614 (1979). Under the New Jersey statute, assertion of the privilege triggers a threshold hearing before the court, at which the reporter is obliged to make a prima facie showing that he qualifies as a news gatherer within the meaning of the statute and that the information at issue was obtained in his capacity as a journalist. The party seeking disclosure must then demonstrate that there is a reasonable probability that the information is relevant and necessary to his case and that the material is not obtainable from another source. The defendant may also attempt to show that the privilege has been waived. If the court finds that the defendant has met his burden of proof, an in camera inspection of the material and a second hearing ensue. After viewing the information and hearing arguments of the parties, the court will make its ruling. This hearing involves the same criteria as the preliminary hearing, but the defendant must establish a more specific need for the information. The court's decision is subject to interlocutory appeal by either party. \textsc{N.J. Stat. Ann. §§ 2A:84A-21.3, 2A:84A-21.4, 2A:84A-21.6} (West. Supp. 1982-83). This procedure was established by the New Jersey Supreme Court in \textit{In re Farber}, 78 N.J. 259, 394 A.2d 330, \textit{cert. denied}, 439 U.S. 997 (1978), and subsequently codified by the legislature.


\textsuperscript{280} 42 U.S.C. § 2000aa (Supp. 1984). This statute was Congress' reaction to the Supreme Court's decision in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), in which it was held that nothing in the first or fourth amendments precluded newsroom searches. Some states also responded with statutes of their own. See, e.g., \textsc{Tex. Code Crim. Proc. art. 18.01(e)} (Vernon Supp. 1984).