

2006

Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination

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Recommended Citation

Stephanie J. Frazee, Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination, 8 *Vanderbilt Journal of Entertainment and Technology Law* 609 (2020)

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Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination

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In the paradigm case on reporter's privilege in the context of grand jury testimony, *Branzburg v. Hayes*, the Supreme Court presciently stated its concern that "[a]lmost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury."¹ In the majority opinion, Justice White also declared that:

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of [reporters] 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.²

The time has come to define the categories of reporters who qualify for the privilege and to determine whether it also protects

the proprietor of a web log: the stereotypical 'blogger' sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? How could one draw a distinction consistent with the court's vision of a broadly granted personal right?³

These concerns regarding expanding the reporter's privilege beyond traditional, unequivocal journalism have come to bear on the topic of blogging. This has been prompted in part by Apple Computer, Inc.'s pending action for trade secret misappropriation against some of its own, as yet unnamed, employees who allegedly leaked trade secrets to non-party bloggers Jason O'Grady, Monish Bhatia, and Kasper

1. *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972).

2. *Id.* at 703-04.

3. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 979 (D.C. Cir. 2005).

Jade.⁴ The Superior Court of Santa Clara County recently ruled that Apple was entitled to seek discovery in the form of:

[S]ubpoenas to Powerpage.com, Appleinsider.com, and Thinksecret.com requiring each to produce all documents relating to any information posted on its site relating to an unreleased Apple product code named 'Asteroid' . . . and to serve subpoenas on each of the Apple News Sites for information leading to the identity of any individual or individuals who have knowledge regarding the posts on its site disclosing information about the Product.⁵

Additionally, "Apple obtained an order authorizing subpoenas to [Nfox.com, Inc., PowerPage's email service provider,] and its principal, Karl Kraft."⁶ The bloggers subsequently sought a protective order from the court to prevent Apple from obtaining the information citing federal and state reporter's privilege.⁷ The order was denied, and the bloggers' appeal to the Sixth District California Court of Appeal is pending.⁸

The sequence of events prompting Apple's suit against its own employees began when O'Grady posted an article on his site, Powerpage.com, "discussing a rumored new product from Apple called 'Asteroid'" on November 19, 2004, along with follow-up articles on November 22 and 23.⁹ These articles stated "that Apple was developing an add-on device that would let musicians plug their electric guitars and other instruments into a Macintosh computer The articles included two artist's renderings of the rumored device."¹⁰ O'Grady also posted an article on November 26 written under the pseudonym of Dr. Teeth and the Electric Mayhem that "summarized some additional details about the device from an article on createdigitalmusic.com and discussed the various artists' renderings."¹¹ A few days later, on December 7, Apple requested that these articles be removed from the site, and O'Grady complied.¹² During the same time period, AppleInsider.com posted an article written by Jade "entitled 'Apple developing FireWire audio interface for GarageBand,' " which cited anonymous sources in discussing Asteroid and an artist's rendering of the product.¹³ Bhatia is involved

4. Brief for Petitioners at 1, *O'Grady v. Superior Court of the State of California*, No. 1-04-CV-032178, 2005 WL 770069 (Cal. App. Dep't. Super. Ct. Mar. 22, 2005).

5. *Id.* at 11 (internal quotations omitted).

6. *Id.* at 12.

7. *See id.* at 13.

8. *See id.*

9. *Id.* at 9.

10. *Id.*

11. *Id.* (internal citations and quotations omitted).

12. *Id.* at 10.

13. *Id.*

in Apple's pending discovery as the publisher of the Mac News Network on www.macnn.com.¹⁴ She also provides hosting service to several websites, including AppleInsider.com, which posted Jade's article.¹⁵

Numerous questions and concerns are presented by the Apple case and by the rising prominence of blogging in general.¹⁶ What protections are afforded to bloggers when they are relying on confidential sources to disseminate information? What protections should be afforded? How can a court determine when bloggers are acting as reporters in the first place? And, what protections do traditional reporters get in similar situations? This note will attempt to answer these questions with the purpose of the First Amendment (as well as the practicality and risks of extending its protections) in mind. The next section will follow the development of the traditional reporter's privilege under federal law, examining the Supreme Court case *Branzburg v. Hayes*¹⁷ and federal circuit court decisions, concentrating on how the circuit courts determine who and what is protected under the guarantees of the First Amendment. This note will then briefly discuss state constitutional privileges and statutory shields for reporters focusing on how states determine who is included in the category of reporters and what materials are considered journalistic. The analysis section will start by applying the federal First Amendment jurisprudence and the state constitutional and statutory privilege of New York and California to the context of blogging; then it will focus on the purpose of the First Amendment protections and statutory shields to examine whether blogging furthers this purpose. Finally, the proposed solution will further focus in on the systemic nature of free speech and press and the First Amendment's function in our democracy to support a determination that court inquiries into a blogger's privilege should focus on whether the results, not the process, of the blogger's speech advances our democracy.

14. *Id.* at 7.

15. *Id.*

16. This case is complicated by the trade secrets involved in the information leak, but it nonetheless serves as a good example for the questions that arise regarding protection of bloggers' sources.

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

I. HISTORY AND CURRENT STATE OF THE JOURNALIST'S PRIVILEGE

A. *Branzburg v. Hayes*

In *Branzburg v. Hayes*, the Supreme Court thoroughly examined the reporter's privilege and concluded that, in the context of grand jury testimony, reporters have no constitutionally guaranteed special privileges of speech beyond that of ordinary citizens.¹⁸ Specifically, the Court held that "requiring [a newspaper reporter] to appear and testify before state or federal grand juries [does not abridge] the freedom of speech and press guaranteed by the First Amendment."¹⁹ In that case, a reporter had personally observed the commission of the crime that he wrote about in the *Louisville Courier Journal*, which involved "two young residents of Jefferson County [Kentucky] synthesizing hashish from marihuana [sic]."²⁰ Branzburg "had promised not to reveal the identity of the two hashish makers."²¹ The Jefferson County grand jury issued a subpoena to Branzburg after publication of his article.²² Branzburg appeared before the grand jury, but he refused to reveal the identity of the individuals featured in his article, attempting to invoke the Kentucky reporter's privilege statute, the First Amendment of the U.S. Constitution, and sections 1, 2, and 8 of the Kentucky Constitution.²³ The U.S. Supreme Court affirmed the Kentucky Court of Appeal's holding that the Kentucky statute afforded a reporter "the privilege of refusing to divulge the identity of an informant who supplied him with information, but . . . the statute

18. *Id.* at 682-86.

19. *Id.* at 667.

20. *Id.*

21. *Id.* at 667-68.

22. *Id.* at 668.

23. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."); KY. CONST. §§ 1, 2, 8 (§ 1 states in relevant part: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Fourth: The right of freely communicating their thoughts and opinions." § 2 states: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." § 8 states in relevant part: "Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."); KY. REV. STAT. ANN. § 421.100 (West 2005) ("No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the general assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.").

did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed.”²⁴

Further, in recognizing that “the sole issue before [the Court was] the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime,”²⁵ the Court noted that “the great weight of authority is that [reporters] are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation.”²⁶ Ultimately, the Court issued a narrow holding, specific to situations concerning a reporter’s testimony in front of a grand jury.²⁷ In fact, the Court noted that it did not intend to suggest “that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.”²⁸ However, the Court also emphasized that “the publisher of a newspaper has no special immunity from the application of general laws [and] no special privilege to invade the rights and liberties of others,”²⁹ and that

the press is not free to publish with impunity everything and anything it desires to publish A newspaper or journalist may also be punished for contempt of court . . . [and] the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.³⁰

In other words, although the Court noted that there was some protection afforded to reporters by the First Amendment, it did not articulate what that protection encompassed, and did not differentiate the reporter’s freedom of speech from that of the ordinary citizen.

Justice Powell, in his concurrence, went a bit further than the majority opinion by articulating that an:

[A]sserted 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.³¹

B. Federal and State First Amendment Jurisprudence: Reactions to

24. *Branzburg*, 408 U.S. at 669.

25. *Id.* at 682.

26. *Id.* at 685.

27. *See id.* at 667.

28. *Id.* at 681.

29. *Id.* at 683 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)).

30. *Id.* at 683-84.

31. *Id.* at 710.

Branzburg

1. Federal Circuit Court Decisions

Federal courts have interpreted *Branzburg* in various ways. Some circuits have read *Branzburg* as establishing, or at least leaving room for, a qualified reporter's privilege.³² Other circuits have strictly adhered to *Branzburg* in all claims of reporter's privilege by denying that such a privilege exists in any situation.³³ One circuit's stance on a reporter's privilege is unclear.³⁴ This note will briefly examine the circuit court decisions that have recognized a qualified privilege in addition to providing an overview of the states' stances on reporter's privilege while focusing on two states, New York and California, as examples of state jurisprudence on point.

a. Broadly Qualified Reporter's Privileges and Balancing Tests – The First, Second, Third, Ninth, Tenth, and D.C. Circuits

In *In re Special Proceedings*, the First Circuit considered a reporter's privilege in the context of a television reporter who had aired a leaked video showing public officials accepting bribes, where the reporter had given "a pledge of confidentiality" to the source of the leaked videotape.³⁵ Appealing the district court's decision to issue a subpoena requiring the reporter be deposed, the reporter argued that "it violate[d] the First Amendment to hold him in civil contempt for refusing to answer questions as to who leaked the taped material to

32. See discussion *infra* Part I.B.1.

33. See, e.g., *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003); *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987); *Patterson v. Burge*, 33 Media L. Rep. 1200 (N.D. Ill. 2005); *In re Daimler Chrysler AG Sec. Litig.*, 216 F.R.D. 395 (E.D. Mich. 2003); see also, Bill Kenworthy, *Branzburg v. Hayes* (July 12, 2005), available at <http://www.firstamendmentcenter.org/analysis.aspx?id=15525> (discussing status of reporters' privilege in the lower federal courts in the wake of *Branzburg*).

34. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997) ("Some courts have interpreted *Branzburg* as establishing a qualified news reporter's privilege Although the Ninth Circuit in *Shoen* cited our opinion in *Cervantes* for support, we believe this question is an open one in this Circuit."); *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972) ("absent a positive showing of relevance or materiality, a newsman need not divulge the identity of his confidential news informants"); *In re Grand Jury Subpoena Am. Broad. Co., Inc.*, 947 F. Supp. 1314, 1318 (E.D. Ark. 1996) ("where a grand jury inquiry is not conducted in good faith, or where the inquiry does not involve a legitimate need for law enforcement, or has only a remote and tenuous relationship to the subject of the investigation, then the balance of interests struck by the *Branzburg* majority may not be controlling" (quoting *In re Grand Jury Proceedings*, 5 F.3d 397, 401 (9th Cir.1993))).

35. 373 F.3d 37, 40 (1st Cir. 2004).

him.”³⁶ The First Circuit Court noted that *Branzburg* left open “the prospect that in certain situations . . . First Amendment protections might be invoked by the reporter.”³⁷ Specifically, the court observed that “the three leading cases in this circuit require ‘heightened sensitivity’ to First Amendment concerns and invite a ‘balancing’ of considerations (at least in situations distinct from *Branzburg*).”³⁸ The court ultimately affirmed the order of civil contempt because “there [was] no doubt that the request to [the reporter] was for information highly relevant to a good faith criminal investigation; and . . . that reasonable efforts were made to obtain the information elsewhere.”³⁹

In *New York Times Co. v. Gonzales*, a case involving a subpoena of telephone records of two New York Times reporters, the District Court for the Southern District of New York articulated the Second Circuit’s application of *Branzburg* by stating that it:

[H]as recognized a qualified First Amendment privilege, applicable in civil actions and in all phases of a criminal prosecution, that protects reporters from compelled disclosure of confidential sources. Pursuant to this qualified privilege, the party seeking disclosure must make a ‘clear and specific showing that the sought information is: [1] highly material and relevant, [2] necessary or critical to the maintenance of the claim, and [3] not obtainable from other available sources.’⁴⁰

The Second Circuit viewed this case as a battle between the conflicting interests of “the free press on the one hand and the fair and full administration of criminal justice on the other.”⁴¹ Upon balancing “the interests of the free press and the government under these facts and authorities,” the court held that the “balance requires maintaining the secrecy of the confidential sources of [the reporters].”⁴²

Similarly, in *Von Bulow v. Von Bulow*, the Second Circuit was faced with deciding “whether one who gathers information initially for a purpose other than traditional journalistic endeavors and who later decides to author a book using such information may then invoke the First Amendment to shield the production of the information and manuscript.”⁴³ Focusing on the Supreme Court’s use of the term ‘newsgathering,’ the court noted that “a qualified privilege may be

36. *Id.* at 44.

37. *Id.* at 45.

38. *Id.* (citing *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716-17 (1st Cir. 1998); *United States v. LaRouche*, 841 F.2d at 1182-83 (1st Cir. 1988); *Bruno & Stillman, Inc. v. Globe Newspaper, Co.*, 633 F.2d 583, 596-99 (1st Cir. 1980)).

39. *Id.*

40. 382 F. Supp. 2d 457, 490 (S.D.N.Y. 2005) (internal citations omitted).

41. *Id.* at 462.

42. *Id.* at 513.

43. 811 F.2d 136, 142 (2d Cir. 1987).

proper in some circumstances because *newsgathering* was not without First Amendment protection.”⁴⁴ On the question articulated in *Von Bulow*, the court held that “the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material – sought, gathered or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process.”⁴⁵ According to the court, this determination would require “an intent-based factual inquiry to be made by the district court.”⁴⁶

Along the same line of reasoning, the Third Circuit explained in *Fox v. Township of Jackson* that it has “imposed a heavy burden on parties wishing to overcome [the reporter’s privilege] and compel a newsperson to testify in a civil matter.”⁴⁷ The court further stated that in *Riley v. City of Chester* it had “found a federal common law privilege for journalists to refuse . . . to testify in a civil matter,” noting that the “privilege recognizes society’s interests in protecting the integrity of the news gathering process, and in ensuring the free flow of information to the public.”⁴⁸ The standard applied in *Fox* and articulated in a previous Third Circuit case, *United States v. Criden*, was that “[t]he moving party must demonstrate that: (1) he has made an effort to obtain the information from other sources; (2) the only access to the information is through the journalist and his sources; and (3) the information sought is crucial to the claim.”⁴⁹ The *Fox* court held that this standard was not met because the information in the article at issue in the case “was not specific enough to lead the reader to believe the journalist possessed any relevant and unique information” because “it was not a quotation . . . nor did it rise to the level of an admission, and there is no evidence the information sought . . . was crucial to [the] claim” in the case.⁵⁰

Comparably, the Ninth Circuit’s broad reporter’s privilege “is a recognition that society’s interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of

44. *Id.* at 142 (emphasis in original) (internal citations omitted).

45. *Id.* at 144.

46. *Id.*

47. 64 Fed. Appx. 338, 340 (3d Cir. Apr. 28, 2003) (unpublished decision).

48. *Id.* (internal quotations omitted); see also *In re Madden*, 151 F.3d 125, 128 (3d Cir. 1998); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979).

49. *Fox*, 64 Fed. Appx. at 341; *United States v. Criden*, 633 F.2d 346, 358-59 (3d Cir. 1980).

50. *Id.*

justice.”⁵¹ In *Farr v. Pritchess*, the Ninth Circuit held “that the journalist’s privilege recognized in *Branzburg* was a partial First Amendment shield that protects journalists against compelled disclosure in all judicial proceedings, civil and criminal alike,” but that nevertheless:

[T]he privilege is qualified, not absolute, and . . . the process of deciding whether the privilege is overcome requires that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts, and a balance struck to determine where lies the paramount interest.⁵²

The Ninth Circuit also followed the Second Circuit in holding that “the journalist’s privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public.”⁵³

The Tenth Circuit, in examining a claim of First Amendment privilege of a taxpayer who refused to comply with a discovery order on behalf of the IRS, similarly stated that “although the First Amendment does not normally restrict the actions of purely private individuals, the amendment may be applicable in the context of discovery orders, even if all of the litigants are *private entities*.”⁵⁴ The court applied the balancing test set forth in *Silkwood v. Kerr-McGee Corp.*, holding that:

[A]mong the factors that the trial court must consider are (1) the relevance of the evidence; (2) the necessity of receiving the information sought; (3) whether the information is available from other sources; and (4) the nature of the information. The trial court must also determine the validity of the claimed First Amendment privilege.⁵⁵

In *Silkwood*, the court examined the following questions:

[First], whether a privilege exists in favor of a non-party witness which permits him to resist pretrial discovery in order to protect a confidential source of information. Secondly, whether assuming that such a privilege does exist, it applies to a person in the position of [the freelance reporter]. Third, if [the reporter] has a privilege, how should the trial court proceed.⁵⁶

In determining these questions, the court relied on Supreme Court holdings, including *Branzburg*, in noting that the “Supreme Court has not limited the privilege to newspaper reporting. It has in fact held that the press comprehends different levels of publications

51. *Schoen v. Schoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (internal quotations omitted); see also *Herbert v. Lando*, 441 U.S. 153, 183 (1979) (stating that the sacrifice of informational sources is sometimes justified, in the protection of certain interests).

52. *Schoen*, 5 F.3d at 1292 (quoting *Farr v. Pritchess*, 522 F.2d 464, 467 (9th Cir. 1975)).

53. *Id.* at 1293; *Von Bulow v. Von Bulow*, 811 F.2d 136, 142-43 (2d Cir. 1987).

54. *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (emphasis added).

55. *Id.*

56. *Silkwood v. Kerr McGee Corp.*, 563 F.2d 433, 435 (10th Cir. 1977).

which communicate to the public information and opinion.”⁵⁷ Additionally, the Supreme Court had recognized that “the First Amendment occupies a preferred position in the Bill of Rights” and that “any infringement of the First Amendment must be held to a minimum – that is to be no more extensive than the necessities of the case.”⁵⁸ In sum, the Tenth Circuit reads *Branzburg* to mean that the press is not required to

publish its sources of information or indiscriminately to disclose them on request . . . In holding that a reporter must respond to a subpoena, the Court is merely saying that he must appear and testify. He may, however, claim his privilege in relationship to particular questions which probe his sources.⁵⁹

Similarly, in *Zerilli v. Smith*, the D.C. Circuit established its “guidelines for balancing First Amendment interests with a litigant’s need for information when a plaintiff seeks to subpoena a non-party journalist in the context of a civil action.”⁶⁰ The D.C. Circuit requires that the information sought goes “to the heart of the matter” and not be merely marginally relevant.⁶¹ Second, the plaintiff must have “exhausted every reasonable alternative source of information”⁶² so that journalists are not simply a default source of information for plaintiffs. The D.C. Circuit also specifies in *Zerilli* that “despite *Branzburg*[,] there is a reporter’s privilege in civil actions, and that in the ordinary case the civil litigant’s interest in disclosure should yield to the journalist’s privilege.”⁶³ Thus the D.C. Circuit’s qualified privilege carries a presumption against disclosure in the civil context that can only be outweighed by meeting the requirements of the balancing test in *Zerilli*.

b. Highly Qualified Reporter’s Privilege – The Fourth, Fifth, and Eleventh Circuits

The Fourth Circuit recognizes that “there are First Amendment interests in newsgathering,” but also views these as

57. *Id.* at 437; see also *Lovell v. Griffin*, 303 U.S. 444, 452 (1935) (stating that the freedom of the press is not limited to newspapers and periodicals).

58. *Silkwood*, 563 F.2d at 437; see also *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 404 U.S. 876 (1971); *In re Stolar*, 401 U.S. 23 (1971).

59. *Silkwood*, 563 F.2d at 437.

60. *Lee v. DOJ*, 413 F.3d. 53, 57 (D.C. Cir. 2005) (citing *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981)).

61. *Zerilli*, 656 F.2d at 713.

62. *Id.*

63. *Lee*, 413 F.3d at 58 (citing *Zerilli*, 656 F.2d at 712).

highly qualified interests.⁶⁴ It has “applied *Branzburg* to compel testimony from the press in a civil contempt trial, recognizing that only when evidence of harassment is presented do we balance the interests involved.”⁶⁵ In *In re Shain*, the Fourth Circuit held that:

[T]he incidental burden on the freedom of the press in the circumstances of this case [where the Attorney General caused subpoenas to be served on the reporters after determining that the Department of Justice was unaware of any other sources to obtain the information it sought] does not require the invalidation of the subpoenas issued to the reporters, and absent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution.⁶⁶

Thus, the Fourth Circuit allows a highly qualified privilege based on a broader reading of *Branzburg* that there is no reporter’s privilege in the context of testimony at a criminal prosecution or a civil contempt proceeding.⁶⁷

In *United States v. Smith*, the Fifth Circuit declined to view Justice Powell’s concurrence in *Branzburg* as “a mandate to construct a broad, qualified newsreporters’ privilege in criminal cases.”⁶⁸ Rather, this Circuit views Justice Powell’s concurrence as emphasizing “that at a certain point, the First Amendment must protect the press from government intrusion” such as when a “grand jury investigation is not being conducted in good faith.”⁶⁹ In *Smith*, the court declined to extend a privilege to non-confidential information, as this information is not subject to the same concerns as confidential information, such as chilling potential sources who rely on a promise of confidentiality and violation of the rights of the informant.⁷⁰ Additionally, in response to the argument that absent an institutional privilege for the press, prosecutors will “annex the news media as an investigative arm of the government,” the court opined that the “fears that nonconfidential sources will shy away from the media because of its unholy alliance with the government are speculative at best.”⁷¹

64. *Food Lion, Inc. v. Capital Cities/ABC, Inc.* 194 F.3d 505, 520 (4th Cir. 1999) (quoting *In re Shain*, 978 F.2d 850, 855 (4th Cir. 1992)).

65. *Shain*, 978 F.2d at 853 (quoting *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976) (Winter, J., dissenting), *adopted en banc*, 561 F.2d 539, 540 (4th Cir. 1977)) (internal quotations omitted).

66. *Shain*, 978 F.2d at 852.

67. *Id.* at 852-53.

68. *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998).

69. *Id.* (citing *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring)).

70. *See id.* at 970.

71. *Id.* (citing *Branzburg*, 408 U.S. at 709 (Powell, J., concurring)).

The “standard governing the exercise of reporter’s privilege” utilized by the Eleventh Circuit is borrowed from the Fifth Circuit.⁷² This standard “provides that information may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and [is] unavailable from other sources.”⁷³

2. State Privileges

Almost all states have enacted Reporter’s Shield statutes, and all but one recognize some form of a qualified reporter’s privilege.⁷⁴ In fact, most states provide broader protections and further-reaching privileges than those recognized under federal law. This note will examine the reporter’s privilege jurisprudence of two states, New York and California, which are fairly representative of state-recognized reporter’s privilege.

a. New York – Broadly Qualified Privilege for Confidential and Nonconfidential Materials

In *O’Neill v. Oakgrove Construction, Inc.*, the Court of Appeals of New York held that its qualified reporter’s privilege extends to both confidential and non-confidential materials and that it “is triggered where the material sought for disclosure . . . was prepared or collected in the course of newsgathering.”⁷⁵ This case involved a subpoena for non-confidential photographs taken by a journalist “in the course of newsgathering activities and kept as resource material” and that were sought as evidence in a personal injury claim.⁷⁶ Because these photographs were non-confidential materials, New York’s Shield Law, “which provides *unqualified* protection to a reporter’s *confidential* sources and materials” did not apply, but the state constitutional qualified privilege for materials obtained in confidence did apply.⁷⁷

72. United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986); Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980).

73. Caporale, 806 F.2d at 1504; Miller, 621 F.2d at 726.

74. Connecticut, Idaho, Hawaii, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, New Hampshire, Wisconsin, West Virginia, Virginia, Vermont, Washington, Wyoming, Texas, South Dakota, and Utah do not have Reporter’s Shield Statutes. Hawaii has no statute and recognizes no privilege. See Bill Kenworthy, State Shield Statutes and Leading Cases (Oct. 17, 2005), http://www.firstamendmentcenter.org/analysis.aspx?id=15938&SearchString=state_shield_laws.

75. O’Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 277 (N.Y. 1988).

76. Id.

77. Id. at 277 n.1 (emphasis in original); see also N.Y. CIV. RIGHTS LAW § 79-h(b) (Consol. 2006) (“Absolute protection for confidential news No professional journalist or

The court observed that "the autonomy of the press would be jeopardized if resort to its resource materials . . . for private purposes, were routinely permitted" and that the "practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of newsgathering activity, would be particularly inimical to the vigor of a free press."⁷⁸ The court further noted that "confidentiality or the lack thereof has little, if anything, to do with the burdens on the time and resources of the press that would inevitably result from discovery without special restrictions."⁷⁹ The court also recognized that the "protection afforded by the guarantee of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment" and that the court generally agreed with the federal circuit courts that had recognized a federal reporter's privilege.⁸⁰

b. California – Broadly Qualified Privilege through Immunity from Contempt

California's Reporter's Shield Law "protects a newsperson from being adjudged in contempt for refusing to disclose either: (1) unpublished information, or (2) the source of information, whether published or unpublished."⁸¹ The Supreme Court of California in

newscaster presently or having previously been employed or otherwise associated with any . . . professional medium of communicating news or information to the public shall be adjudged to be in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt . . . for refusing or failing to disclose any news obtained or received in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public"); *Id.* § 79-h(c) (explaining the qualified protection for non-confidential news such that no journalist or newscaster may be held in contempt for refusing or failing to disclose any unpublished news unless "the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source").

78. *O'Neill*, 523 N.E.2d at 279-81.

79. *Id.* at 279-80.

80. *Id.*; see N.Y.C.L.S. CONST. art. I, § 8 ("Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").

81. *Delaney v. Superior Court of Los Angeles County*, 789 P.2d 934, 939 (Cal. 1990); see CAL. CONST. art. 1 § 2(b)-(c) ("A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the

Delaney emphasized that this statute creates an immunity, not a privilege.⁸² However, the court later recognized in *Miller v. Superior Court of San Joaquin County* that in practice the Shield Law is absolute because “contempt is the only effective remedy against a nonparty witness” and the law grants “such witnesses virtually absolute protection against compelled disclosure.”⁸³ The *Delaney* court also agreed with an article in the *L.A. Times* which stated that “[a] reporter who, say, wanders into a liquor store on his way home from work and witnesses a holdup could not invoke the shield law and refuse to testify. Off the job, a journalist is no different from any other citizen.”⁸⁴

c. The Problem – What is Journalism, and Who is Protected by the Reporter’s Privilege?

Most federal circuits and states recognize some form of a reporter’s privilege. The question then becomes, who does it apply to, and who should it apply to? Specifically, should courts consider bloggers to be journalists for purposes of First Amendment and statutory privilege, and why or why not? As blogging becomes a more common way for individuals who are not otherwise members of the press to share their opinions and beliefs and to report on a potentially broad scale, courts must develop a way of thinking about the First Amendment that is based not on traditional notions of the press, but on the nature of speech itself, and whether it serves the purposes of the First Amendment. This note will attempt to distinguish between various proposed approaches to First Amendment jurisprudence and reach a method of judicial inquiry that will be inclusive to all forms of media, including blogging, and that will serve First Amendment purposes and goals.

source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public. Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.”); Cal. Evid. Code § 1070 (West 2006) (California’s Reporter’s Shield Law containing essentially the same language).

82. *Delaney*, 789 P.2d at 939.

83. *Miller v. Superior Court of San Joaquin County*, 986 P.2d 170, 174 (Cal. 1999).

84. *Delaney*, 789 P.2d at 939 (internal quotations and emphasis omitted); Editorial, *Breaking the Shield*, L.A. TIMES, July 20, 1988, at Metro, pt. 2 p. 6, col. 1.

II. ANALYSIS

A. First Amendment Privileges – Systemic Purposes

The basic scope and purposes of the First Amendment are articulated in Justice Douglas's dissent in *Branzburg*. Justice Douglas dissented in the result of the case because he believed that "there is no 'compelling need' that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity . . . is therefore quite complete."⁸⁵ Justice Douglas relies heavily on Alexander Meiklejohn's article in explaining his view of the First Amendment as protecting "governing 'powers' of the people from abridgment by the agencies which are established as their servants In the field of our governing 'powers', the notion of 'due process' is irrelevant" because protections of these powers should be absolute.⁸⁶ Additionally, Justice Douglas declares that the First Amendment is essential to self-governance because "self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."⁸⁷ In order for voters to achieve these elements of self-governance:

[P]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.⁸⁸

As Justice Douglas also refers to James Madison's statement that:

A popular government, without popular information, or the means of acquiring it, is but a prologue to a Farce or Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.⁸⁹

Justice Douglas cautions that there are two principles of First Amendment doctrine at stake in *Branzburg*. The first principle:

[I]s that the people, the ultimate governors, must have absolute freedom of, and therefore privacy of, their individual opinions and beliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion

85. *Branzburg v. Hayes*, 408 U.S. 665, 713 (1972).

86. *Id.* at 713 (quoting Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 254 (1961)).

87. *Id.* at 714.

88. *Id.*

89. *Id.* at 723.

that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs.⁹⁰

The second principle at risk is that “effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination.”⁹¹

Thus, as articulated by Justice Douglas, James Madison, and Alexander Meiklejohn, First Amendment freedom of speech and press is meant to serve a single basic purpose: self-governance. Two basic principles are necessary to this purpose: freedom of individual opinions and beliefs, and the unrestricted flow of opinion and reporting. Arguably, considering blogging as part of the press fits nicely into these principles because it advances these necessary freedoms and serves public governance, as will be further explored below.

B. Inquiring into a Reporter's Privilege for Bloggers

1. Application of Federal Court Cases

It is informative to the inquiry of whether bloggers should be considered journalists to apply the reasoning of the federal courts in regards to the current state of traditional reporter's privilege to the context of blogging. In *Branzburg*, the Court clearly precluded application of First Amendment protections to grand jury testimony situations.⁹² However, while the Court did specify that it was *not* holding that “news gathering does *not* qualify for First Amendment protection,” it did not explain what protections it did qualify for.⁹³ As explained above, most lower federal circuit courts do recognize some form of qualified reporter's privilege, and most of those circuits apply some form of a balancing test.⁹⁴

The test used by the circuits applying a moderately qualified privilege can be generally summarized as requiring that in order for a reporter to give up his or her sources, the material sought must be (1) highly material and relevant to a good faith claim, (2) necessary or critical to the heart of the claim, and (3) not obtainable from any other

90. *Id.* at 714.

91. *Id.* at 715.

92. *See id.* at 682-86.

93. *Id.* at 681 (emphasis added).

94. See discussion *supra* Part I.B.1.

available sources.⁹⁵ These circuits will generally apply this test in most situations, including cases involving non-confidential information, but excluding grand jury testimony.⁹⁶ The tests utilized by those circuits recognizing a highly qualified privilege are essentially the same: in order for a reporter to be required to surrender confidential information, the information sought must be (1) highly relevant and sought in good faith, (2) necessary to the proper presentation of the case, and (3) unavailable from other sources.⁹⁷ However, these circuits may not apply the privilege in certain classes of cases, such as criminal prosecutions or civil contempt trials or to non-confidential information.⁹⁸ Thus, summarizing the reasoning of these cases allows the inference that there is a reporter's privilege in the majority of circuits, that the circuits that recognize such a privilege use essentially the same test, but that the test may be applied in different situations depending on the level of qualification or limits the circuit imposes on the privilege. Thus, inquiring into a reporter's privilege for bloggers is a legitimate examination in the majority of circuits.

2. Application of State Law Reasoning

Both of the example states, California and New York, recognize a reporter's privilege that is farther-reaching than any federal privilege.⁹⁹ Both are, at least effectively, absolute privileges that protect both confidential and non-confidential materials.¹⁰⁰ Thus, a

95. See *In re Special Proceedings*, 373 F.3d 37, 40 (1st Cir. 2004); *United States v. Criden*, 633 F.2d 346, 358 (3d Cir. 1980)..

96. *Lee v. DOJ*, 413 F.3d 53, 57 (D.C. Cir. 2005) ; *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 490 (S.D.N.Y. 2005); *In re Special Proceedings*, 373 F.3d at 40, 45; *Fox v. Township of Jackson*, 64 Fed. Appx. 338, 341 (3d Cir. Apr. 28, 2003); *Schoen v. Schoen*, 5 F.3d 1289, 1293-94 (9th Cir. 1993); *Von Bulow v. Von Bulow*, 811 F.2d 136, 142-43 (2d Cir. 1987); *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981); *United States v. Criden*, 633 F.2d 346, 358 (3d Cir. 1980); *Silkwood v. Kerr McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).

97. *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980).

98. *Smith*, 135 F.3d at 970; *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992).

99. CAL. CONST. art. I, § 2; N.Y.C.L.S. CONST. art. I, § 8; *Miller v. Superior Court of San Joaquin County*, 986 P.2d 170, 174 (Cal. 1999); *Delaney v. Superior Court of Los Angeles County*, 789 P.2d 934, 939-40 (Cal. 1990) (quoting CAL. CONST. art. I, § 2); *O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 524 (N.Y. 1988) (citing N.Y.C.L.S. CONST. art. I, § 8).

100. *Miller*, 986 P.2d at 174; *Delaney*, 789 P.2d at 939 (quoting CAL. CONST. art. I, § 2); *O'Neill*, 71 N.Y.2d at 524 (citing N.Y.C.L.S. CONST. art. I, § 8).

reporter's privilege for bloggers could potentially be appropriate in a number of states, as well.

3. Defining Journalism

Defining journalism for the purpose of a reporter's privilege is no small task. Unfortunately, "[i]n most Western countries, there are no universal standards for . . . the journalism profession – no required degrees, no entrance exam, no mandatory organizational membership."¹⁰¹ This lack of formality for the profession is based on the "fundamental" idea that "no one should have to obtain a license to speak."¹⁰² Although:

[M]any working journalists have a current or prior association with an established news gathering organization, there are countless persons who work either alone or tangentially with an established news gathering organization as stringers¹⁰³, freelancers, independent authors, and bloggers.¹⁰⁴

a. An Example of the Difficulty and Inconsistency in Defining Journalism – The Citizen Journalist Reports and the Drudge Report

It is much easier to draw a parallel between a traditional journalist, such as a reporter for the New York Times or a correspondent for a local news station, or Joel Achenbach, who writes the Achenblog for Washingtonpost.com.¹⁰⁵ But, what about the Citizen Journalists Report on msnbc.msn.com? MSNBC is a well-respected and established news gathering organization. But do the "Citizen Journalists" who take assignments from "The Assignment Desk" on the website and post their own reports on topics such as "Rebuilding homes and lives" and "Returning home" after Hurricane Katrina attain the status of bona fide reporters?¹⁰⁶

101. Anatasia Heeger, *Securing a Journalist's Testimonial Privilege in the International Criminal Court*, 6 SAN DIEGO INT'L L.J. 209, 219-20 (2005).

102. Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1407 (2003).

103. "A stringer is a person who acts as a professional information-source for a reporter. Freelancers are journalists who sell their work on a project basis and who are not permanently associated with a news organization." Heeger, *supra* note 101, at 220 n.31.

104. *Id.* at 220.

105. See Joel Achenbach, Achenblog, WashingtonPost.com (Jan. 17, 2005), http://blogs.washingtonpost.com/achenblog/2005/01/about_the_achen.html.

106. See Citizen Journalists Report, MSNBC.com, <http://msnbc.msn.com/id/6639760/> (last visited Apr. 20, 2006). A section on the webpage labeled "The Assignment Desk" asks "Do you have a Citizen Journalist report?" and lists several assignments with links to email a story to MSNBC.com, inviting bloggers to send text, pictures, and videos. See *id.*

It is arguable that the bloggers for MoJo Blog and the Achenblog, who are employees of Mother Jones and The Washington Post, respectively, would be considered true journalists simply because of their affiliation "with an established news gathering organization,"¹⁰⁷ but it would be much more difficult to make an argument that the Citizen Journalists on MSNBC should be considered journalists because these people may be one-time reporters who have no employment contract for their work. Is there any reason why this should be the case? Are there any fundamental differences between the information provided by these 'official' and 'unofficial' journalists besides the nature of their relationship with the news organization publishing their material?

Upon closer comparison of the blogs on MoJo Blog, Achenblog, and the Citizen Journalists Report, one may discover a difference in writing quality, detail, and use of statistical facts. Additionally, each blog entry on the Citizens Journalists Report is prefaced with a short explanation by the editor giving the blogger's name, location, and purpose of the entry, as well as the submission date.¹⁰⁸ The status of the bloggers on the Citizens Journalists Report become even less clear considering that their articles become property of MSNBC.com and that they may be edited by MSNBC.com.¹⁰⁹ Does the fact that the Citizen Journalist bloggers take 'assignments' from the MSNBC.com website, that their entry may be edited and becomes sublicensed to the website give the bloggers and their posted material an adequate relationship to an established newsgathering organization in order to make them journalists?

The Citizen Journalists Report illustrates the difficulty of developing a working definition of journalism and journalists. Journalism is "a loosely-defined profession" and defining it should

107. Heeger, *supra* note 101, at 220.

108. See Gena McCown, Citizen Journalists Report: CJ: Far From Normal in Wilma's Aftermath, MSNBC.com, <http://msnbc.msn.com/id/9776189/> (last updated Oct. 28, 2005) ("Editor's note: Gena McCown of Boynton Beach, Fla., describes the aftermath of Hurricane Wilma on her community, which is 55 miles north of Miami. This essay was submitted Thursday, Oct. 27.").

109. Under each entry on the Citizens Journalist Report, the site states:

For materials you post or otherwise provide to MSNBC (a "Submission"), you grant MSNBC permission to (1) use, copy, distribute, transmit, publicly display, publicly perform, reproduce, edit, modify, translate and reformat your Submission, each in connection with the MSNBC Web Site, and (2) sublicense these rights, to the maximum extent permitted by applicable law. MSNBC will not pay you for your Submission. MSNBC may remove your Submission at any time. For each Submission, you represent that you have all rights necessary for you to make the grants in this section.

Id.

achieve “a balance between covering all those who could and should benefit from [a journalist’s] privilege, while at the same time excluding those who would seek to wrap themselves in the privilege simply to avoid their duty to testify [about their sources].”¹¹⁰

A case involving Matt Drudge, who was sued by plaintiffs for publishing “defamatory material about them on his web site, the ‘Drudge Report,’ ” also further illustrates the uncertain state of the legal definition of journalism.¹¹¹ In that case, the plaintiffs “moved to compel [Drudge] to respond to a number of their interrogatories and document requests” in an effort to obtain Drudge’s sources of information about the plaintiffs.¹¹² Drudge invoked, among other defenses, the protection of the reporter’s privilege under both the California and U.S. constitutions.¹¹³ In determining whether to grant Drudge these protections, the court did not address the question of whether Drudge was actually a journalist for the purposes of this privilege despite the fact that Drudge’s website is not affiliated with any established news gathering organization.¹¹⁴ Rather, the court’s focus was directly on the inquiry as to whether the protections of the First Amendment had been overcome, holding that the “plaintiffs [had] proffered nothing to satisfy their burden [that they had exhausted every reasonable source of information]” and ruling that “the Court cannot find that the First Amendment’s protections have been outweighed absent such a showing.”¹¹⁵

b. What Should Courts Make of This Difficulty and Ambiguity?

Journalism has been described as existing on a continuum, with “individuals who gather news, which is then vetted by editors and disseminated through an established news outlet (newspaper, internet, television, or radio), which may be either independent (such as the New York Times or CNN) or government-funded (such as the British and Canadian Broadcasting Companies)” at one end of the

110. Heeger, *supra* note 101, at 220.

111. *Blumenthal v. Drudge*, 186 F.R.D. 236, 239 (D.D.C. 1999).

112. *Id.* at 238.

113. *Id.*

114. *Blumenthal*, 186 F.R.D. at 244. At the time of the case, Drudge’s sole source of income was a contract with AOL whereby AOL paid Drudge \$3,000 per month “to carry his reports, and retained the right to remove, or direct [Drudge] to remove, any content which, as reasonably determined by AOL . . . [violated] AOL’s then-standard Terms of Service.” James P. Jenal, *When Is a User Not a “User”? Finding the Proper Role for Republication Liability on the Internet*, 24 LOY. L.A. ENT. L.J. 453, 465 (2004) (internal citations omitted).

115. *Blumenthal*, 186 F.R.D. at 244. The court found no reason to address the claim under California law.

spectrum.¹¹⁶ These are bona fide, undeniable journalists because they “must adhere to [their] organizations’ codified standards of news reporting conduct and subject their work to the scrutiny of editors,” and because “[u]ltimately, the work of these journalists, editors, and executives is inextricably intertwined with the reputation of the news organization for which they are associated and, in turn, a news organization builds on the collective works of its employees to gather access and influence.”¹¹⁷

On the “opposite end of this spectrum are individuals who work as sole practitioners, either as stringers or freelancers who collect and produce reportage, commentary, or analysis to be sold to media organizations or to be used in a non-traditional news outlet or book.”¹¹⁸ Heeger expresses concern that “there really is nothing to stop the individual who writes an article and posts it on the Internet . . . from calling himself or herself a journalist. A journalist working alone does not necessarily benefit from the safety net of established standards and editors to enforce these standards.”¹¹⁹ However, should a lack of ‘a safety net’ be the primary concern in granting privilege to an individual? Or, should the focus be on the newsworthiness of the work produced? If no one should have to have a license to speak, should one be required to have a ‘safety net’ in order to be considered a journalist?¹²⁰ Perhaps this stance boils down to elitism in the form of bias against any ‘so-called’ journalist who operates outside the large-scale news institutions.

Blumenthal v. Drudge may shed some light on these questions.¹²¹ Although the court did not elucidate its reasons for not addressing the question of whether Drudge was a journalist in that case, one may assume that the court had some reason for assuming that he was, or it would make no sense that it applied the reporter’s privilege to his source information. Thus, it seems that some bloggers could be afforded constitutional protections despite a lack of affiliation with an established news gathering organization. This case is especially poignant considering that the Drudge Report is not affiliated with any major news organization, and that its content varies from critiques on Britney Spears’ fashion choices¹²² to Samuel

116. Heeger, *supra* note 101, at 221.

117. *Id.* at 221-22.

118. *Id.* at 222.

119. *Id.*

120. One could argue that the blogger’s reputation is safety net enough.

121. See *Blumenthal v. Drudge*, 186 F.R.D. 236, 244 (D.D.C. 1999).

122. See Gina Serne, Britney Bottoms Out with Blackwell, Eonline (Jan. 10, 2006), <http://www.eonline.com/News/Items/0,1,18120,00.html?rsslatest>.

Alito's confirmation hearings,¹²³ and that Matt Drudge has been referred to as a mere "gossip columnist"¹²⁴ and the Drudge Report has been likened to a "[garbage] dump"¹²⁵ and a "scandal sheet."¹²⁶ If a court considered Drudge to be a journalist amidst this variety of reporting and criticism, perhaps the definition of journalism is much broader than it appears.¹²⁷

C. Developing a Working Approach to Applying First Amendment Jurisprudence to Blogging

1. Institutional Approach to First Amendment Jurisprudence

Some scholars believe that current First Amendment doctrine does not differentiate sufficiently between categories of speakers – specifically the press and the non-press speakers.¹²⁸ Professor Schauer believes that the "First Amendment does not protect all speech, or even most speech, but the speech that it does protect is protected as speech, with relatively little regard for the identity of the speaker or of the institutional environment in which the speech occurs."¹²⁹ Stated differently, "existing First Amendment doctrine renders the Press Clause redundant and thus irrelevant, with the institutional press being treated simply as another speaker."¹³⁰ However, this viewpoint seems to overlook the numerous state shield laws referenced above, as well as federal and state court cases providing for a reporter's privilege that is not applied to private, non-press citizens' speech.¹³¹ Professor Schauer seems to rely on an expansive reading of *Branzburg* when he states that the Supreme

123. See Jesse J. Holland, *Democrats Say Alito's Answers Inconsistent, myway* (Jan. 11, 2006), <http://apnews.myway.com/article/20060111/D8F2IGHG4.html>.

124. Matt Richtel, *From the Drudge Report to the Drudge Retort*, N.Y. TIMES, Aug. 27, 1998, at G3.

125. *Joke of the Day*, SLATE, Sept. 17, 1999.

126. Jenal, *supra* note 114, at 465.

127. Additionally, it is important to note that at the 2004 Democratic National Convention, press credentials were issued to thirty-six bloggers, thus showing the trend of considering bloggers to be legitimate reporters. David D. Caron & Megan A. Fairlie, Eds., *International Decision: Evidentiary Privilege of Journalists Reporting in Areas of Armed Conflict-Evidence in War Crimes Trials-Rule-Making Process of ICTY*, 98 A.J.I.L. 805, 809 n.32 (2004).

128. See Frederick Schauer, *The Faegre & Benson Symposium: Law, Information and Freedom of Expression: Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

129. *Id.* at 1256.

130. *Id.* at 1257.

131. See discussion *infra* Parts I.B.1., I.B.2.

Court “[refused] to create a constitutional privilege for journalists asked to identify their sources.”¹³² In response to this supposed lack of differentiation between speakers, Professor Schauer advocates an Institutional Account of the First Amendment.¹³³ This account relies on the following inquiry:

We first locate some value that the First Amendment treats, or should treat, as particularly important. Then we investigate whether that value is situated significantly within and thus disproportionately served by some existing social institution whose identity and boundaries are at least moderately identifiable. If so, then we might develop a kind of second-order test. If there is a reporter’s privilege, for example, we might ask not whether this exercise of the privilege serves primary First Amendment purposes, but instead simply whether the person claiming the privilege is a reporter. Obviously, defining the category of people who receive the privilege will be based both on the reasons for having the privilege and the reasons for locating it in a particular institution, but the case-by-case inquiry will largely consist of applying the rule, rather than applying the reasons lying behind the rule directly to individual cases.¹³⁴

This suggested inquiry simply does not follow a sensible order. Rather than asking at the outset whether the speech at issue should be protected and/or privileged because it serves First Amendment purposes, Schauer’s inquiry appears to proceed in the following way. Faced with a First Amendment privilege question, a court would ask what the values protected by the First Amendment are, and whether certain social institutions, like the press, serve those values. Then, the court would ask “simply whether the person claiming the privilege was a reporter,” and the court would make this determination by applying a pre-established rule based on “the reasons for having the privilege and the reasons for locating it in a particular institution.”¹³⁵ However, given that the very text of the First Amendment places the privilege in “the press,” it seems redundant to examine the reasons why the privilege is located in the press at every trial involving reporter’s privilege. That may be a stimulating intellectual exercise, but it is not helpful to this particular inquiry in its practical context. The real question comes back to determining who is the press, and the case-by-case inquiry involves *both* “defining the category of people who receive the privilege” and “applying the reasons behind the rule

132. Schauer, *supra* note 128, at 1262. However, as delineated above, many courts have not read *Branzburg* as completely fatal to any form of reporter’s privilege.

133. See *id.* at 1273.

134. *Id.* at 1275.

135. *Id.*

directly to individual cases” to determine whether the person seeking to invoke the privilege should receive it.¹³⁶ Otherwise, the court is stuck in a redundant and rigid inquiry in every case.

In advocating for an institutional account that involves courts defining the institutions involved, Professor Schauer simultaneously points out the difficulties that courts have in “understanding nonlegal institutions, describing them, and then designing doctrine around them” and following their “special mission of stability for stability’s sake” while responding “to changing institutions and changing technology.”¹³⁷ The answer to this predicament seems to be exactly what Professor Schauer is trying to avoid, a case by case inquiry on the purposes of the First Amendment privilege for the press in determining whether the person or group seeking to invoke the privilege is a member of the press. This keeps the court within the realm of the legal institution of the First Amendment while avoiding an inquiry into the non-legal institutions of “the Internet and other aspects of modern communication.”¹³⁸ This encourages a clear, stable, but not fixed, rule focused on First Amendment purposes and priorities rather than the details of the workings of specific institutions.

David D. Smyth’s proposition adds to this idea. His article examines blogging in the context of “the traditional split of First Amendment treatment of the media on one hand and ordinary trial participants on the other” when speaking and publishing news about criminal cases.¹³⁹ Smyth states:

News media have traditionally been accorded greater First Amendment protection with respect to reporting on judicial events than other speakers receive. Now, because a witness’s speech about a trial can easily take the form of a website post, the distinction between press and citizen-witness becomes much less significant, and the courts have less justification for granting lower protection to ordinary speakers than they do to the media.¹⁴⁰

Smyth also states that, at least in the context of press coverage of public trials, the changing face of the press will require that “[i]nstead of excluding traditional media along with bloggers, the courts will have to include bloggers along with the conventional press to bring them under the same tent.”¹⁴¹ Thus, rather than lowering the access

136. *Id.*

137. *Id.* at 1266.

138. *Id.*

139. David D. Smyth, *A New Framework for Analyzing Gag Orders Against Trial Witnesses*, 56 BAYLOR L. REV. 89, 94 (2004).

140. *Id.*

141. *Id.* at 125.

and protections afforded to traditional media, Smyth suggests raising the status of bloggers up to that of the traditional media to put all who speak as the press in the same category.

2. Democracy-Focused Approach to First Amendment Jurisprudence

a. Speech is More than Speech as Such

In the context of government regulation that interferes with speech, Professor Post suggests that the Court's attempts to "formulate general principles for the constitutional protection of 'speech as such'" is the common cause of the Court's First Amendment doctrinal failures.¹⁴² This is because " 'speech as such' has no constitutional value Constitutional value inheres instead in specific forms of social order, and . . . speech has tended to receive the constitutional protection necessary for it to facilitate the maintenance and success of specific forms of social order."¹⁴³ In response to what he sees as the Court's faulty analysis, Post's theory directs the Court to "decide First Amendment cases by authorizing particular social practices. For this purpose[,] rights ought not to be regarded as the private attachments of persons or entities, but rather as the instruments by which the law locates, defines, and sustains desirable social practices."¹⁴⁴

This theory applies easily to blogging. Arguably, one can view blogging as a desirable social practice because it allows for wide dissemination of information relatively cheaply and quickly, it often invites comment and interaction, and it allows anyone with access to the internet to become part of the press. Thus, the Court could consider blogging to be a desirable social practice for First Amendment purposes, and, following Professor Post's proposed doctrinal approach, it would extend First Amendment rights and protections to bloggers in order to sustain the practice of blogging. However, this is not an entirely workable inquiry, as it requires courts to determine which social practices should be authorized and valued. As previously discussed, it is difficult for courts to define certain social institutions, let alone determine which institutions should be valued over others.

142. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1279 (1995).

143. *Id.*

144. *Id.*

b. Distinguishing the Internet from Other Media

An important distinction between traditional forms of media, or “traditional mass media,” and the Internet is that “Internet technology presents the opportunity for individuals to participate actively in the exchange of information through two-way communication. The Internet is a global forum, facilitating open dialogue on important issues.”¹⁴⁵ Another significant difference is that the Internet has “[m]ore diverse ownership” than traditional media.¹⁴⁶ For less than twenty dollars per year plus the cost of an internet connection, an individual can own and maintain a website, but owning a television station or a newspaper is obviously much more expensive and complicated.¹⁴⁷ This difference “increases the possibility that some content will address the interests of [minority and lower income groups] and represent the makeup of American society more accurately” than traditional media.¹⁴⁸ This reinforces the idea that the Internet and blogging can serve to enhance our democracy through dissemination of information from diverse sources that is accessible to diverse readers. This also supports the idea that bloggers should be protected by the same privileges of traditional journalists because they contribute to our democratic society by making information obtainable on a wide scale no less, if not more so than traditional journalists.

In contrast, Professor Berger, in quoting from the Hutchins Commission Four Theories of the Press, states that “because of a growing monopoly power [of the press], the press must hold freedom of the press in trust for the entire population.”¹⁴⁹ However, blogging has the potential to reduce this monopoly power by injecting individuals into the institution of the press.

145. Erica Hepp, Note, *Barking Up the Wrong Channel: An Analysis of Communication Law Problems Through the Lens of Media Concentration Rules*, 85 B.U. L. REV. 553, 584 (2005).

146. *Id.* at 587.

147. Yahoo’s standard webhosting service is \$19.95 per year. Plan Comparison Chart, Yahoo! Small Business, <http://sbs.smallbusiness.yahoo.com/webhosting/compare.php> (last visited Apr. 20, 2006).

148. Hepp, *supra* note 145, at 587.

149. Berger, *supra* note 102, at 1403 (quoting FREDERICK SEATON SIEBERT et al., *FOUR THEORIES OF THE PRESS* (1963) (the four theories are authoritarian, libertarian, social responsibility, and Soviet communism)) (internal quotations omitted).

3. Process-Based Approach

Professor Berger focuses on language in state shield statutes under which “the protected journalist usually must meet two requirements: (1) he or she must have a substantial connection with or relationship to a recognized or traditional news media entity, and (2) he or she must be engaged in recognized or traditional news media activities.”¹⁵⁰ Berger extends this reasoning to determine that bloggers in particular should benefit from First Amendment protections when they “[behave] as press,”¹⁵¹ which “includes engaging in an aggressive newsgathering process.”¹⁵² This process “directly serves important First Amendment purposes: gaining and sharing information about the government, as well as informing the public about a range of matters important to their lives.”¹⁵³ Additionally, “[w]hat distinguishes the protected press from other, unprotected, information businesses is the use of editorial judgment – the ‘independent choice of information and opinion of current value, directed to public need, and borne of non-self-interested purposes.’”¹⁵⁴

The proposition that First Amendment protection should be based on the ‘aggressive newsgathering process’ seems fundamentally flawed. Arguably, a blogger’s act of posting her blog for the world to see would fall under press behavior, as making information available for public dissemination is an inherent part of the press.¹⁵⁵ But, concepts such as “aggressive newsgathering,” “current value,” public need” and “non-self-interested purposes” seem too broad to be workable.¹⁵⁶

These concepts are too vague in the sense that defining them in a way that a court can apply them consistently and efficiently would be a daunting task. Would a reporter for the New York Times who received a call from a government sources leaking a secret, attempts to verify the information provided, and then writes an article using the source’s information have engaged in aggressive newsgathering? What about an independent blogger in the same situation? Must the writer seek out a source in order to be sufficiently aggressive? Is fact checking sufficient aggression, or is something more required? What

150. *Id.* at 1393.

151. *Id.* at 1396.

152. *Id.* at 1400.

153. *Id.*

154. *Id.* at 1399 (quoting Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 856 (1998)).

155. Berger, *supra* note 102, at 1403.

156. *Id.* at 1399-1400.

more could be required? Who determines the current value of or public need for information? Is a judge equipped to assess these concepts in a given case? Would a judge have to make such a determination on a case-by-case basis? Non-self-interested purposes seem to present an even more problematic analysis. In some ways, independent bloggers who are not paid for their efforts are less self-interested than reporters who are paid for their work by major newspapers or television stations. In short, basing access to First Amendment protections on the ill-defined "process" of journalism opens more doors in the judicial inquiry than it closes.

Professor Berger cites "[t]he most comprehensive current effort by working journalists to define journalism" as the three-year study conducted by the Committee of Concerned Journalists.¹⁵⁷ This study yielded a publication that listed nine general elements that comprise journalism:

(1) journalistic truth, (2) a first loyalty to citizens, (3) discipline of verification, (4) independence from subject matter, (5) independent monitoring of power, (6) providing a forum for public criticism and compromise, (7) making the significant interesting and relevant, (8) comprehensiveness and proportionality of the news, and (9) exercise of personal conscience.¹⁵⁸

While these elements are useful in formulating a code of ethics for the profession of journalism, they should not preclude an individual who is widely disseminating information on the Internet independently from seeking and obtaining the protections of the First Amendment as a member of the press. Perhaps the press, for First Amendment purposes, should be viewed independently from the profession of journalism.

Professor Berger's basic premise is that the inquiry of who is a journalist should focus on intent to engage in journalism.¹⁵⁹ She states that "[a]n individual is engaged in journalism when he or she is involved in a process that is intended to generate and disseminate truthful information to the public on a regular basis."¹⁶⁰ On its face, this proposition makes sense and seems appropriate. However, Berger further identifies two elements of the newsgathering process: "the reporter's . . . record of publication" and "the availability of information from which readers can judge the . . . reporter's

157. *Id.* at 1404.

158. *Id.* (quoting BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 12-13 (Three Rivers Press 2001)).

159. Berger, *supra* note 102, at 1411.

160. *Id.*

independence.”¹⁶¹ The first (and more problematic) element requires evidence of “a [t]rack [r]ecord of [g]athering and [p]ublicly [d]isseminating [u]sually [t]ruthful [i]nformation.”¹⁶² Professor Berger states that:

[I]f the reporter . . . intends to publish only once, there is no real need for shield law protection. The law’s purpose is to protect the free flow of information; that flow is not diminished if a reporter is forced to testify about the information obtained in order to report one story.¹⁶³

But it seems that the free flow of information would be greatly chilled by the requirement of a track record. Sources of confidential information would be forced to research various reporters to find one with a substantial track record so that the source would be assured of protection. The self-governance purpose of freedom of the press does not seem to contemplate a requirement that only those with track records of publication are entitled to its protections. Self-governance should encourage even one-time publication if it furthers the free flow of information in general, if not a frequent “flow” through the individual publishing only one time.

In addition to a track record, Professor Berger states that “some evidence of intent to disseminate information to a public audience is necessary to fulfill journalism’s role of providing information necessary for self-governance.”¹⁶⁴ Again, intent does not seem to be contemplated by or necessary to self-governance. To truly serve this value, information need only have the effect of serving self-governance. Although intent to do so would clearly make serving self-governance more direct and straightforward, one can conceivably advance self-governance unintentionally by, for example, posting an blog entry that the blogger thinks is merely interesting about a public official that turns out to influence an election. Berger specifies that intent can be shown through “[e]vidence of past publication to a broader audience” or dissemination “to at least a portion of some public audience.”¹⁶⁵

Again, past publication seems unnecessary to serving self-governance. Additionally, although it would clearly better serve self-governance to disseminate information to a wide audience, it is not necessary to self-governance that this occur. A college student may potentially serve self-governance by posting a blog read by only her friends that raises their awareness about an issue or event on campus,

161. *Id.* at 1411-12.

162. *Id.* at 1412.

163. *Id.* at 1413.

164. *Id.*

165. *Id.* at 1414.

even though the information is “disseminated to only a few, or to only a private audience.”¹⁶⁶ Similarly, a concerned citizen may hand out pamphlets to her friends and colleagues about an issue in her town, and this may serve self-governance even though she has no intent to reach a broader audience. These examples may not be the norm, or even frequent occurrences, but that does not mean that they should be categorically precluded from statutory and constitutional press protection.

III. SOLUTION: AN EFFECT-BASED APPROACH

Professor Berger makes the point that “[b]oth constitutional and statutory shield laws are designed to protect the gathering and dissemination of the kind of information that is of value to a public that must make intelligent decisions to govern itself.”¹⁶⁷ This relates to the proposed solution in this note, an effect-based approach to determining whether bloggers are subject to a reporter’s privilege. However, unlike Berger, this solution finds unnecessary a track record of publication or intent to affect the political process. Rather, the inquiry should focus on whether the information at issue is “of value to a public that must make intelligent decisions to govern itself.”¹⁶⁸ Regardless of the medium through which information is disseminated, or the process or intent behind its production and dissemination, if information enhances freedom of individual opinions and beliefs and contributes to the free flow of opinion and reporting, it should be protected. Thus, some bloggers will be protected, but not all will. But this should not depend on how many blogs the individual has posted or who reads them. If the first blog posted by an individual is read by one person, but contributes to self-governance, this should be enough to for the blogger to be protected.

In making this inquiry, courts could focus on the purpose of the reporter’s privilege under the First Amendment and the shield laws – that of self-governance – and the two principles that serve it: freedom of opinion and belief, and unrestricted flow of opinion and reporting. This inquiry could potentially be expansive, time consuming, and overwhelming for courts. However, in focusing on the effect of the information, the court can narrow the inquiry to who the information reached, how the information was used, and how the information contributed the freedom and flow of opinion.

166. *Id.*

167. *Id.* at 1409-10.

168. *Id.* at 1410.

An example may make this more clear. If a blogger posts a statement made by a local official, leaked to him by a confidential source, and a few residents of his city read the blog, and then vote against that official in the next election, it is relatively clear that self-governance has been served by the freedom of belief and the flow of reporting. Thus, if this blogger was brought into court by a subpoena for information about his source, a court should apply the reporter's privilege to this blogger so that he would not have to disclose confidential information about his source, as doing so may chill such flow of information in the future and thus impede self-governance. This is an "easy" case, however, and other cases may be much more difficult. But, this is a workable starting place for courts to apply the reporter's privilege more evenhandedly across mediums.

IV. CONCLUSION

A more inclusive, effect-based approach to applying the reporter's privilege serves self-governance more effectively than other proposed approaches, and it means that the privilege will more often apply to bloggers. This method allows courts to focus on the speech itself and the purpose of the First Amendment, rather than on a specific institution, the process behind the speech, or the tenants of the profession of journalism. Although bloggers as a per se rule will not be included under this approach, traditional media will not always be included either. A blogger posting about his date the night before should not be protected, just as a horoscope columnist in a major newspaper should probably not be protected. This approach does not yield a clear-cut, universally applicable bright line rule, but it does provide guidance to courts for a serious, thoughtful inquiry into whether a blogger is contributing to self-governance through promotion of freedom of opinion and belief and unrestricted flow of reporting and opinion. In this new age of high-speed, wide information dissemination, and availability, blogging may in fact provide the best means for achieving these ends.

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* J.D. Candidate, May 2007, Vanderbilt University Law School. The author would like to thank her husband, Joe Frazee, for providing ideas and support throughout the process of writing this note. Additionally, the author would like to thank her editor, Stephen A. Lund, for his thorough and helpful comments and suggestions.