

Comments

ACADEMIC RESEARCHERS AND THE FIRST AMENDMENT: CONSTITUTIONAL PROTECTION FOR THEIR CONFIDENTIAL SOURCES?

The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. The granting of a privilege from such disclosure constitutes an exception to that rule.¹

INTRODUCTION

In *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*,² a federal district court recently ruled that an academic researcher³ need not disclose information obtained under a pledge of confidentiality. The decision in *Richards* is notable in two respects.

1. *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291, 199 N.E. 415 (1935).

2. 71 F.R.D. 388 (N.D. Cal. 1976).

3. Though referring to the *academic researcher*, the *Richards* court does not define the term. As used in this Comment, the term refers to academicians and scholars who engage in the scholarly investigation and analysis of the policy considerations of public issues with a view towards dissemination in a wide variety of media, including pamphlets, monographs, and books. Some commentators have adopted the term *public scholar* to describe such individuals. Note, *The Public Scholar and the First Amendment: A Compelling Need for Compelling Testimony?*, 40 GEO. WASH. L. REV. 995, 1010-11 (1972) [hereinafter cited as *The Public Scholar*]. However, this Comment retains the use of *academic researcher* for clarity inasmuch as it is used by the *Richards* decision.

First, it clearly recognizes a public interest in protecting the confidential relationships between academic researchers and their sources of information.⁴ Second, though not answering the question of whether the public interest warrants a constitutional privilege, the decision relies heavily on cases involving the newsman's qualified first amendment privilege in civil litigation.⁵

The last two decades⁶ have witnessed a continuing controversy over whether the Constitution's free press guarantee⁷ protects newsmen from legally compelled disclosure of confidential information sources.⁸ The jailing of four California newsmen in the late summer of 1976 for refusing to disclose a source⁹ is a recent example of this controversy.¹⁰ However, the disagreement has generally centered on journalists rather than on academic researchers.¹¹

4. See note 31 *infra*.

5. See text accompanying notes 33-36 *infra*.

6. *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), was the first case in which the constitutional argument that freedom of the press privileged a reporter to protect and conceal his information sources was raised. See, e.g., Note, *Reporter's Privilege—Guardian of the People's Right to Know?*, 11 *New Eng. L. Rev.* 405, 410 (1976).

7. "Congress shall make no law . . . abridging the freedom . . . of the press . . ." U.S. CONST. amend. I.

8. To the extent that a privilege is recognized, it is accorded only for the protection of confidential information sources. See *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 511 (E.D. Va. 1976). *But see United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976).

9. *L.A. TIMES*, Sept. 4, 1976, pt. 2, at 1, col. 5. Managing Editor George Gruner, City Editor James Bort, and reporters William Patterson and Joe Rosato of the *Fresno Bee* were held in civil contempt for failing to disclose their source of material leaked from a county grand jury transcript ordered sealed by a California superior court. *Id.* The case went to the United States Supreme Court three times, once on the ground that reporters have an absolute constitutional right to protect their sources. *Id.* at 12, col. 1. See *Fair Trial—Free Press, Newsmen's Shield Law*, 62 *A.B.A.J.* 119 (1976).

10. The controversy over the existence of a newsman's privilege has generally concerned all instances of compulsory disclosure. However, the arguments for and against a privilege vary depending upon whether the litigation background is criminal or civil. See, e.g., Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 *TEX. L. REV.* 829, 878-915 (1974) [hereinafter cited as Murasky]. The focus of this Comment is upon first amendment privilege in civil litigation.

11. See, e.g., Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 *HASTINGS L.J.* 709 (1975) [hereinafter cited as Goodale]; Note, *Beyond Branzburg: The Continuing Quest for Reporter's Privilege*, 24 *SYRACUSE L. REV.* 731 (1973); Note, *Newsman—Source Privilege: A Foundation in Policy for Recognition at Common Law*, 26 *U. FLA.*

Richards is a noteworthy extension of the rationale of those cases¹² articulating the strong public interest in protecting confidential relationships which promote the flow of information on matters of public concern.

The first section of this Comment describes the *Richards* decision. As will be seen, that decision reflects the exercise of judicial discretion to ensure that the quest for discovery under the Federal Rules of Civil Procedure does not override other important interests.¹³ The validity of that exercise is then examined. Finally, the Comment addresses the constitutional privilege issue left unanswered by *Richards*.¹⁴ It advances the thesis that academic researchers deserve a qualified first amendment privilege against compulsory disclosure of their confidential sources.

THE *Richards* CASE

In 1974,¹⁵ Harvard economics professor Marc J. Roberts conducted a research project investigating the manner in which utility companies make environmental decisions.¹⁶ The research, to be used for a book,¹⁷ focused on the relationship between organizational structure and decisionmaking.¹⁸ During his research, Professor

L. REV. 453 (1974); Comment, *The Newsmen's Privilege After Branzburg v. Hayes: Whither Now?*, 64 J. CRIM. LAW & CRIM. 218 (1973); Comment, *Newsmen's Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy*, 49 TUL. L. REV. 417 (1975) [hereinafter cited as *The First Amendment in Jeopardy*]. However, the controversy has occasionally spilled over beyond the bounds of the organized media. See *United States v. John Doe* (Appeal of Samuel L. Popkin), 460 F.2d 328 (1st Cir. 1972) (college government professor); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975) (medical newsletter); *United States v. John Doe* (*In re* a Grand Jury Subpoena Served Upon Richard Falk), 332 F. Supp. 938 (D. Mass. 1971) (college international law professor); *United States v. Doe* (*In re* a Grand Jury Subpoena Served Upon Leonard Rodberg), 332 F. Supp. 930 (D. Mass. 1971) (public scholar), *aff'd*, 455 F.2d 753 (1st Cir.), *rev'd sub nom.* *Gravel v. United States*, 408 U.S. 609 (1972).

12. See *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975); *Buchanan v. Cronkite*, Civ. No. 1087-73 (D.D.C. July 18, 1974) (order denying motion to compel answer); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973); *Morgan v. State*, 337 So. 2d 951 (Fla. 1976); *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1973); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974).

13. 71 F.R.D. at 391.

14. *Id.* at 390. See note 34 *infra*.

15. See TRIAL MAGAZINE, Aug. 1976, at 5, col. 1.

16. 71 F.R.D. at 389.

17. TRIAL MAGAZINE, Aug. 1976, at 5, col. 2.

18. 71 F.R.D. at 389.

Roberts interviewed employees of Pacific Gas & Electric Company, a California public utility.¹⁹ In exchange for the interviews, Roberts gave the company a signed pledge of secrecy.²⁰ One subject of inquiry for Roberts' research was a decision by the utility company to install spray cooling equipment manufactured by Richards of Rockford, Inc., at one of its power plants.²¹

Subsequently, a dispute arose between Pacific Gas & Electric and Richards over the quality and performance of the spray cooling equipment, and the utility company withheld final payment. Richards brought suit in federal court for breach of contract and defamation.²² In particular, Richards alleged it had been defamed by Pacific Gas & Electric employees during their confidential interviews with Professor Roberts.²³ In conducting pretrial discovery, Richards sought from Professor Roberts the identity of the employees interviewed and the content of their statements.²⁴ Roberts declined to disclose that information, and Richards moved for an order to compel²⁵ Roberts' research assistant to produce research notes and disclose the identity of the employees.²⁶

United States District Court Judge Charles B. Renfrew denied Richards' motion.²⁷ Citing the Federal Rules of Civil Procedure, Judge Renfrew invoked his broad judicial discretion to supervise the course and scope of discovery.²⁸ He noted that the exercise of this discretion often requires balancing competing interests.²⁹

19. *Id.*

20. *Id.* See TRIAL MAGAZINE, Aug. 1976, at 5, col. 2.

21. 71 F.R.D. at 389.

22. *Id.*

23. *Id.* at 390.

24. *Id.* at 389.

25. *Id.* FED. R. CIV. P. 37(a) provides in pertinent part: "A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery."

26. 71 F.R.D. at 389 & n.1.

27. *Id.* at 388.

28. The liberal discovery provisions of the Federal Rules of Civil Procedure are an integral part of the overall scheme of litigation in the federal courts. Their scope is unquestionably broad. It is for that very reason that the application of the rules of discovery is subject to the supervisory discretion of the trial judge, whose duty it is to ensure that the quest for discovery does not subsume other important interests.

Id. at 391.

29. "The exercise of this discretion often requires that the court balance

On the one hand, both the private litigant and the public have a strong interest in the fair and efficient resolution of civil disputes.³⁰ On the other hand, "society has a profound interest in the research of its scholars, work which has the unique potential to facilitate change through knowledge."³¹

Judge Renfrew, however, found the interests at stake in *Richards* not easily comparable.³² He turned to the cases recognizing a qualified first amendment privilege for newsmen's sources.³³ Judge Renfrew did not resolve the question of whether the first amendment privileges academic researchers' sources.³⁴ However, he did rely on the newsmen's privilege cases for "useful guidelines" in striking the balance between the competing interests.³⁵ Those guidelines include the nature of the proceedings, whether the deponent is a party, availability of the information from other sources, and whether the information sought goes to the heart of plaintiff's claim.³⁶

EVALUATION OF *Richards* FROM THE PERSPECTIVE OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Extent of the Discretion to Deny Discovery

The pre-trial discovery provisions³⁷ of the Federal Rules of Civil Procedure serve as a device for ascertaining the facts actually

the interests of the private litigant in obtaining the information sought against the costs of providing it." *Id.* at 389.

30. *Id.*

31. [S]ociety has a profound interest in the research of its scholars, work which has the unique potential to facilitate change through knowledge. Counsel . . . have produced an impressive series of affidavits from scholars throughout the country attesting to the necessity of maintaining confidential relationships if their research is to be accomplished. Much of the raw data on which research is based simply is not made available except upon a pledge of confidentiality. Compelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is greatest.

Id. at 389-90.

32. *Id.* at 389.

33. *Id.* at 390.

34. "Whether the public interest in protecting confidential relationships between academic researchers and their sources rises to the stature of a constitutional privilege *need not be resolved* by the instant case." *Id.* (emphasis added).

35. "[T]he cases involving the newsmen provide useful guidelines for striking a balance between discovery and non-disclosure: the nature of the proceeding, whether the deponent is a party, whether the information sought is available from other sources, and whether the information sought goes to the heart of the claim." *Id.*

36. *Id.*

37. See FED. R. CIV. P. 26-37.

in dispute.³⁸ They promote the fair and efficient resolution of civil disputes.³⁹ In keeping with this purpose, the discovery principles underlying the Federal Rules are liberal in allowing either party to compel the other to disclose facts in his possession.⁴⁰ A strong showing of good cause is required before a party will be denied entirely the right to discovery.⁴¹

Exceptions to the principle of liberal discovery are derogations from the positive general rule.⁴² Nevertheless, a discovery motion is addressed to the discretion of the trial court.⁴³ That court may limit discovery to protect parties and witnesses from annoyance and excessive expense, and its discretion is necessarily broad.⁴⁴ Rule 26(c), in pertinent part, provides:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the

38. See 4 MOORE'S FEDERAL PRACTICE ¶ 26.02[1], at 2662 (2d ed. 1976). The United States Supreme Court has stated: "Modern instruments of discovery serve a useful purpose. . . . They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958).

39. See 4 MOORE'S FEDERAL PRACTICE ¶ 26.02[2], at 2664-66 (2d ed. 1976).

40. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). See *Hickman v. Taylor*, 329 U.S. 495 (1947).

[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiry into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

Id. at 507 (footnotes omitted).

41. "All motions under [Rule 26(c)] . . . must be supported by 'good cause' and a strong showing is required before a party will be denied entirely the right to take a deposition." 4 MOORE'S FEDERAL PRACTICE ¶ 26.69, at 26494-95 (2d ed. 1974). See *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

42. See *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1396-97 (D.D.C. 1973). The court noted that underlying the right to compel discovery is "the basic proposition that the public has a right to every man's evidence." *Id.*

43. *Baker v. F & F Inv.*, 470 F.2d 778, 781 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). *Accord*, *Apel v. Murphy*, 70 F.R.D. 651, 654 (D.R.I. 1976); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 82 (E.D.N.Y. 1975).

44. *Dolgow v. Anderson*, 53 F.R.D. 661, 664 (E.D.N.Y. 1971).

court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
(1) that the discovery not be had.⁴⁵

The central problem inherent in the discovery rules is providing a litigant access to needed information without imposing an onerous burden on the party who must provide it.⁴⁶

In *Richards* the burden and expense on defendant Pacific Gas & Electric and the deponent were neither onerous nor excessive. Rather, the court found that the real burden and expense were on society; disclosure would stifle research into questions of public policy.⁴⁷ *Richards* thus presents the question of whether the trial judge has discretion to deny discovery when in his opinion the social costs are too great. In at least two instances the federal courts have answered that question affirmatively.⁴⁸

In *Baker v. F & F Investment*,⁴⁹ the Second Circuit held that a freelance writer for the *Saturday Evening Post* did not have to disclose the source for his article about block-busting in Chicago. An action had been filed charging racial discrimination in housing that violated federal and state law. The writer was subpoenaed to disclose his confidential source of information.⁵⁰ Judge Kaufman, writing for the court, concluded that the district court judge acted within his discretion under the Federal Rules of Civil Procedure in denying the motion to compel disclosure of the writer's confidential information source. The court balanced the litigants' private interests against the public interest in non-disclosure.⁵¹ He stressed that freedom of the press is fundamental to our way of life and that the first amendment tolerates no restraints absent a compelling state interest.⁵² The *Baker* court noted that compelled disclosure

45. FED. R. CIV. P. 26(c).

46. *Dolgow v. Anderson*, 53 F.R.D. 661, 664 (E.D.N.Y. 1971).

47. 71 F.R.D. at 390.

48. *But see* *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973). In *McCord* newsmen were served with subpoenas for news material including information from confidential sources. The newsmen sought protection from the subpoenas under Federal Rule of Civil Procedure 26(c), but the district court found the subpoenas to be neither unreasonable nor oppressive. However, the court did quash the subpoenas after finding the information sought was conditionally privileged under the first amendment. *Id.* at 1396-97.

49. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

50. *Id.* at 781.

51. *Id.*

52. It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free. Freedom of the press may be stifled by direct or,

of confidential sources threatens a journalist's ability to secure information.⁵³ Such disclosure thereby threatens freedom of the press and undermines values traditionally protected by the federal courts.⁵⁴

In *Apicella v. McNeil Laboratories, Inc.*,⁵⁵ a federal district court applied a balancing test as in *Baker*. The court denied a motion to compel disclosure by a medical newsletter of the identity of people who had contributed information to an article on the drug Innovar, produced by defendant McNeil Laboratories. Plaintiffs filed an action against defendant for personal injuries caused by the use of Innovar.⁵⁶ Although recognizing the information's logical relevance and the litigants' right to discover relevant evidence in civil litigation,⁵⁷ the court denied discovery.⁵⁸ Noting that no absolute privilege protects newsmen's confidential sources, the court found that the policy protecting these sources is sufficiently strong to warrant exclusion from discovery in some instances.⁵⁹ The *Apicella* court cited⁶⁰ Mr. Justice Powell's concurring opinion in *Branzburg v. Hayes*.⁶¹

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and

more subtly, by indirect restraints. Happily, the First Amendment tolerates neither, absent a concern so compelling as to override the precious rights of freedom of speech and the press.

Id. at 785.

53. Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis. . . . The deterrent effect such disclosure is likely to have upon future "undercover" investigative reporting, the dividends of which are revealed in articles such as Balk's, threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy.

Id. at 782.

54. *Id.*

55. 66 F.R.D. 78 (E.D.N.Y. 1975).

56. *Id.* at 80.

57. *Id.* at 82.

58. *Id.* at 85.

59. The court stated: "No absolute rule of privilege protects newsmen. Nevertheless, the policy protecting news reporters' sources is sufficiently close to a privilege to warrant exclusion from discovery in some instances."

Id. at 83.

60. *Id.*

61. 408 U.S. 665 (1972).

the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.⁶²

The *Apicella* court found this balancing approach to be even more justified in a civil proceeding than in a criminal case.⁶³

Further, the 1970 Notes of the Advisory Committee state that "Rule 26(c) . . . confers broad powers on the court to regulate or prevent discovery even though the materials sought are [relevant] and these powers have always been freely exercised."⁶⁴ There are "many situations, not capable of governance by precise rule, in which courts must exercise judgment [with respect to discovery]."⁶⁵ Thus, it appears that the federal courts may take into account the social costs inherent in compelling disclosure of confidential news sources when exercising their discretionary power over discovery;⁶⁶ the social interest in a free press seems to extend to academic research outside the organized media.⁶⁷ The question then arises of how the various interests should be weighed in a case such as *Richards*.

The Exercise of the Discretion in Richards

The *Richards* decision rests on factual analysis founded upon four factors: the nature of the proceeding, the status of the

62. *Id.* at 710 (Powell, J., concurring).

63. 66 F.R.D. at 83. *Accord*, *Baker v. F & F Inv.*, 470 F.2d at 785. Circuit Judge Kaufman stated for the court in *Baker*:

If, as Mr. Justice Powell noted in [*Branzburg*], instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure.

Id. at 784-85.

64. FED. R. CIV. P. 26 (Advisory Comm. Note, 1970 Amend. to Subdivision (b), 28 U.S.C.A. 155 (West 1972)). In 1935, when the Supreme Court decided to act under its then recently acquired statutory power to draft rules for a unified system of law and equity in the federal courts, it appointed an Advisory Committee to assist it. The Advisory Committee's purpose was to prepare and submit to the Court a draft of the new Federal Rules of Civil Procedure. See 295 U.S. 774, 774-75 (1935). In early 1942, the Court recreated the Advisory Committee to act as a standing rules committee in respect to amendments to the Federal Rules. See 314 U.S. 720 (1942).

65. FED. R. CIV. P. 26 (Advisory Comm. Note, 1970 Amend. to Subdivision (b), 28 U.S.C.A. 155 (West 1972)).

66. *But cf.* note 48 *supra* (federal court in civil action denied claim that subpoenas requiring disclosure of news sources were unreasonably oppressive under the Federal Rules).

67. This question is discussed at length in text accompanying notes 139-57 *infra*.

deponent in the litigation, the exhaustion of alternative sources of the information, and the relationship of the information to the heart of the claim. Because these factors had been suggested to the court by the closely analogous newsmen privilege cases, these cases will now be considered to determine whether the competing interests in *Richards* were properly weighed.

The Nature of the Proceedings

The heart of newsmen's arguments for a privilege has been that forced disclosure of confidential information drives a wedge between them and their sources, blocking the free flow of information to the public which the first amendment was designed to protect.⁶⁸ Controversy over the newsmen's asserted first amendment privilege culminated⁶⁹ in the much publicized 1972 case of *Branzburg v. Hayes*.⁷⁰ This case involved three reporters who had been called before grand juries to testify about information they had individually received in their capacities as newsmen.⁷¹ Two of the re-

68. Note, *Beyond Branzburg: The Continuing Quest for Reporter's Privilege*, 24 SYRACUSE L. REV. 731, 731 (1973).

69. See Recent Decisions, *Constitutional Law—Freedom of the Press—Virginia Recognizes a Newsmen's Qualified First Amendment Privilege of Confidentiality of Information and Identity of Source—Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974), 9 U. RICH. L. REV. 171, 174 (1974).

70. 408 U.S. 665 (1972).

71. The *Branzburg* opinion involved a trilogy of cases consolidated for appeal to the Supreme Court as follows:

Branzburg v. Hayes, 461 S.W.2d 345 (Ky. App. 1971), involved Paul Branzburg, an investigative reporter for the *Louisville Courier-Journal*, who wrote an article about local drug abuse practices. He was subpoenaed before a grand jury but refused to reveal the confidential sources who had provided information for his article. Branzburg raised the first amendment issue of privilege but later abandoned it in favor of reliance upon Kentucky's newsmen shield statute. *Id.* at 346 n.1. The Kentucky Court of Appeals declined to quash the subpoenas, and the Supreme Court affirmed.

In re Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), concerned Paul Pappas, a reporter for a New Bedford, Massachusetts, television station. Pappas gained entrance to a Black Panther meeting on the condition he would not disclose anything he saw or heard inside the building. He appeared before a grand jury but refused to answer questions concerning his attendance at the Black Panther meeting. The Supreme Judicial Court of Massachusetts declined to quash the subpoena and stated: "We adhere to the view that there exists no constitutional newsmen's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury." *Id.* at 612, 266 N.E.2d at 302. The Supreme Court refused to disturb this holding.

Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), involved *New*

porters claimed a privilege to withhold confidential sources and information,⁷² while the third claimed a privilege not to appear at all before a grand jury.⁷³ All three claims of privilege were based on first amendment protection of the press to gather and disseminate news and information.⁷⁴ The Supreme Court, in a plurality opinion, held that the first amendment affords newsmen no privilege against appearing and testifying before a grand jury.⁷⁵ Thus, *Branzburg* seemingly rejected any absolute or qualified privilege for newsmen under the first amendment.⁷⁶

However, as Circuit Judge Kaufman pointed out in *Baker*,⁷⁷ the sole issue in *Branzburg* was "the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime."⁷⁸ According to Judge Kaufman, the Supreme Court had been concerned with the grand jury as an investigating arm of the criminal justice system.⁷⁹ No such criminal overtones color the facts in civil litigation.⁸⁰ Further, Mr. Justice Powell had written a concurring opinion in *Branzburg* which many commentators view as the key to the decision.⁸¹ He had indicated that when subpoenaed by a

York Times reporter Earl Caldwell, who had been subpoenaed by a grand jury to testify about the aims, purposes, and activities of the Black Panthers, an organization he had been assigned to cover. The Court of Appeals for the Ninth Circuit quashed the subpoenas, and the Supreme Court reversed.

72. *Branzburg v. Hayes*, 461 S.W.2d 345, 346 (Ky. App. 1971); *In re Pappas*, 358 Mass. 604, 605 n.1, 266 N.E.2d 297, 298 n.1 (1971).

73. *Caldwell v. United States*, 434 F.2d 1081, 1083 (9th Cir. 1970).

74. See Note, *Beyond Branzburg: The Continuing Quest for Reporter's Privilege*, 24 SYRACUSE L. REV. 731, 747-48 (1973).

75. 408 U.S. at 667. Mr. Justice White's opinion was joined by Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. Justices Douglas, Stewart, Brennan, and Marshall dissented. However, Justice Powell filed a brief concurring opinion stressing "the limited nature of the Court's holding." *Id.* at 709.

76. *Id.* at 667.

77. 470 F.2d at 784.

78. *Id.* at 784, quoting *Branzburg v. Hayes*, 408 U.S. at 682.

79. 470 F.2d at 784.

80. *Id.* In *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505 (E.D. Va. 1976), the court stated:

In the context of a civil trial, the rationales for forcing a newsman to reveal his confidences are much less weighty than those involved in criminal proceedings. For example, in such a context, one cannot validly contend that a newsman is concealing the criminal conduct of his source, or shielding the anonymity of criminal figures.

Id. at 510.

81. In view of the plurality decision, many courts and commentators have characterized Justice Powell's concurring opinion as the key to the decision in *Branzburg*. See *United States v. Steelhammer*, 539 F.2d 373, 376

grand jury, newsmen are not totally without first amendment rights to protect their sources.⁸² Justice Powell had noted that even in criminal cases instances will arise in which first amendment values outweigh the duty of a journalist to testify.⁸³ If first amendment "free press" values can outweigh the duty of the newsmen to testify in a criminal case,⁸⁴ surely in civil cases the public interest in non-disclosure of confidential sources will often be weightier than the private litigant's interest in disclosure.⁸⁵ The newsmen's claim for non-disclosure is strongest in civil actions such as *Richards*.

The Status of the Deponent in the Litigation

Although the cases do not shed light on how much significance courts attach to the status of deponent as a party, the deponent's status in the underlying litigation is a factor frequently mentioned in the decisions. However, all courts refusing to compel disclosure of a newsmen's confidential sources in civil litigation found, in addition to the deponent's non-party status, either that the party seeking disclosure failed to exhaust alternative sources or that the information was not necessary to his case.⁸⁶ All the cases requiring

(4th Cir. 1976) (dissenting opinion); *Baker v. F & F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 510 (E.D. Va. 1976); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 83 (E.D.N.Y. 1975); *Loadholtz v. Fields*, 389 F. Supp. 1299, 1301 & 1302 (M.D. Fla. 1975); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1397-98 (D.D.C. 1973); *Morgan v. State*, 337 So. 2d 951, 954 (Fla. 1976). See, e.g., *Goodale*, *supra* note 11, at 916-17; Comment, *The Newsmen's Privilege After Branzburg v. Hayes: Whither Now?*, 64 J. CRIM. LAW & CRIM. 218, 219 (1973).

82. 408 U.S. at 709 (Powell, J., concurring).

83. *Id.* at 710. Mr. Justice Powell implied that the *Branzburg* holding does not compel a journalist "to give information bearing only a remote and tenuous relationship to the subject of the [grand jury] investigation." *Id.*

84. *Id.* See *Morgan v. State*, 337 So. 2d 951 (Fla. 1976); *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1973); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974).

85. See *Baker v. F & F Inv.*, 470 F.2d 778, 785 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Murasky*, *supra* note 10, at 898-99; Note, *Reporter's Privilege—Guardian of the People's Right to Know?*, 11 NEW ENG. L. REV. 405, 425-26 (1976).

86. E.g., *Baker v. F & F Inv.*, 470 F.2d 778, 783 (court found other available sources of the information sought; the information did not go to the heart of plaintiff's claim), *cert. denied*, 411 U.S. 966 (1973); *Gilbert v. Allied*

disclosure of confidential sources were libel actions in which the deponent was a party defendant.⁸⁷ However, it is likely that this factor was subsumed into the inquiry about whether the information sought went to the heart of plaintiff's claim.⁸⁸ No civil court has decided a case in which the newsman deponent was a party, but in which all relevant factors cut in favor of non-disclosure. Thus, the importance of this factor is unclear.

The Exhaustion of Alternative Sources

The importance of this factor is not readily ascertained. Exhaustion of alternative sources of the information sought is relevant, but it may not be essential for a decision compelling disclosure.⁸⁹ All decisions refusing to compel disclosure found no exhaustion of alternative sources of information.⁹⁰ However, these cases also found that the information sought either was irrelevant⁹¹

Chem. Corp., 411 F. Supp. 505, 510 (E.D. Va. 1976) (no showing that the confidential information sought was crucial to plaintiff's case or that such information was not practically accessible through other channels); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 85 (E.D.N.Y. 1975) (parties requesting disclosure did not show unavailability of information from other sources); *Loadholtz v. Fields*, 389 F. Supp. 1299, 1302 (M.D. Fla. 1975) (plaintiff showed no compelling need for information and did not show that it was unavailable from other sources); *Buchanan v. Cronkite*, Civ. No. 1087-73 (D.D.C. July 18, 1974) (order denying motion to compel answer) (no showing of the relevance of the information sought and no attempt to exhaust alternative sources of the information); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1397-98 (D.D.C. 1973) (no showing by moving parties that alternative sources of evidence were exhausted or that the testimony and materials sought went to the heart of the claim).

87. *E.g.*, *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *Adams v. Associated Press*, 46 F.R.D. 439 (S.D. Tex. 1969).

88. The cases all involved libel suits filed against the reporters seeking a privilege from disclosure of their confidential news sources, and the courts in each case found that the information sought was necessary to each plaintiff's claim. *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *Adams v. Associated Press*, 46 F.R.D. 439 (S.D. Tex. 1969).

89. *See Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Garland v. Torre*, 259 F.2d (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973); *Adams v. Associated Press*, 46 F.R.D. 439 (S.D. Tex. 1969).

90. *See cases cited note 86 supra.*

91. *See Buchanan v. Cronkite*, Civ. No. 1087-73 (D.D.C. July 18, 1974) (order denying motion to compel answer).

or failed to go to the "heart of the claim."⁹² Moreover, two cases held that a newsman's confidential sources should be disclosed when the information sought goes to the heart of plaintiff's libel claim, even if plaintiff has not shown exhaustion of alternative sources of information.⁹³ The only safe generalization is that failure to exhaust alternative sources, if coupled with a failure to show that the information goes to the heart of the claim, will result in judicial refusal to compel disclosure of confidential news sources.⁹⁴

The "Heart of the Claim" Test

Regardless of how a court views the preceding factors, inquiry into the relevance and materiality of the information will always be made before a federal court orders discovery.⁹⁵ The newsmen libel cases best demonstrate the federal courts' attitude toward materiality. In *Garland v. Torre*,⁹⁶ columnist Marie Torre attributed to unnamed CBS executives a statement describing actress Judy Garland as overweight. Garland sued for libel and sought from CBS the identity of the people who had made the statements. After a futile attempt to obtain the information from other sources, Garland sought to depose Torre. Torre refused on first amendment grounds to disclose her source, and the federal district court held her in criminal contempt. The court of appeals upheld the contempt citation.⁹⁷ Circuit Judge Stewart, writing for the court, noted that compulsory disclosure of confidential news sources raises

92. See cases cited note 86 *supra*.

93. In *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974), the court noted that plaintiff had made no effort to discover the source of Hume's information. However, it excused such failing with the statement that it would be unreasonable to have plaintiff interview all the United Mine Workers' employees to discover the source. *Id.* at 638-39. In *Adams v. Associated Press*, 46 F.R.D. 439 (S.D. Tex. 1969), the district court made no attempt whatever to determine whether alternative sources of the information sought were available but rather was satisfied with a determination that the information was necessary to preparation of plaintiff's case. *Id.* at 441.

94. See Goodale, *supra* note 11, at 737 & 741.

95. FED. R. Civ. P. 26(b) provides in part:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: . . . Parties may obtain discovery regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action

(emphasis added).

96. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

97. *Id.* at 545.

serious constitutional issues.⁹⁸ Any infringement on first amendment rights must be justified by an overriding public interest.⁹⁹ This decision was the first to articulate the requirement that the requested confidential information go to the "heart of the claim."¹⁰⁰ The confidential information must bear directly on the major thrust of the moving party's claim. In *Garland* the identity of Torre's source was essential to Judy Garland's libel action.¹⁰¹ The "heart of the claim" test is more stringent than a test of mere relevancy: Unless the information sought is essential to the moving party's claim, there is no compelling state interest in using legal process to compel disclosure.¹⁰²

Garland was cited approvingly by the Supreme Court in *Branzburg*,¹⁰³ and the "heart of the claim" test has been followed by federal courts in newsman libel cases both before and after *Branzburg*.¹⁰⁴ The test has been almost uniformly used by federal courts dealing with compulsory disclosure of a newsman's confidential sources in non-libel civil actions as well.¹⁰⁵ Thus, information sought from a newsman about his news gathering activities not only must be relevant but also must go to the heart of the claim of the party seeking disclosure.

Did the Trial Court Properly Apply These Factors in Richards?

The underlying litigation in *Richards* was a civil action for breach

98. Circuit Judge Stewart wrote: "[W]e accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgement of press freedom by imposing some limitation upon the availability of news." *Id.* at 548.

99. *Id.*

100. [W]e are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. The question asked of [Torre] went to the heart of the plaintiff's claim.

Id. at 550.

101. *Id.*

102. See Goodale, *supra* note 11, at 738.

103. 408 U.S. at 686.

104. *E.g.*, *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Buchanan v. Cronkite*, Civ. No. 1087-73 (D.D.C. July 18, 1974) (order denying motion to compel answer); *Adams v. Associated Press*, 46 F.R.D. 439 (S.D. Tex. 1969).

105. *E.g.*, *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973).

of contract and defamation.¹⁰⁶ Neither the professor nor his assistant was a party to the underlying suit.¹⁰⁷ The research was not conducted with a view to litigation, and most facts were available to plaintiff through interrogatories propounded to defendant. Thus, any information the professor or his assistant had in regard to the breach of contract claim was largely supplementary.¹⁰⁸ In short, the first three factors cut against disclosure. At first glance, the fourth factor seems to weigh in favor of disclosure; plaintiff Richards alleged that it was defamed during the interviews between Roberts and defendant's employees.¹⁰⁹ If the allegations were true, Roberts' information would go to the heart of Richards' defamation claim. However, Judge Renfrew found the evidence insufficient to establish a *prima facie* showing of defamation.¹¹⁰ Richards failed to show that the confidential information it sought from Roberts and his assistant went to the heart of a *valid* claim.¹¹¹ Thus, all four factors support Judge Renfrew's determination that Richards' need for the information was not weightier than the public interest in maintaining confidentiality. The denial of the motion to compel disclosure of Professor Roberts' confidential sources was a proper exercise of the court's discretion under the Federal Rules of Civil Procedure.

106. 71 F.R.D. at 389.

107. *Id.* at 390.

108. The research project for which the interviews were conducted was not initiated with an eye to this litigation. The central subject of this action, the events surrounding the decision to discontinue using the spray cooling system, . . . was not a focus of the study. The factual issues which divide the parties may certainly be resolved without resort to statements made by PG&E employees to Professor Roberts. . . . Any information Professor Roberts or Lane McIntosh [the research assistant] may have as to the identity of those PG&E officials who decided to abandon the system and the reasons for their decision is available to plaintiffs through interrogatories propounded to PG&E. In short, the information sought is largely supplementary.

Id. (footnotes omitted).

109. *Id.*

110. "Given the importance of maintaining confidential channels of communication between academic researchers and their sources, the Court will not compel disclosure absent at least a *prima facie* showing that Richards was in fact defamed in the course of the interviews conducted by Professor Roberts." *Id.* at 390-91.

111. See *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Cerrito v. Time, Inc.*, 302 F. Supp. 1071 (N.D. Cal.), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971).

DOES THE PUBLIC INTEREST IN ACADEMIC RESEARCH WARRANT
A FIRST AMENDMENT PRIVILEGE FOR CONFIDENTIAL SOURCES?

Since *Garland v. Torre*,¹¹² there has been a continuing controversy over the existence of a first amendment privilege for newsmen's confidential sources of information. Some commentators viewed *Branzburg* as a negative resolution of that controversy.¹¹³ However, a growing number of post-*Branzburg* decisions, both state¹¹⁴ and federal,¹¹⁵ have recognized a qualified first amendment privilege against compulsory disclosure of confidential news sources. This recognition is particularly apparent in civil litigation, in which the qualified privilege will give way only upon a showing of some compelling state interest.¹¹⁶

*Baker v. F & F Investment*¹¹⁷ was one of the first federal civil decisions after *Branzburg*. In light of *Branzburg*, the *Baker* court concluded that federal law does not recognize an absolute or conditional journalist's testimonial privilege.¹¹⁸ Nonetheless, the court upheld the lower court's denial of a motion to compel the non-party journalist to disclose his confidential source for an article on blockbusting in Chicago. *Baker* read *Branzburg* as limited to criminal investigations¹¹⁹ and noted the adverse effects that compulsory disclosure of sources has on a free press.¹²⁰ The *Baker* court was concerned that freedom of the press not be infringed without a counter-

112. 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958). See note 6 *supra*.

113. E.g., *The First Amendment in Jeopardy*, *supra* note 11, at 422; Note, *Beyond Branzburg: The Continuing Quest for Reporter's Privilege*, 24 SYRACUSE L. REV. 731, 731-32 (1973).

114. E.g., *Morgan v. State*, 337 So. 2d 951 (Fla. 1976); *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1973); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974). But see *Lightman v. State*, 15 Md. App. 713, 294 A.2d 149, *aff'd*, 266 Md. 550, 295 A.2d 212 (1972); *Dow Jones & Co. v. Superior Court*, 364 Mass. 317, 303 N.E. 847 (1973); *In re Bridge*, 120 N.J. Super. 460, 295 A.2d 3 (Super. Ct. App. Div. 1972).

115. E.g., *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976); *Apel v. Murphy*, 70 F.R.D. 651 (D.R.I. 1976); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973).

116. One state interest which might very well be deemed compelling is that of assuring a fair trial.

117. 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973). See text accompanying notes 49-54 *supra*.

118. 470 F.2d at 781.

119. *Id.* at 784. The court said that "concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from [civil cases] . . ." *Id.*

120. *Id.* at 782.

vailing compelling interest,¹²¹ which it found to be absent on the facts before it.¹²² Thus, the *Baker* court evidently regarded the newsman-source relationship as conditionally privileged.¹²³

Despite the *Baker* court's reluctance to expressly recognize a newsman's qualified first amendment privilege in the face of *Branzburg*, a number of lower federal courts have done so. *Democratic National Committee v. McCord*¹²⁴ followed *Baker*'s lead by denying compulsory disclosure of confidential news sources in a civil action. Following the Watergate break-in, the Democratic Party brought damages actions against the Committee for the Re-election of the President and others. Reporters for *The New York Times*, *The Washington Post*, *The Washington Star-News* and *Time Magazine* were subpoenaed by the defendants for depositions. They were to produce documents, audio and video tapes, and other materials relating to the break-in or other political espionage against the Democratic Party. The district court quashed the subpoenas, stating that the great public importance of the case dictated a finding that the reporters were entitled to a qualified first amendment privilege.¹²⁵ To enforce the subpoenas, the court said, might inhibit reporting about a major political party and people within the highest circles of government.¹²⁶ The court found that defendants had not demonstrated that the information sought went to the heart of their claim¹²⁷ or that they had exhausted alternative sources of the information.¹²⁸ The court concluded that the "scales . . . [were]

121. *Id.* at 784-85.

122. *Id.* at 785.

123. See Goodale, *supra* note 11, at 736.

124. 356 F. Supp. 1394 (D.D.C. 1973).

125. *Id.* at 1396. The *McCord* court distinguished the cases before it from *Branzburg* by noting that they were not "criminal" cases as was *Branzburg*. *Id.* at 1397.

126. What is ultimately involved in these cases between the major political parties is the very integrity of the judicial and executive branches of our government and our political processes, for without information concerning the workings of government, the public's confidence in that integrity will inevitably suffer. This is especially true where, as here, strong allegations have been made of corruption within the highest circles of government. . . . This Court cannot blind itself to the possible "chilling effect" the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public.

Id. (footnotes omitted). See Goodale, *supra* note 11, at 735.

127. 356 F. Supp. at 1397.

128. *Id.* at 1398.

heavily weighted in the [reporters'] favor."¹²⁹

The 1975 case of *Loadholtz v. Fields*¹³⁰ is in accord. The case arose in Florida, a state with no statutory shield protection for newsmen. A newspaper article quoted a couple who claimed they had been intimidated and harassed when arrested by police. In a libel action by the arresting officer against the couple, the reporter was subpoenaed to appear at a deposition to testify about his interview with the couple. He refused to comply, and plaintiff filed a motion to compel discovery. The court denied the motion and distinguished the holding in *Branzburg* as being limited to criminal cases.¹³¹ The court cited *McCord* as authority that the first amendment affords a newsman a qualified privilege in a civil action when no compelling interest justifies compelled disclosure.¹³²

McCord and *Loadholtz* were recently followed in *Gilbert v. Allied Chemical Corp.*,¹³³ an action for personal injury damages allegedly resulting from contact with the chemical Kepone. During pre-trial discovery defendant Allied Chemical requested a subpoena requiring a non-party operator of television and radio stations to produce news material. The court quashed the subpoena,¹³⁴ holding that newsmen have a privilege not to reveal their confidential news sources in civil proceedings that may be abrogated only in compelling circumstances.¹³⁵ *Gilbert* refused to read *Branzburg* as holding that the first amendment offers no protection to the press from subpoenas.¹³⁶ Rather, it relied on Mr. Justice Powell's view that a qualified privilege does exist to protect the confidential newsman-source relationship.¹³⁷ In this case, defendant failed to show that the confidential information sought was crucial to its case or that the information was not practically accessible through other sources.¹³⁸

129. *Id.*

130. 389 F. Supp. 1299 (M.D. Fla. 1975).

131. "This Court has neither been cited nor has found any subsequent case which has extended the *Branzburg* case holding beyond the limited confines of the criminal justice system." *Id.* at 1301.

132. *Id.* at 1303.

133. 411 F. Supp. 505 (E.D. Va. 1976).

134. However, the court refused to find a privilege for non-confidential news information. "Only if material requested directly leads to the disclosure of confidences does the privilege attach." *Id.* at 511.

135. *Id.* at 508.

136. *Id.*

137. The *Gilbert* court found Mr. Justice Powell's concurring opinion to be the "minimum common denominator" of all the views expressed in *Branzburg*. *Id.* at 510.

138. *Id.*

Given a qualified first amendment privilege for newsmen, the question arises of whether the privilege should extend to academic researchers. The inquiry is twofold. First, does the first amendment's guarantee of a free press extend to academic researchers outside the organized press? Second, do the underlying reasons for a qualified newsmen's privilege warrant extension of that privilege to academic research?

Does "the Press" Mean Only the "Press"?

No court has squarely held that freedom of the press applies to academic researchers. However, the Supreme Court has emphasized that "[t]he liberty of the press is not confined to newspapers and periodicals . . . [but] in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."¹³⁹ Under the first amendment, the relevant inquiry is not whether the individual asserting freedom of the press is a newsmen, but rather whether the individual performs a function furthering the social objectives of the first amendment. Thus it is the function which an individual performs, rather than the medium which he uses, that is the essential first amendment consideration.¹⁴⁰ At least one federal court has extended the policy protecting news reporters' sources beyond the organized news media. In *Apicella v. McNeil Laboratories, Inc.*,¹⁴¹ the trial court applied to a medical newsletter the same constitutional free press considerations it found to exist for members of the organized media. In particular, the court found that the medical letter performed a first amendment function by providing valuable information on various drugs to the medical profession and the public.¹⁴²

The Supreme Court itself stated in *Branzburg*: "The informative function asserted by representatives of the organized press in the

139. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1936). In *Branzburg v. Hayes*, Mr. Justice White stated for the Court that freedom of the press is the right of all types of reporters and includes "the lonely pamphleteer who uses carbon paper or a mimeograph just as much as . . . the large metropolitan publisher who utilizes the latest photocomposition methods." 408 U.S. at 704 (1972).

140. *The Public Scholar*, *supra* note 3, at 1012 n.111.

141. 66 F.R.D. 78 (E.D.N.Y. 1975). See text accompanying notes 55-63 *supra*.

142. 66 F.R.D. at 85.

present case is also performed by lecturers, political pollsters, novelists, *academic researchers*, and dramatists."¹⁴³ Academicians play a special role in the communication of ideas. In order to carry out their task "[t]hey must have freedom of responsible inquiry."¹⁴⁴ This should be true even if the activity is only data collection; the *Branzburg* majority conceded that news gathering, not just dissemination, is also protected by the first amendment.¹⁴⁵ If an academic researcher is performing a first amendment function, he or she is entitled to the first amendment guarantees that members of the press enjoy with regard to their confidential sources of information.¹⁴⁶

Because *Branzburg* rejects an absolute privilege for newsmen, the courts recognizing a qualified privilege have stressed the underlying social interests served by maintaining confidential newsman-source relationships.¹⁴⁷ Thus, the extension of the qualified confidential

143. 408 U.S. at 705 (emphasis added).

144. *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring). See *The Public Scholar*, *supra* note 3, at 1017.

145. The newsmen in *Branzburg* presented a constitutional argument. They claimed that the right to gather information is protected, for without such protection the recognized first amendment right to disseminate news would be hollow. The majority in *Branzburg* accepted this assertion in principle and conceded that "without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 681. Two lower courts had accepted this argument even prior to *Branzburg*. *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Kovach v. Maddux*, 238 F. Supp. 835 (M.D. Tenn. 1965).

146. *But see United States v. John Doe* (Appeal of Samuel L. Popkin), 460 F.2d 328 (1st Cir. 1972). This case grew out of the federal grand jury investigations into the unauthorized release and publication of the Pentagon Papers. Samuel Popkin, a government professor at Harvard and author of a number of published works on the Vietnam War, was subpoenaed by the grand jury to answer questions concerning his knowledge of the release of the papers by Daniel Ellsberg. Popkin refused to answer certain questions, asserting a first amendment privilege against disclosing his sources akin to the one claimed by newsmen. The district court held him in contempt, and the court of appeals affirmed in part. In particular, the court of appeals denied Popkin's asserted first amendment privilege and stated that the scholar-source relationship is not covered by the "special canopy of the free press." *Id.* at 333. However, the court recognized that the privilege, if it exists, rests upon the important public interest in a continued flow of information that would be adversely affected were scholars forced to divulge their sources. *Id.* The court stated that this rationale falls short of immunizing a scholar from testifying about his nonconfidential conversations and found in this case that the questions put to Popkin did not call for disclosure of government officials or other "participant-sources." *Id.* at 334. Thus, the court of appeals, rather than explicitly rejecting a first amendment privilege for scholars, rejected only Popkin's assertion that the privilege is an unqualified one covering all sources of information.

147. See, e.g., *Baker v. F & F Inv.*, 470 F.2d 778, 782-83 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

source privilege to academician-source confidences will depend on the extent to which they serve the same underlying social interests.

The principal objective of the Founding Fathers in providing for a free press was to stimulate an interplay of diverse ideas which would enable the public to act as an effective watchdog over government.¹⁴⁸ They also believed that a free press would promote constructive change by providing the public with necessary information on important issues.¹⁴⁹ Correlative to these first amendment objectives is the public right to access to ideas.¹⁵⁰ The public must have facts and opinions bearing on public issues, and the task of reporting to the public falls principally on journalists of the organized media.¹⁵¹

However, with accelerated social change and the increasing complexity of public issues, journalists alone are unable to meet the great need for in-depth, analytical reporting.¹⁵² In response to this need, academic researchers and scholars have assumed functions which were formerly the province of the journalist.¹⁵³ Scholarly research provides the public with historical and analytical perspective on issues of public concern in government¹⁵⁴ and private

148. See *The Public Scholar*, *supra* note 3, at 1009. In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court noted: "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas. . . . That right may not constitutionally be abridged. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . ." 395 U.S. 367, 390 (1969). "[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

149. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). See *Smith v. California*, 361 U.S. 147, 150 (1959); *Roth v. United States*, 354 U.S. 476, 484 (1954).

150. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); Note, *Branzburg Revisited: The Continuing Search for a Testimonial Privilege for Newsmen*, 11 *TULSA L.J.* 258, 260 (1975).

151. *The Public Scholar*, *supra* note 3, at 1009-10.

152. *Id.*

153. *Id.* The term *public scholar* has been adopted by some authorities to describe those researchers, academicians, and others who engage in scholarly research and investigation of public issues. *Id.* at n.102. See note 3 *supra*.

154. In *United States v. John Doe* (Appeal of Samuel L. Popkin), the public issue in question was that of United States military involvement in Vietnam. 460 F.2d 328 (1st Cir. 1972).

industry.¹⁵⁵ Academic researchers perform an important first amendment function by providing information to the public which the journalists are unable to provide.¹⁵⁶ As Judge Renfrew aptly stated in *Richards*, the research of society's scholars "has the unique potential to facilitate change through knowledge."¹⁵⁷ Thus, the free press guarantee should extend to academic researchers.

Does the Public Interest Warrant a Privilege for Academic Researchers' Confidential Sources?

The qualified newsman's privilege finds its roots in judicial recognition of the adverse impact compulsory disclosure of confidential sources may have on the press' first amendment functions. Many courts, mindful of the first amendment's preferred position in "the pantheon of freedoms,"¹⁵⁸ have found that compelled disclosure of confidential sources threatens a newsman's ability to secure information that is made available only on a confidential basis.¹⁵⁹ Compulsory disclosure of confidential news sources impedes first amendment functions in two ways: by drying up sources of confidential information and by deterring future investigation and information gathering which rely upon confidential sources.¹⁶⁰ Compulsory disclosure of academicians' confidential sources interferes with academicians' first amendment functions in a strikingly similar fashion.

Drying Up Sources

A strong argument supporting the newsman's privilege is that informants will be reluctant to come forward with closely held in-

155. See *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. at 390. The public today is vitally concerned with all areas of energy and environmental policy, especially as it may be affected by decisionmaking within the private sphere. See generally Binder, *The Energy Crisis, The Environment and the Consumer: A Solomonian Task*, 1 OHIO N. L. REV. 215 (1974); Hildreth, *The Coast: Where Energy Meets the Environment*, 13 SAN DIEGO L. REV. 253 (1976).

156. See *The Public Scholar*, *supra* note 3, at 1010 n.102.

157. 71 F.R.D. at 390.

158. *Baker v. F & F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

159. *Id.* at 782. See *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 508 (E.D. Va. 1976); *Loadholtz v. Fields*, 389 F. Supp. 1299, 1300 (M.D. Fla. 1975); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1397 (D.D.C. 1973). *Accord*, *Brown v. Commonwealth*, 214 Va. 755, 756-77, 204 S.E.2d 429, 430 (1974).

160. See *The Public Scholar*, *supra* note 3, at 1012 & 1015; Note, *Reporter's Privilege—Guardian of the People's Right to Know?*, 11 NEW ENG. L. REV. 405, 406 (1976); *The First Amendment in Jeopardy*, *supra* note 11, at 419.

formation in the absence of a guarantee of anonymity.¹⁶¹ That reluctance may be attributed to both the informant's fear that a subpoenaed newsman might reveal his identity under judicial order and the knowledge that a newsman who does not betray the confidence might go to jail.¹⁶² Given that fear and knowledge, the informant may keep the information to himself.¹⁶³ In *In re Caldwell*,¹⁶⁴ one of the *Branzburg* trio of cases,¹⁶⁵ the district court found that "confidential relationships . . . are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing and publishing the news . . ." ¹⁶⁶ Furthermore, a number of journalists submitted affidavits supporting Caldwell's position before the courts. These affidavits stated that sources often gave information only on the condition that their identity remain confidential.¹⁶⁷ They also stated that sources occasionally refused to provide information because of the fear of disclosure by legal process.¹⁶⁸ Thus, the protection of the identity of a news source is often essential to the source's willingness to give information to the press.¹⁶⁹

161. Note, *Branzburg Revisited: The Continuing Search for a Testimonial Privilege for Newsmen*, 11 TULSA L.J. 258, 260 (1975).

162. *Id.* See *Newsmen's Privilege: Hearings on H.R. 215 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 130 (1975) (letter from Irwin Karp to Hon. Robert W. Kastenmeier).

163. Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 46 (1969).

164. 311 F. Supp. 358 (N.D. Cal.), *aff'd*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

165. See note 71 *supra*.

166. 311 F. Supp. at 361.

167. The affidavit of Walter Cronkite, a CBS network television reporter, is one example of the views expressed. "In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and, equally important, in assessing the importance and analyzing the significance of public events." 408 U.S. at 730. Affidavits expressing the same general view were submitted by newsmen Gerald Fraser, Thomas Johnson, John Kifner, Timothy Knight, Nicholas Proffitt, Anthony Ripley, Wallace Turner, Gilbert Noble, Anthony Lukas, Martin Arnold, David Burnham, Jon Lowell, Frank Morgan, Min Yee, Eric Sevareid, Mike Wallace, Dan Rather, and Marvin Kalb. *Id.* at 736 n.20.

168. 408 U.S. at 736 n.20.

169. *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 84 (E.D.N.Y. 1975). See Gordon, *The Confidences Newsmen Must Keep*, 10 COLUM. JOURNALISM REV., Nov./Dec. 1971, at 15, 19. Mr. Justice Stewart, dissenting

Although the Supreme Court considered such affidavits as self-serving,¹⁷⁰ a number of courts since *Branzburg* have found that the drying-up effect represents a real threat to news gathering.¹⁷¹ The language in *Gilbert v. Allied Chemical Corp.*¹⁷² is notable:

The Court recognizes that to effectively gather information for the conveyance of news to the public, it is often necessary for reporters to make assurances either not to identify the source . . . or to broadcast or publish only part of the information obtained, or both. If a news station or newspaper is forced to reveal the confidences of their reporters, the sources so disclosed, other confidential sources of other reporters, and potential confidential sources will be significantly deterred from furnishing further information to the press.¹⁷³

Information lost to the press because of the threat of compulsory disclosure of confidential sources is information lost to the public.¹⁷⁴

The same considerations apply with equal weight to academic researches and scholars. Scholars, in the course of their studies, rely to a significant extent on other individuals for information.¹⁷⁵ In many cases, if the scholar's ties with his sources are severed, no alternative sources exist for the information sought.¹⁷⁶ Yet, these ties can be extremely delicate and confidential in nature, readily destroyed by indiscriminate use of the subpoena power to compel disclosure.¹⁷⁷ As the facts in *Richards* indicate, Professor Roberts was able to obtain the interviews with Pacific Gas & Electric's employees only by pledging confidentiality.¹⁷⁸ If Professor Roberts breached his pledge, particularly if to the detriment of Pacific Gas & Electric, it is unlikely that the company would be a fruitful source of information for future researchers. Therefore, compulsory disclosure for researchers may have as great a drying-up effect as for members of the organized press.

in *Branzburg*, stated that "[w]e can and must accept the evidence . . . that overwhelmingly supports the premise that deterrence will occur with regularity in important types of news-gathering relationships. 408 U.S. at 736.

170. 408 U.S. at 694.

171. *E.g.*, *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 84 (E.D.N.Y. 1975); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1396 (D.D.C. 1973).

172. 411 F. Supp. 505 (E.D. Va. 1976).

173. *Id.* at 508. *Accord*, *Gordon, The Confidences Newsmen Must Keep*, 10 COLUM. JOURNALISM REV., Nov/Dec. 1971, at 15, 19.

174. *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 508 (E.D. Va. 1976).

175. *The Public Scholar*, *supra* note 3, at 1012. *Accord*, *United States v. John Doe* (Appeal of Samuel L. Popkin), 460 F.2d 328, 333 (1972).

176. *The Public Scholar*, *supra* note 3, at 1013.

177. *Id.*

178. 71 F.R.D. at 389.

The Deterrent Effect

Another argument favoring the newsman's privilege is that compulsory disclosure of confidential sources deters future investigation by intimidating the newsman forced to disclose and other newsmen who view the compelled disclosure as a threat to themselves.¹⁷⁹ Faced with a subpoena, the newsman is confronted with the dilemma of breaching the source's confidence or being held in contempt.¹⁸⁰ Many newsmen have accepted jail sentences to preserve their sources of information.¹⁸¹ However, the price of preserving confidentiality includes not only a jail sentence but also the financial costs of fighting subpoenas in the courts¹⁸² and employers' loss of their news employees' services.¹⁸³ The newsman must choose between obedience to the courts and the ethical scruple forbidding a breach of confidence.¹⁸⁴ To avoid such a dilemma, some news gatherers may refrain from collecting or publicizing information available only from confidential sources.¹⁸⁵ Consequently, such compulsory disclosure of confidential information sources chills the exercise of first amendment expression by such news gatherers.¹⁸⁶ Additionally, the more controversial the subject

179. See *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1397 (D.D.C. 1973); *The Public Scholar*, supra note 3, at 1017; *The First Amendment in Jeopardy*, supra note 11, at 419.

180. Note, *Branzburg Revisited: The Continuing Search for a Testimonial Privilege for Newsmen*, 11 TULSA L.J. 258, 260 (1975).

181. Murasky, supra note 10, at 863. Case law demonstrates that newsmen have been willing in the past to exhaust their legal remedies and then to go to jail, if necessary, to protect their confidential sources. See Comment, *Constitutional Law—First Amendment—Right of Newsmen Not to Reveal Confidential Sources of Information to a Grand Jury*, 11 DUQ. L. REV. 657, 658 (1973).

182. Fred Graham, legal correspondent for CBS News, related that when he was subpoenaed by Spiro Agnew—a subpoena lasting for only 10 days—his attorney's bill was twice his annual salary. ABA CRIM. JUSTICE SECTION, *THE FUTURE OF "NEWSMAN'S PRIVILEGE": The Whither & Whether of Disclosure for News-Persons*, Aug. 15, 1974, at 13 (comments of Fred Graham).

183. Murasky, supra note 10, at 864.

184. Accord, Gordon, *Newsman's Privilege Viewed in Context of Court Cases*, VA. L. WEEKLY, Apr. 19, 1974, at 2, col. 3. Professor Gordon stated that "threats of punishment usually don't work—newsmen have almost always taken the attitude that a promise of confidentiality must be honored even at the cost of going to jail." *Id.*

185. See note 188 *infra*.

186. See authorities cited note 179 *supra*.

of the report, the more likely it is that the newsman will be subpoenaed to provide information.¹⁸⁷ Hence, the newsman is inhibited from seeking out sources of information at the outset.¹⁸⁸

The deterrence argument has been accepted by some courts. In *Baker v. F & F Investment*,¹⁸⁹ the court of appeals was concerned with the deterrent effect that compulsory disclosure of the journalist's confidential source would have on other undercover investigative reporting.¹⁹⁰ Similarly, the court in *Loadholtz v. Fields*¹⁹¹ accepted the newsman's argument that his attendance at a deposition would necessarily have a chilling effect on his functioning as a reporter and thus upon the flow of information to the public.¹⁹² The chilling effect of compulsory disclosure of confidential sources will work as harshly on academic researchers and scholars as it does on members of the organized press.¹⁹³ Certainly the academic researcher in *Richards*¹⁹⁴ is in as great a dilemma as any reporter who is faced with a judicial demand for confidential information. In each case the detrimental effect is the same—a restriction on the free flow of information about public issues.¹⁹⁵

CONCLUSION

Shortly after the decision in *Branzburg*, one commentator noted that several centuries ago journalists had their ears lopped off for

187. *The First Amendment in Jeopardy*, *supra* note 11, at 421. See Murasky, *supra* note 10, at 864-65.

188. A number of instances have been documented in which news stories were cancelled or abandoned because of the lack of guarantee of confidentiality. Some of these cases are as follows:

CBS News had arranged an interview with a woman who said she would disclose how she had cheated on welfare, if her identity would remain confidential. CBS declined to so promise, and the interview was cancelled.

ABC News declined an opportunity to conduct filmed interviews with the Black Panthers in their headquarters because the network was unable to offer a firm promise of confidentiality.

The *Baton Rouge State-Times* was unable to follow up a public official corruption story after a key source expressed fear that his newsman contact would be subpoenaed.

The *Boston Globe* was unable to continue investigation of official corruption because sources told the newspaper investigative reporters they were afraid of being identified. THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, PRESS CENSORSHIP NEWSLETTER No. I, at 5-6 (Mar./Apr. 1973).

189. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

190. *Id.* at 782.

191. 389 F. Supp. 1299 (M.D. Fla. 1975).

192. *Id.* at 1300.

193. See *The Public Scholar*, *supra* note 3, at 1015-17.

194. See text accompanying notes 15-26 *supra*.

195. *Accord*, *The Public Scholar*, *supra* note 3, at 1023.

publishing libel.¹⁹⁶ He contended that today they continue to be denied the right to hear confidences, although in a subtler way. However, the trend of post-*Branzburg* decisions shows growing recognition of a qualified first amendment privilege for the confidential newsman-source relationship. The privilege is necessary to provide a free flow of information to the public.¹⁹⁷ As Mr. Justice White stated: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."¹⁹⁸

Under the Federal Rules of Civil Procedure, courts have the discretion to limit discovery when they find that the costs to society in compelling disclosure of a confidential source outweigh the countervailing need for the information. Moreover, the social interest in a free press justifies extension of a constitutional privilege to academicians who serve valuable first amendment functions. Society has a profound interest in the research of its scholars who provide a free flow of information and ideas to its "marketplace." This interest should not be impaired by the indiscriminate use of judicial authority to compel disclosure of confidential sources.

HOWARD GRAY CURTIS

196. Comment, *The Newsman's Privilege After Branzburg v. Hayes: Whither Now?*, 64 J. CRIM. LAW & CRIM. 218, 239 (1973).

197. Gordon, *Newsman's Privilege Viewed in Context of Court Cases*, VA. L. WEEKLY, Apr. 19, 1974, at 3, col. 5.

198. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).