

Washington Law Review

Volume 57 | Number 2

3-1-1982

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David Joseph Smith

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Recommended Citation

David J. Smith, Comment, *News-Source Privilege in Libel Cases: A Critical Analysis*, 57 Wash. L. Rev. 349 (1982).

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NEWS-SOURCE PRIVILEGE IN LIBEL CASES: A CRITICAL ANALYSIS

Plaintiffs in libel suits who are public officials or public figures have a difficult burden of proof. Under *New York Times Co. v. Sullivan*,¹ these plaintiffs must show with “convincing clarity”² that the defendant acted with actual malice when publishing defamatory material. The ability of these plaintiffs to obtain evidence necessary to show such malice has been hampered by recent court decisions³ granting a qualified constitutional privilege to reporters protecting their refusal to reveal the identities of their confidential news sources.

This comment first examines the recent cases in which a libel plaintiff was impeded by the use of a qualified privilege from obtaining the identity of news sources behind an allegedly defamatory story. It next discusses the historical development of the constitutional news-source privilege and concludes that neither traditional first amendment press clause doctrine nor the United States Supreme Court’s decision in *Branzburg v. Hayes*⁴ is authority for such a privilege. This comment then points out that courts which nonetheless recognize a constitutional news-source privilege in civil cases have given the same protection to all sources, regardless of the publication’s news-gathering value, at the expense of libel plaintiffs. These courts, in reaching their decisions, also have rarely considered the need or expectation of the source for confidentiality.

This comment endorses source protection as necessary under certain circumstances. It proposes, however, that such protection be based on Rule 26(c) of the Federal Rules of Civil Procedure or its equivalent in a given jurisdiction. Rule 26(c), a discovery rule, gives a court discretion to protect parties and other persons from “annoyance, embarrassment, oppression, or undue burden or expense.” The use of a court’s discretionary power will, unlike the use of the qualified constitutional privilege, give the court more flexibility in determining when the need of libel plaintiffs to know the source of reports damaging to their reputations outweighs the need to protect the confidentiality of news sources.⁵

1. 376 U.S. 254 (1964).

2. *Id.* at 285–86.

3. Cases dealing with confidential sources have arisen throughout this nation’s history. *E.g.*, *Ex Parte Nugent*, 18 F. Cas. 471 (D.C. Cir. 1848); *Clein v. State*, 52 So. 2d 117 (Fla. 1951); *In re Grunow*, 84 N.J.L. 235, 85 A. 1011 (1913); *People ex rel. Mooney v. Sheriff of New York County*, 269 N.Y. 291, 199 N.E. 415 (1936). The amount of litigation increased markedly, however, after the Supreme Court’s decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972).

4. 408 U.S. 665 (1972).

5. The reporter-source privilege also arises in non-libel cases. *E.g.*, *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (class action civil rights suit in which

I. BACKGROUND

A. *Protecting a Libel Plaintiff's Reputation*

Libel is the publication of false information that tends to diminish the esteem in which a person is held in a community.⁶ The person's reputational interest is considered an important social value⁷ because such publications can damage the person's personal relationships⁸ as well as business opportunities.⁹ An action for libel is designed to compensate a wronged plaintiff for such losses.¹⁰

To prevail, a libel plaintiff historically had only to show that the published information was untrue and damaged his or her reputation in the community.¹¹ In 1964, however, the United States Supreme Court held in *New York Times Co. v. Sullivan*¹² that the first amendment requires a public official¹³ to show that the libel defendant acted with actual malice in publishing the defamatory material. Actual malice was defined as knowledge of the falsity or reckless disregard for the truth.¹⁴ In 1967, the Court extended the malice standard to "public figures"¹⁵ suing for libel, in *Curtis Publishing Co. v. Butts*.¹⁶ The effect of the malice standard is that public figures and officials usually try to show that the reporter's source

plaintiffs sought the identity of a source for a story relevant to their action); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505 (E.D. Va. 1976) (defendant sought confidential information and sources obtained by a radio station in a products liability action). This comment, however, addresses the issue only in the context of libel law.

6. *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 28 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974).

7. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

8. *Meeropol v. Nizer*, 381 F. Supp. 29, 36 n.6 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (1977), *cert. denied*, 434 U.S. 1013 (1978).

9. *Riss v. Anderson*, 304 F.2d 188, 194 (8th Cir. 1962).

10. *Gruschus v. Curtis Publishing Co.*, 342 F.2d 775, 776 (10th Cir. 1965).

11. *Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 583-84 (1964).

12. 376 U.S. 254 (1964).

13. Public officials include, "at the very least," government employees "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

14. Reckless disregard for the truth occurs when the defendant "in fact entertain[s] serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The recklessness may be inferred if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Id.* at 732.

15. There are two categories of public figures. The first category contains those who occupy positions of "such persuasive power and influence that they are deemed public figures for all purposes." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). The second category consists of "limited" public figures. "Limited" public figures are those persons who have voluntarily "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.*; see *Wolston v. Readers Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

16. 388 U.S. 130 (1967).

of information was inherently unreliable; it is often easier to show that defendants acted with reckless disregard for the truth than to show they knew of the publication's falsity.¹⁷ To show recklessness, these plaintiffs often need access to the news sources who, the reporter claims, supplied the information for the story.¹⁸ In these cases, the ability of the libel plaintiff to protect his or her interest comes into direct conflict with the protection of confidential news sources.¹⁹

For example, in *Cervantes v. Time, Inc.*²⁰ the Mayor of St. Louis, Missouri sued for libel after an article in Life magazine reported that the Mayor had close ties with the criminal underworld. Confidential FBI sources had supplied most of the information for the story. The plaintiff brought a motion to compel disclosure of the sources from the reporter, but the trial court never ruled on the motion; instead, the court simply granted defendant's subsequent motion for summary judgment. The court of appeals conceded that the plaintiff's arguments on behalf of compulsory disclosure were not "frivolous,"²¹ but it affirmed summary judgment because the Mayor had "wholly failed" to demonstrate that the defendants had acted with actual malice.²²

In *Carey v. Hume*,²³ another libel plaintiff sought the identity of a confidential source. The District of Columbia Court of Appeals said that the *New York Times* decision could be interpreted to have so downgraded the importance of libel suits "that a plaintiff's interest in pressing such a claim can rarely, if ever, outweigh a newsman's interest in protecting his

17. "It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself" *Herbert v. Lando*, 441 U.S. 153, 170 (1979).

18. One libel plaintiff's brief, as summarized by the court in *Cervantes v. Time, Inc.*, 464 F.2d 986, 991 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973), set forth the following reasons for compulsory disclosure:

(a) [D]isclosure enables the plaintiff to scrutinize the accuracy and balance of the defendant's reporting and editorial processes; (b) through disclosure it is possible to derive an accurate and comprehensive understanding of the factual data forming the predicate for the news story in suit; (c) disclosure assists successful determination of the extent to which independent verification of the published materials was secured; and (d) disclosure is the sole means by which a libeled plaintiff can effectively test the credibility of the news source, thereby determining whether it can be said that the particular source is a perjurer, a well-known libeler, or a person of such character that, if called as a witness, any jury would likely conclude that a publisher relying on such a person's information does so with reckless disregard for truth or falsity.

19. The court in *DeRoburt v. Gannett Co.*, 507 F. Supp. 880, 884 (D. Hawaii 1981), stated: "The media defendant cannot have it both ways: he cannot enjoy the protection afforded by the heavy burden imposed upon the public official plaintiff by *New York Times* and at the same time enjoy a privilege that prevents the plaintiff from obtaining evidence necessary to carry that burden."

20. 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

21. *Id.* at 992.

22. *Id.*

23. 492 F.2d 631 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974).

sources.”²⁴ In affirming an order compelling disclosure, however, the court concluded that other Supreme Court opinions negate “any inference that the Court does not consider the interest of the defamed plaintiff an important one.”²⁵

More recently, the United States Supreme Court confirmed its continuing recognition of the valid interests of libel plaintiffs in a case involving a different kind of reporter’s privilege. The plaintiff in *Herbert v. Lando*²⁶ was a United States Army colonel who had accused his superiors of war crimes in Vietnam. Herbert sued reporter Lando after Lando had portrayed Herbert as having manufactured the war-crimes charges.²⁷ When Herbert posed questions in discovery probing the state of Lando’s mind when he prepared the report, Lando declined to answer on first amendment grounds. The Court refused to provide first amendment protection, reasoning that the editorial privilege Lando sought would constitute a “substantial interference” with the ability of a public-figure libel plaintiff to obtain evidence in light of the actual-malice standard.²⁸ *Herbert* is about an editorial privilege rather than news-source protection, but the Supreme Court’s emphasis on the reputational interest of the libel plaintiff²⁹ indicates that the Court may look with equal disfavor upon a reporter’s claim of source privilege in libel cases.³⁰

B. News-Source Protection

Historically, courts rejected on common-law principles claims for protecting confidential news sources.³¹ These courts claimed that the social

24. *Id.* at 635.

25. *Id.*

26. 441 U.S. 153 (1979).

27. *Id.* at 156. In Lando’s portrayal, Herbert had allegedly made the charges to explain why his superiors had relieved him of his command.

28. *Id.* at 170.

29. *See id.* at 169.

30. *See Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 101 Idaho 795, 623 P.2d 103, 108 (1980) (the validity of denying constitutional news-source protection was settled by *Herbert*). *But see Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (policy supporting a first amendment news-source privilege is stronger than the policy supporting editorial privilege).

31. *E.g.*, *People ex rel. Mooney v. Sheriff of New York County*, 269 N.Y. 291, 199 N.E. 415 (1936). In *Mooney*, the court stated:

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 general rule. In the administration of justice, the existence of the privilege from disclosure as it now exists often, in particular cases, works a hardship. The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege.

On reason and authority, it seems clear that this court should not now depart from the general rule in force in many of the states and in England and create a privilege in favor of an additional

value of news-source protection was insufficient to justify an exception to the normal evidentiary rule in civil as well as criminal cases requiring disclosure of all information.

In 1958, however, the Court of Appeals for the Second Circuit, in *Garland v. Torre*,³² acknowledged in dictum that the Constitution would in some circumstances prohibit the compelled disclosure of confidential news sources.³³ Nevertheless, the court, in an opinion written by Judge Potter Stewart, reasoned that libel-plaintiff Garland's demand for the identity of the source behind a newspaper columnist's story outweighed any such protection because it went to the "heart" of her claim.³⁴ Although the court avoided any talk of "privilege" in its constitutional analysis,³⁵ the standard for resolving the issue set forth in *Garland* has become the touchstone for nearly all subsequent opinions granting news-source protection.³⁶

class. If that is to be done, it should be done by the Legislature which has thus far refused to enact such legislation.

Id. at 416. Approximately 26 states currently have some form of statutory protection for confidential sources. Comment, *The Fallacy of Farber: Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases*, 70 J. CRIM. L. & CRIMINOLOGY 299, 302-10 (1979).

32. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). In *Garland*, the libel plaintiff, singer Judy Garland, successfully moved in the trial court to compel newspaper columnist Marie Torre to reveal the source of an offending story. Torre refused to comply and was held in contempt. This was the first reported time a court had accepted the argument that the "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. The argument, however, had been made frequently prior to that case. Eckhardt & McKey, *Substantive and Remedial Aspects of First Amendment Protection for a Reporter's Confidential Sources*, 14 IDAHO L. REV. 21, 62 n.262 (1977).

33. 259 F.2d at 548. On appeal, defendant Torre argued that courts could not compel newspaper reporters to reveal confidential sources because this would be an indirect form of constitutionally prohibited prior restraint. At the time of the drafting of the first amendment, the predominant concept of freedom of the press was that of "laying no *previous* restraint upon publication, and not in freedom from censure for criminal matter when published." 4 W. BLACKSTONE, COMMENTARIES *151. In *Near v. Minnesota*, 283 U.S. 697, 716 (1931), the Court suggested that prior restraint is impermissible except in exceptional cases, such as: (1) publications that might hinder the nation's efforts in time of war; (2) obscene publications; and (3) "incitements to acts of violence and the overthrow by force of orderly government."

34. 259 F.2d at 550.

35. *See id.*

36. The defendant in *Garland* presented two other arguments to the court. The first was a common-law claim for privilege based upon the "societal interest in assuring a free and unrestricted flow of news to the public." *Id.* at 548. The court rejected this argument, saying that to recognize such a privilege "would poorly serve the cause of justice." *Id.* at 550.

The second argument was that the trial court had abused its discretion in denying the defendant's motion for a protective order under FED. R. CIV. P. 30 that would have prevented inquiry into the identity of the informant. *Id.* at 548. The court ruled that there had been no abuse of discretion by the lower court: "While it is possible that the plaintiff could have learned the identity of the informant by further discovery proceedings . . . , her reasonable efforts in that direction had met with singular lack of success. . . . [W]e cannot say that the claim is patently frivolous. The information sought was of obvious materiality and relevance." *Id.* at 551.

1. *Source Anonymity in the United States Supreme Court: Branzburg v. Hayes*

In 1972, the United States Supreme Court in *Branzburg v. Hayes*³⁷ addressed the issue of news-source protection for the first time. Justice White, speaking for a majority of five, declined to grant journalists an evidentiary privilege to withhold the identities of confidential news sources when testifying before a grand jury. In *Branzburg*, three reporters who pursued stories on the Black Panther Party and on illegal drug distribution refused to reveal their sources during subsequent grand jury investigations.³⁸ The Court acknowledged in prefatory remarks that there must be some protection for the news-gathering process.³⁹ The Court discounted, however, any comparison of compelled source disclosure with prior restraint,⁴⁰ focusing instead on the criminality of the activities un-

Subsequent courts have combined into one constitutional test *Garland's* separate tests for evaluating (1) the constitutional claim and (2) the claim that the trial court abused its discretion in ruling on the protective order. *E.g.* *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *DeRobert v. Gannett Co.*, 507 F. Supp. 880 (D. Hawaii 1981).

37. 408 U.S. 665 (1972).

38. *Branzburg* was a consolidation of four cases. Two of the cases, *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970), and *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971), involved *Louisville Courier-Journal* reporter Paul Branzburg. The earlier case arose after Branzburg had written a story on his observations of two unnamed youths synthesizing hashish from marijuana. The later case arose out of a story that provided a comprehensive survey of the "drug scene" in Frankfort, Kentucky, derived from confidential informants. In each case, the Kentucky Court of Appeals ruled that Branzburg had no privilege to refuse to answer questions about his stories before a grand jury. The third case, *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971), dealt with a television reporter who had been allowed to remain at Black Panther headquarters in New Bedford, Massachusetts for about three hours. The Massachusetts Supreme Judicial Court rejected his attempt to quash a grand jury summons based upon a first amendment privilege. The final case, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), concerned a *New York Times* reporter assigned to cover the Black Panther Party and other militant groups. When Caldwell refused to even appear before a grand jury that was investigating the Black Panthers, he was ordered jailed for contempt. The Ninth Circuit reversed that order on the grounds that a qualified first amendment privilege protected Caldwell from appearing before the grand jury. *Id.* at 1089.

39. The Court stated:

We do not question the significance of free speech, press, or assembly to the country's welfare. *Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.* But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

408 U.S. at 681-82 (emphasis added).

40. *Id.* at 691.

derlying the news reports.⁴¹ The Court claimed that compelling reporters to reveal their sources before a grand jury did not intrude on the freedom of the press.

In reaching its result, the Court pointed out the problems of giving to the institutional press rights that were superior to those of private citizens.⁴² In addition to the practical difficulty of defining the “press,” the Court noted that to do so would be a conceptually “questionable procedure” in light of traditional first amendment press clause doctrine that protects the “right of the lonely pamphleteer . . . as much as the large metropolitan publisher.”⁴³ Thus, under this “speech” model of the press clause, the press can be protected from disclosing sources only to the extent that any other similarly situated person would be.

Justice Powell, while joining in the majority opinion, emphasized in a separate concurring opinion the Court’s narrow focus. He noted that the press in these cases was not being threatened with “annexation” as an investigative arm of the government.⁴⁴ Powell also said that a reporter could move to quash the subpoena whenever the information sought of a reporter bore only a “tenuous” relationship to the subject of the investigation.⁴⁵ He concluded that lower courts should weigh the facts and strike the “proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct” on a “case-by-case” basis.⁴⁶ Since this standard denying protection to reporters appears less stringent than that in the majority opinion, the Powell opinion has been widely discussed and cited.⁴⁷

41. *Id.* at 682. The Court noted: “The sole issue before us is 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.” *Id.*

42. *Id.* at 703–04.

43. *Id.* at 704. Justice White, writing for the majority, also stated that “[f]reedom of the press is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals.’” *Id.* (quoting *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938)). Justice Brennan has termed this traditional press clause doctrine the “speech” model:

According to this traditional “speech” model, the primary purpose of the First Amendment is more or less absolutely to prohibit any interference with freedom of expression. The press is seen as the public spokesman *par excellence*. Indeed, this model sometimes depicts the press as simply a collection of individuals who wish to speak out and broadly disseminate their views.

Address by Justice Brennan, Samuel I. Newhouse Law Center Dedication Ceremony, Rutgers University (Oct. 17, 1979), reprinted in 32 RUTGERS L. REV. 173, 176 (1979) [hereinafter cited as *Brennan Address*].

44. 408 U.S. at 709.

45. *Id.* at 710. Justice Powell also claimed that a reporter who believed a grand jury was not being “conducted in good faith” was “not without remedy.” *Id.*

46. *Id.*

47. The court in *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 509 (1976), noted: Mr. Justice Powell’s concurring opinion . . . may be joined with Mr. Justice Stewart’s dissenting opinion, joined by Justices Brennan and Marshall, and with Mr. Justice Douglas’ dissenting

In a dissenting opinion joined by Justices Marshall and Brennan, Justice Stewart wrote that the reporter's right to gather news, inferred from the press clause, implies a right to maintain confidential sources.⁴⁸ Justice Stewart claimed that, without such a privilege, news sources would be deterred from providing information and publishers would engage in self-censorship.⁴⁹ Stewart proposed a qualified privilege whereby a court would balance on a case-by-case basis the reporter's need for confidential source protection against the grand jury's need for all available information.⁵⁰

The dissenting opinion expresses the "structural" model of the press clause.⁵¹ The structural model supposes that the press as an institution is

opinion, to provide a majority of five justices that would accept the proposition that newsmen are entitled to at least a qualified First Amendment privilege.

See also notes 72-75 and accompanying text *infra*. The meaning of the Powell opinion has also been discussed by commentators. *E.g.*, Eckhardt & McKey, *supra* note 32, at 74-75; Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 741-42 (1975); Comment, *Journalists In the Courts: Toward Effective Shield Legislation*, 8 U.S.F.L. REV. 664, 668-69 (1974).

48. 408 U.S. at 728.

49. *Id.* at 731. *But see* notes 86-88 and accompanying text *infra*.

50. 408 U.S. at 736-43. Justice Stewart would require reporters to testify before a grand jury only if: (1) there was probable cause that they had specific information of a probable criminal violation; (2) no means less destructive of first amendment rights were available; and (3) a compelling, overriding need existed. *Id.* at 743. Such a test, Stewart maintained, would prevent needless injury to first amendment rights. *Id.* at 744-45.

Justice Douglas expressed his view in a separate dissenting opinion that "absent his involvement in crime," a reporter has an "absolute right not to appear before a grand jury." *Id.* at 712.

51. See generally Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975) (address to the Yale Law School Sesquicentennial, 1974). In his address, Justice Stewart said:

It seems to me that the Court's approach to all of [the press] cases has uniformly reflected its understanding that the Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals. . . . In contrast, the Free Press Clause extends protection to an institution. . . .

It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press Clause meant no more than freedom of expression, it would be a constitutional redundancy.

Id. at 633. Justice Brennan has also spoken in favor of the "structural" model. See *Brennan Address*, *supra* note 43, 32 RUTGERS L. REV. at 176-77.

The "structural" interpretation has also been subject to criticism. One commentator has found it "less than convincing," considering that "[t]he historical context of the first amendment suggests that the Framers had printing presses in mind when they spoke of 'the press' and intended merely to protect the written as well as the spoken word—not to give newspapers a preferential status." Lewis, *Cantankerous, Obstinate, Ubiquitous: The Press*, 1975 UTAH L. REV. 75, 89 (1975). Professor Henry Monaghan said Justice Stewart's "recently advanced" thesis "is both doubtful and troublesome." Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 43 (1975). Chief Justice Burger wrote that "[t]o conclude that the Framers did not intend to limit the freedom of the press to one select group is not necessarily to suggest that the Press Clause is redundant. . . . The liberty encompassed by the Press Clause . . . merited special men-

protected, and, therefore, is entitled to special rights to facilitate the flow of information to the public.⁵² Furthermore, the press is perceived in part as a “Fourth Estate,” the function of which is to scrutinize the activities of the three official branches of government.⁵³ One of the superior rights necessary to perform these functions is the right to gather news. The structural model would also grant the press a superior right to maintain confidential sources necessary for news gathering.

Although the majority in *Branzburg* was unaccommodating to the structural approach, it did not foreclose all aspects of the model. The majority opinion did suggest, in a dictum, that reporters would be protected from prosecutorial harassment designed to disrupt the reporter-source relationship.⁵⁴ While this can be interpreted as a minor move in the structural direction, the Court has made no other such moves.⁵⁵ Indeed, the more recent case of *Zurcher v. Stanford Daily*,⁵⁶ in which the Court rejected a first amendment requirement of special procedural safeguards before the issuance of a warrant to search a newspaper’s offices, suggests that the Court still rejects the structural model.⁵⁷

2. Source Anonymity in the Lower Courts: a Qualified Privilege

Despite the Supreme Court’s holding in *Branzburg* and its indifferent treatment of the structural approach, a majority of lower courts since

tion simply because it had been more often the object of official restraints.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 799–800 (1978) (concurring opinion).

52. *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting).

53. Justice Stewart in his address, *supra* note 51, at 634, stated:

Consider the opening words of the Free Press Clause of the Massachusetts Constitution drafted by John Adams:

“The liberty of the press is essential to the liberty of the state.”

The relevant metaphor, I think, is the metaphor of the Fourth Estate. What Thomas Carlyle wrote about the British Government a century ago has a curiously contemporary ring:

“Burke said there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all.”

54. 408 U.S. at 707–08.

55. The only other indication from the Supreme Court that the structural model may have some vitality comes from a concurring opinion in *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 798 (1978). Chief Justice Burger there stated: “The Court has not yet squarely resolved whether the Press Clause confers upon the ‘institutional press’ any freedom from government restraint not enjoyed by all others.”

56. 436 U.S. 547 (1978).

57. The proposed safeguards in *Zurcher* included showing probable cause that issuing a subpoena would be impracticable, and that: (1) important materials would be destroyed; and (2) issuing a restraining order would be futile. *Id.* at 552–53.

Congress enacted the Privacy Protection Act of 1980, Pub. L. No. 96–440, 94 Stat. 1877 (codified at 42 U.S.C.A. §§ 2000aa–2000aa-12 (West Supp. 1981)), in response to *Zurcher*. Part of the effect of the statute is to require investigators to proceed by subpoena rather than by search warrant when seeking documents from the media. *Id.* § 2000aa(b)(3).

Branzburg have recognized a qualified first amendment news-source privilege in civil cases.⁵⁸ This is true even in libel cases⁵⁹ where protecting the source can critically impinge on the ability of libel plaintiffs to defend their reputations.

Nearly all of these courts, however, have settled upon a three-part test that allows a plaintiff to overcome a defendant's qualified privilege. First, the plaintiff must show that his or her claim is not frivolous.⁶⁰ Second, the plaintiff must show that the identity of the source is critical to the plaintiff's case, that it goes to the "heart" of the claim.⁶¹ Third, the plaintiff must show that he or she has exhausted all reasonable alternative sources of the information.⁶² Thus, the courts have attempted to resolve the competing interests by tightening normally liberal discovery rules⁶³ and compelling source disclosure only where necessary.

The courts generally have reached their constitutional source protection result in two ways. The courts claim that either: (1) *Branzburg* implies source protection in civil cases; or (2) *Branzburg* does not prevent such

58. *E.g.*, *Miller v. Transamerican Press Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *DeRobert v. Gannett Co.*, 507 F. Supp. 880 (D. Hawaii 1981); *Solargen Elec. Motor Car Corp. v. American Motors Corp.*, 506 F. Supp. 546 (N.D.N.Y. 1981); *cf. Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980) (resolution of the issue does "not lie in any black letter pronouncement or broad scale confrontation between First Amendment and reputation interests").

Other courts have failed to find any first amendment protection for the reporter-source relationship. *E.g.*, *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791 (1977), *cert. denied*, 434 U.S. 930 (1978); *Dow Jones & Co. v. Superior Court*, 364 Mass. 317, 303 N.E.2d 847 (1973); *Ammerman v. Hubbard Broadcasting*, 91 N.M. 250, 572 P.2d 1258 (1977); *cf. Seneary v. Daily Journal American*, No. 47503-2 (Wash. Sup. Ct. Mar. 4, 1982) (Washington Supreme Court failed to reach the constitutional issue because it recognized a common-law news-source privilege).

59. *See, e.g.*, *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974).

60. The plaintiff was unable to show that his claim was not frivolous in *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), because of the media defendant's extensive investigation before it published the story at issue. *Cf. Carey v. Hume*, 492 F.2d 631 (D.C. Cir.) (defendant's investigation consisted of one unanswered telephone call to the plaintiff; the order to compel disclosure was upheld), *cert. dismissed*, 417 U.S. 938 (1974).

61. *See, e.g.*, *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

62. *See, e.g.*, *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974).

63. FED. R. CIV. P. 26(b)(1) provides:

In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

protection. Under either line of analysis, courts often rely on the prefatory language in the *Branzburg* majority opinion that news gathering is entitled to some protection.⁶⁴ Other courts claim that a privilege is implied or permitted based on Powell's concurrence in *Branzburg*, which advises courts to resolve the issue by weighing the facts of the competing interests on a "case-by-case" basis.⁶⁵

Courts using the first line of reasoning contend that *Branzburg* establishes news-source protection in civil cases by implication.⁶⁶ In *Silkwood v. Kerr-McGee Corp.*,⁶⁷ the Court of Appeals for the Tenth Circuit used the *Branzburg* news-gathering passage⁶⁸ to justify finding a first amendment news-source privilege. In *Silkwood*, defendant Kerr-McGee sought to depose a free-lance reporter, who was conducting an investigation into the death of one of Kerr-McGee's employees, about the identity of and information provided by his confidential sources. The lower court rejected the reporter's claim of a first amendment privilege. The court of appeals reversed and referred to the *Branzburg* majority's news-gathering language as proof that the privilege claimed was "no longer in doubt."⁶⁹

Under the second line of analysis, courts conclude that, although *Branzburg* does not establish a news-source privilege, it does not inhibit the freedom of lower courts to recognize such a privilege.⁷⁰ Some courts deciding libel cases distinguish *Branzburg* on its facts. *Branzburg* concerned reporters' testimony before grand juries considering criminal indictments; arguably, the public policy against source confidentiality is stronger in such cases than in civil cases.⁷¹ For example, in *Carey v. Hume*⁷² the defendant reporter in a libel suit refused on first amendment

64. *E.g.*, *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 n.1 (10th Cir. 1977).

65. *E.g.*, *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974).

66. *E.g.*, *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977), *cert. denied*, 436 U.S. 905 (1978).

67. 563 F.2d 433 (10th Cir. 1977).

68. 408 U.S. at 681-82.

69. 563 F.2d at 437.

70. *E.g.*, *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594 (1st Cir. 1980); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F & F Inv.*, 470 F.2d 778, 784-85 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 83 (E.D.N.Y. 1975).

71. *See Baker v. F & F Inv.*, 470 F.2d 778, 784-85 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). In *Baker*, a class action suit brought under the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1976), the court said:

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.

72. 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974).

grounds to supply the identities of his eyewitness sources.⁷³ The *Carey* court analyzed *Branzburg* as being controlled by the vote of Justice Powell. The court distinguished *Branzburg*, with its criminal overtones, from *Carey*, a purely civil case, and relied on Powell's admonition⁷⁴ to resolve the issue on a "case-by-case" basis. The court concluded that Justice Powell's comments meant that the balancing process in *Garland v. Torre* had been left intact.⁷⁵

The constitutional news-source protection recognized by these lower courts is expressly or impliedly available only to reporters.⁷⁶ These opinions thus rest on a structural interpretation of the press clause, although none of the courts have acknowledged this.

II. ANALYSIS

A. *The Qualified Constitutional Privilege*

Regardless of their ultimate decision to compel disclosure or not, many courts have recognized a constitutional basis for news-source confidentiality in civil cases. These courts have not adequately justified this position, either in their analysis of Supreme Court precedent or by their assumption that constitutional policy is furthered by their results. The courts recognizing source confidentiality use a structural press clause analysis when they hold that protection of source confidentiality is available only to members of the press. They do so despite the Supreme Court's unreceptiveness to the structural press clause approach.⁷⁷ The lower courts justify this result by citing either the news-gathering language in the *Branzburg* majority opinion or the case-by-case language in the Powell concurrence. Neither of these statements, however, supports the structural model as a basis for a privilege.

Relying on the news-gathering passage as a justification for news-source protection in civil cases, as the *Silkwood* court and others have

73. The defendant reported that the plaintiff had been seen removing boxes of documents, which were the subject of a government investigation, from a union headquarters, and that the defendant had later notified the police of a burglary.

74. See 408 U.S. at 710 (Powell, J., concurring). See generally notes 44-47 and accompanying text *supra* (discussion of Justice Powell's concurrence in *Branzburg*).

75. 492 F.2d at 636. See generally notes 32-36 and accompanying text *supra* (discussion of *Garland v. Torre*). The court in *Carey* compelled disclosure nevertheless because it claimed that the identity of the source was critical to the plaintiff's case and that the plaintiff's claim was not frivolous. 492 F.2d at 637-38.

76. One issue that arose both in *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977), and in *Solargen Elec. Motor Car Corp. v. American Motors Corp.*, 506 F. Supp. 546 (N.D.N.Y. 1981), was whether the persons claiming protection were reporters within the meaning of the reporters' privilege.

77. See notes 42-43 & 56-57 and accompanying text *supra*.

done, takes the *Branzburg* language out of context. Protecting news-gathering is not equivalent to protecting news-source confidentiality. To base a privilege on *Branzburg's* prefatory dictum ignores the fact that the *Branzburg* holding and its rationale for not providing protection can be broadly applied to other types of cases. For example, the *Branzburg* Court noted that there had been no demonstration that any "significant constriction of the flow of news" would result from failing to protect news-source confidentiality.⁷⁸ Further, the Supreme Court has never held that news-gathering stands for a set of press rights that are superior to those of the public. Although the Court has, in a few cases, alluded to a right to gather information,⁷⁹ the only example of such a right the Court has recognized, the right of the press to be present for a criminal trial, is coextensive with the public's right.⁸⁰

Other courts, such as the D.C. Circuit in *Carey v. Hume*,⁸¹ are also mistaken in providing source protection based upon Powell's *Branzburg* concurrence. It does not necessarily follow from his "case-by-case" language that the press would ever be entitled to protection when private parties would not be.⁸² In fact, Powell explicitly rejected the idea of first

78. 408 U.S. at 693. The Court went on to say:

Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative. It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees. . . . Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena; quite often, such informants are members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public.

Id. at 693–95.

79. *E.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

80. *See id.* at 580. In *Richmond Newspapers*, Justice Stevens stated in concurrence: "This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever." *Id.* at 582. Justice Brennan noted, however, that the "conceptually separate, yet related question" of whether the press should enjoy greater access rights than the general public was not at "stake" in the case. *Id.* at 586 n.2 (concurring opinion). *See also* *Estes v. Texas*, 381 U.S. 532, 540 (1964) (stating in a dictum that television and radio reporters have the same right of access to a criminal trial as does a newspaper journalist: "All are entitled to the same rights as the general public").

81. 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974), *discussed in* notes 72–75 and accompanying text *supra*.

82. Just what Justice Powell meant is unclear. Justice Stewart called the concurrence "enigmatic," but one which gave "some hope of a more flexible view in the future." *Branzburg*, 408 U.S. at 725 (dissenting opinion).

Justice Powell's first amendment views have been unclear elsewhere. In *Herbert v. Lando*, 441 U.S. 153 (1979), Powell also wrote a separate concurrence in which he declared that there should not be an evidentiary privilege that protects the editorial process because "whatever protection the 'exercise of editorial judgment' enjoys depends entirely on the protection the First Amendment accords the product of this judgment, namely, published speech." *Id.* at 178. In response, Justice Brennan wrote:

amendment rights for the institutional press surpassing those of others in his subsequent dissent in *Saxbe v. Washington Post Co.*⁸³

The courts that cite the news-gathering or case-by-case language are indulging in the assumption that they are breaking no new doctrinal ground. They have ignored, however, what the *Branzburg* majority called the "practical and conceptual" difficulties of limiting the protection of the press clause to members of the press.⁸⁴ None of these courts, for example, have suggested standards for distinguishing members of the "press" from other citizens.⁸⁵

"I assume my Brother POWELL means by this that the exposure of predecisional editorial discussions will not meaningfully affect the nature of subsequent publications. But if this is true, I have difficulty understanding exactly what First Amendment values my brother POWELL expects district courts to place in the balance." *Id.* at 195 n. 14 (opinion dissenting in part).

83. 417 U.S. 843, 857 (1974). Justice Powell said:

I agree, of course, that neither any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals. For me, at least, it is clear that persons who become journalists acquire thereby no special immunity from governmental regulation.

84. See *Branzburg*, 408 U.S. at 703-04. Professor Henry Monaghan has proposed that news-source protection be based on "constitutional common law." Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). The system would comprise a substructure of substantive, procedural, and remedial rules "drawing their inspiration from but not required by the constitution." *Id.* at 2-3. Monaghan has suggested that the "structural" press clause approach serve as a foundation for rules about the press, consistent with first amendment policy, including but not requiring some sort of news-source protection. *Id.* at 43.

85. *New York Times* Columnist Anthony Lewis elaborated on this problem:

Is the privilege to be only for employees of regular newspapers, magazines, and broadcast stations? What about writers for the underground press? Or a man who prints his own broadsheets, like the eighteenth century pamphleteers whom the Framers of the first amendment presumably had in mind? And is it only journalists who have an interest in confidential sources? What if a professor drew on talks with frustrated officials, without naming them, in writing a paper on what went wrong with American policy in Vietnam? Or suppose a commission investigating the Attica tragedy promised confidentiality to prisoners who talked freely; should its private notes be subject to subpoena while a newspaper's are not?"

Lewis, *Cantankerous, Obstinate, Ubiquitous: The Press*, 1975 UTAH L. REV. 75, 88 (1975). Many definitions of the "press" have been proposed. See *Newsmen's Privilege: Hearings on S. 36 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 409-62 (1973) (text of nine proposed news-source privilege bills and one Senate Joint Resolution). One definition was proposed by Congressman Charles Whalen: "[Any] person connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast." C. WHALEN, YOUR RIGHT TO KNOW 182 (1973). Whalen claimed that such a broad definition would not be open to abuse since "the courts . . . would be competent, as they are in other areas of the law, to ferret out abusive claims." *Id.* at 182-83. The Supreme Court, however, pointed out in *Branzburg* that:

It might appear that such "sham" newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into the content of expression, except in cases of obscenity or libel, and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness or taste.

408 U.S. at 705 n.40. The Court concluded that giving a privilege to "some organs of communication but not to others" would "inevitably be discriminating on the basis of content." *Id.*

B. Policy Considerations

The analysis of Supreme Court precedent by courts recognizing news-source protection would be understandable if the first amendment policy of facilitating the flow of information to the public would be furthered by the courts' holdings. While some courts have assumed that the free circulation of news would be aided by their holdings,⁸⁶ many commentators have challenged this assumption. In addition, the *Branzburg* majority was not only skeptical that the free flow of information would be constrained without protection, but also noted that it is often in the source's self-interest to provide information regardless of whether the confidentiality is legally sanctioned.⁸⁷ The Court further doubted the wisdom of protecting "a private system of informers" who would not be publicly accountable and who would threaten the public's "expectations of privacy."⁸⁸

Empirical evidence indicates that reporters continue to have access to their confidential sources despite the lack of legally protected anonymity. The trust that reporters have established with their sources and the reporters' willingness to keep their promises of secrecy even when this means going to jail may ensure this access.⁸⁹ Whatever the explanation, it has

86. *E.g.*, *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981). The court in *Zerilli* stated: [I]n the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed if the privilege does not prevail in all but the most exceptional cases, its value would be substantially diminished. Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters.

Id.; see also *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 508 (E.D. Va. 1976) ("Information lost to the press is information lost to the public; unnecessary impediments to a newsman's ability to gather facts, follow leads, and assimilate sources can restrict the quality of our news as effectively as censorship activities").

87. 408 U.S. at 693-95, *quoted in note 78 supra*.

88. 408 U.S. at 697.

89. *New York Times* columnist Anthony Lewis has written:

I recently asked a person whom I regard as the premier investigative journalist in this country, Seymour Hersh of *The New York Times*, whether he thought his ability to get confidential sources to talk depended on a reversal of *Branzburg v. Hayes*. He said no. Hersh added that we have been arguing this issue in the courts for many years, and it is obvious to everyone that there are more stories about the inside of government and other important aspects of our society than there used to be, stories depending on confidential sources who want to talk for their own reasons.

Lewis, *Court Decisions Have Not Dried Up News Sources*, CENTER MAGAZINE, Mar.-Apr. 1979, at 42. Newspaper editors themselves are divided over what effect the lack of news-source protection has had:

Steve Rogers, metropolitan editor of the *Miami Herald*, expressed the belief that sources are not drying up. Gordon Pates, managing editor of the *San Francisco Chronicle*, was not sure. Mark R. Arnold of the *National Observer* thought that it was too early to tell. Jack Anderson thought that his sources trusted him and therefore would not be concerned with the government's policies one way or the other. Rod Van Every, city editor for the *Milwaukee Journal*, thought that sources had great confidence in the paper and the ultimate defense of civil disobedience by reporters. Kenneth Smart, managing editor of the *Dallas Times Herald*, said that its staff did not

yet to be demonstrated that the existence of a qualified news-source privilege substantially influences a source's decision to provide information.⁹⁰ This is consistent with an observation by the *Branzburg* Court that only absolute protection can provide sources with security.⁹¹

Thus, courts that have recognized news-source protection in civil cases as a first amendment requirement are relying not only on doubtful Su-

sense a chill. Ralph Otwell, managing editor of the *Chicago Sun-Times*, states that the subpoena threat was not as great because they had been consistently aggressive in going to court in getting subpoenas quashed and had been relatively successful with the courts in that area. But [A.M.] Rosenthal of the *New York Times* thought that many editors were simply looking at the surface. He believed that it was difficult to tell who was being "elbowed out . . . people with something to reveal but not powerful enough to reveal it with their name tags on."

M. VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS 97 (1979).

An interesting empirical study on reporter-source secrecy appears in J. Cohen, *Shield Law: An Aid to Newsgathering?* (Aug. 3, 1979) (unpublished Master's thesis on file both at the University of Southern California Library and the *Washington Law Review*). Cohen surveyed California editors and journalists in order to determine the degree to which confidential sources relied upon the California shield statute, CAL. EVID. CODE § 1070 (West Supp. 1981). This statute provided that journalists could not be "adjudged in contempt . . . for refusing to disclose . . . the source of any information procured while so connected or employed . . ." The statute was incorporated into the California constitution in 1980. CAL. CONST. art. I, § 2. Cohen found that from his "findings about reporters' perceptions of sources . . . that sources generally do not consider the shield law when making the decision of whether to confide in reporters." J. Cohen, *supra*, at 61. Only 27.8% of Cohen's respondents (22 of 79) believed that the law made sources believe the reporters' promises. *Id.* at 36. "The rarity of instances in which reporters have divulged their confidential sources, rather than the shield law, appears to account for the uninterrupted flow of information between sources and reporters." *Id.* at 53.

One of the theses that Cohen tested was whether the reporter-source "atmosphere" had been "poisoned" by the *Branzburg* decision, as feared by reporters surveyed in Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 284 (1971). Cohen found that "[t]he qualitative data in this study suggest that sources generally have not been affected by the *Branzburg* ruling or by any other shield law case. Few sources appear to base their decisions to confide in reporters on the subtleties of either the shield law or recent court rulings." J. Cohen, *supra*, at 53. Cohen surmised from his survey that the effect of "court ordered disclosures from reporters may have a greater effect on journalists than sources" since those surveyed were aware of the potential danger of the subpoena threat to their jobs. *Id.* at 54-58. Nevertheless, Cohen noted that "[t]here are no data to indicate whether reporters are actually holding back on potential news stories because of the subpoena threat." *Id.* at 58.

90. Senator Sam Ervin wrote that Congress lost interest in enacting a federal statutory shield law because it appeared unnecessary.

Paradoxically, the monumental revelations of the press during the course of the Watergate scandals, while overwhelmingly supported by the public, apparently demonstrated that the press could do its job without the benefit of a statutory privilege. Senator Alan Cranston (D-Calif.), one of the Senate's leading proponents of the privilege, conceded: "Watergate, I think, improved the general attitude toward the press, but, on the other hand, it was all done without a shield law, so why do we need one?"

Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. LEGIS. 233, 274 (1974).

91. 408 U.S. at 702. The Court stated:

The privilege claimed here is conditional, not absolute . . . If 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 satisfactory solution to the problem. For them, it would appear that only an absolute privilege would suffice.

preme Court authority but also on questionable logic. The evidence that investigative journalism continues to proliferate despite *Branzburg* indicates that the first amendment policy of preserving the flow of information to the public is not yet threatened.

III. PROPOSALS

The lack of authority for a constitutional news-source privilege does not mean that the confidentiality of news sources should never be protected. Source protection could be justified, in some situations, by the desirable policy of preventing unnecessary interferences with reporters' investigations. What is needed, however, is a more flexible method of source protection than that provided by a constitutional privilege. This can be accomplished by inferring source protection from Federal Rule of Civil Procedure 26(c) or similar state discovery rules,⁹² which allow a court discretion to protect parties in discovery from "annoyance, embarrassment, oppression, or undue burden or expense." The court in *Carey v. Hume*,⁹³ for example, could have used its discretionary power to apply the same news-source protection test without changing the result. Doing so would avoid the possibility of constitutional inflexibility at a time when empirical justification for the protection is not yet established.

Based upon the policy of protecting reporters' investigations, news-source protection under Rule 26(c) would be closely analogous to the attorney work-product doctrine. As attorneys are protected from unnecessary interference into their investigations for the benefit of their clients,⁹⁴ so too would reporters be protected in their investigations for the benefit of the public. The protection in each situation, moreover, yields to a showing of necessity.⁹⁵ After such a showing, if the defendant refuses to

92. *E.g.*, WASH. SUPER. CT. CIV. R. 26(c).

93. 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974), *discussed in notes 72-75* and accompanying text *supra*.

94. *See* FED. R. CIV. P. 26(b)(3).

95. The similarity between the two doctrines has been noted by some courts. *Hart v. Playboy Enterprises*, 4 Media L. Rep. (BNA) 1616, 1619 (D. Kan. 1978); *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P.2d 472, 483 (1961). This analogy is particularly relevant for federal district courts. Although FED. R. EVID. 501 provides that state testimonial privileges are to be applied in civil diversity cases, federal courts should not be dissuaded from exercising their discretion in accordance with the test suggested in this proposal and based upon FED. R. CIV. P. 26(c). Just as the attorney work-product doctrine is not a "privilege" within the meaning of FED. R. EVID. 501, neither should news-source protection be so construed.

In *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court stated that although the "subject matter" covered by the attorney work-product doctrine was protected, it was not because "the subject matter is *privileged* or irrelevant, as those concepts are used" in the Federal Rules of Civil Procedure. *Id.* at 509-10 (emphasis added). Other courts have also reiterated that the attorney work-product doctrine is not a true privilege. *E.g.*, *In re Grand Jury Subpoena*, 599 F.2d 504, 509 (2d Cir.

comply with court-ordered disclosure in a libel case, there are sufficient remedies available to a trial court so that a contempt citation would not be appropriate.⁹⁶

A. *The Public Interest Test*

Most courts recognizing constitutional source protection have protected all sources equally regardless of the value of the information provided. The courts usually place the burden of proof for each element of the three-part source-protection test⁹⁷ on the libel plaintiff.⁹⁸ The courts have justified their holdings by saying that they are necessary to protect the flow of information to the press so that information will reach the public. When the press is able to provide the public with the full range of information necessary for self-government, the press is serving a core constitutional purpose.⁹⁹ Not all published information, however, serves the first amendment purpose, so fairness to a libel plaintiff requires recog-

1979), and cases cited therein. Similarly, news-source protection in *Garland v. Torre*, 259 F.2d 545, (2d Cir.), cert. denied, 358 U.S. 910 (1958), was not couched in "privilege" language in the constitutional discussion.

The true "privileges," which usually must be absolute to be effective, are those that protect various professional-client relationships in order to encourage full disclosure by clients. News-source protection, like the attorney work-product doctrine, is intended for a different purpose: to prevent unnecessary disclosure of information that will disrupt the ability of the person protected to effectively conduct investigations. News-source protection can also be better analogized to the protection given to trade secrets under FED. R. CIV. P. 26(c) than to the "privileges" contemplated by FED. R. EVID. 501. Both news-source protection and protection given to trade secrets can be limited in the discretion of a court and both require a sensitive balancing of the interests.

Even if news-source protection is considered a "privilege" for purposes of FED. R. EVID. 501, a federal court should not be deterred from considering a source confidentiality issue solely because the state wherein the court sits has not recognized the privilege. Because the issue is associated with first amendment interests, see note 84 *supra*, the federal interest overrides state limitations.

96. See, e.g., *DeRoburt v. Gannett Co.*, 507 F. Supp. 880, 887 (D. Hawaii 1981). In *DeRoburt*, the court compelled disclosure of sources and stated that "if defendants fail to disclose their sources within 60 days, there shall ARISE a presumption that defendants had no sources, which presumption may be removed by disclosure of the sources within a reasonable time before trial." *Id.*

97. See generally notes 60-62 and accompanying text *supra* (discussion of the courts' three-part test).

98. See, e.g., *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); *DeRoburt v. Gannett Co.*, 507 F. Supp. 880, 886 (D. Hawaii 1981).

99. *Branzburg v. Hayes*, 408 U.S. 665, 726-27 (1972) (Stewart, J., dissenting). Professor Zechariah Chafee Jr. wrote:

The First Amendment protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.

Z. CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 33 (1941). Professor Phillip Kurland noted that the idea of freedom of speech as an end in itself is a recent one. Kurland, *The Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses*, 29 DRAKE L. REV. 1, 6 (1979).

tion that at times the news-gathering value of some published information is so minimal that the plaintiff's right to know the source surpasses it in importance. Courts recognizing constitutional source protection do not take into account the value of the information provided by the source when evaluating the need of the libel plaintiff to know the identity of the source.

A method exists to remedy this inequity both for the courts that continue to use a constitutionally based news-source privilege and for those courts using discretionary power to protect sources. In several jurisdictions a libel plaintiff must show actual malice to prevail if the press can show that the subject of a published item is in the "public interest."¹⁰⁰ One test employed to determine whether the subject is in the public interest balances: (1) the social value of the story, that is, the extent to which the story affects the interests of a significant portion of the audience; (2) the depth of the article's intrusion into ostensibly private affairs; and (3) the extent to which the party voluntarily acceded to the position of public notoriety.¹⁰¹

This comment proposes the use of the public interest test as a means of limiting source protection to those stories with news-gathering value. Just as a libel plaintiff must satisfy the more difficult actual-malice standard if the media defendant can show a story to be in the public interest, so too should a plaintiff have to make a greater showing of need for a source's identity and information when the story is in the public interest. If a story does not meet this criterion, however, the confidentiality of the news source should not be entitled to protection. The fact that a published item

100. In *Rosenbloom v. Metromedia*, 403 U.S. 29, 52 (1971), the Supreme Court announced in a plurality opinion that the actual malice standard would also apply in cases where the plaintiff was neither a public official nor a public figure but in which the offending story was in the public interest. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), however, the Court reversed itself and dropped the "public interest" doctrine as a constitutional requirement. After *Gertz*, states were allowed to choose their own standard of proof for libel suits brought by private party plaintiffs as long as the standard required some culpability on the part of the defendant. *Id.* at 347. Several courts have continued to use the "public interest" standard. *E.g.*, *Gay v. Williams*, 486 F. Supp. 12 (D. Alaska 1979); *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975); *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1975), *cert. denied*, 423 U.S. 913 (1976); *Peisner v. Detroit Free Press, Inc.*, 82 Mich. App. 153, 266 N.W.2d 693 (1978).

101. See *Labruzzo v. Associated Press*, 353 F. Supp. 979, 984 (W.D. Mo. 1973); *Goldman v. Time, Inc.*, 336 F. Supp. 133, 138 (N.D. Cal. 1971); *Cottom v. Meredith Corp.*, 65 A.D.2d 172, 411 N.Y.S.2d 53, 56-57 (1978).

Although the category of stories in the public interest is a large one, items of gossip are excluded. Gossip could be defined as information concerning someone's private life communicated for curiosity's sake alone. A story on a confrontation 10 years earlier between two professional basketball players, for example, has been held to be not in the public interest. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (1970). Of course, information appearing in a gossip column or newspaper would be protected if it were in the public interest.

is in the public interest would not of itself require, however, that the source of information be entitled to confidentiality. Rather, that determination would serve as a prerequisite for a court's considering whether a confidential source is entitled to protection. A court should only use the public interest test to make a threshold determination of news-gathering value; balancing a story's news-gathering value against other factors would risk engaging in impermissible content discrimination.¹⁰² By using such a test, the libel plaintiffs' rights would be impinged only in circumstances in which the press can make a threshold showing that its report has news-gathering value for the public.

B. *The Need for Source Confidentiality*

Libel plaintiffs seeking source disclosure have also been placed at an unfair disadvantage because media defendants have not had to show a need for, or a legitimate expectation of, confidentiality. The Fifth Circuit in *Miller v. Transamerican Press, Inc.*¹⁰³ made its decision on source protection after looking only at the plaintiff's need for the information to prosecute his case, not the defendant's need for confidentiality. That court considered: (1) the relevance of the source's identity; (2) whether the identity could be learned by alternative means; and (3) whether there was a compelling need for the information.¹⁰⁴ This is the approach taken by nearly all courts that have recognized a news-source privilege.¹⁰⁵

The First Circuit, however, takes a different and preferable approach.

102. A threshold distinction between publications based upon their respective news-gathering value should not be constitutionally impermissible content discrimination. The first amendment guarantee of freedom of self-expression usually prohibits the government from placing restrictions on speech based upon content. An exception to this rule allows content discrimination when the "speech" has little or no first amendment value, as in libel or obscenity cases. *Branzburg v. Hayes*, 408 U.S. 665, 705 n.40 (1972). The right to confidential source protection, however, is premised upon a different first amendment value than that of self-expression: the right to gather news. Just as courts can discriminate on the basis of content in libel and obscenity cases because such speech has little or no first amendment value in terms of self-expression, so should courts be allowed to discriminate among news items that have little or no news-gathering value. Because the press is seeking preferential status when it asserts the right to gather news, the content of the stories for which greater rights are asserted should be held to a correspondingly higher standard.

Lower courts should limit themselves to determining whether an item is in the public interest and should not balance the news-gathering value of a publication against the other interests in a particular case. When the news-gathering value of a publication goes beyond the minimal stage of "public interest," any discrimination based upon content, as with that of self-expression, should be impermissible.

103. 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

104. *Id.* at 726.

105. *E.g.*, *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *DeRoburt v. Gannett Co.*, 507 F. Supp. 880 (D. Hawaii 1981).

In *Bruno & Stillman, Inc. v. Globe Newspaper Co.*,¹⁰⁶ a boat manufacturer brought a libel suit on the basis of news reports, partially based on confidential sources, that its boats were defective. In addition to requiring that the plaintiff demonstrate a need for the identity of the source, that court required the media defendant to show a need for “preserving” the confidentiality of its source.¹⁰⁷ Other courts should follow the *Globe Newspaper* lead since many within the news industry believe that sources would agree to be quoted, in a substantial number of cases, if reporters so insisted.¹⁰⁸

Because the protection of confidential sources can be justified only to the extent that such sources would not otherwise reveal their information, courts should independently determine whether the source had a legitimate expectation of or need for confidentiality before the court provides source protection.¹⁰⁹ If a court finds a need for confidentiality, it should then balance that need against the plaintiff’s need to discover the source. By not requiring such a showing by the media defendant, courts risk protecting non-confidential sources at the libel plaintiff’s expense.

As a broader policy, the unnecessary use of confidential sources should not be rewarded with special protection by the courts. The public audi-

106. 633 F.2d 583 (1st Cir. 1980).

107. *Id.* at 597–98.

108. One survey of newspaper editors has revealed that they believe that over half (56%) of all confidential sources would agree to be quoted if reporters insisted. Cuthbertson, *Leaks—A Dilemma for Editors As Well As Officials*, 57 JOURNALISM Q. 402, 408 (1980).

Norman Isaacs, chairman of the 1981 Pulitzer Prize Jury on Commentary and chairman of the National News Council, has said:

[W]e have a sort of national syndrome. It’s rather become fashionable for reporters to want stories without sources named. It sort of adds an aura to the story they think. . . . [T]here’s too much confidentiality appearing, not enough drive for attribution. I’m offended personally . . . I have reporters call me up at the News Council, ask for comments about things, and one of the first things they say to me is, “If you don’t want to be quoted by name, I’ll be glad to offer that,” and, you know, this is something I hadn’t even thought of. You don’t even have to ask for it anymore. And I’ve questioned people out in the general community I run into once in awhile when they’ve been in the stories. Several of them have verified that same thing.

Interview on The MacNeil-Lehrer Report, Library No. 1449, Show No. 6209 (Air Date Apr. 16, 1981), transcript at 5 (transcript on file with the *Washington Law Review*). This phenomenon has been reported elsewhere:

“Particularly in Washington, reporters let people talk on background without pressing them to talk on the record,” says The New York Times’s Nicholas Horrock. . . . [Some journalists] have come to believe that anyone who is willing to be quoted by name cannot possibly have anything interesting to say. “For years, everybody believed that if you could name your source you had a harder and more reliable story,” says Associated Press reporter Michael J. Sniffen. “But there are some reporters who stand that principle on its head. They think they have a better story if it comes from an unnamed source.”

NEWSWEEK, May 4, 1981, at 53.

109. Cf. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 598 (1st Cir. 1980) (“If the claimed confidentiality seems unsupported, unlikely, or speculative, the court may order discovery”).

ence is often unable to appraise the value of the information supplied from a confidential source since any ulterior motives of the source are hidden along with the identity.¹¹⁰ Also, where a source is unidentified, a reporter has less reason to fear that any embellishment of a quotation will be challenged and may as a result be less concerned with accuracy than with the way in which the quotation fits the story.¹¹¹ Thus, when anonymity is unnecessary, the public receives information, which may be tainted by these negative aspects of confidentiality, that could have been obtained on the record.

By balancing the defendant's need for confidentiality against the plaintiff's need for relevant evidence, courts will have a more flexible standard for arriving at the most equitable result. This will be useful especially in difficult cases. For example, in *Globe Newspaper*, where only a few of the sources of the offending story were anonymous, the plaintiff's need to discover their identities was considerably less than in a case in which there was only one source for a story. Despite this lesser need, a court might nevertheless compel disclosure if it finds that the source's expectation of confidentiality was predicated only on an unsolicited offer by the reporter. On the other hand, a court might refuse to compel disclosure when there was only one source for a story if it appeared that, by the court's compulsion of disclosure, the source would be placed in great danger.

In determining whether a source has a legitimate expectation or need of anonymity, a court should evaluate: (1) whether the source sought and relied upon the confidentiality;¹¹² (2) the potential for and degree of harm the source might suffer upon identification;¹¹³ and (3) whether the com-

110. Media critic Thomas Griffith has noted: "An odd transfer of responsibility occurs when a paper stands behind an anonymous source. It thereby vouches for the story more than for stories whose origins are honestly stated. The leaker always has some self-serving motive, good or bad, but gets off scot-free while accomplishing his purpose." Griffith, *A Sinking Feeling About Leaks*, TIME, Dec. 22, 1980, at 81.

111. In May 1981, *New York Daily News* Columnist Michael Daly wrote a story allegedly about a British soldier in Northern Ireland. Later it was learned that the story had been invented, and Daly resigned from the paper. In response to that incident, media commentator Ron Powers wrote:

A quotation from Michael Daly—it appeared in the *Daily News's* own story of his resignation—keeps running through my mind.

Daly told reporter Jane Perlez that the technique in his disputed column was no different from what he had used in "300 columns over two years. The question of reconstruction and using a pseudonym—I've done a lot of it. No one has ever said anything."

A lot of people have done "a lot of it," and Michael Daly knows that, and his editors know it, and we all know it.

Powers, *Post-objectivity*, COLUM. JOURNALISM REV., July-Aug. 1981, at 31. One explanation for such embellishments is the desire of journalists to make stories "sound better—sometimes to further their careers, sometimes to tell the 'real' story." NEWSWEEK, May 4, 1981, at 51.

112. See *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980).

113. See *Schwartz v. Time, Inc.*, 71 Misc. 2d 769, 337 N.Y.S.2d 125, 131 (1972).

pelled disclosure of the source's identity would be likely to deter future sources.¹¹⁴ By denying protection to sources who have no legitimate expectation of confidentiality, courts can prevent overbroad source protection that unfairly impinges on the ability of the libel plaintiff to protect his or her reputation.

IV. CONCLUSION

The overbreadth of the first amendment protection the courts provide for the confidentiality of news sources detracts from a libel plaintiff's ability to protect his or her reputation. Although news-source confidentiality needs protection in some situations, there is no valid precedential authority for a constitutional news-source privilege. Courts should, instead, regulate disclosure based upon the discretionary power available in discovery by virtue of Federal Rule of Civil Procedure 26(c) or a state equivalent. This comment proposes that a court, under its discretionary power, should first require the plaintiff to demonstrate that the libel claim is not frivolous, thereby ensuring that the lawsuit is not brought to find out the identity of sources purely for retaliatory purposes. Next, the court, before protecting the source's identity, should require the libel defendant to show that: (1) the publication is in the public interest; and (2) confidentiality was a legitimate need or expectation of the source. If the defendant is unable to make both of these showings, the court should compel disclosure. In this event, the libel plaintiff would be relieved of the expense and burden of showing that the source's identity goes to the heart of the claim or that the information is not reasonably available from alternative sources. If, on the other hand, the libel defendant is able to show some expectation of or need for confidentiality, then the court should balance that need against the plaintiff's need for the identity of the source. By basing their holdings on discovery rules instead of the Constitution, courts will have a more elastic, as well as a more supportable, test for reaching the most equitable result.

David Joseph Smith

114. See *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597-98 (1st Cir. 1980).