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I. INTRODUCTION

A television company broadcasts a program criticizing a nationalized corporation and disclosing documents passed to it secretly by one of the corporation's employees. The corporation asks the television company to reveal the identity of the employee. The television company refuses and eight of nine judges ultimately decide that the refusal is unjustified.

That, in essence, is the story of *British Steel Corp. v. Granada Television, Ltd.*[1] If this situation had arisen in the United States, legal consequences probably would be unremarkable in view of the law's considerable experience with such matters. The novelty posed for English law, however, and the reaction prompted from all three levels of the judicial hierarchy make the tale and its implications worthy of some elucidation. This Article will explain the case, its implications for the confidentiality of journalists' sources and, more generally, the judicial attitude toward freedom of the press in the United Kingdom, as exemplified by other, more recent decisions.

II. GRANADA CASE

A. The Facts

In order to present an adequate account of the judgments delivered in the case and, in particular, to evaluate their reasoning, it is essential to recount at some length the facts of the case and context in which it arose.

1. *Dramatis personae*

British Steel Corporation (B.S.C.)—a nationalized undertaking, accountable to the British Government.[2]

Sir Charles Villiers—the chairman of B.S.C. at the time of the controversy.

Mr. Douglas Mackenzie—a former employee of B.S.C., who was responsible for records and archives.

Granada Television Limited (Granada)—an independent company

1. The case has not been reported in official law reports. A collection of all the judgments regarding the case may be found at [1980] 3 W.L.R. 774 and [1981] 1 All E.R. 417.

2. The industry has a checkered political history. It was nationalized in 1949, denationalized in 1953, and renationalized in 1967. It is governed currently by the Iron and Steel Act, 1975, ch. 64.

with a license to broadcast as part of the independent television network in the United Kingdom.

2. *The Leak*

At the end of 1979, B.S.C. employees began a national strike as part of their campaign for a wage increase. B.S.C. is a nationalized industry; its chairman is appointed by the British Government and it is accountable to that government for its policies. In turn, it receives considerable financial support from public funds. B.S.C. has a large share in steel production,[3] and the strike produced immediate and widespread effects. Much of British industry ground to a halt. The tension and occasional violence at picket lines exacerbated public concern.[4] Moreover, this strike was the first serious challenge to the newly elected Conservative government's policy of strict wage restraint in the publicly-paid sector of the economy.

Granada Television produces a weekly current affairs program entitled *World in Action.* It is broadcast throughout the national network of independent television companies. Over the years the program has acquired a good reputation—and occasional notoriety—for its treatment of sensitive political issues. By the end of January 1980 it had planned a thirty-minute program on the steel strike. On January 28th, 250 B.S.C. documents were delivered to the *World in Action* offices by an employee of B.S.C. According to Granada, these documents came from a source within B.S.C. who had "a keen sense of indignation about the dealings between B.S.C. and the British Government before, and during, the strike."[5] In any event, their unexpected receipt "must have come as manna from heaven,"[6] for many were marked "confidential" or "secret" and allegedly revealed that there had been mismanagement within B.S.C. and that, as part of its policy of wage restraint, the government had instructed B.S.C. not to accede to the

3. It produces approximately 50% of the steel produced in the United Kingdom.

4. A flavor of that atmosphere may be gleaned from Duport Steels, Ltd. v. Sirs, [1980] 1 All E.R. 529. That case arose out of a union's decision to classify its workers, who were employed in the private sector, as strikers even though no dispute existed between those workers and the union.

5. *Granada,* [1980] 3 W.L.R. at 782 (opinion of Vice Chancellor Megarry). Each presiding judge was prepared to accept the argument that the source did not act maliciously and was not paid for the documents.

6. *Id.* at 828 (opinion of Viscount Dilhorne).

strikers' wage demands. In return for the documents, Granada promised to conceal the identity of the source.

3. *"The Steel Papers"*

The program was scheduled to be broadcast on Monday, February 4, and the chairman of B.S.C., Sir Charles Villiers, had agreed to appear. Granada did not tell him of their documentary acquisition, however, until the evening before. On that evening, the producer telephoned B.S.C., told a B.S.C. official that he would be referring to twenty-seven B.S.C. documents on the program,[7] and that his source could not be revealed. It is clear that the lateness of this communication to B.S.C. was an important factor in most of the subsequent court decisions; it set the tone for the judicial disapproval of Granada's conduct.

Once alerted, however, B.S.C. took no legal steps to halt the broadcast of the program. Instead, its chairman duly appeared. Much of the thirty-minute program was based on the documents Granada had acquired; indeed, the program was entitled *The Steel Papers*. Extracts were read, and pictures of the documents with their "secret" markings were shown. Toward the end of the program, Sir Charles Villiers in effect was cross-examined about the content of some of the documents.

The program aroused considerable publicity. The country had just entered the sixth week of a crippling national steel strike, and here was evidence that the Government, which had previously denied any involvement in the strike, had instructed B.S.C., contrary to B.S.C.'s wishes, not to improve its pay offer to the strikers and that the strike was as much due to poor management as to the conduct of the steelworkers. A less significant controversy might have led to no further action, but the widespread publicity given to the program and the atmosphere of national concern impelled the parties towards legal conflict.

4. *The Legal Proceedings*

Two days after the program was broadcast, B.S.C. obtained an *ex parte* injunction against further use of the documents and sought an order to force Granada to return the documents. After negotiation, Granada agreed to make no further use of the documents and to deliver them to the safekeeping of the parties' solic-

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7. *Id.* B.S.C. learned of the remaining 223 documents at a later date.

itors. At this point, the crucial twist to the story occurred, for, upon delivery of the documents, it became evident that they had been so mutilated and edited that it was impossible to discover from the remains the identity of the informer. Once B.S.C. had decided not to try to stop transmission of the program, however, identifying that informer became the real goal of B.S.C.'s legal proceedings. Consequently, the writ was amended to include an order that Granada reveal the identity of the informer. In essence, this was a request for an order of discovery and, as legal negotiations continued, it became the sole bone of contention between the parties.

At first instance, Vice-Chancellor Sir Robert Megarry decided in favor of B.S.C., and his decision was upheld by the Court of Appeal and the House of Lords.[8] The Law Lords, however, took an unusual and disturbing course by announcing their decision in July—before their opinions had been written. The opinions were subsequently delivered in November 1980.[9] In the meantime, just after the announcement of the decision in July, B.S.C. declared that it would take no steps to enforce the decision. Finally, in November 1980 the issue between the parties became purely theoretical when the source came forward and revealed himself to be a former employee of B.S.C. whose job had been made obsolete earlier in the year. Far from being a part of senior management, the informer had been a records officer within B.S.C.

B. The Legal Issues

The simplicity of the writ's terms belies the complexity of the issue before the courts because of the disclosure of a journalist's source lies at the crossroads of a number of converging legal principles and public interests. The legal issues include privilege before a court, the privilege against self-incrimination, breach of confidence, the limits of the discovery process, and contempt of court. The case raises the following public policy concerns: the need for an effective and fair administration of justice; the value of a free and effective press; and the need for scrutiny of govern-

8. *See supra* note 1.

9. Lord Salmon refused to be a party to this, stating: "The hearing which lasted about six days finished only a week ago. I regret that I am not prepared to come to any final decision before I have had more time to reflect on the many authorities and documents and the arguments which were put before us." *Granada*, [1981] 1 All E.R. at 452 (opinion of Lord Salmon).

ment and quasi-governmental bodies. Finally, the case reveals the peculiarities of the English system caused by the absence of any constitutional or statutory safeguard for the press and the consequent unfamiliarity of English courts with direct and open treatment of issues of civil liberties.

C. B.S.C.'s Case

The action was based on a writ and notice of motion in which the plaintiffs, B.S.C., sought

> An order that the defendants, Granada Television Ltd., should forthwith make and serve on the plaintiffs' solicitors an affidavit setting forth the names of all persons responsible for supplying them with or who had offered to supply them with documents being the property of the plaintiffs or with any copies thereof.[10]

The origins of this action lie in the venerable bill of discovery, which equity created to help a litigant prepare his case. A bill of discovery could be obtained to determine the identity of the would-be defendant. It was rarely used for this purpose and certainly could not be abused for the purpose of "fishing" for information.[11] But the procedure was given a new lease on life after a decision of the House of Lords in 1974.[12] In that case, a patent owner learned that foreign-made goods had been imported into the United Kingdom in breach of the patent. The owner successfully sought to discover the identity of the infringer from documentation compiled by the Customs and Excise Commissioners. The House of Lords laid down the principle that where a person innocently becomes involved in the tortious act of another, he is under a duty to anyone who is injured by that act to give him full information by way of discovery and disclosure of the wrongdoer's identity.[13] The administration of justice must take priority.

This principle, according to B.S.C. and, subsequently, the House of Lords, applies with even greater force when, as here, the

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10. *Granada*, [1980] 3 W.L.R. at 780 (opinion of Vice Chancellor Megarry).

11. *E.g.*, Post v. Toledo, Cincinnati & St. Louis R.R. Co., 144 Mass. 341, 11 N.E. 540 (1887).

12. Norwich Pharmacal Co. v. Customs & Excise Comm'rs, 1974 A.C. 133 (H.L.). That decision was followed by Loose v. Williamson, [1978] 1 W.L.R. 639 (Ch.), and R.C.A. Corp. v. Reddingtons Rare Records, [1974] 1 W.L.R. 1445 (Ch.).

13. *Norwich Pharmacal*, 1974 A.C. at 175.

third party knowingly becomes involved with the wrongdoing.[14] After all, Granada actively assisted B.S.C.'s employee in breaching his obligation of confidence to the corporation. The bill of discovery was held to be appropriate. In this context, therefore, it cannot avail the media to claim that they came upon information innocently, unbidden, or even unwittingly.

As to the wrongdoing at stake, Lord Fraser commented:

> B.S.C.'s real complaint is that the occurrence of the leak has shown that they have a disloyal employee with access to confidential information, that their efforts to identify him have created an unpleasant atmosphere of suspicion among their employees, especially at head office, and that they need to know the name of the traitor in order to clear the air.[15]

This concise summary of B.S.C.'s grievance and the absence of any evidence that B.S.C. intended to take any legal action against its disloyal employee reveal something of the true scope of the House of Lords' decision. The mere possibility of legal action or disciplinary measures, or the need to maintain a company's morale, can suffice to justify the bill of discovery.[16] Apparently, mere curiosity may be enough.

D. Granada's Case

All the English legal principles and authorities available to Granada were either unhelpful or equivocal. Coupled with the absence of statutory protection for freedom of the press, this quickly forced Granada to fall back upon arguments of public interest. Bringing such a case before a judiciary bred upon the interpretation of statute and the common law rather than upon the weighing of constitutional rights and duties made it inevitable that the tighter and more traditional legal arguments of B.S.C. would prevail.

Granada's defense before the three courts was constructed essentially around the following three arguments, though their precise form varied before each court: (1) the privilege against self-incrimination entitled Granada to conceal its source; (2) because of its special function in a democratic society, the press was immune from the type of action brought by B.S.C.; and (3) even if

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14. *Granada*, [1980] 3 W.L.R. at 824 (opinion of Lord Wilberforce).
15. *Id.* at 846 (opinion of Lord Fraser).
16. *See id.* at 851.

the press could be embraced by the action, the court retained discretion as to the award of the remedy and that discretion ought to be exercised in favor of the press and Granada.[17]

1. *The Privilege Against Self-Incrimination*

This defense was filed at the last minute and its terms varied as time passed. Before the Chancery Division, Granada claimed that to reveal the source of the *Steel Papers* would expose them to a real risk of criminal prosecution for conspiracy to steal, defraud, and violate the copyright legislation. Before the Court of Appeal, Granada expressed a fear of prosecution for conspiracy to defraud, and before the House of Lords, for handling stolen goods and conspiracy to defraud.[18] Each court gave short shrift to the defense. First, the "real risk" of self-incrimination was too speculative; indeed, it contradicted the earlier part of Granada's evidence which claimed that there was no element of dishonesty or criminal conduct in the receipt of the documents. Second, even if Granada could establish a "real and appreciable risk"[19] of prosecution for an offense, disclosure of the source's identity would not enhance that risk—B.S.C. already had enough information to commence further legal proceedings.

The courts' arguments are overwhelming. The plea of self-incrimination was shallow and perhaps inserted to give Granada's case a more solid appearance. By its agreement to appear in the program, B.S.C. indicated that it was unlikely to seek redress through the criminal law. Implicit in the judges' statements, however, is the recognition that, if a reporter can establish reasonable grounds for believing that an answer would incriminate him and that there is a real and appreciable risk of criminal proceedings, the privilege against self-incrimination will apply.

In these times when investigative journalism has acquired an aura of respectability, the possibility of infringing the criminal law in its pursuit is a real one. Therefore, if the journalist is prepared to take the risk of being prosecuted, he may be able to avoid disclosure of his sources by subsequently invoking the privilege against self-incrimination. It is ironic that the more reprehensible the reporter's conduct, the better the chance he stands

17. *See, e.g., id.* at 829-34 (opinion of Viscount Dilhorne).
18. *See id.* at 830.
19. *Id.* at 830.

of avoiding disclosure to a potential litigant.

2. *Press Immunity*

The press immunity claim was argued in three guises before each court. Nevertheless, the claim was carefully tied to the particular facts of the case. In other words, an immunity was asserted against discovery at the interlocutory stage of civil proceedings. This circumscribed claim is understandable in the absence of constitutional (or any other clear legal) entitlement to freedom of speech, and in the context of the narrow approach invariably adopted by English courts. Its consequences were unfortunate, however, because it enabled all of the courts—especially the House of Lords—to avoid a wide-ranging discussion of the role and value of the press and the scope of possible legal protection that may follow. In sharp contrast, the United States press would immediately invoke the first amendment to the United States Constitution or similar state provisions and force the court to face the wider policy issues.

a. The "newspaper rule"

Granada prayed in aid the newspaper rule, which is a common law rule stating[20] that interrogatories aimed at discovering the source of the libel are not allowed in libel proceedings against newspapers and, probably, other branches of the media.[21] This exception is confined to the interlocutory stage of proceedings. The rule is well established at common law, though its original purpose is shrouded in obscurity.[22] It seems to have been founded on two rationales. Because the plaintiff already is assured of his action against the newspaper, the identity of the informer is superfluous to his legal needs. More probably, the rule is an expres-

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20. *See, e.g.*, Lyle-Samuel v. Oldhams, Ltd., [1920] 1 K.B. 135 (C.A.); Adam v. Fisher, 30 T.L.R. 288 (C.A.). The rule is accepted in other parts of the Commonwealth. *See* McGuinness v. Attorney-Gen. of Victoria, 63 C.L.R. 73 (Austl. 1940); Isbey v. New Zealand Broadcasting Corp. (no. 2), [1975] 2 N.Z.L.R. 237 (N.Z.S.C.). *But see* Price v. Richmond Review, 54 W.W.R. 378 (British Columbia S.C. 1965); McConachy v. Times Publishers, Ltd., 50 W.W.R. 389 (British Columbia C.A. 1964).

21. *See* Broadcasting Corp. of N.Z. v. Alex Harvey Indus., Ltd., [1980] 1 N.Z.L.R. 163; Brill v. Television Serv. One, [1976] 1 N.Z.L.R. 683 (N.Z.S.C.); *Isbey*, [1975] 2 N.Z.L.R. 237.

22. *See Lyle-Samuel*, [1920] 1 K.B. at 144.

sion of public policy related to the special nature and function of newspapers and their contributors; the rule is "concerned with . . . supporting a proper flow of information for use by the news media."[23]

To the majority of judges in the present case, the newspaper rule was a limited exception to the general right of discovery. It applied only at the interlocutory stage of proceedings. Since 1949 it had been included within the procedural rules of the Supreme Court[24] and covered all defendants; it was no longer a special exception for newspapers and could not be stretched by analogy to the present case.

In contrast, the sole dissenter, Lord Salmon, illustrated the remarkable extent to which judges can vary in the interpretation of precedent and what can be achieved through that interpretation if the will to do so is present. He believed that there was no reason not to extend the newspaper rule to cover actions other than libel.[25] Because it was intended to ensure a free flow of information and to promote the public interest in protecting newspapers, Salmon felt that the rule applied equally in the *Granada* case. Moreover, to cover all fronts, he was convinced that passages in the *World of Action* broadcast were clearly "defamatory."[26] Therefore, Lord Salmon reasoned that, if B.S.C. had issued a writ of libel, Granada could have sheltered itself behind the newspaper rule—Why should the selection of a different writ by B.S.C. remove the protection of that rule? A flaw in Lord Salmon's argument is that in a libel action the plaintiff wants damages, and the identity of the original defamer is not essential to that process. Because B.S.C. sought an injunction against breach of confidence, an effective remedy demands that its disloyal employee be revealed so that future leaks will be deterred.

The paucity of authority supporting Lord Salmon's judgment seriously detracts from its emotive power. At least he confronted the issue of press freedom directly. If his judgment only had been backed by a constitutional right of free speech, it would not have

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23. *Alex Harvey Indus.*, [1980] 1 N.Z.L.R. at 167; *see* D. v. National Soc'y for the Prevention of Cruelty to Children, 1978 A.C. 171, 228 (H.L.); *McGuiness*, 63 C.L.R. at 104.

24. Rules of the Supreme Court, order 82, rule 6 (Great Britain), *reprinted in* 1 THE SUPREME COURT PRACTICE 1225 (1973).

25. *Granada*, [1980] 3 W.L.R. at 839 (opinion of Lord Salmon).

26. *Id.*

appeared, as it does, to be wishful rhetoric.

b. Lack of precedent

In support of its claim to a press immunity, *Granada* further relied upon the absence of any authorities directly on point. The English press had been ordered by a court to disclose its source of information in only two cases, and both of those had arisen in special circumstances.[27] They concerned the Tribunal of Inquiry, which had been set up in 1963 to investigate a spy scandal. During its investigations, journalists published articles containing further details of impropriety in the Admiralty. When called to appear before the Tribunal, the journalists refused to name their sources of information and were sentenced to terms of six and three months in prison. The courts ruled that the sources were relevant to the Tribunal's inquiry, that the law had not yet developed a privilege protecting the press, and that the interests of state security demanded that the Tribunal's questions be answered.[28]

To the majority of judges in the *Granada* case, these two spy cases were merely examples of the general rule that the press could claim no immunity before a court of law. To Lord Denning in the Court of Appeal—who appears to have qualified his earlier views in *Attorney General v. Mulholland*[29]—and to Lord Salmon in the House of Lords, however, they were exceptional and could be distinguished on the special exigencies of national security.[30] The absence of authorities elsewhere had to imply that the press had been treated differently and had in effect acquired a general immunity from disclosure of its sources. Reliance upon the absence of authorities as a legal argument is invariably a sign of "scraping the bottom of the barrel" and, in this context, it starkly illustrates the lack of concrete legal protection for the press in English law. As other judges pointed out, the absence of authorities may be explained on other grounds, such as the fact that legal action to obtain disclosure generally is avoided because of likely adverse publicity and further scandal. The silence of the

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27. Attorney-Gen. v. Mulholland, [1963] 2 Q.B. 477 (C.A.); Attorney-Gen. v. Clough, [1963] 1 Q.B. 773 (C.A.).

28. *Mulholland*, [1963] 2 Q.B. at 491; *Clough*, [1963] 1 Q.B. at 789.

29. [1963] 2 Q.B. 477 (C.A.).

30. *See Granada*, [1980] 3 W.L.R. at 804-05 (opinion of Lord Denning (C.A.); *id.* at 841-42, 846 (opinion of Lord Salmon (H.L.)).

common law did not, therefore, necessarily condone press immunity by implication.

The obvious response to the majority's opinion is that a legal vacuum offers a perfect opportunity for judicial creativity which the judges in bygone days would have been eager to seize, especially when the "precedents," as here, can be confined to their exceptional facts. Unfortunately, that opportunity is rarely exploited today.[31]

c. The value of the press

Granada confined its case to the narrow issue of the discovery process and the exercise of judicial discretion. Consequently, its most powerful argument in favor of a press immunity—the special value of the press and public's right to a free flow of information—was not presented as forcefully as it could have been.[32] This well-worn argument states that the press fulfills an essential function in procuring and presenting information of concern to the public. In order to perform that function effectively, it occasionally must guarantee confidentiality to informers. If it cannot do so, and a court subsequently compels disclosure, all sources would dry up. There is therefore a strong public interest in the protection of the media's confidentiality.[33] After all, the law has recognized the importance of confidentiality in the lawyer-client relationship and in other areas. For example, police informers and informers to the Gaming Board, which licenses gambling houses, have been granted anonymity.[34] More recently, in *D. v. National Society for the Prevention of Cruelty to Children*,[35] the House of Lords held that, in an action for discovery, public policy required that the identities of informants who pass information of possible child abuse to a child protection agency remain confidential. Thus, in *Granada*, the public interest in the proper functioning of

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31. *See* Malone v. Metropolitan Police Comm'r, 1979 Ch. 344 (Ch.) (first British case regarding telephone tapping); *see also* Bevan, *Is Anybody There?*, 1980 PUB. L. 431.

32. *See infra* text accompanying notes 36-42.

33. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972).

34. *See* Alfred Crompton Amusement Machs. v. Customs & Excise Comm'rs (no. 2), 1974 A.C. 405 (H.L.); Regina v. Lewes Justices, 1973 A.C. 388 (H.L.); Marks v. Beyfus, 25 Q.B.D. 494 (C.A. 1890).

35. 1978 A.C. 171 (H.L.); *cf.* Gashkin v. Liverpool City Council, [1980] 1 W.L.R. 1549 (C.A.) (public interest required that the confidentiality of child care documents be preserved).

the press ought to permit an extension of these classes of immunity.

Only three judges in the *Granada* case were prepared to countenance such a proposal. To Lord Denning in the Court of Appeal, the cases, or absence of them, revealed a move towards the following principle:

> The public has a right of access to information which is of public concern and of which the public ought to know. The newspapers are the agents, so to speak, of the public to collect that information and to tell the public of it. In support of this right of access, the newspapers should not in general be compelled to disclose their sources of information. Neither by means of discovery before trial. Nor by questions or cross-examination at the trial. Nor by subpoena. The reason is because, if they were compelled to disclose their source, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans would not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power—in companies or in government departments—would never be known. Investigative journalism has proved itself as a valuable adjunct of the freedom of the press. Notably in the Watergate exposure in the United States and the Poulson exposure in this country. It should not be unduly hampered or restricted by the law. Much of the information gathered by the press has been imparted to the informant in confidence. He is guilty of a breach of confidence in telling it to the press. But this is not a reason why his name should be disclosed. Otherwise much information, that ought to be made public, will never be made known. Likewise with documents. They may infringe copyright. But that is no reason for compelling their disclosure, if by so doing it would mean disclosing the name of the informant. . . . I know that in some cases it might be relevant and useful—in the interests of justice—for a plaintiff to get to know the name of the newspaper's informant—so as to prove malice, for instance—but the plaintiff will have to forego this advantage in deference to the interest which the public has in seeing that newspapers should not be compelled to disclose their sources of information.[36]

In spite of this principle, Lord Denning subsequently ruled that Granada had behaved irresponsibly and had forfeited the immu-

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36. *Granada*, [1980] 3 W.L.R. at 804 (opinion of Lord Denning). The reference to "Poulson" concerns a notorious case of corruption of local government in England occurring in the 1970s.

nity. Only Lord Salmon in the House of Lords accepted the principle outright. At the outset of his judgment he made it clear where his loyalties lay:

> A free press is one of the pillars of freedom in this and indeed in any other democratic country. Granada Television Ltd. ("Granada") reports news throughout the whole of this country and can properly be regarded as part of the press. A free press reports matters of general public importance, and cannot, in law, be under any obligation, save in exceptional circumstances, to disclose the identity of the persons who supply it with the information appearing in its reports.
>
> It has been accepted for over a hundred years that if this immunity did not exist, the press's sources of information would dry up and the public would be deprived of being informed of many matters of great public importance: this should not be allowed to occur in any free country.[37]

The majority, however, refused to accept press immunity for a variety of reasons. First, there was the lack of authority in favor of any press immunity. No case supported Granada directly.[38] Second, English courts have always sought to give preeminence to establishing truth in the administration of justice.[39] Consequently, there has been a traditional reluctance to extend the categories of immunity into areas such as the doctor-patient or priest-penitent relationships. Anonymity for police informers and informants of child protection agencies was essential because those agencies fight against the unlawful, whereas the press may have other motives. As Megarry, V.C., commented:

> [U]nlike the police or the [National Society for the Prevention of Cruelty to Children], whose major function is to prevent wrongdoing and take remedial action when it occurs, these activities are but a minor part of the usual functions of the press. The press seeks, not always successfully, to make money by providing the public with a particular form of useful service. In the press, news predominates over entertainment, though of course I do not suggest that news cannot be made entertaining, or that the balance between news and entertainment will not vary considerably from day to day and between one newspaper and another. With television, en-

37. *Id.* at 836 (opinion of Lord Salmon).

38. *See id.* at 822 (opinion of Lord Wilberforce).

39. *See, e.g.*, Attorney-Gen. v. Times Newspapers, Ltd., 1974 A.C. 273 (H.L.) (typifying the judiciary's attitude to the publication of prejudicial articles).

> tertainment predominates over news. But however much or little these generalisations may be accepted, it cannot be disputed that the so-called "investigative journalism" occupies but a small part of the space in the press and the time of the television programs. No doubt a striking piece of investigative journalism assists in selling newspapers and in attracting the public to watch commercial television programs, thereby encouraging advertisers. If such journalism damped sales and repelled viewers, or perhaps if it merely stood neutral, it is unlikely that it would be undertaken. After all, it costs money; and although no doubt there are a number of instances of crusading zeal which would seek to ignore financial discouragement, there must be some limits. All this, it seems to me, is very different from the police and the N.S.P.C.C.[40]

Of course investigative journalism is commercially attractive. This argument, however, begs the wider questions whether investigative journalism fulfills a meritorious, altruistic purpose of benefiting the public by exposing and discussing issues of legitimate concern to the public, and whether the law in turn *ought* to recognize that purpose on its own merits, regardless of the alleged distinction from other classes of immunity.

Third, the *Norwich Pharmacal* case[41] had resuscitated the usefulness of the action for discovery. Because it had not protected the "innocent" Customs and Excise Commissioners from the process of discovery, it could not be expected to protect a recipient such as Granada, which had taken part in the wrongdoing. Pleas of the "value of the press" could not stand in the way, for otherwise,

> [i]f in a case such as this, where the taker of the documents had no right to take them, where he was clearly a wrongdoer and where Granada was involved in handling the documents and used them when it had no right to do so, no order for the discovery of the identity of the wrongdoer could be made with the result that B.S.C. could not obtain redress for the wrong they had suffered at the hands of the taker, there would be a denial of justice to B.S.C. and the gap in the law would constitute a charter for wrongdoers such as the taker of the documents in this case.[42]

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40. *Granada*, [1980] 3 W.L.R. at 792 (opinion of Vice-Chancellor Megarry); *cf.* Waugh v. British Rys. Bd., 1980 A.C. 521 (H.L.) (legal privileges struck down where public interest in the nondisclosure of press sources was overridden).

41. Norwich Pharmacal Co. v. Customs & Excise Comm'rs, 1974 A.C. 133 (H.L.).

42. *Granada*, [1980] 3 W.L.R. at 836 (opinion of Viscount Dilhorne); *cf.* Sci-

Again, the narrowness of these arguments is self-evident. Although much blame for this must lie with Granada for the narrow way in which it argued its case, it still does the courts little credit to be seen avoiding the opportunity of seizing and confronting at their own initiative the real issue of press freedom, especially because the courts historically have seen themselves as the guardians of freedom.

3. *Discretion*

Throughout the proceedings, Granada asserted that, even if it could not establish a press immunity, *Norwich Pharmacal*[43] had made it clear that the grant of an order of discovery lies within the discretion of the court. Granada claimed that discretion should be exercised in favor of nondisclosure for three reasons. First, the courts have established that information shall not be demanded of witnesses unless it is material and necessary to the administration of justice. Yet here there was no evidence that B.S.C. intended to initiate proceedings against the informer. Second, B.S.C. could be compensated adequately by proceeding against Granada for breach of confidence and damages rather than by pursuing a remedy against the source. Third, the special characteristics and role of the press in a democratic society tilted the balance of interests in Granada's favor.

As previously explained, Lord Salmon discovered that press immunity existed to shield Granada and therefore he had no need to consider any discretion.[44] The other eight judges, however, refused to exercise their discretion in favor of Granada.

First, the House ruled that the balance lay clearly in favor of the administration of justice. B.S.C. had a legitimate grievance and the only way it could be remedied was by discovery of the source's identity. B.S.C. clearly had a prima facie case against its employee for breach of confidence, but, as Granada pointed out, B.S.C. had shown no intention of commencing an action. The court retorted that Granada had no proof that B.S.C. would *not* take action at a later date. Yet it should be noted that within days of the judgment of the House, B.S.C. announced that it did not intend to pursue the matter further against its errant em-

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ence Research Council v. Nassé, 1980 A.C. 1028 (H.L.).

43. 1974 A.C. 133 (H.L.).

44. *See Granada*, [1980] 3 W.L.R. at 846 (opinion of Lord Salmon).

ployee, whoever he was. In any event, the court held that an intention to litigate was irrelevant. This proposition is supported by *Post v. Toledo, Cincinnati and St. Louis Railroad Co.*[45] where Judge Field suggested that discovery can be awarded to a potential plaintiff whether or not he intends to bring proceedings.

Moreover, the court reasoned, B.S.C.'s grievance need not be a legal one. As Lord Fraser explained,

> B.S.C.'s real complaint is that the occurrence of the leak has shown that they have a disloyal employee with access to confidential information, that their efforts to identify him have created an unpleasant atmosphere of suspicion among their employees, especially at head office, and that they need to know the name of the traitor in order to clear the air.[46]

Vice-Chancellor Megarry went further:

> B.S.C. is not seeking to discover Granada's sources as part of some other claim: the action is a direct action simply to discover the sources. Discovery of the sources is not merely a means to an end; it is the end itself. The evidence of Mr. Siddons, a director of the secretariat of B.S.C., is that inquiries have been made to discover the person or persons responsible for removing the documents; and these inevitably have created an unpleasant atmosphere among B.S.C.'s employees, particularly at their head office. A cloud hangs over a number of people, many of whom must be entirely innocent. Inevitably there must be suspicion and uncertainty about whether there will be any further disclosures of confidential information, and to whom.[47]

These propositions were used as a basis to justify the order for disclosure. They considerably and unwisely broaden the scope of the discovery process. It is one thing to order disclosure for legal purposes, and quite another to do so for reasons of internal discipline. First, the latter greatly increases the risk that applications for discovery will be made for the primary and disguised purpose of satisfying curiosity. Second, discomfort or "an unpleasant atmosphere" are weak reasons for overriding the interests of press freedom. Third, this is a good example of the court's overwhelming preoccupation with private interests at the expense of the public interest. Fourth, as a consequence of this preoccupation,

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45. 144 Mass. 341, 11 N.E. 540 (1887).
46. *Granada*, [1980] 3 W.L.R. at 846 (opinion of Lord Fraser).
47. *Id.* at 794 (opinion of Vice-Chancellor Megarry).

the limits of discovery are broadened to the extent that in the future it would appear to be sufficient for a plaintiff only to present a reasonably plausible explanation in order to undermine the journalist's confidentiality.

It followed from Vice-Chancellor Megarry's observation that damages against Granada would be an insufficient remedy for B.S.C. As Lord Wilberforce commented, "To confine B.S.C. to its remedy against Granada and to deny it the opportunity of a remedy against the source, would be a significant denial of justice."[48]

Second, the majority believed that the likely unlawfulness of Granada's conduct was a significant factor in the court's refusal to exercise its discretion. Put bluntly, lawbreakers could not "get away with it."

> As a general rule, the court should not, in my judgment, allow the media knowingly to break the law, civil or criminal, and claim the immunity. The media should not be allowed to exploit the immunity by promising a wrongdoer concealment so that he may break the law with impunity or by rewarding a wrongdoer with a promise that the media will conceal his guilt, when the wrongdoing is committed with the object and is successful in achieving the object of enabling the media in turn to break the law provided they are successful in evading an injunction and are willing to pay damages. There is no acceptable public interest in upholding the secrecy of unlawful communications made for the purposes of unlawful publications.[49]

Third, it is possible to detect a strand of disapproval of Granada's conduct running through seven of the judgments. For example, Granada's delay in telling B.S.C. that it had obtained the documents, the tone of the interview with B.S.C.'s chairman, and the mutilation of the documents before their return, assumed special importance when the court considered whether to exercise its discretion in favor of Granada. This conduct influenced the approach and tenor of the judgments. Lord Justice Watkins, for example, was convinced that "[b]y their act of mutilation of the documents alone Granada are in my judgment disentitled to immunity. It constituted a gross interference with [B.S.C.'s] rights

48. *Id.* at 827 (opinion of Lord Wilberforce). This assertion of a "significant denial" should be contrasted with B.S.C.'s anouncement within days of their Lordships' ruling that it would take no further action.

49. *Id.* at 812.

of property."[50]

Lord Denning went even further and made explicit what his colleagues implicitly accepted. Although after a review of English and United States authorities he was prepared to concede the existence of a principle of press immunity, he was convinced that in exceptional cases it must give way to other policy considerations.[51] The protection was given to the press

> on condition that it acts with a due sense of responsibility. In order to be deserving of freedom, the press must show itself worthy of it. A free press must be a responsible press. The power of the press is great. It must not abuse its power. If a newspaper should act irresponsibly, then it forfeits its claim to protect its sources of information.[52]

Granada's conduct was "deplorable" and "disgraceful" and His Lordship could not think it

> right that their want of responsibility should enable them to make this damaging attack on [B.S.C.] and on the government. They behaved so badly that they have forfeited the protection which the law normally gives to newspapers and broadcasters. This protection is given only on condition that they do not abuse their power. Here Granada have abused it. They should be compelled to discover the source of their information.[53]

Lord Denning's test of "responsibility" and the majority's implicit acceptance of a similar standard is unrealistic. It is unrealistic because investigative journalism is by nature contrary to notions of responsible and tactful conduct. If a journalist must temper his conduct in this way, his inquiries are likely to suffer. This assumes particular importance when the object of his inquiries is the government or a quasi-governmental body. In the British context, the veil of secrecy which traditionally surrounds the government and the lack of any freedom-of-information legislation make vigorous journalistic research an essential safeguard for the public. If the press behaved with perfect decorum in the face of government, it would get few worthwhile stories. Moreover, His Lordship's test is far too uncertain, and ultimately is subject to the subsequent vagaries of each court. "To fasten on the conduct

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50. *Id.* at 816.
51. *Id.* at 804-05.
52. *Id.* at 805.
53. *Id.* at 805-06.

of the newspaper, particularly its conduct after it has obtained the information, offers scant protection to the sources of the particular information or to potential sources."[54]

Finally, the proposed test makes protection of the source's identity depend upon the rectitude of someone else's conduct and "[t]hat does not seem logical or right."[55] This is not to suggest that journalists should not be concerned with the ethics of their conduct; clearly they should. This, however, is a matter better suited to self-discipline within the profession, either by codes of conduct or by disciplinary tribunals.[56] Allowing the courts to judge the morality and good taste of the media's conduct is likely to foster unpredictable censorship which, in the law's hands, is usually heavy-handed.

In this respect, it is suggested that Lord Fraser's approach is preferable. He eschewed the temptation to judge the morality of Granada's conduct and preferred to confine himself to the law and the questions of principle presented by the case.[57]

E. The "Iniquity Rule"

This "rule" was mentioned by all the judges, but its potential importance to the current discussion and to the interests of press freedom was not effectively highlighted in the case.

B.S.C.'s most obvious option for redress against its disloyal employee would be an action for breach of confidence. This is a branch of English law which has undergone considerable development in the last twenty years, chiefly to compensate for the absence of a law of privacy and to bolster the protection of intellectual property. It certainly would permit recovery from an employee who secretly passes his employer's files to a third party. If, however, the employee reveals criminal conduct or "iniquity" on the part of his employer, the action will fail, for "there is no confidence as to the disclosure of iniquity."[58]

Granada, therefore, could have claimed that its *World in Ac-*

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54. Broadcasting Corp. of N.Z. v. Alex Harvey Indus., Ltd., [1980] 1 N.Z.L.R. 163, 174.

55. *Id.* at 167.

56. In the United Kingdom a Press Council exists to ensure good standards of journalism, but its findings cannot be enforced and its effectiveness has been criticized. *See* ROYAL COMMISSION ON THE PRESS, ch. 20, CMD. 6810 (1974-1977).

57. *Granada*, [1980] 3 W.L.R. at 822 (opinion of Lord Wilberforce).

58. Gartside v. Outram, 112 Rev. Rep. 378 (Ch. 1856).

tion program exposed B.S.C.'s iniquity, that there had been no breach of confidence and that, consequently, it did not have a duty to reveal the source of its information. Unfortunately, Granada did not plead this defense. On the contrary, from the outset Granada generously and fatally conceded that B.S.C. was entitled to an injunction to prevent a future breach of confidence. All the judges except Lord Salmon thereby avoided an important discussion of principle. The scope of the rule is relatively narrow.

"Criminal conduct" is self-explanatory. The superficial consideration of the meaning of "iniquity" by the courts in the *Granada* case suggests that its meaning is intended to be very circumscribed. Although it certainly extends to "misconduct generally," Lord Wilberforce and most of his colleagues held that the iniquity rule could not assist Granada because "giving the widest extension to the expression 'iniquity', nothing within it is alleged in the present case. The most that it is said the papers reveal is mismanagement and government intervention."[59] As Lord Fraser pointed out, however, there were other definitions available in the authorities, and he strongly hinted that Granada should have pressed the issue of "iniquity," thereby forcing the House of Lords to review its scope thoroughly.[60] For example, Lord Denning in *Initial Services v. Putterill*[61] refused to accept the suggestion that "this exception was confined to cases where the master has been guilty of a crime or fraud . . . . I do not think that it is so limited. It extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others."[62]

Was it not in the public interest to reveal possible mismanagement of a publicly owned and funded industry and to allege that the government actively was preventing settlement of a costly strike? As Lord Salmon observed:

> No doubt crime, fraud or misconduct should be laid bare in the public interest; and these, of course, did not occur in B.S.C. There was however much else, even more important in all the circumstances, which called aloud to be revealed in the public interest. I have already stated the most important of these matters at the beginning of this speech. I should perhaps add that there was also—"example after example of failure to meet targets because of

59. *Granada*, [1980] 3 W.L.R. at 852 (opinion of Lord Fraser).
60. *Id.* at 851.
61. [1968] 1 Q.B. 396 (C.A.).
62. *Id.* at 405.

> mechanical breakdown and design faults"—"the lateness and inaccuracy of export documentation . . . which must be costing the Corporation . . . almost certainly millions of pounds"— and "errors of estimation up to £200m." I consider it was the moral duty of Granada to lay all these matters before the public on whose shoulders the losses fell, so that a decision would be taken as to how the mistakes causing the parlous conditions of B.S.C. could be remedied. Since Granada's programme at 8:30 p.m. on 4th February, 1980, no doubt much has been done to put B.S.C. on the road to recovery. We know, for one thing, that an American industrialist of the highest standing is now chairman of B.S.C. in place of Sir Charles Villiers who has retired. True it is that the new chairman is receiving what in our country are considered to be exceptionally large emoluments; that however would hardly matter should he be able to stop the losses of hundreds of millions of pounds which B.S.C. have suffered this year and last, and then to transform these losses into reasonable profits.[63]

Surely this is persuasive reasoning. The borderline between iniquity or misconduct on the one hand and mismanagement on the other is obviously unclear. To confine the rule to the former may place a journalist in the very difficult position of seeking to determine which type of conduct his investigations concern without the benefit of hindsight. Second, circumscribing the rule does not help to elucidate the precise meaning of its terms. If the rule is wider than criminal or civil unlawfulness, but falls short of mismanagement, what does it encompass? The majority in *Granada* was sufficiently convinced of its meaning to assert, without hesitation, that it did not embrace the present case, yet none of the Lords offered any elaboration of, or guidance to, its meaning. Finally, the court's narrow reading of the rule ignores the public's interest as taxpayers in uncovering the mismanagement of a public corporation and the apparent duplicity of the government.

F. Comment

With the benefit of hindsight, it would have been wiser for Granada to have resisted the injunction sought by B.S.C. As it was, Granada very quickly submitted to the injunction and agreed to deliver the documents. This concession not only shrouded Granada with guilt, it also clearly placed them on the wrong side of any sympathetic judicial feelings which might have existed. It

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63. *Granada*, [1980] 3 W.L.R. at 843 (opinion of Lord Salmon).

also denied them the opportunity to plead the iniquity rule. To invoke the rule and refuse to submit to the injunction might well have proved equally fruitless because Lord Salmon was the only judge prepared to espouse Granada's case. Such tactics, however, would have compelled the courts to confront directly the central issues of the role and scope of press freedom.

Other, wider issues then could have been brought out. First, the analysis in *Attorney-General v. Jonathan Cape, Ltd.*[64] could have been employed. In that case, the diaries of a deceased Cabinet Minister were about to be published. There were objections to the frank descriptions of Cabinet meetings and Ministers' dealings with civil servants. The Attorney-General sought to halt publication, claiming that the public interest required Cabinet matters and related business to be kept confidential. Though Lord Widgery was prepared to accept this public interest argument, he did not consider it absolute; it had to be balanced against other public interests.[65] On the particular facts, the passage of time meant that the public's competing interest in the publication of the diaries was more compelling than the need for Cabinet confidentiality and the injunction against the publishers was refused.

Therefore, if Granada had contested the requested injunction, those competing public interests would have been forced into sharper relief and the *Jonathan Cape* case could have been used. After all, if reports of Cabinet and Ministerial office proceedings can be published in spite of pleas of confidentiality, the desirability of publishing the revelations of mismanagement in a public corporation deserve serious consideration.

The second consideration that should have been addressed by the court is the distinctive nature of public corporations. Their shareholders are the members of the public, but public control over them is notoriously slender. Their chairmen are appointed by a government Minister, and a senior civil servant usually will occupy a seat on the managerial board. They are accountable to a Minister for their policies, and he in turn can be questioned in Parliament. A Select Committee of the Houses of Parliament has the task of scrutinizing them and is a useful, though little publicized, source of detailed information. In addition, some offer a

64. Attorney-Gen. v. Jonathan Cape, Ltd., [1976] 1 Q.B. 752; *cf.* Burmah Oil Co. v. Bank of Eng., [1979] 3 W.L.R. 722 (H.L.)(showing the court's willingness to uphold confidentiality).

65. *Jonathan Cape*, [1976] 1 Q.B. at 770-73.

consumer advisory council to voice, but not enforce, individual complaints from the public. In view of the vast financial resources which most of these corporations consume, one must ask whether the existing machinery of accountability is satisfactory. For example, in the present case Lord Salmon explained that

> [l]ast year B.S.C. lost £700m and was lent this sum by the nation, interest free. In the present year, B.S.C. considered that they would reduce their loss to £450m; and the nation agreed to lend, interest free, that sum but no more. The nation had also lent B.S.C. £3 billion to provide themselves with the finest machinery and equipment in existence, in order to enable them to equal their foreign competitors. Their chief competitors are in Germany and Japan, whose steel industries produce large profits. B.S.C. had acquired their new machinery and equipment prior to the losses which I have mentioned. It still takes two British workmen to produce the amount of steel which is produced by one workman in West Germany.[66]

Consequently, His Lordship continued,

> It is not surprising that the public should wish, and indeed are morally entitled, to know how it is that B.S.C. are in such a parlous condition. Is it due to bad management, or to government interference, or to the trade unions' actions or to some other reasons?[67]

The press plays a vital role in this process by supplementng the existing procedures and informing the general public of the state of the company's assets. This is the element of public interest which the majority of judges conveniently sidestepped.

As it happened, the *Granada* case proceeded upon the well-traveled lines of legal and procedural precedents concerning the precise scope of the newspaper rule, the ambit and discretionary nature of the equitable bill of discovery, and the extent of the privilege against self-incrimination. It is true that the judges adverted to the value of a free press, but the majority only did so at the final stage of their reasoning when considering how to exercise their discretionary remedy.[68] Even then, these cosmetic references are made to create the appearance of fairness to Granada. It is here that the absence of a "bill of rights" is most marked. There is no legal right—as distinguished from a moral or political

66. *Granada*, [1980] 3 W.L.R. at 836 (opinion of Viscount Dilhorne).
67. *Id.*
68. *See id.* at 827 (opinion of Lord Wilberforce).

right—upon which Granada could rely and which would force the courts to confront the question of press freedom squarely. The point is vividly illustrated by comparing *Granada* with the cases in the United States. For example, in *Branzburg v. Hayes*,[69] the result for the journalist was the same but the wide ranging Supreme Court discussion of the value of the press highlights the narrowness of the House of Lords' approach. It is inconceivable that in an analogous case a court in the United States would agree with Lord Wilberforce that "this case does not touch upon the freedom of the press even at its periphery,"[70] or with Lord Russell that "this case has not even marginal connection with any concept of 'the freedom of the press.' "[71] The objection here is that it does. Whether the press ought to have an immunity is a separate and clearly critical question, but to argue that the case does not involve the freedom of the press is to avert the judicial eye in a most unrealistic fashion.

III. Recent Decisions on Freedom of Speech

Unfortunately this narrowness is not atypical. On the contrary, it has come to permeate recent decisions of the English courts on questions of the freedom of speech. The two examples which follow show the pattern which has developed and explain that the *Granada* case can be viewed against a background of the judiciary's indifference to the state of freedom of speech in the United Kingdom.

A. *Schering Chemicals, Ltd. v. Falkman, Ltd.*[72]—Breach of Confidence

Schering Chemicals manufactured a contraceptive pill called Primodos. It was used as a pregnancy test, but doubts were raised about its safety. The press took up the theme, and the drug eventually was withdrawn from the market. To defend itself more effectively against public criticism, Schering engaged a company to train its executives in the art of media presentation. In turn, El-

69. 408 U.S. 665 (1972).

70. *Granada*, [1980] 3 W.L.R. at 821 (opinion of Lord Wilberforce).

71. *Id.* at 853 (opinion of Lord Fraser).

72. Schering Chems., Ltd. v. Falkman, Ltd., [1981] 2 All E.R. 321 (C.A.) (considered and criticized by the Law Commission Breach of Confidence, Cmd. 8388, ¶¶ 4.21-.23, 6.67).

stein, an employee of a television company and one who was well versed in broadcasting techniques, was hired to teach Schering executives how to deal with hostile interviews. In the course of his employment, Elstein learned a great deal about Primodos and decided to make a documentary about it for the television company. Schering refused to cooperate and sought an injunction to restrain the showing of the documentary. Not surprisingly, on these facts a majority of the Court of Appeal ruled that the broadcast of the film would be a breach of confidence, and granted the injunction.[73] The distinctive feature of this case, for present purposes, is that all of the information Elstein acquired from his work with Schering and used in the television program was already publicly available in scientific journals. Therefore, it was Elstein who argued that no obligation of confidence could attach to information that was already in the public domain. This was rejected. As in *Granada*, the majority preferred to uphold the private rights of Schering and eschewed the invitation to promote the interests of the press and the public's right to information.[74] Confidentiality was an important principle. *Granada* had shown that the press has no special immunity and, when considering the discretionary award of an injunction, it was better to uphold the principle of confidentiality. Moreover, as Lord Judge Templeman commented, "If the injunction is withheld, the court will enable a trusted adviser to make money out of his dealing in confidential information."[75] In any event, the court did not consider that "the injunction . . . interfere[d] with the freedom of the press to inform the public or any other freedom of the press."[76]

The similarity between the majority's opinion and *Granada* is evident: the private right of the offended litigant must prevail, the press has no immunity, the press must not benefit from wrongdoing, and the freedom of the press is not affected. The narrowness of this approach again illustrates the fragility of freedom of speech in English law. The preoccupation with the rights of Schering reduces such freedom to an empty platitude.

Lord Denning, the dissenter, speaking as though he had never appeared in the *Granada* case, argued that the issue was very different. He believed that the documentary was fair to Schering. It

73. *See id.* at 329, 338.
74. *Id.* at 340, 347-48.
75. *Id.* at 347.
76. *Id.*

was quite unfair to accuse the producer, Elstein, of "a flagrant breach of duty or of being a traitorous adviser."[77] Moreover,

> The freedom of the press is extolled as one of the great bulwarks of liberty. It is entrenched in the constitutions of the world. . . . It means that there is to be no censorship. No restraint should be placed on the press as to what they should publish. Not by a licensing system. Nor by executive direction. Nor by court injunction. It means that the press is to be free from what Blackstone calls "previous restraint" or what our friends in the United States, co-heirs with us of Blackstone, call "prior restraint." The press is not to be restrained *in advance* from publishing whatever it thinks right to publish. It can publish whatever it chooses to publish. But it does so at its own risk. It can "publish and be damned." Afterwards, after the publication, if the press has done anything unlawful they can be dealt with by the courts. If they should offend by interfering with the course of justice they can be punished in proceedings for contempt of court. If they should damage the reputation of innocent people, by telling untruths or making unfair comment, they may be made liable in damages. But always afterwards. Never beforehand. Never by previous restraint.[78]

Lord Denning referred to, and quoted from, Blackstone and the European Convention for the Protection of Human Rights. Freedom of the press, he concluded, could be restricted only if there was a "pressing social need" and, on the particular facts of the present case, the public interest in learning about the drug Primodos outweighed Schering's interest in confidentiality.[79]

Though it is pleasing to observe the Master of the Rolls tackling the issue of principle squarely and upholding the priority of freedom of the press, the contrast with his earlier approach in *Granada* typifies the uncertainty of this method of protection. In *Granada*, he disapproved of the ethics of the journalist's conduct and the freedom was lost; in *Schering* he did not, and freedom was preserved.

B. *Home Office v. Harman*[80]—Discovery and Contempt

In *Schering*, the action for breach of confidence was used to

77. *Id.* at 329.
78. *Id.* at 330.
79. *Id.* at 334.
80. [1982] 1 All E.R. 532 (H.L.). The judgments of the Divisional Court and the Court of Appeals are reported at [1981] 2 All E.R. 349.

restrain the press. In *Harman* as in *Granada*, the discovery procedure was used with a similar effect. The case deserves discussion because it explains that *Granada* is part of a developing pattern of restrictive barriers to the freedom of information and the freedom of the press. It arose out of an unsuccessful attempt by a prisoner to sue the Prison Department over the conditions of his confinement. As a "totally subversive and dedicated troublemaker,"[81] he was transferrred to a controversial "control unit"—a spartan, rigorous prison routine which was introduced to deal with uncontrollable inmates and subsequently withdrawn after it proved to be unsuccessful. He unsuccessfully sued the Home Office, the government department responsible for the units, claiming that the units were unlawful. During his trial, the court ordered discovery of many Home Office documents. Out of 6,800 pages, counsel read the material parts of some 800 in open court. The prisoner's solicitor, who also happened to be the legal adviser to the National Council for Civil Liberties, the leading civil liberties pressure group in the United Kingdom, was approached by a journalist who asked to see the 800 pages. He was allowed to do so, and wrote an article critical of the Home Office. The Home Office claimed that the solicitor, Harman, had committed a civil contempt of court by using the discovered documents for an improper purpose. Harman contended that, because the documents had been read in court, they had entered the public domain and no element of confidentiality still applied to them.

Seven out of nine judges agreed with the Home Office. They considered that the precious right of discovery could be used only for litigation purposes.[82] By letter, Harman had given an implied undertaking that the use of the documents would be so confined. They could not be used to enable journalists to write general articles, even though the documents already had been read in open court. The proper administration of justice required that the inherent confidentiality of the documents be breached solely for the purposes of the trial. Consequently,

> public policy requires that the implied undertaking given by a solicitor to the court, on obtaining production on discovery of documents belonging to his own client's adversary, that he will not take advantage of his possession of those documents to use them or to enable others to use them for some collateral purpose does *not* ter-

81. *Harman*, [1981] 2 All E.R. at 358-59.
82. *Harman*, [1982] 1 All E.R. at 539-42, 554-55.

> minate as respects each individual document at the very moment that that document, whether admissible or not, is actually read out in court.[83]

This decision is disturbing. First, it flies in the face of common sense. As Lord Scarman in dissenting hypothesized, it could mean that, if the solicitor had handed the journalist a transcript of the case with her right hand and the Home Office documents with her left hand, her left hand could be guilty and her right hand innocent of contempt.[84] As the minority pointed out, it is possible for any member of the public to purchase a copy of the proceedings transcript from the court office. Lord Diplock dismissed this possibility as "hypothetical in the extreme," but in cases of extreme interest to the journalist it is perfectly feasible.[85] Moreover, his comment does not overcome the illogicality. Lord Keith dismissed the point by the even more remarkable observation that the reading of the documents in court was irrelevant because the public does not often attend.[86] Open justice, it would seem, is attainable when documents are read aloud, provided that no member of the public is present to hear it.

Lord Diplock was still troubled by the apparent illogicality and the frequency with which journalists do ask counsel to show them these documents. He therefore proposed a refinement.[87] He suggested that journalists could be divided into three classes: reporters of cases for the Law Reports and the like, reporters who wanted a condensed but accurate account of the proceedings, and reporters who wanted to write feature articles.[88] The first category could have access to any discovered documents which had been read out in court, for the sake of writing accurate law reports.[89] Bona fide members of the second group also might be permitted similar access, but members of the third group would not.[90]

These subtle distinctions are unrealistic, artificial, and impracticable. Moreover, they are absurd. The judgment means that the

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83. *Id.* at 539.
84. *Id.* at 546.
85. *Id.* at 538.
86. *Id.* at 541.
87. *Id.* at 539.
88. *Id.*
89. *Id.*
90. *Id.*

very same documents are in the public domain for the purposes of preparing a transcript through an official shorthand writer, and outside of it for the purpose of revealing them to some journalists, but not to others. Second, the majority agreed with Lord Diplock that the case "is *not* about freedom of speech, freedom of the press, openness of justice or documents coming into the public domain; nor . . . does it . . . call for consideration of any of those human rights and fundamental freedoms which [are contained] in the European Convention for the Protection of Human Rights . . . ."[91] It is respectfully submitted that, as Lords Scarman and Simon recognized in their dissent, the case has everything to do with such freedoms and rights however much the majority may wish to ignore them. It hardly can serve the reputation of the courts, as protectors of liberties, when in *Granada, Schering,* and *Harman* the judges are seen to shy away from grappling with them. Nor can it help Lord Diplock to pray in aid a selected passage from Jeremy Bentham, a man whose convictions would surely have sided him with the dissenting minority. Third, the majority's avoidance of the central issue is engineered by reliance upon the special nature and functions of the discovery process in England. As in the *Granada* decision, which was based on the preeminence of discovery in England, and the *Schering* opinion, which set forth a wide definition of confidentiality, the court defends the private interests of the particular party and ignores the wider public interests in freedom of speech and information. Thus, the case turned "on its own particular facts, which are very special"[92] and involved, in essence, a legal technicality. If there was a public interest to consider, it lay in the inviolability of such technicalities.

The minority adopted an encouragingly robust approach and, with timely references to Milton and the traditional respect of the common law for freedom of communication, concluded that such background could not "decently and rationally permit" the consequences of the majority's ruling.[93] After all,

> [j]ustice was done in public so that it may be discussed and criticized in public. Moreover, trials will sometimes expose matters of public interest worthy of discussion other than the judicial task of doing justice between the parties in the particular case. It cannot

91. *Id.* at 534.
92. *Id.*
93. *Id.* at 544.

> be desirable that public discussion of such matters is to be discouraged or obstructed by refusing to allow a litigant and his advisers, who learnt of them through the discovery of documents in their action to use the documents in public discussion after they have become public knowledge.[94]

This approach is more likely to comply with the United Kingdom's obligations under the European Convention for the Protection of Human Rights.[95] The European Court has already seen fit to correct one House of Lords decision on freedom of speech,[96] and that correction prompted the government to pass amending legislation to comply with the Convention's obligations.[97] Because the *Harman* case is set for appeal to the European Court, the relevance of the Convention as a substitute for a United Kingdom Bill of Rights will once again be at issue.[98]

If ever a case called out for a bold assertion of the principle of freedom of speech, it is the *Harman* case, especially because, as the House of Lords conceded, the courts were faced with virgin territory. As in *Granada*, the vacuum of authorities offered the perfect opportunity for judicial creativity. That this opportunity was not taken is particularly unfortunate in view of the fact that both cases concerned the government or a quasi-governmental body. With the tradition of secrecy and confidentiality that surrounds all government in the United Kingdom, the public's interest in a free flow of information is significantly more important. As it is, if Lords Denning, Salmon, Simon, and Scarman sit together, freedom of speech has a fighting chance of protection. This, however, is a slim and unpredictable substitute for statutory or constitutional rights of speech and information.

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94. *Id.* at 547. Lord Scarman's view is more in keeping with the spirit behind the earlier decision of the House in Attorney Gen. v. Leveller Magazine, Ltd., 1979 A.C. 440.

95. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953 Gr. Brit. T.S. No. 71 (Cmd. 7854).

96. The Sunday Times Case, 30 Eur. Ct. on Human Rights, series A (1979).

97. Contempt of Court Act, 1981, ch. 49. For a commentary regarding the Act, see Miller, *The Contempt of Court Act*, 1982 CRIM. L. REV. 71.

98. The Convention's influence upon British judges is spasmodic. It is not part of English law and is, therefore, not binding upon the courts. *See, e.g.*, Malone v. Commissioner of Police, [1979] 1 Ch. 344 (Ch.). Conversely, some judges accord the Convention great weight. *E.g.*, Attorney-Gen. v. British Broadcasting Corp., [1980] 3 All E.R. 161, 178 (H.L.); Morris v. Beardmove, [1980] 3 W.L.R. 283, 296 (H.L.). The *Harman* case is being appealed on the basis of articles 7, 10, and 14 of the Convention.

IV. COMMENTARY

A. Implications

Predictably, the July 1980 decision of the House of Lords in *Granada* and its November judgment were greeted with alarm and condemnation by the press. The media's central argument is that if sources are not protected, they will dry up, and the public will thereby be deprived of information to which it is entitled. For example, The Times remarked that the judgment

> is bound to make prospective informants think twice before commiting themselves to passing on information to the press, and many will now not do so. It will create a new and inhibiting framework within which the journalist operates. Its tendency will be to make for fewer exposures of wrong-doing, dishonesty and inefficiency in public bodies.[99]

This argument has a plausible ring to it, but whether the fear is a realistic one cannot be gauged adequately. In the opinion of the Massachusetts Supreme Court in *Re Pappas*:[100] "Any effect [of refusing a reporter's privilege] on the free dissemination of news is indirect, theoretical, and uncertain, and relates at most to the future gathering of news."[101] Similarly, Viscount Dilhorne commented in *Granada*:

> [W]e were told more than once of the dire consequences which, it was said, were likely to follow if disclosure was ordered. The sources of information for the media would, it was said, dry up to the great injury to the public interest. These consequences do not appear to have followed from the decisions in 1963 [*Attorney General v. Mulholland*; *Attorney General v. Clough*] to which I have referred and which establishes that journalists did not enjoy any privileged position with regard to disclosure of their sources. I find it difficult to accept that those consequences will follow from the decision in this case which follows those decisions.[102]

Both comments are matters of guesswork. The most that can be said is that no evidence at hand shows that the compulsory disclosure of sources will pose a serious threat to journalists. On the other hand, there is no compelling requirement that the threat be

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99. The Times, (London) Nov. 8, 1980, at 15.
100. 358 Mass. 604, 266 N.E.2d 297, (1971).
101. *Id.* at 612, 266 N.E.2d at 302.
102. *Granada*, [1980] 3 W.L.R. at 835-36 (opinion of Viscount Dilhorne).

serious before protection is warranted. On the contrary, it can be argued that, if there is any threat, the especially vulnerable nature of press freedom should demand the judiciary's assistance. As United States Supeme Court Justice Stewart observed in his *Branzburg v. Hayes*[103] dissent:

> The impairment of the flow of news cannot, of course, be proved with scientific precision, as the [majority of the] court seems to demand . . . . And it is difficult to pinpoint precisely how many relationships do require a promise or understanding of non-disclosure. But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist. . . .[104]

This cautionary note is particularly apposite in the United Kingdom context. The United States press might well be able to shrug off the implications of a *Granada* decision because it possesses broader rights of access under legislation such as the freedom of information laws. In contrast, the law in the United Kingdom emphasizes the protection of confidentiality and secrecy. Freedom of speech in England is at most a negative concept—the residue of freedom which is left after subtracting the controls of libel, contempt of court, official secrecy legislation, confidentiality, and so on. These are sufficient deterrents to a free flow of information without the extra disincentive of the *Granada* case.

In evaluating the potential effect of *Granada*, it should be pointed out that there was considerable publicity surrounding the decision, and it is likely that potential informers elsewhere in public corporations are aware of the result. Furthermore, a future plaintiff, unlike B.S.C., may decide not to allow initial transmission or publication of the media report. The effect of *Granada* upon journalists is unclear. Whether similarly leaked information and its source will be published doubtless will depend upon individual editorial courage and judicial policy. Certainly nondisclosure of sources remains a professional rule, regardless of the House of Lords statements. The code of conduct of the principal British media trade union, the National Union of Journalists, states, "A journalist shall protect confidential sources of informa-

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103. 408 U.S. 665 (1972).

104. *Branzburg*, 408 U.S. at 773. For a discussion of a possibly adverse affect upon the press, see Comment, *Newsman's Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy*, 49 TUL. L. REV. 417, 417-22 (1975).

tion." Thus, it is always possible for a journalist to refuse to obey a court order of discovery and pay the penalty of contempt of court. To this extent, the judgment in the *Granada* case is really a reminder that the penalties for nondisclosure are a "risk of the job," a risk which journalists have been running for many years. It will be submitted later in this Article that this is a penalty journalists ought not to have to face, save in cases involving serious crime punishable with more than five years imprisonment.

Granada establishes five preconditions for obtaining an order of discovery. First, the plaintiff must establish that he has a legitimate interest in discovering the identity of the source. It has been seen already that "legitimate interest" carries an extremely broad meaning in this context. It covers intended—or merely possible—legal proceedings, intended—or merely possible—internal disciplinary proceedings, and a wish to improve morale by eliminating the "atmosphere of suspicion" among the plaintiff's employees. Second, there must be no iniquity on the part of the plaintiffs. "Iniquity," however, is confirmed narrowly to criminal conduct or "misconduct." Third, the court retains discretion to order discovery, and the interests of the press are a factor in that decision. As *Granada* amply illustrates, the interests of the press amount to a factor of little practical weight. Fourth, although it is not made clear from the judgments, it can be assumed that the identity of the source must be relevant to the plaintiff's aims. Again, no clear obligation was placed on the plaintiff to present evidence to prove this. Finally, it also might be assumed that the plaintiff first must exhaust all other methods of discovering the source's identity. In *Granada*, however, there is no explicit requirement that he do so, nor is there a demand that he must satisfy the court that he has done so.

A journalist has four potential defenses. First, if he can establish that there is a real risk that criminal proceedings will be taken aginst him, he can plead the privilege against self-incrimination. Second, he can deny that there has been a breach of confidence either because the information is aleady in the public domain or because it reveals "iniquity" on the part of the plaintiff. As *Schering* and *Harman* indicate, however, "public domain" has a narrow and eccentric legal meaning. Furthermore, *Granada* confines "iniquity" to a very narrow scope. Third, he can try to persuade the court to exercise its discretion in his favor. The three cases reveal, however, that the courts attach great importance to the smooth administration of justice, in particular to the

efficiency of the discovery process. The courts also value the private rights of the litigant, especially the doctrine of confidentiality. Moreover, it is essential for the journalist to come to the court "with clean hands" because the fairness and good standards of his conduct may be a crucial factor for the court. Finally, he can deny that the source's identity is essential or relevant to the plaintiff's needs. The success of this argument will depend on how rigorously the court questions the plaintiff and how well the journalist's case is prepared. An illustration of this argument in the criminal field can be seen in the peculiar facts that led to the recent contempt of court decision in *Attorney General v. Lundin.*[105] In 1978, Lundin, a journalist, had investigated the illegal methods used by a casino to attract customers. He revealed that, for example, it had made lavish gifts to potential customers, paid people a commission for introducing clients, and used a police officer's access to the police computer to trace the car owners who frequented rival casinos. When identified, they were lavishly entertained to induce them to switch their custom. The police investigated the allegations, and the casino subsequently lost its licenses. Proceedings were brought against the police officer for corruption, and the prosecution asked Lundin to reveal the source of his information. He refused and the prosecution did not proceed. The Attorney General, at the invitation of the trial judge, sought an order for contempt of court against Lundin for refusing to disclose his source. The Divisional Court reaffirmed stressing the principle announced in *Granada* that the journalist had no immunity and holding that the request to him to reveal his source was a relevant one. The court held, however, that disclosure was not necessary. Revelation of the source would not have facilitated a successful prosecution because other related and essential evidence was needed and had not been obtained by the prosecution. Thus, as Watkins, L.J., concluded, "That which [is] useless cannot conceivably be said to be necessary."[106] Therefore, if the journalist is prepared to place his trust in fortune, or more accurately,

105. *See* The Times (London), Feb. 20, 1982, at 21, col. 5.

106. *Id.* The point is supported by Senior v. Holdsworth, [1975] 2 All E.R. 1009 (C.A.) where an unnecessarily broad summons against a television company was struck down. *Cf.* Baker v. F. & F. Inv. Co., 470 F.2d 778 (2d Cir. 1972); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973) (need for relevance of the evidence before it may be subpoenaed). A "compelling interest" requires disclosure.

in the poor preparation of the prosecutor's case, his decision to conceal his source may subsequently be vindicated. This is, however, a slender protection.

Although the Contempt of Court Act 1981 must also be considered, it is difficult to see how matters will be improved. Section 10 allows a journalist to refuse to name his source and thereby to evade contempt of court "unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security, or for the prevention of disorder or crime." For the first time a journalist is given a right to refuse disclosure of his source. In view of the court's persistent preoccupation with the administration of justice, however, it is unlikely that the section will make any real difference in practice. The phrases "interests of justice" and "prevention of disorder and crime" give the courts all the room for maneuver that was present in *Granada.*

The *Granada* case revealed an extraordinary gulf between the judges. For example, to Lord Wilberforce *Attorney General v. Mulholland*[107] and *Attorney General v. Clough*[108] were indicative of a general rule that the press had no privilege, whereas to Lord Salmon they clearly were confined to the area of national security. More fundamentally, *Granada* illustrated, on the one hand, the narrow, well-worn tradition of English judges who stick firmly to the particular facts of the case and to recognized legal doctrines and, on the other, the bold, broad brush of policy making. Infrequent examples of the former can perhaps be tolerated in the area of freedom of expression, but there is now a disturbing pattern of cases wherein the judgments are restrictive of that freedom. It is all the more disturbing when one remembers that the courts have traditionally regarded themselves as guardians of civil liberties and that, in each case, the court was not constrained by binding, relevant precedent, but in fact had a free hand.

In this relatively barren field, the courts made very little use of comparative material from the United States and hardly referred to the spirit of the European Convention for the Protection of Human Rights, in spite of the fact that the European Court already has ruled against the narrow approach of the House of Lords in a freedom of speech case.[109] When the court did look to

107. [1963] 2 Q.B. 477 (C.A.).
108. [1963] 1 Q.B. 773.
109. The Sunday Times Case, 30 Eur. Ct. on Human Rights, series A (1979).

the United States, it was content to acknowledge the *Branzburg v. Hayes*[110] decision as conclusive and seemingly failed to appreciate the complexity of the United States position. The court did not refer to the limitations of *Branzburg* which include the fact that the case is confined to grand jury proceedings and grants state legislatures considerable room for maneuver in developing protection of media sources.

Finally, it is interesting to observe the surprisingly prominent part which the discovery process has played in this field. It is almost possible to detect pride in the way the courts have extolled its virtues. It is also almost possible to see how the technicalities of discovery have been used as a vehicle to promote the administration of justice and to avoid serious consideration of the issue of freedom of the press. In the process, its scope has been delineated. Thus, in *Granada*, equity's venerable bill of discovery no longer is confined to helping a potential plaintiff discover who is the proper defendant for the purposes of his litigation; it can be used simply to discover the source of the media's information. Thus, "[d]iscovery of the sources is not merely a means to an end; it is the end itself."[111] In *Harman*, the discovery process was deemed to be of such preeminence that it was used to maintain the confidentiality of information already available to the general public by other means.

B. Prospects for Reform

It is unrealistic to expect the courts to lay down a new and detailed code for press immunity. After all, as Vice Chancellor Megarry queried, if an immunity is to be allowed,

> does it apply to freelance journalists or freelance television reporters, obtaining information in the hope of persuading a newspaper or television company to buy the results? Does it apply to an author gathering material for a book for which he hopes to find a publisher? Does it apply to a crank or a busybody preparing a pamphlet that he will publish at his own expense? What of manufacturers or advertising agents engaged in market research? Does it

110. 408 U.S. 665 (1972). Only Lord Scarman, in the *Harman* case, recognized the importance of the United States and the doctrine of "public judicial record." *See Harman*, [1982] 1 All E.R. at 548-49.

111. *Granada*, [1980] 3 W.L.R. at 794 (opinion of Vice Chancellor Megarry); *cf.* Brill v. Television Serv. One, [1976] 1 N.Z.L.R. 683 (N.Z.S.C.) (regarding technicality of discovery).

> apply even to newspapers and television companies and their staffs if the material is being gathered for some article or programme which is intended merely to entertain and not to expose some evil or wrong?[112]

Moreover, the variety and complexity of the state "shield laws" in the United States clearly demonstrate[113] that Parliament is really better suited to remedy the problem.

In *Granada*, however, no such bold and expansive steps were required in order to protect the press. As Lord Salmon's judgment indicates, it was possible merely to extend the newspaper rule, or to distinguish *Mulholland*[114] and *Clough*,[115] or to define "iniquity" more broadly, or to require of B.S.C. a firmer commitment to institute proceedings against its employee. Instead, there was no indication from the judgments of the majority that the courts wanted to change the law. Nor can change be expected from Parliament. Neither leading political party has shown any real commitment to law reform aiding the press. The only recent development, the Contempt of Court Act 1981 (Act), is a perfect example of governmental indifference. Having allowed a committee's proposals for reform of the law to gather dust for seven years,[116] the Government finally was forced to liberalize the law in order to comply with the judgment of the European Court of Human Rights,[117] and with its international law obligations under the Convention. In the Act, however, Parliament took the opportunity to strengthen the law against the press in other respects[118] and the initial approach of the courts to the Act does not auger well for a liberal interpretaton.[119]

Unfortunately, the defense of press freedom in the United

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112. *Granada*, [1980] 3 W.L.R. at 786 (opinion of Vice Chancellor Megarry).

113. *See, e.g.*, Comment, *supra* note 104, at 429-36; Annot., 99 A.L.R.3d 37, 88-114 (1980).

114. [1963] 2 Q.B. 477.

115. [1963] 1 Q.B. 773.

116. CONTEMPT OF COURT COMMITTEE, REPORT, CMD. No. 4794 (1974) (the Phillimore Committee).

117. The Sunday Times Case, 30 Eur. Ct. on Human Rights, series A (1979).

118. For example, § (4)(2) of the Criminal Justice Act, 1967, ch. 80, enables the court to order postponement of the press reporting of a case. The power has already been used widely. *See* Regina v. Horsham Justices, The Times (London), Nov. 14, 1981, at 4, col. 1.

119. *See* Attorney-Gen. v. English, The Times (London), Feb. 20, 1982, at 21, col. 5 (interpretation of § 5 of the Contempt of Court Act, 1981, ch. 49).

Kingdom must almost invariably rely upon self-advertisement from the press itself. This normally takes the form of the pious editorial indignation that greeted the *Granada* and *Harman* cases; such indignation wins few committed allies for reform.

C. The Future

As has been suggested, Granada made a tactical error by conceding that it was liable for breach of confidence and thereby lost the opportunity to present fully the media's case. *Granada* was decided while the Law Commission was engaged in a study of the law of confidence. In its final report, published in October 1981,[120] the Commission proposed enactment of a statutory tort of breach of confidence. Among its detailed proposals, the Commission considered the implications of the *Granada* case.[121] First, it advocated the following statutory defenses to the new tort: "[T]he courts should have a broad power to decide in an action for breach of confidence whether, in the particular case, the public interest in protecting the confidentiality of the information outweighs the public interest in its disclosure or use."[122] One of these competing public interests, which already exists in the common law, is the entitlement to establish "iniquity" on the part of the plaintiff. The Law Commission criticized *Granada*'s narrow definition of "iniquity" and implicitly vindicated Lord Salmon's opinion by stating that there are important areas of information, not necessarily involving "misconduct," where the public's claim to be informed should be weighed by the courts against the interest in protecting confidentiality.[123] This more relaxed definition is welcomed because it allows legitimate public concerns—such as the mismanagement of public corporations—to be pleaded in defense. Third, the Commission recommended that, in view of the importance of the "free circulation of information," the primary burden of establishing which public interest should prevail ought to lie with the plaintiff.[124] Freedom of the press would thereby receive a slight evidentiary advantage.

These modest proposals are qualified by the Commission's pro-

120. LAW COMMISSION, REPORT ON BREACH OF CONFIDENCE, CMD. NO. 8388 (1981).
121. *Id.* ¶¶ 4.46-.53, 4.63-.67.
122. *Id.* ¶ 6.77.
123. *Id.* ¶ 6.78.
124. *Id.* ¶ 6.82.

posal that, in balancing the public interests, the court specifically should consider the manner in which the confidential information was acquired.[125] It appears that Lord Denning's criterion of "reprehensible conduct" and the unsavory taste that Granada's tactics clearly left in the mouths of his brethren could be avoided under the Commission's proposals because the complaint against Granada arose over what it did with the information it obtained and not with how the information was acquired. These factors still could be relevant because, according to the Commission, "all the circumstances" would be available for consideration.[126]

The means by which information is acquired may be a legitimate subject for legal sanction. For example, a journalist who trespasses or steals clearly should be liable to a civil action or prosecution. That conduct, however, should not affect the question whether publication of the information is in the public interest. If, for example, a newspaper acquires information that a political party has bugged the proceedings of a rival party, dissemination of that information is still likely to be in the public interest whether the newspaper's journalist broke into a safe or acquired the information unbidden from an unnamed source. The journalist could be prosecuted for breaking into the safe and, it would be hoped, would be disciplined by his professional colleagues. But the information—if in the public interest—should be free for publication all the same.

If, as in *Granada*, the information is used, as opposed to gained, in an unethical fashion, then that conduct should be subjected to sanctions under the journalist's professional code of conduct,[127] but the information still should be published. The Law

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125. *Id.* ¶ 6.46.

126. *Id.* ¶ 6.84.

127. It must be conceded that self-discipline within the press is limited. In 1953 the Press Council, set up at the recommendation of the first ROYAL COMMISSION ON THE PRESS, CMD. No. 7700 (1947-1949), existed to maintain professional standards and could investigate complaints about the conduct of the press. Its constitution was changed after the second ROYAL COMMISSION ON THE PRESS, CMD. No. 1811 (1962). *See* H. LEVY, THE PRESS COUNCIL (1967).

The Press Council's record, however, provoked criticism from the third ROYAL COMMISSION ON THE PRESS, CMD. No. 6810, ch. 20 (1974-1977), which recommended, *inter alia*, that the Council should draw up and administer a code of conduct for the press. If the Council were seen to do that, no doubt the pleas by the press for reform of the law would appear more persuasive.

Television has its own Complaints Commission. *See* Broadcasting Act, 1980, ch. 64.

Commission's proposal that, in cases like *Granada*, other public interests should be balanced against the public interest in confidentiality is fraught with danger in the United Kingdom context. First, the British courts have shown that in balancing exercises involving civil liberties they normally favor suppression.[128] Their record of protecting civil liberties is poor. It is all very well to require, as the Commission proposes, that the plaintiff satisfy an extra burden of proof, but it is a small obstacle compared to the difficulty that the courts would face if rights on the order of the United States Constitution's first amendment or more detailed Bill of Rights were made available to the defendant. As the experience in the United States indicates, the mere adoption of a balancing test would solve little. Both the Commission's balancing proposal and the approach of the courts in *Granada* omit the simple qualifications inherent in *Branzburg v. Hayes*[129]—the identity of the source of the information must be material or essential to intended proceedings and the plaintiff must prove that he cannot discover the identity by other means. No doubt these qualifications were implicit in the minds of some of the judges in *Granada*, but they made little effort to elucidate them. No effort was wasted on giving guidance to the press as to the parameters in which they could work. The Law Commission's proposed balancing test skirts too many detailed problems, and a comprehensive survey is required. The proliferation of state shield laws, implicitly advocated by the narrow factual decision in *Branzburg v. Hayes*, is a clear indication of this. For example, should there be a press immunity for civil cases but not for criminal cases? Should it make a difference that the media is not a party to those proceedings? Should an immunity apply to the information as well as to its source? Should an immunity belong to the press or to the source? And when can it be waived?

A distinction should be drawn between criminal and civil proceedings.[130] In the former, the maintenance of society's law and

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128. Apart from the cases presently under review, a flavor can be detected from Whitehouse v. Lemon, 1979 A.C. 617 (H.L.) (resurrecting the offence of blasphemy); Dockers Labour Club & Inst., Ltd. v. Race Relations Bd., 1976 A.C. 285 (H.L.) (interpreting restrictively the Race Relations Act, 1926); Attorney-Gen. v. Times Newspapers, Ltd., 1974 A.C. 273 (H.L.) (interpreting contempt expansively, but which was overruled by the Contempt of Court Act 1981, ch. 49).

129. 408 U.S. 665 (1972).

130. *Cf.* Baker v. F. & F. Inv. Co., 470 F.2d 778, 783 (2d Cir. 1972); Demo-

order and the physical liberty of the individual are at stake, and truth is essential to the proper administration of justice. If, therefore, the identity of a journalist's source is essential for the prosecution and/or defense of serious crimes,[131] the press should have no immunity. The consequent dangers to investigative journalism and the free flow of information should not be overstated. It would still be possible to incorporate safeguards such as the relevance and materiality of the source's identity,[132] whether or not all other methods of discovering it have been tried. In addition, it would be possible for the Attorney General to set out guidelines which confine the need for discovery to a minimum.[133]

In civil proceedings, it is safer to expand the free role of the press.[134] In view of the restrictive approach of the courts and the restrictive nature of the laws of official secrecy, libel, confidentiality, and contempt, it is essential to accord the press an absolute immunity. The shield laws in the United States offer guidance on the type of issues with which such an immunity would deal. Any hardship to the litigant would have to be endured for the sake of the greater, long-term value of the press and the public's right to a free flow of information. This is especially important when the government or a quasi-governmental body is involved.[135]

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cratic Nat'l Comm. v. McCord, 356 F. Supp. 1394, 1397 (D.D.C. 1973).

131. Under an analogy with and an extension to § 2(1) of the Criminal Law Act, 1967, ch. 80, such crimes could be defined as those punishable with imprisonment for a term exceeding five years.

132. *See* Attorney-Gen. v. Lundin, The Times (London), Feb. 20, 1982, at 21, col. 5; Senior v. Holdsworth, [1975] 2 All E.R. 1009.

133. *See* Branzburg v. Hayes, 408 U.S. 665, 706-07 (1972) (describing the guidelines established in the United States). In the United Kingdom, a relevant comparison is between the use made of Home Office Circulars and the Attorney-General's Guidance to the policy, such as the latter's guidelines on jury-vetting.

134. *Cf.* Apicella v. McNeil Laboratories, 66 F.R.D. 78 (E.D.N.Y. 1975).

135. It is suggested that a more liberal view regarding freedom of the press should be adopted at least where the Government is concerned. As Justice Mason observed:

> It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.

Commonwealth of Austl. v. John Fairfax & Sons, Ltd., 32 Austl. L.R. 485, 492-

V. CONCLUSION

It must be conceded that the possibilities of reforming the law in any material way to protect a newspaper's source are remote. Laws to promote freedom of speech do not appear among the priorities of United Kingdom governments.[136] Meanwhile, *Granada* and other recent cases illustrate that the courts have a clear preference for the technicalities of the discovery process and the administration of justice. Lord Denning may say: "The freedom of the press is extolled as one of the great bulwarks of liberty. It is entrenched in the constitutions of the world."[137] Nevertheless, the fact remains that there is no constitutional or statutory protection for this freedom. The courts' traditional reputation as defender of the free press is now so mythological that a Law Lord in *Granada* can blandly assert that the case "does not touch upon the freedom of the press even at its periphery."[138] Adoption of guarantees akin to those incorporated in the United States Constitution's first amendment or Bill of Rights would not solve all problems, but if legal protection of freedom of speech is to have any power in the United Kingdom, it is submitted that such a provision must be adopted.

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93 (1980).

136. COMMITTEE ON DEFAMATION, REPORT, CMD. No. 5909 (1975); FRANKS COMMITTEE ON SECTION 2 OF THE OFFICIAL SECRETS ACT 1911, CMD. No. 5104 (1972).

137. Schering Chems., Ltd. v. Falkman, Ltd., [1981] 2 All E.R. 321, 330 (C.A.).

138. *Granada*, [1980] 3 W.L.R. 774, 821 (opinion of Lord Wilberforce); *see also* Home Office v. Harman, [1982] 1 All E.R. 532, 534 (H.L.) (appeal of a finding of contempt regarding attorney's disclosure of discovery documents to a journalist where Lord Diplock stated the case did not concern freedom of the press).