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SHAPING THE CONTOURS OF THE NEWSPERSON'S PRIVILEGE—*GILBERT v. ALLIED CHEMICAL CORP.*

The newsperson's privilege[1] to protect the identity of news sources and the content of information accumulated in preparing a news story has received little attention from the United States Supreme Court. In its only ruling on the issue, the Court in *Branzburg v. Hayes*[2] held that the

1. The privilege issue essentially is a conflict between the First Amendment's protection of the flow of information to the public and the Sixth Amendment's protection of an orderly administration of justice. This controversy focuses on the right of the press to transmit news and the right of the public to receive that information versus the right of litigants to procure evidence and have access to a fair trial. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972); Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974); United States v. Liddy, 354 F. Supp. 208 (D.D.C. 1972); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429 (1974).

The controversy, dating back more than 125 years, originally centered on whether a newsperson could keep confidential sources secret. It then was expanded to include whether the content of confidences could be protected by any grant of privilege. *See* Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970). To compensate for the lack of a common law recognition of protection for a newsperson's notions of confidentiality, "shield laws" have been passed in more than half the states in order to create an occupational privilege similar to privileges already available in relationships such as attorney-client, confessor-penitent, or doctor-patient. Note, *Reporter's Privilege—Guardian of the People's Right to Know*, 11 N. ENG. L. REV. 405, 414-418 (1976).

2. 408 U.S. 665 (1972). *Branzburg* involved three cases consolidated on appeal to the United States Supreme Court. Branzburg v. Pound, 461 S.W.2d 345 (Ky. App. 1971), focused on a reporter for the Louisville Courier-Journal who wrote a series of articles based on his observation of two men preparing hashish. Subpoenaed to testify before a grand jury investigating the drug culture, Branzburg refused to identify the men. He then sought review of the denial of his second motion to quash a second subpoena for another story he wrote concerning conversations with area drug users. The reporter relied heavily on the Kentucky shield law which seemed to provide absolute protection for confidential sources.

Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), concerned a New York Times reporter who was subpoenaed to appear before a grand jury to testify about the operations of the Black Panther Party that he had been assigned to investigate. The United States petitioned for *certiorari* after the Ninth Circuit reversed a contempt order against Caldwell for his refusal to testify. In the course of litigation in the lower courts, the reporter was granted not only a privilege for confidential materials but also a right not to appear at all before the grand jury when he argued that even an appearance would compromise his effectiveness as a reporter.

In re Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), centered on a television newsman who gained access to the Black Panther headquarters on his pledge not to report any activities except an anticipated police raid. The Supreme Court granted Pappas' writ of *certiorari* after the Supreme Judicial Court of Massachusetts denied his motion to quash a subpoena seeking his testimony on activities at the Panthers' headquarters.

In June 1972, the Supreme Court affirmed the *Branzburg* and *Pappas* holdings and

First Amendment does not protect newspersons from being forced to reveal confidential sources when subpoenaed by a grand jury during a criminal investigation.[3] Subsequent to that decision, the Court resumed a pattern of denying *certiorari* to other cases advocating a constitutionally guaranteed privilege.[4] This placed the burden on the lower courts to determine whether the Constitution confers a privilege in judicial settings other than grand jury investigations.[5] Confronted with the problem of resolving conflicts in which *Branzburg* is not directly applicable, the lower courts have developed the law of newsperson's privilege on a case-by-case basis.[6]

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reversed the *Caldwell* decision. Thus, the Court held that newsmen could be required to disclose confidential sources to a grand jury conducting a criminal investigation. Branzburg v. Hayes, 408 U.S. at 667.

3. 408 U.S. at 667.

4. Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), was an unsuccessful attempt to get the Supreme Court to review the newsperson's privilege issue. In *Torre*, a constitutional claim to protect confidentiality emerged for the first time and relegated the unsuccessful common law claim for an occupational privilege to secondary status. *Torre* involved an alleged libel and breach of contract and was decided against columnist Marie Torre who refused to divulge the name of the CBS executive who criticized singer Judy Garland. Disclosure was demanded because, according to the opinion written by then-Judge Stewart, the material sought went to "the heart of the plaintiff's claim." 259 F.2d at 550. That language was construed in subsequent cases as absolutely barring a newsman's claim to privilege under the First Amendment. *See* also State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968) (grand jury investigation into alleged drug abuse on university campus that had been described in articles in student newspaper).

After the *Branzburg* decision, the Court has consistently denied *certiorari*. Cases where review was sought include Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973), where lower federal courts held that revelation of the real name of a realtor who helped write an article on blockbusting under a pseudonym was not crucial enough to the case to warrant infringement of First Amendment rights. *See also* Lightman v. State, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973); *In re* Bride, 120 N.J.Super. 460, 295 A.2d 3 (1972), *cert. denied*, 410 U.S. 991 (1973); Farr v. Superior Court, 22 Cal.App.3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972).

5. Privilege problems usually arise in four legal contexts: (1) general investigations, such as by a grand jury or a legislative committee; (2) criminal trials; (3) civil litigation where the newspersons are third parties; and (4) civil litigation where a member of the news media is a party, such as a libel case. *See* Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 20 (1969).

6. This development clearly was encouraged in Mr. Justice Powell's concurring opinion in *Branzburg*:

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

In one of the most recent decisions in a series[7] following *Branzburg*, a federal district court ruled, in *Gilbert v. Allied Chemical Corp.*,[8] that the First Amendment[9] guarantees reporters[10] a qualified privilege to protect confidential news sources in civil proceedings. The court decided, however, that constitutional protection for the free flow of information[11] does not extend to unpublished materials that are not confidential.[12]

The privilege issue in *Gilbert* emerged when the plaintiffs filed a tort action for personal injuries allegedly sustained as a result of contact with a chemical compound commonly known as Kepone. Allied Chemical, one of the corporate defendants in the suit, sought pre-trial discovery from the radio and television stations that exposed problems in the Kepone manufacturing process at the Hopewell, Virginia plant. A broad subpoena duces tecum[13] requested that the owner of the stations, Na-

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with the tried and traditional way of adjudicating such questions.
408 U.S. 665, 710 (1972) (Powell, J., concurring).

7. The cases prior to *Gilbert* contain some obvious contradictions. *See, e.g.*, Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), which limited *Branzburg* to criminal proceedings, while Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974), extended *Branzburg* to civil cases. For a brief summary of major litigation, see Note, *Branzburg Revisited: The Continuing Search for a Testimonial Privilege for Newsmen*, 11 TULSA L.J. 258 (1975). For a sampling of reported and unreported decisions that points out the chaos among the circuits and between the states, see D. GORDON, NEWSMAN'S PRIVILEGE AND THE LAW (1974).

8. 411 F. Supp. 505 (E.D. Va. 1976).

9. The First Amendment reads in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

10. The words "reporters" and "newspersons" are used interchangeably throughout this Note to refer to persons who fill a variety of roles, including news reporters, copyeditors, editors, and publishers in any form of the media—radio, television, newspapers, magazines, and pamphlets.

Most courts use the term "newsmen" very loosely. Legislative attempts to be more specific with "shield laws," statutes that create a newsman's privilege, have often created more problems than they have resolved. *See* Comment, *Constitutional Protection for the Newsman's Work Product*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 119, 121-22 (1970); Note, *Reporter's Privilege—Guardian of the People's Right to Know?*, 11 N. ENG. L. REV. 405 (1976).

11. 411 F. Supp. at 508.

12. *Id.* at 511.

13. The defendant requested that the following subpoena be directed at Nationwide Communications, Inc.:

> With respect to WLEE radio and WXEX-TV, please bring with you: All documents, transcripts, memoranda, writings and recordings of any nature whatsoever of all news stories, editorials, opinion polls, questionnaires, dialogues or conversations that have been broadcasted *or drafted, taken, made or secured in contemplation of being broadcasted* since January 1, 1973, in respect of or in any wise connected to the chemical compound popularly called Kepone.

Id. at 507 (emphasis added by court).

tionwide Communications, Inc., produce all published and nonpublished materials, both confidential and nonconfidential, contained in the files of its media subsidiaries that "broke" the story.[14] Information from sources who requested secrecy was classified as confidential,[15] while material gathered from other media outlets, such as wire service copy and press releases, was labeled nonconfidential.[16] Allied contended that information in the files was crucial to the presentation of its case and necessary to substantiate a request for a change of venue due to allegedly prejudicial pre-trial publicity.[17] After providing the published materials, Nationwide sought to quash the subpoena for unpublished information, arguing it was oppressive, unreasonable, and beyond the permissible scope of discovery.[18] The District Court for the Eastern District of Virginia ruled that a qualified privilege protects against the disclosure of confidential sources, but that nonconfidential matters are open to discovery.

Gilbert reinforces the prevailing view of lower courts that the Constitution allows privileged treatment of confidential matters in specific circumstances. This Note will point out, however, that *Gilbert* confuses the question of whether constitutional protection should be extended to nonconfidential materials.

In granting a privilege for confidential matters, the *Gilbert* court outlined a familiar dichotomy between civil and criminal proceedings.[19] The *Gilbert* opinion distinguished the context of the case at bar from that of *Branzburg*, emphasizing that *Branzburg* denied a First Amendment privilege only when news reporters are subpoenaed in a criminal grand jury investigation.[20] Adopting this distinction, the district court

14. Memorandum of Nationwide Communications, Inc. at 19, Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976).

15. 411 F. Supp. at 511.

16. Material classified as nonconfidential included press clippings, information from other general sources, such as books, journals and documents, unedited draft scripts, soundtrack and film not broadcast, and reporters' notes from sources not concerned with confidentiality. *Id.*

17. *Id.* at 507-08.

18. *Id.* at 507.

19. The purpose of structuring a dichotomy between civil and criminal proceedings is to show that society's interest in compelling testimony shifts according to the context. Investigations of crime and enforcement of the criminal code to vindicate constitutional rights are usually judged more compelling than actions vindicating property rights. Cases involving the privilege issue often note that parties in civil actions, unlike criminal actions, lack constitutional status to compel testimony. Their interests may be subordinated to freedom of the press. However, Wigmore suggests that the Due Process Clause guarantees compulsory testimony for both parties in criminal and civil actions. 8 J.WIGMORE, EVIDENCE §2191 (McNaughton rev. 1961).

20. *See* Branzburg v. Hayes, 408 U.S. 665 (1972). This point is emphasized in United

departed from the *Branzburg* method of balancing the newsperson's constitutional rights against the public's interest in prosecuting criminal activities. Discounting that test as inappropriate for civil litigation, the *Gilbert* court succinctly explained that "[a] different context requires that a different balance be struck."[21] Relying on Mr. Justice Stewart's dissent in *Branzburg*,[22] the court placed the burden of proving the relevancy of and the necessity for subpoenaed information in a civil matter squarely upon the party seeking the confidential materials. The court warned that only in "rare and compelling circumstances,"[23] where the confidential information sought is both crucial to the case and unobtainable through other sources, would there be sufficient grounds to defeat a First Amendment privilege. To buttress this stance, the *Gilbert* court cited the concurring *Branzburg* opinion of Mr. Justice Powell, who emphasized the "limited nature"[24] of the majority's holding and issued the assurance that "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."[25] *Branzburg* was thus interpreted as supporting, at a minimum, a qualified privilege for confidential matters.

Two factors distinguish the holding in *Gilbert* from that in *Branzburg*: factual differences and a philosophical divergence between the two

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States v. Liddy, 354 F. Supp. 208 (D.C. Cir. 1972), where the issue concerned whether a First Amendment privilege sanctions a newspaper's refusal to produce evidentiary material in its possession relevant to a criminal trial. In denying the privilege for confidential information in the context of a criminal trial, Chief Judge Sirica noted that considerations in civil discovery are vastly different from those in the criminal setting and explained that "First Amendment values will weigh differently." *Id.* at 213 n.14.

21. 411 F. Supp. at 509.

22. 408 U.S. at 743 (Stewart, J., dissenting):

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

Id.

23. 411 F.Supp. at 508.

24. 408 U.S. at 709.

25. *Id.* at 710. This concurrence, which infers that some kind of privilege is available, was cited by the *Gilbert* court in conjunction with the *Branzburg* dissents. Mr. Justice Douglas advocated an absolute privilege in his dissent in *Branzburg*. He explained, "My belief is that all of the 'balancing' was done by those who wrote the Bill of Rights." *Id.* at 713. This argument may be used to support the contention that any limitation on press activity has a "chilling effect" on the flow of news. Mr. Justice Stewart petitioned for a qualified privilege in a dissent joined by Justices Brennan and Marshall. *Id.* at 725-52.

courts. While *Branzburg* involved a criminal case in which the public's interest in criminal prosecution weighed heavily against the news media's interest, *Gilbert* dealt with a civil trial in which the interest in forcing the news media to reveal sources was much less weighty. Philosophically, the *Branzburg* majority questioned the strength of the media's contention that reporting would be undermined if confidences were challenged.[26] However, the *Gilbert* court expressly recognized that revealing confidential sources would significantly deter newspersons in providing information to the public.[27] These differences reinforce the court's well-reasoned decision to grant a qualified privilege for confidential matters. However, the court's denial of a privilege for nonconfidential materials was not as persuasive.

The *Gilbert* court tersely denied any constitutional protection for nonconfidential materials.[28] Faced with a lack of controlling precedent, the court followed its own inclinations, citing little authority and offering only perfunctory explanations. First, the court indicated that the First Amendment offers protection only for those materials that directly lead to the divulgence of confidences. The court cautioned, however, that "[v]ague allegations of potential indication of confidential sources will not suffice."[29] Second, the court discounted arguments that a compelled disclosure of nonconfidential materials would violate the Fourteenth Amendment as a taking of property without due process of law. Dismissing the claim as "without merit," the court explained that an incamera inspection would not expose materials to competitors and threaten their value.[30] Third, the court ignored the media's contention that the process of separating confidential from nonconfidential materials would be burdensome, time-consuming, costly and unjustifiable because it interfered with editorial operations. Tallying the number of files involved, the court determined that a "quick purview" would be sufficient for separation.[31]

In denying a privilege for nonconfidential materials, the court in *Gilbert* did not engage in extensive analysis. First, the court failed to consider *Branzburg* dicta that might have provided guidance and ignored the reasoning of another district court that challenged the traditional concept of confidentiality. Second, the court did not evaluate general discovery purposes that might have supported its decision to

26. *See* 408 U.S. at 693.
27. *See* 411 F. Supp. at 508.
28. *Id.* at 511.
29. *Id.*
30. *Id.*
31. *Id.*

enforce the subpoena nor did it consider two potential injuries that the news media outlined to support the motion to quash.

In dicta, the Supreme Court in *Branzburg* recognized for the first time that newsgathering qualifies for constitutional protection[32] because "without some protection for seeking out the news, freedom of the press would be eviscerated."[33] The *Gilbert* court expressly acknowledged that special consideration should be accorded the newsgathering process, stating that "unnecessary impediments" to newsgathering efforts threaten the quality of the news "as effectively as censorship activities."[34] Had the *Branzburg* observation been reviewed, the court might have extended the privilege to nonconfidential materials, which could be considered as much products of the newsgathering process as confidential materials. By failing to consider this logical application, the *Gilbert* court, in effect, undermined its own acknowledgement of the dangers of censorship inherent in interference with newsgathering.

In denying a privilege for nonconfidential materials, the *Gilbert* court ignored another district court case, *Loadholtz v. Fields*,[35] which found that the compelled production of even nonconfidential materials would have a chilling effect on freedom of the press.[36] In *Loadholtz*, a reporter challenged a subpoena to compel discovery of materials relating to a newspaper article that he wrote about an incident of alleged police harassment. The court held that all unpublished information received and developed by the reporter in his professional capacity was privileged under the First Amendment and that a reporter cannot be compelled to testify about or to produce such documents in a civil action. In granting the privilege, the *Loadholtz* court claimed that the confidentiality of the materials was irrelevant to the "chilling effect" that the enforcement of subpoenas would have on the press' newsgathering role[37] and on

32. For a brief history of the attempt to protect the newsgathering process and a summary of how the issue has been handled in the lower courts, see Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971).

33. 408 U.S. at 681. While acknowledging the right to gather news, the Court rejected the claim that the right implies a privilege to protect the identity of news sources. After citing numerous cases in which restrictions on the right to gather news have been sustained, *id.* at 683-84, the Court classified the requirement to answer subpoenas and disclose sources as another permissible restriction. *Id.* at 685. The majority noted that the "evidence fails to demonstrate there would be a significant constriction of the flow of news to the public" if the Court reaffirmed the prior common law stance of no privilege. *Id.* at 693.

34. 411 F. Supp. at 508.

35. 389 F. Supp. 1299 (M.D. Fla. 1975).

36. *Id.* at 1303.

37. *Accord*, Hendrix v. Liberty Mutual Insurance Co., 43 Fla. Supp. 137 (1975), where the court concluded:

the flow of information to the public.[38] As the court explained, "The compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants."[39] The *Gilbert* court did acknowledge the importance of the free flow of information to the public,[40] but it did not review the *Loadholtz* observations about confidentiality. Instead, *Gilbert* recognized the source's demand for confidentiality as the only ground for privileged treatment. The court did not attempt to measure the validity of this traditional assumption, as did the *Loadholtz* court. The *Gilbert* court's failure to evaluate or, at least, distinguish the *Loadholtz* ruling may be interpreted as an unwillingness to support either a strong First Amendment protection for newsgathering or the position that a countervailing interest to a claim of privilege need be compelling.[41]

The *Gilbert* court based its decision to enforce the subpoena regarding nonconfidential material on a very cursory examination of the defendant's interests in obtaining information. Not even general discovery purposes, the only interest the defendant could claim,[42] were mentioned to support the issuance of the subpoena. In contrast, the grant of the privilege for confidential information involved a specific examination of the social interest in resolving conflicts justly between private litigants, as reflected in the rules of compulsory process.[43] Had the court explored the defendant's need for pre-trial discovery as carefully as it considered society's interest in the settlement of disputes, it might have provided a stronger rationale for its decision. For instance, the defendant's request for all unpublished materials might warrant consideration if a liberal interpretation of the Federal Rules of Civil Procedure were adopted. Such an interpretation would support discovery of virtually all

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> Whether or not the source or information is confidential, inquiry into unpublished information necessarily intrudes upon editorial decisions and can seriously impair the gathering and publication of news.

Id. at 139. *See* Schwartz v. Almart Stores, 42 Fla. Supp. 165 (1975).

38. 389 F. Supp. at 1303.

39. *Id.*

40. 411 F. Supp. at 508.

41. Recognition of newsgathering as a firm right would require that its infringement be justified by a compelling state interest. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963); *cf.* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

42. The defendants originally sought discovery for general discovery purposes and to bolster a request for change of venue. The *Gilbert* court noted the irrelevance of the second claim, especially after Nationwide had presented all published materials requested by Allied in early discovery. 411 F. Supp. at 507-08, 510.

43. *Id.* at 510.

information.[44] This argument was presented in cases cited in *Gilbert*[45] and might have been considered by the court in explaining the grant of defendant's request for discovery.

Two interests outlined by the movants to protect the reporters' preparatory materials received only the briefest review in the *Gilbert* decision. First, media representatives contended that any procurement of "reporter's notes . . . and any other newsgathering materials" amounted to a deprivation of property without due process.[46] The movants argued that "[a] compiler, who merely gathers and arranges . . . materials . . . is as much the owner of the result . . . as if his work were a creation rather than a construction."[47] The disclosure of the newsgatherer's compilation efforts was characterized as "tantamount to revealing his thought processes."[48] Although classified as a deprivation of property, the argument echoes the one advanced in *Hickman v. Taylor*[49] to protect an attorney's work product. The *Hickman* court's observation that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney"[50] has some merit in considering the value of the work of a

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44. *See* FED. R. CIV. P. 26(b).

45. The *Gilbert* court could have advocated a liberal construction of the Federal Rules of Civil Procedure, an argument frequently touted in privilege cases. However, the authority which the *Gilbert* decision noted would undermine even this stance. In Democratic National Committee v. McCord, 356 F. Supp. 1394 (D.D.C. 1973), the court, after approving a liberal application of rules and a broad subpoena similar to that requested in *Gilbert* and evaluating the unique circumstances of the Watergate break-in, concluded:

> This court cannot blind itself to the possible "chilling effect" the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public . . . . This court stands convinced that if it allows the discouragement of investigative reporting into the highest level of government no amount of legal theorizing could allay the public suspicions engendered by its actions and by the matters alleged in these lawsuits.

Id. at 1397.

In State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974), the court warned that the right to discovery is not of "constitutional dimension" and "[w]hen it is confronted by policy considerations related to a constitutional privilege, a carefully considered modification in the light of both concerns is in order." *Id.* at 256. Although courts often reiterate that the final grant of discovery requests rests with the discretion of the judge, an additional caveat, as expressed in Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 82 (E.D.N.Y. 1975), is frequently noted: "In exercising this authority, the court must consider the possible necessity for the information . . . ."

46. Memorandum for Nationwide Communications, Inc. at 18, Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976).

47. *Id.* at 20, *quoting* 18 AM. JUR. 2d *Copyright and Literary Property* §11 (1965).

48. *Id.* at 21.

49. 329 U.S. 495 (1947).

50. *Id.* at 510.

newsperson. While the analogy may grow tenuous as the context shifts from the legal adversary setting of *Hickman*,[51] the premise underlying the work product rule—that an adversary should not receive the benefit of a "free ride" on his opponent's preparation—is applicable to the investigations of reporters. The same "[i]nefficiency, unfairness and sharp practices"[52] that the *Hickman* court feared if the attorney's work product were not protected could easily transform newspersons into conduits of information.[53] The *Gilbert* court's failure to perceive this possibility ignores the *Branzburg* discussion of journalists as unpaid private investigators[54] and the trends within the legal profession advocating a qualified privilege for journalists' work product.[55]

The *Gilbert* court also seemed insensitive to the media's interest in avoiding interference with news room policy. In deciding to allow discovery, the court emphasized the ease with which confidential matter could be separated from nonconfidential material without considering the possible ramifications of changing news room policy. The media representatives contended that they would be forced to reconsider their policy of retaining unpublished materials if such materials were open to discovery.[56] Revising the retention policy would impose a cost burden by requiring the duplication of research efforts. The immediate availability of materials to refresh a reporter's memory, verify facts, or provide valuable background information for a continuing investigation would be eliminated. Similar hazards of tampering with news room policy were recognized by the Ninth Circuit in *Bursey v. United States*.[57] The court quashed a motion to compel testimony regarding who was responsible for editorial content and for distribution of a radical underground publication. The *Bursey* court stressed that such questions "cut deeply into press freedom."[58] While *Gilbert* involved the alteration of the news re-

51. *Hickman* involved a controversy between lawyers as to the extent and type of information that can be obtained from an opponent lawyer in the discovery process. *Id.* at 497.

52. *Id.* at 511.

53. A rash of subpoenas to testify before grand jury investigations in the late 1960's drew an angry reaction from journalist who felt restricted unjustly in their efforts to report social upheaval. In response to this media concern, Attorney General John Mitchell issued subpoena guidelines to eliminate harassment. Address by Attorney General Mitchell, House of Delegates, American Bar Association, Aug. 10, 1970. *See also* 28 C.F.R. §50.10 (1973).

54. 408 U.S. at 725. (Stewart, J., dissenting).

55. AMERICAN BAR ASSOCIATION, RECOMMENDATION OF THE STUDY GROUP ON JOURNALISTS' SHIELD LEGISLATION 2, 14-15 (1973).

56. Gilbert v. Allied Chemical Corp., 411 F. Supp. at 508.

57. 466 F.2d 1059 (9th Cir. 1972).

58. *Id.* at 1084.

tention procedure and *Bursey* the revelation of editorial responsibility, both situations portend changes in news room policy. The need for freedom to make unfettered policy decisions is common to both. This autonomy, essential to freedom of the press, was overlooked as the *Gilbert* court considered only the mechanics of changing news room procedures and not the implications of changing news room policies.[59]

The court's declaration that media files can be examined in a protected fashion,[60] by in camera inspection, does not sufficiently explain why they should be examined at all. The lack of a rationale for restricting the privilege to confidential materials in the face of reasoned contrary decisions, cited by the *Gilbert* court,[61] emphasizes the arbitrariness of the denial. Sound reasons for the denial, consistent with the reasoning used to grant the privilege for confidential material, could allay apprehension among journalists, their counsel, and potential informants who may be confused about the contours of the privilege.

The lack of rationale is, in effect, silence from the court. Such silence increases the fear expressed by the media of the possible "drying up" of sources,[62] harassment,[63] self-censorship,[64] and the transformation of journalists into researchers for other agencies.[65] Confronted with these fears, the news media would be forced to reconsider newsgathering techniques. Threatened by prosecution or exploitation, newspersons might react with subterfuge, by coaching sources,[66] or by re-evaluating their information retention policies.[67]

59. The Court stated, in pertinent part, "The Court has the power as well as the duty to fashion protective orders . . . to secure the needed information at a minimum of public exposure . . . [conditioned on] reasonable payment for the services rendered." 411 F. Supp. at 511.

60. The authority cited by *Gilbert* indicates how other courts successfully handled complicated patent cases without jeopardizing the secrecy of the product. Again, the emphasis is on the mechanics of the protective effort and not on the reason such effort had to be made. *Id.*

61. *Gilbert* cited both *Loadholtz* and *Bursey* to support its grant of a qualified privilege protecting confidential news sources. 411 F. Supp. at 508. However, the court did not mention either of these cases in denying a privilege for nonconfidential matters, *id.* at 511, although both those decisions contain reasoning that would have been applicable. *See* discussion in text accompanying notes 35-39 and 57-58 *supra*.

62. Memorandum of the Reporters Committee for Freedom of the Press as Amicus Curiae at 6, Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976).

63. *Id.*

64. *Id. See also* note 53 *supra*.

65. *See* note 54 *supra*. *See also* Beaver, *The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 ORE. L. REV. 243 (1968).

66. For a further discussion of the repercussions, see Beaver, *supra* note 65, at 250-57.

67. Gilbert v. Allied Chemical Corp., 411 F. Supp. at 508.

The *Gilbert* court's failure to explain its order for discovery is a setback for the orderly evolution of the law of newsperson's privilege. As noted in *Democratic National Committee v. McCord*,[68] "a prompt judicial inquiry and hopefully one that will not only be sound but which the public will also understand and accept"[69] is necessary when a possible Bill of Rights incursion occurs. Whether the *Gilbert* court met this responsibility is questionable.

Alice M. Klement

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68. 356 F. Supp. 1394 (D.D.C. 1973).
69. *Id.* at 1398-99.