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Shield Laws: The Legislative Response to Journalistic Privilege

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SHIELD LAWS: THE LEGISLATIVE RESPONSE TO JOURNALISTIC PRIVILEGE

There is little question that the events surrounding the Watergate break-in have cast journalists, particularly investigative reporters, into the public spotlight. The "Deep Throat" informant of Watergate fame has indeed become legend. Despite the increasing importance of the journalist in society, however, one controversy which has long been of significant concern to reporters has yet to be resolved — the compelled disclosure of journalistic sources in courtroom or grand jury proceedings. Threatened with citation for contempt, the journalist in such situations must often face two equally unacceptable alternatives: divulge a confidential source, or go to jail.

To circumvent conflicts of this nature, the journalistic profession has urged the adoption of an evidentiary privilege which would protect reporters from compelled disclosure of confidential sources. This Note will focus on one means of instituting such a privilege — the shield law. To provide a framework for the analysis of legislative efforts in this area, however, the discussion must begin with an examination into the scope and limitations of judicially-recognized concepts of journalistic privilege.

I. THE JUDICIAL APPROACH

A. The Common Law

No privilege against source disclosure was recognized at common law. The ground most often asserted in support of such a privilege was injury to the journalist's career. These arguments, however, were generally unsuccessful. The 1936 decision in People ex rel. Mooney v. Sheriff is the definitive statement on the question. In Mooney, the New York Court of Appeals held that the law generally required the disclosure of all pertinent information by witnesses in order that justice might be served. Non-disclosure privileges constituted exceptions to this general rule, and made it more difficult to achieve just results. The tendency, therefore, was to restrict privileges against non-disclosure.

B. Constitutional Claims

Finding no relief at common law, newsmen began to base their claims of privilege on the first amendment guarantees of freedom of the

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1 See, e.g., Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911). A reporter was called to testify about information he had received from a police officer. The reporter asserted that if he were to respond to this line of inquiry, he would be ruined as a professional journalist since he had received the information under a promise of confidentiality. He claimed he would lose his position with the Augusta Herald and would be unable to find employment elsewhere as a reporter.


3 See Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951) (newsperson required to answer questions and disclose the sources if these questions were pertinent to the pro-
press. In *Garland v. Torre*, a journalist for the *New York Herald Tribune* refused to divulge the source of an allegedly libelous story she had written about Judy Garland, claiming that to do so would violate the first amendment by placing an impermissible burden on the flow of news to the public. The Second Circuit considered this premise and rejected it. The court held that the first amendment freedoms were not absolute, and that whether they were to prevail depended upon the outcome of a balancing test. This balance was to be struck between the first amendment claim and "a paramount public interest in the fair administration of justice." When the journalist's testimony was of doubtful relevance or when the judicial process was being employed to force a wholesale disclosure of news sources, the balance should be struck in favor of the journalistic privilege. The *Garland* court adopted the "heart of the claim test," holding that when the issue of the source's identity was indispensable to the plaintiff's claim, the Constitution did not give the witness a right to refuse to answer.

*Garland* was the first of many cases which involved a balancing between the two conflicting premises of free press and the fair administration of justice. These cases arose in three broad areas: criminal, civil, and legislative proceedings. The application of the balancing test to each of these areas has produced divergent results.

Criminal proceedings are governed by the sixth amendment guarantee of fair trial. When a journalist asserts a testimonial privilege in the context of such proceedings the conflict is one between the free flow of information to the public and the fair and effective administration of justice, and is necessarily resolved only upon examination of individual fact patterns on a case by case basis. The courts must weigh the

ceedings); *Clein v. State*, 52 So. 2d 117 (Fla. 1951) (journalists enjoy no privilege of confidential communication and are subject to general duty to testify).

4 U.S. Const. amend. I states in pertinent part: "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." This amendment has been applied to the states via the due process clause of the fourteenth amendment. See *Gitlow v. New York*, 268 U.S. 652 (1925).


6 Id.

7 Id. at 549.

8 Id. at 550.

9 U.S. Const. amend. VI states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.


competing constitutional values, taking into account the surrounding factors of societal benefit and detriment. The procedure of balancing such fundamental values is always precarious because the question is always a close one; the courts have found a privilege in some cases, and have declined to do so in others.

Journalists' claims of privilege in grand jury proceedings present a different problem. To understand the problem fully, it is necessary to examine briefly the functions of a grand jury. The Framers of the Constitution incorporated the English common law concept of the grand jury in the fifth amendment. The function of a grand jury is investigatory, not prosecutory, and does not involve the issue of guilt or innocence. The grand jury is mandated to determine only if there is probable cause to formally charge an individual with a crime. Unlike a trial, therefore, a grand jury investigation operates without sixth amendment constraints, and the direct confrontation to the journalistic privilege presented by the sixth amendment is absent. What is present, however, is the doctrine that "the public . . . has a right to every man's evidence," which must be balanced against the journalist's first amendment claim of privilege. The courts have held that every citizen owes to the United States the duty of giving testimony, no matter how onerous the burden or how great the sacrifice. While there may be


An interesting example of a direct confrontation between the first and sixth amendments is afforded by the Nebraska "gag order" case, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). The case involved pre-trial publicity surrounding a murder which had attracted national attention. The prosecutor and defendant's counsel asked the court for a restrictive order to limit news coverage of the case. The resulting order specifically enumerated items which the media would not be permitted to report.

The Supreme Court, in an opinion by Chief Justice Burger, recognized the burden placed upon courts to insure fair trials but refused to accept prior restraint of the press as a method for meeting this burden. The Court had considered prior restraint before and found it repugnant to the first amendment. See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

12 See, e.g., People v. Marahan, 81 Misc. 2d 637, 368 N.Y.S.2d 685 (Sup. Ct. 1975) (attempt to compel journalist's testimony on a collateral issue entitled to first amendment protection). But see People v. Monroe, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (Sup. Ct. 1975) (privilege must yield to accused's right to defend himself even where such privilege is asserted on a collateral issue).

13 For an excellent summary of the history of grand jury powers, see Blair v. United States, 250 U.S. 273 (1919).

14 U.S. Const. amend. V states in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on . . . indictment of a Grand Jury. . . ."


18 8 J. Wigmore, Evidence § 2192, at 71 (McNaughton rev. 1961).

factors in some situations which would mitigate a general duty to testify, such factors are exceptions and are not considered lightly.

Journalists have argued that they meet the requirements for such an exception, but, as in the cases involving the sixth amendment, they have not always succeeded.

Although the sixth amendment cases have been difficult to resolve, the courts have had the benefit of a specific constitutional standard. In grand jury cases, however, the courts have only a broad traditional rule to guide them. While the absence of specific standards should not detract from the importance of the rule, the process of balancing it against a first amendment claim is more arbitrary and uncertain than the balancing involved in a sixth amendment case. In practice the courts have defined the standard as the fair and effective administration of justice, the public interest in self-protection, or the national interest in self-preservation, all of which are more sweeping and less easily applied than the more specific standards of the sixth amendment.

Because of the uncertainty inherent in a nebulous rule, the standard can be applied in many ways. For example, a very broad interpretation is possible, literal application of the "every man's evidence" doctrine. The very fact that a grand jury's function is investigatory rather than prosecutorial lends credence to this approach. It can be argued that if the grand jury is to perform effectively, it should have at its disposal all relevant evidence. Support for this approach can be found in cases which hold that hearsay evidence is admissible in a grand jury proceeding, and that a defendant may be compelled to testify before the grand jury. In such a reading of the rule, a qualified journalist's privilege would be given short shrift when weighed against the grand jury's all encompassing need for evidence. Another possibility would be a restrictive interpretation of the standard. A court may decide that the

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20 See, e.g., Blair v. United States, 250 U.S. 273 (1919) (citizen's duty to testify is subject to mitigation in exceptional circumstances, such as those involving public policy). At common law other mitigating circumstances were recognized, including forfeiture of an estate, self-incrimination, disgrace, infamy, or public ridicule. See Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).


22 See People v. Knops, 49 Wis. 2d 641, 183 N.W. 2d 93 (1971) (public interest in fair and effective administration of justice overrode its interest in the free dissemination of news); State v. Buchanan, 250 Or. 244, 436 P.2d 729, cert. denied, 392 U.S. 905 (1968) (journalist enjoyed no special evidentiary privilege which exempted her from general public duty to testify). But see, In re Grand Jury Witnesses, 322 F. Supp. 573 (N.D. Cal. 1970) (journalists granted protective order so that they did not have to testify about anonymous sources, but order was subject to modification upon a showing by the government of a compelling and overriding need which could not be met by other means).

23 People v. Knops, 49 Wis. 2d 641, 183 N.W. 2d 93 (1971).

24 Id.


28 Some courts may take the position that the secrecy of grand jury proceedings would protect the journalist who has been asked to reveal a source. In fact, however, this is the
standard is so broad as to be virtually incapable of application. In such a case, the court would probably be inclined to uphold the first amendment claim unless a more specific need for the information could be shown.29

The problem with cases involving either the sixth amendment or grand jury proceedings is that the courts are faced with a weighing of difficult abstract standards each time a journalist claims a privilege. The court must take into account all the particular circumstances of the case, and then perform a feat of constitutional juggling. The lower federal courts and state courts have struggled with this issue with little helpful precedent to guide them.

The Supreme Court attempted to resolve the evidentiary privilege issue in the Branzburg v. Hayes trilogy.30 The reporters in each case had refused to testify before a grand jury as to the identity of their sources or personal observations garnered from interviews with the sources. Each reporter asserted a claim of privilege against revealing the information sought by the grand juries.31

The Court completely disposed of any notion of testimonial privilege as it related to grand jury proceedings. It found that a balancing of competing interests was inappropriate because it could not "accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over 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."32 The Court held that if a privilege is to be recognized,

most dangerous situation. Because the proceedings are secret, the source will never know whether the journalist has or has not given the desired testimony. Therefore, some reporters decline even to appear at the proceedings in order to avoid the appearance of having revealed a source. See Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), rev’d sub nom, Branzburg v. Hayes, 408 U.S. 665 (1972). This case was noted in 84 Harv. L. Rev. 1536 (1971).

29 See In re Grand Jury Witnesses, 322 F. Supp. 573 (N.D. Cal. 1970). Balancing is the traditional judicial method of dealing with constitutional questions. The end result is a ruling that turns on the particular facts involved. Other persons in similar situations have nothing concrete to guide them in determining the correctness or incorrectness of the particular position they are asserting. Such uncertainty works a great hardship in ordinary cases, but this hardship is magnified with respect to an institution such as the press. Journalists wary of crossing a nebulous line which could lead them to prison or to being discredited may in fact err on the side of caution. The result can be an impairment of the functioning of the press and, in the end, it is the public which suffers.


31 While Branzburg claimed that his privilege stemmed from the Kentucky shield statute, Pappas and Caldwell argued for first amendment protection. In the lower courts only Caldwell was successful in his argument, and then only in the court of appeals.
it should be created by enactment of state legislature and not derived by the courts from the Constitution.\textsuperscript{33}

The Branzburg rule applies only to journalists' claims of privilege before grand juries. In other proceedings, it is still necessary to apply the balancing test.

Civil lawsuits provide another fertile area for journalists to assert claims of privilege. The most prominent assertion of the privilege occurs in the context of libel suits, though privilege claims have not been restricted to these actions. \textit{Garland v. Torre}\textsuperscript{34} established the text to be used in libel cases. Following \textit{Garland}, the balancing test became the accepted judicial tool for resolving the privilege issue in this difficult area.\textsuperscript{35}

The libel cases seem to have developed a standard that is unique to their circumstances. To understand it one must look to the nature of a libel suit in relation to news entities and public figures. In \textit{New York Times v. Sullivan},\textsuperscript{36} Justice Brennan discussed the standard of proof in libel actions. Respondent Sullivan, a public official in Montgomery, Alabama, brought suit against the New York Times claiming that he had been libeled by advertisements appearing in the newspaper.\textsuperscript{37} The Supreme Court, in reversing the state court and striking down an Alabama statute, held that the first amendment guarantees of freedom of the press were of primary importance and that special safeguards were required to protect those rights. Libel laws such as the one in force in Alabama at the time\textsuperscript{38} were found to have a detrimental effect on the Constitutional guarantee. Therefore, the Court held that the Constitution required that a public official could not recover damages in a libel action unless he could prove by clear and convincing evidence that the offensive material was published with "actual malice"\textsuperscript{39} — either with the knowledge of its untruth or with "reckless disregard"\textsuperscript{40} as to whether it was true.

The disadvantage of allowing a journalist to assert a privilege for confidentiality of sources in libel cases is obvious. If the journalist is

\begin{itemize}
\item \textsuperscript{33} Id. at 706.
\item \textsuperscript{34} 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958). See notes 5-7 supra and accompanying text.
\item \textsuperscript{36} 376 U.S. 254 (1964).
\item \textsuperscript{37} Id. at 256-58.
\item \textsuperscript{38} Alabama used the concept libel per se. Something was libelous per se if it injured a person in his reputation or brought him into public contempt. Once libel per se was established, the only defense allowable was truth, which had to be proven to the jury. \textit{Id.} at 267.
\end{itemize}
permitted to cloak the identity of the source or the information given by the source, the plaintiff will be all but helpless in proving the actual malice that the *New York Times* rule requires.\(^{41}\) Thus, the public interest in the fair and effective administration of justice\(^{42}\) and the right to "every man's evidence"\(^{43}\) often combine in libel situations to provide the compelling interest needed to override the journalist's claim.\(^{44}\)

Not all civil cases in which a privilege is asserted involve libel. In other civil cases the standard against which the claim is to be weighed resembles the "every man's evidence" standard utilized in grand jury cases. The courts, however, have looked upon claims of privilege in other civil cases with more favor.\(^{45}\) While the balancing test is employed, the standard is very different from that employed in criminal cases. One distinction is the lack of constitutionally-mandated guidelines such as those of the sixth amendment in criminal cases. Grand jury and civil cases, however, are more similar. In both proceedings the "every man's evidence" standard prevails, but this standard is flexible and takes on

\(^{41}\) Reporter Britt Hume, sued by a public official about whom he had published allegedly defamatory news articles, apparently recognized this aspect of libel actions. In his concurring opinion in Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert. denied, 417 U.S. 935 (1974). Judge MacKinnon agreed with the court that permitting non-disclosure of sources would virtually immunize the media from responsibility for their libelous publications. Judge MacKinnon further pointed out that Hume had recognized this in an article he had published in the *New York Times Magazine*, December 17, 1972: "Yet Carey has a point. If newsmen can refuse to name the source of defamatory stories, they can effectively vitiating what is left of the libel laws (after New York Times v. Sullivan) by hiding behind anonymous sources whenever sued." 492 F.2d at 640 (MacKinnon, J., concurring).

\(^{42}\) People v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971). See notes 14-29 *supra* and accompanying text.

\(^{43}\) 8 J. WIGMORE, EVIDENCE § 2191, at 71 (McNaughton rev. 1961). See notes 14-29 *supra* and accompanying text.

\(^{44}\) Some courts have found in favor of the privilege. Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973) is illustrative. Mayor Cervantes of St. Louis, accused by *Time Magazine* of having underworld connections, sued a *Time Magazine* reporter for libel. During the extensive pre-trial discovery, Cervantes deposed the reporter, who answered that most of his information had come from sources in the Justice Department and in the Federal Bureau of Investigation but refused to divulge their names. He claimed that the principles of the first amendment would be violated by the inhibition on the dissemination of news which would follow if he, as a professional journalist, could not effectively guarantee the anonymity of his sources. Cervantes countered with the assertion that, without disclosure, he would be unable to test the credibility of the sources or to scrutinize the journalist's reporting, and thus would be prevented from effectively meeting the strict burden of proof required by the *New York Times* rule. While the court sympathized with Cervantes and agreed that his claims were not frivolous, it found that Cervantes had failed to show that the reporter or the magazine had acted in a libelous fashion. Although a testimonial privilege for journalists had not been recognized by most courts, the Eighth Circuit held that to require a journalist to reveal confidential sources in libel cases "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 engraven upon the enforcement of State libel laws." *Id.* at 993.

\(^{45}\) See, e.g., Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1978) (journalist's claim of privilege to protect the free flow of news upheld in a tort action as more compelling than the need for the information); *Accord*, Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975) (the public interest in liberal discovery was outweighed by potential for hampering the free flow of news if the journalist is compelled to reveal...
different meanings depending on the circumstances of the case. Thus, in grand jury cases the standard reflects the compelling need of the grand jury to perform its functions effectively, and promotes the public interest in punishment and prevention of crime. In libel cases, strict application of the standard depends upon the plaintiff's difficulty in meeting the heavier burden of proof unique to these cases, and the journalist's claim usually has to give way to the competing claims of the plaintiff. There is a distinct turnabout in civil cases not involving libel; the claims of journalistic privilege are usually upheld against the countervailing interests of "every man's evidence" and the fair administration of justice.

This divergence between the types of cases can best be understood by examining the ultimate goals achieved in compelling testimony. In grand jury cases the basic preservation of the values of society is the ultimate concern, while in libel cases the basic issue is often the securing of the only evidence which will enable the plaintiff to meet the burden of proof to establish the claim. The need for the information is not as compelling in ordinary civil actions; such actions are wholly private, as opposed to criminal cases which involve the public interest. When the purely private interest in source disclosure is weighed against the public interest in the free flow of news, social policy requires upholding the reporter's claim.46

Generally, the outcome of a civil action is of lesser significance for society than the outcome of a criminal action.47 The former involves the possible loss of money, while the latter involves the loss of liberty or life. The different public interest considerations in each are obvious. While the potential loss of liberty or life is compelling enough to override the constitutional demands of the first amendment, the potential loss of money is not.48

A different question is posed when a journalist claims a right to remain silent in legislative investigations. Here, the first amendment guarantees come into direct conflict with the powers of Congress. As the lawmaking body, Congress has the power and authority to conduct investigations as a corollary to its legislative function. This power to investigate, although broad, is not without its limits.49 As early as 1881, the Supreme Court recognized that Congress did not possess a general power of inquiry over the affairs of a private citizen50 even though

48 That the law regards the interests differently in civil and criminal proceedings is well illustrated by the different standard of proof required in each. Criminal actions require proof beyond a reasonable doubt while in civil cases the burden of proof is by a preponderance of the evidence.
49 See Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957). For a discussion of these cases, see notes 52-60 infra and accompanying text.
50 Kilbourn v. Thompson, 103 U.S. 168 (1881). The Supreme Court recognized that Congress possessed a contempt power as a corollary to its power to legislate in Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821). Anderson, who refused to answer the charges of the House of Representatives, was ordered into custody in order to have him brought before the body. The Supreme Court held that Congress possessed the power to imprison
Congress by statute may call witnesses to testify before it and punish those who prove reticent.\textsuperscript{51}

The use of the legislative investigation expanded during the McCarthy Era's intensive search for Communists. It was during this period that first amendment values were exposed to the threat of congressional inquiry by the House of Representatives Committee on Un-American Activities (HUAC). In \textit{Watkins v. United States},\textsuperscript{52} Watkins, a labor union official, was called to testify before HUAC. He testified freely about his own political affiliations, and was willing to disclose the identity of Communist Party members known to him as long as they were still members, but he refused to testify about persons who had abandoned party connections. He was convicted of contempt of Congress for his refusal to answer. The Supreme Court reversed the conviction. In discussing the scope of Congress' investigative power, the Court held that any inquiry had to be in furtherance of a legitimate congressional end.\textsuperscript{53} While the Court recognized the duty of every citizen to appear and testify before a congressional investigative body, the witness' constitutional rights, including first amendment rights, had to be protected.\textsuperscript{54}

Two years later, the case of \textit{Barenblatt v. United States}\textsuperscript{55} presented a further inquiry into the limits of Congress' investigative power. A HUAC subcommittee subpoenaed Barenblatt, who had been a graduate student and teaching fellow at the University of Michigan and a psychology instructor at Vassar College. He objected on first amendment grounds to the subcommittee's right to question him with respect to his political beliefs or associational activities.\textsuperscript{56} The Supreme Court determined that the tenets of the first amendment served as a limiting

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\item \textsuperscript{51} 2 U.S.C. § 192 (1970) provides in pertinent part: Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry . . . willfully makes default, or who, having appeared, refuses to answer any questions pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine . . . and imprisonment. . . .
\item \textsuperscript{52} 354 U.S. 178 (1957).
\item \textsuperscript{53} This required a clearly defined, legitimate congressional purpose, which could permit an investigation into an individual's affairs. The critical factor was the "existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness." \textit{Id.} at 198.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} 360 U.S. 109 (1959).
\item \textsuperscript{56} The subcommittee forwarded a request to the House of Representatives for institution of criminal contempt proceedings. In the ensuing trial, Barenblatt was convicted of contempt. The Supreme Court, which had granted certiorari, vacated the judgment and remanded the case for further consideration in light of the decision in \textit{Watkins}. The conviction was reaffirmed, and again, certiorari was granted.
\end{itemize}
\end{footnotesize}
factor on congressional investigations.\textsuperscript{57} When a witness asserted first amendment guarantees to prevent inquiry into certain areas, the Court held that a balancing of the competing public and private interests was required.\textsuperscript{58} Justices Black and Douglas, together with Chief Justice Warren, dissented, taking a more absolutist position. They found the balancing test to be vague and uncertain, imputing a qualification to first amendment rights which did not exist.\textsuperscript{59} In the view of the dissenting justices, first amendment rights were not intended to be protected only when the courts deemed it reasonable.\textsuperscript{60}

Thus, while Congress and the state legislatures possess a power to investigate, a corollary to the legislative function, this power is limited by constitutional constraints.\textsuperscript{61} Such investigations are generally governed by the balancing test to determine whether the request for disclosure will prevail against the witness' first amendment claim.\textsuperscript{62}

\textbf{C. The Scope of the Privilege}

In examining the journalist's claim of privilege, some commentators have noted that the common law is not the place to begin, and that it is better to assume a presumption of a constitutional privilege and then to entertain justifications for denying it.\textsuperscript{63} As has been shown, this appears to be the trend, with the justification for denying the privilege found in the use of the

\textsuperscript{57} 360 U.S. at 126.
\textsuperscript{58} \textit{id. Barenblatt also reiterated that the investigation had to be related to a valid legislative purpose, and that all questions must be relevant and pertinent.}
\textsuperscript{59} 360 U.S. at 143 (Black, J., dissenting).
\textsuperscript{60} Compare Justice Black's dissent in \textit{Barenblatt} with his dissent in \textit{Braden v. United States}, 365 U.S. 431, 442 (1961). Black maintained that the first amendment was absolute, and the balancing test represented an encroachment upon its principles.
\textsuperscript{61} States, too, have the power to subpoena witnesses for civil and criminal proceedings, and presumably for legislative investigations. See, e.g., \textit{Ohio Rev. Code Ann. \S 2945.46 (Page 1975)}. There also exist state laws for punishing a recalcitrant witness by contempt. See, e.g., \textit{Ohio Rev. Code Ann \S 2705.02 (Page 1954)} which provides for holding a person in contempt who disobeys a court order, who resists a subpoena, who refuses to sworn or answer as a witness, or who fails to appear as a witness.

As to state legislative investigations, the Supreme Court in \textit{Sweezy v. New Hampshire}, 354 U.S. 234 (1957) followed the principles of \textit{Watkins} by limiting state investigative power in the face of conflicting constitutional interests.

\textsuperscript{62} During the summer of 1976, Daniel Schorr, then a Newsman for the Columbia Broadcasting System (CBS), was called to testify before the House Select Committee on Intelligence which was investigating the leak of a secret report on Central Intelligence Agency operations to a New York newspaper, the \textit{Village Voice}. Schorr refused to reveal the source of his information. A constitutional argument was avoided when the House of Representatatives Ethics Committee did not cite Schorr for contempt. For a detailed account of this incident, see \textit{Investigation of Publication of Select Comm. on Intelligence Report: Hearings Before the Comm. on Standards of Official Conduct Pursuant to H.R. 1042, 94th Cong., 2d Sess. 577 (1976)}. See, e.g., United States v. Liddy, 354 F. Supp. 208 (D.D.C. 1972) (right to fair trial outweighs any burden on newsgathering); \textit{In re Dan}, 80 Misc. 2d 399, 363 N.Y.S.2d 493 (Sup. Ct. 1975) (Need for testimony outweighs burden on newsgathering). See also Garland v. Torre, 259 F.2d 545 (2d Cir.) \textit{cert. denied,} 358 U.S. 910 (1958). For a discussion of this case, see notes 5-7 supra and accompanying test.

balancing test. There are some perplexing problems with this approach, however, which make it a less than satisfactory solution to a complex question.

Where the more common evidentiary privileges such as lawyer-client and doctor-patient are involved, only the client or the patient has the right to waive the privilege. With the journalist's privilege, however, the confidentiality lies with the journalist, not the source, so that the journalist is the only one who can waive. In the usual case, the client and patient are known; it is the information they impart to their lawyer or doctor which is protected. But in the journalist-source relationship, only the journalist is known; it is the very identity of the source, the other party to the relationship, which is sought to be protected by the privilege.

In the cases examined thus far, the reporter involved was attempting to keep the identities of the sources secret. There are some cases, however, in which the reporter is seeking to keep the information confidential. These attempts generally occur in one of three situations: where the source is already known, where the source is unknown but the journalist fears that revelation of the information will lead to the identity of the source, and where there is no source at all. Claims of privileged information in situations in which the source is already known have not fared well. In United States v. Liddy, a subpoena duces tecum was issued to John Lawrence of the Los Angeles Times to produce materials which related to an interview with Alfred C. Baldwin, III. These materials had been subpoenaed from Baldwin, but had been destroyed. The material was not sought for discovery purposes, but as relevant evidence for the defense.

Because Baldwin had previously been identified as the source, the Los Angeles Times asserted a claim of privilege based upon the confidentiality of the communication. The court denied the claim, stating that under Branzburg, the justification for a privilege was outweighed by the defendant's need for evidence.

The New York Supreme Court similarly refused to find a privilege

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64 See, e.g., Lightman v. Maryland, 15 Md. App. 713, 294 A.2d 149 (1972), cert. denied, 411 U.S. 951 (1973). See also Carter, The Journalist, His Informant and Testimonial Privilege, 35 N.Y.U.L. Rev. 1111 (1960). The source could, of course, come forward personally or permit the journalist to divulge his or her identity. In this sense the source, too, has the power to waive the privilege. Consider, however, the following hypothetical. A journalist called to testify on behalf of a defendant at trial refuses to name the source, and after being found in contempt is sent to jail. The source then comes forward and reveals his identity. The journalist has said nothing. Is the journalist still in contempt? It would appear that he is, because the source revealed himself and the journalist remained silent. How, then, could the journalist purge himself of the contempt if the information sought has been discovered through other means, such as self-disclosure by the source?


66 Judge Sirica pointed out that the Los Angeles Times has breached the confidence by publishing the interviews after Baldwin's lawyer had requested it not to. For an account of the hearing, see C. Bernstein & B. Woodward, All the President's Men 224-25 (1974).
for confidential information in People v. Wolf.67 After prison riots, a reporter obtained a manuscript which had been written by an inmate, and published it under the inmate's by-line in the Village Voice. A subpoena duces tecum was served on the paper and its editor for production of the original manuscript because the District Attorney claimed the manuscript was a confession.

The court refused to find a privilege by distinguishing between a case in which a newspaper or a journalist claimed a privilege to withhold a confession from the proper tribunal when the confession was authored by a person under indictment, and a case in which a privilege was asserted to maintain the secrecy of an unknown source. The cases falling into the former class were found to be undeserving of constitutional protection.

Cases in the second category, in which the source is unknown but revelation of the information might lead to the identity, have fared little better. In two separate cases involving the same radio newsman, no privilege was found. In the first case, In re Lewis,68 the newsman's radio station received a communique from a revolutionary group which had claimed responsibility for a Los Angeles hotel bombing. The police attempted to get the communique from the newsman, even searching the radio station, but to no avail. A subpoena duces tecum was finally issued for production of the information. In subsequent proceedings, the newsman's claim of privilege under the first amendment was rejected by the Ninth Circuit.

In the other case involving Lewis, Lewis v. United States,69 the unfortunate newsman received a tape recording from a revolutionary group. The Court denied a privilege to withhold the tape from law enforcement personnel, adopting the reasoning of Branzburg.70

Cases in the third category, in which there is no source per se, have been no more successful. The most common case of this type involves the journalist who has personally observed criminal activity.71 Thus, a journalist who observed two persons making hashish from marijuana,72 and a journalist who observed the Black Panthers inside their headquarters,73 have been held not to have a privilege to remain silent as to whom they observed or where they observed it.

70 354 F. Supp. at 140.
71 The overlapping between this category and the one immediately preceeding is apparent. The journalist is reluctant to reveal what he saw or where he saw it for fear that such information will lead to discovery of the source. Thus, the distinction between the categories is more of degree than concept.
In *Lightman v. Maryland*,74 a reporter who was covering a "head shop" for a story observed drug use. He was summoned by a grand jury, and asked to state the location of the "head shop" and to describe the shopkeeper. He refused, claiming that the shopkeeper was a source, and that disclosure of the location of the shop would lead to the discovery of the source.75 The court refused to accept Lightman's premise, holding that only sources were privileged, not communications.76

Although it is the journalist who must assert the privilege,77 it is necessary to determine who is protected by it. There can be little doubt that the first amendment, in the ultimate effect, is for the benefit of all Americans. In its immediate effect, however, it is meant to safeguard the press as an institution. As Justice Stewart noted, "[m]ost of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals. In contrast, the free press clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection."78

While this approach may offend a sense of equal protection under the law, the public is the ultimate beneficiary of such an institutional protection. Indeed, the claim of privilege which rests on the first amendment is based upon the detriment to the public which would occur if there was an impediment to the free flow of information.79 The media are characterized as "the principal watch-dogs and protectors of honest, as well as good government."80 Thus, there is a strong public policy which favors an extension of constitutional protection to an institution.

At least one court has looked at this from a different perspective. In *State v. Buchanan*,81 the Supreme Court of Oregon refused to find a journalist's privilege under the first amendment, stating in dictum that to do so might invite governmental intrusion into the journalistic field in order to define who qualifies for such a privilege. The court noted that the first amendment served to protect the general public, not only those persons possessing the credentials of a journalist.82

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75 Lightman admitted that the shopkeeper did not know he was a reporter, but claimed that any time information is communicated to a journalist in confidence such information is privileged, even if the communicant does not know he is a journalist.

76 The court held that, in order to be confidential, the communication had to originate in the confidence that it would not be disclosed without the consent of the communicant. For a discussion of "off the record" information, see Note, The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law, 24 U.C.L.A. L. Rev. 160 (1976).

77 See notes 63-64 supra and accompanying text.


82 Id. For a discussion of who qualifies as a reporter, see Note, Reporters and Their
II. Shield Laws: A Statutory Response to Ambiguity

The controversy surrounding the evidentiary privilege for journalists is ongoing, and the judicial approach has been less than satisfactory. Some states have chosen to meet this problem through legislative enactment of "shield laws," so named because they shield the journalist from forced revelation of information. At this time, twenty-six states have enacted legislation giving a testimonial privilege to journalists; these statutes, lack uniformity, however, and provide protection in varying degrees.

Shield statutes have helped to resolve some of the problems with the judicial approach. The person to be protected by the statute is usually clearly defined, as is what is to be protected. Some statutes cover only the source of a reporter's information, while others include the information. Furthermore, the statutes frequently avoid the worst problem with the judicial approach by creating an absolute privilege, thus obviating the need for a balancing test. No statute, of course, can clear up all problems surrounding a complex issue, and the application of a statute must always depend upon judicial construction.

A. The Difficulties Inherent in the Statutory Approach

The statutes extend the protective shield to a defined class of persons. In so doing, the state legislatures were implicitly attempting to define "the press." Consequently, at least one court has held that a


84 Id. at 27-65. A typical shield law is that of Ohio, which provides:

No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committeee thereof


85 See, e.g., Forest Hills Util. Co. v. Heath, 37 Ohio Misc. 30, 302 N.E.2d 593 (C.P. 1973). The court held that the Ohio shield law permitted the journalist to conceal only the name of the informant; the information itself was not protected. There still remains the problem of defining a source. In Forest Hills Utility Co., the court stated that the term "source" should be limited to persons since only they can be encouraged to reveal information. Id. at 35, 302 N.E.2d at 596.

86 The privilege can thus inure to "[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or . . . a press association or wire service, or any person who has been so connected or
journalist whose endeavors were not explicitly covered by the statute was not entitled to keep his source confidential. 87

It is possible that an attempt to define by statute the members of the press may result in an infringement upon first amendment guarantees by forcing the courts to intrude into the journalistic field to delineate the membership. 88 It is more likely, however, that it will lead to a more effective functioning of the press. As Justice Stewart has noted:

If it is to perform its constitutional mission, the press must do far more than merely print public statements or public prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called "news" is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of "newsmakers." 89

It would appear, therefore, that even if the state legislatures did invade the journalistic field to the extent of determining who qualifies for a statutory testimonial privilege, the invasion would be minimal in comparison with the benefit to the functioning of the press.

Some shield statutes cover only the source of the information 90 while others protect both the source and "off-the-record" information. 91 Defining a "source" within the purview of the statute, however, remains a problem similar to that encountered under the judicial approach.

A journalist's personal observations of criminal activity have generally been held to be outside the statutory protection as a source. 92 Those things which do not directly impinge on the source's identity have likewise been unprotected. 93 Consequently, the courts have construed


87 In Cepeda v. Cohane, 233 F. Supp. 465 (S.D.N.Y. 1964), the court held that a magazine reporter was not included in the statutory definition. Cohane, a reporter for a magazine, had written an allegedly libelous article about Cepeda, a baseball player for the San Francisco Giants. Cohane refused to reveal his source during a deposition. Since the California shield statute covered only journalists connected with newspapers, press associations, wire services, radio, or television stations the court held that it had to "be guided by the rule of strict statutory construction." Id. at 472.


a source to include only someone who or something which actually gave
the reporter the information. Even this limitation is not without prob-
lems, however, due to the sometimes broad, sometimes narrow appli-
cation by the courts. For example, one court has construed the stat-
ute liberally, holding that sources of information included documents
as well as persons, while other courts have been unwilling to reach
this result.94

The problem is further complicated in much the same way as under
the judicial approach — establishing a dichotomy between a source per
se and pure information. Shield statutes have attempted to solve this
problem by indicating exactly what is protected as sources, or as sources
and information, but classification in this area has not been easy.
The New York Supreme Court in People v. Wolf95 confronted the prob-
lem when it found a manuscript written under a prisoner's by-line
unprotected by the New York shield statute.

It is evident that the statutory approach to the testimonial privilege
for journalists is a vast improvement over the haphazard, catch-as
catch-can judicial approach. At a minimum, the statutory method
eliminates much of the discretion which was problematic with the judi-
cial approach. Nevertheless, shield laws present unique problems in
terms of public policy considerations. If any advantages are to be rec-
ognized with the judicial approach, they are to be found in the fact that
the balancing test recognizes the competing policies involved. The
for journalists is a vast improvement over the haphazard, catch-as-
policy "which has placed the gathering and the protection of the source
of news as of greater importance to the public interest and of more
value to the public welfare than the disclosure of the alleged crime or
the alleged criminal."96

Still, many courts have circumvented the strict mandates of these
statutes.97 For example, the courts have exercised discretion in deter-

the source and had printed it in his newspaper was asked the means by which the source
had conveyed the information for publication. The court held that the narrow question
was who had taken the information to the paper. Such act of communication was ob-
viously intended by the source; the legislative intent behind the shield law would not
preclude revelation of this kind of information. Judge Donges, in the dissenting opinion,
felied to see the distinction between the source and the means of communication to the
journalist. He noted that the source was not the one who had made the news, but merely
the one who gave it to the reporter. Id. at 489, 30 A.2d at 429 (Donges, J., dissenting in
part).

95 See, e.g., Forest Hills Util. Co. v. Heath, 37 Ohio Misc. 30, 302 N.E.2d 593 (C.P.
1973) (source restricted to "animate objects").
96 For a discussion of the similar problem arising in the dichotomy resulting from a
legislative definition imposed upon the term press, see notes 86-89 supra and accompan-
nying text.
97 69 Misc. 2d 256, 329 N.Y.S.2d 291 (Sup. Ct.), aff’d per curiam, 39 App. Div. 2d
864, N.Y.S.2d 299 (1972). The case presents a classic example of meticulous statutory
construction of N.Y. Civ. Rights Law §§ 79-h(a)(8), 79-h(b) (McKinney 1976).
99 See, e.g., People v. Monroe, 82 Misc. 850, 370 N.Y.S.2d 1007 (Sup. Ct. 1975)
being without a source or privilege allowing non-compliance with compulsory process,
mining what constitutes a waiver of the statutory privilege. Since the privilege is that of the journalist, and not of the source, the journalist may waive it if he desires.100 Some courts which take a dim view of the privilege have broadly applied the waiver concept to defeat an assertion of the privilege. One court which denied a first amendment privilege held that the statutory protection could be waived merely by the disclosure of any part of the privileged material, if there was no coercion and if there was knowledge of a privilege not to disclose.101 Conversely, another court which construed the shield statute liberally held that waiver of the statutory privilege would only apply to statements made by the informant which were actually published or disclosed, and not to statements made by the informant to the newperson.102

While some courts, through the exercise of discretion in determining statutory construction, have apparently distorted the legislature's intent in creating the shield statutes, few have questioned the wisdom of enacting these statutes.103 Judicial activism in this area has been growing, however, with the most notable examples occurring in California and New Mexico. In Farr v. Superior Court,104 a reporter for a California newspaper had obtained a memorandum of the prospective testimony of a witness in a murder trial. In the investigation which followed publication of this information, Farr refused to divulge the source who had

but merely prevented those journalists asserting it from being cited for contempt; Lightman v. Maryland, 15 Md. App. 713, 294 A.2d 149 (1972) (statute did not apply because alleged source informed against herself, unaware that she was speaking to a reporter, and newsmen's personal observations were the actual source). The Monroe holding is evasive. The court acknowledged that the New York shield statute prevents a journalist from being held in contempt for refusing to divulge his sources, but does not protect him from compulsory process. However, the court further held that the statutory privilege would have to yield if the defendant required the information for due process reasons. Since the defendant in Monroe failed on procedural matters to force disclosure, the court never reached the issue of what would happen if the privilege did not apply and the journalist persisted in his refusal, since admittedly the court could not sanction him with contempt proceedings under the statute.

See also, Stokes v. Lorain Journal Co., 26 Ohio Misc. 219, 268 N.E.2d 857 (C.P. 1970), in which the Court of Common Pleas for Cuyahoga County held that the Ohio Supreme Court, in adopting the Ohio Rules of Civil Procedure, never contemplated that Ohio Rev. Code Ann. § 2739.12 (Page 1954), Ohio Const. art. I, § 11, or U.S. Const. amend. I would inhibit or prohibit the eliciting of information necessary for the preparation of a tort action, or that libel suits did not fall within the discovery provisions of the Rules of Civil Procedure. Accord, Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956). The New Jersey court held that the respondent newspaper, in basing its defense on having received the information from a source but without disclosing that source, denied the jury the chance to determine whether in fact the source was reliable. The court decided that the legislature's intent in creating the New Jersey shield law could not have been to afford newspapers a hiding place when their own actions gave rise to a question of liability.


103 See, e.g., Ex parte Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953) (court declined to question the legislature's wisdom in creating the statute).

given him the memorandum. Farr based his refusal to testify in part upon the California shield law. The court, however, never reached the point of construing the shield statute. Instead, it summarily dismissed the statute as "an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers." The court acknowledged the power of the legislature to reasonably restrict or prescribe procedures for the exercise of the court's contempt power, but denied the legislature's right to determine what should constitute contempt. The court held that because it had a duty to prevent prejudicial pretrial publicity, it had a concomitant obligation to investigate violations of its orders by its own officers.

Similarly, the Supreme Court of New Mexico, in Ammerman v. Hubbard Broadcasting, Inc., invalidated the state's shield law. A journalist, who had been named as the defendant in a libel action, was requested to name one of his sources. He refused, claiming that the state's shield statute granted him a privilege not to testify about his source. The court, after noting that historically only the judiciary could exercise power over its functions, declared the statute unconstitutional. The court stated that in creating the shield statute, the legislature had attempted to promulgate new rules of evidence comparable to those already adopted by the court. Such rules of evidence were of a procedural nature, governing the functioning of the court itself, and were within the exclusive province of the courts to exercise for the sake of clarity and uniformity in procedure, pleading, and practice. The shield statute was found to conflict with an already established rule of evidence.

The Supreme Court of the United States has yet to decide the constitutionality of shield statutes, but cases such as Farr and Ammerman raise perplexing questions concerning the separation of power between the legislative and judicial branches.

Following the decision in Farr, the California courts were confronted with another case involving the shield statute. In Rosato v. Superior Court, the trial court had ordered transcripts of a grand jury proceeding sealed to avoid detrimental pre-trial publicity. An article printed in the Fresno Bee after the order contained quotations from the earlier proceedings. Assuming that the publicity order had been violated, the court subpoenaed the journalists to appear before it, but the reporters refused to answer any questions which would have tended to disclose the nature and identity of their sources. The journalists were subsequently cited for contempt. On appeal, the newsmen argued that the California shield statute was absolute; while the California

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106 Id. at 70, 99 Cal. Rptr. at 348.
108 Id. at 310, 551 P.2d at 1357.
Law Revision Commission had advocated limiting the scope of the privilege for newspapermen, the legislature had rejected it.\textsuperscript{110}

In \textit{Rosato}, it appeared that the California Court of Appeals was faced merely with a problem of statutory construction. It was, but the problem was severely confounded by the holding in \textit{Farr v. Superior Court}.\textsuperscript{111} The court in \textit{Rosato} held that the trial court had both the right and the duty to issue its order concerning publicity and hold hearings to investigate possible violations of it. It found that the California shield statute was limited in its scope. The statute did not extend protection when there was participation in or observation of criminal activity by the journalist nor could the statute infringe upon the judiciary's duty to control its own personnel and proceedings as established in \textit{Farr}. The court determined that the principle upon which the judiciary had the power to compel the journalists' testimony despite the shield statute was the necessity of investigating violations of its orders as a means of enforcing its constitutional duty to prevent prejudicial publicity by its own personnel.\textsuperscript{112} Thus, the protection of the shield statute was held to extend to identification of sources who were subject to a court order and violated it. However, if a question was overbroad to the point where it would reveal that either a particular court officer or an unrelated protected source was involved, it would not be permitted under the shield statute. “The court is only entitled to ask questions directed toward affirmatively determining if the information did come from court officers or attaches.”\textsuperscript{113}

\textit{Rosato}, and similar cases such as \textit{Ammerman} and \textit{Farr}, are signifi-

\textsuperscript{110} Brief for Petitioner for Writ of Certiorari and Request for Stay at 2, Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (Ct. App. 1975). The petitioners claimed that the legislature's purpose in drafting such a statute was to elevate the newspaper's privilege to the status enjoyed by more established privileges such as the attorney-client privilege. The petitioners reasoned that the shield law would be useless unless construed broadly. They contended that there were five questions relating to the privilege: 1) which journalist had the actual contact with the source; 2) where such contact was made; 3) the time of the contact; 4) how the information was actually obtained; and 5) the form which the information took when received. As to factors 2 to 4, it can be readily seen that disclosure of such information could easily provide leads to finding the source. While the judicial approach generally refused to give credence to these claims, in a jurisdiction which has statutorily recognized a newspaper's privilege, it would appear to defeat the legislative purpose in enacting such a statute if there could be forced disclosure of such leading information. As to factor 5, there is a possibility that this information could lead to the source, but it is not as compelling as the preceding factors. Factor 5 would seem to go more to CAL. EVID. CODE § \textit{1070(a) and (c) (West 1966)}, which protects unpublished information. An admittedly weak argument could be made that, since only excerpts of the transcript were published, disclosure of the form of the published information could lead to disclosure of protected unpublished information. The first part, however, which is the identity of the reporter who had actual contact with the source, is less susceptible of protection by a statutory privilege. It has been demonstrated that a reporter-source privilege, regardless of its status in relation to other privileges, is necessarily different in one important respect: the privilege is that of the journalist, not that of the communicant. See note 64 supra and accompanying text. There seems to be little reason why the identity of the journalist should be protected.


\textsuperscript{112} 51 Cal. App. 3d at 218-19, 124 Cal. Rptr. at 446.

\textsuperscript{113} \textit{Id.} at 224, 124 Cal. Rptr. at 450. Thus, the court proceeded to determine, on an individual basis, which questions were permissible. These included:
cant because they involve a constitutional confrontation problem such as was encountered in the judicial balancing approach. While Rosato narrowed the scope of the Farr court's blanket rejection of the shield statute by holding the statute inapplicable only when the court is involved in determining if court officers have violated court orders, the holding still has a limitation — the separation of powers doctrine. The court refused to find that the legislative branch could invade the judicial province of keeping its own house in order. Thus, the legislature, it seems, can go only so far in protecting journalists; no shield statute can give them unqualified protection from non-disclosure if it purports to impinge on the separation between the government branches. Therefore, while a shield statute gives more protection to the journalist than the judicial approach with its balancing test, the degree of protection is still not absolute. Even in those jurisdictions in which the legislature has acted, the journalist will still act at his own peril in some circumstances

B. Shield Laws in the Federal System

The federal shield law can be described in one word: non-existent. Although there has been a continuing effort to persuade Congress to pass such a law, this effort has met with failure.114

In codifying the Federal Rules of Evidence, Congress was faced, in the original draft, with thirteen rules pertaining to non-constitutional privileges115 which were to be recognized by the federal courts. The House Committee on the Judiciary rejected these, however, and adopted

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114 See, e.g., H.R. 172, 94th Cong., 1st Sess. (1975) (creating an absolute privilege before Congress, any court, grand jury, or administrative body); H.R. 215 94th Cong., 1st Sess. (1975) (creating a qualified privilege before any federal or state proceedings); H.R. 562, 94th Cong., 1st Sess. (1975) (creating an absolute privilege before Congress or any federal court or administrative body); H.R. 6228, 94th Cong., 1st Sess. (1975) (creating an absolute privilege subject to certain conditions). From the Seventy-first Congress to the Eighty-eighth, 23 bills creating a newperson's privilege were introduced, eight of which were in the Senate. None were passed. STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH Cong., 2d Sess., The Newsman's Privilege (Comm. Print 1966).

115 The privileges included: lawyer-client, physician-patient, psychotherapist-patient, husband-wife, religious (clergyman-confidant), political vote, trade secrets, governmental, and identity of government informant. There was no journalist privilege.
Federal Rule of Evidence 501\(^6\) which, in effect, left the law regarding privilege as it stood, to be developed by federal courts under a uniform standard applicable to civil and criminal cases.\(^1\) That standard was to be derived from the Federal Rules of Criminal Procedure.\(^2\) The Committee on the Judiciary included a provision in the rule which required the application of state law for privileges in civil actions and proceedings when the issue is substantive rather than procedural.\(^3\) The rationale was to preclude federal law from superceding state law in substantive areas and to prevent forum shopping in civil actions.\(^4\)

While there is no federal shield statute, the Department of Justice has developed guidelines for government use when it is necessary to subpoena members of the media.\(^5\) The guidelines were established to balance the need to protect the freedom of the press with the Department of Justice's obligation to the fair administration of justice. Thus, the thrust of the guidelines is that, before issuing subpoenas to newsspersons, all reasonable attempts to obtain the information by other means should be exhausted. If it becomes necessary to seek the information from the media, negotiations should be attempted in order to reach an accommodation. If negotiations should fail, express permission of the Attorney General is necessary before a subpoena can be issued.\(^6\) The guidelines further provide standards and conditions under which such subpoenas may issue, as well as the subsequent questioning of the journalist. An important aspect of the guidelines is that if a subpoena is issued without the necessary authorization, the Justice Department will move, as a matter of course, to quash without prejudice.\(^7\) While these guidelines do not grant an evidentiary privilege to the press, they do express a federal concern for journalists' rights. This concern, however, is not the same as the protection which would be afforded by a federal shield law.

The problems inherent in enacting a federal shield law are the same as those encountered in states which have passed shield laws, with one addition; that is, whether Congress can enact a privilege which would be binding in state proceedings. Congress, unlike the states, can exercise

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\(^{116}\) Fed. R. Evid. 501.


\(^{118}\) Id. Fed. R. Crim. P.26 stated in pertinent part:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed ... by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

This was the 1973 edition of the Rules, which was subsequently amended. The "light of reason and experience" standard has been incorporated into Fed. R. Evid. 501.

\(^{119}\) See Erie Railroad Co. v. Thompkins, 304 U.S. 64 (1938).


\(^{124}\) 28 C.F.R. § 50.10(c), .10(d) (1977).
only constitutionally enumerated powers. Thus, there must be a clause in the Constitution on which to base congressional enactment of a journalist's privilege.\textsuperscript{124}

As has been suggested, the commerce clause\textsuperscript{125} appears to be a possible source on which to base such a statute. This clause has been given extremely broad application.\textsuperscript{126} Even purely intrastate activities may be regulated if such activities, when combined with others which are similar, affect interstate commerce.\textsuperscript{127} Thus, a restaurant located in a privately owned recreational facility was held to be subject to federal regulation because it served interstate travelers, and because ingredients of the bread and soft drinks served had been obtained out of state.\textsuperscript{128}

It is possible that most aspects of the media could be covered by a federal statute based on the commerce clause. For example, a newspaper which obtained its newsprint, ink, or even the components of its presses outside the state, a news agency which sent reporters to cover out of state stories, or a television or radio network which reached beyond the state of origin could come within the purview of a federal shield law. The possibilities are endless, and it is evident that the courts could find at least one aspect of a news organization which was involved in interstate commerce.

Conceivably, the states would raise the objection that an interpretation of the commerce clause so broad that the enactment of a federal shield statute would encompass most of the media would permit Congress to invade state sovereignty in contravention of the tenth amendment.\textsuperscript{129} Traditionally, the tenth amendment has proved to be a weak foundation for argument, and has been regarded with little favor by the courts.\textsuperscript{130} With the Supreme Court's decision in \textit{National League of Cities v. Usery},\textsuperscript{131} however, this trend may not represent current judicial thinking. The Court held in \textit{National League} that there are certain fundamental areas which must be left to the states to insure their sovereignty. Whether the functioning of the state judicial system is one of these fundamental areas must be left to the future litigation which would likely result upon enactment of a federal shield statute.


\textsuperscript{125} U.S. CONST. art. I, § 8.

\textsuperscript{126} A full analysis of the commerce clause is beyond the scope of this paper. However, mention must be made of this clause in order for the reader to gain an appreciation of its implications with respect to a federal shield statute.

\textsuperscript{127} Fry v. United States, 421 U.S. 542 (1975).


\textsuperscript{129} U.S. CONST. amend. X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

\textsuperscript{130} See, e.g., Sperry v. Florida, 373 U.S. 379 (1963) (the Court held that federal legislation permitting non-lawyers to practice before the United States Patent Office was valid so long as Congress had acted within the scope of its delegated powers); Reina v. United States, 364 U.S. 507 (1960) (the Court held that Congress could grant immunity from state criminal prosecution in furtherance of its ability to effectively exercise one of its powers without impinging on the tenets of the tenth amendment).
III. PRESS DEPENDENCE UPON CONFIDENTIAL SOURCES:  
THE "WHY" OF THE PROBLEM

In 1934, the Newspaper Guild recognized the following journalistic 
canon of ethics: "That newspapermen shall refuse to reveal confidences 
or disclose sources of confidential information in court or before other 
judicial or investigatory bodies, and that the newspaperman's duty to 
keep confidences shall include those he shared with one employer after he 
has changed his employment." Thus, there is a demand by the pro-

fession that journalists keep their sources confidential.

Jack Anderson, author of a nationally syndicated column, stated in an 
affidavit submitted to the House Committee on Standards of Official 
Conduct that he has built up a number of anonymous, credible sources at 
all levels of government who have been invaluable to him in his work. 
These sources have helped him to uncover stories involving major cor-

porate scandals and government deceit. Anderson declared that the 
information communicated by such sources has increased the public's 
knowledge and awareness of government operations and has led to legis-

lative and judicial actions aimed at curbing governmental corruption. 
Without the sources, he claims, many of the abuses would have gone 
undetected.

Anderson views his sources as "people who view their primary obli-
gation as being to principles of open and honest government in a demo-
cratic society. They view deceit and corruption in general as a most 
debilitating force in a democratic form of government. . . . [T]hey are 
anti-corruption." Anderson noted that if access to these sources was 
limited, it would result in a substantial threat to public knowledge of 
government operations.

Frances Barnard, a Washington correspondent, also stated in the 
House of Representatives' hearing on official conduct that many of her 
stories were based upon information given to her by persons who would 
not have revealed their knowledge unless assured of anonymity. Other 
journalists concurred with this assessment.

After conducting an empirical study, two authors found that many 
news stories are indeed based on material provided by confidential 
sources, concluding that restriction of the practice of maintaining 

132 CONG. RSEARCH SERVICE, NEWSMAN'S PRIVILEGE: A TESTIMONIAL PRIVILEGE FOR 
133 Investigation of Publication of Select Comm. on Intelligence Report: Hearings 
bef ore the Comm. on Standards of Official Conduct Pursuant to H.R. 1042, 94th Cong., 
134 Id. at 716.
135 Id. 
136 Id. 
137 Investigation of Publication of Select Comm. on Intelligence Report: Hearings 
bef ore the Comm. on Standards of Official Conduct Pursuant to H.R. 1042, 94th Cong., 2d 
138 Id. at 728-41.
139 Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their
confidential sources could lead to a burden on newsgathering. This contention is supported by the journalists. Robert Dudney, a Dallas reporter, stated that the flow of information to the press would be adversely affected if the sources feared exposure.\(^{140}\) Indeed, Jack Anderson reported that his work has suffered the effects of the efforts to require the disclosure of sources; one White House source expressed fear of retribution if exposed, and refused to continue the relationship.\(^{141}\) In another instance, a California journalist, upon contacting a source for confirmation of a tip, was asked whether he would go to jail to protect the source.\(^{142}\)

The use of confidential informants is not new, nor is it restricted to the press. The government has relied on the practice for many years, and its use generally has been permitted. In Scher v. United States,\(^{143}\) the Supreme Court held that a police informant's identity could remain secret unless it was shown to be essential to the accused's defense. Nearly twenty years later, the government was again permitted non-disclosure of the identity of an informant who had been instrumental in the commission of the crime. In Rovario v. United States,\(^{144}\) the Court held that an informer's privilege of remaining anonymous helped to further and protect the public interest in law enforcement because it helped to encourage citizens to report crimes to the police.

However, the Court found that the privilege was not without limits. For example, it would no longer apply once the informant's identity had been revealed. Further, when the identity or the information given by the informant was "relevant and helpful"\(^{145}\) to an accused's defense or was essential to a fair trial, the privilege had to yield. The Court concluded, therefore, that no set rule regarding an informer's privilege was justifiable. What was instead required was a "balancing [of] the public interest in protecting the flow of information against the individual's right to prepare his defense,"\(^{146}\) necessitating a case by case determination which would take into account all relevant factors.

It is apparent that there is a parallel between the informer's privilege and the journalist's source privilege. The difference lies in the public policy factors involved. In the former, the privilege helps to protect

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**Sources**, 64 NW. U. L. REV. 18, 43 (1969). Both authors, who are members of the Massachusetts bar, conducted a survey of editors of daily newspapers throughout the United States to ascertain how much the press relied on confidential sources.

\(^{140}\) Investigations of Publication of Select Comm. on Intelligence Report: Hearings before the Comm. on Standards of Official Conduct Pursuant to H.R. 1042, 94th Cong., 2d Sess. 723 (affidavit of Robert S. Dudney). Mr. Dudney concluded that requiring disclosure of anonymous sources would "result almost certainly ... in the disappearance of investigative reporting about matters of extreme public interest as we know it today." *Id.*

\(^{141}\) See note 133 supra.

\(^{142}\) *Newsweek* Jan. 15, 1973, at 47.

\(^{143}\) 305 U.S. 251 (1938).

\(^{144}\) 353 U.S. 53 (1957).

\(^{145}\) *Id.* at 60.

\(^{146}\) *Id.* at 62. See also McCray v. Illinois, 386 U.S. 300 (1967) (use of informants in
drug-related relationship *id.*
society against crime, while in the latter the privilege involves the public interest in the free flow of news. Yet, the pre-eminence that the first amendment has held in American law would seem to indicate a much stronger support for the public interest in the free flow of news. The right to a free press has always been characterized as fundamental to the carrying out of the constitutional design.\(^{147}\) The press has played the role of societal watch-dog, keeping the government in check.\(^{148}\) Consequently, the policies which mitigate against a journalistic privilege should not be regarded as paramount.

A set of four conditions necessary to the establishment of a testimonial privilege have been formulated: the information must be related in confidence with the understanding that it will remain undisclosed, the element of confidentiality must be an essential part of the relationship between the communicant and the confidant, the relationship must be one which the community has an interest in fostering, and the injury to the relationship which would result from disclosure must outweigh the benefit which is gained for the correct disposition of the litigation.\(^{149}\)

The journalist's privilege certainly fits this pattern. The crux of the relationship between the reporter and the source is the understanding that the source will not be disclosed. The community has an interest in the preservation of the relationship because it adds to the store of information disseminated. The fourth condition involves a balancing test for which there is no conclusive answer, but the argument can be, and has been made that the public detriment resulting from forced disclosure exceeds that resulting from non-disclosure.\(^{150}\)

IV. CONSIDERATIONS FOR THE FUTURE

As demonstrated above, the approach which has been taken by some courts\(^{151}\) toward the question of journalists' privilege is both unrealistic and unreasonable. The courts must recognize that the constitutional system does confer a fundamental role upon the press, and that the judiciary must be as helpful as it can in aiding the press in carrying out that role. The courts must also recognize the professional ethics of journalism,

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\(^{147}\) See, e.g., Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. State, 308 U.S. 147 (1939).


\(^{149}\) S J. Wigmore, EVIDENCE § 2985, at 527 (McNaughton rev. 1961).

\(^{150}\) See STAFF OF SENATE COMM. ON THE JUDICIARY, 89th CONG., 2d SESS., THE NEWSMAN'S PRIVILEGE 15 (Comm. Print 1966). The report indicated that Wigmore's four criteria are not met: the informant's identity is confidential whereas both parties are usually known; the communicated information is disclosed whereas it usually remains confidential; the privilege belongs to the journalist and only he may waive it, whereas the privilege is usually that of the communicant; and the journalist may assert the privilege in connection with any information received by him whether confidential or not, whereas the usual privilege inures only to confidential information.

\(^{151}\) Branzburg v. Hayes, 408 U.S. 665 (1972). The Court completely abrogated the existence of a privilege for non-disclosure of a source by journalists, albeit it was limited by language in the ground for In re Tyrone. See notes 30-33 supra and accompanying text.
and accept those ethics whenever possible. This means that before subpoenas are issued, negotiation should be attempted with the journalist involved, and an honest effort made to reach a compromise.

The press must recognize that it walks a precarious line, especially with respect to pre-trial publicity. The rights of the defendant must be considered, which will often require the journalist to make value judgments as to what to publish or broadcast and what to withhold. In some cases the journalist will have to choose the side of restraint. It is also obvious that no reasonable request for information should be denied. Much litigation and animosity could be avoided if the courts and the media could reach accommodation through negotiation.

Total reliance should not be placed on shield laws, for their constitutionality is open to question. Where they exist, however, the courts should respect the obvious intent of the legislation and allow compulsion only in extreme and unusual circumstances. In any case, a journalist should be subpoenaed only as a last resort, and every means of gathering the information required should first be exhausted no matter how burdensome.

A federal shield law would do much to alleviate the problems inherent in a privilege for journalists. Such a statute should confer upon news persons the right to keep their sources and information confidential. This right must be qualified, however, so that in exceptional circumstances it must yield, particularly when a defendant would be denied the right to a fair trial. When the exception does arise, the burden of proving the need for the information should rest with the party urging the abrogation of the privilege. If the court determines that the information is essential, the journalist should be permitted to disclose it in camera before the court.

No statute will solve all the problems, but an established set of rules, both procedural and substantive, will at least permit reporters generally to ascertain in advance the full ramifications of refusal to disclose confidential sources.

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