
SHIELDING THE FOURTH ESTATE: WHY THE IOWA LEGISLATURE SHOULD PROTECT JOURNALISTS FROM SUBPOENA-COMPELLED TESTIMONY BY ENACTING A SHIELD STATUTE

ABSTRACT

*While the U.S. Supreme Court in *Branzburg v. Hayes* declined to adopt a federal journalist privilege against compelled testimony, it simultaneously issued an implicit invitation to Congress or the individual states to adopt their own. States have accepted this invitation in a number of fashions, by way of statute or common law. Specifically, the State of Iowa provides a common law, qualified privilege for its journalists. This Note traces the origins and development of the Iowa protection and urges the Iowa legislature to enact a journalist shield statute that provides absolute privilege in civil cases and qualified privilege in criminal cases.*

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I. INTRODUCTION

A jail cell or a witness stand: this is a choice some professionally ethical¹ journalists have faced since before the nation's founding.² Today, fortunately for modern newsgatherers, all states (except Wyoming) and the District of Columbia provide their own statutory or common law protection.³ The State of Iowa's journalist privilege has evolved through common law, originating in *Winegard v. Oxberger*,⁴ just five years after the U.S. Supreme Court's issuance of an implicit invitation for state action in *Branzburg v. Hayes*.⁵

This Note urges the Iowa legislature to adopt a journalist privilege statute that heightens the current protection afforded by Iowa common law. Part II first explains the rationale that supports journalist shield protection, then demonstrates the necessity of state fortification in the absence of a

1. See SOC'Y OF PROF'L JOURNALISM, SPJ CODE OF ETHICS (Rev. Sep. 6, 2014) [hereinafter SPJ CODE OF ETHICS], available at <http://www.spj.org/ethicscode.asp> ("Journalists should . . . [b]e cautious when making promises but *keep the promises they make.*") (emphasis added).

2. "In 1722, Benjamin Franklin's half-brother, James, was hauled before a committee of the Assembly and asked to reveal the name of an author of an article in his newspaper, the *New England Courant*. Franklin refused and was imprisoned for a month." Louis A. Day, *Shield Laws and the Separation of Powers Doctrine*, 2 COMM. & L. 1, 3 (1980).

3. See *infra* note 47 and accompanying text.

4. *Winegard v. Oxberger*, 258 N.W.2d 847, 849–50, 852 (Iowa 1977) (holding for the first time that there existed a fundamental journalist privilege, though holding it is qualified and limited).

5. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) ("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."); see Day, *supra* note 2, at 4 (noting that at the time, nine states had statutorily accepted the Court's invitation by passing shield statutes).

federally recognized privilege. Part III traces Iowa's common law privilege from its foundational roots in *Winegard* to subsequent, clarifying case law. Part IV contends that the current Iowa privilege is insufficient in two ways, and that: (1) Iowa should complement its qualified privilege with an absolute privilege for sources and information in civil cases, and (2) the Iowa legislature should enact a statute that encompasses these protections. Finally, this Note proposes a statute that satisfies the above-suggested requirements.

II. LAYING THE FOUNDATION FOR STATE ACTION

A. Important Rationales Support Journalist Protection

Before examining *Branzburg* and its aftermath, one must understand, at least rudimentarily, the importance of shield protection. The Society of Professional Journalists' Code of Ethics admonishes journalists to "be honest and courageous in gathering, reporting and interpreting information."⁶ While performing the information-gathering function of journalism, diligent reporters often acquire sensitive information, ranging from an observation of illegal drug activity (presumably bartered with a promise of confidentiality)⁷ to a videotape of a suicide.⁸ Naturally, in the prosecution of those involved in the aforementioned illegal drug activity (and not so naturally, in the civil litigation surrounding the suicide), the otherwise-private information obtained in the reporting process becomes the target of a subpoena.⁹

As illustrated by the first example, both the reporter and the source have a vested interest in quashing the subpoena. The reporter's interest in upholding the confidentiality agreement stems from basic trustworthiness.¹⁰ A journalist who feasibly envisions using an anonymous source in the future depends on maintaining both rapport with familiar sources and reputation in potential sources.¹¹ The source's interest is generally more visceral—public shame or fear of retaliation—and is exacerbated by the voluntary

6. SPJ CODE OF ETHICS, *supra* note 1.

7. *See Branzburg*, 408 U.S. at 667–68.

8. *See Bell v. City of Des Moines*, 412 N.W.2d 585, 586 (Iowa 1987).

9. *See Branzburg*, 408 U.S. at 668; *Bell*, 412 N.W.2d at 586–87.

10. *See* SPJ CODE OF ETHICS, *supra* note 1.

11. *See Branzburg*, 408 U.S. at 729 (Stewart, J., dissenting) (stating that being able to work with various sources, anonymous or not, is vital to the journalism industry, or else journalists will become "captive mouthpiece[s] of 'newsmakers'").

nature of confidential interviews: but for the reporter's promise, the source almost certainly would not have divulged the information.¹² Thus, the fear of an empty promise spurred by unclear judicial protection generates an inherent distrust, which, if strong enough, can block or chill the otherwise free flow of information from the confidential source, through the reporter, to the public.¹³

Further, as illustrated by the second example, journalists—especially those subject to the strong guidance of a news outlet that wishes to avoid a damaged reputation via compromised promises or costly litigation—without shield protections may be discouraged from investigating and publishing stories that are likely to produce a subpoena.¹⁴ While more tenuous than the confidential source argument, this situation is necessarily more difficult to anticipate, as a number of factors must be present before the danger may be realized.¹⁵ Additionally, reporters have a commonsense interest in contributing to their profession without being subject to subpoena for nonconfidential information or materials, which could involuntarily “annex the journalistic profession as an investigative arm of government.”¹⁶

B. *Branzburg Declines to Accept the Reporter Privilege Rationales*

However, the Supreme Court in *Branzburg* rejected these very contentions.¹⁷ The Court admitted that a diminished flow of news was not an “irrational” consequence of a lack of protection but remained unpersuaded as to the “extent informers are actually deterred from furnishing information

12. *See id.* at 729–30 (“An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views.”).

13. *See id.* at 731–33.

14. *See id.* at 731.

15. While it is possible journalists, especially those without the backing of organizational funds or in-house counsel, could be altogether deterred by the threat of subpoena, the deterrence seems more likely to occur after an expensive legal battle and the negative coverage that ensues. *See* Robert T. Sherwin, Comment, “Source” of Protection: The Status of the Reporter’s Privilege in Texas and a Call to Arm for the State’s Legislators and Journalists, 32 TEX. TECH. L. REV. 137, 141 (2000).

16. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting). *But see id.* at 709 (Powell, J., concurring) (“The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort . . .”).

17. *See id.* at 693 (majority opinion).

when newsmen are forced to testify before a grand jury.”¹⁸ Both the dissent and commentators,¹⁹ though, were quick to point out the infeasibility and impropriety of the plurality’s request for specific, empirical data,²⁰ since concretely demonstrating a “significant constriction of the flow of news to the public”²¹ would be “difficult to pinpoint precisely.”²² Furthermore, in a dissenting opinion joined by Justices William Brennan and Thurgood Marshall, Justice Potter Stewart opined, “[W]e have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.”²³

The lingering rationales that support journalist protection, addressed most notably in *Branzburg*’s concurring and dissenting opinions, did not disappear. Though on its face the *Branzburg* holding initially seemed to emphatically reject any reporter privilege,²⁴ under more careful scrutiny, it becomes clear the decision actually precipitated a very different result: a limited, qualified privilege many lower courts applied in a variety of situations.²⁵

18. *Id.*

19. See e.g., Paul Marcus, *The Reporter’s Privilege: An Analysis of the Common Law*, *Branzburg v. Hayes*, and *Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 827 (1984) (noting the “showing [of proof] made by the media representatives [of the adverse effects a rejection of the journalist privilege would have] was most impressive,” including “extensive surveys” and affidavits filed by many “reputable journalists . . . in strong support of this position”).

20. See *Branzburg*, 408 U.S. at 693–94.

21. *Id.* at 693.

22. *Id.* at 733 (Stewart, J., dissenting).

23. *Id.*

24. “We are asked to create another [testimonial privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.” *Id.* at 690 (majority opinion).

25. See, e.g., *LaRouche v. Nat’l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Miller v. Transamerica Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974); *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958). It is important to note that 18 states enacted legislative protection prior to *Branzburg*, and some states—before and after *Branzburg*—have enacted an absolute protection. Day, *supra* note 2, at 3, 10; see, e.g., CAL. EVID. CODE § 1070 (West 2015); see also *infra* note 40 and accompanying text.

C. Branzburg's *Muddied Wake All But Demands Lower Court
Interpretation and Legislative Action*

In *Branzburg*, the Supreme Court's sole confrontation with reporter privilege,²⁶ the Court, in a plurality opinion written by Justice Byron White, recognized that "news gathering is not without its First Amendment protections,"²⁷ for "without some protection for seeking out the news, freedom of the press could be eviscerated."²⁸ However, the Court failed to "resolve many of the difficulties"²⁹ that existed in determining when First Amendment common law rights could permissibly be subordinated by other compelling governmental interests.³⁰

Arguably, the Court increased reporter privilege controversy³¹ in two ways. First, its primary holding, though seemingly broad,³² was responsive to the limited situation involving grand jury proceedings,³³ where the "fundamental governmental role" is compelling³⁴ and takes precedence over "the public interest in possible future news about crime from undisclosed, unverified sources."³⁵

Second, some lower courts questioned the plurality opinion's authority and concluded Justice Lewis Powell's concurrence controlled, since the result of the case hinged on his vote.³⁶ These courts applied Justice Powell's case-by-case balancing test,³⁷ which he touted as "the tried and traditional

26. Timothy M. Mulligan, *The Court of Special Appeals of Maryland to the Press Shield Law: "Good Night, and Good Luck"*, 41 U. BALT. L.F. 1, 4 (2010).

27. *Branzburg*, 408 U.S. at 707.

28. *Id.* at 681.

29. Marcus, *supra* note 19, at 820.

30. See *Branzburg*, 408 U.S. at 700; see also, e.g., *DeGregory v. Attorney Gen. of N.H.*, 383 U.S. 825, 829 (1966); *NAACP v. Button*, 371 U.S. 415, 439 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama*, 357 U.S. 449, 464 (1958); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

31. *Winegard v. Oxberger*, 258 N.W.2d 847, 849 (Iowa 1977).

32. "We are asked to create another [testimonial privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." *Branzburg*, 408 U.S. at 690.

33. *Id.* at 682.

34. *Id.* at 700; see U.S. CONST. amend. V.

35. *Branzburg*, 408 U.S. at 695.

36. See, e.g., *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974).

37. See, e.g., *Riley v. City of Chester*, 612 F.2d 708, 715-16 (3d Cir. 1979).

way of adjudicating such questions.”³⁸ Further still, many lower courts and state legislatures fashioned tests³⁹ similar to Justice Stewart’s dissenting proposal,⁴⁰ which “essentially established a presumption against disclosure,” rebuttable only by “satisfy[ing] a three-prong test.”⁴¹

The *Branzburg* decision’s admittedly narrow⁴² applicability spared ample leeway for lower federal court discretion in interpreting the journalist privilege outside the context of grand jury proceedings and flat refusals to appear.⁴³ Coupled with its implicit call for congressional action,⁴⁴ the decision explicitly reminded state courts that they may “respond[] in their own way and constru[e] their own constitutions so as to recognize a newsman’s privilege,” and encouraged state legislatures “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.”⁴⁵ Simply put, rather than construct a federal common law shield protection or attempt to preclude other governmental entities from constructing their own protections, the *Branzburg* Court elected to extend a sweeping invitation

38. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

39. *See, e.g.*, FLA. STAT. § 90.5015(2) (West 2015).

40.

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 newsman 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 rights; and (3) demonstrate a compelling and overriding interest in the information.

Branzburg, 408 U.S. at 743 (Stewart, J., dissenting) (footnotes omitted).

41. Sherwin, *supra* note 15, at 147.

42. *Branzburg*, 408 U.S. at 682 (majority opinion) (“The sole issue before us is the obligation of reporters to respond to grand jury subpoenas . . . to answer questions relevant to an investigation into the commission of a crime.”).

43. Sherwin, *supra* note 15, at 156; *see, e.g.*, *Baker v. F & F Inv.*, 470 F.2d 778, 784 (1972) (stating that *Branzburg* was “only of tangential relevance to this case,” because “[n]o such criminal overtones color the facts in this civil case”).

44. *Branzburg*, 408 U.S. at 706 (“At the federal level, Congress has freedom to determine whether a statutory newsman’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.”).

45. *Id.*

addressed to Congress, state legislatures, and state courts.⁴⁶ Gradually, every state (except Wyoming) and the District of Columbia have judicially or statutorily accepted the Court's invitation.⁴⁷

III. ACCEPTING *BRANZBURG*'S STATE COURT INVITATION

A. *Iowa Law Basics*

The Iowa Constitution provides:

Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous was true, and was published with good motives and justifiable ends, the party shall be acquitted.⁴⁸

This language differs from the First Amendment to the U.S. Constitution.⁴⁹ However, these textual differences have not necessarily translated to a readily cognizable independent state review.⁵⁰ In fact, the Iowa Supreme Court's view of the separate protections is blurred: "Because these state provisions are almost identical to the federal Constitution, this court has accepted interpretation of the federal Constitution as the proper interpretation of the Iowa Constitution as well."⁵¹ This sentiment was also employed in the Iowa Supreme Court's initial recognition of a qualified

46. *See id.*

47. *United States v. Sterling*, 724 F.3d 482, 531–32 (4th Cir. 2013) (compiling the statutory and case law protections for the journalist privilege).

48. IOWA CONST. art. I, § 7.

49. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

50. *See generally* Michael A. Giudicessi, *Independent State Grounds for Freedom of Speech and of the Press: Article I, Section 7 of the Iowa Constitution*, 38 DRAKE L. REV. 9 (1989) (providing a detailed discussion of the Iowa Supreme Court's early reliance on independent state grounds, subsequent trend away from independent state grounds, and the area-specific usage of independent state grounds).

51. *Des Moines Register & Tribune Co. v. Iowa Dist. Court*, 426 N.W.2d 142, 144 n.1 (Iowa 1988) (citing *Iowa Freedom of Info. Council v. Wifvat*, 328 N.W.2d 920, 924 (Iowa 1983)).

journalist privilege.⁵² But when tasked with defining procedures for testing the privilege just five years later, the Iowa Supreme Court “probably . . . grounded [the adoption of the procedure] on the independent speech and press provisions of the Iowa Constitution.”⁵³ At a minimum, disagreement exists with regard to the foundation on which the Iowa journalist privilege rests.⁵⁴

B. *Winegard v. Oxberger*

In 1975, the Iowa Supreme Court granted certiorari to address a question of first impression in Iowa: “To what extent, if any, does the First Amendment protect confidentiality of newsperson’s sources and information?”⁵⁵ The court cited *Branzburg*⁵⁶ and *Schneider v. New Jersey*⁵⁷ to refute the petitioner’s argument that “a constitutionally based newsperson’s privilege” does not exist.⁵⁸ Accordingly, the court recognized a “fundamental newsperson privilege,” with the caveat that the privilege “is not absolute or unlimited.”⁵⁹ Then, pursuant to relevant Supreme Court precedent, the court held that an interest-balancing inquiry that weighs the burden of an “impairment of . . . First Amendment freedom” against “the interest to be served by compelling the testimony of the witness” can result in favor of either party.⁶⁰

The *Winegard* court then adopted a three-element test, similar but not identical to the *Branzburg* dissent’s proposed test,⁶¹ that the issuing party

52. See *Winegard v. Oxberger*, 258 N.W.2d 847, 852 (Iowa 1977).

53. Giudicessi, *supra* note 50, at 27.

54. See *id.*

55. *Winegard*, 258 N.W.2d at 849.

56. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (“Freedom of the press is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.’”) (quoting *Lovell v. City of Griffen*, 303 U.S. 444, 450 (1938)) (alteration in original).

57. *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939) (“The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgement by a state.” (citation omitted)).

58. *Winegard*, 258 N.W.2d at 849–50.

59. *Id.* at 850.

60. *Id.* at 851 (quoting *Garland v. Torre*, 259 F.2d 545, 548–549 (2d Cir. 1958)).

61. Compare *id.* at 852, with *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting).

must satisfy in order to compel disclosure:

(1) That the information is necessary or critical to the involved cause of action or defense pled. As stated in *Garland [v. Torre]*, often quoted as authority for this standard, the information sought should go to the heart of the questioner's claim.

(2) That other reasonable means available by which to obtain the information sought have been exhausted.

(3) That it does not appear from the record the action or defense is patently frivolous.⁶²

Encompassed in this holding are standards that harken back to both Justice Powell's concurrence and Justice Stewart's dissent in *Branzburg*—specifically, the interest-balancing⁶³ and three-prong test, respectively.⁶⁴ Interestingly, the Iowa court did not reference *Branzburg* in the adoption of the test, perhaps suggestive of the court's quiet reliance on the Iowa Constitution.⁶⁵ Because the petitioner advanced First Amendment and Section 7 claims, the court addressed both, albeit concurrently: "For purpose of clarity it is understood our holding today regarding a newsperson's privilege shall be deemed equally applicable to article I, section 7, of the Iowa Constitution."⁶⁶

With the first brick laid, the Iowa Supreme Court effectively accepted the *Branzburg* invitation. But further development of the Iowa reporter privilege surfaced quickly because the qualified privilege, by its rebuttable essence, provoked unanswered procedural questions.

C. *Lamberto v. Bown*⁶⁷

The *Lamberto* court sought to clarify the vast penumbra *Winegard*

62. *Winegard*, 258 N.W.2d at 852 (citations omitted).

63. *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring).

64. *Id.* at 743 (Stewart, J., dissenting).

65. IOWA CONST. art. I, § 7; cf. Note, *The Right of the Press and Public to Attend Criminal Trial Proceedings in Iowa*, 66 IOWA L. REV. 153, 178–79 (1981) (noting that *Winegard*'s dual claims—First Amendment and Section 7—prevented a subsequent Supreme Court inconsistency from overruling it, and thereby suggesting that Section 7's scope "is greater than the scope of the . . . protections as interpreted by the United States Supreme Court.").

66. *Winegard*, 258 N.W.2d at 852 (citations omitted).

67. *Lamberto v. Bown*, 326 N.W.2d 305 (Iowa 1982).

produced by tightening the recently adopted three-part test and providing clear procedural guideposts to aid litigants attempting to assert or overcome the privilege.⁶⁸ First, the court eliminated the “requirement of a separate showing that a claim or defense is not patently frivolous,” due to its “duplicative and unnecessary [nature] in view of the other elements.”⁶⁹ Then, in the heart of its decision, the *Lamberto* court prescribed a procedural blueprint,⁷⁰ as well as the proper examination to conduct if the privilege is in fact rebutted:

[A] determination must be made whether the resisting party falls within the class of persons qualifying for the privilege. If that preliminary showing is made, the material is to be treated as presumptively privileged, and the burden falls on the requesting party to satisfy the court by a preponderance of the evidence, including all reasonable inferences, that (1) there is a probability or likelihood that the evidence is necessary and (2) it cannot be secured from any less obtrusive source. If the court is so satisfied, an in-camera examination of the evidence should be ordered. The in-camera determination should then be made based upon an examination of the evidence in question, and any other evidence presented, whether the evidence is necessary to the claim or defense, and whether it would probably be admissible at trial. If these criteria are met, the requesting party should be permitted to use the evidence.⁷¹

Finally, the court attempted to bolster the federal legitimacy of such a procedure (because it otherwise cited only state case law) by noting that the “Supreme Court has approved a similar procedure in assessing a claim of executive privilege” in *United States v. Nixon*.⁷² However, the questionable applicability of *Nixon* weighs in favor of the argument that the procedure “probably was grounded on the independent speech and press provisions of the Iowa Constitution.”⁷³

68. *See id.* at 308–09.

69. *Id.* at 308.

70. *Id.* at 308–09.

71. *Id.* at 309 (citations omitted) (citing *In re Farber*, 394 A.2d 330, 338 (N.J. 1978)).

72. *Id.* (citing *United States v. Nixon*, 418 U.S. 683, 713 (1974)).

73. Giudicessi, *supra* note 50, at 27.

D. *Bell v. City of Des Moines*⁷⁴

Taken together, *Winegard* and *Lamberto* set forth a seemingly straightforward, step-by-step approach to evaluating the applicability of a qualified privilege.⁷⁵ But like many judicially created standards, the Iowa Supreme Court failed to provide definitions for terms of art within its test, including who specifically fell within the “class of persons qualifying for the privilege.”⁷⁶ While the court in *Bell v. City of Des Moines* did not set forth an exhaustive list of those who qualify, it accepted those “whose function is to gather and edit and disseminate the news” as within the protected class.⁷⁷

In doing so, the *Bell* court either added a requirement to or clarified the “preliminary showing” a journalist must make to qualify for the presumptive privilege, which shifts the burden to the requesting party:⁷⁸ the “information in question [must be] obtained in the news gathering process.”⁷⁹ This requirement was likely implicit in the original test because journalists acting outside their professional capacity are no different than ordinary citizens.⁸⁰ Nonetheless, the loose definition of those within the class has important precedential value, especially when looking toward future litigation, which almost inevitably will involve nontraditional newsgatherers, such as bloggers or social-media-based outlets.⁸¹

In *Bell*, the plaintiffs sought access to and preservation of all of WHO-TV’s video footage of a publicly committed suicide, as well as the testimony of the news station’s news director.⁸² While parts of the video footage were packaged and aired on television (and were therefore public material), other

74. *Bell v. City of Des Moines*, 412 N.W.2d 585 (Iowa 1987).

75. See *Winegard v. Oxberger*, 258 N.W.2d 847, 852 (Iowa 1977); *Lamberto*, 326 N.W.2d at 309.

76. See *Lamberto*, 326 N.W.2d at 309.

77. *Bell*, 412 N.W.2d at 587 (quoting parties’ stipulations).

78. *Lamberto*, 326 N.W.2d at 309.

79. *Bell*, 412 N.W.2d at 588.

80. See, e.g., Kurt Wimmer & Stephen Kiehl, *Who Owns the Journalist’s Privilege—The Journalist or the Source?*, 28 COMM. LAW. 9, Aug. 2011, at 11 (citing *Diaz v. Eighth Judicial Dist. Court*, 993 P.2d 50, 57 (Nev. 2000)).

81. See generally Benjamin J. Wischnowski, Note, *Bloggers with Shields: Reconciling the Blogosphere’s Intrinsic Editorial Process with Traditional Concepts of Media Accountability*, 97 IOWA L. REV. 327, 329 (2011) (“The new landscape of modern journalism, populated by professional journalists and independent bloggers, is forcing courts to consider the degree to which independently operating bloggers should receive the protection that states generally give traditional reporters.”).

82. *Bell*, 412 N.W.2d at 586–87.

parts of the footage never aired.⁸³ In ruling that the privilege applied in this scenario, the court recognized the protection of unpublished, nonconfidential material.⁸⁴

Additionally, *Bell* expressly rejected the district court's reasoning that "the absence of confidential informants, and the fact that [an] event [is] 'open for the whole world to see'" automatically disqualifies the reporter's shield.⁸⁵ Thus, the court in *Bell* held that the qualified privilege test is applicable regardless of confidentiality because the test "turns simply on whether the resisting party is a member of the protected class engaged in the news gathering process."⁸⁶

E. *Waterloo-Cedar Falls Courier v. Hawkeye Community College*⁸⁷

In 2002, the *Waterloo-Cedar Falls Courier* (Courier) sued Hawkeye Community College (Hawkeye) for allegedly violating the Open Meetings Act⁸⁸ "by conducting a closed-session meeting regarding the competency of the president of the College."⁸⁹ In fact, two of these closed meetings eventually resulted in the president's forced resignation.⁹⁰ Two Courier editors spoke with two people present during the closed meetings and promised them confidentiality.⁹¹ During deposition, the editors refused to disclose the identities or the content of the discussion.⁹² The trial court ordered the Courier's editors to provide their sources and interview notes for in camera review.⁹³ The Iowa Supreme Court then granted the Courier's application for interlocutory appeal.⁹⁴

On appeal, Hawkeye first asserted that the reporter privilege was inapplicable to the Courier, as its actions could be construed as "attempting

83. *Id.* at 587.

84. *See id.* at 587–88.

85. *Id.* at 588 (quoting district court opinion).

86. *Id.* (citing *Lamberto v. Bown*, 326 N.W.2d 305, 309 (Iowa 1982)).

87. *Waterloo-Cedar Falls Courier v. Hawkeye Cmty. Coll.*, 646 N.W.2d 97 (Iowa 2002).

88. IOWA CODE § 21.5(1)(i) (2015).

89. *Waterloo-Cedar Falls Courier*, 646 N.W.2d at 99.

90. *Id.* at 103.

91. *Id.* at 99.

92. *Id.* at 99–100.

93. *Id.* at 100.

94. *Id.*

to gather discovery for the pending lawsuit.”⁹⁵ The court, however, disposed of the argument neatly, holding that “[t]he College has done nothing more than merely suggest the editors took their hats off as reporters to act instead as litigants.”⁹⁶ Thus, the presumptive privilege applied to the Courier.⁹⁷ Essentially, the court alerted future litigants that a “mere assertion” of a journalist’s dual role as reporter and litigant would be insufficient to prevent triggering the presumption.⁹⁸

In its foresight, Hawkeye alternatively asserted that if the “privilege applied, the Courier waived it by filing [the original open meetings] suit.”⁹⁹ The court also rejected this argument, providing its own dual reasoning.¹⁰⁰ First, the editors, as holders of the privilege, were the only parties who could waive it.¹⁰¹ Because the Courier filed the original suit—not the editors—it could not have waived a protection it did not hold.¹⁰² Second, the court held that the privilege cannot be waived by “mere status as litigants”; instead, the party must affirmatively “do something to waive the privilege.”¹⁰³ Finally, the court concluded the Courier had not waived the privilege because the material being sought was not necessary or at issue in the underlying litigation.¹⁰⁴

Indirectly, the *Waterloo-Cedar Falls Courier* holding clearly established that the privilege indeed shields sources, as well as confidential information, such as that at issue in *Lamberto*.¹⁰⁵

95. *Id.* at 101 (quoting Brief for Appellee, *Waterloo-Cedar Falls Courier v. Hawkeye Cmty. Coll.*, 646 N.W.2d 97 (Iowa 2002)).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 102.

101. *Id.* at 102.

102. *Id.* at 101–02.

103. *Id.* at 102 (“[A] waiver of the privilege has most often been found where the plaintiff put the sought-after information into issue in the litigation and then attempted to prevent its disclosure by invoking the shield of privilege. . . . The privilege may also be waived if the holder voluntarily discloses or consents to disclosure of any significant part of the matter or communication.”) (citations omitted).

104. *Id.* at 103–04.

105. *See id.* at 102; *Lamberto v. Bown*, 326 N.W.2d 305, 306 (Iowa 1982).

F. *Denk v. Iowa District Court*¹⁰⁶

While some states construe the privilege as inapplicable in criminal proceedings, the Iowa Supreme Court has held that the privilege is, in fact, applicable, though its test may be less stringently applied, and therefore, more easily overcome.¹⁰⁷ In a brief decision, the court held that the *Lamberto* test should still be employed in criminal proceedings, but “a less compelling interest may need to be shown in a criminal case than a civil suit to override the reporter privilege.”¹⁰⁸

IV. TRANSITIONING FROM QUALIFIED, COMMON LAW PROTECTION TO PROVISIONAL ABSOLUTE AND QUALIFIED, STATUTORY PRIVILEGE

The nature of Iowa’s current reporter privilege can be summarized as a qualified, common law privilege. This Note proposes two substantial changes: (1) the privilege should be absolute as it applies to compelled disclosure in civil cases, and (2) the privilege should be codified in the Iowa Code.

A. *Absolute Privilege Is Preferential to Qualified Privilege for Information in Civil Cases*

In *Branzburg*, Justice White, writing for the plurality, chose not to adopt federal common law recognition of a qualified reporter’s privilege, as he was unconvinced a qualified privilege would provide the guarantee of secrecy confidential informants purported to require.¹⁰⁹ Justice White argued 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.”¹¹⁰ Justice White’s rejection of qualified privilege left two courses of action: no privilege or absolute privilege.¹¹¹

106. *Denk v. Iowa Dist. Court*, 20 Med. L. Rep. (BNA) 1454 (Iowa 1992).

107. *Id.* at 1455.

108. *Id.* (“However, this does not mean that, in a criminal case, the procedures for evaluating the applicability of the reporter privilege may be abandoned. The fact that information is subpoenaed from the media for purposes of a criminal investigation does not *automatically* override the constitutional privilege.”) (emphasis added).

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

110. *Id.*

111. *See id.* Clearly, the former option was the course of action chosen by the plurality. Justice White in fact, recognized the second option: “For [newsmen’s confidential sources], it would appear that only an absolute privilege would suffice.” *Id.*

At the time of the *Branzburg* decision, the Supreme Court was not ready to recognize such a progressive protection because “the task of judges . . . is not to make the law but to uphold it in accordance with their oaths.”¹¹² The Court proposed that this problem be addressed by the aforementioned implicit invitation to congressional and state action.¹¹³ The *Branzburg* Court also found fault with journalist privilege because of its “practical and conceptual difficulties.”¹¹⁴ This criticism, however, can be escaped with the adoption of an absolute privilege. In its decision, the Court noted three specific difficulties: (1) the inevitable classification as to who qualifies as a journalist and thus qualifies for the privilege; (2) the difficult procedural requirements associated with qualified privilege invocation in criminal cases; and (3) the untested veracity of journalists’ fears of law enforcement and prosecutor harassment.¹¹⁵

First, the classification problem, discussed *infra*, can be addressed in detail with the passage of a statute.¹¹⁶ Further, the assertion that protection should not be afforded simply because a court may find difficulty in determining whether an individual in fact qualifies as a journalist is illogical and counterproductive.

Second, the issues associated with invocation of the privilege in criminal cases are certainly difficult to resolve, and a bright-line rule is inappropriate.¹¹⁷ In *Branzburg*, the Court noted that, if a qualified privilege were to be implemented, future criminal courts would have to engage in a multifaceted inquiry:

[T]he courts would . . . be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter’s appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?¹¹⁸

This Note does not propose absolute privilege for journalists subpoenaed in

112. *Id.* at 706.

113. *Id.*; see *supra* text accompanying note 5.

114. *Branzburg*, 408 U.S. at 704.

115. See *id.* at 704–08.

116. See *infra* Part B.

117. See *Branzburg*, 408 U.S. at 705–06.

118. *Id.* at 705.

criminal cases. Rather, it proposes qualified privilege, which the *Branzburg* Court argued against.¹¹⁹ This is because criminal cases involve a defendant's constitutional rights, which could possibly be deprived if the journalist's disclosure is not compelled. In this situation, important—and often, constitutional—rights come to a head: the defendant's Fifth or Sixth Amendment rights or the state's interest in the “fair administration of justice” and the journalist's First Amendment rights.¹²⁰ As such, the somewhat detailed inquiry presented by the *Branzburg* Court does not seem out of place; rather, a test that balances each right against the other seems a rational solution.¹²¹ Indeed, the qualified privilege inquiry is meant to determine when an “interest [is] of such persuasive force as to subordinate a newsperson's privilege to withhold confidential information.”¹²²

Third, the *Branzburg* plurality used three rationales to conclude that journalists' fears of law enforcement or prosecutor harassment were unfounded: (1) “the press . . . is far from helpless to protect itself from harassment or substantial harm”; (2) prosecutors will be deterred from using law enforcement to investigate through journalists because those ventures are not generally successful; and (3) investigations must be conducted in good faith, otherwise officers of the court are subject to consequence.¹²³ To be sure, the first rationale cannot be believed as true; many independent, local, or resource-strained journalists and organizations cannot afford mechanisms that may be in place in larger organizations.¹²⁴ In addition, the second and third rationales assume self-regulation and motives of integrity. However, in civil cases where a plaintiff, and not the government, is generally the subpoenaing party, self-regulation should not be so automatically assumed, especially in cases where empty subpoenas could potentially be used as a stalling tactic.¹²⁵ Further, in the interest of judicial economy, these subpoenas should be closely monitored; journalists interested in maintaining source confidentiality have strong motivation to fight compelled disclosure subpoenas by way of hearings.¹²⁶

119. *Id.* at 702–08.

120. *Winegard v. Oxberger*, 258 N.W.2d 847, 852 (1972).

121. *See id.* at 851 (“That kind of determination often presents a ‘delicate and difficult’ task.” (citations omitted)).

122. *Id.* at 852.

123. *Branzburg*, 408 U.S. at 706–07.

124. *See Sherwin*, *supra* note 15.

125. *See id.*

126. *See id.*

Without the criticisms of reporter privilege that were presented in *Branzburg* and with the criticisms of qualified privilege in civil cases, the Court's logic makes for a compelling argument for absolute privilege. Further, the Court's encouragement of state action would be accomplished by the passage of an absolute privilege statute.

Independent of the *Branzburg* Court's criticisms, a number of reasons in support of absolute privilege exist. First, sound policy supports the recognition of absolute privilege for sources and information in civil cases. The role of the Fourth Estate, and relatedly, the importance of the free flow of information to the people, is to act as a check on other branches.¹²⁷ The impediment created by a qualified privilege inately burdens such an important function.¹²⁸

Second, the Iowa Constitution encourages more protection than that of the First Amendment to the U.S. Constitution.¹²⁹ There are obvious divergences in the actual text of the two amendments.¹³⁰ The Iowa Constitution provides an affirmative right and a legislative prohibition.¹³¹ The U.S. Constitution provides only a legislative prohibition.¹³² The addition of the affirmative right in the Iowa Constitution indicates, at least, a separation of thought. But further, the textual difference

make[s] it possible for the Iowa Supreme Court to expand speech and press protection in two ways. First, . . . even where state and federal provisions are identical, the interpretation on state grounds need not be the same as that of the federal provisions so long as it does not reduce the protection afforded by the federal law. Second, the distinct language gives the court a clear, independent mandate for extending

127. Cynthia Hujar Orr, *The Fourth Estate: A Vital Component of Our Justice System*, 34 CHAMPION 5, 5 (May 2010) ("Without a strong Fourth Estate, we would suffer at the whim of powerful public officials, unchecked prosecutors who exercise their discretion in the dark, and corrupt governments worldwide." (footnote omitted)).

128. See *Branzburg*, 408 U.S. at 702.

129. Giudicessi, *supra* note 50, at 16.

130. Compare U.S. CONST. amend. I, with IOWA CONST. art. I, § 7.

131. See IOWA CONST. art. I, § 7 ("Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press."); Giudicessi, *supra* note 50, at 16.

132. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

protection.¹³³

To be certain, the Iowa Constitution provides ample room—and possibly even a mandate—for greater protection. In fact, the procedure for in camera review set forth in *Lamberto*¹³⁴ was not guided by Supreme Court interpretation, which logically leaves independent state grounds as its backdrop.¹³⁵

Finally, it is important to remember that the qualified privilege would still be reserved for criminal cases.¹³⁶ Criminal cases generally pit two constitutional interests against one another: the defendant's and state's interest in the fair administration of justice and the journalist's First Amendment interest.¹³⁷

B. Statutory Journalist Privilege Is Preferential to Common Law Privilege

Statutory recognition of journalist privilege can be more comprehensive, detailed, clear, and even resistant to erosion. A plethora of commonsense reasoning, discussed below, supports a statute of this kind.

The journalism field today, like many others, is a rapidly changing one. The introduction and accelerated growth of new media, such as social media and other Internet vehicles, has already transformed the journalistic landscape.¹³⁸ This issue is also interwoven with one of the problems Justice White found with qualified privilege in *Branzburg*: the classification problem.¹³⁹ As media continue to develop, independent journalists like bloggers could potentially find themselves in a gray area under the common law.¹⁴⁰ However, a statute could clear some of this confusion by providing concrete definitions of whom or what “makes” a journalist.¹⁴¹ Similarly, statutes can be easily amended to account for hasty changes created by

133. Giudicessi, *supra* note 50, at 16 (citations omitted).

134. See *Lamberto v. Bown*, 326 N.W.2d 305, 308–09 (1982).

135. See Giudicessi, *supra* note 50, at 26–27. *But see* *United States v. Nixon*, 418 U.S. 683, 713 (1974).

136. See *supra* notes 117–23 and accompanying text.

137. See *supra* notes 120–23 and accompanying text.

138. See Tom Regan, *Technology is Changing Journalism*, NIEMAN REPORTS 6–7 Winter 2010.

139. See *Branzburg v. Hayes*, 408 U.S. 665, 704–05 (1972).

140. See Wischnowski, *supra* note 81.

141. Lauren J. Russell, Comment, *Shielding the Media: In an Age of Bloggers, Tweeters, and Leakers, will Congress Succeed in Defining the Term “Journalist” and in Passing a Long-Sought Federal Shield Act?*, 93 OR. L. REV. 193, 223–25 (2014).

technology.¹⁴² Along a similar line, a statute can address a wider array of situations, especially ones that are easily foreseeable, rather than waiting for litigants to bring a case or claim before a court may adjudicate.¹⁴³ In drafting a statute, the legislature then has the opportunity to hear testimony and examine compelling research before making any binding decisions.¹⁴⁴ As such, the scope of a statute can also more accurately encompass the policy considerations stressed by journalists, the state, and the people as a whole.

In addition, to afford the protection of absolute privilege to journalists who seek to withhold their sources and information, a statute is practically imperative.¹⁴⁵ Currently, there are 16 states that provide absolute journalist privilege, and all 16 states have done so statutorily.¹⁴⁶ In other words, no state courts have judicially created an absolute privilege.¹⁴⁷ Thus, it is highly unlikely the Iowa Supreme Court will judicially create an absolute privilege, which it has not done to date.¹⁴⁸

Finally, the Iowa Supreme Court's concurrent reliance on the U.S. Constitution and the Iowa Constitution demonstrates, at minimum, an interwoven relationship.¹⁴⁹ If the Supreme Court were to chip away at the privilege, the Iowa Supreme Court would likely be pressured to do so as well. Certainly, no one can be sure what effect the Supreme Court would have on the Iowa Supreme Court. In addition, the Iowa Supreme Court's nonrecognition of the greater protection implicitly afforded by the Iowa Constitution's text should press the Iowa legislature to pursue more reflective action.

142. See Sandra Davidson & David Herrera, *Needed: More Than a Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277, 1326 (2012) (stating that a "broad definition of journalist is precisely what modern technology calls for").

143. See Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 389–95 (2008).

144. See *id.* at 379.

145. See Davidson & Herrera, *supra* note 142, at 1284.

146. See *United States v. Sterling*, 724 F.3d 482, 531–32 (4th Cir. 2013) (compiling statutes proving absolute privilege to journalists in their states).

147. See *id.*

148. See *Waterloo-Cedar Falls Courier v. Hawkeye Cmty. Coll.*, 646 N.W.2d 97, 101 (Iowa 2002); *Bell v. City of Des Moines*, 412 N.W.2d 585, 587–88 (Iowa 1987); *Lamberto v. Bown*, 326 N.W.2d 305, 308–09 (Iowa 1982); *Winegard v. Oxberger*, 258 N.W.2d 847, 850 (Iowa 1977).

149. See Giudicessi, *supra* note 50, at 16–17.

V. CONCLUSION

Journalists who inform and protect the people, serving as the Fourth Estate, should and must be protected in turn. Without absolute privilege for journalists who use confidential sources and information, the free flow of information will continue to be abridged.¹⁵⁰ Similarly, without absolute privilege, journalists are at a risk of being used as an investigative tool for litigants, and ultimately, the courts.¹⁵¹ Further, without statutory privilege, journalists are at the mercy of judicial interpretation, breeding uncertainty for journalists who find themselves in situations that have not been litigated before Iowa courts in the past.¹⁵² For these reasons, the Iowa legislature should draft and adopt a limited, absolute statutory privilege for journalists acting in the scope of such an important role.

VII. APPENDIX A: PROPOSED JOURNALIST PRIVILEGE STATUTE

Section 1: Definitions.

As used in this Act:

(a) “Information” has its ordinary meaning and includes, but is not limited to, any written, oral, audio, pictorial, or electronically recorded news or other record;

(i) “Unpublished information” includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated, and includes, but is not limited to, all notes, outtakes, photographs, tapes, film, or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published or broadcast information based upon or related to such material has been disseminated.

(b) “Journalist” means one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping, photographing, analyzing, commenting on, or broadcasting of news intended for a newspaper, magazine, periodical, news agency, press association, wire service, radio broadcast, television broadcast, or other professional medium or agency which has as one of its regular functions the processing and

150. See *Brazenburg v. Hayes*, 408 U.S. 665, 725, 729–32 (1972) (Stewart, J., dissenting).

151. See Sherwin, *supra* note 15, at 144.

152. See *supra* Part IV.B.

researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

(i) "Journalist" does not include any governmental entity or individual employed by the government or its entities engaged in official governmental information activities.

(c) "Source" means a person from whom a journalist obtained information by means of written or spoken communication or the transfer of physical objects, but does not include: (1) a person from whom a journalist obtained information by means of personal observation unaccompanied by any other form of communication; (2) a person from whom another person who is not a journalist obtained information, even if the information was ultimately obtained by a journalist; and (3) a situation in which a journalist intentionally conceals from the source the fact that he is a journalist.

Section 2: Privilege

(a) Subject to paragraphs (b) and (c) of Iowa Code xxx.2, a journalist shall not be required to disclose any unpublished information or the source of any information procured or obtained by the Journalist in any proceeding, trial, or investigation before any government unit, including but not limited to judicial, legislative, executive, or administrative bodies.

(b) The privilege granted by Iowa Code xxx.2(a) shall be qualified in any criminal proceeding, trial, or investigation before any government unit, including but not limited to judicial, legislative, executive, or administrative bodies. In such proceedings, Iowa Code xxx.3 shall provide relevant procedural requirements.

(c) The provisions of Iowa Code xxx.2(a) do not apply with respect to Information or Sources of allegedly defamatory information in a civil action for defamation in which the defendant asserts a defense based on the Information or source of such information, in accord with the Iowa Constitution, Article I, Section 7.

Section 3: Determination of Privilege Claim in Criminal Cases¹⁵³

In a criminal case, a claim of privilege is rebuttable and the evidence should

153. This section is derived from the procedure outlined in *Lamberto v. Bown*, 326 N.W.2d 305, 309 (Iowa 1982) (citing *United States v. Nixon*, 418 U.S. 683, 713 (1974); *In re Farber*, 394 A.2d 330, 338 (N.J. 1978)).

be permitted upon the satisfaction of the following:

(a) Upon a showing that the resisting party falls within the class of persons protected by the privilege (defined in Iowa Code xxx.1(b)), the source or information is presumptively privileged, and the requesting party must, by a preponderance of the evidence, show:

(i) There is a probability that the evidence is necessary to the claim or defense, and

(ii) It cannot be secured from any less obtrusive source.

(b) Upon satisfaction of Iowa Code xxx.3(a)(i–ii), the evidence should undergo in camera examination to determine:

(i) Whether the information or source is necessary to the claim or defense, and

(ii) Whether there is a probability that the evidence will be admissible at trial.

(c) Upon satisfaction of Iowa Code xxx.3(a)(i–ii) and Iowa Code xxx.3(b)(i–ii), the evidence should be permitted for usage.

Section 4: Waiver

(a) The holder of the privilege does not waive the provisions of Iowa Code xxx.2 unless the holder affirmatively and voluntarily agrees to waive the privilege or voluntarily discloses unpublished information or sources while under sworn oath.

(b) The holder of the privilege does not waive the provisions of Iowa Code xxx.2 by disclosing all or any part of the information or source protected by the privilege to any other person, so long as the information remains unpublished, in accord with Iowa Code xxx.1(a)(i).

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