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The First Amendment, Journalists, and Sources: A Curious Study in "Reverse Federalism"

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THE FIRST AMENDMENT, JOURNALISTS, AND SOURCES: A CURIOUS STUDY IN "REVERSE FEDERALISM"

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I. A CURIOUS STORY OF REVERSE-FEDERALISM

The engaging presentations of Anthony Lewis, Max Frankel, and Victor Kovner ranged widely and provocatively over questions of law and journalistic ethics in relation to the journalist and his or her source.

Among the many perceptive insights that emerged in that colloquy was the striking point that virtually all American states now recognize some form of "reporter's privilege," protecting confidential sources, either through legislatively enacted state "shield laws" or judicially created privilege doctrines.

Justice Louis Brandeis, reflecting on the nature of our American federalism, once referred to the states as laboratories for experiment.[1] In that spirit, it might appear that the results of that experiment are now in. American law seems to accept and embrace the wisdom of providing some legal shield of confidentiality between reporter and source, for the purpose of encouraging the free flow of information between source and journalist, thereby facilitating the process of newsgathering, all to the benefit of a better informed public and robust marketplace of ideas.

But not so fast. In the *federal* judicial system, the relationship of journalists to sources is currently under siege. It is unclear whether journalists have any right grounded in federal constitutional or common law to protect the identity of confidential sources.

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1 New State Ice Co. v. Liebmann, 285 U.S. 262, 386-87 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

II. IS THE "REPORTER'S PRIVILEGE" A RULE OF FEDERAL LAW?

A. *The Ambiguity of* Branzburg

There is judicial disagreement over whether a "reporter's privilege" exists in the federal system. The rub is over how to understand *Branzburg v. Hayes,*[2] the case in which the Supreme Court appeared to reject, by a five-to-four vote, the existence of a privilege. The opinion of the Court was brusque and unequivocal, making it plain that no privilege exists, because journalists, like everyone else in society, are bound by the rule of law.[3]

In a short three-paragraph concurring opinion, however, Justice Powell wrote separately, in his words, to "add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding."[4] Justice Powell was famous for his role as the man in the middle. It is a role I have always admired, and unabashedly praised. In the specific context of the First Amendment and the media, Justice Powell's penchant for the center was central to two opinions that continue to exert a strong gravitational pull on our law and policy, his opinion in the libel case *Gertz v. Robert Welch, Inc.*,[5] and his concurring opinion in *Branzburg*.

In *Gertz*, Justice Powell, writing for the Court, adopted a middle-ground with regard to the extension of the "actual malice" standard in defamation cases, the highly protective standard that strongly protects journalists (and other libel defendants) when it applies.[6] *Gertz* adopted

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2 408 U.S. 665 (1972).

3 The opinion of the Court in *Branzburg* was replete with language expressing stern rejection of the privilege, with scores of sentences expressing, in different ways, the Court's unwillingness to read such a privilege into the First Amendment. *See, e.g.*, *id*. at 697 ("Of course, the press has the right to abide by its agreement not to publish all the information it has, but the right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function."); *id*. at 698-99 ("We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press."); *id*. at 699 ("It is said that currently press subpoenas have multiplied, that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere.").

4 *Id*. at 709 (Powell, J., concurring).

5 418 U.S. 323 (1974).

6 "Actual malice" is a constitutional term of art in defamation law, requiring proof by clear

a compromise: the actual malice standard would apply to cases in which the plaintiffs were "public figures" or "public officials," but a less protective negligence standard would apply to private figures. And indeed, *Gertz* had a "federalism" quality of its own, in that the Court made it clear that the rules it was imposing were constitutional "floors," establishing the minimum fault requirements for defamation, but simultaneously making it clear that states were free to be laboratories of experiment, imposing high levels of fault if they chose. A handful of states, including the very important jurisdiction of New York, a world center of media and communication activity, took up the invitation, and imposed higher standards.[7]

There is, however, a striking difference between Justice Powell's centrism in *Gertz* and his centrism in *Branzburg*. In *Gertz*, it was quite clear what Justice Powell meant. In *Branzburg*, it was not. *Gertz,* in fact, reads like a section from the Restatement of Torts. It is an organized, coherent, multi-layered matrix of legal rules, establishing a whole list of libel doctrines relating to the status of plaintiffs, fault, and damages.[8] While there have been many elaborations and refinements of *Gertz* over the years, in its basic framework the case has been remarkably stable. It remains the unshaken law of the land. Thousands of lower court defamation cases have been litigated under its framework. And while application of the *Gertz* doctrines is not always easy—the question of whether a plaintiff is a public figure or private

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and convincing evidence that a defendant published the defamatory material with "knowledge that it was false" or "reckless disregard of whether it was false or not." *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). The "reckless disregard" prong of the actual malice standard means that the publisher "in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). To prove actual malice, therefore, a plaintiff must "demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 n.30 (1984); McCoy v. Hearst Corp. 727 P.2d 711, 728 (Cal. 1986). Actual malice is a subjective standard. The critical question is state of mind. Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 688 (1989). The Supreme Court and the lower courts have repeatedly emphasized the subjective nature of the actual malice standard. Thus in *Herbert v. Lando*, 441 U.S. 153 (1979), the Supreme Court considered whether the plaintiff could use discovery to probe the editorial decision-making processes of CBS in connection with a *60 Minutes* segment portraying a Vietnam War hero's allegations concerning atrocities which supposedly took place during the war. The Supreme Court concluded that the plaintiff could inquire into the defendant's mental processes, rejecting the defendant's claim of special First Amendment privilege, emphasizing that *N.Y. Times* and its progeny require the plaintiff to focus on the defendant's subjective state of mind. *Id*. at 170. And in *Bose Corporation v. Consumer's Union of U.S., Inc.*, 466 U.S. 485 (1984), the Supreme Court, in reaffirming the principle of "independent appellate review" of the actual malice determination, again emphasized the subjective nature of the inquiry, noting that the actual malice issue before it "rests entirely on an evaluation of [the author's] state of mind when he wrote his initial report, or when he checked the article against that report." *Id*. at 494.

[7] *See* Chapadeau v. Utica Observer-Dispatch, 341 N.E.2d 569 (N.Y. 1975) (establishing a "gross irresponsibility" standard for private figure libel cases involving issues of public concern).

[8] *See* RODNEY SMOLLA, LAW OF DEFAMATION § 2:11 (2d ed. 2007).

figure is quite often fiercely contested, with many cases very difficult to call clearly—the essential fact remains that *Gertz* as legal doctrine has proven hardy and enduring, and now seems well-absorbed into the fabric of American First Amendment and media law.

In striking contrast, the opinion of Justice Powell in *Branzburg* has proven a model of muddle. Justice Powell's opinion, on the one hand, seemed to profess agreement with the Chief Justice. Yet the opinion of Justice Powell also proceeded, somewhat opaquely, to hint that it may be appropriate to balance the competing interests at stake on a case-by-case basis.[9]

Very bright and very persuasive media advocates exploited the ambiguity of the Powell opinion with incredibly facile facility. Notwithstanding what seemed on the surface to be a resounding pounding for the press in *Branzburg*, many lower courts, relying on Justice Powell's cryptic concurring opinion, held that the First Amendment did provide a conditional reporter's privilege of some kind.[10]

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[9] *Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring):

> The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in Mr. Justice Stewart's dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government.". . .
>
> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id.

[10] *See, e.g.*, Zerilli v. Smith, 656 F.2d 705, 711-12 (D.C. Cir. 1981) (allowing qualified privilege available under some circumstances in civil litigation, since *Branzburg* does not control in civil cases); United States v. Burke, 700 F.2d 70, 76-77 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983) (allowing reporters qualified privilege in criminal, as well as civil cases, conditioned upon a clear and specific showing that the information sought (1) is highly material and relevant, (2) is necessary or critical to the claim, and (3) is not obtainable from other available sources); United States v. Cuthbertson, 630 F.2d 139, 146-47 (3d Cir. 1980), *cert. denied*, 454 U.S. 1056 (1981) (holding that journalists have a federal common law qualified privilege, in both civil and criminal cases, to refuse to divulge their sources); LaRouche v. Nat'l Broad. Co., Inc., 780 F.2d 1134, 1139 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986) (holding that whether journalist's privilege will protect source depends upon whether the information sought is relevant, can be obtained by alternate means, and is the subject of a compelling interest); Miller v. Transam. Press, Inc., 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (holding that a reporter has first amendment privilege which protects refusal to disclose identity of confidential

And then the tide began to turn. A number of lower courts began to second guess the notion that the Powell opinion supplied a sound basis for recognizing a federal privilege,[11] fueled in part by ambivalent signals from the Supreme Court itself.[12] Several recent decisions,[13]

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informants, although privilege is not absolute).

[11] *See In re* Grand Jury Proceedings, Storer Commc'ns, Inc. v. Giovan, 810 F.2d 580, 585 (6th Cir. 1987) ("Accordingly, we decline to join some other circuit courts, to the extent that they have stated their contrary belief that those predicates do exist, and have thereupon adopted the qualified privilege balancing process urged by the three *Branzburg* dissenters and rejected by the majority. . . . That portion of Justice Powell's opinion certainly does not warrant the rewriting of the majority opinion to grant a first amendment testimonial privilege to news reporters, especially when the quoted language is considered in the context of that language which precedes it."). Among courts that do recognize a reporter's privilege, there is a debate over whether it applies only to confidential material gathered by journalists, or to non-confidential material as well, such as videotape outtakes from television interviews. Several circuits have extended the privilege to non-confidential work product, either in civil or criminal cases. *See* Shoen v. Shoen, 5 F.3d 1289, 1294-95 (9th Cir. 1993). Other courts, however, have refused to extend the privilege to non-confidential material. *See* Gonzalez v. Nat'l Broad. Co., 155 F.3d 618 (2d Cir. 1998) (rejecting privilege as to non-confidential material); United States v. Smith, 135 F.3d 963 (5th Cir. 1998) (refusing to apply privilege to nonconfidential videotape outtakes sought in a criminal proceeding); *In re* Shain, 978 F.2d 850, 853 (4th Cir. 1992) (tacitly rejecting the privilege in a criminal case where the information sought was non-confidential).

[12] Subsequent statements by the Supreme Court and individual Justices have advanced the ambiguity. In *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 (1990), for example, the Supreme Court stated: "In *Branzburg*, the Court rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary." And in *N.Y. Times Co. v. Jascalevich*, 439 U.S. 1301, 1302 (1978), Justice White, writing an in-chambers single-Justice opinion denying a stay, stated: "There is no present authority in this Court that a newsman need not produce documents material to the prosecution or defense of a criminal case, or that the obligation to obey an otherwise valid subpoena served on a newsman is conditioned upon the showing of special circumstances."

[13] *See* McKevitt v. Pallasch, 339 F.3d 530, 531-32 (7th Cir. 2003) (Posner, J.):

> The defendants claim that the tapes in question are protected from compelled disclosure by a federal common law reporter's privilege rooted in the First Amendment. See Fed. R. 501. Although the Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), declined to recognize such a privilege, Justice Powell, whose vote was essential to the 5-4 decision rejecting the claim of privilege, stated in a concurring opinion that such a claim should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings. *Id.* at 709-10, 92 S.Ct. 2646. Since the dissenting Justices would have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the majority opinion (for they said that his 'enigmatic concurring opinion gives some hope of a more flexible view in the future,' *id*. at 725, 92 S.Ct. 2646), maybe his opinion should be taken to state the view of the majority of the Justices-though this is uncertain, because Justice Powell purported to join Justice White's "majority" opinion. A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope. See, e.g., *In re Madden*, 151 F.3d 125, 128-29 (3d Cir. 1998); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998) *Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir.1993); *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir.1988); *von Bulow v. von Bulow,* 811 F.2d 136, 142 (2d Cir.1987); *United States v. Caporale*, 806

including the highly visible decision by the United States Court of Appeals for the District of Columbia in the Judith Miller litigation, have cast serious doubt on the existence of a First Amendment privilege. Until the United States Supreme Court squarely addresses the issue and revisits *Branzburg*, First Amendment law will continue to be plagued by uncertainty.

In *In re Grand Jury Subpoena, Judith Miller*,[14] the United States Court of Appeals for the District of Columbia Circuit, in 2005, interpreted *Branzburg* as squarely holding that no First Amendment privilege existed, period. When the United States Supreme Court refused to accept review, despite the urging of many amici and the able representation of prominent constitutional litigators, the significance of the Court of Appeals ruling was further magnified. That the Supreme Court would let rest a decision of the District of Columbia Court of Appeals rejecting the privilege in a case of such prominence and visibility seemed to send a signal of agreement with the Judith Miller ruling, and the possible demise in the long run of lower court precedent that had endorsed the existence of a qualified reporter's privilege grounded in the First Amendment. In the aftermath of *Branzburg*, journalists who continued to successfully assert the existence of a First Amendment reporter's privilege may have been living on borrowed time. That time may now have run out.

> F.2d 1487, 1504 (11th Cir. 1986). A few cases refuse to recognize the privilege, at least in cases, which Branzburg was but this case is not, that involve grand jury inquiries. *In re Grand Jury Proceedings*, 5 F.3d 397, 402-03 (9th Cir. 1993); *In re Grand Jury Proceedings*, 810 F.2d 580, 584-86 (6th Cir. 1987). Our court has not taken sides. Some of the cases that recognize the privilege, such as *Madden*, essentially ignore *Branzburg*, see 151 F.3d at 128; some treat the 'majority' opinion in *Branzburg* as actually just a plurality opinion, such as *Smith*, see 135 F.3d at 968-69; some audaciously declare that *Branzburg* actually created a reporter's privilege, such as *Shoen*, 5 F.3d at 1292, and *von Bulow v. von Bulow*, supra, 811 F.2d at 142; see also cases cited in *Schoen* at 1292 n.5, and *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975). The approaches that these decisions take to the issue of privilege can certainly be questioned. See *In re Grand Jury Proceedings*, supra, 810 F.2d at 584-86. A more important point, however, is that the Constitution is not the only source of evidentiary privileges, as the Supreme Court noted in *Branzburg* with reference to the reporter's privilege itself. 408 U.S. at 689, 706, 92 S.Ct. 2646. And while the cases we have cited do not cite other possible sources of the privilege besides the First Amendment and one of them, *LaRouche*, actually denies, though without explaining why, that there might be a federal common law privilege for journalists that was not based on the First Amendment, see 841 F.2d at 1178 n.4; see also *In re Grand Jury Proceedings*, supra, 5 F.3d at 402-03, other cases do cut the reporter's privilege free from the First Amendment. See *United States v. Cuthbertson*, 630 F.2d 139, 146 n.1 (3rd Cir. 1980); *In re Grand Jury Proceedings*, supra, 810 F.2d at 586-88; cf. *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 36 n.2 (2d Cir. 1999).

Id. (citations as in original).

[14] 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005).

CONCLUSION: A BLUEPRINT FOR A FEDERAL PRIVILEGE

To extend a newsgathering privilege to our federal court system is not a radical proposition. The fact that some 49 states and the District of Columbia have extended some form of newsgathering privilege to citizens is a "national referendum" attesting to this country's sense of the critical role that a vibrant press plays in a free society. Federal legislation would simply put the federal court system, and most importantly, the federal government itself, within the rubric of the same balance that has been struck by most states. The experience of the states and the District of Columbia have served as a valuable proving ground for the value of a reporter's privilege, and the possibility of crafting such a privilege in a nuanced manner that balances the competing societal interests.

This essay is not the appropriate vehicle for an exhaustive taxonomy of the many variants among state rules, but a nutshell summary of the principles that ought to inform the creation of a federal shield law, and the principles that ought to guide the federal judiciary in its interpretation of such a shield law, may be distilled from the substantial body of state and federal decisions that have either applied state shield or common-law doctrines, or crafted a conditional privilege grounded in the First Amendment or federal common law. Here are some suggestions:

The privilege should be qualified, not absolute, and should borrow from the rich body of case law and statutory experience with the statutory and common-law balancing tests that have been employed by many state and federal courts.

The privilege should not be confined to "mainstream," "professional" journalists, but should extend more broadly to others (such as internet bloggers) who gather information from confidential sources for the purpose of disseminating news or commentary on issues of public concern to the general public. A federal shield law should thus include language that would encompass those who engage in the "functional equivalent" of traditional journalism, even though we would not consider them part of the mainstream or traditional press.

In applying the qualified privilege in defamation cases in which the defendant journalist refuses to divulge the identity of a confidential source allegedly relied on in producing the story giving rise to the defamation claim, courts should not permit the journalist interposing the privilege to rely on the unidentified confidential source to support the journalist's claim that he or she published without actual malice or negligence.[15]

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[15] The invocation of a shield law, for example, should normally be sufficient in and of itself to defeat a defense motion for summary judgment on the actual malice issue. In *Collins v. Troy*

The legislation should contain an explicit provision that extends the privilege after the death of a journalist, following the model in *Swidler & Berlin v. United States*.[16]

There should be no *per se* "carve out" for national security matters. We live at a time in American history in which the watchdog role of a free and aggressive press is more vital than ever, and that watchdog role must above all include the vital and historic role of the press as a check and balance on the actions of the national government in matters relating to national security and foreign affairs. The delicate balance between the compelling interest in protecting our national security and the preservations of civil liberty that rests at the very heart of the American identity and our constitutional system is best preserved by granting to citizens qualified protection for promises of confidentiality extended in the process of newsgathering. Debate over how to strike this balance is one of the profound issues of our times. A newsgathering privilege ensures that this debate will be a "fair contest" between the role of the press as a watchdog ferreting out wrongdoing and abuses, and the right and duty of the government to protect truly important national security secretes. We should thus not carve out a blanket exception for all national security matters, but instead include national security within the general balancing test. In most instances national security interests would trump the invocation of the privilege, but we should preserve the possibility that the invocation of the national security interest would be overridden by courts when it is a sham.

Publ'g Co., 623 N.Y.S.2d 663 (N.Y. Sup. Ct. 1995), for example, the court held that on defendant's motion for summary judgment, a triable issue of fact existed regarding whether an article was published with actual malice when the defendant newspaper did not have any support for its allegations other than confidential sources. The defendant was precluded from relying on these sources at trial to prove lack of actual malice if it kept them confidential under the state shield law. If the defendant was allowed to rely on its confidential sources to prove it acted without actual malice, the court reasoned it would deprive the plaintiff access to important evidence that would make up a critical part of the cause of action. *Id*. at 881 (citing Greenberg v. CBS, Inc., 419 N.Y.S.2d 988, 996-97 (Sup. Ct. App. Div. 1979)); s*ee also* Oak Beach Inn Corp. v. Babylon Beacon, 464 N.E. 967, 971 (N.Y. 1984), *cert. denied* 469 U.S. 1158 (1985). The logic here is simple fair play. The journalist should be prevented "from using as a sword the information which they are shielding from disclosure." Sands v. News Am. Publ'g, Inc., 560 N.Y.S.2d 416 (Sup. Ct. App. Div. 1990).

16 524 U.S. 399 (1998) (holding that the attorney-client privilege survives death of the client).