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The Reporter's Privilege in Georgia: "Qualified" to Do the Job?

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THE REPORTER’S PRIVILEGE IN GEORGIA:  
“QUALIFIED” TO DO THE JOB?

“Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigative bodies”¹

“No pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice. . . . Accordingly, a confidential communication . . . to a journalist . . . is not privileged from disclosure.”²

INTRODUCTION

The First Amendment to the United States Constitution extends to the press the freedom to exercise free speech, unrestricted by congressional limitations.³ However, the United States Supreme Court has held that this constitutional protection does not extend to a media reporter’s legal obligation to respond to grand jury subpoenas and to answer questions relevant to a grand jury investigation into criminal activity.⁴ The Court in Branzburg v. Hayes⁵ declined to acknowledge or to create a testimonial reporter’s privilege grounded in the Constitution or common law exempting members of the press from the general obligation of the average citizen to respond to grand jury subpoenas and to disclose to grand juries information received in confidence if so summoned.⁶

However, the impact of the Branzburg decision was not to foreclose the existence of a reporter’s privilege; on the contrary, that case has been construed since its inception by many federal

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² 4 J. WIGMORE, WIGMORE ON EVIDENCE § 2286 (J. McNaughton rev. ed. 1961).

³ U.S. CONST. amend. I provides in relevant part: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”


⁵ Id.

⁶ Id. at 682 n.21 (citing 8 J. WIGMORE, EVIDENCE § 2286 (J. McNaughton rev. ed. 1961)).
and state courts to condone the formation of a journalistic privilege either by statute or on constitutional or common law grounds. Of all the federal circuits considering the issue since 

Branzburg, all but one have recognized a reporter's privilege to some extent. Twenty-eight states and the District of Columbia currently recognize a reporter's privilege by statute; another eighteen recognize one grounded in either constitutional or common law. The Eleventh Circuit Court of Appeals recognized a journalistic privilege in United States v. Caporale.


8. Id. Ostensibly, the only basis upon which the federal circuits may recognize such a privilege is on constitutional grounds, as the Supreme Court clearly established in Erie Railroad v. Tompkins that "[t]here is no federal general common law." 304 U.S. 64, 78 (1938); see also Boyle v. United Technologies Corp., 487 U.S. 500, 516-17 (1987) (Brennan, J., dissenting). Nevertheless, one circuit has recognized a reporter's privilege grounded in "federal common law." Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979). The Third Circuit Court of Appeals held: "[T]he strong policy which supports the unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy, expressly recognized in Branzburg v. Hayes, lead us to conclude that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources." Id. at 715 (emphasis added). The court, however, referred to the text of Rule 501 of the Federal Rules of Evidence as authority for the establishment of this "federal common law" privilege for reporters. Id. at 713-14. Further, the court determined that it was not bound to follow applicable state law (the Pennsylvania Reporter's Shield Law in that case), as the 

Erie doctrine would seemingly mandate, because it was "[a] federal court sitting in a non-diversity case . . . [and] in the last analysis its decision turns upon the law of the United States, not that of any state." Id. at 715. Rule 501 provides that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501. For a detailed analysis of this issue, see Bruce I. McDaniel, Annotation, Situ ations in Which Federal Courts are Governed by State Law of Privilege Under Rule 501 of Federal Rules of Evidence, 48 A.L.R. FED. 259 (1980 & Supp. 1992).

9. Tofel, supra note 7, at 733. Six of the 28 states with statutory shield laws created an absolute privilege for the media—Alabama, Montana, Nebraska, Nevada, New York, and Oregon. Id. at 735. Further, in the wake of United States Senate action to subpoena five journalists as part of its probe into press leaks surrounding the Clarence Thomas and Thomas Keaning investigations, the District of Columbia passed a reporter's privilege statute. Senate Ends Fruitless Search for Leakers, NEWS MEDIA & LAW, Spring 1992, at 4; D.C. Gets Shield Law, NEWS MEDIA & LAW, Fall 1992, at 37. The D.C. statute gives reporters an absolute privilege not to disclose confidential sources and a qualified privilege to refuse to disclose unpublished news or information. Id. Moreover, it protects reporters from any governing body with power to issue a subpoena, including any judicial, legislative, or administrative body. Id.

Georgia did not recognize any form of a journalistic privilege before the passage of Code section 24-9-30 in March of 1990. In fact, in the year before that statute's passage, the Georgia Supreme Court denied such a privilege in separate decisions to reporters in both a criminal\textsuperscript{11} and a civil\textsuperscript{12} proceeding. The effect of Code section 24-9-30 was to create a qualified privilege for the media, which can only be overridden by the seeking party convincing the trial judge that the information sought is relevant to the case at bar, that the party lacks reasonable alternative means to access the information or source at issue, and that the information is necessary to the proper presentation of the case.\textsuperscript{13}

Since Code section 24-9-30 was only recently enacted and has only been applied by the Georgia courts on a few occasions,\textsuperscript{14} it remains to be seen how the statute will be applied, and to what groups and situations it will extend. This Note will seek to arrive

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\textit{denied, 450 U.S. 1041 (1981). That privilege required a slightly higher showing of relevancy of the information than the Georgia statutory reporter's privilege by the proponent to compel a reporter to disclose information: "[T]he party requesting the information \ldots [must] show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources." Caporale, 806 F.2d at 1604; see also In re Selcraig, 705 F.2d 789, 792 (5th Cir. 1983) (holding that application of the Miller privilege was appropriate in discovery seeking reporter's knowledge of charges against school district in libel suit).}
\end{quote}

\textsuperscript{11} Vaughn v. State, 381 S.E.2d 30 (Ga. 1989).


\textsuperscript{13} O.C.G.A. § 24-9-30 provides:

\begin{quote}
\textit{Any person, company, or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

(1) Is material and relevant;
(2) Cannot be reasonably obtained by alternative means; and
(3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.}
\end{quote}


at some predictive conclusion in this regard through an analysis of the evolution of the journalistic privilege in selected state and federal forums, including Georgia, since the pivotal Branzburg decision.

I. BACKGROUND OF THE JOURNALISTIC PRIVILEGE

A. The Ambiguous Decision in Branzburg v. Hayes

In Branzburg v. Hayes, the United States Supreme Court first addressed the issue of whether journalists have a First Amendment right not to disclose confidential sources and information in a grand jury proceeding. The Court, in rejecting "[t]he heart of the [appellants'] claim... that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information," tipped the balance in favor of recognizing a duty incumbent upon all citizens, including members of the media, to testify before a grand jury when called.

1. The Facts of Branzburg

Branzburg involved a newspaper article written by Louisville Courier-Journal staff reporter Paul Branzburg which detailed his interviews with two Jefferson County, Kentucky, hashish makers. The article included a photograph of two hands over a

16. Id. at 681.
18. Branzburg, 408 U.S. at 667-68. The Branzburg case involved the consolidation of four cases dealing with a newperson's refusal to testify before a grand jury regarding confidential sources and information. Two years after the Courier-Journal piece on hashish synthesis that was at issue in Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971), Branzburg published another article detailing his observations of drug use which became the subject of Branzburg v. Meigs, 503 S.W.2d 748 (Ky. Ct. App. 1971). Branzburg, 408 U.S. at 669. The third companion case involved a television newsman-photographer who had recorded and photographed a prepared statement by a leader of the Black Panthers at the group's headquarters, but had agreed to keep that information confidential. In re Pappas, 266 N.E.2d 297 (Mass. 1971). The last consolidated case involved New York Times reporter Earl Caldwell's refusal to respond to a grand jury subpoena and bring with him recordings of interviews of members of the Black Panther Party. The case was on appeal from the Ninth Circuit Court of Appeals, which had reversed the lower federal court's contempt order regarding Caldwell. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).
laboratory table apparently performing the process of synthesizing hashish from marijuana. Branzburg appeared before a state grand jury, but refused to reveal the identity of the individuals that he witnessed make hashish from marijuana. The trial judge ordered him to disclose the information, rejecting Branzburg's claim of a reporter's privilege based on the First Amendment, the Kentucky Constitution, and the Kentucky reporter's privilege statute. The Kentucky Court of Appeals affirmed, holding that the Kentucky reporter's privilege statute allowed journalists to refuse to disclose the sources of confidential information sought by a grand jury, but afforded them no protection against revealing the information which they had personally observed.

2. Justice White's Plurality Opinion

Justice White, writing for a four-member plurality, intimated early in the opinion in a footnote that the Branzburg decision would be a narrowly crafted one that would address only "[w]ether a newspaper reporter who has published articles about an organization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in the published articles." The plurality acknowledged that the process of news gathering was inclusive in the First Amendment's freedom of the press protection; however, the opinion emphasized that the cases at issue involved no instance where that freedom was intruded upon or where news gathering was interfered with by the grand jury subpoena process. Justice White wrote that "[t]he use of confidential sources by the

20. Id.
21. Id. KY. REV. STAT. § 421.100 (Baldwin 1962) provided a privilege against disclosure in a legal or judicial proceeding of "the source of any information procured or obtained by [a person], 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." Branzburg, 408 U.S. at 668 n.4.
23. Chief Justice Burger and Justices Rehnquist and Blackmun joined Justice White's plurality opinion. Id. at 665.
24. Id. at 679 n.16 (quoting from the petition for certiorari presented by the United States Government in the appeal of the Caldwell case, 434 F.2d 1081 (9th Cir. 1970)).
25. Id. at 681.
press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.\footnote{26}

Accordingly, the plurality was unconvinced of the appellant's assertion that the burden of compelling testimony from reporters outweighed the public interest at hand represented by the grand jury investigation into criminal activities.\footnote{27} The Court reaffirmed that "[t]he investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged."\footnote{28}

Further, the \textit{Branzburg} plurality denied the claim of appellants Branzburg and Pappas and respondent Caldwell of the existence of a "conditional" privilege, or, in other words, a privilege to be applied at a threshold level on a case-by-case determination by the trial judge.\footnote{29} The Court tersely reasoned that "[i]f newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem."\footnote{30}

The Court concluded that the only privilege that would adequately serve the reporters' interests was an absolute privilege rooted in the First Amendment.\footnote{31} Justice White

\begin{enumerate}
\item \textit{Id.} at 681-82.
\item \textit{Id.} at 681.
\item \textit{Id.} at 700 (citing Costello v. United States, 350 U.S. 359, 364 (1956)).
\item \textit{Id.} at 702.
\item \textit{Id.} (citing John B. Kuhns, \textit{Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship}, \textit{80 Yale L.J.} 317, 341 (1970)).
\item \textit{Branzburg}, 408 U.S. at 702. At least one commentator has questioned this "conclusion" arrived at by Justice White:

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\textit{Strangely, Justice White either misconstrued the reporters' position, or chose to interpret it as encompassing an assertion of absolute privilege. Indeed, much of the opinion is written as if the media representatives had specifically requested that the Court announce an absolute first amendment privilege. The reporters' argument, though, was straightforward and hardly advocated an absolute privilege. They asserted that certain showings must be made before a grand jury or at trial: possession by the reporter of information relevant to a crime under grand jury investigation, unavailability of the information from other sources, and a sufficiently compelling need for the information to override the invasion of first amendment interests.}
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identified a number of reasons why the Court was “unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination.” Administration of such a constitutionally mandated privilege, because it would require courts to consider on every occasion who was entitled to the privilege and in what situations the privilege controlled, would impose upon the judicial system a task that, in the plurality’s view, belonged to the legislature.

While the plurality in Branzburg declined to recognize a constitutional reporter’s privilege at the Supreme Court level, Justice White left the issue up to Congress and the individual states to decide for themselves whether reporters merited a privileged status:

At the federal level, Congress has freedom to determine whether a statutory newsmen’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsmen’s privilege, either qualified or absolute.

Thus, while ostensibly slamming the door on the establishment of a privilege for the media in judicial proceedings, the Branzburg Court in essence left the matter open for future consideration.

32. Branzburg, 408 U.S. at 703.
33. Id. at 704-06.
34. Id. at 706.
35. While many view Justice White’s opinion in Branzburg as a “disappointment,” one commentator has remarked that “[s]till, one should not overstate its negative impact.” Marcus, supra note 31, at 829. While Congress has not, many states have acted on the plurality opinion’s invitation to adopt statutory privileges for reporters. See supra note 9 and accompanying text. Furthermore, the Court in Branzburg recognized the constitutional right of the media to gather information: “We do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that newsgathering does not qualify for First Amendment protection;
3. Justice Powell’s Concurrency

In a separate concurring opinion in Branzburg, Justice Powell did not reject the possibility of a qualified privilege for reporters grounded in the First Amendment. He concurred to stress the limited holding of the Court, and to express his view that the constitutional rights of a reporter regarding the confidentiality of news information should be balanced against the judicial need for the reporter’s testimony on a case-by-case basis:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. 36

Further, in keeping with this suggested case-by-case balancing process, Justice Powell indicated that reporters have access to a motion to quash a grand jury summons and a motion for a protective order as procedural defenses against any abuse of the grand jury subpoena power. 37 In this respect, the concurrence re-emphasized the words of the plurality that “no harassment of newspeople will be tolerated.” 38

One commentator has suggested that Justice Powell filed this brief concurrence instead of joining the Branzburg dissenters because he apparently believed that reporters do in fact share with the average citizen the general obligation to respond to a grand jury subpoena, as the plurality opinion underscored, but was adamant that reporters in grand jury investigations have

without some protection for seeking out the news, freedom of the press could be eviscerated.”

Marcus, supra note 31, at 829 (quoting Branzburg, 408 U.S. at 681). This language from the Branzburg plurality opinion, combined with Justice Powell’s enigmatic concurrence, has formed the basis for the recognition by many lower federal courts of a reporter’s privilege grounded in the First Amendment. See infra note 41 and accompanying text. But see Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) (recognizing a reporter’s privilege based on “federal common law” and Rule 501 of the Federal Rules of Evidence). For further discussion of Riley, see supra note 8; see also United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981) (holding that even in the absence of an absolute First Amendment privilege courts are free to adopt a common-law privilege for reporters).

36. Branzburg, 408 U.S. at 710 (Powell, J., concurring).
37. Id.
38. Id. at 709-10.
recourse to challenge disclosure of sensitive information or sources on constitutional grounds after obeying the summons.\textsuperscript{39}

In any case, the concurrence, particularly Justice Powell's closing sentence,\textsuperscript{40} has provided a solid foundation for a reporter's privilege in lower federal courts since Branzburg.\textsuperscript{41} Furthermore, the case-by-case balancing test became the basis for a qualified reporter's privilege, which has been adopted in one form or another by twenty-two of the twenty-eight states with reporter's shield laws.\textsuperscript{42}

4. \textit{Strength of the Dissent}

Justice Stewart,\textsuperscript{43} joined by Justices Brennan and Marshall,

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39. Gillmor & Baron, supra note 17, at 363.
40. "In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." Branzburg, 408 U.S. at 710.
41. Tofel, supra note 7, at 733. Justice Powell's concurring opinion is the primary authority cited in subsequent cases that have recognized a reporter's privilege. In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987); see, e.g., United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986); LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir. 1986); In re SelCraig, 705 F.2d 789 (5th Cir. 1983); United States v. Burke, 700 F.2d 70 (2d Cir. 1983); Zerelli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980); Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972).
42. Tofel, supra note 7, at 733, 735. The gravamen of Justice Powell's concurrence has provided the "spirit" of the qualified reporter's privilege model, while the dissent of Justice Stewart has provided the basic formula that many states with qualified reporter's privilege statutes have adopted. One commentator has noted: "The opinion of Justice Powell is confusing. Still, one must ultimately conquer its ambiguities; . . . this concurring opinion is central to any understanding of the meaning of Branzburg v. Hayes and is the foundation for the view of many judges that the [Branzburg] Court . . . created a qualified privilege for reporters." Marcus, supra note 31, at 831.
43. It is interesting to note that Justice Stewart was the Circuit Judge for the Second Circuit Court of Appeals who wrote the majority opinion in Garland v. Torre, 259 F.2d 645 (2d Cir.), cert. denied, 358 U.S. 910 (1958), the first significant case to deal with the issue of a reporter's duty to disclose information in a judicial proceeding. 2 Slade R. Metcalf, et al., Rights and Liabilities of Publishers, Broadcasters and Reporters § 3.01 (1982). That case involved a newspaper columnist in a libel action who refused to reveal the identity of a "network executive" who was the source for her article containing allegedly false and defamatory statements made regarding the plaintiff, actress Judy Garland. In considering the columnist's claim of privilege based on First Amendment grounds and her assertion of a qualified media privilege based on a "societal interest," Garland, 259 F.2d at 548, Judge Stewart originated the balancing test that he would later modify in his dissent in Branzburg:
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dissented in *Branzburg*, charging that the plurality's view "invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government." While the dissent recognized that the interest of the reporter in keeping and protecting confidential relationships must be limited by the equally vital societal interest in the effective administration of justice, "[a]nd to perform these functions the grand jury must have available to it every man's relevant evidence," it asserted that "[y]et the longstanding rule making every person's evidence available to the grand jury is not absolute."

Because Justice Stewart emphasized that the journalist's interest in protecting confidential information and sources was not purely personal to that journalist, but rather was in the interest of the broader public via the national commitment to safeguarding the free flow of information guaranteed by the First Amendment, he promulgated a three-pronged test in the dissenting opinion designed to determine whether a journalistic privilege could be overridden by judicial necessity:

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsmen has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment

Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press . . . . What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom.

*Garland*, 259 F.2d at 548. The judgment of the lower court holding the columnist in criminal contempt was affirmed by the *Garland* court. *Id.* at 551.

44. Justice William O. Douglas also dissented in a separate opinion. *Branzburg*, 408 U.S. at 711. Justice Douglas advocated a nearly absolute privilege for the media, based on the First Amendment, which would immunize a reporter from appearing or testifying before a grand jury in all circumstances except those where the reporter was implicated in the commission of a crime. *Id.* at 712.

45. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

46. *Id.* at 737 (citations omitted).

47. *Id.*
rights; and (3) demonstrate a compelling and overriding interest in the information.\textsuperscript{48}

This test has served as the primary blueprint for the establishment of journalistic privileges in both federal and state case law, in both criminal and civil contexts.\textsuperscript{49} While interpretations of the application of this three-pronged standard for a qualified reporter's privilege are numerous among the different courts, and although there are many semantic variations on Justice Stewart's enumerated factors, this test has clearly been preeminent in the development of the law surrounding the reporter's privilege.\textsuperscript{50}

B. Branzburg Revisited: University of Pennsylvania v. EEOC

The Supreme Court recently addressed the issue of a constitutionally based reporter's privilege in University of Pennsylvania v. EEOC,\textsuperscript{51} a case in which the appellant university had refused to release confidential materials relating to the university's tenure process in an action alleging discrimination brought by the EEOC on behalf of a former faculty member.\textsuperscript{52}

Justice Blackmun, a member of the Branzburg plurality, rejected the university's claim of privilege by citing the Branzburg decision's refusal to extend a First Amendment privilege to reporters against appearing or testifying regarding confidential information.\textsuperscript{53} Paralleling Branzburg, Justice Blackmun reasoned that recognizing such a privilege based on a First Amendment right to the free flow of information would unduly burden the judiciary because of the uncertainty in deciding "how often and to what extent informers are actually deterred from furnishing information when newsmen are forced

\begin{footnotes}
\textsuperscript{48} Id. at 743 (footnotes omitted).
\textsuperscript{49} GILLMOR & BARON, supra note 17, at 363.
\textsuperscript{50} Id. at 363-64.
\textsuperscript{52} While the facts of University of Pennsylvania did not involve a reporter, the Court likened the First Amendment claim at issue to that claimed by the reporter in Branzburg by stating "[t]he case we decide today in many respects is similar to Branzburg v. Hayes . . . . Petitioners there, like petitioner here, claimed that requiring disclosure of information collected in confidence would inhibit the free flow of information in contravention of First Amendment principles." University of Pa. v. EEOC, 110 S. Ct. at 588.
\textsuperscript{53} Id.
\end{footnotes}
to testify before a grand jury." The Court in *University of Pennsylvania v. EEOC* reaffirmed the *Branzburg* Court's refusal "to embark the judiciary on a long and difficult journey . . . to an uncertain destination."

C. Development of the Journalistic Privilege in the Lower Federal Courts

1. The Federal Reporter's Privilege

Since *Branzburg*, there have been repeated unsuccessful attempts to pass legislation that would create a reporter's privilege by federal statute. However, every circuit court of appeals has addressed the issue of reporters' claims to a right to resist compelled disclosure of confidential information and has, with one exception, interpreted *Branzburg* as sanctioning the establishment of a qualified privilege in that respect.

2. The Exception to the Rule: In re Grand Jury Proceedings

The Sixth Circuit Court of Appeals in *In re Grand Jury Proceedings* upheld the contempt citation of a television reporter who had refused to turn over film footage to a grand jury that was needed to identify a suspect in an ongoing police


55. Id. at 588 (citations omitted).


57. For case citations, see supra note 41. The majority of the circuits have recognized a qualified reporter's privilege based on either constitutional or common-law grounds. But see *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987) and discussion infra notes 58-66 and accompanying text. While the Fourth Circuit recognized a qualified reporter's privilege in LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir. 1986), that circuit, citing *Branzburg* as precedent, held in *In re Shain*, 978 F.2d 850 (4th Cir. 1992), that the incidental burden on the freedom of the press in the circumstances of this case [reporters subpoenaed in connection with criminal prosecution of members of South Carolina legislature charged with accepting bribes] 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.

978 F.2d at 852.

58. 810 F.2d 580 (6th Cir. 1987).
investigation of the murder of a police officer. The court expressly denied the reporter any recourse to a constitutional privilege to justify his refusal to comply with the grand jury's requirements.

This opinion is notable because it goes against the tide of the federal courts' interpretation of the import of the Branzburg decision. The court expressly rejected the "loopholes" that Justice Powell's concurring opinion and Justice Stewart's dissent adeptly created. The court refused to accept the reporter's argument for a qualified privilege against disclosure because it asserted that such a recognition "would be tantamount to our substituting, as the holding of Branzburg, the dissent written by Justice Stewart."

The court took its cue from the Branzburg plurality's reference to Professor Wigmore's comments regarding testimonial privileges and introduced "four fundamental conditions" [suggested by Wigmore] as predicates to recognition of any privilege against disclosure of communications: (1) the communications must originate in a confidence that they will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship must be one which, in the opinion of the community, ought to be fostered; and (4) the injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Apparently, the Sixth Circuit Court of Appeals determined that a reporter must meet each and every one of the components of this "test" before a privilege against disclosure could even be considered in a judicial proceeding. Accordingly, the court in one motion adopted a strict interpretation of the Branzburg plurality.

59. Id. at 582-83.
60. Id. at 584. The court also determined that the reporter could not invoke the protection of the Michigan reporter's privilege, holding that the statute applied only to the print media, and not to the appellant, who was a television reporter. Id. at 587-88.
61. Branzburg, 408 U.S. at 710 (Powell, J., concurring).
62. Id. at 725 (Stewart, J., dissenting).
63. In re Grand Jury Proceedings, 810 F.2d at 584.
64. Branzburg, 408 U.S. at 690 n.29.
65. In re Grand Jury Proceedings, 810 F.2d at 584 (citing 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 2286 (J. McNaughton rev. ed. 1940)).
opinion, rejected the balancing test of Justice Stewart in the Branzburg dissent, and summarily broke with all other circuits and lower federal courts that had developed a looser interpretation of the Branzburg decision.66

3. The Eleventh Circuit Reporter’s Privilege: United States v. Caporale

The Eleventh Circuit Court of Appeals in United States v. Caporale67 applied the evidentiary standard required to overcome a reporter’s claim of a privilege against disclosure espoused in Miller v. Transamerican Press, Inc.68 In Caporale, the court held that the appellants, convicted on conspiracy charges, had not overcome the qualified reporter’s privilege in seeking to compel the testimony of two reporters who had potential information relating to the appellants’ claim of jury tampering.69

The court recited the Miller test requirements, “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 unavailable from other sources.”70 The court then determined that the appellants had not carried their burden of proof in this respect because the court was unconvinced that the appellants could not get the requested information from another source.71

66. Moreover, the court also rejected other circuits’ interpretation of Justice Powell’s concurring opinion in Branzburg as subtly modifying the majority opinion to accommodate a reporter’s privilege: “It is readily apparent . . . that Justice Powell’s concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands upon its holding, but that, instead, it responds to what Justice Powell perceived as an unwarranted characterization of that holding by Justice Stewart.” In re Grand Jury Proceedings, 810 F.2d at 565; see also In re Shain, 978 F.2d 850 (4th Cir. 1992), discussed supra note 57.
67. 806 F.2d 1487 (11th Cir. 1986).
69. 806 F.2d at 1503-04.
70. Id. at 1504.
71. Id.
II. GEORGIA LAW BEFORE THE PASSAGE OF O.C.G.A. SECTION 24-9-30

A. The Criminal Context

The first instance in which a Georgia court dealt with the issue of a journalist's refusal to comply with an order to supply testimony relevant to a criminal investigation was the early twentieth century case of Plunkett v. Hamilton. Hamilton had written an article for the Augusta Herald that contained information regarding a murder. On the basis of that article, he was called before a police board of commissioners to answer questions under oath regarding his knowledge of the murder.

Hamilton admitted that he had received the information concerning the murder from a member of the Augusta police force but refused to reveal to the board the identity of that person, claiming that he had promised the informant not to disclose his name. Hamilton claimed that if he gave up his source, "[i]t would ruin me in my business. It would cause me to lose my position as a newspaper reporter . . . and would prevent my ever engaging in the occupation of a newspaper reporter again." The reporter was jailed for contempt for declining to testify, and he appealed his petition by writ of habeas corpus to the Georgia Supreme Court.

The Plunkett court unequivocally rejected Hamilton's attempt to justify his refusal to disclose the name of his informant, which was grounded in his claim that he would lose his job if he did so. The court relied on Professor Wigmore's writings on journalistic privileges as the basis for its denial of Hamilton's petition:

[T]he mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege . . . . No pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice . . . . Accordingly, a confidential

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72. 70 S.E. 781 (Ga. 1911).
73. Id. at 785.
74. Id.
75. Id. at 785.
76. Id.
77. Id. at 781.
78. Id. at 785.
communication . . . to a journalist . . . is not privileged from disclosure.\textsuperscript{79}

The \textit{Plunkett} court affirmed the duty of citizens and inhabitants of the state to testify when called before a court of law with the same forcefulness it used to deny Hamilton’s claim of privilege in that case. The court cited the state constitution’s mandate that “protection to person and property is the paramount duty of government, and shall be impartial and complete”\textsuperscript{80} as the controlling authority for its holding that any citizen or inhabitant of the state is compelled to give testimony in a court of law if required. The rationale of this early opinion effectively negated any basis for a journalistic privilege at that time, and for years to come, by tipping the balance so far in the direction of the judiciary’s right to compel testimony from anyone that reporters’ arguments against compelled disclosure fell on deaf ears.\textsuperscript{81}

Over seventy years later, \textit{Plunkett} still had force of law. Citing \textit{Plunkett} and \textit{Branzburg} as precedent, the Georgia Court of Appeals in \textit{Hurst v. State}\textsuperscript{82} not only declined to recognize a First Amendment privilege for reporters, but further held that the defendant’s Sixth Amendment right to compulsory process essentially “trumped” the reporter’s asserted First Amendment rights at issue in that case.\textsuperscript{83} At the trial court level in \textit{Hurst}, the defendant on trial for voluntary manslaughter sought to subpoena the testimony of a reporter who had interviewed an eyewitness to the alleged killing with which the defendant was charged.\textsuperscript{84} The defendant wished to secure the reporter’s testimony to impeach the eyewitness. On the basis of the trial

\textsuperscript{79} \textit{Id.} (quoting from 4 J. \textsc{Wigmore}, Wigmore on Evidence § 2286). The court also noted Wigmore’s reference to the “fundamental maxim that the public . . . has a right to every man’s evidence,” \textit{Id.} (quoting 4 J. \textsc{Wigmore}, Wigmore on Evidence § 2192), a maxim which the \textit{Branzburg} dissenters later recognized and asserted was not absolute. See supra note 47 and accompanying text.

\textsuperscript{80} \textit{Id.} at 786.

\textsuperscript{81} The effect of \textit{Plunkett} was not felt just within the State of Georgia. The first major case to deal with a reporter’s assertion of a constitutional privilege (or qualified, in the alternative), \textit{Garland}, discussed supra in note 43, relied on \textit{Plunkett} as precedent for its refusal to recognize a journalistic privilege in the absence of a statute creating one. \textit{Garland v. Torre}, 259 F.2d 545, 550 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

\textsuperscript{82} 287 S.E.2d 677 (Ga. Ct. App. 1982).

\textsuperscript{83} \textit{Id.} at 677.

\textsuperscript{84} \textit{Id.}
court's ruling that the defendant "could call the reporter as a witness, but only if he first called as witnesses two other persons who were present when the interview with the alleged eyewitness was conducted," counsel for the defendant did not pursue the reporter's testimony.86

On appeal, the court of appeals agreed with the defendant that the trial court's attempt to strike an equitable balance between the First Amendment rights asserted by the reporter and the rights of the criminal defendant denied that defendant his Sixth Amendment right to compulsory process.87 Implicit in the appellate court's ruling, then, was the assumption that a criminal defendant's constitutional right to subpoena witnesses in furtherance of his own defense outweighed any asserted constitutional right of a reporter whose testimony is relevant to that defendant's case to resist such a subpoena.88

In contrast to the holding in Hurst, the Georgia Supreme Court in Carver v. State89 affirmed the decision by the court of appeals to narrow the criminal defendant's right to compel testimony of a reporter-witness.90 In Carver, the defendant, a Ku Klux Klan leader who was charged with making terroristic threats toward another individual in the midst of a Klan march, sought to subpoena the production of all of the photographs that had been taken during the incident by a newspaper photographer.91 The newspaper moved to quash the defendant's subpoena and the trial court responded by ordering an in camera inspection of all of the requested photographs. However, for this inspection, the trial judge ordered the production of only those photographs which contained the defendant and the victim of the alleged threats, or either separately.92 The defendant appealed the ruling, claiming that the photographs that were not produced

85. Id. One of these witnesses was a relative of the victim of the killing; the other was a member of the same police force as the victim. Id.
86. Id.
87. Id.
88. Id. The Hurst court stated: "The record shows that the trial judge conscientiously attempted to balance conflicting interests, but we must disagree with the weight assigned to each of those interests." Id.
89. 369 S.E.2d 471 (Ga. 1988).
91. Id. at 878.
92. Id. at 879.
for the in camera inspection were relevant and necessary to his defense.  

The court of appeals affirmed, stating:

It is undisputed that The Times produced all photographs in its records depicting defendant or the victim for the in camera inspection . . . . Contrary to defendant's assertions, we find any photographs not depicting defendant or the victim irrelevant to defendant's defenses to the offense of a terroristic threat or for the purpose of impeaching the State’s witnesses.

The Georgia Supreme Court found no error in the appellate court's judgment and affirmed.

However, a strong dissent by Justice Smith harkened back to the emphasis the Hurst court placed on the right of a criminal defendant to compel a reporter's testimony. Asserting that the Carver defendant's Sixth Amendment right to compulsory process was violated by the exclusion of photographs from the in camera inspection, and therefore from the defendant's defense, the dissent lashed out at the press. The dissent accused the press of hiding behind First Amendment protections, and accordingly denying a citizen's constitutional right to a fair and impartial trial, by asserting a constitutional privilege against disclosure. Justice Smith wrote: “The press . . . is part of the community not apart from the community. As such, it is burdened with certain obligations to the community. The press, more than any other private institution, must encourage equal treatment for all.”

Despite the vigorous dissent, however, the Carver decision reflects the state courts' concern for striking an equal balance between a defendant's right to a fair trial and a reporter's interest in nondisclosure of information, giving more weight to the reporter's interest than was extended in Hurst.

93. Id.
94. Id.
95. Carver, 369 S.E.2d 471, 472.
96. Id. at 474-76 (Smith, J., dissenting).
97. Id. at 474.
98. Id.
99. Id.
100. One commentator has noted, however, that Carver and Hurst can be distinguished on their facts, in that the former involved the rather negligible charge of threatening to commit a crime upon another, whereas the crime alleged in Hurst was murder. S. Dewberry, Legislative Review, Witnesses: A Qualified Reporter's
York: The Reporter's Privilege in Georgia: "Qualified" to Do the Job?

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The case of Vaughn v. State101 was decided nine months before Code section 24-9-30 went into effect. The Georgia Supreme Court in that case definitively held that Georgia did not recognize, on federal or state constitutional grounds or common law grounds, a reporter's privilege that allowed members of the media to refuse to disclose confidential information or sources to a grand jury in a criminal proceeding.102 The Vaughn case involved a reporter for the Clayton Daily News who published an article based on his interview with a drug dealer.103 The reporter described in an editorial footnote to the article that he had promised the dealer confidentiality in return for the dealer's story, and referred to the dealer by the fictitious name of "Carlos" in the article.104 On the basis of that article, the reporter was subpoenaed to appear before a grand jury to testify regarding the identity of Carlos; he refused to do so and was cited for contempt by a superior court judge.105

In a brief per curiam opinion, the Georgia Supreme Court rejected Vaughn's claim of privilege based on both the First Amendment and a similar clause in the state constitution, citing Branzburg as authority.106 However, Justice Gregory filed a dissenting opinion which defined the issue at stake as "a clash between the task of investigating criminal activity given the government by the people and the restriction the people place on the government concerning free flow of ideas."107 Based on the First Amendment's freedom of the press guarantee and its equivalent in the Georgia Constitution,108 Justice Gregory

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Privilege, 7 GA. ST. U. L. REV. 285, 289 n.19 (1990). Hence, the interest of the defendant in Hurst in compelling the testimony of the interviewer was much greater and more "serious" a need than in Carver. Id. The court of appeals in Carver seemed to indicate, in fact, that it suspected the defendant of engaging in a "fishing expedition" by seeking the production of all of the newspaper's photographs. 364 S.E.2d 877.
101. 381 S.E.2d 30 (Ga. 1989).
102. Id. at 31-32.
103. Id.
104. Id. at 31. Vaughn also stated in the editorial note that the purpose of the article was "to inform the public of the seriousness of the problem of drug trafficking in . . . [Clayton] County." Id. The article related that Carlos revealed that he sold hundreds of pounds of marijuana per month. Apparently, Carlos also told Vaughn the source of his illegal drugs. Id.
105. Id.
106. Id.
107. Id. at 33 (Gregory, J., dissenting).
108. The Georgia Constitution provides: "No law shall be passed to curtail or
argued that the governmental interest in criminal investigations must give way to a reporter’s interest in protecting information received in confidence when the two interests are in conflict, provided that the reporter was “emersed [sic] in the milieu of ideas.”\textsuperscript{109} According to the dissent, Vaughn’s article was not simply “fact reporting,”\textsuperscript{110} but was “a matter of concern to the sovereign in sifting among many ideas in order to give direction to the state.”\textsuperscript{111} As such, it was a curtailment and restriction of Vaughn’s First Amendment freedom of the press rights to order him to disclose his source.\textsuperscript{112}

B. The Civil Context

In the case of \textit{Georgia Communication Corp. v. Horne},\textsuperscript{113} the plaintiffs in a suit for defamation against a defendant radio announcer amended their complaint to allege a further act of slander by the defendant in which he stated on his radio program that the plaintiffs were conspiring to “get” him.\textsuperscript{114} The defendant refused during his deposition to reveal the names of the persons who he claimed gave him information regarding this alleged “conspiracy”; he claimed he had promised not to reveal their identities.\textsuperscript{115} After the trial court cited him for contempt and entered judgment against him, the defendant appealed, claiming that the state and federal constitutions extended him a journalistic privilege against disclosure of information that he received in confidence.\textsuperscript{116} The \textit{Horne} court reaffirmed the \textit{Plunkett} holding that no reporter’s privilege existed in Georgia, and cited \textit{Branzburg} and \textit{Hurst} as authority for holding that there was no federal or state constitutional grounds for a testimonial reporter’s privilege.\textsuperscript{117}

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\textsuperscript{109} Vaughn, 381 S.E.2d at 33 (Gregory, J., dissenting).
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 33-34.
\textsuperscript{113} 294 S.E.2d 725 (Ga. Ct. App. 1982).
\textsuperscript{114} Id. at 726.
\textsuperscript{115} Id.
\textsuperscript{116} Id. \textit{Horne} has been noted for its imposition of the harshest penalty against a media defendant in a defamation action—the default judgment. Jens B. Koepke, Note, \textit{Reporter Privilege: Shield or Sword? Applying a Modified Breach of Contract Standard When a Newsperson “Burns” a Confidential Source}, 42 FED. COMM. L.J. 277, 281 (1990).
\textsuperscript{117} Horne, 294 S.E.2d at 726.
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The immediate precipitator of Code section 24-9-30 was the Georgia Supreme Court's decision in *Howard v. Savannah College of Art and Design, Inc.* 118 decided three months prior to the passage of the statute. 119 In *Howard*, the defendant college had been sued by two women who had been raped on the campus, both alleging that the college had been negligent in its security provisions. 120 One of the women filed a discovery request seeking the college's financial budget documents from 1982 to 1987, which the school refused to provide. 121 Later in the pretrial proceedings, the college learned that counsel for that woman had a copy of the college's income statement for a certain period. 122

Armed with a court order, the college demanded to know who had provided the plaintiffs with the document, and learned it was newspaper reporter Howard, who had written a series of articles regarding the college earlier. 123 The college subpoenaed Howard, and she answered questions regarding the income statement document, but refused to disclose any information she had regarding other financial records of the college on the basis of an asserted qualified reporter's privilege. 124 She also refused on the same grounds to disclose any of her confidential sources or any information she might have shared with plaintiffs' counsel. 125 Howard opposed the college's motion to compel, and on appeal to the Georgia Supreme Court she argued that the court should recognize a qualified privilege on her behalf because her interests as a non-party reporter in a civil case outweighed the litigants' interest in obtaining the information she possessed. 126

The college responded that the Georgia courts had never recognized a reporter's privilege, and that the Georgia legislature had never created one by statute. Moreover, the college noted that if such a privilege existed, it would only protect

118. 387 S.E.2d 332 (Ga. 1990).
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
newsgathering, not the case where a reporter shared information with one party to litigation and not the other.\textsuperscript{127} In an extremely brief opinion, the Georgia Supreme Court unanimously affirmed the lower courts' rejection of Howard's claim to a qualified privilege.\textsuperscript{128}

The holding in this case set the stage for a focused effort on the part of the media to champion a statutory qualified privilege in the state, and, indeed, "was the catalyst of the Georgia Press Association's... [successful] lobby for a statutory reporter's privilege."\textsuperscript{129} Ostensibly, with the passage of the evidentiary privilege found in Code section 24-9-30, the disclosure issues that were decided against the media in \textit{Vaughn} and \textit{Howard} would now necessarily swing the other way. Further, under the statute, the onus is now on the party seeking disclosure of a reporter's information to overcome that privilege, rather than it being the reporter's duty to comply with a subpoena and then seek to invoke a privilege against disclosure.\textsuperscript{130}

\section*{III. Application of O.C.G.A. Section 24-9-30}

\subsection*{A. The First Test: Stripling v. State}

Seventeen days after the passage of the Georgia reporter's privilege, the statute was brought to bear in the case of a reporter seeking to protect the sources and methods she utilized for a story about the illegal monitoring of conversations between attorneys and their clients in a Douglas County jail.\textsuperscript{131} The defendant in \textit{Stripling v. State}\textsuperscript{132} appealed his conviction for murder, armed robbery, and aggravated assault, citing as error,

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127. \textit{Id.}
128. \textit{Howard}, 387 S.E.2d at 332. The full text of the opinion is as follows: A newspaper reporter refused to answer certain questions propounded to her during a deposition taken in the course of civil litigation. Her refusal was based upon her assertion of a "qualified reporter's privilege." The trial court held: "Georgia has no statutory qualified reporter's privilege . . . . [She] has no qualified reporter's privilege under the law of this state." This holding was correct.
129. \textit{Id.}
130. \textit{Dewberry}, supra note 100, at 286.
\end{flushright}
inter alia, the trial court’s ruling that Code section 24-9-30 shielded journalist Trisha Renaud from disclosure of information. 133

Renaud had reported in the Fulton County Daily Report134 the allegations of a “confidential source” regarding extensive electronic monitoring of conversations occurring in the Douglas County jail between incarcerated clients and their attorneys. 135 On the basis of the allegations, defendant Stripling subpoenaed Renaud to appear at trial. 136 Renaud testified that she had no personal knowledge as to any monitoring of any conversations at the jail between Stripling and his attorney, but invoked the qualified reporter’s privilege against disclosure of any information regarding the sources and details applicable to her newspaper article. 137

The trial judge agreed with the reporter’s argument that the privilege had not been overcome because the defense had not met its burden of showing that it could not obtain the desired information by other means. 138 Similarly, the Georgia Supreme Court upheld the ruling of the trial court regarding the qualified privilege on the ground that the defense had not met the second prong of the statute—that the information sought could not be reasonably obtained by other means. 139

133. Id. at 501.
135. Id.
136. Id.
137. Id.
138. Renaud’s article had quoted statements of three unidentified ex-Douglas County Sheriff’s deputies; the reporter’s counsel argued that the defense had not shown that an effort had been made to find and question these ex-deputies—“You can’t just use the press, the legislature has said [with the passage of the shield law],” he asserted. Id. In response, pro bono counsel for the indigent defendant Stripling argued that they did not have the investigative resources to ferret out the sources of the alleged eavesdropping, implying that it was enough that Renaud’s testimony was relevant to Stripling’s defense and necessary to the proper presentation of that defense. Id. at 3.
139. Stripling, 401 S.E.2d at 500. The same month that Stripling was decided, the United States District Court for the Northern District of Georgia decided in Izbicki v. Ridgeview Institute, No. 1:93-CV-306-RCF (N.D. Ga. Mar. 27, 1990), a case in federal court on diversity grounds, that O.C.G.A. § 24-9-30 applied to the testimony of a subpoenaed newspaper reporter and ruled, similar to the Stripling decision, that the plaintiff could not compel the reporter to disclose material relevant to the plaintiff’s case without demonstrating that the material could not be obtained by other means. Langford, Reporters Shield Survives Second Test, FULTON CO. DAILY REP., April 17, 1990, at 2. Most recently, O.C.G.A. § 24-9-30 was discussed by the Georgia Court of
B. Lower Georgia Courts’ Application of the Privilege

Following Stripling, the Georgia reporter's privilege was again tested in a criminal case in Hall County, Georgia. In State v. McGraw, the defendant, who was convicted of stealing narcotics from a sheriff's office evidence room, subpoenaed a local newspaper editor to testify about a telephone conversation the editor had instructed a staff reporter to have with the local district attorney. The defendant sought a new trial on grounds that the information regarding the conversation provided a basis for prosecutorial misconduct in relation to the indictment of the defendant.

The Hall County Superior Court granted the editor’s motion to quash the subpoena, holding that the defense had failed to show that the information sought from the editor was unavailable from another source. Bearing on the court’s decision was the fact that defense counsel had subpoenaed another individual who was present during the telephone conversation and the fact that he had not subpoenaed the staff reporter who made the call, even though that reporter lived out-of-state at the time of trial.

Appeals in Nobles v. State, 411 S.E.2d 294 (Ga. Ct. App. 1991). The court in that case upheld the trial judge’s quashing of the criminal defendant’s subpoena of a television news reporter in connection with the defendant’s motion for a new trial. The reporter broadcasted an inaccurate report of the standing of the jury during its deliberation; however, all of the jurors stated that they had not seen or heard of the broadcast before they reached a verdict. Nobles, 411 S.E.2d at 298-99. The court of appeals determined, therefore, that the reporter’s information was not material or relevant to the defendant’s case (prong one), and was not necessary to the proper presentation of his defense (prong three) because the jury was not exposed to it. Id. at 299. The court wrote: “While this case was the subject of intensive news coverage, nothing in the language of [O.C.G.A. § 24-9-30] . . . indicates to us that it was meant to be used to uncover the source of mere courtroom gossip or speculation that appears to have been involved here . . . . We find no error.” Id.

140. Langford, supra note 139, at 2.
142. Langford, supra note 139, at 2. The editor had instructed the reporter to call the district attorney to confirm a rumor that drugs had been taken from the evidence room. The editor, the reporter, and a third person were present when the call was made. Id.
143. Id. The theory of the defense was that the defendant, the teenage son of an evidence room officer, was hastily charged with the theft of the drugs in order to draw public attention away from the controversy to safeguard the re-election chances of the incumbent sheriff. Id. Defense counsel sought the editor’s testimony to bolster that theory. Id.
144. Id.
145. Id.
As in *Stripling*, the court rested its protection of the journalist’s information on the seeking party’s failure to prove that it had exercised all other means of securing that information from another source. Unlike the subpoenaed reporter in *Stripling* who was required to testify on the stand before the court ultimately protected her from disclosure, the editor in *McGraw* was excused from giving any testimony at trial through the successful use of a motion to quash based on the invocation of the statutory reporter’s privilege.\(^{146}\)

The Georgia reporter’s privilege was recently invoked in the Superior Court of Dekalb County in *Vance v. Krause*.\(^{147}\) In that case, the court twice ruled on motions to compel a nonparty journalist to disclose information relevant to the plaintiffs’ case. The “reporter” in *Krause I* and *II* was actually a photographer employed by a local Atlanta television station who was also a longtime friend of the defendant.\(^{148}\) He had accumulated information contained in fourteen notebooks detailing his activities following the disappearance of the defendant’s wife.\(^{149}\) When the plaintiffs sought to compel the photographer to produce the notebooks, he asserted that the reporter’s privilege prevented disclosure of them.\(^{150}\)

The court first considered whether the photographer was acting in the capacity of a newsgatherer and disseminator as defined by the statute, or whether he gathered the information in the role of a friend of the defendant.\(^{151}\) The court accepted the defendant’s argument that he was a “photo-journalist,” and was therefore entitled to protection under the statute as a member of the news media.\(^{152}\) However, the court noted that the

\(^{146}\) Id.


\(^{148}\) *Krause I*, supra note 147, at *1.

\(^{149}\) Id. The photographer’s information included “conversations with . . . [the defendant] concerning his wife’s disappearance; conversations with law enforcement officials and others regarding the ongoing investigation; participation in the search for . . . [the defendant’s wife] before . . . [her body] was found; assistance in the coordination of media relations for . . . [the defendant] during the entire time; and, efforts to obtain information for . . . [the defendant] after the filing of the . . . lawsuit.” Id.

\(^{150}\) Id.

\(^{151}\) Id. at *3.

\(^{152}\) Id.
photographer was clearly acting in the dual role of reporter and friend while gathering the information, and determined that it must decide whether the photographer had “crossed the line” between journalist and friend. The court held that those roles were not “inherently contradictory,” and left the true judgment of the photographer’s actions up to the ethical obligations of the media profession: “Whether one’s objectivity as a news gatherer is unduly compromised by his closeness to a news maker, the court leaves to business judgment and journalistic ethics.”

In addressing whether the three prongs of the qualified privilege had been met by a showing of the plaintiffs’ need for the information, the court cited an influential case decided by the New Jersey Supreme Court as authority for ordering an in camera inspection of the photographer’s notebooks to determine to what extent, if any, the privilege had been overcome. However, the Krause I court held that before an in camera inspection could be conducted, the plaintiffs had to meet the three qualifications of the statute—relevance, lack of reasonable alternative means, and necessity to the plaintiffs’ case.

In effect, what the court did by ordering an in camera inspection was to place another buffer zone between the reporter and compelled disclosure. Provided the plaintiffs could sustain their burden of proof in the preliminary hearing on the disclosure issue, the judge, through the in camera proceedings, would be the ultimate arbiter of what information the journalist must disclose.

153. Id.
154. Id. at *4. The court cited the famous case of In re Farber, 394 A.2d 330 (N.J.), cert. denied, 439 U.S. 997 (1978), in which the New Jersey Supreme Court held that an in camera inspection by the trial judge of the information sought by a criminal defendant from an investigative reporter did not violate the state's reporter's privilege statute. The court stated: "[T]he trial judge] refused to give ultimate rulings with respect to relevance and other preliminary matters until he had examined the material. We think he had no other course. It is not rational to ask a judge to ponder the relevance of the unknown." Id. at 338.
156. Apparently, the plaintiffs were successful in overcoming the privilege because the notebooks of the journalist were submitted for in camera review in February of 1991. Krause II, supra note 147, at *1. Following the in camera inspection, the trial judge determined that in balancing the journalist's privilege found in O.C.G.A. § 24-9-30 against the plaintiffs’ right to discovery, “the reporters privilege must give way to the plaintiffs' discovery rights” and therefore ordered the production of the notebooks. Id. The judge also noted that the privilege did not apply to nonconfidential information already known to the plaintiffs; only the information contained in the
IV. SUBSTANTIVE SCOPE OF O.C.G.A. SECTION 24-9-30

A. Persons to Whom the Privilege Applies

A significant percentage of cases which involve the assertion of a reporter's privilege are defamation actions with a media organization as defendant.\textsuperscript{157} Several states have reporter's privilege statutes which contain provisions for the media defendant in a defamation action.\textsuperscript{158}

Georgia's statute circumvents the issue of whether media defendants in a defamation action may assert the privilege by providing in the express language of the statute that the privilege does not apply to a party to litigation.\textsuperscript{159} Drafted as such, the statute forecloses any party to any judicial proceeding from employing the privilege.\textsuperscript{160} Thus, the denial of a reporter's privilege to a media defendant that was effected in Georgia


\textsuperscript{158} See ARK. CODE ANN. § 16-85-510 (Michie 1977) (privilege applies unless proof of bad faith, malice, and not in the interest of the public welfare); Privileges and Immunities—Reporters (Public Act 84-938) ch. 110, 1985 Ill. Laws 437 (privilege is not available to media defendant in libel or slander action); LA. REV. STAT. ANN. § 45:1454 (West 1982) (burden of proof is on media defendant in defamation action to show legal defense of good faith regarding confidential information); MINN. STAT. ANN. § 635.025 (West Supp. 1986) (privilege shall not apply, except as to source's identity, in defamation action if person seeking disclosure can show that information sought is clearly relevant to the issue of actual malice); OKLA. STAT. ANN. tit. 12, § 2506 (1980) (privilege protecting source of information and information does not apply where media defendant in defamation action seeks to invoke privilege to protect source or content of allegedly defamatory material); OR. REV. STAT. § 44.530(3) (1983) (privilege does not apply to media defendant in defamation action seeking to protect via the statute the source or content of allegedly defamatory information); R.I. GEN. LAWS § 9-19.1-3 (1985) (privilege does not apply to media defendant in defamation action regarding the source of any allegedly defamatory information); TENN. CODE ANN. § 24-1-205 (1980) (privilege does not apply to media defendant in defamation action to protect the disclosure of any allegedly defamatory information where defendant asserts a defense based on the source of such information).

\textsuperscript{159} O.C.G.A. § 24-9-30 (Supp. 1992). During the legislature's consideration of SB 636 (which became O.C.G.A. § 24-9-30), a member of the Georgia Senate Committee on Judiciary expressed concern that the privilege would give a media defendant in a defamation action an unfair advantage if the party was allowed to invoke the privilege during litigation. Dewberry, supra note 100, at 291.

\textsuperscript{160} Dewberry, supra note 100, at 291. Denial of the privilege to any party to litigation is as far as any state's reporter's privilege statute goes to protect against the unfair use of the privilege by a media defendant in a defamation case. See supra note 158.
Communications Corp. v. Horne\textsuperscript{161} on constitutional grounds, would be effected after the statute’s passage by a simple reading of the scope of the statute’s application.

A noted problem with the application of a journalistic privilege has been defining the class of media personnel who are entitled to the protection of the privilege.\textsuperscript{162} The United States Supreme Court has traditionally given a broad interpretation to what constitutes the “press” for purposes of First Amendment protection.\textsuperscript{163} A primary apprehension of the Branzburg majority in recognizing a privilege for the media was that such a recognition would eventually require the judicial system to include the “lonely pamphleteer”\textsuperscript{164} and the “soapbox orator”\textsuperscript{165} as members of the “press” for the purposes of the privilege.\textsuperscript{166}

The Georgia reporter’s privilege statute avoids the problem of determining who qualifies for the statute’s protection by limiting the universe of members of the “press” who are eligible. Under the statute, the invoker of the privilege must be: (1) a “person, company, or other entity;” (2) “engaged in the gathering and dissemination of news for the public;” (3) “through a newspaper, book, magazine, or radio or television broadcast.”\textsuperscript{167} Therefore,


\textsuperscript{162} Branzburg, 408 U.S. at 704.

\textsuperscript{163} Note, The Right of the Press to Gather Information, 71 COLUM. L. REV. 838, 851 (1971). The author also noted:

\[\text{The Court has up to the present considered first amendment rights as a guarantee of freedom of expression, and therefore it is only natural that it would view many different media as enjoying the protection of that guarantee. Thus it has held pamphlets, leaflets, signs, books, motion pictures, and non-commercial advertisements to be constitutionally protected, in addition to the more journalistic media of newspapers, magazines, radio, and television.}\]


\textsuperscript{164} Branzburg, 408 U.S. at 704. The plurality remarked:

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

\textit{Id.}


\textsuperscript{166} Branzburg, 408 U.S. at 704.

\textsuperscript{167} O.C.G.A. § 24-9-30 (Supp. 1992). The House Committee on Judiciary in
the "lonely pamphleteer" and the "soapbox orator" arguably could not use the statute because they do not meet the third requirement of the statute.168

B. What Is Protected By the Privilege

1. The Source

The journalistic privilege is like other traditional privileges established at common law in that often the relationship between the reporter and the source of information is one in which confidentiality is an element.169 Journalists claim that if the judicial system can force them to reveal their confidential sources, their ability to effectively gather news will be severely impaired, and therefore their First Amendment freedoms will be chilled.170

considering the bill to create the privilege proposed that the scope of the privilege be narrowed by changing "gathering or dissemination" to "gathering and dissemination." Dewberry, supra note 100, at 292. Thus, if potential invokers of the statute were not engaged in both the gathering and disseminating phases of journalism, they would not be eligible to use it. 

168. Perhaps the argument could be made that a pamphlet is a "newspaper," or that a multiple page handout qualifies as a "book" under the statute. To foreclose negligible arguments such as these, some state's reporter's privilege statutes require publication by the news medium, see, e.g., CAL. EVID. CODE § 1070 (West Supp. 1985) (requires invoker of privilege to be connected or employed with news publication, but protects against disclosure of unpublished information), or impose a requirement that the entity meet a specified circulation minimum, see, e.g., Privileges and Immunities—Reporters (Public Act 84-398) ch. 110, 1985 ILL. LAWS 436 ("news medium" means any newspaper or other periodical issued at regular intervals and having a general circulation") (emphasis added).

169. Monk, supra note 157, at 51. The attorney-client privilege, the clergyman-parishioner privilege, and the doctor-patient privilege are traditional privileges that were recognized at common law as exceptions to the common law’s "right to every man's evidence," and are now recognized by state and federal statutes. GILLMOR & BARON, supra note 17, at 347-48. However, the common law recognized a privilege only where communications originate in confidence, and where that relationship was one in which confidentiality was essential. S. J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 2286 (J. McNaughton rev. ed. 1940), discussed supra in note 65 and accompanying text.

170. GILLMOR & BARON, supra note 17, at 347. Surveys of the press in the late 1960s indicated that reporters relied on information from confidential sources for a significant amount of their information. For instance, one survey reported that the Christian Science Monitor relied on confidential sources for approximately 35 to 50 percent of their stories, while the Wall Street Journal determined that it relied on confidential sources for approximately 15 percent of its articles. Kuhn, supra note 30, at 350 (citing Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 NW. U. L. REV. 18, 43-44, 61 (1959)); see also Vincent Blasi, The Newsmen's Privilege: An Empirical Study, 70 Mich. L. Rev. 229 (1971).
The reporter’s privilege is distinct from traditional privileges recognized at common law, however, in that it is based not on the protection of the individual, private interests involved—such as the client’s interest in the attorney-client relationship, the parishioner’s interest in the clergyman-parishioner relationship, or the patient’s interest in the doctor-patient relationship—but is instead invoked to protect the media’s public interest in the free flow of information grounded in the First Amendment. Thus, the reporter’s privilege cannot be justified “under the privacy rationale, [where] the privilege is extended not because it promotes some other social policy but because the disclosure itself is thought to be offensive to our notions of legitimate privacy expectations and human dignity.”

The media’s argument against compelled disclosure of the sources of reporters’ information was a potent argument in the 1960s and 1970s when confidential sources were widely used by journalists for their articles, but “[b]y 1984, ... reliance on anonymous sources had decreased significantly... Journalists [now] report that on-the-record sources are preferred to assure credibility... Many news organizations have also become more cautious in their use of confidential sources.”

A recent development in the law regarding the relationship between reporters and their sources has been breach of contract claims brought by sources whose identities were disclosed by reporters who had allegedly promised to keep the relationship confidential. The most notable case in this area is Cohen v. Cowles Media Co., in which the United States Supreme Court recently ruled that the First Amendment did not bar a news source from bringing a cause of action based on state promissory estoppel doctrine against a newspaper that broke its promise to keep the source’s identity confidential.

171. Monk, supra note 157, at 3.
172. Gillmor & Baron, supra note 17, at 361. This commentator attributes the preference for identifiable sources by media organizations to the 1981 admission by a Washington Post reporter that she had made up statements attributed to a confidential source in a piece that won her a Pulitzer Prize. Id.
173. See generally Koepke, supra note 116.
175. Id. At the trial court level, the Minnesota state court rejected the defendant newspaper’s argument that the First Amendment shielded it from a breach of contract claim brought by the confidential source it identified. The case was tried before a jury, which awarded the source $200,000 in punitive damages and $500,000 in compensatory damages. Cohen v. Cowles Media Co., No. 798806 (Minn. Dist. Ct.)
While the case does not stand for the proposition that reporters may be civilly liable to their confidential sources on breach of contract grounds as a matter of law, it does suggest that there is potential harm to the source in compelled disclosure, in conjunction with the "chill" placed on the free flow of information claimed by the press. Moreover, Cohen mandates the proposition that "burned" sources may pursue an equitable remedy against the media entities that disclosed their identities without the burden of overcoming the defense of First Amendment protection.

Of the twenty-eight state reporter's privilege statutes, only three require that a confidential relationship between reporter and source exist before the privilege may apply. However,
once the confidential relationship is established under these statutes, the privilege granted extends to the source and the information communicated by that source. In contrast, another eight state statutes only protect the identity of the source, not the information that source relates to the reporter.

The Georgia reporter's privilege statute makes no distinction between information gathered or disseminated and the identity of the source of that information. Since the identity of the source can be considered information known to the reporter as well as the story that the source gives, ostensibly the statute protects a reporter's source. The Georgia legislature intended to extend the privilege to protect the information and the identity of its source.

2. The Information

A reason proffered for the establishment of privileges to protect disclosure of reporters' information is that, if unprotected, reporters are exposed to abuse from parties to litigation. Such abuse can occur in the context of civil litigation when a party seeks to discover or subpoena the contents of a reporter's files as a time and money shortcut to gathering the same information itself. In the criminal context, a related concern is that "the government not be allowed to look upon the media as its own private investigative force."

In order to guard against these potential abuses, most reporter's privilege statutes do not require that the information

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179. See supra note 178 for statute citations.
182. See Stripling, 401 S.E.2d 500 (Ga. 1991), discussed supra in notes 131-39 and accompanying text, in which the Georgia Supreme Court applied O.C.G.A. § 24-9-30 to protect the disclosure of a reporter's information, including the identities of the ex-sheriffs' deputies who gave it to her, regarding an alleged system of illegal monitoring of attorney-client conversations at the Douglas County jail. Id.
183. Dewberry, supra note 100, at 294.
184. Id.
185. Id.
186. Monk, supra note 157, at 15.
sought be published before the privilege may attach to it.\(^{187}\) However, three state statutes do extend the privilege only to published material.\(^{188}\)

The Georgia reporter's privilege does not specify what information it protects, other than that it extends to "any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding."\(^{189}\) The statute does not distinguish between confidential and nonconfidential information, so ostensibly it covers both.\(^{190}\) The Georgia legislature intended nonconfidential information to be covered by the statute.\(^{191}\) Therefore, since there is no distinction made between confidential and nonconfidential information, and because the statute specifically covers information obtained in the news gathering stage, the statute does not require publication before the privilege applies to that information.

C. Judicial Proceedings in Which the Privilege May Be Invoked

1. Grand Jury Proceedings

Despite the clear holding of the *Branzburg* plurality that reporters are not entitled to a privilege against disclosure of information relevant to a grand jury proceeding, all of the state reporter's privilege statutes do protect a reporter in such a proceeding.\(^{192}\) However, the reason states have not been

\(^{187}\) Id. at 51.

\(^{188}\) Id.; see ALA. CODE § 12-21-142 (1975); ARK. CODE ANN. § 43-917 (Michie 1977); KY. REV. STAT. ANN. § 421.100 (Michie/Bobbs-Merrill 1972).

\(^{189}\) O.C.G.A. § 24-9-30 (Supp. 1992). Once the invoker of the statute has met the requirements for gathering and dissemination, the privilege protects against disclosure of information produced in either the gathering or disseminating stages of the news process. Id.

\(^{190}\) See Krause *I* and *II*, supra notes 147-56 and accompanying text, in which the photo-journalist's 14 notebooks contained confidential information (e.g., notes of conversations he had with defendant Hans Krause) and nonconfidential information (e.g., notes of conversations he had with police investigators during the investigation into the disappearance of defendant's wife). *Id.* The court held that the qualified privilege extended to all the notebooks, and conditioned an *in camera* inspection of the notebooks to separate the protected from the nonprotected information upon plaintiffs' successful proof of the three prongs of the privilege. *Id.*

\(^{191}\) Dewberry, *supra* note 100, at 294. In addition, the problem of the "lazy litigant," one who relies on subpoenaing nonconfidential information previously gathered by newspapers simply as a convenient discovery shortcut, was one of the reasons for the introduction of the reporter's privilege bill to the state legislature. *Id.*

\(^{192}\) Monk, *supra* note 157, at 36-37.
compelled to consider *Branzburg* as precedent in this respect in the drafting of privilege legislation is because the Court in that case expressly left the scope of a statutory privilege up to the individual state legislatures.\(^{193}\)

Unlike the trial of a criminal defendant, where in some cases the rights of a reporter under a statutory privilege must yield to the overriding Sixth Amendment rights of the criminal defendant in a criminal trial, the investigative power inherent in the operation of a grand jury is derived from the common law rather than from an explicit constitutional mandate.\(^{194}\) Accordingly, many state courts, in construing their respective statutory reporter's privilege laws, have held that the reporter's privilege extends to grand jury proceedings just as other traditional evidentiary privileges do.\(^{195}\)

The Georgia reporter's privilege statute applies to "any proceedings,"\(^{196}\) which necessarily encompasses grand jury investigations. Since the statute's passage, Georgia courts have not had the opportunity to apply the statute to the grand jury subpoena of a reporter's testimony.\(^{197}\) This fact is particularly notable in light of the Georgia Supreme Court's denial of a privilege to the subpoenaed reporter in *Vaughn v. State* months before the privilege became law.\(^{198}\)

With the statute now in place, it is unclear whether *Vaughn*, on its facts, would be decided differently. Arguably, the prosecution in *Vaughn* could have met the three prongs necessary to overcome the privilege. Unquestionably, the articles written by Vaughn were material and relevant to the prosecution's case since the substance of the articles formed the basis for the investigation.\(^{199}\) For that same reason, the articles

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195. *Id.* at 37. Of course, the reporter's privilege may be held to have been overcome by the need for the information by the grand jury, unlike the traditional attorney-client, clergyman-parishioner, or doctor-patient privileges. At a threshold level, however, the powers inherent in the grand jury system have generally not automatically overridden the protection offered the reporter by the legislature. *Id.*
196. O.C.G.A. § 24-9-30 (Supp. 1992). This broad use of the word "proceedings" necessarily includes administrative and legislative proceedings, as well as judicial, but a discussion of those proceedings are outside the scope of this article.
197. *See supra* notes 132-56 and accompanying text for discussion of Georgia cases applying the statute.
199. *Id.*
were necessary to the proper preparation or presentation of the prosecution's case against the defendant drug dealer Carlos. Assuming, then, that the reporter was the only person who knew the true identity of Carlos, the prosecution could have successfully argued that it could not reasonably obtain Carlos’ identity from any other means other than the reporter's testimonial disclosure. Thus, a good case could be made on the facts of Vaughn that the privilege would have been defeated and the reporter would have been compelled to disclose his source.

However, the wrinkle in this analysis is the disturbing fact that but for the reporter's article, there would have been no grand jury investigation at all. Further, and most importantly, it is unclear whether a court would hold that the prosecution had overcome the second prong of the statute, no reasonable obtainment of the information by alternative means, by simply showing that it had no knowledge of any other source able to identify Carlos. It is not clear what level of proof would be required of the prosecution in this regard. Perhaps the mere allegations contained in the article would suffice, or perhaps the court would require evidence of some sort of good faith investigation into Clayton County drug dealing before the lack of “reasonable alternative means” argument satisfied the court.

A latent factor to be considered if Vaughn were decided under the reporter's privilege is suggested by Justice Gregory's point in dissent in Vaughn that the reporter's article was not merely an instance of “fact reporting,” but “a matter of concern to the sovereign in sifting among many ideas in order to give direction to the state.” While the apparent purpose of Code section 24-9-30 was to give reporters protection against disclosure on more solid ground than the constitutional bases reporters were forced to invoke before its inception, this is not to say that those same constitutional arguments could not find their way into judicial consideration of whether a party had overcome the qualified privilege. Accordingly, a court might very well decide today in a Vaughn-type situation that the second prong of the privilege

200. The applicable reasoning arguably suggests a tautology, or, at the least, circular logic: The prosecution cannot reasonably obtain by alternative means the identity of the reporter's confidential source to criminally indict the source because it does not know the source's identity.

201. Vaughn, 381 S.E.2d at 33 (Gregory, J., dissenting).

202. See generally Dewberry, supra note 100.
had not been overcome by taking into account the potential harm to the free flow of information and ideas to the public due to compelled disclosure.\(^{203}\)

2. **Trials of Criminal Defendants**

When a criminal defendant seeks the compelled disclosure of a reporter's information, the reporter's interest against disclosure is pitted against the criminal defendant's Sixth Amendment\(^{204}\) right to a fair trial and compulsory process.\(^{205}\) The conflict between these interests has been characterized as an "apparent constitutional dilemma of a clash between the first and sixth amendment[s]."\(^{206}\)

The influential case of *In re Farber*\(^{207}\) signalled to reporters that whatever First Amendment basis the media enjoyed against compelled disclosure was subordinate to the Sixth Amendment rights of a criminal defendant if the demands of that defendant were "legitimate."\(^{208}\) The New Jersey Supreme Court in *Farber*

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203. Further, one could argue that Wigmore's four elements for recognition of a privilege, discussed *supra* in notes 65-66 and accompanying text, apply to Vaughn's circumstance—there was an express confidential relationship between Vaughn and Carlos; that confidentiality was essential to the maintenance of the relationship (if Vaughn had not promised secrecy, Carlos would not have disclosed the incriminating statements); in the opinion of the community, while the relationship between a criminal and investigative reporter is not directly fostered, arguably the public's general awareness of criminal behavior is mandated; and, arguably the harm to the role of effective journalism outweighs the one criminal indictment predicated entirely on the reporter's information. But see Plunkett v. Hamilton, 70 S.E. 781 (Ga. 1911) and discussion, *supra* notes 72-81 and accompanying text. The *Plunkett* court cited Wigmore's statement: "No pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice . . . . Accordingly, a confidential communication . . . to a journalist . . . is not privileged from disclosure." 70 S.E. at 785.

204. U.S. CONST. amend. VI provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to have compulsory process for obtaining Witnesses in his favor."

205. Monk, *supra* note 157, at 43. The prosecution's efforts in a criminal trial to compel disclosure of a reporter's information are "conceptually analogous to disclosure in a grand jury proceeding." *Id.* (footnote omitted).

206. *Id.* at 44. Unlike the conflict between the grand jury power and a reporter's interest in nondisclosure, which pits a common law derived power against the reporter's First Amendment interest, this conflict sets two fundamental constitutional rights at odds. *Id.*


208. *Id.* at 337. In *Farber*, the investigative reporting of a *New York Times* reporter led to the prosecution of a New Jersey doctor for murder. *Id.* The doctor subpoenaed the reporter's notes claiming that they were necessary for his defense. *Id.* at 332.
rejected a reporter's claim of privilege premised on both the New York and New Jersey reporter's privilege statutes.209 As to the reporter's claim of a privilege based on the First Amendment, the court held that the defendant's rights controlled when the information sought was relevant and compelling to his case.210

Farber seems to suggest that a reporter's absolute claim, asserted either constitutionally or under a shield statute, must yield to a defendant's constitutional rights. But the requirement in Farber that the defendant's needs be relevant and compelling to his or her defense suggests that a qualified reporter's privilege would not inherently conflict with a criminal defendant's Sixth Amendment rights.

In fact, most state reporter's privilege statutes that are absolute provide an exception in criminal proceedings.211 Further, most state statutes that are qualified require that the defendant in a criminal trial carry the burden of meeting the qualifications of the privilege before the privilege is overridden.212

The Georgia qualified reporter's privilege was applied in Stripling v. State and again in State v. McGraw. In both instances, the criminal defendant was adjudged not to have overcome the privilege. However, in both cases, the basis for the defendants' alleged needs for the reporters' information rested on tenuous grounds.

In Stripling, the defendant subpoenaed the reporter in order to compel her to reveal the source of her article on wiretapping in the county jail.213 The reporter stated that she had no personal knowledge of any monitoring of defendant's conversations with his attorney; nevertheless, the defense sought to expose the identity of the source apparently in the hope that it would have specific information relevant to the defendant so that he could substantiate his motion for a new trial on the basis of the wiretapping allegations.214 The pursuit of specific information

209. Id. at 335-37. While the court conceded that the reporter's claim fell squarely within the range of the statutory protections, it held that the Sixth Amendment and its New Jersey counterpart prevailed in the criminal context. Id.
210. Id. at 336-37.
211. Monk, supra note 157, at 43.
212. Id.
214. Lundy, supra note 131, at 2.
that may or may not exist by subpoenaing a source with only general knowledge comes quite close to a "fishing expedition."

Similarly, in McGraw, the defendant sought an editor's testimony, not only where another witness to the telephone conversation at issue was also subpoenaed to deliver essentially the same testimony, but also to support the defense's theory that ultimately the defendant had been framed in a political coverup. 215 Further, there was only a tenuous connection between the information sought from the editor and the defense charge of prosecutorial misconduct in the case. 216

Therefore, the factual situations of the criminal cases that have applied Code section 24-9-30 indicate that the Sixth Amendment rights of a criminal defendant to compulsory process and a fair trial have not yet conflicted in full force with the statute. While both Stripling and McGraw technically involved a criminal defendant's Sixth Amendment rights, both implicated essentially collateral interests of the defendant in relation to the crime charged. 217

The conflict between an asserted reporter's privilege and a defendant's Sixth Amendment rights was evident before the passage of Code section 24-9-30. The difference in outcome between the Hurst and Carver cases again emphasizes that any information a criminal defendant seeks from a reporter must, in effect, go to the heart of the defendant's defense before the Sixth Amendment will operate to compel disclosure. In Hurst, the defendant was permitted on Sixth Amendment grounds to impeach an eyewitness to the defendant's alleged act of murder with the testimony of a reporter who interviewed the eyewitness

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216. Id.
217. The alleged wiretapping scheme in the Douglas County jail had nothing to do with the murder and armed robbery charges against the defendant. Lundy, supra note 131, at 2. In State v. McGraw, discussed supra in notes 140-46 and accompanying text, the alleged prosecutorial misconduct related to the rather vague defense theory that the defendant was framed for stealing drugs out of a police evidence room in order to dispose of the issue before the upcoming sheriff's election. State v. McGraw, No. 89-OR-2622A (Ga. Super. Ct. Hall County Apr. 16, 1990), aff'd on other grounds, 405 S.E.2d 53 (Ga. Ct. App. 1991); Langford, supra note 139, at 2. As such, it did not contribute to establishing that the defendant did not take the drugs. But cf: In re Farber, discussed supra in notes 207-10 and accompanying text, in which the defendant alleged that the notes of the reporter (which were in fact the basis for the indictment and prosecution of the defendant for murder) were essential to the defense of the murder charge. In re Farber, 394 A.2d 330, 332 (N.J. 1978).
after the killing, regardless of the fact that the defendant could have called two other witnesses to the interview. Obviously, the court considered the reporter's testimony as potentially vital to the defense.

In contrast, the Georgia Supreme Court in Carver denied the defendant access to a newspaper's photographs that did not picture the defendant or the victim of his alleged terroristic threats because it found those particular photographs irrelevant to the defense. In other words, the photographs were excluded because they did not function to rebut or explain the specific criminal charge against the defendant.

3. Civil Proceedings

The circumstance of the civil litigant who seeks disclosure of a reporter's information is unlike that of the criminal defendant because the former implicates no constitutional right equivalent to the criminal defendant's Sixth Amendment rights. In that respect, the civil litigant is analogous to the prosecution in a grand jury proceeding or criminal trial; however, unlike the prosecution's public interest in those contexts, the interest of the civil litigant in compelling disclosure by a reporter is considered to be inherently private. Further, this private interest is not necessarily subjected to a good faith foundation as is a prosecutorial interest in a reporter's information.

Abuse of a reporter's interest in nondisclosure by a civil litigant can occur whether that litigant seeks the information as a discovery shortcut or as a tactical delay in the proceedings, knowing that the reporter will oppose a motion to compel. In either case, the civil litigant presents the weakest interest in a judicial proceeding to compel a reporter to testify or produce information.

220. Excluded from this section is a discussion of defamation actions against a media defendant because O.C.G.A. § 24-9-30 only applies to nonparties to litigation. See O.C.G.A. § 24-9-30 (Supp. 1992).
221. Monk, supra note 157, at 37.
222. Id.
223. Id. This commentator notes that "it is thus not surprising that, both before and after Branzburg, there has been strong protection of the privilege in nondefamation civil actions." Id. (footnote omitted).
An application of the qualified reporter’s privilege to the decision reached in Howard three months before the Georgia reporter’s privilege statute went into effect does not clearly indicate that the defendant college in that case could not have overcome the privilege. Certainly, the privilege would have initially applied to the reporter, but the ultimate issue raised by the reporter’s acts now that the statute controls is whether a nonparty reporter can give information to one party to a civil lawsuit and refuse to give or identify the same information to the opposing party by invoking Code section 24-9-30. Further complicating this matter is the fact that the information the reporter possessed and would not disclose to the college was information regarding the college’s finances which the reporter had collected while writing an article on the college before the litigation arose.\(^{224}\)

It seems clear that the college would be required to meet the three prongs of the Georgia statute, regardless of the questionable alliance of the reporter, unless it could show that the reporter was not acting within the scope of her profession by disclosing the information to the plaintiffs’ counsel. While Krause is not controlling in this regard, it does shed some light on how a higher state court might assess the matter. Like the journalist’s relationship with the defendant in Krause, the reporter’s one-sided actions in Howard suggest that she was interfering with the litigation. While it is clear that the reporter in Howard was initially acting within her capacity in gathering and disseminating the information, whether she was still engaged in either of those functions when she provided the information to plaintiff’s counsel is highly suspect.

Further, no confidential source was involved. Disclosure of the information would hardly affect the reporter, as it was financial information about the defendant, sought by the defendant, already in the possession of the plaintiff.\(^{225}\) Perhaps a court would hold, as in Krause, that the privilege would not apply to the information in the first place, since there was no level of sensitivity implicated.\(^{226}\)

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\(^{225}\) Id.

\(^{226}\) Krause II, supra note 147, at *1; see also Pinkard v. Johnson, 118 F.R.D. 517, 523 (M.D. Ala. 1987) (holding that *[a] reporter is not free to give a sworn statement
On the other hand, given the fact that the information was initially obtained from the defendant, technically the defendant possessed the information. Therefore, the college arguably could have obtained the information by alternative means. But those means were not necessarily "reasonable,"227 since the defendant had no idea what specific information the reporter had obtained from the college and had turned over to the plaintiffs.

Perhaps the most equitable method to deal with such a situation is the in camera inspection, as mandated by Farber and employed by the court in Krause I.228 Such an inspection allows a judge to evaluate the seeking party's proof toward overcoming the privilege and still protect whatever sensitivity attaches to the information. In the civil context, the judge cannot be expected to "ponder the relevance of the unknown."229

CONCLUSION

The recent re-emphasis of the Branzburg holding threatens to disturb an interpretation of that opinion maintained by many federal courts and some state courts that recognize a reporter's privilege based on constitutional grounds.230 Already, one federal circuit has come out in support of a strict interpretation of Branzburg and in support of the legal system's distaste for evidentiary privileges reflected in the tradition of the common law.231 Certainly, these events could lead to the widespread erosion of support for any constitutional basis for a reporter's privilege. The Eleventh Circuit Court of Appeals, which recognizes a qualified privilege for reporters grounded in the First Amendment,232 could be affected by such a movement.

However, even a strict interpretation of Branzburg will not disturb the Branzburg plurality's invitation to Congress and state legislatures to enact legislation that would extend such a privilege to reporters.233 While Congress has not passed any

228. Krause I, supra note 147, at *4.
229. In re Farber, 394 A.2d at 338.
230. See supra note 41 and accompanying text.
231. In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987); see also In re Shain, 978 F.2d 850 (4th Cir. 1992).
federal reporter's privilege legislation, the opportunity to do so will always exist. It is probable that the case for a national reporter's privilege law will become stronger if the federal courts rescind their applications of a constitutionally grounded reporter's privilege against disclosure.

Georgia's recent reporter's privilege legislation ends the state's long history of denying a common law or constitutionally based reporter's privilege. The qualified privilege created by Code section 24-9-30 will effectively protect reporters from abuses inherent in the subpoena process. On the other hand, the fact that the privilege is qualified and not absolute assures that evidence possessed by a reporter that is vital to a party's case will not be denied to that party simply because of the existence of the statute. While a burden is placed on parties seeking information from a reporter to prove that they cannot litigate, prosecute, or defend without compelling the reporter to disclose, that burden is not insurmountable.

Regardless of the effectiveness of the Georgia reporter's privilege statute, problems will still be encountered with its application, especially when the privilege conflicts with a criminal defendant's constitutional rights to compulsory process and a fair trial. The privilege may also conflict with the power of a grand jury to compel the testimony of a reporter, but such a conflict will likely be difficult to resolve only if the reporter possesses confidential information that served as the basis for the grand jury investigation. The privilege will probably operate most effectively in the context of civil nondefamation litigation.

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