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A Reporter's Privilege in Florida: Has the Conflict Between the First Amendment and Sixth Amendment Been Reconciled?

Jay B. Rosman

A REPORTER'S PRIVILEGE IN FLORIDA: HAS THE CONFLICT BETWEEN THE FIRST AMENDMENT AND SIXTH AMENDMENT BEEN RECONCILED?

Honorable Jay B. Rosman[*]

I. INTRODUCTION

The reporter's privilege in Florida is examined. At the heart of this examination is the inherent conflict between two constitutional amendments in the Bill of Rights—the First Amendment and the Sixth Amendment[1]—specifically, the conflict that exists between the freedom of the press and the right to a fair trial.[2] The salient question addressed is whether the conflict between the First Amendment and the Sixth Amendment has been reconciled on the issue of a reporter's privilege by Florida courts and the Florida Legislature. The answer to that question is addressed throughout the paper and more directly during the paper's conclusion.

This is both an analytic and empirical study. Analytically, in order to address this constitutional conflict, it is important to look at the two amendments, to define a reporter's privilege, and to consider the history of the privilege. After looking at the history of the reporter's privilege, pivotal early Florida Supreme Court cases dealing with the reporter's privilege are discussed. Also, section 90.5015 of the Florida Statutes, enacted in October of 1998, and known as the Journalist's Privilege Statute, is examined along with Florida Supreme Court cases and Florida District Court of Appeals cases, post-legislatively. In addition, federal cases that have interpreted Florida law in this area are discussed. Finally, there is a brief discussion of the new media and what affect, if any, it has had on Florida law regarding this issue.

Empirically, a survey was conducted and the results are discussed. The survey company was hired to conduct a random phone survey using ten questions to see whether the public's attitudes and perceptions regarding this issue are consistent or

* Judge Jay B. Rosman presently serves as the Chief Judge of Florida's Twentieth Judicial Circuit. Judge Rosman has served as a Circuit Judge since 1992. Prior to the circuit bench, he served as a County Judge for Lee County from 1986. Judge Rosman has also served as an Associate Judge for the Second District Court of Appeal on three occasions. Judge Rosman received his B.A. with honors from Hofstra University in 1975, his J.D. from the University of Akron in 1978, and M.J.S. from the National Judicial College at the University of Nevada in 1994. He presently is a Doctoral candidate in judicial studies. This article is submitted towards completion of his doctorate. Prior to becoming Chief Judge, Judge Rosman taught Business Law and Criminal Law from 1982–2010 at the University of South Florida in Ft. Myers and at Florida Gulf Coast University in Ft. Myers, Florida.

1. MATTHEW D. BUNKER, JUSTICE AND THE MEDIA: RECONCILING FAIR TRIALS AND A FREE PRESS 68 (Jennings Bryant et al. eds., 1997).

2. DOUGLAS S. CAMPBELL, FREE PRESS V. FAIR TRIAL: SUPREME COURT DECISIONS SINCE 1807 1 (1994).

contrary to the state of the law concerning this issue.[3] An additional five questions were administered inquiring about the gender, race, age, political affiliation, and education level of the respondents; the results were tabulated to see if any of those factors impacted the results.[4]

II. THE RELEVANT CONSTITUTIONAL AMENDMENTS

A. First Amendment

The First Amendment provides that: "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."[5]

B. Sixth Amendment

The Sixth Amendment provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[6]

III. THE REPORTER'S PRIVILEGE IN CONTEXT

A constitutional battle exists today between journalists and participants in the criminal justice system.[7] The participants include judges, prosecutors, defense attorneys, and law enforcement. Central to the battle is the desire of the participants to seek evidence from members of the media.[8] Journalists argue that the First Amendment protects them from testifying.[9] The thrust of the argument is that testifying undermines the essence of a free press, which is to keep the public informed.[10] A journalist cannot keep the public informed if one is restricted to a

3. *See* Telephone Poll with 600 Florida registered voters, Public Policy Polling (2011) [hereinafter Public Policy Polling].
4. *Id.*
5. U.S. CONST. amend. I.
6. U.S. CONST. amend. VI.
7. *See generally* MEDIA STUDIES JOURNAL: COVERING THE COURTS (1998), *reprinted in*, COVERING THE COURTS: FREE PRESS, FAIR TRIALS AND JOURNALISTIC PERFORMANCE (Robert Giles & Robert Snyder eds., 1999) (discussing the conflict that journalists and participants face when balancing free press versus fair trials).
8. *Id.* at 120.
9. *Id.* at 27.
10. *Id.* at 7.

courtroom. The public also may not view the press as free and objective if journalists continually become witnesses for litigants.

Moreover, subpoenaing a journalist threatens to transform an independent press into an investigative arm of the government, the same government that the press was intended to scrutinize in order to maintain a free and open society.[11] Also, by forcing journalists to testify, confidential sources may become reluctant to speak.[12] This would result in the reduction of the "free flow of information to the public,"[13] which would violate the First Amendment.[14] Over time, journalists have argued that a reporter's privilege should exist through the First Amendment to act as a shield to prevent journalists from testifying about any information gained as part of their newsgathering work product.[15]

However, the criminal justice perspective is viewed from a different constitutional prism. That perspective is based on the Sixth Amendment. The participants in the justice system look at evidence that will assist or detract from the case at hand.[16] Who holds the salient information does not matter from this perspective. The overriding consideration is whether the material probative evidence will assist a jury, grand jury, or judge in their pursuit.[17]

Furthermore, safeguarding the First Amendment is not a priority, if even a consideration at all, in seeking to admit evidence before a judge or jury.[18] However, establishing probable cause or guilt beyond a reasonable doubt is of prime importance.[19] Whether or not a case is proven is the focal point of the participants in the trial setting.[20] Ensuring that criminal defendants obtain a fair trial is paramount.[21] Prosecutors seek to introduce evidence that will assist them in meeting their high burden to obtain a conviction.[22] From this perspective, reporters are simply another class of individuals who have gained possession of material evidence in a case, who, like any other citizen of this country, have a duty and an obligation to testify.[23]

IV. HISTORICAL BACKGROUND OF THE REPORTER'S PRIVILEGE

In the United States, the roots of the reporter's privilege can be traced back to 1848.[24] The situation involved Congress and a reporter, not the justice system.[25] A

11. Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).
12. *Id.* at 731.
13. *Id.* at 725.
14. *Id.* at 725–26.
15. MEDIA STUDIES JOURNAL, *supra* note 7, at 7.
16. Myriad Media, *The Criminal Justice System*, NATIONAL CENTER FOR VICTIMS OF CRIME, http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/the-criminal-justice-system (last visited Oct. 12, 2013).
17. *Id.*
18. *Branzburg*, 408 U.S. at 736–38 (Stewart, J., dissenting).
19. *Id.* at 686–87 (majority opinion).
20. *Id.*
21. *Id.* at 685.
22. *Id.* at 739–40 (Stewart, J., dissenting).
23. *Id.* at 685 (majority opinion).
24. STEPHEN BATES, THE REPORTER'S PRIVILEGE, THEN AND NOW 2 (2000).

journalist from the *New York Herald*, John Nugent, refused to testify before Congress.[26] Congress wanted Nugent to reveal who gave him a copy of a proposed secret treaty with Mexico.[27] (Evidently, "leaks" are not a recent phenomenon.). When Nugent refused to testify, Congress found him in contempt and sentenced Nugent to jail:[28] a punishment against journalists that continues to this day.[29] Nugent relied on the reporter's privilege in the First Amendment when refusing to testify.[30] However, Congress recognized no such privilege.[31] When Nugent attempted to have the federal court intercede, the judge deferred to Congress and found no basis to intervene.[32] Arguably, the federal court did not recognize a reporter's privilege at that time. The Senate released Nugent after it became apparent that he was not going to testify.[33]

In the 1800s, American treatises recognized certain privileges from the common law, specifically, the attorney-client privilege and the husband-wife privilege.[34] Interestingly, at that time the doctor-patient privilege and the clergy-penitent privilege had not gained academic acceptance.[35] Later in time, the courts began to accept the doctor-patient privilege and the clergy-penitent privilege.[36] This gave hope to journalists that their claim to a reporter's privilege would ultimately be recognized.[37]

Throughout the early 1900s, journalists refused to testify.[38] The refusal was based on the belief that testifying would have a "chilling effect" on their sources of news.[39] Journalists argued that without such sources, newspapers would no longer exist.[40] One argument made by a reporter was that by breaching the promise of confidentiality, the reporter could lose an important property right—his job.[41] However, courts continually refused to recognize the existence of any reporter's privilege under the First Amendment.[42] The courts' position was that reporters

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *See generally Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, http://www.rcfp.org/jailed-journalists (last visited November 18, 2013) (illustrating that journalists are still being found in contempt and sentenced to jail when refusing to testify in recent cases).
30. *See* Daniel Scardino, *Vanessa Leggett Serves Maximum Jail Time, First Amendment-Based Reporter's Privilege Under Seige*, FINDLAW (March 26, 2008), http://corporate.findlaw.com/litigation-disputes/vanessa-leggett-serves-maximum-jail-time-first-amendment-based.html.
31. *Id.*
32. BATES, *supra* note 24, at 2.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. BATES, *supra* note 24, at 2.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

were citizens, no different from any other citizen who had relevant information concerning the particular proceeding at hand.[43]

Initially, legislatures were not any more sympathetic to journalists than the courts.[44] While the earliest shield law was passed in Maryland in 1896,[45] it was not until the 1930s and the 1940s that additional states passed shield legislation.[46]

A. *Garland v. Torre*

In fact, the first time a First Amendment privilege case reached a federal appeals court was in 1958, in the case of *Garland v. Torre*.[47] The *Garland* case involved the famous entertainer Judy Garland.[48] In 1957, CBS and Garland were trying to schedule television specials together.[49] However, they were unable to agree on the times and format for the programs.[50] Marie Torre, a columnist for the *New York Herald Tribune*, quoted an unnamed source from CBS who told Torre that Garland was unable to come to terms with CBS because she was troubled.[51] The source believed that Garland was troubled because Garland, herself, believed that she was "terribly fat."[52]

Garland was offended by the remarks printed in the newspaper and sued CBS for libel and breach of contract in the amount of 1.4 million dollars.[53] When questioned by Garland's lawyers, Torre refused to reveal the source of her information.[54] Torre argued that no one would talk to her again if she revealed the confidential source.[55] Torre's attorney, retained by the *New York Herald Tribune*, argued that the First Amendment created a reporter-source privilege that shielded Torre from disclosing the source of her information.[56]

The federal appellate court declined to recognize the reporter's privilege, even though the court noted the importance of a vibrant First Amendment and its role in a free society.[57] However, the ruling clearly stated that the freedom contained within the First Amendment was not absolute.[58] More importantly, the court noted that a person's First Amendment right is almost always impinged upon when a person is asked to testify.[59] Moreover, the court found no specific protection to

43. *Id.*
44. BATES, *supra* note 24, at 2.
45. *Id.*
46. *Id.*
47. *Id. See* Garland v. Torre, 259 F.2d 545 (2d Cir. 1958).
48. BATES, *supra* note 24, at 2.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. BATES, *supra* note 24, at 3.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

refuse to testify in a court setting within the strict construction of the Constitution based upon the grounds asserted.[60]

Ultimately, between the two constitutional provisions, the court continued the tradition of recognizing the need for testimony in a Sixth Amendment setting of a trial, irrespective of the source of the information.[61] In the First Amendment context, the court found no specific guarantee of a reporter's privilege in the plain language of the Constitution, and that a reporter had to testify just like any other citizen.[62]

In the *Garland* case, Torre was incarcerated for ten days for refusing to testify.[63] However, she received a great deal of publicity and journalistic support for her decision not to testify.[64] Torre proclaimed that she did not regret her decision not to testify; in fact, she thought it may have been her greatest opportunity in advancing her career.[65] In the end, the court neither gained the testimony it sought from the reporter, nor did the contemnor express any remorse for her decision.[66]

B. Landmark Decision: *Branzburg v. Hayes*

In the 1960s and 1970s, it was the government that sought information from reporters.[67] Prosecutors issued subpoenas to force journalists to disclose confidential sources before grand juries.[68] Notably, three such journalists refused to testify.[69] One was Earl Caldwell of the *New York Times*, who began covering the Black Panther Organization and compiled notes and tape-recorded conversations of various members.[70] After an article appeared in the *New York Times*, the FBI became interested in the information that Caldwell had gathered.[71] Caldwell refused to comply with the production of any of his work product and claimed a reporter's privilege in refusing to testify before a federal grand jury.[72]

Another journalist and television reporter, Paul Pappas, was also covering the Black Panther movement.[73] His coverage in New Bedford, Massachusetts, also drew the interest of law enforcement.[74] When issued a subpoena to testify concerning what he observed at the Black Panther's headquarters, Pappas refused to testify before a state grand jury.[75]

60. BATES, *supra* note 24, at 3.
61. *See id.*
62. *See id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *See* BATES, *supra* note 24, at 3.
67. *See id.* at 4.
68. *Id.*
69. *Id.* at 5.
70. *Id.* at 3.
71. *Id.* at 4.
72. BATES, *supra* note 24, at 5.
73. *Id.*
74. *Id.*
75. *Id.*

The third journalist, Paul Branzburg, was a reporter with the *Louisville Courier-Journal*.[76] Unlike the other two journalists, Branzburg was not covering the Black Panther movement.[77] Branzburg's investigation focused on drug dealers and drug users.[78] His articles were based upon his observations and information from confidential sources.[79] After being subpoenaed by the state grand jury, Branzburg refused to testify and also refused to reveal his confidential sources.[80] As with the other two reporters, Branzburg asserted a First Amendment reporter's privilege not to testify.[81]

All three cases, which involved grand jury subpoenas of reporters, were merged into the landmark First Amendment case, *Branzburg v. Hayes*, which was decided by the United States Supreme Court in 1972.[82] In a five-to-four decision, Justice White wrote the majority opinion.[83] The majority succinctly addressed and responded to the issue before it as follows:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.[84]

The United States Supreme Court rejected the existence of a reporter's privilege.[85] While the majority gave initial recognition to the importance of the First Amendment, Justice White's opinion did not believe that the courts were impinging on any rights by requiring grand jury testimony of a reporter.[86] Justice White maintained "these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold."[87]

Furthermore, the majority found no impact on the First Amendment in requiring journalists to testify and no "chilling effect" on the gathering or publishing of information necessary for a free press.[88] Nor did the Court find that revealing confidential sources had a negative effect on newsgathering if journalists were forced to disclose their confidential sources.[89]

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76. *Id.*
77. *Id.*
78. BATES, *supra* note 24, at 5.
79. Branzburg v. Hayes, 408 U.S. 665, 667–68 (1972).
80. *Id.* at 668.
81. *Id.* at 679–80.
82. BATES, *supra* note 24, at 5.
83. *Id.*
84. *Branzburg*, 408 U.S. at 689–90.
85. *Id.* at 709.
86. *See id.* at 682–83.
87. *Id.* at 681.
88. BATES, *supra* note 24, at 5.
89. *Id.*

The *Branzburg* majority noted the historical importance of the grand jury and the need for information to be given to that body.[90] In reviewing the common law, the Court found no precedent for a reporter's privilege.[91] Moreover, the Court found no specific mention of a constitutional privilege affording a reporter a right not to testify in the First Amendment or the Bill of Rights.[92] The Court, as earlier stated, only recognized the specific federal privilege not to testify that is set out in the Fifth Amendment right against self-incrimination.[93]

The Court also looked at the First Amendment and the criminal justice system, specifically noting that First Amendment rights were required to give way to grand jury proceedings and criminal trials.[94] The Court looked at the role of a reporter and a common citizen, and did not distinguish the two.[95] In the Court's eyes, both had the duty to testify before a grand jury and in a criminal trial.[96]

Interestingly, the majority wrote that state legislatures were free to consider the issue of a reporter's privilege and had the power to address the issue differently, in light of their respective state constitutions.[97] The only protection for journalists that the majority recognized was from a bad faith grand jury investigation.[98] The Court warned that harassment of a reporter without any good faith basis would find protection under the First Amendment.[99]

An important facet of the *Branzburg* decision was the concurring opinion written by Justice Powell.[100] Justice Powell agreed with the majority that reporters were not without some constitutional protection.[101] While not specifically recognizing a privilege, Justice Powell noted that the Court was sympathetic to the First Amendment and would not allow the media to become an arm of the government.[102] He also stated that journalists should be free from harassment.[103] Not only was the reporter protected from a bad faith investigation, but according to Justice Powell, the reporter would be protected from an investigation that sought information that was remote and tenuous.[104] If a journalist asserted such harassment, Justice Powell suggested that a motion to quash the subpoena should be brought.[105] Furthermore, Justice Powell maintained that such an assertion should be addressed on a case-by-case basis, by use of the balancing test approach.[106] Justice Powell surmised that a judge must consider the balance between freedom of

90. *Branzburg*, 408 U.S. at 685.
91. *Id.*
92. *Id.* at 689–90.
93. *Id.*
94. *Id.* at 691.
95. *Id.* at 697.
96. *Branzburg*, 408 U.S. at 697.
97. *Id.* at 706.
98. *Id.* at 707.
99. *Id.* at 707–08.
100. *Id.* at 709 (Powell, J., concurring).
101. *Id.*
102. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).
103. *Id.* at 709–10.
104. *Id.* at 710.
105. *Id.*
106. *Id.*

the press and the duty of a citizen to provide testimony about criminal conduct.[107] In short, Justice Powell stated that the courts were "available" to journalists if there is a First Amendment violation.[108] He was unable, however, to take the next step and recognize a constitutional privilege for reporters based in the First Amendment.

In the eight months following *Branzburg*, thirty-five reporters were called to testify and refused.[109] They were found in contempt of court and dozens of journalists were jailed as a result.[110] Journalists continued to seek relief at the state and federal level.[111] At the time of the *Branzburg* decision, seventeen states had shield laws.[112] Today, a review of state statutes revealed that thirty-one states and the District of Columbia[113] have shield laws. Hawaii repealed their reporter's privilege statute on June 30, 2013.[114]

After *Branzburg*, media lawyers argued to lower courts that Justice Powell's concurring opinion together with the dissenting four Justices created a qualified reporter's privilege, even though the majority opinion rejected a qualified reporter's privilege.[115] Courts at the state and federal level in both civil and criminal cases accepted the proposition that a qualified reporter's privilege existed.[116] Many of the courts that acknowledged the existence of a qualified reporter's privilege applied a three-prong test.[117] The test required the following: (1) relevant evidence; (2) a compelling need for information that the witness possesses; and (3) no alternative means of obtaining the information.[118] Unless the test was satisfied, courts post-*Branzburg* were quashing subpoenas issued to journalists.[119] This three-prong test was the test enunciated by the *Branzburg* dissent and rejected by the majority.[120]

The United States Supreme Court has not receded from the *Branzburg* majority opinion. However, it is interesting to note that approximately forty years since its decision, the Court has declined to hear another case involving the reporter's privilege, even when lower courts have recognized a privilege and applied the three-prong test before requiring a journalist to testify.[121] As to how the Supreme Court would rule if presented with a reporter's privilege issue again remains an open academic question.

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107. *Id.*
108. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).
109. BATES, *supra* note 24, at 6.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. H.R. 622, 27th Leg., Reg. Sess. (Haw. 2013).
115. BATES, *supra* note 24, at 7.
116. *Id.* at 8.
117. *Id.*
118. *Id.* at 7.
119. *Id.*
120. *Id.*
121. BATES, *supra* note 24, at 7.

V. EARLIEST FLORIDA SUPREME COURT CASES

A. *Morgan v. State*

The origin of the reporter's privilege in Florida can be traced back to a 1976 case involving a reporter named Lucy Morgan, in which the Florida Supreme Court recognized a reporter's limited or conditional First Amendment privilege.[122] The court's analysis was based on the Justices' interpretation of the *Branzburg* decision.[123]

Morgan, a reporter for the *Pasco Times*, a Florida newspaper, was covering a story about public officials being investigated for corruption in Dade City.[124] County and city officials were being investigated by a grand jury.[125] On November 1, 1973, Morgan, utilizing a confidential source, wrote an article that summarized the grand jury's sealed presentment. Morgan stated that the presentment was critical of various public officials and agencies.[126]

The state attorney, who presented the corruption case to the grand jury, was displeased with the article written by Morgan.[127] The prosecutor sought to find out the source of the information by questioning Morgan.[128] She refused to disclose the confidential source to the state attorney.[129] Within twelve hours of publication of the article, Morgan was convicted of contempt and sentenced to serve five months in jail.[130]

Before the Second District Court of Appeals reversed the first conviction, Morgan was convicted a second time for contempt when a grand jury was convened to address the issue of her disclosing a secret presentment.[131] When asked to reveal the source of her information concerning the presentment, Morgan again refused to answer.[132] She was then sentenced to serve a ninety-day sentence.[133] The appellate court affirmed the second conviction and sentence.[134] The court distinguished the two convictions by finding that the first contempt proceeding was brought improperly by the prosecutor on his own behalf, while the second contempt proceeding was properly brought before a grand jury.[135]

Previous to the *Morgan* case, in 1950, the Florida Supreme Court had rejected the contention that reporters had any privilege to refuse to disclose confidential sources.[136] That was the last time the Florida Supreme Court addressed the

122. *See* Morgan v. State, 337 So. 2d 951 (Fla. 1976).
123. *See id*.
124. *Id.* at 952.
125. *See id.*
126. *See id.*
127. *See id.*
128. *Morgan*, 337 So. 2d at 952.
129. *Id*.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 953 (citing Morgan v. State, 325 So. 2d 40, 42 (Fla. Dist. Ct. App. 1975)).
134. *Morgan*, 337 So. 2d at 952–53 (citing *Morgan*, 325 So. 2d at 41).
135. *Id.* at 953.
136. Clein v. State, 52 So. 2d 117, 120 (Fla. 1950).

existence of a reporter's privilege. *Branzburg*, however, had been decided by the United States Supreme Court only four years before the *Morgan* decision. Therefore, the Florida Supreme Court was mindful of the *Branzburg* case and analyzed the *Morgan* case according to the standards set forth by the United States Supreme Court. The Florida Supreme Court wrestled with determining which standard should be imposed when addressing the existence of a reporter's privilege.[137]

Justice Hatchett wrote the majority opinion.[138] Noting initially the importance of *Branzburg*, the court stated, "The United States Supreme Court has now sanctioned the view that the First Amendment affords 'some protection for seeking out the news.'"[139] The court also distinguished the majority opinion, as well as the concurring and dissenting opinions in *Branzburg*.[140] Justice White's majority opinion was acknowledged; however, it was noted that the majority did not find a privilege for journalists to refuse to testify about crimes they had witnessed.[141] The only protection the *Branzburg* majority granted was the protection from bad faith investigations of crime.[142]

The Florida Supreme Court pointed out that *Morgan* was factually distinguishable from *Branzburg*.[143] Morgan had not witnessed a crime; she reported the general criticism of a presentment from a grand jury that was investigating public officials.[144] The reporters in *Branzburg* observed crimes that became the subject of their reporting.[145] After making this factual distinction, the *Morgan* court turned its analysis to Justice Powell's concurring opinion and his balancing test.[146] The court then took an important analytical step that had been taken by other courts post-*Branzburg* and recognized a privilege by combining Justice Powell's concurrence with the four dissenting Justices.[147] "Although the plurality opinion rejected even a qualified reportorial privilege in terms, Mr. Justice Powell agreed with the dissenting justices that a reportorial privilege should be recognized in some circumstances. . . . The *Branzburg* dissenting and concurring opinions recognize news gathering as an essential precondition to dissemination of [the] news . . . ."[148]

In taking this important step in recognizing a privilege, the Florida Supreme Court then applied Justice Powell's balancing test to determine if Morgan was privileged to refuse to disclose her confidential source.[149] The test that was applied weighed the freedom of the press versus the obligation of citizens to testify with

137. *Morgan*, 337 So. 2d at 953.
138. *Id.* at 951.
139. *Id.* at 953 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).
140. *Id.* at 954.
141. *Id.* (citing *Branzburg*, 408 U.S. at 692).
142. *Id.*
143. *Morgan*, 337 So. 2d at 954.
144. *Id.*
145. *Id.* at 953 (citing *Branzburg*, 408 U.S. at 701).
146. *Id.* at 954 (citing *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring)).
147. *Id.*
148. *Id.*
149. *Morgan*, 337 So. 2d at 954 (citing *Branzburg*, 408 U.S. at 710 (Powell, J., concurring)).

relevant evidence.[150] The only interest the government sought to advance in *Morgan* was the "preservation of secrecy in grand jury proceedings."[151] In this case, the court failed to find a legitimate governmental interest that outweighed First Amendment rights.[152]

> We cannot accept the view that a generalized interest in secrecy of governmental operations should take precedence over the interest in assuring public access to information that comes to the press from confidential informants. . . . The "preservation of the rule of secrecy" in which some government activity has traditionally been enshrouded, is not the specific, substantial governmental interest necessary to defeat a reportorial source privilege.[153]

In closing, the *Morgan* court returned to the *Branzburg* majority opinion and noted that the prosecutor in *Morgan* had brought contempt proceedings against the reporter solely to force her to disclose a confidential source.[154] The state attorney was not interested in seeking evidence concerning an independent crime that the journalist had observed.[155] Nor was the prosecutor seeking testimony that was necessary to obtain an indictment or a conviction.[156] The prosecution was solely based on the goal of forcing the disclosure of the grand juror who was "leaking" information to a reporter.[157] In conclusion, the *Morgan* court found that the government could not even meet the standard set out by the *Branzburg* majority, in that the prosecution could not even show that they were proceeding with a good faith grand jury investigation.[158] The court indirectly scolded the government's prosecution of Morgan by stating, "The present case falls squarely within this language in the *Branzburg* plurality opinion: 'Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.'"[159]

The analysis of the *Branzburg* majority was a response to the sole dissent in *Morgan*. The *Morgan* majority, while adopting Justice Powell's balancing test, as well as the position that Justice Powell's concurrence combined with the minority, created a reporter's privilege, and addressed the *Branzburg* plurality decision head on.[160] The *Morgan* majority pointed out to the *Morgan* dissent that the state government could not even satisfy the bad faith *Branzburg* standard.[161]

150. *Id.* at 955.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 956.
155. *Morgan*, 337 So. 2d at 956.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* (quoting Branzburg v. Hayes, 408 U.S. 665, 707–08 (1972)).
160. *Id.* at 954.
161. *Morgan*, 337 So. 2d at 954.

There was a concurring opinion in *Morgan* written by Justice Sundberg.[162] Justice Sundberg generally agreed with the majority and construed the opinion to mean that the court had embraced a limited or conditional reporter's privilege.[163] In a footnote, Justice Sundberg interpreted *Branzburg* as providing a privilege through Justice Powell's concurring opinion combined with the four dissenting Justices.[164] While Justice Sundberg expressed his approval of the balancing test as set forth in *Branzburg*, which was adopted in *Morgan*, he also expressed approval of the three-prong test as set forth in the *Branzburg* dissent.[165]

Returning to the facts of the *Morgan* case, Justice Sundberg maintained that Morgan was convicted of a crime with evidence that was not supported by the record.[166] The thrust of his position was that the statute that was alleged to have been violated proscribed grand jurors from disclosing their deliberations or their vote.[167] This was not the case with Morgan. Morgan did not violate the statute, according to the concurrence, because she was not a grand juror.[168] The statute speaks to the person "leaking" information, not to the person who reports or publishes the information.[169]

The sole dissent was from Justice Overton.[170] He expressed concern that the *Morgan* ruling promoted the disclosure of secret information from a grand jury.[171] Justice Overton maintained that the majority decision would allow grand jurors, prosecutors, and court reporters the ability to "leak" (a term he used) information with immunity.[172] Such a consequence would diminish the integrity of the grand jury, according to Justice Overton.[173] While expressing support for Justice Powell's opinion in *Branzburg*, Justice Overton very briefly distinguished Justice Powell's concurrence by stating that the facts in *Morgan* were not the same as in the case at bar.[174]

While Justice Overton's dissent expresses a meritorious concern, it is a tenuous position. It assumes that the person illegally leaking information will never be discovered other than by forcing journalists to disclose their sources. As with any criminal investigation, law enforcement is capable of discovering who committed a criminal act without solely relying on reporters to prove its case. Punishing the "leaker" would prevent the disclosure of secret grand jury evidence, as opposed to punishing the journalist for publishing information to the public under the First Amendment.[175]

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162. *Id.* at 956 (Sundberg, J., concurring).
163. *Id.*
164. *Id.*
165. *Id.* at 957 (citing Morgan v. State, 325 So. 2d 40, 43 (Fla. Dist. Ct. App. 1975)).
166. *Id.*
167. *Morgan*, 337 So. 2d at 958.
168. *Id.*
169. *Id.*
170. *Id.* (Overton, J., dissenting).
171. *Id.*
172. *Id.*
173. *Morgan*, 337 So. 2d at 958–59.
174. *Id.* at 959.
175. *Id.* at 958–59.

Morgan is an important case in Florida. It was the first Florida Supreme Court case to recognize any reporter's privilege up to that point.[176] It was also the first Florida Supreme Court case to analyze the *Branzburg* decision from the United States Supreme Court. The *Morgan* court found merit in Justice Powell's concurrence and adopted a balancing test when confronted with the issue of applying the reporter's privilege to a journalist who refused to disclose a confidential source.[177] Florida followed the trend that was occurring throughout the country—to find a reporter's privilege in the *Branzburg* concurring opinion combined with its dissent.[178]

B. *Tribute Company v. Huffstetler*

In 1986, ten years after deciding the *Morgan* case, the Florida Supreme Court was again faced with the issue of a reporter's privilege arising out of a journalist being jailed for contempt.[179] The case involved a reporter for the *Tampa Tribune* named James Tunstall.[180] Tunstall co-authored an article in the newspaper stating that "an influential resident of West Hernando County" had filed an ethics complaint with the Ethics Commission, which charged two local county commissioners for misusing their public offices.[181] The Commission received the complaint after the newspaper article had been published.[182] The Ethics Commission dismissed the complaint after finding that the charges were legally insufficient.[183]

After the ethics complaint was dismissed, the two county commissioners named in the ethics complaint filed a complaint with the state attorney's office alleging violation of a Florida statute that prohibited disclosure of either an intended or existing ethics complaint.[184] The state attorney's office conducted an investigation.[185] As part of the investigation, an assistant state attorney subpoenaed Tunstall to question him as to the source of his article.[186] Tunstall's attorney moved to quash the subpoena based on the First Amendment.[187] The circuit court denied the motion to quash.[188] When asked to reveal his confidential source, Tunstall refused.[189] Judge Huffstetler, the named defendant in the case, found the journalist to be in contempt of court for refusing to reveal the confidential source.[190] The

176. *Id.* at 955.
177. *Id.* at 954 (citing Branzburg v. Hayes, 408 U.S. 665, 709–10 (1972) (Powell, J., concurring)).
178. *Id.*
179. Tribune Co. v. Huffstetler, 489 So. 2d 722 (Fla. 1986).
180. *Id.*
181. *Id.* (quoting Tribune Co. v. Huffstetler, 463 So. 2d 1169, 1170 (Fla. Dist. Ct. App. 1984)).
182. *Id.*
183. *Id.*
184. *Id.* at 723.
185. *Huffstetler*, 489 So. 2d at 723.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*

court sentenced Tunstall to serve six months in jail.[191] The contempt would have been purged if the reporter agreed to testify.[192] An appeal followed that ultimately reached the Florida Supreme Court in the case of *Tribune Company v. Huffstetler*.[193]

In the analysis in *Huffstetler*, Justice McDonald, writing for the majority, initially referred to the court's ruling in *Morgan* and reaffirmed its position.[194] The court stated, "We begin our analysis of Tunstall's privilege claim by noting that we have previously recognized a qualified reporter's privilege against the forced revelation of sources."[195] After reciting the facts of *Morgan*, the majority then turned to the *Branzburg* case.[196] The court noted that the *Morgan* case was based on the United States Supreme Court's analysis in *Branzburg*.[197] More importantly, the court expressed its approval of the Powell concurrence and acknowledged that the Florida Supreme Court "embraced" Justice Powell's concurrence in *Morgan*.[198] By devoting attention to *Morgan* and its *Branzburg* foundation, the Florida Supreme Court was reaffirming its stance on the existence of a reporter's privilege, as well as a balancing test to determine the extent of the privilege.[199]

The court, in reaffirming the *Morgan* analysis and balancing test, found the facts of the *Huffstetler* case to be analogous.[200] The majority utilized the balancing test and found that there was a private interest in protecting one's reputation when looking at the Florida law prohibiting the disclosure of ethics complaints.[201] The court further ruled that this private interest did not outweigh a reporter's First Amendment right.[202] The freedom of the press prevailed when balanced against a limited private interest. Tunstall also attacked his conviction by arguing that the applicable Florida statute dealing with the disclosure of ethics complaints was unconstitutional.[203] The majority found no merit in this argument because Tunstall had no standing to challenge the constitutionality of the statute.[204] The court ruled that only a person who is charged criminally under a statute has the ability to challenge its constitutional sufficiency.[205]

One brief concurring opinion was written by Justice Overton, the sole dissenter in *Morgan*.[206] Justice Overton noted that he dissented in *Morgan*, but found that, under the facts of the *Huffstetler* case, he agreed with the majority that the

191. *Huffstetler*, 489 So. 2d at 723.
192. *Id.*
193. *Id.*
194. *Id.* at 722–23.
195. *Id.* at 723.
196. *Id.*
197. *Huffstetler*, 489 So. 2d at 723.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 724.
202. *Id.*
203. *Huffstetler*, 489 So. 2d at 724.
204. *Id.*
205. *Id.*
206. *Id.* at 725 (Overton, J., concurring).

reporter's privilege should prevail.[207] He noted his approval of Justice Powell's balancing test, as well as the Florida Supreme Court's application of the balancing test in *Huffstetler*.[208]

The case contained one dissent written by Chief Justice Boyd, who was joined by Justice Shaw.[209] The dissent began by acknowledging that many United States courts of appeals and many Florida appellate courts have been recognizing a reporter's privilege to refuse to disclose information, as well as the identity of confidential sources in civil and criminal proceedings.[210] From there, the dissent departed from the majority by arguing that there was no authority at the state or federal constitutional level that protected a reporter from refusing to provide information concerning a crime committed in the journalist's presence.[211]

In essence, Chief Justice Boyd distinguished "between a reporter's receiving information from a confidential source about the commission of a crime and the reporter himself witnessing the commission of a crime."[212] According to the dissent, in the former scenario, the journalist may or may not be protected by a privilege.[213] A balancing test would determine the application of the privilege.[214] In the latter scenario, the dissent rejected any privilege.[215] Chief Justice Boyd maintained that the reporter who personally observed a crime should be treated no differently, in that he or she has the same duty to testify as any other citizen who witnessed a crime.[216]

The thrust of the *Huffstetler* dissent was rooted in the *Branzburg* majority opinion. *Branzburg* and the *Huffstetler* dissent afforded journalists no privilege when witnessing the commission of a crime.[217] Because Tunstall became a witness to a criminal violation of a Florida law dealing with disclosure of ethics complaints, Tunstall would have a duty to testify and, in turn, reveal the confidential source.[218] The dissent also, for argument's sake, maintained that even under Justice Powell's balancing test the result would be the same.[219] According to Chief Justice Boyd, the interest in enforcing a criminal statute outweighed a reporter's privilege under the First Amendment freedom of the press.[220]

The *Huffstetler* case had significance for several reasons. It clearly reaffirmed the principles of *Morgan* in recognizing a reporter's privilege.[221] The majority in *Huffstetler* spoke in terms of a "qualified" privilege[222] compared to the language in

207. *Id.*
208. *Id.*
209. *Huffstetler*, 489 So. 2d at 725 (Boyd, J., dissenting).
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Huffstetler*, 489 So. 2d at 725.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 725.
221. *Huffstetler*, 489 So. 2d at 722–23.
222. *Id.* at 723.

Morgan of a "limited" or "conditional" privilege.[223] The majority even gained the acceptance of a reporter's privilege from Justice Overton, who ten years previously in *Morgan*, had written the sole dissent.[224]

Huffstetler reaffirmed the existence of a reporter's privilege and raised the argument that the court should expand the privilege.[225] While the *Morgan* court analyzed its decision under both Justice Powell's concurrence and the majority opinion in *Branzburg*, the *Huffstetler* court embraced Justice Powell's opinion as the basis for its decision.[226] Furthermore, the *Morgan* case represented the protection of a journalist's confidential sources in a criminal setting, while *Huffstetler* expanded the protection of confidential sources to include civil cases.[227]

C. *Miami Herald v. Morejon*

In 1990, the Florida Supreme Court was asked again to expand the qualified reporter's privilege.[228] However, the court declined to expand the privilege any further than it had under *Morgan* and *Huffstetler*.[229] The *Morejon* court decided the case without a single dissenting justice. While deciding the issue presented before it, the *Morejon* case also raised many questions.[230] Unlike the *Morgan* and *Huffstetler* cases that preceded it, the *Morejon* case did not involve a journalist who had been jailed for refusing to reveal a confidential source.[231] Also, unlike the cases before it, *Morejon* did not involve a situation where prosecutors sought the disclosure of a confidential source.[232] In *Morejon*, a defense attorney sought exculpatory testimony from a journalist who witnessed his client's arrest.[233]

The reporter involved in the *Morejon* case was *Miami Herald* writer, Joel Achenbach, who was working on a story for the paper's Sunday magazine section—the *Miami Herald Sunday Tropic Magazine*.[234] Achenbach had obtained permission from the Metro-Dade police to follow officers who were on duty at the Miami International Airport.[235] While on routine patrol, three police officers conducted a consensual search of Morejon and his traveling companion at a public

223. Morgan v. State, 337 So. 2d 951, 956 (Fla. 1976) (Sundberg, J., concurring).
224. *See Huffstetler*, 489 So. 2d at 725; *Morgan*, 337 So. 2d at 958–59 (Justice Overton was Chief Justice of the Florida Supreme Court when the Morgan case was decided. He was unable to get another justice to join with him in the *Morgan* dissent.).
225. *Huffstetler*, 489 So. 2d at 722–23, 725 (Boyd, J., dissenting).
226. *Id.* at 723; *Morgan*, 337 So. 2d at 954.
227. *Huffstetler*, 489 So. 2d at 723.
228. *See* Miami Herald Pub. Co. v. Morejon, 561 So. 2d 577 (Fla. 1990).
229. *Id.* at 578.
230. *Id.* at 577–78.
231. *Id.* at 581.
232. *Id.*
233. *Id.* at 578.
234. *Morejon*, 561 So. 2d at 578.
235. *Id.*

concourse at the airport.[236] The search revealed four kilos of cocaine.[237] After the search, Morejon and his companion were both arrested.[238]

Achenbach witnessed the entire event in his newsgathering capacity.[239] As the events transpired, he was five to six feet away and was taking notes about the search and arrest.[240] He later wrote and published an article discussing the airport search and arrest.[241] In writing the article, Achenbach did not rely on any confidential sources.[242] Morejon's attorney argued that some details of the article were inconsistent with the officer's account of the arrest.[243]

Morejon was formally charged with a crime—trafficking cocaine.[244] He pled not guilty.[245] His attorney filed a motion to suppress the evidence.[246] The basis for the motion was the allegation that the search was not consensual because Morejon claimed he was not sufficiently fluent in English to understand his right to refuse to be searched.[247] His attorney also filed a demand, pursuant to Florida law, for discovery seeking the names of witnesses who had any relevant information about the offense that was charged.[248] The state attorney responded to the discovery demand and listed the reporter, Achenbach, as an individual who had information about the case.[249] Morejon issued a subpoena requiring Achenbach to appear at a deposition and to produce documents.[250]

Achenbach and the *Miami Herald* filed a motion to quash the subpoena claiming a qualified privilege not to testify under the First Amendment.[251] The trial court denied the motion to quash.[252] The court ordered Achenbach to submit to a deposition and held that no qualified privilege existed for any observations Achenbach made during the course of the search and arrest of the defendant, Morejon.[253] The court also found that even if a privilege existed, it would not outweigh the need for the reporter to testify as to relevant evidence.[254]

The *Miami Herald* sought a writ of certiorari seeking review of the case by the appellate court.[255] That court refused to issue a writ.[256] The Third District Court of Appeal held that the reporter's qualified privilege "has utterly no application to

236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Morejon*, 561 So. 2d at 578.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Morejon*, 561 So. 2d at 578.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Morejon*, 561 So. 2d at 578.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*

information learned by a journalist as a result of being an eyewitness to a relevant event in a subsequent proceeding," which included the events that transpired in the search and arrest of Morejon.[257] The appellate court allowed for further review of the issue by certifying the question of the reporter's privilege under the facts of the case to the Florida Supreme Court.[258]

The Florida Supreme Court began its analysis of the *Morejon* case by first addressing the *Branzburg* case.[259] Justice McDonald wrote the majority opinion, as he had in *Huffstetler*.[260] The Florida Supreme Court reviewed the *Branzburg* majority opinion and Justice Powell's concurrence.[261] Unlike the *Morgan* and *Huffstetler* cases before it, the *Morejon* court italicized Justice Powell's balancing test for further emphasis.[262]

The *Morejon* majority explained that it decided two cases post-*Branzburg*.[263] Importantly, in the first footnote, the majority explained its posture in those two cases by referencing the concluding remarks of the *Branzburg* majority opinion.[264] In those concluding remarks, the *Branzburg* majority invited and encouraged state legislatures and state courts to address the reporter's privilege as they deemed appropriate.[265] The Florida Supreme Court also noted that the Florida Legislature had declined to adopt a statutory reporter's privilege or shield law.[266] Notwithstanding, the court explained that any reporter's privilege would be based on the court's analysis of protections under the United States Constitution and the Florida Constitution.[267] This was an acceptance by the Florida Supreme Court of the *Branzburg* majority's invitation for states to consider the reporter's privilege based on state law.[268]

It is interesting to note that the court in *Morejon*, for the first time, explained why the court had adopted Justice Powell's concurrence rather than following the strict posture of the *Branzburg* majority, which the court failed to explain fourteen years earlier in *Morgan* or four years earlier in *Huffstetler*.[269] Those courts simply followed Justice Powell's concurrence without any rationale for discarding the *Branzburg* majority.[270] The Court's explanation was expressed in the first footnote of the *Morejon* case.[271]

257. *Id.* at 578 (quoting Miami Herald Pub. Co. v. Morejon, 529 So. 2d 1204, 1208 (Fla. Dist. Ct. App. 1988)).
258. *Morejon*, 561 So. 2d at 578.
259. *Id.*
260. *Id.* at 577; Tribune Co. v. Huffstetler, 489 So. 2d 722 (Fla. 1986).
261. *Morejon*, 561 So. 2d at 579.
262. *Id.*
263. *Id.*
264. *Id.* at 579 n.1.
265. *Id.* (citing Branzburg v. Hayes, 408 U.S. 665, 706 (1972)).
266. *Id.*
267. *Morejon*, 561 So. 2d at 579 (quoting *Branzburg*, 408 U.S. 665 at 702); BUNKER, *supra* note 1, at 68.
268. *Morejon*, 561 So. 2d at 579 n.1 (quoting *Branzburg*, 408 U.S. at 706).
269. *Id.* at 579–80.
270. *Id.* at 579.
271. *Id.* at 579 n.1.

After explaining the court's alignment with Justice Powell's concurrence, the court went through its own analysis in *Morgan*.[272] The court stated it had taken Justice Powell's balancing test and applied it in *Morgan* to recognize, for the first time, a limited or qualified privilege preventing the disclosure of confidential sources.[273] The court then explained what it did in *Huffstetler*, noting that it had applied the same balancing test as it had in *Morgan*, and ruled in favor of a qualified reporter's privilege that protected the reporter from revealing confidential information.[274]

In returning to the case at hand, the *Morejon* court postulated that the first step in determining whether a reporter must testify at a deposition was based upon a determination of whether any privilege existed to preclude a reporter from testifying under the facts of a particular case.[275] A court will not apply a balancing test unless and until there is a finding that a privilege exists.[276]

The *Miami Herald* argued that there should be a broad qualified privilege whenever a journalist was acting in a newsgathering capacity.[277] The paper sought for the Florida Supreme Court to recognize and expand the reporter's privilege to not only confidential sources, but also to anything a reporter observed or gathered.[278] The newspaper also encouraged the court to adopt a three-prong test, instead of Justice Powell's balancing test.[279] Four out of the five state appellate courts utilized the three-prong test, which was first enunciated in *Garland*[280] and then asserted in the *Branzburg* dissent.[281] The *Miami Herald* also argued that compelling eyewitness testimony would have a chilling effect on the newsgathering process.[282]

The court rejected the arguments brought by the *Miami Herald* and the reporter.[283] It found that no privilege existed when a reporter was a witness to relevant events.[284] A reporter would be required to testify as to those observations in "a subsequent court proceeding."[285] Because there was no privilege, no balancing test was necessary, and *Morgan* and *Huffstetler* were distinguishable from the case at issue.[286] The court, in finding that no privilege existed, also declined to address the merits of the three-prong test being utilized by the Florida appellate courts.[287]

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272. *Id.* at 579–80.
273. *Id.*
274. *Morejon*, 561 So. 2d at 580.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *See* Garland v. Torre, 259 F.2d 545, 548–50 (2d Cir. 1958).
281. *See* Branzburg v. Hayes, 408 U.S. 665, 744–47 (1972) (Stewart, J., dissenting).
282. *Morejon*, 561 So. 2d at 580.
283. *Id.*
284. *Id.*
285. *See Morejon*, 561 So. 2d 577 (The Florida Supreme Court did not distinguish between a civil or criminal proceeding).
286. *Id.*
287. *Id.* at 580 n.4.

The court expressed its support for, and recognized the importance of, a vigorous and aggressive press.[288] The court, however, took the following position: "[W]e fail to see how compelling a reporter to testify concerning his eyewitness observations of a relevant event in a criminal proceeding in any way 'chills' or impinges on the newsgathering process."[289] The court went on to say that its ruling did not hamper newsgathering and would not have the effect of making reporters reluctant to seek out news.[290]

The Florida Supreme Court ruled that a reporter is like any other citizen who has a duty to come forward with relevant evidence.[291] The court noted that "[e]videntiary privileges in litigation are not favored, and . . . must give way in proper circumstances."[292] While the court recognized that journalists would be "somewhat inconvenienced," it found that, as with every other citizen, such inconvenience would not serve as a basis for being excused from testifying.[293] In conclusion, the *Morejon* majority reminded the parties that no authority existed supporting the proposition that there was a qualified privilege, which precluded reporters from testifying as to their own eyewitness observations.[294] To the contrary, the court cited authority that showed other courts in the United States had found there to be no privilege when the journalist personally observed criminal activity.[295]

The *Morejon* case contained one concurring opinion written by Justice Barkett.[296] While Justice Barkett agreed with the conclusion that the reporter was not shielded to testify under the facts of the case, she was concerned with the breadth of the majority opinion.[297] The concern was that the majority seemed to find that there was no First Amendment interest recognized when a reporter acts in a newsgathering capacity.[298] Also, Justice Barkett was concerned that there was no balancing of respective interests utilized by the majority.[299] She urged that the newsgathering process triggered First Amendment considerations because it was essential to the dissemination of news by the press.[300] Justice Barkett noted that the majority should have concluded that First Amendment rights exist when a reporter personally eyewitnesses criminal activity.[301] She maintained, however, that she

288. *Id.* at 580–81.
289. *Id.* at 581.
290. *Id.*
291. *Morejon*, 561 So. 2d at 581.
292. *Id.* at 581.
293. *Id.* Evidently, the term "somewhat inconvenienced" is less than being "inconvenienced." It is incongruous for the Court to admit to some inconvenience on the one hand but deny that there is impingement "in any way" to a reporter on the other hand.
294. *Id.*
295. *Id.* at 581–82.
296. *Id.* at 582 (Barkett, J., dissenting).
297. *Morejon*, 561 So. 2d at 582 (Barkett, J., dissenting).
298. *Id.*
299. *Id.*
300. *Id.* (citing Morgan v. State, 337 So. 2d 951, 954 (Fla. 1976)).
301. *Id.*

would balance that interest under the facts of the case and still arrive at the same result as the majority.[302]

The *Morejon* case raises a number of questions. As Justice Barkett opined, the majority analysis appeared to find that no First Amendment interest is impacted when a reporter is an eyewitness to a criminal event.[303] Because a reporter operates under the First Amendment freedom of the press, is not the First Amendment always a consideration when, in a newsgathering capacity, the reporter obtains information from a confidential source or observes an event as an eyewitness? The entire court took the position that a reporter was no different from any other citizen.[304] Because every citizen has a duty to testify, the reporter must also testify when called upon.[305] But is the reporter the same as every other citizen? The reporter claimed protection under the First Amendment right of freedom of the press.[306] The average citizen has no claim to protection under freedom of the press.[307] The average citizen is not a member of the press. The reporter is a member of the press and works within the rights guaranteed by the freedom of the press clause within the First Amendment.[308] Therefore, a reporter is not the same as every other citizen.

The majority asserted that the First Amendment is not impacted at all except, perhaps, "journalists may be somewhat inconvenienced."[309] Did the Florida Supreme Court give adequate consideration to the impact its decision would have on the freedom of the press? Being subpoenaed to testify at a grand jury proceeding, at a deposition, or at a trial is time consuming. The press cannot be free to publish news if reporters are sitting in a deposition or waiting in a witness room for extended periods of time. The press is not free if its reporters, who gather news under the Constitution, are taken away from their newsgathering capacity. The press is impacted when its journalists become witnesses.

By forcing a reporter to be a participant in the justice system, the First Amendment is impacted.[310] It is impacted not only in terms of time, but also in terms of objectivity.[311] A free press relies on the belief that it is neutral and objective[312]—traits that freedom brings to it. By becoming a participant in the criminal justice system, reporters, and in turn the press, place their objectivity into question.[313] Are they then the arm of the government or the criminal defendant? Regardless of the answer, an important component of a free press is diminished.

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302. *Id.*
303. *Morejon*, 561 So. 2d at 582–83 (Barkett, J., dissenting).
304. *Id.* at 581 (majority opinion).
305. *Id.*
306. *Id.* at 578.
307. U.S. CONST. amend. I.
308. *Id.*
309. *Morejon*, 561 So. 2d at 581.
310. *Id.* at 582.
311. *See id.* at 581 (Barkett, J., concurring).
312. Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 729 n.242 (2007).
313. Josh Sager, *How "Neutral" Reporting Is Biased*, THE BOSTON OCCUPIER (Aug. 6, 2012), http://bostonoccupier.com/how-neutral-reporting-is-biased/.

While *Morejon* involved a criminal case,[314] would the same rule apply in a civil case? Will journalists be called as witnesses in civil cases such as personal injury, contracts, tenant evictions, and probate contests? The answer appears to be yes. The court did not distinguish between a reporter who observes a criminal event or a civil event.[315] The general rule as stated by the Florida Supreme Court is: "We adhere to the district court's conclusion that there is no privilege, qualified, limited, or otherwise, which protects journalists from testifying as to their eyewitness observations of a relevant event in a subsequent court proceeding."[316] No distinction is made by the court between a criminal or civil proceeding.[317] If a reporter is an eyewitness to a relevant event, they become duty-bound to testify in a subsequent proceeding.[318] That subsequent proceeding may be a grand jury, a deposition, or a trial—whether the matter is criminal or civil.

Is this court, as well as other courts, so focused on Sixth Amendment considerations that it is unable to consider the First Amendment? Why, as between the two amendments, should the Sixth Amendment prevail? Is the Sixth Amendment more important than the First? Should they not equally stand on their own, providing rights and protections to their respective citizens that our founders intended to protect? Courts should recognize that the First and Sixth Amendments have equal value, and should rule accordingly.

Those are just a few of the questions that the *Morejon* decision raised. The Florida Supreme Court will address the reporter's privilege again.[319] More questions will be answered in this area and more questions will be raised as a result of the dynamics between the First and Sixth Amendments.

D. *CBS, Inc. v. Jackson*

Less than a year after deciding the *Morejon* case, the Florida Supreme Court would once again address the reporter's privilege in 1991.[320] In *CBS, Inc. v. Jackson*, the court also faced the demands of a criminal defendant with drug charges, who was seeking information from a journalist to assist in the defense of his case.[321] However, the *CBS, Inc.* case involved a television journalist instead of a print reporter.[322] The court saw no distinction between the two professions, nor did the court extend a reporter's privilege in this case.[323]

Jackson was a defendant arrested by police for the charge of possession of cocaine.[324] Law enforcement was conducting a drug enforcement operation that a

314. *See Morejon*, 561 So. 2d at 578 (Barkett, J., concurring).
315. See *id.* at 577–82.
316. *Id.* at 580.
317. *Id.*
318. *Id.*
319. *See* CBS, Inc. v. Jackson, 578 So. 2d 698 (Fla. 1991) (per curiam).
320. *Id.*
321. *Id.* at 699.
322. *Id.*
323. *Id.*
324. *Id.*

CBS news team was videotaping.[325] CBS videotaped portions of the law enforcement operation and broadcasted parts of it on television.[326] Jackson's defense attorney sought portions of the videotapes that pertained to his client, which were not televised, and were referred to as "outtakes."[327] The defense wanted to view the outtakes in order to prepare for trial.[328]

CBS refused to provide the tapes to the defendant.[329] It claimed that the outtakes were protected work product under the reporter's qualified privilege.[330] The trial court found that the privilege was "inapplicable because the information was not from a confidential source."[331] The trial court also found that if the qualified privilege applied, the defendant carried the burden to show the need to disclose the outtakes.[332]

CBS argued that as journalists operating under the First Amendment, they had a qualified privilege against the forced disclosure of any information obtained in a newsgathering capacity.[333] CBS maintained that in order to overcome the privilege, the party seeking the information must satisfy a three-prong test.[334] This was the same three-prong test that was argued in previous cases before the Florida Supreme Court, which was set forth in the *Garland* case and the *Branzburg* dissent, and adopted and applied by a number of appellate courts post-*Branzburg*.[335]

In a per curiam opinion, the Florida Supreme Court rejected the existence of a qualified privilege in the *CBS, Inc.* case after briefly analyzing *Branzburg*, *Morgan*, *Huffstetler*, and its most recent privilege case at the time, *Morejon*.[336] The court saw no distinction between the *Morejon* case and the case before it.[337] The majority stated, "[f]rom a [F]irst [A]mendment privilege standpoint, we can perceive no significant difference in the examination of an electronic recording of an event and verbal testimony about the event."[338]

The analysis was virtually identical to that in *Morejon*.[339] The court found no implication of confidential sources and no basis for the argument that the First Amendment was impacted at all by its decision to disclose the videotapes of Jackson's arrest.[340] The majority found that there was only a minor inconvenience to the media, not a constitutional impingement.[341] The *CBS, Inc.* court applied no

325. *CBS, Inc.*, 578 So. 2d at 699.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *CBS, Inc.*, 578 So. 2d at 699.
332. *Id.*
333. *Id.*
334. *Id.*
335. *See* Branzburg v. Hayes, 408 U.S. 665 (1972) (Stewart, J., dissenting); Garland v. Torre, 259 F.2d 545 (2d Cir. 1958).
336. *CBS, Inc.*, 578 So. 2d at 699–700.
337. *Id.* at 700.
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*

balancing test because it believed that a qualified privilege did not exist in this case.[342] According to the court, a reporter who observes criminal conduct as an eyewitness and a television journalist who records observations on videotape were the same.[343]

Interestingly, in the majority's conclusion, the court suggested to CBS that its time was better spent on the issue of recovering costs.[344] "While CBS seeks to implicate the [F]irst [A]mendment, we think that its concern is more legitimately directed toward the trouble and expense of having to furnish the video outtakes."[345] The court then provided the basis for CBS to seek recovery of costs with authority under the Florida Rules of Civil Procedure and the inherent authority of the court, even though this was not the issue before the court.[346] While the court was looking at reimbursable costs, CBS was looking at a more precious cost—the First Amendment.[347]

There were also two concurring opinions.[348] Justice McDonald concurred in part and dissented in part.[349] He agreed with the majority view that a reporter has no qualified privilege against disclosing physical evidence of a crime or observations of a crime.[350] Justice McDonald's dissent was based on the view that the videotapes were property belonging to CBS, a nonparty. As such, the party seeking the property has the burden of going forward to prove that the material is relevant, there is no alternative source, and there is a need for the information.[351] The burden was basically a three-prong test.[352] Justice McDonald's concern was not the First Amendment, but the interruption of any business activity or interference with work product.[353]

The other concurring opinion was by Justice Barkett, who agreed with the result reached by the majority because *Morejon* was controlling.[354] However, she continued to assert the position she held in *Morejon*: the First Amendment is always implicated when journalists are engaged in their newsgathering capacity.[355] Whether evidence is admissible then depends upon the results of the balancing test in considering the issue of admissibility.[356]

Morgan and *Huffstetler* represented an expansion and recognition of First Amendment rights through a qualified reporter's privilege.[357] The cases that

342. *CBS, Inc.*, 578 So. 2d at 700.
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *See CBS, Inc.*, 578 So. 2d 698 (Fla. 1991).
348. *Id.* at 701 (McDonald, J. and Barkett, J., concurring in part and dissenting in part).
349. *Id.*
350. *Id.* (McDonald, J., concurring in part).
351. *Id.* (McDonald, J., dissenting in part).
352. *Id.*
353. *CBS, Inc.*, 578 So. 2d at 701.
354. *Id.* (Barkett, J., concurring in part).
355. *Id.* (Barkett, J., dissenting in part).
356. *Id.*
357. *See* Tribune Co. v. Huffstetler, 489 So. 2d 722 (Fla. 1986); Morgan v. State, 337 So. 2d 951 (Fla. 1976).

followed neither expanded nor recognized First Amendment rights or a qualified reporter's privilege within the context of the facts of the cases.[358] *Morejon* and *CBS, Inc.* marked an erosion of the qualified reporter's privilege in Florida.[359] The Florida Supreme Court held there is no protection in the form of a privilege when a reporter witnessed or recorded a crime; in situations where no privilege is attached, there is no requirement to conduct the balancing test analysis.[360]

Justice Barkett's position in both cases has merit. Her view is that the First Amendment is implicated whenever a journalist is working in a newsgathering capacity, and that a balancing test should be applied whenever a journalist has information that is sought as evidence in a trial proceeding.[361] Why should there be exceptions to the privilege if the journalist is working under the free-press clause and accumulating information? Granted, the Sixth Amendment has a need for this information, but the value of the First Amendment should be acknowledged and respected also. They are co-equal amendments. If there is not going to be an absolute privilege precluding disclosure of a reporter's information, then a balancing test would be better than no test at all.

VI. THE JOURNALIST'S PRIVILEGE: 1998

In 1998, the Florida Legislature enacted a reporter's privilege statute, which became effective in May of that same year.[362] Perhaps the legislature's actions were a response to the erosion of First Amendment rights, the inconsistent application of varying standards to the reporter's privilege, the lack of clarity in free-press cases, and the continued jailing of journalists in the state.

Some viewed the enactment of the statutory privilege as a victory for the media, in that the journalist's privilege finally gained legislative approval.[363] The thought was that legislation would guide judges through the privilege and its application, and there would be consistency in Florida courts applying the reporter's privilege.[364]

Others would argue that the statutory privilege was a defeat for the media.[365] The argument was that the First Amendment is a constitutional protection for the press against governmental interference and that the First Amendment neither permits nor needs a legislative privilege among common law privileges.[366] The

358. *See CBS, Inc.*, 578 So. 2d 698; Miami Herald Pub. Co. v. Morejon, 561 So. 2d 577 (Fla. 1990).
359. *See CBS, Inc.*, 578 So. 2d 698; *Morejon*, 561 So. 2d 577.
360. *See CBS, Inc.*, 578 So. 2d 698.
361. *See id.*; *Morejon*, 561 So. 2d 577.
362. FLA. STAT. § 90.5015 (1998).
363. *See generally* Sanford L. Bohrer & Susan H. Aprill, *Reporter's Qualified Privilege*, FLORIDA BAR, http://www.floridabar.org/DIVCOM/PI/RHandbook01.nsf/1119bd38ae090a748525676f0053b606/e8a24671dbdb7fdb852569cb004cab2f!OpenDocument (updated Sept. 2007) (discussing the judicial and legislative history behind Florida's journalist privilege, and the enactment of section 90.5015 of the Florida Statutes).
364. *Id.*
365. *See generally* Kurt Wimmer & Stephen Kiehl, *Who Owns the Journalist's Privilege—the Journalist or the Source?*, 28 COMMS. LAW. 9 (August 2011) ("Lowering the bar for when a journalist will disclose confidential information could redound to the detriment of an entire news organization or, if it happened often enough, the industry itself.").
366. *Id.* at 12 n.53.

statute itself could be interpreted as an impingement on the Constitution.[367] Also, in terms of its strength as a privilege, it could be considered weak.[368]

Irrespective of the varying views on the merits of the legislation, the statutory reporter's privilege gained legislative approval.[369] Whether there should be a statutory privilege of a constitutional protection is a valid theoretical question. The pragmatic answer to the question is that, based on decided cases, the need for the journalist's privilege became evident. The statute is set out in its entirety below.

VII. THE JOURNALIST'S PRIVILEGE: FLORIDA STATUTE SECTION 90.5015

> **(1)** ***Definitions:*** For purposes of this section, the term:
>
> **(a)** "Professional journalist" means a person regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine. Book authors and others who are not professional journalists, as defined in this paragraph, are not included in the provisions of this section.
>
> **(b)** "News" means information of public concern relating to local, statewide, national, or worldwide issues or events.
>
> **(2)** ***Privilege:*** A professional journalist has a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news. This privilege applies only to information or eyewitness observations obtained within the normal scope of employment and does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes. A party seeking to overcome this privilege must make a clear and specific showing that:
>
> **(a)** The information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought;

367. *See* John K. Edwards, *Should There Be Journalist's Privilege Against Newsgathering Liability?*, AMERICAN BAR ASSOCIATION, http://apps.americanbar.org/forums/communication/comlawyer/spring00/edwards.html (last visited Nov. 29, 2013).

368. *See generally* Holli Hartman, *The Erosion of the Reporter's Privilege*, THE SOC'Y OF PROF. JOURNALISTS (Sept. 1997), *available at* https://www.spj.org/pdf/pkr1997.pdf (discussing the weaknesses and "erosion" of the journalist's privilege).

369. Bohrer & Aprill, *supra* note 363.

(b) The information cannot be obtained from alternative sources; and

(c) A compelling interest exists for requiring disclosure of the information.

(3) ***Disclosure:*** A court shall order disclosure pursuant to subsection (2) only of that portion of the information for which the showing under subsection (2) has been made and shall support such order with clear and specific findings made after a hearing.

(4) ***Waiver:*** A professional journalist does not waive the privilege by publishing or broadcasting information.

(5) ***Construction:*** This section must not be construed to limit any privilege or right provided to a professional journalist under law.

(6) ***Authentication:*** Photographs, diagrams, video recordings, audio recordings, computer records, or other business records maintained, disclosed, provided, or produced by a professional journalist, or by the employer or principal of a professional journalist, may be authenticated for admission in evidence upon a showing, by affidavit of the professional journalist, or other individual with personal knowledge, that the photograph, diagram, video recording, audio recording, computer record, or other business record is a true and accurate copy of the original, and that the copy truly and accurately reflects the observations and facts contained therein.

(7) ***Accuracy of evidence:*** If the affidavit of authenticity and accuracy, or other relevant factual circumstance, causes the court to have clear and convincing doubts as to the authenticity or accuracy of the proffered evidence, the court may decline to admit such evidence.

(8) ***Severability:*** If any provision of this section or its application to any particular person or circumstance is held invalid, that provision or its application is severable and does not affect the validity of other provisions or applications of this section.[370]

370. FLA. STAT. § 90.5015 (1998).

A. Florida Statute Section 90.501 in Relation to Section 90.5015

Florida recognizes a number of privileges.[371] Section 90.501 allows a person asserting a privilege to refuse to be a witness, refuse to disclose any matter, refuse to produce any object or writing, or prevent another from doing any of the aforementioned.[372] While privileges have been based in the common law and the federal and state constitutions, the Florida Evidence Code enacted by the legislature acknowledges these privileges.[373] Privileges in Florida no longer look to the judiciary for creation and their existence.[374]

Statutes in Florida provide that privileges that are defined by the legislature, as well as federal and state constitutions, will be honored.[375] Importantly, the Florida Evidence Code recognizes privileges that the legislature has approved to protect interests or relationships that it deems worthy of protection.[376] The impact of these privileges, including the journalist's privilege, is to sacrifice facts in the administration of justice because the interest protected is important to society.[377]

The essence of what is protected is the communication that takes place in a recognized privileged relationship.[378] In Florida, these relationships include, but are not limited to, the lawyer-client privilege, the husband-wife privilege, the accountant-client privilege, the psychotherapist-patient privilege, the clergy-penitent privilege, and the focus of this paper, the journalist's privilege.[379] In May of 1998, the journalist's privilege, as set out in Florida Statute section 90.5015, joined the other privileges in the Florida Evidence Code.[380]

B. Florida Statute Section 90.5015(1): Who May Assert Privilege?

Before providing who may assert the journalist's privilege, the legislature defined who that person may be.[381] The Code announces that the journalist who may assert the privilege is a "professional journalist."[382] The section then defines who is a professional journalist.[383] To qualify as a "professional journalist," the person must be regularly engaged in gathering or publishing news for some form of the print media, radio, or television.[384] Importantly, the person involved in the newsgathering or publishing capacity must be doing so for gain or livelihood.[385] The newsgatherer must be a salaried employee or independent contractor for one of

371. *See* §§ 90.5015–.5055
372. § 90.5015(2).
373. CHARLES W. EHRHARDT, FLORIDA EVIDENCE 285 (2002).
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. EHRHARDT, *supra* note 373, at 285.
380. FLA. STAT. § 90.5015 (1998).
381. § 90.5015(1)(a).
382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.*

the news agencies listed.[386] The section then explicitly states who is not a professional journalist, thereby, being incapable of exerting the privilege.[387] Book authors, who are not professional journalists, are listed and are, therefore, excluded from asserting the privilege.[388]

The definition section of the statute raises a number of questions. While the legislature addressed conventional newsgathering forums such as newspapers, radio, and television, the legislature did not address whether the Internet is included or excluded from the definition of a professional journalist.[389] More specifically, may a person who gathers and publishes news over the Internet qualify as a professional journalist? May an internet reporter assert the journalist's privilege? The answer should be yes. While its form may be different, the Internet serves the present day function of the newspaper, the radio, and the television in terms of informing people of the news.[390] The form should not matter. The key requirements should be the gathering and publishing of news; the Internet satisfies this requirement.[391]

An additional question is what is meant by gain? Must a court look at the adequacy of consideration similar to a contract analysis? In contract disputes, courts will look at the issue of legal sufficiency rather than whether the consideration is adequate.[392] Must the gain only be in United States currency? Would anything of value be a gain? Since the statute used the term "gain," arguably anything of value would be legally sufficient.[393]

Would a reporter for a school newspaper qualify as a professional reporter? While a student may claim that he or she is a newsgatherer, the issue of gain comes into play. There is no monetary incentive. On the other hand, if college credit is being applied or experience is considered, then this may be considered a type of gain. The student must still pass the hurdle of being a salaried employee or an independent contractor for the news agency. Because a student acts as a newsgatherer, obtains credit or experience as a gain, and has a relationship with the school newspaper, it could be argued that a student may satisfy the requirements of the statute.

The relationship with a news agency is important. Another question is whether a freelance journalist falls within the definition of this section. If the freelance journalist has a relationship with a news entity mentioned in the statute, then arguably he or she would qualify as an independent contractor for the news agency. If there is no formal relationship established prior to the newsgathering, then the

386. *Id.*
387. § 90.5015(1)(a).
388. *Id.*
389. § 90.5015.
390. Pew Research Center, *In Changing News Landscape, Even Television Is Vulnerable: Trends in News Consumption: 1991–2012*, PEW RESEARCH: CENTER FOR THE PEOPLE & THE PRESS (Sept. 27, 2012), http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable/.
391. *See generally id.* (discussing the transformation of news platforms from traditional print newspaper to the internet).
392. ROGER LEROY MILLER & GAYLORD A. JENTZ, FUNDAMENTALS OF BUSINESS LAW: EXCERPTED CASES 186 (2d ed. 2010).
393. § 90.5015(1)(a) (1998).

analysis becomes more problematic. While the argument may be made that a freelance journalist receives a gain or livelihood, the statute speaks specifically of either a salaried employee or an independent contractor for the news agency. The relationship, apparently, must be established first for the privilege to be asserted.

Also, may a book author qualify under the statute if he or she is also a reporter for a news agency? The Code speaks only about a book author who is not a professional journalist.[394] Arguably, a book author who has a relationship at the same time with the news media and is working in a journalistic capacity would be able to assert the privilege. On the other hand, if an author had no relationship with a news agency, then there would be no privilege because the author would not meet the definition of a professional journalist under this section.

C. Florida Statute Section 90.5015(2): When Privilege May Be Asserted

The legislature has clearly stated that the journalist's privilege is not absolute.[395] It is a qualified privilege.[396] The privilege attaches to a defined journalist who is gathering news information while in a reporter capacity.[397] The privilege would shield the reporter from being a witness and would shield the reporter from having to disclose information.[398] Most importantly, this section provides protection to not only confidential sources, but also non-confidential sources.[399] The statute settles the issue of confidentiality or non-confidentiality faced by Florida courts.

The privilege is qualified because even when the privilege applies, it still may be overcome. If there is a sufficient policy interest that outweighs the privilege, a reporter will have to testify and disclose information, which then requires applying the three-prong test set out in the statute.[400] The three-prong test is based on the dissent from *Branzburg* and has been adopted by a large number of courts post-*Branzburg*.[401]

The *State v. Davis* decision from the Florida Supreme Court added another burden or prong upon a trial court's application of the balancing test.[402] In determining the compelling need of a criminal defendant, the trial court must factor into the equation the federal and Florida constitutional rights to compulsory and due process to ensure that the defendant receives a fair trial.[403] This added requirement, or fourth prong, is not set out by the legislature in the journalist's privilege statute.[404]

394. *Id.*
395. § 90.5015(2).
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. Branzburg v. Hayes, 408 U.S. 665, 743 (1972).
402. State v. Davis, 720 So. 2d 220, 227 (Fla. 1998).
403. *Id.*
404. § 90.5015(2).

The standard to overcome the privilege is a clear and specific showing that appears to be more than a preponderance standard, yet, less than a reasonable doubt standard.[405] It seems to be compatible with a clear and convincing standard.

Specifically excluded from the privilege are matters noted in Florida cases. The privilege does not apply to physical evidence, eyewitness observations, or recordings of crimes.[406] This is consistent with previous rulings made by the Florida Supreme Court.[407]

D. Florida Statute Section 90.5015(4): Waiver of Privilege

This section provides that a waiver of the privilege does not occur when there is publication or broadcasting of the information.[408] This section recognizes that a newsgathering entity is going to publish or disseminate information in the normal course of its business capacity.[409] If the information is disseminated in the normal course of the media process, then a waiver of the privilege cannot be claimed against the reporter or news agency that asserts the privilege.[410] Because the statute is silent as to other situations, a waiver may occur when not precluded by this section.[411]

E. Florida Statute Section 90.5015(6): Authentication

This section allows authentication of evidence such as, photographs, recordings, and records by an affidavit from a professional journalist who has knowledge of the evidence that is being sought to be admitted.[412] As an accommodation to journalists, this procedure would allow for the admission of documentary evidence without the need for the particular journalist to wait to testify or to testify in court. Perhaps this is a legislative recognition of the newsgathering process under the First Amendment. Rather than waiting in court to authenticate a document, the journalist can continue his work without interference under these circumstances.

VIII. LATER FLORIDA SUPREME COURT CASES

A. *State v. Davis*

May of 1998 was an important year for the reporter's privilege in Florida. The legislature enacted the state's first shield law.[413] On October 22, 1998, the Florida

405. *Davis*, 720 So. 2d at 227.
406. *Id.*
407. Miami Herald Pub. Co. v. Morejon, 561 So. 2d 577, 581–82 (Fla. 1990).
408. § 90.5015(4).
409. *Id.*
410. *See infra* Ulrich v. Coast Dental Serv., 739 So. 2d 142, 144 (Fla. Dist. Ct. App. 1999).
411. *See infra* News Journal Corp. v. Carson, 741 So. 2d 572, 573 (Fla. Dist. Ct. App. 1999).
412. § 90.5015(6).
413. § 90.5015.

Supreme Court decided three cases dealing with the reporter's privilege.[414] The court would do so without basing their decisions on the new Florida statute. The first case decided was *State v. Davis*.[415] The facts of the first case preceded the passage of the journalist's statute, according to the *Davis* decision.[416] It was not referenced in the other two.

Merlan Davis was a man who had a relationship with a woman named Nicole Terry.[417] She saw the error of her ways and terminated the relationship in January of 1990.[418] Davis did not understand the concept of terminating a relationship and continued to pursue Terry.[419] His pursuit was unwelcomed.[420] Davis' behavior became hostile.[421] He repeatedly called and threatened Terry.[422] He left a message on her answering machine that he was going to kill her.[423] Davis also had threatened to kill a police officer who had gone to Terry's home and answered her phone.[424] In May of 1991, Terry obtained an injunction that prevented future contact.[425] Davis paid little attention to the injunctive order.[426] On several occasions, Davis continued to follow and harass Terry.[427] One day, he followed her in his vehicle and cut her off while she was driving, almost causing an accident.[428]

In December of 1991, an incident occurred that gave rise to criminal charges against Davis.[429] While driving over the Skyway Bridge, Terry saw Davis close behind her in his vehicle.[430] He was beeping his horn and waving a gun out of the window.[431] Terry tried to elude Davis by driving fast.[432] A reckless pursuit ensued and ended when Davis' car slammed into the rear of Terry's car.[433] She had tapped her brakes lightly hoping he would back off, but he was traveling so close behind her that she could not see his headlights.[434] Terry lost control of her vehicle and smashed into cement dividers.[435] Davis maintained that, because Terry applied the brakes, she intended to cause the accident, not Davis.[436] He argued her conduct

414. State v. Davis, 720 So. 2d 220, 220 (Fla. 1998). *See infra* Kidwell v. State, 730 So. 2d 670 (Fla. 1998); *see infra* Morris Commc'ns Corp. v. Frangie 720 So. 2d 230 (Fla. 1998).
415. *Davis*, 720 So. 2d at 220.
416. *Id.* at 224.
417. *Id.* at 222.
418. *Id.*
419. *Id.*
420. *Id.*
421. *Davis*, 720 So. 2d at 222.
422. *Id.* at 229.
423. *Id.*
424. *Id.*
425. *Id.* at 222.
426. *Id.*
427. *Davis*, 720 So. 2d at 229.
428. *Id.*
429. *Id.* at 222.
430. *Id.*
431. *Id.* at 229.
432. *Id.*
433. *Davis*, 720 So. 2d at 222.
434. *Id.* at 229.
435. *Id.*
436. *Id.* at 222.

negated proof of any specific intent to cause her harm.[437] Davis was charged and convicted at trial of aggravated assault with a motor vehicle.[438]

Diane Mason was a reporter with the St. Petersburg Times. She wrote an article on domestic violence and featured the events and accident involving Davis and Terry.[439] Mason interviewed Terry for the article and discussed the events surrounding the accident.[440] After reading the article, Davis' attorney wanted to depose the journalist prior to trial about any statements the victim made to her about the case.[441] The newspaper would not cooperate with the defense attorney.[442] As a result, he filed a motion for a subpoena *duces tecum*.[443] A hearing was held on the motion before the trial judge.[444]

The attorney for the newspaper argued that the Second District Court of Appeal had ruled in this area and had adopted a three-prong test for determining when a reporter is privileged from testifying.[445] The appellate court required the three-prong test for any proceeding, civil or criminal, when information was sought from a reporter, whether the information was from a confidential or non-confidential source.[446] The trial court applied the three-prong test and ruled that Davis did not carry his burden for disclosure because he failed to show that the information was unavailable from an alternative source.[447] Not only had the victim admitted to the braking, but she also told another witness this same information.[448]

On appeal, the Second District rejected its previous position based on the Florida Supreme Court's recent rulings in the *Morejon* and the *CBS, Inc.* cases.[449] The appellate court interpreted those cases to limit the privilege to confidential sources only.[450] As a result, the appellate court reversed the ruling of the trial judge.[451] The Second District Court of Appeals certified the issue in the form of a question to the Florida Supreme Court.[452]

The Florida Supreme Court answered the question at the beginning of its ruling.[453] The majority opinion in *Davis* was written by Justice Overton, the same justice who issued the sole dissent in *Morgan*.[454] The *Davis* court found that the reporter's qualified privilege in Florida applied in situations involving both confidential and non-confidential sources.[455] However, the court immediately

437. *Id.* at 229.
438. *Id.* at 220.
439. *Davis*, 720 So. 2d at 222.
440. *Id.* at 229.
441. *Id.* at 222.
442. *Id.*
443. *Id.*
444. *Id.*
445. *Davis*, 720 So. 2d at 223.
446. *Id.*
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.*
451. *Davis*, 720 So. 2d at 223.
452. *Id.* at 220–21.
453. *Id.* at 222.
454. *Id.* at 221. *See* Morgan v. State, 337 So. 2d 951, 958 (Fla. 1976).
455. *Davis*, 720 So. 2d at 222.

cautioned in its opinion that a defendant's Sixth Amendment rights and due process rights must be considered when determining whether to preclude disclosure of information.[456]

After addressing the facts of the case, the Florida Supreme Court discussed the history of the reporter's privilege starting with *Branzburg*.[457] The court reviewed the majority opinion, Justice Powell's concurrence, and the dissent in *Branzburg*; then the court conducted its own analysis of the privilege starting with *Morgan* and *Huffstetler*.[458] The court noted that it had adopted Justice Powell's concurrence in those two cases.[459] It also acknowledged that those two cases involved the qualified reporter's privilege in the context of confidential information sought by the government.[460]

The court then reviewed its decisions in *Morejon* and *CBS, Inc*.[461] It noted that in those two cases, the information sought was by the defendant in a criminal context that involved eyewitness observations and the visual recording of a crime.[462] The court stated again the position that no privilege, whatsoever, attaches in the situation where the journalist is an eyewitness to an event.[463] Moreover, when a defendant, as in *CBS, Inc*., seeks to obtain relevant physical evidence recorded electronically, there is no privilege.[464] The court saw no distinction between the electronic recordings of the events of a crime and the reporter's eyewitness observations.[465] The court then capsulized what it had ruled to date on the journalist's privilege:

> In summary, these cases reflect that this Court has adopted a qualified reporter's privilege, at least in those cases involving confidential information; but we have indicated that, where a defendant seeks testimony or evidence, no such privilege exists to excuse reporters from testifying about their eyewitness observations or from providing physical material relevant to a crime.[466]

After presenting the state of the privilege in Florida, the Florida Supreme Court then turned to the rights of the accused and noted it had not discussed this issue in either the *Morejon* or *CBS, Inc.* cases.[467] The court quoted the Sixth Amendment and referenced the Due Process Clause of the Florida Constitution.[468] The court

456. *Id.*
457. *Id*. at 223.
458. *Id.* at 224.
459. *Id.* at 224–25.
460. *Id.* at 225.
461. *Davis*, 720 So. 2d at 225.
462. *Id.*
463. *Id.* at 226.
464. *Id. See* CBS, Inc. v. Jackson, 578 So. 2d 698, 700 (Fla. 1991).
465. *Davis*, 720 So. 2d at 226.
466. *Id.*
467. *Id.*
468. *Id.*

next looked at how other states addressed the reporter's privilege.[469] The court noticed that there was one common theme when looking at how all of the states dealt with the reporter's privilege.[470] All of the state courts applied some form of the traditional three-prong test proposed by the *Branzburg* dissent.[471]

After reviewing the other state decisions, the Florida Supreme Court set forth its new standard on the reporter's privilege and referred to this new standard as a clarification on the limitations of the qualified reporter's privilege in Florida.[472] The court first explained that a qualified reporter's privilege existed in Florida to both confidential and non-confidential information gathered in a journalistic capacity.[473] Second, the court reaffirmed its position in *Morejon* and *CBS, Inc.* by announcing, as it had in the past, "that the privilege does not apply to eyewitness observations or physical evidence, including recordings, of a crime."[474]

The Florida Supreme Court then, for the first time, embraced and adopted the three-prong test, noting that it was a test being used by an overwhelming majority of the states.[475] While the court embraced the three-prong test, it added an additional requirement to the test that could be considered either a fourth prong or a variance of the third prong.[476] The variance, or fourth prong, required that the party seeking disclosure had to show a compelling need for the information.[477] The Florida Supreme Court ruled as follows:

> When determining the compelling need of a defendant, however, a court not only must weigh the concerns expressed by Justice Powell; it also must factor into the equation the federal and Florida constitutional rights to compulsory and due process so as to ensure that the defendant receives a fair trial.[478]

After enunciating this new standard with a varied third prong or new fourth prong, the court then addressed and scolded the media.[479] "We emphasize that it is the court and not the reporter or the reporter's publisher that determines whether the privilege acts to preclude disclosure."[480] The court then noted that there were instances in the country when reporters voluntarily testified in serious criminal cases without the threat of contempt.[481]

469. *Id.* at 227.
470. *Id.*
471. *Davis*, 720 So. 2d at 227.
472. *Id.* (The court uses the term "clarify").
473. *Id.*
474. *Id.*
475. *Id.*
476. *Id.*
477. *Davis*, 720 So. 2d at 227.
478. *Id.*
479. *Id.*
480. *Id.*
481. *Id.*

The court next noted that the ruling in *Davis* was compatible with the new statute passed by the legislature on a journalist's privilege.[482] This was the extent of the court's analysis of the new statute that codified a reporter's privilege. The *Davis* court then published section 90.5015 of the Florida Statutes without further comment.[483]

The *Davis* majority returned to the facts of the case before it and acknowledged a qualified privilege existed in the case.[484] The majority emphasized that the defendant's liberty was at stake and that the defendant's interests in a fair trial and compulsory process were not factored into any balancing test.[485] The trial court failed to consider the defendant's interests appropriately.[486] While this may have been an error, the court found it to be harmless error in light of the facts in the case.[487] The statements in the newspaper article were consistent with the victim's own statements at trial.[488] Even if the victim told the reporter that she intentionally caused the accident, it would not have been sufficient to warrant a new trial.[489] The facts, as they were, were egregious enough to establish the aggravated assault charge.[490] The court found that there was "no reasonable possibility that the error contributed to the conviction," and, in conclusion, affirmed the conviction and sentence.[491]

Justice Wells wrote the only other opinion, which concurred in part and dissented in part with the majority.[492] Justice Wells concurred with the result of the majority, the adoption of the three-prong test, and the exceptions to the journalist's privilege.[493] However, he dissented on the requirement by the majority to factor into the test the federal and Florida constitutional rights of the accused to compulsory and due process to ensure a fair trial.[494] Justice Wells argued that it added additional confusion to the balancing test.[495] Justice Wells also expressed concern that this new requirement appeared to be an additional factor or prong rather than the three-prong test enunciated in the new law, which he supported.[496]

In conclusion, *Davis* is a case that fails to give equal value to the First Amendment. The court did recognize that the reporter's privilege attached to both confidential and non-confidential sources, and it also adopted the three-prong test.[497] However, the majority added an additional requirement to the three-prong

482. *Id.* at 227–28.
483. *Davis*, 720 So. 2d at 228.
484. *Id.*
485. *Id.*
486. *Id.* at 229.
487. *Id.*
488. *Id.*
489. *Davis*, 720 So. 2d at 230.
490. *Id.*
491. *Id.*
492. *Id.* (Wells, J., concurring in part and dissenting in part).
493. *Id.*
494. *Id.*
495. *Davis*, 720 So. 2d at 230.
496. *Id.*
497. *Id.* at 227 (majority opinion).

test, which placed emphasis on a defendant's Sixth Amendment rights.[498] The varied three-prong standard in *Davis* favors invading the journalist's privilege and is contrary to the test set out by the legislature. The traditional three-prong test in the journalist's privilege statute makes no mention of the additional requirement presented in the *Davis* decision.[499] Even with the new statute before it, the *Davis* court essentially ignored it.

B. *Kidwell v. State*

Kidwell v. State was the second of the three reporter's privilege cases that the Florida Supreme Court ruled on in October of 1998.[500] David Kidwell was a reporter who interviewed a defendant charged with first-degree murder of a child.[501] The interview took place while the defendant was in jail awaiting trial.[502] The defendant also gave a confession to police.[503] The prosecution sought to have Kidwell testify at trial and he was given the option of either testifying or going to jail.[504] Without applying the three-prong test, the Palm Beach circuit judge jailed the reporter for seventy days.[505] A federal judge eventually released Kidwell on a petition for a writ of habeas corpus pending the exhaustion of all appeals.[506]

The Fourth District Court of Appeals upheld the trial court's contempt conviction and sentence and ruled that there was no qualified reporter's privilege precluding the disclosure of non-confidential information in a criminal proceeding.[507] The appellate court certified the question of the existence of a privilege when dealing with non-confidential information to the Florida Supreme Court.[508] The court ruled as it had in *Davis*, and found that there was a privilege for non-confidential information.[509]

Justice Overton wrote the decision for the majority in *Kidwell*.[510] While finding that a privilege existed, the court also emphasized, as it had in *Davis*, that any balancing test must be applied with the court according "great weight to a defendant's right to due process and compulsory process in evaluating whether the requested information should be disclosed."[511]

The court went on to say that in applying the three-prong test, Kidwell's information was relevant.[512] Even if the confession was also given to the police, it did not automatically mean the information was obtainable from an alternative

498. *Id.*
499. FLA. STAT. § 90.5015(2) (1998).
500. Kidwell v. State, 730 So. 2d 670, 670 (Fla. 1998).
501. *Id.* at 671.
502. Kidwell v. State, 696 So. 2d 399, 400 (Fla. Dist. Ct. App. 1997).
503. *Id.*
504. *Id.*
505. *Id.*
506. *Id.* at 407.
507. Kidwell v. State, 730 So. 2d 670, 671 (Fla. 1998).
508. *Id.*
509. *Id.*
510. *Id.*
511. *Id.*
512. *Id.*

source.[513] A defendant would still have the opportunity to determine what specifically was said to each particular witness.[514] One way to achieve that goal would be an in-camera hearing held by the trial judge.[515] The judge would determine if the information was different and determine its importance for credibility purposes.[516] The majority also said to keep in mind that a jury needs to hear and consider all relevant information at any trial.[517] Mistakes are made if a jury does not have all the information.[518] The *Kidwell* court opined that because the public has a confession through a reporter's article, the jury should also have that information.[519] However, the court cautioned that care should be taken so that the media does not become "an investigative arm of the government."[520]

In their conclusion, the majority again stated their position that if a reporter has direct evidence of a crime, the information is not privileged.[521] Evidence of a crime would include personal observations and physical evidence—including recordings of a crime.[522] The *Kidwell* court then boldly addressed confessions made to a reporter, leaving the First Amendment by the way side: "Like an eyewitness observation, a direct confession to a reporter is direct evidence of a crime that would not fall within the information protected under the qualified privilege."[523]

In essence, the *Kidwell* court reaffirmed the general proposition that there is a privilege for non-confidential information.[524] When considering whether to allow such testimony over objection, the trial judge must apply the three-prong test in-camera before its admission.[525] Yet, in its conclusion, the court unequivocally stated that a confession is evidence of a crime, which is no different from eyewitness observations.[526] Because it is direct evidence, it falls outside the protection of a qualified privilege.[527] Then, arguably, there is no need for a balancing test. Eyewitness testimony simply comes into evidence without the need to perform any balancing test.

Furthermore, if a confession is no different from eyewitness observations, it makes no sense that the majority, earlier in its opinion, went through the analysis of the three-pronged test. Either a confession is an exception or it is not. If it is not, then a balancing test is needed. The decision is inconsistent at best, and is intellectually faulty at worst. From a First Amendment standpoint, the decision

513. *Kidwell*, 730 So. 2d at 671.
514. *Id.*
515. *Id.*
516. *Id.*
517. *Id.*
518. *Id.*
519. *Kidwell*, 730 So. 2d at 671.
520. *Id.*
521. *Id.*
522. *Id.*
523. *Id.*
524. *Id.*
525. *Kidwell*, 730 So. 2d at 671.
526. *Id.*
527. *Id.*

recognizes only the interests of the accused and that of the government, which seeks to prosecute the crime.

In the only concurring opinion, Justice Wells agreed with the result and relied upon his opinion in *Davis*.[528] There, he mentioned his concern over the clarity of the balancing test.[529] Justice Wells expressed concern over the issue of factoring in due process concerns and the compulsory process as part of the test, which he believed, would add confusion to the exactness of the test.[530]

Justice Wells then expressed his approval of Judge Klein's opinion from the *Kidwell* appellate court case.[531] Judge Klein noted the inconsistency of federal courts and Florida courts in addressing the issue of, and standards for, non-confidential sources.[532] He also distinguished an eyewitness observation at the time of the crime from an interview by a reporter a long time after a crime has been committed.[533] Judge Klein then expressed his First Amendment concerns over the admission of information from non-confidential sources.[534] He considered any request for a reporter's information to be a significant intrusion into the newsgathering process.[535] Whenever a party seeks the information from a reporter involving a non-confidential source, Judge Klein believed that party had the burden of satisfying a three-prong test.[536]

Although decided in October of 1998, the *Kidwell* court analyzed a confession contrary to the journalist's statute enacted in May of the same year.[537] The court ruled that confessions were direct evidence of a crime and no different from eyewitness observation of a crime.[538] The analysis is intellectually weak. There is a distinction between observing a crime at the moment it is being committed, and receiving a statement from a defendant weeks or months after the commission of a crime. Furthermore, the legislature noted three exceptions to the privilege.[539] The privilege "does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes."[540] A confession is not enumerated as an exception to the privilege in the statute, it is not physical evidence like a gun or a knife, it is not an observation of a crime during its commission, and it is not a recording of a crime.

Arguably, confessions are not an exception under the journalist's privilege statute. As such, the statute would require a three-prong test be applied to such information to determine admissibility. The three-prong test is set out in the code

528. *Id.* at 672 (Wells, J., concurring).
529. State v. Davis, 720 So. 2d 220, 230 (Fla. 1998).
530. *Id.*
531. *Kidwell*, 730 So. 2d. at 672 (Wells, J., concurring). *See* Kidwell v. State, 696 So. 2d 399, 406–09 (Fla. Dist. Ct. App. 1997).
532. *Kidwell*, 696 So. 2d. at 407.
533. *Id.* at 407–08.
534. *Id.* at 408.
535. *Id.*
536. *Id.* at 409.
537. *See id.*; FLA. STAT. § 90.5015 (1998).
538. *Kidwell*, 730 So. 2d at 671.
539. § 90.5015(2).
540. *Id.*

and is not the test announced in *Davis* and *Kidwell*.[541] Justice Overton's opinion strains to recognize confessions as an exception to the privilege.[542] It is also another example of the Florida Supreme Court giving priority to Sixth Amendment interests at the expense of free-press interests under the First Amendment.

C. *Morris Communication v. Frangie*

The *Frangie* decision was the last of the three First Amendment cases decided by the Florida Supreme Court on October 22, 1998.[543] The issue that reached the court was similar to the issue raised in the *Davis* decision. The *Frangie* case was a short opinion, perhaps because the court already addressed the issue in *Davis*.

In *Frangie*, a reporter was served a subpoena in a civil, rather than a criminal, proceeding.[544] Morris Communication brought a motion to quash before the trial court, which the judge denied.[545] On appeal, the First District Court of Appeals affirmed the trial court's ruling, relying on the rationale of the Second District Court of Appeals in the *Davis* decision.[546] The First District Court of Appeals ruled that Florida law did not recognize a privilege for non-confidential sources for journalists.[547] Because *Frangie* was in the context of a civil proceeding, the First District Court of Appeals certified the question of the reporter's privilege in a civil proceeding to the Florida Supreme Court.[548]

The Florida Supreme Court addressed the issue in the *Frangie* case by immediately quoting its own language in the *Davis* opinion: "[f]irst, we hold that a qualified reporter's privilege exists in Florida and that such a privilege extends to both confidential *and* nonconfidential information gathered in the course of a reporter's employment."[549] The court then reaffirmed its position that the privilege did not attach to "eyewitness observations or physical evidence, including recordings, of a crime."[550] The court found that once the privilege is recognized, the trial judge must apply the three-prong balancing test.[551]

In essence, the court ruled that a qualified privilege applied in both criminal and civil proceedings, and then remanded the case to the trial court to reconsider a ruling on the motion to quash based on its decision in *Davis* as set out in *Frangie*.[552] The court noted that its ruling in *Frangie* was basically a clarification of its ruling in *Davis*, as the latter involved a criminal proceeding while the former involved a civil proceeding.[553]

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541. *Id.*
542. *Kidwell*, 730 So. 2d at 671–72.
543. Morris Commc'n Corp. v. Frangie, 720 So. 2d 230 (Fla. 1998).
544. *Id.* at 231.
545. *Id.*
546. *Id.*
547. *Id.*
548. *Id.*
549. *Frangie*, 720 So. 2d at 231 (quoting State v. Davis, 692 So. 2d 220, 226 (Fla. 1998)).
550. *Id.*
551. *Id.*
552. *Id.* at 231–32.
553. *Id.*

Since the enactment of the journalist's privilege statute in 1998, the Florida Supreme Court has not addressed another reporter's privilege case since *Frangie*. We will have to wait until the court rules on a journalist's privilege case to determine how the court will apply the statute together with its own body of cases. While this paper has mainly looked at Florida Supreme Court cases, it will now address Florida appellate court cases that have dealt with the issue.[554] Below is a brief summary of those appellate cases followed by federal cases interpreting Florida law.

IX. FLORIDA DISTRICT COURT OF APPEALS CASES

A. *Ulrich v. Coast Dental Services*

In July of 1999, the Fifth District Court of Appeals decided the case of *Ulrich v. Coast Dental Services*.[555] Ulrich was a television news reporter who was involved in a broadcast concerning Coast Dental.[556] After the television broadcast, Coast Dental sued former employees for breach of their confidentiality agreements.[557] Ulrich was subpoenaed by Coast Dental to identify the employees that Ulrich had spoken with concerning the investigative news piece.[558] Ulrich moved to quash the subpoena.[559] The trial judge denied the motion to quash and an appeal to the appellate court followed.[560]

The Fifth District Court of Appeals began their analysis by citing the reporter's privilege statute, recognizing that the statutory privilege applied to both confidential and non-confidential information.[561] The trial court agreed that the privilege was attached, but found that there was a waiver based on Ulrich's disclosure of the information to other parties.[562] The issue was whether the journalist's privilege was waived by the prepublication disclosure of the information.[563] The appellate court looked at the distinction between the reporter's privilege and other privileges that are based on the initial relationship of privacy.[564] The court also considered the First Amendment need to gather news from protected sources and relied on other state opinions that had ruled on the issue.[565] The conclusion of the Fifth District Court of Appeals was that prepublication disclosure would not waive the privilege.[566]

554. *See, e.g.*, Ocala Star v. State, 721 So. 2d 838 (Fla. Dist. Ct. App. 1998) (A motion to quash a subpoena issued on a reporter was rendered moot after the subpoena had been withdrawn. The reporter privilege statute was referenced in the decision).
555. Ulrich v. Coast Dental Servs., 739 So. 2d 142 (Fla. Dist. Ct. App. 1999).
556. *Id.*
557. *Id.*
558. *Id.*
559. *Id.*
560. *Id.*
561. *Ulrich*, 739 So. 2d at 143.
562. *Id.*
563. *Id.*
564. *Id.*
565. *Id.* at 143–44.
566. *Id.* at 144.

B. *News-Journal Corp. v. Carson*

In August of 1999, the Fifth District Court of Appeals again addressed the reporter's privilege and analyzed the statutory privilege.[567] In *News-Journal Corp. v. Carson*, the newspaper was sued by Carson for libel.[568] Carson was a candidate for county judge.[569] The newspaper attempted to protect from disclosure two documents—an unemployment compensation form and a job evaluation form—that were sought in discovery, which were given to the newspaper by Carson.[570]

The trial court ruled that the privilege did not bar discovery production because both documents were given to the newspaper by Carson.[571] The Fifth District Court of Appeals cited the new privilege statute and acknowledged that many states had adopted a journalist's privilege statute.[572] The court noted that the first document was filed as part of the lawsuit in the public records.[573] As a result, the court found this constituted a waiver under the statute and under the general waiver of privilege theory analysis.[574] The second document, however, was not placed into the court record.[575] Carson argued that the document was discoverable as physical evidence; therefore, the privilege would not apply.[576] The court rejected this position.[577] The appellate court then applied the three-prong test to the disclosure of the second document.[578] The court found a strong public policy consideration in bringing libel actions.[579] Because of the compelling need to meet the high burden in a libel case, the court decided that the privilege had to give way.[580] The Fifth District Court of Appeals was concerned that a litigant would be denied his or her day in court if he or she were denied information necessary to prosecute a defamation case.[581]

C. *State v. Famiglietti*

The Third District Court of Appeals looked at the statutory privilege in the case of *State v. Famiglietti*, decided in May of 2002.[582] However, the specific privilege that was before the court was not the journalist's privilege; it was the psychotherapist-patient privilege.[583] The court indirectly addressed the journalist's

567. News-Journal Corp. v. Carson, 741 So. 2d 572, 573 (Fla. Dist. Ct. App. 1999).
568. *Id.*
569. *Id.*
570. *Id.* at 573–74.
571. *Id.* at 573.
572. *Id.* at 573–74.
573. *News-Journal Corp.*, 741 So. 2d at 574.
574. *Id.*
575. *Id.*
576. *Id.*
577. *Id.* at 575.
578. *Id.*
579. *News-Journal Corp.*, 741 So. 2d at 576.
580. *Id.*
581. *Id.*
582. State v. Famiglietti, 817 So. 2d 901 (Fla. Dist. Ct. App. 2002).
583. *Id.* at 902.

privilege statute.[584] The case was also an interesting contrast and comparison between a traditional common law privilege recognized by statute and the new statutory reporter's privilege in Florida.[585]

In the *Famiglietti* case, the defendant was charged with serious acts of domestic violence and attempted murder for beating his girlfriend nearly to death with a tire iron.[586] The victim was deposed prior to trial.[587] She testified at the deposition that she told her psychiatrist two other men had beaten her in the past.[588] She said this to protect her boyfriend, rather than revealing his identity as a perpetrator of violence.[589] The defense then sought to subpoena all of the victim's records from her psychiatrist in order to obtain evidence to attack the credibility of the victim.[590] The trial court authorized the issuance of a subpoena, but ruled that it would determine in-camera what records would be released to the defense.[591] The State appealed the ruling to the Third District Court of Appeals.[592]

An original three-judge panel agreed that the privileged records could be ordered after the application of an unspecified balancing test.[593] The original panel ruled, however, that the defense had not made a sufficient showing of a need to invade the psychotherapist-patient privilege.[594] On its own motion, the appellate court set the case for a rehearing en banc.[595] In an eleven-to-three vote, the court ruled that the Florida Evidence Code prohibited the disclosure of the victim's communications to her psychiatrist because the communications were protected by the psychotherapist-patient privilege.[596]

The majority maintained that this privilege was absolute, subject to exceptions that were inapplicable in the case before it.[597] The dissent argued that the privilege was a qualified one that could and should be invaded to assure that the defendant secures a fair trial.[598] The majority of eleven disagreed and ruled that the psychotherapist-patient privilege was not a qualified privilege subject to a balancing test.[599] The court pointed toward the journalist's privilege statute and proclaimed that the legislature knew how to create a qualified privilege.[600] They maintained that the legislature clearly created a qualified reporter's privilege and could do so with any of the other privileges recognized by the Florida Evidence

584. *Id.* at 904.
585. *See Famiglietti*, 817 So. 2d 901.
586. *Id.* at 902.
587. *Id.*
588. *Id.*
589. *Id.*
590. *Id.*
591. *Famiglietti*, 817 So. 2d at 902–03.
592. *Id.* at 903.
593. *Id.*
594. *Id.*
595. *Id.*
596. *Id.* at 908.
597. *Famiglietti*, 817 So. 2d at 904.
598. *Id.*
599. *Id.*
600. *Id.*

Code.[601] By comparing the language of the two privileges, the majority ruled that the legislature simply had not created a qualified psychotherapist-patient privilege.[602]

In an interesting contrast with the reporter's privilege, the court looked at the policy considerations of protecting the psychotherapist-patient privilege.[603] The court found that it was "sound" policy not to invade that privilege.[604] It opined that invading a patient's privacy would "eviscerate the effectiveness" of the confidential privilege.[605] It shunned the idea that a balancing test had to be applied to protect a defendant's fair trial and due process rights.[606] The court stated that the right to confrontation and the right to cross-examination under the Sixth Amendment did not outweigh the application of the psychotherapist-patient privilege.[607] The court further found that "the due process clause does not authorize the invasion of a generally-accepted testimonial privilege."[608] Such judicial deference is not articulated when reading Florida cases that address the reporter's privilege.

D. *TheStreet.com, Inc. v. Carroll*

In December of 2009, the Fourth District Court of Appeals granted the petitioners' petition for writ of certiorari and quashed the decision of the Fifteenth Judicial Circuit in the case of *TheStreet.com, Inc. v. Carroll*.[609] The lower court's ruling required the petitioners to produce information claimed to be protected under Florida's qualified journalist's privilege and denied petitioners' motion to compel the return of documents they claimed were inadvertently provided as part of discovery.[610]

TheStreet.com, Inc. is a financial media company, internet website, and publisher.[611] Melissa Ann Davis was the investigative reporter for the company, and also one of the petitioners. [612] TheStreet.com, Inc. published an article that included statements about Carroll, characterizing him as an insurance fraud felon, a con artist, and a troubling character.[613] Carroll sued for defamation.[614] He served a request to produce documents in connection with the materials gathered and the research conducted for preparation of the article.[615] Petitioners invoked the Florida journalist's privilege among their objections and produced certain documents that

601. *Id.* at 904.
602. *Id.*
603. *Famiglietti*, 817 So. 2d at 905.
604. *Id.*
605. *Id.* (citing Jaffee v. Redmond, 518 U.S. 1, 2 (1996)).
606. *Id.* at 906.
607. *Id.* at 907.
608. *Id.* at 907–08.
609. TheStreet.com, Inc. v. Carroll, 20 So. 3d 947 (Fla. Dist. Ct. App. 2009).
610. *Id.* at 948.
611. *Id.*
612. *Id.*
613. *Id.*
614. *Id.*
615. *TheStreet.com, Inc.*, 20 So. 3d at 948.

they believed were covered by a tentative confidentiality agreement between the parties.[616] However, petitioners also contended that they inadvertently produced two documents in which they failed to redact the identities of their confidential sources.[617]

The trial court held that the Florida journalist's privilege had been waived by the actions and pleadings of the petitioners, and ordered the petitioners to produce un-redacted documents totaling sixty of the 897 pages produced.[618] The court also found that the journalist's privilege had been used as a sword and a shield by the petitioners.[619]

The district court held that certiorari lies to review orders compelling the production of documents and information claimed to be protected under the qualified journalist's privilege in Florida.[620] The district court found that the element of irreparable harm had been demonstrated, and that the trial court departed from the essential requirement of law when it ordered discovery notwithstanding petitioners' assertion of the Florida journalist's privilege.[621] The district court also stated that the privilege is governed by section 90.5015 of the Florida Statutes, which expressly provides a "professional journalist" with a qualified privilege not to disclose the information, including the identity of any source that was obtained while the reporter was actively gathering news.[622]

The court disagreed with the trial court's conclusion that the petitioners had asserted the privilege as both a sword and a shield.[623] The court found that the discovery in dispute related to an affirmative defense and that even if the sword and shield doctrine applied, the proper remedy would have been to dismiss or strike petitioners' defenses and to compel the production of the very information claimed to be privileged.[624] The court also rejected the trial court's suggestion that the petitioners failed to invoke the privilege unequivocally and at the earliest time.[625] The court further found that Carroll had failed to make the clear and specific showing required to overcome the privilege, and that the trial court failed to make the required clear and specific findings for such a result.[626] Based on these findings, the court granted the petition and quashed the orders.[627]

616. *Id.*
617. *Id.*
618. *Id.* at 949.
619. *Id.*
620. *Id.*
621. *TheStreet.com, Inc.*, 20 So. 3d at 949.
622. *Id.*
623. *Id.*
624. *Id.*
625. *Id.*
626. *Id.* at 950.
627. *TheStreet.com, Inc.*, 20 So. 3d at 950.

E. *WTVJ-NBC 6 v. Shehadeh*

In the recent 2011 case of *WTVJ-NBC 6 v. Shehadeh*,[628] the Third District Court of Appeals granted the petition for a writ of certiorari, quashed the trial court's order that granted Shehadeh's motion to compel, and denied the motion by WTVJ and Burnside for a protective order.[629] WTVJ, a television network affiliate, and its reporter, Jeff Burnside, sought a writ of certiorari to quash an order compelling Burnside to appear for a deposition on a limited topic relating to an earlier news broadcast.[630] The broadcast covered a dispute between the City Counsel of the City of Homestead, Florida and its former City Manager, Mike Shehadeh.[631]

The issue presented to the court was whether WTVJ and Burnside were entitled to a protective order under Florida's journalist's privilege statute.[632] The appellate court found that WTVJ and Burnside were entitled to invoke the qualified privilege, and that Shehadeh did not make a clear and specific showing regarding two of the three elements identified in section 90.5015 of the Florida Statutes.[633] In the motion to compel, Shehadeh sought the original of a CD diskette containing text messages, e-mails, and pin messages of employees and officials of the City of Homestead that was believed to have been turned over to the press.[634] Pin messages are unencrypted text messages sent from one person's handheld device to another's without going through an intermediate server.[635] Essentially, Shehadeh wanted to ask the reporter if the diskette was received through a public records request or if the information was leaked.[636]

While the court found that WTVJ and Burnside were entitled to invoke the privilege, it questioned whether Shehadeh made a clear and specific showing of all three elements as required to overcome the limited privilege.[637] The court found that while Shehadeh satisfied the first element, he failed to establish the second and third elements.[638] The court stated that Shehadeh had an array of discovery procedures available to determine whether any of the City of Homestead commissioners or employees leaked information to Burnside, a professional journalist, without questioning Burnside.[639] The court also found that the record presented in this case was precisely the kind of scenario in which the assertion of the privilege should be upheld.[640]

628. WTVJ-NBC 6 v. Shehadeh, 56 So. 3d 104 (Fla. Dist. Ct. App. 2011).
629. *Id.* at 105.
630. *Id.*
631. *Id.*
632. *Id.*
633. *Id.* at 105–06.
634. *WTVJ-NBC 6*, 56 So. 3d at 105.
635. *Id.* at 106 n.2.
636. *Id.* at 105.
637. *Id.* at 106.
638. *Id.*
639. *Id.*
640. *WTVJ-NBC 6*, 56 So. 3d at 106.

X. THE NEW MEDIA

When a reporter's privilege was created in Florida by statute in 1998, the traditional media outlets included radio, television, newspapers, and magazines.[641] Today, the new media includes most forms of computer-enhanced communications.[642] Most forms have an inherent interactive quality such as blogs, discussion boards, podcasting, social networking websites, and Wikis.[643]

Blogging appears to be the predominant form and the fastest growing cultural oriented segment of the new media.[644] This is due in part to the flexibility of the platform and that it can be maintained by a single individual.[645] Conversely, social networking websites like Facebook, MySpace, and Meetup require a staff of full-time employees to maintain the sites.[646] Therefore, there is not as much variety as there is among bloggers. Blogging is also an excellent device for current events.[647] Many traditional media outlets incorporate blogs in their online offerings in an effort to remain connected to their readership.[648] However, most bloggers are single authors who are usually not paid to generate content.[649]

The Media Bloggers Association is trying to unite bloggers.[650] They are a nonpartisan organization dedicated to supporting the development of blogging, or citizen journalism, as a distinct form of media.[651] However, the simple declaration that bloggers are journalists does not afford them the shield law protection in many states.[652]

Most states, including Florida, would not confer the privilege to most bloggers unless they meet the requirements of the definition of a "professional journalist" under section 90.5015 of the Florida Statutes.[653] Section 90.5015 of the Florida Statutes requires that, in order to qualify as a "professional journalist," a person must be regularly engaged in gathering or publishing the news for some form of print media, radio or television; they must be doing so for gain or livelihood, and they must be a salaried employee or independent contractor for one of the news agencies listed.[654] As of yet, there are no cases in Florida that have addressed this issue.

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641. *See* Drew McManus, *How to Connect With New Media: Part I*, ADAPTISTRATION BLOG (Feb. 1, 2008), http://www.adaptistration.com/blog/2008/02/01/how-to-connect-with-new-media-part-1/.
642. *Id.*
643. *Id.*
644. *Id.*
645. *Id.*
646. *Id.*
647. McManus, *supra* note 641.
648. *Id.*
649. *Id.*
650. *See* A. Bauer, *Blogging on Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining When Media Shield Laws Apply to Bloggers*, 10 MINN. J.L. SCI. & TECH. 747, 754 n.47 (2009).
651. *Id.*
652. *Id.*
653. *Id.* at 747–48.
654. FLA. STAT. § 90.5015(1) (1998).

However, in a recent New Jersey case,[655] the court ruled against a blogger finding that she produced no credentials or proof of affiliation with any recognized news agency, nor had she demonstrated adherence to any standard of professional responsibility regulating institutional journalism, such as editing, fact-checking, or disclosure of conflict of interest.[656]

Furthermore, it is telling that the Florida legislature has not revised the journalist's privilege statute since its creation in 1998. Evidently, the legislature has not felt a need to revise the statute, even with the onslaught of all new computer-enhanced communications.

XI. FEDERAL COURTS INTERPRET FLORIDA'S JOURNALIST'S PRIVILEGE

A. *McCarty v. Bankers Insurance Company, Inc.*

The first federal court case to interpret and apply section 90.5015 of the Florida Statutes was the case of *McCarty v. Bankers Insurance Company, Inc*.[657] McCarty sued his former employer, Bankers Insurance Company, Inc., as well as individual company officers and investigators for defamation and intentional interference with employment relationships following an illegal wiretapping of his phone.[658] The United States District Court for the Northern District of Florida issued protective orders permitting the disclosure of confidential materials for discovery, but reserving privilege claims.[659]

Lucy Morgan was a reporter and chief of the Times Publishing Company's Tallahassee news bureau.[660] Morgan had interviewed individuals and obtained documents concerning the controversy between the Florida Department of Insurance and Treasurer (DOI), McCarty, and Banker's Insurance, and had published a story in *The St. Petersburg Times* on June 18, 1996.[661] McCarty sought information relevant to his claims through a subpoena for Morgan's deposition.[662] *The Times* and Morgan moved for an order to quash the subpoena and asked for a protective order under the First Amendment privilege.[663]

Morgan argued that the federal court should apply the federal common law regarding privileges because the central claim was based on the alleged violation of 18 U.S.C. § 2520.[664] In regard to the state claims, Morgan argued that the law of Florida was "in disarray" with respect to the validity of a journalist's privilege and, thus, was in conflict with federal law.[665]

655. Too Much Media, LLC v. Hale, 993 A.2d 845 (N.J. Super. Ct. App. Div. 2010).
656. *Id.*
657. McCarty v. Bankers Ins. Co., 195 F.R.D. 39 (N.D. Fla. 1998).
658. *Id.* at 40.
659. *Id.* at 41.
660. *Id.* at 44.
661. *Id.*
662. *Id.*
663. *McCarty*, 195 F.R.D. at 44.
664. *Id.*
665. *Id.*

McCarty argued that the federal court should adopt the state law standard regarding a journalist's privilege, which requires the journalist to bear the burden of showing a privilege exists.[666] McCarty also argued that no conflict existed between federal and state law, therefore, the state law standard should apply to pending state claims for which the discovery was needed.[667]

However, at the time the federal court considered the case in June of 1998, any conflict between Florida and federal common law had been resolved by the Florida legislature by the creation of a statutory journalist's privilege section 90.5015 of the Florida Statutes.[668] The court determined that application of either the federal common law standard or the newly announced Florida standard would yield the same result because the factors of each were virtually indistinguishable.[669] In either case, the burden rested with McCarty, the party seeking to overcome the qualified privilege, to establish by clear and convincing evidence each of the three factors, which were considered the three-prong test.[670]

After considering all of the factors together, the court agreed with *The Times* and Morgan that McCarty had failed to overcome his burden by clear and convincing evidence.[671] Specifically, McCarty had failed to show that the information he sought from Morgan could not be obtained by other sources, like "press releases to show Bankers' public statements about him and his alleged illegal behavior."[672] He could have also used the article itself "to establish the discrepancies in" the investigator's stories.[673] McCarty did not succeed in showing a compelling need for Morgan's testimony; "he [could not] otherwise establish his entitlement to relief on his asserted claims."[674]

The court further surmised that despite McCarty's showing that the information sought was relevant to his claims, that "relevancy [was] outweighed by the other factors" along with "the compelling need to uphold the journalist's privilege which is so broadly recognized in the federal common law and the now applicable Florida statutory provisions of section 90.5015."[675] Based on that determination, the court granted the motion for a protective order and quashed the subpoena for Morgan's deposition.[676] The court also ordered that, "[a]bsent prior approval of [the] [c]ourt and a proper showing entitling a party to waiver of the journalist's privilege, no further discovery shall be had . . . with respect to [Morgan's] interviews with Bankers officials or with respect to her news gathering efforts."[677]

666. *Id.* at 44–45.
667. *Id.*
668. *Id.*
669. *McCarty*, 195 F.R.D. at 46.
670. *Id.*
671. *Id.* at 47.
672. *Id.*
673. *Id.*
674. *Id.*
675. *McCarty*, 195 F.R.D. at 47.
676. *Id.* at 48.
677. *Id.*

B. *Green v. Office of the Sheriff's Office*

In 2002, the United States District Court for the Middle District of Florida, in the case of *Green v. Office of the Sheriff's Office*,[678] addressed the journalist's privilege under Florida case law and section 90.5015 of the Florida Statutes.[679] Unlike the *McCarty* case, both parties agreed that the statute was the relevant standard.[680] "The underlying action [was] for retaliation under Title VII and the Florida Civil Rights Act."[681] The action was brought by Green, a female police officer, against the Jacksonville Sheriff's Office.[682]

"Winston Dean, a local television news reporter, and [his employer,] Multimedia Holdings Corporation," moved to quash Green's subpoena for Dean's testimony.[683] Green alleged that Dean's testimony was necessary to support her allegations of retaliation and was needed to elicit "the identity of the person who prompted [Dean] to prepare and broadcast" "a story about incompetent police officers featuring [Green] as an example of such."[684]

After addressing whether the "reporter possess[ed] relevant information; [whether] the information [could] be obtained from alternative sources; and [whether] there exist[ed] a compelling interest for requiring the reporter to disclose the information," the court granted the motion to quash the subpoena.[685] The court found that Green "failed to take advantage of all reasonable means to determine the identity of [the] individual."[686] Green "did not pursue the obvious vehicle of an interrogatory[,]" whereby, the defendant would have had "the burden of conducting [an] inquiry to determine whether one of its agents [contacted] Dean."[687] Therefore, because Green had failed to establish the second element, she failed to meet her burden.[688]

C. *Smoliak v. Greyhound Lines, Inc.*

In another Northern District of Florida case, *Smoliak v. Greyhound Lines, Inc.*,[689] the journalist's privilege was before the court after a magistrate judge denied a motion to quash a subpoena.[690] Greyhound sought information from Jeff Burlew, a professional reporter, who had observed Smoliak at a tailgate "party

678. Green v. Office of the Sheriff's Office, No. 3:99CV658J21HTS, 2002 WL 32128623 (M.D. Fla. Nov. 4, 2002).
679. *Id.* at *1.
680. *Id.*
681. *Id.*
682. *Id.*
683. *Id.*
684. *Green*, 2002 WL 32128623 at *1.
685. *Id.* at *1–2.
686. *Id.* at *1.
687. *Id.*
688. *Id.* at *2.
689. Smoliak v. Greyhound Lines, Inc., No. 5:04CV245PSPMAK, 2005 WL 3434742 (N.D. Fla. Oct. 17, 2005).
690. *Id.* at *1.

before Florida State University's first home game in 2002."[691] Smoliak sought "damages for injuries he suffered as a passenger in a bus accident on December 4, 2000."[692] Smoliak "claim[ed] that the accident caused him severe pain that kept him in bed, [made him] unable to move some days, and forced him to drop out of pre-med classes."[693]

The issue before the court was "whether the reporter's privilege, codified at section 90.5015 of the Florida Statutes, protect[ed] Burlew from being a witness concerning his eyewitness observations of Plaintiff, Scott Smoliak, on matters relevant to [the] case" and, if so, "whether [Greyhound] made a sufficient showing to overcome the privilege."[694] In considering whether the privilege applied to eyewitness observations, the court and the magistrate "relied [on] the Florida Supreme Court's opinion in *Miami Herald* [*Publishing*] *Co. v. Morejon*."[695]

"In *Morejon*, the [court] stated 'that there is no privilege, qualified, limited, or otherwise, which protects journalists from testifying as to their eyewitness observations of a relevant event in a subsequent proceeding.'"[696] However, the federal court interpreted *Morejon* to be limited to criminal matters, because *Morejon* was a criminal case and many of the cases cited therein were about journalists having to testify about criminal activity that the reporters observed.[697] The federal court also relied on the later Florida Supreme Court case of *State v. Davis*.[698] The court surmised that because this was not a criminal case, the privilege applied.[699] In addition, there was no indication that Burlew had observed Smoliak committing a crime.[700]

After examining the other two factors, the court found that Greyhound had not demonstrated a compelling need that was sufficient to overcome the reporter's privilege.[701] "[T]he observations at issue represent[ed] just one day in [Smoliak's] life," and Smoliak had "admitted in his deposition that he attended games and could drink six or seven beers in one episode."[702] Also, Smoliak "did not deny making the statement" to Burlew nor did he "deny being at the pre-game party."[703] Furthermore, the court found that Greyhound made no attempt to depose "Nick Crossman or Mark Spiser, who according to [Burlew's] article were with [Smoliak] at the pre-game party."[704] Therefore, the court quashed the subpoena issued to Burlew.[705]

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691. *Id.* at *1–2 ("[T]he parties do not dispute that Jeff Burlew is a 'professional journalist.'").
692. *Id.* at *2.
693. *Id.*
694. *Id.* at *1.
695. *Smoliak*, 2005 WL 3434742 at *1.
696. *Id.* (citing Miami Herald Pub. Co. v. Morejon, 561 So. 2d 577, 580 (Fla. 1990)).
697. *Id.* at *2.
698. *Id.* 720 So. 2d 220 (Fla. 1998).
699. *Id.*
700. *Id.*
701. *Smoliak*, 2005 WL 3434742 at *3.
702. *Id.*
703. *Id.*
704. *Id.*
705. *Id.*

D. *United States v. Fountain View Apartments, Inc.*

In the most recent case, the United States District Court for the Middle District of Florida, the Orlando Division, examined the journalist's privilege in the case of the *United States v. Fountain View Apartments, Inc*.[706] However, the federal court decided that the Florida statute did not apply because the case was "brought under the Fair Housing Act and jurisdiction [was] based on a federal question."[707] Therefore, federal law governed the case.[708]

XII. REVIEW OF FLORIDA'S JOURNALIST'S PRIVILEGE

The tension between the First Amendment and the Sixth Amendment of the U.S. Constitution continues to exist in Florida. The tension is inherent in the relationship of these two amendments. The press seeks to gather and publish information free from any governmental intrusion. The justice system seeks relevant evidence to ensure fair trials for defendants, plaintiffs, and victims.

The reporter's privilege in Florida was initially recognized in the *Morgan* case, decided in 1976, by the Florida Supreme Court.[709] Its creation is based on the court's analysis of the *Branzburg* decision.[710] More specifically, the Florida Supreme Court adopted Justice Powell's concurring opinion and found the existence of a qualified reporter's privilege.[711] While the Florida Supreme Court recognized a journalist's privilege in both criminal and civil cases, the privilege was not expansive. Initially, the privilege protected information from only confidential sources.[712] Neither eyewitness observations of a crime nor recordings of a crime were privileged.[713]

The Florida Supreme Court eventually adopted a three-prong test in 1998.[714] The court attached another requirement, or prong, that weighed the test in favor of forcing disclosure of information during trial proceedings.[715] The court ruled that when determining a compelling need for information, a trial court must factor into the test "the federal and Florida constitutional rights to compulsory and due process so as to ensure that the defendant receives a fair trial."[716] This additional burden, or fourth prong, is tantamount to the creation of a presumption that favors the limitation of the privilege in a criminal setting. The application of the court's

706. United States v. Fountain View Apartments, Inc., No. 6:08-cv-891-Orl-35DAB, 2009 WL 1905046 (M.D. Fla. July 1, 2009).
707. *Id.* at *2.
708. *Id.*
709. *See* Morgan v. State, 337 So. 2d 951 (Fla. 1976).
710. *Id.* at 953–54 (analyzing and interpreting Branzburg v. Hayes, 408 U.S. 665 (1972)).
711. *Id.* at 954.
712. Tribune Co. v. Huffstetler, 489 So. 2d 722, 723, 725 (Fla. 1986).
713. *See Branzburg*, 408 U.S. 665 (1972). As one of the first cases to recognize a reporter's privilege, the Court did not make any exceptions to the criminal setting it was confronted with.
714. State v. Davis, 720 So. 2d 220, 227 (Fla. 1998).
715. *Id.*
716. *Id.*

balancing test has benefited Sixth Amendment interests at the expense of First Amendment interests.[717]

The Florida Supreme Court ruled that confessions are "direct evidence of a crime" and not protected by any privilege.[718] The court also ruled that the qualified reporter's privilege applied to both confidential and non-confidential information, in both criminal and civil cases.[719]

The Florida Legislature finally addressed the reporter's privilege in favor of a qualified privilege. While not as protective as many common law privileges also recognized by the Florida Evidence Code, the reporter's privilege had gained statutory strength. Its strength is limited to the three-prong test, as well as to its exceptions. "[T]he privilege *does not* apply to eyewitness observations or physical evidence, including recordings, of a crime."[720] While the legislature adopted a three-prong test, the added requirement, or fourth prong, under *Davis* is still being applied as a further limitation of the privilege.[721] Subsequent to the passage of the journalist's privilege by the legislature, only a few appellate courts have addressed the statute. To date, the Florida Supreme Court has not directly analyzed the new statute.

XIII. SURVEY OF REGISTERED FLORIDA VOTERS' ATTITUDES

A. Methodology

The following survey was designed to discover and analyze the attitudes and perceptions of Florida's registered voters in order to see if those perceptions and attitudes are in sync with the law, which provides for a reporter's privilege.[722] The survey concerns the importance of the First Amendment's right to a free press versus the Sixth Amendment's right to a fair trial.[723]

The survey was conducted by phone.[724] The respondents were from a list obtained by the surveyor on March 29, 2011, of randomly sampled registered voters throughout the State of Florida.[725] Only phone numbers were used to create a random and anonymous response.[726] The phone numbers were further randomized by using the RAND function in Microsoft Excel, so that they would not be called

717. *Id.* By adding a fourth prong that favors the limitation of the privilege in a criminal setting, the court has shown a preference of the Sixth Amendment over the First Amendment.
718. Kidwell v. State, 730 So. 2d 670, 671 (Fla. 1998).
719. *Davis*, 720 So. 2d at 222 ("[W]e answer . . . finding that the qualified reporter's privilege in Florida applies to factual situations involving both nonconfidential and confidential information."); Morris Commc'n Corp. v. Frangie, 720 So. 2d 230, 231–32 (Fla. 1998) ("[W]e clarify that a qualified reporter's privilege applies in both civil and criminal proceedings.").
720. *Davis*, 720 So. 2d at 227.
721. *See Kidwell*, 730 So. 2d at 671 (while acknowledging the three-prong test in *Davis*, the majority agreed that the fourth prong should also be considered).
722. Public Policy Polling, *supra* note 3.
723. *Id.*
724. *Id.*
725. *Id.*
726. *Id.*

in any particular order.[727] The RAND function generates a random decimal in cell B1 with the numbers in Column A.[728] The formula is copied and pasted so that each phone number is associated with a different random decimal.[729]

The sample started with 30,000 respondents who were dialed up to a maximum of six times in order to obtain 600 responses.[730] When the respondents answered the phone, they heard the recorded questions and pushed the numbers that corresponded to the answer choices, and those numbers were recorded.[731]

B. Procedure

The survey consisted of fifteen questions.[732] The respondents could choose the answers yes, no, or not sure.[733] The first three questions were asked to gauge if the respondents felt that a free press and the right to a fair trial were important, and to see which one was more important if there was a conflict between the two.[734] The next seven questions focused on the rights of the reporter to protect their sources and to see in what instances the respondents would support that right.[735] The last five questions focused on demographics, in order to see the makeup of the respondents, and if factors like gender, race, age, education, and political affiliations impacted the results.[736]

C. Results

Of the 600 respondents, 53% were female and 47% were male.[737] Forty-one percent were Democrats, 34% were Republicans, and 25% were Independents/Other.[738] Sixty-eight percent of the respondents were White, 15% were Hispanic, 12% were African-American, and 6% were marked other.[739] Thirty-six percent of the respondents were age 46 to 65, 28% were older than 65, 24% were 30 to 45 years of age, and 12% were 18 to 29 years old.[740] Forty-eight percent of the respondents had a two or four year degree, 25% had a high school education, 24% had more than a four-year degree, and 4% marked none of the above.[741]

When asked if they felt that a free press was important, 91% of all respondents answered yes, 4% said no, and 5% said that they were not sure.[742] When asked if

727. *Id.*
728. Public Policy Polling, *supra* note 3.
729. *Id.*
730. *Id.*
731. *Id.*
732. *Id.*
733. *Id.*
734. Public Policy Polling, *supra* note 3.
735. *Id.*
736. *Id.*
737. *Id.*
738. *Id.*
739. *Id.*
740. Public Policy Polling, *supra* note 3.
741. *Id.*
742. *Id.*

they felt that a right to a fair trial was important, 96% of the respondents said yes, 3% said no, and 1% said that they were not sure.[743] However, when the respondents were asked which right was more important if a conflict existed between the right to a free press and the right to a fair trial, 68% of the respondents picked the right to a fair trial, 13% picked the right to a free press, and 19% said that they were not sure.[744]

The most salient results were found in question number three. While 91% of respondents said that a free press was important and 96% said that the right to a fair trial was important, when asked to choose which was more important in the face of a conflict, 68% picked the right to a fair trial and 13% picked a right to a free-press, and those that were not sure rose significantly.[745] Perhaps this is why the battle to secure a reporter's privilege under the law has been slow and arduous. In this instance, the law is in sync with public perception, in that, a right to a fair trial is paramount.

When asked if a reporter should have the right to protect his or her confidential sources from disclosure, 63% said yes, 24% said no, and 12% said that they were not sure.[746] When asked if they would support a law that allows reporters to protect their sources, 55% of the respondents said yes, 27% said no, and 18% were not sure.[747] However, when the respondents were asked if a reporter should be required to reveal a source if the information is needed to ensure a fair trial, 67% of respondents said yes, 18% said no, and 15% were not sure.[748] As in the first instance, the right to a fair trial trumps a reporter's rights when a conflict between the two arises.

The respondents were divided when they were asked if reporters should be incarcerated if they disobeyed a court order to disclose a confidential source or information.[749] Only 44% of respondents said yes, 39% said no, and 16% were not sure.[750] When asked if they would support a law that protects reporters from incarceration, 36% said yes, 40% said no, and 24% said that they were not sure.[751]

The respondents were then asked if a reporter observes a crime being committed, whether the reporter should be required to testify as to his or her observances.[752] In response to this question, 84% said yes, 8% said no, and 7% were not sure.[753] The numbers were a little lower when respondents were asked if a reporter hears a witness make statements concerning a crime, whether they think that reporter should be required to testify about what was heard.[754] Seventy-three

743. *Id.*
744. *Id.*
745. *Id.* (analysis came from comparing the results from questions one, two, and three).
746. Public Policy Polling, *supra* note 3.
747. *Id.*
748. *Id.*
749. *Id.* (analysis came from observing the results in question seven).
750. *Id.*
751. *Id.*
752. Public Policy Polling, *supra* note 3.
753. *Id.*
754. *Id.*

percent of respondents answered yes, 16% said no, and 10% were not sure.[755] These results are also consistent with the state of the law, which holds that a reporter must testify if he observes a crime being committed or overhears statements regarding a crime.[756]

The data was then cross-tabulated to see what the results would show when they were tabulated for gender, party affiliation, race, age, and education.[757] The statistics were very close when the respondents were analyzed based on gender. It appears that males and females answered in a similar way on the majority of the questions. However, it appears that females answered more often that they were not sure on questions seven through ten. For example, when asked if there should be a law to protect reporter's sources, the results were that 21% of females were not sure versus 15% males.[758] When asked whether reporters should go to jail if they disobey a court order, 22% of females were not sure versus 10% males.[759] And when asked whether they would support a law protecting reporters for refusing to disclose a source, 33% of females were not sure versus 14% males.[760] Females also tended to be more supportive of a reporter's rights in questions four through seven.

When the results were analyzed for party affiliation, the results were also surprisingly consistent among the respondents. Notably, a significant difference was seen where democrats were more supportive of a reporter's rights than their counterparts.[761] This is especially noticeable in questions four through eight.[762]

Notable in the race categories was that Hispanics and African Americans were at 75% and 79% respectively concerning question three, when their counterparts were at 66% and 56% in finding a fair trial more important than a free press.[763] Another deviation was from the subgroup called "Other," when asked if a reporter should have to reveal his or her source to ensure a fair trial, that group answered yes at 82% versus other groups whose answers ranged from 65% through 70%.[764] The "Other" subgroup was also 15% higher on questions nine and ten.[765]

When analyzed according to age, the eighteen through twenty-nine year olds deviated from their counterparts concerning questions one, two, three, nine, and ten.[766]

The only correlation for education were on questions three, six, seven, and eight, where it appears that high school and none-of-the-above subgroups voted similarly on those questions.[767]

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755. *Id.*
756. *Id.*
757. *Id.*
758. Public Policy Polling, *supra* note 3.
759. *Id.*
760. *Id.*
761. *Id.*
762. *Id.*
763. *Id.*
764. Public Policy Polling, *supra* note 3.
765. *Id.*
766. *Id.*
767. *Id.*

D. Further Analysis of Survey Results

Surprisingly, the overall survey results were very consistent with the law as it now stands. While the respondents found that the right to a free press and the right to a fair trial were equally important, when there was a conflict between the two, the Sixth Amendment prevailed.[768] Also, the answers to questions nine and ten, whether a reporter should have to testify if he observes a crime or overhears evidence of a crime, were also very consistent with the law as it now stands.[769] Notably, the respondents were split on questions four through eight and were more ambiguous than in their answers to one, two, three, nine, and ten.[770] Perhaps that is why the courts created a balancing test in those situations. Maybe the respondents were looking for the middle ground like the courts.

XIV. CONCLUSION

In looking at the reporter's privilege in Florida, this paper has raised the question as to whether the conflict between the First Amendment and the Sixth Amendment has been reconciled. The Florida Supreme Court, through case decisions, has reconciled the constitutional conflict.[771] The Florida Legislature, through the passage of section 90.5015 of the Florida Statutes, has also reconciled the debate between the two amendments.[772] Both the Florida Supreme Court and the Florida Legislature have settled the constitutional dispute by adopting a balancing test to be applied when both amendments are in play within the justice system.[773] Interestingly, the balancing test pronounced by the Florida Supreme Court is weighted in favor of the Sixth Amendment's need for evidence over the interest of a free press in the First Amendment.[774] The court's test is less protective of the journalist's privilege than the test set out by the legislature.[775]

While the Florida Supreme Court and the Florida Legislature have settled the conflict, the question remains whether the application of a balancing test appropriately resolves the dispute. The balancing test's goal is not to reach equilibrium with amendments on opposite sides of the scale. The test is clearly from the justice system's perspective. The perspective is focused on the admissibility of evidence. Unlike absolute common law privileges recognized in the Florida Evidence Code, the qualified journalist's privilege may be overcome

768. *Id.*
769. *Id.*
770. Public Policy Polling, *supra* note 3.
771. *See* Morgan v. State, 337 So. 2d 951, 954 (Fla. 1976) (the balancing test takes consideration of both freedom of press and right to a fair trial).
772. FLA. STAT. § 90.5015(2) (1998) (by including a privilege limitation in criminal cases, the Florida Legislature has used the balancing test).
773. *Id.*; *Morgan*, 337 So. 2d at 954.
774. *Morgan*, 337 So. 2d at 954 (the balancing test takes consideration of criminal cases and makes exceptions to the privilege, thus making it favor the Sixth Amendment).
775. *See* § 90.5015(2); *Morgan*, 337 So. 2d at 954.

without great difficulty because of the emphasis placed on the Sixth Amendment by both the courts and the legislature.[776]

The balancing test does not give equal value to both amendments. It is a test that results in the impingement of one amendment in favor of another. The impingement is upon the First Amendment in favor of rights enumerated in the Sixth Amendment. No court would consider compromising the Sixth Amendment right to a fair trial. Courts have not been as deferential to or mindful of compromising free-press rights.[777]

Likewise, the survey showed that Florida voters also value the right to a fair trial over the right to a free press.[778] The survey showed that respondents highly and equally valued the right to a free press and the right to a fair trial.[779] However, when a conflict arose between the two, the right to a fair trial was chosen 68% of the time.[780] Perhaps the law is based on common sense in this instance. Is the best law not based on principles that the common person can understand, value, and ultimately choose to follow?

Or is a test that would have as its goal a state of equilibrium, one that would give equal value to both amendments preferable? Giving equal value to both amendments would not result in the admissibility into evidence of information gathered and published by reporters. If the First Amendment were viewed as having equal value to the Sixth Amendment, a court or legislature would not impinge upon it.[781]

Many in the media support this view, and it has some support from those in the judiciary.[782] Information from the press under this analysis would be admitted into court only at the pleasure of the particular news agency or individual journalist. In the past, journalists have voluntarily testified to confessions made by criminal defendants in murder cases.[783] If the decision to provide testimony were left to those in the press, then it is likely that voluntary evidence would be provided in particular cases.

Is one amendment more important than another? Did our founders intend to apply equal value to the First and Sixth Amendments? Would they applaud or decry the balancing test being utilized? If one were a strict constructionist, there would be the argument that all the amendments should have equal value. The founders did not intend that one amendment be given greater weight than

776. *See* § 90.5015(2); *Morgan*, 337 So. 2d at 954; EHRHARDT, *supra* note 373.

777. *See generally* CBS, Inc. v. Jackson, 578 So. 2d 698 (Fla. 1991) (holding that the privilege does not apply to video recording that were taken during criminal events); Miami Herald Publ'g Co. v. Morejon, 561 So. 2d 577 (Fla. 1990) (holding that no privilege existed when a reporter witnessed an event during a criminal situation during the scope of a news investigation).

778. Public Policy Polling, *supra* note 3.

779. *Id.*

780. *Id.*

781. *See* Branzburg v. Hayes, 408 U.S. 665, 712 (1972) (Douglas, J., dissenting).

782. *See* Latara Appleby, *Senate Judiciary Committee Passes a Reporter's Shield Bill*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Sept. 12, 2013), http://www.rcfp.org/browse-media-law-resources/news/senate-judiciary-committee-passes-reporters-shield-bill. (The Senate Judiciary Committee passed a federal shield bill for the Senate's approval that will give reporters a qualified privilege.).

783. State v. Davis, 720 So. 2d 220, 227 (Fla. 1998).

another.[784] Ideally, there should be no interference upon the First Amendment in favor of another amendment. Academically, one would not favor the Sixth Amendment above another amendment either.

If the ideal would be to give equal value to the First Amendment, why have courts and legislatures adopted and applied a balancing test? Perhaps the answer is that it is a pragmatic compromise between competing interests within the First and Sixth Amendments. It should be noted that prior to the passage of shield laws, many judges did not recognize any journalist's privilege at all, other than from a bad faith investigation.[785] Yet, not recognizing any privilege places very little value on the First Amendment; considering a journalist to be no different than any other citizen fails to give any value or deference to free-press rights. While a balancing test gives greater respect and deference to the First Amendment, it still results in an impingement upon it. The consequence of balancing, however, is the compromise of one amendment over another. It sacrifices one in favor of another.

The failure to give equal value to the amendments is based upon individuals, ultimately judges, who believe that the Sixth Amendment has greater value than the First Amendment.[786] It is an application of the amendments that seeks as its priority an admirable goal—a fair trial.[787] It is a pragmatic good faith application made by those who operate within the Sixth Amendment as part of the trial process.[788] This creates an understandable, yet natural bias in favor of giving greater value to the right to a fair trial as compared with a free press. Imagine if the decision of admitting a journalist's information were to be made by the media as opposed to the courts. The perspective would be one that gave great value and deference to free-press rights in favor of protecting a reporter's information from disclosure.

As an academic exercise, it is easy to discuss the optimum application of the Bill of Rights. The ideal application of equal value to the amendments will often bring about a practical, but harsh result. In the justice system, a defendant will be denied exculpatory evidence and the prosecution will be denied material evidence that impacts the ability to prove the case beyond a reasonable doubt.[789] In civil cases, similar results will occur.[790] If the optimum ideal is not acceptable from a policy standpoint, the balancing test is a pragmatic approach to resolving conflict between the First and Sixth Amendments.

On the other hand, other privileges in the evidence code sacrifice admissible evidence in favor of a societal purpose.[791] The consequence of nondisclosure from

784. *See generally* U.S. CONST. art. VI. (Article VI of the Constitution states that the Constitution is the supreme law of the land. Because it does not state that one article and/or amendment can be more supreme than another, it follows that all articles and/or amendments are held equal to one another.).

785. Garland v. Torre, 259 F.2d 545, 551 (2d Cir. 1958).

786. *See* Sandra F. Chance & Susan D. Ross, *Gag Orders: Shields or Swords in the Constitutional Conflict Between Fair Trial and Free Press*, 1 COMM. L. & POL'Y 271–97 (1996).

787. *Id.*

788. *Id.*

789. *See* Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984).

790. *Id.* at 412 n.129.

791. *See* EHRHARDT, *supra* note 373.

those privileges is harsh from a justice system perspective. If a confession were given within the context of the lawyer-client privilege, the husband-wife privilege, the psychotherapist-patient privilege, or the clergy-penitent privilege, disclosure of the statement would not take place.[792] The absolute nature of those privileges, subject to their exceptions, would protect the confidentiality of the information.[793] Why then is the journalist's privilege less important than other privileges? Why are traditional common law privileges in the evidence code more important than the reporter's privilege? The journalist's privilege is the weakest privilege in the Florida Evidence Code.[794] As a statutory privilege, the journalist's privilege is the weakest privilege in terms of precluding disclosure of protected information.[795] Its strength is based on the value that the people of Florida have accorded the press as compared with other privileged relationships.[796]

It is interesting to see the deference given to an absolute privilege. The courts are reluctant to invade a common law privilege, even when faced with Sixth Amendment interests.[797] Yet, the courts have little hesitancy invading the journalist's privilege based on the First Amendment of the Constitution in favor of the Sixth Amendment.[798] Evidently, there is support for the principle that the Sixth Amendment cannot trump a common law privilege, but one amendment, the Sixth Amendment, may easily trump another amendment, the First Amendment.[799] Theoretically, it should be easier for a constitutional right, such as the Sixth Amendment, to trump a common law privilege rather than a constitutional amendment to trump another constitutional amendment.[800]

The application of a balancing test should take place with equal value being afforded to both amendments. The test should not be weighted at the outset in favor of impinging upon the First Amendment. Also, the balancing test should apply to all information that is requested from a journalist. If a defendant gives multiple confessions, a balancing test may preclude a journalist from testifying about that same confession. Yet under Florida case law, a confession has been interpreted as being direct evidence and, therefore, an exception to the privilege.[801]

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792. *See The Reporter's Privilege Compendium: An Introduction*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (2002), http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/introduction#sthash.j7i5czfU.dpuf [hereinafter, REPORTER'S COMMITTEE].

793. *Id.*

794. EHRHARDT, *supra* note 373.

795. *Id.* (comparing to the common law privileges found in Florida's Evidence Code).

796. *See generally* Public Policy Polling, *supra* note 3 (showing that the majority of those questioned believe a fair trial is more important than the freedom of press when they conflict each other).

797. *See generally* State v. Famiglietti, 817 So. 2d 901 (Fla. Dist. Ct. App. 2002) (discussing that a defendant could not obtain privileged communication between the victim and her psychotherapist even if the defendant can show a "reasonable probability" that the communication is necessary to his defense).

798. *See* Morgan v. State, 337 So. 2d 951, 954 (Fla. 1976) (discussing the balancing test shows that when confronted with the fair trial of a defendant, the privilege may not apply).

799. *See* REPORTER'S COMMITTEE, *supra* note 792.

800. *See generally* EHRHARDT, *supra* note 373 at 284–405; U.S. CONST. art. VI. (Article VI of the Constitution states that the Constitution is the supreme law of the land. Because a common law privilege cannot be held higher than the Constitution, it follows that a constitutional right is supreme to a common law privilege.).

801. Kidwell v. State, 730 So. 2d 670, 671 (Fla. 1998).

Judges should be educated on the importance of free-press rights. It is critical to note that the result of any balancing test depends on who is doing the balancing.[802] Many judges have an adversarial perspective when considering First Amendment issues.[803] Even United States Supreme Court Justices are distrustful and critical of the media.[804] Many judges view the media as being very powerful, critical, and unethical.[805] It is an important role of a free press to investigate the government and to freely publish that information to the public. Many people in the government, including judges, do not understand nor appreciate the media's function, especially when the news story is about that individual.[806] This creates an antagonistic relationship. It is understandable then that the underlying conflict between a judge and the media would give rise to a conflict between the First and Sixth Amendment.

In the final analysis, the Florida Supreme Court and the Florida Legislature have reconciled the competing interests presented by the First and Sixth Amendments.[807] The balancing test is a pragmatic approach to reconciling conflicts between the amendments. The balancing test, however, results in a compromise often at the expense of impinging upon free-press rights in favor of the right to a fair trial.[808] The test favors forced disclosure of information from the media. The test is applied by judges who may, unknowingly and sometimes knowingly, have a bias in favor of Sixth Amendment rights and against free press rights. With a better understanding and education on the function of the press, judges will be better able to apply an objective, unbiased balancing test. Until equal value is placed on the First and Sixth Amendments, the tension between the two amendments and between the media and the courts will continue in Florida.

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802. Chance & Ross, *supra* note 786.

803. *Id.*

804. *See generally* S.L. ALEXANDER, COVERING THE COURTS: A HANDBOOK FOR JOURNALIST 68 (University Press of America 1999). ("[J]udges are particularly sensitive to public opinion of their abilities, and many judges are wary of courtroom cameras which may broadcast every detail of their conduct in a trial for all to evaluate."); KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS (2007). This book was written about Justice Clarence Thomas. He was quoted as describing the media as "malicious." He also stated the following to a reporter, "You've got some scoundrels in your business. Why do you have so many scoundrels?" Justice Thomas's contempt for the media is shared by other judges in the country, including Justice Scalia.

805. ALEXANDER, *supra* note 804.

806. MERIDA & FLETCHER, *supra* note 804.

807. *See generally* FLA. STAT. § 90.5015(2) (1998); Morgan v. State, 337 So. 2d 951, 954 (Fla. 1976) (After the Supreme Court of Florida held that there should be a proper balance between the First and Sixth Amendments, legislature enacted section 90.5015(2) of the Florida Statutes which states that a privilege applies to a reporter's eyewitness observations obtained during the scope of employment but does not apply to physical evidence, eyewitness observations, or recordings of a crime.).

808. *See* § 90.5015(2); *Morgan*, 337 So. 2d at 954. The balancing test found in both sources show that when confronted with the fair trial of a defendant, the privilege may not apply to all situations.