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JOURNALIST'S PRIVILEGE AND THE CRIMINAL DEFENDANT

*THE HONORABLE DAVID N. EDELSTEIN**
*WITH ROBERT P LoBUE***

INTRODUCTION

The United States Supreme Court has addressed the conflict between freedom of expression and the proper administration of justice repeatedly and, in so doing, has passed upon a broad sweep of first amendment claims. It has affirmed the effectiveness of the ban on prior restraint even as measured against a criminal defendant's rights.[1] It has curtailed the courts' power to penalize speech after the fact even when such speech may impede goals of the judicial process.[2] It will soon decide whether the preliminary hearing procedure may be closed to the public—and the press—in furtherance of a criminal defendant's right to trial before an impartial jury.[3] Yet, in *Branzburg v. Hayes*,[4] the Court refused to relieve journalists of their obligation to give testimony relevant to a criminal investigation pursuant to a grand jury subpoena, despite an agreement to maintain the confidentiality of their sources. This last holding has engendered impassioned criticism from the press, whose members have vigorously argued for a journalist's

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1. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

2. Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

3. *See* Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *cert. granted*, 435 U.S. 1006 (1978) (No. 77-1301).

4. 408 U.S. 665 (1972). *Branzburg* and its companion cases involved subpoenas requiring reporters to testify before grand juries. In two cases, journalists who had gained the confidence of the Black Panthers refused to appear at all. In the third, the journalist appeared but refused to answer questions respecting criminal acts he had observed and reported. The Court held that the first amendment does not relieve newsmen of the general obligation of citizens to appear and answer grand jury questions relevant to a criminal investigation. Since *Branzburg*, a number of lower courts have considered the question of a journalist's privilege to withhold information from the criminal defendant. The flurry of recent judicial activity in this area demonstrates the continuing troublesomeness of the issue. *See, e.g.*, United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976); United States v. Liddy, 354 F. Supp. 208 (D.D.C. 1972); Hammarley v. Superior Court, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976); State v. Sandstrom, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied*, 99 S. Ct. 1265 (1979); *In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 99 S. Ct. 598 (1978); People v. Marahan, 81 Misc. 2d 637, 368 N.Y.S.2d 685 (Sup. Ct. 1975); *cf.* Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972) (holding in *Branzburg* does not require journalist to disclose material from confidential source in civil discovery proceeding).

privilege to withhold names of sensitive sources and information received in confidence. The absence of a champion for the rights of the accused[5] is disquieting, especially when the party seeking disclosure is not the state, but the defendant.[6] This Article is not intended to fill such a role or to decide the journalist's privilege question once and for all. Rather, its purpose is to explore the question in light of the vital constitutional and jurisprudential issues it raises, and to suggest ways and means of bringing about an accommodation and equilibrium between opposing rights.

I. THE CONSTITUTIONAL QUESTION

The cases adjudicating conflicting first amendment rights and needs of the judicial process have developed a familiar spectrum of free expression theories. At the pole reserved for most persuasive first amendment claims we find, expectedly, the inhibition on prior restraint as manifested in *Nebraska Press Association v. Stuart,*[7] the gag order case. One need not be an apologist for the press to know that old news is not printed late—it is simply not printed.[8] Irreparable harm is done if a restraint is later found to be constitutionally unsupportable. Expeditious decisionmaking is essential in such cases, but the indecorous rush for a judicial determination of the validity of the restraint repels the judicial temper.[9] This is only to suggest that the free speech principle most securely and anciently bound to the history of the first amendment[10] derives continued sustenance from modern circumstance. As we move away from this familiar end of the spectrum, however, the answers become more doubtful.

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5. Senator Ervin's narrative of the abortive effort to enact a federal journalist's privilege statute in 1972 and 1973 reports that the Subcommittee on Constitutional Rights of the Senate Judiciary Committee found it all but impossible to secure witnesses opposed to a journalist's privilege. Ervin, *In Pursuit of a Press Privilege,* 11 Harv. J. Legis. 233, 266 (1974). Although an abundance of journal articles have advocated some form of press privilege, the counterbalancing sixth amendment right to compulsory process has been underdeveloped in commentary as well as in the courts, as one constitutional scholar has recently noted. Schmidt, *In the Matter of Free Press vs. Fair Trail,* N.Y. Times, July 30, 1978, § 4, at 11, col. 3.

6. *E.g., In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied,* 99 S. Ct. 598 (1978).

7. 427 U.S. 539 (1976).

8. *See* Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 1329 (1975) (Blackmun, Circuit Judge, granting, in part, application for stay of a gag order). "Where . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable." *Id.*

9. *See* New York Times Co. v. United States, 403 U.S. 713, 752-56 (1971) (Harlan, J., dissenting).

10. In the eighteenth century, the predominant view was that freedom of speech and of the press prohibited prior restraint of but not subsequent punishment for speech. *See* 4 W. Blackstone, Commentaries *151-52; L. Levy, Legacy of Suppression 14-15 (1960).

What is the nature of the continuum that takes us from a principle against prior restraint to the question whether a journalist may withhold the name of his confidential source? Surely the variation is not simply along the line of the tangible burden on constitutional speech. Whether a potential source will be deterred in any given case and whether the news he would have generated would have had greater significance to society than the speech directly restrained by a gag order are imponderables. It is also amiss to say that the continuum varies according to the weight of the opposed interest. For example, the identical right to trial before an impartial jury is the countervailing interest invoked whether the constitutionality of a gag order or of closing the courtroom is at issue, yet we sense in the latter an imposition on news gathering further removed from the core purposes of the first amendment than the direct restraint on the press condemned in *Nebraska Press*. Rather, the "unit of measurement" along the first amendment spectrum that stretches from *Nebraska Press* to *Branzburg* seems to depend, at least in part, upon an infrequently stated but still important concern: the judiciary's perception of its own institutional competence to make certain kinds of constitutional judgments. The issue, at root, is one of legal process: it is a matter of deciding which governmental institution may most suitably render judgment on the question.

Judicial introspection, often on an implicit level, has played a part in many first amendment decisions. Consider, for example, the Supreme Court's response to the persistent claim that the first amendment affords an absolute right against suppression of constitutional speech—a claim that underlies the present journalist's privilege controversy. Despite the eloquent efforts of some of this century's most respected justices and commentators,[11] absolutism is not the rule of the first amendment. Reasonable persons may differ as to the propriety of balancing competing claims to expression and suppression in the pure speech cases. Yet, it seems clear that the Court has sensibly dealt with the mixed speech/action cases by validating reasonable time, place, and manner restrictions on the medium of expression,[12] by attempting to winnow speech from nonspeech elements of conduct, and by explicitly balancing the individual's interest in the former against the state's need to regulate the latter:

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment

11. *See generally* Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960); Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424 (1962); Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245; Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 Calif. L. Rev. 821 (1962).

12. *See generally* G. Gunther, Constitutional Law 1142-1234 (9th ed. 1975) (citing cases).

freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[13]

This statement of the rule—quoted from *United States v. O'Brien*,[14] the draft card burning case—is significant in that the rule evolved not from abstract conceptions of the quality of the first amendment but from acute perceptions of the limits of principled judicial review. The decision in large part constituted an expression of judicial hesitance to inquire into legislative motive. Perhaps more to the point, a premise for the rule quoted above was the statement: "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[15] It is patent that the Court, familiar with the definitional difficulties attendant upon symbolic speech cases, was looking to the future and passing judgment not only on the merits of the argument before it, but also on its own ability to decide cases in a principled and consistent manner.

The question of a journalist's privilege to withhold confidential information and identities, and indeed the constitutional protection to be accorded news gathering generally,[16] can be compared with the mixed speech/action cases. Surely protection of news gathering, similar to protection of expressive conduct[17] or the employment of certain media or fora to reach an audience,[18] is consistent with and supportive of first amendment goals, as the Supreme Court has recognized.[19] Recourse to the text of the first amendment, however, reminds us that it is abridgment of constitutional speech that is forbidden.[20] News

13. United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (footnotes omitted).

14. 391 U.S. 367 (1968).

15. *Id.* at 376.

16. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (press has no right of access superior to that of general public to information held by government); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (same); Pell v. Procunier, 417 U.S. 817 (1974) (same). As Professor Van Alstyne has pointedly written, the claim to special access privileges for the press can be a double-edged sword. Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 Hastings L.J. 761, 768-69 (1977).

17. *E.g.*, Street v. New York, 394 U.S. 576 (1969).

18. *E.g.*, Saia v. New York, 334 U.S. 558 (1948); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940).

19. *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (without some protection for news gathering, freedom of press would be "eviscerated").

20. As Justice Stewart has observed: "So far as the Constitution goes, the autonomous press may publish what it knows and may seek to learn what it can. But this autonomy cuts both ways.

gathering is supportive of speech and of the common good induced by robust political discourse, but it is not constitutional speech. Moreover, nondisclosure of confidences itself may be ancillary to and supportive of news gathering, but it is not news gathering.[21] Thus, the claimed journalist's privilege seeks to protect endeavors surely relevant to the first amendment but at least two logical degrees removed from the constitutional imperative against abridgment of speech.[22]

That the need for such an asserted privilege must be balanced against countervailing imperatives of society is also derivable from two somewhat analogous areas of constitutional concern. Notable Supreme Court decisions disallowing state attempts to coerce disclosure of associational ties have been cited as support for a newsman's constitutional privilege not to disclose confidential sources of information,[23] yet these pronouncements argue convincingly only for close scrutiny of the competing first amendment and governmental claims. In *NAACP v. Alabama*[24] the state sought discovery of the NAACP's membership roster incident to litigation attempting to oust the organization from the state for failure to comply with its corporation statute. In *Shelton v. Tucker*[25], the state required its untenured public school teachers, as a condition of continued employment, to provide a list of associations to which they had contributed or belonged. The penalties for noncompliance were severe: a contempt order of $100,000 against the NAACP; nonrenewal of employment in *Shelton*. In both cases, the Court recognized that, under the circumstances, confidentiality of associational memberships was all but necessary to sustain such organized activity itself, which in turn was strongly supportive of free

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The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed." Address by Justice Stewart, Yale Law School (Nov. 2, 1974), *quoted in* The Media and the Law 2 (H. Simons & J. Califano eds. 1976). Just as the Constitution neither requires the state to underwrite the cost of exercising first amendment rights, nor forbids it from reasonably regulating that exercise, it does not guarantee success by securing the confidentiality of news sources.

21. The fifth amendment guarantee against compelled self-incrimination demonstrates that the drafters of the Bill of Rights knew how to create a privilege in explicit terms when deemed desirable. It is therefore inferable that by the first amendment they did not mean to enact a reporter's privilege.

22. For example, the "chilling effect" argument that is often persuasive in the first amendment cases would apply, presumably, to the confidential source fearful of disclosure, and only indirectly to the journalist. Yet it is the latter whose first amendment claim is in issue, and this incongruity was not lost on the Court. *See* Branzburg v. Hayes, 408 U.S. 665 (1972) (privilege claimed was that of reporter, not informant). *But see* Note, *The Rights of Sources—The Critical Element in the Clash over Reporter's Privilege*, 88 Yale L.J. 1202 (1979) (source's interest is paramount); *cf.* Murasky, *The Journalist's Privilege:* Branzburg *and Its Aftermath*, 52 Tex. L. Rev. 829, 851-53 (1974) (both informants and reporters may be chilled by absence of privilege).

23. *E.g.*, Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18, 31 n.70, 34 (1969).

24. 357 U.S. 449 (1958).

speech. Here is a rough but obvious analogy to the question of a journalist's privilege, which is supportive of news gathering and thus, indirectly but undeniably, of the dissemination of information.

It is instructive that, although upholding the confidentiality claim in both cases, the Court traveled two very different routes. *NAACP* was the easier case. There, the Court perceived no "substantial bearing" on the subject matter of the litigation of the membership roster demand.[26] *Shelton* was more difficult because, as in the case of a subpoena against a journalist seeking possibly exculpatory evidence on behalf of a criminal defendant, the relevance and importance of the state's interest were undeniable:

> This controversy is thus not of a pattern with such cases as *N.A.A.C.P. v. Alabama* . . . . [There] the Court held that there was no substantially relevant correlation between the governmental interest asserted and the State's effort to compel disclosure of the membership lists involved. Here, by contrast, there can be no question of the relevance of a State's inquiry into the fitness and competence of its teachers.[27]

Confronted with competing individual and governmental interests, the Court did not declare either to be paramount; rather, it decided *Shelton* on the overbreadth principle. Such restraint, especially in the face of evidence of questionable purposes for the state action,[28] teaches a good deal about the institutional limitations of the judiciary. The Court would not second-guess legislative motive; given a facially valid state interest, unlike the *NAACP* case, the Court sought to decide the disclosure question in a way that avoided establishing a hierarchy of competing personal and governmental interests. So too, in the present question of a journalist's privilege, alternatives to the sometimes necessary but always difficult judicial task of weighing the opposing interests of the individual and the state should be sought.

This is also the teaching derived from the Court's experience with other asserted constitutional privileges. The Court has often avoided the formulation of rigid rules in this area. For instance, when the Government's claim for confidentiality of its informants was set up in opposition to the criminal defendant's rights, the Court said: "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."[29]

The patchwork that results from such a process of adjudication of constitutional privilege claims—and the variety of holdings in this area

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25. 364 U.S. 479 (1960).
26. 357 U.S. at 464.
27. 364 U.S. at 485 (footnote and citations omitted).
28. *Id.* at 485 n.5.
29. Roviaro v. United States, 353 U.S. 53, 62 (1957).

may indeed be difficult to reconcile[30]—demonstrates not a failure of meaningful judicial response to such claims but rather fidelity to the essentially ad hoc adjudicatory process. Yet this process, in which courts may be called upon explicitly to assess the relevance and persuasiveness of competing societal interests, raises pointed questions regarding the suitability of the courts, as the government's nonrepresentative branch, to decide such issues of social policy. Courts unavoidably render value judgments in cases of constitutional stature. These actions do not deprive their judgments of validity or authority, but they do suggest that the legal community cultivate a role for the legislatures as interpreters of the Constitution whose choices will be respected, within proper limits, by the courts.

The temper of judicial restraint traced above would be especially applicable to a question that required an assessment of the truth of a premise that, in the court's view, was beyond its institutional capability or expertise. The likelihood that subpoenas of journalists would deter sources or newspapers from speech is just such a premise. Indeed, judicial reluctance thus far to pronounce a full-fledged journalist's privilege seems as much a reaction to advocacy that has framed the deterrence question as one dependent on assumptions or empirical proof about behavior as it is a concession of the need to avoid absolute rulemaking in an area where opposed interests may all appear entitled to great weight.

Although the Court has long decided constitutional questions upon implicit or understated findings of legislative fact,[31] robust debate on the standard of empirical proof required to prove deterrence or the chilling of first amendment speech only arose, it seems, with the *Branzburg* opinion. Justice White, writing for the Court, noted that "[e]stimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative."[32] Justice Stewart's dissent responds: "[W]e have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist . . . ."[33] Professor Kurland concludes that the two sides had not really joined issue:

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30. *See, e.g.*, Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 626-27 & nn.164-65 (1978) (surveying varying holdings in which privileges were claimed in opposition to process issued pursuant to confrontation and compulsory process clauses).

31. There are excellent discussions of this point in Moynihan, *Social Science and the Courts*, 54 Pub. Interest 12 (1979), and Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75. *See also* 1 K. Davis, Administrative Law Treatise § 6:38 (2d ed. 1978); Chayes, *The Role of the Judge In Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

32. 408 U.S. at 693-94 (footnote omitted).

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

"Certainly [Justice Stewart] is right in this proposition. But no one even now called for 'scientific precision'. . . . All that was asked for [by the Court] was some evidence to support the proposition. Hyperbole doesn't answer the demand."[34]

The apparent absence of a meeting of minds on the *Branzburg* Court as to the level of empirical proof required to prove deterrence does much to explain the Court's negative decision on a journalist's privilege. Surveys and statistics are not always the primary source of judicial wisdom.[35] Consider, for example, two of the empirical surveys before the *Branzburg* Court. Professor Blasi collected data by interview and mail questionnaire from various persons involved in the collection and dissemination of news.[36] How should a court assess the first amendment implications of such responses as (1) threats by a source to cut off information if he is exposed are "made far more frequently than they are carried out";[37] (2) developing sources depends more on the reporter's personality than on his assurance of confidentiality;[38] (3) sources are "more willing" to lie when they believe confidentiality will not expose their fabrication to those who know differently?[39] Similarly, another empirical study cited in *Branzburg* concludes that the "present effect" of subpoenas on newsmen probably is not great.[40]

The point is not that there is insufficient empirical proof of deterrence or that such studies are unreliable. Is it not true, however, that the net result of such efforts is a set of findings just as impressionistic and speculative, or as obvious, as those derivable from common sense?[41] One of the survey takers whose results are noted above even admits that the impact of subpoenas on news sources is ultimately

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34. Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 Sup. Ct. Rev. 181, 244.

35. Senator Moynihan observes: "If it is quite clear that the courts employ social science with considerable deftness on some occasions, then it must be allowed that on other occasions the courts have got themselves into difficult situations by being too casual, even trusting, about the 'truths' presented to them by way of research on individual and group behavior." Moynihan, *supra* note 31, at 15. Perhaps, in *Branzburg*, the Court was recoiling from the second category of cases described by Senator Moynihan.

36. Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229 (1971).

37. *Id.* at 245.

38. *Id.* at 240.

39. *Id.* at 248-49.

40. Guest & Stanzler, *supra* note 23, at 56.

41. Professor McCormick and others, for example, have often doubted—without the benefit of empirical evidence—whether the behavioral assumptions underpinning the exclusionary rules generally are valid. C. McCormick, Handbook of the Law of Evidence §§ 90-91, at 185-91, § 108, at 231-32 (2d ed. 1972); *accord*, Morgan, *Foreword* to Model Code of Evidence 22-24 (1942); *see* Schneckloth v. Bustamonte, 412 U.S. 218, 250-75 (1973) (Powell, J., concurring). Similarly, Senator Ervin reached conclusions on the questionable impact of press privilege similar to those of the empirical survey takers, without the benefit of their statistics. Ervin, *supra* note 5, at 276.

unquantifiable.[42] And even if more quantified results were achieved, the next question—whether the given chilling effect outweighed the evidentiary loss sustained because of the privilege—would pose a subject for analysis too subtle for even the most accomplished social scientist.

II. THE LEGISLATIVE ALTERNATIVE

The reluctance of courts to fashion a constitutional journalist's privilege surely is not mere antipathy to the needs of reporters or insensitivity to the requirements of the first amendment.[43] Rather, *Branzburg* and its progeny are expressions of judicial respect for the coordinate legislative branch of federal government, and for the states, as interpreters and implementers of the federal Constitution. That the issue is often argued as if empirical proof—"legislative fact"—were decisive is consistent with this implicit declaration of judicial deference.

Schooled in the ways of *Marbury v. Madison*,[44] we are accustomed to believe that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[45] The Third Branch, however, is not the sole agent of constitutional interpretation. Judicial review is not absolute; it is counterbalanced by the various doctrines of nonjusticiability that render certain constitutional and other legal questions, often of the gravest import to our country, beyond the power of the courts to answer.[46] The reasons why the judiciary will not decide political questions,[47] cases so unripe as to be hypothetical,[48] or issues legislatively entrusted to the special expertise of an administrative agency[49] have often been recited and need not detain us here. We need only remember that, when the court does not decide a question of constitutionality, it does not mean that the question remains undecided. Rather, the effect of such refusal is to render dispositive the constitutional judgment previously made by the legislature or executive. Yet, there are more and less subtle forms of nonjusticiability. For example, a court may refuse to decide a case altogether, either by constitutional compulsion or for prudential rea-

42. Blasi, *supra* note 36, at 265-67.

43. Contrast this with the view of Anthony Lewis that courts have developed an "animus toward the press." Lewis, *Sentence First—Trial Later*, N.Y.L.J., Sept. 26, 1978, at 3, col. 4.

44. 5 U.S. (1 Cranch) 137 (1803).

45. *Id.* at 177.

46. *See generally* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 64-241 (2d ed. 1973).

47. *See, e.g.*, Massachusetts v. Laird, 400 U.S. 886, 891-900 (1970) (Douglas, J., dissenting); Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

48. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 371-73 (1976).

49. *See* Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 349-50 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

sons,[50] or in reaching a decision it may simply withdraw a single issue as unfit for judicial determination.[51] Finally, judicial reluctance to render value judgments better left to the legislature may be an unexpressed but persuasive factor. As Professor Bickel, our most eloquent expositor of this point, has noted, "[t]he case does not exist in which the power of judicial review has been exercised without some such misgivings being applicable in some degree."[52]

The cases on the journalist's privilege belong to the category of cases in which this more subtle form of judicial deference to the interpretive powers of the legislative departments, both federal and state, suggests the better result without requiring an outright declaration of judicial incompetence. It is true that in *Branzburg* and similar cases traditional grounds for nonjusticiability are absent,[53] and indeed the question involves traditional domains of judicial expertise: evidentiary privilege; the powers of the grand jury; the rights of the criminally accused. Yet, as noted above, it has been urged that these cases turn on questions of empirical proof of deterrence of first amendment rights or, alternatively, require the court to accept the premise that certain chilling effects will result. Moreover, when the privilege is asserted in opposition to a criminal defendant's subpoena, the conflict between the first and sixth amendments becomes an all but intractable dilemma. Perhaps that is why the *Branzburg* Court concluded by reminding us that, although the Court would not fashion a newsman's privilege from constitutional cloth, Congress and state legislatures were free to enact rules of privilege "and, equally important, to refashion those rules as experience from time to time may dictate."[54]

A legislative response to the journalist's privilege question resolves complexities on several levels. A statutory, as opposed to a constitutional, privilege is consistent with the concept that decisions regarding the scope of such an evidentiary rule are more properly a question of social policy than of fundamental principle.[55] The principles are

50. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975).

51. *See* A. Bickel, The Least Dangerous Branch 183-98 (1962); Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1303 (1961).

52. A. Bickel, *supra* note 51, at 184. The "misgivings" alluded to in the text are included in Professor Bickel's classic description of the political question: "[T]he Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ('in a mature democracy'), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from." *Id.*

53. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

54. 408 U.S. at 706. The benefits of a legislative solution to the journalist's privilege question have not been completely disregarded. For example, one recent commentator noted that the question was one "particularly susceptible to legislative solution." Glekel, *The 'Times' Free Press—Fair Trial Case*, N.Y.L.J., Aug. 7, 1978, at 2, col. 3.

55. This is supported by the history of the litigative campaign for a journalist's privilege. The

already clear: the press shall be free; the defendant shall have compulsory process and due process. These principles do not change, but surely the relationship between them is subject to fine tuning as our society matures. As Justice White recognized in *Branzburg*, the practical effect of allocating this judgment to the legislatures is that alteration and adjustment are more easily achieved. Constitutional pronouncements from the Supreme Court, by contrast, are hardly the media by which to prescribe experimental formulas for the laboratories of the several states. The argument against etching privilege rules in the constitutional tablet is especially potent when, as in the case of a journalist's privilege, the issue is relatively new. Perhaps time will uncover the impact of such rules in a way the empirical studies have not.[56]

The allocation of the privilege question to the legislative branch is also a sensible use of factfinding resources. Given that advocates have urged empirical studies of deterrence of first amendment rights as a basis for a journalist's privilege, legislatures are better equipped than are courts to respond to such data. Legislatures may commission studies tailored to the contours of the perceived local problem and are not confined to judicially noticing or receiving proof of previous studies. The reliability of the data so adduced does not depend on the fortuities of the resources, industry, or talent of the counsel before the court. As Professor Davis has recently written:

> Judges who decide policy questions and thereby make administrative law—whether in interpreting constitutions, in interpreting statutes, or in developing common law—necessarily need facts . . . .
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> The methods by which judges acquire the factual materials they need for developing the administrative law they create are largely unplanned and largely unsystematic. Some records of cases contain rich collections of needed legislative facts; most do not. Some judges are pleased to have elaborate Brandeis briefs, and other judges make little use of extrarecord facts presented in briefs, even when they are well presented.[57]

To accept the premise that the journalist's privilege question requires an accommodation of counterpoised constitutional interests and to recognize that the various legislative departments have a significant role to play in striking such a balance is not to say that the courts are wholly ousted from their wonted role as arbiter of the meaning of the Constitution. Even if courts decline to fashion an absolute constitutional privilege out of the preexistent vacuum, surely they will con-

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attempt to gain a constitutional press privilege that met with failure in *Branzburg* is said to have been a reenactment of largely unsuccessful attempts to gain such a common law privilege in the state courts in the 1950's and 1960's. Guest & Stanzler, *supra* note 23, at 20 & n 12.

56. In both *Branzburg*, 408 U.S. at 706-08, and Zurcher v. Stanford Daily, 436 U.S. 547, 566 (1978), Justice White dismissed claims of deterrence of first amendment rights as speculative and noted that there will be time enough in the future to deal with specific instances of abuse

57. 1 K. Davis, *supra* note 31, § 2:15, at 125-26.

tinue to be called upon to adjudicate the validity of the various shield laws that have been, and will be, legislatively imposed.[58]

The many extant state shield statutes[59] defy reduction into a composite shield law, and it is not the purpose here to propose a detailed model. The broad outlines of a suitable shield law may, however, be sketched out. The procedural component is often just as weighty as the substantive content of the privilege provided.[60] Justice Frankfurter's remark in quite another context may have application here as well: "The history of liberty has largely been the history of observance of procedural safeguards."[61] In the present context, due process clearly means the right of the reporter to be heard initially on his privilege claim *before* producing any information called for by the subpoena. For example, in a recent case, contested as vigorously in the press as it was in the courtroom, the ultimate issue was not so much the substantive content of a journalist's privilege but the right to argue such a privilege to the court *before* complying with a subpoena issued at the instance of the criminal defendant.[62] Similarly, the right to a hearing even before issuance of the subpoena was urged by Professor Amsterdam in 1973 hearings on a proposed, but never enacted, federal shield law.[63]

Thus, it is apparent that a statutory privilege should afford a two-step procedure for adjudication of claims of privilege. First, the journalist should have an opportunity to argue that, in the circumstances, *any* compelled disclosure of his sources or notes would violate the first amendment, an argument left open by *Branzburg* but seemingly limited to cases of bad faith or patent irrelevance of the de-

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58. *See, e.g., In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied,* 99 S. Ct. 598 (1978). There, the Supreme Court of New Jersey refused to apply that state's shield law to the extent that it would withhold from a criminal defendant compulsory process to obtain a newsman's notes developed while researching stories that led to the indictment. For examples of state shield laws, see Ariz. Rev. Stat. Ann. § 12-2237 (Supp. 1978); Del. Code Ann. tit. 10, §§ 4320-4326 (1974); Mich. Comp. Laws Ann. § 767.5a (1968); N.J. Stat. Ann. § 2A:84A-21 to -21a (West 1978); Ohio Rev. Code Ann. § 2739.04, .12 (Page 1954 & Supp. 1978).

59. "The term 'shield law' is commonly and widely applied to statutes granting newsmen and other media representatives the privilege of declining to reveal confidential sources of information." *In re* Farber, 78 N.J. 259, 269 n.2, 394 A.2d 330, 335 n.2, *cert. denied,* 99 S. Ct. 598 (1978).

60. Senator Ervin suggests that a legislative resolution of the privilege problem may be inferior to an ad hoc judicial resolution because the former is overly rigid. Ervin, *supra* note 5, at 267. This need not be so if the shield law provides a forum for speedy resolution of all first amendment claims, without purporting to decide in the abstract "who wins" each case.

61. McNabb v. United States, 318 U.S. 332, 347 (1943).

62. *In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied,* 99 S. Ct. 598 (1978); *see* Lewis, *supra* note 43.

63. *Newsmen's Privilege: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 93rd Cong., 1st Sess. 179-81 (1973).

mand.[64] If such a threshold showing is not made, the second stage of the proceeding should be in camera review of the contested material.[65] The standard of necessity to the defense or relevance to the issues in the criminal case that must be shown before disclosure will be ordered and the allocation of burden of proof as to this standard are precisely the kind of judgments the legislature may implement to secure uniformity and a proper balance between competing interests.[66] Finally, the panoply of remedies that may be granted should be enumerated. The purpose of such an enumeration is not to curb judicial resourcefulness but, on the contrary, to require the court to consider intermediate solutions that fall between the extremes of full disclosure and absolute privilege.[67]

Would such a shield law pass constitutional muster? The flexibility of the statute adumbrated above—emphasizing procedural safeguards and general standards for disclosure without imposing fixed or absolute substantive rules—makes a blanket judgment as to its validity impossible and unnecessary, for it merely affords a forum for restriking the constitutional balance according to the facts of each case, within legislated guidelines. This partnership between the courts and legislatures both raises and answers some interesting constitutional problems.

From the criminal defendant's point of view, the shield law di-

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64. *See* 408 U.S. at 707; *id.* at 709-10 (Powell, J., concurring).

65. Recent decisions have invoked the in camera review process to resolve competing claims of litigants to disclosure or protection of sensitive information. *E.g.*, United States v. Nixon, 418 U.S. 683 (1974); *In re* Halkin, No. 77-1313 (D.C. Cir. Jan. 19, 1979); Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130 (2d Cir. 1977). The difficulty of prosecuting certain defendants who possess sensitive information has also, reportedly, led the present administration to consider proposing legislation requiring in camera submission by the defendant of portions of his evidence for pretrial judicial review. N.Y. Times, Feb. 9, 1979, at 1, col. 3.

66. Courts too have at times fashioned a relevancy test to limit journalists' materials subject to disclosure, but they have differed on the applicable standard. *See* Guest & Stanzler, *supra* note 23, at 52 nn.165 & 166 (citing cases). For a recent compilation of shield laws containing specific standards for disclosure, see Note, *A Study in Governmental Separation of Powers: Judicial Response to State Shield Laws*, 66 Geo. L.J. 1273, 1289 n.103 (1978). The recent case State v. Sandstrom, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied*, 99 S. Ct. 1265 (1979), summarizes the case law in this fashion: "As a general rule, disclosure has been required only in those criminal cases where it is shown the information in possession of the news reporter is material to prove an element of the offense, to prove a defense asserted by the defendant, to reduce the classification or gradation of the offense charged, or to mitigate or lessen the sentence imposed." *Id.* at 575, 581 P.2d at 815.

67. *See* Socialist Workers Party v. Attorney General, Nos. 78-6114, 78-6179, 78-3050 (2d Cir. Mar. 19, 1979). There, the plaintiff alleged civil rights violations, including the use of confidential informants, by various federal officers. The district court held the Attorney General in contempt for refusing to obey a court order to disclose files including the informants' names. The Second Circuit issued a writ of mandamus vacating the order of contempt, finding that in the circumstances of this case the trial court, before resorting to compulsory disclosure, should have considered issue-related remedies that would be less intrusive on the responsibilities of federal officers.

minishes his right to compulsory process under the sixth amendment. Yet the possibility of such diminution does not require a conclusion that the compulsory process clause is violated in every conceivable circumstance by a shield law that withholds material from the defendant. The scope of the clause is delineated in a line of recent cases beginning with *Washington v. Texas*.[68] As one commentator has concluded:

> [T]he . . . clause gives defendants definite but limited protection: it guarantees not that the state will always succeed in producing witnesses for the defense, but that it will make an appropriate effort to do so. The state has no duty to produce a witness who, through no fault of its own, has become unavailable because of death, disappearance, or illness.[69]

Whether a potential witness' assertion of privilege is a form of "unavailability" within this statement of the rule is a question currently besetting and dividing the courts.[70] Unlike physical disappearance, death, or the like, "unavailability" because of assertion of testimonial privilege is in a way procured or made possible by the state, in recognizing the privilege. But the shield law considered above is decidedly remote from the state law struck down in *Washington*. That statute barred testimony on behalf of, though not against, a criminal defendant by a coparticipant in the charged crime. The disqualification was one-sided, unreasonable, and arbitrary. One could hardly reach the same conclusion about an enactment that established procedures for compelling a journalist to yield only material that was necessary and central to an accused's defense, in an effort to balance polar constitutional commands.[71] In *Washington,* the statute prejudiced the criminal defendant and favored the state as adversary in the criminal process, whereas a state that granted a qualified journalist's privilege would neutrally arbitrate the claims of opposed constituents both deserving of protection—the press and the accused.

If a qualified shield law that gave the defendant access to material vital to his case survives the sixth amendment, it nevertheless remains exposed to continued first amendment challenge by the press. It is submitted that the first amendment is not disserved by balancing its

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68. 388 U.S. 14 (1967).

69. Westen, *supra* note 30, at 595.

70. *Id.* at 626-27 nn.164 & 165 (citing cases).

71. Professor Westen, whose views on compulsory process are quoted at text accompanying note 69 *supra,* leaves resolution of the viability of privilege rules under the sixth amendment for another day, Westen, *supra* note 30, at 625-26, although in an earlier article he stated: "No interest protected by a privilege is sufficiently important to outweigh the defendant's right to establish his innocence through the presentation of clearly exculpatory evidence." Westen, *The Compulsory Process Clause,* 73 Mich. L. Rev. 71, 161 (1974). Although this rule would undermine an absolute press privilege, it would not invalidate one that limited forced disclosure to "clearly exculpatory evidence" as determined in camera.

demands against compelling countervailing interests of the individual and society. If this is so, then a shield law that allows and requires courts to determine the extent of disclosure, within legislated standards, on a case-by-case basis, and after full hearings that expose the needs of all involved, should not be considered subversive of the first amendment. Indeed, the reasonableness of such a legislative accommodation that suggests its viability under the compulsory process clause similarly counsels a favorable result under first amendment analysis.

The legal process concerns voiced earlier should support the constitutionality of any shield law that does not go to the absolutist extreme. When an elected branch of government offers its judgment on the interface between two counterpoised tenets of the Bill of Rights, the courts should heed. If legislatures are to act at all, the constitutional language can do no more than set the outside limits, framing a "window" of valid legislative alternatives. This is no different from our jurisprudence in the establishment/freedom of religion area, where the Supreme Court has long recognized that latitude must be afforded between those polar commands if efforts to implement legislated policy are to succeed.[72]

One might consider an affirmative legislative role in determining the meaning of a constitution to be a double-edged sword. Senator Ervin, for example, reports the argument by some that rights granted only by the legislature are as easily rescinded and thus less secure than constitutional protection.[73] A recent writer voices the apprehension that a shield law once enacted will be taken as the constitutional norm, deterring the courts from venturing further in protecting the press.[74]

These arguments fall wide of the mark. If we believe that the meaning of the Constitution is shaped by the legislature in coordination with, and not wholly subservient to, the courts, then a legislative enactment that defines the boundary of counterpoised rights neither adds to nor dilutes either one[75]—it simply construes the Constitution,

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72. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947). In *Everson*, the Court said: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. . . [W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." *Id.* at 16.

73. Ervin, *supra* note 5, at 270-71.

74. Sack, *The 'Times' Free Press—Fair Trial Case*, N.Y.L.J., Aug. 7, 1978, at 2, cols. 4-5.

75. *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (Congress may add to, but not dilute, constitutional guarantees through legislation). *See generally* Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) (constitutional adjudication by the Court is preeminent in area of "pure" constitutional law, but Congress

as would any court. If it is true that a legislature could repeal a shield law, this is only to say that it could decide to withhold a privilege that the Constitution permitted but did not require. If it is true that a legislative judgment could be taken as the constitutional norm, this is only to say the courts could ratify and give proper deference to the value choices implemented by a democratic organ of government.

CONCLUSION

Deciding "who decides" is often more important than the ultimate judgment on the merits. In the case of constitutional construction, we are accustomed to fighting the great battles in the courtroom, not on the floors of Congress and the state legislatures. To date, however, the campaign for judicial acknowledgment of a constitutional or common law privilege of journalists to withhold confidential names and data has not prospered. The reason is not antipathy of judges to the press, but a resolve to submit the question in the first instance to the democratic organs of national and state government. It would be naive to say that the decisional process in those fora will be any easier or speedier. It would be wrong to say that the judgments reached there would be "better" than judicial ones on any absolute scale. By reposing the question of a journalist's privilege primarily in the legislative process, however, we will achieve the most orderly and mature balance of the rights and interests of all concerned—including the public.

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may supersede the Court by legislating in area of "constitutional common law," such as accommodation of conflicting rights or content of procedures required by due process).