

# THE REPORTER'S PRIVILEGE: AN ANALYSIS OF THE COMMON LAW, *BRANZBURG v. HAYES*, AND RECENT STATUTORY DEVELOPMENTS

Paul Marcus\*

## INTRODUCTION

Reporters<sup>1</sup> believe strongly that confidential sources are essential to successful investigative reporting.<sup>2</sup> Without them, it is argued, the traditional "undisclosed informant" would not exist, drying up many rich sources of information for the media.<sup>3</sup> This point was forcefully made by the reporters in perhaps the most famous investigation of all time.

To the President's other men and women—in the White House and elsewhere—who took risks to provide us with confidential information. Without them there would have been no Watergate story told by the Washington Post.<sup>4</sup>

The reporter's belief in the need for the protected, confidential source has strong roots in our history<sup>5</sup> and has been incorporated in the American Newspaper Guild's Code of Ethics: "Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or

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\* Dean and Professor of Law, University of Arizona, College of Law. A.B., 1968; J.D., 1971, University of California at Los Angeles.

1. The term "reporters" is used throughout this article to include members of all forms of media who are involved in the newsgathering process. The definitional niceties presented by the statutory term will be explored *infra* in the text accompanying notes 363-67.

2. Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 245-46 (1971). Blasi noted that confidential informants aid in several areas: "not-for-attribution quotations," verification of other sources, and assessment of the information which should be emphasized in a story.

3. Blasi conducted an empirical study of reporters and concluded that many thought that dependence on confidential sources was important to the reporters' ability to function effectively. *Id.* at 247.

4. C. BERNSTEIN & B. WOODWARD, *ALL THE PRESIDENT'S MEN* 7 (1974).

5. Even the Federal Papers were published under the cloak of anonymity. See the discussion in *Talley v. California*, 362 U.S. 60, 65 (1960) and in *Morgan v. State*, 337 So. 2d 951, 953 (Fla. 1976).

before judicial or investigative bodies."<sup>6</sup>

The reporter's privilege claim is not of recent vintage. What has developed in the twentieth century is a confrontational battlefield in which the claimed privilege often clashes with other interests. This can occur in several ways. In a criminal proceeding the accused may subpoena the reporter and request notes of interviews with witnesses<sup>7</sup> or copies of documentary evidence.<sup>8</sup> In a civil action the reporter may herself be a party and have evidence relevant to the cause of action<sup>9</sup> or, as a non-party, she may have information which will assist the parties in the presentation of the case.<sup>10</sup>

As we shall see,<sup>11</sup> courts have been loath to allow the claimed privilege to be asserted, especially in civil cases in which the reporter is a party or in criminal prosecutions where the evidence could prove dispositive.<sup>12</sup> As stated by one court: "The rights of the press under the First Amendment can never exceed the rights of a defendant to a fair and impartial trial."<sup>13</sup> As this quote indicates, two competing interests can often be raised in this context. The first is the concern that there be a full and fair judicial proceeding at which all relevant evidence is presented. The other is that presented in the first amendment. Justice Black made the argument well: "The press was protected so that it could bare the secrets of government and inform the people."<sup>14</sup>

The problem has been particularly vexing in recent years. Reporters have been vehement in their opposition to subpoenas and other court orders involving confidential sources. This opposition has manifested itself in a willingness to pay fines and even to go to jail.<sup>15</sup> The problem has been all the more vexing within the last two decades because courts and legislatures have recognized the need both for full disclosure in many cases<sup>16</sup> and

6. Cited in Comment, *Newsman's Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy*, 49 TUL. L. REV. 417, 418 n.7 (1975).

7. See, e.g., *People v. Iannaccone*, 112 Misc. 2d 1057, 447 N.Y.S.2d 996 (1982).

8. See, e.g., *People v. Dupree*, 88 Misc. 2d 791, 338 N.Y.S.2d 1000 (1976) (news photos which would allegedly have shown the trajectory of the bullets in a murder case).

9. For a good discussion of cases in which the media is the subject of libel actions, see Note, *Source Protection in Libel Suits After Herbert v. Lando*, 81 COLUM. L. REV. 338 (1981).

10. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

11. See *infra* notes 21-46 and accompanying text.

12. See Comment, *Reporter's Privilege*, 58 DENVER L.J. 681 (1981); Comment, *Developments in the News Media Privilege*, 33 MAINE L. REV. 401 (1981) [hereinafter cited as Comment, *Developments*].

13. 158 N.J. Super. 488, 492, 386 A.2d 466, 470 (1978).

14. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (concurring opinion). See also Justice Harlan's statement in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967): "[It was] the intent of the Founders. . . that a free press would advance 'truth, science, morality and arts in general' as well as responsible government." *Id.* at 147.

15. Some penalties have been relatively minor, as in *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5 (2nd Cir.) (\$100 per day fine), *cert. denied*, 103 S. Ct. 215 (1982) and *United States v. Cuthbertson*, 630 F.2d 139 (3rd Cir.) (\$1 per day fine), *cert. denied*, 449 U.S. 1126 (1981). *But see In re Farber*, 78 N.J. 259, 394 A.2d 330 (40 days in jail, fine of \$285,000), *cert. denied*, 439 U.S. 997 (1978) and *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976) (reporter initially sentenced to six months imprisonment). Questions have been raised over the effectiveness of any form of imprisonment or fine in this area. See Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 863 (1974).

16. See generally *United States v. Nixon*, 418 U.S. 683 (1974). "The need to develop all

for protection of sources.<sup>17</sup> The resolutions we have seen have been neither wholly satisfactory nor complete, for the process requires a "delicate balance of interests."<sup>18</sup>

It is this writer's view that it is important to recognize a qualified privilege for reporters in both criminal and civil cases. It is essential that the first amendment interests of the press in gathering and disseminating information be supported through the privilege avenue. On the other hand, in cases in which information cannot be obtained from other sources and where disclosure is essential to the disposition of the case, the media representatives should not be allowed to claim a first amendment shield from disclosure. The traditional common law position was a flat refusal to consider the media argument. We look first to that position, then turn to the Supreme Court's puzzling opinion in *Branzburg v. Hayes*,<sup>19</sup> and finally consider a proper resolution of the problem.

### THE COMMON LAW APPROACH

Reporters in the United States "have a long history of protecting the confidentiality of their news sources."<sup>20</sup> Great figures in our history have been involved in this process when directed by courts and legislatures to appear and give information. Benjamin Franklin's half-brother was brought before a committee of the legislature and told to reveal the name of an author of a story in his newspaper. When Franklin refused, he was imprisoned for a month.<sup>21</sup> Twelve years later, in 1734, John Peter Zenger, who had been in jail for libelling the governor, refused to give the sources of his information. After remaining in jail for nine months, Zenger was tried and acquitted.<sup>22</sup> The earliest reported judicial decision is generally thought to be *Ex parte Nugent*<sup>23</sup> in 1848. Nugent was a newspaper reporter who had obtained secret documents concerning a proposed treaty to terminate the war with Mexico. The United States Senate subpoenaed him, but he refused to disclose his source. The Senate jailed Nugent after holding him in contempt, and his habeas corpus petition was unsuccessful.<sup>24</sup> This long history of defiance by reporters has continued to the present time, with numerous cases<sup>25</sup> being decided in which reporters have

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relevant facts in the adversary system is both fundamental and comprehensive . . . The very integrity of the judicial system . . . depends on full disclosure. . . ." *Id.* at 709.

17. See *infra*, text accompanying notes 320-55.

18. *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir.), *cert. denied*, 449 U.S. 1126 (1981).

19. 408 U.S. 665 (1972).

20. Day, *Shield Laws and the Separation of Powers Doctrine*, 2 COM. AND THE LAW 1, 3 (1980).

21. Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. LEG. 233, 234 (1974).

22. See M. VAN GERPEN, *PRIVILEGED COMMUNICATION AND THE PRESS* 5-6 (1979).

23. 18 F. Cas. 471 (no. 10,375) (D.C. Cir. 1848).

24. See discussion in Comment, *The Fallacy of Farber: Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases*, 70 J. OF CRIM. LAW AND CRIMINOLOGY 299, 301-02 (1979).

25. See, e.g., *Clein v. State*, 52 So. 2d 117 (Fla. 1950); *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911), and other cases cited in Comment, *Branzburg v. Hayes: A Need for Statutory Protection of News Sources*, 61 KY. L.J. 551, 552-53 (1972). See also Note, *Evidentiary Privilege*, 6 U. DAYTON L. REV. 251 (1981). As stated in Saxon, "Cases Against Reporters Increase," *New*

gone to jail rather than reveal sources.<sup>26</sup>

While the empirical data in this area is notoriously incomplete,<sup>27</sup> it is indisputably certain that the problem of reporters refusing to disclose sources is not new but is one which the common law had to confront frequently.<sup>28</sup> It is just as certain that historically judges did not grant the privilege, at least not expressly.<sup>29</sup>

Until recently, many judges adopted Professor Wigmore's test for determining whether a privilege should be granted.

1. The communications must originate in a *confidence* that they will not be disclosed;
2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
3. The *relation* must be one which in the opinion of the community ought to be sedulously fostered; and
4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.<sup>30</sup>

Accordingly, few judges had difficulty rejecting the media's position.

In general . . . the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. . . . No pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice. . . . Accordingly, a confidential communication . . . to a journalist . . . is not privileged from disclosure.<sup>31</sup>

Two chief reasons have been given for the rejection of the reporter's privilege at common law. The first, and principal, ground is that *any* privilege restricts the flow of evidence at trial and thus should be granted only rarely. The Supreme Court of Idaho stated the view succinctly: "New testimonial privileges are disfavored since they obstruct the search for the truth."<sup>32</sup> In essence, courts traditionally have taken the view that it is the

*York Times*, July 25, 1978, at B1, col. 1: "Contempt-of-court proceedings against journalists refusing to disclose their sources are a fairly new phenomenon that multiplied in the 1970's despite laws adopted in many states to protect a reporter's confidential information."

26. There have been few instances in which reporters have disclosed in response to a threat of fine or imprisonment. See Comment, *supra* note 6, at 417.

27. Justice White seized upon this point in *Branzburg*. See *infra* text accompanying notes 73-76. See generally Comment, *The Newsman's Privilege After Branzburg v. Hayes: Wither Now?*, 64 J. OF CRIM. L. & CRIMINOLOGY 218, 231 (1973).

28. The claimed privilege is not limited to members of the media. Some academic scholars have also refused to disclose sources. See *United States v. Doe*, 460 F.2d 328 (1st Cir. 1972), *cert. denied*, 411 U.S. 909 (1973).

29. "There can be little dispute that the common law recognized no privilege which would support a newspaper or reporter in refusing, upon proper demand, to disclose information received in confidence." *United States v. Liddy*, 354 F. Supp. 208, 214 (D.D.C. 1972). See also Comment, *supra* note 27, at 227.

30. J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961) (emphasis in original). See generally Note, *Shielding Editorial Conversations from Discovery: The Relationship Between Herbert v. Lando and Oregon's Shield Law*, 59 OR. L. REV. 477, 481 (1981); Comment, *supra* note 25, at 552; Comment, *Developments*, *supra* note 12, at 40.

31. Wigmore, *supra* note 30, at § 2286.

32. *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 291, 562 P.2d 791, 794, *cert. denied*, 434 U.S. 930 (1977). See also Wigmore, *supra* note 28, at § 2192: "It has . . . been recognized as a fundamental maxim that the public . . . has a right to every man's evidence."

responsibility of each person to give evidence in open court<sup>33</sup> unless a strong policy reason dictates a privilege.<sup>34</sup>

The other reason given for rejecting the reporter's privilege is that such protection would not necessarily improve the free flow of accurate information.

. . . Superior protection from forced disclosure of news sources may also mean merely that journalists are at greater liberty to *invent* the news; a priori, greater immunity from having to validate a story plainly can be as much of an incentive for sensationalized fiction as for the fearless reporting of actual corruption.<sup>35</sup>

Upon analysis, these reasons for rejecting the privilege do not appear powerful. While it is no doubt true that we should do all we can to promote the free flow of evidence in court, we have traditionally excluded numerous sources of information because of the policies served by such exclusion. The law does not require the priest to discuss a confidential communication because, as a matter of policy, it is believed that the need for evidence is outweighed by the need to maintain this sort of confidential relationship. Hence, it is not enough to say that the law wishes to encourage full disclosure at trial;<sup>36</sup> the real question is whether the need for evidence outweighs, in *all* cases, the claimed need for a confidential relationship. I do not believe that such a showing can *always* be made.

As to the second ground, the encouragement of accurate reporting, it is difficult to understand how the rejection of a privilege supports more responsible reporting. Particularly in criminal cases, one might legitimately ask what incentive there would be generally to invent stories or facts in stories.<sup>37</sup> If such an incentive exists, the presence or absence of a privilege would appear somewhat irrelevant. Moreover, and further to the point, there is simply no evidence to support the view that a privilege creates greater liberty to invent stories or portions of stories. No showing has even been made that, for instance, reporters for the *Baltimore Sun* have

33. [T]he longstanding principle that "the public . . . has a right to every man's evidence," except for those persons protected by a constitutional, common-law, or statutory privilege, is particularly applicable to grand jury proceedings.

These are recent reaffirmations of the historically grounded obligation of every person to appear and give his evidence before the grand jury. "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." And while the duty may be "onerous" at times, it is "necessary to the administration of justice."

*United States v. Dionisio*, 410 U.S. 1, 9-10 (1973). See also *Joslyn v. People*, 67 Colo. 297, 303, 184 P. 375, 377 (1919) ("A witness may not refuse to testify because such testimony may influence civil litigation in which he is interested. For the same reason he may not refuse to testify because he considers the matter inquired about as his 'private, confidential, and personal business.'").

34. Policy forms the basis for such well accepted privileges as the attorney-client privileges and doctor-patient communications.

35. Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 16 (1980).

36. Of course, many of the cases never involved a *trial* issue at all and were never likely to. In such cases (grand jury investigations, civil discovery) the support for compelled disclosure becomes somewhat more problematic.

37. This is all the more obviously true when one considers that the reporter—with or without privilege—may be subject to libel actions. Before the constitutionalization of the tort—see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)—this was a relatively potent weapon for the unjustly accused.

been more "creative" with the facts than reporters for the *Houston Post* because Maryland has had a statutory reporter's privilege for almost one hundred years and Texas has not. In some cases reporters may exaggerate or even lie, but surely it would be impossible to demonstrate that they are more or less inclined to do so because of the existence or nonexistence of a privilege.

While common law judges have expressly rejected the privilege, they would appear to have accepted the criticism of the reasons given for rejecting it. That is, while no common law case existed<sup>38</sup> in explicit support of the privilege, judges were not at all tough in their treatment of journalists who refused to disclose sources. Some judges for "technical reasons" refused to compel disclosure; others, while ostensibly ordering disclosure, imposed remarkably weak penalties for those who failed to comply.<sup>39</sup> We are, therefore, left with the anomaly of the common law. Judges expressly rejected a reporter's privilege, yet when faced with refusal to divulge information, those same judges exercised great leniency.

In recent times, the problem has been exacerbated. More forms of media devote more effort to investigative reporting,<sup>40</sup> resulting in the creation of more confidential relationships between reporters and informants.<sup>41</sup> As a consequence, there has been a good deal of litigation in the last two decades in which reporters have been directed to disclose sources.<sup>42</sup> Not surprisingly, there has also been a parallel, sharp increase in the number of states which now provide statutory privileges for reporters.<sup>43</sup> Unfortunately, the state statutes do not provide a uniform manner of treatment of the problem and there is no federal rule which would apply on a nationwide basis. Because of the extremely difficult balancing of interests present in cases in which the privilege is raised,<sup>44</sup> there was optimism that the United States Supreme Court's decision in *Branzburg v. Hayes* would finally resolve many of the difficulties. The optimists, however, were greatly disappointed.

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38. There were no common law cases until recently, with the development of the federal common law privilege. See *infra* and notes 179-83 and accompanying text.

39. See Comment, *supra* note 27, at 227.

40. Carley, "Bad Reception: As TV News Reporting Gets More Aggressive It Draws More Suits," *Wall St. Journal*, Jan. 21, 1983, at 1.

41. Blasi, *supra* note 2, at 252-53.

42. See generally Murasky, *supra* note 15, at 830 ("There are numerous indications that the conflict between a journalist's asserted right to protect his confidences and a government tribunal's right to compel disclosure of such confidences has recently intensified"); Comment, *supra* note 27, at 221 ("In recent years there has been a vast increase in the number of subpoenas served upon the press"); Comment, *Journalism's Privilege: In re Farber and the New Jersey Shield Law*, 32 *RUTGERS L. REV.* 545, 546-47 (1979) ("In the last decade more frequent use of subpoenas against journalists increased the media's demand for a reporter's privilege.").

43. For many years Maryland stood alone in its adoption of a statutory reporter's privilege. The Maryland statute, passed in 1896, is discussed in *Lightman v. State*, 15 Md. App. 713, 294 A.2d 149, *aff'd*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973). Indeed, no other state adopted a statutory privilege until 1933. See Day, *supra* note 20, at 3. For a discussion of the state laws, see *infra* text accompanying notes 320-73.

44. As Judge Coffin has stated, "The task is one that . . . defies formula." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980).

*BRANZBURG V. HAYES*<sup>45</sup>A. *The Facts*

Three separate actions were consolidated for consideration by the Supreme Court in *Branzburg*. Because much of the Court's opinion centers on one of the three cases, and because that case involved a contrary federal circuit court opinion, the facts in *Caldwell v. United States* will be emphasized here.<sup>46</sup> Earl Caldwell, a reporter for the *New York Times*, was assigned to cover the Black Panthers on the West Coast in the late 1960's. During the year 1969, Caldwell wrote numerous articles about the Black Panthers and interviewed one of the Panther leaders, David Hilliard. In one of these articles, Caldwell pointed out that Hilliard had made reference to his desire to kill then-President Richard Nixon. This statement was reiterated by another member of the Black Panther Party in a publicly televised speech.<sup>47</sup>

Several subpoenas were issued, the main one simply ordering Caldwell "to appear . . . to testify before the Grand Jury."<sup>48</sup> The grand jury at that time had been investigating the "aims, purposes and activities" of the Black Panther organization.<sup>49</sup> Caldwell moved to quash the subpoena and requested a protective order from the District Court arguing that he was "constitutionally protected from appearing"<sup>50</sup> before the grand jury.<sup>51</sup> The trial judge agreed with the view that under some circumstances Caldwell need not divulge confidential sources. "[H]e need not reveal confidential associations that impinge upon the effective exercise of his First Amendment right to gather news . . . until such time as a compelling and overriding national interest which cannot be alternatively served has been established to the satisfaction of the Court."<sup>52</sup> The judge disagreed, however, with the assertion that Caldwell did not even have to appear before the grand jury, and found him in contempt of court. The Ninth Circuit concurred with the conclusion that Caldwell did not have to reveal confidential sources, but went on to find that Caldwell did not have to appear before the grand jury absent a showing of "compelling need" for the appearance.<sup>53</sup>

While broad arguments were put forth by some of the parties<sup>54</sup> the

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45. 408 U.S. 665 (1972).

46. The other two consolidated actions also involved reporters. Paul Branzburg was a reporter for a Kentucky newspaper who refused to give information to the grand jury concerning the making of hashish which he had witnessed. Paul Pappas was a reporter for a Rhode Island television station who had been present in a Black Panther meeting hall during riots in Massachusetts. Before the grand jury, Pappas declined to state what he had been told while in the hall (although he did testify as to what he had seen outside the hall).

47. 408 U.S. at 677.

48. *Id.* at 676.

49. *Id.* at 675.

50. See Goodale, *Branzburg v. Hayes and Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 712 (1975). Mr. Goodale was counsel for the *New York Times* in *Caldwell*.

51. This was the same position taken by both Branzburg and Pappas. See *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971); *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971).

52. 311 F. Supp. 358, 360 (N.D. Cal. 1970).

53. 434 F.2d 1081, 1089 (9th Cir. 1970).

54. See especially the argument made by Branzburg: "Branzburg argued that the state has

amici,<sup>55</sup> and by commentators,<sup>56</sup> the facts in the case actually did not call for a broad opinion which would be dispositive of the issues that might arise in all source cases. As Judge Wright pointed out in a recent case,<sup>57</sup> the facts in *Branzburg* were quite limited (and "especially compelling"):

First, each of the reporters called to testify was himself an eyewitness to the alleged criminal activity under investigation by the grand jury. As a result, the case for disclosure was much stronger than in the more common instance where the reporter has merely been informed of such activity. . . . Moreover, in *Branzburg* all three reporters refused not merely to respond to specific questions posed by the grand jury, but even to appear before the grand jury in answer to five of the six subpoenas. Clearly, refusal to appear presents a far more sweeping claim of privilege from a citizen's duty to offer evidence than does a refusal to answer selected questions or provide specific documents. Finally, in *Branzburg* there was no question that the grand juries were operating in good faith and were in the process of discharging their legitimate function of investigating crime.<sup>58</sup>

The reporters' argument to the court was deceptively straightforward. They argued that newsgathering often requires an agreement not to identify a source or to publish only a part of the information revealed by the source; and that forcing the reporter to reveal these confidences to a grand jury will deter sources from furnishing information, to the detriment of the freedom of communication protected by the first amendment.<sup>59</sup> Moreover, the Court made clear that the reporters did not "claim an absolute privilege against official interrogation in all circumstances."<sup>60</sup> Still, the difficult question was put at issue: "Whether a newspaper reporter who has published articles about an organization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in the published articles."<sup>61</sup> The media argued that it should not have to testify or even appear before the grand jury unless the reporters had information relevant to a crime, the information was unavailable from any other source, and the "need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure."<sup>62</sup>

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the heavy burden of proving that the testimony of the reporter is absolutely necessary to prevent direct, immediate and irreparable prospective damage to the national security, human life and liberty." Goodale, *supra* note 50, at 714.

55. Among others, the following filed briefs: Radio Television News Directors Association, Office of Communication of the United Church of Christ, American Society of Newspaper Editors, American Civil Liberties Union, and National Press Photographers Association. 408 U.S. at 666-67.

56. See, e.g., Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18 (1969).

57. *Reporters Com. v. American Tel. & Tel.*, 593 F.2d 1030, 1095 n.33 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979) (Wright, J., dissenting).

58. For a particularly good discussion of the limiting facts in *Branzburg*, see *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972).

59. 408 U.S. at 679-80.

60. *Id.* at 680.

61. *Id.* at 679 n.16.

62. *Id.* at 680.



## B. *The Plurality Opinion*

Before turning to an analysis of Justice White's plurality opinion<sup>63</sup> it is important to note what the petitioners in *Branzburg* did not request. They specifically did *not* request an absolute privilege which would allow them to ignore inquiries from the grand jury under *all* circumstances. Counsel for Caldwell and the New York Times<sup>64</sup> argued "that so drastic an incursion upon First Amendment freedoms should not be permitted 'in the absence of a compelling governmental interest—not shown here—in requiring Mr. Caldwell's appearance before the grand jury.'"<sup>65</sup> In dissent Justice Douglas understood this position well, for he railed against it. "The New York Times, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government."<sup>66</sup>

Strangely, Justice White either misconstrued the reporters' position, or chose to interpret it as encompassing an assertion of absolute privilege. Indeed, much of the opinion is written as if the media representatives had specifically requested that the Court announce an absolute first amendment privilege.<sup>67</sup> The reporters' argument, though, was straightforward and hardly advocated an absolute privilege. They asserted that certain showings must be made before a reporter could be forced to appear or testify before a grand jury or at trial: possession by the reporter of information relevant to a crime under grand jury investigation, unavailability of the information from other sources, and a sufficiently compelling need for the information to override the invasion of first amendment interests.<sup>68</sup>

The starting point for Justice White was to evaluate the purported restrictions the criminal justice system imposed on the media by requiring reporters to appear before grand juries and answer questions. For the four plurality Justices, the restrictions were not overly severe.

But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no

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63. The Chief Justice and Justices Black and Rehnquist joined in the opinion. Justice Powell filed a concurring opinion. Justices Douglas, Stewart, Brennan, and Marshall dissented. See discussion *infra*.

64. The *New York Times* was represented by Yale Law Professor Alexander Bickel. For a review of his argument before the Court, see *infra* text accompanying notes 139-40.

65. 408 U.S. at 676.

66. *Id.* at 713 n.1. Citing the brief filed by the *New York Times*:

The three minimal tests we contend must be met before testimony divulging confidences may be compelled from a reporter are these: 1. The government must clearly show that there is probable cause to believe that the reporter possesses information which is specifically relevant to a specific probable violation of law. 2. The government must clearly show that the information it seeks cannot be obtained by alternative means, which is to say, from sources other than the reporter. 3. The government must clearly demonstrate a compelling and overriding interest in the information.

Brief for *New York Times* as *Amicus Curiae* at 29.

67. "If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them, it would appear that only an absolute privilege would suffice." *Id.* at 702 (emphasis added).

68. *Id.* at 680.

penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.<sup>69</sup>

Justice White was unable to express much sympathy for the reporters when he found that, even in the absence of a common law privilege,<sup>70</sup> reporters historically were able to function effectively.<sup>71</sup> He then asked the question which springs into the mind of any lawyer reviewing the claim of imposition on first amendment rights: What evidence is there to show a genuinely serious interference with press process?

The parties in *Branzburg* had assembled substantial evidence in support of their claim of interference with the press process.<sup>72</sup> Affidavits had been filed by prominent news professionals<sup>73</sup> indicating that a lack of a reporter's privilege was a serious restriction on the gathering and dissemination of the news.<sup>74</sup> Yet, not surprisingly, the empirical data was not clear. In studies conducted before the Court's opinion was issued, some journalists were able to say that they relied heavily on the confidential source, while others were unable to make that statement.<sup>75</sup>

For Justice White, the evidence was inconclusive in two significant respects. First, he was uncertain "how often and to what extent informers are actually deterred from furnishing information when newsmen are

69. *Id.* at 681-82.

70. See *supra* notes 20-45 and accompanying text.

71. We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

408 U.S. at 698.

72. See generally Comment, *supra* note 6, at 619-20.

73. Newscaster Walter Cronkite filed an affidavit with the Ninth Circuit in the *Caldwell* case. He stated:

Particularly disturbing to me has been a marked increase, recently, in the reticence of my confidential sources in government itself. These sources, some of whom have in the past been instrumental in exposing instances of governmental abuse or corruption, now tell me that, because of the increasingly widespread use of subpoenas to obtain names and other confidential information from reporters, they are fearful of reprisals and loss of jobs if they are identified by their superiors as sources of information for newsmen.

74. Blasi analyzed the evidence in some detail. See Blasi, *supra* note 2.

75. The Court cited one example:

A number of editors of daily newspapers of varying circulation were asked the question, "Excluding one- or two-sentence gossip items, on the average how many stories based on information received in confidence are published in your paper each year? Very rough estimate." Answers varied significantly, e.g., "Virtually innumerable," Tucson Daily Citizen (41,969 daily circ.), "Too many to remember," Los Angeles Herald-Examiner (718,221 daily circ.), "Occasionally," Denver Post (252,084 daily circ.), "Rarely," Cleveland Plain Dealer (370,499 daily circ.), "Very rare, some politics," Oregon Journal (146,403 daily circ.).

408 U.S. at 694 n.32.

forced to testify before a grand jury."<sup>76</sup> Second, even if some informers would be unavailable because of a rejection of the privilege, the plurality was not persuaded that preservation of the confidentiality of the informant would "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."<sup>77</sup>

This latter point was central to the disposition of the case by the four Justices.<sup>78</sup> It was not enough for the media representatives to come forth with evidence of restrictions on their reporting capabilities that would be imposed by a rejection of the privilege. Even if the Court were to believe this evidence,<sup>79</sup> the question remained whether the newsgathering/dissemination function should "take precedence" over the grand jury function.

The Court emphasized heavily the role of the grand jury in the American criminal justice system.<sup>80</sup> The fifth amendment requires grand jury involvement for serious criminal offenses,<sup>81</sup> and "the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming majority of the States."<sup>82</sup> Justice White then turned to the needs of the grand jury with respect to outside witnesses. Noting that the grand jury's "investigative powers are necessarily broad," the Justice wrote that "the grand jury's authority to subpoena witnesses is not only historic . . . but essential to its task."<sup>83</sup> While expressing concern with any negative impact its opinion might have on the dissemination of information, the Court considered the

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76. *Id.* at 693. The point was made even more forcefully elsewhere in the opinion. Nothing before us indicates that a large number or percentage of *all* confidential news sources . . . would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.

*Id.* at 691.

77. *Id.* at 695.

78. It was central also for Justice Powell. See *infra* notes 111-21 and accompanying text.

79. It did not. See, e.g., 408 U.S. at 691.

80. Grand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and "its constitutional prerogatives are rooted in long centuries of Anglo-American history." The adoption of the grand jury "in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice."

*Id.* at 687.

81. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V. See FED. R. CRIM. P. 7(a):

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by indictment or by information.

82. 408 U.S. at 687-88.

83. *Id.* at 688. The Court quoted Jeremy Bentham:

Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpen-

lack of a privilege at common law<sup>84</sup> and the needs of the grand jury, and declined to create a testimonial privilege "rooted in the Federal Constitution."<sup>85</sup>

Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on newsgathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.<sup>86</sup>

Justice White was careful to explain that reporters engaged in protected activities had some constitutional claims which could be made even in the grand jury context.

Finally, as we have earlier indicated, newsgathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.<sup>87</sup>

Moreover, while the Constitution did not require the privilege, it certainly did not prohibit the creation of privileges.<sup>88</sup> Several times in the opinion the Court mentioned that states could enact statutory privileges<sup>89</sup> or that state courts could interpret state constitutions as imposing a privilege.<sup>90</sup>

nyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.

*Id.* at 688-89 n.26 (quoting 4 THE WORKS OF JEREMY BENTHAM 320-21 (J. Bowring ed. 1843)).

84. "A number of States have provided newsmen a statutory privilege of varying breadth, but the majority have not done so. . . ." *Id.* at 689. The Justice remarked that the "creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth." *Id.* at 690 n.29 (citing Wigmore, Morgan, McCormick, Chaffee and Ladd).

85. *Id.* at 689-90.

86. *Id.* at 690-91. Justice White explained that no serious hardship would follow from the Court's decision:

This conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources. Grand Juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas.

*Id.* at 691.

87. *Id.* at 707-08.

88. The issue is not fully settled. See *infra* notes 356-62 and accompanying text.

89. "There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas." 408 U.S. at 706.

90. "It goes without saying, of course, that we are powerless to bar state courts from respond-

The plurality opinion of Justice White in *Branzburg* is a major disappointment. Where one would have hoped for clarity and a thoughtful evaluation of the competing interests, one finds, instead, conclusions based on one major mistaken assumption and on two great leaps of faith. The mistaken assumption is that the media petitioners made no showing that reporters would be adversely affected by a rejection of the reporter's privilege because there was no clear empirical support for this position. It is true that the empirical evidence was not precise on this point. Nevertheless, the showing made by the media representatives was most impressive. They offered extensive surveys which had been made by able non-journalist experts; these surveys gave strong support to the media's position.<sup>91</sup> Additionally, many famous and reputable journalists filed affidavits in strong support of this position.<sup>92</sup>

The Court sidestepped the surveys and opinions by concluding rather neatly that "surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in light of the professional self-interest of the interviewees."<sup>93</sup> No doubt, this conclusion is sound, for some self-interest shows in the affidavits and surveys. Still, the contrary evidence was not strong; nothing indicated that the surveys and affidavits were plainly wrong. Additionally, it is not certain how anyone could prove empirically the claimed adverse impact in an area where first amendment interests conflict with other interests. The Supreme Court in *Chandler v. Florida*<sup>94</sup> recognized the limitations of empirical proof. The Court there allowed for the televising of criminal proceedings over the objection of the defendants. Chief Justice Burger acknowledged the sparse nature of the evidence: "No one has been able to present empirical data sufficient to establish the mere presence of the broadcast media inherently has an adverse effect."<sup>95</sup> The Court found that the "data thus far assembled [were] 'limited' and 'non-scientific.'"<sup>96</sup> By placing the burden on the reporters<sup>97</sup> in *Branzburg*, the Court guaranteed that the media could not prevail. No one could clearly demonstrate an adverse impact on the media by refusing to recognize a privilege.<sup>98</sup> Yet, one might legitimately question

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ing in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." *Id.*

91. For an excellent analysis of the data, see Comment, *Newsman's Privilege to Withhold Information from the Grand Jury*, 86 HARV. L. REV. 137, 147-48 (1972).

92. Documents were filed in *Caldwell* by, among many others, Eric Sevareid, Marvin Kalb, and Dan Rather.

93. 408 U.S. at 694.

94. 449 U.S. 560 (1981).

95. *Id.* at 578-79.

96. *Id.* at 576 n.11.

97. The Court in *Chandler* refused to place the burden on the media representatives. *Id.* at 578-79.

98. In the same way that no one could clearly demonstrate lack of prejudice in the *Chandler* case. But see Marcus, *The Media in the Courtroom: Attending, Reporting, Televising Criminal Cases*, 57 IND. L.J. 235, 284 (1982): "Can anyone doubt that—at least in some cases—the televising of proceedings will have some serious impact on the trial participants, an impact which will not be tangible and will not likely lead to appealable issues?" For a similar argument in the *Miranda* setting, see Kamisar, *A Dissent from the Miranda Dissents*, 65 MICH. L. REV. 59 (1966). With regard to the historical evidence, the conclusions are mixed. On the one hand, it could be argued that no adverse impact could be shown when most states did not recognize the privilege,

why the burden should be on the media when it is obvious that at least in *some* cases the impact will be severe.<sup>99</sup>

The *Branzburg* opinion is also disappointing because it accepts as a matter of faith the proposition that subpoenaed reporters will be sufficiently protected under traditional limitations on the grand jury. These limitations<sup>100</sup> are narrowly confined, as the Court simply reiterated that the grand jury investigation must be "conducted in good faith"<sup>101</sup> and cannot amount to "official harassment."<sup>102</sup> The force of such limitations may be more apparent than real. To prove "official harassment" would be a difficult chore indeed. Moreover, as the United States government conceded in *Branzburg*, the grand jury "need establish no factual basis for commencing an investigation, and can pursue rumors which further investigation may prove groundless."<sup>103</sup> The chief complaint of the media representatives was not the practice of conducting bad faith investigations; rather, the complaint centered on reporters being ordered to appear when the information they possessed was not particularly important and could have been obtained elsewhere.

This latter point, of course, leads to the final leap of faith taken by Justice White and the other plurality Justices. Without any extended discussion, they simply concluded that a *qualified* privilege would unduly interfere with the grand jury function.<sup>104</sup> The *New York Times* proposal for the privilege<sup>105</sup> was that:

- (1) The Government must clearly show there is a probable cause to believe that the reporter possesses information which is specifically relevant to a specific probable violation of law.
- (2) The Government must clearly show that the information it seeks cannot be obtained by alternative means, which is to say, from sources other than the reporter.
- (3) The Government must clearly demonstrate a compelling

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yet reporters were still seemingly able to report effectively. On the other hand, in most states while the privilege was not expressly recognized, few reporters were punished harshly for failure to divulge sources. See *supra* notes 38-39 and accompanying text.

99. Certainly, the empirical evidence offered in *Branzburg* was considerably more persuasive and far-reaching than that offered in either *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) or *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In both of those cases, however, the Court was willing to greatly limit the common law defamation action in order to safeguard press interests. In *Gertz*, Justice Powell in the majority opinion noted that private persons who sue media defendants for defamation would have to prove actual—as opposed to presumed—damages because "juries may award substantial sums as compensation for supposed damages to reputation without any proof that such harm actually occurred." *Id.* at 349. Justice White, in dissent, attacked the majority's reliance on nonempirical data. "The Court points to absolutely no empirical evidence to substantiate its premise." *Id.* at 397.

100. Justice Stewart argued that "the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers." 408 U.S. at 731. For a discussion of his dissenting opinion, see *infra* notes 129-44 and accompanying text.

101. *Id.* at 710.

102. *Id.* at 707.

103. See the government's brief in *Caldwell*, at 11.

104. It may be permissible to speculate that the reason for such a conclusion is that the plurality Justices still truly saw the media's argument as one espousing an *absolute* privilege. See *supra* note 67 and accompanying text.

105. The proposal was adopted almost entirely by the dissenting Justices. See *infra* note 106 and accompanying text.

and overriding interest in the information.<sup>106</sup>

It is difficult to explain why such a balancing test would adversely affect the grand jury process in any significant fashion. Many states had adopted by statute such a test even as early as 1971 with no apparent disruption of the investigative process.<sup>107</sup> Moreover, it is useful to reiterate that such a balancing test does *not* contemplate an absolute immunity; that is, if the material is relevant, unavailable from other sources, and connected to a significant investigation, the reporter will have to divulge sources and information.

The opinion of Justice White is a disappointment. Still, one should not overstate its negative impact. Many states have followed the Court's suggestion in considering—and adopting—statutory privileges. Even more importantly, the Court in *Branzburg* recognized the constitutional right of the media to gather information: "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."<sup>108</sup> This principle has been followed by the Court in several major First Amendment cases, including *Richmond News Papers, Inc. v. Virginia*<sup>109</sup> and *Chandler v. Florida*.<sup>110</sup> The plurality opinion in *Branzburg* is, therefore, not wholly without redeeming value; however, its cavalier treatment of the press' claim is unfortunate. Instead of a thoughtful weighing of the two important interests—newsgathering and grand jury investigations—the Court simply promoted the latter at the expense of the former.

### C. The Concurring Opinion

Lawyers often complain of the great length of Supreme Court decisions, arguing that the opinions are far more detailed than necessary. Yet, the initial complaint to be leveled against the extremely short<sup>111</sup> concurring opinion of Justice Powell is its brevity. In this strange opinion,<sup>112</sup> Justice Powell has created a good deal of confusion resulting in conflicting conclusions as to the actual holding in *Branzburg*. It is a strange opinion because in part it agrees with the plurality opinion, and in even larger part it appears to agree with the dissenting opinion of Justice Stewart.<sup>113</sup> Ultimately, however, Justice Powell votes with the plurality.

A quick review of the opinion would suggest that it is merely a gloss

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106. Brief for the New York Times Co., et al., as *Amicus Curiae*, at 29.

107. For an evaluation of the state statutes, see *infra* notes 320-73 and accompanying text.

108. 408 U.S. at 681.

109. 448 U.S. 555 (1980) (open criminal trials). Justice Stevens, concurring in *Richmond Newspapers*, emphasized that the 1980 decision was the first by the Court in which it "squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever." *Id.* at 582. While Justice Stevens is correct as to the "square holding" of *Richmond Newspapers*, that holding has roots which can be traced directly to the discussion of Justice White in *Branzburg v. Hayes*.

110. 449 U.S. 560 (1981) (televising of criminal trials over the objection of the defendants).

111. The opinion is only two pages in the United States Reports.

112. "Justice Powell's opinion is singularly opaque. . . ." Goodale, *supra* note 50, at 709.

113. See *infra* notes 129-45 and accompanying text.

on Justice White's opinion, for it rejects any explicit constitutional privilege for the reporter to refuse inquiries from the grand jury. The only protection expressly given to the media is the same as that given in the plurality opinion: "If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy."<sup>114</sup>

Other portions of the opinion indicate that Justice Powell's view of the protection offered the reporters is far more expansive than that of Justice White. He is careful to point out "what seems to me to be the limited nature of the Court's holding."<sup>115</sup> That is, the media representatives are not "without constitutional rights with respect to the gathering of news or in safeguarding their sources."<sup>116</sup> More importantly, however, Justice Powell seems willing to accept the notion that reporters may be entitled to constitutional protection from the grand jury even if the grand jury is *not* proceeding in bad faith.

Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. 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.<sup>117</sup>

The statement of one commentator reflects the problematic nature of Justice Powell's view:

[S]urely there will be some facts which can be said to make out a showing that requested information bears only a remote and tenuous relationship to the subject of investigation but that cannot be said to demonstrate the bad faith of the grand jury. And the category of circumstances where there might be "other reason[s] to believe" a source relationship needlessly implicated seems to be explicitly open-ended.<sup>118</sup>

Under a test which utilizes a phrase such as "remote and tenuous relationship," reporters may well be able to go beyond the limits of the plurality

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114. 408 U.S. at 710 (Powell, J., concurring).

115. *Id.* at 709.

116. *Id.* This statement solidifies the view that the origins of *Richmond Newspapers* may be traced to *Branzburg*. See *supra* note 109.

117. 408 U.S. at 710.

118. Comment, *Newsmen's Privilege to Withhold Information from Grand Jury*, 86 HARV. L. REV. 137, 145 (1972). But see the statement of Judge Wilkey in *Reporters Com. v. American Tel. & Tel.*, 592 F.2d 1030, 1061 n.107 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979): "Although Justice Powell refers to case-by-case 'balancing,' it is clear that he is actually referring to the availability of judicial case-by-case screening out of *bad faith* improper and prejudicial interrogation." While asserting that a good faith investigation will "always override a journalist's interest in protecting his sources," *id.* at 1049, Judge Wilkey defined "bad faith" to include "not only investigations actuated by bad intentions but also investigations that probe at will *without relation* to law enforcement needs and that expose for the sake of exposure." *Id.* at 1047 n.52.



opinion.<sup>119</sup> To compound the confusion, however, Justice Powell went on to criticize the dissenting opinions for avoiding the

balance of these vital constitutional and societal interests on a case-by-case basis . . . [by creating] a constitutional privilege not even to appear before the grand jury. The new constitutional rule endorsed . . . would . . . defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.<sup>120</sup>

The opinion of Justice Powell *is* confusing. Still, one must ultimately conquer its ambiguities; as we shall see,<sup>121</sup> this concurring opinion is central to any understanding of the meaning of *Branzburg v. Hayes* and is the foundation for the view of many judges that the Court in *Branzburg* created a qualified privilege for reporters.

#### D. *The Dissenting Opinions*

Only one member of the Court in *Branzburg* adopted an absolute privilege for reporters to refuse to appear and testify before grand juries. Following the principle that he and Justice Black so eloquently asserted for decades,<sup>122</sup> Justice Douglas argued that a media representative should *never* be required to appear before a grand jury unless the "reporter himself is implicated in a crime,"<sup>123</sup> a highly unusual situation. In *Branzburg*, Justice Douglas' belief in the absolute position of the First Amendment was as unshakable as ever before. "Sooner or later, any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all."<sup>124</sup> Any test less than an absolute privilege would have, according to his dissenting opinion, "two retarding effects upon the ear and the pen of the press."<sup>125</sup> Specifically, "Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens."<sup>126</sup> Moreover, unlike the plurality Justices, Justice Douglas fully accepted the media's contention that the rejection of a privilege would result in adverse consequences.

A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to

119. One commentator flatly contended that "Justice Powell did adopt a qualified privilege for newsmen. . . ." Goodale, *supra* note 50, at 716.

120. 408 U.S. at 710.

121. See *infra* notes 145-66 and accompanying text.

122. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (clear and present danger test); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (privacy).

123. 408 U.S. at 712 (Douglas, J., dissenting).

124. *Id.* at 720.

125. *Id.* at 721.

126. *Id.*

the public the press releases which the various departments of government issue.<sup>127</sup>

Justice Douglas can hardly be criticized for continuing to promote the position of the absolute protection offered by the First Amendment. He can be criticized, however, for choosing to ignore the reality that two conflicting interests may be involved in the reporter's privilege context. While in some cases reporters should not be compelled to testify in front of a grand jury, in other cases their appearance might prove essential. In the organized racketeering or sabotage case where *all* other sources of information have been exhausted and where the reporter clearly knows the one individual connected to the mobsters or saboteurs, it is difficult indeed to justify an absolute right to ignore the questions of the grand jury. None of the other Justices adopted, and none of the parties<sup>128</sup> seriously asserted, the absolute privilege.

Justice Stewart<sup>129</sup> was strongly critical of what he characterized as the broad opinion of Justice White.<sup>130</sup> The second dissenting opinion centered on the need to accommodate two strong, yet competing interests—the grand jury investigatory function and the dissemination of information. The opinion began by recognizing the value of the grand jury system.

The grand jury serves two important functions: "to examine into the commission of crimes" and "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." And to perform these functions the grand jury must have available to it every man's relevant evidence.<sup>131</sup>

Unlike Justice White, however, Justice Stewart evaluated the grand jury interest with a careful eye to the lack of limitations imposed on the grand jury.

[T]he vices of vagueness and overbreadth that legislative investigations may manifest are also exhibited by grand jury inquiries, since grand jury investigations are not limited in scope to specific criminal acts, and since standards of materiality and relevance are greatly relaxed. For, as the United States notes in its brief in *Caldwell*, the grand jury "need establish no factual basis for commencing an investigation, and can pursue rumors which further investigation may prove groundless."<sup>132</sup>

If the first amendment interest were shown to be vital, it would be perfectly consistent with current and traditional practice to allow for a reporter's privilege. While generally persons must testify before a grand jury, this "rule has been limited by the Fifth Amendment, the Fourth

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127. *Id.* at 722.

128. See *supra* note 66 and accompanying text.

129. Justices Brennan and Marshall joined Justice Stewart.

130. "[T]he Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury." 408 U.S. at 725 (Stewart, J., dissenting). He later referred to "the Court's rejection of any newsman's privilege." *Id.* at 744.

131. *Id.* at 737.

132. *Id.* at 742-43.

Amendment, and the evidentiary privileges of the common law."<sup>133</sup> According to the dissenters, the First Amendment interest in this context is vital. The First Amendment guarantee is "not for the benefit of the press so much as for the benefit of all of us" . . . . Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society."<sup>134</sup>

The real question in the case for the dissenters therefore, was whether the rejection of a privilege would adversely affect these first amendment interests. The answer was given resoundingly in the affirmative. Taking a view contrary to the plurality Justices, they believed that the impact on the media would be very severe. They stressed preliminarily the "obvious" fact that "informants are necessary to the newsgathering process as we know it today."<sup>135</sup> They went on to rely on the trial court's finding of fact, that compelled disclosure of information received through confidential relationships jeopardizes the relationships and impairs the journalistic process.<sup>136</sup>

The dissenters concluded that a rejection of the privilege would have a negative impact on the grand jury system as well as on the newsgathering function.

People entrusted with law enforcement responsibility, no less than private citizens, need general information relating to controversial social problems. Obviously, press reports have great value to govern-

133. *Id.* at 737.

134. *Id.* at 726 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)). The dissenters discussed in more detail than the plurality or concurring opinion the constitutional right to gather news. "No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist." *Id.* at 728. See generally *Morgan v. State*, 337 So. 2d 951, 954 (Fla. 1976).

135. The dissenters continued:

If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish 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."

It is equally obvious that the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants. An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views.

408 U.S. at 729-30. Justice Stewart expressed great doubt about Justice White's reliance on the lack of empirical support for the petitioners' position.

Empirical studies, after all, can only provide facts. It is the duty of courts to give legal significance to facts: and it is the special duty of this Court to understand the constitutional significance of facts. We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values.

*Id.* at 736 n.19.

136. *Id.* at 732 n.12.

ment, even when the newsman cannot be compelled to testify before a grand jury. The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import. I cannot subscribe to such an anomalous result, for, in my view, the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great "breathing space."<sup>137</sup>

To accommodate the two interests which had apparently conflicted in the three consolidated cases, the dissenters would have required that the government make a strong showing before reporters could be compelled to appear and testify before the grand jury.<sup>138</sup> The test proposed by the dissenters<sup>139</sup> is indistinguishable from that proposed by Professor Bickel in his brief on behalf of the *New York Times*:

[T]he 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.<sup>140</sup>

The dissenters' view of both the evidence and the broader interests served by granting a reporter's privilege is correct. Can there be serious question that a lack of privilege will discourage at least *some* important confidential relationships and thus deprive the public of information it should possess? Moreover, the test proposed by the Justices does not seem overly stringent. The government must demonstrate only that the interest is quite important to a serious investigation and that it cannot obtain the information elsewhere. It is difficult to understand why such a test would adversely affect the grand jury process in many cases.

Two criticisms have been leveled at the dissenters' proposal. The first is that the proposal goes too far; the second, that it does not go far enough. Justice Powell argued forcefully that the dissenters' test should not be used to exempt journalists from *appearing* before the grand jury.<sup>141</sup> It truly may

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137. *Id.* at 746.

138. The dissenters explained that the need for such a stringent test arises from Supreme Court precedent dealing with the type of investigation which "impinges on First Amendment rights . . ." *Id.* at 739.

Governmental officials must, therefore, demonstrate that the information sought is clearly relevant to a precisely defined subject of governmental inquiry. They must demonstrate that it is reasonable to think the witness in question has that information. And they must show that there is not any means of obtaining the information which is less destructive of First Amendment liberties.  
*Id.* at 740.

139. See Goodale, *supra* note 50, at 714.

140. 408 U.S. at 743.

141. The precise application of the dissenters' test is unclear, for the opinion constantly merges the concepts of appearing and testifying. Still, there is at least one fairly clear indication that the Justices would generally allow the reporter to refuse to appear.

be futile for the reporter to appear and then refuse to testify, as argued by the dissenters. Nevertheless, Justice Powell is correct that the right of refusal to appear is too great an accommodation to the media.

It is to be remembered that Caldwell asserts a constitutional privilege *not even to appear before* the grand jury unless a court decides that the Government has made a showing that meets the three preconditions specified in the dissenting opinion of Mr. Justice Stewart. To be sure, this would require a "balancing" of interests by the court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the court's decision. The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him. Moreover, absent the constitutional preconditions that Caldwell and that dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court—when called upon to protect a newsman from improper or prejudicial questioning—would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by that dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.<sup>142</sup>

It has also been argued that the dissenters' formulation is too narrow, for only an absolute privilege would adequately protect reporters' interest in maintaining confidential relationships. Interestingly enough, on this point both Justice White and Justice Powell were in agreement.<sup>143</sup> The answer to this criticism, however, is that the first amendment interest cannot be evaluated in the abstract. The issue arises only because of a purported conflict with the grand jury process. There may be cases in which the testimony of a reporter is vital to the investigation of serious criminal endeavors. In such cases the dissenters would reject a claim of privilege, and in this writer's view, correctly so. While the Supreme Court has recognized the important function of the first amendment, it has been careful to engage in thoughtful balancing when that function conflicts with other interests, especially those associated with the criminal justice system.<sup>144</sup> To do any less here would be to raise grave questions about the vitality of other sections of the Bill of Rights.

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This is not to say that a grand jury could not issue a subpoena until such a showing were made, and it is not to say that a newsman would be in any way privileged to ignore any subpoena that was issued. Obviously, before the government's burden to make such a showing were triggered, the reporter would have to move to quash the subpoena, asserting the basis on which he considered the particular relationship a confidential one.

*Id.* at 743.

142. *Id.* at 710 (emphasis added) (Powell, J., concurring).

143. *Id.* at 702, 709.

144. See generally *Chandler v. Florida*, 449 U.S. 560 (1981) (televising of criminal trial over the defendant's objection); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980) (open criminal trials); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) (gag orders/prior restraints).

### E. *The Meaning of Branzburg*

Even a thorough reading of the four opinions in the *Branzburg* case will not lead to an absolutely certain understanding of the holding in the one Supreme Court decision<sup>145</sup> that dealt with the notion of reporter's privilege.<sup>146</sup> Four members of the Court<sup>147</sup> appear strongly to conclude that there is no privilege under any circumstances that would specially give a media representative the right to refuse to answer grand jury inquiries.<sup>148</sup> Four members of the Court<sup>149</sup> strongly disagree with this view and believe that the reporter should have, under the first amendment, a right to refuse requests by the grand jury. Justice Douglas would make this right absolute.<sup>150</sup> The Justices who signed Justice Stewart's opinion would limit the privilege, but only if the government makes a strong showing of compelling need for the particular information.

These three opinions cover eight members of the Court—four against any privilege, four in favor of a limited or broad privilege. What then, is the holding in *Branzburg*? A reading of the cases since the Court's decision, noting especially cases decided very recently,<sup>151</sup> makes reasonably certain that the "principle" to be derived from the case is "controlled by the concurring opinion of Justice Powell as the fifth Justice of the majority."<sup>152</sup>

145. *Herbert v. Lando*, 441 U.S. 153 (1979) involves a related but different issue. See *infra* text accompanying notes 284-94.

146. One commentator noted that since the decision, "confusion is manifest . . . [The opinion is] not a model of clarity." Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 760-61 (1977). He went on to state: "*Branzburg* is reconcilable with a principled theory of the free press guarantee." *Id.* at 762. See also Comment, *Newsmen's Privilege to Withhold Information from Grand Jury*, 86 HARV. L. REV. 137, 141 (1972); Comment, *Newsmen's Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy*, 49 TUL. L. REV. 417, 423 (1975).

147. The Chief Justice and Justices Blackmun and Rehnquist joined with Justice White.

148. The plurality did state that there is some constitutional protection for the newsgathering process. This conclusion is of major dimension, as indicated previously, note 109, *supra*. Still, the only protection offered to the media before the grand jury is related to a showing of harassment or bad faith, a showing which can be made by any person required to appear before the grand jury.

149. Justices Douglas, Brennan, Marshall, and the author of the major dissent, Justice Stewart.

150. Justice Douglas recognized a limited exception; no privilege would attach to the extent that "the reporter himself is implicated in a crime." 408 U.S. at 712.

151. A review of these cases is a luxury available to this writer, but unavailable to the many commentators and judges who dealt with the problems immediately after the decision in *Branzburg*. This may explain the tremendous difference in both judicial and academic perceptions between those in the late 1970's/1980's and those in the early 1970's. The earlier writers and judges viewed *Branzburg* as a case which rejected any privilege. See *infra* note 165.

152. *United States v. Liddy*, 478 F.2d 586, 586 (D.C. Cir. 1972) (execution of contempt judgment). See also *McGraw-Hill, Inc. v. Arizona*, 680 F.2d 5, 8 (2d Cir.), *cert. denied*, 103 S. Ct. 215 (1982) ("The Powell opinion) is particularly important in understanding the decision"); Note, *Source Protection in Libel Suits After Herbert v. Lando*, 81 COLUM. L. REV. 338, 351 (1981) ("As Justice Powell's concurrence was necessary to make a majority, his position may significantly influence the ultimate scope of the holding"); Comment, *Reporter's Privilege*, 58 DEN. L.J. 681, 685 (1981) ("The deciding, and somewhat qualifying, vote was cast by Justice Powell"); Note, *Media Law*, 54 TEMP. L.Q. 170, 171 (1981) ("Justice Powell's concurrence was the deciding vote and has been adopted as the legal standard for the newsman's privilege."); Note, *Evidentiary Privilege*, 6 U. DAYTON L. REV. 251, 256 (1981) ("Mr. Justice Powell's concurring opinion is more relevant than the opinion of the majority."). But see *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 211, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976) ("dicta by a concurring justice . . . is not binding. . .").

As indicated previously, determining with certainty the meaning of Justice Powell's opinion is a difficult task. This determination, however, has been made somewhat less complex by constructions given to the opinion by many judges, including Justice Powell. Soon after the decision in *Branzburg*, the Supreme Court was faced with a question involving access by the media to the prisons. In *Saxbe v. Washington Post Co.*,<sup>153</sup> Justice Powell wrote a separate opinion in which he discussed his view of the holding in *Branzburg*. Beginning with the recognition that the Court had rejected a broad privilege, Justice Powell emphasized that in *Branzburg* the "Court did not hold that the government is wholly free to restrict press access to newsworthy information."<sup>154</sup>

To the contrary, we recognized explicitly that the constitutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful: "Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." We later reiterated this point by noting that "newsgathering is not without its First Amendment protections. . . ." And I emphasized the limited nature of the *Branzburg* holding in my concurring opinion: "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." In addition to these explicit statements, a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated.<sup>155</sup>

This language in *Saxbe* would certainly lead readers to conclude that Powell meant to stress that he believed the proper test to be a balancing, or "assessment" one, rather than a rejection of the first amendment principle. This is precisely the position taken by most lawyers who have considered the issue in recent times. Some judges and commentators conclude without question that a "limited privilege with respect to the disclosure of confidential sources is recognized."<sup>156</sup> Others tend to link the opinions of Justices Stewart and Powell, rather than Justices White and Powell. One judge remarked that "the concurring opinion of Justice Powell and the dissenting opinion of Justice Stewart have similar overtones, as both find it necessary to balance First and Sixth Amendment interests."<sup>157</sup> Other judges are even more direct, noting that "if one aligns Justice Powell's concurring opinion with Justice Stewart's dissent, joined by Justices Brennan

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153. 417 U.S. 843 (1974).

154. *Id.* at 859.

155. *Id.* at 859-60.

156. *Connecticut State Bd. of Labor Relations v. Fagin*, 33 Conn. Sup. 204, 206, 370 A.2d 1095, 1097 (1976). See also *Reporters Com. v. American Tel. & Tel.*, 593 F.2d 1030, 1085 (D.C. Cir. 1978) (Wright, J., dissenting), cert. denied, 440 U.S. 949 (1979); Note, *Privileges*, 28 *DRAKE L. REV.* 167, 172 (1978); Comment, *The Fallacy of Farber: Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases*, 70 *J. OF CRIM. L. AND CRIMINOLOGY* 299, 314 (1979).

157. *Matter of McAuley*, 63 Ohio App. 2d 5, 18, 408 N.E.2d 697, 707 (1979). See also Goodale, *supra* note 50, at 717-18.

and Marshall, and with Justice Douglas' dissent, a majority of five justices accepted the proposition that journalists are entitled to at least a qualified First Amendment privilege."<sup>158</sup>

It is this writer's view that labeling Justice Powell's opinion in a certain fashion, or attempting to connect it directly to the dissenting opinions is more a hindrance than a help, as the real question is how Justice Powell would respond to a qualified privilege claim. Instead, the best approach may be the one taken by the District of Columbia Circuit in *United States v. Liddy*,<sup>159</sup> where the court used the opportunity to analyze the Powell opinion. The conclusion reached is the equivalent of that offered previously in this Article.<sup>160</sup> "[T]here is no universal constitutional privilege of a newsman to keep confidential the identity of his sources and the content of their revelations."<sup>161</sup> When first amendment interests are involved, as they so often are, however, the judge must follow the view set out in Justice Powell's opinion. At that point, in the words of the Vermont Supreme Court, the judge must balance "between the ingredients of freedom of the press and the obligation of citizens, when called upon, to give relevant testimony relating to criminal conduct."<sup>162</sup>

The now widely accepted view of *Branzburg*, therefore, is that it was limited by the specific facts presented to the Justices in the consolidated cases<sup>163</sup> and that the case-by-case analysis must be used by trial judges in "balancing freedom of the press against a compelling and overriding public interest in the information sought."<sup>164</sup> While this view is not universally held,<sup>165</sup> it is certainly the clear majority position, especially in federal courts.<sup>166</sup> An understanding of *Branzburg* is essential in this area. It is not, however, enough. The facts in *Branzburg* were quite limited.<sup>167</sup> What would happen when the reporters appeared before the grand jury and

158. *Los Angeles Memorial Coliseum Com'n v. N.F.L.*, 89 F.R.D. 489, 492 (C.D. Cal. 1981). See also *Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505, 509 (E.D. Va. 1976); Higdon, *The Burger Court and the Media: A Ten Year Perspective*, 2 W.N. ENG. L. REV. 593, 649 (1980).

159. 478 F.2d 586 (D.C. Cir. 1972).

160. See *supra* notes 111-21 and accompanying text.

161. 478 F.2d at 586.

162. *State v. St. Peter*, 132 Vt. 266, 269, 315 A.2d 254, 255 (1974).

163. One court characterized *Branzburg* as simply the case in which "the Supreme Court decided that a journalist does not have an absolute privilege under the First Amendment to refuse to appear and testify before a grand jury to answer questions relevant to an investigation into the commission of crime." *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979).

164. *Zelenka v. State*, 83 Wis. 2d 601, 618, 266 N.W.2d 279, 287 (1978).

165. See, e.g., *People v. Monroe*, 82 Misc. 2d 850, 854, 370 N.Y.S.2d 1007, 1011 (1975) ("The *Branzburg* Court laid to rest the notion that newsmen were entitled to either a conditional or an absolute testimonial privilege under the free press clause of the First Amendment"); *Petition of McGowan*, 298 A.2d 339, 341 (Del. 1972), *rev'd* 303 A.2d 645; *Resorts Int'l, Inc. v. NJM Assoc.*, 180 N.J. Super. 459, 470-71, 435 A.2d 572, 578 (1981); *Gagnon v. District Ct.*, 632 P.2d 567, 569 n.2 (Colo. 1981); *In re Farber*, 78 N.J. 259, 268, 394 A.2d 330, 334, *cert. denied*, 439 U.S. 997 (1978). The issues are discussed more fully, *infra* notes 168-91 and accompanying text.

166. See, e.g., *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975) (*Branzburg* "appears to have fashioned at least a partial First Amendment shield"), *cert. denied*, 427 U.S. 912 (1976); *State v. Sandstrom*, 224 Kan. 573, 574-75, 581 P.2d 812, 814-15 (1978); *State v. Siel*, 444 A.2d 499, 502 (N.H. 1982); *Altomose Constr. v. Bldg. & Constr. Trades Council*, 443 F. Supp. 489 (E.D. Pa. 1977).

167. Caldwell did, to reiterate, refuse even to appear before the grand jury claiming a very broad First Amendment privilege unless the government demonstrated a compelling interest. See *supra* notes 57, 65 and accompanying text.



presented a compelling case for nondisclosure of sources or information? What would happen when the refusal of the journalist was made in a criminal trial rather than during an investigation? Finally, what would happen when the reporter declined to give information in a civil case? It is to these questions that we now turn.

## THE PROBLEM AREAS

### A. *Reading Branzburg*

As we have seen, the "true" holding in the *Branzburg* case is hardly self-evident.<sup>168</sup> Judges handling matters in this area were therefore faced with the extreme difficulty of attempting to understand the case and to apply the perceived holding to the facts in the individual actions before them. Without the guidance of specific statutes,<sup>169</sup> judges could be found to have wandered in any one of at least three directions.

The earliest reaction to *Branzburg*, particularly by state judges, was to conclude that, in denying the privilege, the plurality opinion had wholly disposed of any media claims.<sup>170</sup> The majority judges in the well-known *Farber* case stated that the United States Supreme Court "squarely held that no such First Amendment right exists. . . . [This court does] no weighing or balancing of societal interests. . . . The weighing and balancing has been done by a higher court."<sup>171</sup> In a more recent case, one federal judge declared that in the grand jury context, the government's interest will "always override a journalist's interest in protecting his source."<sup>172</sup>

Most federal judges, and many state judges, disagreed with this view and read *Branzburg* as conferring a qualified privilege to refuse disclosure even in certain grand jury proceedings.<sup>173</sup> Many of the judges relied heavily on Justice Powell's opinion to find a "privilege of nondisclosure. . . [in which the test is] balancing freedom of the press against a compelling and overriding public interest in the information sought."<sup>174</sup>

Some state courts had a somewhat more direct approach to the problem. These judges looked to state statutes designed to deal with the re-

168. See *supra* notes 145-167 and accompanying text. See generally Note, *Evidentiary Privilege*, 6 U. DAYTON L. REV. 251, 260 (1981).

169. See *infra* notes 320-62 and accompanying text.

170. *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978).

171. 78 N.J. at 266-68, 394 A.2d at 333-34.

172. *Reporters Com. v. American Tel. & Tel.*, 593 F.2d 1030, 1049 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979). This certainly seems to be the position Justice White has continued to take. In an application for a stay in the *Farber* case, *supra* note 170, Justice White wrote in chambers:

There is no present authority in this Court either that newsmen are constitutionally privileged to withhold duly subpoenaed documents material to the prosecution or defense of a criminal case or that a defendant seeking the subpoena must show extraordinary circumstances before enforcement against newsmen will be had.

*New York Times Co. v. Jascavech*, 439 U.S. 1317, 1322 (1978) (White, J., in chambers).

173. See, e.g., *State v. Sandstrom*, 224 Kan. 573, 574, 581 P.2d 812, 814 (1978) ("The United States Supreme Court recognized the privilege in *Branzburg*").

174. *Zelenka v. State*, 83 Wis. 2d 601, 618, 266 N.W.2d 279, 287 (1978) overruled *State v. Dean*, 103 Wisc. 2d 228, 307 N.W.2d 628 (1981). See generally *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972), where the court carefully analyzed the various opinions in *Branzburg* and concluded that the balancing approach "is not impaired by *Branzburg*." *Id.* at 1091.

porter's privilege question and simply viewed *Branzburg* as a somewhat immaterial exercise by the Supreme Court.<sup>175</sup> In other states where no statutory privilege existed, state supreme court justices considered their own state constitutional provisions and found that a qualified privilege existed.<sup>176</sup> Even where the provisions were almost identical to the language contained in the first amendment to the United States Constitution, the privilege was found.<sup>177</sup>

Federal judges, who obviously did not have the luxury of other constitutional provisions or statutes on point, sought other ways in which to apply a qualified privilege without casting doubt on the validity of the plurality opinion in *Branzburg*. Soon after *Branzburg*, great attention was given to Rule 501 of the Federal Rules of Evidence. This rule provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they might be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.<sup>178</sup>

The language of the Rule is intentionally vague.<sup>179</sup> The key phrase is that judges in determining privilege should look to the "light of reason and experience." In spite of the apparently contrary view of Justice White and three other Justices, many federal judges seized upon this language to declare that, in the media representative context, "the courts should continue to develop the federal common law of privilege on a case-by-case basis."<sup>180</sup> And develop they did.

One court noted that the legislative history of the Rule indicated that the language "was designed to encompass . . . a reporter's privilege not to disclose a source."<sup>181</sup> Another panel of judges found a common law privi-

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175. See *infra* notes 320-62 and accompanying text.

176. Opinion of the Justices, 373 A.2d 644 (N.H. 1977).

177. Of course, even where the language in the state and federal constitutions is virtually identical, state courts have never been reluctant to hold that the state document requires more of the government than the federal instrument requires. See, e.g., *State v. Menne*, 380 So. 2d 14 (La. 1980) (state supreme court gave the *Miranda* requirements a far more expansive reading than that given by the United States Supreme Court), *cert. denied*, *Louisiana v. Menne*, 449 U.S. 833 (1980).

178. FED. R. EVID. 501.

179. See H. REP. NO. 650, 93d Cong. 1st Sess. 8 (1973).

180. *Lewis v. United States*, 517 F.2d 236, 238 n.4 (9th Cir. 1975).

181. *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979). The court went on to state: The original draft of the Rule defined nine specific nonconstitutional privileges, but failed to include among the enumerated privileges one for a reporter or journalist. The Advisory Committee gave no reason for the omission. This was one of the primary focuses of the congressional review of the proposed evidentiary rules, stemming in part from the "nationwide discussions of the newspaperman's privilege." Following testimony on behalf of groups such as the Reporters Committee for Freedom of the Press, the privilege rule was revised to eliminate the proposed specific rules on privileges and to leave the law of privilege in its current state to be developed by the federal courts.

lege, based "on the strong public policy supporting the unfettered communication to the public of information and opinion . . . grounded in the first amendment."<sup>182</sup> Though casting its privilege in terms of the common law requirement, this same court "found support for this privilege in *Branzburg v. Hayes* . . . where the Supreme Court acknowledged the existence of first amendment protection for newsgathering."<sup>183</sup>

Most judges evaluating the holding of *Branzburg* have taken one of the three routes which allow for the use of a qualified reporter's privilege. Today, few judges cling to the view that under no circumstances is there a privilege. Recognition of the privilege, however, is but a necessary first step. Great problems regarding definition and application of that privilege remain even today. In construing the privilege, the preliminary question as to the application of *Branzburg* must relate to the specific factual context presented to the judge. In the three consolidated cases in *Branzburg*, the grand juries were investigating allegations of very serious crimes.<sup>184</sup> In many cases, however, even in the criminal context that type of situation will not be present.

It is perfectly proper to emphasize the interest in viable grand jury investigations of serious criminal offenses, a point made by many judges. Judge McGowan stated this well in a famous libel action, *Carey v. Hume*.<sup>185</sup>

This is a civil libel suit rather than a grand jury inquiry into crime, and the dispute over disclosure is between the press and a private litigant rather than between the press and the Government. This difference is of some importance, since the central thrust of Justice White's opinion for the Court concerns the traditional importance of grand juries and the strong public interest in effective enforcement of the criminal law. Justice White also relied on the various procedures available to prosecutors and grand juries to protect informants and on careful use by the Government of the power to compel testimony.<sup>186</sup>

612 F.2d 708, 714-17.

[W]e refer to the following comment by Congressman Hungate, the principal draftsman of the Federal Rules of Evidence:

For example, the Supreme Court's rule of evidence contained no rule of privilege for a newspaperperson. The language of Rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspaperpeople any protection they may have from state newspaperpersons' privilege laws.

120 Cong. Rec. H. 12253-54 (daily ed. Dec. 18, 1974) (explaining the final Conference Report version of the Rules).

*Id.* at 714 n.6.

182. *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

183. *Id.* See also the discussion the listing of authorities in *Los Angeles Memorial Coliseum Com'n. v. N.F.L.*, 89 F.R.D. 489, 492-93 (C.D. Cal. 1981).

184. In *Caldwell*, for example, the crime under consideration was conspiracy to assassinate the President of the United States. See *supra* notes 46-49 and accompanying text.

185. 492 F.2d 631 (D.C. Cir. 1974), *cert. dismissed*, 417 U.S. 938 (1974).

186. *Id.* at 636 n.6. See also *State v. Siel*, 122 N.H. 254, 444 A.2d 499, 503 (1982): "[B]ecause the individual citizen's civil rights must be protected, 'a news reporter's privilege is more tenuous in a criminal proceeding than in a civil case. . . .'"

This point is unquestionably legitimate in the case in which the grand jury is investigating allegations (found in a reporter's story) about the sale of drugs<sup>187</sup> or in the case in which the reporter was supposed to have received information concerning a murder.<sup>188</sup> In many grand jury investigations, however, such an independent crime is not what is at issue. In *Farr v. Pitchess*,<sup>189</sup> for instance, the reporter was thought to have information concerning the infamous Charles Manson case—not information regarding the murders themselves, but rather information as to the question of which person leaked statements to the public in violation of an order prohibiting public dissemination. Similarly, in *Morgan v. State*,<sup>190</sup> the investigation centered on which party had told the reporter about the contents of a sealed indictment.<sup>191</sup> In these situations, the government interest may be viewed as somewhat less compelling than that presented in the investigation of crimes independent of the investigatory process. "[T]he purpose [is] to force a newspaper reporter to disclose the source of published information, so that the authorities [can] silence the source."<sup>192</sup>

It is also true that the investigatory process itself may be subject to vigorous questioning as to scope and process. To give a disturbingly coarse example is to illuminate the problem. In *Ealy v. Littlejohn*,<sup>193</sup> the grand jury was investigating the killing of a citizen by a police officer. A civil rights organization labeled the investigation process a farce; at that point the grand jury ordered leaders of the organization to appear, allegedly to give information which might be relevant to the investigation. The leaders of the organization brought an action, however, when the grand jury began asking questions about the membership of the organization and the finances of the group. The Fifth Circuit upheld the leaders' action: "we fail to see . . . how the subject of League finances was of any legitimate concern to the grand jury."<sup>194</sup>

Even when the grand jury process runs rampant, as in *Ealy*, one can still analyze the process vis-a-vis the role and function generally of the grand jury. In other criminal cases, however, it is not the grand jury which is involved at all. For example, there have been cases in which the investigating agency was the state attorney general's office.<sup>195</sup> In such cases, the traditional deference given to the grand jury process would not necessarily be present.<sup>196</sup>

In many criminal cases, direct requests are made of reporters for

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187. *Lightman v. State*, 15 Md. App. 713, 294 A.2d 149 (1972), *aff'd*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973).

188. *In re McAuley*, 63 Ohio App. 2d 5, 408 N.E.2d 697 (1979).

189. 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1981).

190. 337 So. 2d 951 (Fla. 1976).

191. *See also* *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976); *Pankratz v. District Court*, 199 Colo. 411, 609 P.2d 1101 (1980).

192. *Morgan v. State*, 337 So. 2d 951, 956 (Fla. 1976).

193. 569 F.2d 219 (5th Cir. 1978).

194. *Id.* at 230.

195. *In re McGowan*, 303 A.2d 645 (Del. 1972).

196. Indeed, in the *McGowan* case, *id.*, the court held that such an investigation was beyond the authority of the attorney general's office.

sources or information<sup>197</sup> not by the grand jury, but instead by the defendant or by the prosecuting attorney. A typical fact pattern may be found in *United States v. Cuthbertson*.<sup>198</sup> The defendant there had been charged with conspiracy and fraud in connection with a franchising operation. Reporters for the television show "60 Minutes" extensively investigated the franchising system involving the defendant and interviewed many of the principals. The defendant requested the notes and tapes of these interviews from the CBS producers and reporters.<sup>199</sup> In a case in which the media representative has extensive information concerning the defendant and the alleged crime, the defendant may be able to make a compelling case for disclosure. In such a case, the reporter may have become "an investigative arm of the state as he and the prosecution joined forces against the defendant."<sup>200</sup>

It is becoming increasingly common for government attorneys to request information from journalists to assist in the preparation of the prosecution's case. While the traditional role of the grand jury would not, of course, be present in such a situation, the interests of the state would remain the same but in a more direct fashion. When the government requests the information via the prosecuting attorney, the case is typically ready to go to trial, well after grand jury deliberations. In such a situation it is, as one commentator stated, "extremely unlikely that the [courts] will impose more stringent standards on a prosecutor seeking information for use at trial, when the state's interest in compelling testimony is admittedly more substantial."<sup>201</sup>

If the judge concludes that reporter's privilege should be invoked in a given matter, the analysis is not complete; the judge must also consider other constitutional rights present in the case. In many cases in which the reporter refuses to disclose information in response to a request by a criminal defendant, that defendant may claim that the deprivation of the information violates his constitutional rights. Often, the defendant does not detail the constitutional basis for this claim, but simply refers to the need for a fair trial.<sup>202</sup> It would appear, however, that there are two principal bases for such a claim. First, the deprivation of important information may affect the defendant's ability to fully present his case, raising due process concerns. Second, being unable to call the reporter as a witness may violate the sixth amendment right to compulsory process.<sup>203</sup> Indeed, in

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197. This distinction is discussed *infra* in the text accompanying notes 213-14.

198. 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

199. After remand the Third Circuit held that the journalists would not have to give up the information as other sources for this information existed. 651 F.2d 189, 196 (3d Cir.), *cert. denied*, 454 U.S. 1056 (1981). See also *People v. Marahan*, 81 Misc. 2d 637, 368 N.Y.S.2d 685 (1975); *People v. Monroe*, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (1975).

200. *Farber v. Job*, 467 F. Supp. 163, 168-69 (D. N.J. 1978).

201. Murasky, *supra* note 15, at 891.

202. See, e.g., *State v. Boiardo*, 82 N.J. 446, 449-50, 414 A.2d 14, 16 (1980); *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (1978); *State v. Jascalevich*, 158 N.J. Super. 488, 386 A.2d 466 (1978).

203. The Sixth Amendment provides, in part, that "in all criminal prosecutions, the accused shall [have] the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." While most courts speak in terms of the right to compulsory process, some courts in this area refer

evaluating a defense claim, one court has gone so far as to note that the First Amendment privilege is not actually expressed in the Constitution, but "[i]n contrast the Sixth Amendment . . . guarantees an explicit right to the defendant 'to have compulsory process. . . .'"<sup>204</sup>

Supreme Court precedent casts grave doubt on the constitutionality of any sort of absolute reporter's privilege which would always prevail against an asserted need by the defendant.<sup>205</sup> Three cases in particular are relevant here. In *Chambers v. Mississippi*,<sup>206</sup> the defendant was prevented by state law from cross-examining a witness who confessed to the crime for which the defendant was on trial. The Supreme Court struck down the defendant's conviction.

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.<sup>207</sup>

Similarly, in *Washington v. Texas*,<sup>208</sup> the Court closely guarded the defendant's right to present his case. A Texas statute prohibited co-defendants from testifying for one another. The defendant claimed that he was denied favorable testimony of a witness who would exonerate him. The Court found that the Sixth Amendment right to compulsory process applied to the states, and the defendant's conviction was reversed.

Perhaps the most important of the three cases is *Davis v. Alaska*,<sup>209</sup> where state law created a privilege for juvenile offenders on probation. Under this law the defendant was precluded from establishing that the witness was on probation. The defendant could therefore not impeach the witness by demonstrating that the witness may have had an interest in providing favorable testimony. Weighing the state's interest in the legislative privilege—protecting the anonymity of juvenile offenders—against the defendant's right to present evidence, the Court found a constitutional violation, in that

defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the wit-

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to the confrontation right under the Sixth Amendment. See, e.g., *Hurst v. State*, 160 Ga. App. 830, 287 S.E.2d 677 (1982).

204. *People v. Zagarino*, 97 Misc. 2d 181, 189, 411 N.Y.S.2d 494, 498 (1978). This reference to explicit language in the Constitution is confusing. Certainly, the Supreme Court has not been deterred by any lack of express constitutional reference to the term "privacy" in seminal cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) (information about contraception) and *Roe v. Wade*, 410 U.S. 113 (1973) (abortions).

205. The assertion will not always relate to a claimed need for information. In *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1978), the trial judge ordered the reporter to disclose the name of the party who had given him information that was to be kept from the public. The purpose of this order was to protect the defendant's right "to a fair trial, free of prejudicial publicity." *Id.* at 467. Other constitutional arguments are discussed below in the text accompanying notes 354-60.

206. 410 U.S. 284 (1973).

207. *Id.* at 294.

208. 388 U.S. 14 (1967).

209. 415 U.S. 308 (1974).

ness. Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."<sup>210</sup>

By this discussion of support for the defendant's constitutional claims, I do not mean to suggest that the defendant will automatically be entitled to complete disclosure by the reporter. The trial judge must engage in a balancing process, weighing the defendant's need for the information against the reporter's need to maintain confidentiality.<sup>211</sup> What I am suggesting is that the trial judge must do what the Supreme Court in *Davis* did—utilize a thoughtful balancing process—as "a defendant does not have an absolute right to obtain confidential information from a newsperson."<sup>212</sup> There has never been such an absolute right in connection with other privileges; there should be no such absolute right with the reporter's privilege.<sup>213</sup> Unhappily, once again no clear formula or straightforward answer to the tough questions can be found.

Before turning to the manner in which judges should resolve the privilege claim in criminal cases, a last matter must be discussed. To this point in the Article, I have implied that the request of the reporter<sup>214</sup> was for a single item: the confidential source, the name of the person(s) from whom the journalist received certain information. To suggest that this is the only type of request present, however, is to unfairly load the equation. In some cases it is the *information* received by the reporter rather than the source of the information which is at issue. In such cases, some courts are willing to distinguish the case from that in which the source was requested, finding less of a threat to the newsgathering function.<sup>215</sup>

The more difficult problem occurs when it is the source who is sought, but it is not established that the reporter had a confidential relationship with that source. *Lewis v. United States*<sup>216</sup> is a well-known example of this problem. The manager of a radio station received in the mail tape recordings and a written message from an underground group, the Symbionese Liberation Army, suspected of bombings and other terrorist activities. During the process of investigating these acts, the grand jury requested the tapes and message. While the request was not directly for the source, it was clear that the purpose of the request was to use the tapes and message

210. *Id.* at 318.

211. This balancing process is discussed *infra* in the text accompanying notes 224-43.

212. *In re McAuley*, 63 Ohio App. 2d 5, 408 N.E.2d 697 (1979).

213. See generally Comment, *The Newsman's Privilege After Branzburg v. Hayes: Withier Now?*, 64 J. OF CRIM. LAW AND CRIMINOLOGY 218, 222-23 (1973). See also Note, *Reporters and their Sources: The Constitutional Right to a Confidential Relation*, 80 YALE L.J. 317, 347 n.131 (1970):

Although the Sixth Amendment grants the defendant the right of compulsory process, that Amendment was adopted to guarantee the defendant the same right of process as that provided the prosecution by common law. This right to compulsory process does not override exemptions from disclosure protected by . . . statutes. . . .

214. This was the case whether the request was by the grand jury, the prosecuting attorney, or the defense in a criminal case.

215. *Lightman v. State*, 15 Md. App. 713, 294 A.2d 149 (1972). See generally Note, *Branzburg Revisited: The Continuing Search For A Testimonial Privilege for Newsmen*, 11 TULSA L.J. 258, 270 (1975).

216. 501 F.2d 418 (9th Cir. 1974), *cert. denied*, 420 U.S. 913 (1975).

to find out who the sender/source was. No showing of a prearranged confidential relationship was made; still, the station claimed that it was privileged to deny the grand jury's request. The court did not dispose of the issue of confidentiality, for it found that under any circumstances the grand jury requests were "overwhelmingly . . . legitimate and justified."<sup>217</sup> In a case in which the source no longer wished to maintain the confidential relation, the court stressed that confidentiality was "irrelevant to the chilling effect" on the newsgathering process.<sup>218</sup> For this court, the question was whether the first amendment function was being tampered with, not whether the relationship with the source happened to be confidential.<sup>219</sup> Indeed, in some jurisdictions it is made clear that the privilege is fully the reporter's and that the source cannot make any claims based upon it. The Indiana experience is typical. In a 1970 case, the state supreme court held that the defendant could not object to the reporter's compelled disclosure of a conversation, as the right to object was the reporter's personally.<sup>220</sup> Five years later, an intermediate state court explicitly held that the privilege in this area could only be invoked by the reporter, not by the source.<sup>221</sup>

A related question arises in the situation in which the information sought from the journalist deals with her own personal observation as a witness, rather than as a reporter who was given information by others. As stated by one commentator, "when courts are presented with the question of the witnessing of a crime by a reporter, they usually require the reporter to testify."<sup>222</sup> While the answer to the question may not be quite so apparent in cases in which the reporter witnesses the event because she was invited to the scene by a confidential informer,<sup>223</sup> often that issue does not arise. A recent federal case demonstrates the principle well. The reporter in the case of *In re Ziegler*<sup>224</sup> "happened to be in the situation that can only be envied by most other newsmen."<sup>225</sup> While waiting outside a courtroom, the reporter witnessed a fight between two alleged organized crime figures. The grand jury requested that the reporter appear to testify about the incident, but he refused. The court rejected the journalist's first amendment claim, viewing the case as the same as that in which the ordinary citizen observed criminal activity.

While it may be "inherently unpleasant" to testify to the same incident before a Grand Jury, it is one of the highest duties of citizenship imposed upon all of us by the Constitution. That Constitution does not immunize him from testifying merely because he makes the observation as a news reporter. The ordinary citizen would not be

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217. *Id.* at 423.

218. *United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982). See generally *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), cert. denied, 449 U.S. 1113 (1981).

219. 534 F. Supp. at 297. But see *People v. Zagarino*, 97 Misc. 2d 181, 411 N.Y.S.2d 494 (1978); *In re Dack*, 101 Misc. 2d 490, 421 N.Y.S.2d 775 (1979).

220. *Lipps v. State*, 254 Ind. 141, 258 N.E.2d 622 (1970).

221. *Shindler v. State*, 166 Ind. App. 258, 335 N.E.2d 638 (1975).

222. Goodale, *supra* note 50, at 720.

223. *People v. Dan*, 341 A.D.2d 687, 342 N.Y.S.2d 731 (1973).

224. 550 F. Supp. 530 (W.D.N.Y. 1982).

225. *Id.* at 532.



excused from testifying as to what he observed and the First Amendment cannot be given an interpretation which would grant him immunity from testifying simply because he made these observations while on duty as a reporter. . . .

In a sense, this case is a logical extension of the *Branzburg* case. In *Branzburg*, the reporter's eyewitness account of an incident was relevant to the Grand Jury's investigation of that particular incident. In the instant case, Mr. Ziegler's testimony is not needed by a Grand Jury investigating the assault Mr. Ziegler witnessed. Rather, his testimony is relevant to an investigation of which the incident Ziegler witnessed is but one small part. Nonetheless, the legal principle *Branzburg* stands for is no less applicable to the instant case, that a reporter, the same as any other citizen, must testify before the Grand Jury as to what he has personally observed.<sup>226</sup>

## B. Criminal Cases

In criminal cases, as previously indicated, most courts today have adopted a balancing test when a source or information is requested from a reporter: Whether under state law, federal law, or a broad reading of the holding in *Branzburg*,<sup>227</sup> these courts require trial judges to engage in some sort of weighing process before resolving the privilege assertion.<sup>228</sup> In addition to requiring a balance, they may also impose fairly stringent procedural requirements during the evaluation process. Many courts, for instance, will routinely hold an in camera hearing with the reporter and may even speak to the source before reaching a determination.<sup>229</sup> Other courts may establish quite clearly the burdens of proof,<sup>230</sup> the need for the judge to make specific findings in the record, and the opportunity to appeal the judge's decision immediately.<sup>231</sup>

The procedures are no doubt important, and they certainly should be established before any proceeding goes to the hearing stage. The crucial question, however, is one of substance: What is the test to be utilized in balancing the interests? One judge set forth a five-part analysis:<sup>232</sup>

1. The potential chilling effect on future news stories.
2. The public interest served by disclosure.
3. The existence of alternative sources for the information.

226. *Id.*

227. "[T]he concurring opinion of Justice Powell and the dissenting opinion of Justice Stewart have similar overtones, as both find it necessary to balance First and Sixth Amendment interests." *In re McAuley*, 63 Ohio App. 2d 5, 18, 408 N.E. 697, 707 (1979).

228. *See, e.g.*, *State v. Boiardo*, 82 N.J. 446, 414 A.2d 14 (1980); *People v. LeGrand*, 67 A.D.2d 446, 415 N.Y.S.2d 252 (1979).

229. *State v. Siel*, 122 N.H. 254, 259, 444 A.2d 499, 503 (N.H. 1982).

230. For example, in *In re Farber*, 78 N.J. 259, 292, 394 A.2d 330, 346, *cert. denied*, 439 U.S. 997 (1978), the court found the reporter to have the burden "to make a *prima facie* showing that he is a newsgatherer and that he obtained the subpoenaed materials in the course of his newsgathering duties." At that point the burden shifted to the defendant "to make a threshold showing" as to the elements found in the balancing test. *See infra* text accompanying notes 232-233.

231. 78 N.J. at 284, 394 A.2d at 347 (dissenting opinion).

232. *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 238-39, 124 Cal. Rptr. 427, 464-65 (1975) (dissenting opinion), *cert. denied*, 427 U.S. 912 (1976).

4. The relevance of the inquiry.
5. The impact of the process on the rights of others.

While this test would appear to encompass the factors considered important by Justice Powell as well as Justice Stewart in *Branzburg*, most courts avoid the first and fifth elements. Such an avoidance is unfortunate. I would prefer to see the First Amendment interests placed at the forefront of the balance, so that judges would be required to make specific findings on the record regarding these interests. Nevertheless, in formulating the test most courts look only to three elements: the relevance of the information in the case, the compelling need for the information, and the unavailability of the information from "other sources less chilling of First Amendment freedoms."<sup>233</sup>

*Relevance.* The question here is whether the information sought is truly helpful in the action or whether a "fishing expedition" is being conducted. Will the information aid in the proof of the crime? Will it assist the defendant in resisting conviction? As stated by one district judge, "[does the] inquiry [go] to the heart of the matter. . . . [or does it appear] that the subject to be disclosed is irrelevant or immaterial."<sup>234</sup> A state court's formulation is similar. In rejecting a request for disclosure, the Wisconsin Supreme Court found that the information sought "was at best tangential . . . only remotely relevant to the issues at hand."<sup>235</sup>

In some cases the judges carefully scrutinize the claimed relevance and look closely at the facts which the information is supposed to uncover. In *United States v. Orsini*,<sup>236</sup> the defendant claimed due process violations in connection with his arrest. He asked that a *Newsweek* reporter disclose information received during an investigation of a story on methods of the Drug Enforcement Agency (the arresting office). The court examined the defendant's claims and found that, even if believed, they would not entitle him to any relief under the Due Process Clause. The request was, therefore, denied. Such a review is to be contrasted with that found in cases such as *State v. Sandstrom*,<sup>237</sup> a recent Kansas case. There the reporter was said to have information regarding the identity of a declarant who was purported to have said that he was threatened by the victim of the murder. On first blush, it would appear that such information would be relevant to a number of questions involving motive, self defense, and identification. The court thus required disclosure. Unfortunately, as noted by the dissenting judge, the case did not involve questions of motive, self defense, or identification; the only defense raised was insanity.

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233. *United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982). See also *United States v. Criden*, 633 F.2d 346, 359 (3d Cir. 1980), cert. denied, 449 U.S. 1113 (1981).

234. *United States v. Homer*, 411 F. Supp. 972, 981 (W.D. Pa. 1976), aff'd, 545 F.2d 864 (3d Cir. 1976), cert. denied, 431 U.S. 954 (1977).

235. *Zelenka v. State*, 83 Wis. 2d 601, 620, 266 N.W.2d 279, 287 (1978), overruled, *State v. Dean*, 103 Wisc. 2d 228, 307 N.W.2d 628 (1981). In this case the defendant claimed that the information was relevant to an entrapment defense. The court affirmed the first degree murder conviction.

236. 424 F. Supp. 229 (E.D.N.Y. 1976), aff'd, 559 F.2d 1206 (2d Cir. 1977), cert. denied, 434 U.S. 997 (1977).

237. 224 Kan. 573, 581 P.2d 812 (1978), cert. denied, 440 U.S. 929 (1979).

*Need.* Even if the information sought would be of some assistance in the government or defense case, most courts will not direct the reporter to disclose sources or confidential information unless this data would be of great importance in the disposition of the case. The Virginia Supreme Court stated the test in the following way: "[The case] must be substantially dependent upon what the testimony of the source might be. . . . [T]he privilege of confidentiality should yield only when the . . . need is essential to a fair trial."<sup>238</sup> If the information would prove a necessary element of the government's case or would establish an affirmative defense, it is obviously essential that the information be given.<sup>239</sup> In many cases, however, the need is not so clearly shown.

The most vexing problem concerns privileged information which would assist one side in the impeachment of a witness for the other side. Typically, the problem arises when the lawyer claims that the reporter has information (or has a source with the information) which would show a prior inconsistent statement by the trial witness. Some courts are willing, with no additional proof, to order disclosure by the reporter to facilitate this impeachment.<sup>240</sup> Other courts require a greater need, finding that it is not enough "to show that a . . . witness had made prior statements inconsistent with statements at trial."<sup>241</sup>

The "need" element has been the subject of debate, with some journalists contending that many courts accept without question the lawyers' claims that the information is of genuine significance to the presentation of their case. They "say that the Government vastly overestimates the quantity and quality of the information that is given to the press. Why, these reporters ask, should their source relationships be put in jeopardy when they really can contribute nothing new to the factual inquiry?"<sup>242</sup>

*Unavailability.* The third element of the balancing test is also designed to insure that reporters will not be required to jeopardize confi-

238. *Brown v. Commonwealth*, 204 S.E.2d 429, 430-31 (Va.), *cert. denied*, 419 U.S. 966 (1974).

239. *See, e.g., Pankratz v. District Court*, 609 P.2d 1101, 1103 (Colo. 1980), where the reporter was "a central witness . . . he is allegedly the only person who was present during the entire period, from the beginning of the meeting . . . to its conclusion." *See generally* *People v. Marahan*, 81 Misc. 2d 637, 368 N.Y.S.2d 685 (1975); *People v. Monroe*, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (1975).

240. In *Hurst v. State*, 160 Ga. App. 830, 831, 287 S.E.2d 677, 679 (1982), the court specifically held that to deny the defendant this information would be to impose a "restriction on appellant's constitutional right to compel witnesses to testify. . . ." This conclusion may be a bit too dramatic, for in *Hurst* there were other witnesses who could have corroborated the source's story.

241. *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va.), *cert. denied*, 419 U.S. 966 (1974).

242. *Blasi, supra* note 2, at 261. Professor Blasi went on to write:

A frequently voiced complaint is that newsmen are sometimes . . . forced to the witness stand to give cumulative evidence that is already a matter of public record. There are other situations, some newsmen believe, in which the Government subpoenas reporters to avoid blowing the cover on its own agents who have infiltrated dissident movements. We asked the respondents to what they primarily attributed the recent spate of subpoenas: "It's just an easy way to get information and the freedom of the press be damned." "Laziness, inept investigative procedures and a disrespect for the press and a misunderstanding of its role." . . . "Police sometimes are too lazy or not well enough trained to build up their own cases."

dential relationships if the information sought from them is not truly necessary. That is, if the defense or prosecution attorneys could find this information elsewhere, they must attempt to do so. Normally the trial judge must make a finding that "all suggested alternate sources had been carefully explored and found wanting. . . ." <sup>243</sup> One judge characterized the test as a showing "that no less intrusive means of gaining the information are extant." <sup>244</sup> Virtually all judges are in agreement that the moving party cannot seek the reporter's information or source as a first step; rather, other efforts must first have been made. Of course, the obvious question is how strictly this requirement will be enforced. Based upon a review of the recent cases in this area, one must say that the requirement is often being *very* strictly enforced. For instance, in *United States v. Cuthbertson*, <sup>245</sup> the defendant requested the name of the reporter's source. He argued that without this source he would only be able to find the important information by speaking with all persons on the long list of potential witnesses. The court rejected the request, noting that the defendant would prevail only if he could prove "that his only practical means of access to information sought is through the media." <sup>246</sup>

### C. Civil Actions

Immediately after the Supreme Court's decision in *Branzburg*, most judges and commentators had no difficulty concluding that even the apparently confining plurality opinion would not likely apply to non-criminal actions. <sup>247</sup> Justice White's opinion had emphasized the vital function of the grand jury, <sup>248</sup> an important consideration obviously not present in the civil context. As Judge Wright put it: "[Branzburg is not controlling in] civil cases, where the public interest in effective criminal law enforcement is absent. . . ." <sup>249</sup> Nor in civil actions is the defendant's liberty at issue as in some criminal actions where the defendant requests informa-

243. *State v. Boiardo*, 82 N.J. 446, 462, 414 A.2d 14, 22 (1980). See also *In re Farber*, 78 N.J. 259, 282, 394 A.2d 330, 341 (Hughes, J., concurring), cert. denied, 439 U.S. 997 (1978).

244. 78 N.J. at 292, 394 A.2d at 346 (Pashman, J., dissenting).

245. 630 F.2d 139 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981).

246. *United States v. Cuthbertson*, 630 F.2d 139, 195 (3d Cir.), cert. denied, 449 U.S. 1126 (1981).

247. See generally Note, *Newsperson's Privilege and the New York State Shield Law: A Proposal*, 43 ALB. L. REV. 918, 925-26 (1979).

248. [T]he countervailing interests are less compelling. . . than in grand jury proceedings. Justice White's opinion repeatedly stressed that law enforcement, "securing the safety of the person and property of the citizen," is a fundamental function of government. The opinion also emphasized the key role the grand jury plays in effectuating law enforcement objectives. The plurality observed that grand jury proceedings are mandated by the federal constitution and by the constitutions of most states, and that society's interest in detecting and prosecuting crime is so pronounced that citizens have a special duty to convey information about criminal activity to government officials.

Note, *Source Protection in Libel Suits After Herbert v. Lando*, 81 COLUM. L. REV. 338, 355 (1981).

249. *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). See also *Mazzella v. Philadelphia News Inc.*, 479 F. Supp. 523, 526 (E.D.N.Y. 1979) ("interests that (civil) litigants have in forcing disclosure are typically not as compelling."); *Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505, 510 (E.D. Va. 1976) (in civil cases the interests in disclosure are "much less weighty than those involved in criminal proceedings").

tion<sup>250</sup> from the media representative.

As a consequence, most judges in state and federal civil actions pause only briefly in finding that *Branzburg* is not controlling.<sup>251</sup> This finding is but a starting point, however. Surely, in *some* civil cases compelled disclosure by a journalist will be appropriate.<sup>252</sup> Moreover, it is even more accurate to say in the civil setting than in the criminal that the claim will be raised in a wide variety of contexts.<sup>253</sup> Thus, it is important to begin here with the questions of whether the reporter has a privilege and how that privilege is to be applied.

It is now well established in all federal circuits and in most states that journalists have a qualified privilege to refuse to disclose confidential sources when requested in civil litigation.<sup>254</sup> In the federal courts, judges primarily have reached this conclusion by noting the non-criminal nature of the action and—as in the criminal case—construing Justice Powell's concurring opinion in *Branzburg* as conferring such a privilege.<sup>255</sup> These judges carefully scrutinize requests for information in light of the heavy burden imposed by the first amendment. "But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling [disclosure in civil actions] may significantly interfere with this newsgathering ability. . . ."<sup>256</sup>

State judges also look to the first amendment as establishing a privilege in civil actions. In many cases, however, state judges in the civil context grant the privilege under common law principles, emphasizing the "increasing importance of journalists to convey information to citizens. . . ."<sup>257</sup> Judges are not reluctant to act on behalf of the media in the civil context because there is little fear that constitutional rights of other individuals will be infringed. In the criminal action, the judge may properly hesitate because of a concern that the defendant's right to present evidence will be seriously restricted if a privilege is recognized.<sup>258</sup> In the civil case, even with the defamation action, no such right is normally at issue.<sup>259</sup>

250. See *supra* notes 202-13 and accompanying text.

251. Most, but not all, judges do so. See, e.g., *Dow Jones & Co. v. Superior Ct.*, 364 Mass. 317, 325, 303 N.E.2d 847, 850 (1973), where the court found that there was no privilege so that disclosure is required unless there is a finding that the requests constitute "unnecessary harassment or frivolous inquiries."

252. Disclosure would be appropriate, for example, in the situation where the reporter is the plaintiff. A strong case can also be established for disclosure in the defamation action where the reporter is the defendant and has the only access to the most relevant source of information in the case. See discussion below.

253. A few states have statutes which specifically deal with the civil action, creating an *absolute* privilege. See, e.g., *Maressa v. New Jersey Monthly*, 89 N.J. 176, 200, 445 A.2d 376, 389, *cert. denied*, 103 S. Ct. 211 (1982). Most states—and the federal system—do not have such broad statutes.

254. *Liberty Lobby, Inc. v. Anderson*, 96 F.R.D. 10, 11-12 (D.D.C. 1982), and cases cited therein. See generally Note, *Media Law*, 54 TEMP. L.Q. 170 (1981).

255. *Bruno & Stillman, Inc. v. Globe Newspaper, Co.*, 633 F.2d 583, 594 (1st Cir. 1980); *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5, 8 (2d Cir.), *cert. denied*, 103 S. Ct. 215 (1982).

256. *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981).

257. *Senear v. Daily Journal American*, 97 Wash. 2d 148, 641 P.2d 1180, 1183 (1982).

258. See *supra* notes 201-13 and accompanying text.

259. That the initiation of a civil action is not a matter of constitutional dimension was settled by the United States Supreme Court in *Paul v. Davis*, 424 U.S. 693, 712 (1976). See *Maressa v. New Jersey Monthly*, 89 N.J. 176, 200, 445 A.2d 376, 385, *cert. denied*, 103 S. Ct. 211 (1982).

The existence of the privilege, therefore, is not subject to great doubt.<sup>260</sup> What may be subject to some doubt, however, is the manner in which the privilege is invoked and applied.

The problem is especially acute due to the incredibly varied civil actions in which the privilege claim is made. Within the past decade the courts have seen the issue arise in the following sorts of cases: antitrust suits,<sup>261</sup> securities matters,<sup>262</sup> will contests,<sup>263</sup> defamation actions in which the media representative was not a party,<sup>264</sup> civil suits against the government,<sup>265</sup> labor proceedings,<sup>266</sup> judicial inquiries,<sup>267</sup> and a host of other civil actions.<sup>268</sup> Given such a broad category of cases, it is not surprising that judges have been quite creative with respect to remedies short of total disclosure. It has been suggested, for example, that disclosure could be deferred until late in the discovery process to enable normal routes of discovery to uncover the information; a referee could be appointed to examine the reporter's notes, and then a seal could be placed on them.<sup>269</sup> Additional protection could be afforded the reporter by restricting use of the information solely to the litigation.<sup>270</sup> In short, the options are "limited only by the needs of the situation and the ingenuity of the court and counsel."<sup>271</sup>

As indicated previously in connection with criminal prosecutions and investigations, often the reporter will not be asked to disclose purely confidential sources of information. In the criminal context, the courts may then be less inclined to grant a privilege, considering the important interests present. In the civil setting, however, courts are reluctant to require disclosure even if the source is no longer confidential<sup>272</sup> or if the informa-

260. In many civil actions the term "privilege" is never used in denying the litigant's request for information from a journalist. In many cases, under traditional rules of discovery, the request is not honored. *Dallas Oil & Gas, Inc. v. Mover*, 533 S.W.2d 70 (Tex. 1976); Note, *Source Protection in Libel Suits After Herbert v. Lando*, 81 COLUM. L. REV. 338, 348 (1981).

261. *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5 (2d Cir.), *cert. denied*, 103 S. Ct. 215 (1982); *Gulliver's Periodicals Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978).

262. *S.E.C. v. McGoff*, 647 F.2d 185 (D.C. Cir.), *cert. denied*, 452 U.S. 963 (1981); *In re Forbes Magazine*, 494 F. Supp. 780 (S.D.N.Y. 1980).

263. *Newburn v. Howard Hughes Medical Inst.*, 95 Nev. 368, 594 P.2d 1146 (1979).

264. *Application of Consumers Union of United States, Inc.*, 495 F. Supp. 582 (S.D.N.Y. 1980).

265. *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

266. *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976); *Conn. St. Bd. of Labor Rel. v. Fagin*, 33 Conn. Supp. 204, 370 A.2d 1095 (1976).

267. *In re Roche*, 381 Mass. 624, 411 N.E.2d 466 (1980).

268. See, e.g., *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Maughan v. N.L. Indus.*, 524 F. Supp. 93 (D.D.C. 1981); *Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *Times Pub. Co. v. Burke*, 375 So. 2d 297 (Fla. 1979).

269. *Bruno & Stillman, Inc. v. Globe Newspaper, Co.*, 633 F.2d 583, 598 (1st Cir. 1980) (The court "has available to it a range of actions that can be tailored to the needs of sensitive balancing").

270. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 727 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

271. *Bruno*, 633 F.2d at 598.

272. *Altomose Constr. v. Building & Constr. Trades Council*, 443 F. Supp. 489 (E.D. Pa. 1977); *Times Pub. Co. v. Burke*, 375 So. 2d 297 (Fla. 1979). As stated in *Maughan v. N.L. Indus.*,

tion is not secret.<sup>273</sup> The extreme example is probably *United States v. Steelhammer*,<sup>274</sup> where the reporter attended a general meeting held by a union. The reporter received the same information from the same sources as hundreds of other persons, yet he refused to respond to a judge's questions regarding the meeting.<sup>275</sup> On appeal the court agreed with the reporter, finding that if the reporter were required to disclose this information, it "would as a practical matter result in the closing of future meetings. . . ." <sup>276</sup>

While courts are most protective of reporters' interests generally in the civil context, in two specific types of cases disclosure has been ordered rather consistently. The first involves the situation in which the reporter is the plaintiff making allegations of wrongdoing by the defendants; the defendants in discovery ask the names of the persons who have information concerning the allegations of wrongdoing, but the reporter refuses to disclose. In such a case, the reporter has little chance of protection. The most famous of these cases is *Anderson v. Nixon*,<sup>277</sup> in which columnist Jack Anderson sued a number of principals in the Watergate affair, including former President Richard Nixon. Anderson asserted that the defendants conspired to retaliate against his sources and to damage his credibility before the public. The defendants asked who his sources were, a relatively routine discovery request. Anderson refused to divulge his sources and asked that the court order disclosure only if, after weighing the various interests, his disclosure would be the only way in which vital information would be available to the parties.<sup>278</sup> The court recognized that a balancing process was often used in both criminal and civil cases in which the privilege question arose.<sup>279</sup> In this situation, however, the court refused to engage in the process, where Anderson was "attempting to use the First Amendment simultaneously as a sword and a shield."<sup>280</sup>

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524 F. Supp. 93, 95 (D.D.C. 1981): "[T]he qualified privilege acknowledged in *Branzburg* extends to resource materials. . . ."

273. Application of Consumers Union of United States, Inc., 495 F. Supp. 582, 586 (S.D.N.Y. 1980) ("[T]hey seek to examine the reportorial and editorial processes.").

274. 539 F.2d 373 (4th Cir. 1976).

275. The judge had entered a temporary restraining order forbidding the calling of a strike. The questions of the reporter were asked to find out which members of the union hierarchy had violated the order. *Id.* at 375.

276. *Id.* at 377.

277. 444 F. Supp. 1195 (D.D.C. 1978).

278. *Id.* at 1199.

279. See *supra* notes 227-33 and accompanying text.

280. 444 F. Supp. at 1199. The court explained:

Here the newsman is not being obliged to disclose his sources. Plaintiff's pledge of confidentiality would have remained unchallenged had he not invoked the aid of the Court seeking compensatory and punitive damages based on his claim of conspiracy. . . . But when those he accuses seek to defend by attempting to discover who his sources were, so that they may find out what the sources knew, their version of what they told him, and how they were hurt, plaintiff says this is off limits—a forbidden area of inquiry. He cannot have it both ways. Plaintiff is not a bystander in the process but a principal. He cannot ask for justice and deny it to those he accuses. . . . Where, as here, it is the newsman himself who has provoked the legal controversy about which his confidential sources may have relevant information, any "balancing" seems most unrealistic. Having chosen to become a litigant, the newsman is not exempt from those obligations imposed by the rule of law on all litigants in the federal courts.

*Id.* See also *Campus Communications v. Freeman*, 374 So. 2d 1169 (Fla. 1979). For a twist on

The second category of cases in which judges are generally less protective of media representatives is the defamation action in which the publisher is the defendant. This matter arises with great frequency in both federal and state courts.<sup>281</sup> In these cases judges may determine that the discovery request made by the plaintiff can be disposed of under the usual discovery rules.<sup>282</sup> In cases in which the normal rules are not helpful, however, courts are faced with a very serious dilemma in which the aggrieved party seeks out purportedly vital information while the reporter complains of interference with the newsgathering process.<sup>283</sup>

The beginning point of analysis is the Supreme Court's decision in *Herbert v. Lando*.<sup>284</sup> The Court in that case dealt with an important problem which traced its roots to the earlier decision in *New York Times v. Sullivan*.<sup>285</sup> In *New York Times*, the Court found that, due to first amendment considerations, public officials<sup>286</sup> who sue for defamation must prove malice, defined as either knowledge of the falsity or reckless disregard for the truth.<sup>287</sup> The key is that the plaintiff must focus on the defendant's subjective state of mind in order to prevail in a defamation action.<sup>288</sup>

In *Herbert*, a retired army officer sued the producers of the television show, "60 Minutes," claiming that he had been defamed in one of the programs. Under the *New York Times* standard, he was required to prove malice, by clear and convincing evidence. During the course of discovery, Herbert requested information regarding the editorial process, conversations which had taken place among the editors, and details of the decision-making process. The producers of the show refused to disclose such information, claiming a privilege. In disagreeing with the "60 Minutes" producers, the Supreme Court employed a test balancing "the plaintiff's need for the disclosure against the publisher's claim of confidentiality of the editorial process which encompassed both the publisher's and the public's interest in the free flow of information."<sup>289</sup> As explained by the Fifth Circuit:

*Herbert* held that the press had no First Amendment privilege against discovery of mental processes where the discovery was for the

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the usual situation, see *Newburn v. Howard Hughes Medical Inst.*, 95 Nev. 368, 594 P.2d 1146 (1979), where a reporter voluntarily gave information to some of the litigants but not to others.

281. See, e.g., *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Liberty Lobby, Inc. v. Anderson*, 96 F.R.D. 10 (D.D.C. 1982); *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979); *Senear v. Daily Journal American*, 97 Wash. 2d 148, 641 P.2d 1180 (1982); *Gagnon v. District Court*, 632 P.2d 567 (Colo. 1981); *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, cert. denied, 434 U.S. 930 (1977).

282. Note, *Source Protection in Libel Suits After Herbert v. Lando*, 81 COLUM. L. REV. 338 (1981): "In many defamation cases, the identity of the source will not be material to the question of culpable state of mind and thus disclosure will be unnecessary." *Id.* at 347.

283. See generally Note, *Newsperson's Privilege and the New York State Shield Law: A Proposal*, 43 ALB. L. REV. 918, 925-26 (1979).

284. 441 U.S. 153 (1979).

285. 376 U.S. 254 (1964).

286. The rule was later extended to apply to public figures as well. See the discussion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332-39 (1974).

287. 376 U.S. at 279-80.

288. This point was made clear in *St. Amant v. Thompson*, 390 U.S. 727 (1968): "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731.

289. *Mize v. McGraw-Hill*, 86 F.R.D. 1, 3 (S.D. Tex. 1980) (discussing *Herbert v. Lando*).



purpose of determining whether malice existed. . . . [T]he Supreme Court reasoned that requiring disclosure of journalists' thought processes would have no chilling effect on the editorial process; the only effect would be to deter recklessness.<sup>290</sup>

It is perhaps true, as some have argued, that *Herbert* is not dispositive of the question of disclosure of sources in defamation cases.<sup>291</sup> After all, the case dealt with disclosure of the editorial process rather than of confidential sources. Still, the case is highly relevant to the question at issue, for it evinces a desire by the Supreme Court to utilize a balancing test in the defamation area rather than to employ an absolute privilege on behalf of the media. Most courts to consider the application of *Herbert* have agreed with this view. The court in *Downing v. Monitor Publishing Co., Inc.*<sup>292</sup> stated the matter forcefully: "It is untenable to impose the heavy *New York Times* burden of proof upon plaintiff and at the same time prevent him from obtaining the evidence necessary to meet that burden."<sup>293</sup> As explained by a federal district judge:

The media defendant cannot have it both ways: he cannot enjoy the protection afforded by the heavy burden imposed upon the public official plaintiff by *New York Times* and at the same time enjoy a privilege that prevents the plaintiff from obtaining the evidence necessary to carry that burden. Were the media defendant allowed to have it both ways, he would have absolute license, and the libel plaintiff would have no recourse in the courts. As the Court stated in *Herbert*, "Only complete immunity from liability for defamation would [protect the press from the burdens of defamation litigation], and the Court has regularly found this to be an untenable construction of the First Amendment."<sup>294</sup>

*Herbert*, then, seems to have had no remarkable impact on the analysis in this area. No magic formula or rule can be taken from that case to clarify the questions in the area of the reporter's privilege for confidential sources. Once the moving party has made a showing of a good faith, serious claim,<sup>295</sup> the trial judge will be confronted with a most difficult question. Two cases will be helpful in answering this question, with opinions written by outstanding jurists. The opinions provide insight into the relevant evaluation process. Potter Stewart, while serving on the Second Circuit Court of Appeal, wrote the opinion for the court in *Garland v. Torre*.<sup>296</sup> In this case, actress Judy Garland sued a reporter, claiming she had been defamed in an article that quoted an unnamed network source. Garland attempted to find out who the source was before she subpoenaed the reporter. The court rejected the reporter's claim of privilege, finding

290. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).

291. Note, *supra* note 280, at 358: "*Herbert* does not provide authority for requiring disclosure of confidential sources in libel actions." *Id.*

292. 415 A.2d 683 (N.H. 1980).

293. *Id.* at 685-86. See also *Saxton v. Arkansas Gazette Co.*, 264 Ark. 133, 569 S.W.2d 115 (1978).

294. *DeRoburt v. Gannett Co., Inc.*, 507 F. Supp. 880, 884 (D. Hawaii 1981).

295. *Id.* at 886; *Saxton*, 264 Ark. at 137, 569 S.W.2d at 117.

296. 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

that the information was important to a serious claim and was unavailable from other sources.<sup>297</sup>

Judge Carl McGowan in *Carey v. Hume*<sup>298</sup> shed even greater light on the question. The plaintiff was an official of the United Mine Workers accused of unlawfully removing documents from his office during the course of an investigation. The reporter's story was based entirely on information received from an unnamed source, whom the plaintiff could not locate. The reporter was required to disclose the name of the source. The court explained that the reporter could not have an absolute privilege to refuse to disclose significant information in this context.

The courts must always be alert to the possibilities of limiting impingements upon press freedom to the minimum; and one way of doing so is to make compelled disclosure by a journalist a last resort after pursuit of other opportunities has failed. But neither must ligigants be made to carry wide-ranging and onerous discovery burdens . . . We have rejected the only contention made to us by appellant, and that was the pre-*Branzburg* claim that there either is, or should be, an absolute First Amendment barrier to the compelled disclosure by a newsman of his confidential sources under any circumstances. That was not, in our view, the law before *Branzburg*, and it is certainly not the law after, in either civil or criminal proceedings.<sup>299</sup>

The principle to be gleaned from these cases may be stated as follows: In civil cases generally, and in defamation cases in particular, the resolution of the reporter's privilege claim is to be made on a case-by-case basis. This principle is, of course, not surprising; it is consistent with the views generally expressed in the criminal context<sup>300</sup> and with the position of the Supreme Court in the editorial privilege case, *Herbert v. Lando*.<sup>301</sup> Virtually every court to confront the issue of the reporter's privilege in civil actions has agreed that a balancing approach to the problem must be taken, with a heavy emphasis on the particular facts found in each case.<sup>302</sup>

297. Without question, the exaction of this duty impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears. But "[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public."

If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."

*Id.* at 549 (citations omitted).

298. 492 F.2d 631 (D.C. Cir. 1974), *cert. dismissed*, 417 U.S. 938 (1974).

299. *Id.* at 639. *See also* *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Resorts Int'l, Inc. v. N.J.M. Assoc.*, 180 N.J. Super. 459, 435 A.2d 572 (1981), *rev'd*, 89 N.J. 212, 445 A.2d 395, *cert. denied*, 103 S. Ct. 212 (1982).

300. *See supra* notes 227-33 and accompanying text.

301. 441 U.S. 153 (1979). *See* *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

302. *See, e.g., In re Petroleum Products Antitrust Litig.*, 680 F.2d 5 (2d Cir.), *cert. denied*, 103 S. Ct. 215 (1982); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Gulliver's Periodicals Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978); *Senear v. Daily Journal American*, 97 Wash. 2d 148, 641 P.2d 1180 (1982); *Caldero v. Tribune Pub. Co.*, 98 Idaho 288, 562 P.2d 791, *cert. denied*, 434 U.S. 930 (1977).

Moreover, the balancing test to be utilized here is almost identical to that found in the criminal setting:

First and foremost, is the information sought a "critical element" of the plaintiff's cause of action?; does it "go to the heart" of the plaintiff's case? Second, has the plaintiff "demonstrated specific need" for the evidence?; is the information otherwise not reasonably available to him? Third, has the plaintiff made a showing that his claim is not "without merit"?<sup>303</sup>

To state the formula more concisely: (1) is the information relevant, (2) can it be obtained from other sources, and (3) is there a compelling need for the information?<sup>304</sup>

*Relevance.* In civil actions, judges typically require a showing of more than mere relevance or materiality. As Justice Stewart stated in the *Garland* case, the information must go "to the heart of the plaintiff's claim."<sup>305</sup> Moreover, because of the balance present in the civil setting, these judges very closely scrutinize claims regarding the application of the doctrine. Once again, Judge McGowan's thoughtful opinion in *Carey v. Hume* is of assistance in analyzing the problem. The plaintiff, a public figure, had been accused of improperly removing documents from the UMW office during the course of an investigation. The reporter's charge was based upon information given to him by a single source. The identity of the source, therefore, appeared "to go to the heart of appellee's libel action. . . ."<sup>306</sup> The court, in requiring disclosure, explained:

It would be exceedingly difficult for appellee to introduce evidence beyond his own testimony to prove that he did not, at any time of day or night over an indefinite period of several weeks, remove boxfuls of documents from the UMW offices. Even if he did prove that the statements were false, *Sullivan* also requires a showing of malice or reckless disregard of the truth. That further step might be achieved by proof that appellant in fact had no reliable sources, that he misrepresented the reports of his sources, or that reliance upon those particular sources was reckless.

Knowledge of the identity of the alleged sources would logically be an initial element in the proof of any of such circumstances. Although it might be possible to submit the question of malice to the jury simply on the basis of the conflicting allegations of the parties, that procedure would seem to provide the plaintiff little prospect of success in view of his heavy burden of proof.<sup>307</sup>

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303. *DeRobert v. Gannett Co., Inc.*, 507 F. Supp. 880, 886 (D. Hawaii, 1981).

304. *Miller*, 621 F.2d at 726. See also *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).

305. 259 F.2d at 550. See also *Connecticut State Bd. of Labor Relations v. Fagin*, 33 Conn. Supp. 204, 207, 370 A.2d 1095, 1098 (1976) (The information must be "highly relevant to the proceeding.")

306. 492 F.2d at 636. The court in *Carey* also discussed why relevance was found in *Garland* but not in cases such as *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973), where the information sought was relevant, but not central, to a federal class action alleging racial discrimination in the sale of houses. 492 F.2d at 636 n.9.

307. 492 F.2d at 636-37.

Unlike the situation in *Carey*, in the careful review of claims, courts often do not require reporters to disclose, finding that the information sought would be of "only marginal relevance to the plaintiff's case."<sup>308</sup> This result is proper, for the reporter should have to give up the confidential source or information only if the matter is truly of great importance to the resolution of the law suit.<sup>309</sup>

*Unavailability.* Most judges seem to apply strictly the rule that the party requesting the confidential data must show "that he has exhausted every reasonable alternative source of information."<sup>310</sup> To be sure, many appeals courts require trial judges to make findings in the record with respect to the unavailability of alternative sources. Some courts will reverse if the "findings contain only a general assertion of necessity. The conclusory statements fall far short of the type of specific findings of necessity which may overcome the privilege."<sup>311</sup>

This exhaustion requirement is taken most seriously for fear that routine disclosure orders would, as a practical matter, eliminate the privilege.<sup>312</sup> In *Zerilli v. Smith*,<sup>313</sup> for example, alternative sources for the information existed, but the plaintiffs argued that a review of these would be "time-consuming, costly, and unproductive." The court nevertheless required the plaintiffs to "[fulfill] their obligation to exhaust possible alternative sources of information."<sup>314</sup> Similarly, the Second Circuit recently required the parties to conduct many more depositions before requesting the confidential source. "This requirement is reasonable when balanced against the strain on the First Amendment. . . ."<sup>315</sup> Of course, this principle could be carried to an extreme so that disclosure would never be ordered, thus making the privilege absolute. Most courts, however, are sensitive to the interests of both sides. In *Carey v. Hume*, the court required disclosure even though it was possible to track down the source, a UMW employee, by speaking with all employees.

We think it may be assumed that the national offices of the

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308. *Riley v. City of Chester*, 612 F.2d 708, 718 (3d Cir. 1979). See also *Taylor v. Miskovsky*, 640 P.2d 959 (Okla. 1981).

309. See generally *DeRobert v. Gannett Co., Inc.*, 507 F. Supp. 880 (D. Hawaii 1981); Note, *Source Protection in Libel Suits After Herbert v. Lando*, 81 COLUM. L. REV. 338 (1981).

310. *Liberty Lobby, Inc. v. Anderson*, 96 F.R.D. 10, 12 (D.D.C. 1982). See also *Connecticut State Bd. of Labor Relations v. Fagin*, 33 Conn. Sup. 204, 207, 370 A.2d 1095, 1097-98 (1976).

311. *Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1979).

312. See, e.g., *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976), where the reporter was sentenced to six months' imprisonment for refusing to disclose information. The reporter had attended a general meeting of a union (called to discuss a strike, in violation of a temporary restraining order). Many other persons were present at the meeting, yet the judge ordered the defendant to disclose the information regarding the meeting. The court on appeal reversed, finding that if the reporter were forced to disclose information as to the meeting, it "would as a practical matter result in the closing of future meetings. . . ." *Id.* at 377.

313. 656 F.2d 705 (D.C. Cir. 1981).

314. *Id.* at 714.

315. *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5, 9 (2d Cir.), cert. denied, 103 S. Ct. 215 (1982). But see *In re Roche*, 411 N.E.2d 466 (Mass. 1980), where the court ordered disclosure even though many persons already known to the parties possessed the same information. The reporter's request for confidentiality amounts "simply to a shuffle as to priority of time." *Id.* at 470.

UMWA are manned by a very substantial number of employees. It is also clear from the foregoing that the observations in question could have been made by anyone from an office boy to a top officer, and in any part of the building. We do not think that the concept of exhaustion of remedies relevant here is invoked by guide marks as vague as these.<sup>316</sup>

*Compelling need.* This last prong of the three-part test is the most difficult to evaluate, for courts view it in different ways. Some judges simply look to the "need" factor as indicating no alternative sources.<sup>317</sup> Others seem to focus attention on a compelling need arising only if the litigants have first shown some likelihood of success in the lawsuit, thus indicating a nonfrivolous request.<sup>318</sup> Most courts, however, look to this last element as an opportunity to balance, on an ad hoc basis, the interests served by the dissemination of the information as opposed to the maintenance of the confidential relationship. As a judge in one recent case stated: "I do not find that the societal interest represented by the plaintiff's cause of action and served by compelling the reporter's testimony here approaches the societal interest in disclosure noted in *Branzburg v. Hayes*."<sup>319</sup>

### THE STATUTORY RESPONSE

Until very recently there had been little legislative action in the area of the reporter's privilege for confidential sources and information. Maryland passed the first statute in 1896,<sup>320</sup> but no other legislature acted until 1933.<sup>321</sup> Indeed, as of the date of the decision in *Branzburg v. Hayes*, only seventeen statutes had been enacted by the states.<sup>322</sup> In recent years there has been a good deal of discussion concerning the question of federal and state statutory reporter's privileges so that today a majority of states has some form of reporter's privilege.<sup>323</sup>

316. 492 F.2d at 638.

317. See, e.g., *Maughan v. N.L. Indus.*, 524 F. Supp. 93, 95 (D.D.C. 1981); *Application of Consumers Union of United States, Inc.*, 495 F. Supp. 582, 588 (S.D.N.Y. 1980).

318. *DeRoburt v. Gannett Co., Inc.*, 507 F. Supp. 880, 886 (D. Hawaii 1981).

319. *In re Forbes Magazine*, 494 F. Supp. 780, 781 (S.D.N.Y. 1980). See also *Liberty Lobby, Inc. v. Anderson*, 96 F.R.D. 10, 12 (D.D.C. 1982) (the question is "whether this is the rare or exceptional case in which the disclosure of the source is critically necessary as going to the heart of the plaintiff's case, without which justice would fail").

320. The Maryland law "was passed in apparent response to the jailing, in early 1896, of a newspaper reporter who had obtained information which enabled him to accurately report the proceedings of the Baltimore City Grand Jury." *Lightman v. State*, 15 Md. App. 713, 717 n.2, 294 A.2d 149, 152 n.2, *aff'd*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 441 U.S. 951 (1973).

321. New Jersey adopted its law in 1933. See generally *Day, Shield Laws and the Separation of Powers Doctrine*, 2 COM. AND THE LAW 1, Vol. 4 (1980).

322. 408 U.S. at 689 n.27.

323. ALA. CODE § 12-21-142 (1975); ALASKA STAT. § 09.25.150 (1973); ARIZ. REV. STAT. ANN. § 12-2237 (1982); ARK. STAT. ANN. § 43-917 (1977); CAL. EVID. CODE § 1070 (West Supp. 1983); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1974); ILL. ANN. STAT. ch. 110, §§ 8-901 to 8-909 (Smith-Hurd Pamphlet 1983) (repealed 1982); IND. CODE § 34-3-5-1 (1983 Supp.); KY. REV. STAT. ANN. § 421.100 (Baldwin 1979); LA. REV. STAT. ANN. §§ 45-1451 to -1454 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1980); MICH. STAT. ANN. § 28.945(1) (1978); MINN. STAT. ANN. §§ 595.021-.025 (West Supp. 1983); MONT. CODE ANN. § 26-1-901 to 903 (1981); NEB. REV. STAT. §§ 20-144 to 146 (1977); NEV. REV. STAT. § 49.275 (1979); N.J. STAT. ANN. §§ 2A:84A-21 to

*Branzburg* no doubt spurred action by many legislators who were concerned with the ambiguous holding in the case.<sup>324</sup> Others were certainly reacting to the sharp increase in the number of judicial proceedings brought against members of the media.<sup>325</sup> Still others may have been influenced by the concern expressed by judges in fashioning a judicial remedy to this delicate weighing process.<sup>326</sup> Whatever the reasons for the flurry of state activity, those reasons have not been sufficient to move the federal system into action for uniform legislation in the area.<sup>327</sup> Unfortunately, while many bills were proposed in Congress both immediately after *Branzburg* and since, no statute has been adopted.<sup>328</sup> Considering the national scope of much of the newsgathering and reporting processes, this lack of a national, uniform privilege is especially unfortunate.<sup>329</sup> Moreover, this fact is troubling to lawyers and journalists because the state statutes differ so very much in both scope and application.<sup>330</sup>

### A. *The Variety of Alternatives*

The purpose of each of the state statutes is the same.<sup>331</sup> The legisla-

21.13, -29 (West 1976 & Supp. 1983-84); N.M. STAT. ANN. 38-6-7 (Supp. 1978); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1982-83); N.D. CENT. CODE ANN. § 31-01-06.2 (1976); OHIO REV. CODE ANN. § 2739.12 (Page 1981); OKLA. STAT. tit. 12, § 2506 (1980); OR. REV. STAT. §§ 44.510-.540 (1981); 42 PA. CON. STAT. ANN. § 5942 (Purdon 1982); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (Supp. 1983); TENN. CODE ANN. § 24-1-208 (1980).

324. See *supra* notes 62-110 and accompanying text.

325. See *supra* note 42.

326. See, e.g., the dissenting opinion in *Senear v. Daily Journal American*, 97 Wash. 2d 148, 154, 641 P.2d 1180, 1185 (1982):

If some kind of shield law for reporters is necessary under present day circumstances, as the majority recognized, it must be created. It seems to me that the legislature, consisting of some 147 members, is better able to determine the need for creating such a shield law than is this court. This is so not only because the legislature is closer to the people of the state than is the court, but also because the legislature is equipped to hold hearings to determine whether such a far-reaching change in the law is truly in the public interest.

327. Surprisingly, many reporters do not appear to be aware of the statutory protection now offered in many states. See Blasi, *supra* note 2, at 275-76; Comment, *Branzburg Revisited: The Continuing Search for a Testimonial Privilege for Newsmen*, 11 TULSA L.J. 258, 277 (1975).

328. See Day, *supra* note 321, at 2; Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEG. 233, 255-61 (1974); Note, *Media Law*, 54 TEMP. L.Q. 170, 188 (1981). Day points out that in 1973, the year following *Branzburg*, over sixty bills creating a privilege were introduced in Congress. 2 COM. AND THE LAW at 1 n.3.

329. The failure at the federal level is in sharp contrast to that found in an analogous area, governmental searches of media offices. In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Supreme Court refused to recognize any First Amendment exception to otherwise proper searches conducted under the Fourth Amendment, even when the newsmen were not themselves suspected of any wrongdoing. Just two years after the decision, Congress passed the Privacy Protection Act of 1980, which sharply cut back on the Court's holding. Several states have also adopted provisions which limit *Zurcher*. See Higdon, *The Burger Court and the Media: A Ten Year Perspective*, 2 W. NEW ENG. L. REV. 593, 646 n.305 (1980).

330. See Note, 54 TEMP. L.Q., *supra* note 326, at 188. But see O'Neil, *Shield Laws: Partial Solution to a Pervasive Problem*, 20 N.Y.L.F. 515 (1975).

331. As indicated previously, no federal law on point has ever passed Congress. The Attorney General of the United States did, however, establish guidelines to be used by Justice Department attorneys. While the scope of these guidelines is obviously limited to actions in which the United States government is a party, the guidelines are useful in reflecting a government policy similar to judicial and state legislative pronouncements. 28 C.F.R. § 50.10 (1982) provides, in material part:

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible

tors declared that the gathering and dissemination of news was more important, at least in certain circumstances, than the disclosure of confidential sources and information. Some statutes contain specific references to this policy.<sup>332</sup> In other states the judges have so interpreted the intent of the legislature.<sup>333</sup> While common patterns exist in the various state laws dealing with the reporter's privilege, there are important differences. In this section of the Article, I will discuss the important elements of the statutes and explain—by example—the manner in which the laws differ.

*Nature of the Privilege.* The statutes can be characterized as either absolute or qualified. By enacting absolute laws, the legislators sought to create privileges which could not be lost irrespective of any competing interests. In California, for instance, the statute declares that the reporter "cannot be adjudged in contempt . . . for refusing to disclose, in any proceeding . . . the sources of any information. . . ."<sup>334</sup> No reference is made to the need for the information as asserted by investigatory bodies, criminal defendants, or civil plaintiffs. Similarly, the Indiana law indicates that the journalist "shall not be compelled to disclose in any legal proceedings . . . the sources of any information procured or obtained. . . ."<sup>335</sup>

The Illinois Code provides for a qualified privilege. It states that the reporter need not disclose the information unless "all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved."<sup>336</sup> This requirement is very similar to the common law restriction imposed in

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controversial public issues. . . . In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all members of the Department in all cases:

(a) In determining whether to request issuance of a subpoena to a member of the news media . . . the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.

(b) All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena. . . .

(c) Negotiations with the media shall be pursued in all cases in which a subpoena to a member of the news media is contemplated. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media.

. . .

(e) No subpoena may be issued to any member of the news media . . . without the express authorization of the Attorney General.

*Id.*

332. The Minnesota statute explicitly declares that its purpose is to protect the free dissemination of information. MINN. STAT. ANN. § 595.022 (West Supp. 1983).

333. *See, e.g.,* Rosato v. Superior Ct., 51 Cal. App. 3d 190, 217-18, 124 Cal. Rptr. 427, 445 (1975), *cert. denied*, 427 U.S. 912 (1976).

334. CAL. EVID. CODE § 1070(a) (West Supp. 1983).

335. IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1983).

336. ILL. ANN. STAT., ch. 110, § 8-907(2) (1983). The New Jersey law is similar. *See infra* note 353.

most federal courts.<sup>337</sup> New Mexico also created a qualified privilege, but a somewhat more ambiguous version. Under the New Mexico law, the privilege was lost where "disclosure [is] essential to prevent injustice."<sup>338</sup>

*Coverage.* Many of the more recently enacted statutes provide that all reporters and members of all forms of news media are covered under the privilege. Illinois defines a reporter as "any person regularly engaged in the business of collecting, writing, or editing news for publication through a news medium."<sup>339</sup> "News medium" includes, among many others, "any newspaper or other periodical . . . a news service . . . a radio station; a television station. . . ."<sup>340</sup>

The approach in other states is more limited. Alabama extends the privilege only to persons employed by newspapers and radio or television stations, thus excluding magazine reporters.<sup>341</sup> New Jersey includes radio and television reporters, but only if the station keeps open for inspection exact recordings or transcripts of the news presentations in question.<sup>342</sup>

*Publication.* The early statutes tended to require publication of the information before a privilege would be provided. The Alabama requirement is that the information be "published . . . broadcast . . . or televised."<sup>343</sup> This requirement is somewhat difficult to understand. The information may be privileged because of the reporter's relationship with the source, a relationship which courts have determined should be protected. Why, then, should it matter whether the editor of the news decided to print or broadcast the reporter's story? Most statutes do not impose a publication requirement, so long as the information was received by the reporter during work-related activities.<sup>344</sup>

*Exemptions.* Many statutes provide no exemptions at all. If the statutory conditions are met, the source or information will be privileged. California follows this rule and applies the privilege in "all proceedings of whatever kind in which testimony can be compelled by law to be given."<sup>345</sup> In other states, however, some specific proceedings are excluded

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337. See *supra* notes 302-19 and accompanying text.

338. N.M. STAT. ANN. § 38-6-7A, C (Supp. 1978). This statute was declared unconstitutional by the state supreme court in *Ammerman v. Hubbard Broadcasting*, 89 N.M. 307, 551 P.2d 1354 (1976), discussed *infra* at text accompanying notes 359-61.

339. ILL. ANN. STAT. ch. 110, § 8-902(a) (1983).

340. *Id.* § (b). The approach under the California statute is similar, including persons employed by a newspaper, magazine, radio or television station. CAL. EVID. CODE § 1070 (West Supp. 1982). The California law is unique in one respect. It does not create a privilege, but simply states that the reporter is immune from punishment for refusing to disclose. In some cases (such as the civil action in which the reporter is a defendant) this distinction is of importance. See *KSDO v. Superior Ct.*, 136 Cal. App. 3d 375, 186 Cal. Rptr. 211 (1982); *Hammarly v. Superior Ct.*, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979).

341. ALA. CODE § 12-21-142 (1975).

342. N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1983-84).

343. ALA. CODE § 12-21-142 (1975).

344. *E.g.*, ". . . any information procured or obtained in the course of his employment. . . ." IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1983).

345. CAL. EVID. CODE § 901, Comment — Law Revision Commission (West 1966). The proceedings includes "civil and criminal actions and proceedings, administrative proceedings, legisla-



from the coverage of the statute. In Illinois, the legislators provided that the privilege rules are "not available in any libel or slander action in which a reporter or news medium is a party defendant."<sup>346</sup> This restriction might be understandable in a jurisdiction which enacted an absolute privilege; the legislators would not want the reporter-defendant in a defamation action to withhold relevant and vital discovery information from the aggrieved parties. In a qualified privilege jurisdiction—one which, by statute, uses a weighing process<sup>347</sup>—it is indefensible to obliterate any privilege simply because the reporter happens to be a defendant in a defamation action. Cases may arise in which there is simply no need for disclosure. A far more defensible exclusion is present in New Jersey, where the privilege may not be claimed in "any situation in which a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage."<sup>348</sup> Here the legislative judgment is that in such cases the claimed privilege must bow to the public interest in the prevention of violence or property loss. This applies only in the limited situation in which the reporter actually witnessed the crime, a restriction generally imposed by the courts.<sup>349</sup>

*Type of privileged matter.* Many jurisdictions do not distinguish between the privileged source and the privileged information. The New York statute, to give one illustration, states that the journalist cannot be required to disclose "any news or the source of any such news. . . ."<sup>350</sup> In some other states, however, the privilege extends only to the source.<sup>351</sup> Once again, it is somewhat difficult to understand this restriction. In many instances, of course, it is the source that the media wishes to protect. In some cases, though, the source may be known to the public, but the information provided may be confidential. In still other cases, the source may not even be known to the reporter, but the information may be an important part of the confidential newsgathering process.<sup>352</sup>

*Procedures.* Many of the statutes make no specific provisions for procedures to be followed when the privilege is at issue. Other states are quite careful in establishing safeguards. In New Jersey, the statute sets forth in

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tive hearings, grand jury proceedings, coroners' inquests, arbitration proceedings, and any other kind of proceeding in which a person can be compelled by law to appear and to give evidence." *Id.*

346. ILL. ANN. STAT. ch. 110 § 8-901 (1983).

347. Illinois uses the usual weighing process elements: need, relevance, and unavailability. See ILL. ANN. STAT. ch. 110 § 8-906 (1983).

348. N.J. STAT. ANN. § 2A:84A-21a(h) (West Supp. 1983-84).

349. See *supra* notes 223-26 and accompanying text.

350. N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney Supp. 1982-83). See also N.M. STAT. ANN. § 38-6-7A(1)(2) (Supp. 1978); N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1982).

351. See, e.g., ALA. CODE § 12-21-142 (1975); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1983).

352. One issue which does not often arise under the statutes concerns the source of information which was not derived from a confidential relationship. Most statutes simply make no reference to a requirement of a confidential relationship, referring only to sources or news information. Those few laws which do discuss confidential relationships make clear that such relationships are not prerequisites for the privilege. For example, the New York law creates a privilege even if "the information was not solicited by the journalist or newscaster prior to disclosure to him." N.Y. CIV. RIGHTS LAW § 79-h(8)(b) (McKinney Supp. 1983-84).

detail the procedures to be followed. The reporter must make a prima facie showing, before trial, that she is covered by the privilege. At that point, the opposing party must show either by clear and convincing evidence that the reporter waived the privilege or by a preponderance of the evidence that the qualified privilege requirements<sup>353</sup> have been met. If the moving party prevails preliminarily, the judge must inspect the materials in camera.<sup>354</sup> If a final trial court determination requires disclosure, an interlocutory appeal may be filed staying the imposition of a penalty.<sup>355</sup>

## B. *The Constitutional Issues*

A number of important constitutional questions may be raised when courts apply a common law or statutory privilege for reporters. In a criminal prosecution, the defendant may claim that the extension of the privilege denies the sixth amendment right to present evidence or confront witnesses.<sup>356</sup> The civil plaintiff who argues that she has been deprived of material important to the development of her case is less likely to succeed.<sup>357</sup> These questions, however, arise in certain cases only because particular information is being kept from the litigants. Because most statutes would allow for the disclosure of information when needed,<sup>358</sup> the issues are not especially crucial to the enactment of a statute.

One issue, however, is directly linked to the statutory creation of a reporter's privilege. This issue concerns the separation of powers doctrine. It has been argued in several cases that legislatively created evidentiary privileges infringe on the role of the judiciary in determining the operation of courts. The leading case to adopt this position is *Ammerman v. Hubbard Broadcasting, Inc.*,<sup>359</sup> where the New Mexico Supreme Court struck down the state's statutory privilege. The court found that the act of the legislature "did nothing more nor less than attempt to create a rule of evidence."<sup>360</sup> The statute was invalid because under the state constitution it is the power of the judiciary "to prescribe . . . rules of evidence."<sup>361</sup>

*Ammerman*, however, stands virtually alone. Few courts today seriously entertain doubts about the constitutionality of statutes which create limited privileges for journalists. As explained by one commentator: "Privilege rules are not intended to regulate court procedure but rather to

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353. The balance in New Jersey is taken from the case approach. The moving party must show relevance, necessity, and unavailability from other sources and further demonstrate that the "value of the material sought . . . outweighs the privilege against disclosure. . . ." N.J. STAT. ANN. § 2A:84A-21.3(b) (West Supp. 1983-84).

354. *Id.* § 21.4.

355. *Id.* § 21.6.

356. See *supra* notes 202-13 and accompanying text.

357. *Maressa v. New Jersey Monthly*, 89 N.J. 176, 190, 445 A.2d 376, 383-85 (1982), relying on *Paul v. Davis*, 424 U.S. 693 (1976), found that there was no violation of due process in such a restriction because the civil action of defamation was not entitled to any constitutional level of protection.

358. This is so because most statutes create only qualified privileges, as opposed to the absolute privileges.

359. 89 N.M. 307, 551 P.2d 1354 (1976).

360. 551 P.2d at 1356.

361. *Id.* at 1359.

promote state social policy. In creating a privilege, society, working through the state legislatures, has decided that protecting a given relationship is more important than reaching the truth in a lawsuit."<sup>362</sup>

### C. *The Open Questions*

Three important questions must be raised in connection with the state statutes which create journalist's privileges. The first concerns the important issue of definition under the statutes, particularly the definition of those persons covered by the law. While some statutes give detailed statements of the coverage,<sup>363</sup> most statutes do not. The lawyer and reporter, thus, must attempt to understand, for instance, what it means to be a person "connected with . . . news media for the purpose of gathering . . . news . . ."<sup>364</sup> With the usual investigative reporting, the problem is not serious. In today's reporting world, however, much of the reporting is not "usual." Consider, for instance, the parties involved in *Silkwood v. Kerr-McGee Corp.*<sup>365</sup> The plaintiff was the administrator of the estate of an employee of the defendant energy company who claimed that the defendant and others violated the deceased's constitutional rights by conspiring to prevent her from organizing a union and by "willfully and wantonly contaminating her with toxic plutonium radiation."<sup>366</sup> The Karen Silkwood story was very much in the public eye, and the "reporter" had formed a production company for the purpose of making a film based on the life of Karen Silkwood. He was not regularly employed by a station or journal and was not under contract to any newsgathering company. Under many of the statutes, there would be grave doubt as to his receiving a privilege. The court properly held that a privilege would be applied, for he was regularly engaged in the newsgathering process and was investigating the facts for purposes of dissemination to the public.<sup>367</sup>

The second open question relates to the application of the various statutes which utilize a qualified privilege. If all burdens of proof are met by the respective parties, under these laws the trial judge must then engage in a balancing process to determine if disclosure will be required. Unfortunately, the application of the statutes will not be immediately predict-

362. Note, *Separation of Powers and the Federal Rules of Evidence*, 26 HASTINGS L.J. 1059, 1072 (1975). See also Note, *A Study in Governmental Separation of Powers: Judicial Response to State Shield Laws*, 66 GEO. L.J. 1273 (1978); Day, *Shield Laws and the Separation of Powers Doctrine*, 2 COM. AND THE LAW Vol. 4, 1, 8-9 (1980):

[T]he granting or withholding of an evidentiary privilege requires a balancing of competing policies. And the weighing of competing policy interests is a legislative, not a judicial, function. . . . States which have adopted modern evidence codes have recognized that privilege rules should be made by the legislature. And most courts despite their reluctance to recognize a common law privilege for reporters, have acknowledged the substantive nature of such privilege rules.

*Id.*

363. See, e.g., ILL. REV. STAT. ch. 110, § 8-902(a) (1983), which defines reporter as "any person regularly engaged in the business of collecting, writing, or editing news for publication through a news medium. . . ."

364. N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1983-84).

365. 563 F.2d 433 (10th Cir. 1977).

366. *Id.* at 435.

367. *Id.* at 437.

able, as they speak in terms of material being "essential to the protection of the public interest involved,"<sup>368</sup> or "essential to prevent injustice."<sup>369</sup> Presumably, under these statutes the judges will have to use the traditional federal common law approach,<sup>370</sup> very much on a case-by-case basis.<sup>371</sup>

Finally, it is important to reiterate that a major question here is the manner in which a national newsgathering process is to respond to the various state statutes.<sup>372</sup> Some of the statutes grant absolute privileges; others give qualified privileges. Some laws require publication; others do not. Some distinguish between protection of sources and protection of information; other statutes make no such distinction.<sup>373</sup> How is a national magazine, television network, or newspaper to deal with such differences in state law? An answer, alas, is impossible to give.

### CONCLUSION

We have seen a great change in the judicial and legislative attitudes regarding a privilege for reporters to refuse to disclose confidential information or sources. In spite of the paucity of early common law precedent and the ambiguous opinion of the Supreme Court in *Branzburg v. Hayes*, federal and state judges have looked both to constitutional law and to the developing common law to establish a qualified privilege in many cases. Moreover, since a majority of states have enacted statutory privileges, it can now be said safely that in most jurisdictions and in most cases a reporter will have at least a limited claim to a privilege.

As I have pointed out, the establishment of such a qualified privilege is an important manifestation of the public's right to know under the First Amendment. Without such a privilege, the newsgathering and dissemination functions of the media would be seriously and adversely affected. In some cases, however, the claimed privilege of the media must fall before the need for information which is dispositive to the case and which cannot be obtained from other sources. Hence, the balancing test adopted by most courts makes sense under the first amendment right to know, the sixth amendment right of the criminal defendant to present her case, and the public's right to have fair and prompt adjudication of both civil and criminal cases. This balancing test, however, has been created largely on an ad hoc basis. Without a national statute or dispositive Supreme Court decision in this area, great problems remain in what is essentially a national newsgathering media. Until uniformity in this important sphere is

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368. ILL. REV. STAT. ch. 110, § 8-907(2) (1983).

369. N.M. STAT. ANN. § 38-6-7-A, C (Supp. 1978).

370. See *supra* notes 227-46 and accompanying text.

371. In some states, additionally, questions can arise as to whether under the statute the reporter waived the privilege. See *Resorts Int'l, Inc. v. N.J.M. Assoc.*, 180 N.J. Super. 459, 435 A.2d 572 (1981), *rev'd*, 89 N.J. 212, 445 A.2d 395 (1982).

372. There is also a question as to the response to the rules in the federal courts and in those numerous states where there is no statutory privilege.

373. For a discussion of these points, see *supra* notes 320-55 and accompanying text. See also Comment, *Newsmen's Privilege Two Years after Branzburg v. Hayes: The First Amendment in Jeopardy*, 49 TUL. L. REV. 417 (1975).

reached, the first amendment and rights of criminal defendants and civil plaintiffs will be unnecessarily subject to compromise.

