To Shield or Not To Shield:
A Qualified Response to the Question of Newperson's Privilege

An Honors Thesis (ID 499)

by

Cathy A. Briskie

Thesis Director

Dr. Herbert Hamilton

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CHAPTER I

A press which is not free to gather news without threat of ultimate incarceration cannot play its role meaningfully. The people as a whole must suffer. For to make thoughtful and efficacious decisions—whether it be at the local school-board meeting or in the voting booth—the people need information. If the sources of that information are limited to official spokesmen, the people have no means of evaluating the worth of their premises and assurances.

Senator Samwel Ervin

The concepts of contract and natural law (under which people form a government by consent and subject to their direction) underlie the American form of government. These concepts, and the Jeffersonian belief that an educated electorate will make wise decisions, have led to a recognition of the press as the media most necessary for a government by the people. In order to perform this important function, the press must have the freedom to print myriad views and, consequently, the freedom to obtain these views.

Yet the public has, in addition to its interest in and right to know the news, an important interest in the enforcement of laws—particularly through the grand jury system—and in the judicial safeguards guaranteed the accused by the Fifth and Sixth Amendments to the Constitution. It is the resolution of these highly important and often opposing public interests that is now involved in the issue of whether to pass a so-called shield law in the United States, thus providing journa-

1"Right Over Freedom and Privilege," Time, March 5, 1973, p. 64.
lists with some degree of testimonial immunity to protect their confidential sources.

Three general courses of action in the federal area are possible: adoption of an absolute shield law, which confers an unconditional right to decline identification of a source of information or information itself obtained by a newperson in the course of his/her work before a proceeding of any governmental branch; adoption of a qualified shield law, which offers a conditional privilege to decline identification of a source of information (and possibly the information itself) by persons meeting a specific definition under specifically defined circumstances; and the adoption of no federal shield law at all, relying instead upon the judicial process with possible executive guidelines. 

Congressional passage of any absolute shield legislation is deemed, even by its supporters, as highly unlikely if not impossible; qualified legislation has a much greater chance of becoming law. Although a qualified shield law might deal with any or all testimonial situations likely to occur within the three branches of government, the situations which now make most use of subpoenas to gain testimony from journalists—and which are most likely to be covered in a qualified law—are those of the judicial branch, particularly grand jury investigations but not excluding civil and criminal cases. Therefore, the question which will be addressed in this thesis is: in view of the increasingly noted clash between the concepts of the public's right to know and the freedom of the press which insures that right, and the public interest in law enforcement and parti-

ularly the grand jury process and judicial safeguards guaranteed the accused by the Fifth and Sixth Amendments to the Constitution; and because passage of a law granting absolute testimonial privilege to newpersons is highly unlikely, and because any qualified shield law would probably cover judicial investigations: should a shield law qualified in regard to claimant, occasion and scope of testimonial privilege in response to a judicial subpoena be passed by the United States Congress, or should the judicial system continue to decide the issue on an individual case-by-case basis with possible guidance from the executive branch?

My conclusion that a qualified shield law should be adopted has been arrived at by a process copied in the arrangement of this paper. The second chapter very briefly reviews the present situation which has fostered the drive for federal shield legislation, paying particular attention to the subpoena process; the nature of testimonial privilege; the current status of newperson's privilege under common, federal, and state laws; a brief comparison of the proposed newperson's privilege with that afforded other professions; and a review of the problems involved in writing a qualified shield law.

The third chapter discusses, in chronological order, court cases involving testimonial immunity for newpersons in grand jury investigations and other trial situations. The fourth chapter summarizes the major arguments favoring adoption of a qualified shield law, and the fifth chapter summarizes arguments favoring continuation of judicial resolution on a case-by-case basis with possible executive guidance.

The last chapter notes my conclusion and those points which I believe to be the most important and relevant.

Because the arguments and literature on this topic are voluminous,
I have limited my study to information printed, for the most part, up to or before autumn, 1973; and to points which I think might be legally arguable in view of their relation to the public interests which I have noted. Court cases are referred to by case name and date only, as many sources did not cite them properly and I would like to be consistent in my citation form. Because division among persons in the legal field on the desirability of shield legislation is equalled or surpassed by the division among persons in the news media, I have not classified arguments by profession. And because the proposals for shield legislation currently before Congress are so numerous, varied, and susceptible to change before reaching final form, I have dealt only with the general thrust of qualified legislation rather than with actual possibilities.

Senator Ervin, Chairman of the Senate Judiciary Subcommittee on Constitutional Rights, has stated that shield legislation is the most difficult area in which he has ever attempted to write a bill. As one researcher of this complex topic, I can thoroughly understand the Senator's dilemma.

3"All or Nothing?", Newsweek, April 2, 1973, p. 57.
CHAPTER II

Although legislation proposing testimonial immunity for subpoenaed newpersons has been proposed on the federal level intermittently since 1929, the 92nd Congress was the first body to take the matter seriously; the Supreme Court decision in the Branzburg-Pappas-Caldwell cases, and the public debate it aroused, led in 1973 to hearings in both the House and the Senate.¹

Several reasons can be cited for the recent rise in subpoenas and, hence, public interest. The increased reporting during the late 1960's and early 1970's of "anti-establishment," "counter-culture" activities such as racial power groups, protesters and drug users has caused grand juries and courts investigating or prosecuting violations of the law to subpoena newpersons who might have pertinent information.² Anthony Amsterdam, professor of law at Stanford University, posits another explanation:

Historically, press subpoenas have been restrained largely because, prior to the Supreme Court's decision in the Branzburg case... their legal posture under the First Amendment was an open and troublesome question. The subpoena seekers now have a clear field and nothing to lose.³

Yet until 1970, most grand jury subpoenas were issued at the local


²Ibid, p. 137.

³"Shield Law Decision Near in Congress?", The Quill, April, 1973, p. 38.
and state levels; there has been a marked increase since that time. This may have occurred because of an alleged "anti-press" attitude of the Nixon administration, in which the charge of biased reporting obscures a real effort to change the government-press relationship fundamentally, and to assert governmental authority to quiet critics. Another reason for the marked increase may be the Caldwell portion of the Supreme Court's 1972 combined ruling, which states that reporters are not constitutionally immune from grand jury inquiries. Many newspapers now fear that fishing expeditions by "lazy law officers and inept judges and prosecutors" will result.

The primary, and certainly major, concern of the press is that without some shield provision and the consequent assurance of confidentiality, sources of information will "dry up," thus limiting the breadth of news coverage which can be provided and thus the public's information. A corollary to this concern is the feeling that reporters themselves may delve less deeply into their investigative reporting if a subpoena (and possible contempt citation) loom before them.

Federal rules of evidence require witnesses to answer all questions asked of them while testifying, with the certain well-defined exceptions known as privileges. These exceptions have been made to encourage the social relationships in which their parties stand, with the recognition that an injury to these relationships caused by forced disclosure of

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fidential information would be a greater less than that incurred to justice by granting a privilege. Under the Federal Rules of Criminal Procedure, the privileges of witnesses are governed by common law as interpreted by the courts; under the Federal Rules of Civil Procedure, privileges are governed by the laws of the state in which a court is located, and state shield laws are observed. However, in the absence of shield legislation the federal courts could change these stipulations.?

A testimonial privilege for newspersons is not recognized at the federal level under either common or statutory law. Newspersons are therefore subject to a penalty for refusing to answer a subpoena, testify, or answer any questions; the penalty may consist of a fine and/or imprisonment for contempt of court.

In 1970, a set of guidelines were issued by the United States Attorney General John Mitchell regulating the issuance of subpoenas to the news media. These guidelines prescribed prior negotiations with the press whenever a subpoena was contemplated, specified the procedures to be followed when subpoenas were actually issued, and called for "all reasonable attempts...to obtain information from non-press sources before there is any consideration of subpoenaing the press." According to Roger C. Crumten, Assistant Attorney General in charge of the Office of Legal Counsel, a subpoena should not be requested unless the information is

...essential to a successful investigation of a serious crime, the information is not available from non-press sources, and the subpoena is limited and reasonable in time and scope... 9

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However, Craton notes that in five of thirteen cases cited in discussions of the guidelines' success, the Internal Security Division or the Justice Department's Civil Rights Division had not even referred the matter to the Attorney General before issuance of the subpoenas (contrary to a provision requiring the Attorney General's clearance); he also adds that "individual federal district judges are not in a good position to determine whether disclosure in a particular instance involves a 'compelling national interest' (also prescribed for issuance of a subpoena)." 10

Federal subpoenas of newswomen, however, are often seen as a lesser (if not diminishing) problem. 11 State and local authorities are considered to the worst practitioners of subpoena abuse.

As of December, 1973 twenty-five states had adopted some form of shield law. 12 This represents an increase in recognition of newswoman's privilege of six states since March, 1973. 13 The laws differ in details, though most state statutes allow a newswoman to protect a source of information in the courts. 14 In states lacking a shield law, members of the news media are subject to widely varying interpretations of privilege; in most reported cases, a newswoman has been unsuccessful in securing protection for his source and/or information in the absence


12"Shield Laws Passed by 6 States in '73," Editor and Publisher, December 29, 1973, p. 16.

13"Shield Bill Signed Into Law in North Dakota," Editor and Publisher, March 31, p. 66.

of a statute (most of these tried to assert a common law privilege or
shield interpretations of the First Amendment).\textsuperscript{15}

A federal shield law is now being sought, then, not merely to cover
a minimal number of federal abuses; it is also sought to prevent what
Senator Samuel Ervin has termed the "confusing and conflicting" inter-
pretations given by state courts,\textsuperscript{16} by pre-empting state laws (or the
lack thereof) and allowing a profession which often works on a national
level to work under national regulations.

There is disagreement on whether such legislation could, constitu-
tionally, pre-empt state legislation. Although the Department of Jus-
tice and the Supreme Court appear to think that such a privilege--while
constitutionally legislatable by Congress--could not pre-empt state
laws,\textsuperscript{17} others believe that such pre-emption would be legal under the
interstate commerce clause (as a grant of power given to the federal
government to regulate and protect interstate communications), or the
due process clause of the Fourteenth Amendment.\textsuperscript{18} A less likely ground
for pre-emption might be the First Amendment.\textsuperscript{19}

The American and English Encyclopedia of Law defines privilege as
follows:

\begin{quote}
\begin{itemize}
\item \textsuperscript{15}James A. Guest and Alan L. Stanzler, "The Constitutional Argument
for Newmen Concealing Their Sources," Northwestern University Law Review
(March-April, 1969), 20-1.
\item \textsuperscript{16} "Shield Law Decision Near in Congress?", The Quill, April, 1973, p. 37.
\item \textsuperscript{17} Fred P. Graham and Jack C. Landen, "The Federal Shield Law We Need,"
Columbia Journalism Review (March-April, 1973), 576.
\item \textsuperscript{18} The Council of State Governments, Shield Laws: A Report On
Freedom of the Press, Protection of News Sources, and the Obligation to
\item \textsuperscript{19} Stanton Favors Absolute Privilege for Journalists," Broadcasting,
\end{itemize}
\end{quote}
The conception of privilege in the law...is: that an individual may with immunity commit an act which is a legal wrong, and, but for his privilege, would afford a good cause of action against him; all that is required, in order to raise the privilege and entitle him to protection, being that he shall act honestly in the discharge of some duty which the law recognizes, and shall not be prompted by a desire to injure the person who is affected by his act.20

The emphasis on a legally-recognized duty is also present in a report issued by the Senate Subcommittee on Administrative Practices in 1966:

The reason for the existence of these exceptions is that society over the centuries has fostered the social relationships in which these people stand...It has become recognized at law that the injury done to them which would result from enforced disclosure of confidential information would be far greater than the loss to justice occasioned by granting the privilege.21

Thus, a relationship is protected by privilege not only for its own sake, but for the service those relationships perform for society. Privileged relationships principally include those of lawyer-client, doctor-patient, and priest-parishioner: none of these is absolute.

Dean John Henry Wigmore, a jurist and professor of law recognized as an authority on evidence, defines the legal privilege thus:

(1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communication relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.22

The medical privilege is not recognized in common law, but it is now recognized in practice by states with the exception of cases dealing

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with workmen's compensation and sanitary legislation. While clerical privilege (also unrecognized under common law) is sanctioned by law in at least twenty-one states, the issue has not been tested.\textsuperscript{23}

In order to gauge the legality of a newperson's testimonial privilege, it is instructive to compare the relationship of reporter-source to both Dean Wigmere's legally noted requirements for privilege and to the other such privileges. Wigmere cites four fundamental conditions necessary to justification of a privilege: (1) the communication must originate in a confidence that it will not be disclosed; (2) the confidential element must be essential to "full and satisfactory maintenance" of the relationship; (3) the relationship must be one which, in society's opinion, ought to be "sedulously" fostered; and (4) any injury to the relationship from disclosure of the communication must be greater than any benefit gained by the judicial process.

The argument against placing the reporter-source relationship within Wigmere's definition cites several points: (1) while both parties to a relationship are normally known and the communication private, in this case the identity of one party is meant to be protected as the communication itself is intended for publication; (2) the element of confidentiality is not essential; (3) society's opinion is difficult to determine, and society's interest in fostering the relationship for its own sake is doubtful; and (4) the communication is already disclosed. The point is also made that the privilege in this case belongs to the newperson alone, while in other cases the client, patient, or parishioner alone can waive it.\textsuperscript{24}


\textsuperscript{24}Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the United States Senate, \textit{The Newperson's Privilege}, Washington, D.C., 1966, 15.
Yet it can be argued that because a free press is so important to the democratic form of government, this privilege differs from other precedents. Dr. Fredrick S. Siebert, who is trained in law and the author of books on journalism's legal aspects, believes that newpersons' privilege does come within Wigmore's stipulations. He cites the following points: (1) information is communicated with the understanding that the source's identity will not be disclosed (a source must trust the reporter before he will disclose information); (2) the relationship cannot exist without the confidential element (a source will not confide in a reporter who has violated the previously noted understanding); (3) the community has a strong interest in fostering the relationship because of its need for all available information on which to base its decisions; and (4) the dissemination of news sometimes outweighs society's interest in litigation (the point being that the public has greater interest in gaining information, not merely the name of an individual, for other important activities such as legislative decision-making, and public decision-making in general elections). Siebert also notes that in most cases a journalist could and perhaps should mention his source without harm to anyone, but the privilege should be granted in these cases involving harm to the source.25

Many problems are involved in drafting any qualified shield legislation. Chief among these are which newpersons should be covered, including considerations of regularity of employment, legitimacy of the media, and whether an occupational or geographic change affects the protection.

Another factor is whether the protection includes information as well as the source, and if so what type of information (unpublished as well as published?). Prescribing assertion and waiver of the privilege might also offer difficulties: under what circumstances could the privilege be claimed? by whom (the newsperson, the source, or both?)? with whom does responsibility lie for proving that the privilege has been properly invoked? when can the privilege be waived, and by whom? And perhaps, considering the greater problem of subpoena abuse at the state and local levels of government, and the lack of consistency among the states in shield coverage, should federal legislation pre-empt that of the states?
CHAPTER III

Early Cases

Cases involving testimonial privilege for newspapers are noted at least as far back as the late 1800's. A New York newspaper editor, in People ex re. Phelps v. Francher (1874), refused to disclose the writer of a libelous story on the grounds that it would violate office regulations; the court ruled that privilege could not be based on a policy subject to change by editors or owners at will. In Pledger v. State (1886), Pledger refused both to testify and to reveal the writer of an article cited in a case of criminal libel; the Georgia court said that while he could have refused to answer a question, he could not refuse to testify. In the California case of People v. Durant (1897), a defendant accused of murder claimed that his statement regarding the location and murder of the victim—made to a reporter—was privileged; the court ruled that the remark was not one having legal confidence. And in Ex parte Lawrence et al. (1897), a California editor and reporter refused to reveal sources of information to a State senate investigating charges of bribery of senate members; the court upheld the newspapers' contempt citations, stating that witnesses were not justified in such a refusal under the Code of Civil Procedure.¹

Privilege cases were intermittently scattered throughout the early 1900's. An acceptable privilege was described in the Washington case of Woodhouse v. Peakes (1906):

A privileged communication is one which the publisher has a legal right to make, whatever may be its character or its effect upon other persons. Thus the allegations in pleadings in civil cases or in an indictment in a criminal case; statements in public journals, concerning matters of public interest, made in good faith, and without actual malice, from personal knowledge or on apparently reliable information; from confidential disclosures, without actual malice, of matters which the publisher has reasonable ground for believing to be true, and which it is his duty to impart to the readers for the protection of their lives or property—fall within the class of privileged communications.2

Privilege was not so leniently dealt with, however, in the case In re Grunew (1913), in which a New Jersey reporter—writing about graft in a village board of trustees—testified but refused to reveal his source, claiming a privilege; the court ruled that he pleaded a privilege "which finds no countenance in the law," and added that such a privilege would allow a transgressor of the law to go unpunished.3

The Hawaii case In re Wayne (1914) added a new argument against a newspaper's privilege. When a grand jury finding was made public before the time it was to be announced, the leak was reported to a court that overruled the newspaper city editor's contention that privilege allowed him to refuse to disclose the source of the leak. The court said that the canons of journalistic ethics forbidding disclosure is subject to qualification, and "must yield when in conflict with the interest of justice."4

4 Ibid, 22.
The only case to reach the United States Supreme Court in which a reporter claimed the Fifth Amendment (preventing self-incrimination) was that of Burdick v. United States (1915). The editor of the New York Tribune, appearing before a grand jury investigating alleged customs' frauds, refused to disclose the source of his articles on the subject, claiming the Fifth Amendment. He was held in contempt when he refused a presidential pardon for any offense he might have committed in securing or publishing the articles, but the Supreme Court reversed the lower court and ruled that the contempt charge should be dismissed because one cannot be forced to accept a pardon.5

In Jeslyn v. People (1919), a Colorado editor was held in contempt of court for refusing to say whether he had written an article which attacked the integrity of certain grand jurors investigating a municipal department. The court ruled that a witness could not refuse to testify because such testimony may affect legislation in which he is interested, or because he feels the matter to be private business. In the Texas case Ex parte Taylor (1920), Taylor was held in contempt for refusing to appear in an Illinois court for a suit, and for refusing then to testify before a Texas notary public as arranged by the Illinois court. The Texas court said that it was within its jurisdiction to honor the Illinois court request, and that Taylor had a duty to testify unless the court found privilege.6

The case of People ex re. Mooney v. Sheriff of New York County (1936) involved a reporter who wrote a story stating that a policy racket was con-

5 Ibid.
6 Ibid.
timuing despite a grand jury investigation; when called upon to testify, he refused to reveal the names and addresses of those mentioned in his article and urged an extension of privilege to newpapers in light of legal and social relation developments. The New York court ruled that, because such a privilege was not recognized by common law or previous American court decisions, only the legislature--not the courts--could extend the privilege.7

After enactment of a newperson's privilege statute, a New Jersey paper attacked a city governing body for allowing existence of brothels. The question in State v. Donevan (1943) was not the identity of the source or the writer(s), but whether a shield statute covered a person who physically carried an article to a newspaper. The court ruled that the statute should be strictly construed, and that in doubtful cases the common law principles should not be changed any more than specifically indicated by the intent of the law; therefore, the carrier was not covered by the shield. The court, however, made one even more important reflection on the subject of newperson's privilege:

Such a privilege...leaves the witness free to tell or not to tell as he may choose. Thus, it depends, not upon the issue, or upon the rules of evidence, or upon the judgment of the court or other impartial arbiter, but upon the uncontrolled determination of the witness whether he will help or hinder an inquiry; and that condition is fraught with such serious consequences that it ought not be applied unless the facts are clearly within the purview of the statute.8

In the Florida case Clein v. State (1950), Clein published stories regarding occurrences of a grand jury room dealing with Miami gambling. He was summoned to testify before the grand jury and cited for contempt when he refused to reveal his source. The Florida Supreme Court held

7Ibid, 23.
8Ibid, 27.
that journalists do not have a testimonial privilege, but have the same duty to testify as other citizens. The court reiterated the idea that the Canon of Journalistic Ethics must yield in the interest of justice, and that private interest must yield in that of the public. 9

In re Heward (1955) dealt with a habeas corpus proceeding in California, in which a petitioner sought relief from a contempt order. The district court of appeals held that those parts of the petitioner's story relating to a union leader's speech in quotation marks did not disclose the source and thus the reporter had waived his privilege under a state shield statute. The district court reversed the ruling. 10

The case of Bregan v. Passaic Daily News (1956) throws doubt on shield statutes. Defendant Allen Smith of New Jersey's Passaic Daily News wrote an article the insinuation of which was that Bregan, a political candidate, had gotten into a political argument which led to a fistfight with the city dog warden (who refused to either make up or keep quiet). The trial court found this story to be false and defamatory. Smith plead that the story had been published in good faith; that it was true; and that it was fair comment because of Bregan's candidacy. Smith refused to reveal his source, saying he had received the information over the phone from "a reliable source" and that the information was later verified. The court ruled that the shield statute of New Jersey was not mandatory and that a newspapers could reveal a source; that a state shield law should not be interpreted as protecting a source of false and libelous information; and that Smith, by disclosing his information and by claiming a "reliable

source"—the reliability of which the reporter alone could judge—had waived his privilege.  

According to Justice Heber in a concurring opinion:

The defendant cannot invoke the statutory privilege to render conclusive his own evaluation of the character and quality of the source. This is basic to due process. Otherwise, cross-examination relevant to a crucial issue would be denied. The statute was not designed to reach this situation.

**Pre-Branzburg Cases**

During the period from 1958-1968, the Supreme Courts of Colorado, Hawaii, Pennsylvania and Oregon, and the Court of Appeals for the Second Circuit were among those denying privilege claims under the auspices of the First Amendment. All cases indicate that the courts recognized two opposing interests: the need for compulsory testimony to facilitate an effective judicial system, and the need for a free flow of news.

One case was that of Garland v. Torre (1958), tried in New York. Singer Judy Garland sued the Columbia Broadcasting Company, claiming that CBS had breached a contract and had made false and defamatory statements about her which were published in the New York Herald Tribune column of Mario Torre. Torre's column attributed to a CBS "network executive" several statements damaging to Garland's career. When CBS denied Garland's claim, pre-trial discovery proceedings were begun, during which Torre was asked to testify. Torre testified that the allegedly libelous comments were the "exact words" used over the phone by her CBS informant, but she

11 Ibid, 26-8.
12 Ibid, 43.
refused to reveal her source. Proceedings were then initiated in a district court, where Torre again refused to disclose her source and was held in criminal contempt and jailed. Torre then appealed to the United States Court of Appeals.15

Torre presented three major arguments: 1) that to compel disclosure of a confidential source would encroach upon the First Amendment by imposing an "important practical restraint on the flow of news to the public;" 2) that society's interest in a free and unrestricted flow of news impelled the court to permit at least a qualified protection for sources; and 3) that Rule 30 of the Federal Rules of Civil Procedure indicated that no disclosure attempt should be made.16

In a unanimous ruling, the appeals court answered Torre's arguments as follows. To her first proposition, the court replied that freedom of the press had historically meant freedom from previous restraints on publication and freedom from censorship, but that such freedom—important as it might be—was not absolute. The duty of a witness to testify was as deeply rooted in United States law as the concept of freedom of the press: "What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom." The essentiality of compelling testimony to the "fabric of our society" was deemed "beyond controversy," even if such testimony impinge on the First Amendment or cause material sacrifice, invasion of privacy, or the disappearance of the right to remain silent. According to Chief Justice Hughes, "the personal sacrifice involved is a

part of the necessary contribution of the individual to the welfare of the public."\(^{17}\) The First Amendment, then, "must give place to a paramount public interest in the fair administration of justice," especially when the disclosure was not one intended to force a "wholesale disclosure" of a newspaper's sources nor one in which the source's identity was of doubtful relevance, but instead "went to the heart of the plaintiff's claim." The court held that the Constitution conferred "no right to refuse an answer."\(^{18}\)

In response to Terre's second claim, the court stated that without a state shield law there was no reason to depart from precedent and recognize a privilege. The court also dismissed Terre's third contention by finding that there had been no abuse of Rule 30.\(^{19}\)

In the Hawaii case In re Goodfader (1961), the plaintiff was seeking reinstatement as a member of the Honolulu Civil Service Commission and had asked a photographer for the source of a remark he had heard which indicated that the plaintiff's ouster had been illegal and arbitrary. The photographer pleaded a constitutional privilege, but it was rejected and he was held in contempt by the state Supreme Court.\(^{20}\) The court held that:

\[\ldots\text{(a) private litigant's right to testimony is not limited by fact that his cause arises out of or involves official action, and mere fact that confidential information relates to administration of government affords newsmen no privilege against disclosing source of such information.}\(^{21}\)

\(^{17}\)Ibid.

\(^{18}\)Ibid, pp. 242-3.

\(^{19}\)Ibid, p. 243.


The Pennsylvania case In re Taylor (1963) involved a shield statute under which a newspaper was not required--before an investigating grand jury--to produce sources of information for stories on alleged corruption in city government. Robert L. Taylor, president of the Bulletin Company and Earl Selby, Bulletin City editor, were subpoenaed by a grand jury investigating John J. Fitzpatrick, a former Democratic ward leader, and his statements on alleged crimes. Taylor and Selby were instructed to bring tapes, notes, expense records, and other materials regarding Fitzpatrick because an article in the Bulletin had discussed an interrogation of Fitzpatrick in the office of a district attorney who allegedly refused to release public transcripts to which the paper had other access. Taylor and Selby appeared before the grand jury but refused to answer all questions put to them, saying answers would identify their sources. They were cited for contempt, convicted, sentenced and fined when they refused to answer the questions after they were brought before a judge; the court's rationale was that the state shield law's protection of sources did not include compulsory disclosure of documents or other materials.

Upon appeal, the state Supreme Court reversed the contempt citation, making four main points. The first quoted a 1937 statute which included documents as well as persons under the definition of source; the court advised that the statute should be construed liberally in any case of doubt, since newspapers are "pro bono publico." In its second point, the court--while noting that a person may be his acts or omission waive

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22Ibid, 33-5.


a testimonial privilege—pointed out that a newperson's waiver applies only to statements made by an informer which are actually published, not to other statements made to the newperson. The court in its third point stated its belief that neither Taylor nor Selby had waived their privilege, and in the fourth point the court therefore found them not in contempt.25

The Application of Cepeda (1964) to the United States District Court arose when baseball player Orlando Cepeda sued Look magazine for libel, based on an article by Timothy Cohane in which unidentified San Francisco Giants' officials were quoted as to an imminent trade of Cepeda. A deposition was taken in New York for the California-based case and Cohane, refusing to answer questions regarding his sources was cited for contempt. The main question was whether a federal or state law should determine privilege in this case, since California had a shield law and New York (the state in which Look maintained offices) did not. The court determined that the law of the place of trial should determine the validity of a privilege. It then noted that the California shield did not cover periodicals; that while no California precedent on extension of the unspecified privilege existed under this particular law, another state shield statute was held not to cover magazines; and that Cohane thus did not fall within the privilege as specifically defined under the law of the trial state.26

Bregan v. Passaic Daily News provided the precedent for Beecroft v. Point Pleasant Printing and Publishing Company (1964), a libel case in which a defendant newspaper wanted several questions asked by the plaintiff struck from the record. An editorial had accused the plaintiff of per-

26 Ibid, 44-53.
forming police chief duties in an illegal, partial and dictatorial manner "without regard to the rights of the public, contrary to law and in vi-

c.ation of his oath of office."27 A superior court said that disclosure of sources at pre-trial hearings may be necessary to give the plaintiff an opportunity to review the background of witnesses for any predisposition to malice. It ruled that a newspaper arguing fair comment, good faith, and reasonable belief about the truth of published material upon which a suit is based has waived any privilege and is therefore required to answer questions about facts and sources.28

The case of Estes v. Texas (1965) is relevant in this discussion because of the reason for the court ruling to bar television cameras from court proceedings; the court reiterated the argument that while the First Amendment protected freedom of the press other "overriding interests may justify limitations on newsgathering."29

The Oregon case of State v. Buchanan (1968) arose when Annette Buchanan, managing editor of the University of Oregon student newspaper, answered a grand jury subpoena but refused to disclose the sources of her story on marijuana use. Her plea of First Amendment protection for privilege was rejected and she was cited for contempt, convicted, and fined. The state Supreme Court upheld the conviction, noting that freedom of the press protects the public as well as the publisher; that anonymity of a source is not essential to freedom of the press; and that in the absence of any common law or statutory protection, a newperson has no right to

27Ibid, 39.

28Ibid, 39-42.

refuse to disclose a source in face of a court order.\textsuperscript{30}

Several lesser court decisions should also be noted here. During the years 1969-71, lower courts ruled that reporters need not reveal their sources. A federal district court ruling in Levin v. Marshall (1970) is also relevant for its differentiation of subpoenas issued to newspapers regarding information gathered in their work from those issued to other citizens, and its placement of the burden of showing need for subpoena issuance and compliance upon the government. This concept—requiring government proof of the need for disclosure—was evident in a decision by the Wisconsin Supreme Court in 1971. Following an explosion at the University of Wisconsin which killed a researcher, underground newspaper editor Mark Knepps was asked to appear before a grand jury to discuss a story claiming that those responsible for the bombing had discussed with him that explosion and future plans. Knepps, offered immunity under the Fifth Amendment, refused to testify and was jailed for contempt. The court ruled that Knepps had a constitutional right to refuse disclosure of his sources, although in cases involving serious breaches of public order a newspaper must yield to the "public’s overriding need to know."\textsuperscript{31}

The Supreme Court Branzburg Decision

In June, 1972 the United States Supreme Court handed down a joint ruling on the cases of Paul M. Branzburg v. John P. Hayes, Judge, etc., et al.; In the Matter of Paul Pappas, petitioner; and United States,


petitioner, v. Earl Caldwell. Although the details of these cases will be discussed separately, the court decision on these three cases will be summarized as a whole.

Paul Branzburg, a reporter for the Louisville Courier-Journal, had written an article describing conversion of marijuana to hashish, in which he stated that anonymity had been promised to his sources. When subpoenaed, Branzburg refused to give the names of those persons he had observed. The court held that Kentucky's privilege statute protected the source but not information. Branzburg tried to get a writ of mandamus from the state appeals court, but the court said that the privilege statute did not allow a reporter to refuse to testify about events he personally witnessed. 32

Paul Pappas, a television newsgroup for a Massachusetts television station, had spent several hours in a Black Panther Party headquarters while covering civil disorders in New Bedford. He refused to appear in answer to a subpoena issued by a grand jury investigating possible criminal acts committed during the disorders; his motion to quash the summons was denied by the trial judge, and the Supreme Judicial Court of Massachusetts upheld the denial, stating that newsmen have no constitutional privilege to withhold testimony. 33

Earl Caldwell, reporter for the New York Times, had covered the Black Panther Party and was subpoenaed for notes and tapes of interviews with Party leaders regarding their aims and activities by a California grand jury investigating possible violations of several criminal statutes (assas­sination threats against the president, interstate travel to incite a riot, ...


33Ibid.
Caldwell's motion to quash the subpoena—arguing that his relationship with his sources would be endangered even by an appearance before the grand jury—was denied by the Northern District of California Court, although the court accepted to an extent his argument of First Amendment protection by issuing a protective order exempting from disclosure confidential information pending a "showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means." The Court of Appeals for the Ninth Circuit reversed this decision and exempted Caldwell from appearing at all.\(^\text{34}\)

In what has come to be known as the Branzburg decision, the Supreme Court affirmed (5-4) the lower court decisions in the Branzburg and Pappas cases and reversed the Caldwell decision.\(^\text{35}\) The Supreme Court recognized the protection afforded the press by the First Amendment but it differed from the reporters' concept of the scope of that protection. According to the majority opinion, the issue in these cases is whether requiring a newsperson to appear before a state or federal grand jury abridges the freedom of speech and press guaranteed by the First Amendment; the Court held that it does not.\(^\text{36}\)

The Court rejected the arguments that an increase in the number of press subpoenas, mutual press-government distrust, or alleged changes in reporting emphasis made a testimonial privilege for newspersons necessary; and that the burden imposed on newsgathering by compelling reporters to

\(^{34}\)Ibid. \\
\(^{35}\)Ibid, 140. \\
disclose confidential sources and/or information outweighed any public interest in obtaining information. 37

We perceive no basis for holding that the public interest in law enforcement...is insufficient to override the consequential, but uncertain, burden on newsgathering which 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...The evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen. 38

The Court cited three reasons why a reporter's privilege clashed with public policy. One, common law and statutory history dealing with the crime of misprision of felonies showed that "concealment of crime and agreements to do so are not looked upon with favor." Two, recognition of such a privilege could create a private system of informers not subject to any control comparable to that exercised over police informers by courts and elected officials. But three and most important, the government has a "compelling" interest in "investigation of crime by a grand jury (which) implements a fundamental governmental role of securing the safety of the person and property of the citizen." 39 The Court felt that a grand jury should, because of this importance to law enforcement, be free to determine its own need for evidence; a grand jury needs every person's evidence in order to fulfill its role. The Court's decision—that a witness' examination can not be obstructed by the requirement of a foundation for questions put to reporters—is crucial to the reconciliation--


tion of the court's decision with the principle that First Amendment rights may be infringed upon no more than necessary for legal purposes. 40

Although the importance of the grand jury function was the main reason that the Court rejected even a qualified privilege, two other factors should also be noted. One, administration of a qualified shield would involve substantial practical and conceptual problems, said the Court; and two, a qualified privilege under which a judge would determine whether a situation justified unmasking a source would hardly ease the mind of a sensitive confidential informant. 41

The Court, however, failed to accept the argument that—without a privilege—newsgathering would be hindered by constraint of sources. It noted that the traditional lack of privilege had not stifled sources and it argued that any evidence to the contrary was "speculative" and "dil­
gent." Three additional reasons for their refusal were cited: one, a source might not expect a reporter to be subpoenaed, or to testify over objections; two, a source might be part of a dissident group whose need for public exposure outweighs fear of disclosure; and three, a source met implicated in a crime, but fearful of reprisals by those incriminated by their stories, might prefer to rely on law enforcement officials rather than reporters for protection. 42

Newspersons were not left entirely without constitutional protection against disclosure by this decision, although the scope of that protection was left unclear. The Court specified that in instances of harassment the courts would be available to protect "legitimate First Amendment

40 Ibid, 142-3.
41 Ibid.
42 Ibid, 140-1.
interests" of newsmen. It described two instances in which grand jury motives for subpoenaing a reporter might be questioned: investigations "instituted or conducted other than in good faith," and "official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources." In these cases a judicial order could limit the grand jury's power to compel testimony. The good faith test does present difficulties, though. It implies that the burden of proving that a grand jury is acting in other than good faith rests on the reporter; this proof may be difficult to acquire, partly because of the very grand jury characteristics pointed out by the Court (breadth of investigative powers, importance of determining the need for evidence, reliance upon tips and other avenues whose relevance may be difficult to determine). The difficulty of the proof is compounded by the fact that usually evidence of bad faith will not be clear or available until after an investigation is completed and a newsmen has already been harassed.43

One additional aspect of this decision which should be noted is the Court's statement in its majority opinion regarding Congressional power in the matter of granting privilege:

Congress has freedom to determine whether a statutory newsmen's privilege is necessary and desirable and to fashion standards and rules as narrow or as broad as deemed necessary to address the evil discerned and equally important to refashion these rules as experience...may dictate.44

Post-Bransburg Court Cases

Since the Branzburg decision, the federal courts have generally pre-

43Ibid, 143-4.

ected reporters in connection with libel suits, grand jury proceedings, and criminal trials.\textsuperscript{45} The only major exceptions to this trend were the Supreme Court affirmations of lower court decisions in cases involving Peter Bridge and William Farr.

The case of Peter Bridge v. New Jersey (1972) arose when Bridge—a reporter for the Newark News—declined to disclose to a grand jury the details of an unpublished interview with a Newark Housing Commissioner who said she had been offered a bribe in connection with a vote on the appointment of the Commission's executive director. Bridge answered almost all of the body's ninety-odd questions except the five which went beyond the published news story to inquire about the description of the man allegedly offering the bribe. New Jersey courts rejected Bridge's argument that interrogation must be limited to what has been published, saying that by revealing his source in print Bridge had waived his privilege. The Supreme Court let this decision stand (8-1),\textsuperscript{46} refusing to review Bridge's contempt citation\textsuperscript{47} and thereby denying his move to stay execution of a jail sentence.\textsuperscript{48}

William Farr, a reporter for the Los Angeles Herald Examiner, was assigned to cover the Manson murder trial. He wrote a story in July, 1970 concerning plans to murder other film celebrities but asked his editor to hold it until Susan Atkins' cellmate had testified. However, in October the


\textsuperscript{47}"All or Nothing?", \textit{Newsweek}, April 2, 1973, p. 57.

trial judge barred publication of discussion with witnesses before, during and after their testimony; because this form of gag rule was unusual, Farr tested it. He obtained trial transcripts of the cellmate's testimony from a defense attorney, then asked that the judge be notified that Farr had such information. Farr then refused to reveal the source of his copy when called before the judge, invoking the California shield law; while the matter was temporarily dropped, the judge later summoned Farr again so that the attorney who had leaked the transcript could be punished for violation of the gag rule. Farr again said he had promised his source anonymity. In March, 1971 Farr left the newspaper to work as an executive assistant to the Los Angeles district attorney. He was then summoned in May, 1971 to show cause why he should not reveal his source since he was no longer covered by the California newsperson's shield. 49

A series of hearings then commenced, in which Farr was cited for civil contempt; the judge decreed an indeterminate sentence until the question of his source was answered. Farr appealed to the Second District Court of California; his appeal was rejected, although the court did not decide whether Farr's privilege had changed with his job, but ruled instead that the shield law was unconstitutional because it interfered with the power of a judge to govern his court. Farr then appealed to the Supreme Court, which rejected his appeal and upheld the decisions of the lower courts. 50

As pointed out above, however, these two cases are exceptions to the trend of federal post-Bransburg decisions in 1972 and early 1973. Brief reviews of other cases—which generally upheld newsperson's privilege to


50 Ibid, pp. 10-12.
In 1972 Thomas Miller, a freelance writer for the Liberation News Service and other underground newspapers refused to disclose confidential information regarding political dissidents before a federal grand jury in Arizona. Although the Justice Department said Miller was not a reporter and therefore not entitled to protection under either Department guidelines or the Constitution, an appeals court ruled in December that Miller was indeed a press member. 51

Reporter James Mitchell of Los Angeles Station KFWB answered a county grand jury subpoena but refused to disclose the source of information on corrupt bail bond practices. Public reaction to the jailing of William Farr contributed to the quashing of the subpoena in 1972. 52

Although a subpoena to radio Station WBAI of New York for tape recordings of prisoner interviews during the Tombs Prison Riot was eventually quashed in 1972, 53 two New York newsmen were ordered that year by an appellate court to tell a special grand jury what they had witnessed during the Attica Prison riot. The court rejected Stewart Dan and Roland Barnes' claims that they would not have been admitted to the prison without an understanding of confidentiality, 54 and it ruled that the New York shield law did not allow them to refuse to testify regarding events personally witnessed. 55

52 Ibid.
53 Ibid, 32.
54 Ibid, 30.
In Sherrie Bursey v. United States (1972), California's Ninth Circuit Court held that Sherrie Bursey and Brenda Joyce Presly--reporters for the Black Panther Party newspaper--did not have to reveal the identities of persons associated with the paper's internal management to a federal grand jury investigating threats of presidential assassination and other possible criminal conduct.56

Connecticut Chief District Court Judge M. Joseph Blumenfeld ruled in 1972 that Gilbert Kelman, publisher of the Wallingford Post, did not have to reveal the sources of charges that Boston philanthropist Joseph M. Linsey had Mafia connections. Linsey was suing the Post for libel because his plans to build a dog track in Wallingford were rejected after the story came out.57

Subpoenas for confidential tape recordings and various other unpublished information (requested of ten reporters and editorial personnel of four major publications including the Los Angeles Times Washington Bureau Manager John F. Lawrence; the Washington Post; the New York Times; Time Magazine; and other publications) were quashed in 1973 by Federal District Court Judge Richey, who ruled that the First Amendment protected these news-persons from even appearing in the civil Democratic National Committee et al. v. James W. McCord et al. (1972).58 Richey noted that:

What is involved here is the right of the press to gather and publish, and that of the public to receive, news from widespread, diverse and oftentimes confidential sources...

This court cannot blind itself to the possible "chilling


effects" the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public.\textsuperscript{59}

In 1973 the United States Supreme Court refused to review a Maryland court ruling of contempt against a Baltimore Evening Sun reporter for refusing to divulge the sources of his article(s) on marijuana purchases. However, state courts upheld the new person's privilege.\textsuperscript{60}

A Florida Circuit Court ruled that a Miami News reporter need not disclose his source or hand over his notes for stories about harbor pilots in a civil suit to which the paper was not a party; the court cited the First Amendment guarantee of freedom of the press as the basis for its decision. In Georgia, a judge ruled that a law firm could not force a television newswoman to disclose his sources for a report on gambling raids in a building housing the firm; he affirmed "the God-given right and constitutional guarantee to pursue a career without being hampered." And a Tennessee state court of appeals dismissed a contempt citation against a television talk show host who refused to reveal the name of a local grand jury member who had called in critical comments on that body.\textsuperscript{61}

In 1973 the United States Supreme Court upheld a decision favoring new person's privilege in Charles Baker et al. v. F and F Investment Company et al. Reporter Alfred Balk of the Saturday Evening Post had received information from a Chicago real estate agent regarding profits the source acquired from moving black families into previously all-white neighborhoods. The plaintiffs in a class action suit on behalf of Chicago black residents

\textsuperscript{59}"All or Nothing?", \textit{Newsweek}, April 2, 1973, p. 37.


\textsuperscript{61}Ibid.
requested the name of his source in their case against city realtors. Balk refused to disclose his source and the United States Court of Appeals upheld him. The court stressed the "fundamental principle" of press freedom and the "paramount public interest in the maintenance of a vigorous, aggressive, and independent press."

Although we recognize that there are cases--few in number to be sure--where the First Amendment rights must yield, we are still mindful of the preferred position the First Amendment occupies in the pantheons of freedom...Accordingly, though a journalist's right to protect confidential sources may not take precedence over that overriding and compelling interest, we are of the view that there circumstances, at the very least in civil cases, in which public interest in non-disclosure of a journalist's sources far outweighs the public and private interest in compelled testimony.

In a consequent appeal this decision was upheld by the United States Supreme Court.62 While this decision contradicted the court's decision in Garland v. Torre, the distinction was made that in this case the plaintiffs had not used other means of finding the informant.63

62"Writer Needn't Identify Source for Civil Suit," Editor and Publisher, December 16, 1972, p. 12.

63Ibid.
CHAPTER IV

The basic argument for a qualified shield law for journalists is that subpoenas must be controlled in order to insure the press freedom necessary to meeting the public's right to know, thereby aiding the public's interest in self-government. In this sense, the right of the public to be informed and the right of the press to publish has been termed by the United States Supreme Court "the essence of self-government."¹

The press is therefore necessary to inform and, in sometimes so doing, expose corruption, incompetence, and illegality which can only be discovered through contact with sources in a position to know about such activities.² Confidentiality is implicit in such contact; if a reporter discloses his source, not only will that source not confide in him again, but news of the breach of confidence may spread and affect the effectiveness of the reporter.³ Although it has been said that no source need fear reprisal for revealing correct information, criminals cannot be guaranteed protection from organized criminal elements and government employees cannot be guaranteed retention of their jobs when they have brought their


superiors into question. 4

While there has been no traditional recognition of a newsperson's privilege, the Branzburg decision may have made explicit statutory guidelines desirable. 5 The public furor raised by reporters since the decision has increased the emphasis on the risk a source (or reporter) assumes in a confidential newsgathering relationship, and this emphasis may now make legislation, traditionally avoided, necessary.

The importance of confidentiality can be gauged by reviewing a recent study on the use of confidential sources; and by noting cases in which assured confidentiality either led to valuable public information, or in cases in which potential information was not given or requested because confidentiality could not be assured.

In a survey of newsmen in all media, conducted by Professor Vince Blasi of Stanford Law School, almost 1,000 questionnaires were returned by major reporters for large daily newspapers, personnel of local and network radio and television stations, magazine writers, members of the wire services, and miscellaneous news personnel. Eighteen percent had been subpoenaed during their careers, and seven percent said that coverage of a story had been adversely affected during an eighteen-month period by the possibility of a subpoena. Of the seven percent whose stories had been endangered, court reporters led the list followed by reporters covering radical militants and minority groups and investigative reporters. 6

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More than sixty-five percent of the respondents estimated that between zero and ten percent of their stories depended upon confidential sources. Among the findings were the fact that sources provide more stories once they have been shown that confidence will be kept. Broadcast reporters depend most on one-shot sources; newsmagazines depend most on sources who confide information more than once; general assignment reporters and feature writers generally depend on one-time sources, while wire service reporters, police reporters, and financial writers depend on two-time sources; and investigative, court, and government reporters rely equally on first-time and older sources.\(^7\)

Several points must, however, be kept in mind. One, this was a random survey including responses from reporters who do not use sources at all as well as those whose work depends upon them for ever ten percent of their stories. Two, the percentages do not reflect the quality of the newspersons affected by subpoena threats (eight times as many newspersons who adjudged themselves very well qualified found themselves threatened by subpoenas, as compared to those who thought themselves least qualified). And three, these percentages only indicate those newspersons who have already been affected by subpoenas; if the use of subpoenas is indeed increasing, then the adverse affect upon stories noted by this group of newspersons will also increase.\(^8\)

Several cases can be cited in which assurance of confidentiality allowed reporting of information valuable to the public welfare. In 1956 George Thiem, a Chicago Daily News reporter, was unable to produce concrete

\(^7\)Ibid, 52.

evidence that the state auditor was living beyond his state salary. Then a state office clerk—upon the understanding that he would not reveal her name—directed him to record the checking of which revealed nepotism, payroll padding, bogus contracts, fraudulent expense accounts, illegal expenditures and phony checks; this led to an indictment of the auditor for misappropriation of $650,000-$2,000,000 of tax funds. The auditor was jailed, the state adopted broad reforms to prevent such activities, and the reporter was awarded a Pulitzer Prize.9

Robert Schulman of Louisville's WHAS-TV won the Sigma Delta Chi Distinguished Service Award for editorializing the effects of strip mining in eastern Kentucky, an endeavor which he believes would have been impossible if he had not assured his sources of confidentiality:

Tensions in the area were so high that some coal company men, and those critical of them, were going about armed. The mountain people who guided me to stripmine sites in recent and current violation of state law, were therefore exposing themselves to retribution of serious kinds. Had they not been able to put implicit faith in my keeping their help confidential, I even doubt...that I would have sought it. And so the public would have been left to mere blandishments by sweet-talking coal operators, discrediting yet another news report as having been based on a view of outdated, pre-law evidence.10

Confidentiality was also promised for several stories by the Boston Globe Spotlight Team, including a series on towing kickbacks (in which some policemen confirmed the use of the practice and gave information, and for which industry sources were promised confidence to avoid police harassment and possible physical harm); a series on concrete inspection...9


(in which a firm with political connections performed shoddy inspections and received much public work, and in which one of the firm's own people was fired for giving his information); and a series on the New England Regional Commission (in which interviews with employees revealed that the group was staffed mainly with the aides of senators and governors, and which led to a cut-off of funds by the President). 11

Stories have also been refused or cancelled since the Branzburg decision emphasized the risk to sources. An investigation of a state agency member who allegedly had accepted payment for a personal favor was dropped by the Philadelphia Inquirer when the source's lawyer urged the source not to cooperate since there was no assurance of confidentiality. 12 ABC News declined a chance to film an interview with Black Panther Party members, and CBS News declined an interview with a woman who was to disclose how to cheat on welfare, when promises of confidentiality could not be made. 13

While these cases indicate a need for confidentiality, it must be noted that the point of confidentiality that proponents of a shield law are arguing involves not the numbers of stories in which confidentiality might be important, but the principle of the public's right to know. According to American Newspaper Publishers Association President Stanford Smith,

The fact is that any subpoena which places a reporter in the position of having to reveal his source of information is cause enough for serious concern. If only one source dries up,

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11 Ibid, p. 11.

12 Ibid, p. 10.

then the American people have lost a vital part of the freedom which was promised in the Constitution.\textsuperscript{14}

*New York Times Magazine* writer A.M. Rosenthal echoes Smith's sentiment:

> We will never know what this loss of confidentiality of sources will cost, because we will never know what we might have known. It seems entirely plain that the destruction of confidentiality of news sources will have an impact on how much the public knows about every aspect of public affairs.\textsuperscript{15}

It is also feared that without availability of confidential sources, the press will be forced to rely upon official representations of fact, with no means for balancing them.\textsuperscript{16}

Yet it is argued that even if sources are not deterred by the lack of assurance of confidentiality, newsmen may either censor themselves because of a fear of subpoenas, contempt citations and jail sentences; or because of the financial burdens which battling subpoenas places upon news organizations. *Los Angeles Times* editor William T. Thomas notes that the cost to his paper of fighting subpoenas and contempt rulings has totaled more than $200,000 during the past few years.\textsuperscript{17}

While large papers may have the resources to fight court battles, Spiedel Newspapers representative Ron Einstess points out that

> Prolonged and frequent defenses in court will weaken the ability of small newspapers to do their job...For the press to remain free, it must also remain financially strong.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{17}Luther A. Husten, "Errin Bill to Pre-empt State Shield Statutes," *Editor and Publisher*, March 3, 1973, p. 12.
\item \textsuperscript{18}Luther A. Husten, "Mollenhoff Says An Absolute Shield Would Hurt the Press," *Editor and Publisher*, March 10, 1973, p. 11.
\end{itemize}
Justice Brennan perceived the crux of the difficulty in his remarks in the Times v. Sullivan decision by the Supreme Court:

Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. 19

Proponents of a qualified shield law claim that granting testimonial privilege to newsmen will not interfere with law enforcement: they point out that enforcement officials are better trained and equipped to track down criminals, and that such officers in states having shield laws have not noted an increased difficulty in law enforcement. 20

A qualified shield law is sought, as opposed to other means of settling the problem, for any of three main reasons: to reinforce the constitutional guarantee of freedom of the press; to prevent the status of privilege from changing with the court in question; and/or to rectify the insufficiency of the Attorney General's guidelines with the weight of law.

Lesser arguments in favor of a qualified shield law include the claim that such a privilege meets Wigmore's requirements and equals parallel situations in other professions. (Both points have been discussed earlier in this paper.)


CHAPTER V

The primary argument against adoption of a qualified shield law is that no right is absolute, that the public interest in law enforcement—especially as it relates to compulsory testimony in grand jury proceedings or cases involving a defendant's rights under the Fifth and Sixth Amendments—often outweighs the public's right to know as represented by freedom of the press.

Freedom of the press is said to mean only freedom from prior censorship or restraint,¹ not freedom from a citizen's obligation to testify; according to the Supreme Court's Branzburg decision,

The First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence thereof.²

The general principle governing the administration of American justice is that judicial bodies have the right to obtain and demand complete information; thus, there is great reluctance—even in states with shield laws—to exempt journalists from testimonial obligation.³ It is argued that


courts are better able to reach a fair consideration of issues with compulsory testimony, and the Supreme Court has held that when an order for testimony is refused the party refusing to testify may be cited for contempt and fined and/or jailed.4

The importance courts have attached to the grand jury function has already been noted in this paper. There is, however, another important element of the judicial system which might be significantly harmed by adoption of a shield law: the rights guaranteed to the accused under the Fifth and particularly the Sixth Amendments to the Constitution. The Fifth Amendment guarantees that

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury... nor be deprived of life, liberty, or property, without due process of law...

The Sixth Amendment insures that

In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor...

Thus, while newsmen often view the shield issue as one of government versus the press, a reporter could also be subpoenaed by an individual who is falsely accused of a crime or who might be persecuted by authorities.5 A shield law could violate these two important amendments; the Fifth might be weakened if the amount of evidence available to a grand jury were reduced, and the Sixth could suffer if an entire profession were exempted from compulsory testimony.6


6Ibid.
A testimonial privilege for newspapers presents a problem in itself, apart from those problems which would be created when such a privilege conflicted with the grand jury function or constitutional guarantees for the accused. It is argued that a newsperson's privilege would be personal to the reporter:

...such a privilege, personal to the reporter, cannot be justified as serving the general public good if the reporter is allowed to disclose his source for his own benefit, for example, in mitigation of damages in a libel suit. The protection of innocent persons from libel by the unscrupulous newsman seems more compelling in the public interest than the protection of equally unscrupulous informants. Reprehensible journalism—lying—would become too easy.7

This doubt of newspapers' integrity may be justified, as reporters have been known to write stories on alleged facts from "unimpeachable" sources which did not actually exist.8

Opponents of a qualified shield law also doubt the necessity of confidentiality between reporter and informant to the newsgathering process. They note that the traditional lack of such a privilege has not prevented sources from disclosing information, and that other channels of information are available to reporters in addition to sources who will not confide without assurance of anonymity. The worth of information gleaned from an anonymous source may also be questioned:

The protection of an informed source works to the advantage of the source, inhibiting the circulation of any news that does not enhance the self-importance of the man circulating it. More often than not the reporter who agrees to deal in protected information transforms himself into a press agent.9


The protected source of information takes no risk, and neither does the reporter who gives credence to his tale. If a man takes no risk, what is the worth of his opinions? What is to prevent the source from distorting the news to conform to his own interest?  

The matter of misprision (A crime in which one party knowingly conceals the crime of another) is also raised. By protecting a source who is involved in an illegal or dubious activity, a newsperson might be guilty of misprision.

Many reasons are cited for opposition to even a qualified shield law. What Congress gives, Congress may also take away according to Senator Samuel Ervin:

The same Congress which grants the privilege may condition it on proper conduct. A future Congress, irritated by a critical press, may hold repeal of the privilege as a threat to secure a more compliant press. What is new protective legislation may tomorrow be a hostage to good behavior.

A qualified shield law might well result in a greater abuse by aggressive prosecutors and unsympathetic judges, since any limitations would probably be endlessly arguable. Just as the courts are now responsible for defining the First Amendment protection of the press, so will they be responsible for defining any new legislation; and as reporter Peter Bridge has said, "...the only thing necessary for conditions to exist—separately or simultaneously—is the pronouncement of a judge."

The problems involved in drafting qualified shield legislation, described in Chapter I, are also cited as reason for continued reliance on

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10 Ibid., p. 51.
12 Ibid.
the present deliberation of privilege on a case-by-case basis by the courts, who have been described as "more vigilant protector(s)" of freedom of the press than either the executive or legislative branches of government. 14

In practice the courts...almost always give tacit recognition to the views of journalists and rarely insist upon such revelation even in states where no statutes exist to provide legal recognition of any absolute right. 15

Newspersons are urged to rely upon courts upholding of the First Amendment, a guarantee more flexible and responsive to changing circumstances than specific laws. 16 They are reminded that in cases of harassment they may be protected by the Branzburg decision; they may move to quash any subpoena of questionable scope or substance; and the judicial process provides for entrance of an appropriate protective order. 17

Should the judicial process appear truly incapable of protecting the privilege aspect of freedom of the press, shield opponents argue that other corrective means may be taken. The recent guidelines issued by Attorney General John Mitchell are noted as a step in this direction. The guidelines require that all reasonable attempts to gain information must be exhausted before a press subpoena is considered, at which point negotiations with the press must be held: specific principles are prescribed for those instances in which subpoenas are actually issued. 18


17 "Right Over Freedom and Privilege," Time, March 5, 1973, p. 64.

Lesser arguments against a qualified shield law—that such a privilege neither meets Wigmore's standards nor parallels other privilege situations—have already been discussed.
CHAPTER VI

The area of shield legislation, as noted in the introduction, is one of immense complexity and consequence. Any conclusion as to whether or not a federal qualified shield law should be passed by Congress eventually becomes, I feel, a personal value judgment. It is with this understanding that I urge enactment of some form of qualified shield legislation protecting the confidentiality of a newspaper's sources; the main reasons for this conclusion follow.

Our governmental system rests on the assumption that, once informed, an electorate will be able to discern its proper direction and make the wisest decisions. The major source of information is the news media, and its freedom must be protected not for its own sake, but for the sake of the people who need its assistance. This freedom must include, at least to some extent, the protection of news sources. If this protection clashes with that of law enforcement or individual rights, the interest of the majority in matters—governmental and societal—directly affecting it should perhaps prevail. The public gains made possible by stories such as those by George Thiem, Robert Schulman, the Boston Globe Spotlight Team and other newspaper's outweigh, in most cases, the risk to society by the loss of one person's testimony.

The increased emphasis on the risk taken by a source—particularly evident since the Branzburg decision—necessitates a reconsideration of the traditional lack of newspaper's privilege. While no common law or
federal privilege has existed, and while sources have supposedly confided in newspaper people anyway, the increase in subpoenas coupled with the inferences--real or imagined--of the Supreme Court's stance may well cause sources--heretofore unfamiliar with the legal backing for press confidentiality assurances--to think twice before relaying information. While the press-source relationship may or may not meet Wigmore's standards, and does not (in my opinion) parallel other professional privileges, such a relationship should be given equal consideration to other privileges because of its crucial role in the process of helping the public govern itself.

The fact that sources are not always (or even usually) criminal characters should also be considered. When faced with the beneficial information they often supply to the public, it does not seem fair to expose them to economic or physical harm for their efforts.

A qualified shield law would give added reinforcement to the Constitutional guarantee of freedom of the press, and give needed guidance to or control over both wavering or over-zealous judges and prosecutors, respectively. Though it is said that courts have generally upheld newspaper person's privilege despite the Branzburg decision--and that they have upheld it even before that decision--the court cases summarized in this paper indicate to me that, regardless of prevailing judicial opinion, most courts re-investigate the status of newspaper person's privilege in each case and base their decisions on their findings. While the courts would still have to determine the definition of a law, the very specificity of language which should be used in such a law would at least offer judges an equally specific base from which to deliberate. Such legislative definition and direction might reduce the time needed to re-determine the status and application of the privilege on a case-by-case basis. A qualified shield law
would also prove beneficial to anyone accused of a crime; the accused would be assured that the court could not extend a privilege for newsmen beyond a certain boundary.

A qualified shield law is needed in spite of the guidelines set up by the Attorney General. Despite these guidelines, the number of subpoenas has increased; even if the number had not increased, the guidelines can be too easily disregarded—and are. This increase in number is equalled or surpassed by an increase in the cost to newspapers for defense. Restraint of the press, either by financial restraint or self-restraint by newsmen who cannot promise anonymity, may also increase—to the public's detriment.

My recommendation of a qualified shield law bears five qualifications. One, such a law should be carefully written to cover most legitimate members of the news media; the privilege should not be denied merely because it might not cover every conceivable person even remotely aligned with the newsgathering process. Two, the law should allow protection of the source and the information acquired by newsmen in the performance of their jobs. Three—because confidentiality is so important to the newsgathering function—a qualified shield law should offer protection in all cases except those in which a newperson's testimony bears (as in Garland v. Torre) directly upon the thrust of a case—particularly in cases involving the rights guaranteed the accused—and in all cases in which other means of obtaining the newperson's information have not been exhausted.

Four, special arrangements should be required for obtaining testimony in instances in which a person's rights under the Fifth and/or Sixth Amendments affect such persons' very life or liberty. A qualified shield law
should provide for the compulsion of a reporter's testimony in such a case if all other means of gaining the information have been exhausted.

And five--because it is the uniformity, not the numbers, of subpoenas that is important--a qualified shield law should be made applicable to state as well as federal judicial and investigative bodies. Uniform protection should be granted to a profession which increasingly crosses state lines (and thereby qualifies, perhaps, for protection under the interstate commerce clause). While other professional privileges are not national in application, they generally involve individuals in a certain area rather than the total public.

Therefore, upon the basis of my research, I recommend that a qualified shield law be adopted in the United States.
BIBLIOGRAPHY

Books


Journals, Newspapers and Reports


Magazines

"All or Nothing?" *Newsweek*, April 2, 1973, pp. 57-8.


"Shield Bill Signed Into Law in North Dakota." *Editor and Publisher*, March 31, 1973, p. 66.


"Shield Laws Passed By 6 States in '73." Editor and Publisher, December 29, 1973, p. 16.


"Writer Needn't Identify Source for Civil Suit." Editor and Publisher, December 16, 1972, p. 12.