

Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information

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In 1999, North Carolina became the thirty-first state to enact a statute granting journalists a privilege to withhold information from compelled disclosure.¹ The North Carolina law, like other journalist's privilege statutes across the United States, applies to persons, companies, or other entities engaged in the business of gathering or disseminating news. Further, by defining the privileged group in terms of newsgathering and disseminating functions, the General Assembly continued the time-honored practice of state legislatures in limiting the testimonial privilege to those who work for traditional news media.²

Over the years, debate has centered on whether journalists should have a privilege allowing them to refuse to testify about matters and news sources they have promised to keep confidential.³ Journalists have long demonstrated the need for such a privilege to protect valuable sources of news and information for stories that probe into sensitive matters. Weighing in favor of such a privilege is a wealth of scholarship identifying categories and justifications in areas of particular need.⁴ Scholars have also framed arguments favoring a

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1. N.C. GEN. STAT. § 8-53.11 (1999).

2. *Id.* The pertinent section, called "Definitions," reads: "Journalist—Any person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information, for dissemination via any news medium." N.C. GEN. STAT. § 8-53.11(a)(1) (1999).

While the definition of a "journalist" shares a number of characteristics with nearly all other shield laws, the statute broadly defines "news medium" as "any entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public." N.C. GEN. STAT. § 8-53.11 (a)(3)(1999). On the surface, this language would allow an argument for including new-media journalism, even if some new types of journalists were excluded.

3. See, e.g., MAURICE VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS (1979); Julie M. Zampa, Case Note, *Journalist's Privilege: When Deprivation Is a Benefit*, 108 YALE L.J. 1449 (1999); A. David Gordon, Protection of News Sources: The History and Legal Status of the Newsman's Privilege (1971) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with author).

4. See e.g., Douglas A. Anderson, *How Newspaper Editors Reacted to Post's Pulitzer Prize Hoax*, 59 JOURNALISM Q. 363 (1982) (stating that editors will probably give more scrutiny to stories containing unnamed sources); William Blankenburg, *The Utility of Anonymous Attribution*, 13 NEWSPAPER RES. J.

privilege for non-confidential sources of information.⁵

While it is clear that traditional news gatherers need to protect the secrecy of their sources and information, many others who collect information for dissemination outside of the confines of traditional newsrooms believe they should be afforded the same courtesy as journalists who are subpoenaed to testify. Book authors, academics, researchers, corporate communicators, newsletter editors, and talk-show hosts have all tried with varying degrees of success to claim the journalist's privilege. Even Internet journalists like Brock Meeks and Matt Drudge arguably meet the statutory standards for the protection.⁶

But how far should that legal definition be stretched—to include everyone whose occupation requires them to write or publish? David H. Weaver and G.

10 (1992) (suggesting that anonymous sourcing is not only critical to American journalism as a news-gathering tool, but can also enhance diversity of thought in the marketplace of ideas); Hugh M. Culbertson, *Veiled Attribution—An Element of Style?* 55 JOURNALISM Q. 456 (1978) (finding that unnamed news sources often added scope and importance to a story); Bryan E. Denham, *Anonymous Attribution During Two Periods of Military Conflict: Using Logistic Regression to Study Veiled Sources in American Newspapers*, 74 JOURNALISM & MASS COMM. Q. 565 (1997) (examining anonymous sourcing in the American press during coverage of the conflicts in Somalia and Bosnia, and finding in part that news sources had numerous reasons for requesting anonymity and journalists had numerous reasons for granting it); George M. Killenberg, *Branzburg Revisited: The Struggle to Define Newsmen's Privilege Goes On*, 55 JOURNALISM Q. 703 (1978) (recognizing that courts acknowledge the societal benefits of a reporter-source relationship as a tributary in the free flow of news to the public); Daniel Riffe, *Relative Credibility Revisited: How 18 Unnamed Sources Are Rated*, 57 JOURNALISM Q. 618 (1980) (suggesting unnamed sources were still regarded as more believable than unbelievable); K. Tim Wulfemeyer, *How and Why Anonymous Attribution Is Used by Time and Newsweek*, 62 JOURNALISM Q. 81 (1985) (contending the use of confidential sources can continue to be accepted in journalistic practice if journalists reduce their reliance on them, work hard to get on-the-record information, give as much source identification as possible, and confirm the accuracy of confidential information).

5. Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States with Shield Laws*, 4 COMM. L. & POL'Y 325 (1999); Michael Fitzsimmons, Case Note, *Defending the Informers: The Media's Right to Protect Nonconfidential Source Information Following United States v. Smith*, 6 VILL. SPORTS & ENT. L.J. 295 (1999).

6. John Schwartz, Editorial, *Journalism's Old Rules Should Apply to Cyber-Libel*, WASH. POST, Jan. 26, 1998, at F20. Schwartz prefers Meeks' work to Drudge's work because Meeks' reporting experience and skills shine through his online stories, while Drudge reports gossip and relies solely on tips from insiders with "precious little actual reporting." *Id.* Meeks parlayed his online reporting into a job with MSNBC, while Drudge, publisher of *The Drudge Report* and a host for ABC Radio and FoxNews, is best known for falsely quoting unnamed sources who claimed that White House Special Assistant Sidney Blumenthal had abused his spouse and that his actions had been effectively covered up. *See Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998). Despite Drudge's retraction the next day, Blumenthal filed suit against him for libel. *Id.* In response to Drudge's challenge that the court lacked personal jurisdiction over him, the court made a brief statement about his status as a journalist. In a footnote, the court stated, "Drudge is not a reporter, a journalist or a newsgatherer. He is, as he himself admits, simply a purveyor of gossip." *Id.* at 57 n.18. Therefore, the court refused to seriously consider his argument that he should benefit from the newsgathering exception to the long-arm statute. *But see Blumenthal v. Drudge*, 186 F.R.D. 236 (D.D.C. 1999). In analyzing Drudge's claim to a First Amendment reporter's privilege, however, there is no mention of his lack of journalist status to assert the privilege. Once he claims the privilege, the court reviews it without questioning or discussing Drudge's qualifications. Ultimately, the court grants Drudge the protection because the Blumenthals cannot meet the requirements for nullifying the privilege. *See id.* Recently, the parties announced a settlement in the case in which Blumenthal agreed to pay Drudge \$2,500 for travel costs associated with the lawsuit. The action left Drudge jubilantly claiming victory and Blumenthal crediting Drudge's wealth of legal resources rather than his journalistic accuracy. *See Howard Kurtz, Clinton Aide Settles Libel Suit Against Matt Drudge—at a Cost*, WASH. POST, May 2, 2001, at C1.

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Cleveland Wilhoit, journalism professors who have researched the characteristics of news professionals for many years, define journalists as persons who are responsible for preparing and transmitting news articles and other information—including fulltime reporters, writers, correspondents, columnists, photo-journalists and editors.⁷ While this list serves the purposes of narrowing the universe of news gatherers by identifying journalists' characteristics and studying their functions and habits, it is somewhat limited and dated when considering the effect of technology on the field. The advent of inexpensive desktop and online publishing have contributed to the creation of classes of persons who do not earn their livings as journalists, but who participate in many of the same information gathering functions as the traditional journalists expressly mentioned.

Generally speaking, traditional journalists do not oppose accepting novices into the fold. But such a warm reception to a seemingly innocuous group could be fraught with legal complexities when the issue turns to whether newer information gatherers and disseminators should be able to avail themselves of the privileges bestowed on traditional news professionals. Exploring this dynamic, this article will review the theory behind the journalist's privilege, drawing upon the theorists who played significant roles in developing protections for traditional journalists. This review will serve as a backdrop for examining legal and statutory precedent to determine the breadth of protection for those engaged in activities that resemble journalistic functions. Additionally, the article proposes a model statute that addresses the concerns inherent in broadening the journalist's privilege. Following this proposal is a discussion of how some of the more salient provisions of the proposed model would be interpreted and applied to preserve the privilege for traditional journalists without unnecessarily excluding others who perform the functions of journalists but may not be members of the traditional, establishment press.

WELCOMING NON-TRADITIONAL JOURNALISTS

Traditional journalists are those usually associated with the newsgathering functions of the establishment press.⁸ A number of prominent journalists from

7. DAVID H. WEAVER & G. CLEVELAND WILHOIT, *THE AMERICAN JOURNALIST IN THE 1990S: U.S. NEWS PEOPLE AT THE END OF AN ERA* 248 (1996). The population for the study, which is the major subject of the book, was journalists who worked for mainstream general interest news media in the United States. The mainstream news media included daily and weekly newspapers, news magazines, radio and television stations, and general news or wire services. The definition of journalists included editorial cartoonists but not comic strip cartoonists. They also excluded news personnel that did not have direct responsibility for news content, such as librarians, camera operators, and video and audio technicians.

8. Beginning in the nineteenth century, the press emerged as a news gatherer and began to assume more characteristics of commercial corporations than lonely pamphleteers. *See, e.g.*, GERALD A. BALDASTY, *THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY* (1992); HAZEL DICKEN-GARCIA, *JOURNALISTIC STANDARDS IN NINETEENTH CENTURY AMERICA* (1989).

traditional media are prepared to welcome and accept their new media counterparts into the fold.⁹ One leading journalism commentator believes that the ability of anyone with a modem to deliver news to a global audience could potentially enrich the Internet with new sources of information, a diversity of views, and a variety of viewpoints.¹⁰ Similarly, Mike Godwin, a leading online journalism author and commentator, recounts and rejects popular arguments disfavoring online journalists: that online journalists need editors to enhance their legitimacy; that they make it harder to tell fact from fiction and truth from rumor; that they lack the resources to report important or groundbreaking enterprise stories; and that their emergence would cause ethical and professional values to fall by the wayside.¹¹ Instead, Godwin notes the tradition of sole-operator journalists¹² that has existed along with the institutional news media. Goodwin writes, “We should respond to the prospect of independent journalists on the Internet with hope rather than fear or disdain—they represent not just the future but our best hopes for journalism and democracy.”¹³ Echoing Godwin’s sentiment, J.D. Lasica predicts that as the Web matures, community journalism, which caters to the needs of small towns and municipalities, also will flourish. He foresees consumers as active participants in future newsgathering, stating, “[j]ournalism will become a catalyst for creating communities of interest and for building links and relationships between news providers and consumers.”¹⁴

Equating the roles of these non-traditional information providers with the function of the working press presents vexing questions, in part because of the nature of the journalist and the journalism profession. American journalists who provide content for books, magazines, and newspapers operate in a society that generally prohibits government regulation,¹⁵ and those who broadcast

9. E.g., Mike Godwin, *Who's a Journalist?—II: Welcome the New Journalists on the Internet*, 13 MEDIA STUD. J. 38 (1999); Lawrence K. Grossman, *From Marconi to Murrow to—Drudge?* 38 COLUM. JOURNALISM REV. 17 (1999); J.D. Lasica, *Citizens and Budding Writers and Editors*, 21 AM. JOURNALISM REV. 92 (1999). Not everyone, however, is ready to accept non-journalists. See Ted Gup, *Who's A Journalist?—I: The Answer Lies in Training, Character and Attitude*, 13 MEDIA STUD. J. 34 (1999). Another commentator refuses to accept the paparazzi as journalists, referring to them instead as freelancers who are blurring news, entertainment and gossip. Tara Sonenshine, *Is Everyone A Journalist?* 19 AM. JOURNALISM REV. 11 (1997).

10. Grossman, *supra* note 9, at 18.

11. Godwin, *supra* note 9, at 39-42.

12. *Id.* (citing Samuel Johnson and I.F. Stone as successful examples).

13. *Id.* at 42. Some of the Internet journalists decry the lack of respect they receive from their brethren in the traditional media. See Stephen Borelli, *On-Line Journalism: Frustrations Along the Road to the Future*, 53 NIEMAN REP. 20 (Spring 1999); Rebecca Quick, *Net Interest: Web Journalists Are Finding Themselves Out of the Loop*, WALL ST. J., Aug. 14, 1997, at B5. For an analysis of how the Internet journalists are perceived in their own work environment, see Jane B. Singer, Martha P. Tharp & Amon Haruta, *Online Staffers: Superstars or Second-Class Citizens*, 20 NEWSPAPER RES. J. 29 (1999).

14. Lasica, *supra* note 9.

15. See U.S. CONST. amend. I; see also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

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news now have minimal restraints on their content.¹⁶ Additionally, journalists have neither a legally binding code nor a minimum educational requirement, let alone a certification examination. Yet, in the spirit of keeping the press independent and free from external influences, journalists' sources and information are protected through the common law, state constitutions, and statutes. Such laws and the policies that flow from them tend to define journalists in terms of the social institution in which they operate and the democratic functions that they provide for society.

Certainly, this is not the first time questions have been raised about the applicability of the privilege to non-traditional news gatherers. In 1972, when journalists appealed to the Supreme Court in *Branzburg v. Hayes* for a constitutional privilege to help them protect their confidential sources, the Justices denied the request. The main reason given by the Court was that journalists had a civic duty to testify just as other citizens. Additionally, the Court credited the difficulty lower court judges would have in determining precisely who would be protected by the privilege, since press freedom is guaranteed to all—from the large metropolitan publisher to the lonely pamphleteer.¹⁷ Nevertheless, the issue of who would be considered a journalist for the purpose of applying the privilege persists. What will happen when these new journalists begin to use confidential arrangements and seek the protection of the journalist's privilege? The answers to these questions have important implications for the longevity and strength of the journalist's privilege.

Most troubling for journalists and others who want to preserve a free press—including this author—is that so many divergent groups of persons could be called journalists that the protection of the privilege would be dissolved. To the most neutral observer, it should be clear that allowing classes of persons other than journalists to use the privilege may sap the strength out of these provisions, which help keep journalists out of court. Application of the journalist's privilege to a variety of social communicators would require universal acceptance of an excessively broad perspective of our traditional notions of the press. Such expansion runs counter to the fundamental notions of a privilege, which should be maintained for a select, well-defined group to the exclusion of all others. In essence, the smaller and more identifiable the class of persons able to assert the privilege, the easier it will be to sustain this protection for journalists. Conversely, a wide-ranging and far-reaching privilege that would include non-traditional journalists would face difficulty in the courts. The greatest concern of this author is that such laws may then be rendered ineffective at keeping journalists out of court.

16. See *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269 (2000) (directing the Federal Communications Commission to immediately repeal the personal attack and political editorial rules, which were left intact when the FCC abandoned the fairness doctrine in 1985).

17. 408 U.S. 665 (1972).

FOUNDATIONS OF PRESS PRIVILEGE

Journalists use confidential sources to gather important news and information that they would not be able to obtain through other means. Whenever they use these sources, journalists increase the risk of being subpoenaed to testify or to produce professional notes and records.

Historically, news reporters have relied on confidential sources in gathering information for public dissemination.¹⁸ Increases in the use of unnamed sources have been documented over the years,¹⁹ while such sources have facilitated journalists' newsgathering in a number of ways: (1) helping them to obtain information that is otherwise unavailable; (2) cultivating sources; (3) building trust; and (4) giving comfort, confidence, and protection to fearful sources.²⁰ Because of the access that journalists have to sources of important information, they have long been subjected to subpoenas.²¹ At the same time, the proximity of reporters to news events and the professional observation, recording, and recall skills they exercise daily as news gatherers have made them choice candidates for establishing the facts required to arrive at the truth in judicial proceedings. As a result, journalists become easy subpoena targets for their eyewitness testimony, notes, film, documents, and other information.²²

Journalists' use of the privilege has met with great success in the areas of in-depth, enterprise, and investigative reporting.²³ An impact study found that newspapers in states with journalist-protecting shield laws do more investigative reporting and win more awards for their reporting than their counterparts in non-shield-law states. These laws protecting journalists also help increase the quantity of investigative reporting, thereby fulfilling the original purpose of the legislative policy.²⁴ Studies show that an increasing majority of people fa-

18. See, e.g., Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence after a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57 (1985); Reporters Committee for Freedom of the Press, Survey, *Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 1991* (1992); Reporters Committee for Freedom of the Press, Survey, *Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 1989* (1990); Byron St. Dizier, *Reporters' Use of Confidential Sources, 1974 and 1984: A Comparative Study*, 6 NEWSPAPER RES. J. 44 (1985).

19. Virtually all of the journalists surveyed years ago in a comparative study in the state of Florida said they have used confidential sources in their reporting (100% in 1974 and 97% in 1984). St. Dizier, *supra* note 18.

20. K. Tim Wulfemeyer & Lori L. McFadden, *Anonymous Attribution in Network News*, 63 JOURNALISM Q. 468 (1986).

21. Gordon, *supra* note 3.

22. Subpoenas enable either party in a criminal or civil proceeding to demand the reporters' testimony in court. Generally, such demands seek to discover information in the journalists' possession, including the identity of their sources whose names have been kept confidential at the sources' request. See, e.g., BLACK'S LAW DICTIONARY 995 (6th ed. 1991).

23. Eileen M. Wirth, *Impact of State Shield Laws on Investigative Reporting*, 16 NEWSPAPER RES. J. 64 (1995).

24. *Id.*

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vor a press that uncovers and reports on corruption and fraud in business and government. However, that approval does not necessarily translate into public support for investigative reporting techniques, such as using anonymous sources.²⁵

Robert F. Ladenson, however, challenges the assumption that investigative reporting could only be carried on by heavy reliance on confidential information.²⁶ He suggests that increased statutory protections for employees who expose official wrongdoing through government channels might create a climate in which the need for investigative reporters to rely on confidential information would diminish. But, Ladenson would agree, there is no question that investigative journalists have been aided by the use of confidential sources and information.

With the increasing use of such sources and information, journalists have sought to protect the secrecy of their communications in much the same way that communications between other professionals and their clients are protected, such as doctor-patient and lawyer-client confidentiality. Lawyers and doctors are legally bound to maintain their clients' confidences, and journalists until recent years had been forbidden to relinquish the same only by ethics codes.²⁷ Testifying with only the protection of ethics codes, however, would necessitate disclosure of sources and information that journalists have promised to keep confidential. As such, compelled disclosure would cause news sources to avoid future contact with news employees, breaking the trust between journalists and society, and jeopardizing the free flow of information from source to reporter.

25. Lars Willnat & David H. Weaver, *Public Opinion on Investigative Reporting in the 1990s: Has Anything Changed Since the 1980s?*, 75 JOURNALISM & MASS COMM. Q. 449 (1998).

26. ROBERT F. LADENSON, A PHILOSOPHY OF FREE EXPRESSION AND ITS CONSTITUTIONAL APPLICATIONS (1983).

27. See American Society of Newspaper Editors: Statement of Principles (1996), available at <http://www.asne.org/kiosk/archive/principl.htm> (visited Nov. 12, 2001) (stating that "pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly"); Associated Press Managing Editors: Code of Ethics (1995), available at http://www.apme.com/about/code_ethics.shtml (visited Nov. 12, 2001) (urging journalists to sparingly grant confidentiality to news sources, but suggests that the reason for the usage be explained); Radio-Television News Directors Association (2000), at <http://www.rtnda.org/ethics/coe.shtml> (visited Nov. 12, 2001) (endorsing the use of confidential sources "only when it is clearly in the public interest to gather or convey important information or when a person providing information might be harmed, but that at the same time, journalists "should keep all commitments to protect a confidential source"); Society of Professional Journalists: Code of Ethics (1996), available at http://www.spj.org/spj_ethics_code.asp (visited Nov. 12, 2001) (requiring members to "acknowledge the newsman's ethic of protecting confidential sources of information").

In 1991, the U.S. Supreme Court held that the First Amendment does not bar journalists from liability for breach of promises of confidentiality. The Court ruled that laws of general applicability, such as promissory estoppel, can be enforced against the press without violating the First Amendment. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). See also Jerome A. Barron, *Cohen v. Cowles Media and its Significance for First Amendment Law and Journalism*, 3 WM. & MARY BILL RTS. J. 419 (1994); Laurence B. Alexander, *Civil Liability for Journalists Who Violate Agreements with Sources*, 14 NEWSPAPER RES. J. 45 (1993).

A PRIVILEGE FOR THE INSTITUTIONAL PRESS

Special privileges to exempt persons from testifying in court were disfavored at common law; courts were entitled to hear whatever relevant evidence was available.²⁸ Some exceptions were made, however, as a result of a strong policy to protect the confidences in certain social relationships, such as husband-wife, physician-patient, attorney-client, and priest-penitent.²⁹ Following the Court's refusal to grant a privilege to journalists in *Branzburg*, provisions allowing journalists to escape the need to testify have continued to undergo state-by-state adoption.³⁰

In addition to the importance of confidentiality protections to communicants, privileges sometimes shelter the institutions that rely on them as well. Institutional privileges, like those belonging to the press, protect the flow of information from confidential outside sources to institutions that rely on such data to keep readers and viewers informed. Sources often seek confidentiality to escape harm, embarrassment, or legal entanglement.³¹ On the other hand, a disruption in the flow of information could harm the public by impeding the dissemination of news and information.³²

The press privilege issue is further complicated by the presence of a dual clientele for journalists—both the sources who provide news and information and the readers who consume them. This situation differs greatly from the physician's and attorney's relationships with patients and clients, respectively. The nature of the journalist's privilege, however, is one that is personal to the news professional, and one that relies more on ethical responsibility than legal enforcement. Finally, the nature of the news business is such that information is collected for disseminating, not for withholding.³³

Through the years, the confidentiality of news sources had to be protected if journalists were to be successful in exposing public and private wrongdoing.

28. 8 WIGMORE, EVIDENCE §§ 2285, 2286 (McNaughton rev. 1961).

29. ROY D. WEINBERG, CONFIDENTIAL AND OTHER PRIVILEGED COMMUNICATION (1967). Wigmore, the most influential evidence scholar, summarized the four prerequisites that must be met before anyone could claim a confidentiality privilege: 1) the communications must originate in a confidence that they will not be disclosed; 2) the asserted confidentiality must be essential to the satisfactory maintenance of the relationship between the parties; 3) this relationship must be one that the community feels ought to be fostered; 4) the injury to the relationship that would result from disclosure must exceed the benefit thereby gained for the expeditious disposal of the case. WIGMORE, *supra* note 28, at § 2285.

30. VAN GERPEN, *supra* note 3. However, Congress has been unwilling to extend this privilege to the press in its own tribunal. James J. Mangan, Note, *Contempt for the Fourth Estate: No Reporter's Privilege Before a Congressional Investigation*, 83 GEO. L.J. 129 (1994).

31. *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450 (1985).

32. *See id.* One can argue too that the lack of confidential source protection interferes with the public's right to know. CHARLES W. WHALEN, JR., YOUR RIGHT TO KNOW (1973).

33. *But see* Miami Herald v. Tornillo, 418 U.S. 241 (1974), in which the Supreme Court left to the discretion of editors decisions on what would or would not be published in the newspaper. The decision turned back legislative efforts to give citizens a right to reply similar to the Federal Communications Commission's broadcasting requirement, giving the subjects of personal attacks the right to reply on air.

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These promises had to be kept even at the risk of upsetting government and judicial officials.³⁴ Tracing the nineteenth century watchdog concept of press freedom, legal historian Timothy W. Gleason finds no special protection for the institutional press, except the limited and highly arbitrary protection for the Fourth Estate established by the judges of that period.³⁵ He finds that information the press published on governmental abuses and societal breakdown was necessary for citizens to carry out the self-governance process in a democracy. But, he argues, the watchdog function did not create any special rights for the institutional press. Such claims would require greater rights than those granted to citizens. Hence, these claims of the press serving a special function open the door to legally defined standards of conduct and responsibility, not stronger rights than citizens.³⁶

Patrick M. Garry picks up on this watchdog notion while crystal-gazing into future First Amendment applications to the changing press. The future definition of the press, Garry argues, should embrace the democratic-dialogue function instead of the watchdog function. Such a definition should focus on the constitutional functions and role of the press in a democratic society. In this way, the press would be defined by what it *does*, rather than by what it *is*.³⁷ Other scholars also have documented how the definition of the press long ago differed from the press today. In the seventeenth and eighteenth centuries, the term “press” was used to refer to any form of printing, not only magazines and newspapers but books and pamphlets, too. Freedom of the press was generally thought of in terms of the lone pamphleteer, not the large metropolitan daily newspapers.³⁸ Regardless of whether the speaker was an individual or a media corporation, those who represented the press engaged in political speech and open criticism of governmental officials and policies. Such criticism operates as an important and necessary check on government power.³⁹

34. JEROME A. BARRON & C. THOMAS DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 416-417 (1979). More than the risk of upsetting government or corporate leaders, journalists also need to keep their promises to sources today to avoid liability for breaking confidences. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), finding no First Amendment immunity from enforcement of promises that journalists make to sources. While exposing corrupt public officials and corruption is a noble and valuable cause led by the press, Robert F. Ladenson argues that such a role is not constitutionally fundamental. Ladenson argues that our societal institutions should not rely on watchdog activities as the primary protection against the dangers posed by official corruption. Rather, he says, the press function of keeping the public informed is a matter of constitutional significance. Unlike the situation in investigative journalism, the public information function of the press could be accomplished even if the confidential relationship between reporters and their sources is not protected. LADENSON, *supra* note 26, at 85-91.

35. TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA 50 (1990).

36. *Id.* at 109-11.

37. PATRICK M. GARRY, SCRAMBLING FOR PROTECTION: THE NEW MEDIA AND THE FIRST AMENDMENT (1994).

38. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 106 (1982).

39. *Id.* at 107-08.

Vincent Blasi connects the protections of press privilege to the press' Fourth Estate role. His "checking value" theory acknowledges the important role of First Amendment freedoms in checking the abuse of power by public officials. Blasi interprets how the watchdog role of the press is relevant not only to confidential-source relationships that lead to an expose of wrongdoing, but also for the more perceptive reporting of ordinary government operations that seeks to place an event or personality in context. The checking-value theory is grounded in political thought that addresses the tendency of officials to abuse the public trust. Blasi notes that the colonial pamphleteers organized much of their political thought around the need they perceived to check the abuse of governmental power. The First Amendment was an outgrowth of this body of thought. The abuse of official power is an especially serious evil—more serious than the abuse of private power—mainly because of the government's capacity to employ "legitimized violence."⁴⁰

It is tempting to append the watchdog concept to an important social policy outcome like self-governance. After all, evidence of abuses of government power is often garnered by the newsgathering watchdogs and disseminated to audiences for their use in voting, public discussion, and debate. But Blasi sees the watchdog function as distinct from the self-governing role of the First Amendment as proposed by Alexander Meiklejohn, a leading proponent of the centrality of the self-governance rationale for free expression and debate. In *Free Speech and Its Relation to Self-Government*, Meiklejohn acknowledges the importance in attaining the truth through a free trade of ideas.⁴¹ He also points out that it is far more critical to the principle of self-government that whatever truths are known be made public so that all citizens, including voters, might "understand the issues which bear upon our common life."⁴² Expanding on this notion, Patrick Garry argues that self-government, therefore, is supported when the public is able to exchange ideas, determine truth, and participate in the democratic dialogue on public issues.⁴³

Blasi's theory, which contemplates a more passive role for the citizen in shaping public policy, takes into account the political realities in America. Citizens retain veto power when official decision-making goes awry. But it is the press that needs the protection from subpoenas, not the average or even the politically active citizen. As such, these ideas about the watchdog role, the Fourth Estate, and self-government all support the goals and policies of investigative journalism and, hence, the constitutional power of the First Amend-

40. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

41. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 82-89 (1948).

42. *Id.* at 88-89.

43. GARRY, *supra* note 37, at 76.

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ment to achieve these ends. As a result of pressure from news media interests and the courts' stance on privilege, many more judges and scholars have recognized the need for the press to have additional privilege protection at the state level.

Since 1896, when Maryland enacted the first such law, states have individually passed shield laws, largely to protect journalists from the consequences of their service as the watchdog of the public. In the first half of the twentieth century, only twelve of the thirty-one states that today have such laws had already passed them. Around the middle of the century, First Amendment scholars and advocates started to develop the notion that the press clause might confer special privileges on the institutional media. Meiklejohn tied the need for free speech to the ability of the public to govern itself.⁴⁴

Events within the government and in society in the latter half of the century accelerated the need for journalists' source protection. Meiklejohn's influence in *Times v. Sullivan*, which granted a constitutional privilege in libel, whetted the appetites of journalists who wanted to see greater First Amendment privileges for the press.⁴⁵ During the 1960s, the federal government stepped up its investigations of dissidents engaged in anti-war and civil rights protests while the press increased its reporting in these areas. Indeed, the increasing role of investigative journalism caused the government to attempt to use the press more often.⁴⁶ In many instances, journalists were subpoenaed to testify before grand juries about possible criminal activities they may have witnessed firsthand. This increase in subpoenas was greeted by an unprecedented number of journalists claiming that a constitutional privilege protected them from compelled disclosure. It could be said that this conflict between the Nixon administration's assault on leftist, radical activity versus the strong resistance by the press led in fact to the Supreme Court decision in *Branzburg v. Hayes*.⁴⁷

THE INFLUENCE OF *BRANZBURG V. HAYES*

*Branzburg v. Hayes*⁴⁸ is the seminal 1972 case in which the Court addressed the journalist's testimonial privilege. The ruling resulted from the consolidation of three separate cases in which reporters had been subpoenaed to identify their sources of information or to disclose other confidences to grand juries. One case, specifically, resulted from stories written by Paul Branzburg, a reporter for the *Louisville Courier-Journal*. Branzburg was asked to identify two young people he observed synthesizing hashish from marijuana. A second

44. MEIKLEJOHN, *supra* note 41, at 24-26.

45. See BARRON & DIENES, *supra* note 34.

46. GARRY, *supra* note 37, at 76.

47. See, e.g., Mark Neubauer, Comment, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 UCLA L. REV. 160, 163-64 (1976).

48. 408 U.S. 665 (1972).

subpoena required Branzburg's testimony about the sale and use of drugs after he reported interviewing several dozen drug users. The two Branzburg cases were consolidated on appeal.⁴⁹ In the second subpoena case, Paul Pappas, a reporter for a Massachusetts television station, was called before a grand jury to tell what he had seen and heard when he spent several hours at a Black Panthers headquarters.⁵⁰ The third case involved Earl Caldwell, a reporter for *The New York Times*, who was called before a grand jury investigating the activities of the Black Panthers in Oakland, California.⁵¹

In a majority opinion written by Justice Byron White and joined by Chief Justice Warren Burger and Associate Justices Harry Blackmun, William Rehnquist, and Lewis Powell, the Court rejected the reporters' First Amendment claims of a privilege protecting them from testifying in court. The Court held that the First Amendment does not relieve a journalist of the citizen's obligation to respond to a grand jury subpoena and to answer questions that are relevant to a criminal investigation. Therefore, the First Amendment does not afford journalists a constitutional testimonial privilege for an agreement they made to keep sources or information confidential. The reporters' argument for such a privilege rested heavily on cases that emphasized the importance of First Amendment guarantees to citizens to assist them with their self-governance responsibility, and cases that require that government action adversely impacting First Amendment rights be justified by a compelling public interest, thereby preserving those rights and liberties that are necessary for citizen participation in a representative democratic government.

While conceding that newsgathering deserved some First Amendment protection,⁵² Justice White noted that the cases consolidated before the Court in *Branzburg* did not involve any direct infringements on First Amendment rights, such as prior restraint or intrusions on speech and assembly. Responding to journalists' claims that compelled grand jury testimony would make it impossible to get sensitive newsworthy information, White wrote that the First Amendment did not invalidate every "incidental burdening" of the press caused by the enforcement of laws that apply to all citizens.⁵³ Courts, White wrote, consistently had found that the public "has a right to every man's evidence," except in those instances when a constitutional, common-law, or statutory privilege had been accorded to a possible witness.⁵⁴

In a concurring opinion, Justice Powell noted the "limited nature" of the

49. *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1971); *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971).

50. *In re Pappas*, 266 N.E.2d 297 (Mass. 1971).

51. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970).

52. *Branzburg*, 408 U.S. at 681.

53. *Id.* at 682-683.

54. *Id.* at 686-688 (citing *U.S. v. Bryan*, 339 U.S. 323 (1950)).

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holding.⁵⁵ Powell said that journalists who suspected they were called to testify for harassment or that were called in bad faith “will have access to the court” to quash the subpoenas.⁵⁶ In such cases, Powell said, courts should determine that the information sought was relevant and that the government had a legitimate need for it. Each such claim, Powell added, should be judged on a case-by-case basis, with the claim to a privilege balanced against the obligation of all citizens to testify about criminal activities.⁵⁷

Justice Potter Stewart, joined by Justices William Brennan and Thurgood Marshall, dissented, arguing that the decision would lead state and federal authorities to “annex the journalistic profession as an investigative arm of government.”⁵⁸ If these fears were realized, the inevitable outcome would be an interference with the traditional Fourth Estate role of the press as a powerful watchdog investigating and reporting on the activities of government. Stewart wrote that the right of journalists to protect confidential sources was rooted in the societal interest in “a full and free flow of information to the public.”⁵⁹ Stewart was concerned that the Court’s refusal to grant a privilege would drive away potential confidential sources due to fears that reporters would be compelled to disclose their identities. Conversely, reporters, who operate independent of government control in performing their watchdog function, must speculate about whether contact with a certain source or publication of controversial material would lead to their receipt of a subpoena. Noting surveys on the impact of subpoenas on newsgathering, Stewart said “unbridled subpoena power” will substantially impair the flow of news to the public.⁶⁰ Nevertheless, Stewart did not argue that the privilege should be absolute. Instead, he laid out a three-part test for balancing the needs of law enforcement against the First Amendment interests of journalists. In order to force a journalist to reveal a confidential source, Stewart wrote, the government should:

- (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.⁶¹

Although the *Branzburg* decision effectively precluded a nationwide, judicially created journalist’s privilege, White added that nothing in the majority

55. *Id.* at 709.

56. *Id.* at 710.

57. *Id.*

58. *Id.* at 725.

59. *Id.*

60. *Id.* at 728. Indeed, such a subpoena power is especially dangerous in sensitive areas involving governmental officials, financial affairs, political figures, dissidents, or minority groups that require in-depth, investigative reporting.

61. *Id.* at 743.

opinion could prevent Congress or state legislatures from establishing statutory privileges or state courts from recognizing a common-law privilege.⁶² But Justice Powell's concurrence left doubt as to whether a First Amendment privilege to protect confidential sources might exist in other fact situations. Ironically, almost immediately after *Branzburg*, three federal appellate courts recognized a constitutional privilege allowing reporters to keep source identities confidential.⁶³ Nearly all of the other federal circuits have since followed suit.⁶⁴

In *Branzburg*, reporters argued to no avail for recognition of a constitutional privilege to protect their confidential sources and information. Nevertheless, the Court strongly implied that its denial of a privilege did not leave the press without a remedy. The Court suggested that either Congress or the state legislatures could enact a privilege.

By the time the *Branzburg* decision was released, eighteen states had shield laws that protected journalists from forced disclosure of the identities of confidential sources to various extents.⁶⁵ Since 1972, thirteen states and the District of Columbia have enacted such laws, including Florida in 1998⁶⁶ and North Carolina in 1999.⁶⁷

No matter how the privilege is created, one of the questions that courts have dealt with involves who will fall inside the circle of protection. The American press has been defined in everyday terms largely by its institutional nature. Historically, the U.S. Supreme Court has referred to the press in the

62. *Id.* at 706-707.

63. *Baker v. F&F Inv. Co.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972), *reh'g denied*, 466 F.2d 1090 (1972); *Cervantes v. Time Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

64. *See, e.g.*, *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134 (4th Cir. 1986), *cert. denied*, 107 U.S. 79 (1986) (applying Stewart three-part test); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986) (recognizing qualified privilege and finding district court did not err in quashing subpoenas in criminal case); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983) (finding a constitutional privilege in the context of a criminal case); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (finding a constitutional privilege in the context of a civil case); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (finding that journalists have First Amendment privilege, although it is not absolute); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (holding that federal common law privilege exists in both civil and criminal cases); *Silkwood v. Kerr-McGee*, 563 F.2d 433 (10th Cir. 1977) (finding that documentary filmmaker could assert privilege to seek protective relief, though not technically a salaried news reporter). *But see Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 584-585 (6th Cir. 1987) (rejecting existence of privilege and refusing to join some other circuit courts which have adopted a qualified privilege based on the balancing approach adopted by the three *Branzburg* dissenters and rejected by the majority).

65. The *Branzburg* decision refers to seventeen shield laws: Alabama, Alaska, Arizona, Arkansas, California, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, and Pennsylvania. *Branzburg v. Hayes*, 408 U.S. 665, 689 (1972). However, Rhode Island enacted a shield law in 1971, apparently after the *Branzburg* case was briefed for the Court. *See R.I. GEN. LAWS* § 9-19.1-2 (1997).

66. *FLA. STAT. ANN.* § 90.5015 (West 2000). In addition to Florida, the other states enacting shield laws after 1972 were Colorado, Delaware, Georgia, Illinois, Minnesota, Nebraska, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, and Tennessee. *See infra* note 93.

67. *N.C. GEN. STAT.* § 8-53.11 (1999).

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most expansive of terms. In *Lowell v. Griffin*,⁶⁸ the Court said that press liberty was not limited to newspapers and periodicals. Then it went on to say that the press historically has included all kinds of publications that serve as vehicles for information and opinion.

In *Branzburg v. Hayes*,⁶⁹ which squarely addressed the issue of press privilege, Justice White wrote that recognition of a constitutional privilege would result in “practical and conceptual difficulties of a high order”⁷⁰ when the issue turns to the beneficiaries of the privilege:

Sooner or later, it would become necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.⁷¹

The majority was concerned that those entitled to grant such a testimonial privilege would have difficulty conferring this privileged status only on journalists. This is because the public communication function asserted by the journalists is likewise performed by lecturers, pollsters, novelists, and academic researchers. In his professional capacity, almost any author may be able to assert that he is contributing to the flow of information to the public, relying on confidential sources of information, and jeopardizing his continuing relationship with these sources if he is required to disclose his sources or information to the grand jury.⁷² In a footnote to the opinion, the Court expressed the dangers that such a privilege could be claimed by “sham” newspapers set up by groups who want to engage in criminal activity and insulate themselves from grand jury inquiry. While such newspapers could be easily distinguishable from traditional newspapers, the Court pointed out that such determinations may be impermissible because they would require courts to delve into the content of the expression and make discriminating choices by affording a privilege to some publications and not to others.

PUBLIC POLICY POST-BRANZBURG

The *Branzburg* Court’s refusal to recognize a privilege for journalists spurred action on the part of many state legislators. Many of the lawmakers were concerned about the increases in news-related subpoenas, the confusion in interpreting the holding in *Branzburg*, and the need to protect the public interest in the free flow of information as a matter of public policy.⁷³

68. 303 U.S. 444 (1938).

69. 408 U.S. 665 (1972).

70. *Id.* at 704.

71. *Id.*

72. *Id.* at 705.

73. Paul Marcus, *The Reporter’s Privilege: An Analysis of the Common Law*, *Branzburg v. Hayes*,

Increases in news-related subpoenas have been tracked in a number of academic studies, which also have recognized the importance of confidential news sources to the process of newsgathering and reporting.⁷⁴ Studies have also documented that journalists rely heavily on such confidential sources, who will give valuable information only on the condition that their names be omitted from publication.⁷⁵ Courts have used the subpoena power to compel the testimony of journalists who have relevant information that will shed light on a particular case. Although some of the available studies on journalists' use of unnamed sources was presented to the court in *Branzburg*, the majority felt there was insufficient empirical data to conclude that journalists needed a privilege to protect their sources.⁷⁶ Years after *Branzburg*, the Reporters Committee for Freedom of the Press, seeking to fill the void in research data, conducted several studies that demonstrated a substantial number of subpoenas issued to news organizations.⁷⁷ In its most recent report of the incidence of subpoenas, the committee noted that it "has taken on the task of documenting the burden of these subpoenas to satisfy the demand for empirical evidence."⁷⁸

At least as troublesome for legislators was the confusion that existed in the lower courts over the meaning of the *Branzburg* decision. Some courts strictly interpreted the plurality in *Branzburg* to refuse to give a media defendant any First Amendment confidentiality privilege. Most courts, however, recognized a qualified privilege for journalists by giving greater weight to Justice Powell's case-by-case approach, balancing press freedom against a compelling public interest in the information.⁷⁹ Other lower courts adopted balancing tests similar to Justice Stewart's three-part analysis in his dissenting opinion.⁸⁰ This confu-

and Recent Statutory Developments, 25 ARIZ. L. REV. 815, 860 (1983).

74. James A. Guest & Alan L. Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U. L. REV. 18 (1969); Osborn, *supra* note 18.

75. Laurence B. Alexander, Linda M. Perry & Bill F. Chamberlin, *Branzburg v. Hayes Revisited: A Survey of Journalists Who Become Subpoena Targets*, 15 NEWSPAPER RES. J. 83 (1994); St. Dizier, *supra* note 18 (finding that nearly all journalists surveyed in 1974 and 1984 for this comparative study acknowledged using confidential sources, but also finding that such sources were used less frequently and with greater caution in 1984 than they were in 1974).

76. The Court cited studies by Blasi, *supra* note 18, and Stanzler, *supra* note 74.

77. REPORTERS COMMITTEE ON FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED IN THE NEWS MEDIA IN 1999 (2001); REPORTERS COMMITTEE ON FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED IN THE NEWS MEDIA IN 1997 (1999); REPORTERS COMMITTEE ON FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED IN THE NEWS MEDIA IN 1993 (1995); REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1991 (1992); REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1989 (1990).

78. REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (2001), *supra* note 77.

79. Killenberg, *supra* note 4, at 705; Marcus, *supra* note 73, at 831; Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1, 24 (1986); *Privileged Communication*, *supra* note 31, at 1604.

80. Note, *Just Between You and Me . . . For Now: Reexamining a Qualified Privilege for Reporters To Keep Sources Confidential in Grand Jury Proceedings*, 1988 U. ILL. L. REV. 739, 750 (1988).

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sion over the meaning of *Branzburg*, combined with a lack of uniformity in applying reporters' privileges, moved some state legislatures to action.

Additional impetus for action on behalf of the legislators can be found in the public policy rationales that appear in the statutes. Apparently, the *Branzburg* Court's primary public interest concern was assisting law enforcement by requiring disclosure. It is equally clear from the rationales available in only a few of the statutes that the primary interest of the legislators was protecting journalists from forced disclosure. Although all journalist privilege statutes were created with the purpose of protecting journalists from interference, few of them include an explicit statement of the public policy behind the enactment. For example, a reading of the Illinois statute indicates that the legislature wanted to protect reporters from disclosing their sources.⁸¹ A federal appellate court reviewing the reporter's privilege in Illinois noted that the law "reflects a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment."⁸² Nevertheless, the law cannot be viewed as a wholesale ban on ever calling reporters to testify. This is because the statute established a procedure through which a court could divest a reporter of the privilege.⁸³

Similarly, the Minnesota statute provides that the news media should have a privilege to protect sources and unpublished information in order to protect the public interest and the free flow of information. Further, it notes that the confidential relationship between the news gatherer and source requires protection.⁸⁴ The Nebraska law has a comparable provision, but it goes further. It states that those who gather news "shall not be inhibited, directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be fully informed."⁸⁵ Further, it provides "[t]hat the obstruction of the free flow of information through any medium of communication to the public affects interstate commerce."⁸⁶ Thus, some legislators determined as a policy matter that the "gathering and dissemination of news was more important, at least in some circumstances, than the disclosure of confidential sources and information."⁸⁷ A study of the press' privilege conducted a few years after *Branzburg* demonstrated that some shield laws were not having the desired policy effects. The study found

81. 735 ILL. COMP. STAT. ANN. 5/8-901 (West 1992).

82. *Baker v. F&F Inv.*, 470 F.2d 778 (2d Cir. 1972).

83. 735 ILL. COMP. STAT. ANN. 5/8-901 (West 1999).

84. MINN. STAT. ANN. § 595.022 (West 1998).

85. NEB. REV. STAT. § 20-144 (1997).

86. *Id.*

87. Marcus, *supra* note 73, at 861.

statutory protection remained little more than a “paper” shield because various courts had interpreted these laws narrowly to deny reporters’ claims of privilege.⁸⁸ The study also noted that shield laws in at least two states—California and New Mexico—were attacked in state courts on constitutional grounds.⁸⁹ These cases, however, may continue to be the exception rather than the rule.⁹⁰ According to the latter study, qualified shield statutes are more likely to avoid this kind of confrontation because judicial power and integrity remain unimpaired when conditions are attached to the laws, but absolute privilege shields raise serious separation of power concerns because they restrict or abridge the court’s contempt authority.⁹¹

Although a few states have shield laws that provide journalists an absolute privilege, most states have shield laws that provide a qualified privilege, which sets forth the circumstances and conditions under which news gatherers will be allowed to keep sources and information confidential. Examples of absolute privilege statutes can be found in Alabama and Pennsylvania.⁹² Both state statutes essentially protect journalists from being compelled to disclose their sources of information in any legal proceeding. Qualified privilege laws, on the other hand, vary widely from state to state, but most of these statutes require a First Amendment balancing test to determine whether the privilege applies to a given situation.

Although most state shield laws do not include the legislative rationale for giving journalists a privilege, such reasons can be obtained from state statutes that do indicate such rationales and gleaned from those that do not. A review of those statutes that state their reasons reveals a common purpose across boundaries to protect journalists from compelled testimony. It is apparent that the legislatures intended that this privilege apply to those who were employed in traditional print and broadcasting news media outlets. This is because of the need journalists have to use confidential relationships in gathering news and information for dissemination to the public. Moreover, the rationales acknowledge the critical democratic role of journalists in maintaining a free flow of information from the sources to the public and its citizenry. No mention is made of any other persons outside of the journalist-source context who could avail themselves of the privilege. Given the clearly stated policy distinctions in the aforementioned states, it is doubtful that this privilege could be stretched to ap-

88. Killenberg, *supra* note 4, at 708.

89. *Id.* These cases, *Ammerman v. Hubbard Broad., Inc.*, 551 P.2d 1354 (N.M. 1976) (holding that state constitution gives courts, not the legislature, power to create privileges, which are rules of evidence and procedure), *Farr v. Superior Court*, 22 Cal. App. 3d 60 (1971), and *Rosato v. Superior Court*, 51 Cal. App. 3d 190 (1975), address the courts’ need to explore violations of their orders by those who are subject to the orders. Such violation justifies compelled disclosure by the journalist as a means of enforcing the constitutional obligation to prevent prejudicial publicity.

90. Louis A. Day, *Shield Laws and the Separation of Powers Doctrine*, 2 COMM. L. 15 (1980).

91. *Id.*

92. ALA. CODE § 12-21-142 (Michie 1995); 42 PA. CONS. STAT. ANN. § 5942 (West 2000).

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ply to non-journalistic disseminators of information.

WHO IS A JOURNALIST UNDER STATE LAW?

In each of the thirty-one states with shield laws, legislatures identify journalists as those professionals who should be protected from testifying about their sources and information.⁹³ Consequently, the states have also taken on the responsibility of clarifying how broadly the term “journalist,” and others like it, can be used with respect to the categories of persons to be protected by the privilege. A review of those state statutes revealed that no two states use identical language to describe the persons protected, but that most states adopt the approach of listing the occupations that are covered. The typical shield law text protects persons “engaged in” newsgathering, and those “connected with” or “employed by” certain specified media organizations. An example of a typical statutory description can be found in the North Dakota statute, which reads in pertinent part:

No person shall be required in any proceeding or hearing to disclose any information or the source of any information . . . procured . . . while the person was engaged in gathering, writing, photographing, or editing news and was employed by or acting for any organization engaged in publishing or broadcasting news, unless directed by an order . . .⁹⁴

Many jurisdictions bolster their definitions of the class of protected journalists by also listing the types of media with which the privilege user must be identified. These media include the obvious employers, such as newspapers, magazines, “other periodicals,” wire or news services, news agencies, news and feature syndicates, press associations, radio, and television broadcasters. Less noticeable forms of delivery include pamphlets, books, facsimiles, newsreels or motion picture news, and cable and community-antenna television.

Justification for a testimonial privilege rests largely on the need of investigative reporters to be protected from the worry of subpoenas. None of the state statutory privileges, however, expressly protects investigative reporters. Nev-

93. ALA. CODE § 12-21-142 (Michie 1995); ALASKA STAT. § 09.25.300 (Michie 2000); ARIZ. REV. STAT. ANN. § 12-2237 (West 1999); ARK. CODE ANN. § 16-85-510 (Michie 1987); CAL. EVID. CODE § 1070 (West 1995); COLO. REV. STAT. ANN. § 13-90-119 (West 1997); DEL. CODE ANN. tit. 10, § 4320-4326 (Michie 1999); FLA. STAT. ANN. § 90.5015 (West 2000); GA. CODE ANN. § 24-9-30 (2000); 735 ILL. COMP. STAT. ANN. 5/8-901 (West 1992); IND. CODE ANN. § 34-46-4-1 (West 2001); KY. REV. STAT. ANN. § 421.100 (Michie 2000); LA. REV. STAT. ANN. § 45.1451 (West 1999); MD. ANN. CODE § 9-112 (Michie 1998); MICH. COMP. LAWS ANN. § 767.5a (West 2001); MINN. STAT. ANN. § 595.022 (West 1998); MONT. CODE ANN. § 26-1-902 (2001); NEB. REV. STAT. § 20-146 (1997); NEV. REV. STAT. ANN. § 49.275 (Michie 1999); N.J. STAT. ANN. § 2A:84A-21 (West 1994); N.M. STAT. ANN. § 38-6-7 (West 2000); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2001); N.C. GEN. STAT. § 8-53.11 (1999); N.D. CENT. CODE § 31-01-06.2 (Michie 1999); OHIO REV. CODE ANN. § 2739.12 (Anderson 2000); OKLA. STAT. ANN. § 2506 (2001); OR. REV. STAT. § 44.510 (1997); 42 PA. CONS. STAT. ANN. § 5942 (West 2000); R.I. GEN. LAWS § 9-19.1-2 (1998); S.C. CODE ANN. § 19-11-100 (2000); TENN. CODE ANN. § 24-1-208 (2000).

94. N.D. CENT. CODE § 31-01-06.2 (Michie 1999).

ertheless, each of the state laws makes it possible for all traditional journalists—reporters (including so-called investigative reporters), photographers, and news managers and publishers—to keep secret the identities of the persons with whom they have communicated in confidence.⁹⁵

Generally, statutes are silent on whether journalists who work part time would be protected.⁹⁶ Many are also silent on whether former journalists would be covered. Strong indications are that they would be.⁹⁷ At the same time, it would seem, those who work as journalists on a volunteer basis would be excluded because their work is not for gain or livelihood. But if volunteers were excluded, how would courts treat interns who work as apprentices for news organizations? Interns could be counted among the privileged, depending on their payroll status. Student journalists who perform the traditional job functions of their brethren outside of the academy would be deserving of the protection of the shield law based on the similarities between the newsgathering functions performed by both groups. In some cases student journalists are paid, but in many other instances, they are not. Like some interns, student journalists often are working to gain valuable experience that will aid them in launching a professional career.⁹⁸ Therefore, it would seem logical and practical to include in the privilege student journalists who are performing identical newsgathering functions as professionals for the same goals of informing the public and its citizens in a democratic society.

Other evidence of a legislative tilt toward the large, established commercial press can be found in the language addressing the protected institutions. Newspapers are listed in the protected sphere in all state statutes but only defined in a few. While New Jersey protects newspaper and magazine employees, it restricts the kinds of publications that would be the beneficiaries.⁹⁹ A qualifying newspaper in that state must appear at least once a week and contain items of

95. See *supra* note 93.

96. Exceptions are found in Illinois and Delaware, where elaborate provisions include limitations on numbers of hours and weeks employed. Similarly, freelancers and stringers are generally not singled out for coverage by statutes. However, the language of nearly all state statutes allows an argument to be made for covering these news gatherers based on a lack of distinction between their duties and those of the daily working reporters and editors.

97. Gilbert Cranberg, *A Downside to Shield Laws*, 29 COLUM. JOURNALISM REV. 48 (1991) (discussing the extension of protection to a retired journalist). States like Illinois include in the privileged class "any person who was a reporter at the time the information sought was procured or obtained." 735 ILL. COMP. STAT. ANN. 5/8-902 (West 1993).

98. For example, a New York federal district court determined in 1993 that a volunteer student reporter for a law school newspaper could invoke the federal constitutional privilege. *Blum v. Schlegel*, 150 F.R.D. 42, 45 (W.D.N.Y. 1993). The court said it was irrelevant whether a person was a paid, professional journalist as long as that person gathered the information sought for the purpose of disseminating it to the public.

99. For example, a "newspaper" was defined for legal and public policy purposes in New Jersey as "a paper that is printed and distributed ordinarily not less frequently than once a week and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at a United States post office as second class matter." N.J. STAT. ANN. § 2A:84A-21a (West 1994).

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current interest, such as news articles, opinions, editorials, features, and advertising. In addition, newspapers and magazines¹⁰⁰ are required to have a paid circulation and entry at a U.S. Post Office as second-class matter.¹⁰¹ Such a limited definition effectively could omit publications that are distributed free of charge.¹⁰² Many college and university newspapers would fall into this category, although some that are funded in part by student fees arguably have an indirect paid circulation. Alternative newspapers often are distributed at no direct cost to the consumer, even though their employees are performing the same tasks and services as news entities with a paid circulation. Also frustrating for First Amendment and fairness purposes is a provision in the New York law requiring magazines to have been published for at least one year before being included.¹⁰³ In essence, newer publishers, one-time publishers, and the occasional pamphleteers might have a difficult time bringing themselves and their employees within the strictures of that privilege statute.¹⁰⁴ The result is a definition of “press” that excludes the eighteenth century’s lone pamphleteers, forerunners of the large commercial news establishments, and ironically, the primary beneficiaries of earlier notions of a free press.¹⁰⁵

A few states have made an additional requirement for newspapers and “other periodicals” that they have a “general circulation.”¹⁰⁶ While “general circulation” is a phrase that has a specific meaning with legal effect, state legislatures have not taken upon themselves the role of defining it. Therefore the task has been left to state courts, which have described such newspapers as those devoted to the interests of a particular class of persons and specializing in news and intelligence ordinarily of interest to that class.¹⁰⁷ Such newspapers

100. Magazines or “other periodicals” were named or referenced in twenty-three of the state statutes. But only thirteen of the shield states mentioned magazines specifically by name. Perhaps because of the variety of magazines or “other periodicals” on the market, fewer states chose to include them by reference. Other statutes define newspaper in terms similar to those of New Jersey. See N.Y. CIV. RIGHTS LAW § 79-h(a)(1) (McKinney 2001) and N.M. STAT. ANN. § 38-6-7 (Michie 2001). In addition to the New Jersey strictures, New York requires that newspapers and magazines be circulating for at least a year before the privilege attaches.

101. N.J. STAT. ANN. § 2A:84A-21a (West 1994). The postal requirement appears to be an additional, albeit official, check on the status of the entity employing the person claiming the privilege. U.S. Post Office regulations restrict second-class mailing privileges to publishers and registered news agents approved for mailing periodicals at a special rate. U.S. Postal Service, Consumer’s Guide to Postal Services and Products, Publication 201 (2001). For a discussion of the origins and development of the policy governing periodicals, see Richard B. Kielbowicz, *Postal Subsidies for the Press and the Business of Mass Culture, 1880-1920*, 64 BUS. HIST. REV. 451, 488 (1990).

102. New Mexico excludes the paid circulation requirement. N.M. STAT. ANN. § 38-6-7 (West 2001).

103. N.Y. CIV. RIGHTS LAW § 79-h(a)(2) (McKinney 1999) reads: “‘Magazine’ shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at a United States post-office as second-class matter.”

104. Cranberg, *supra* note 97.

105. See SHAUER, *supra* note 38.

106. ALASKA STAT. § 09.25.390(1)(A)(i) (Michie 2000); IND. CODE ANN. § 34-46-4-1(1)(A) (West 2001); LA. REV. STAT. ANN. § 45: 1451(a) (West 2001).

107. Dale R. Agthe, Annotation, *What Constitutes Newspaper of “General Circulation” Within*

also are expected to publish items of a general interest, such as news of political, religious, commercial or social affairs and circulate this news among the general public.¹⁰⁸

In addition to states that provide umbrella protection for journalists working in any media organization, there are indications that lawmakers would be willing to extend the protection to traditional journalists who communicate through newer technologies. Research for this study found pockets of explicit protection for journalists appearing on cable television.¹⁰⁹ Similarly, there was protection for those who disseminate news via community-antenna television.¹¹⁰ Alaska's shield law includes protection for sources of news transmitted by facsimile,¹¹¹ and New Mexico's law makes two references to news sources who are protected for an electronically delivered product.¹¹² But no states, however, were Internet-specific in their determinations.

FEDERAL COURT CONTRIBUTIONS TO THE PRIVILEGE

In addition to the protections found in state statutes and case law, a separate strand of the journalist's privilege has emerged and developed in the federal courts. Several Circuit Courts of Appeals cases have had to determine the threshold question of whether the person asserting the privilege was a journalist. In so doing, the courts have created a small body of case law that has contributed significantly to the definition of the class of persons protected by the journalist's privilege. In *von Bulow v. von Bulow*,¹¹³ the Second Circuit refused to extend the privilege to someone who gathered information initially for a non-journalistic endeavor, but who later decided to author a book using that information. Andrea Reynolds, a third-party witness in a civil lawsuit, appealed the order holding her in contempt for refusing to comply with subpoenas seeking investigative reports she commissioned, notes she took while observing the trial, and the manuscript of an unpublished book. The court held that she was not a member of the class that could assert the journalist's privilege. The court found no such privilege in federal law or the New York shield law. Further, the court found that at the time she sought the investigative information, she did not intend to use the reports to disseminate the information to the public; that her note-taking did not constitute gathering and dissemination of news; and that her memories were not privileged merely because, at a later date, she

Meaning of State Statutes Requiring Publication of Official Notices and the Like in Such Newspaper, 24 A.L.R. 4TH 822 (1996).

108. *Id.*

109. COLO. REV. STAT. ANN. § 13-90-119 (West 1997); OKLA. STAT. ANN. tit. 12, § 2506 (West 1993); OR. REV. STAT. § 44.510 (1997).

110. 735 ILL. COMP. STAT. ANN. 5/8-902 (West 1999); MONT. CODE ANN. § 26-1-902 (2001).

111. ALASKA STAT. § 09.25.390(1)(A)(iii) (Michie 1999).

112. N.M. STAT. ANN. § 38-6-7 (West 2001).

113. *Von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987).

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would commit those memories to writing. In denying Reynolds the privilege, the court reiterated a Second Circuit decision from 1972, holding that the person seeking the journalist's privilege must demonstrate the intent to use the material sought to disseminate information to the public and show that such intent existed at the inception of the newsgathering process.¹¹⁴

Following the reasoning in the *von Bulow* case, the Ninth Circuit in *Shoen v. Shoen* granted the protections of the journalist's privilege to Ronald Watkins, "an investigative author of books on topical and controversial subjects."¹¹⁵ Watkins, who was working on a book on the Shoen family feud over control of the U-Haul Company, was subpoenaed to testify and turn over all materials related to Eva Berg Shoen's death.¹¹⁶ The court found that the journalist's privilege was designed to protect investigative reporting irrespective of the medium. Noting the vital historical role that book authors have played in exposing corruption and abuse in American life, the court then put investigative book authors on the same footing as investigative reporters on the issue of privilege. "[W]e see no principled basis for denying the protection of the journalist's privilege to investigative book authors while granting it to more traditional print and broadcast journalists. What makes journalism journalism is not its form, but its content."¹¹⁷ The court found that Watkins undertook his research with the intention of writing a book about the Shoen family, thereby satisfying the *von Bulow* requirements that authors intend to disseminate the information they gather and that such intent exist at the inception of the newsgathering process. The court held that the plaintiffs had failed to demonstrate a sufficiently compelling need for the information to overcome Watkins' assertions of the journalist's privilege.¹¹⁸

114. *Id.* (citing *Baker v. F&F Investment*, 470 F.2d 778 (2d Cir. 1972)).

115. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

116. Watkins' primary source for the book was family patriarch and U-Haul founder Leonard Shoen, who implicated his sons, Mark and Edward, in the death of their sister-in-law, Eva Berg Shoen. The subpoena issued to Watkins grew out of a lawsuit filed by the two sons against their father for damage to their reputations. *Id.*

117. *Id.* at 1293.

118. *Id.* at 1294. At a minimum, the court concluded, the plaintiffs should depose Leonard Shoen before seeking Watkins' tapes and notes. *Id.* at 1293. Before the decision was announced, however, the plaintiffs deposed Shoen and attempted to give the impression that they had exhausted all reasonable alternative sources. Once again, they demanded Watkins' tapes and notes. When Watkins refused, he was held in contempt by the district court and ordered incarcerated until he complied. However, the U.S. Court of Appeals for the Ninth Circuit stayed the incarceration order and found that the plaintiffs had failed to overcome the Watkins' assertion of the journalist's privilege by showing that the material is (1) unavailable despite exhaustion of all reasonable alternative sources; (2) non-cumulative; and (3) clearly relevant to an important issue in the case. *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995).

Recently, author and lecturer Vanessa Leggett went to jail in Texas after refusing to hand over her notes to a federal grand jury. Leggett, who had interviewed Roger Angleton in a Houston jail after he had been arrested for the murder of his sister-in-law, was writing a true-crime book about the homicide. As such, she was the last person to interview him before he committed suicide in this jail cell. Federal prosecutors argued that she does not qualify as a writer, presumably because she is not connected with a news media organization and does not have a publisher. The Fifth Circuit upheld a civil contempt charge and included a reference to her lack of status as a journalist in its ruling. "Even assuming that Leggett, a

In *Lowe v. S.E.C.*,¹¹⁹ the U.S. Supreme Court raised the issue of whether newsletters would be considered in the same vein as traditional newsgathering organizations, but it provided no answer. A majority of the Court held that an investment newsletter was not subject to regulation by the Securities and Exchange Commission under the Investment Advisor's Act of 1940, effectively avoiding the issue of whether the newsletter falls within the First Amendment's definition of press.

Since *Lowe*, a number of federal courts have applied the journalist's privilege to employees who work for newsletters targeted to specific audiences.¹²⁰ In *In re Scott Paper Co. Securities Litigation*,¹²¹ a federal district court applied the press privilege to information used by Standard & Poor's in rating and commenting on the creditworthiness of public companies and disseminating that information to the public through its periodicals. Plaintiffs sought to use the information from S&P in a class action against Scott Paper Co. for securi-

virtually unpublished freelance writer, operating without an employer or a contract for publication, qualifies as a journalist under the law, the journalist privilege is ineffectual against a grand jury subpoena, absent evidence of governmental harassment or oppression." See David Horrigan, *Writer Faces Jail Time for Holding on to Notes*, NAT'L L. J., Aug. 27, 2001, at B9; Ronald Goldfarb, *Who Is a Writer? It's Not a Federal Case*, WASH. POST, Aug. 26, 2001, at B3.

Book authors are expressly protected by shield laws in several states. GA. CODE ANN. § 24-9-30 (2000); NEB. REV. STAT. § 20-145 (1999); OKLA. STAT. § 2506 (1998); OR. REV. STAT. § 44.510 (1997); S.C. CODE ANN. § 19-11-100 (2000). In Illinois and Louisiana, however, statutes do not mention book authors. Nevertheless the privilege has been interpreted by the courts to extend to book writers in those states. See *Desai v. Hersh*, 954 F.2d 1408 (7th Cir.), cert. denied, 506 U.S. 865, (1992); *Louisiana v. Fontanille*, 1994 La. App. LEXIS 191 (5th Cir. 1994). *Contra Matera v. Superior Court*, 825 P.2d 971 (Ariz. Ct. App. 1992) (denying author use of journalist's privilege after a subpoena issued for his notes and documents he collected in preparation of the book on a legislator who was a key figure in the government's sting operation, since the author had not claimed that the subpoena would cause him to reveal confidential sources and information, the only situations protected by that state's privilege); *People v. Le Grand*, 67 A.D.2d 446 (N.Y. App. Div. 1979) (denying the author use of the journalist's privilege to shield him from an order to disclose notes of an interview for an upcoming book about an alleged crime family, ruling that the privilege was for professional journalists only and should not "be deemed to encompass those engaged in a different field of writing and research"). As with magazines and other media, those who capture non-fiction in book form also could argue for some protection in the catch-all language of some state statutes. One state that probably would not stand for that argument is Florida, which specifically wrote book authors out of the law. Unless an exception is made for nonfiction writers, omitting all book authors could create problems for those writers who choose to consolidate their daily or weekly reports into a work that is book length. Such a policy would leave out two of the most prominent journalists of the twentieth century: Seymour Hersh and Bob Woodward. See Steve Weinberg, *From Watergate to Monicagate*, 23 IRE J. 12 (2000) (identifying more than 100 investigative books written by journalists in 1999).

119. 472 U.S. 181 (1985).

120. *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366 (E.D. Pa. 1992). *Contra Deltec Inc. v. Dun & Bradstreet, Inc.*, 187 F. Supp. 788 (N.D. Ohio 1960) (refusing to extend the state statutory journalist's privilege to apply to a bimonthly newsletter report on the financial status of companies and individuals). State courts, too, have interpreted the privilege to apply to newsletter staffs. See *King v. Photo Mktg. Ass'n Inter.*, 327 N.W. 2d 515 (Mich. Ct. App. 1982) (recognizing a privilege for a publication of an association of photo dealers and photofinishers that published information on members' activities in trade newsletters and a monthly magazine); *Burnett v. Merrill Lynch*, 635 A.2d 1019 (N.J. Super. 1993) (finding an annual insurance rating report qualified as a "news medium," thus protecting those who publish it from producing documents upon which the ratings are based).

121. 145 F.R.D. 366 (E.D. Pa. 1992).

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ties fraud. While S&P is not a traditional newsgathering organization, the court pulled it under the umbrella of the press privilege because of the company's attributes that are indicative of the press: it published periodicals with a regular circulation to a general population; though securities issuers pay for the service, they did not get to advertise; instead, S&P maintained complete editorial control over the form and content of its publications; and it published the information for the benefit of the general public. The court relied in part on its interpretation of *Lowe*. Though the *Lowe* Court did not reach this precise issue, this court noted that the three concurring Justices would have reached the constitutional issue and declared that such a newsletter was protected by the free press clause. Given the efforts taken by both the majority and concurring Justices in *Lowe* to distinguish between investment newsletters for public dissemination and those for private use, the court in *In re Scott Paper Co.* believed that newsletters would be within the protection. Applying the qualified privilege of its own circuit,¹²² the court concluded that the plaintiffs had not met their burden of demonstrating that they had exhausted other means of obtaining the information and that the material sought was so crucial to the case that compelling First Amendment interests should be overcome.

Likewise in *Apicella v. McNeil Laboratories, Inc.*,¹²³ another federal district court held that the editor of a medical trade magazine was entitled to First Amendment protection from disclosure of confidential information regarding reports on various drugs sought by the plaintiff in a malpractice action.¹²⁴ Specifically, the court in *Apicella* allowed the editor of a bi-monthly medical newsletter to use the journalist's privilege to protect the identity of a physician who prepared the preliminary draft of the article and the consultants who had responded to it. Dr. Mark Abramowicz, the newsletter's chief executive officer, was sought for deposition because the newsletter had published information on the dangers of the drug Innovar, which was at issue in the underlying lawsuit.¹²⁵ In shielding the newsletter from discovery, the court expressed concern about the possible chilling effects disclosure would have on the ability of the newsletter to obtain the services of consulting physicians in the future.¹²⁶ In addition, the party requesting disclosure had not demonstrated a need for the information or an inability to obtain the information from an alternate

122. In *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979), the court held that the privilege could be overcome but only on a showing by the party seeking discovery that he or she has "exhausted other means of obtaining the information" and that the material sought provides crucial information that goes to the heart of the claim.

123. 66 F.R.D. 78 (E.D.N.Y. 1975).

124. Similarly, a federal court protected a newsletter editor from compelled disclosures of the names of confidential sources in an antitrust suit. *Citicorp v. Interbank Card Ass'n*, 4 Med. L. Rptr. 1429 (S.D.N.Y. 1978).

125. *Apicella*, 66 F.R.D. at 80.

126. *Id.* at 85

source.¹²⁷ Therefore, the court held that the newsletter should not, at that time, be forced to reveal the author or the consultants on the article.¹²⁸ While the court in *Apicella* applied the privilege analysis to see if the facts met the legal requirements, that practice is not followed in all tribunals where writers and editors want to mask their identities.¹²⁹

Only recently have scholars begun to make inroads under the protective shield of the journalist's privilege.¹³⁰ In *Cusumano v. Microsoft Corp.*, the First Circuit protected two business school professors who were then co-authors of a forthcoming book recounting Microsoft's and Netscape's battle for supremacy in the Internet software marketplace.¹³¹ In preparing its defense of a federal antitrust action, Microsoft subpoenaed materials gathered by the professors. Noting the similarities between the work of academic researchers and news professionals, the First Circuit posited, "academicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides to journalists."¹³² Academicians, like journalists, are concerned about the "chilling effect" that a lack of source protection would have on speech. The *Cusumano* court stated, "Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses."¹³³

It is interesting that in *Cukier v. American Medical Association*, the court held an editor of a scholarly journal, *The Journal of the American Medical Association* (JAMA), was within the definition of a "reporter" under the Reporter's Privilege Act in Illinois.¹³⁴ Jean Cukier and his co-authors submitted a manuscript to the scientific periodical JAMA for publication consideration, and

127. *Id.*

128. *Id.*

129. Occasionally, government employees who publish newsletters have claimed the journalist's privilege to mask the identities of the responsible parties in an attempt to escape disciplinary efforts. S.K. Bardwell, *Officer Under Probe for Article Cites First Amendment*, HOUS. CHRON., May 5, 1995, at A26 (police officer claimed personal knowledge of wrongdoings in the union's monthly newspaper but refused to give more information to internal affairs division investigators); Frank Klimko, *National City's Council Rejects Firefighter's Appeal of Demotion*, SAN DIEGO UNION-TRIB., Nov. 30, 1995, at B14 (fire fighter refused to name the authors of articles in a union newsletter that contained sexually graphic language).

130. For a discussion of a researcher's privilege, see Louis A. Day, *In Search of a Scholar's Privilege*, 5 COMM. & L. 3 (1983), and the authorities cited therein. Day favored a scholar's privilege based on academic freedom, the right of privacy, freedom of expression, or an extension of the reporter's privilege. *Id.* Even as recently as 1993, doctoral candidate Rik Scarce was jailed for five months by U.S. District Judge W. Fremming Nielson for refusing to testify before a grand jury concerning his interviews with an animal rights activist suspected of participating in a raid on a university laboratory. Nicole Peradotto, *Scarce Freed: Judge Releases WSU Grad Student Jailed for Refusing to Divulge Names of Those Suspected in Research Raid*, LEWISTON MORNING TRIB., Oct. 21, 1993, at 1A; Victoria Slind-Flor, *Jailed Researcher Claims Shield*, NAT'L L.J., Aug. 9, 1993, at 3.

131. 162 F.3d 708 (1st Cir. 1998).

132. *Id.* at 714.

133. *Id.*

134. *Cukier v. Am. Med. Ass'n*, 630 N.E. 2d 1198 (Ill. App. 1994).

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Cukier included a statement that he had no financial interest in the publication of the manuscript. A JAMA editor sent Cukier and a co-author a letter informing the co-author that it had come to his attention Cukier had a financial interest in the publication of the manuscript, and he asked Cukier for a full disclosure of his financial interest in the publication. After Cukier denied such an interest and his submission was declined, he filed a pre-suit discovery to learn the identity of the person who had called into question his professional honesty and integrity. JAMA, like other scholarly publications that use a blind-refereed manuscript review process, guarantees the confidentiality of its peer reviewers and others who may provide information to it in the course of the editorial process. While the editor learned of a possible financial interest while evaluating Cukier's manuscript, the court found that such a discovery did not preclude the possibility that it all occurred during the newsgathering process. Therefore, the pre-suit discovery was not allowed.

The federal court journalist's privilege, which has evolved independently of the state-granted protections, has been reserved mostly, but not solely, for investigative reporters. Though protection for investigative journalists seems to be a major thrust of federal policy, the determination is not quite so simple. Note that as a result of *von Bulow* and the case of *In Re Madden*,¹³⁵ which will be discussed later, the test for a journalist's status has come down to three requirements. The claimant must (1) be engaged in investigative reporting; (2) be engaged in gathering news; and (3) possess the intent at the inception of the newsgathering process to disseminate this news to the public. Some of the courts' insistence on investigative purpose rightly recognizes one type of reporting that is in need of the privilege. In fact, the underlying rationale for the privilege as discussed by Blasi rests in the investigative arena.¹³⁶ But while investigative reporters are essential partakers of the privilege, they are by no means the only deserving group. All journalists, especially those charged with gathering the news, benefit from the use of the privilege at one time or another in acquiring vital information that may not be obtained elsewhere and that may be valuable to news consumers. Some courts, however, may have gone farther than necessary in extending the press's privilege to include newsletters, which serve as important vehicles of communication, but which do not encompass many of the journalistic functions or public dissemination that usually would require invoking the protection of the privilege.

The statutory and common-law definitions of journalists are highly protective of traditional newsmen. Limiting the privilege to traditional journalists in this manner could help preserve the shield laws in their current state. Moreover, a more narrowly scoped privilege would accommodate any concerns

135. 151 F.3d 125 (3d Cir. 1998).

136. See Blasi, *supra* note 40.

about privilege expansion and ward off potential constitutional attacks for being over-inclusive. On the other hand, the definitions could exclude those—such as the lone pamphleteers—engaged in newsgathering activities that are protected by the First Amendment but are shelved on a lower tier. What are the alternatives? Any suggestion that journalists justify their privileged placement through certification or licensing like other professions—public relations, accounting, law and medicine—is likely to gain little, if any, support because of the obvious implications of such regulations on press freedom. Of course, there could be some anti-press legislators who favor repeal of the privilege statutes. Short of any repeals, courts facing these dilemmas could themselves expand the definition of journalists to include some new methods of communication.

WOLVES IN WATCHDOGS' CLOTHING

Most states define the protected class as persons who work in a newsgathering or an editorial capacity for a news operation. The typical cases involve news reporters or photographers who challenge efforts to secure their testimony or appearance in court. Yet there is evidence that others not associated with the traditional press want to be able to claim the protections of the privilege. While the privilege historically has been linked to investigative reporting and the watchdog function of the press, many others who are trusted with confidences have sought the protective coverage of the journalist's privilege.¹³⁷ Some have claimed to be journalists for this purpose, and in doing so, opened questions of the application of the journalist's privilege to a number of professional and amateur communicators.

One of the most interesting and complex questions of privilege application involves whether to extend the protection to include so-called "Internet journalists." It is noteworthy that three Circuit Courts of Appeals have held that the medium that an individual uses to disseminate the news does not make a difference in the degree of protection accorded to the work.¹³⁸ Indications are that some Internet journalists would have an easy time persuading a court they were deserving of the protection of the privilege. In one case, Dan Goodin, a reporter for the San Francisco-based online news provider CNet, escaped forced disclosure of documents that were subpoenaed by Microsoft Corp. to aid the software giant in its defense of a lawsuit by Sun Microsystems, Inc. A federal magistrate ruled that requiring disclosure may reveal a confidential source be-

137. Priscilla Coit Murphy, *Who Belongs to the Privileged Class? Journalistic Privilege for Non-Traditional Journalists* (March 1995) (paper presented to the Southeast Colloquium of the Association for Education in Journalism and Mass Communications, Gainesville, Fla.). Without addressing new technologies specifically, the study found that non-traditional journalists had a decreasing likelihood of protection as the restrictions increased.

138. See *In re Madden*, 151 F.3d 125, 128-131 (3d Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1293-94 (9th Cir. 1993); *von Bulow v. von Bulow*, 811 F.2d 136, 142-44 (2d Cir. 1987).

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cause the documents did not likely come from someone bound by the court's protective order in the lawsuit.¹³⁹ Logic, it seems, dictates including an online news reporter in the privileged class. After all, the duties and functions mimic those of traditional journalists, and they hold the same job titles and classifications.¹⁴⁰ But how should courts address non-traditional journalists like Matt Drudge, proprietor of the *Drudge Report*? Should those news and information disseminators who have no institutional backing, credentials or credibility be afforded the same protections as those who work for established newspapers, magazines and broadcast stations? Should they be considered like the lone pamphleteers of old, who established their own medium of communication in colonial America, laying the foundation for the commercial press? Would such a consideration cause them to be counted among traditional or non-traditional journalists?

Matt Drudge, a high-profile Internet gossip columnist, raised the issue when he asserted the First Amendment reporter's privilege and withheld information about the source of his reports concerning Sidney Blumenthal, an aid to then-President Bill Clinton. Blumenthal and his wife, Jacqueline, sued Drudge and America Online, Inc. (AOL) for defamation after Drudge published an article accusing Blumenthal of physically abusing his wife in the past and effectively covering it up. Working from an office in his apartment in Los Angeles, California, Drudge compiled his columns focusing on gossip from Hollywood and Washington, D.C., packaged them in an electronic publication called the *Drudge Report*, and posted them on his Internet website. On the eve of Blumenthal's first day as an aid to Clinton, Drudge wrote and transmitted the edition of the *Drudge Report* that contained the alleged defamatory statement by e-mail to his direct subscribers and posted a headline and the full text of the story on the World Wide Web site. In addition, under a licensing agreement he had with AOL, Drudge transmitted the text without the headline to the interactive computer service giant, which in turn made it available to AOL subscribers.¹⁴¹

In analyzing Drudge's claim to a First Amendment reporter's privilege, however, there is no mention of his lack of journalist status to assert the privilege.¹⁴² Once Drudge claimed the privilege, the court reviewed it without

139. David Noack, *Microsoft Won't Get Reporter's Notes: Judge Rules Against Software Giant's Pursuit of CNet Reporter*, EDITOR & PUBLISHER, Mar. 27, 1999, at 14.

140. Schwartz, *supra* note 6.

141. Blumenthal v. Drudge, 992 F. Supp. 44, 45-48 (D.D.C. 1998).

142. It is ironic that the district court earlier rejected Drudge's attempts to use the newsgathering exception to the District of Columbia long-arm statute to escape the court's jurisdiction. In so doing, the court noted that Drudge is, "not a reporter, a journalist or a news gatherer. He is, as he himself admits, simply a purveyor of gossip." *Id.* at 57. While the general rule in the statute allowed the court to have personal jurisdiction for those who do business in the District and cause a tortious injury, the District of Columbia Circuit Court of Appeals had held that the rule could not be used to establish jurisdiction over newsgathering organizations who conduct most of their business out of state. *Lohrenz v. Donnelly*, 958

questioning or discussing his qualifications. The court then noted the limitations on the qualified privilege. The court held that it can be overcome by the party seeking the information if that person is able to show a sufficient need for the information by satisfying the requirements of a three-part test: (1) the information cannot be discovered through alternative sources; (2) the party seeking the information must have exhausted all reasonable alternative means of identifying the source; and (3) refusal to provide any the information sought must go to the heart of the plaintiff's claim. Noting that the Blumenthals had not given the court enough information to evaluate their request, the court found that they had brought forth no evidence that would meet their burden. Therefore, the court concluded, without such a showing, the First Amendment privilege could not be defeated.¹⁴³

Judging by the texts of the shield laws and the evolution of the common law, they would be excluded because of the tendency of the law to require a linkage between a newsgathering person and an established medium of communication. It would take a much broader reading of the current law to include everyone on the Internet who purports to supply news, information, and commentary.¹⁴⁴ Before dismissing the claim, a court deciding the issue would necessarily have to study the facts and circumstances of each case to determine if the communicator was engaged in traditional newsgathering functions, with an eye toward publishing or disseminating the information. At least by providing for a factual review of each case, courts could move away from a strict test that accommodates only traditional journalists and consider including lone news gatherers performing a traditional journalistic role requiring the protection of a privilege.

Moreover, courts have been particularly vigilant in sorting through cases in which entertainers who emulate journalists in some respects try to wrap themselves in the protection of the privilege. This is a particularly interesting problem because of the blurring of the lines between news and entertainment.¹⁴⁵ In *In Re Madden*,¹⁴⁶ the court used the precedents of other federal circuits in denying the journalist's privilege to wrestling commentator Mark W. Madden. Madden recorded his comments on a 900-number hotline operated by World

F. Supp. 17, 19 (D.D.C. 1997) (applying the newsgathering exception to the Copley Press.) The court went on to explain that the policy behind exempting news media is that the fully extended long-arm statute would subject nearly all important national and international news media organizations to suit in Washington, D.C.

143. *Blumenthal v. Drudge*, 186 F.R.D. 236 (D.D.C. 1999).

144. Other examples of Internet communicators who likely would be excluded from the privilege include everything from semi-automated "weblogs" (www.blogger.com provides a service and a list) to news forums (such as www.democrats.com or www.freerepublic.com) to gossip pages purportedly populated by insiders (such as www.capitolgrilling.com).

145. SAMUEL P. WINCH, *MAPPING THE CULTURAL SPACE OF JOURNALISM: HOW JOURNALISTS DISTINGUISH NEWS FROM ENTERTAINMENT* (1997).

146. *Titan Sports v. Turner Broadcasting Systems*, 151 F.3d 125 (3d Cir. 1998).

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Championship Wrestling (WCW). He was called to testify by Titan Sports, owner of the World Wrestling Federation (WWF), in a lawsuit that pitted the WWF against Turner Broadcasting Systems, Inc. (TBS), owner of the WCW.¹⁴⁷ Titan sought to question Madden about the identity of the sources at TBS and WCW that Madden consulted in connection with his reports on the hotline. In addition, Titan sought to discover information exchanged between Madden and his employers that was related to allegedly false and defamatory statements on the hotline. Instead of complying with the subpoena, Madden invoked the journalist's privilege, refusing to identify his sources of information.

He testified that he received information from sources at the WCW and TBS for use in preparing the commentaries, which promoted upcoming WCW events and pay-per-view television programs, announced the results of wrestling matches, and discussed wrestlers' personal lives and careers. Although he acquired some of his hotline information from confidential sources, Madden admitted that his announcements were as much entertainment as journalism.¹⁴⁸

Nevertheless, the district court concluded that Madden was a "journalist" with standing to assert the privilege because he intended to disseminate information to third parties. The court identified the Second Circuit's test enunciated in *von Bulow v. von Bulow*¹⁴⁹ as the leading test for determining whether a person qualifies as a journalist for purposes of the federal privilege. The *von Bulow* test requires the person seeking the journalist's privilege to demonstrate the intent to use the material sought to disseminate information to the public and to show that such intent existed at the inception of the newsgathering process. Applying this test, the court found that Madden "'sought, gathered, or received' materials from the WCW or TBS personnel or other sources with the intent to disseminate the information to the public, and such intent to disseminate to the public 'existed at the inception of the newsgathering process.'"¹⁵⁰ Madden met the test for journalist status, enabling him to use the privilege, and Titan failed to overcome the privilege by meeting these three criteria: (1) showing that Titan made the effort to get the information from other sources; (2) demonstrating that the only access to the information sought was through Madden and Madden's source; and (3) persuading the court that the desired information was crucial to the claim. Because Titan failed to meet the first and second criteria, Madden was protected from identifying his confidential sources.¹⁵¹

147. Madden's subpoena grew out of a lawsuit by the WCW against the WWF alleging unfair trade practices, copyright infringement, and other state law claims stemming from charges that it refused to allow its wrestlers to engage in promotional competitions with the WCW.

148. *In re Madden*, 151 F.3d 125, 126 (3d Cir. 1998).

149. *Von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987).

150. *In re Madden*, 967 F. Supp. 142, 145 (W.D. Pa. 1997) (citing *von Bulow*, 811 F. 2d at 144).

151. *Id.* at 146 (citing *Riley v. Chester*, 612 F.2d 708 (3d Cir. 1979); *In re Williams*, 766 F. Supp. 358, 368 (W.D. Pa. 1991)).

On appeal, the Third Circuit reversed. It endorsed the use of the *von Bulow* test, but it also noted that “the Ninth Circuit has indicated that the journalist’s privilege was not designed to protect a particular journalist, but ‘the activity of investigative reporting more generally.’”¹⁵² Therefore, the Third Circuit set forth the additional requirement that the person claiming the privilege be engaged in the process of “investigative reporting” or “news gathering.” The Third Circuit formulated a three-part test for determining whether an individual can claim the protections of the journalist’s privilege. According to the court, the claimant must (1) be engaged in investigative reporting; (2) be engaged in gathering news; and (3) possess the intent at the inception of the newsgathering process to disseminate this news to the public.

The court found that Madden was lacking in all three areas. First, the court said, he was not gathering or investigating news. The record showed that all of Madden’s information was given to him by WCW executives, a fact which he acknowledged in his deposition. He neither uncovered a story on his own nor did he independently investigate any of the information given to him by WCW executives. Second, Madden had no intention at the start of his information gathering process to disseminate the information he acquired. His production amounted “to little more than creative fiction about admittedly fictional wrestling characters,” Judge Richard Nygaard wrote. Madden’s primary goal was to advertise and entertain, not to gather news or disseminate information, according to the court. Furthermore, he admitted in his deposition that his work for the WCW amounts to a mixture of entertainment and reporting. As an author of “entertaining fiction, [Madden] lacked the intent at the beginning of the research process to disseminate information to the public.” He intended at the beginning to create a piece of art or entertainment. Because Madden is not a journalist, the court concluded, he cannot “conceal his information within the shadow of the journalist’s privilege.”¹⁵³ The court held that individuals claiming the protections of the journalist’s privilege must demonstrate all three elements. Madden, having failed to sustain his burden, could not protect his sources or his information by invoking the journalist’s privilege.

In a separate case involving an entertainer’s claim to the journalist’s privilege, Denver talk-radio host Peter Boyles was fined \$20,000 by Denver District Judge Herbert Stern when Boyles refused to disclose the sources for his report about a 1997 brawl involving a Denver police officer. Officer Bryan Gordon sued Boyles and his broadcast station for defamation, claiming the reports of his involvement in the fight were false. Boyles tried to claim the protection of the state’s shield statute, but Stern ruled that Gordon’s constitutional rights outweighed Boyles’ First Amendment protections. While Stern acknowledged

152. *In re Madden*, 151 F.3d 125, 129 (3d Cir. 1998) (citing *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993)).

153. *In re Madden*, 151 F.3d at 130.

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he understood what Boyles was doing by not revealing his sources, the judge said he needed to protect the sanctity of the court system.¹⁵⁴

Therefore, read together, these cases from different tiers and court systems have identified a clear line of demarcation that would include bona fide, well-defined journalists who are entitled to the privilege and exclude communicators whose purposes are primarily entertainment in nature. The Third Circuit test for determining who can use the privilege is even clearer and more direct. Its three-part standard seeks to limit the privilege to those who are performing functions ascribed to traditional journalists and other nonfiction writers. Not so clear is the privilege status of communicators who ostensibly serve as news or information gatherers but present their findings in a format that is entertaining. Continuation of the blurring lines between news and entertainment could make it difficult for courts and legislatures to determine which journalists are privilege-protected.

Gilbert Cranberg examined this issue of broadening the privilege beyond the professional journalistic realm when the Internet was little more than a pipe-dream. Cranberg, a former editorial page editor, favored giving ordinary citizens who comment on public issues the same First Amendment protection as journalists. He appreciated laws that protected journalists “from being used as pawns in litigation.”¹⁵⁵ At the same time, he felt the citizen-journalist deserved a status equal to that of the professional journalist, especially at a time when desktop publishing had significantly increased the potential for citizens who wanted to be investigative reporter-publishers.¹⁵⁶ Cranberg questioned whether courts would give the same kind of protection to a citizen activist who regularly contributed editorials to a major daily newspaper. “It is no sure thing that John Q. Citizen would be as protected from harassment by subpoena as John Q. Journalist.”¹⁵⁷

While citizen-critics do receive some constitutional privilege protection against libel judgments for their criticism of public officials and public figures,¹⁵⁸ there is no concomitant need for a privilege to protect confidential sources and information. An exception can be made, however, for those citi-

154. Howard Pankratz, *Boyles Fined for Hiding Sources*, DENV. POST, Sept. 11, 1998, at B1.

155. Cranberg, *supra* note 97.

156. *Id.* Can investigators at a nonprofit center be considered journalists and make use of the privilege afforded them? Although there is no case law in this area, one commentator has raised this possibility in the context of the Center for Public Integrity, a Washington-based special-interest group that broke both the story of the White House as a bed-and-breakfast stopover for campaign contributors and the stories of the moneyed interests behind the campaigns to pass the NAFTA bill and to defeat the Clinton universal health care plan. Richard Harwood, *Hot Source for the Cyber-Age Media*, WASH. POST, Oct. 20, 1997, at A23. With a staff of 15-20 investigators, many of whom are former journalists, the Center focuses on three or four projects a year, using journalism students and interns to build the computer databases upon which most of its reports are based. *Id.* In this instance, there appears to be sufficient journalistic contacts to make the argument for applying the privilege.

157. Cranberg, *supra* note 97.

158. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

zens who perform in roles as traditional journalists. Expanding the privilege beyond those limits would diminish its value to traditional news gatherers, possibly rendering it useless. In this nation of critics, few would be required to testify if all non-traditional disseminators of information and opinion were allowed to claim the journalist's privilege.

A PROPOSED JOURNALIST'S PRIVILEGE STATUTE

Definitions:

A "journalist" is any person who is engaged in gathering news for public presentation or dissemination by the news media.

"News media" are newspapers, magazines, television and radio stations, online news services, or any other regularly published news outlet used for the public dissemination of news.

"News" is defined as information of public interest or concern relating to local, statewide, national, or worldwide issues or events.

Rule of Privilege:

No journalist shall be required to give testimony or other evidence in any proceeding that would disclose information communicated to him, properly entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his occupation.

Neither shall such person be required to testify concerning information he has obtained that is not imparted in confidence, except in circumstances where the party seeking the information shows by clear and convincing evidence that:

- (1) there is probable cause to believe that the journalist has information which is clearly relevant to a specific probable violation of law;
- (2) the information sought cannot reasonably be obtained by alternative means;
- (3) there is a compelling and overriding interest in the information.

No person who has been granted confidentiality by a journalist shall be required to testify or give other evidence concerning the person's identification.

Who May Claim the Privilege:

The privilege can be asserted by anyone who qualifies as a journalist. Nevertheless, the privilege shall not be available to persons who gather information for entertainment or non-dissemination purposes, including hobby, recreation, sport, personal use, promotion or sale of a product or service.

The status of a person seeking to claim the privilege shall be determined by the judge of the court wherein such litigation is pending.

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Waiver:

The privilege shall not apply to cases where the person from whom testimony is sought chooses to make a personal appearance in open court or by a properly sworn affidavit filed with the court where the litigation is pending. A waiver also can be implied through the publication or presentation of sources or information that the journalist has promised to keep confidential.

Penalty:

Any person who violates the journalist's privilege established under this section would be charged with a misdemeanor.

IMPLICATIONS FOR THE FUTURE

The privilege that excuses journalists from testifying or bringing forth evidence exists to protect news gatherers and producers from breaking confidential agreements with sources or divulging information that newsmen would rather not divulge under threat of sanctions. In recent years, the privilege has been expanded in some circumstances to include persons who compile and distribute information, such as book authors, academics, researchers, newsletter editors, and talk show hosts. If courts and legislatures begin to give widespread acceptance to non-traditional journalists, they risk doing great harm to the free flow of information undergirding the concept of a journalist's privilege. The foregoing statute is offered as a means of stemming the tide of imposters claiming the privilege by returning the focus of these laws to the class of persons they were drafted to protect. Like most other journalist's privilege statutes, this proposal was written exclusively to protect journalists.

The model statute defines the word "journalist" broadly, referring to any person engaged in gathering news for public presentation or dissemination by the news media. Though the model statute appears to use broad language to define a journalist for the purpose of triggering the protections, state statutes that are more protective of the interests of news gatherers tend to define the protected class of persons in the broadest terms. For instance, Tennessee includes newsroom employees among the protected class, as well as those who are independently engaged in gathering information.¹⁵⁹ In Alaska, a "reporter" could be an individual who is regularly engaged in the business of "collecting or writing news for publication, or presentation to the public, through a news organization."¹⁶⁰ Colorado links the definitions of journalist or "newsperson" to the mass media, and it restricts the definition of a mass medium to "any publisher of a newspaper or periodical; wire service; radio or television station or

159. TENN. CODE ANN. § 24-1-208 (2000).

160. ALASKA STAT. § 09.25.390 (Michie 2000).

network; news or feature syndicate; or cable television system.”¹⁶¹ North Carolina comes closest to addressing the issues raised by the proposed statute. As written, it is crafted in the mold of the traditional journalists and press institutions, but the drafters retained enough flexibility to allow an argument for Internet and other nontraditional journalists to avail themselves of the privilege.¹⁶² Like the proposed model, it speaks rather broadly in terms of persons who are in the business of gathering information, regardless of the medium.¹⁶³

Not only must the persons seeking the privilege be news gatherers, but they must also be connected in some substantial way with the news media. By requiring connectivity with a news media organization, the model act limits the chances that nontraditional newsmen could claim the privilege. Some states are very specific about the types of organizations that will qualify.¹⁶⁴ In others, the meaning of “newspaper” or “news media” has been stretched to include nearly all printed publications.¹⁶⁵ In many cases, the person asserting the privilege will have to be engaged in newsgathering on a fulltime or a part-time basis, which potentially excludes many otherwise bona fide journalists who ply their trade as free-lancers. Like most state shield laws, the proposed model act delineates the types of media with which the journalist must affiliate to obtain the benefit of the privilege. The proposal departs from the usual statutory construction by including non-traditional media. Additionally, the medium employing the newsmen who wants to invoke the privilege must be published at regular intervals but does not need to have a paid circulation.¹⁶⁶ To be sure, there are good reasons for requiring that the employer of the privilege-protected journalist publish with regularity. Such a publication requirement guards against non-journalists who might publish or point to a single journal as evidence of their need for a testimonial privilege based on status. Whether publications need to have a paid circulation to legitimately qualify for the

161. COLO. REV. STAT. § 13-90-119 (West 1997).

162. N.C. GEN. STAT. § 8-53.11 (1999).

163. *Id.* (“Any person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium.”)

164. Colorado, for example, identifies a “mass medium” as “any publisher of a newspaper or periodical; wire service; radio or television station or network; news or feature syndicate; or cable television system.” COLO. REV. STAT. § 13-90-119 (West 1997). Georgia, on the other hand, protects news gatherers who disseminate “for the public through a newspaper, book, magazine, or radio or television broadcast . . .” GA. CODE ANN. § 24-9-30 (2000).

165. Specifically, the Ohio statute allows “any person, firm, partnership, voluntary association, joint-stock association, or corporation” that is “engaged in the business of printing or publishing a newspaper, magazine, or other periodical” to come within the meaning of a “newspaper,” thus making the journalist’s privilege applicable to those entities as well. OHIO REV. CODE ANN. § 2739.11 (Anderson 2000).

166. Some states require regular publication and a paid circulation. LA. REV. STAT. ANN. § 45:1451(a) (2001); R.I. GEN. LAWS § 9-19.1-1 (Supp. 2000). Other states, like Alaska, merely require regular publication, but they say nothing about the need for a paid circulation. ALASKA STAT. § 09.25.390(1)(a)(i) (1999).

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privilege is debatable. Some statutes may intentionally leave out the requirement in deference to the absence of a directly paid circulation in electronic media, such as broadcasting and the Internet. Perhaps an equally sound reason for excluding the paid circulation requirement is the presence of the free publications produced by employees who more or less perform the same functions as traditional journalists who work for commercial newspapers and magazines. Thus, while the “paid circulation” requirement may be an efficient means of identifying professional journalists, such a requirement could define the class so narrowly as to leave out similarly situated news gatherers who work for a non-profit or not-for-profit establishment.¹⁶⁷

In addition, the definition of news in the statute as information of public concern is purposely nonspecific so news managers would have great latitude in making that determination. Still, the requirement that news be of a “public interest or concern” eliminates the potential application of the privilege to private persons and private in-house communications.

The language used in the model is inclusive of all members of the working press. So broad is that section that it could also accommodate under its reach persons who gather news outside of the confines of the establishment press. One can argue that the privilege to protect confidential sources in particular is one that was created to assist investigative reporters. While these reporters are not specifically mentioned in any of the statutes, it is clear that the laws were written for their protection. Blasi writes that these highly skilled newsmen need a privilege to do their job in serving as an additional check and balance on the corruption in the other three branches of government and to aid in the free flow of information to the public. He favors an unqualified privilege protecting the identity of all confidential government-employee sources and information provided by those sources. He also favors a minimally qualified privilege covering all other reporter-source relationships. Under Blasi’s tiered approach, those in greatest need of protection do receive the most substantial offer of protection.¹⁶⁸ Hence, the emphasis is on assisting those who might root out corruption in government and assist the press in its Fourth Estate role in a democracy.

167. Newspapers were listed in the protected sphere in all state statutes but only defined in a few. While New Jersey protects newspaper and magazine employees, it restricts the kinds of publications that would benefit. A qualifying newspaper in that state must appear at least once a week and contain items of current interest, such as news articles, opinions, editorials, features and advertising. In addition, newspapers and magazines are required to have a paid circulation and entry at a U.S. Post Office as second-class matter. N.J. STAT. ANN. § 2A:84A-21a (West 2001). Such a limited definition as New Jersey’s effectively could omit publications that are distributed free of charge. Many college and university newspapers would fall into this category, although some that are funded in part by student fees arguably have an indirect paid circulation. Alternative newspapers often are distributed at no direct cost to the consumer even though their employees are performing the same tasks and services as news entities with a paid circulation.

168. See Blasi, *supra* note 40.

Examples of the absolute privilege can be found in Alabama and Pennsylvania. Both state statutes essentially protect journalists from being compelled to disclose their sources of information in any legal proceeding. Only a few states express the journalist's privilege in absolute terms. From a free flow of information perspective, it would be best to have a privilege that provides protection to sources and information in all circumstances. While such an unconditional privilege would seem like it could be a dreamland for investigative journalists, the resulting irony is inescapable. Journalists, on the one hand, want protection for their sources and information. At the same time, however, they advocate confidentiality as a means of benefiting the free flow of information from news sources to news consumers. Thus, an absolute privilege may run afoul of other social policy goals, such as gathering evidence for state or federal prosecutions. In fact, an absolute privilege would nullify the effect of the claims of a Sixth Amendment violation of the accused person's right to confront his or her accusers. In Pennsylvania and Alabama, the statute effectively prohibits a person working for a news organization from being called to testify.¹⁶⁹

The qualified privilege, on the other hand, varies widely from state to state, but most of the statutes require a First Amendment balancing test to determine whether the person asserting the privilege will be excused from orders to testify or produce materials. Like the proposed statute, most states offer news gatherers a qualified privilege, which provides for the protections under the privilege to be overcome by demonstrating to the court there are good policy reasons for removing the privilege. In Louisiana, the person seeking the privilege may apply to the court for an order to revoke the privilege based on the "public interest."¹⁷⁰ Some other states allow the subpoenaing person to challenge the privilege by requesting that the court divest the person of the privilege.¹⁷¹ In states where divestiture is allowed, the party seeking the information generally needs to show evidence of a need for the sought after information and the inability to obtain that information from any other source. Many states operate like Colorado in that they require the subpoenaing party to show by a preponderance of the evidence the three-part requirement in opposition to a motion to quash.¹⁷²

A number of other limitations have been placed on the privilege. Waiver is a type of limitation that could erase the privilege if the sought-after information

169. ALA. CODE § 12-21-142 (Michie 1995); 42 PA. CONS. STAT. ANN. § 5942 (West 2000).

170. LA. REV. STAT. ANN. § 45:1451 (2001).

171. See 735 ILL. COMP. STAT. ANN. 5/8-907 (West 2001); *Illinois v. Arya*, 589 N.E. 2d 832, 841 (4 Dist. 1992) (holding that the legislature intended divestiture of a reporter's privilege to be the last resort to get the sought after information); R.I. GEN LAWS § 9-19.1-3 (2000); TENN CODE ANN. §24-1-208(c) (2000). See also ALASKA STAT. § 09.25.320(5)(b) (Michie 2000).

172. Note that someone can overcome the journalist's privilege in Florida by adhering to the more stringent showing of clear and specific evidence of a three-part requirement. Meanwhile, the operation of the California statute allows the news professionals entitled to a privilege to get immunity from a citation for contempt.

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is published. A waiver usually occurs when the privilege-holder voluntarily discloses the information or makes some other revelations that effectively eliminate the application or exercise of the privilege. In a Montana case, the court found a waiver of the statutory privilege ended protection for a reporter's notes because the reporter took the witness stand and testified.¹⁷³ A concurring justice found part of the court's decision contrary to the legislative intent of the shield law, which was to encourage a free and dynamic press. He said that the reporter's notes should not be subjected to disclosure because the notes were not voluntarily offered or referred to by the reporter.¹⁷⁴ Another waiver of the privilege occurred in a Nevada case in which the reporter revealed conversations and memoranda he had access to in connection with Howard Hughes estate. The court said the privilege had been waived by voluntary disclosure.¹⁷⁵

By contrast, New Jersey has changed its position on waiver as the legislature has moved to strengthen its shield law. The state could not compel *New Jersey Herald* reporter Evan Schuman to testify about a murder defendant's confession just because the reporter published information about the confession, the New Jersey Supreme Court ruled. The reporter did not waive his privilege simply because he published some information, the court noted.¹⁷⁶ "Other fundamental public policies underlying New Jersey's strong Shield Law support the conclusion that (reporter) Schuman should not be compelled to testify," the court said. "The public perception conveyed by compelling Schuman to testify will hinder the free flow of information from newspapers to the public."¹⁷⁷ As an alternative to testifying, Louisiana and Florida allow the journalist to substitute an affidavit for testimony under certain circumstances.¹⁷⁸

CONCLUSION

Journalists need a privilege to protect their sources and information if they are going to be effective in presenting the news and maintaining their independence. They need to be able to make promises sincerely to sources that will aid them in uncovering information, corruption and wrongdoing that others in society would overlook or ignore. In order to perform as societal or government watchdogs and provide additional checks and balances on the three branches of government, journalists need a testimonial privilege. The U.S. Supreme Court in *Branzburg v. Hayes* refused to grant such a privilege as a matter of constitutional law, but it left open the possibility that states may provide

173. *Sible v. Lee Enter.*, 729 P.2d 1271 (Mont. 1986).

174. *Id.* at 1275-76.

175. *Newburn v. Howard Hughes Med. Ins.*, 594 P.2d 1146 (Nev. 1979).

176. *State v. Mayron*, 552 A.2d 602 (N.J. 1989).

177. *Id.* at 609.

178. FLA. STAT. ANN. § 90.5015 (West 2000); LA. REV. STAT. ANN. § 45.1451 (West 1999).

such a privilege through their courts, constitutions and legislatures.¹⁷⁹ Historically, the journalist's privilege embodied in most states' laws has been held to include traditional news establishments and the persons who work in an editorial capacity for those organizations. Despite attempts by legislatures and courts to concisely define these privileged persons in terms of their functions as news gatherers, others who gather information for dissemination have sought to liken themselves to journalists in an attempt to take advantage of the privilege for news gatherers. Clearly, it would be impossible to include all such persons within the definition of the privilege-protected journalists. Such an expansive definition could stretch the application of the privilege to all who collect and disseminate information, potentially making a privilege-protected journalist of everyone who sends messages through the mass media. It is feared that such a privilege would become so broad that it would emasculate its effectiveness as a device for protecting journalists.

This article has offered a statutory response to the inclusiveness problem. The proposal would limit the application of the privilege to journalists and those who perform similar newsgathering functions. In addition, it would exclude those who gather information for non-news purposes. Limiting the growth of the privilege in such a way would provide the necessary protection to the class of persons that the privilege was designed to protect.

179. 408 US 665, 689-91 (1972).