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Chipping Away at the First Amendment: Newspapermen Must Disclose Sources

Michael F. Buchicchio

CHIPPING AWAY AT THE FIRST AMENDMENT: NEWSPAPERMEN MUST DISCLOSE SOURCES

INTRODUCTION

THOMAS JEFFERSON WROTE, "Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter."[1]

He understood that a free people are better off with no government at all than with a government and no watchdog. Nor did he retract after he had been abused as President by irresponsible newspapers. Jefferson felt that all avenues of truth should remain open, and one of the most effective means was freedom of the press. By forcing newsmen to reveal their confidential sources, the Supreme Court has obstructed an important intersection of this avenue.

This Comment will explore the background and history of the journalistic privilege in light of case law and early constitutional argument. It will analyze the recent Supreme Court decisions denying a privilege to newsmen to conceal their sources, and attempt to explain how this privilege can best be maintained.

I. BACKGROUND

(a) Common Law

The common law recognized only four relationships which gave rise to privileged communications: attorney-client,[2] husband-wife,[3] informer-government[4] and juror-juror.[5] Two others, physician-patient[6] and clergyman-penitent,[7] have received almost universal statutory implementation. Since this privilege is an exception to the general rule which requires "disclosure of all information by witnesses in order that justice may prevail,"[8] the tendency has been to restrict the scope of existing privileges rather than to create new ones. Since every person owes a duty to the community to give any testimony he is capable of, the privileged communication has not met with widespread approval.

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1 E. CHANNING, THOMAS JEFFERSON, PRESIDENT 1743-1826 (1969).

2 Alexander v. United States, 138 U.S. 353 (1891); Graver v. Schenley Products Co., 26 F. Supp. 768 (S.D.N.Y. 1938).

3 People v. McCormack, 278 App. Div. 191, 104 N.Y.S. 2d 139 (1951).

4 Worthington v. Scribner, 109 Mass. 487 (1872).

5 Clark v. United States, 289 U.S. 1 (1933).

6 Edington v. Mutual Life Insurance Co., 67 N.Y. 185 (1876).

7 Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958).

8 People *ex rel.* Mooney v. Sheriff of New York City, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936).

Although newsmen obtain much of their material from confidential informants, they rely today at their own peril. For years newsmen in this precarious position have attempted to sway the courts that a common law privilege for newsmen to conceal confidential sources should be recognized. Their arguments have centered around grounds of public interest in the flow of news and an analogy to traditional privileges, as discussed above. No court has sustained the desired privilege at common law.[9]

The common theme of courts and commentators rejecting a common law privileged relationship for newsmen is that it does not satisfy Professor Wigmore's four fundamental conditions necessary for the traditional establishment of a privilege against the disclosure of communication. The four criteria are:

1. The communication must originate in a confidence that they will not be disclosed.
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.[10]

These four criteria have caused considerable confusion in the consideration of privilege statutes and of the constitutional argument. Whether or not these conditions are obtained for a newsman depends on an understanding of what interests need protection and how those interests are affected in the absence of a privilege. The newsmen are not claiming a privilege to conceal the basic information communicated to them by the informant, but desire this privilege to conceal only the identity of the source and nothing more. It is highly doubtful that a person's identity—simply his name—fits the notion of "communication" as it is advanced by Wigmore. Even if the informant's name is a "communication," the four conditions justifying the privilege still exist: (1) the name was communicated on the understanding it would not be disclosed; (2) the relation, for public revelation of vital information which the informant will not disclose unless he can be guaranteed anonymity, requires the confidentiality; (3) the community has a strong interest in fostering the relationship because of its concern for the wide dissemination of news; (4) the injury to the relation and consequent dissemination of news outweighs, in many circumstances, the interest in disposal of litigation.

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[9] Brewster v. Boston Herald Traveler Corp., 20 F.R.D. 416 (D.C. Mass. 1957).
[10] 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

Although these arguments have been rejected, newsmen have achieved some success in obtaining their privilege through various state statutes.

(b) Privilege by Statute

At the present time, 23 states have enacted statutes[11] which appear to create a right of newsmen not to divulge confidential sources of information. A typical statute is that of New Jersey which reads:

> [A] person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished or delivered.[12]

These statutes create a statutory right to reveal the contents of a communication without being required to reveal the name of its auhor. The statutes do not expressly permit such employees to refuse to testify as to information confidentially received. There are but a few cases interpreting these statutes. In a Pennsylvania decision, *In re Taylor*,[13] which involved the refusal by the editor of *The Philadelphia Bulletin* to obey a subpoena *duces tecum* ordering him to bring records of confidential interviews held with a city official whose activities were being investigated by a grand jury for possible wrong doing, the court found that the words "source of information" in the Pennsylvania statute embrace documents as well as the identity of the parties. In its opinion, the court viewed the purpose of the statute with favor and held it should be liberally construed.

A contrary view was taken by the New Jersey Supreme Court. Although not faced with the same issues presented in *Taylor*, the New Jersey court in *State v. Donovan*[14] held that the statute should be strictly construed. From this negative posture, it would appear that the New Jersey courts will resist any extension of the coverage of the statute beyond its plain words. Therefore, it is doubtful that the New Jersey statute as presently worded will be interpreted as protecting information confidentially received as well as the source of such information.

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[11] ALA. CODE RECOMPILED tit. 7 § 370 (1970); ALASKA STAT. § 9.25.150 (1971); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1972-73); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE ANN. § 1070 (West 1966); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1969); LA. REV. STAT. § 45:1451-54 (Cum. Supp. 1972); MD. ANN. CODE art. 35 § 2 (1971); MICH. STAT. ANN. § 28.945(1) (1954), M.C.L.A. § 767.5a; MONT. REV. CODES ANN. tit. 93, ch. 601-2 (1964); NEV. REV. STAT. § 48.087 (1970); N.J. REV. STAT. § 2A, 84A-21 (Supp. 1969); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1969); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1970); OHIO REV. CODE § 2739.04-.12 (Page Supp. 1970); PA. STAT. ANN. tit. 28 § 330 (Supp. 1973).

[12] N.J. REV. STAT. § 2A:84A-21 (Supp. 1970).

[13] 412 Pa. 32, 193 A.2d 181 (1963).

[14] 129 N.J.L. 478, 30 A.2d 421 (1943).

Although the scope of these modern statutes is yet undefined, the decisions interpreting them serve to reiterate the prevailing common law rule that a newspaperman must answer pertinent questions and disclose sources of information when called to testify. It is the statute alone which permits a newsman to remain silent in the face of judicial interrogation. Until such time as state courts undertake the actual interpretation of the question, the potential breadth of these statutes will remain a matter of pure conjecture.

II. IN THE BALANCE

(a) Duty to Disclose Testimony

A basic rule of our judicial system is that witnesses properly summoned before a court must give their testimony unless there exists a special privilege or exemption.[15]

Wigmore summarized the history of this principle and states the current approach as follows:

> For more than three centuries it has now been recognized as a fundamental maxim that the public has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give testimony that one is capable of giving, and that any exceptions which may exist are distinctly exceptional. . . .[16]

It appears a court can easily reach a fair consideration of the issues through compulsory testimony. The Supreme Court has emphasized the importance of compelling testimony.[17] It has been held that the power extends to grand juries and to the taking of depositions.[18] The power has also been held applicable to legislatures.[19]

When a person refused to testify in any of these situations, he could be brought by the party seeking information before the court or legislature, ordered to testify, and be found guilty of contempt and jailed if he refused. It is clear, then, that the power of courts to compel a witness to answer questions and to cite him for contempt if he refuses, does not violate the witness' constitutional right of freedom of speech.

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[15] 8 WIGMORE, *supra* note 10, at § 2190-92.

[16] *Id.* at § 2192.

[17] Blair v. United States, 250 U.S. 273, 281 (1919):

> [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.

See also, e.g., Blackmer v. United States, 284 U.S. 421 (1932).

[18] *E.g.*, Shillitoni v. United States, 384 U.S. 364, 370 (1966) and cases cited therein.

[19] *E.g.*, Barenblatt v. United States, 360 U.S. 109 (1959).

But it is doubtful that a litigant in a civil action has a constitutional right to compulsory testimony of witnesses.[20]

A defendant in a criminal action has explicit guarantees under the sixth amendment.[21] In situations not covered under the sixth amendment, however, it may be that there is no constitutional authority of litigants and courts to compel testimony but rather the power is an English common law principle adopted by the American judicial system.[22] The duty to testify and the power to compel testimony are not absolute, but courts are reluctant to find exceptions.

(b) Free Press-News Gathering

The constitutional argument has been that the first amendment[23] is broad enough to protect the dissemination of news against restrictions on news gathering, and that this protection outweighs the competing interest in compulsory testimony. While there are no extensive records of what was meant by the phrase "freedom of the press," the Supreme Court has made it clear that first amendment guarantees are to give broader protection than what was available in England in the late 18th century.[24] The Court has claimed repeatedly that the first amendment protection of freedom of speech and of the press is to be given broad and sweeping coverages,[25] and it has invalidated attempts to qualify the coverage while finding a variety of restraints to be unconstitutional.[26]

The reason which the Court most often expresses for a broad reading of the first amendment is that public discussion and debate of issues, and criticism and investigation of public bodies are essential to a free society.[27]

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20 *See generally* 61 MICH. L. REV. 184, 185 n. 5 (1962).

21 "In all criminal prosecutions, the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor...." U.S. CONST. amend. VI; the sixth amendment applies to the states, Pointer v. Texas, 380 U.S. 400 (1965).

22 *See* WIGMORE, *supra* note 10, at § 2192.

23 "Congress shall make no law... abridging the freedom... of the press...."

24 *See, e.g.*, Bridges v. California, 314 U.S. 252, 262-65 (1941); Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940); Grosjean v. American Press Co., 297 U.S. 233, 245-6 (1936); Z. CHAFEE, FREEDOM OF SPEECH AND PRESS, 10, 42-44 (1955); 6 WRITINGS OF JAMES MADISON 1790-1802, 387-91 (1906).

25 *E.g.*, Associated Press v. United States, 326 U.S. 1, 20 (1945); Bridges v. California, 314 U.S. 252, 265 (1941).

26 *E.g.*, Pennekamp v. Florida, 328 U.S. 331 (1946)—(contempt citation); Lovell v. City of Griffin, 303 U.S. 444 (1938) (City nuisance ordinance).

27 "The free press has been a mighty catalyst in awakening public interest in government affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences...." Estes v. Texas, 381 U.S. 532, 539 (1965).

The first amendment, however, is not absolute, and if there are strong policy reasons for restrictions, protection is subject to compromise.[28]

There is no indication in writings of the times that the framers and supporters of the Bill of Rights intended "freedom of the press" to include news gathering. Clearly, the first amendment covers more than direct restraints on publication.[29]

The Supreme Court has emphasized that it is essential "not to limit the protection of the right to any particular way of abridging it."[30] Morover, the exclusion of news gathering from first amendment coverage is unresponsive to the policy of the amendment. Forced disclosure of certain relationships may interfere with the exercise of first amendment liberties as effectively as direct governmental rstraints against such exercise.[31] If newspapers are restrained in gathering news, obviously they cannot print the news which they were prevented from gathering.[32] Nevertheless, the courts in *Torre* and *Goodfader* doubted whether freedom of the press covered news gathering.[33] However, both hypothesized that the first amendment did apply and, thus, were forced to reach their conclusions through a subsequent superficial weighing of interests.

Subsequent to *Torre* and *Goodfader*, the Supreme Court in *Lamont v. Postmaster General* held that the first amendment does protect the right to receive information.[34] Acting pursuant to a federal statute, Post Office officials established a system whereby, whenever a local post office received for final delivery an item of "communist political propaganda," it would hold the item and send a notice to the addressee. If he desired to receive the item, the addressee simply had to send in a request. All requests were honored and no lists of those desiring the propaganda were kept. According to the Post Office, the sole purpose of the system was to prevent propaganda from being delivered to those persons who did not want to receive it. The Supreme Court held that the statute as interpreted and applied in such a system was unconstitutional. In a concurring

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[28] Libel and obscenity are not protected by the first amendment. Ginzburg v. United States, 383 U.S. 463 (1966); Roth v. United States, 354 U.S. 476 (1957).

[29] *E.g.*, Winters v. New York, 333 U.S. 507 (1948). It protects distribution and circulation of what is published. *See* Smith v. California, 361 U.S. 147 (1959).

[30] Grosjean v. American Press Co., 297 U.S. 233, 249 (1936), *citing* Near v. Minnesota, 283 U.S. 697, 716 (1931).

[31] *See* Shelton v. Tucker, 364 U.S. 479 (1960).

[32] Although restraint is not the purpose but rather a secondary effect of the denial of the privilege, the operative effect is restraint on news. The restraint need not be direct to be abridgement under the Constitution. American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950).

[33] Garland v. Torre, 259 F.2d 545 (2nd Cir. 1958); *In re* Goodfaders, 45 Hawaii 317, 367 P.2d 472 (1961).

[34] Lamont v. Postmaster General, 381 U.S. 301 (1965).

opinion, Mr. Justice Brennan was more explicit and agreed that, "[T]he first amendment 'necessarily protects the right to receive [information].' "[35]

Of course some restraint on news gathering is necessary, reasonable and constitutional. For example, courts can bar newsmen along with the general public from the courtroom.[36] In *Estes v. Texas*,[37] the Supreme Court held that the trial court should have barred television from courtroom proceedings. The Court did not say that news gathering is outside the scope of the first amendment coverage, but rather that overriding interests may justify limitations on news gathering.

On the other hand, the popular analogy between barring reporters from courtrooms to assure fair trials and compelling them to disclose sources to assure fair trial is inappropriate. In the case of restriction of news gathering during a trial, the harm done by gathering is immediate. If information is gathered and published, the trial is upset by extraneous factors which may influence the court and jury. Judicial process has been impaired and an individual litigant may have been injured. But in the case of the confidential source, no immediate harm is caused by the newsmen talking to informants and then publishing the information. Indeed this activity may be in the social interest because the public is better informed. A recent case, *Seymour v. United States*,[38] recognized this distinction. While upholding a contempt conviction of a photographer who violated a standing court order prohibiting courtroom photographs, the court assumed that where there was no interference with the judicial process restrictions on news gathering would violate the first amendment.

To argue that there should be no privilege at a later trial or other judicial or legislative proceeding ignores the fact that if the reporter had been barred from his source there would have been no potential testimony anyway.

Analysis of the Supreme Court's application of the first amendment to other situations reinforces the argument that there should have been at least by analogy a qualified protection for newsmen to conceal confidential sources. In *N.A.A.C.P. v. Alabama*,[39] the Supreme Court held that a state statute requiring the N.A.A.C.P. to reveal its members—in this case to file membership lists with the state attorney general—violates rights of freedom of speech and assembly made applicable to the states under the 14th amendment. The Court reasoned that forced disclosure of

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[35] *Id.* at 308; *quoting* dictum from Mortin v. City of Struthers, 319 U.S. 141, 143 (1943).

[36] United Press Ass'n v. Valenti, 308 N.Y. 71, 123 N.E. 2d 777 (1954).

[37] Estes v. Texas, 381 U.S. 532 (1965).

[38] Seymour v. United States, 373 F.2d 629 (5th Cir. 1967).

[39] N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

members might discourage persons from exercising the right to associate. Similarly, requiring newsmen to reveal sources would discourage sources from transmitting news and consequently would inhibit the free flow of news to the public in violation of the first amendment protection.[40] *N.A.A.C.P. v. Alabama* is distinguishable, however, on two points. First, the Court there accepted the notion that the N.A.A.C.P. was not asserting rights of its own, but rather rights of the individual members and potential members whose identities it sought to conceal. Analogously, the newsmen situation doesn't assert that the informants have a constitutional right to have heir identities concealed; rather the policy concern is the public interest in the flow of news. Nevertheless, espcially in light of *Lamont,*[41] th Supreme Court could easily have found acceptable a newspaper's or newspaperman's standing to assert the rights of its individual readers and potential readers to have access to information. This position would reflect the notion reiterated in *Time, Inc. v. Hill* where the Supreme Court upheld a news magazine's, not a reader's, assertion of freedom of the press, stating that, "those [constitutional] guarantees are not for the benefit of the press so much as for the benefit of all of us."[42]

Second, in the *N.A.A.C.P.* case, the Court rejected as weak and insufficient the state's justification that it wanted to determine whether or not the organization was engaged in interstate commerce in violation of the state corporation statute. The Court pointed out that compliance with the request for names would not aid that determination. In some circumstances, requiring the newsmen to divulge the name of the informant would not further the underlying purpose of assisting courts, grand juries or legislative committees in their determination.

In *New York Times v. Sullivan*[43] the Supreme Court noted that in considering common law policies, it gave special weight to the first amendment when public officials are concerned. In holding that persons could be held responsible for libel of public officials only where erroneous information was published "with actual malice," the Court displayed a willingness where the first amendment is concerned to limit rights which a litigant otherwise would have.[44] The Supreme Court's extension of *The New York Times* doctrine in *Time, Inc., v. Hill*[45] was and may still be

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[40] 259 F.2d 545, 549 (dictum), *cert. denied,* 358 U.S. 910 (1958); Comment, *Confidentiality of News Sources Under the First Amendment,* 11 STAN. L. REV. 541-46 (1959).

[41] 381 U.S. 301.

[42] Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

[43] New York Times v. Sullivan, 376 U.S. 254 (1964).

[44] The case turned on the public officials nature of the libel, not on the fact that a newspaper was involved.

[45] 385 U.S. 374, 389.

one of the strongest arguments for recognition of the newsman's privilege. In that case *Life Magazine* published an article which intended to and did give the erroneous impression that a fictional play, "The Desperate Hours," mirrored the experience of the Hill family when they were held hostage in their suburban home by three escaped convicts. In the play, the father and son are beaten and the daughter is subjected to verbal sexual insults, but in fact, these events did not occur. Hill sued the magazine for invasion of privacy and, on appeal, the Supreme Court held for the defendant magazine. In setting the standard that a newspaper could be liable for invasion of privacy through error or in a story only where the error was made with "knowledge of reckless falsity," the Court noted:

> We create grave risks of serious impairment of the indispenable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in the news article with a person's name, picture or portrait, particularly as related to non-defense matter.[46]

Thus in *Time, Inc.*, the family suffered injury to its reputation but was denied recovery in a civil suit because of the danger to the free flow of news. Analogously, the injury to a litigant in a civil action caused by this inability to force a newsman to identify his confidential source could be justified by the superior interest in the dissemination of news.

Although the Supreme Court and lower courts have considered the issue of governmental informers to be an evidentiary question and not a constitutional one under the first amendment, the policies regarding government informers and newsmen informants are parallel. Wigmore emphatically recognizes government informers, concluding that "its soundness cannot be questioned."[47] He observes that disclosures from informers are discouraged if informer's identities are disclosed, for they, then would be subject to great risks and that "law enforcement agencies often depended on professional informers to furnish them with a flow of information about criminal activities."[48]

The Supreme Court has also realized the need for such privilege.[49] It has been noted that "public policy forbids disclosure of an informant's identity unless essential to the defense,"[50] and that "the purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement."[51] The same analysis fits the newspaperman's

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[46] 355 U.S. at 389.

[47] WIGMORE, *supra* note 10, at § 2374.

[48] *Id.*

[49] McCray v. Illinois, 386 U.S. 300, 311-312 (1967); Rovairo v. United States, 353 U.S. 53, 59 (1957) (dictum).

[50] Scher v. United States, 305 U.S. 251, 254 (1938).

[51] Rovairo v. United States, 353 U.S. 53, 59 (1957).

privilege. Disclosures from informants would be discouraged if their identities are revealed. The purpose of the newsman's privilege should be the furtherance and protection of the public interest in the free flow of news. Therefore public policy could also forbid disclosure of an informant's identity unless essential to the defense. The analogy is even more powerful when the source has uncovered public misdoings. In that case, the newsman's privilege could further not only the public's right to know, but also its concern in exposure of public wrongdoing and in effective law enforcement. It is through the press that crimes of public officials which otherwise might go undisclosed are revealed.

III. EVALUATION AND REJECTION OF FIRST AMENDMENT PRIVILEGE FOR NEWSMEN

(a) As discussed previously, since reporters met with so little success in asserting a common law privilege, newsmen in recent cases have maintained that the right to conceal their sources is constitutionally guaranteed.

In 1958, Judy Garland brought a civil action against the Columbia Broadcasting System for breach of contract and for defamation.[52] In pre-trial discovery proceedings, Miss Garland sought the name of the CBS "network executive" whose allegedly defamatory statements had been published in Marie Torre's gossip column in the *New York Herald Tribune*. Miss Torre refused to answer deposition questions seeking the name of her source, and when she subsequently disobeyed a federal district court order to reveal the name, she was found in contempt of court.[53] An appeal to the Court of Appeals of the second circuit Mr. Justice (then Judge) Stewart, presiding at *Garland v. Torre*[54] as the Circuit Justice, accepted 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."[55] But, pointing out that the first amendment is not absolute and that "the fair administration of justice" underlies the well-established policy that witnesses shall testify. Stewart held that where the identity of her source went to the heart of the plaintiff's claim, "The Constitution conferred no right to refuse to answer."[56] The Supreme Court denied

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[52] 259 F.2d 545.

[53] Miss Torre argued three grounds to justify her refusal to testify: (1) Freedom of press; (2) Federal public policy; (3) Trial court discretion to limit the scope of pre-trial discovery under Federal Rule 30.

[54] 259 F.2d 545.

[55] *Id.* at 548.

[56] *Id.* at 558.

certiorari and Miss Torre served 10 days in jail. She was not called again by Miss Garland, although the process could have been repeated endlessly.[57]

In 1961 the Supreme Court again refused to review a case directly raising the issue of the newsmen's privilege. In a disbarment proceeding, the Supreme Court of Colorado sought to prove that in filing a petition with defamatory statements about a former chief justice of the Court, the accused attorney was motivated by a malicious purpose to achieve publicity for himself. The court wanted to know whether the attorney had given a copy to a reporter before filing petition, but the reporter in question refused to disclose whether the attorney was her source. The court held her in contempt and sentenced her to 30 days' imprisonment. As it turned out, the information apparently was not essential because the attorney was disbarred on other grounds.[58]

In that same year, the Supreme Court of Hawaii rejected a news photographer's assertion of a constitutional privilege. The party seeking the source's name was the plaintiff in a suit for reinstatement as a member of the Honolulu Civil Service Commission on the ground that her ouster at a meeting of the commission had been illegal and arbitrary. In deposition proceedings a news photographer admitted attending the ouster meeting, having received information from a confidential source that an attempt to dismiss the plaintiff was being contemplated. The photographer disobeyed an eventual court order to give the name of his source and was held in contempt of court. In contrast to *Torre,* the information here related to actions of public, not private, individuals and the identity of the source did not go to the heart of the litigant's claim. But in *In re Goodfader's*[59] appeal, the Supreme Court of Hawaii nevertheless relied heavily on the *Torre* case and affirmed the contempt conviction.

In another case, as part of the grand jury probe of criminal conduct and corruption by Philadelphia city officials, the district attorney sought tape recordings, written statements, memoranda of interviews, and other documents about an identified official which were held by the *Philadelphia Bulletin.* The president and the general manager of the paper refused to produce the documents citing a Pennsylvania statute that "no [newsman] shall be required to disclose the source of any information."[60] The Pennsylvania Supreme Court reversed in favor of the newsman by giving the statute a liberal reading to include the privilege to withhold documents even when the source has been identified otherwise. But the court brusquely denied the newsman's constitutional claim as

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57 Even though the CBS executive eventually revealed his identity, Miss Garland still lost the suit.

58 Murphy v. Colorado, 365 U.S. 843 (1961).

59 45 Hawaii 317, 367 P.2d 472 (1961).

60 PA. STAT. ANN. tit. 28, § 330 (1930).

devoid of merit.[61] More recently, the managing editor of the University of Oregon's student newspaper wrote an article concerning the use of marijuana by students at the university. She promised the students that if they permitted her to interview them for publication, she would not reveal their identity. Summoned before a grand jury, she refused to divulge the names of the persons interviewed and quoted in the article. Her first amendment plea was rejected in a 1968 decision by the Oregon Supreme Court which upheld a lower court order finding her guilty of contempt and fining her $300.[62]

The most recent decision which prior to reversal represented a significant expansion of the concept of freedom of the press was *Caldwell v. United States.*[63] A comparison between this decision and the later reversal proves elucidating. On February 2, 1970, a federal grand jury investigating possible breaches of federal criminal law by the Black Panther Party subpoenaed Earl Caldwell, a *New York Times* reporter specializing in the reporting of news concerning the Black Panthers. Caldwell was directed to appear and to bring notes and tape recordings of interviews reflecting statements made for publication by officers and spokesmen of the Black Panther Party. Caldwell protested the scope of the subpoena and a second subpoena was served which included a protective order, providing in general that the journalist could not be required to reveal confidential associations and information developed or received by him as a news gatherer (and in particular, information given to him by members of the Black Panther Party), unless such information had been given for public disclosure. It also offered Caldwell the right to consult with his counsel at any time during the proceeding. Despite the protective order, Caldwell refused to appear. His motion to quash the subpoena was denied and he was directed to appear subject to the protective order. In the meantime, the term of the old grand jury expired and a new grand jury was sworn in. On May 22, 1970, a new subpoena was served directing Caldwell's attendance and containing the protective provision of the first subpoena. Caldwell disregarded this subpoena as well, and for his failure to attend the grand jury proceeding was held in contempt of court.

Caldwell contended, and his contentions were supported by several amici curiae briefs,[64] that the privilege granted by the district court would not suffice to protect the first amendment interest at stake. Caldwell argued that the inevitable effect of the subpoenas will be to suppress vital

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[61] *In re* Taylor, 412 Pa. 32, 193 A.2d (1963).

[62] State v. Buchanan, 86 Ore. Ad. St. 81, 436 P.2d 729 (1968).

[63] Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

[64] Among the participants in these briefs were counsel for several branches of the American Civil Liberties Union, the Washington Post, the New York Times, and Newsweek.

first amendment freedoms—by driving a wedge of distrust and silence between the mass media and the militants and in the absence of compelling governmental interest not shown here,[65] his appearance before the grand jury should not be required. The court noted the suspicion of outsiders endemic to news sources like the Black Panther Party and the subtle nature of the journalist-informer relation, especially the often surreptitious manner by which the Panthers conduct their affairs. Thus, compelling testimony of confidential information before grand juries would result in an unbridgeable rift between the militant group and the press.

Moreover, pointing to the fragility of the relationship between the militant group and the press, the court recognized that fear of betrayal is compounded by a reporter's being called to testify behind closed doors of a grand jury proceeding. The uncertainty engendered by such secret proceedings could effectively render the journalist-Panther relationship non-existent. Therefore, judicial process destructive of rights cannot be used without the government's demonstrating a compelling need for the witnesses' presence.[66] In reaching its decision, the court utilized the balancing test above. Repeatedly, the court spoke of the necessity of balancing the rights at stake. For instance, after stating that first amendment rights are in jeopardy, the court remarked, "On the other side of the balance is the scope of the grand jury investigative power."[67]

Soon thereafter the court noted that "the question posed was whether, as a matter of law, the loss to grand jury . . . outweighs the injury to first amendment freedoms."[68] In this case the court held first amendment rights tipped the balance. The specific aspect of "freedom of the press" being weighed is the public's right to know. It was apparent that the court was not concerned with preserving Caldwell's relationship of trust with the Panther's for its own sake;[69] it was not worried about the "inevitable effect of the subpoenas . . . to suppress first amendment freedoms of Mr. Caldwell,"[70] rather, it was troubled by the prospect that the public has a first amendment right to the potential news stories (which stories could be lost by adherence to the subpoena) paramount to the right of the grand jury to compel attendance and testimony. Basically, this decision was in conformity with the line of "balancing" decisions

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65 434 F.2d at 1084.
66 Application of Caldwell, 311 F. Supp. 358 (1970).
67 434 F.2d at 1085.
68 *Id.*
69 *Id.* at 1084.
70 *Id.*

requiring the government to demonstrate a compelling and substantial interest if essential freedoms are to be curtailed or inhibited.[71]

The Ninth Circuit affirmed the district court's finding that the government, in Caldwell, had shown no compelling need for the testimony.[72] It therefore determined that the applicant as the medium for preserving the public's first amendment right, was entitled to a qualified privilege.

However, the qualified privilege granted was to be only an ephemeral privilege for newspapermen.

(b) Tipping Back the Balance.

In *Branzburg v. Hayes*,[73] the Supreme Court considered on first impression the claim that the first amendment affords newsmen a privilege to refuse to reveal to a grand jury information gathered from confidential sources.

In *Branzburg*, the Court held 5-4 in an opinion by Mr. Justice White that "the consequential but uncertain, burden on news gathering" created by compelling reporters to testify before a grand jury is outweighed by the public interest in "fair and effective law enforcement,"[74] a process in which the reporter may obtain a protective order limiting a grand jury investigation only when he can show that the grand jury is conducted in "bad faith" or for the purpose of disrupting his relations with his confidential law enforcement need.[75]

The Court identified as the "heart of the claim" pressed by the newsmen the view that the "burden on news gathering resulted from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information."[76] The bulk of the opinion accordingly marshalled a number of disparate arguments alternately evaluating the two sets of interests being weighed: some minimized the burden on the flow of news caused by grand jury subpoenas of newsmen; others stressed the presence and importance of countervailing government interests. The Court cited with approval past cases which suggested a first

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[71] DeGregory v. Attorney General, 383 U.S. 825 (1966); Gibson v. Florida Legislation Investigative Comm., 372 U.S. 539 (1963); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

[72] Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

[73] Branzburg v. Hayes, 408 U.S. 665 (1972).

[74] *Id.* at 690.

[75] Justice Stewart filed a dissenting opinion, joined by Justices Brennan and Marshall which reached the opposite conclusion: That first amendment interests in newsgathering outweigh the government interest in law enforcement and thus the Constitution should afford newsmen a qualified testimonial privilege before a grand jury. 408 U.S. at 725. Justice Douglas filed a separate dissenting opinion in which he argued that newsmen were entitled to an unqualified privilege since the protection of the first amendment is absolute. 408 U.S. at 711.

[76] 408 U.S. at 681.

amendment right to receive information.[77] The Court attempted to characterize the empirical evidence that press subpoenas deterred sources from confiding in newsmen as "speculative and divergent,"[78] and suggested reasons why some informants might continue to divulge information to reporters. The Court suggested three such reasons. Some informants may expect that the reporter will not be called or that he will not be compelled by the prosecution to testify if he objects. Others may be members of a dissident group whose desire for public exposure could outweigh any fear they may have that their confidences will be divulged to a grand jury. Still other informants, who are not themselves implicated in crime but might be fearful of reprisals by those whom their stories incriminate, may be willing to rely on law enforcement officials to protect them, much as police informers rely for protection upon the prosecutors.[79]

It is also argued that the traditional absence of a newsman's privilege had not historically dampened the free flow of news.[80] On the government interest side of the balance, the Court made two preliminary arguments suggesting that a newsman's privilege would clash with "public policy." It argued at some length that the common law and statutory history of the crime of misprison of felony[81] demonstrated that "concealment of crime and agreements to do so are not looked upon with favor.[82] Second, it argued that recognition of such a privilege would create a "private system of informers operated by the press"[83] not subject to any control comparable to that exercised by the courts and by elected law enforcement officials over the system of police informers. But the Court's control arguments on the government interest side concerned the interests served by the grand jury and its power to compel testimony. The Court stressed that the "investigation of crime by a grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen."[84] The Court found that safety to be a "compelling" government interest to which the practice of calling reporters to testify bore a "substantial relation."[85]

In the final portion of the opinion, the Court stressed directly the major issue which divided it from Justices Stewart, Brennan and Marshall

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77 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-390 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster General, 381 U.S. 301 (1965).

78 408 U.S. at 693-4.

79 *Id.* at 694-95.

80 *Id.* at 698-99.

81 *See* 18 U.S.C. § 4 (1964).

82 408 U.S. at 697.

83 *Id.* at 697-98.

84 *Id.* at 700.

85 *Id.* at 700-01.

who joined the dissent. This was the newsmen's claim of a qualified privilege requiring the government to make special showings of need before a grand jury could compel the testimony of any reporter who invoked the first amendment privilege. The argument for the imposition of such a requirement was based largely upon prior cases which required the government to show that an interference with first amendment interest was no broader than necessary to achieve permissible government ends.[86] Justice Stewart, relying on these cases, concluded that before compelling newsmen to testify, a court should require that the government make three showings: First, "That there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law;" second, "That the information sought cannot be obtained by alternative means less destructive of first amendment rights;" third, the government has a "Compelling and overriding interest in the information."[87]

The majority rejected a qualified privilege for three reasons. First, it reasoned that "[I]f newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a solution to the problem."[88] Only an absolute privilege would quell the fears of such sensitive sources. Second, the Court argued that the administration of a qualified privilege would present substantial practical and conceptual difficulties. Justice White predicated that in the administration of only qualified newsmen's privilege, the courts would have to define categories of newsmen so qualified for the privilege—a procedure seemingly in conflict with the traditional doctrine that freedom of press is enjoyed by all publishers whatever their size or quality. Furthermore, he argued that administering such a privilege would require distinguishing among different types of crime to determine when a government interest was compelling.[89] But the most important consideration persuading the Court to refuse to require preliminary showings of need was its view that the grand jury must be free to make its own determination of its need for evidence. The Court reasoned that to play its role as an instrument of law enforcement, the grand jury had to have access to everyman's evidence; it had to be able to proceed on the basis of clues, tips or rumors, and its examination of witnesses could not be obstructed by requiring that a foundation for its questions be laid whenever a newsman claimed that his access to confidential sources would be jeopardized if he were compelled to testify.[90]

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[86] *See, e.g.*, Elfbrandt v. Russel, 384 U.S. 11, 18 (1966); N.A.A.C.P. v. Alabama, 377 U.S. 288, 307 (1964).
[87] 408 U.S. at 740.
[88] *Id.* at 702.
[89] *Id.* at 704-06.
[90] *Id.* at 701-02.

At the end of the opinion, the Court noted that there were some circumstances in which the court might inquire into a grand jury's reasons for calling a newsman to testify. Recalling its recognition that news gathering did qualify for first amendment protection,[91] the Court stated that when a grand jury investigation is "instituted or conducted other than in good faith" or "in furtherance of official harassment of the press, undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources," a judicial order should issue limiting power to the grand jury to compel testimony.[92] The *Branzburg* opinion thus indicated that in the future, newsmen will have some constitutional protection against attempts to compel the disclosure of confidential information to a grand jury. It is quite unclear, however, what the scope of that protection will be. The "good faith" test as formulated by Justice White seems minimally protective.

There may, however, have been two different versions of what the good faith test means among the five Justices of the *Branzburg* majority, and this discrepancy may have important consequences for the test's application in the federal courts. Justice Powell, though he joined the Court's opinion, filed a very brief concurring opinion in which he reiterated the good faith test in a way that made it appear more liberal than it seemed as stated by Justice White. To begin with, Justice Powell appeared to interpret the test as not imposing any burdens of proof on either newsmen or the government. "[T]he Court—when called upon to protect a newsman from improper or prejudicial questioning—would be free to balance the competing interest on their merits in the particular case."[93] More importantly, Justice Powell seemed to expand the meaning of the good faith standard. For him it meant that a newsman might seek a motion to quash a protective order whenever he was "called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe his testimony implicated confidential source relationships without a legitimate need of law enforcement."[94]

This conception of when a newsman may obtain judicial protection from a grand jury investigation seems distinctly broader than that of the Court; surely there will be some facts which can be said to make out a showing that requested information bears only a remote and tenuous relationship to the subject of investigation, but that cannot be said to demonstrate the bad faith of the grand jury. And the category of circumstances where there might be "other reasons to believe" a source

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91 395 U.S. 367, 386-390; 394 U.S. 557, 564; 381 U.S. 301.
92 408 U.S. at 707-08.
93 *Id.* at 710, n. 4.
94 *Id.* at 710.

relationship needlessly implicated seems to be explicitly open-ended. Unfortunately, Justice Powell made no attempt to clarify by reference to facts his abstract statements of conditions under which a newsman might be privileged not to testify. Both Justice Powell and Justice White assumed that the three cases before the Court raised no question of good faith: and neither embellished his statement of the test with hypothetical examples. It is far from certain that there will be a significant range of factual settings in which Justice Powell might break with the rest of the *Branzburg* majority and join the four dissenters.

Branzburg raises questions, however, as to whether a newsman's privilege may be recognized in the context of other investigative proceedings, particularly civil and criminal trials, and legislative committee hearings. One argument militating against such recognition is that once the court has held that a grand jury may compel a newsman to testify about his confidential sources, there may be no further deterrent effect on the willingness of those sources to furnish information by compelling testimony in civil and criminal suits or to legislative committees. This argument may not be valid, however. Trials and legislative hearings, unlike grand jury proceedings, are public. Persons who seek confidentiality for reasons other than fear of prosecution might be deterred from confiding in newsmen if their testimony could be compelled in public hearings.

To be sure, in criminal trials this incremental burden on news gathering may not outweigh strong countervailing government interests. The government interest is greater where a newsman is called to testify at trial than where he is called before a grand jury, for in the criminal trial the government's prosecutional interest is directly at stake. And the testimony that may be compelled will be limited by the relatively strict standards of relevance which govern the admission of evidence at trial. Moreover, if the newsman's testimony is sought by the defendant, then the sixth amendment guarantee of compulsory process to all necessary witnesses who will be involved becomes relevant.

Civil trials and legislative investigations may pose a closer question, however. The incremental burden on news gathering attendant upon compulsion of testimony in such a wide variety of public hearings might not be justified by the needs of these particular proceedings because the social interest in compelling testimony from newsmen in a civil trial is arguably less than the interest in compelling testimony at a criminal trial,[95]

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[95] The Court has already indicated its willingness to deprive a civil litigant of recovery in order to protect the first amendment interests in a free press. Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In addition, statutory privileges limit the availability of testimony at civil trials, *supra* note 11.

and because the testimony of an individual is less likely to be essential to a legislative investigation than to a trial or grand jury proceeding.[96]

WILL DENIAL OF PRIVILEGE HAVE AN EFFECT ON FLOW OF NEWS?

Lack of privilege might inhibit the free flow of news by affecting: (1) The willingness of the informant to seek out or to communicate with the newsmen; (2) The willingness of the newsmen to seek out informants and to transmit information received from informants for publication. Surveys of the press indicate that a substantial number of newspaper stories are based on information which could only be secured through confidential informer-reporter relationships.[97] Erwin Conham, Editor-in-Chief of the *Christian Science Monitor,* estimates that from 33 per cent to 50 per cent of that newspaper's stories involve confidential sources, and the *Wall Street Journal* states that 15 per cent of its articles are based on information from confidential informants.[98] The managing editor of the *San Francisco Chronicle* writes that "An absolutely staggering number of stories, political and non-political, arise from information received in confidence."[99] "Systematic" empirical evidence has not been developed, in part because reporters and editors do not keep records of the confidential nature of sources and therefore must make educated guesses as to the incidence of confidentiality. But it is still clear from available data that some leading newsmen regard confidentiality as essential for development of many news stories. To argue that newsmen feel no pressure or restraint in the present situation is to obscure the critical point. If the power to enforce compulsory testimony is used to the full extent, there would be a serious effect on the free flow of news. This potential power is vast and can be intimidating. It is reporters who cover activity unfavorable or embarrassing to authorities who seem likely to be hampered. For the sources of this information are now vulnerable to identification and subsequent punishment. It is impossible to measure how reluctant such sources have become in the aftermath of the Supreme Court action. In a

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[96] *See* United States v. Doe, 460 F.2d 328, 331-32 (1st Cir. 1972), where Judge Caffin reasoned that detailed testimony by an individual is more likely to be crucial to a grand jury investigation than to legislative investigation since the purpose of the former is to see if there is probable cause to believe that particular crimes have been committed by particular persons, while the object of the latter is to gather information to resolve problems of a general nature.

[97] For the most intensive survey to date, see appendix to Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources,* 64 NW. U.L. REV. 18 (1969). Also in *Caldwell,* 18 affidavits by such prominent newsmen as Walter Cronkite and Eric Sevareid were submitted with the *Caldwell* and amicus briefs stressing the importance of informer-reporter relationships in gathering of news and the necessity of guaranteeing confidentiality for the maintenance of these relationships.

[98] Guest and Stanzler at 43-44.

[99] *Id.* at 60.

recent feature article,[100] many reporters including the famous muckraker, Jack Anderson, have commented that sources he has been dealing with for years have begun to ask cautious questions about the *Caldwell* case and to seek renewed assurances he would protect them. Although relatively few reporters have suffered from the crackdown, relatively few reporters engage in serious investigative work. Must we wait for a "chipping away" which will make the first amendment unrecognizable?

CONCLUSIONS

As articulated by the Supreme Court majority, the rule, as it now stands, provides that newsmen must respond to relevant and material questions asked during "good-faith" grand jury proceedings. Even though it was a 5-4 decision with Justice Powell's understanding that the holding is a limited one, and although the matter may be subject to future modification upon the submission of cases presented, we cannot wait for the Court to forge a case-by-case distinction through interpretation of the "good-faith" test.

Congress now has before it two dozen bills dealing with the newspaperman's privilege.[101] Some of them would give the press an "unqualified privilege," which is blanket exemption from forced testimony such as that which covers most doctor-patient relationships. Realizing that news reporting like any other profession is comprised of both strong and weak people, this author does not feel an absolute privilege is proper. Suppose a fictitious story could, under absolute privilege, be defended on the ground that its sources cannot be revealed. But in fact there may be no sources. Also, in a criminal trial an exception to absolutism is justified because the source has been linked with some specificity to alleged criminal acts. For this reason a middle-of-the-road approach seems most equitable. This bill should provide unqualified immunity from coerced disclosure before grand juries, legislative committees or government agencies, but a limited immunity before open courts trying major criminal cases. The easiest way to sculpt the dimensions of the privilege may be definitional: Who is a newsman? When is the privileged relationship created? Under what conditions is the informant protected?

The bill which this author prefers is a bill sponsored by Senator Lowell Weicker of Connecticut.[102] It would apply only to federal proceedings but could provide example for state legislative action. The Weicker Bill would bar any federal grand jury, agency, or committee of

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[100] *See*, N.Y. Times, Dec. 17, 1972 (Magazine), at 78.
[101] S. 318, 93d Cong., 1st Sess. (1973).
[102] *Id.*

Congress from compelling disclosure of sources by bona fide newsmen, as defined in the Bill. On the other hand, in a federal court if the action was pending in a case of murder, forcible rape, aggravated assault, kidnaping, airline hijacking or breach of national security statute, disclosure of sources could be ordered by the judge if it could be shown that the source was of "substantial and direct" relevance to the fair determination of the case and if it could be demonstrated that the source was not reasonably available in any other manner. While the Weicker Bill primarily protects the identity of sources, it is not absolute.

However, one thing is absolute. Congress must act soon before the best way to inform people in a democracy is silenced!

MICHAEL F. BUCHICCHIO

* Ed. Note: Recently six more states have enacted protective statutes. They are: Nebraska, Illinois, Minnesota, North Dakota, Rhode Island and Tennessee. *See* note 11, *supra.*