

# Case Comment

## Freeing Newsgathering from the Reporter's Privilege

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

A number of recent high-profile cases have forced courts to reexamine whether reporters must respond to subpoenas seeking disclosure of confidential sources or whether they are protected from doing so by the doctrine of reporter's privilege.<sup>1</sup> While these confidential-source cases have garnered the most public attention, the vast majority of subpoenas issued to reporters seek to compel disclosure of nonconfidential information.<sup>2</sup> In a recent case, *McKevitt v. Pallasch*, Judge Posner suggests that the reporter's privilege, if it exists at all, should not extend to nonconfidential information.<sup>3</sup> In this Comment, I argue that Posner overlooks the unique ways in which a privilege for nonconfidential information protects the newsgathering process. Federal courts should use their common law power under Federal Rule of Evidence 501 to articulate a flexible newsgathering privilege for reporters analogous to the work product immunity that exists for attorneys.<sup>4</sup>

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1. See, e.g., *In re Grand Jury Subpoena* (Miller), 397 F.3d 964 (D.C. Cir. 2005) (upholding the district court's contempt ruling against reporters who refused to comply with a grand jury subpoena in an investigation into the leak of Valerie Plame's status as a CIA operative); *Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004) (holding reporters in contempt for refusing to comply with a subpoena issued in Wen Ho Lee's civil suit against the government).

2. THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001, at 8-9 (Lucy A. Dalglish et al. eds., 2003).

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

4. Courts are divided on this issue. For example, the three-judge panel that heard *In re Grand Jury Subpoena* (Miller), which involved a confidential source, filed three separate concurrences on the issue of a common law privilege. Judge Sentelle would have held that there is no common law privilege, Judge Tatel would have held that there is, and Judge Henderson thought the court should not reach the question. *In re Grand Jury Subpoena* (Miller), 397 F.3d at 973.

## I

In *McKevitt*, a defendant in a terrorism case in Ireland obtained a U.S. district court order compelling a group of biographers to produce videotapes of an interview with a key prosecution witness. The witness did not object to the disclosure of the tapes, and his identity had not been kept confidential. Nevertheless, the biographers appealed the order on the basis of a claimed federal common law reporter's privilege rooted in the First Amendment. In refusing to issue a stay, the Seventh Circuit held that subpoenas of reporters deserve no special treatment and should be subject to the reasonableness test applied to all subpoenas.<sup>5</sup>

*McKevitt* evinces the commonly held view that a privilege for nonconfidential information is merely an expansion of the privilege for confidential sources sanctioned by *Branzburg v. Hayes*.<sup>6</sup> Within the First Amendment framework of *Branzburg*, the absence of confidentiality weakens the claim to privilege: "When the information in the reporter's possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure."<sup>7</sup>

However, as Judge Posner acknowledges, the First Amendment is not the only possible source of protection for newsgathering activities.<sup>8</sup> The Federal Rules of Evidence invite courts to consider recognizing new evidentiary privileges according to "the principles of the common law . . . in the light of reason and experience."<sup>9</sup> In recognizing privileges, courts look, among other things, to state common law and state statutes.<sup>10</sup> With more than twenty states offering protection for nonconfidential information—in the form of shield laws or case law—a *prima facie* case exists for recognizing a common law privilege for newsgathering.<sup>11</sup>

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5. *McKevitt*, 339 F.3d at 531-33.

6. 408 U.S. 665, 679-80 (1972). The *Branzburg* Court held, however, that this privilege was overcome in grand jury proceedings. In a concurrence, Justice Powell, the decisive fifth vote, argued for a balancing test and case-by-case determination of the privilege. *Id.* at 709 (Powell, J., concurring).

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

8. *Id.* at 532.

9. FED. R. EVID. 501.

10. See *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996) ("That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege."); *Trammel v. United States*, 445 U.S. 40, 48-50 (1980) (examining the evolution of state practices in reviewing the testimonial privilege for spouses).

11. See Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL'Y 241, 255-57 (2002). See generally Robert D. Lystad & Malena F. Barzilai, *Reporter's Privilege: Legislative and Regulatory Developments*, MEDIA L. RESOURCE CENTER BULL., Aug. 2004, at 83, 133-43 (White Paper on the Reporter's Privilege).

Ten federal circuits have recognized a qualified reporter's privilege preventing disclosure of confidential and, in some cases, nonconfidential information. Kelli L. Sager et al., *The Road Less*

In *McKevitt*, Posner discards those arguments advanced in support of a nonconfidential-information privilege as “skating on thin ice,” because they were rejected in *Branzburg* in the context of a confidential-source privilege.<sup>12</sup> However, rejecting certain interests as not protected by the First Amendment does not foreclose their adoption for Rule 501 analysis.<sup>13</sup>

## II

The *McKevitt* opinion rests on a failure, common among courts, to adequately distinguish between the newsgathering process generally and the journalist’s relationship to a confidential source. These very different aspects of the journalistic enterprise cannot be conceptualized in the same way, nor should they be protected by the same privilege. Judge Posner is correct to criticize proponents of a newsgathering privilege for attempting to stretch *Branzburg* too far. Courts that have recognized such a privilege have conflated newsgathering and source identity, rather than properly recognizing that the rationale of *Branzburg* reaches only protections for confidential sources. By justifying the nonconfidential-information privilege in general terms that apply equally to the confidential-source privilege, even its defenders have left it susceptible to outright rejection by unsympathetic judges and relegated newsgathering to a secondary status.<sup>14</sup>

In order to recognize a newsgathering privilege, courts must articulate justifications based on the distinct and important newsgathering interests at

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*Taken: The Path to Recognition of a Qualified Reporter’s Privilege Through the Law of Evidentiary Privileges*, MEDIA L. RESOURCE CENTER BULL., Aug. 2004, at 1, 21 n.40 (White Paper on the Reporter’s Privilege); see also *Shoen v. Shoen*, 5 F.3d 1289, 1292 n.5 (9th Cir. 1993) (describing the status of the privilege in other circuits); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (recognizing a privilege for nonconfidential information); Anthony L. Fargo, *Reconsidering the Federal Journalist’s Privilege for Non-Confidential Information: Gonzales v. NBC*, 19 CARDOZO ARTS & ENT. L.J. 355, 372 (2001) (outlining the circuit courts’ rationales for a privilege for nonconfidential information, namely, “(1) protecting the free flow of information to the public; (2) protecting the autonomy, or independence, of the press; and (3) protecting the press from undue burdens on time and resources caused by the threat of an unchecked flood of subpoenas”).

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

13. See Sager et al., *supra* note 11, at 6 n.3 (articulating the difference between recognition of the privilege under First Amendment jurisprudence and under privilege law).

14. In recognizing a reporter’s privilege for nonconfidential information, the Second Circuit relied on the same rationale used to justify a confidential-source privilege: a “paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.” *Gonzales v. NBC*, 194 F.3d 29, 35 (2d Cir. 1999) (internal quotation marks omitted). *But cf.* *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998) (rejecting a reporter’s arguments to extend reporter’s privilege to “nonconfidential work product”).

In 1972, the House Judiciary Committee considered but never adopted a bill to privilege journalists’ work product. *Newsmen’s Privilege: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong. 150, 204-09 (1972). However, this proposal was cast as expanding the proposed confidential-source privilege rather than creating a separate source of protection and thus failed to address the contours of an independent privilege. *Id.*

stake. A newsgathering privilege should stand on independent footing from the confidential-source privilege just as the work product doctrine has a distinct basis from the attorney-client privilege. Constitutional interests in effective representation necessitate these two complementary protections for attorneys. Similarly, newsgathering and confidential-source protections bolster different aspects of a free press.

The attorney-client privilege is one of the oldest common law privileges, rooted in the need for effective representation. The privilege is based on a need for "full and frank communication between attorneys and their clients."<sup>15</sup> Work product immunity was first recognized by the Supreme Court in *Hickman v. Taylor*<sup>16</sup> and was later codified in the Federal Rules of Civil Procedure.<sup>17</sup> The rationale that *Hickman* articulated is that preparation for vigorous advocacy in an adversarial system requires "privacy, free from unnecessary intrusion by opposing parties and their counsel."<sup>18</sup> These complementary and somewhat overlapping protections guard different types of interests within the attorney-client relationship and thus have distinct shapes.

The analogy between attorney-client privilege and work product doctrine illustrates the discrete incentives protected by the confidential-source privilege and the newsgathering privilege. The attorney-client privilege seeks to encourage disclosure of information within the protected relationship,<sup>19</sup> as does confidential-source protection.<sup>20</sup> Without the assurance of confidentiality, clients would not disclose certain types of information to their attorneys. Similarly, the confidential-source privilege facilitates disclosure to journalists of information that sources would not disclose without identity protection. A further illustration of the centrality of disclosure incentives to the attorney-client and confidential-source privileges is that both privileges can be waived by the party external to the protected institution: the client or the source.<sup>21</sup>

In contrast, work product immunity and the newsgathering privilege protect the lawyer's and the journalist's discretion in performing their

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15. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

16. 329 U.S. 495 (1947).

17. FED. R. CIV. P. 26(b)(3).

18. *Hickman*, 329 U.S. at 510-11.

19. See *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("The purpose of the [attorney-client] privilege is to encourage clients to make full disclosure to their attorneys."); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating that the attorney-client privilege is founded on the need for assistance, which "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

20. See *Branzburg v. Hayes*, 408 U.S. 665, 679-80 (1972) (recognizing reporters' claim "that if the reporter is . . . forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information").

21. A source can effectively waive her protection of confidentiality by publicly disclosing her identity. Nevertheless, as the facts of *McKevitt* illustrate, this disclosure does not waive the journalist's claim of privilege.

respective duties.<sup>22</sup> Failure to protect the preparation stage in both processes damages the underlying institutions in ways that go beyond the ordinary inconvenience of responding to a subpoena. In recognizing work product immunity, *Hickman* focused on the adversarial nature of the justice system. Work product disclosure would undermine the adversarial system, requiring lawyers to turn over to opponents their strategies and views on the weaknesses of their cases.<sup>23</sup> To avoid doing this, attorneys would self-censor and eschew certain strategies, causing clients' interests to suffer.

The press also exists in a type of adversarial relationship that requires preserving the integrity of its internal processes. The press serves as an institutional check on governmental and other abuses.<sup>24</sup> Thus, preserving the checking value of the press demands protections mirroring those for attorney work product. Disclosure of the interim steps in newsgathering may result in self-censorship: "[I]nternal policies of destruction of materials may be devised and choices as to subject matter made . . . ."<sup>25</sup> The specter of forced disclosure leads to a form of covert and creeping censorship. For similar reasons, the Court has deemed editorial discretion and subject matter choice central to the integrity of a free press.<sup>26</sup> To the extent that resource materials, drafts, and outtakes reveal the editorial choices made by the press, they should be protected.<sup>27</sup>

Thus, protections for confidential sources and for newsgathering are rooted in different theories of a free press. The confidential-source privilege shields the free flow of information, while the newsgathering privilege

22. In *Herbert v. Lando*, the Second Circuit articulated the importance of editorial discretion:

If we were to allow selective disclosure of how a journalist formulated his judgments on what to print or not to print, we would be condoning judicial review of the editor's thought processes. Such an inquiry, which on its face would be virtually boundless, endangers a constitutionally protected realm, and unquestionably puts a freeze on the free interchange of ideas within the newsroom. A reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism.

568 F.2d 974, 980 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979). The Supreme Court, overruling, found that these interests were overcome in a libel action. *Herbert v. Lando*, 441 U.S. 153 (1979).

In *Hickman*, the Supreme Court outlined a similar interest in allowing unfettered time for an attorney to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy." *Hickman*, 329 U.S. at 511.

23. *Hickman*, 329 U.S. at 510-11.

24. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 535-43, 591-611.

25. *United States v. La Rouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (upholding a subpoena for nonconfidential information but acknowledging the public interests arrayed against compelled disclosure).

26. *E.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

27. Congress has recognized the importance of reporters' work product by singling out for protection against searches and seizures "any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication" or "documentary materials, other than work product materials, possessed by a person in connection with" such a purpose. 42 U.S.C. § 2000aa(a)-(b) (2000).

ensures the independence and autonomy of the press. Both the newsgathering privilege and the attorney work product doctrine guard the internal processes related to the functioning of constitutionally protected institutions. The work product doctrine protects the lawyer's "role in assuring the proper functioning of the criminal justice system,"<sup>28</sup> while the newsgathering privilege acknowledges that the "freedom of the press can be no broader than the freedom of reporters to investigate and report the news."<sup>29</sup> The work product doctrine furthers the public policy interests in both an adversarial justice system and the "fair and accurate resolution" of disputes.<sup>30</sup> Similarly, a newsgathering privilege promotes the autonomy of the press required to serve as a check on government abuses<sup>31</sup> as well as society's interest in a newsgathering process free from intrusion.

As a consequence of these different interests, the attorney-client and confidential-source privileges can be waived by the party external to these protected institutions. Granting a source the power to waive the privilege encourages disclosure to the press and public dissemination of information by giving the source some level of control in the relationship. In contrast, the newsgathering privilege is held internally in order to protect the autonomy and integrity of the press from intrusion. Traditional Wigmorean analysis is only suited to certain types of interests: It emphasizes confidentiality interests and focuses on the relationships between protected institutions and external sources.<sup>32</sup> This view underprotects the internal process—editorial discretion—at stake in newsgathering. Thus, extending the rationale of *Branzburg* will never appropriately address the distinct interests protected by a newsgathering privilege.

### III

Critics of expanding the reporter's privilege to include newsgathering focus on the difficulties in shaping such a privilege.<sup>33</sup> Conceptualizing newsgathering as distinct from confidential-source relationships would allow courts to craft a privilege tailored to the interests protected. A

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28. *United States v. Nobles*, 422 U.S. 225, 238 (1975).

29. Department of Justice Guidelines for Subpoenas Issued to the Press, 28 C.F.R. § 50.10 (2004) (requiring prosecutors to negotiate with the press before issuing a subpoena).

30. *Nobles*, 422 U.S. at 238. Compare *id.* with *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

31. See Blasi, *supra* note 24, at 535-43, 591-611 (discussing the autonomy of the press and its checking function).

32. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (John T. McNaughton ed., 1961).

33. See, e.g., *In re Grand Jury Subpoena* (Miller), 397 F.3d 964, 981 (D.C. Cir. 2005) (Sentelle, J., concurring) (outlining the "difficult policy questions" in recognizing a reporter's privilege); *Storer Commc'ns v. Giovan* (*In re Grand Jury Proceedings*), 810 F.2d 580, 584 (6th Cir. 1987) (citing "the difficulties of administering such a privilege" in refusing to grant a privilege for nonconfidential information).

newsgathering privilege modeled on the attorney work product doctrine could respond to the specific interests in newsgathering. The work product doctrine provides a useful template for sketching out the contours of a newsgathering privilege: the holder of the privilege, waiver requirements, the scope of the privilege, and the standard for overcoming the privilege.

As attorneys hold work product immunity, so should reporters hold the newsgathering privilege. This proposal is not unproblematic. The same concerns about how to define who is a reporter that haunt the existing privilege for confidential sources would apply to a newsgathering privilege as well.<sup>34</sup> Yet courts have resolved this dilemma in the body of case law interpreting state shield laws and common law privileges.<sup>35</sup>

Distinct waiver requirements for a newsgathering privilege should be crafted to safeguard the complementary interests protected by the newsgathering and confidential-source privileges. For instance, a client may waive the attorney-client privilege on a particular matter, yet public policy interests dictate that the attorney retain work product immunity on materials related to the same issue.<sup>36</sup> Similarly, in a case like *McKevitt*, a source may effectively waive the confidential-source privilege by disclosing his or her identity, yet the broader interests in a free press may argue for protecting the reporter's notes and editorial processes through a newsgathering privilege.<sup>37</sup>

The scope of any new privilege related to the press is likely to be similar to the work product doctrine. The work product doctrine is, in some senses, broader than its attorney-client-privilege counterpart,<sup>38</sup> it is also more easily overcome, by a showing of a "substantial need" for materials that a party cannot obtain without "undue hardship."<sup>39</sup> Similarly, a newsgathering privilege would be broader in scope but more easily overcome than the qualified privilege afforded confidential sources in most jurisdictions. In *Gonzales v. NBC*, the Second Circuit articulated such a standard, with a qualified privilege for nonconfidential information more easily overcome than the privilege for confidential sources.<sup>40</sup> A party seeking disclosure must show that there is a "likely relevance to a

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34. For a discussion of the evolution of this problem, see 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5426, at 750-66 (1980 & Supp. 2004).

35. See C. THOMAS DIENES ET AL., *NEWSGATHERING AND THE LAW* 773-75 (2d ed. 1999) (discussing the definitional issues in interpreting who is covered by state shield laws).

36. See, e.g., *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Del. 1977) ("Since the attorney-client privilege is a *client's* privilege, while work product immunity may be invoked only by an attorney, waiver of attorney-client privilege does not necessarily also waive work product immunity . . .").

37. See also *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (upholding a privilege for journalists' resource materials despite confidentiality waivers from sources).

38. *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975).

39. *FED. R. CIV. P.* 26(b)(3).

40. 194 F.3d 29 (2d Cir. 1999).

significant issue in the case, and [that such information is] not reasonably obtainable from other available sources."<sup>41</sup>

The newsgathering privilege should also provide for a tiered structure for different types of information similar to the distinction between ordinary and opinion work product.<sup>42</sup> Parties would face a higher burden before obtaining certain types of information (e.g., research notes, prior drafts, or editors' notes) that are central to the newsgathering process and a lower burden for published materials and transcripts of interviews with nonconfidential sources.<sup>43</sup> Here, the body of case law on state shield laws protecting unpublished information provides a useful model. A tiered structure tailors protections to the interests vital to the newsgathering process while limiting the concerns about granting sweeping immunity to the press.<sup>44</sup> This proposed privilege would likely have afforded additional protection to the tape recordings at issue in *McKevitt*, requiring a showing of more than mere reasonableness.

#### IV

*McKevitt* resonates with the widespread frustrations about the reporter's privilege doctrine. A privilege for nonconfidential information is misplaced under *Branzburg's* First Amendment framework.<sup>45</sup> A separate rationale for newsgathering protection would create a distinct locus for that protection in the federal common law like the separate basis for work product doctrine.

Freeing a newsgathering privilege from the confidential-source privilege would afford more carefully tailored protections to the interests at stake. Moreover, this separation would provide a stronger basis for Judge Posner's intimations at possible future recognition of a federal common law basis for the newsgathering privilege.<sup>46</sup> Under this proposed separation of privileges, the newsgathering privilege would likely have protected the biographers in *McKevitt* from compelled disclosure or at least required a stronger showing from the parties seeking subpoenas.

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41. *Id.* at 36; see also *In re Petrol. Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982) (articulating the stricter standard for overcoming a confidential-source privilege).

42. See FED. R. CIV. P. 26(b)(3). Opinion work product is that which reveals the mental processes of the attorney, and it is absolutely protected from discovery; in contrast, ordinary work product can be disclosed on a showing of undue hardship.

43. Compare the standards for protecting editorial materials in *Herbert v. Lando*, 568 F.2d 974 (2d Cir. 1977) (arguing for absolute protection for journalists' mental processes), *rev'd*, 441 U.S. 153 (1979), with those in *Tofani v. State*, 465 A.2d 413 (Md. 1983) (finding that a reporter's interests in protecting sources were overcome when the names of sources had been published).

44. For a discussion of the policy reasons favoring a nonconfidential-information privilege as an extension of the existing reporter's privilege, see Fargo, *supra* note 11, at 271-73.

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

46. *Id.*