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STATE NEWSMAN'S PRIVILEGE STATUTES: A CRITICAL ANALYSIS

I. Introduction

In 1972 the United States Supreme Court resolved a long-standing constitutional question: Are reporters and other journalists protected by the first amendment to such an extent that they may refuse to testify before an official proceeding without being judged in contempt? Much to the dismay of newsmen and civil libertarians, the Court, by a five-to-four margin, denied that such a constitutionally based privilege exists. The decision, *Branzburg v. Hayes*,¹ made it clear that the full disclosure of the truth and the interests of justice dependent thereon outweigh any reasons for granting journalists an evidentiary privilege on first amendment grounds. Accordingly, those advocating the privilege can find little solace in *Branzburg* if they choose to argue from a purely constitutional standpoint. However, a short passage in Mr. Justice White's plurality opinion leaves open the possibility that journalists may obtain their privilege through legislative means, either on the federal or the state level or both:

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to erect any bar to state courts responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.²

Currently, congressional proposals for a federal newsmen's privilege statute flounder in committee. However, seventeen states already have various forms of newsmen's privilege statutes in effect, all having adopted them prior to *Branzburg*. Absent federal legislation and a common law privilege (which no American court has ever granted), the post-*Branzburg* period leaves the reporters with only the so-called state "shield" laws as a source of protection. The purpose of this study is to analyze critically these statutes, pointing out their weak and strong features, noting comparisons and contrasts, and suggesting possible amendments and alternative courses of action.

II. The Rationale Behind the Shield Statutes

The decision whether any shield statute is desirable must be a function of two competing values: availability of information to the public versus efficiency

¹ 403 U.S. 665 (1972).

² *Id.* at 706.

in the search for truth in the courts.³ While each state adopted its shield law in reaction to different specific stimuli, a general rationale can be suggested which includes most legislative intentions in this field. The essential premise for affording such protection consists of a simple logical relationship: First, the public is served by the press, whose primary function is to keep the people well informed. Second, the press cannot perform that function unless journalists can protect their sources of information. A number of extensive empirical studies have been made which show how heavily newsmen rely upon confidential informants and how such sources would "dry up" should the reporter be required to testify and reveal his sources before grand juries, legislative hearings, etc.⁴ Legislatures in states with shield statutes appear generally to have accepted this rationale, concluding that the confidential relationship between the newsman and his source is another of those relationships such as attorney-client, husband-wife, and priest-penitent, which deserve to be fostered and held inviolate for public policy reasons. Seventeen states, in seventeen different ways, have given the newsman a privileged status unrecognized outside statutory law. If one accepts the above rationale, the importance of these statutes cannot be overemphasized, for they are the only explicit protection the newsman has at present.

III. Which Media Are Protected?

With few exceptions, the shield statutes cover both broadcast and print media, the latter having been protected from the initial enactment of these statutes and the former gaining protection by amendment only in the late 1940's and 1950's. For example, Maryland was the first state to offer the press a testimonial privilege, having done so in 1896;⁵ however, the broadcast media did not gain coverage until 1951. New Jersey remains the only shield state which protects only newspapers,⁶ an apparent anomaly in an era when the public relies upon the broadcast media for the majority of its information.

A problem arises under those statutes which do not provide comprehensive definitions of "newspapers" and similar terms. For example, the California statute covers those connected with newspapers, press associations, wire services, and radio and television stations.⁷ A 1964 case⁸ interpreted the statute so as not to include magazines within the ambit of protection, stating that "newspaper" means "newspaper" and nothing else. Such a narrow statutory construction is common in this area of the law since it is a generally followed rule that statutes in derogation of the common law are subject to very strict interpretation.⁹ Facing such a consequence, carelessly drawn statutes may severely restrict protection

³ Note, *Privileged Communications—News Media—A "Shield Statute" for Oregon?* 46 ORE. L. REV. 99, 102 (1966).

⁴ V. BLASI, *PRESS SUBPOENAS: AN EMPIRICAL AND LEGAL ANALYSIS* (1971); GUEST AND STANZLER, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U. L. REV. 18 (1969).

⁵ MD. ANN. CODE art. 35, § 2 (1971).

⁶ N.J. STAT. ANN. tit. 2A, ch. 84A, § 21 (Supp. 1972).

⁷ CAL. EVID. CODE § 1070 (West 1966).

⁸ *Cepeda v. Cohane*, 233 F. Supp. 465 (S.D.N.Y. 1964).

⁹ *Yount v. National Bank of Jackson*, 327 Mich. 342, 42 N.W.2d 110 (1950); *State v. Court of Common Pleas of Mercer County*, 1 N.J. 14, 61 A.2d 503 (1948).

apparently intended to be much broader. The California statute is a good example of this. There the statute was adopted with the announced policy of encouraging confidences between journalists and informants and preserving them inviolate, with no evident legislative reason existing for excepting magazine writers.¹⁰ Needless to say, careful draftsmanship is an absolute necessity in this area of legislation.

Indiana went to great lengths in its shield statute to define exactly what a "newspaper" is. To be protected, print newsmen in Indiana must work for a newspaper which has been published for at least five consecutive years in the same town or city and has a paid circulation of at least two per cent of the county in which it is published.¹¹ Technically, a four-year-old newspaper with a large circulation, as well as a failing century-old newspaper with a very small circulation, is not included in Indiana. Such overspecificity and restrictive requirements both run counter to the stated public policy objective and invite a constitutional challenge based upon the equal protection clause of the fourteenth amendment.

Some states have, however, reached a comfortable compromise in the specificity battle. The recently adopted (1970) New York statute defines newspaper as:

. . . a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at the United States post-office as second-class matter.¹²

Admittedly, one can never avoid all definitional problems, but carefully drawn statutes like New York's can reduce the semantic disputes to a minimum and insure that only those people determined legitimately to be in need of protection are so included.

Overly broad provisions in proposed shield laws have sometimes contributed to their legislative downfall. In the 1960's an Oregon law revision commission recommended a statute which would protect ". . . those engaged in the work of gathering or disseminating news."¹³ Taken literally, such a law would protect even backyard gossipers, as well as bona fide newsmen. This, and other similarly broad clauses, no doubt was one of the causes for the proposal's rejection by the Oregon Legislature.

IV. Which Individuals Are Protected?

A corollary problem involves the scope of employment of the individual to be protected. On the whole, states have done a good job in clearly delimiting this area of coverage. Most of them follow a formula similar to Alabama's:

¹⁰ Note, *Newsman's Immunity Needs a Shot in the Arm*, 11 SANTA CLARA LAW. 56 (1970).

¹¹ IND. CODE § 34-3-5-1 (1973).

¹² N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1972).

¹³ Note, *supra* note 3, at 104.

No person engaged in, connected with, or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news-gathering capacity shall be compelled to¹⁴

The term "newsgathering capacity," a common one among shield statutes, presents interpretive problems in light of the nature of the journalistic profession. Reporters are prone to say that they are *always* on the job, so the contention naturally follows that they are *always* shielded, assuming other qualifications are met. Cases are lacking which interpret "newsgathering capacity" but, given the tendency of courts to construe shield statutes very narrowly, chances are that only bona fide reportorial endeavors can gain coverage.

Michigan¹⁵ provides no scope of employment requirement, and previous to 1968 neither did Pennsylvania.¹⁶ The omission of such a requirement provides an obvious opportunity for abuse which is the product of careless drafting. California's statute protects a ". . . publisher, editor, reporter, or other person connected with or employed upon a newspaper. . . ."¹⁷ Since the "newsgathering capacity" requirement is lacking, this could ostensibly include a printer or even a delivery boy.

For most of the statutes, *current* employment by the medium is a prerequisite for protection.¹⁸ Difficulty arises when a *former* employee of a newspaper or broadcasting station is subpoenaed regarding information obtained during the period of his previous employment. Broad construction might include such an individual but, practically speaking, statutory provisions are necessary to guarantee the protection. This has been done in the Louisiana shield statute, which includes ". . . all persons who were previously connected with any news media . . . as to the information obtained while so connected."¹⁹ California also adopted such an approach in its 1971 amended version.²⁰ This extension of coverage seems only logical if the policy of the newsman's shield law is to encourage and preserve journalistic confidences for the public welfare. The mere passage of time and the severance of employment should not destroy a previously valid confidential relationship.

It is recognized throughout the shield jurisdictions that the statute, while it may be avowed intention protect the confidential relationship, is available only to the newsman and not to the source or informant.²¹ The privilege statutes create a right personal to the reporter, one which only he can invoke. It cannot be invoked by the person who communicated to the newsman in order to prevent the latter from testifying. A contrast with other evidentiary privileges is evident. In the traditional confidential relationships (doctor-patient, priest-penitent, etc.), neither party can testify at all without the other's consent, so a great deal more

14 ALA. CODE tit. 7, § 370 (1960).

15 MICH. STAT. ANN. § 28.945(1) (1972). The Michigan statute is further uniquely limited in that it alone among the shield jurisdictions applies only to criminal proceedings.

16 PA. STAT. ANN. tit. 28, § 330 (Cum. Supp. 1972).

17 CAL. EVID. CODE § 2 (West 1971).

18 *E.g.*, ARK. STAT. ANN. § 43-917 (1964); KY. REV. STAT. § 421.100 (1969); MD. ANN. CODE art. 35, § 2 (1971).

19 LA. REV. STAT. ANN. § 45:1451 (Cum. Supp. 1972).

20 CAL. EVID. CODE § 1070 (Cum. Supp. 1972).

21 *Beecroft v. Point Pleasant Printing and Pub. Co.*, 82 N.J. Super. 269, 197 A.2d 416 (1964); *Hestand v. State*, 273 N.E.2d 282 (Ind. 1971).

than mere protection from contempt is concerned. The confidential communication itself is privileged, not just the recipient of it. Under newsman's privilege statutes, the newsman is the principal object of protection, with the actual subject matter and the source being seemingly secondary in importance.

V. Waiver

The personal nature of the privilege is intimately entwined with the question of waiver. Generally speaking, the same cases which have held the privilege to be personal to the reporter have stated that he is free to waive it and divulge the confidential source's identity and the imparted information at his own will.²² Consequently, the informant cannot object when the journalist voluntarily testifies. Put simply, the various shield statutes are permissive rather than mandatory in granting the privilege. The problem of determining what constitutes waiver arises, since most statutes are silent on this point and leave the matter to the courts to determine.²³ How much must a reporter reveal before it can be concluded that he has at least implicitly waived his privilege? In one case the California Supreme Court held that writing a story concerning information about a speech by a union leader which contained parts in quotation marks but which did not disclose the source from which the story was obtained did not constitute waiver.²⁴ On the other hand, a New Jersey case held that a newspaper which had set forth the defenses of fair comment and reasonable belief as to the truth of an editorial which formed the basis of a libel suit had waived its statutory privilege and was therefore required to answer the plaintiff's interrogatories concerning the source of the facts.²⁵ This strict view of waiver contrasts radically with the broader Pennsylvania view, which is that a waiver applies only to statements made by an informer which are actually published or publicly disclosed and not to other statements made by the informer to the newspaper employee.²⁶ Pennsylvania, in other words, permits selective waiver, allowing the reporter to pick and choose that which he wants to divulge without waiving the privilege for the undisclosed matters. This is an extreme rarity among the shield jurisdictions, which, on the whole, interpret a waiver to have occurred whenever the journalist reveals all or part of the privileged matter.²⁷

State legislatures should carefully consider waiver in drafting their shield statutes—a precaution which few appear to have taken. Absent specific language, courts are generally free to read in various traditional concepts of waiver which the legislative body may or may not have intended.

Since the public supposedly is the primary beneficiary of the shield statutes, the question arises as to whether a reporter should be prohibited from waiving and testifying. The issue is a complex one and deserves closer legislative scrutiny than it has previously been given.

22 *Id.*

23 Note, *supra* note 3, at 108.

24 *Ex parte Howard*, 136 Cal. App. 2d 816, 289 P.2d 537 (1955).

25 *Beecroft v. Point Pleasant Printing and Pub. Co.*, 82 N.J. Super. 269, 197 A.2d 416 (1964).

26 *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1965).

27 *D'Alemberte, Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARVARD J. LEGIS. 307, 333-34 (1969).

VI. What Matter Is Protected?

A current problem in both drafting and interpreting the typical shield statute involves its substantive scope: Should it protect only the identity of the source or informant or, on a much broader scale, should it also cover the information which the source reveals to the reporter? The statutes are almost unanimous in limiting coverage to the "source" of the information,²⁸ however that term may be construed. Only New York²⁹ and Michigan³⁰ have chosen to avoid this restriction with different language.

Even some of the states whose legislatures have singled out "sources" as the only protected matter have had difficulty in deciding just what "sources" means. Pennsylvania serves as a good example of this interpretive conflict. The words of the statute are clear enough: The reporter cannot ". . . be required to disclose the source of any information procured or obtained by him. . . ."³¹ The Pennsylvania Supreme Court applied these words rather differently in the landmark decision of *In re Taylor*,³² giving the section an interpretation broad enough to cover not only the identity of the informant but also any documents involved. The case concerned an attempt to subpoena the tapes and other records of a conversation held between a reporter for the Philadelphia *Evening Bulletin* and a confidential informant concerning alleged corruption in city government. The court decided that the statute must be construed liberally in favor of the news media, and that *documentary* sources of information used in writing the article were just as essential to the protection of the reporter as the personal identity of the informant.³³

Very few states have followed the path of Pennsylvania. For example, almost identical language in Maryland's statute³⁴ was held by their courts in *Lighthman v. State*³⁵ to protect only the personal identity of the source, and not the accompanying information, unless such information would itself reveal the source's identity. Kentucky gave such statutory language only a slightly broader meaning when, in the state-level version of *Branzburg*,³⁶ it was held that "source" refers to the method by which or the person from whom the newsman gains his information. A similarly strict construction in New Jersey in *State v. Donovan*³⁷ prompted that state's legislature to amend the statute to include ". . . source, author, means, agency or person . . . ,"³⁸ though the actual information is still generally excluded from protection under such wording.

New York enacted its newsman's privilege statute in 1970 and used the broadest language of all the shield jurisdictions. The statute protects the news-

28 *E.g.*, ARK. STAT. ANN. § 43-917 (1964); LA. REV. STAT. ANN. § 45:1453 (Cum. Supp. 1972).

29 N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1972).

30 MICH. STAT. ANN. § 28.945(1) (1972).

31 PA. STAT. ANN. tit. 28, § 330 (Cum. Supp. 1972).

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

33 *Id.* at 40, 193 A.2d at 184-85.

34 MD. ANN. CODE art. 35, § 2 (1971).

35 15 Md. App. 713, 294 A.2d 149, 156; *cert. denied*, 266 Md. 550, 295 A.2d 212 (1972).

36 *Branzburg v. Pount*, 461 S.W.2d 345 (Ky. 1970), *interpreting* KY. REV. STAT. § 421.100 (1969).

37 129 N.J.L. 478, 30 A.2d 421 (1943).

38 N.J. STAT. ANN. tit. 2A, ch. 84A, § 21 (Supp. 1972).

man from being cited for contempt for “. . . failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published. . . .”³⁹ In addition, the statute defines “news” as “. . . written, oral or pictorial information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.”⁴⁰ A more all-inclusive privilege can hardly be conceived. However, New York courts to date have chosen to limit coverage by reading in an otherwise unmentioned requirement of confidentiality, which is discussed below. For the moment it is sufficient to say that if a newsman in New York obtains information confidentially, both the content of the revelations and the identity of the revealer are held sacrosanct.

To avoid the source/information interpretive controversy state legislative drafters would do well to add qualifying provisions to their proposals. If only personal identity is intended to be covered, such should be explicitly stated in the text of the statute. New Jersey's qualifying phrase, even though contextually it may be recognized as including only the personal or mechanical identity of the source, does not seem to adequately solve the problem.⁴¹ It is helpful to remember that the general purpose behind such statutes is to protect confidential relationships in journalism. Normally this can be achieved by protecting the source's identity, and not necessarily the content of the exchange. As long as there is a competing public interest in revealing the content, such will be the case in most states, New York to the contrary notwithstanding.

VII. The Question of Confidentiality

A concomitant problem in New York involves the requirement of confidentiality or lack thereof. Since other shield statutes have coverage limited to “sources,” they never really reach the issue of confidentiality, either because confidentiality is an express or implied prerequisite or because the “source” limitation is so narrow as to make the question of acquired nonconfidential information immaterial.⁴² New York's broad provisions, however, have caused serious construction problems. Currently, the question is still being litigated on the appellate level, but lower New York courts in two cases have, in effect, read in a requirement of confidentiality. In *In re WBAI-FM*,⁴³ the court held that where information received is not the result of affirmative questioning of a person by a news media agent acting as such, it cannot be protected. In *WBAI* a radio announcer had received an anonymous tip-off call regarding a bombing, directing employees to a place where a written statement was to be found. The court stated that there was no confidential relationship involved here and, therefore, the statement could be subpoenaed. Making a policy judgment, the court held that the statute “. . . cannot be distorted through breadth of interpretation

39 N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1972).

40 *Id.*

41 Note, *supra* note 3, at 107.

42 MICH. STAT. ANN. § 28.945(1) (1972).

43 68 Misc. 2d 355, 326 N.Y.S.2d 434 (1971).

to the point of impairing the orderly process of the investigation of crime. . . ."⁴⁴

Another New York lower court found similarly and even more specifically in *People v. Wolf*.⁴⁵ In this case the *Village Voice* published an article on the Tombs riot under the by-line of an inmate indicted for taking part in the uprising. The court held that the inmate could not gain immunity from subpoena through the statute simply because he wrote the article. Under the New York statute information or its sources must be imparted to a reporter under a "cloak of confidentiality" upon an understanding, express or implied, that information or its sources will not be disclosed.⁴⁶ In a rather conclusory fashion, the court in *Wolf* found the element of confidentiality "implicit" in the statute.

With appeals now pending, the New York law in this regard is still in doubt. Perhaps if one considers the consequences of an overly broad—but, admittedly, liberal—interpretation of the statute, the outcome of the issue at the New York Court of Appeals level can be predicted. Taking the statute literally, a newsman could conceivably be an eyewitness to a crime, while interviewing an informant or not, and still be protected from testifying regarding what he saw, provided, of course, he were acting in a "newsgathering capacity." Accepting an equally broad construction of "newsgathering capacity," it is not hard to see that the newsman is being granted a professional immunity virtually without parameters. It is indeed doubtful whether the New York Legislature intended such an all-encompassing result when it enacted § 79-h of the Civil Rights Law.

VIII. Is the Privilege Absolute or Qualified?

All but three of the state newsman's shield statutes grant an absolute privilege; that is, once certain definitional criteria are met, the reporter cannot be deprived of his privilege because of any overriding public interest, no matter how valuable the desired information or identity may be.⁴⁷ Alaska, Arkansas, and Louisiana, however, have adopted a different approach which in general grants the newsman a testimonial privilege to the extent that the interests of public justice will allow. Under the Arkansas statute, before a reporter can be denied the privilege, ". . . it must be shown that [his] article was written, published or broadcast in bad faith, with malice, and not in the interests of the public welfare."⁴⁸ This qualification, which focuses largely on motive and content, both compares and contrasts with that of Louisiana, which, after setting out a rather detailed procedure for revocation, states that the ". . . order shall be granted only when the court, after hearing the parties, shall find that the disclosure is essential to the public interest."⁴⁹ Alaska's statute is the broadest of the three in this regard, stating that a court may deny the privilege ". . . if it finds the withholding of the testimony would (1) result in a miscarriage of jus-

44 *Id.*

45 69 Misc. 2d 256, 329 N.Y.S.2d 291 (1972).

46 *Id.*

47 *E.g.*, Ala. Code tit. 7, § 370 (1960); N.J. STAT. ANN. tit. 2A, ch. 84A, § 21 (Supp. 1972); PA. STAT. ANN. tit. 28, § 330 (Cum. Supp. 1972).

48 ARK. STAT. ANN. § 43-917 (1964).

49 LA. REV. STAT. ANN. § 45:1453 (Cum. Supp. 1972).

tice or the denial of a fair trial to those who challenge the privilege; or (2) be contrary to the public interest."⁵⁰ Unfortunately, there are no available cases in the three states which have adjudicated individual situations which might fit under these qualifications.

The concept of a qualified shield statute seems valuable in resolving the previously mentioned conflict of values: the protection of the free press versus the full disclosure of evidence in the courts. Mr. Justice Powell suggested such a compromise position in his concurring opinion in *Branzburg*:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.⁵¹

In more specific terms, Mr. Justice Stewart's dissent lists those occasions when, for reasons of public interest, the newsman should be denied the evidentiary privilege:

[W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold the government must (1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.⁵²

Obviously, Justice Stewart's suggested standards are considerably more precise and strict than Justice Powell's and those employed by Louisiana, Arkansas, and Alaska, but they are all alike in that they add subjectively determinable conditions to the exercise of the privilege. Such qualifications, unless worded in most precise terms, can effectively negate any benefit to be derived from a shield statute. Since a broad qualification, such as Louisiana's, puts the real onus on the court, the privilege becomes a discretionary one subject to the individual judge's decision. Inevitably, this discretion is open to abuse, and the newsman may end up with no more than what the common law gave him—no privilege at all. As Justice Powell states, the privilege is reduced to one determined on a case-by-case basis which means an increased court caseload and an added source of pretrial controversy. Above all, one should consider the effect this would have on the asserted reason for enacting the newsman's privilege statute in the first place. If the purpose is to encourage confidences, then a qualified privilege may very well prove counterproductive. Knowing the journalist's privilege to be a conditional one, an informant may understandably hesitate or refuse to give information to the newsman when he is unsure of the security of their relation-

50 ALASKA STAT. § 09.25.160 (Cum. Supp. 1972).

51 408 U.S. 665, 710 (1972) (concurring opinion).

52 *Id.* at 743 (dissenting opinion).

ship.⁵³ These considerations lead to the conclusion than an absolute privilege, bound within certain definitional parameters (*e.g.*, "source" only), is more desirable than a fluid, uncertain, qualified version.

IX. Other Statutory Requirements

In six states⁵⁴ the journalist cannot claim his privilege of withholding the source's identity unless he has published or broadcast the information secured. The rationale behind this appears to be that if the public is to be served by the journalist's confidences, then eventually the information must reach the people, either in print or through court testimony. However, nine other states⁵⁵ offer the privilege without any such publication requirement. Interestingly, Arkansas requires that the acquired information be ". . . written, published or broadcast . . .,"⁵⁶ a requirement which ostensibly could be fulfilled by having the reporter take written notes.

It has been contended that to require publication as a necessary condition precedent to the protection of the statute would fail to give enough protection to the source, and without such protection the potential source would not feel free to make disclosures.⁵⁷ Both published and unpublished communications may and do rely on a confidential relationship, and, lest the newsman be told what to print under threat of losing his privilege, it seems sound to have no publication requirement at all. This is especially true since the major goal of facilitating confidences is achieved regardless of publication.

Ohio and Pennsylvania are alone among the states in requiring that if a radio or television station or employee thereof wishes to claim an evidentiary privilege, a record of any broadcast material must be kept available for a given period of time.⁵⁸ However, this is not a true broadcast requirement since the statutes do not require broadcast as a condition precedent to claiming the privilege. The words of the Ohio statute are:

Every commercial radio broadcasting station, and every commercial television broadcasting station, shall maintain for a period of six months from the date of its broadcast thereof, a record of those statements of information the source of which was procured or obtained by persons employed by the station in gathering, procuring, compiling, editing, disseminating, publishing or broadcasting news.

Record as used in this section shall include a tape, disc, script or any

⁵³ Note, *supra* note 3, at 108.

⁵⁴ ALA. CODE tit. 7, § 370 (1960); ARIZ. REV. STAT. ANN. § 12-2237 (Cum. Supp. 1972); CAL. EVID. CODE § 1070 (West 1966); KY. REV. STAT. § 421.100 (1969); MD. ANN. CODE art. 35, § 2 (1971); N.J. STAT. ANN. tit. 2A, ch. 84A, § 21 (1971).

⁵⁵ ALASKA STAT. § 09.25.150-220 (Cum. Supp. 1972); IND. CODE § 34-3-5-1 (1973); LA. REV. STAT. ANN. § 45:1451-1454 (Cum. Supp. 1972); MICH. STAT. ANN. § 28.945(1) (1972); MONT. REV. CODES ANN. tit. 93, ch. 601-2 (1964); N.M. STAT. ANN. § 20-1-12.1 (1970); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1972); OHIO REV. CODE ANN. § 2739.12 (1954), § 2739.04 (Cum. Supp. 1972); PA. STAT. ANN. tit. 28 § 330 (Cum. Supp. 1972).

⁵⁶ ARK. STAT. ANN. § 43-917 (1964).

⁵⁷ D'Alemberte, *supra* note 27, at 336-37.

⁵⁸ OHIO REV. CODE ANN. § 2739.04 (Cum. Supp. 1972); PA. STAT. ANN. tit. 28, § 330 (Cum. Supp. 1972).

other item or document which sets forth the content of the statements which are required by this section to be recorded.⁵⁹

Such a requirement serves the public interest by guaranteeing future access to already disclosed information, while at the same time protecting the confidential relationship.

X. The Conflict of Laws Problem

Case I: Assume *P* sues *D* in Federal District Court in state *X*, which has no newsman's privilege statute, and *P* attempts to secure the identity of a confidential source through a deposition from reporter *R* in state *Y*, which does have a shield statute. Can *P* force *R* to disclose his source? Held: No.

Case II: Assume *P* sues *D* in Federal District Court in state *Y*, which recognizes a privilege for journalists, and *P* seeks a deposition of reporter *R* in state *X*, which lacks a shield statute. Can *P* force *R* to disclose his source? Held: No.

These two actual cases, classic examples of the conflict of laws problem in this area, are seemingly contradictory but at this time are the sole precedents available. Case I is *Ex parte Sparrow*,⁶⁰ in which Dell Publishing Company sued for libel in New York, which at that time had no shield law. Depositions were taken of witness Sparrow, a reporter who refused to disclose the source of the questioned article, in Alabama, a shield jurisdiction. The United States District Court for the Northern District of Alabama stated:

While this court does not consider the question of privilege to be a matter of substance and therefore controlled by *Erie R. Co. v. Tompkins*, 304 U.S. 64 . . . , it would appear that this court should refer to the statutory law of Alabama in the absence of any Federal rule on privilege. . . .⁶¹

* * *

. . . [R]ule 26, under which examination was being conducted, provides that ". . . the deponent may be examined regarding any matter *not privileged*, which is relevant to the subject matter involved in the ending action. . . ." For the purpose of determining the witness' claim of privilege, this court, by rule 37, is constituted the forum or the place where plaintiff, the proponent, is required to pursue his remedy to compel the witness to answer.⁶²

This both compares and contrasts with Case II, *Cepeda v. Cohane*,⁶³ in which Orlando Cepeda sued *Look* magazine for libel in a California state court. The action was removed to a Federal District Court in California, and an attempt was made to take a deposition from the author in New York. At the time California had a shield law but New York did not. The court held that the

59 OHIO REV. CODE ANN. § 2739.04 (Cum. Supp. 1972).

60 14 F.R.D. 351 (N.D. Ala. 1953).

61 At this point the court cited in a footnote *Actna Life Ins. Co. v. McAdoo*, 106 F.2d 618 (8th Cir. 1939).

62 14 F.R.D. 351, 353 (N.D. Ala. 1953).

63 233 F. Supp. 465 (S.D.N.Y. 1964).

public policy of California, rather than that of New York, controlled, and that when depositions are taken in a state other than the trial state, the law of the trial state governs. Unlike *Sparrow*, the court here did definitively state that privilege is a matter of substantive law. It recognized an exception when the deposition state has its own shield law and the trial state does not, which is the situation in *Sparrow*, so the two cases appear consistent at least on the surface.⁶⁴

Needless to say, the extreme paucity of cases on this question makes the rendering of a general rule impossible. At this writing there is no federal newsman's privilege. This would force a federal court in a statutory conflict situation either to adopt the confused *Sparrow-Cepeda* approach or strike out on its own in a virtually uncharted area. Once again it is evident how relatively unlitigated has been the overall question of state shield statutes.

XI. Conclusion

At this stage a number of points should have become more than evident. First, newsman's privilege jurisdictions vary greatly in their approaches to the problem. Whether it be the subject matter covered, the media included, the question of "source," or other miscellaneous requirements, there is certainly no unanimity; very few general majority rules can be gleaned from the statutes. Second, a majority of the states have chosen not to grant newsmen any evidentiary privilege at all. Whether this will change now that *Branzburg* has been decided remains to be seen. Even if all the other jurisdictions adopt shield statutes, the problem of nonuniformity remains. The great variance of protection and nonprotection from state to state has a detrimental effect on the effective operation of a free press. At the present time newsmen, unless they have constant legal guidance, are understandably unsure of where they stand in the morass—especially as they move from one state to another in their professional status. Network and national publication reporters are constantly crossing state lines, thus traversing jurisdictions offering varying degrees of protection. The legal problems are obvious, and the resultant uncertainty can only hinder the proper functioning of the press in gathering information, confidential and otherwise.

The solution to this problem rests in either a uniform state law adopted nationwide or federal legislation. Past experience demonstrates the severe impracticality of the former, particularly in a matter of such controversy. The conclusion, therefore, must be that uniformity can only be achieved through an act of Congress which contains the best features of the state shield statutes and is applicable on both the federal and state levels. Journalism is a feature of interstate commerce; the commerce clause could be the basis for the statute's constitutionality, just as it has been for so many other apparently local matters in this century.⁶⁵ Interstate consistency and a truly free press demand no less.

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⁶⁴ Note, *supra* note 3, at 111.

⁶⁵ *E.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).