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## ARE OLIVER STONE AND TOM CLANCY JOURNALISTS? DETERMINING WHO HAS STANDING TO CLAIM THE JOURNALIST'S PRIVILEGE

Kraig L. Baker

*Abstract:* Most circuits recognize a qualified privilege that provides a partial First Amendment shield for journalists to protect the confidentiality of their sources and materials. Few courts, however, discuss the scope of the class protected by this privilege. This Comment examines who has traditionally been part of the protected class and explores the trends and concerns of courts in granting standing. This Comment also recommends a framework that courts can use to determine whether to extend the journalist's privilege to new formats of communication and applies this framework to two examples.

Journalists have long claimed a privilege under the First Amendment's freedom of the press provision that protects the confidentiality of their sources and research materials.<sup>1</sup> They argue that confidential sources and materials are essential to successful investigative reporting and contribute to the free flow of information that lies at the heart of the freedom of the press provision.<sup>2</sup> Conversely, testifying in criminal and civil trials has traditionally been an obligation of citizenship and integral to serving the public interest.<sup>3</sup> First Amendment values, therefore, may conflict with the public interest in effective law enforcement and guaranteeing a fair trial in which all relevant evidence is presented.

The past thirty years have produced vehement conflicts between these competing interests. Seldom does a month go by without a journalist confronting efforts to force disclosure of confidential sources.<sup>4</sup> The courts have attempted to solve this problem by developing a qualified privilege that provides journalists with a partial First Amendment shield

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1. Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 *Ariz. L. Rev.* 815, 816 (1984).

2. Glenn A. Browne, Note, *Just Between You and Me . . . For Now: Reexamining a Qualified Privilege for Reporters to Keep Sources Confidential in Grand Jury Proceedings*, 1988 *U. Ill. L. Rev.* 739, 739 (1988).

3. See *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Blair v. United States*, 250 U.S. 273, 280 (1919).

4. In December 1993, an Anchorage Daily News reporter faced repeated efforts to force disclosure of her source of internal corporate documents. David Whitney, *Alyeska, Hamel, Fail to Settle Case*, Anchorage Daily News, Dec. 11, 1993, at A1. In April 1993, a reporter in Florida was jailed for thirty days for refusing to disclose a source. Owen Thomas, *Notes on the Media*, Christian Sci. Monitor, Apr. 6, 1993, at 13.

from compelled disclosure of confidential sources and materials. Legislatures have attempted to provide protection to journalists by enacting state statutes dubbed "press shield" laws. These resolutions, however, have often been incomplete and inadequate.

There is little case law that discusses who, beyond the traditional media, is covered by journalist's privilege.<sup>5</sup> Historically, nearly all claims involved members of the traditional print and broadcast media. A recent Ninth Circuit case, however, granted the privilege to an investigative book author.<sup>6</sup> Determining exactly who is entitled to the privilege will be particularly important as technology provides additional tools and techniques to improve information flow<sup>7</sup> and trends in the media suggest a blurring of the traditional lines between news and entertainment.<sup>8</sup>

This Comment examines the evolution of the class protected by journalist's privilege. Part I provides a doctrinal and historical analysis of journalist's privilege. Part II examines who is currently entitled to protection and the courts' concerns about expanding this protection. Part III advocates that all circuits adopt the *von Bulow* test and reject adding a public interest requirement to standing analysis. It also recommends how courts should respond to authors of small circulation, private newsletters and creators of fictional works who claim the privilege.

## I. THE DEVELOPMENT OF THE JOURNALIST'S PRIVILEGE

Journalists have long claimed a privilege to protect the confidentiality of sources. In 1722, Benjamin Franklin's half-brother was brought before a committee of the legislature and told to reveal the name of an author of a story in his newspaper. When he refused, he was imprisoned for a month.<sup>9</sup> Until the 1960s, relatively few courts considered whether a

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5. For the purposes of this Comment, the traditional media includes newspapers, magazines, television, radio, and wire services.

6. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993). The Ninth Circuit rejected an academic researcher's right to claim the journalist's privilege in *In re Grand Jury Proceedings, Scarce*, 5 F.3d 397 (9th Cir. 1993), *cert. denied*, *Scarce v. United States*, 114 S.Ct. 685 (1994). This is not within the scope of this Comment.

7. Examples include electronic mail, on-line services such as Prodigy or Westlaw; and 24-hour news networks such as CNN or C-Span. For an argument why electronic on-line services deserve freedom of the press protections, see Tung Yin, Comment, *Post-Modern Printing Presses: Extending Freedom of the Press to Protect Electronic Information Services*, 8:2 High Tech. L. J. 311 (1993).

8. This trend is exemplified by the rise of tabloid journalism such as *A Current Affair* and *Hard Copy* and "reality" programming such as *COPS* and *Rescue 911*.

9. Marcus, *supra* note 1, at 817.

constitutional privilege protected journalists who refused to reveal their sources. Following a number of confrontations between the press and the government, the United States Supreme Court rejected an absolute privilege in 1972 in *Branzburg v. Hayes*.<sup>10</sup> Since this decision, most courts have recognized a qualified privilege that provides a partial First Amendment shield from compelled disclosure of journalists' confidential sources and materials.<sup>11</sup> Courts typically engage in two separate analyses to determine when a journalist is protected. First, the courts will decide if the journalist has standing to claim the privilege. Second, the courts will balance the interest in freedom of the press against the need for disclosure, and then determine where the paramount interest lies.

#### A. *The Need for a Journalist's Privilege*

There are two competing interests at issue in deciding the existence and extent of a journalist's privilege. The preservation of the free flow of information has long been recognized as a core objective of the First Amendment.<sup>12</sup> The First Amendment also rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the public's welfare.<sup>13</sup> There is, therefore, a paramount public interest in maintaining a "vigorous, aggressive and independent press."<sup>14</sup> Courts recognize that this public interest is threatened by compelled testimony of journalists because of the likely deterrent effect on future undercover investigative reporting.<sup>15</sup>

Additionally, courts are concerned that shielding information will prevent parties in litigation from receiving a fair trial. In civil trials, pre-trial discovery is treated liberally.<sup>16</sup> If no privilege applies,<sup>17</sup> a person can be compelled to produce any relevant evidence or any information

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10. 408 U.S. 665 (1972).

11. The circuits do not define the privilege uniformly. Although the journalist's privilege definition varies among the circuits, the differences do not significantly affect the subject of this Comment.

12. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

13. *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139–40 (1969).

14. *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), *cert. denied*, 464 U.S. 816 (1983).

15. *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

16. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

17. Recognized privileges vary from state to state, but at least protect marital communications, communications between client and lawyer, confidential information secured in the course of the physician-patient relationship, and governmental secrets. John W. Strong et al., *McCormick on Evidence* § 72–113 (4th ed. 1992).

reasonably calculated to lead to the discovery of admissible evidence.<sup>18</sup> This broad right of discovery is based on the principle that litigants have a right to every person's evidence and that this wide access advances the integrity and fairness of the judicial process by promoting the search for the truth.<sup>19</sup> In criminal trials, courts are even more concerned about the paramount public interest in effective law enforcement and a defendant's right to a fair trial.

Despite these competing interests and the long history of journalists claiming a privilege,<sup>20</sup> few cases addressed the privilege's existence until the late 1950s.<sup>21</sup> Two factors contributed to this. First, reporters seldom demanded a hearing, and many cases went unreported because courts dealt leniently with reporters who violated court orders to disclose informants' identities.<sup>22</sup> Second, to maintain a good working relationship with the press, the federal government often limited its efforts to obtain journalists' confidential information and sources.<sup>23</sup>

Journalists initially relied on the common law to argue that a privilege existed that protected confidential sources.<sup>24</sup> They contended that the public's interest in the unrestricted flow of information justified the recognition of a common law privilege. Courts rejected this argument and ruled that a reporter's confidential communications were not privileged from disclosure,<sup>25</sup> because the harm to the fair adjudication of litigation would outweigh the uncertain improvement to the free flow of information.<sup>26</sup>

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18. Fed. R. Civ. P. 26(b)(1).

19. *United States v. Bryan*, 339 U.S. 323, 331 (1950).

20. The first reported case was *Ex parte Nugent*, 18 F. Cas. 471 (D.C. Cir. 1848) (No. 10,375) (jailing a reporter for contempt of Congress for sending a copy of a proposed treaty to end the Mexican-American War to his editor).

21. Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 Cal. L. Rev. 1198, 1200 n.9 (1970).

22. *Id.* at 1201 n.11 and accompanying text. The punishment dealt to reporters for refusing to disclose information was mild compared to the damage journalists felt that disclosure of confidential sources would cause. See, e.g., *State v. Buchanan*, 436 P.2d 729 (Or.), cert. denied, *Buchanan v. Oregon*, 392 U.S. 905 (1968) (fining a reporter \$300).

23. Comment, *supra* note 21, at 1201. When the government needed confidential information from the press, it usually entered into negotiations with the party from whom the information was sought in order to reach a compromise.

24. Craig A. Newman, *Qualified Privilege for Journalists Branzburg v. Hayes: A Decade Later*, 61 U. Det. L. Rev. 463, 464 (1984).

25. *Id.* at 465.

26. Marcus, *supra* note 1, at 818-19.

Having failed to persuade courts to grant protection under the common law, reporters asked state legislatures to enact "press shield" laws. These shield laws created a reporter's right to protect confidential sources and research materials. Although a significant number of states have enacted such legislation,<sup>27</sup> journalists have found that these shield laws do not provide adequate protections. The shield laws are not uniform, which creates problems for national publications. They are also narrowly written with respect to both the scope of the privilege and the scope of the protected class.<sup>28</sup> For instance, the California press shield law limits protections to the sources of "persons connected with or employed by or any person who has been so connected or employed by" newspapers, magazines, press associations, wire services, and other periodical publications.<sup>29</sup> Finally, courts have construed these statutes narrowly.<sup>30</sup>

*Garland v. Torre*,<sup>31</sup> decided in 1958, was the first case to recognize that compelled disclosure of a journalist's confidential sources could abridge the First Amendment's guarantee of press freedom.<sup>32</sup> Over the next decade, several cases endorsed the *Garland* recognition of a First Amendment privilege.<sup>33</sup> The majority of courts, however, still refused to grant reporters a privilege in any form.<sup>34</sup>

During the 1960s, the number of subpoenas for journalists' confidential sources rose dramatically as a result of the Nixon Administration's attempts to undermine leftist, radical activity.<sup>35</sup> The

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27. Twenty-eight states have enacted press shield laws. Jonathan Groner, *Media Push Broader Protection; ACLU Says D.C. Bill Shields Press Too Much*, *Legal Times*, Dec. 2, 1991, at 6. Courts in ten other states have found a privilege in the common law or the state constitution. Laurence H. Tribe, *American Constitutional Law* 975 (1988).

28. *People v. LeGrand*, 415 N.Y.S.2d 252 (N.Y. App. Div. 1979) (rejecting a book author's claim of privilege under the New York press shield law); *see also* *Matera v. Superior Court*, 825 P.2d 971 (Ariz. Ct. App. 1992). Because the protected class in shield laws is drawn narrowly, shield laws do not significantly impact this Comment.

29. Cal. Evid. Code §1070(a) (West 1994 Pocket Part).

30. Comment, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 *UCLA L. Rev.* 160, 169 (1976). Courts have held reporters to the strict letter of the law. They have not used legislative intent to correct ambiguities or mistakes in the shield law's wording. *Id.*

31. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

32. *Id.* at 548.

33. *Adams v. Associated Press*, 46 F.R.D. 439 (S.D. Tex. 1969), *cert. denied*, 402 U.S. 901 (1971); *People v. Dohrn*, Order No. 69-3808, Cook Co., Ill., Cir. Ct. Crim. Div. (1970).

34. *In re Goodfader*, 367 P.2d 472 (Haw. 1961); *State v. Buchanan*, 436 P.2d 729 (Or.), *cert. denied*, 392 U.S. 905 (1968); *State v. Knops*, 183 N.W.2d 93 (Wis. 1971).

35. Comment, *supra* note 30, at 162-63 nn.13, 15, 20. The first sign of the growing use of subpoenas was in the Chicago Seven trial. The government served subpoenas on all four major

government alleged that the press was sympathetic to leftist organizations and, thus, often had information unobtainable by the government.<sup>36</sup> The rise in subpoenas met with strong opposition from the media, and an unprecedented number of journalists began claiming that a constitutional privilege protected them from compelled disclosure of information.<sup>37</sup> The Justice Department tried to quell the complaints of journalists by issuing "Guidelines for Subpoenas of the News Media." These guidelines encouraged Justice Department lawyers to negotiate with reporters and to issue subpoenas only as a last resort.<sup>38</sup> Despite the guidelines, federal law enforcement officials continued to subpoena journalists to testify and to reveal unpublished information.<sup>39</sup>

*B. Branzburg v. Hayes Rejects an Absolute Privilege But Recognizes the Potential for a Qualified Privilege*

The United States Supreme Court's seminal ruling on the protection of journalist's confidential sources came in a group of four consolidated cases titled *Branzburg v. Hayes*.<sup>40</sup> In a 5-4 decision, the Court rejected a special First Amendment privilege for the press but recognized that a qualified privilege would exist in certain circumstances. The first three cases involved reporters whose motions to quash<sup>41</sup> had been denied by

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Chicago daily newspapers, the three major television networks, and *Newsweek*, *Time*, and *Life* magazines. Thereafter, reporters faced subpoenas in almost every trial brought against leftists. These included the trials of members of Students for a Democratic Society, Angela Davis, and Bobby Seale.

36. *Id.* at 163. Before the Nixon administration began to investigate militant left-wing activists, there had rarely been a problem. Usually the Justice Department wanted information on Klan-type elements. The press had little sympathy for these groups so the information was passed on in a casual, amiable spirit. This changed after Vice-President Agnew's attacks on the press and Attorney General John Mitchell's strong prosecutions of left-wing militants who many reporters felt were justified in some of their militancy.

37. John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Hum. Rts. L. Rev. 57, 62 n.24 (1985) (noting that between 1968 and 1981 eighty cases arose involving a reporter's claim of privilege); *Cf.* Comment, *supra* note 21, at 1200 n.9. (noting that between 1911 and 1968 there were only seventeen reported cases involving reporter's privilege).

38. Newman, *supra* note 24, at 469-70 (quoting Department of Justice, Memo No. 692 (Sept. 2, 1970)).

39. *Id.*

40. 408 U.S. 665 (1972).

41. A motion to quash is one that is brought to annul or make void an indictment or subpoena. *Black's Law Dictionary* 1245 (6th ed. 1979).

the highest state courts in Kentucky and Massachusetts.<sup>42</sup> These courts rejected the reporters' assertions that they could refuse to appear before grand juries. The courts found that the grand jury investigations were proper, and that any adverse effect on the free dissemination of news caused by the reporters' appearances was indirect, theoretical, and uncertain.<sup>43</sup> In contrast, the Ninth Circuit, in *United States v. Caldwell*, granted a reporter's motion to quash.<sup>44</sup> The Ninth Circuit said that First Amendment protections existed to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest.<sup>45</sup> The court concluded that the First Amendment required that the press enjoy a constitutional privilege to decline to appear before a grand jury investigating dissenting groups. Otherwise, the public's First Amendment right to be informed would be jeopardized.<sup>46</sup> The Supreme Court granted certiorari in order to resolve this conflict.

Justice White, writing for a plurality, rejected the assertion that the press deserved a privilege to withhold confidential information. He noted that, historically, the grand jury had a right to every person's evidence,<sup>47</sup> and a reporter owed the same responsibility as any other citizen to a grand jury. He further held that the public interest in effective law enforcement and efficient grand jury proceedings was sufficient to override the burden on newsgathering that would result from compelling reporters to respond to relevant questions in a valid grand jury investigation.<sup>48</sup> Justice White was also skeptical about the contention that the freedom of the press to collect and disseminate news would be undermined if the Court rejected a journalist's privilege. He noted that the press had operated without constitutional protection for their informants since the country's inception. This had not inhibited the development or retention of confidential news sources.<sup>49</sup>

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42. *Branzburg*, 408 U.S. at 669–70, 674.

43. *Id.* at 674.

44. *Id.* at 675, 677.

45. *Caldwell v. United States*, 434 F.2d 1081, 1084–85 (9th Cir. 1970), *rev'd sub nom.*, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

46. *Id.* at 1089.

47. *Branzburg*, 408 U.S. at 688 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

48. *Id.* at 690–91.

49. *Id.* at 698–99.



Finally, the plurality stated that, unlike the dissent,<sup>50</sup> it was unwilling to recognize a privilege whose administration would present significant practical and conceptual difficulties.<sup>51</sup> Every time a reporter resisted a subpoena, the court would have to make preliminary factual and legal determinations as to whether the proper predicate had been laid for the subpoena.<sup>52</sup> The court would also have to evaluate the importance of different laws when considering whether enforcement of a particular law served a compelling government interest.<sup>53</sup> Finally, it would be necessary to define those categories of newsgatherers who qualified for the privilege. The plurality considered this a questionable exercise in light of the traditional doctrine that the liberty of the press is the right of the lonely pamphleteer just as much as the large metropolitan publisher.<sup>54</sup>

*Branzburg*, however, was not a total loss for the press. The Court recognized for the first time that newsgathering was protected by the First Amendment.<sup>55</sup> In addition, Justice Powell stated, in a concurrence, that the Court did not hold that journalists subpoenaed to testify before a grand jury were without any constitutional right to safeguard their sources.<sup>56</sup> He recognized that a motion to quash should be granted if a reporter is required to provide information that bears only a remote and tenuous relationship to the subject of the investigation or if the reporter has some other reason to believe that the compelled testimony implicates a confidential source relationship without advancing a legitimate need of law enforcement.<sup>57</sup> Justice Powell also asserted that claims of privilege should be determined case by case by balancing the freedom of the press against the obligation of all citizens to give relevant testimony about criminal conduct.<sup>58</sup> Justice Powell further clarified his limited view of

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50. *Id.* at 743 (Stewart, J., dissenting). The dissent would have held that a reporter's sources would remain confidential unless the government could demonstrate a compelling interest in the information. It would have required the government to: (1) show that there is probable cause to believe that the journalist has information that is clearly relevant to a specific, probable violation of the law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

51. *Id.* at 703-04.

52. *Id.* at 705.

53. *Id.* at 705-06.

54. *Id.* at 704.

55. *Id.* at 681.

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

57. *Id.* at 710.

58. *Id.*

*Branzburg* in a dissent in *Saxbe v. Washington Post*.<sup>59</sup> He wrote that a fair reading of the plurality's analysis in *Branzburg* made plain that its outcome hinged on a balancing of the competing societal interests in the case and not on any determination that First Amendment protections did not exist.<sup>60</sup>

### C. Growth of the Qualified Privilege

The holding in *Branzburg* caused confusion among commentators and judges alike. Four justices concluded that reporters could be compelled to disclose their sources; four justices said they could not be so compelled; and Justice Powell took a middle position by allowing compelled disclosure in some circumstances but not in others. This left the lower courts to decide whether a privilege existed in those situations that went beyond the *Branzburg* facts.

Immediately following *Branzburg*, many judges and commentators felt that a journalist's privilege had been completely rejected.<sup>61</sup> In fact, in the first cases after *Branzburg*, both federal and state judges denied any First Amendment privilege of confidentiality for press defendants.<sup>62</sup> A reading of the cases since the Court's decision, however, makes reasonably certain the conclusion that Justice Powell's concurrence is the controlling opinion of the case.<sup>63</sup> Based on this concurrence, every circuit but one that has ruled on the issue has adopted a qualified privilege that requires a case-by-case balancing of interests.<sup>64</sup>

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59. 417 U.S. 843, 850 (1974) (Powell, J., dissenting).

60. *Id.* at 859–60.

61. Marcus, *supra* note 1, at 839. Many states responded to the holding of *Branzburg* by enacting or strengthening existing "press shield" laws. *Id.* at 859–60. There was also a movement in the U.S. Congress to enact a national "press shield" law. *Id.* at 860.

62. See *Lewis v. United States*, 501 F.2d 418 (9th Cir. 1974), *cert. denied*, 420 U.S. 913 (1975); *Lightman v. State*, 294 A.2d 149 (Md. Ct. Spec. App. 1972), *cert. denied*, 411 U.S. 951 (1973); *In re Farber*, 394 A.2d 330 (N.J.), *cert. denied*, N.Y. Times Co. v. New Jersey, 439 U.S. 997 (1978); *In re Bridge* 295 A.2d 3 (N.J. Super. Ct. App. Div. 1972), *cert. denied*, 410 U.S. 991 (1973). *But see Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972).

63. Marcus, *supra* note 1, at 836.

64. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595–96 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *La Rouche v. Nat'l Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Miller v. Transamerican Press, Inc.*, 621 F. 2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992–93 & n.9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Farr v. Pitchess*, 522 F.2d 464, 467–68 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436–37 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d

*Farr v. Pitchess*<sup>65</sup> was the first case to recognize formally a qualified privilege. *Farr* asserted that *Branzburg* identified a limited or conditional First Amendment protection of news sources.<sup>66</sup> *Farr* then formulated a test to determine whether the requested testimony or material was within the privilege. The court stated that the claimed First Amendment privilege and the opposing need for disclosure should be considered in light of the surrounding facts and a balance should be struck in favor of the more compelling interest.<sup>67</sup> Other circuits adopting a qualified privilege have also construed *Branzburg* as advocating a case-by-case balancing of interests. Almost every circuit has adopted the following three-part test: (1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in obtaining the information.<sup>68</sup> Most courts also recognize that there is little reason for drawing a formal distinction between the standards of review for civil and criminal cases.<sup>69</sup> Therefore, courts have used this three-part test, or some variation, for both civil and criminal cases.

## II. DEFINING THE PROTECTED CLASS

Part of the plurality's reason for rejecting the privilege in *Branzburg* was a concern that defining the protected class would present practical and conceptual difficulties.<sup>70</sup> Justice White felt that almost all authors could assert that they were providing information to the public and that

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705, 714 (D.C. Cir. 1981). Only the Sixth Circuit has explicitly rejected the privilege. *In re Grand Jury Proceedings, Storer Communications, Inc.*, 810 F.2d 580, 584-85 (6th Cir. 1987). The Seventh and the Eleventh Circuits have not ruled on the issue.

65. 522 F.2d 464. The Eighth Circuit, in *Cervantes*, 464 F.2d at 992-93, was the first circuit to suggest that prior cases did not absolutely reject a testimonial privilege for journalists, although it fell short of recognizing a formal privilege. The court felt that to routinely grant motions compelling reporter's testimony would deter the free flow of news from confidential sources.

66. *Farr*, 522 F.2d at 467.

67. *Id.* at 468.

68. *La Rouche*, 780 F.2d at 1139. This test is refined from one originally articulated in *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

69. *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983). There is a marked difference, however, between the way the interests are balanced in these cases. In criminal cases, courts nearly always view the public's interest in effective law enforcement and in guaranteeing defendants a fair trial as compelling. In contrast, courts in civil cases often find for the journalist. Courts conclude that compulsory process should not automatically prevail over the competing First Amendment interests because the reporter's interest is public while the civil litigant's is predominantly private.

70. *Branzburg v. Hayes*, 408 U.S. 665, 703-04 (1972).

they relied on confidential sources who would be silenced if the authors were compelled to disclose information to a grand jury.<sup>71</sup> He was also worried that some criminals might set up “sham” newspapers in order to claim the privilege and, thereby, insulate themselves from grand jury inquiry.<sup>72</sup>

Contrary to the plurality's concern, courts have rarely been forced to define categories of journalists who have standing to assert the privilege. Most claims have involved the institutional press, whose membership in the protected class is simple to determine. In *von Bulow v. von Bulow*, the Second Circuit designed a test to determine who, beyond the institutional press, belongs to the protected class.<sup>73</sup> The *von Bulow* test, also adopted by the Ninth Circuit,<sup>74</sup> defines a member of the protected class as anyone who, at the inception of the newsgathering process, had the intent to disseminate information to the public. If the intent is present, the method of dissemination is irrelevant as long as it serves as a vehicle for information and opinion.<sup>75</sup>

Courts have specifically acknowledged the rights of the institutional print and broadcast media,<sup>76</sup> documentary filmmakers,<sup>77</sup> authors of technical publications,<sup>78</sup> and professional investigative book authors<sup>79</sup> to claim the journalist's privilege. Authors are not protected, however,

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71. *Id.* at 705.

72. *Id.* at 705 n.40.

73. 811 F.2d 136, 144 (2d Cir.), *cert denied*, 481 U.S. 1015 (1987).

74. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993).

75. *Id.* at 1293.

76. *See supra* note 64.

77. *Silkwood v. Kerr-McGee Co.*, 563 F.2d 433 (10th Cir. 1977) (reversing a district court's conclusion that the claimant was not a newsperson because he did not regularly engage in obtaining, writing, reviewing, editing or otherwise preparing the news).

78. *Apicella v. McNeil Lab., Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975) (protection for technical publications is included within the scope of journalist's privilege because the traditional doctrine of freedom of the press is the right of all types of reporters).

79. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (reversing a district court order denying a professional investigative book author standing to claim journalist's privilege.); *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987) (denying standing to a novice unpublished book author who did not have the intent to disseminate at the inception of the news gathering process); *State v. Fontanille*, No. 93-KH-935, 1994 WL 25830 (La. Ct. App. Jan. 24, 1994) (finding an investigative book author constitutionally entitled to the journalist's qualified testimonial privilege).

when, by their own actions, they become investigative arms of the state<sup>80</sup> or when the issues of the case involve questions about the truth of factual assertions contained in their books.<sup>81</sup> The courts have not ruled on non-investigative book authors. Some cases have held book authors ineligible to claim protection under “press shield” laws. These cases raise arguments that could impact book authors’ eligibility for the journalist’s privilege.<sup>82</sup>

In addition to meeting the *von Bulow* test, the courts’ analysis of claims of journalist’s privilege appear to contain three common elements. First, the courts seem to require that the class in question serves a public interest. Second, they balance the law’s traditionally narrow view of privileges and the need to expand the protected class in order to maintain consistency in applying the journalist’s privilege. Finally, the courts’ determinations are often driven by the unique facts of each case.

#### A. *The “Public Interest” Requirement*

Case law suggests that for standing to be granted, a claimant must demonstrate a public interest in the general subject matter of a work. The earliest appearance of this requirement was in *Apicella v. McNeil Laboratories*.<sup>83</sup> *The Medical Letter*, the publication at issue in *Apicella*, reported on the properties, effectiveness, and adverse effects of various drugs. In order to accomplish this, the publishers employed doctors as confidential consultants to evaluate the drugs. The defendant attempted to depose these consultants, but *The Medical Letter* refused to disclose their names.<sup>84</sup> The court upheld the publication’s refusal, finding that the

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80. *Farber v. Job*, 467 F. Supp. 163 (D.N.J. 1978) (holding that author was not eligible to claim journalist’s privilege when, by his own actions, he had become an investigative arm of the state and the only reason he was withholding his confidential sources was to make a “bigger splash” with his book).

81. *In re Grand Jury Matter, Gronowicz*, 764 F.2d 983 (3rd Cir. 1985), *cert. denied*, *Gronowicz v. United States*, 474 U.S. 1055 (1986) (holding that author would not be protected by the privilege when the issues of the case involved questions about the truth or falsity of factual assertions contained within the book).

82. *See, e.g., People v. LeGrand*, 415 N.Y.S.2d 252 (N.Y. App. Div. 1979). (concluding that an author’s interest in protecting confidential information was less compelling than that of a journalist) To report the news and remain valuable to the public, professional journalists must constantly cultivate sources of information. Journalists must also maintain their credibility and trustworthiness as repositories of confidential information. Most authors, in contrast, are independent contractors whose success invariably depends more on the researching of public and private documents, than on confidential rapport with sources of information.

83. 66 F.R.D. 78 (E.D.N.Y. 1975).

84. *Id.* at 80.

newsletter, with a circulation of 70,000, performed a public and professional service by providing information on various drugs.<sup>85</sup> The court felt that free communication in the area of health, just as in politics, should be encouraged and that this could best be accomplished by providing technical journals the same privileges afforded to other publications.<sup>86</sup> *Apicella*, therefore, implies that there must be a public interest in the content of the material.

This public interest requirement was reinforced in *Silkwood v. Kerr-McGee*.<sup>87</sup> In *Silkwood*, the defendant subpoenaed a third party's research for a documentary film.<sup>88</sup> The court upheld the filmmaker's right to have the subpoena quashed because of the underlying public interest in documentary filmmaking and, particularly, in affording it the same protections as other publications that communicate information to the public.<sup>89</sup>

Although *Silkwood* and *Apicella* preceded the *von Bulow* test, a more recent case, *Shoen v. Shoen*,<sup>90</sup> also suggests that a public or professional function is necessary. In *Shoen*, the court subpoenaed an investigative book author's research in a defamation action.<sup>91</sup> The court upheld the author's right to have the subpoena quashed. The court noted that the journalist's privilege was designed to protect investigative reporting, regardless of the medium used to report the news to the public. It further recognized that investigative book authors have historically played a vital role in bringing to light newsworthy facts on topical and controversial matters of great public importance.<sup>92</sup> The court held that because these authors performed an important public service, they deserved the same protections as conventional journalists. Thus, the emphasis on public or professional service remains essential in defining the scope of the journalist's privilege.

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85. *Id.* at 85.

86. *Id.*

87. 563 F.2d 433 (10th Cir. 1977).

88. *Id.* at 434.

89. *Id.* at 436-37.

90. 5 F.3d 1289 (9th Cir. 1993).

91. *Id.* at 1291.

92. *Id.* at 1293. The court cited the works of Rachel Carson, *The Silent Spring* (1962); Jessica Mitford, *The American Way Of Death* (1963) and *The American Way Of Birth* (1992); Ralph Nader, *Unsafe At Any Speed* (1965); Upton Sinclair, *The Jungle* (1906); and Lincoln Steffens, *The Shame Of The Cities* (1904).

B. *Balancing the Courts' Narrow View of Privilege and the Trend to Expand the Protected Class.*

Courts have historically been cautious about privileges, because privileges contravene a fundamental principle of our judicial system that the public has a right to every person's evidence.<sup>93</sup> As such, exceptions are not lightly created nor expansively construed.<sup>94</sup> Evidentiary limitations are properly recognized only to the extent that such privileges promote a public good that transcends the normally predominant principle of using all rational means for finding the truth.<sup>95</sup>

By definition, any expansion of the protected class will provide more exceptions to the public's right to evidence and compromise the fair and complete adjudication of matters. One seeking to expand a privilege, therefore, must demonstrate an individual or public interest substantial enough to outweigh the interest in having access to all information necessary for a fair trial. In many cases, freedom of the press and the public's right of access to social, political, aesthetic, moral, and other ideas will meet this burden.<sup>96</sup>

Despite the courts' reluctance to expand privileges, the general trend has been to expand the class of those who have standing to claim the journalist's privilege. The "press" includes a wide variety of communication formats. As the Supreme Court said in *Lovell v. City of Griffin*, "[T]he liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."<sup>97</sup> The journalist's privilege, therefore, has not been limited to institutional or traditional types of media, but includes other forms that contribute to the free flow of information to the public.<sup>98</sup>

Furthermore, the courts have expanded the class in order to be fair and consistent in applying the privilege.<sup>99</sup> Information that would be protected if gathered and published in a newspaper has also been protected if communicated to the public in another way.<sup>100</sup> Journalism

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93. *United States v. Bryan*, 339 U.S. 323, 331 (1950).

94. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

95. *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

96. *See supra* notes 61-69 and accompanying text.

97. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

98. *Silkwood v. Kerr-McGee Co.*, 563 F.2d 433, 437 (10th Cir. 1977); *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987).

99. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993).

100. *Apicella v. McNeil Lab., Inc.*, 66 F.R.D. 78, 85 (E.D.N.Y. 1975); *Shoen*, 5 F.3d at 1293.

must be defined by its content, not its form. This makes sense because it would be unthinkable to have a rule that an investigative journalist, such as Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing about Watergate, but not as the author of *All the President's Men*.<sup>101</sup>

### C. Courts' Determinations Are Fact Driven

Courts have considered the facts of each case when determining whether a claimant has standing to claim the journalist's privilege. This is illustrated by contrasting the results of *von Bulow*<sup>102</sup> and *Shoen*<sup>103</sup>. The identical test was used to determine standing in both cases.<sup>104</sup> Nevertheless, the courts rejected the privilege for the author in *von Bulow* but granted it in *Shoen*.

*Von Bulow* grew out of civil litigation between Claus von Bulow and the children of his wife, Martha von Bulow. Andrea Reynolds, a third-party witness, appealed a contempt order that directed her to produce certain materials relevant to the litigation, including the manuscript of an unpublished book she had written. Reynolds, an intimate friend of Claus von Bulow, claimed that the manuscript was protected by the journalist's privilege. To support her claim, she asserted that she was a writer for the German magazine, *Stern*, showed a press pass issued by the *New York Post*, and produced a telex indicating that her final manuscript would be serialized by a German publishing agency.<sup>105</sup> During her deposition, however, Reynolds stated that she had never published anything under her own name and that the manuscript had not been prepared under contract.<sup>106</sup>

In *Shoen*, author Ronald Watkins became involved in a defamation action because of his work on a non-fiction book about the long and bitter feud over control of the U-Haul company.<sup>107</sup> This feud pitted Leonard Shoen against two of his sons, Mark and Edward. Following the murder of the wife of a third son, Leonard Schoen made statements to the national press implying that his sons were involved in the killing.

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101. *Shoen*, 5 F.3d at 1293.

102. 811 F.2d 136 (2d Cir.), cert. denied, 481 U.S. 1015 (1987).

103. 5 F.3d 1289 (9th Cir. 1993).

104. *Id.* at 1293; *von Bulow*, 811 F.2d at 144.

105. *von Bulow*, 811 F.2d at 137-39.

106. *Id.* at 139-40.

107. 5 F.3d at 1290.



Mark and Edward Schoen subsequently filed a defamation action. Meanwhile, Watkins secured a contract with a major publisher to write a book about the Shoen family. Leonard Shoen agreed to cooperate with Watkins by providing source material for the book. Mark and Edward Schoen then subpoenaed Watkins's tapes and notes for the defamation action.<sup>108</sup>

The differences between the cases demonstrate why one court granted standing to Watkins, while another denied it to Reynolds. Watkins was a professional author with previous book credits and had a contract with a publisher to produce the book in question.<sup>109</sup> In court, Watkins claimed only the journalist's privilege,<sup>110</sup> and he had only a professional relationship with the Shoens.<sup>111</sup> In contrast, Reynolds' manuscript had been rejected by publishers, and she had never published anything under her own name.<sup>112</sup> She claimed not only journalist's privilege, but also scholar's privilege, attorney-client privilege, and "any other privilege that exists under the sun."<sup>113</sup> Finally, Reynolds was romantically involved with Claus von Bulow.<sup>114</sup> This comparison suggests that a professional who has an affiliation with a legitimate medium and who appears to be sincere about the claim of privilege is more likely to be granted standing. If the person claiming the privilege appears to claim it solely to prevent the production of documents or to refuse to testify, standing should be rejected.

It appears that when determining standing, courts will consider the sincerity of the claimant as well as whether the public's interest in the content outweighs the need to construe privileges narrowly. These factors will be considered in addition to the requirements of the *von Bulow* test. The public interest in the content of a work or in an individual publication, however, should not be considered in determinations of standing. Instead, it should be weighed when examining whether the public interest in maintaining a fair trial outweighs the burden on the press.<sup>115</sup>

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108. *Id.* at 1290-91.

109. *Id.* at 1290.

110. *Id.* at 1291.

111. *Id.* at 1290-91.

112. *von Bulow*, 811 F.2d at 139-40. Novice and free-lance writers are eligible for the privilege, but must clearly show that the author's intent was to disseminate the news to the public.

113. *Id.* at 139.

114. *Id.*

115. See *infra* notes 123-28 and accompanying text.

### III. A PROPOSED TEST TO EVALUATE CLAIMANTS OF THE JOURNALIST'S PRIVILEGE AND HOW IT WOULD APPLY TO TWO EXAMPLES

The *von Bulow* test should be adopted by all circuits to determine whether an individual or group has standing to claim the journalist's privilege. Currently, both the Ninth Circuit and the Second Circuit use the *von Bulow* test. It defines the protected class as anyone who has the intent to use material sought, gathered, or received to disseminate information to the public and had that intent at the inception of the newsgathering process.<sup>116</sup> The test should be adopted for three reasons.

First, the *von Bulow* test should be adopted because it is consistent with the goals and concerns that underlie the journalist's privilege. Since the test emphasizes the intent behind the newsgathering process and not the mode of dissemination, it is consistent with the Supreme Court's recognition that the press includes all publications that contribute to the free flow of information.<sup>117</sup> The test is also consistent with the courts' concerns that the privilege apply only to legitimate members of the press. The test does not grant standing to any person with a manuscript or film, but requires an *intent* to disseminate *news* to the *public* at the *inception* of the newsgathering process. Therefore, the privilege is available only to persons whose purposes are those traditionally inherent in the press.

Second, the *von Bulow* test should be adopted because it can apply to new ways of communicating information. For a test to be useful, it must be flexible enough for courts to apply it effectively to both the traditional media and new communication formats. The *von Bulow* test satisfies this requirement because it emphasizes the existence and timing of the author's intent, not the method of dissemination. Finally, the test should be adopted because the Second and Ninth Circuits are experts in this area because most of the publishing and media industries are located within their boundaries. As a result, they have more experience in adjudicating disputes involving the media.

What follows is a demonstration of how the *von Bulow* test would apply to two groups that are likely claimants. These groups are particularly intriguing, because an analysis of their claims raises issues of whether different standards should be applied to public and private speech and whether the privilege is designed to protect fiction as well as fact. The best approach for courts to take is to grant standing to authors

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116. *von Bulow*, 811 F.2d at 144.

117. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

of small circulation newsletters and reject standing for creators of fictional works.

*A. Authors of Small Circulation Private Newsletters Should Have Standing To Assert the Journalist's Privilege*

The first potential class includes the editors, publishers and contributors of small circulation private newsletters. These publications are designed to reach a discrete audience, typically members of a club, workplace, or organization. Authors or publishers of these newsletters may claim the journalist's privilege in a number of situations. In criminal cases, newsletters may print information that would be relevant to law enforcement officials pursuing or prosecuting a crime. The most likely examples would be newsletters published by white supremacists or computer users. For instance, a white supremacist newsletter could print an article about a hate crime that included information unknown to law enforcement. Similarly, a newsletter for computer users could print information regarding illegal accessing of databases. These differ from "sham" newsletters, because they do not exist for an illegal purpose.

In civil actions, a claim of the journalist's privilege may arise from allegations that a newsletter printed libelous statements or material that demonstrated that the newsletter had information relevant to ongoing litigation. For instance, a newsletter's coverage of power struggles for leadership of an organization could lead to allegations of libel, or a published interview could refer to unpublished information that parties would like to acquire in discovery.

The question of standing for authors of these publications arises, because small circulation newsletters arguably fail to meet the "intent to disseminate to the public"<sup>118</sup> clause of the *von Bulow* test. Although they disseminate information, the newsletters are available only to a discrete audience determined by membership or employment. These newsletters are not in libraries, nor are they readily available to the general public in any other way.<sup>119</sup>

These newsletters are similar to the publications that worried Justice White in *Branzburg*. He was afraid that groups might set up newspapers in order to engage in criminal activity and then claim the journalist's

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118. *von Bulow*, 811 F.2d at 144.

119. Large circulation newsletters, such as publications from professional associations or public interest groups, will have few problems gaining standing because their large circulation blurs the line between their membership and the public. Their publications are also usually available to the public.

privilege to insulate themselves from grand jury inquiry. Justice White said one might expect that “sham” newspapers would be easily distinguishable from legitimate ones. He said, however, that the First Amendment normally prohibits courts from inquiring into the content of expression and thus protects publications regardless of their motivation, orthodoxy, timeliness, or taste.<sup>120</sup>

The courts will probably treat this question on a case-by-case basis. Precedent suggests that courts will grant the privilege in most cases and will base this decision on the holding of *Lovell*.<sup>121</sup> *Lovell* held that, historically, the press included all methods of communication that provided a vehicle for information or opinion. The language from *Lovell* has been cited to extend standing to documentary filmmakers, publishers of technical journals, and investigative book authors, and was important in formulating the *von Bulow* test.<sup>122</sup>

Courts will probably not grant the privilege to all newsletters. Some courts may reject standing because a newsletter's circulation is too small to reach the “public.” Other courts may adopt the reasoning of *Dun & Bradstreet v. Greenmoss Builders*<sup>123</sup> and reject standing to claim the privilege, because the subject matter of the newsletter does not involve matters of public or general interest. In *Dun & Bradstreet*, a plurality suggested that libel protections for journalists extended only to defamatory statements involving a matter of public or general interest.<sup>124</sup> Although this limitation has not been formally adopted as part of the journalist's privilege analysis, the public interest requirement in *Apicella*, *Silkwood*, and *Schoen* suggests that some courts may adopt *Dun & Bradstreet* as part of the test.<sup>125</sup> The newsletters that will most likely fail to qualify will be published by extremist or counterculture groups, because their speech is traditionally disfavored by the majority and, therefore, may not serve a general or public interest.

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120. *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972). Although Justice White's concerns were directly related to the use of “sham” newspapers to escape the grand jury, they apply to all criminal and civil cases because of the courts' general concerns about the right to a fair trial.

121. 303 U.S. 444, 452 (1938). See *supra* note 97 and accompanying text for a quotation of the language.

122. *Silkwood v. Kerr-McGee Co.*, 563 F.2d 433, 437 (10th Cir. 1977); *Apicella v. McNeil Lab., Inc.*, 66 F.R.D. 78, 84 (E.D.N.Y. 1975); *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987).

123. 472 U.S. 749 (1985).

124. *Id.* at 755 (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971)).

125. See *supra* notes 83–92 and accompanying text.

A better reasoned approach would be to recognize the right of all those affiliated with private newsletters to claim journalist's privilege. Denying standing to those affiliated with a private newsletter because its circulation is too small and doesn't reach the public contradicts the way courts have previously defined "public." The courts have not insisted that "dissemination to the public" means "dissemination to everyone."<sup>126</sup> In fact, the courts haven't even required "dissemination to the public" to mean complete public access to the publication.<sup>127</sup> For instance, courts have granted the privilege to small circulation newspapers.<sup>128</sup>

The audiences of private newsletters are also no more discrete than street corner pamphleteers, whom the courts have protected. *Branzburg* stated that the right of the "lonely pamphleteer" is equal to that of the "large metropolitan publisher."<sup>129</sup> *Lovell* said that the press "necessarily embraces pamphlets and leaflets."<sup>130</sup> The pamphleteer might be distinguished by some, because the audience is limited to who walks by and not to who joins the organization. This argument is unpersuasive. Like any organ of communication, a pamphlet's dissemination is defined by who elects to take, purchase, or view it. Furthermore, pamphleteers may self-select their audience and only offer the publication to members of a certain ethnic group or gender. Pamphleteers also self-select the audience based on where they stand. For instance, a pamphleteer would reach a significantly different audience distributing material in a suburban shopping mall than at a downtown bus stop. It would be awkward for courts to protect a pamphleteer, whose means of production and dissemination result in a small circulation and discrete audience, while denying protection to those affiliated with a private newsletter. The differences between the audiences are slight and should not be grounds for disqualifying newsletters.

The courts should not reject claims based on the failure of a newsletter to be in the public or general interest. As Justice Brennan said, courts should not have the power to decide what speech is of public concern.<sup>131</sup> Even if the courts require that publications perform some public

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126. This seems obvious. Not everyone sees a newspaper or owns a television.

127. Many magazines or newspapers are unaffordable to indigent persons. Similarly, many publications or programs are only available at a regional level.

128. See, e.g., *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993) (granting the journalist's privilege to a law student writing for his law school newspaper).

129. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

130. *Lovell v. Griffin*, 303 U.S. 444, 452 (1938).

131. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 785 n.11 (1985) (Brennan, J., dissenting).

function, every private newsletter can arguably meet this threshold. Employee newsletters maintain employee morale and lead to increased productivity.<sup>132</sup> Organizational or commercial newsletters enhance the expertise of their members and lead to heightened aesthetics, innovation, or economic success.<sup>133</sup> Even newsletters of extremist or counterculture groups serve the public interest by adding to the "marketplace of ideas" and the nation's diversity.<sup>134</sup>

Second, denying standing to some private newsletters would complicate the tests for determining whether to grant the journalist's privilege and, therefore, unnecessarily burden the judiciary. Currently, the application of journalist's privilege involves a threshold determination of standing using the *von Bulow* test. This is followed by a balancing of the competing interests of freedom of the press against the right to a fair trial to determine where the paramount interest lies. If courts denied standing to some authors and publishers of private newsletters because the newsletters' circulations were too small or because they failed to perform a public function, courts would be forced to draw a line based on the publication as well as on the intent of the individual author. This would require a third test to be met before a claim of journalist's privilege could be resolved. In stark contrast, reporters from a newspaper or television station would only have to prove the intent to disseminate their individual work, not the legitimacy of their organizations.

This third test would require findings of fact regarding whether the newsletter performed a public function or whether its circulation was large enough to constitute dissemination to the public. At the very least, it would require additional briefing and affidavits and probably the presentation of witnesses in a hearing. This would burden tight judicial calendars and overused courtrooms.

These added burdens are unnecessary. Because the journalist's privilege is a qualified rather than an absolute privilege, courts can factor in the public or general interest of a newsletter when examining whether

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132. Considerable literature exists that discusses the important role newsletters play in maintaining effective communication in the workplace and high employee morale. See, e.g., Robert C. Ford and Pamela L. Perrewe, *After the Layoff: Closing the Barn Door Before All the Horses Are Gone*, *Business Horizons*, July–Aug. 1993, at 34–41; Robert Liparulo, *Iron out Morale Problems*, *Real Estate Today*, Nov.–Dec. 1993, at 18–23; Martha Ray, *The New Way to Boost Morale: Keep Your Staff Informed*, *Working Woman*, July 1991, at 16–18

133. See, e.g., *In re Pan Am Corp.*, 161 B.R. 577 (S.D.N.Y. 1993) (granting Standard & Poor's the journalist privilege for their commercial periodicals).

134. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

the public interest in maintaining a fair trial outweighs the burden on the press. Thus, the courts do not have to make these determinations during the standing analysis. Contrary to Justice White's fears, sham newsletters will not be protected by the journalist's privilege, because they will always fail the balancing test.

Finally, denying the privilege to small circulation private newsletters would unfairly burden the small press and inhibit the expression of alternative views. Defining "dissemination to the public" or "public function" as including a circulation requirement or a narrow interpretation of what constitutes the public would stifle alternative views and unpopular speech. It would be a manifestation of the tyranny of the majority to say that publications with large circulations are, by definition, "public" or serving a "public function" while forcing small circulation newsletters to prove their public function. To deny the journalist's privilege to small newsletters would create problems of inequality and would deny some citizens access to communication that reflects their views.

*B. Creators of Fictional Works Should Not Have Standing To Assert the Journalist's Privilege*

Creators of fictional works also could attempt to claim standing for journalist's privilege. The potential class includes, but is not limited to, novelists, dramatists, filmmakers, artists, and television producers. Specifically, the increasing number of television movies that are "based on a true story,"<sup>135</sup> the recent play based on the Thomas-Hill hearings,<sup>136</sup> the movie *JFK*,<sup>137</sup> and the best-selling novels of Tom Clancy,<sup>138</sup> are examples of fictional works whose background research could have uncovered information relevant to litigation or law enforcement investigations and could have inspired claims that the creators' informative function was close enough to a journalist's to be eligible for the journalist's privilege.

The situation most likely to involve a claim of journalist's privilege would almost parallel the facts in *von Bulow* or *Silkwood*. A researcher

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135. Examples would include the recent television movies on Amy Fisher, the David Koresh incident in Waco, and the inevitable movies about Tonya Harding and Nancy Kerrigan.

136. Mame Hunt, *Unquestioned Integrity: The Hill-Thomas Hearings*.

137. (Warner Bros. 1992) (about the assassination of John F. Kennedy).

138. E.g., *The Hunt for Red October* (Berkley Books 1984); *Patriot Games* (G.P. Putnam's Sons 1987); *Red Storm Rising* (Berkley Books 1986).

investigates a controversial issue and intends to produce a work for public dissemination. While doing this research, the researcher uncovers information relevant to parties in litigation or law enforcement. The only difference from *von Bulow* or *Silkwood* is that in the hypothetical the researcher intends to create a fictional work to *entertain* the public rather than a non-fiction work to *inform* the public.

There is little in the case law to indicate how courts would rule on this issue. Justice White asserted in *Branzburg* that the informative function of the organized press is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. He felt that almost any author could accurately assert that the author was contributing to the flow of information to the public and that the author relied on confidential sources of information who would be silenced if the author were forced to make disclosures before a grand jury.<sup>139</sup> Although this language seems dispositive, Justice White did not argue that these classes should have standing to claim the journalist's privilege. Instead, he argued that an absolute journalist's privilege should be rejected on the ground that the potential class of persons claiming the privilege would be too large. Since *Branzburg*, however, courts have cited this language to show that *Branzburg* upheld *Lovell* and that protection from disclosure may be sought by those not associated with the institutionalized press.<sup>140</sup> No court has held that all of the classes mentioned by White should be eligible for the privilege.<sup>141</sup>

The language that most clearly implies that creators of fictional works should be eligible to claim journalist's privilege is found in *Shoen*. The majority noted that investigative book authors historically played a vital role in uncovering information on matters of great public importance.<sup>142</sup> An example cited by the court is Upton Sinclair and his novel, *The Jungle*.<sup>143</sup> It is unclear whether the inclusion of this fictional work among a list otherwise consisting of non-fiction examples was intended to extend standing to creators of fictional works.

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139. *Branzburg v. Hayes*, 408 U.S. 665, 702 (1972).

140. *von Bulow v. von Bulow*, 811 F.2d 136, 145 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987); *Apicella v. McNeil Lab., Inc.*, 66 F.R.D. 78, 84 (E.D.N.Y. 1975).

141. To this point, none of the classes cited by Justice White, except academic researchers, have asserted a right to a privilege. Academic researchers do not claim standing to assert journalist's privilege, but claim an analogous privilege.

142. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993).

143. *Id.* The book exposed the horrors of the Chicago meat-packing industry. It led to almost immediate reform in pure-food legislation. Ronald Gottesman, Introduction to Upton Sinclair, *The Jungle*, at xxiii–xxiv (Penguin Books 1965) (1906).



The circuits may split on this issue. The Second and Ninth circuits would be the most likely to extend the privilege to creators of fictional works given the historical expansiveness with which they have viewed the privilege and their experience and sensitivity in adjudicating disputes involving the media. Although other circuits may look to the Second and Ninth circuits for guidance in determining the appropriate test, they may not look to them for help in applying the test or balancing the competing interests. Other circuits may determine that the need to view privileges narrowly and the need to avoid placing additional burdens on the judiciary outweigh the public interest in protecting creative artists, who they may not view as fulfilling the public service of providing news to the public.

Courts should uniformly reject the standing of creative authors to claim the journalist's privilege because such authors do not primarily gather news. A creative author's primary goal is to provide entertainment, not to disseminate information. An artist will view facts selectively, change the emphasis or chronology of events, or fill in factual gaps. In contrast, a journalist is interested primarily in informing the public. Journalists are expected to report information fully and accurately and will be taken to task if they don't.<sup>144</sup>

Even when creative authors gather news, they fail the *von Bulow* test because they lack the intent to disseminate information to the public at the beginning of the research process. Creators of fictional works intend at the beginning of the information gathering process to create a piece of art or entertainment. Any intent to disseminate factual information discovered during this process is peripheral to that goal. This is very different from authors of non-fiction works or members of the institutional press, whose intent from the outset is to disseminate information to the public. Even if a creator of a fictional work intends at the outset to disseminate information to the public, there is still a question of credibility. The public does not rely on fictional works for factual information, nor does it refer to these works as sources for scholarship. Therefore, a person who claims to have chosen fiction as a medium for disseminating news to the public must and will be viewed with skepticism.

It can be argued that the journalist's privilege should extend to those who use fiction as a tool to inspire the public or whose fiction is based on

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144. In 1981, Janet Cooke of the Washington Post was widely criticized, lost her job, and gave up her Pulitzer Prize when she admitted that her feature profile about an 8-year old heroin addict was faked. *Ask the Globe*, Boston Globe, Apr. 22, 1993, at 62.

underlying truth. While this type of art should be encouraged, it should not receive protection under the journalist's privilege. First, the *von Bulow* test applies only to informing the public, not inspiring the public.<sup>145</sup> More importantly, granting standing to creators of fictional works would further blur the lines between truth and fiction and erode public confidence in the standards of journalism.<sup>146</sup> The journalist's privilege is a means to assist the public in receiving news and finding truth.<sup>147</sup> Standing to claim the journalist's privilege should be denied to any group that would undermine these values.

Even if granting creative artists standing to claim the journalist's privilege would have positive value for those works based on underlying truth, the resulting administrative burdens on the courts and law enforcement would outweigh those benefits. To properly determine whether a creator of a fictional work had standing, courts would be forced to expend judicial resources determining whether a work imparted enough information to the public to be considered "disseminating news." In addition, uncertainty about whether parts of a work would lead to important information or were merely fictional enhancements would lead courts and law enforcement on wild goose chases and cause them to expend further resources. Finally, courts would be required to inquire into the accuracy of facts in order to determine which information was true and which information had been altered, added to, or created to enhance the story. This would put courts in the uncomfortable position of making judgments on the public interest and social value of various claimants' art. Considering the questionable newsgathering function performed by creative artists, courts should find these concerns dispositive and reject the standing of creative artists to claim the journalist's privilege.

#### IV. CONCLUSION

Most courts recognize a qualified privilege for journalists that provides a partial First Amendment shield from compelled disclosure of confidential sources and materials. This privilege should apply to more than just members of the traditional press. Some courts have adopted the *von Bulow* test to provide a mechanism for determining membership in the protected class. This test should be adopted by all circuits because

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145. *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987).

146. Telephone Interview with Robb London, *New York Times* (Mar. 17, 1994)

147. *See supra* notes 12-15 and accompanying text.

the test would provide uniformity, is consistent with the goals of journalist's privilege, and is flexible enough to apply to new ways of communicating information. The courts should reject, however, attempts to add a public interest requirement when determining standing, because public interest will be considered when balancing the freedom of the press and the need to guarantee a fair trial. In addition, the general trend of courts has been to expand the class eligible to claim the privilege. This expansion should continue, including recognition of standing for persons connected to small circulations and private newsletters, because a wide variety of persons and communication formats contribute to the free flow of information to the public. This expansion should not include creators of fictional works, however, because creators of fictional works do not gather or disseminate news and there is a fundamentally different intent behind the creation of their work.