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# THE YALE LAW JOURNAL POCKET PART

COLIN MILLER

## A Public Privilege

If a rule is only as good as its exceptions, and a reporter is only as good as her sources, then according to a recent Pennsylvania Supreme Court opinion,<sup>1</sup> Pennsylvania's reporter's privilege is the best of privileges and the worst of privileges. In that opinion, the court failed to carve a crime-fraud exception<sup>2</sup> out of Pennsylvania's reporter's privilege – or its “Shield Law” – despite having previously read a similar exception into *every other* evidentiary privilege.<sup>3</sup> Ironically, this alleged act of judicial “passivism” transformed the Shield Law into both a shield and a sword and mischaracterized the purposes served by all evidentiary privileges.

According to the court, the Shield Law is exceptional, and thus exceptionless, because it is directed toward protecting the free flow of information to society for the public good, while the attorney-client privilege is intended for the private benefit of the client. In its reasoning, however, the court misunderstood both the attorney-client and reporter's privileges. This essay argues that, as the U.S. Supreme Court recognized in *Jaffee v. Redmond*,<sup>4</sup> all evidentiary privileges must serve two masters, private interests and public ends, and, contrary to the Pennsylvania Supreme Court's logic, crime-fraud exceptions do not undercut but bolster those public ends.

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1. *Nadler v. Warner Co.*, 184 A. 3 (Pa. 1936).
  2. Under Pennsylvania's crime-fraud exception to its attorney-client privilege, “When the advice of counsel is sought in aid of the commission of crime or fraud, the communications are not ‘confidential’ within the meaning of the statute, and may be elicited from the client or the attorney on the witness stand.” *Id.*
  3. *Castellani v. Scranton Times, L.P.*, 956 A.2d 937, 945 (Pa. 2008).
  4. 518 U.S. 1, 11 (1996).

**LACKAWANNA COUNTY BLUES: THE CASTELLANI OPINION**

In *Castellani v. Scranton Times, L.P.*, a Pennsylvania court empanelled a grand jury to investigate allegations of wrongdoing at the Lackawanna County Prison.<sup>5</sup> Citing “an unnamed source close to the investigation,” Jennifer Henn authored front-page stories for the *Scranton Tribune* and *The Scranton Times*, which proclaimed that former Lackawanna County Majority Democratic Commissioners Randall Castellani and Joseph Corcoran were “stonewalling” the grand jury.<sup>6</sup> This was news to the public and Supervising Judge Isaac S. Garb, who found that the stories were completely at variance with grand jury transcripts and that “[o]bviously, the source of the reporter’s information was someone not privy to the Grand Jury proceedings.”<sup>7</sup>

Castellani and Corcoran subsequently sued *The Tribune*, *The Scranton Times*, and Henn, claiming that the stories were defamatory and that their “source” engaged in “tortious, criminal, or contemptuous conduct.”<sup>8</sup> The papers and Henn thereafter refused Castellani’s and Corcoran’s request for them to disclose the unnamed source and invoked Pennsylvania’s Shield Law, which states that “[n]o person . . . employed by any newspaper of general circulation . . . shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.”<sup>9</sup>

Trial Judge Robert Mazzoni disagreed, finding that when the Shield Law “clashes with the need to enforce and protect the foundation of the grand jury purpose” – securing the safety and reputation of witnesses and grand jurors – “the Shield Law should relinquish its priority.”<sup>10</sup> A Superior Court panel reversed, concluding that Pennsylvania’s reporter’s privilege was absolute.<sup>11</sup>

On appeal to the Supreme Court of Pennsylvania, the appellants claimed, inter alia, that the court should carve out a crime-fraud exception to the Shield Law similar to the one it read into Pennsylvania’s attorney-client privilege in

5. 956 A.2d at 939-40.

6. *Id.* at 940 (citing Jennifer L. Henn, *Dems Stonewall*, SCRANTON TIMES, Jan. 12, 2004, at 1; Jennifer L. Henn, *Dems Stonewall Grand Jury*, TRIB. (Scranton), Jan. 12, 2004, at A1, available at [http://www.thetimes-tribune.com/articles/2004/01/12/top\\_local\\_stories/10790624.txt](http://www.thetimes-tribune.com/articles/2004/01/12/top_local_stories/10790624.txt)).

7. *Id.* at 940.

8. *Castellani v. Scranton Times, L.P.*, 956 A.2d 937, 941 (Pa. 2008).

9. 42 PA. CONS. STAT. § 5942(a). For more information, see also PA. NEWSPAPER ASS’N, CONFIDENTIALITY SHIELD LAW NEWSPAPER HANDBOOK, [http://www.pa-newspaper.org/web/2005/10/confidentiality\\_shield\\_law\\_newspaper\\_handbook.aspx](http://www.pa-newspaper.org/web/2005/10/confidentiality_shield_law_newspaper_handbook.aspx).

10. 956 A.2d at 942 (citation omitted).

11. *Id.* at 942-43 (citing *Castellani v. Scranton Times, L.P.*, 916 A.2d 648, 652-53, 655 (Pa. Super. Ct. 2007)).

*Nadler v. Warner Co.*<sup>12</sup> Moreover, they averred that Pennsylvania’s highest court had “at one time held every type of privilege—accountant-client, husband-wife, priest-penitent, psychologist-patient—inapplicable where it would further a crime or fraud.”<sup>13</sup>

The court, however, refused to find such an exception, concluding that “the Shield Law is not comparable to the attorney-client privilege, or, for that matter, to any other privilege with respect to the issue presented here.”<sup>14</sup> According to the court, while “[t]he Shield Law was enacted to protect the free flow of information to the news media in their role as information providers to the general public,” “[t]he attorney-client privilege . . . renders an attorney incompetent to testify as to communications made to him by his client in order to promote a free flow of information only between attorney and his or her client so that the attorney can better represent the client.”<sup>15</sup>

The court further found that *Nadler* did not speak to the issue before it because “the attorney-client privilege is for the benefit of the client, as privilege holder, [whereas] the protections recognized in the Shield Law are intended to allow the news media to serve the public.”<sup>16</sup> The court punctuated this point by concluding that “while the news media may be the ‘holder’ of the [Shield Law’s] protection, the general public is deemed to be the overall beneficiary of the Shield Law’s protections.”<sup>17</sup>

#### **NO PRIVILEGE IS AN ISLAND: THE PUBLIC NATURE OF ALL PRIVILEGES**

Contrary to the Pennsylvania court’s conclusion, no privilege is an island, entire of itself, and, as the Supreme Court announced in *Jaffee v. Redmond*, all privileges must further both private interests and public ends.<sup>18</sup> The attorney-client privilege is no exception. As the Supreme Court articulated in *Upjohn Co. v. United States*, the purpose of the privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote

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12. *Id.* at 944-45 (construing *Nadler v. Warner Co.*, 184 A. 3, 5 (1936)). In *Nadler*, the court concluded that “[w]hen the advice of counsel is sought in aid of the commission of crime or fraud, the communications are not ‘confidential’ within the meaning of the statute, and may be elicited from the client or the attorney on the witness stand.” *Nadler*, 184 A. at 5.

13. *Castellani v. Scranton Times, L.P.*, 956 A.2d 937, 945 (Pa. 2008).

14. *Id.* at 951.

15. *Id.*

16. *Id.*

17. *Id.*

18. 518 U.S. 1, 11 (1996).

broader public interests in the observance of law and administration of justice.”<sup>19</sup> Indeed, the core premise of the privilege is “that sound legal advice or advocacy serves public ends.”<sup>20</sup> And, as the Supreme Court of Pennsylvania has itself forcefully concluded on more than one occasion, “[t]he intended beneficiary [of the privilege] is not the individual client so much as the systematic administration of justice which depends on frank and open client-attorney communication.”<sup>21</sup> According to that court, then, the attorney-client privilege is primarily a public privilege, just like the Shield Law, and not the privately focused privilege the court described.

**THE SHIELD AND (THE PEN IS MIGHTIER THAN) THE SWORD: HOW  
CRIME-FRAUD EXCEPTIONS BOLSTER PUBLIC ENDS**

While the contrary conclusion in *Castellani* was troubling, perhaps the part of the opinion even less fit to print was the assertion that the crime-fraud exception is symbiotic with the allegedly privately focused attorney-client privilege and yet parasitic to the publicly focused Shield Law. When explaining the purpose of the crime-fraud exception to the attorney-client privilege, courts often find that the “privileged communication may be a shield of defense as to crimes already committed, [but] it cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society.”<sup>22</sup> If the sole beneficiary of the privilege were the client, this distinction would be indefensible and there would be no reason to sheath the sword because the client would desire nondisclosure in either situation. It is only because of the public nature of the privilege that the law cares about prospective harm to third parties. Thus, “the basis for the crime-fraud exception is not any diminished expectation of confidentiality, but rather the overarching public policy principle that a court will not enforce privilege where to do so would facilitate a crime.”<sup>23</sup> In other words, “[t]he exception demonstrates the policy;” it does not undermine it.<sup>24</sup>

Despite the Supreme Court of Pennsylvania’s protestations to the contrary, the analysis is “precisely analogous” under the Shield Law<sup>25</sup> for reporters. The ostensibly lying source in *Castellani* at best facilitated false reporting of news

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19. 449 U.S. 383, 389 (1981).

20. *Id.*

21. *In re Search Warrant B-21778*, 521 A.2d 422, 428 (Pa. 1987).

22. *State v. Smith*, 979 S.W.2d 215, 220 (Mo. Ct. App. 1998) (citation omitted).

23. *Madanes v. Madanes*, 199 F.R.D. 135, 148 (S.D.N.Y. 2001).

24. *In re Burlington Northern, Inc.*, 822 F.2d 518, 524 (5th Cir. 1987).

25. *In re Grand Jury Subpoena, Miller*, 405 F.3d 17, 19 (D.C. Cir. 2005).

and at worst *created* news that could have tainted later grand jury testimony as well as tarnished the reputations and implicated the legal rights of two men.<sup>26</sup> These outcomes are antithetical to the purposes behind reporters' privileges in that they foster a journalistic house of cards rather than a fortified Fourth Estate. Assuming that the source's behavior was fraudulent or criminal, it did not merit protection under Pennsylvania's Shield Law just as similar behavior would not merit protection under any other evidentiary privilege.<sup>27</sup>

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26. *Id.*

27. Eileen A. Scallen, *Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege*, 38 LOY. L.A. L. REV. 537, 541 (2004).