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# Archives Beyond the Pale: Negotiating Legal and Ethical Entanglements after the Belfast Project

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## ABSTRACT

With a subpoena in one hand and a donor agreement in the other, what choice should an ethical archivist make? Since the legal battle over the Belfast Project—an oral history collection of Northern Irish paramilitaries from the Troubles—at Boston College erupted in 2011, such a scenario has become a reality. Should archival collections be legally protected? Or is the idea of “archival privilege” something to be avoided? Regardless of the ultimate fate of the Belfast Project, the archival field will have to adapt to a new reality.

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## KEY WORDS

Privacy and Confidentiality, Oral History, Legal Issues

The legal and archival professions are distinct. Each has its own designated area and, except for a few instances such as copyright or replevin, they do not overlap. However, events surrounding a particular oral history collection are bringing the law and archives together in an interesting way. The Belfast Project, an oral history collection housed at Boston College and consisting of interviews with paramilitaries from Northern Ireland involved in the Troubles, is at the center of a legal and political controversy. Interviewers promised absolute confidentiality to those who chose to tell their stories, but the American legal system does not recognize that promise. For some oral histories, confidentiality might not be an issue; however, when testimonies coming from paramilitaries concern murder, conspiracy, and accusation—not to mention the breaking of a well-known code of silence—confidentiality is not just important, it is vital. The American legal system recognizes protection for vital situations in which the harm from breaking confidentiality is greater than the silence. However, should privilege—the legal system’s method of protection—apply to those who give potentially damning accounts that are later housed in oral history collections? Should a concept of “archival privilege” be recognized?

Using the Belfast Project as a backdrop, in this article I explore the idea of archival privilege and argue the need for the archival community to either embrace or reject the concept. I begin with an overview of the Belfast Project, followed by a discussion of the general theory of privilege, including the contested notions of journalistic privilege and scholar’s privilege. I then look at a prior instance when archival privilege was raised and subsequently rejected by the courts. To conclude, I call for action from the professional archival community. The Belfast Project presents an opportunity for the professional community to decide whether or not to support or shun archival privilege.

### The Belfast Project<sup>1</sup>

On May 13, 2011, the *New York Times* carried the headline, “Secret Archive of Ulster Troubles Faces Subpoena.”<sup>2</sup> For many, this headline was the first introduction to the Belfast Project, an oral history effort that involved “two interviewers<sup>3</sup> [who] set out to collect memories of the conflict from men and women who had been involved as paramilitary fighters in some of the [Troubles] era’s most violent and grim episodes.”<sup>4</sup> Details on the specifics of the project are rather vague because the “precise contents of the collection have not been disclosed,” but the article mentioned that “it is believed to contain 30 to 50 oral histories from both republicans and paramilitaries loyal to the British Crown, many of whom used violence in hope of winning their side of the argument over Britain’s role in Ireland.”<sup>5</sup> The article reported that Boston College sponsored the project and that the interviewers had “two tools: a digital minidisk recorder and a promise

of confidentiality. In exchange for candor, the people being interviewed were assured that the contents would remain sealed until they were dead.”<sup>6</sup> However, a federal subpoena put that promise to the test.

The subpoena was reported as being issued by “federal prosecutors acting at the behest of British officials,” and it “is the first indication that a criminal investigation is underway into the disappearance of at least nine people in Northern Ireland during the early 1970s who were thought to have informed for British authorities about the activities of republicans who were working to end British rule.”<sup>7</sup> The article mentioned that one of the Disappeared, Jean McConville, “was a widowed mother of 10 who vanished from Belfast in 1972. . . .”<sup>8</sup> The article identified Brendan Hughes and Dolours Price, two former IRA members whose interviews were the subject of the subpoena.<sup>9</sup> It also introduced the reader to Ed Moloney, the author of *Voices from the Grave*, a book based on two interviews from the Belfast Project, and Anthony McIntyre, one of the interviewers.<sup>10</sup> At the time the article was published, Boston College had “not yet decided how it [would] respond to the subpoena,” and its lawyers were “trying to learn more about who issued it and why. . . .”<sup>11</sup> Some concern arose about what the situation could mean for other oral history projects; the director of Columbia University’s oral history research office was quoted as saying, “This is our worst-case scenario.”<sup>12</sup>

The purpose of the Belfast Project “was to collect a story of the Troubles that otherwise would be lost, distorted or rewritten, deliberately by those with a vested interest, or otherwise by the passage of time or the distortion wrought in the retelling.”<sup>13</sup> Ed Moloney, former director of the project and author of *Voices from the Grave*, the first publication to come from the project, explained that the “defining rule of the project was that no material could be used until and unless the interviewee had consented or had died.”<sup>14</sup> Moloney further explained:

The key consideration in going ahead was the willingness of the interviewees, even before the smoke of battle had cleared from the field, to open up candidly and comprehensively not only about their own lives and activities but about others’ activities as well. It seemed unlikely that they would be receptive to the traditional academic researcher . . . and so to maximize trust, and the value of the interviews, it was decided that the interviewers should be people the interviewees could trust, who broadly came from the same communities while being academically qualified individuals with a record of research.<sup>15</sup>

Until the subpoena, Boston College kept the transcripts under lock and key, following the rule articulated by Moloney.

If the IRA has a code of silence, and Boston College was keeping the interviews sealed, how did the world find out about Brendan Hughes and Dolours Price? The circumstances surrounding the disclosures were extremely different. Simply put, Hughes died, thus opening his interviews to the public, and Price

allegedly mentioned having spoken to the Belfast Project while giving an interview about her involvement with the IRA.<sup>16</sup> The difference in how the public found out about Hughes's and Price's involvements with the Belfast Project have come to play a very important part in the ensuing legal proceedings.<sup>17</sup>

Between the release of *Voices from the Grave* and news interviews with Price, there appeared to be more evidence on McConville's death. The Police Service of Northern Ireland (PSNI) set up a Historical Enquiries Team, which had the ability to reopen the investigation. However, it needed to be able to access interviews an ocean away. Since the interviews were housed in an archives in the United States, they would technically be out of the PSNI's jurisdiction. The authority behind the subpoenas ultimately came from a treaty the United States made with Great Britain in 1994.<sup>18</sup> The Mutual Legal Assistance Treaty (M-LAT) is a bilateral treaty "intended to improve law enforcement cooperation between two nations."<sup>19</sup> Essentially the treaty allows each country to call upon the other to subpoena materials relevant to criminal investigations.<sup>20</sup> For the Belfast Project, this meant that the British government<sup>21</sup> was able to invoke the M-LAT and authorize the United States attorneys in Boston to issue a subpoena for the materials.

Served on May 5, 2011, the initial subpoena only sought a limited number of materials, namely those in the Hughes and Price interviews. By invoking the M-LAT, the British government was able to have U.S. attorneys subpoena documents relevant to their investigation into McConville's murder. Since Hughes was dead, his materials were open to the public, and Boston College provided them as stipulated by the court order. The problem arose with Price's materials. Since Price was still alive, according to the agreement, she would have to give permission for her interview to be released.<sup>22</sup> Even though the promise of confidentiality would not hold up against a federal subpoena, Boston College responded in good faith with a motion to quash the subpoena for Price's materials. In its motion, Boston College acknowledged the importance of keeping the Price materials sealed, stating:

The reason those interviewed for the Belfast Project insisted on confidentiality was not simply their interest in not incriminating themselves or their colleagues. In the case of former IRA members such as Dolours Price, of equal or greater importance was the danger of retaliation from other IRA members. The IRA imposes a code of silence akin to the concept of "omerta" in the Mafia. Because those who were perceived as having violated that code were subject, under IRA rules, to punishment by death, interviewers and interviewees who have been associated with the IRA were naturally unwilling to participate in the Belfast Project without assurance that the interviews would be kept locked away until the interviewees' deaths.<sup>23</sup>

In July 2011, the United States government filed a brief opposing the motion to quash, believing that the materials should be handed over because of the treaty and the fact that they could aid in the murder investigation. Boston College filed a reply brief, stating that it was “pure speculation that the Belfast Project interviews contained any such evidence” of the murder.<sup>24</sup>

In August 2011, the court issued a second set of subpoenas to Boston College. These subpoenas requested additional materials from the archives—access to other interviews from IRA members. Boston College filed a motion to quash, just as it had with the earlier subpoena. On December 16, 2011, the Massachusetts District Court denied Boston College’s motion to quash the subpoenas and granted an *in camera* review<sup>25</sup> of the materials before they were to be handed over to U.S. attorneys.<sup>26</sup> The deadline for turning in the Price materials to the judge was set for noon on December 21, 2011.<sup>27</sup> Additionally, Boston College was expected to turn over transcripts of twenty-four other IRA interviews by December 27, 2011, for the judge to review *in camera*. On December 27, the Massachusetts District Court ruled that the Price materials should be given to the U.S. attorneys to be turned over to British authorities. After reviewing the additional interviews, the Massachusetts District Court determined that seven of those interviews should also be turned over.<sup>28</sup> Boston College did not initially file an appeal to the court’s decision. In an editorial, Thomas E. Hachey, executive director of the Center for Irish Programs at Boston College, and Dr. Robert K. O’Neill, librarian at the John J. Burns Library at Boston College, stated that by not appealing it would “be the better course to protect the interests of interviewees. . . .”<sup>29</sup> The concern was that if Boston College were to appeal, that appeal might lead to the order to turn over all of the interviews instead of a smaller number.<sup>30</sup> Within the editorial, Hachey and O’Neill distinguished Price from the others who had given interviews, stating:

That important need for discretion was honoured by all surviving participants, with the notable exception of one, Dolours Price, who chose publicly to volunteer her involvement, while making some provocative statements. Given how the details she freely disclosed entailed references to a still unresolved crime, the PSNI or some arm of British law enforcement sought to employ an enforceable Anglo-American legal assistance treaty to seek discovery of that material through the issuance of a subpoena by a U.S. federal court.<sup>31</sup>

Another aspect of the ruling worth noting is that the court acknowledged “‘confidential academic information’ must be treated with ‘heightened scrutiny’” and that “‘forced disclosure generally hurts ‘the free flow of information.’”<sup>32</sup> This acknowledgment fits within the discussion of academic privilege, which I address in the following section. For a brief moment, it seemed that the legal battles were over.

Moloney and McIntyre have attempted to include themselves in the legal action. On August 30, 2011, they filed a complaint as intervenors.<sup>33</sup> Then on December 29, 2011, they filed a request for judicial review<sup>34</sup> against U.S. Attorney General Eric Holder and a stay of execution<sup>35</sup> with the First Circuit.<sup>36</sup> Holder filed a motion to dismiss the case, and after a hearing on January 24, 2012, the district court granted the government's motion on the grounds that the researchers did not have standing.<sup>37</sup> The researchers were more successful with their stay from the First Circuit. Basically, they asked the First Circuit to stop any proceedings in the district court until the First Circuit Court, which is an appellate court,<sup>38</sup> could hear their appeal. The district court denied the appeal, and the researchers filed an appeal with the First Circuit, which granted it. The First Circuit issued an opinion on July 6, 2012, upholding the district court's decision.<sup>39</sup> Moloney and McIntyre filed for a rehearing of the case in the First Circuit *en banc*<sup>40</sup> on August 20, 2012, which was denied.<sup>41</sup> Boston College filed its own appeal with the First Circuit, which was heard on September 7, 2012.<sup>42</sup>

On October 1, 2012, the case made it to the next level when U.S. Supreme Court Justice Stephen Breyer issued a temporary stay, preventing the interviews from being handed over to the PSNI.<sup>43</sup> The stay was meant to give the researchers time to petition for *certiorari*<sup>44</sup> to have the case heard before the Supreme Court, which they did.<sup>45</sup> Should the Supreme Court decide not to hear the case, there will be no further legal recourse to prevent the interviews from going to the PSNI. The case took a turn on January 24, 2013, when Delours Price died.<sup>46</sup> Even though according to the agreement, her death meant that her interview could be opened, her interview was still protected by the Supreme Court's stay. However, days after Price's death, Boston College attempted to vacate the district court's order concerning the additional seven interviews.<sup>47</sup> Federal prosecutors opposed the motion. As of March 1, 2013, the petition for cert with the Supreme Court and the motion to vacate in the First Circuit have not been decided.

Since filing their appeals, both Moloney and McIntyre have been critical of Boston College, initially for not filing the appeal itself and then later for the handling of the case. Moloney claims that he cautioned Boston College long before the initial subpoenas that something like this could happen.<sup>48</sup> He wanted to remove the entire archives to Ireland.<sup>49</sup> Both Moloney and McIntyre claim that they are fighting for the rights of the interviewees whom they feel Boston College endangered.<sup>50</sup> McIntyre is concerned about his own safety because of his participation in the Belfast Project,<sup>51</sup> having received death threats.<sup>52</sup> Boston College has defended its stance against the researchers' accusations.

For the past few months, the battle in the press has been just as intense as the battle in the courtroom. The Belfast Project has evoked extreme emotion from those involved in the saga. The researchers have fought and continue to fight to protect those who gave interviews from potential fallout. Although it

has not been explicitly stated, the researchers' argument to protect the Belfast Project's oral histories fits neatly into the concept of privilege, which offers an exception to the law in a limited number of circumstances. The circumstances surrounding the Belfast Project show why it is necessary to limit access—even when a federal subpoena grants it—to protect its participants.

### To Restrict or Not to Restrict

In his introduction to *Voices from the Grave*, Ed Moloney explicitly stated that a “defining rule of the [Belfast] project was that no material could be used until and unless the interviewee had consented or had died.”<sup>53</sup> As mentioned previously, such a restriction was deemed necessary since the expectation was that the “interviewees, even before the smoke of battle had cleared from the field . . . [would] open up candidly and comprehensively not only about their own lives and activities but about others' as well.”<sup>54</sup> Moloney went further, explaining, “Boston College is contractually committed to sequestering the taped transcriptions unless otherwise given a full release in writing, by the interviewees, or until the demise of the latter.”<sup>55</sup> While the promise of confidentiality was no doubt comforting to the interviewees, it was not a promise that could be kept.

While archives can deny access to the average citizen, the courts are another matter. In the words of author John A. Neuenschwander, “If someone were to file a freedom of information request (known as FOIA, for the Freedom of Information Act)<sup>56</sup> for an interview held by a state supported program or serve a subpoena, the best that any repository can do is to mount a reasonable defense.”<sup>57</sup> As discussed previously, a subpoena is a summons to provide materials to the court. To ignore or refuse a subpoena carries substantial penalties, including “legal penalties such as orders to compel discovery and disclosures of documents, contempt, fines or jail time, or an adverse judgment on the merits of the case.”<sup>58</sup> Although material from an oral history would most likely be considered hearsay,<sup>59</sup> “if there is even a remote chance that interviews might be helpful, attorneys will usually want to take a look rather than miss any valuable evidence.”<sup>60</sup>

Once a subpoena is issued, the receiving party either has to comply with or challenge it. Generally, if a party wants to challenge a subpoena, it can “object to and limit the scope of an overly broad subpoena via a motion to quash,<sup>61</sup> modify,<sup>62</sup> or vacate the subpoena, or a Motion for a Protective Order. . . .”<sup>63</sup> Once any of those motions are filed—and the filing must occur before the deadline stated on the subpoena—the party will not have to comply with the subpoena until told to do so by the court.<sup>64</sup>

A variety of defenses can be used when challenging a subpoena. For instance, the subpoenaed party could argue that the scope of the subpoena is

too broad or that to comply would constitute an undue hardship. The court may be compelled by those arguments, depending on the situation. Another defense is privilege. Materials that are privileged cannot be used as evidence and cannot be successfully subpoenaed. However, invoking privilege is an uphill battle, particularly for an archives. Privilege is a very limited protection, and some believe that archives do not qualify for it.

### Privilege, Generally

According to the Federal Rules of Evidence, all relevant evidence is admissible.<sup>65</sup> This means that any information relevant to a case is allowed to be entered during trial in the United States. This broad mandate does include a very important caveat. If the U.S. Constitution, a federal statute,<sup>66</sup> the Federal Rules of Evidence, or the Supreme Court say otherwise, even relevant evidence is not allowed to be used.<sup>67</sup> The Federal Rules of Evidence offer a plethora of reasons why evidence might be found inadmissible, most of them falling under the umbrella of hearsay.<sup>68</sup> Evidence is also considered inadmissible when it falls under privilege. With privilege, the accuracy of the information is not called into question. Rather, the information is excluded because “disclosure would harm a governmental interest or a private relationship that courts and legislatures deem worthy of preserving or fostering.”<sup>69</sup> Privilege is in essence the acknowledgment that certain social concerns are more important than the legal process. Privilege is based in common law,<sup>70</sup> but much like relevant evidence in general, it can be limited by the U.S. Constitution, federal statute, or the Supreme Court.<sup>71</sup>

Through popular culture, many are familiar with the different categories of privilege, though they might not immediately realize it. In the United States, privilege can exist between attorneys and their clients, spouses,<sup>72</sup> therapists or physicians and their patients, and priests and penitents.<sup>73</sup> A “state secrets privilege” protects “sensitive military and diplomatic information.”<sup>74</sup> Perhaps the most familiar privilege is enshrined in the Fifth Amendment to the United States Constitution, by which an individual can protect him- or herself from self-incrimination by “pleading the Fifth.” If someone wants to invoke any of these privileges, he or she must assert that fact to the court.<sup>75</sup> Privilege is not assumed.

Because of the benefits and protections that spring from privilege, other groups would like to have those protections as well. However, United States courts are reluctant to add to the already established protected groups. Journalists are at the forefront of the fight for privilege as a protection for their sources. Certain sources want to remain confidential for a variety of reasons and only give information if promised confidentiality. While it is within the

journalist's power to keep a source's name out of a story, should that journalist be subpoenaed, he or she may face the choice of naming the source or being in contempt of court.<sup>76</sup>

While privilege is incredibly difficult to obtain, it is also exceedingly easy to break. Once privilege is broken, information or materials once off limits become available to the subpoena. Privilege is broken when the information is shared with a third party. It is interesting to note that when Boston College explained why it was challenging the court order for the seven additional interview transcripts and not for Price's transcript, its rationale implicitly followed the theory of privilege. Recall the college's earlier statement explaining that Price had given an interview and mentioned her involvement with the Belfast Project. The individuals who gave those other seven interviews did not. Essentially, Price broke privilege by speaking to a third party and must pay the consequences.

### Journalists and Privilege

In terms of privilege, journalists have been trailblazers because they need to protect their sources. For journalists, sources are vital. Sources help journalists gather information and sniff out stories. Many times, those sources are "on the record," which means "any information provided by the source can be attributed transparently directly to the source, by name and title."<sup>77</sup> An on-the-record source is often considered more credible than one that is "off the record."<sup>78</sup> There are reasons, though, why a source may need to be off the record, and those reasons do not diminish the value of the information that he or she offers. Particularly in political, criminal, national security, military, and investigative reporting, "A promise of confidentiality is the price journalists are willing to pay for access to information they otherwise could not obtain."<sup>79</sup> As when working with oral history informants, a level of trust is required. The source must trust that the journalist will keep his or her identity a secret, and the journalist must be worthy of that trust. Once the trust is broken, so is the flow of information.

With an understanding of the trust required between journalists and their sources, the issue of privilege comes into play. A study conducted over the course of three decades provided "consistent evidence that protecting confidential sources is a fundamental journalistic value, with fewer than 10 percent of journalists saying that it is ever justifiable to name a confidential source."<sup>80</sup> One journalist arguing in favor of privilege for confidential sources invoked freedom of speech and freedom of the press by maintaining that privilege should be granted under the First Amendment of the United States Constitution.<sup>81</sup> In *Branzburg v. Hayes*,<sup>82</sup> the issue was whether journalists could be compelled to testify before a grand jury about their sources.<sup>83</sup> The case was heard by the Supreme Court which ruled:

The First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional testimonial privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence thereof.<sup>84</sup>

While this does appear to be a rather harsh ruling, the court did make it clear that this was in the instance of a grand jury subpoena relating to criminal offenses. At the beginning of the opinion, the court acknowledged, "The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request."<sup>85</sup> It may not be an outright acknowledgment of a privilege, but it does offer some protection to confidential sources. Although the judgment came down in 1972, this case is still good law and cited today.<sup>86</sup>

The dissent<sup>87</sup> in *Branzburg v. Hayes* offers some hope for those who still strive for a journalistic privilege. In writing the dissent, Justice Stewart emphasized the potential effects of a lack of privilege: "When government officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to 'self-censorship.'"<sup>88</sup> Fueled by the dissent, journalists continue to challenge the courts to gain privilege. Taking inspiration from journalists, scholars began to clamor for their own privilege.

## Scholar's Privilege

To a degree, the fight for scholar's privilege is related to journalistic privilege. Scholar's privilege has been invoked in several cases, and two in particular are relevant to this discussion. Those cases involved Mario Brajuha, a PhD student from SUNY Stony Brook, and James Richard Scarce, a PhD student from Washington State University (WSU). Both students refused to comply with subpoenas and sought privilege to protect their work.

Brajuha was working on his dissertation, "The Sociology of the American Restaurant," in 1983.<sup>89</sup> After a "suspicious fire and explosion" at Le Restaurant where he worked, the police interviewed Brajuha.<sup>90</sup> Brajuha answered all of the police's questions and "related to the police that it was his practice to record contemporaneously his daily observations and conversations at Le Restaurant as field notes to be used in preparation of his dissertation."<sup>91</sup> The police wanted access to those field notes, which contained several hundred pages of information.<sup>92</sup> A federal grand jury issued a subpoena for the information, and Brajuha

motioned to quash the subpoena on the grounds that he had promised confidentiality to his “research sources” and to comply would be to “divulge his sources and to turn over his personal diary.”<sup>93</sup>

Brajuha’s arguments were compelling enough to quash the subpoena. The court relied upon “a limited federal scholar’s privilege analogous to the limited news reporter’s privilege recognized in *Branzburg v. Hayes*.”<sup>94</sup> The government appealed, and the appellate court reversed the lower court’s decision stating, “We regard the record in this case as far too sparse to serve as a vehicle for consideration of whether a scholar’s privilege exists, much less to provide grounds to applying it to Brajuha.”<sup>95</sup> Though the court decided against granting the scholar’s privilege, it did provide interesting *dicta*<sup>96</sup> concerning the logistics of a scholar’s privilege. The court was concerned about creating “an unqualified and indeterminate immunity attaching generally to all academically related inquiries upon the bald assertion that someone was promised confidentiality in connection with the study.”<sup>97</sup> It is important to note that the court did not come out and say that no such privilege was meant to exist, but instead that the facts of the case did not warrant such a privilege.

Nine years later, across the country, another scholar refused to comply with a grand jury subpoena, this time issued in relation to an attack on an animal research facility at WSU. James Richard Scarce was a PhD student who “authored various publications, essays and papers on the environmental movement and animal rights groups.”<sup>98</sup> Scarce had also authored a book on “militant environmentalist groups,” including the Animal Liberation Front (ALF).<sup>99</sup> Scarce refused to be interviewed, so a subpoena was issued for him to appear in front of a grand jury to testify.<sup>100</sup> Scarce was willing to answer general questions, but when the questions turned specific about conversations he had had with an ALF leader, he claimed the conversation “concerned confidential information about the WSU incident that was in furtherance of his scholarly research.”<sup>101</sup> The district court denied Scarce’s privilege claim and ordered him to testify.<sup>102</sup> When he did not, the district court found Scarce in contempt.<sup>103</sup> Scarce appealed, but the appellate court affirmed both of the district court’s decisions—no privilege existed and Scarce was in contempt.<sup>104</sup> Relying firmly on the precedent set by *Branzburg*, the court stated:

He [Scarce] does not argue here, nor did he argue in the district court, that the questions were posed in bad faith, that they had tenuous relationship to the subject of the investigation, that law enforcement did not have legitimate need for the information, or that they were posed as a means of harassment.<sup>105</sup>

Similar to the court in *Branzburg*, the appellate court did not say that no such privilege could exist, rather, that the circumstances of Scarce’s case did not warrant it.

Journalistic privilege and scholar's privilege complement each other. The cases considered here do not reject either outright. Granted, they provide no ringing endorsement of privilege, but some judicial support does exist. With that understanding, I now discuss archival privilege, which is very similar to journalistic and scholar's privileges, and yet is not nearly as common in the courts.

## Archival Privilege

In 1986, the issue of archival privilege concerning private papers had its day in court. Ann Braden was a fixture in the South's civil rights movement in the 1960s and 1970s.<sup>106</sup> Ann and her husband, Carl Braden, were involved with the Southern Conference Educational Fund, and Ann also was involved with the efforts to end the House Un-American Activities Committee.<sup>107</sup> Starting in 1966, Ann began donating her personal papers, and those of her husband, to the State Historical Society of Wisconsin.<sup>108</sup> The donations went in several installments and ultimately consisted of a collection of "over 240 boxes of documents, tapes and microfilm" donated with the condition "that access to the documents would be restricted to those persons having written permission from Braden to study the files."<sup>109</sup> The term of the access agreement was five years, after which the materials would be opened to the public. However, Braden was given the right to renew the five-year term, which she did five times and had planned to do for the sixth time when the latest term was set to expire in 1987.<sup>110</sup> During this time, the FBI was investigating the National Committee Against Repressive Legislation (NCARL) and its former executive director, Frank Wilkinson.<sup>111</sup> While engaging in discovery,<sup>112</sup> the FBI was researching NCARL at the historical society<sup>113</sup> and found a link between Braden's papers and the organization.<sup>114</sup> Braden had been a member of NCARL's predecessor, made donations to NCARL, and served as NCARL's vice-chair for a period of time.<sup>115</sup> The FBI attempted to gain access to the files, which Braden would not grant. Consequently, the FBI requested a subpoena for the files.<sup>116</sup>

Braden's argument against the subpoena had three parts. First, she claimed a "First Amendment privilege against disclosure, on the basis that the subpoena infringes her rights of free association, free speech and privacy,<sup>117</sup> and cannot meet the heightened level of scrutiny<sup>118</sup> mandated by that privilege."<sup>119</sup> Second, Braden argued that since "the documents are deposited in an archive and are used by scholars, access to the government should only be granted if such discovery meets the criteria applicable to a claim of First Amendment privilege."<sup>120</sup> Third, Braden argued that even if the court did not agree with the privileges she asserted, the request was "unduly burdensome and unreasonably cumulative" and thus should be narrowed.<sup>121</sup> "A group of scholars, historians and archivists"

as well as Wisconsin's attorney general, who all filed *amici* briefs, supported Braden's assertion of archival privilege.<sup>122</sup>

While allowing for some narrowing of the subpoena, the arguments in favor of an archival privilege did not sway the court. Since no common law provided for the archival privilege, Braden and the *amici* invoked statutes that recognized the authority of access agreements and drew analogies to cases in which courts acknowledged confidentiality for scholarly sources.<sup>123</sup> The court rejected the argument that to disallow archival privilege would dissuade potential donors from giving or leaving their papers to an archives, stating:

The Court is *not* striking down the access restriction agreement in its entirety, thereby permitting the government or the public to rifle at will through Braden's files. Nor is it permitting a third party to obtain the files for use in some unrelated proceeding. Instead, the situation before the Court is one where a member of the plaintiff class seeks to insulate otherwise discoverable documents from disclosure simply by virtue of the fact that she has placed them in an archive under an agreement restricting access by the general public. In such a case, the access restriction agreement must yield to the judicial process' search for truth. . . . Finally . . . the protection sought here amounts in the end to nothing more than the assertion that the mere act of placing documents in an "archive" should protect it from the judicial process, including discovery. Braden does not contend that the documents sought would be "privileged" if she had retained physical possession of them. The ruling here does no more than hold that the documents are as equally discoverable after they have been deposited in an archive as they would have been had they been retained by the donor.<sup>124</sup>

As a result, archival privilege remained unrecognized and the stage was set for the Belfast Project.

## What Now?

In 1989, Harold L. Miller, who was then the State Historical Society of Wisconsin's reference archivist, wrote a paper entitled "Will Access Restrictions Hold up in Court? The FBI's Attempt to Use the Braden Papers at the State Historical Society of Wisconsin," which he adapted from a presentation he made at the Society of American Archivists' annual meeting in 1988.<sup>125</sup> Some of the points Miller made foreshadowed Moloney and McIntyre's and Boston College's arguments for quashing the subpoena: "The crux of the 'archival privilege' justification is also the heart of the archival community's concern in this case; namely that without the ability to restrict collections we will be unable to collect, and important historical information will be lost to this and future generations."<sup>126</sup>

Problematically, instances of a dire need for archival privilege appear to be solitary and distinguishable. Twenty-five years separate Braden's subpoena from the one issued to Boston College. The parties involved are also an issue. Braden retained a large portion of control over her papers. The subpoena was served to her, not to the historical society. The existence of a finding aid for Braden's collection creates another distinction.<sup>127</sup> Miller pointed out, "It is hard to believe that the fact that her papers were in a public institution and described in a detailed descriptive register played no role in that selection."<sup>128</sup> Going further, Miller highlighted another unique fact that makes the court's assumption that the materials were discoverable whether in or out of an archive "right in a legal sense, but wrong in a practical one."<sup>129</sup> Remember, the FBI discovered Braden's files because it was conducting other research and stumbled upon the finding aid for her papers. Miller pointed out that if "Braden's papers [had] been in her basement, the FBI would have had no firm basis for asserting that she had relevant documents. The simple facts of the case show that Braden incurred greater risk by placing her papers in an archives."<sup>130</sup>

It is interesting to think about Braden's case in relation to the Belfast Project. In both instances, one huge "if" loomed over the proceedings. If a finding aid had not been created for Braden's papers, would the FBI have felt the need to expand its search? Had Dolours Price not given her interview, would the PSNI have invoked the treaty to subpoena the oral histories? Even though engaging in a "what if" exercise appears futile, it is important when considering archival privilege. If the facts of each situation had been different, archival privilege would not be in play at all. It takes a worst-case scenario for the topic to become truly relevant. Miller addressed this sentiment in his paper when he stated:

In view of these issues' importance, it seems appropriate to consider what, if anything, the archival profession might do to counter the Braden access rulings. If a similar case comes before the courts again the Society of American Archivists should not sit on the sidelines. While it may be unlikely, it is possible that another court looking at the same issues would rule differently. . . .<sup>131</sup>

Because of the appeals still in process with the Belfast Project, one cannot conclusively say how one court measures up to the other.

## Call for Action

Archivists are tasked with preserving the historical record. This duty goes beyond merely looking at physical objects and encompasses the abstract world of principles. As the keepers of the historical record, it is imperative that archivists advocate for archival privilege, which is going to be a recurring issue. Until

the archival community understands the importance of archival privilege and works toward its adoption, collections will be at risk. With so much at stake, archivists have a duty to be proactive about archival privilege. As journalists have learned, privilege is not granted readily. If the opportunity presents itself to provide insight about laws or rulings that will affect archives, that opportunity must be taken. To remain silent is to give up all professional authority on the matter.

Granted, the Belfast Project may not be the ideal vehicle for arguing for archival privilege. Not only is there a charged political situation, there is also the complication of an international treaty. However, that does not mean that archivists should not be involved. At the point of this writing, the fate of those oral histories is in the hands of the Supreme Court. But, should the court decide to hear the case, fallout could resonate throughout the profession. It is in the profession's best interest that the Supreme Court render a narrow ruling. In Braden's case, the judge ruled that archival privilege did not apply to that particular instance.<sup>132</sup> By distinguishing Braden's particular situation, the judge left open the possibility that archival privilege could exist. So, while the court did not endorse archival privilege, it did not reject it outright. An instance in the future could warrant the privilege and thus it could be invoked. If a court renders a decision outright against archival privilege, making the argument in favor of granting the privilege will be much more difficult in the future. That is why the time to act is now.

## NOTES

<sup>1</sup> Information in this section is current up until March 1, 2013. Developments since that time are not referenced in this article.

<sup>2</sup> Jim Dwyer, "Secret Archive of Ulster Troubles Faces Subpoena," *New York Times*, May 13, 2011, [http://www.nytimes.com/2011/05/13/world/europe/13ireland.html?\\_r=2](http://www.nytimes.com/2011/05/13/world/europe/13ireland.html?_r=2). A subpoena is a request from the court to provide materials. To ignore the request can carry hefty penalties.

<sup>3</sup> The two interviewees were Anthony McIntyre and Wilson McArthur. They are described as "former activists from opposing sides who each took degrees at Queen's University, Belfast, and whose contacts among IRA [Irish Republican Army] and UVF [Ulster Volunteer Force] paramilitary veterans helped make this oral history a reality." Thomas E. Hachey and Robert K. O'Neill, Preface, in *Voices from the Grave: Two Men's War in Ireland*, auth. Ed Moloney (New York: Public Affairs, 2010), 3.

<sup>4</sup> Dwyer, "Secret Archives of Ulster." The "Troubles" refers to a roughly thirty-year period in Northern Ireland that was rife with sectarian violence. It was essentially a conflict between Protestants and Catholics, although politics played just as important a role as religion. From the late 1960s until the late 1990s, the six counties of Northern Ireland hosted some truly gruesome events. The Catholics, represented by the Irish Republican Army (IRA)—more specifically the Provisional IRA—had been repressed by Protestants and the British for centuries. By the end of the Troubles (which many consider to be the signing of the Good Friday Agreement in 1998), measures had been put into place to make sure that Catholics were not treated as second-class citizens. Some might say that those efforts were not enough and that the Troubles continue to do this day. Certainly there are still instances of violence.

<sup>5</sup> Dwyer, "Secret Archives of Ulster."

- <sup>6</sup> Dwyer, "Secret Archives of Ulster."
- <sup>7</sup> Dwyer, "Secret Archives of Ulster." During the Troubles, a number of people were abducted by the IRA, murdered, and then buried in secret. They are referred to as the Disappeared. After the Good Friday Agreement in 1998, the IRA agreed to assist the British and Irish governments in locating the bodies of the Disappeared. To this day some bodies have not yet been recovered.
- <sup>8</sup> Dwyer, "Secret Archives of Ulster." Jean McConville is perhaps one of the more well known of the Disappeared. As stated in the text, she was a widowed mother of ten. She was abducted in 1972 and her body was not recovered until 2003. Her family has been involved with activist groups focused on bringing justice for the Disappeared. In particular, her family has been calling for justice for her murder. The family believes that Gerry Adams, a Sinn Féin politician who is currently serving in the Republic of Ireland's parliamentary body, the Dáil, gave the order for her murder. Sinn Féin is a political party in both Northern Ireland and the Republic of Ireland. It has been viewed as the political arm of the IRA.
- <sup>9</sup> Dwyer, "Secret Archives of Ulster."
- <sup>10</sup> Dwyer, "Secret Archives of Ulster."
- <sup>11</sup> Dwyer, "Secret Archives of Ulster."
- <sup>12</sup> Dwyer, "Secret Archives of Ulster." Mary Marshall Clark, the director of Columbia's oral history research office, also made it clear that "interviewers for Columbia projects advise the subjects that whatever they say is subject to release under court orders, like subpoenas, and require them to sign consent forms." Dwyer, "Secret Archives of Ulster."
- <sup>13</sup> Moloney, *Voices from the Grave*, 8.
- <sup>14</sup> Moloney, *Voices from the Grave*, 7.
- <sup>15</sup> Moloney, *Voices from the Grave*, 6.
- <sup>16</sup> It should be noted that I was not able to find the news story in which Price mentioned the Belfast Project. At this point, I am not certain whether a statement about her involvement with the Belfast Project made it into print or was simply "on the record" and made its way into the public sphere another way.
- <sup>17</sup> It is interesting to note that two loyalist individuals were also revealed to have been involved with the Belfast Project. These individuals are the second and third loyalists to have been identified (the first being David Ervine, who died in 2007). These two names were made public for a reason different from that of Hughes and Price—the two loyalists wanted their interviews returned. William "Plum" Smith and Winston "Winkie" Rea have begun to take legal action to have their interviews returned. At this point, no further information is available as to whether or not they have been successful. In an article, Smith was quoted as saying, "I'm not concerned about the content. I'm concerned about the principle. I have asked for the tapes back because Boston College cannot guarantee the basis on which the interviews were given." Brian Rowan, "Loyalist Wants Boston College Tapes Returned," *Belfast Telegraph*, January 3, 2012, <http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/loyalist-wants-boston-college-tapes-returned-16098445.html>.
- <sup>18</sup> *In re Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Criminal Matters in the Matter of Dolours Price*, No. 11-91078-WGY, District of Massachusetts, December 16, 2011, 2. The original treaty was amended in 2003 when the United States signed another legal assistance treaty, this time with the European Union. The terms of the two treaties were integrated, and the court notes that the terms in contention with the present case were not affected by the merger with the later treaty. See *In re Request from the United Kingdom*, 10.
- <sup>19</sup> *In re Request from the United Kingdom*, 9.
- <sup>20</sup> Jennifer Howard, "Boston College Must Release Oral-History Records, but Court Will Review Them First," *Chronicle of Higher Education*, December 19, 2011, <http://chronicle.com/article/Boston-College-Must-Release/130119/>.
- <sup>21</sup> Since May 2011, there had been speculation that, even though the request came from the British government, it was really the PSNI that wanted the materials. In fact, many stories outright said that the PSNI was using the treaty. Although it does make sense, given the fact that the PSNI's Historical Enquiries Team has been investigating cold cases from the Troubles time period, it was not until January 2012 that the PSNI actually confirmed its involvement. Ross Kerber,

- "Kerry Reaches Out on Northern Ireland 'Troubles' Records," *Reuters*, January, 27, 2012, <http://www.reuters.com/article/2012/01/27/us-usa-britain-ira-idUSTRE80Q27R20120127>.
- <sup>22</sup> This will become a point of contention between Boston College and the researchers. Although confidentiality can be promised to people who give oral history interviews, that confidentiality is only to the extent that the laws of the United States allow. In the case of a federal order, such as a subpoena, the promises of confidentiality will not be upheld. Boston College claims that the agreements made with the people being interviewed were supposed to contain a clause addressing the limitations of confidentiality. The researchers did not include such a clause in the agreements made with the people they interviewed. David Cote, "Researchers Weigh in on Belfast Project Legal Drama," *Heights*, <http://www.bcheights.com/news/researchers-weigh-in-on-belfast-project-legal-drama-1.2783367>.
- <sup>23</sup> Motion of the Trustees of Boston College to Quash Subpoenas, M.B.D. No. 11-MC-91078, United States District Court District of Massachusetts, June 7, 2011, 5–6.
- <sup>24</sup> Memorandum of Trustees of Boston College in Reply to Government's Opposition to Motion to Quash Subpoenas and in Opposition to Government's Motion to Compel, M.B.D. No. 11-MC-91078, United States District Court District of Massachusetts, July 15, 2011, 1.
- <sup>25</sup> This is a legal term meaning a private review by the judge.
- <sup>26</sup> *United States v. Trustees of Boston College*, No. 11-91078-WGY, United States District Court District of Massachusetts, December 16, 2011, 48.
- <sup>27</sup> *Trustees of Boston College*, 48.
- <sup>28</sup> John R. Ellement, "BC Decides to Fight Transcript Release," *Boston Globe*, February 23, 2012, <http://www.bostonglobe.com/metro/2012/02/22/boston-college-will-fight-court-order-releasing-some-project-belfast-records-british-police/j7CMIhr8GSAafRAMH9FU4I/story.html?camp=pm>.
- <sup>29</sup> Thomas E. Hachey and Dr. Robert K. O'Neill, "College Has Fought to Deny Access to Interview Materials," *Irish Times*, January 19, 2012, <http://www.irishtimes.com/newspaper/opinion/2012/0119/1224310447302.html>.
- <sup>30</sup> Hachey and O'Neill, "College Has Fought to Deny Access."
- <sup>31</sup> Hachey and O'Neill, "College Has Fought to Deny Access."
- <sup>32</sup> Howard, "Boston College Must Release Oral-History Records."
- <sup>33</sup> An intervenor, as provided by Rule 24 of the Federal Rules of Civil Procedure, is someone who either is "given an unconditional right to intervene by a federal statute" or "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Rule 24, Federal Rules of Civil Procedure, Cornell University Law School, "Legal Information Institute," [http://www.law.cornell.edu/rules/frcp/rule\\_24](http://www.law.cornell.edu/rules/frcp/rule_24). The researchers classified themselves as the second because they were the ones who were properly representing the people who had given the IRA interviews with the Belfast Project.
- <sup>34</sup> Judicial review allows a court to examine executive and legislative actions and potentially invalidate them. It is an example of the checks and balances that are provided in the separation of powers of the United States government.
- <sup>35</sup> This does not have anything to do with death. A stay of execution prevents an order from being carried out.
- <sup>36</sup> Essentially, the researchers are asking for the same things they were when they attempted to be added as intervenors, but they are using a different legal route.
- <sup>37</sup> In the United States legal system, standing is what allows one to have his or her day in court. If you do not have standing, the court will not decide your case on the merits. Typically, to achieve standing, you must be connected to the issue. To prove standing, you must show injury, causation, and redressability. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). More simply put, you have to show how you were harmed by the issue, that the issue is what caused that harm, and that the issue can be remedied to stop causing the harm. Those who are third parties to the issue do not typically have standing and cannot take legal action. Because Boston College holds the Belfast Project—through donor agreements or contracts—it has standing. Because of the court's

determination on their standing, Moloney and McIntyre are severely limited in any legal actions they can take concerning the Belfast Project.

<sup>38</sup> Courts in the United States have a hierarchy of authority. In the federal system, where the Belfast Project case is being heard, district courts are the lowest level. A state can comprise one district, as does Massachusetts, or more than one—New York has four. Above the district courts are the circuit courts. Circuit courts hear appeals, which are typically brought forth to overturn a lower court's decision. There are rules concerning what can be appealed and how it must be done, but those are beyond the scope of this article. In the United States, there are eleven circuit courts. The top rung of judicial hierarchy is the Supreme Court of the United States, the final stop in the appeals process. Once it decides a case, there is no further means of appeal. Sometimes a case, such as a conflict between two states, originates at the Supreme Court; cases at the appeals court level are more common.

<sup>39</sup> Derek J. Anderson, "Boston College Can't Keep IRA Materials Confidential," *Boston Globe*, July 7, 2012, <http://www.bostonglobe.com/metro/2012/07/06/appeals-court-upholds-subpoenas-ruling-belfast-oral-history-project-case-LaGEiFxeQgp2OPC5KjKDP/story.html>.

<sup>40</sup> When a case is heard *en banc*, it means that it is heard by the entire bench of a court, rather than by a selected panel of judges.

<sup>41</sup> David Cote, "Belfast Project Case May Go to Supreme Court," *Heights*, September 5, 2012, <http://www.bcheights.com/belfast-project-case-may-go-to-supreme-court-1.2893043>.

<sup>42</sup> "Boston College: IRA Interviews Should Stay Sealed," 90.9 WBUR, September 7, 2012, <http://www.wbur.org/2012/09/07/boston-college-ira-appeal-2>.

<sup>43</sup> Conor Lally, "Stay Granted on North Interviews," *Irish Times*, October 2, 2012, <http://www.irishtimes.com/newspaper/ireland/2012/10/02/1224324729718.html>.

<sup>44</sup> *Certiorari* is a judicial review of a lower court's decision.

<sup>45</sup> David Cote, "Belfast Project Researchers Appeal to Supreme Court," *Heights*, November 19, 2012, <http://www.bcheights.com/belfast-project-researchers-appeal-to-supreme-court-1.2956636>.

<sup>46</sup> Paul Vitello, "Delours Price, Defiant I.R.A. Bomber, Dies at 61," *New York Times*, January 25, 2013, [http://www.nytimes.com/2013/01/26/world/europe/dolours-price-defiant-ira-bomber-dies-at-61.html?\\_r=0](http://www.nytimes.com/2013/01/26/world/europe/dolours-price-defiant-ira-bomber-dies-at-61.html?_r=0).

<sup>47</sup> Travis Andersen, "Officials Still Seek BC Tapes on IRA," *Boston Globe*, February 12, 2013, <http://bostonglobe.com/metro/2013/02/12/authorities-still-seeking-tapes-from-project-ira-after-death-dolours-price/NLJlgYkE8NjdEKyePQ0jRL/story.html>.

<sup>48</sup> Belfast Project Director Ed Moloney, interview transcript, Radio Free Eireann, WBAI.org, January 7, 2012.

<sup>49</sup> Moloney, Radio Free Eireann interview.

<sup>50</sup> Moloney, Radio Free Eireann interview.

<sup>51</sup> Moloney, Radio Free Eirann interview.

<sup>52</sup> Cote, "Researchers Weigh In."

<sup>53</sup> Moloney, *Voices from the Grave*, 7.

<sup>54</sup> Moloney, *Voices from the Grave*, 6.

<sup>55</sup> Moloney, *Voices from the Grave*, 1.

<sup>56</sup> Public requests for information under the Freedom of Information Act are beyond the scope of this article. For further information, please refer to "Learn," FOIA.gov, Department of Justice, <http://www.foia.gov/about.html>.

<sup>57</sup> John A. Neuenschwander, *A Guide to Oral History and the Law* (New York: Oxford University Press, 2009), 10.

<sup>58</sup> Menzi Behrndt-Klodt, *Navigating Legal Issues in Archives* (Chicago: Society of American Archivists, 2008), 23.

<sup>59</sup> Simply put, hearsay is an unsworn, out-of-court statement that is not admissible as evidence at trial. Hearsay will be discussed at length in the next section.

<sup>60</sup> Neuenschwander, *A Guide*, 20.

- <sup>61</sup> A motion to quash typically is a request to void a lower court's judgment. It indicates that a mistake has been made and should be corrected.
- <sup>62</sup> A motion to modify is a request to change the parameters of the subpoena.
- <sup>63</sup> Behrndt-Klodt, *Navigating Legal Issues*, 21.
- <sup>64</sup> See Behrndt-Klodt, *Navigating Legal Issues*, 21.
- <sup>65</sup> Federal Rules of Evidence, § 402, effective 2011, Cornell University Law School, "Legal Information Institute," [http://www.law.cornell.edu/rules/fre/rule\\_402](http://www.law.cornell.edu/rules/fre/rule_402).
- <sup>66</sup> A federal law is enacted by the United States Congress and applies to all fifty states. The alternative is a state law, which is enacted by an individual state's legislature and applies to that state alone.
- <sup>67</sup> Federal Rules of Evidence § 402.
- <sup>68</sup> See generally the Federal Rules of Evidence, effective 2011, Cornell University Law School, "Legal Information Institute," <http://www.law.cornell.edu/rules/fre>. Essentially, hearsay is an unsworn statement, made outside of the current court proceeding, used "to prove the truth of the matter in the statement." Federal Rules of Evidence § 801, effective 2011, Cornell University Law School, "Legal Information Institute," [http://www.law.cornell.edu/rules/fre/rule\\_801](http://www.law.cornell.edu/rules/fre/rule_801). Hearsay is inadmissible in court because the truth of the statement cannot be proven. The person who spoke it—referred to as the declarant in legal terms—was not sworn to tell the truth and is not available to cross examine so that the opposing counsel can "assess his sincerity, precisions, perception, and memory of the event." Graham C. Lilly et al., *Principles of Evidence*, 5<sup>th</sup> ed. (St. Paul, Minn.: West 2009), 137. The simplest way to think of hearsay is to consider a story you heard third or fifth hand. Would you necessarily believe without reservation something you learn from a story that begins with, "I heard from a friend's cousin's fiancée's mother's colleague . . . .?"
- <sup>69</sup> Lilly et al., *Principles*, 315.
- <sup>70</sup> Common law is judge-made law, meaning that it comes from opinions issued by courts rather than being enacted in statutes and codified by the legislature.
- <sup>71</sup> Federal Rules of Evidence § 501, effective 2011, Cornell University Law School, "Legal Information Institute," [http://www.law.cornell.edu/rules/fre/rule\\_501](http://www.law.cornell.edu/rules/fre/rule_501).
- <sup>72</sup> There are two separate spousal privileges. The first is referred to as the "Spousal Privilege for Confidential Communications" and the second as the "Spousal Testimonial or Incapacity Privilege." The Confidential Communications Privilege provides that communications shared between spouses during the period of their marriage are protected. The reason for this is "that it encourages marital partners to share their innermost thoughts and secrets, thus adding to the intimacy and mutual support that strengthens marriage." Lilly et al., *Principles*, 340. This particular privilege also feeds into the rationale that "certain aspects of one's private life should be free from public disclosure." Lilly et al., *Principles*, 340. The Testimonial Privilege protects one spouse from giving unfavorable testimony against the other. The privilege "is concerned with the *negative effect* on the marriage of . . . adverse testimony during the marriage. . . ." Lilly et al., *Principles*, 342.
- <sup>73</sup> It should be noted that the privileges discussed here are separate from any professional ethical obligations doctors or lawyers would have to protect the confidential information of their clients or patients. See Lilly et al., *Principles*, 317 for further information.
- <sup>74</sup> Lilly et al., *Principles*, 354.
- <sup>75</sup> There are exceptions to this, when privilege can be asserted for someone else, but it is a narrow exception. For further information please refer to Lilly et al., *Principles*, 316–17.
- <sup>76</sup> Contempt of court is a punishment for those who do not comply with the court's requests. Penalties can take the form of fines and/or jail time.
- <sup>77</sup> Jason M. Shepard, *Privileging the Press: Confidential Sources, Journalism Ethics and the First Amendment* (El Paso, Tex.: LFB Scholarly Publishing LLC, 2011), 4.
- <sup>78</sup> Shepard, *Privileging the Press*, 4.
- <sup>79</sup> Shepard, *Privileging the Press*, 4.
- <sup>80</sup> Shepard, *Privileging the Press*, 9.
- <sup>81</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

- <sup>82</sup> In *Branzburg*, three cases were consolidated. If several cases all concern one particular issue, a court can decide to consolidate them to address the issue once and have the opinion apply to all of the cases.
- <sup>83</sup> *Branzburg*, 667–68.
- <sup>84</sup> *Branzburg*, 665.
- <sup>85</sup> *Branzburg*, 681–82.
- <sup>86</sup> In reaction to such rulings, individual states have enacted what are referred to as “shield laws.” These laws provide protection to journalists who do not want to reveal their sources. The laws vary from state to state concerning the amount of protection and privilege they provide. See Jason D. Burke, “Shielding the Public Interest: What Canada Can Learn from the United States in the Wake of *National Post* and *Globe and Mail*,” *Boston College International and Comparative Law Review* 35, no. 1 (2012): 197.
- <sup>87</sup> The term “dissent” refers to a dissenting opinion. When the court consists of multiple judges, such as the Supreme Court with its nine justices, members of the court are allowed to write their own opinions. Typically, the majority will submit one opinion, known as the majority opinion. One justice writes it and the others sign on to it. A concurring opinion, written by a justice who voted with the majority but for a different reason may also be submitted. Justices who did not vote with the majority can write a dissenting opinion, stating the reasoning for voting the way they did and possibly attacking the majority opinion. Concurring and dissenting opinions can be just as important as majority opinions because, although they are not law themselves, they are used as justification for breaking judicial precedent or overturning a case.
- <sup>88</sup> *Branzburg*, 731.
- <sup>89</sup> *In re Grand Jury Subpoena* DTD January 4, 1984, 750 F.2d 223 (1984), 224.
- <sup>90</sup> *In re Grand Jury Subpoena*, 224.
- <sup>91</sup> *In re Grand Jury Subpoena*, 224.
- <sup>92</sup> *In re Grand Jury Subpoena*, 224.
- <sup>93</sup> *In re Grand Jury Subpoena*, 224.
- <sup>94</sup> *In re Grand Jury Subpoena*, 224.
- <sup>95</sup> *In re Grand Jury Subpoena*, 224.
- <sup>96</sup> *Dicta* are statements contained within a judicial opinion that are not a part of the binding decision. They can be used as authority when making an argument for a later case.
- <sup>97</sup> *In re Grand Jury Subpoena*, 225.
- <sup>98</sup> *In re Grand Jury Proceedings*, *Scarce v. United States*, 5 F.3d 397 (1993), 398.
- <sup>99</sup> *In re Grand Jury Proceedings*, 398.
- <sup>100</sup> *In re Grand Jury Proceedings*, 399.
- <sup>101</sup> *In re Grand Jury Proceedings*, 399.
- <sup>102</sup> *In re Grand Jury Proceedings*, 399.
- <sup>103</sup> *In re Grand Jury Proceedings*, 399.
- <sup>104</sup> *In re Grand Jury Proceedings*, 399.
- <sup>105</sup> *In re Grand Jury Proceedings*, 400.
- <sup>106</sup> *Wilkinson v. Federal Bureau of Investigation*, 111 F.R.D. 432 (1986), 434.
- <sup>107</sup> *Wilkinson*, 434.
- <sup>108</sup> *Wilkinson*, 434.
- <sup>109</sup> *Wilkinson*, 434–35.
- <sup>110</sup> *Wilkinson*, 435.
- <sup>111</sup> *Wilkinson*, 433–34.
- <sup>112</sup> Discovery is the fact-finding period before a formal trial. Each side learns as much as it can about the other and the issues in contention.
- <sup>113</sup> NCARL had a collection at the historical society that was unrestricted. See Harold L. Miller, “Will Access Restrictions Hold Up in Court?: The FBI’s Attempt to Use the Braden Papers at the State Historical Society of Wisconsin,” *The American Archivist* 52, no. 2 (1989): 182.

<sup>114</sup>Wilkinson, 435.

<sup>115</sup>Wilkinson, 434.

<sup>116</sup>Wilkinson, 435.

<sup>117</sup>The First Amendment of the U. S. Constitution contains a variety of “freedom ofs.” Earlier in this article, I discussed freedom of speech and freedom of the press. There is also the guaranteed freedom of association, by which the government cannot restrict individuals from gathering and expressing their common interests.

<sup>118</sup>Scrutiny refers to the standard that courts use when weighing an individual’s or group’s rights against the interests of the government. Three standards are used: *strict scrutiny*, invoked with fundamental rights and requires that the government have a compelling interest in limiting those rights with a narrowly tailored policy or law that is the least restrictive means of achieving its interest; *intermediate scrutiny*, meant to protect quasisuspect classes, such as issues involving gender, that fall between strict scrutiny and rational basis review and requires that the government has an important interest and that the means of achieving that interest are substantially related to the means utilized; and *rational basis review*, the lowest standard in which the government must only provide that the policy or law is rationally related to a legitimate government interest.

<sup>119</sup>Wilkinson, 435.

<sup>120</sup>Wilkinson, 435.

<sup>121</sup>Wilkinson, 435.

<sup>122</sup>Wilkinson, 435. *Amici* briefs are filed by people or organizations who are not involved in the suit, but who have an interest in the outcome. Filed with the court and attached to the case, these briefs can support either side or, in certain instances, neither side. The name *amici* comes from the Latin term *amicus curiae*, which translates to “friend of the court.”

<sup>123</sup>Wilkinson, 438–41.

<sup>124</sup>Wilkinson, 442–43.

<sup>125</sup>Miller, “Will Access Restrictions Hold,” 180.

<sup>126</sup>Miller, “Will Access Restrictions Hold,” 184.

<sup>127</sup>Miller, “Will Access Restrictions Hold,” 189.

<sup>128</sup>Miller, “Will Access Restrictions Hold,” 189.

<sup>129</sup>Miller, “Will Access Restrictions Hold,” 189.

<sup>130</sup>Miller, “Will Access Restrictions Hold,” 189.

<sup>131</sup>Miller, “Will Access Restrictions Hold,” 189.

<sup>132</sup>The relevant portion of the opinion reads, “Neither Braden nor the amici could cite any case applying an archival privilege, and the Court has found none—indeed, this question appears to be one of first impression. . . . However . . . none of the authorities cited mandates the creation of an archival privilege and most are distinguishable from the case at hand. Therefore, in view of the absence of persuasive authority on this point, the Court holds that the facts of this case are simply not sufficiently compelling to justify the creation of a wholly new archival privilege.” *Wilkinson*, 437–38.

## ABOUT THE AUTHOR



**Christine George** received her BA from Bard College, her JD from St. John’s University School of Law, and her MSIS from the University of Texas at Austin School of Information. She has processed collections at the New-York Historical Society and worked with special collections as a Tarlton Fellow at the University of Texas School of Law’s Tarlton Law Library. George currently works at the Charles B. Sears Law Library at SUNY Buffalo Law School where she serves as a faculty services and reference librarian and oversees the law library’s archives.