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willing to reason by analogy in its advocacy of the third party beneficiary doctrine, but the whole tenor of the opinion suggests the Court is proceeding under the last mentioned analysis. It is faced with a situation which is not covered directly by the statute and would not be maintainable at common law and hence both statute and common law are evaluated. The fact that the Court does attempt to create a third party beneficiary, however, seems to indicate that the statute as it stands is still limited in scope. Thus, the Court exercises a process of judicial evaluation of prior decisions in the common law tradition.

Theoretically, in a given factual situation, the courts are precluded from judicial manipulations by predetermined judicial decisions. However, factual situations are rarely identical and subjectivity, tempered by considerations of judicial and public policy, may lead a court to adhere to precedent on one hand or distinguish on the other. There are times when the exigencies of the situation will lead the court to re-examine the validity of prior distinctions and question them in the light of further experience. This, it appears, is the evaluating process the Court has used in this case in finding the precedent cases, in the light of resulting experience, resulting in manifest injustice by their insistence on a rule which at best has tenuous foundations in logic.

It is submitted that the inaction of the legislature regarding the proposed statutory amendment is of little significance. The statutory remedy as it stood was insufficient in this instance, not because of legislative inaction, but because of court-made precedents. It is a legitimate function of the courts to re-evaluate these precedents and extend the statutory remedy by analogy when the purchase is made for the benefit of another.

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Judy Garland commenced a libel suit against the Columbia Broadcasting System, Inc. based upon statements made in Maria Torre's newspaper column allegedly based upon information from a C.B.S. executive. The plaintiff's counsel took Miss Torre's deposition[1] in which she admitted that the statements in her column were based upon information given her by a C.B.S. "network executive," but refused to disclose the identity of her informant. The case of *Garland v. Torre*[2] affirmed Torre's contempt conviction for her refusal to disclose her "confidential" news source.

1. See FED. R. CIV. P. 26(b).
2. 259 F.2d 545 (2d Cir. 1958).

The defendant's contentions presented a problem as to the constitutionality and evidentiary propriety of compelling an individual to testify as to matters relevant and essential[3] to a proper adjudication of pending litigation when the production of such information would have the effect of limiting news sources by placing informants in apprehension of discovery. The defendant's specific claims were that "to compel newspaper reporters to disclose confidential sources of news would . . . encroach upon the freedom of the press as guaranteed by the First Amendment, because it would impose an important practical restraint upon the flow of news from news sources to news media and would thus diminish pro tanto the flow of news to the public";[4] and, in the absence of constitutional protection, she asserted that "the social interest in assuring a free and unrestricted flow of news to the public should impel this court to hold that the identity of confidential news sources should be protected by at least a qualified privilege."[5] The court clearly indicated its cognizance of the problem created by the doctrine of *Erie v. Tompkins*[6] as to which law, state or federal, shall determine the meaning of "privileged" as used in Rule 26(b) of the Federal ules of Civil Procedure and its resulting limitations on the scope of inquiry.[7] However, the court stated that neither federal[8] nor state (New York)[9] rules of evidence recognized the privilege claimed, and it refused to create such a privilege (assuming that the court had the power to do so).

The constitutional question presented appears to be one of first impression and the opinion by Judge Stewart, former Circuit Judge, and presently a Justice of the United States Supreme Court, relied on the cases of *Bridges v. California*,[10] *Peniekamp v. Florida*,[11] and *Craig v. Harney*[12] as having established that if the exercise of freedom of the press directly impedes the function of the judicial process, the press must yield. Each of these cases dealt with contempt convictions of members of the press for publications containing prejudicial comments on pending litigation which, the lower courts had determined, obstructed the orderly administration of justice. On review the Supreme Court reversed each of these

3. See N.A.A.C.P. v. Alabama, 357 U.S. 499 (1958).
4. 259 F.2d 545, 547 (2d Cir. 1958).
5. *Id.* at 548.
6. 304 U.S. 64 (1958).
7. *Compare* Engl v. Aetna Life Ins. Co., 139 F.2d 469, 470 (2d Cir. 1955); Palmer v. Fisher, 228 F.2d 603, 607-8 (7th Cir. 1955); Munner v. Swedish American Lines, 35 F.Supp. 493, 496 (S.D.N.Y. 1940); Reeves v. Pennsylvania R. Co., 8 F.R.D. 816 (D. Del. 1949); *with* Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55, 57 (N.D.O. 1953); Ex parte Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953); Hickman v. Taylor, 329 N.S. 495 (1957). See Greene, *The Admissibility of Evidence under the Federal Rules*, 55 HARV. L. R. 197 (1941).
8. See Brewster v. Boston-Hearld-Traveler, 20 F.R.D. 416 (D. Mass. 1957); Rosenburg v. Carroll, 99 F.Supp. 629 (S.D.N.Y. 1951); Clein v. State, 52 So.2d 117 (Fla. 1950); Pinkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).
9. See People v. Sheriff of N.Y. County, 269 N.Y. 291, 199 N.E. 415 (1936).
10. 314 U.S. 252 (1941).
11. 328 U.S. 331 (1946).
12. 331 U.S. 367 (1947).

convictions. These Supreme Court opinions advanced different tests, standards and criteria to determine whether the defendant's actions were such as to justify a contempt conviction and the resulting abridgment of the freedom of the press. As stated by Justice Reed, "whether the threat to the impartial and orderly administration of justice must be a clear and present danger or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of the free discussion and the necessity for fair adjudication, free from interruption in its processes."[13]

In each of the cases relied upon, the judges looked to several factors to determine what effect the publication had upon the judicial proceedings. They looked to the content of the publication to see if it was more than a reporting of what transpired in a courtroom to determine whether it appealed for a particular decision in a pending case. They considered the circulation of the publication to determine the degree of likelihood that such publication would come to the attention of the individuals, who, acting on behalf of the court, would make a final decision and whether the circulation was sufficient to bring public pressure to bear upon such persons. They also looked to the stage of proceeding to determine whether the persons charged with the duty of making such determination were such as to be swayed by such a publication and its effect upon public opinion, generally indicating that such publications are more capable of influencing a jury decision than the decision of an experienced judge. This type of inquiry might be viewed as an application of the clear and present danger test; and each of the three decisions advances such a test at some point.[14] However, the present day status, value, and merit of the clear and present danger test is difficult to determine.[15] Regardless of what label shall be affixed to the criteria used in any of these decisions, the court attempted to determine whether the defendant's actions did impede the orderly administration of justice and whether the interests in a free press were outweighed by the interests in the judicial process.

Judge Stewart's extension of the rationale of the *Bridges, Pennekamp,* and *Craig* cases to the *Torre* case did not expressly state the criteria used to balance the interests in support of the conclusion which subordinates freedom of the press to the proper function of the judicial process. The court reasoned that these decisions established the proposition that if the exercise of freedom of the press directly impedes the function of the judical process, the press must yield, and the court impliedly concluded that judicial inquiry into a witness's knowledge is such an essential and long recognized right as to be essential to the orderly admin-

13. Pennekamp v. Florida, 328 U.S. 331, 336 (1946).
14. See Comment, 17 U. CHI. L. R. 540 (1950).
15. See Dennis v. U.S. 341 U.S. 949 (1951) and Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950).

istration of justice.[16] There can be no doubt that the judicial process is impeded by the withholding of relevant information, but it is submitted that the rationale of the prior decisions would require an analysis of additional factors.

In the prior cases it should be recognized that the abridgment of the freedom of the press was a direct abridgment in that it punished individuals for their publications. However, the scope of such an abridgment was quite limited in that it only prevented a particular type of publication at a particular time. After a final adjudication of the case, the press is at liberty to comment upon and disapprove of the proceedings or the decision.[17] The type of abridgment involved in the *Torre* case is at most indirect in that it does not prevent or punish action of the press, but merely discourages informants from supplying the press with facts. However, the scope of such an abridgment is much wider in that it does not merely postpone publications of a particular type, but discourages publications of any type where the informant wishes to remain anonymous. The court did not indicate that the confidential news sources of a reporter attempting to disclose public graft, gambling and vice, subversion, treason or any other matter of public concern would receive any more protection than is provided for a gossip columnist's news sources. The social interests in a free press would vary depending upon the type of news reported and what it was intended to accomplish. Furthermore, it is submitted that valid distinctions exist as to the weight to be given the interests of society in the administration of justice depending upon the nature of the particular case involved; that is to say, the interests of society may be greater in a criminal prosecution involving a major crime than they would be for a minor offense, and social interest in a civil suit may be greater if damages could only be recovered from the informant and not from the reported.

Although the court's decision did not discuss the aforementioned problems, nor indicate its awareness of them, it is submitted that the court's decision was correct in this case. Although the social interest in a private libel suit may be slight, it is of sufficient interest to outweigh any social interest which may exist in a gossip column that has no other purpose than to provide "interesting" reading matter. However, the balancing of interests between particular types of news and public services performed by the press may outweigh the public interest in some types of judicial inquiries. A detailed consideration of these interests might form the basis for future distinctions between the *Torre* case and future problems of a similar nature. These same considerations may also form a basis for legislative action in this area.[18]

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16. See 8 WIGMORE, EVIDENCE 2192 (3d Ed. 1940).
17. *Supra* note 14.
18. See NEW YORK LAW REVISION COMMISSION, REPORT 23-168 (1949).