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Real to Reel: The *Hirsch* Case and First Amendment Protection for Film-makers' Confidential Sources of Information

STEPHEN F. ROHDE*

INTRODUCTION

Karen Silkwood, Dr. Martin Luther King, Jr., Lee Harvey Oswald, Caryl Chessman, Don Bolles, Senator Joseph McCarthy, Joan Little, Melvin Dummar, Frances Gary Powers, Karen Ann Quinlan, Elizabeth Ray, Joseph Yablonski, Gary Thomas Rowe, Jr., Jack Ruby, John Dean and Gary Gilmore all are famous and notorious people who have shared headlines across the world and have figured, in one way or another, in the current American experience.

This, however, is no arbitrary list. In the last year, major

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motion picture and television productions have been mounted to re-enact, in dramatic and documentary formats, the lives and deaths of these public figures.¹

Whether or not all these productions are ever released and broadcast, it is plain that the coverage of the news events which have surrounded these individuals and which will surround others will no longer be confined to the daily newspaper or the nightly news program. Screenwriters and motion picture producers² are vigorously attempting to engage the attention of movie-goers and TV audiences with factual re-enactments of historical and current events. Previously such material was confined to "fictionalizations" which, by relying upon "dramatic license," may well have misled more than enlightened.

This current development provides the setting in which to explore an important Federal appellate decision which guaranteed that film-makers who use motion pictures for investigative reporting can gather sensitive and explosive information with the assurance that, absent compelling circumstances, the confidentiality of their sources will be protected.³

1. Karen Silkwood (a major documentary dramatizing the life and mysterious death of this "nuclear dissenter" will be produced by Buzz Hirsch, Larry Cano, and Carlos Anderson); Dr. Martin Luther King, Jr. (*King*, produced by Abbey Mann for NBC); Lee Harvey Oswald (*The Trial of Lee Harvey Oswald*, produced by Chuck Fries Productions and broadcast by ABC on September 30 and October 2, 1977); Caryl Chessman (*Kill Me if You Can*, broadcast by NBC on September 25, 1977); Don Bolles (a major motion picture on the murder of this Phoenix investigative reporter is being planned by Brut Productions for CBS in conjunction with *New West* magazine writer John Nugent); Senator Joseph McCarthy (*Tailgunner Joe*, broadcast by NBC and winner of an Emmy award from the Academy of Television Arts and Sciences for "outstanding writing in a special program, drama or comedy"); Joan Little (the story of this southern convict who stabbed her jailer to death is being planned by Universal Studios); Melvin Dummar (Mike Nichols will direct and Bo Goldman will write this motion picture for Universal Studios about the Utah service station owner named in the disputed Howard Hughes "Mormon Will"); Frances Gary Powers (*Frances Gary Powers: The True Story of the U-2 Spy Incident*, broadcast by NBC); Karen Ann Quinlan (*In the Matter of Karen Ann Quinlan*, broadcast in September, 1977 by NBC); Elizabeth Ray (possible motion picture based on her book *THE WASHINGTON FRINGE BENEFIT*); Joseph A. Yablonski (a major motion picture to be directed by William Friedkin and written by Jeremy Lerner for Warner Bros.); Gary Thomas Rowe Jr. (*My Undercover Years with the Ku Klux Klan*, the true story of an FBI agent's infiltration of the Klan and witnessing of the slaying of civil rights worker Viola Liuzza is being produced by NBC); Jack Ruby (*Ruby and Oswald* to be produced by Alan Landsberg for CBS); John Dean (a television adaptation of his book *Blind Ambition* is planned for CBS); and Gary Gilmore (television producer Larry Schiller is planning a 6 hour TV film reaching back several generations in the Gilmore family).

2. The docu-drama format has also had limited exposure on the stage from the highly fictionalized *Trial of the Catonsville 9* to *Sirhan and R.F.K.—A Murder Mystery*, written by Hans Steinkellner from trial testimony and public records.

3. Some related legal questions worthy of full length articles are: a)

In September, 1977, the United States Court of Appeals for the Tenth Circuit, in *Karen G. Silkwood, et al. v. The Kerr-McGee Corporation, et al. v. Arthur Buzz Hirsch*⁴ upheld the right of Buzz Hirsch to refuse on First Amendment grounds to disclose confidential sources of information gathered while preparing a documentary motion picture depicting the life and death of Karen Silkwood, unless the party seeking disclosure could overcome a heavy burden of showing that the specific

whether historical figures and their heirs have a right to restrict and control the depiction of their famous lives. See *Guglielmi v. Spelling Goldberg Productions*, 73 Cal. App. 3d 436, 140 Cal. Rptr. 775 (1977) (Hg. granted Nov. 17, 1977 L.A. 30872) (denying the heir of silent screen star Rudolph Valentino a claim on the commercial value of his famous uncle's image); *Lugosi v. Universal Studios, Inc.*, 70 Cal. App. 3d 552, 139 Cal. Rptr. 35 (1977) (the California Supreme Court has granted a petition for hearing in this case following a court of appeals decision denying the heirs of Bella Lugosi a right to participate in the benefits derived from the commercial exploitation of Lugosi's portrayal of Count Dracula Hg. granted Aug. 11, 1977 (L.A. 30824)); b) whether the re-enactment of a historical event, while litigation surrounding that event is pending, can expose a producer to liability. (After announcing that it intended to produce a "theatre of fact" drama about the 1972 Buffalo Creek Dam disaster which killed 125 people in West Virginia, NBC dropped the project after spending over \$500,000 because of concern that it might influence pending lawsuits involving the same incident and because of a series of alleged errors in the proposed script. The future of other properties optioned by NBC for potential docu-dramas is uncertain. BROADCASTING MAGAZINE, November 7, 1977 at 36; c) whether legislation enacted in New York and proposed in California and in Congress, prohibiting an accused criminal from earning royalties from books, motion picture rights and television interviews relating to his alleged crime(s), is unconstitutional as a denial of free speech, a taking of property without just compensation, cruel and unusual punishment or an unlawful assumption that a suspect is guilty until proven innocent. Phil Kerby, *Making Crime Pay: Sick Business* Los Angeles Times, August 18, 1977, part II, page 1; editorial, *Cutting Sin's Profits* Los Angeles Times, October 5, 1977, part II, page 6; d) whether exposure to television dramas depicting real or imagined violence is either a defense to murder or grounds for a civil suit by the victim or his heirs against the broadcaster. On October 6, 1977 Ronny Zamora was convicted of first degree murder notwithstanding the defense contention that he had been driven temporarily insane by television violence, BROADCASTING MAGAZINE, October 10, 1977, page 32. Also, the California Court of Appeals has ordered NBC to stand trial on a \$22 million civil damage suit claiming that the nationally televised film "Born Innocent," depicting the artificial rape of a teen age girl with a bottle, caused a group of teenagers in 1974 to commit a similar act on the plaintiff's minor daughter. The trial court had viewed the motion picture at the outset of the jury trial, found that it did not advocate or encourage violent or depraved acts and thus did not constitute an incitement, and therefore dismissed the case on First Amendment grounds. *Olivia N. v. National Broadcasting Company*, 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977).

4. 563 F.2d 433 (10th Cir. 1977) (hereinafter referred to as the *Hirsch* decision).

information sought went to the "heart of the case", and that attempts to obtain the information elsewhere had been unsuccessful. In so ruling, the Court of Appeals reversed the decision of the United States Court for the Western District of Oklahoma and for the first time placed film-makers such as Hirsch on a par with newspaper and broadcast journalists.

As the latest federal decision dealing with the tangled question of protection of confidential sources, the *Hirsch* case calls for a review of the need for such protection in all fields of journalism and for a look at the inadequate and inconsistent manner in which Congress and state legislatures have dealt with this problem.

This article will explore the following topics:

A. The vital First Amendment interest in the protection of journalists' confidential sources in all media.

B. The prior court decisions dealing with the protection of confidential sources.

C. State legislation and proposed federal statutes affecting confidential sources.

D. An analysis of the *Hirsch* decision.

FIRST AMENDMENT PROTECTION OF JOURNALISTS' CONFIDENTIAL SOURCES IN ALL MEDIA

There has never been any serious debate that the ability to gather information upon a pledge of confidentiality is critical to the goal of insuring a free flow of information to the public. The plurality opinion in *Branzburg v. Hayes*⁵ acknowledged that it was not suggesting that "news gathering does not qualify for first amendment protection."⁶ Justice Powell's concurring opinion, which was necessary to create a majority, noted that the Supreme Court "does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or safeguarding their sources."⁷ In his dissent, Justice Stewart viewed the right to gather news as the cornerstone of freedom of the press, for if news is cut off at its source there is no free flow of information to the public.⁸

Working journalists have repeatedly emphasized that protec-

5. 408 U.S. 665 (1972).

6. *Id.* at 681.

7. *Id.* at 709.

8. *Id.* at 728.

tion of confidential sources is vital if journalists are to perform their job effectively. Walter Cronkite of CBS News has written: "The fact is that there are few working journalists who believe that freedom of the press, and hence democracy itself, can endure if newsmen are unable to protect their sources."⁹ John Chancellor of NBC News has written: "For the press to be truly free, it must be free to pursue the truth whenever it finds it, and that includes the freedom to honor its pledge of confidence without fear of legal interference."¹⁰

With laudible assuredness, the American Newspaper Guild has included in its Code of Ethics the unqualified command that

9. Letter to California Assemblyman Jerry Lewis dated April 5, 1977. Mr. Cronkite elaborated as follows:

A newsmen in almost all cases is able to reveal perfidy, malfeasance and misfeasance, corruption and venality on the part of public officials *only* with the help of an honest employee privy to the secrets within. If such sources cannot be guaranteed confidentiality, clearly they cannot be cooperative, and the more corrupt the regime the greater the danger to them of exposure.

The truth is so apparent to the working journalist that it beggars his understanding as to why others cannot see. Why can't the American people see that the freedom of the press is not some privilege extended to a favored segment of the population but is purely and simply their own right to be told what their government and their servants are doing in their name?

The press cannot do that job unless it is free to protect its sources. It is as simple as that.

10. Letter to Assemblyman Lewis, dated March 29, 1977. Mr. Chancellor also stated that:

I am concerned about these developments, not only because I am a journalist, but also because I believe that the flow of information we all need as citizens is becoming restricted. The extent of the problem is hard to measure because those who have aided newsmen at personal risk are not likely to volunteer to recount their experiences before committees such as this one. I can state from my own experience that I know of many worthwhile stories which could not have been reported if our sources had not entrusted us to preserve their anonymity and confidentiality. There are, nevertheless, many cases where people need the assurance of confidentiality. The reasons vary as much as people and news items. Family, career, and business relationships, friendships, hatred, fear of retribution by criminals—or bosses—all can be motives. In these cases, the public may never hear their stories unless they can be sure that their identities will not be betrayed.

Mr. Chancellor related that had Judge Sirica's gag order in the Watergate case been strictly adhered to, the press would have been relegated to repeating the official story that the burglars acted alone, seeking evidence that the Soviet Union had made contributions to presidential candidate George McGovern's campaign in exchange for his promise to recognize communist Cuba. "Had members of the press—and their informants—adhered strictly to Judge Sirica's order, development of the Watergate story could have been seriously hindered, and history could have taken a different turn."

“Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial investigating bodies.”¹¹

It is surprising then that the concededly valid proposition that confidential sources of information are vital to a free press has resulted in such a wide diversity of legal opinion and legislative enactment and remains unresolved before the United States Supreme Court, the United States Congress and state legislatures.

Any First Amendment privilege against compulsory disclosure of confidential information must protect persons and organizations who obtain such information in the process of disseminating it to the public, *regardless of the particular medium involved*, whether it be books, pamphlets, magazines, newspapers, broadcasts or motion pictures. It has long been held that: “The liberty of the press is not confined to newspapers and periodicals The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”¹²

The constitutional guarantees of freedom of the press “are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and open society.”¹³

Any grudgingly narrow conception of the “press” is inconsistent with the fundamental doctrine “that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public—that a free press is a condition to a free society.”¹⁴ “Freedom of the press was not guaranteed solely to shield persons engaged in newspaper work from unwarranted governmental harassment. The larger purpose was to protect public access to information.”¹⁵

In considering the First Amendment goal of producing an informed public capable of conducting its own affairs,¹⁶ “it is the right of the viewers and listeners, not the right of the broadcasters which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.”¹⁷

11. G. BIRD AND F. MERWIN, *THE PRESS AND SOCIETY* 592 (1971).

12. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1935). *See also* *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943); *Mills v. State of Alabama*, 384 U.S. 214, 219 (1966).

13. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

14. *Associated Press v. United States*, 326 U.S. 1, 20 (1944).

15. *Burse v. United States*, 466 F.2d 1059, 1083-84 (9th Cir. 1972).

16. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 392 (1969).

17. *Id.* at 390.

Since it is the public's right to know which is at the core of the First Amendment, it is immaterial for constitutional purposes whether the public receives its information from newspapers, books, television, motion pictures, pamphlets or other forms of expression. It is beyond question that the First Amendment is applicable to motion pictures.¹⁸ The fact that a motion picture may be entertaining while at the same time informative is of no constitutional import because "the line between the informing and the entertaining is too elusive for the protection of . . . (freedom of the press)."¹⁹

Nor does the fact that the public is informed by means of a reenactment of real life events disqualify such expression from First Amendment protection. In *Time, Inc. v. Hill*,²⁰ the Court accorded First Amendment protection in a civil invasion of privacy case to a magazine article which contained photographs of actors portraying characters in the Broadway play *The Desperate Hours* based upon the real-life experiences of the Hill family. The Court recognized that such a dramatization was squarely within the scope of the First Amendment.

It is also well settled that because books, newspapers, magazines or motion pictures are exploited for profit does *not* prevent them from being a form of expression safeguarded by the First Amendment.²¹

18. *Burstyn v. Wilson*, 343 U.S. 495 (1952); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Erzonzuik v. Jacksonville*, 422 U.S. 205 (1975). In *Burstyn*, the Court held that "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain, as well as to inform." 343 U.S. 495, 501.

19. *Winters v. People of the State of New York*, 333 U.S. 507, 510 (1948). Most recently, the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. 2849 (1977) held that "There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news, *Time, Inc. v. Hill*, *supra*." *Id.* at 4958. Unfortunately, the result in *Zacchini*, which upheld a cause of action by a performer known as "The Human Cannonball" against a television station for broadcasting a 15-second news clip of his performance, did not serve to enforce the First Amendment doctrine expressed in the opinion.

20. 385 U.S. 374 (1967).

21. *Burstyn v. Wilson*, 343 U.S. at 501-02; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Township of Willingsboro*, 431 U.S. 85 (1977).

Finally, although many of the cases in this field deal with "news", there is no support for the proposition that only "news" is protected by the First Amendment. "No suggestion can be found in the Constitution that the freedom there granted for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."²²

Given the overwhelming impact of motion pictures, in comparison to the audiences which are reached by newspapers and magazines it is imperative for constitutional protection to keep pace.²³

Perhaps the most dramatic example of the audience potential for motion pictures re-enacting current historical events is *All the President's Men*, released in 1976 by Warner Bros. Originally a series of investigative news stories in the *Washington Post* by Bob Woodward and Carl Bernstein, and later a best selling book, the motion picture, *All the President's Men*, has

22. *Bridges v. California*, 314 U.S. 252, 269 (1941); *See also Winters v. New York*, 333 U.S. 507, 510 (1948). For example, in *Time, Inc. v. Hill*, the magazine article at stake dramatized events which had occurred more than two and a half years earlier.

23. In 1977, there were 135,000,000 TV sets in use in the United States. This represents 32.7% of the more than 413,207,000 TV sets in use throughout the world. The ten nations with the largest number of TV sets in use in 1977 were: United States (135,000,000), USSR (50,000,000), United Kingdom (26,500,000), Japan (26,000,000), West Germany (19,000,000), France (14,200,000), Italy (12,805,000), Canada (9,900,000), Brazil (9,000,000), and Spain (6,500,000). TELEVISION/RADIO AGE INTERNATIONAL, November, 1977, pp. A-52 to A-54.

In the United States, the annual theatrical audience for all motion pictures is one billion people, while the annual foreign theatrical audience is 2.6 billion people (statistics compiled by the Motion Picture Association of American (MPAA) Research Department, as of 1977).

In comparison, the largest newspaper in the United States, *The New York Daily News*, has a daily circulation of less than 2 million readers and the top ten newspapers in the United States combined have a daily readership of less than 10 million people. *New York Daily News*, 1,902,717; *Wall Street Journal*, 1,465,633; *Los Angeles Times*, 1,400,718; *New York Times*, 841,476; *Chicago Tribune* 747,715; *Spokane Chronicle*, 641,841; *Detroit News*, 627,461; *Detroit Free Press*, 622,339; *Chicago Sun Times*, 560,124; *Philadelphia Bulletin*, 554,381. *THE WORLD ALMANAC AND BOOK OF FACTS*, 428-29 (1977).

Two examples of theatrical and television motion pictures re-enacting current events demonstrate the overwhelming ability to reach audiences through these media. In 1977, NBC broadcast *Raid on Entebbe*, a dramatic re-enactment of the incredible rescue by the Israeli Air Force. It was seen in an estimated 8,200,000 American households by approximately 24,108,000 viewers. (Generally speaking, the television industry assumes that the average number of persons per household is 2.94.) (A.C. Nielson & Co. figures compiled by the MPAA Research Department). In 1974, Paramount Pictures released *Serpico*, the true story of corruption in the New York City Police Department. It was seen by 10 million theatergoers in the United States and another 16 million people worldwide, followed by a television network broadcast to 9,300,000 households. The estimate of the total number of people who have seen *Serpico* on television and in theatres is 53,342,000. (Theatrical admissions compiled by the MPAA Research Department and television figures provided by A.C. Nielson & Co.).

been seen by at least 50,000,000 movie-goers throughout the world.²⁴

The example of *All the President's Men* is instructive. For constitutional purposes, it makes no difference that the investigative research accomplished by Woodward and Bernstein was first published in a newspaper, later included in a book and ultimately dramatized by actors Robert Redford and Dustin Hoffman in the motion picture. Surely Woodward and Bernstein did not lose their First Amendment rights by having their work re-enacted in a motion picture. Likewise, had they chosen at the outset to disseminate their research by means of a motion picture, they would have been protected by the first amendment from divulging their confidential information for ultimate dissemination to the public.

A. The First Amendment Restricts Compulsory Testimony in all Proceedings, Whether Criminal or Civil, Judicial or Legislative

It is a constitutional doctrine of cardinal importance that all proceedings involving compulsory testimony must avoid abridgments of the First Amendment. "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas."²⁵

The Supreme Court has ruled that "the Bill of Rights is applicable to investigations as to all forms of governmental action."²⁶ Thus, the Supreme Court has prevented abridgments of the First Amendment in congressional investigations²⁷ and in state legislative investigations.²⁸

24. Theatrical figures compiled by the MPAA Research Department indicate Estimated Motion Picture Theatre Admissions of at least 20,000,000 people in the United States and 30,000,000 people in the rest of the world. "All the President's Men" has not yet been shown on network television where it is likely to garner over 10,000,000 households for an additional 30,000,000 viewers.

25. *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957).

26. *Watkins v. United States*, 354 U.S. 178, 188 (1957).

27. *Id.* *Russell v. United States*, 369 U.S. 749, 773 (1962) (concurring opinion). The majority decision was based upon the criminal procedure grounds for testing the sufficiency of the indictment.

28. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1962).

To further the purposes of the First Amendment, the Supreme Court has broadly construed the freedoms of speech and press to include the right to publish,²⁹ the right to distribute,³⁰ the right to circulate,³¹ and the right to receive information.³²

Decisions made by an informed citizenry are the very cornerstone upon which a free society is based and a free press is indispensable to an informed citizenry. The press "has been a mighty catalyst in awakening public interest in government affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences"³³ Since the First Amendment protects the free flow of information to the public, such information would necessarily be restricted if no protection whatsoever were afforded to the process by which such information is gathered. It is essential that any attempt sanctioned by the Government to thwart that process must be justified by extraordinary circumstances and vital national purposes.³⁴

This is not to say that merely by waving the First Amendment all judicial and legislative inquiries must give way, regardless of the circumstances involved, but it is equally untenable to suggest that once having asserted a desire for evidence, First Amendment rights must automatically fall by the wayside.

Thus, in *Watkins v. United States*,³⁵ notwithstanding the "broad" congressional power of investigation, the Supreme Court held that such an investigation "is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking."³⁶ And the Court recognized that the "accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task for any court."³⁷

Likewise, in *Gibson v. Florida Legislature Investigation*

29. *Near v. Minnesota*, 283 U.S. 697 (1931).

30. *Marsh v. Alabama*, 326 U.S. 501 (1946).

31. *Grosjeans v. American Press Co.*, 297 U.S. 233 (1936).

32. *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

33. *Estes v. Texas*, 381 U.S. 532, 539 (1965).

34. "When governmental activity collides with First Amendment rights, the government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interest." (Citations omitted.) *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972).

35. 354 U.S. 178 (1957).

36. *Id.* at 197.

37. *Id.* at 198.

Committee,³⁸ the Supreme Court acknowledged that "there can be no question that the State has power adequately to inform itself—through legislative investigation, if it so desires—in order to act and protect its legitimate and vital interests."³⁹ But notwithstanding such a power, the First Amendment freedoms require that, "Step by step or in totality, an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights."⁴⁰

It is in this setting then that the decision in *Branzburg v. Hayes*⁴¹ must be viewed. In *Branzburg* five justices favored the fair and effective functioning of a grand jury investigation over any risk of abridging the First Amendment by compelling journalists to divulge confidential information regarding *criminal* activity.

The plurality opinion of Mr. Justice White repeatedly limited its scope and application. At the outset, the plurality states that: "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime."⁴²

Time and again the plurality emphasizes that it is "fair and effective law enforcement" and "the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future,"⁴³ which justifies compulsory testimony by journalists regarding their confidential sources.

The plurality derides the idea that a desire to escape criminal prosecution is deserving of constitutional protection, and notes that "it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy."⁴⁴

38. 372 U.S. 539 (1962).

39. *Id.* at 544.

40. *Id.* at 557.

41. 408 U.S. 665 (1972).

42. *Id.* at 682. Also see text accompanying note 7, *supra*, for a discussion of Justice Powell's concurring opinion.

43. *Id.* at 695.

44. *Id.* at 696.

However, the plurality is quick to note that a rule compelling journalists to testify in *grand jury* proceedings investigating *crimes* of which the journalists have knowledge and information, sets no precedent with regard to *other* proceedings *not* involving the investigation of criminal activity.

Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of all confidential news sources falls into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsmen from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.⁴⁵

As noted, the limited nature of the plurality's decision was necessary for Mr. Justice Powell to join in the majority. He reassured the press that "no harassment of newsmen will be tolerated. If a newsmen believes that the grand jury investigation is not being conducted in good faith he is not without remedy."⁴⁶ He concluded that "in short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."⁴⁷

Mr. Justice Powell expanded on his interpretation of *Bransburg* in *Saxbe v. Washington Post Co.*,⁴⁸ where he wrote that "a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interest involved in that case rather than on any determination that First Amendment freedoms were not implicated."⁴⁹

No one can fairly read the plurality and concurring opinions in *Branzburg* without acknowledging that far from rejecting a journalist's privilege against compulsory disclosure of confidential information in *all* proceedings and in *all* circumstances, *Branzburg* exemplifies the arduous and delicate task of accommodating the First Amendment with the requirements of compulsory testimony. The fact that the "fundamental governmental role of securing the safety of the person and property of the citizen" outweighed the First Amendment, "on the records now before" the Court,⁵⁰ does not mean that the balance should

45. *Id.* at 691. "The obligation to testify in response to grand jury subpoenas will not threaten those sources not involved with criminal conduct and without information relevant to grand jury investigations"

46. 408 U.S. 709, 710.

47. *Id.* at 699.

48. 417 U.S. 843 (1974).

49. *Id.* at 859-60.

50. 408 U.S. at 690.

not be struck in favor of freedom of the press in other circumstances and in other proceedings.⁵¹

B. The First Amendment Affords a Privilege to a Non-party Witness During Pre-Trial Discovery in Civil Actions to Protect Confidential Sources of Information

There is a mounting series of court decisions and wide support in scholarly commentaries upholding the doctrine that in pre-trial civil litigation a non-party journalist is entitled to a qualified privilege against compulsory disclosure of confidential information which is lost only after the party seeking disclosure has proven that the information sought is (a) "clearly relevant" and "essential" to the underlying litigation; (b) not available from any alternative sources and (c) not so broad or wide-ranging as to constitute an undue burden on the non-party witness.

1. Case Law

The "Saturday Evening Post" Case.

In *Baker v. F & F Investment*,⁵² the Court of Appeals for the Second Circuit upheld a District Court decision refusing to compel a journalist to disclose confidential news sources. In that case, a New York journalist, Alfred Balk, refused to identify an anonymous real estate agent who was the source for a *Saturday Evening Post* article written ten years earlier about racial discrimination. He was deposed by the plaintiffs in a civil rights class action alleging the existence of "blockbusting" and other racially discriminatory practices in Chicago.

The Court immediately recognized that the existence of state statutes in New York and Illinois⁵³ protecting news sources "reflect(s) a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters,

51. Commentators have noted the "balancing" approach implicit in the plurality opinion in *Branzburg*. See: *The Right of The Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166, 179, 180 (1975); Murasky, *The Journalist's Privilege: Branzburg And Its Aftermath*, 52 TEX. L. REV. 829, 877, 878 (1974).

52. 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973).

53. Comparable statutes exist in 18 states; see note 133.

an interest which has always been a principal concern of the First Amendment.”⁵⁴

The Court found that:

Compelled disclosure of confidential sources unquestionably threatens a journalist’s ability to secure information that is made available to him only on a confidential basis—and the District Court so found. The deterrent effect such disclosure is likely to have upon future “undercover” investigative reporting, the dividends of which are revealed in articles such as Balk’s, threatens freedom of the press and the public’s need to be informed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy.⁵⁵

The Court rejected the view that any overriding importance of compelling testimony in judicial proceedings was sufficient to outweigh the First Amendment.

While we recognize that there are cases—few in number to be sure—where First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms. Accordingly, though a journalist’s right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances, *at the very least in civil cases*, in which the public interest in nondisclosure of a journalist’s confidential sources outweighs the public and private interest in compelled testimony. The case before us is one where the First Amendment protection must not yield.⁵⁶

The Court found that neither *Garland v. Torre*,⁵⁷ nor *Branzburg* controlled the result reached in this case.

As to *Garland*, the Court found that whereas there the party seeking disclosure had taken “active steps independently to determine the identity of the confidential news source,”⁵⁸ in *Baker* there were other available sources of information that might have disclosed the true identity of the informant which the moving parties had not exhausted. And, whereas in *Garland*, having exhausted all other sources, the identity of the defendant’s source became “essential to the libel action (and) went to the heart of the plaintiff’s claim,” in *Baker* neither was the case.⁵⁹

As to *Branzburg*, the Court in *Baker* found it “only of tangential relevance to this case,” since it dealt solely with grand jury

54. 470 F.2d at 782.

55. *Id.*

56. *Id.* at 783 (emphasis added).

57. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

58. 570 F.2d at 783-84.

59. The Court in *Garland* made it clear that its holding was strictly limited to the facts of the case and proceeded to explain that it was “not dealing with use of the judicial process to force a wholesale disclosure of a newspaper’s confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality.” 259 F.2d 545, 549-50.

subpoenas and no such "criminal overtones color the facts in this civil case."⁶⁰

The Court concluded its decision in the following words:

It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will the people remain free. Freedom of the press may be stifled by direct or, more subtly, by indirect restraints. Happily, the First Amendment tolerates neither, absent a concern so compelling as to override the precious rights of freedom of speech and the press. We find no such compelling concern in this case. Accordingly it is our view that the District Court properly exercised its discretion in refusing to order Mr. Balk to disclose the identity of his journalistic source.⁶¹

The "Life Magazine" Case.

In *Cervantes v. Time, Inc.*,⁶² the Mayor of St. Louis, Missouri filed a libel action against *Life* magazine and the reporter whose investigative efforts produced the allegedly defamatory article. The Mayor deposed the reporter who testified that he gathered information from informants within the Federal Bureau of Investigation and the United States Department of Justice, the identity of which he refused to divulge. The Mayor moved for an order to compel discovery of the identity of the informants. The defendants responded by moving for summary judgment on the ground that each had acted without actual "malice."

The District Court did not reach the merits of the motion to compel, but, on the basis of a well-developed record entered summary judgment for the defendants. The Mayor urged on appeal that he could not possibly meet his burden of proof if the reporter was allowed to hide behind anonymous news sources, particularly where the information forming the core of the publication by its nature was not available to the public generally.

The Court found that quite apart from what would be dis-

60. "Manifestly, the Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from the case presently before us. If, as Mr. Justice Powell noted in that case, instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure." 470 F.2d 778, 784-85.

61. *Id.* at 785.

62. 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

closed if the anonymous news sources were divulged, the defendants had established their good faith and the Mayor had wholly failed to demonstrate, with convincing clarity, that either defendant acted with knowledge of falsity or reckless disregard of the truth.

Noting pre-*Branzburg* decisions refusing to grant to reporters a testimonial privilege to withhold news sources, the court ruled that “to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws.”⁶³ With regard to *Branzburg* itself, the Court noted that the Supreme Court was “not faced with and therefore did not address the question whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense.”⁶⁴

The Court concluded that “the point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error. Mere speculation or conjecture about the fruits of such examination simply will not suffice.”⁶⁵

The “Watergate” Case.

In *Democratic National Committee v. McCord*,⁶⁶ the District Court quashed ten subpoenas served on reporters for *The New York Times*, *The Washington Post*, the *Washington News Star*, and *Time* magazine by the defendants in a civil action growing out of the Watergate break-in at the offices of the Democratic National Committee.

The Court posed the competing interests between “the right of the press to gather and publish, and that of the public to receive news, from widespread, diverse and oftentimes confidential sources”⁶⁷ on the one hand and the public’s right to “every man’s evidence”⁶⁸ on the other. Noting that this was *not* a criminal case and that the parties seeking disclosure had *not* demonstrated that the testimony and materials sought go to the heart of their claims, the Court joined the view of Mr. Justice Powell’s

63. *Id.* at 993.

64. *Id.* at 993, n.9.

65. *Id.* at 994.

66. 356 F. Supp. 1394 (D.D.C. 1973).

67. *Id.* at 1396; *see also* *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

68. *Id.*

concurring opinion in *Branzburg* and emphasized the constitutional interest in maintaining "an informed public capable of conducting its own affairs. . . ."⁶⁹

Against this interest must be balanced the interests of parties to receive evidence going to the substance of their claims. Yet there has been no showing by the parties that alternative sources of evidence have been exhausted or even approached as to the possible gleaning of facts alternatively available from the Movants herein. Nor has there been any positive showing of materiality of the documents and other materials sought by the subpoenas. In the face of these considerations the parties still insist that Movants in effect open their doors for inspection. The scales, however, are heavily weighed in the Movants favor.⁷⁰

The Court found support in *Baker v. F. & F. Investment*⁷¹ and in the discussion in *United States v. Liddy*,⁷² which held that First Amendment values will weigh differently in civil and criminal cases.⁷³

The "Pataka Daily News" Case.

In *Loadholtz v. Fields*,⁷⁴ the Court refused, on First Amendment grounds, to compel a non-party reporter to produce documents or answer questions concerning statements made by a defendant about a plaintiff which gave rise to a civil action.

In a veritable catalog of the landmark Supreme Court decisions upholding First Amendment freedoms, the Court summarized the fundamental concepts that "the First Amendment

69. *Id.* at 1398.

70. *Id.*

71. 470 F.2d 778 (2d Cir. 1973).

72. 354 F. Supp. 208 (D.D.C. 1972).

73. In conclusion, the Court notes that the First Amendment entitles the public to more than a right to know. It also requires that any incursions into the areas protected by the Bill of Rights will be given a prompt judicial inquiry and hopefully one that will not only be sound but which the public will also understand and accept. Government generally and the courts in particular must always stand first in the vanguard of upholding the spirit as well as the letter of the First Amendment freedoms which are among the most precious of a citizen's fundamental rights. This is what this Court understands legitimate and necessary 'strict construction' of the Constitution to be all about. This includes recognition of a special role for the press, for as written by James Madison:

"A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." 356 F. Supp. 1394, 1398-99.

74. 389 F. Supp. 1299 (M.D. Fla. 1975).

is the keystone of our constitutional democracy," that it "is broad enough to include virtually all activities for the press to fulfill its First Amendment functions,"⁷⁵ that only a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms;"⁷⁶ and that "any justifiable infringement upon First Amendment rights must be no greater than is necessary to vindicate legitimate subordinating interests."⁷⁷

The Court emphasized that *Branzburg* involved a criminal investigation, pointed out Mr. Justice Powell's view regarding "the limited nature of the Court's holding" and noted that the majority had recognized that news gathering "qualifies" for First Amendment protection since "without some protection for seeking out the news, freedom of the press could be eviscerated. (citations)."⁷⁸

The Court quoted extensively from *Baker v. F. & F. Investment*,⁷⁹ for support that the wide open discovery provisions of the Federal Rules of Civil Procedure did *not* justify compulsory disclosure from a journalist. And the Court found support in Judge Sirica's analysis in *United States v. Liddy*,⁸⁰ in which he acknowledged that "First Amendment values will weigh differently in civil and criminal actions."⁸¹

Finally, the Court found support in *Democratic National Committee v. McCord*,⁸² "The paramount interest served by the unrestricted flow of public information protected by the First Amendment outweighs the subordinate interest served by the liberal discovery provisions embodied in the Federal Rules of Civil Procedure."⁸³

Alternatively, citing *Baker v. F. & F. Investment*, the Court exercised its broad discretion to limit discovery in a civil case.

75. *Id.* at 1300-1301.

76. *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1962); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *La et rel Gremillion*, 366 U.S. 243, 296 (1961).

77. *In re Stolar*, 401 U.S. 23 (1971).

78. 389 F. Supp. at 1301.

79. 470 U.S. 778 (2d Cir. 1972).

80. 389 F. Supp. 1299 (M.D. Fla. 1975).

81. *Id.* at 1302.

82. 356 F. Supp. at 1394.

83. "The plaintiff has shown no 'compelling' reason for this Court to countermand the lofty principles embodied in the First Amendment. He has not even demonstrated that the information sought could not be gleaned from other sources such as interrogatories directed to or depositions of the defendants themselves." 389 F. Supp. at 1302.

The "Medical Letter" Case.

In *Apicella v. McNeil Laboratories, Inc.*,⁸⁴ the Court refused to compel the disclosure of the identity of the physician or consultants who prepared an article for a medical journal which indicated evidence of deaths resulting from a drug alleged to have caused severe and permanent disabilities to the plaintiffs in an underlying civil lawsuit.

The Court acknowledged that the "right of litigants to discover and present relevant evidence in civil litigations is given great weight in federal courts."⁸⁵ Yet, based on *Baker v. F. & F. Investment*,⁸⁶ *Democratic National Committee v. McCord*,⁸⁷ and the concurring opinion of Mr. Justice Powell in *Branzburg*, the Court refused to order discovery, notwithstanding the important public interest involved in the lawsuit and the virtual impossibility of getting "first-hand evidence" other than by requiring the medical journal to disclose the sources of information contained in the article. The Court noted that parties requesting disclosure, in addition to demonstrating need, should show that they are unable to obtain the information from a source other than a journalist.

Because "the possible adverse affect on First Amendment rights is a paramount consideration,"⁸⁸ the Court ruled that disclosure of the requested information would not be compelled.

The "Pacific Gas and Electric" Case.

In *Richards of Rockford, Inc. v. Pacific Gas and Electric Co.*,⁸⁹ the Court refused to compel the disclosure of confidential information obtained by a professor of public health during interviews with employees of Pacific Gas and Electric. The plaintiff in a civil action for breach of contract and defamation had asserted that it may have been defamed during the professor's interviews.

84. 66 F.R.D. 78 (E.D. N.Y. 1975).

85. *Id.* at 82.

86. 470 U.S. 778 (2d. Cir. 1972).

87. 356 F. Supp. 1394 (D.D.C. 1973).

88. 66 F.R.D. 78, 85.

89. 71 F.R.D. 388 (N.D. Cal. 1976).

The Court noted that much of the raw data on which research is based “simply is not made available except upon a pledge of confidentiality” and that compelled disclosure of confidential information “would without question severely stifle research in the questions of public policy, the very subjects in which the public interest is greatest.”⁹⁰

Relying by analogy on cases “involving the qualified First Amendment privilege of newsmen not to testify,” the Court arrived at guidelines for striking a balance between discovery and non-disclosure: “The nature of the proceedings, whether the deponent is a party, whether the information sought is available from other sources, and whether the information sought goes to the heart of the claim.”⁹¹

The Court stated that it was dealing with a civil proceeding; that the professor was not a party; that the interviews were not initiated with an eye to this litigation, and that any information the professor may have had as to the identity of those P.G. & E. officials holding certain views was available to the plaintiffs through interrogatories propounded to P.G. & E. Analyzing the liberal discovery provisions of the Federal Rules of Civil Procedure the Court found “that the costs of compelling the discovery sought . . . far outweigh the movants asserted interest in the information sought. Accordingly . . . the motion . . . was denied.”⁹²

The “Kepone” Case.

In *Gilbert v. Allied Chemical Corp.*,⁹³ the Court refused to compel the owner of radio station WLEE and television station WXEX in Richmond, Virginia to produce reporters’ notes, drafts and documents secured in confidential conversations concerning the chemical substance, Kepone, which the plaintiffs in the underlying civil action had alleged as the cause of severe personal injuries. The defendant, Allied Chemical Corp., urged that the subpoena was necessary to secure information in support of a motion for change of venue on the grounds of prejudicial pretrial publicity and to provide information on the subject matter of the lawsuit that may be helpful in organizing and preparing the case.

90. *Id.* at 390.

91. *Id.* at 390.

92. *Id.* at 391.

93. 411 F. Supp. 505 (E.D. Vir. 1976).

Canvassing all of the cases to date, the decision forcefully stated that:

The Court recognizes that to effectively gather information for the conveyance of news to the public, it is often necessary for reporters to make assurances either not to identify the source of the information broadcast or published, or to broadcast or publish only part of the information obtained, or both. If a news station or newspaper is forced to reveal the confidences of its reporters, the sources so disclosed, other confidential sources of other reporters, and potential confidential sources will be significantly deterred from furnishing further information to the press. Information lost to the press is information lost to the public; unnecessary impediments to a newsman's ability to gather facts, follow leads, and assimilate news can restrict the quality of our news as effectively as censorship activities. Accordingly, the Court holds that the First Amendment, protecting as it does the free flow of information, provides newsmen a privilege from revealing their confidential news sources in civil proceedings that may be abrogated only in rare and compelling circumstances. (Citations omitted).⁹⁴

The Court found that *Branzburg* was not apposite, since the majority opinion expressly limited the scope of the case to grand jury subpoenas when it "struck a balance between the significance of the newsmen's First Amendment rights and the public's interest in pursuing investigations of criminal activity."⁹⁵ Thus, "in the context of a civil trial, the rationales for forcing a newsman to reveal his confidences are much less weighty than those involved in criminal proceedings."⁹⁶

Since Allied Chemical Corp. had made no showing that the reporter's confidential source information was crucial to the development of its case, nor that such information was not practicably accessible through other channels, the Court

94. *Id.* at 508.

95. *Id.* at 509.

96. *Id.* at 510. The opinion further states:

While there is a social interest in resolving conflicts with justice and fairness between private litigants, and the rules of compulsory process are intended to further that interest, to gain information achieved by forcing newsmen to reveal their confidences must be weighed against the restricted access that newsmen would have to their informational sources if such a procedure were adopted. There are generally several avenues open to the civil litigant to acquire the sought after information, of which subpoenaing newsmen is but one. Accordingly, the court concludes that in civil litigation, the First Amendment requires that newsmen be given a privilege against revealing their confidential sources that may be abrogated only by a showing on the part of the moving party that his only practical access to crucial information necessary for the development of the case is through the newsmen's sources.

quashed that portion of the subpoena which required disclosure of confidential news sources.

The "KYW—T.V." Case.

In *Altemose Construction Co. v. Building & Construction Trades Council of Philadelphia*⁹⁷ the Court granted a motion to quash a subpoena duces tecum and for a protective order preventing the disclosure of the files of television station KYW, Montgomery County, Pennsylvania, in a civil case. While rejecting an "absolute rule of privilege," the Court found that the Supreme Court "has etched a case-by-case approach to the protection of news sources and background information, reflecting a concern for the First Amendment protection of freedom of the press."⁹⁸ Citing *Baker v. F. & F. Investment*,⁹⁹ the Court noted that this case-by-case analysis is "mandated even more in civil cases than in criminal cases, for in the former the public's interest is casting a protective shroud over the newsman's sources and information warrants an even greater weight than in the latter."¹⁰⁰

Also relying upon *Apicella v. McNeil Laboratories, Inc.*,¹⁰¹ *Democratic National Committee v. McCord*,¹⁰² and *Loadholtz v. Fields*,¹⁰³ the Court noted that: "Several courts, in recent years, have adopted such an approach to a newsman's resistance to requests for discovery in civil cases and found the First Amendment interest to outweigh the litigant's need for full and complete disclosure (Citations omitted)."¹⁰⁴ Applying the First Amendment doctrine to the facts before it, the Court found that "no particularized need" or "materiality" had been shown for the requested documents and that "there has not even been a demonstration that the information could not be secured from alternative sources."¹⁰⁵

The "Lewiston Morning Tribune" Case.

Of interest is the state court decision in *Caldero v. Tribune*

97. (E.D. Pa. No. 73-773, May 16, 1977), reported at 2 MEDIA LAW REPORTS 1878.

98. *Id.* at 1879.

99. 470 F.2d 778 (2d Cir. 1972).

100. See note 97 *supra*.

101. 66 F.R.D. 78 (E.D.N.Y. 1975).

102. 356 F. Supp. 1394 (D.D.C. 1973).

103. 389 F. Supp. 1299 (M.D. Fla. 1975).

104. *Altemose Construction Co. v. Building & Construction Trades Council of Philadelphia*, *supra*.

105. *Id.* at 1880.

Publishing Company.¹⁰⁶ In a three to two decision the Idaho Supreme Court, with two strong dissents, held that a newspaperman sued for libel had no First Amendment privilege—absolute or qualified—to protect the identity of one of his sources for the allegedly defamatory story. Accordingly a 30-day contempt sentence was upheld. As an interpretation of the United States Constitution, the decision is not precedential outside of Idaho or in the federal courts and the denial of the newsman's Petition for Writ of Certiorari by the U.S. Supreme Court is no indication that a majority of that Court agrees with the decision.¹⁰⁷

The bare majority in *Caldero* chose to construe the plurality opinion in *Branzburg* as rejecting any First Amendment privilege whatsoever, but recognized that case was "cast in the criminal area and testimony before a grand jury."¹⁰⁸ The majority did not agree that Justice Powell's special concurring opinion detracted from the conclusiveness of the plurality opinion.

The decision distinguished *Baker v. F. & F. Investment*¹⁰⁹ by noting that "the journalist was not a party to the underlying action and that there was no showing that the identity of the source was necessary to plaintiff's case."¹¹⁰

106. 98 Idaho 288, 562 P.2d 791, cert. denied 46 U.S.L.W. 3288 (U.S. Nov. 1, 1977).

107. The denial of certiorari by the Supreme Court "carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review". *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950); STERN & GRESSMAN, SUPREME COURT PRACTICE § 5.7 at 213 (4th ed. 1969). The denial of certiorari in *Caldero* is no more indicative of the Supreme Court's position than its denial of certiorari in cases where the lower court had applied a qualified First Amendment privilege. *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir.), cert. denied, 409 U.S. 1125 (1972); *Garland v. Torre*, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

108. 98 Idaho 288, —, 562 P.2d 791, 795 (1977). However, the *Caldero* Court did use *Branzburg* as a guideline for their decision.

109. 470 F.2d 778 (2d Cir. 1972).

110. 98 Idaho 288, —, 562 P.2d 791, 797 (1977). Curiously, the majority in *Caldero* considered it "most important" that in *Baker*, both Illinois and New York (the respective states in which the federal action was pending and the discovery motion was heard) had enacted legislation protecting journalists from forced disclosure of their sources. However it was not these state statutes which led the court in *Baker* to establish a qualified First Amendment privilege, and the absence of such legislation in Idaho should have been irrelevant to determining the proper scope of the newsman's federally protected rights in *Caldero*.

The majority concluded by acknowledging that in a society so organized as ours, the public must know the truth in order to make value judgments, not the least of which regard its government and officialdom. The only reliable source of that truth is a press (which is to say everyone—pamphleteers, nonconformists, undergrounders) which is free to publish that truth without government censorship.¹¹¹

But rather than take the next step which the federal decisions, including *Hirsch*, have taken, the majority in *Caldero* expressed the view that it could not “accept the premise that the public’s right to know the truth is somehow enhanced by prohibiting the disclosure of truth in the courts of the public.”¹¹²

The dissent of Justice Donaldson, joined in part by Justice Bakes, takes the majority to task for ignoring the paramount question involved in every case in which First Amendment rights are infringed: whether there is a compelling interest justifying the infringement.¹¹³ The dissent criticizes the majority for attempting to resolve the case “simply by stating the general theory that new testimonial privileges are disfavored or by stating the importance courts have traditionally placed on compelling testimony in a lawsuit.”¹¹⁴ With respect to *Branzburg*, the dissent points out that Justice White’s plurality opinion did recognize that news gathering is entitled to First Amendment protection¹¹⁵ and expressly limited its holding to grand jury proceedings.¹¹⁶

111. 98 Idaho 288, —, 562 P.2d 791, 801 (1977).

112. *Id.*

113. The dissent relied on the following Supreme Court decisions in support of the proposition that the state must establish a compelling interest before the balance will be tipped against the First Amendment: *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825 (1966); *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Thomas v. Collins*, 323 U.S. 516 (1945); *Schneider v. States*, 308 U.S. 147 (1939). See discussion in the dissent at 98 Idaho 288, —, 562 P.2d 791, 801 (1977).

114. 98 Idaho 288, —, 562 P.2d 791, 801-802 (1977). The dissent urges a balancing of “the interest in allowing the press unfettered access to sources of information and the interest in allowing courts unimpaired access to testimony *in civil litigation*.” (emphasis in original).

115. Justice White states “Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press would be eviscerated”. 408 U.S. at 681. At the end of the opinion he states, “Finally as we have earlier indicated, newsgathering is not without its First Amendment protections and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.” 408 U.S. at 707.

116. Justice White specifically limited the holding in *Branzburg*: “The sole issue before us is the obligation of reporters to respond to Grand Jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime.” 408 U.S. at 682. The dissent in *Caldero* notes that “An exact reading of the issues raised in the *Branzburg* trilogy further limits the Court’s holding. The Court was presented with two issues, a reporter’s appearance before a grand jury and his testimony to crimes *that he actually witnessed*.” 98 Idaho 288, —, 562 P.2d 791, 802 n.1 (1977) (emphasis in the original).

With respect to civil litigation, Justice Donaldson's dissent painstakingly reviews the decisions in *Garland v. Torre*,¹¹⁷ *Baker v. F. & F. Investment*,¹¹⁸ *Carey v. Hume*,¹¹⁹ and *Cervantes v. Time, Inc.*¹²⁰ and concludes that the basic theme of these decisions is that "newsgathering should enjoy a qualified privilege."¹²¹

The separate dissent of Justice Bakes agreed with Justice Donaldson that "the First Amendment to the United States Constitution affords a newsman a limited privilege against disclosure of his news sources in some cases."¹²² Adding one more

The dissent also points out that the majority failed to accept that part of Justice Powell's concurring opinion which specifically left open to a newsgatherer the right to make a motion to quash or for a protective order whenever he was "called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe his testimony implicates confidential source relationships, without a legitimate need of law enforcement." 408 U.S. at 710. As a result, by Justice Donaldson's count, five Supreme Court Justices, Justice Powell and the four dissenters, adopted at least a qualified privilege. 408 U.S. at 710. Justice Donaldson offers his opinion that Justice Powell's concurrence establishes a qualified privilege because he "explicitly states that under certain circumstances he would not force disclosure of sources". 98 Idaho 288 —, 562 P.2d 791, 804 n.3. (1977). Justice Donaldson supports his view with Justice Powell's own words from *Saxbe v. Washington Post Co.*, 417 U.S. 843, 859-860 (1974) which cited his concurring opinion in *Branzburg* as emphasizing the "limited nature" of that decision. He concluded that "a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on my determination that First Amendment rights are not implicated".

117. 259 F.2d 545 (2d Cir. 1958).

118. 470 F.2d 778 (2d Cir. 1972).

119. 492 F.2d 631 (D. Cir.), *cert. denied*, 417 U.S. 938 (1974).

120. 464 F.2d 986 (8th Cir. 1972).

121. 98 Idaho 288 —, 562 P.2d 791, 808 (1977). Justice Donaldson summarizes the present state of the law as follows: "The courts set off the public interest in a robust First Amendment against the private interest in compelled testimony. Equilibrium was reached by allowing a qualified privilege—courts would compel disclosure only when the plaintiff could show that the identity of the source was critical to his case. There were variations from court to court (*Garland* and *Baker* would require exhaustion of alternate sources), but each of the courts used this standard to delineate the limits of the privilege." In applying this standard to the particular facts in *Caldero*, Justice Donaldson would have ruled that the plaintiff has utterly failed to establish the critical importance of the identity of the particular source, because the only possible relevance is that an inference of actual malice would arise if the source was either non-existent or irresponsible, but only if plaintiff's allegations already had some basis in fact before disclosure. 98 Idaho 288, —, 562 P.2d 791, 808 (1977).

122. 98 Idaho 288, —, 562 P.2d 791, 808 (1977). Justice Bakes reasoned that "even where discovery is ultimately ordered, it is only after application of a balancing of First Amendment interests in a free press against the right of

nance to this complex area, Justice Bakes stated that the confidential information would have been sufficiently critical to the issue of actual malice to overcome the privilege, but for the fact that he would be prepared to find the underlying newspaper story was not false and defamatory.¹²³

2. Legal Commentary

This area of the law has generated a wide range of scholarly commentaries both before and after the decision in *Branzburg*.¹²⁴

litigants to discovery of material information, and then narrowly prescribing the questions which must be answered”.

123. “In light of the fact that I believe that the article in question is not defamatory of Caldero, it would serve no purpose to allow discovery of the unidentified police expert, and therefore under the circumstances here, I would reverse the order of the district court holding appellant Shelledy in contempt.” 98 Idaho 288 —, 562 P.2d 791, 812 (1977).

Justice Bakes’ dissent underscores the real tragedy of cases such as *Caldero*. If Justice Bakes is correct that the article at issue is not false and defamatory to begin with, then all of the litigation, including the newsman’s conviction for contempt, is irrelevant and serves only to allow unnecessary explorations into a newsman’s sources with no likelihood of the plaintiff ultimately establishing his libel claims. The specter of public figures bringing libel suits against newsmen as a device to expose their sources with the inevitable embarrassment of the particular source and the chilling effect on other potential sources, must be condemned by everyone who values our system of free expression. As a result, Justice Bakes’ approach, by making a preliminary determination of whether the underlying material is false and defamatory, provides a concrete means by which to ferret out frivolous libel claims before the courts and the parties launch into extensive litigation over confidential sources.

124. Pre-*Branzburg*: Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 N.W.L. REV. 18 (1969); Blasi, *The Newsmen’s Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); Nelson, *The Newsmen’s Privilege Against Disclosure of Confidential Sources and Information*, 24 VAN. L. REV. 667 (1971); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970); Note, *The Newsmen’s Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CAL. L. REV. 1198 (1970). Post-*Branzburg*: Note, 51 N. CARO. L. REV. 562 (1973); Comment, *A Need for Statutory Protection of News Sources*, 61 KY. L.J. 551 (1973); Comment, *Journalists & Their Sources*, 58 IOWA L. REV. 618 (1973); Note, 18 VILLANOVA L. REV. 288 (1973); Note, 41 FORDHAM L. REV. 1024 (1973); Comment, *Newsman’s Privilege*, 25 U. FLA. L. REV. 381 (1973); Comment, *Newsman’s Privilege Statutes*, 49 NOTRE DAME LAWYER 150 (1973); Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233 (1974); Comment, *The Journalist’s Prerogative of Non-Disclosure*, 20 LOYOLA L. REV. 120 (1974); Comment, *Subpoenas to Compel Disclosure of Confidential Information*, 49 L.A.B. BULL. 133 (1974); Comment, *Journalists In the Courts*, 8 U.S.F. L. REV. 644 (1974); Note, 9 U. RICHMOND L. REV. 171 (1974); Note, *Newsman’s Source Privilege*, 26 U. FLA. L. REV. 453 (1974); Note, Dixon, *Newsman’s Privilege by Federal Legislation*, 1 HASTINGS CONST. LAW. Q. 39 (1974); Note, 53 BOST. U.L. REV. 497 (1973); Note, *Newsman’s Privilege Two Years After Branzburg*, 49 TULANE L. REV. 417 (1975); Grodde, *The Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975); Note, 16 SANTA CLARA L. REV. 379 (1976); Note, *Murphy Journalist’s Privilege*, 52 TEXAS L. REV. 829 (1974); Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975); Comment, *Right of the Press to Gather*

Although society has an important interest in affording a vehicle for settling private disputes in a peaceable manner, scholars have agreed that the interests of civil litigants in compelling disclosure of a journalist's confidences are less compelling than those of criminal litigants. Society has a greater interest in obtaining information that may facilitate the apprehension and conviction of criminals than in aiding an individual in an action for a private wrong. Similarly, society has a greater interest in assuring a criminal defendant every reasonable means of proving his innocence than in protecting a civil defendant from an adverse judgment.¹²⁵

Aside from generally supporting protection for confidential sources, most commentators have emphasized that *Branzburg*, (decided in a criminal context) sets little precedence in civil litigation. Whereas a criminal defendant's rights to evidence derive from the Constitution, a civil litigant's rights to discovery are purely statutory.¹²⁶

The Supreme Court, in a series of decisions beginning with *New York Times v. Sullivan*,¹²⁷ subordinated the private interests of certain civil litigants to the overriding interests guaranteed by the First Amendment. Notwithstanding the admitted injury to reputation and privacy, the Supreme Court has held that the First Amendment requires denial of recovery in civil libel and invasion of privacy suits brought by public figures absent actual malice.¹²⁸

Information After Branzburg and Pell, 124 U. PENN. L. REV. 166 (1976); *Supreme Court, 1971 Term*, 86 HARV. L. REV. 52, 137-48 (1972); Comment, *The California Approach to the Yielding of the Newsman's Shielding Law*, 3 PEPPERDINE L. REV. 313 (1976).

125. Murasky, *The Journalist's Privilege Branzburg & Its Aftermath*, 52 TEX. L. REV. 829, 898-99 (1974).

126. "Nondisclosure of information or nonproduction of films may work to the disadvantage of civil litigants, but their right to compel testimony, unlike the criminal defendant's Sixth Amendment right, and their right to a fair trial, unlike the criminal defendant's Fifth and Fourteenth Amendment rights, lack constitutional stature and are, according to *New York Times* and the series of cases following it, subordinate in any event to freedom of the press."

Comment, *The Newman's Privilege Government Investigation, Criminal Prosecutions and Private Litigation*, 58 CAL. L. REV. 1198, 1227 (1970). "In the case of civil litigation, the public has no interest in the outcome; only the litigants have anything at stake, and hence compelled testimony serves only their private interest."

127. 376 U.S. 254 (1964).

128. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). "In such cases as *Time, Inc. v. Hill*, discussed earlier, the Supreme Court indicated its willingness to sacrifice an individual's interest in recovery for society's strong interest in freedom of the press." 64 N.W. U. L. REV. 181 (1969). "Analogously, the injury to a litigant in a civil action caused by his inability to force a newsman to identify his confidential source is justified by the superior interest in the dissemination of news."

The analogy is particularly apt since the Supreme Court in *New York Times* and its progeny was not faced with any direct state interference with the press but only with the availability in private libel actions of damage awards sanctioned through the state court system. Likewise, although the compulsory testimony in a civil action involves no direct state interference with the press, the availability of subpoenas and the enforcement thereof through civil and criminal contempt sanctioned through the state court system provides a comparable abridgment of First Amendment freedoms.

The cost of defeat in criminal proceedings, involving imprisonment and the stigma of social condemnation, is more severe than in civil litigation. Therefore, the Constitution, the Supreme Court, and the judicial system itself recognize many procedural safeguards, as a margin of error, that are not adopted in civil litigation. This distinction has been cited as a justification for compulsory production of confidential information to protect a criminal defendant's right to a fair trial.¹²⁹

In addition to the differences of constitutional dimension between criminal and civil proceedings, it is well established that the purposes of civil discovery will often give way to matters of privacy (such as the nondisclosure of tax returns, selective service records, accident reports, and census responses),¹³⁰ the inviolability of certain relationships (such as testimonial privileges affecting doctors, priests, lawyers, accountants, and others), and even the personal convenience of the witness or the parties (such as geographical restrictions on the scope of subpoenas).¹³¹ Although these limits necessarily foreclose avenues

Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 N.W.U.L. REV. 18, 35-36 (1969).

129. Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L. REV. 317, 359-60 (1970).

130. 8 J. WIGMORE, EVIDENCE, § 2377 et seq. (McNaughton Rev. 1961). Privilege for communications to government such as reports made by citizens under compulsion of law (tax returns, accident reports, etc.).

131. FED. R. CIV. P. 45:

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) Subpoena for a Hearing or Trial.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the

of civil discovery, they are accepted because of the importance of competing interests: interests certainly no greater than the First Amendment.

The very breadth of pretrial civil discovery provides an additional argument for *limiting* compulsory disclosure by journalists of confidential information. The broad discovery provisions of Rule 26 of the Federal Rules of Civil Procedure purport to authorize a party to discover "any matter, not privileged, which is relevant to the subject matter involved in the pending action" and specifically denies any objection on the ground "that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."¹³²

LEGISLATIVE ATTEMPTS AT DEALING WITH THE PROTECTION OF CONFIDENTIAL SOURCES

State Statutes

The courts have not been alone in attempting to come to grips with the protection of journalists' confidential sources of information. For over 40 years state legislatures have enacted various statutory provisions providing protection, in one form or another, for the confidential sources of newsmen.¹³³ The

place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefore, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

132. 4 J. MOORE, *FEDERAL PRACTICE* 2602(3) (1970). "During discovery the litigant's interest in a favorable outcome is not yet directly at stake. Furthermore, civil discovery rules permit litigants to engage in wide-ranging fishing expeditions and to obtain information that may never be used if, for example, the parties settle their dispute out of court. Granting broad power to civil litigants to compel the production of information unnecessary to the vindication of their interests engenders self-censorship by the press and its sources." 52 *TEX. L. REV.* 829, 899 (1974).

133. ALA. CODE, Tit. 7, § 370 (1960); ALASKA STAT. § 09.25.150 (1973); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1975); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West Supp. 1976); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1972); LA. REV. STAT. ANN. §§ 45:1451-1454 (Supp. 1976); MD. ANN. CODE, Art. 35, § 2 (1971); MICH. COMP. LAWS. § 767.5 (a) (Supp. 1956); MICH. STAT. ANN. § 28.945 (1972); MONT. REV. CODE ANN. § 93-601-3 (1964); NEV. REV. STAT. § 49.274 (1973); N.J. REV. STAT. §§ 2A:84A-21, 2A:84A-29 (1976); N.M. STAT. ANN. § 20-1-12.1 (1970); N.Y. CIV. RIGHTS LAW § 79-h (Supp. 1975); OHIO REV. CODE ANN. § 2739.12 (1954); OKLA. CODE OF CIVIL PROC. § 385.1 (1974); PA. STAT. ANN. Tit. 28, § 330 (Supp. 1975). See Schwartz, *The California Approach to the Yielding of the Newsmen's Shield Law*, 3 *PEPPERDINE L. REV.* 313, 320-36 (1976) and D'Alem-

California statute is representative of the approach taken in many states.¹³⁴

The California statute appears to protect a newsman from contempt, but it has been suggested that the provision does not create a privilege and thus may not prevent the use of other sanctions for a refusal to make discovery when the journalist is a party to a civil proceeding.¹³⁵ The statute provides protection for both the "source of any information procured" by the newsman, as well as for "any unpublished information obtained or prepared in gathering, receiving or processing of any information for communication to the public." Notwithstanding the apparent scope of Section 1070 covering any "medium of communication" by which information is gathered "for communication to the public," the specific terms of the statute limit its application only to those who are or have been "connected with or employed" by a "newspaper, magazine, or other periodical publication," "press association or wire service," or "radio or television station." As such, Section 1070 does

berg, *Journalists Under the Acts: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307 (1969) for an examination of the state statutes.

134. The full text of CAL. EVID. CODE § 1070 (West Supp. 1977) reads as follows:

(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, or refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured or also connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving, or processing of information for communication to the public.

(b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose and unpublished information obtained or prepared in gathering, receiving, or processing of information for communication to the public.

(c) As used in this section, 'unpublished information' includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated, and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communications, whether or not published information based upon or related to such information has been disseminated.

135. CAL. EVID. CODE § 1070 (West Supp. 1977), Comment Assembly Committee on Judiciary. See *Application of Cepeda*, 233 F. Supp. 465 (S.D. N.Y. 1964). It should be noted, however, that the predecessor of § 1070 was originally enacted in 1935 by amendment to former CODE OF CIV. PROC. § 1881 as subdivision 6 among a list of privileges against giving testimony.

not cover every form of expression protected by the First Amendment.¹³⁶

The latest development in the field of state protection for confidential sources is a proposal to elevate the existing California shield law contained in Section 1070 to an amendment to the provision of the California Constitution guaranteeing freedom of speech.¹³⁷

The Constitutional amendment has been prompted by two California decisions, *Farr v. Superior Court*¹³⁸ and *Rosato v. Superior Court*¹³⁹ in which Section 1070 was construed as inapplicable to the Court's investigation of particular violations of a court order restricting court officials from engaging in pretrial publicity. In these decisions, the California courts relied upon (1) the inherent power of the judiciary as a separate branch of government to control their proceedings and the conduct of court officials, and (2) the duty of the courts to follow the mandate of the United States Supreme Court that under the Sixth and Fourteenth Amendments to the United States Constitution, trial courts must control pretrial publicity emanating from court officials and attaches.

136. The Oklahoma newsmen's privilege statute, which might have provided additional support for the decision in *Hirsch*, was actually cited by the District Court as a limitation on the scope of the privilege. While the Oklahoma statute protects a "newsman" from compulsory disclosure of both the source and any unpublished information obtained or prepared in "gathering, receiving or processing of information for any medium of communication to the public" and although "medium of communication" is defined to include (but presumably not be limited to) "any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system", the critical word "newsman" is limited to "any man or woman who is a reporter, photographer, editor, commentator, journalist, correspondent, announcer, or other individual regularly engaged in obtaining, writing, reviewing, editing, or otherwise preparing news for any newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station, or other news service". OKLA. CODE OF CIV. PROC. §§ 385.1 and 385.2 (Supp. 1977). *Hirsch's* role as a documentary filmmaker did not fall within the definition of "newsman" although clearly a documentary motion picture re-enacting historical events is a "medium of communication to the public".

137. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2.

138. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971). See the review of the *Farr* litigation at the text accompanying notes 143 to 153.

139. 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975).

It appears as though the elevation of Section 1070 to the stature of a constitutional amendment would be construed to supersede the inherent power of the state judiciary on the theory that it was a constitutional response to the judicially created exceptions to Section 1070 established by *Farr* and *Rosato*. In addition, as a matter of constitutional interpretation, an irreconcilable conflict between two constitutional provisions will be resolved in favor of that provision which was most recently adopted.¹⁴⁰

But the second rationale used by the California courts to emasculate Section 1070 may well not be eliminated even by incorporating that provision in the California Constitution. The concern for the affect of pretrial publicity on the rights of a criminal defendant are dictated by the Sixth and Fourteenth Amendments to the United States Constitution. It is settled that where a conflict exists between a state constitutional right or provision and a federal constitutional right (here a right to a fair trial by an impartial jury) the State Constitution is inferior and subordinated to the United States Constitution.¹⁴¹ As a result, an amendment promoting Section 1070 to constitutional stature would not serve its intended purpose of preventing the erosion of the journalists' right to protect confidential sources of information, at least where that right, in the facts of a particular case, conflicts with the federally guaranteed rights of a criminal defendant.¹⁴²

Aside from the potential futility of the proposed constitutional amendment, there is a serious danger in mechanically enacting Section 1070 in its present form as a constitutional right. First, as noted, Section 1070 only protects a newsman from being adjudged in contempt for refusing to disclose a source of information or unpublished information and is at best ambiguous in granting a testimonial privilege in all proceedings, whether criminal, civil, administrative or legislative. Before this provision becomes emblazoned in the California Constitution, full protection by way of a testimonial privilege and not merely

140. *In re Mascolo*, 25 Cal. App. 92 (1914). Such an intention could be articulated by the inclusion of an affirmative declaration to this effect in the preamble to the constitutional amendment.

141. U.S. CONST., art. VI, § 2; *Mondou v. New York, New Haven & Hartford Railroad Co.*, 223 U.S. 1, 54 (1911).

142. Elevating Section 1070 to a place in the California Constitution would also have no binding affect on proceedings in federal courts where matters of evidence, including testimonial privileges, are controlled by federal procedural law. FED. R. EVID. 501.

limited protection against one form of punishment should be enacted.

Secondly, as noted Section 1070 is grudgingly narrow in its scope by covering only those who are connected with or employed by a "newspaper, magazine, or other periodical publication," "press association or wire service," or "radio or television station." This attempt to catalog particular media of communication should be abandoned in favor of coverage co-extensive with all forms of expression protected by both the First Amendment to the United States Constitution and by Article I, Section 2 of the California Constitution.

Language to achieve this result already exists in Section 1070 which defines the type of information covered as that which is "obtained or prepared in gathering, receiving or processing of information for communication to the public." Just as the First Amendment and the California Constitution protect the freedom of "speech" and "press" without further limitation, a constitutional right to protect confidential sources of information should not pick and choose among various types of publications or media of expression. The choice to communicate information to the public through books and pamphlets rather than newspapers or magazines, or motion pictures rather than television and radio should not result in the loss of a right enjoyed by those who have perhaps chosen more traditional or conventional means. Our constitutional system does not permit favoring one form of expression over another when it comes to protection from criminal or civil penalties.

The first attempt to fashion a state constitutional right to protect confidential sources of information provides California with a unique opportunity to insure wide open and robust protection, thereby setting a precedent for other states and indeed for the Federal Government to do likewise. Thousands of hours of precious judicial time spent construing and interpreting statutory provisions like Section 1070 can be saved by the enactment of a simple constitutional right to the effect that: "No person shall be compelled in any proceeding to disclose the source or content of any information confidentially obtained or prepared in gathering, receiving or processing information for communication to the public by any medium."

William Farr and the Charles Manson Transcript

The ordeal of newsman William Farr displays the intractable legal proceedings which can ensnare a journalist because of the uncertainties in this field of law.

William Farr, then a reporter for the *Herald Examiner* in Los Angeles, California, was assigned to cover the famous Charles Manson murder trial. In December, 1969, Judge Charles Older issued an Order re Publicity prohibiting any attorney, court employee, attache or witness from releasing for public dissemination the content or nature of any testimony on which the Court might subsequently have to rule regarding its admissibility. In preparing its case against Manson and his followers, the prosecutors interviewed Mrs. Virginia Graham who disclosed a confession by Susan Atkins, one of the defendants, that the Manson Family had planned to kill Elizabeth Taylor, Richard Burton, Frank Sinatra, Tom Jones and Steve McQueen. A select number of copies of Mrs. Graham's pretrial statement were distributed to the six defense attorneys and the prosecutors.

On October 9, 1970 the *Herald Examiner* ran a story by Mr. Farr under the headline "Liz, Sinatra on Slay List—Tate Witness" detailing the gory aspects of the Atkins' confession. The following day, Mrs. Graham appeared at the Manson trial and testified to certain aspects of Ms. Atkins' admissions, but some of the matters which had been printed in the newspaper were not admitted into evidence.

After Manson and the others were convicted, Judge Older, on May 19, 1971, convened a special hearing to investigate the apparent violation of his previous Order re Publicity. In what later proved to be an unfortunate career change, Mr. Farr, by that time, had left the *Herald Examiner* to become—of all things—Press Secretary to the late Joseph Busch, Los Angeles District Attorney, whose office had prosecuted the Manson Family.

At the special hearing, Mr. Farr testified that two of the six defense attorneys and one other person subject to the Order re Publicity, had provided him with copies of the Graham statement. Each of the defense attorneys testified under oath that he had not directly or indirectly provided Mr. Farr with the statement. Relying upon Section 1070,¹⁴³ Mr. Farr refused to identify his sources and was held in civil contempt.

Mr. Farr appealed his contempt conviction, but the California

143. See note 134, *supra*.

Court of Appeals refused to overturn it.¹⁴⁴ It held that since the Court was under a constitutional obligation in a criminal case to keep prejudicial material from the news media and the public, no public purpose was frustrated by compelling Mr. Farr to reveal his sources.¹⁴⁵

The Court purposely avoided the opportunity to deal with the proper scope of the California Shield Law. Indeed, an invitation to face the very issue decided six years later in the *Hirsch* case was declined.¹⁴⁶ The California Supreme Court denied hearing and the United States Supreme Court denied certiorari.¹⁴⁷

After Mr. Farr rejected an opportunity to purge himself, he was incarcerated in the Los Angeles County Jail. His Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California was denied. Both that Court and the United States Court of Appeals for the Ninth Circuit denied bail pending appeal, but Justice Douglas granted Farr's release on his own recognizance pending appeal.¹⁴⁸

In the meantime, Farr filed a Petition for Habeas Corpus in the California state court, but it too was denied.¹⁴⁹ However, the Court did not leave Mr. Farr without relief and, in fact, planted the seed which later ended Mr. Farr's ordeal. The Court reasoned that Mr. Farr's civil contempt sentence was not "punitive," but rather "coercive." Therefore, the Court acknowledged that once a point was reached so that the incarceration of the contemnor becomes penal, its duration is limited by the five day maximum sentence provided in California Code of Civil Procedure § 1218. With this opportunity available, the court stayed the

144. *Farr v. Superior Court, County of Los Angeles*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971). The court made its ruling while *Branzburg v. Hayes* was still pending before the United States Supreme Court and anticipated the balancing approach thereafter adopted.

145. The court stated that "the need for disclosure of source must be weighed to determine whether it is as compelling as to outbalance the vital interest in uninhibited flow of news." 22 Cal. App. 3d at 72, 99 Cal. Rptr. at 350.

146. "Thus, respondent notes that the Section (CAL. EVID. CODE § 1070), while immunizing persons connected with newspapers, radio and television from contempt for failure to reveal a source does not protect persons connected with magazines, free lance authors, lecturers or pamphleteers. (In re Cepeda, 233 F. Supp. 465, 473 (S.D.N.Y. 1964) Cf. Comment, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 119, 130);" 22 Cal. App. 3d at 69, 99 Cal. Rptr. at 347.

147. 409 U.S. 1011 (1972).

148. 409 U.S. 1243 (1973).

149. In re Farr, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974).

execution of Farr's contempt sentence to permit him to institute appropriate proceedings in the trial court.

On August 7, 1975, Farr lost his last opportunity to prevent the enforcement of the original contempt conviction when the United States Court of Appeals for the Ninth Circuit affirmed the denial of his Federal Habeas Corpus Petition.¹⁵⁰

Back in the trial court, Mr. Farr prevailed in convincing the trial judge that no amount of incarceration could force him to divulge his confidential sources. Satisfied with the sincerity of that position, the Court ruled that further imprisonment would become penal and must be limited by the maximum sentence provided by law.¹⁵¹ Mr. Farr's nine year legal battle (which is still not over) gives some indication of the unfortunate complexities of this field and the need for plain statutes or workable judicial holdings.

Proposed Federal Statutes

Although various forms of federal legislation have been proposed to deal with the protection of confidential sources of information, to date none have been enacted.¹⁵²

150. *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975). The Court held that . . . the Supreme Court of the United States has considered the question and appears to have fashioned at least a partial First Amendment shield available to newsmen, who are subjected to various demands to divulge the source of confidentially secured information. In striking the proper balance in the *Farr* case, the Court held that "the paramount interest to be protected was that of the power of the Court to enforce its duty and obligation relative to the guarantee of due process to the defendants in the ongoing trial. On June 30, 1976, the United States Supreme Court, with Justices Brennan and Marshall in dissent, denied certiorari and thereby declined a second opportunity to review the history of the *Farr* litigation. *Farr v. Pitchess*, 427 U.S. 912 (1976). However, two of the six defense attorneys, Paul Fitzgerald and Irving Kanarek, filed a \$24 million civil libel suit against Mr. Farr, alleging that their reputations had been damaged by his refusal to admit that they were not the attorneys guilty of having violated Judge Older's Order re Publicity. Not changing his mind (whether the punishment was imprisonment or bankruptcy), Mr. Farr refused to answer questions about whether either of the attorneys had delivered the Graham statement. As a sanction imposed for his refusal, Los Angeles Superior Court Judge Robert Weil established as a fact not subject to dispute at trial that neither Mr. Fitzgerald nor Mr. Kanarek had released the statement to Farr.

151. Shedding some doubt on whether Mr. Farr can withstand pecuniary punishment in the same fashion as the loss of his liberty, it has been reported that his attorney in the civil libel case unsuccessfully argued that the critical questions should be left unanswered until the time of trial, "when Farr would be given an opportunity to answer them before a jury." *Los Angeles Times*, October 1, 1977, Part I, at 26, col. 4.

152. *See, e.g.*, Congressional Record: S. 1311, 92nd Cong. 1st Sess. (1971); S. 3552 91st Cong., 2nd Sess. (1970); H.R. 16328, H.R. 16704 91st Cong. 2nd Sess. (1970); S. 1851, 88th Cong., 1st Sess. (1963); H.R. 8519, H.R. 7787, 89th Cong., 1st Sess. (1963); S. 965, 86th Cong., 1st Sess. (1959); H.R. 355, 86th Cong., 1st Sess.

In the absence of federal legislation, Attorney General Edward H. Levi in 1975 promulgated guidelines for United States attorneys "with regard to the issuance of subpoenas to, and the interrogation, indictment, or arrest of, members of the news media."¹⁵³ The preamble to the Department of Justice guidelines states that:

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all members of the Department.¹⁵⁴

The guidelines expressly adopt a balancing approach between "the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." Even before considering the issuance of a subpoena to a newsman, the guidelines require that "all reasonable attempts should be made to obtain information from non-media sources" Thereafter, the guidelines require that "negotiations" with the media should attempt "to accommodate the interests of the trial or grand jury with the interests of the media." Failing that, no subpoena may be issued without the express authorization of the Attorney General based on certain principles including:

- (a) There should be reasonable ground to believe that the information sought is essential to a successful investigation and not peripheral common non-essential or speculative.
- (b) The government should have unsuccessfully attempted to obtain the information from alternative non-media sources.
- (c) Subpoenas should be limited to the verification of published

(1959). One such proposal would have provided that "A witness who is employed by a newspaper, news service, newspaper syndicate, periodical or radio or television station or network, as a writer, reporter, correspondent, or commentator, or in any other capacity directly involved in the gathering or presentation of news, shall not be required in any court of the United States to disclose the source of any information obtained in such capacity unless in the opinion of the court such disclosure is necessary in the interest of national security." Staff of Senate Committee on the Judiciary, 89th Cong., 2nd Sess., *The Newsman's Privilege* (Comm. Print 1966).

153. 28 C.F.R. § 50.10 (1976). The full text of the Attorney General's policy guidelines are set forth in Appendix A to this article.

154. See note 130, *supra*.

information and to such surrounding circumstances as relate to the accuracy of the published information.

(d) Subpoenas should involve a limited subject matter, a reasonably limited period of time and should avoid requiring production of a large volume of unpublished material.¹⁵⁵

Although the Attorney General's guidelines are not legally binding on private parties, they do express a well-reasoned policy which should be given careful consideration by the courts when the discovery efforts of private litigants place in jeopardy exactly the same First Amendment rights which the government's policy protects. It has been effectively argued by The Reporter's Committee for Freedom of the Press that private litigants should not have greater rights to compel disclosure of journalists confidential information than the Attorney General of the United States under the Department of Justice guidelines.¹⁵⁶

The absence of federal legislation has left a vacuum in which, unfortunately, proponents of punitive regulations have been the first to venture. In 1973 the Nixon administration introduced as Senate Bill 1, a repressive new Federal Criminal Code. S.1 went through several amendments and was ultimately defeated. Much of the proposal has been incorporated in Senate Bill 1437 sponsored by Senator Edward M. Kennedy (D. Mass.) and the late Senator John L. McClellan (D. Ark.). S. 1437 contains a series of changes in various aspects of federal criminal law which have been criticized for reflecting "the undemocratic view that the government requires protection from the citizens of this nation." These include conspiracy, criminal solicitation, use immunity, and witness tampering. It also incorporates several provisions which would "diminish the ability of the press" to foster "an unfettered flow of information."¹⁵⁷

155. *Id.*

156. The current Guidelines grew out of an earlier Department of Justice policy issued in 1970 to all U.S. Attorneys which stated:

The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice. . . . The Department of Justice does not consider the press an investigative arm of the government. Therefore, all reasonable attempt should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press. DEPARTMENT OF JUSTICE MEMO NO. 692 (September 2, 1970).

157. Editorial, *Standing History on its Head*, Los Angeles Times September 6, 1977, part II, at 6 col. —. The editorial urged the defeat of S. 1437 which reflected the "pervasive feeling that the government, in order to insure our security, must have the authority to closely monitor the political freedom of American citizens. To the contrary, our security ultimately rests on the robust

With reference to confidential sources of information S. 1437 would permit a police officer, without a subpoena, to demand the possession of a news reporters notes or photographs taken at a public meeting or demonstration. A refusal could result in prosecution with a possible long jail term and a heavy fine. Under another section of S. 1437, a news reporter could be jailed and fined for refusing to testify or produce information to protect a confidential source. The proposal does contain an enticing provision which would give a witness a defense to these crimes if he has a legal privilege for refusing to testify. But the bill fails to codify the qualified First Amendment privilege which has been recognized in a series of federal civil cases culminating in the *Hirsch* decision. It is open to question whether the vague reference to the defense of privilege in S. 1437 will be construed as legislative recognition or denial of the First Amendment privilege.

It is particularly disconcerting that proponents and critics of S. 1437 cannot even agree on the meaning of its provisions, including those relating to confidential sources. In many circumstances vague statutes attempting to regulate the press can be more dangerous and can engender more self-censorship than explicit regulations which at least set the stage for direct constitutional attack. Indeed, Senator Kennedy argues that the bill would provide a defense for refusing to testify or produce documents if a person had "a legal privilege to refuse to disclose the information."¹⁵⁸

Critics have charged that S. 1437 "would make it a crime for a reporter or a news organization to refuse to disclose confidential news sources to police or courts" and have asserted that the bill seriously damages the "basic elements in our system of individual rights" including the "free flow of information about the government."¹⁵⁹

vitality of democratic institutions that inspire the strongest kind of loyalty: the uncommanded allegiance of a free people."

158. Edward M. Kennedy *Criminal-Code Reform Would Aid Liberty* Los Angeles Times, September 27, 1977 part II, at 7, col. —.

159. Editorial, *Standing History on its Head*, Los Angeles Times September 6, 1977, part II at 6, col. —. "Protection of the confidentiality of sources of information is vital to the gathering of news. It is particularly significant in the exposure of corruption in government." Letter to the Los Angeles Times from Thomas I. Emerson, Law School, Yale University, October 17, 1977, part II, at 6, col. —.

If the sponsors of this reform legislation can be convinced to specifically codify a First Amendment privilege, then S. 1437 could truly serve as the step forward for civil liberties which its proponents say it is.

AN ANALYSIS OF THE *Hirsch* DECISION

Against the background of prior court decisions and the unsettled condition of statutory "shield law" protection, the *Hirsch* decision came as a reassurance of protection for a wide spectrum of newsmen and as the first judicial expression of protection for confidential sources of information outside of the traditional newspaper and broadcast media.

On November 13, 1974, on State Highway 74 outside of Oklahoma City, Oklahoma, Karen Silkwood died in an automobile accident. Buzz Hirsch, then a graduate student in the Film Department at the University of California at Los Angeles, learned of the incident and the questions surrounding her death. Together with Larry Cano, an instructor in the Film Department at UCLA, Hirsch discussed the idea of producing a factual motion picture account of Karen Silkwood's life and the incidents surrounding her death. The questions raised by the mysterious automobile accident had begun to draw national attention.¹⁶⁰

Hirsch and Cano began interviewing individuals who had known Karen Silkwood, either through her employment at The Kerr-McGee Corporation, or personally. Hirsch also interviewed individuals who had knowledge of the operation of The Kerr-McGee facilities. In every interview Hirsch informed those interviewed that it was his intention to make a factually accurate motion picture which necessitated his extensive investigation and research. In virtually every interview, those interviewed demanded and Hirsch assured them that information and documentation received from them would be kept confidential. In addition, in some instances, interviewees demanded that their identities not be revealed, and Hirsch assured them that their identities would be kept confidential. It is no wonder that there was great reluctance to discuss Karen Silkwood's affairs, in light of the circumstances of her death.

On November 5, 1977 a federal action was filed in the United

160. The March 1975 issuance of *Ms. Magazine* carried a story entitled "The Case of Karen Silkwood—The Death of a Nuclear Power Plant Worker Raises the Spector of Murder and A Terrifying Technological Reality". And the April, 1975 issue of *Rolling Stone Magazine* carried an article by investigative reporter Howard Kohn entitled "The Nuclear Industry's Terrible Power and How It Silenced Karen Silkwood".

States District Court for the Western District of Oklahoma by William M. Silkwood, the Administrator of the Estate of Karen G. Silkwood and by William E. Meadows, the Guardian of the three infant heirs of Karen Silkwood, against The Kerr-McGee Corporation, individual officers, directors and employees of Kerr-McGee, two identified agents and one unidentified agent of the Federal Bureau of Investigation and an official informant of the FBI. The defendants were charged with conspiracy to prevent Karen Silkwood from organizing a lawful labor union at Kerr-McGee in violation of her constitutional rights; conspiracy to prevent Karen Silkwood from filing complaints against Kerr-McGee under the Atomic Energy Act in violation of her constitutional rights; and willful and wanton negligence in contaminating Karen Silkwood with toxic plutonium radiation.

While Hirsch was in Oklahoma City in connection with his research, he was served with a subpoena duces tecum by one of the attorneys for Kerr-McGee. The subpoena commanded him to appear for the taking of his deposition in Oklahoma City and to bring with him all documents in his possession under 21 categories, including public records and correspondence with Kerr-McGee itself, as well as correspondence exchanged between any person and 26 identified persons and organizations. At the heart of the subpoena was a request for all of Hirsch's papers relating to "any investigation of the facts and circumstances of the death of KAREN SILKWOOD or the contamination by radioactive materials of the person or property of KAREN SILKWOOD," and all documents and "scripts" relating to "a motion picture or television production which may be made by you, Larry Cano or Carand Productions, Inc. based in whole or in part on portions of the life and activity of KAREN SILKWOOD."

The procedural history of Hirsch's attempt to quash the subpoena is in itself an important area of analysis confronting an attorney in such a proceeding.¹⁶¹ Suffice it to say, the District

161. A procedural technicality might have sidetracked the Court in Hirsch and delayed articulation of the constitutional doctrine for which the case now stands. Aside from the rather nice question presented by the procedural issue, more fundamentally, it emphasizes the legal pitfalls which any journalist may encounter when he or she ventures away from home in search of a story.

In February, 1977 Buzz Hirsch went to Oklahoma City to shepard through the Oklahoma State District Court, a contract with William Silkwood, Karen's

father and the administrator of her estate, granting the exclusive rights to her story to Hirsch's company. Unexpectedly, the negotiations were so drawn out that Hirsch was required to remain in Oklahoma City long past the day he expected to leave. While there, as part of his investigation of the Karen Silkwood story, he attended a deposition of defendant Jacque Srouji. During the deposition, on February 26, 1977, he was served with the *subpoena duces tecum* which triggered the entire litigation. Hirsch's attorneys in Los Angeles unsuccessfully attempted to obtain a stipulation to move his deposition to Los Angeles, California, where Hirsch lived and worked. Failing that, on March 17, 1977, Hirsch filed a Motion to Quash Subpoena Duces Tecum or, in the Alternative, to Transfer the Deposition to the Central District of California, arguing that it was unreasonable and oppressive to require Hirsch to testify and produce documents far from his home, office and attorneys and, in the alternative, that the Court should fix Los Angeles, California as a "convenient place" for the deposition.

Had it not been for Hirsch's unexpected delay in returning to Los Angeles, Kerr-McGee could not have forced Hirsch to travel to Oklahoma City, Oklahoma and would have been required to take the deposition in Los Angeles, California. FED. R. CIV. P. 26 (c)(d) 45 (d)(2). It is unlikely that such a change would have altered the ultimate decision in the case, but the cost and inconvenience to the non-party journalist would have been far less.

United States District Judge Luther B. Eubanks denied Hirsch's Motion and refused to transfer the deposition to Los Angeles, California. Word of that ruling was received by telephone on Friday, March 25, 1977, with the deposition set to commence the following Tuesday, March 29, 1977. On the first available court day following the Court's ruling, March 28, 1977, Hirsch filed his Motion for Protective Order and a Motion to Stay Deposition and Production of Documents Pending Determination of Motion for Protective Order. Kerr-McGee's counsel agreed to a postponement of the deposition for approximately two weeks in order to file opposition to the Motion.

On April 8, 1977 the District Court denied the Motion for Protective Order. Before reaching a decision on the main constitutional issue, the District Court held, as a separate ground for denying the motion, that it was "untimely" under the Federal Rules of Civil Procedure because it had not been combined with the previous Motion to Quash or Transfer the Deposition. This threshold determination by the District Court threatened to prevent a decision on the ultimate First Amendment issue and figured prominently in the opposition brief filed by Kerr-McGee on appeal. The very first point argued in Kerr-McGee's "Brief of Appellees" was that the district court's procedural ruling was within his discretion and should be affirmed.

This procedural obstacle provided the United States Court of Appeals with an inviting means to avoid grappling with the serious constitutional issues involved in the case.

Fortunately for the development of constitutional law, the court in *Hirsch* did reach the critical First Amendment issue by holding that the district court had abused its discretion in finding that the motion was "untimely".

This is consistent with the views that: "The exercise of discretion does not permit the Court to disregard the substantive principles of law established for the protection of litigants," *Cohen v. Young*, 127 F.2d 721, 726 (6th Cir. 1942) and that "Judicial discretion, as we understand it, is impartial reasoning, guided and controlled in its exercise by fixed legal principles requiring the court, in consideration of the facts and circumstances, to decide as its reason and conscience dictate; . . ." *Dixie Cup Co. v. Paper Container Manufacturing Co.*, 174 F.2d 834, 836 (7th Cir. 1949).

The opinion in *Hirsch* acknowledged that "undoubtedly, the trial court has broad discretion in the area of discovery motions, but such an order in this area is reversible nevertheless where an abuse of discretion is shown". 563 F.2d at 436. Similarly, the Court stated that "Unquestionably, it is desirable that all motions which are going to be filed be filed at the same time and undoubtedly

Judge denied Hirsch's Motion for Protective Order and ruled that Hirsch was not entitled to a privilege under the First Amendment or Oklahoma statute, notwithstanding that argu-

the rules contemplate this. However, in this instance, there were justifications for not doing so." *Id.*

The Court noted that "when one seeks to transfer a case, it is the natural course of things to withhold the motion, which goes to the merits of the issue, until the transfer motion is determined." *Id.* The court was also sensitive to Hirsch's concern whether "it would have been a waiver of his motions to transfer or to quash if he had filed a motion for a protective order at that time. *Id.*

Aside from these strategic considerations (which would have alone justified a reversal on this procedural point), the Court of Appeals brought the importance of the underlying constitutional issue to bear on the proper treatment to be given to Hirsch's motion. The Court pointed out that "the protective order particularly was seeking to protect a constitutional right and was a substantial question. Perhaps the trial court could not so regard it. The claimed violations of the first amendment to the Constitution demanded some evaluation of the merits rather than disposing of it on the ground that it was not filed with the motion to quash the *subpoena duces tecum* and the motion to transfer the cause to California." *Id.* In concluding this aspect of the decision, the Court held that, "Considering the importance of the question presented by the motion for protective order in relationship to the lack of magnitude of the problem of failure to file simultaneous motions, it seems to us plain that the trial court should have received the motion and considered it out of time."

The Supreme Court has often refused to permit procedural devices to prevent full review of federal constitutional rights. *Staub v. Baxley*, 355 U.S. 313, 320 (1958) (rejecting any "resort to an arid ritual of meaningless form"); *Douglas v. Alabama*, 380 U.S. 415, 421 (1965) (reviewing constitutional arguments in the absence of required objections); *see also NAACP v. Alabama*, 357 U.S. 449, 455-458 (1958). Because of "the vital importance of keeping open avenues of judicial review of deprivations of constitutional rights," the Supreme Court has held that it is "always preferable to litigate a matter when it is directly and principally in dispute" and that "it is better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the state's right to impose it on the basis of some past action." *Sibron v. State of New York*, 392 U.S. 40, 52, 56-67 (1968); *See also Carasas v. LeVallee*, 391 U.S. 234, 237 (1968); *Fay v. Noia*, 372 U.S. 391, 424 (1963).

The Court of Appeals implicitly recognized that it would have served no useful purpose to affirm the District Court's decision on the narrow procedural ground, after the primary constitutional issue had been exhaustively briefed and argued, since it was apparent from the record that Hirsch would have again been before the court in a subsequent proceeding urging the very same constitutional arguments.

Indeed, the Tenth Circuit Court of Appeals has singularly maintained the view that a witness should *not* be forced to disobey a court order and appeal from a subsequent adjudication of contempt in order to obtain a review of his legal rights. "These non-party witnesses should not be required to expose themselves to the hazard of punishment in order to obtain a determination of their claimed rights." *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 996-997 (10th Cir.), *cert. den.* 380 U.S. 964 (1965). *See also Saunders v. Great Western Sugar Co.*, 396 F.2d 794 (10th Cir. 1968).

ably, a qualified privilege was developing. Hirsch appealed from the decision of the District Court and the U.S. Court of Appeals for the Tenth Circuit granted a stay of all proceedings by way of civil or criminal contempt or otherwise in connection with the subpoena duces tecum and deposition pending appeal.

The Court of Appeals for the Tenth Circuit rendered a unanimous opinion in September, 1977 reversing the District Court's denial of the Motion for Protective Order and remanding the case for further proceedings.

The court posed the constitutional issue in *Hirsch* as follows:

The embattled issue is, therefore, whether the witness Hirsch is entitled to legal protection against revealing information obtained by him in the course of making a factual investigation of events surrounding the death of the decedent herein, Karen G. Silkwood, which investigation looked to the making of a documentary film depicting the events before and after.¹⁶²

The decision subdivided this inquiry into three subsidiary issues:¹⁶³

- (1) (W)hether a privilege exists in favor of a nonparty witness which permits him to resist pretrial discovery in order to protect a confidential source of information.
- (2) (W)hether, assuming that such a privilege does exist, it applies to a person in the position of Hirsch.
- (3) (I)f Hirsch has a privilege, how should the trial court proceed.

The Court tackled the second issue first and in answer to the question whether the constitutional privilege is validly invoked "where the reporter is not a regular newsman," concluded that the First Amendment privilege was *not* limited in its scope to (a) "a regular newsman" or "a salaried newspaper reporter" or (b) any specific form of communication, such as newspaper reporting. In so doing, the Court established two important principles applicable to this field of First Amendment law.

First, the Court refused to distinguish between a free lance or independent journalist, on the one hand and a full-time, salaried employee on the other. The Court disagreed with the District Court's view that Hirsch was not entitled to be considered in the protected class because he did not "regularly engage in obtaining, writing, reviewing, editing or otherwise preparing news." The importance of this aspect of the *Hirsch* decision will be seen when one realizes how many free lance writers, "stringers" and other independent journalists, who are not regularly employed at a salary with a newspaper, magazine or news organization, have been guaranteed a constitutional right, regardless

162. 563 F.2d at 434.

163. *Id.* at 435-36.

of the restrictive provisions of particular state shield laws, most of which have been drawn in such a manner as to give little or no protection to such free lance journalists.

Secondly, the Court refused to limit the application of the constitutional privilege to "newspaper reporting" or any specified medium of communication.¹⁶⁴

Having established these twin foundations for its decision, the Court quickly concluded that Hirsch, an independent filmmaker, qualified for the First Amendment privilege.¹⁶⁵

His mission in this case was to carry out investigative reporting for use in the preparation of a documentary film. He is shown to have spent considerable time and effort in obtaining facts and information of the subject matter in this lawsuit, but it cannot be disputed that his intention, at least, was to make use of this in preparation of the film.¹⁶⁶

The Court of Appeals had accepted Hirsch's sworn affidavit to the effect that he had assured all of the witnesses whom he interviewed that he was working for a production company in

164. The Court held that:

The Supreme Court has not limited the privilege to newspaper reporting. It has in fact held that the press comprehends different kinds of publications which communicate to the public information and opinion. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1935), and other cases recognize the presence of an underlying public interest in this communication and particularly in maintaining it free in the public interest *Id.* at 437.

165. The Court was no doubt satisfied with the legitimacy of Hirsch's journalistic intentions from his background and experience. In 1969-70 Hirsch had been a free lance reporter and had written articles for various newspapers concerning the Chicago Seven trial. Hirsch later enrolled as a graduate student in the Film Department at the University of California at Los Angeles (UCLA).

According to the record on appeal, Hirsch had been a reporter for the St. Louis Post Dispatch and the St. Louis Globe Democrat and had covered the Chicago Seven trial for the St. Louis Argus newspaper and the Mill Creek Intelligentsia, a monthly publication the work for which conducting interviews with Jerry Rubin and Rene Davis, two of the defendants at the highly publicized trial.

The record on appeal indicates that Hirsch had written, directed and produced a short dramatic film which won seven awards in film festivals around the country; had been named outstanding film student in 1972 at Columbia College; and was selected as one of six students whose work was used for instructional purposes for graduate students at UCLA.

166. The Court of Appeals noted the incongruity of Kerr-McGee belittling Hirsch as a journalist while at the same time investing considerable resources in forcing him to divulge what he had uncovered. "It strikes us as somewhat anomalous that the appellee would argue that he is not a genuine reporter entitled to the privilege, implying a lack of ability, while at the same time they are making major legal effort to get hold of his material. They must believe that it has promise for them in this lawsuit; otherwise, they would not be engaging in an effort of some magnitude in order to obtain Hirsch's work product." 563 F.2d 433, 437.

an effort to make a factually accurate film and that he assured the interviewees, who demanded confidentiality, that the information would be kept confidential and that he would respect the requests of those who asked that their identities not be revealed.

Adopting an argument repeatedly voiced by journalists in resisting compulsory disclosure of confidential information, the Court of Appeals noted that Kerr-McGee was seeking "to take personal advantage of Hirsch's efforts in obtaining his investigative work product,"¹⁶⁷ but that Hirsch had "a legitimate interest in seeking to protect the fruits of his labor."¹⁶⁸

The Court initiated its discussion of the First Amendment privilege by discussing the Supreme Court decision in *Branzburg v. Hayes*.¹⁶⁹ Noting that the actual problem in that case was "whether a reporter was free to avoid altogether a Grand Jury subpoena,"¹⁷⁰ the Court in *Hirsch* frankly stated that the "actual decision of the Supreme Court is not surprising nor is it important in the solution of our problem."¹⁷¹ However, the Court found strong authority in *Branzburg* for its decision in *Hirsch*.

But the Court's discussion in both the majority opinion of Justice White and the concurring opinion of Justice Powell recognizing a privilege which protects information given in confidence to a reporter is important. The Court said that the First Amendment occupies a preferred position in the Bill of Rights. *Gooding v. Wilson*, 405 U.S. 518 (1972); and *Cohen v. California*, 403 U.S. 15, *reh. den.*, 404 U.S. 876 (1971). It was then careful to point out that any infringement of the First Amendment must be held to a minimum—that it is to be no more extensive than the necessities of the case. *In re Stolar*, 401 U.S. 23 (1971). The scope and breadth of the protection is fully discussed.¹⁷²

The Court, basing its conclusion on the majority opinion in *Branzburg*, held that the Supreme Court was not requiring the press to publish its sources of information or to indiscriminant-

167. 563 F.2d at 437.

168. *Id.*

169. 408 U.S. 661 (1972).

170. 563 F.2d at 437.

171. *Id.*

172. In a footnote, the court in *Hirsch* quotes the following from *Branzburg*: We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press would be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of the published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminantly to disclose them on request. 408 U.S. 661, 681-82.

ly disclose them on request and that "the present privilege is no longer in doubt."¹⁷³ Thus, *Hirsch* interpreted *Branzburg* to hold that a reporter must respond to a subpoena and appear and testify, but he may claim his constitutional privilege in relation to particular questions which probe his sources.

The Court then reached the last aspect of its decision: how the District Court should proceed in view of the presence of a First Amendment issue. The Court cited the decision in *Baker v. F. & F. Investment*,¹⁷⁴ for the rule that "The First Amendment considerations outweighed the need for the information which was there sought" in a "fully reasoned opinion by Judge Kaufman."¹⁷⁵

In developing the proper contours of a qualified first amendment privilege, the Court in *Hirsch* examined several prior decisions in which the balancing process had been addressed.

From the decision in *Garland v. Torre*,¹⁷⁶ the Court extracted a four pronged test as the criteria for solving the problem presented by the case at hand. Although in the *Garland* case, a defendant (rather than a non-party) was ordered to disclose the identity of a news source in a libel action, the Court in *Hirsch* cited *Garland* as articulating the following tests which establish the burden to be overcome before the production of confidential sources can be compelled:¹⁷⁷

1. whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful.
2. whether the information goes to the heart of the matter.
3. whether the information is of certain relevance.
4. the type of controversy.

From these criteria, the Court concluded that "compulsory disclosure in the course of a 'fishing expedition' is ruled out in the First Amendment case."¹⁷⁸

173. 503 F.2d at 437.

174. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

175. 563 F.2d at 438.

176. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

177. 563 F.2d at 438.

178. Ironically, Kerr-McGee boldly stated that "If Kerr-McGee can be said to be on a fishing expedition, then it appears that Kerr-McGee has hooked a marlin". Record on Appeal, p. 132.

As between the approach in *Baker* and in *Garland*, the Court in *Hirsch* chose to follow the former which it found “more protective of rights under the First Amendment”¹⁷⁹ because *Baker* emphasized that the type of civil action, the compelling necessity for obtaining the information and the degree of relevance were significant.

The Court also reviewed the decisions in *Cervantes v. Time*¹⁸⁰ and *Carey v. Hume*.¹⁸¹ In *Cervantes*, the Court noted that there was a denial of “disclosure of a source of news in a defamation case where the demand for the information was vague and not shown to be consequential.”¹⁸² In *Carey*, the Court pointed out that the defendant newsman was compelled to reveal certain information by weighing “the need for testimony against the claim of the newsman that the public’s right to know is impaired.”¹⁸³ It was critical that the purported testimony was that of eye witnesses who saw documents removed by the principals in the case, who later complained that there had been a burglary of the documents.

Applying the four criteria and the analysis of these prior decisions to the instant case, the Court in *Hirsch* found that:

there has been a failure to weigh the various factors which have been announced in the cases. Indeed it has been impossible to conduct any weighing process because the record does not disclose anything as to the nature of the evidence sought, as to the necessity for appellee to have it, and as to its relevance, all of which are highly important criteria.¹⁸⁴

Because of the lack of evidence in the record and the consequent failure to evaluate it the Court felt compelled to reverse the judgment and remand the case for further proceedings.

Having set forth the specific criteria to be applied in judging whether the qualified First Amendment privilege would be sustained, the Court went on to empower the District Court to compel the parties to catalog:

In the case of appellee, the evidence that it is seeking to the extent of its knowledge plus a showing of its efforts to obtain the information from other sources; in the case of appellant, a description which does not reveal information which is claimed to be privileged of the various documents and a description of the witnesses interviewed sufficient to permit the court to carry out a weighing process in accordance with

179. 563 F.2d at 438.

180. 464 F.2d 986 (8th Cir. 1972).

181. 462 F.2d 631 (D.C. Cir.), *cert. denied*, 417 U.S. 938 (1974).

182. 563 F.2d at 438.

183. *Id.*

184. *Id.*

the decisions above decided. Once the parties have done their work, the trial court can come to grips with the merits.¹⁸⁵

Qualifying the First Amendment privilege by permitting compulsory disclosure upon the satisfaction by the moving party of certain threshold requirements was first articulated in the amicus curiae brief submitted by the *New York Times* in *Branzburg v. Hayes*.¹⁸⁶ The brief urged the Supreme Court to require a moving party to meet the following three tests:¹⁸⁷

- (1) Probable cause to believe the reporter possesses information relevant to a crime;
- (2) The information cannot be obtained by the government by alternative means; and
- (3) The government must demonstrate a compelling and overriding interest in the information.

The dissent of Justice Stewart, joined by Justices Brennan and Marshall, adopted a similar three test requirement:¹⁸⁸

- (1) The government must show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific violation of the law;
- (2) The government must demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and
- (3) The government must demonstrate a compelling and overriding interest in the information.

But Justice Douglas' strong dissent rejected any qualifications on the constitutional right to protect confidential sources of information.

My belief is that all of the 'balancing' was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they

185. *Id.* Kerr-McGee did not seek review before the Supreme Court and to date has not re-instituted proceedings in the District Court.

186. 408 U.S. 661 (1972).

187. Brief for New York Times as amicus curiae at 29, *Branzburg v. Hayes*, 408 U.S. 665, 666 (1972).

188. *Id.* at 740. Justice Stewart viewed these special safeguards as necessary to protect "delicate and vulnerable" First Amendment rights because "The reporters' constitutional right to a confidential relationship with his source stems from the broad social interest in a full and free flow of information to the public." *Id.* at 725. Justice Stewart's dissent has not gone unnoticed. For example, in 1974 when the Oklahoma privilege statute was enacted, it was provided that protection could be lost only if "the court finds that the party seeking the information or identity has established by clear and convincing evidence that such information or identity is irrelevant to a significant issue in the action and cannot be obtained by alternate means." OKLA. CODE OF CIV. PROC. § 385.1 (Supp. 1977).

repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in this case.¹⁸⁹

Justice Douglas concluded that:

Today's decision will impede the wide-open and robust and dissemination of ideas and counter-thought which a free press both fosters and protects and which is essential to the success of intelligent self-government. Forcing a reporter before a grand jury will have two retarding effects upon the ear and the pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens.¹⁹⁰

The roadmap described by the Court represents the most explicit analysis of the qualified nature of the first amendment privilege to date. The four tests established by the Court and elaborated in its subsequent discussion, leave no doubt that while confidential information cannot be compelled merely for the asking, it is not absolutely protected. This approach is consistent with *Branzburg*, *Baker*, and each of the federal decisions which have dealt with the question. The growing line of cases establishing the qualified First Amendment privilege have thus served the salutary purpose of assuring journalists that a substantial burden of proof must be overcome before the production of confidential information can be compelled. But the price for this protection has been the unanimous rejection of any absolute First Amendment privilege.

In giving some, but not all of the protection sought by the press, the *Hirsch* decision (and its predecessors) have necessarily left the door open to some compulsory disclosure of confidential information provided the strict requirements, carefully summarized in *Hirsch*, are established to the satisfaction of the courts. This will doubtless involve journalists in time consuming and expensive litigation involving evidentiary hearings and potentially in-camera review of documents and information followed by appeals and possible contempt proceedings. But this is surely preferable to the indiscriminant production of confidential information on demand.

CONCLUSION

The *Hirsch* decision represents the most recent confirmation of a qualified First Amendment privilege protecting confidential sources of information and it is the first case to place filmmakers on a par with newspapermen and broadcast journalists with respect to such protection. It comes at an opportune time

189. 408 U.S. 661, 713.

190. *Id.* at 720-21.

when screenwriters and producers are increasingly using theatrical and television motion pictures to chronicle the people and events of our time.

Despite the favorable result, the *Hirsch* decision, which was not achieved without complex litigation and the ever-present threat of contempt and jail, is a sobering reminder of the critical need for uniform federal legislation protecting the confidential sources of information of *all* journalists, regardless of the medium by which they choose to communicate to the public.

APPENDIX A

Policy With Regard to the Issuance of Subpoenas To, And the Interrogation, Indictment, or Arrest of, Members of The News Media. 28 C.F.R. § 50.10 (1976).

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all members of the Department: (a) In determining whether to request issuance of a subpoena to the news media, the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.

(b) All reasonable attempts should be made to obtain information from non-media sources before there is any consideration of subpoenaing a representative of the news media. (c) Negotiations with the media shall be pursued in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media. (d) If negotiations fail, no Justice Department official shall request, or make arrangements for, a subpoena to any member of the news media without the express authorization of the Attorney General. If a subpoena is obtained without authorization, the Department will—as a matter of course—move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization. (3) In requesting the Attorney General's authorization for a subpoena, the following principles will apply:

(1) There should be reasonable ground based on information obtained from non-media sources that a crime has occurred.

(2) There should be reasonable ground to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information.

(3) The government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources.

(4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

(5) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment.

(6) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.