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The Fallacy of Farber: Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases

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COMMENTS

THE FALLACY OF *FARBER*: FAILURE TO ACKNOWLEDGE THE CONSTITUTIONAL NEWSMAN'S PRIVILEGE IN CRIMINAL CASES

I. INTRODUCTION

Throughout the 1970's, a growing number of newspaper and broadcast journalists[1] have suddenly become celebrities in a way that none of them could have wished. Reporters such as William Farr, Peter Bridge, and most recently, Myron Farber, have become famous—because they have gone to jail. These persons are journalists who were ordered by courts to identify confidential sources of information. All declined to do so, and for their refusal, were ordered punished for contempt.

These reporters went to jail in the name of a principle—but it is a principle whose constitutional foundation has never been explicitly sanctioned by the Supreme Court of the United States.[2] This principle, often claimed but sometimes rejected, is known as the newsman's privilege. It is the right claimed by journalists to refuse to testify, or otherwise supply information, in judicial, legislative, or administrative proceedings, about their confidential news sources or confidential knowledge obtained in the course of news gathering. Proponents of the privilege have claimed, at differing times, that it is derived from the common law, the first or fifth amendments to the United States Constitution, or various state statutes.

Branzburg v. Hayes,[3] decided June 29, 1972, is the Supreme Court's only comprehensive examination of the subject. The five-to-four decision, authored by Mr. Justice White, opened with this unequivocal declaration: "The issue in these cases is whether requiring newsmen to appear and testify before federal and state grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not."[4]

Despite these strong words, however, the Court's opinion left considerable room for uncertainty and conflicting interpretation. Different judges, later ruling on privilege claims in other cases, came to diametrically dissimilar conclusions—all citing *Branzburg* as the authority for their decisions.[5]

The case that once again has kindled national interest in this issue is *In re Farber*,[6] the celebrated 1978 decision of the New Jersey Supreme Court, which held that any newsman's privilege must yield to the constitutional rights of a defendant in a criminal prosecution. Although the United States Supreme Court did not choose to take certiorari in the case,[7] *In re Farber* still must be regarded as a significant decision, not because it attracted nationwide attention, but because its holding adopts a more inimical stance toward immunity for journalists than most other courts have taken in recent years. The *Farber* decision already has been cited by other judges,[8] and it raises important questions about the future of this issue in the courts.

[1] The terms journalist, newsman, reporter, and the press will be utilized interchangeably in this comment. The question of just who is a journalist is one that has troubled both courts dealing with privilege claims and legislatures trying to formulate adequate shield laws. In this comment, the terms mean those persons directly involved in the processes of gathering, researching, writing, editing, photographing, illustrating, reporting, analyzing, commenting on, or broadcasting information for public consumption through media of mass communication and dissemination of news. These media would include newspapers, magazines, other periodicals, wire services, news or feature syndicates, radio, television, and broadcasting networks.

[2] *See* Branzburg v. Hayes, 408 U.S. 665 (1972).

[3] 408 U.S. 665 (1972).

[4] *Id.* at 667.

[5] As an example of two courts that interpreted *Branzburg* in dramatically different ways, see Florida v. Petrantoni, 4 MED. L. REP. (BNA) 1554 (Cir. Ct. 1978), a criminal case in which a judge cited Justice White's plurality opinion in *Branzburg* as the first of several authorities for a "broad first amendment privilege against compelled testimony and production of documents," and People v. Monroe, 88 Misc. 2d 850, 370 N.Y.S.2d 1007 (Sup. Ct. 1975), a criminal case in which the court ruled that *Branzburg* created no testimonial privilege, either absolute or qualified, for a reporter in any phase of criminal proceedings from grand jury testimony through trial.

[6] 78 N.J. 259, 394 A.2d 330, *cert. denied*, —U.S.—, 98 S. Ct. 598 (1978).

[7] *See* —U.S.—, 98 S. Ct. 598 (1978) (denial of certiorari).

[8] Cases citing *Farber* in refusing to recognize a newsman's privilege that were decided in the first few months after the New Jersey Supreme Court's ruling include

The primary purpose of this comment will be to examine the application of the privilege doctrine in criminal cases and grand jury testimony, and the result in *Farber* will be contrasted with other recent decisions in the area. The history of the newsman's privilege issue and the sources of the doctrine will be outlined initially, followed by a review of the Supreme Court's holding in *Branzburg* and of those cases, both civil and criminal, that have been decided in the years since *Branzburg*. The comment will next examine the *Farber* decision itself, including both the complex procedural development of the case and the four opinions authored by members of the New Jersey Supreme Court. Finally, the comment will analyze the *Farber* decision and other lower court criminal law/newsman's privilege cases, and will suggest alternatives for judicial resolution of the controversy.

II. The Central Issue

The conflict at issue here is a clash between two vital guarantees of the United States Constitution—the right of free press[9] and the right to just and orderly judicial process.[10] It is impossible for the two systems protected by these constitutional guarantees to operate simultaneously under conditions of absolute freedom, as cases like *Branzburg* and *Farber* clearly demonstrate. Society must thus make choices: either one of the systems must be permitted to function at a level of maximum efficiency, with a resulting loss in the flexibility and freedom of the other, or a balance must be struck between the two absolutes.

In reality, of course, there are, and always have been, a variety of constraints upon both the free press and the judicial process. The common law of libel and obscenity and the "clear and present danger"[11] and "fighting words"[12] doctrines are examples of restrictions imposed upon freedom of the press. Similarly, the fifth amendment's right against self-incrimination,[13] the "exclusionary rule"[14] and, significantly, common law and statutory testimonial privileges for lawyer-client,[15] doctor-patient,[16] priest-penitent[17] and husband-wife[18] relationships all impair, to some degree, the efficiency and "truth-finding" function of the judicial system.

The importance of a free press has been acknowledged since the beginnings of the Republic,[19] but because no special training or licensing was needed to become a journalist, and because the journalist did not have a responsibility to provide individual assistance to specific clients, society, and the law did not vest the newsman with the same testimonial privilege given lawyers and doctors. No benefits were believed to derive from recognizing a confidential relationship between a reporter and his source that would justify a testimonial privilege for the reporter.

> [I]t has ... been recognized as a fundamental maxim that the public ... has a right to every man's evidence.
>
> ....
>
> 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.[20]

United States v. Digilio, No. 74-313 (D.N.J. 1978) (magistrate's opinion, unreported) and *In re* Powers, 4 Med. L. Rep. (BNA) 1600 (Vt. Dist. Ct. 1978). Mr. Justice White's opinion refusing to grant a stay in the *Farber* case, New York Times Co. v. Jascalevich, —U.S.—, 99 S. Ct. 6 (1978), was cited in New York v. Zagarino, 4 Med. L. Rep. (BNA) 1693 (N.Y. Sup. Ct. 1978).

[9] The first amendment provides, in pertinent part: "Congress shall make no law ... abridging the freedom of speech, or of the press ...." U.S. Const. amend. I.

[10] The sixth amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor ...." U.S. Const. amend. VI.

[11] *E.g.*, Schenck v. United States, 249 U.S. 47 (1919).

[12] *E.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[13] The fifth amendment provides, in pertinent part: "No person ... shall be compelled in any criminal case to be a witness against himself ...." U.S. Const. amend. V.

[14] *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

[15] *E.g.*, People v. Adam, 51 Ill. 2d 46, 280 N.E.2d 205, *cert. denied*, 409 U.S. 948 (1972); Ill. Ann. Stat. ch. 110A, § 201(b)(2) (Smith-Hurd 1978); N.J. Stat. Ann. § 2A:84A-20 (West 1979).

[16] *E.g.*, N.J. Stat. Ann. § 2A:84A-22.2 (West 1979); Ill. Ann. Stat. ch. 51, § 5.1 (Smith-Hurd 1978).

[17] *E.g.*, N.J. Stat. Ann. § 2A:84A-23 (West 1976); Ill. Ann. Stat. ch. 51, § 48.1 (Smith-Hurd 1978).

[18] *E.g.*, N.J. Stat. Ann. § 2A:84A-22 (West 1979); Ill. Ann. Stat. ch. 51, § 5 (Smith-Hurd 1978).

[19] *See, e.g.*, Z. Chaffee, Free Speech in the United States 16-22 (1941); The Federalist No. 84 (A. Hamilton); XII Papers of Thomas Jefferson 48-49 (J. P. Boyd ed. 1955) (letter to Col. Edward Carrington, Jan. 16, 1787); VI Writings of James Madison 1790-1802, 335 (1906).

[20] Wigmore on Evidence §§ 2192, 2286 (McNaughton) rev. ed. 1961) (emphasis supplied).

Although nineteenth century law did not recognize a newsman's privilege, confidentiality was seldom challenged in the courts and reporters, with little fear, made regular use of such sources. As journalism grew in professional stature and power during the twentieth century and the trend in print media swung toward more in-depth, investigative reporting, dependence on confidential sources increased.[21] Indeed, most newsmen recognized that some of their most important stories would never have been written without the aid of confidential sources.[22]

The American Newspaper Guild acknowledged this important tool of newsgathering and recognized the responsibilities attendant to its use, when it adopted the first code of ethics for journalists in 1934. The code included this provision: "Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigative bodies."[23]

Still, the true test of reporters' resolve did not emerge until the late 1960's. It was during those years that governmental agencies turned to the press subpoena as a helpful and convenient means of gathering information about dissidents. Reporters resisted these subpoenas—and the clash between free press and judicial process ensued.

This, then, is the basic issue in the battle over newsman's privilege. It is a confrontation rooted in social mores and ethical values as well as law—and it is a conflict without any easy answers or simple solutions.

III. The Controversial History of the Newsman's Privilege

American journalists have been insisting for at least 130 years[24] that they should not be forced to reveal the identity of their news sources. This claim has been supported, at differing times, by one or more of four basic legal arguments.

[21] *See* Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229, 234, 252–53 (1971).

[22] *See, e.g.*, Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18, 43–44 (1969); *The Justice and the Journalist*, The Nation, Sept. 18, 1972. Newsmen also have acknowledged their dependence upon confidential sources in their own books and articles. *See, e.g.*, B. Woodward & C. Bernstein, All the President's Men (1974), which details use Washington Post reporters made of confidential sources in exposing the Watergate scandal.

[23] American Newspaper Guild Code of Ethics, *reprinted in* G. Bird & F. Merwin, The Newspaper in Society 567 (1942).

[24] *See* note 29 & accompanying text *infra*.

●*Common law.* Throughout the second half of the nineteenth century, newsmen contended that such a privilege ought to be recognized in the common law, but that claim was rejected repeatedly by the judges writing the common law.[25]

●*Shield laws.* Near the end of the century, the idea was first advanced that immunity for reporters could be secured through the enactment of state statutes—known today as shield laws—but it was not until the 1930's that this proposal began making any real headway in state legislatures. More than half of the states now have shield laws, but courts generally have construed them quite strictly and thus often effectively have denied journalists their protection.[26]

●*Fifth amendment.* In a limited number of cases where reporters have actually witnessed, or have direct knowledge of, criminal conduct on the part of their news sources, the fifth amendment right against self-incrimination has been invoked to justify a newsman's refusal to testify. The fifth amendment theory is not used often, however, since it covers only a small number of the possible situations in which a reporter might wish to refuse to testify.[27]

●*First amendment.* In 1958, it was suggested for the first time that the true foundation for a newsman's privilege might be found in the first amendment.[28] Twenty years later, the development of appellate doctrine indicates that some degree of protection for the press is derived from the first amendment, but the scope of that protection has not yet been clearly defined.

A. The Common Law Argument

The earliest reported case involving a newsman who refused to reveal his sources is *Ex parte Nugent*,[29] an 1848 decision. John Nugent, a reporter covering the United States Senate for the *New York Herald*, had obtained confidential documents concerning a proposed treaty to end the Mexican-American War. After the secret drafts appeared in print, the Senate subpoenaed Nugent and demanded that he reveal his source. He refused, and for his defiance was arrested for contempt of the Senate. Nugent then sought his freedom through a writ of habeas corpus. The *Nugent* opinion does not indicate whether any specific claim for a newsman's privi-

[25] *See* note 38 & accompanying text *infra*.

[26] *See* notes 42–45 & accompanying text *infra*.

[27] *See* note 50 & accompanying text *infra*.

[28] Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

[29] 18 F. Cas. 471 (No. 10,375) (D.C. Cir. 1848).

lege was made before the court. If such an argument were made however, it apparently had no effect upon the decision for Nugent's arrest was upheld. The court rested its judgment on the inherent and sole power of the Senate to judge its own contempts.[30]

The gestation of the common law privilege doctrine can be seen more clearly in an 1857 legislative decision, also stemming from a congressional contempt citation. James Simonton, a Washington correspondent for the *New York Times*, had reported that several unnamed members of the House of Representatives had taken bribes in return for their votes on land grants in the Minnesota Territory.[31] A House select committee investigating the charges called the reporter to testify, but he refused to disclose the identities of either his source or the alleged bribetakers. In defense of his actions, Simonton told the committee: "I do not decline in order to screen the members; my declination was based upon my own conviction of duty.... I do not see how I can answer ... without a dishonorable breach of confidence."[32] Apparently neither the committee nor the full House was impressed by Simonton's motives. A contempt citation was issued upon a 136–23 vote.[33]

The first case in which the highest court of a state was called on to resolve a claim of privilege was *Pledger v. State*,[34] decided in 1886 by the Georgia Supreme Court. In *Pledger*, which was a prosecution for criminal libel, the court held that a newspaper publisher could not refuse to reveal the identity of a reporter who had written a story appearing in his newspaper. A defiant publisher would be subject to fines and imprisonment for contempt, as well as court-assigned liability for the libel.[35]

In *People ex rel. Mooney v. Sheriff of New York County*,[36] a 1936 decision that was later cited frequently, the New York Court of Appeals held that a reporter could not rely on his promises of confidentiality in refusing to answer a grand jury's questions about gambling activities.[37] The issue as framed in that case was not unlike that which the United States Supreme Court later addressed in *Branzburg*.

These and subsequent cases demonstrate that American courts have never extended a friendly reception to claims of a common-law privilege.[38] Indeed, no state without statutory protection for newsmen has ever recognized a privilege at common law.[39]

B. THE SHIELD LAW ARGUMENT

Since appellate courts were unwilling to accept a newsman's privilege at common law, journalists next sought protection from the legislatures. The Maryland General Assembly became the first body to enact a shield law in 1896,[40] but not until 1933 would another state—New Jersey—follow suit.

[30] *Id.* at 483.

[31] CONG. GLOBE, 34th Cong., 3d Sess., 274–75 (1857).

[32] *Id.* at 403.

[33] *Id.* at 413. By the terms of the contempt resolution, Simonton was to be held in custody until he testified, or for the remainder of the legislative session. It is not known whether the reporter ever acquiesced, but Congress adjourned six weeks later on March 3, 1857.

[34] 77 Ga. 242, 3 S.E. 320 (1886).

[35] *Id.* at 248, 3 S.E. at 322.

[36] 269 N.Y. 291, 199 N.E. 415 (1936).

[37] *Id.* at 295, 199 N.E. at 416.

[38] The American Law Reports notes at least 11 cases prior to 1958 in which state and federal appellate courts were called upon to decide whether journalists had a common-law privilege not to disclose information or sources. *See* Annot., 7 A.L.R.3d 591 (1966). In all 11 cases, the courts refused to recognize such a privilege. The 1958 date is of significance in this respect because that was the year in which Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), was decided. *Garland* was the first such case in which a reporter suggested the testimonial privilege might be grounded in the first amendment, in addition to the common law. *See* notes 52–56 & accompanying text *infra*. Since the *Garland* decision, journalists have seldom depended upon the common law as the source of their defense. The earlier cases cited at 7 A.L.R.3d 591 (1966) are:

Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); People v. Durrant, 116 Cal. 179, 48 P. 75 (1897); *Ex parte* Lawrence, 116 Cal. 298, 48 P. 124 (1897); Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); Clein v. State, 52 So. 2d 117 (Fla. 1950); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); Pledger v. State, 77 Ga. 242, 3 S.E. 320 (1887); *In re* Wayne, 4 Hawaii Dist. F. 475 (1914); *In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (1913); People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936); People *ex rel.* Phelps v. Fancher, 2 Hun. 226 (9 Sup. Ct. Reports, N.Y. 1874). With one exception, this list is composed entirely of cases that arose in the criminal law context, either at trial or in instances where newsmen refused to testify before grand juries investigating possible criminal activities. Both the *Durrant* and *Plunkett* cases involved murder trials; the *Pledger* decision stemmed from an indictment for criminal libel; The *Phelps*, *Lawrence*, *Grunow*, *Wayne*, *Joslyn*, *Mooney*, and *Clein* judgments all involved grand juries, and *Brewster* involved a civil libel action.

[39] *See* Adams v. Associated Press, 46 F.R.D. 439, 440 (S.D. Tex. 1969).

[40] MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (Cum. Supp. 1978). In December 1886 and January 1887, Baltimore Sun reporter John T. Morris was jailed for 17 days for refusing to reveal his sources for a story he wrote detailing a grand jury's vote on an election fraud indict-

By the time the United States Supreme Court decided *Branzburg* in 1972, nineteen states had created some sort of statutory protection for newsmen. In *Branzburg*, Justice White, after rejecting the first amendment claims for privilege, added that both Congress and the various state legislatures were free to implement any sort of shield law they felt necessary or desirable.[41] Since then, seven states appear to have accepted Justice White's invitation, bringing to twenty-six the number which have privilege statutes. In addition, ten states substantially strengthened their existing shield laws through amendments or totally new enactments following *Branzburg*. New Jersey, the state in which the *Farber* case would be decided, was one of those ten.[42]

As indicated in Table 1, the scope of the various shield laws varies dramatically.[43] Some states provide what is known as an "absolute" privilege: the journalist cannot be compelled to testify before any official body under any circumstances as to either his information or the sources from which he obtained that information. Prior to the *Farber* decision, New Jersey's shield law was believed to provide an absolute privilege.[44] In recent years however, more states have tended to enact qualified shield laws. These statutes provide only limited protection and include exceptions for certain circumstances in which a reporter may be compelled to testify, such as libel actions, or instances where there is "an overriding public interest" in disclosure. Shield laws also tend to differ with regard to the persons who are permitted to claim their protection, whether both sources and information, or only sources are safeguarded, and when and how the privilege is waived.

The *Farber* case clearly emphasizes what may actually be the biggest single constraint upon the benefit of legislatively enacted press shields: the restrictive interpretations placed upon them by state courts. Several other cases in this decade demonstrate the tendency of appellate jurists to construe these laws narrowly.[45] Indeed, the New

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ment. The arrest is said to have been the catalyst for the passage 10 years later of the first state shield law, enacted by the Maryland General Assembly. A misplaced digit in early historical accounts of the incident caused authors of several law review comments and journalism treatises to report erroneously that the Morris arrest took place only two months before passage of the Maryland shield law, but this misconception was corrected by Professor A. David Gordon of Northwestern University's Medill School of Journalism in Gordon, *1896 Maryland Shield Law, The American Roots of Evidentiary Privilege for Newsmen*, JOURNALISM MONOGRAPHS No. 22 (Feb. 1972).

[41] At the federal level, Congress has freedom to determine whether a statutory newsmen's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. 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. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

408 U.S. at 706.

[42] The statutory citations for the 26 states which now have newsman's shield laws are: ALA. CODE § 12-21-142 (Cum. Supp. 1978); ALASKA STAT. §§ 09.25.150, .160 (Cum. Supp. 1978); ARIZ. REV. STAT. § 12.2237 (Supp. 1978); ARK. STAT. ANN. § 43-917 (1977); CAL. EVID. CODE § 1070 (West Supp. 1978); DEL. CODE tit. 10, § 4320-26 (1974); ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1978); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1978); KY. REV. STAT. § 421.100 (Cum. Supp. 1978); LA. REV. STAT. ANN. §§ 45.1451-54 (West Supp. 1978); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (Cum. Supp. 1978); MICH. STAT. ANN. § 28.945(1) (1978); MINN. STAT. ANN. §§ 595.021-.025 (West Supp. 1978); MONT. REV. CODES ANN. § 93-601-2 (Cum. Supp. 1977); NEB. REV. STAT. §§ 20-144 to 147 (1977); NEV. REV. STAT. § 49.275 (1977); N.J. STAT. ANN. § 2A:84A-21, 21a (West Supp. 1978); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1978); N.D. CENT. CODE ANN. § 31-01-06.2 (1978); OHIO REV. CODE ANN. §§ 2739.04, .12 (Baldwin Supp. 1977); OKLA. STAT. ANN. tit. 12, § 2506 (West 1978); OR. REV. STAT. §§ 44.510-540 (1977); PA. CONS. STAT. ANN. § 330 (Purdon Cum. Supp. 1978); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (Supp. 1977); TENN. CODE ANN. §§ 24-113 to 115 (Supp. 1977).

[43] To compare the current state shield laws with those in effect prior to the *Branzburg* decision, contrast Table 1 with a similar chart appearing in D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 305, 327-30 (1969).

[44] *See* relevant portions of the New Jersey Newspaperman's Privilege Law at note 209 *infra*, and also Justice Pashman's dissent in *In re* Farber, 78 N.J. at —, 394 A.2d at 344.

[45] For example, Paul Branzburg, the Louisville Courier-Journal reporter whose name is identified with the Supreme Court's 1972 privilege decision, initially sought to avoid appearances before two different grand juries by claiming, *inter alia*, protection under what was thought to be an "absolute" reporter's shield law. Kentucky's highest judicial body, the Court of Appeals, conceded that the statute allowed a newsman to refuse to identify his news sources, but then held that the law did not apply when the reporter had actually witnessed the commission of a crime. When Branzburg's sources converted marijuana into hashish while he watched, the court held, they ceased

TABLE I

	Year Enacted (Most recent Amendment)	Persons Covered	Media Included	Absolute	Qualified	Where Asserted	What Covered	Publication Required
Alabama	1935 (1949)	Engaged, employed, connected with newspaper, radio, or television	Newspaper, radio, television	Yes		Anywhere	Source	Yes
Alaska	1967	Public official or reporter	Not specified	No	Court may order testimony as may be in the public interest of a fair trial	Not specified	Source	
Arizona	1937 (1960)	Engaged in, connected with, or employed by newspaper, radio, or television	Newspaper, radio, television	Yes		Anywhere	Source	Yes
Arkansas	1936 (1949)	Editor, reporter, writer for any newspaper, or periodical or radio station or publisher of any newspaper or periodical or manager or owner of any station	Newspaper, periodical, radio	No	Must have written, published, or broadcast in good faith, without malice, and in the public interest	Anywhere (but this § appears in title on criminal procedure only)	Source	
California	1965 (1974)	Publisher, editor, reporter, or other person connected with or employed or formerly connected with or employed	Newspaper, magazine, other periodicals, press association, wire service, radio, television	Yes	Applies to contempt citations only	Anywhere	Source and information (includes all notes, outtakes, photographs, tapes or other data)	Yes
Delaware	1973	Journalist, scholar, educator, polemicist, or other persons either principally employed in or spending 20 hours a week engaged in preparation or dissemination of information through mass reproduction to general public, or agent, assistant, employer, or supervisor of all of the above.	Any medium using facilities for mass reproduction of words, sounds or images to general public	No	Court may order testimony or information only if in public interest, and on source also if reporter's statement proven untrue. Reporter cannot be eyewitness to or participant in, physical violence or property damage	Anywhere	Source (if reporter actually communicates with source) and information	

Illinois	1971	Engaged in collecting, writing, or editing news for publication	Newspaper, periodical, news service, radio, television, community antenna television service, news reels, motion picture news	No	Court may order testimony if essential to public interest and information not available from any alternative source. Not available in libel or slander action	Not Specified	Source	
Indiana	1949 (1973)	Any person connected with or formerly connected with; bonafide owner, editorial or reportorial employee who receives principal income from legitimate gathering, writing, editing, and interpretation of the news. Any person connected with licensed radio or television station as owner, official or as an editorial or reportorial employee who receives principal income from gathering, writing, editing, interpreting, announcing, or broadcasting news	Newspaper or periodical published at regular intervals and having general circulation; press association, wire service, licensed radio, or television	Yes		Anywhere	Source	No
Kentucky	1936 (1952)	Any person engaged, employed, connected	Newspaper, radio, television	Yes		Anywhere	Source	Yes
Louisiana	1964	Reporter (one regularly engaged in collecting, writing, editing news for publication)	Newspaper, periodical (issued at regular intervals and having paid general circulation), press association, wire service, radio, television, news reels	No	Can be revoked in the public interest upon application	Anywhere	Source or identity of any informant	No
Maryland	1896 (1973)	Any person engaged, connected, employed	Newspaper, journal, radio, television	Yes		Anywhere	Source	Yes
Michigan	1949 (1951)	Reporters	Newspapers or other publications	Yes		Only criminal investigations	Source	No

TABLE I—*Continued*

	Year Enacted (Most recent Amendment)	Persons Covered	Media Included	Absolute	Qualified	Where Asserted	What Covered	Publication Required
Minnesota	1973	Any person engaged in gathering, procuring, compiling, editing, or publishing of information for transmission, dissemination or publication to the public		No	Court may order disclosure if source has information on commission of a crime, information cannot be obtained through alternative means, and there is a compelling and overriding interest requiring disclosure	Anywhere	Source, information, and any notes, memoranda, recording tapes, film, or other reportorial data	No
Montana	1943 (1977)	Any person engaged, or who was so engaged when information sought was procured, connected, or employed for purpose of gathering, writing, editing, or disseminating news	Newspaper, news service, radio, televi'on, or community ·:itenna television service	Yes		Anywhere	Source or information	No
Nebraska	1973	Any person engaged in procuring, gathering, writing, editing or disseminating news or other information to the public	Includes, but not limited to, newspaper, magazine, periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or large television system	Yes		Anywhere	Source, information, and all notes, outtakes, photographs, films, tapes, or other data	No
Nevada	1969 (1977)	No reporter, former reporter, or editorial employee (and in radio and television, any employee)	Newspaper, periodical, press association, radio, television	Yes		Anywhere	Source or information	No
New Jersey	1933 (1977)	Person engaged in, or employed for the purpose of gathering, procuring, transmitting, compiling, editing or	Newspapers published at least once a wee:., magazines with paid circulation, press associations, news agencies,	Yes		Anywhere	Source, author, means, agency or person from or through whom any information was procured, obtained, sup-	No

		disseminating	wire services, radio, television, and other printed, photographic, mechanical, or electronic means of disseminating news to general public				plied, furnished, gathered, transmitted, compiled, edited, disseminated or delivered; and any news or information obtained in the course of pursuing his professional activities	
New Mexico	1967 (1973)	Journalist or newscaster (any person who, for gain, is engaged in gathering, preparing, editing, analyzing, commenting on, or broadcasting news, or who was so engaged at the time a source or information was procured) or working associates of journalists or newscasters	Newspaper, magazine, press association, news service, wire service, news or feature syndicate, broadcast or television station, or network, or cable television system	No	Court can order disclosure when essential to prevent injustice	Anywhere	Source or information	No
New York	1970 (1975)	Person, who for gain and livelihood, is engaged in gathering, preparing, or editing of news (for print media) or analyzing, commenting on or broadcasting news (by radio or television)	Newspaper published at least once a week, magazine with paid circulation, news agency, press association, wire service, radio or television transmission station, or network	Yes		Anywhere	Source or information	Yes
North Dakota	1973	Person engaged in gathering, writing, photographing, or editing news and employed or acting for (see Media Included)	Any organization publishing or broadcasting news	No	Court can order disclosure to prevent miscarriage of justice	Anywhere	Source or information	
Ohio	1941 (1977)	Any person engaged in, connected with or employed by; for purposes of gathering, procuring, compiling, editing, disseminating, publishing, or broadcasting news	Newspaper, press association, commercial or noncommercial radio, television	Yes		Anywhere	Source	

	Year Enacted (Most recent Amend-ment	Persons Covered	Media Included	Absolute	Qualified	Where Asserted	What Covered	Publica-tion Required
Oklahoma	1974 (1978)	Reporter, photographer, editor, commentator, journalist, announcer, or others engaged in obtaining, writing, reviewing, editing, or otherwise preparing news	Newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, cable television system	No	Court may require disclosure if information is shown, by clear and convincing evidence, to be relevant to significant issue in action, and is not available through alternate means	Anywhere	Source or information	No
Oregon	1973	Any person connected with, employed by or engaged in any medium of communication to the public or formerly employed or engaged	Newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, cable television systems	No	Does not apply in defamation actions	Anywhere	Source or information	No
Pennsylvania	1937 (1968)	Engaged in, connected with, employed by; in order to gather, procure, compile, edit, publish news	Newspaper or magazine of general circulation, press association, radio, television	Yes	Radio or television must keep transcription or recording of broadcast	Anywhere	Source	No
Rhode Island	1971	Reporter, editor, commentator, journalist, writer, correspondent, news photographer, or other person engaged in gathering or presentation of news	Newspaper or periodical issued at regular intervals and having paid circulation, press association, newspaper syndicate, wire service, radio, television	No	Court may require disclosure if necessary to permit felony prosecution or to prevent a threat to life, when information is not available from other witnesses. Does not apply in defamation actions or to information already made public.	Anywhere	Source or information	No
Tennessee	1973	A person engaged in gathering information for publication or broadcast, either if connected with or employed by, or if independently engaged	News media or press	No	Court may require disclosure if information relates to specific, probable violation of law, it cannot be obtained through alternate means and compelling and overriding public interest is shown	Anywhere	Source or information	"information . . . pro cured for publicatior broadcast"

Mexico Supreme Court struck down its state's shield law as a violation of the state constitution's

being news sources and became criminals instead. Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972); Branzburg v. Meigs, 503 S.W.2d 748 (Ky. 1971), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

Both William Farr and Peter Bridge, two reporters who served widely publicized, highly controversial jail sentences in the early 1970's for their refusal to disclose sources and information, erroneously thought they were protected by state shield laws.

During the 1970 Charles Manson murder trial, the presiding judge, in an attempt to avoid prejudicial pretrial publicity, issued an order to all the attorneys involved in the case, restricting the information they could provide to the press. Farr, then a reporter for the Los Angeles Herald-Examiner, obtained a copy of a witness's deposition and wrote a story based on it. Later, he left the newspaper's staff for a job with the district attorney's office. After the Manson trial had ended, the judge initiated contempt proceedings against Farr and demanded to know who had supplied him with the deposition. Farr refused to name his source, claiming the protection of the California shield law. Upon review however, a state court of appeals denied him immunity. Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972). Although California's statute was theoretically of the "absolute" variety, the appeals court said that permitting Farr to employ it in this case "would be to countenance an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers." *Id.* at 69, 99 Cal. Rptr. at 348. The state court also suggested, but did not actually hold, that the shield law would not protect an ex-newsman like Farr. That dictum prompted the amending of several state statutes, including California's, to include former reporters.

Farr served 46 days in jail for contempt of court—the longest sentence any reporter has so far served in the newsman's privilege cases. His release was finally ordered by Supreme Court Justice Douglas, writing in chambers as Circuit Justice for the Ninth Circuit. *See* Farr v. Pitchess, 409 U.S. 1243 (1973). Farr was set free on personal recognizance, pending disposition of a habeas corpus action, but that petition was later denied. *See In re* Farr, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

Bridge, a reporter with the Newark News, spent 20 days in jail after he refused to answer a grand jury's questions about a bribe offer reportedly made to a state official. In his story about the incident, Bridge had named his news source, but had not revealed the identity of the person who had attempted to make the bribe. Bridge claimed the protection of the New Jersey shield law, but a superior court judge ruled he had waived the privilege by disclosing his source and some of the details in the story itself. A New Jersey appellate court and the U.S. Supreme Court both refused to stay his contempt sentence. *See In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (App. Div. 1972), *cert. denied*, 410 U.S. 991 (1973).

Ironically, it was this incident and the Supreme Court's *Branzburg* decision in 1972 that led the New Jersey legislature to revise and substantially strengthen that state's shield law. *See* note 209 *infra*. The new privilege statute, said to be "one of the most strongly expressed in the country," by a justice writing in *In re* Farber, 78 N.J. at —, 394 A.2d at 351, was the law that Myron Farber relied upon when he attempted to contest the contempt charges against him. That protection, as the New Jersey Supreme Court's ruling demonstrated, was insufficient.

Other recent cases that demonstrate this tendency toward strict construction of shield laws include: Hammarley v. Superior Court, 89 Cal. App. 3d 388, 53 Cal. Rptr. 608 (1979) (privilege must yield to defendant's right to fair trial in murder prosecution); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976) (shield law limited by court's ability to restrict prejudicial pretrial publicity); People v. Gillings, No. 27492 & 27490 (Cal. Sup. Ct., San Joaquin Cty., March 24, 1976) (reported in Goodale, *Subpoenas*, in PRACTICING LAW INST: COMMUNICATIONS LAW 304, (1978) [hereinafter cited as Goodale] (shield law did not protect unpublished photographs sought by both prosecutor and defense in criminal trial); Lightman v. State, 15 Md. App. 713, 294 A.2d 149 (Ct. Spec. App.), *aff'd*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973) (reporter could not claim privilege when he personally had observed potentially criminal drug usage because he thus became the source of the information); Michigan v. Smith, 4 MED. L. REP. (BNA) 1753 (Cir. Ct.), *leave to appeal denied*, 4 MED L. REP. (BNA) 1761 (Mich. 1978) (shield law held to apply only to grand jury inquiries and not to subpoena *duces tecum* directed to reporter at criminal trial); New York v. LeGrand, 4 MED. L. REP. (BNA) 1897 (N.Y. Sup. Ct.), *aff'd*, 4 MED. L. REP. (BNA) 2524 (App. Div. 1979) (author of book not entitled to shield law protection of his confidential sources); Andrews v. Andreoli, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977) (reporter bears burden of proof before grand jury of demonstrating that he has reached a previous agreement of confidentiality with news source); People v. Alikili, No. 2897/76 (N.Y. Sup. Ct., N.Y. Cty., 1977) (reported in Goodale, *supra* at 307) (television films and video tapes reporting robbery not protected from subpoena by shield law when no confidential source involved); People v. Dupree, 88 Misc. 2d 791, 388 N.Y.S.2d 1000 (Sup. Ct. 1976) (newspaper cannot claim privilege where information was not intended to be confidential); People by Fisher v. Dan, 41 App. Div. 2d 687, 342 N.Y.S.2d 731, *appeal dismissed*, 32 N.Y.2d 764, 298 N.E.2d 118, 344 N.Y.S.2d 955 (1973) (television newscaster and cameraman could not refuse to answer grand jury questions concerning events they personally observed during prison riot); *In re* Dan, 80 Misc. 2d 399, 363 N.Y.S.2d 493 (Sup. Ct. 1975) (newscaster could not later refuse to testify in criminal trial that had resulted, in part, from his grand jury testimony); *In re* WBAI-FM, 68 Misc. 2d 355, 326 N.Y.S.2d 434 (County Ct. 1971), *aff'd*, 42 App. Div. 2d 5, 344 N.Y.S.2d 393 (1973) (radio station could not refuse to turn over letter that had revealed bombing threat to district attorney); and People v. Wolf, 69 Misc. 2d 256, 329 N.Y.S.2d 291 (Sup. Ct. 1972), *aff'd*, 39 App. Div. 2d 864, 333 N.Y.S.2d 299 (1972) (reporter could not claim privilege before grand jury when he had not promised informant confidentiality in return for information).

provisions concerning witnesses and evidence,[46] and several lower courts in New York have expressed reservations about the constitutionality of that state's shield.[47] This increasingly confined view on the part of courts and some legislatures[48] has persuaded many journalists and news associations that the best protection would be the enactment by Congress of a federal shield law. Ninety-nine proposals for such a law were introduced in the House or Senate between 1973 and 1978, but none managed to win congressional passage.[49] Even if such a law were enacted, privilege advocates would have to worry not only about what Congress might include in the law, but also about how it might eventually be interpreted by the federal judiciary.

C. THE FIFTH AMENDMENT ARGUMENT

Newsmen have, in a limited number of circumstances involving criminal activities, invoked the fifth amendment as the justification for their refusal to testify. While this can be viewed in part as a newsman's privilege argument, it is actually more an example of a journalist, like any other citizen, relying upon his constitutional right against self-incrimination. A fifth amendment claim occurs in a situation where the newsman, because of his confidential relationship with a source, was a witness to, or had direct knowledge of, criminal activity. A person's failure to report a crime which he has observed or about which he has inside information is the crime of misprison and he can be subjected to criminal penalties. However, a person can refuse to testify about what he saw if such testimony would tend to incriminate him. The United States Supreme Court upheld this defense in *Burdick v. United States*,[50] focusing upon protection of the reporter's fifth amendment right rather than a newsman's privilege. More recent Supreme Court cases, however, raise questions about just how strong a precedent *Burdick* would be for journalists today.[51]

D. THE FIRST AMENDMENT ARGUMENT

In 1958, actress Judy Garland sued the Columbia Broadcasting System for breach of contract and libel, basing her civil action on statements allegedly made by an unnamed network executive and appearing in a story by *New York Herald Tribune* gossip columnist Marie Torre. When the entertainer sought, through discovery proceedings, to learn the name of the executive, Torre refused to reveal it, and her attorneys responded instead with a novel argument that would significantly alter the scope of the newsman's privilege debate.

To compel a newspaper reporter to reveal the identity of confidential sources, they argued, would result in an unconstitutional encroachment upon the first amendment's guarantee of freedom of the press. This would occur because news sources'

Decisions in which journalists' invocation of state shield laws have been sustained include: United States v. Homer, 411 F. Supp. 972 (W.D. Pa. 1976) (federal court, taking note of Pennsylvania statute, said newsman should not be required to disclose nonconfidential information in criminal trial where subject matter is irrelevant or immaterial); *In re* Foster (Cal. Super. Ct., Alameda Cty., March 28, 1974) (reported in Goodale, *supra* at 306) (contents of letter which were broadcast protected by statute); People v. King, 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968) (shield law's use sustained in criminal trial, though not under direct challenge); People v. Bonnakemper, 74 Misc. 2d 696, 345 N.Y.S.2d 900 (City Ct. 1973) (trial court quashed subpoena directed to corporate publisher for published photographs); People v. Dillon, No. 70-4 (N.Y. Sup. Ct., Ontario Cty., June 25, 1971) (reported in Goodale, *supra* at 305 as *In re* CBS) (trial court quashed as overbroad special prosecutor's subpoena for video tapes of campus disturbance).

As this note demonstrates, and as was pointed out in reference to the common law precedents, note 38 *supra*, most shield law privilege cases arise either in the context of a criminal trial or a grand jury's investigation of alleged criminal activity. A small number of civil cases have involved interpretation of state shield laws. They are discussed at note 112 *infra*.

[46] *See* Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976).

[47] *See* New York v. Zagarino, 4 MED. L. REP. (BNA) 1693 (Sup. Ct. 1978); People v. Monroe, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (Sup. Ct. 1975).

[48] *See, e.g.*, Comment, *Legislation Note: House Bill 1363, Testimonial Privilege for Newsmen*, 9 TULSA L.J. 268 (1973).

[49] Figures supplied by the Bill Status Office Committee on House Adminstration U.S. House of Representatives. Of the 99 proposals for a federal shield law, 65 were introduced in the 93rd Cong., 1st Sess., the first session of Congress to meet after the *Branzburg* decision.

[50] 236 U.S. 79 (1915). There has been only one reported case of newsmen relying on the fifth amendment as a shield in recent years. A Massachusetts editor and reporter who were suspected of having obtained information from a grand jury leak pleaded both the first and the fifth amendments in response to a district attorney's questioning. A judge rejected the first amendment claim, but said the newsmen would not have to disclose their sources if it would tend to incriminate them. Grand Jurors for Middlesex Cty. v. Wallace, No. 111800 (Mass. Super. Ct., November 21, 1974) (reported in Goodale, *supra* note 45, at 310 and Press Censorship Newsletter, No. VI, December, 1974–January, 1975, at 34), *aff'd* on other grounds, 343 N.E.2d 844 (Mass. Sup. Jud. Ct. 1976).

[51] *See* Kastigar v. United States, 406 U.S. 441 (1972); Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972).

awareness that their identity might later be disclosed would result in fewer informants revealing inside data to reporters and that, in turn, would lead to an overall reduction in the flow of news from press to public.[52]

The argument did not succeed. Torre was held in criminal contempt for her refusal and the conviction was upheld upon appeal by the United States Court of Appeals for the Second Circuit.[53] Judge Potter Stewart declined to extend any explicit recognition to a privilege under the first amendment, though his opinion did make it clear that freedom of the press was an important right deserving some judicial protection:

> [F]reedom of the press, precious and vital though it is to a free society, is not an absolute. 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 ....
>
> ....
>
> If ... freedom of the press ... is here involved, we do not hesitate to conclude that it ... must give place under the Constitution to a paramount public interest in the fair administration of justice.[54]

Judge Stewart noted that this was not a case where the judicial process was being used to force wholesale disclosure of a newspaper's confidential sources, nor was the news source's identity of doubtful relevance or materiality: "The question asked of the appellant went to the heart of the plaintiff's claim."[55]

Miss Torre still would not testify, choosing instead to spend ten days in jail for contempt. Judy Garland, unable to learn the identity of the unnamed network executive, eventually dropped her libel suit.[56]

The specific facts of the *Garland* litigation and the language of Judge Stewart's narrowly drawn opinion were seen initially as hopeful signs by many privilege advocates. They believed that the first amendment might provide a more substantial foundation for successful claims of protection in future cases. But that early optimism was not well founded. Following the lead of *Garland v. Torre*, courts throughout the 1960's would pay brief homage to the first amendment—and then would proceed to rule that it provided newsmen no privilege.[57]

On three different occasions prior to *Branzburg*, litigants sought Supreme Court review of lower court decisions that held against a first amendment newsman's privilege. In each instance, they were unsuccessful.[58] In 1970 however, in the widely publicized case of *Caldwell v. United States*,[59] the Ninth Circuit Court of Appeals held that *New York Times* reporter Earl Caldwell not only had a privilege not to reveal confidential information, but indeed could not even be required to appear before a federal grand jury when the government had proven no compelling need for his testimony and a lower federal court already had granted him a limited testimonial privilege.[60] The surprising *Caldwell* judment, the first court decision to ever accept

[52] *See* Garland v. Torre, 259 F.2d 545, 547-48 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

[53] 259 F.2d at 551.

[54] *Id.* at 548-49.

[55] *Id.* at 550.

[56] *See* N.Y. Times, July 26, 1978, § A, at 14, col. 3 (city ed.).

[57] A decision which both followed the *Garland* principle and, at the same time, discussed the various other cases that had subscribed to the "no privilege" approach was State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971). An underground newspaper editor refused to answer grand jury questions concerning his sources for a story on a bombing at the University of Wisconsin. The Wisconsin Supreme Court, after a "weighing of competing values," held the editor must testify because of the public's right to protect itself against physical harm. *Id.* at 657, 183 N.W.2d at 99.

The post-*Garland* cases mentioned in *Knops* that rejected any first amendment privilege included: State v. Buchanan, 250 Or. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968) (a campus newspaper editor refused to answer grand jury questions concerning sources for story on drug usage); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963) (editors refused to answer grand jury questions or produce documents concerning alleged criminal activities of an ex-city official. The editors' first amendment privilege argument, the court said, was "devoid of merit." *Id.* at 40, 193 A.2d at 184); and *In re* Goodfader, 45 Haw. 317, 367 P.2d 472 (1961) (a photographer, who was not a party to a civil action, refused to answer deposition questions about confidential sources).

[58] *See* Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); Murphy v. Colorado, No. 19604 (Colo.), *cert. denied*, 365 U.S. 843 (1961) (discussed in *In re* Goodfader, 45 Haw. 317, 366, 367 P.2d 472, 498 (Mizuha, J., dissenting)); State v. Buchanan, 250 Or. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

[59] 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972). Earl Caldwell was a black reporter covering the activities of the radical Black Panther Party. He not only refused to answer a grand jury's questions, but also refused to even attend the grand jury's secret sessions, arguing that his mere appearance there would harm his confidential relationship with the Black Panthers and make it impossible for him to fulfill his first amendment responsibilities as a journalist.

[60] *See* Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

a first amendment privilege claim, was clearly at odds, not only with precedent, but also with three other major privilege cases, all decided at about the same time and all involving grand jury appearances by reporters.[61] On May 3, 1971, the Supreme Court granted certiorari in all four cases.[62]

E. BRANZBURG V. HAYES

In *Branzburg v. Hayes* the High Court, in a five-to-four decision written by Mr. Justice White, held that requiring newsmen to appear and testify before state or federal grand juries did not abridge the first amendment freedom of the press.[63] The Court held that reporters have the same obligation as any other citizen to respond to grand jury subpoenas and to answer questions relevant to investigations into criminal activity.[64] The Court also decided that the first amendment does not give rise to any testimonial privilege, either absolute or qualified, that would protect a newsman's agreement to conceal the criminal conduct of his news sources, or incriminating evidence against them.[65] The *Caldwell* decision was reversed by the Supreme Court, while the other three lower court judgments were upheld.[66]

All three of the newsmen involved, Paul Branzburg, Paul Pappas, and Earl Caldwell, had argued a position not unlike that raised by Marie Torre. They said that, in the course of gathering news, it is often necessary for a reporter to promise either not to identify his sources or not to reveal in print everything he knows about a subject. If a reporter is compelled to reveal this information to a grand jury, confidential sources will be deterred from furnishing further information and the free flow of news, protected by the first amendment, will be diminished.[67]

Justice White's response to this argument did admit one small victory for the fourth estate—he conceded that the seeking out and gathering of news was entitled to "some" first amendment protection. He said that without such protection freedom of the press could be "eviscerated."[68] But, Justice White went on to say:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.
>
> . . . .
>
> Fair and effective law enforcement . . . is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process . . . . [W]e 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 news gathering 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.*[69]

[61] The other three cases incorporated in the Branzburg decision all involved rulings that denied the newsmen's claims to first amendment privilege. As mentioned in note 45 *supra*, Paul Branzburg was a reporter who wrote two series of stories, at differing times, about drug usage in Louisville and Frankfort, Ky. Each of these series resulted in subpoenas from grand juries in those communities. Branzburg refused to answer questions from either body about the identities of persons he had seen in possession of drugs, claiming privilege under both state law and the first amendment. *See* Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972); Branzburg v. Meigs, 503 S.W.2d 748 (Ky. 1971), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

The final case involved Paul Pappas, a Massachusetts television newscaster who had spent several hours inside a local Black Panther headquarters and then refused to answer a grand jury's questions about what he had seen there. The Supreme Judicial Court of Massachusetts rejected Pappas's first amendment defense. *See In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

[62] *See* 402 U.S. 942 (1971).

[63] 408 U.S. at 667.

[64] *Id.* at 690–91.

[65] *Id.* at 692.

[66] *Id.* at 708–09.

[67] *Id.* at 679–80.

[68] *Id.* at 681.

[69] 408 U.S. at 682, 690–91 (emphasis added). Although all the *Branzburg* cases developed in the context of grand jury investigations, these final, additional words of dictum make it clear how Justice White views the issue of privilege claims in relation to criminal trials also.

As part of their argument before the Supreme Court, privilege proponents attempted to demonstrate that the burden upon newsgathering caused by the uncertainty of confidentiality was indeed a real and statistically provable impediment. The empirical studies cited for this proposition included Guest & Stanzler, note 22 *supra*; Blasi, note 21 *supra*; and Blasi, Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press (1972).

Justice White's response to these studies was:

> [W]e remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data indicate that some newsmen rely a great deal on confidential sources and that informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that . . . newsmen must testify pur-

The fifth and deciding vote in the *Branzburg* decisions was added by Justice Powell, who, in a brief concurrence, emphasized what he saw as "the limited nature of the Court's holding."[70] Justice Powell urged a balancing approach to the issue. He echoed Justice White's promise that harassment of the press would not be tolerated and he said that a reporter who was called on to give information bearing only a remote relationship to the subject of investigation, or who had other reason to believe "his testimony implicates confidential relationships without a legitimate need of law enforcement" could seek a protective order of court through a motion to quash.[71] He concluded:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[72]

In dissent, Justice Stewart, joined by Justices Brennan and Marshall, urged recognition of a conditional privilege for newsmen.[73] This recognition would entail shifting the burden of proving whether the privilege applied in a particular case. Instead of the journalist attempting to convince a court that he should be granted a testimonial privilege, the initial responsibility would fall upon the government to demonstrate why the reporter should not be permitted to invoke that protection.[74]

To meet this burden, Justice Stewart said the government should be required to prevail on a three-part test. It should have to

> (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.[75]

Justice Douglas, who focused his dissent on the *Caldwell* case, specifically proclaimed his view that a reporter has an *absolute* right under the first amendment to refuse to appear or testify before a grand jury.[76] Indeed, the Justice upbraided the *New York Times* for urging only a conditional privilege in its arguments before the Court; this "timid, watered-down, emasculated version of the First Amendment" which the *Times* offered was at odds with the Justice's view of the first amendment as an absolute.[77]

F. THE POST-BRANZBURG PRIVILEGE

Today, more than seven years after the *Branzburg* decision, trial and appellate courts and legal commentators are still attempting to decide just what the Court's opinion actually meant. Limited to its facts, of course, the holding required Earl Caldwell, Paul Branzburg, and Paul Pappas to appear and testify before grand juries, although none ever actually did so.[78] On the general question of newsman's privilege however, the holding was not so

> suant to subpoenas, but 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. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosure to newsmen are widely divergent and to a great extent speculative. It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.

408 U.S. at 693-94.

Justice Stewart, in dissent, sharply criticized the majority opinion on this point: "We have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist. . . ." *Id.* at 733 (Stewart, J., dissenting). *See* Murasky, *The Journalists' Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829 (1974), and Comment, *The Newsmen's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 U.C.L.A. L. REV. 160, 173-74 (1976), for an argument that the Supreme Court relied too heavily on a quantitative rather than qualitative analysis and ignored the large number of "important" stories, such as the *Washington Post's* Watergate exposé's, that would not be uncovered and published without the aid of confidential sources.

[70] 408 U.S. at 709 (Powell, J., concurring).

[71] *Id.* at 710.

[72] *Id.* (footnote omitted).

[73] *Id.* at 728 (Stewart, J., dissenting).

[74] *Id.* at 739-43.

[75] *Id.* at 743 (footnotes omitted).

[76] *Id.* at 713 (Douglas, J., dissenting).

[77] *Id.*

[78] The grand juries in the *Caldwell* and *Pappas* investigations were never reconvened to hear testimony. By the time the Supreme Court's decision was announced, Branzburg had left the Courier-Journal and was working as a journalist in Michigan. A Kentucky court held him in contempt *in absentia*, but Michigan would not extradite him. *See* Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 719 (1975).

clear. Four Justices said they would not interpret the first amendment to provide protection,[79] while three others dissented in favor of a qualified testimonial privilege to be granted or denied through the application of a three-part balancing test.[80] A fourth Justice also urged a privilege; indeed, he believed in absolute immunity for journalists.[81] That left the deciding vote with Justice Powell, and though he agreed that these three particular reporters ought to be required to testify, his concluding statement suggesting that "vital constitutional and societal interests [ought to be balanced] on a case-by-case basis" strongly implied that he, too, was willing to acknowledge a conditional privilege.[82] Justice Powell's own analysis of *Branzburg*, expressed two years later in his dissenting opinion in *Saxbe v. Washington Post Co.*,[83] tends to substantiate this interpretation. In fact, the Justice went so far as to suggest that "a fair reading" of the *Branzburg* plurality opinion made it clear that "the result hinged on an assessment of the competing societal interests involved . . . rather than on any determination that First Amendment freedoms were not implicated."[84]

The primary concern of this comment is applications of newsman's privilege to criminal law. Much of the post-*Branzburg* privilege litigation, however, has been civil. For that reason, a brief examination of recent cases dealing with civil actions is necessary in order to better understand trends in this field.

1. *Civil Actions*

A conditional privilege appears to be developing in the area of civil litigation, drawing support more from the limiting language of *Branzburg* than from the holding itself. Courts deciding civil actions have repeatedly pointed to both Justice White's and Justice Powell's emphasis on the limited nature of the *Branzburg* decision.[85] Justice Powell's apparent endorsement of a balancing approach is also cited,[86] along with the *Garland* judgment.[87] These two cases, neither of which granted a privilege on their specific facts, are thus employed now to sanction its creation.

Even though courts have generally acknowledged the existence of a conditional civil privilege, the extent to which they allow its assertion depends upon the nature of the claim. Many of the civil suits brought in the wake of *Branzburg* have been actions for libel. In such cases, the *Garland* standard is generally applied and privilege claims are rejected when the identity of the sources goes to the "heart of the claim." When newsmen are not actual parties to the litigation, however, courts are much more reluctant to require disclosure.[88]

Three post-*Branzburg* cases involving conflicting defamation and privilege claims have been decided by federal circuit courts of appeal.[89] One of the decisions, *Herbert v. Lando*, was reversed last term by the Supreme Court,[90] but the Court's holding

[79] 408 U.S. at 690.

[80] *Id.* at 725, 728, 743.

[81] *Id.* at 713.

[82] *Id.* at 710.

[83] 417 U.S. 843, 859 (1974).

[84] *Id.* at 859–60. But before being too quick to read Justice Powell's case-by-case balancing test into the *Branzburg* plurality opinion, recall Justice White's words:

> We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order.
>
> . . . .
>
> In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance. . . .
>
> . . . [I]n the end, by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes, but not in others, they would be making a value judgment that a legislature had declined to make . . . . The task of judges, like other officials outside the legislative branch, is not to make the law, but to uphold it. . . .

408 U.S. at 703–06.

[85] *See, e.g.*, Carey v. Hume, 492 F.2d 631, 634–36 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); Baker v. F & F Inv., 470 F.2d 778, 783–84 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Rancho La Costa v. Penthouse, 4 MED. L. REP. (BNA) 1564, 1566 (Cal. Super. Ct. 1978).

[86] *See, e.g.*, 492 F.2d at 634–36, 470 F.2d at 783–84.

[87] *See, e.g.*, 492 F.2d at 634–36, 470 F.2d at 783–84.

[88] *See* notes 105, 107, 109 & 112 & accompanying text *infra*.

[89] *See* Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), *rev'd*,—U.S.—, 99 S.Ct 1635 (1979); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972).

[90] —U.S.—, 99 S. Ct. 1635 (1979). Col. Anthony Herbert was a U.S. Army officer who gained national prominence during the latter stages of the Vietnam War when he charged several of his superior officers with concealing war atrocities. Barry Lando was a producer for CBS's documentary news program, "60 Minutes," who became interested in the Herbert story. He investigated several inconsistencies in Herbert's story and this research re-

in *Herbert* should not be viewed as having rendered a major change in the law of privilege claims in libel actions. The 1977 Second Circuit decision which the Supreme Court reversed in *Herbert* had attempted to extend the first amendment privilege well beyond the bounds of previous cases to encompass protection of a journalist's "thoughts, opinions and conclusions" during the editorial process. The plaintiff in the case, a controversial ex-Army officer, had not attempted to discover the identity of news sources or force disclosure of confidential information. Instead, through pretrial discovery, he sought to learn the defendant's "state of mind" during the production and editing of an allegedly libelous television program. The plaintiff contended he needed this information in order to establish "actual malice"—the standard for recovery demanded under *New York Times Co. v. Sullivan*.[91] The Second Circuit opinion noted that the defendant broadcaster already had submitted to an extensive deposition, which revealed everything he "knew, saw, said and wrote during his investigation."[92] To require more would be to "strike to the heart of the vital human component of the editorial process" and would result in journalists being "chilled in the very process of thought."[93]

Writing for a six-to-three majority, Justice White found that argument unpersuasive. He conceded that the editorial process is entitled to some first amendment protection and said it could not be subjected to "private or official examination merely to satisfy curiosity or to serve some general end such as the public interest."[94] But where there is a "specific claim of injury arising from a publication that is alleged to have been knowing or recklessly false,"[95] no constitutional barrier exists. To hold otherwise, the Justice concluded, would be to "erect an impenetrable barrier" to a plaintiff's use of the sort of direct evidence most relevant to establishing "the ingredients of malice required by *New York Times*."[96]

Turning to the more traditional type of privilege assertion in defamation cases, the 1974 decision in *Carey v. Hume*[97] enunciated what continues to be the general rule. In *Carey*, the Circuit Court of Appeals for the District of Columbia eschewed the defendants' claim that journalists could never be compelled to reveal their sources and opted instead for a case-by-case balancing test. Noting that the differences between civil and criminal proceedings distinguished *Branzburg* from the action before the court, Judge McGowan pointed to Justice Powell's

sulted in a national telecast that raised doubts about Herbert's veracity. Herbert then brought a $45 million defamation action against Lando, CBS, and others. Herbert's deposition of Lando filled 2,903 pages, produced 240 exhibits, and required 26 sessions over a period of a year. In the deposition, Herbert inquired about what Lando knew, whom he had interviewed, and the frequency of his communications with his sources. The plaintiff also wanted to know about the producer's beliefs, opinions, intent, and conclusions in preparing the program. Lando refused to answer only a few of these questions—those dealing with his thoughts and conclusions during his research, and his "state of mind" concerning the veracity of the persons he had interviewed. The Second Circuit felt that if malice was involved under the *New York Times* rule, note 91 *infra*, Herbert ought to be capable of proving it through the use of the massive transcript he already had compiled.

[91] 376 U.S. 254 (1964). The *Herbert* and *Cervantes* cases both involved "public figures" and, under the rules spawned by the *New York Times* case and its progeny, a public figure must meet a higher standard of proof in order to win his case. The public figure must demonstrate that the falsehood was published with actual malice or in reckless disregard of the truth. This standard may arguably provide courts with a greater justification for ordering disclosure, though the Eighth Circuit did not choose to do so in *Cervantes*.

[92] 568 F.2d at 984.

[93] *Id.*

[94] —U.S. at —, 99 S.Ct. at 1648.

[95] *Id.*

[96] —U.S. at —, 99 S.Ct. at 1646.

[97] 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974). This case involved a libel action brought by the general counsel of the United Mine Workers union against political columnist Jack Anderson and one of his associate writers. Anderson had relied on the observations of confidential sources in writing a story that charged the plaintiff with taking documents from the union's headquarters in order to thwart a government investigation into union financial affairs.

The *Garland* and *Carey* standard also was applied to another case in which columnist Anderson was involved, this time as a plaintiff. Anderson v. Nixon, 444 F. Supp. 1195 (D.D.C. 1978). Anderson was seeking damages and charging that a conspiracy led by former President Nixon had intended to deprive him of his rights as a journalist. During a pretrial deposition, Anderson refused to identify some of his confidential sources. In resolving the issue, Judge Gerhard Gesell began by describing the newsman's privilege as a " 'fundamental personal right' well founded in the First Amendment"—perhaps the most sweeping language yet used by a jurist in considering the issue. 444 F. Supp. at 1198. The judge went on to say, however, that the protection was qualified:

> The qualified privilege of the newsman is a fragile one. . . . 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 . . . on all litigants in the federal courts.

444 F. Supp. at 1199.

opinion, which he considered controlling in *Branzburg*, and then continued:

> *Branzburg*, in language if not in holding, left intact, insofar as civil litigation is concerned, the approach taken in *Garland*. That approach essentially is that the court will look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public's right to know is impaired.[98]

The court added the *Garland* "heart of the claim" test and a requirement that libel plaintiffs first make a reasonable attempt to exhaust alternative sources of information before seeking disclosure from the newsman—though such attempts did not have to be "wide ranging and onerous" when the number of potential sources was "very substantial."[99] Applying those standards to the libel claim before it, the court concluded that the identity of the newsmen's sources was critical to the plaintiff's claim.

It does not follow, however, that disclosure is foreordained in all defamation cases.[100] In *Cervantes v. Time, Inc.*,[101] decided just three weeks after *Branzburg*, the Eighth Circuit said it would not routinely grant motions for compulsory revelation of confidential sources "without first inquiring into the substance of the libel allegation."[102] Looking at the facts before it, the court said the plaintiff had produced "little more than a series of self-serving affidavits" to support his claim.[103] The court concluded that to compel disclosure when a defamation plaintiff "has not produced a scintilla of proof" would constitute precisely the unjustifiable harassment of the press which Justice Powell had warned against in *Branzburg*.[104]

In three other civil cases decided by federal circuit courts of appeal, journalists were not actually parties to the litigation and the courts ac-

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[98] 492 F.2d at 636.

[99] *Id.* at 638-39.

[100] Three recent state and federal lower court decisions held that the plaintiff in a libel action had failed to meet the "heart of the claim" and "exhaustion of alternative sources" tests outlined in *Carey*. *See* Schultz v. Reader's Digest, 4 MED. L. REP. (BNA) 2356 (E.D. Mich. 1979); Hart v. Playboy Enterprises, 4 MED. L. REP. (BNA) 1616 (D. Kan. 1978); Rancho La Costa v. Penthouse, 4 MED. L. REP. (BNA) 1564 (Cal. Super. Ct. 1978). *But see* Goldfeld v. Post Publishing, 4 MED. L. REP. (BNA) 1167 (Conn. Super. Ct. 1978), in which disclosure was ordered because the court held the plaintiff had met the tests successfully. Also, in two bench rulings, Martin Marietta Corp. v. Evening Star Newspaper Co., No. 75-1827 (D.D.C. July 29, 1976), and Buchanan v. Cronkite, No. 1087-73 (D.D.C. July 3, 1974) (both reported in Goodale, *supra* note 45, at 330, 334), judges ruled that disclosure of confidential sources would be ordered only if libel plaintiffs established relevancy and exhaustion of alternative sources. Summary judgment in the *Martin Marietta* case is reported at 417 F. Supp 947, *aff'd per curiam*, No. 76-1932 (D.C. Cir. 1978).

Utilizing a different approach, a federal court and a state court have applied state shield laws to deny a libel plaintiff's motions for disclosure of confidential sources or broadcast "outtakes." *See* Steaks Unlimited v. Deaner, 4 MED. L. REP. (BNA) 1655 (W.D. Pa. 1978); Saxton v. Arkansas Gazette Co.,—Ark.—, 569 S.W.2d 115 (1978).

While several federal and state courts seem to be acknowledging the existence of a conditional newsman's privilege in defamation cases, it bears mention that two state supreme courts have ruled in libel actions that no such protection, either absolute or qualified, is sanctioned by the first amendment. The Massachusetts Supreme Judicial Court, in Dow Jones & Co. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973), and the Supreme Court of Idaho in Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791, *cert. denied*, 434 U.S. 930 (1977), in factual situations not dissimilar from that of *Carey*, ruled that reporters must reveal their sources. The Massachusetts court cited *Branzburg* and *Garland* and distinguished Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). *See* note 105 & accompanying text *infra*. The Idaho court cited not only *Branzburg* and *Garland*, but *Carey* and *Dow Jones* as well for its conclusion. *But see* the spirited dissents of Justices Donaldson and Bakes, 98 Idaho at 298, 562 P.2d at 801-12, both of whom distinguished *Branzburg* and *Garland* along the same lines followed by many federal courts. A lower Idaho court recently followed *Caldero* in imposing a $1.9 million libel judgment against a newspaper that refused to reveal confidential information after the court ordered its disclosure. *See* Sierra Life Ins. v. Magic Valley Newspapers, 4 MED. L. REP. (BNA) 1689 (Idaho Dist. Ct. 1977).

After the New Mexico Supreme Court had struck down its state's shield law as unconstitutional (*see* note 46 *supra*), the Court of Appeals of New Mexico, in a subsequent case stemming from the same cause of action, ruled that the first amendment also provided no privilege, either absolute or qualified, in defamation actions. The court cited *Dow Jones* and *Carey* in reaching its conclusion. *See* Ammerman v. Hubbard Broadcasting, Inc., 91 N.M. 250, 572 P.2d 1258 (Ct. App.), *cert. denied*, 91 N.M. 249, 572 N.M. 1257 (1977), *cert. denied*, 436 U.S. 906 (1978).

Two reported trial rulings that held against privilege claims in defamation actions were Linsey v. Kelman, No. 15,396 (D. Conn. March 19, 1975), and Dunn v. Morkap Publishing Co., No. 7250 (Md. Cir. Ct. 1974) (both reported in Goodale, *supra* note 45, at 331-33).

[101] 464 F.2d 986 (8th Cir. 1972). In this case, the mayor of St. Louis sued the publisher and a reporter for Life magazine after Life printed a story linking the mayor with organized crime.

[102] *Id.* at 993.

[103] *Id.* at 994.

[104] *Id.* at 994-95 & n.12.

cordingly established a higher standard for disclosure. In *Baker v. F & F Investment*,[105] the Second Circuit recognized a public interest in a reporter not being forced to reveal his sources and then held that, in this particular case, that public interest outweighed the public and private interest in compelled testimony. The *Baker* court ruled that the plaintiffs had not shown that they had exhausted alternative sources of information to learn the name of a confidential news source, nor had they demonstrated that the source's identity went to the heart of their claim.[106]

In *Silkwood v. Kerr-McGee Corp.*,[107] the Tenth Circuit extended *Baker* protection to an independent producer preparing a documentary film, ruling that one did not have to be a reporter on a newspaper to qualify for a journalist's privilege.[108]

The 1975 contempt convictions of two West Virginia reporters were first overturned, then later affirmed by the Fourth Circuit in *United States v. Steelhammer*,[109] though the court vacated the journalists' unserved sentence of six months in jail. The decision grew out of a civil contempt hearing held to determine whether members of a coal miners' union had violated a court order prohibiting wildcat strikes. Two reporters for the *Charleston Gazette* were held in contempt of court for refusing to testify about what they had seen or heard at a union rally. The convictions were initially reversed by the appellate court on the ground that the information could have been obtained from other persons who had attended the rally,[110] but on a rehearing en banc, the contempt judgments were reinstated by a four-to-three vote. The full court adopted the reasoning of the dissenting judge in the earlier case, who said that since the reporters admitted their information came not from confidential sources, but from an open meeting, they should be required to testify. The judge said he reached this conclusion by applying Justice Powell's *Branzburg* balancing test.[111]

In all, twenty-eight reported post-*Branzburg* civil cases in which information was sought from a nonlitigant journalist have been decided in the state and federal courts.[112] In only three cases were

[105] 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). This case involved a civil rights class action brought on behalf of black home buyers against real estate agents who were alleged to have discriminated in their sales practices. The journalist who was deposed by the plaintiffs had written a story based on an interview with one real estate agent, but the information was given only after the reporter promised confidentiality. The reporter made it apparent during his deposition that he was sympathetic to the plaintiffs' cause, but he would not reveal his source.

Several cases on the federal and state levels have cited *Baker* for the proposition that newsmen are entitled to a qualified privilege and should not be required to disclose confidential sources when they are not parties to the civil litigation being contested. In Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973), a civil action arising out of the Watergate burglaries, representatives of President Nixon's Committee for the Re-Election of the President subpoenaed a large number of journalists from several major newspapers and newsmagazines for depositions and to obtain all of their notes, photographs, and tapes relating to the break-ins. In quashing the subpoenas, the court distinguished *Branzburg* as a criminal case, said the plaintiffs had not met the *Garland* "heart of the claim" test, and cited *Baker* as precedent for a qualified privilege.

Cases that have since adopted either the *Baker* or *McCord* standards or both explicitly include: Poirier v. Carson, 537 F.2d 823 (5th Cir. 1976) (no disclosure of source); Gulliver's Periodicals Ltd. v. Charles Levy Circulating Co., 455 F. Supp. 1197 (N.D. Ill. 1978) (no disclosure of source or information); Citicorp v. Interbank Card Ass'n, 4 MED L. REP. (BNA) 1429 (S.D.N.Y. 1978) (no disclosure of source); Altemose Constr. Co. v. Building & Constr. Trades Council, 443 F. Supp. 489 (E.D. Pa. 1977) (no disclosure of unpublished information); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975) (no disclosure of published or unpublished information); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975) (no disclosure of source or information); Connecticut State Bd. of Labor Relations v. Fagin, 33 Conn. Supp. 204, 370 A.2d 1095 (Super. Ct. 1976) (no disclosure of source); Spiva v. Francouer, 39 Fla. Supp. 49 (Cir. Ct. 1973) (no disclosure of source or information); Opinion of the Justices, 2 MED. L. REP. (BNA) 2083 (N.H. Sup. Ct. 1977) (no disclosure of sources); MacKay v. Driscoll, 3 MED. L. REP. (BNA) 2582 (N.Y. Sup. Ct. 1978) (no disclosure of information); and Dallas Oil & Gas, Inc. v. Mouer, 533 S.W.2d 70 (Tex. Ct. Civ. App. 1976) (no disclosure of source). For a decision contra which adopted Baker/McCord standards and still required disclosure, see Winegard v. Oxberger, —Iowa—, 258 N.W.2d 847 (1977), *cert. denied*, 436 U.S. 905 (1978).

[106] 470 F.2d at 783. Interestingly, the *Baker* court, reaching its decision just a few months after *Branzburg*, said that federal law did not recognize either an absolute or conditional newsman's privilege, *id.* at 781, but that same Second Circuit, in deciding Herbert v. Lando five years later, cited both *Branzburg* and *Baker* in its acceptance of a conditional protection for the press. *See* 568 F.2d at 977–78, 986.

[107] 563 F.2d 433 (10th Cir. 1977).

[108] *Id.* at 436–37.

[109] 539 F.2d 373 (4th Cir. 1976), *aff'd en banc*, 561 F.2d 539 (4th Cir. 1977).

[110] 539 F.2d at 375.

[111] *Id.* at 376.

[112] Sixteen of these cases are discussed in notes 105, 107 & 109 *supra*. Twelve other civil cases have not utilized the *Baker/McCord* standards in dealing with subpoenas directed to journalists who were not parties to the litigation.

the reporters required to testify. In addition to the *Steelhammer* decision, a second case involved an interpretation of a state shield law, with an Ohio court holding that sources were protected, but confidential information was not.[113] The third case, decided by the Iowa Supreme Court, resulted in an order to a reporter to reveal both her news source and confidential information.[114] Although the court said it was "persuaded there exists a fundamental newsperson privilege,"[115] it concluded that the plaintiff had shown "an undiluted compelling state interest of such persuasive force as to subordinate" the privilege.[116] The plaintiff had brought a defamation and invasion of privacy action against an attorney who had provided a reporter with facts from which she had written a story about the plaintiff. Since the reporter was the only witness to what the lawyer had actually said, the Iowa court ruled the plaintiff had met what it defined as the three *Garland*, *Baker*, and *Cervantes* tests: (1) the information was necessary or critical to the involved cause of action or defense pleaded; (2) other reasonable means available by which to obtain the information sought had been exhausted; and (3) it did not appear from the record that the action or defense was patently frivolous.[117]

2. *Grand Jury Proceedings*

Grand jury proceedings were the context in which the four *Branzburg* cases arose and on the basic question of whether newsmen can be compelled to appear and testify before grand juries, *Branzburg* still controls. In the seven years since the Supreme Court's 1972 decision, at least eleven federal and state court decisions have been handed down which cite *Branzburg* as their authority for rejecting privilege claims in the grand jury context.[118]

Concern for a "chilling effect" on the first amendment interests involved was the reason given in three cases for quashing subpoenas. *See* Coira v. Depoo Hosp., 4 MED. L. REP. (BNA) 1692 (Fla. Cir. Ct. 1978) (no disclosure of published or unpublished information); Hendrix v. Liberty Mutual Ins. Co., No. 75-1616 (Fla. Cir. Ct. Dec. 11, 1975) (no disclosure of nonconfidential information); Schwartz v. Almart Stores, No. 74-35547 (Fla. Cir. Ct., June 18, 1975) (both reported in Goodale, *supra* note 45, at 321–22) (no disclosure of information, whether or not from confidential source); Amato v. Fellner, 4 MED. L. REP. (BNA) 1552 (Wis. Cir. Ct. 1978) (also citing state constitution for nondisclosure of information sought).

Carey v. Hume, a defamation case, *see* note 97 and accompanying text *supra*, was cited as authority for the quashing of subpoenas in two nondefamation cases. *See In re* Consumers Union, 4 MED. L. REP. (BNA) 2119 (S.D.N.Y. 1978) (no disclosure of information); Gilbert v. Allied Chem. Corp., 411 F. Supp. 505 (E.D. Va. 1976) (no disclosure of confidential sources).

State shield laws were relied upon successfully by nonparty newsmen in four cases. *See* Dumez v. Hauma Mun. Fire & Police Civil Serv. Bd., 341 So. 2d 1206 (La. Ct. App. 1976) (no disclosure of source); Davis v. Davis, 88 Misc. 2d 1, 386 N.Y.S.2d 992 (Fam. Ct. 1976) (no disclosure of information); Greenwood Village, Inc. v. First Fed. Sav. & Loan, Bankruptcy No. 73-996 (N.D. Ohio, Feb. 2, 1976) (no disclosure of sources), and Taylor v. Tennessee Democratic Executive Comm., No. 79507-1 R.D. (Tenn. Chancery Ct., Mem. Opinion June 24, 1975) (no disclosure of sources) (both reported in Goodale, *supra* note 45, at 323, 327). *But see* Forest Hills Util. Co. v. City of Heath, 37 Ohio Misc. 30, 302 N.E.2d 593 (Ct. Common Pleas 1973) (shield law protected only sources and not information).

In another case, *In re* Nomination Paper of Tracy, No. 75-8108-01-6 (Pa. Ct. Comm. Pleas Sept. 3, 1975) (reported in Goodale, *supra* note 45, at 322.), the court quashed a subpoena that would have required disclosure of confidential sources, but no opinion was issued.

[113] *See* Forest Hills Util. Co. v. City of Heath, 302 N.E.2d 593 (Ohio Ct. Comm. Pleas 1973).

[114] *See* Winegard v. Oxberger, —Iowa—, 258 N.W.2d 847 (1977), *cert. denied*, 436 U.S. 905 (1978).

[115] —Iowa at —, 258 N.W.2d at 850.

[116] *Id.* at —, 258 N.W.2d at 852.

[117] *Id.*

[118] Decisions following *Branzburg* include: *In re* Lewis, 501 F.2d 418 (9th Cir. 1974), *cert. denied*, 420 U.S. 913 (1975) and Lewis v. United States, 517 F.2d 236 (9th Cir. 1975) (two cases involving a Los Angeles radio station general manager who refused to turn over the originals of tape recordings from various radical groups, including the Symbionese Liberation Army, concerning bombings and the Patty Hearst kidnaping, even though he had provided police with copies of the tapes. In both cases, the Ninth Circuit ruled the manager had no first amendment right to refuse the grand jury's subpoena duces tecum); *In re* McGowan, 298 A.2d 339 (Del. Super. Ct. 1972), *rev'd on other grounds*, —Del.—, 303 A.2d 645 (1973) (newspaper photographer was ordered to turn over pictures of an antibusing demonstration to state attorney general's office, the lower court holding that the attorney general had full investigative powers and was in the same position as the grand jury in *Branzburg*); *In re* Tierney, 328 So. 2d 40 (Fla. Dist. Ct. App. 1976) (reporter could not refuse to testify about source of grand jury "leaks"); 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) (neither state shield law, nor the first amendment permitted a reporter to refuse to disclose a news source's identity to a grand jury investigating drug use; also discussed at note 45 *supra*); *In re* Suffolk County Grand Jury, (Mass. Super. Ct. 1976) (reported in Goodale, *supra* note 45, at 306) (editors had to turn over transcript of interview with the mayor of Boston to a grand jury investigating alleged bribery); Grand Jurors for Middlesex County v. Wallace, (Mass. Super. Ct., Nov. 21, 1974) (reported in Goodale, *supra* note 45, at 310), *aff'd on other grounds*, 343 N.E.2d 844 (Mass. 1976), (reporters could not on first amendment grounds refuse to

Beyond the basic holding of *Branzburg* however, two other problems concerning grand juries and journalists have emerged to confront the courts. The first is a direct outgrowth of the *Branzburg* position. Assuming that the first amendment does not free a newsman from his responsibility to appear before a grand jury, to what extent, if any, might it limit the scope of questioning to which he is required to respond? *Bursey v. United States*,[119] a Ninth Circuit decision announced just one day after *Branzburg*, provides the most comprehensive treatment of this issue.

The second problem arises out of the grand jury's traditional obligation to keep its proceedings secret. In recent years, "leaks" by insiders to reporters have occasionally resulted in newspaper stories that revealed what had occurred during secret grand jury sessions. Courts have attempted to punish the persons responsible for these leaks, but to do so, it usually is necessary to question the newsmen involved and to order disclosure of confidential sources. Several reporters and editors have been held in contempt of court for refusing to identify their insider sources, but in one instance, a reporter's conviction was overturned after the court applied a balancing test to the case.[120]

As to the scope of grand jury questioning, judges in at least two cases have suggested that the *Branzburg* holding has been augmented by the tests enunciated in *Bursey*.[121] That case involved two members of the Black Panther Party, Sherrie Bursey and Brenda Presley, who also worked as reporters and editors for the party's national newspaper. They were called several times to appear before a federal grand jury that was investigating an alleged threat on the life of President Nixon and rumored Black Panther interference with American military forces. During their grand jury appearances the government also sought to question Bursey and Presley about the operation and staff of the party's newspaper, but they refused to answer. The Ninth Circuit held that the questions dealing with threatened violence and the military interference were legitimate, but ruled the two women could not be compelled to testify about the publication and distribution of Black Panther newspapers or pamphlets because those inquiries violated the first amendment rights of free association and freedom of the press.[122]

The *Bursey* court did not conclude that journalists could never be questioned about their work, but it did hold that "[w]hen governmental activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests."[123]

In the grand jury context, the court said the government would be unable to meet this burden unless it demonstrated that:

> the Government's interest in the subject matter of the investigation is "immediate, substantial, and subordinating," that there is a "substantial connection" between the information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation, and that the means of obtaining the

testify about the source of a grand jury "leak," although they could plead the fifth amendment); *In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (App. Div.), *aff'd*, 62 N.J. 80, 299 A.2d 78 (1972), *cert. denied*, 410 U.S. 991 (1973) (neither state shield law, nor the first amendment permitted a reporter to refuse to answer grand jury questions on unpublished information from known news source; also discussed at note 45 *supra*); People by Fisher v. Dan, 41 App. Div. 2d 687, 342 N.Y.S.2d 731, *appeal dismissed*, 32 N.Y.2d 764, 344 N.Y.S.2d 955 (1973) (neither state shield law, nor the first amendment permitted newscaster or cameraman to refuse to answer grand jury questions concerning their personal observations during a prison riot, though they were not compelled to identify news sources; also discussed at note 45 *supra*); Andrews v. Andreoli, 92 Misc. 2d 910, 400 N.Y.S.2d 442 (Sup. Ct., 400 1977) (discussed at note 45 *supra*); and *In re* Powers, 4 Med. L. Rep. (BNA) 1600 (Vt. Dist. Ct. 1978) (reporters could not refuse to testify as to sources and information before an inquest investigating drug law violations).

But see In re Bensky, Misc. 75-18-OJC (N.D. Cal. April 14, 1975) (reported in Goodale, *supra* note 45, at 305), in which a grand jury had subpoenaed a tape recording of reading by fugitive Weather Underground radicals that had been sent to a California radio station. Responding to a factual situation substantially similar to that in the *Lewis* cases, 517 F.2d 236 (9th Cir. 1975) and 501 F.2d 418 (9th Cir. 1974), a federal court quashed the subpoena, holding that, given the nature of the recording, it was too speculative as to whether the tape would lead to information about criminal activities.

People v. Dillon, No. 70-4 (N.Y. Sup. Ct. June 25, 1971) (Reported in Goodale, *supra* note 45, at 305 as *In re* CBS) was a pre-*Branzburg* ruling in which a judge quashed as overbroad a subpoena for videotapes issued by a special prosecutor investigating campus disturbances.

[119] 466 F.2d 1059 (9th Cir. 1972).

[120] *See* Morgan v. State, 337 So. 2d 951 (Fla. 1976).

[121] *See* United States v. Liddy, 478 F.2d 586 (D.C. Cir. 1972) (Leventhal, J., opinion for extending stay); Morgan v. State, 325 So. 2d 40 (Fla. Dist. Ct. App. 1975), *rev'd on other grounds*, 337 So. 2d 951 (Fla. 1976).

[122] 466 F.2d at 1086–88.

[123] *Id.* at 1083.

information is not more drastic than necessary to forward the asserted governmental interest.[124]

In those cases where newspapers have published "leaked" reports of grand jury proceedings, courts normally have ordered disclosure of the confidential source, though even in this area of conceded judicial supremacy, judges have evinced some concern for the competing first amendment interest.

In a 1977 case involving the *New York Times* and the sealed results of a grand jury's investigation into the Internal Revenue Service's "Operation Leprechaun," involving alleged probes by IRS agents into the drinking and sexual habits of prominent taxpayers, a federal judge, while holding that "there is no constitutional right to withhold sources of grand jury leaks," did permit the disclosure to be made in camera.[125]

A California appellate court ruled that a defendant's right to a fair trial justified sealing a grand jury report until after the completion of the trial, and outweighed a conditional first amendment privilege which it said was granted by *Branzburg* and *Farr v. Pitchess*.[126] The court did conclude however, that under the California shield law, the newspaper was only obligated to disclose its source if that person had been directly subject to the court's gag order.[127]

[124] *Id.*, relying on standards set in Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 551, 557 (1963).

A state court decision which dealt with the scope of grand jury questioning was *In re* Tierney, 328 So. 2d 40 (Fla. Dist. Ct. App. 1976). In that case, the court held that a journalist could claim a first amendment privilege to refuse to answer grand jury questions only if she could demonstrate that the questions were not relevant and material to a good faith investigation. In *Tierney*, the reporter was unable to satisfy that requirement.

[125] *See In re* Disclosure of Grand Jury Report, 2 MED. L. REP. (BNA) 1225, 1231, 3 MED. L. REP. (BNA) 1161, 1163 (S.D. Fla. 1977). The benefit of such an in camera inspection will be analyzed further in the examination of the *Farber* case *infra*.

The New York Times also was involved in a similar case decided two years before *Branzburg* in *In re* Grand Jury, 315 F. Supp. 681 (D.Md. 1970). The court held that while it had the power, under the first amendment, to inquire into the source of a grand jury leak of a sealed indictment that the Times had published, it did not feel such an action was warranted in this case because there was no indication that anyone under the court's direct authority was responsible for the leak.

[126] 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

[127] Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976). *See also* Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972); note 45 *supra*.

The one case that contradicts this general trend presented a factual situation that will not often be repeated. After investigating charges of local governmental corruption, a Florida grand jury decided not to hand down any indictments, though its report did criticize several city officials. Under that state's law, disclosure of such critical reports is forbidden until the unindicted persons have had time to file a motion to repress. A reporter who wrote a story revealing the grand jury's decision was found guilty of criminal contempt after she refused to disclose her source. However, the Florida Supreme Court reversed the conviction, holding that the persons criticized in the report, who might not have succeeded in suppressing the document in any case, were the only ones affected by premature disclosure. The court concluded that their interest did not outweigh the conditional privilege which it detected in *Branzburg*.[128]

3. *Criminal Cases*

As in the area of civil litigation, courts in criminal cases generally seem to be acknowledging the existence of a conditional or qualified privilege for the press. Most courts attribute the initial recognition of this privilege to *Branzburg*,[129] although at least two judges have ruled that *Branzburg* provides no foundation for either an absolute or qualified privilege in criminal cases.[130]

Admitting the existence of a constitutional newsman's privilege is one thing; permitting its use in a specific situation is another. Since *Branzburg*, courts have granted immunity to journalists in fifteen of twenty-seven of the reported criminal

[128] Morgan v. State, 337 So. 2d 951, 954-55 (Fla. 1976). The *Morgan* balancing test was followed in State *ex. rel.* Bradenton Herald v. Garst, County Judge, No. 76-223-7F (Fla. Cir. Ct. 1976) (reported in Goodale, *supra* note 45, at 311).

[129] Decisions that have cited *Branzburg* as the source for recognition of a qualified privilege in criminal cases include: Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); United States v. Orsini, 424 F. Supp. 229, 232 (E.D.N.Y. 1976), *aff'd without opinion*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977); State v. Sandstrom, 224 Kan. 573, 576, 581 P.2d 812, 814 (1978), *cert. denied*, 99 S. Ct. 1265 (1979); People v. Marahan, 81 Misc. 2d 637, 642, 368 N.Y.S.2d 685, 691 (Sup. Ct. 1975); State v. St. Peter, 132 Vt. 266, 269-70, 315 A.2d 254, 255 (1974); Brown v. Commonwealth, 214 Va. 755, 757, 204 S.E.2d 429, 431, *cert. denied*, 419 U.S. 966 (1974); Zelenka v. State, 83 Wis. 2d 601, 619, 266 N.W.2d 279, 287 (1978).

[130] *See* People v. Dupree, 88 Misc. 2d 791, 795, 388 N.Y.S.2d 1000, 1002-03 (Sup. Ct. 1976); People v. Monroe, 82 Misc. 2d 850, 854, 370 N.Y.S.2d 1007, 1011 (Sup. Ct. 1975).

cases in which it was sought; disclosure has been ordered in only nine of the cases.[131] No single clearly enunciated test has emerged from the opinions, though the issues of "relevancy" and "materiality" are mentioned most often by judges. This means that in cases where a court feels that either the identity of a news source or the confidential information in a reporter's possession is relevant and material to the guilt or innocence of the accused, or to the classification of the offense, it will deny the privilege claim and order the name or material disclosed.[132] If, however, the newsman's confidential information is only "collateral"[133] or "tangential"[134] to the case, the court will accept the first amendment argument and uphold the reporter's refusal to testify. This is another application of post-*Branzburg* "balancing" of privilege claims.

In addition to the question of relevancy and materiality, state supreme courts in Vermont and Virginia have added a second test: whether the information sought is otherwise available from an alternative source.[135] These two standards taken

[131] Those reported criminal cases in which courts have accepted first amendment claims of newsman's privilege through early 1979 are: United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976) (news source's identity sought by defendant); United States v. DePalma, 4 MED. L. REP. (BNA) 2499 (S.D.N.Y. 1979) (defendant's motion for mistrial denied and subpoena to learn source of magazine photograph used as trial exhibit quashed); United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd without opinion*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977) (news source's identity sought by defendant); United States v. Calvert, No. 74-107 CR (E.D.Mo. Apr. 26, 1974) (reported in Goodale, *supra* note 45, at 308) (news source's identity sought by defendant); Laughlin v. State, 323 So. 2d 691 (Fla. Dist. Ct. App. 1975) (news source's identity sought by defendant); Florida v. Morel, 4 MED. L. REP. (BNA) 2309 (Cir. Ct. 1979) (published and unpublished information sought by defendant); Florida v. Beattie, 4 MED. L. REP. (BNA) 2150 (Cir. Ct. 1979) (videotape of broadcast and unpublished information sought by defendant); Florida v. Petrantoni, 4 MED. L. REP. (BNA) 1554 (Cir. Ct.1978) (published and unpublished information sought by defendant); Florida v. Hurston, 3 MED. L. REP. (BNA) 2295 (Cir. Ct. 1978) (taped interviews with defendant sought by prosecution); State v. Stoney, 42 Fla. Supp. 194 (Cir. Ct. 1974) (unpublished information sought by defendant for impeachment purposes); People v. Monroe, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (Sup. Ct. 1975) (reporters' notes and television tapes sought by defendants); People v. Marahan, 81 Misc. 2d 637, 368 N.Y.S. 2d 685 (Sup. Ct. 1975) (news source's identity and confidential information sought by defendant); People v. Barnes, Indict. No. 3194/74 (N.Y. Sup. Ct., Bronx Cty. 1975) (reported in Goodale, *supra* note 45, at 318) (unpublished information sought by defendant for impeachment purposes); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974) (news source's identity sought by defendants); and Zelenka v. State, 83 Wis. 2d 601, 266 N.W.2d 279 (1978) (news source's identity sought by defendant).

Reported criminal cases in which courts have rejected first amendment privilege claims (not including the *Farber* case) are: Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975) (news source's identity sought by court policing its own proceedings); United States v. Liddy, 354 F. Supp. 208 (D.D.C.), *aff'd*, 478 F.2d 586 (D.C. Cir. 1972) (tape of interview with news source sought by defendants); State v. Sandstrom, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied*, —U.S.—, 99 S. Ct. 1265 (1979) (news source's identity sought by defendant); Michigan v. Smith, 4 MED. L. REP. (BNA) 1753 (Cir. Ct. 1978), *leave to appeal denied*, 4 MED. L. REP. (BNA) 1761 (Mich. 1978) (records of conversations with defendant sought by state); State v. De La Roche, 3 MED. L. REP. (BNA) 2317 (N.J. Super. Ct. 1977) (tape of interview with defendant sought by state); New York v. LeGrand, 4 MED. L. REP. (BNA) 1897 (Sup. Ct.), *aff'd*, 4 MED. L. REP. 2524 (App. Div. 1979) (confidential information sought by defendant—no privilege found because former journalist had become a free-lance author); New York v. Zagarino, 4 MED. L. REP. (BNA) 1693 (Sup. Ct. 1978) (notes of interview with news source sought by defendant); People v. Dupree, 88 Misc. 2d 791, 388 N.Y.S.2d 1000 (Sup. Ct. 1976) (photographs of scene of crime sought by state); *In re* Dan, 80 Misc. 2d 399, 363 N.Y.S.2d 493 (Sup. Ct. 1975) (personal observations at prison riot sought by state).

Other reported cases did not involve a final appellate determination as to the reporter's privilege: United States v. Nuccitelli, No. 18-187 (D.N.J. 1978) (reported in Goodale, *supra* note 45, at 316) (all notes, documents and records compiled by reporters sought by defendants); CBS v. Superior Court, 4 MED. L. REP. (BNA) 1568 (Cal. Ct. App. 1978) (filmed outtakes sought by defendants); and State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974) (news source's identity sought by defendant). Though the court in *St. Peter* did not decide whether the reporter would be permitted to exercise his newsman's privilege, it did acknowledge a first amendment basis for such a claim. The *Nuccitelli* court refused to quash the subpoena, but also said it would not enforce the defendant's overly broad "fishing expedition."

[132] *See* State v. Sandstrom, 224 Kan. 573, 577, 581 P.2d 812, 815 (1978), *cert. denied*, 99 S. Ct. 1265 (1979).

[133] *See* Brown v. Commonwealth, 214 Va. 755, 758, 204 S.E.2d 429, 431, *cert. denied*, 419 U.S. 966 (1974); People v. Monroe, 82 Misc. 2d 850, 854, 370 N.Y.S. 2d 1007, 1013 (Sup. Ct. 1975).

[134] *See* Zelenka v. State, 83 Wis. 2d 601, 620, 266 N.W.2d 279, 287 (1978).

[135] The Virginia Supreme Court has provided the most complete enunciation of the "materiality/alternative sources" test to date. Justice Poff described it in Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974):

> We are of opinion that when there are reasonable grounds to believe that information in the possession of a newsman is material to proof of any element of a criminal offense, or to proof of the defense asserted by the defendant, or to a reduction in the classification or gradation of the offense charged, or to a

together are easily recognized as a criminal trial variant on the first two disclosure criteria recommended by Justice Stewart in his *Branzburg* dissent.[136] The Justice's third suggested requirement, demonstration of "a compelling and overriding interest in the information," has not been explicitly adopted in subsequent state criminal decisions, though the tone of several of the opinions suggests that such a standard is to be implied.[137]

Most of the criminal cases involving privilege claims have been decided in state, rather than federal courts, and most of the original disclosure motions have been made on behalf of defendants who were seeking either the identity of witnesses or information for impeachment purposes. The Supreme Court of Virginia has said that:

> The Sixth Amendment rights of a citizen accused of crime ... to "call for evidence in his favor" are rights of no less dignity than the right of the government to prosecute. Nor are society's demands that the privilege yield to the legitimate needs of law enforcement superior to the demands of due process that the privilege yield to the legitimate needs of the accused to defend himself.[138]

It is worth noting, however, that defendants have had significantly less success than prosecutors in securing court orders for disclosure. In reported cases between 1972 and 1979, judges directed newsmen to turn over information to defendants in only four of seventeen instances, while the state won favorable rulings in four of five cases.[139] Another decision requiring disclosure involved a court's order on its own behalf where the judge sought to learn the source of a "leaked" deposition.[140]

One commentator explaining the trend toward favoring prosecution requests noted that "[t]he fault lies not in deficient protection of the criminal defendant's interest, but in an overgenerous award of prosecutorial discretion in determining when compulsory disclosure of press confidences is warranted."[141] Another possible explanation for this pattern favoring the prosecution appears to lie in the "materiality" standard. Defense attorneys often seek evidence from newsmen that has little bearing on the actual guilt or innocence of their clients. When this occurs, courts have not been inclined to revoke the reporter's privilege.

In cases where either the defendant or the prosecution has sought information, notes, tape recordings, or video outtakes, courts occasionally have agreed to order disclosure when the identity of the source is known. The first post-*Branzburg* case to adopt this approach was *United States v. Liddy*.[142] Alfred Baldwin, a member of the infamous White House "Plumbers Unit," had agreed to become a government witness against the Watergate burglars in return for a grant of immunity. Prior to trial, he gave an interview to reporters from the *Los Angeles Times* which resulted in several stories appearing in that newspaper. The defendants then subpoenaed "all papers, recordings and transcripts" of the interview, hoping to use them to impeach Baldwin's testimony at trial. The court noted that the newspaper was not seeking to protect the identity of any news source: "Mr. Baldwin's name is emblazoned on the pages of the Los Angeles Times ... for the world to see."[143] The court then discussed the impact of *Branzburg* and concluded: "If impeachment evidence is available, it is critical that the defendants have access to it. If the 'striking of a proper balance' is required, as Mr. Justice Powell suggests, this Court will always strike the balance in favor of due process."[144] The opinion did not mention the materiality, alternative sources, or compelling need tests recommended by Justice Stewart. But the focus on the previous disclosure of the news source as a rationale for requiring the newspaper to turn over its information has been

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> mitigation of the penalty attached, the defendant's need to acquire such information is essential to a fair trial; when such information is not otherwise available, the defendant has a due process *right* to compel disclosure of such information and the identity of the source; and any *privilege* of confidentiality claimed by the newsman must, upon pain of contempt, yield to that right.

214 Va. at 757, 204 S.E.2d at 431 (emphasis in original). This explanation drew upon the Supreme Court of Vermont's test in State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974) and was adopted by the Kansas Supreme Court in State v. Sandstrom, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied*, —U.S.—, 99 S. Ct. 1265 (1979).

[136] *See* 408 U.S. at 743; note 75 & accompanying text *supra*.

[137] References to "overriding" need or concern are found in State v. St. Peter, 132 Vt. at 271, 315 A.2d at 256, and Zelenka v. State, 83 Wis. 2d at 616, 618, 266 N.W.2d at 286–87, though in neither case is it made an explicit standard for disclosure.

[138] Brown v. Commonwealth, 214 Va. 755, 757, 204 S.E.2d 429, 431, *cert. denied*, 419 U.S. 966 (1974).

[139] *See* note 131 *supra*.

[140] *See* Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972).

[141] Murasky, *supra* note 69, at 898.

[142] 354 F. Supp. 208 (D.D.C.), *aff'd*, 478 F.2d 586 (D.C. Cir. 1972). This was one of the several Watergate-related cases presided over by District Judge John Sirica.

[143] 354 F. Supp. at 212.

[144] *Id.* at 215.

cited or otherwise followed by a few courts.[145] Other judges however, have chosen to apply only the materiality or relevancy tests to situations where the source already was known and thus have ignored the *Liddy* approach.[146]

In only one case prior to *Farber* did a defendant seek both a reporter's confidential notes and the identity of his source. That occurred in *People v. Marahan*,[147] a 1975 New York case in which the two defendants sought to impeach the testimony of police officers following an arrest for illegal possession of weapons. A county supreme court quashed subpoenas directed to a New York *Daily News* reporter, holding that the information sought was collateral to the question of guilt. The court held that requiring the reporter to divulge either the identity of the source or the information under such circumstances would violate his rights under both the first amendment and the New York shield law.[148]

IV. The Complicated Case of Myron Farber

For Myron A. Farber, the trail that would lead him to his confrontation between journalist and jurist began in August 1975. Farber, a reporter with the *New York Times* since 1966, was assigned by his editors in August 1975 to follow up on a tip concerning a ten-year-old unsolved mystery, the suspicious, but never explained deaths of thirteen persons at a small hospital in Oradell, New Jersey.[149] Farber spent the next four months trying to piece the puzzle together. Finally, on January 7 and 8, 1976, the results of his investigation appeared in print.[150] In two dramatic front-page stories, Farber laid out a carefully researched case that strongly suggested a doctor on the hospital's surgical staff had murdered patients with injections of a muscle relaxant drug called curare. Because no official accusations had ever been brought concerning the deaths, Farber identified the physician only as "Dr. X."[151]

In the first of the "Dr. X" articles, Bergen County, New Jersey, prosecutor Joseph Woodcock announced the state had reopened its own investigation into the deaths. The evidence uncovered by that probe was presented to a grand jury. Farber was not called as a witness before the grand jury, nor were any of his notes subpoenaed.[152] On May 19, 1976, the grand jury indicted Dr. Mario E. Jascalevich, former chief of surgery at Riverdell Hospital, charging him with the murder by poisoning of five patients.[153] The alleged motive was a desire to discredit other physicians on the hospital staff.

In November 1977, the defense counsel for Jascalevich submitted a list of his prospective defense witnesses, including Farber.[154] The Jascalevich trial began on February 27, 1978. A subpoena *ad testificandum* was served on Farber two days later and he appeared in court on May 24 to testify briefly, outside the jury's presence, about the access he had been given to the state's ten-year-old records on the Riverdell deaths. He declined, however, to answer questions about how he had obtained a copy of a previously missing deposition of Dr. Jascalevich, claiming the protection of the New Jersey shield law.[155]

This testimony did not satisfy defense counsel. The attorney insisted that he would have to see the entire file that Farber had amassed during his four-month investigation. According to the defense, the deaths had resulted from incompetent treatment provided by other doctors on the hospital staff. The charges against Jascalevich, the lawyer argued, had been "concocted" by Farber and prosecutor Woodcock for "financial gain" and were part of a conspiracy "to advance their careers."[156] This theory was based on three facts: (1) Prosecutor

[145] *See* CBS v. Superior Court, 4 Med. L. Rep. (BNA) 1568 (Cal. Ct. App. 1978) (*Liddy* not cited, but similar rationale followed in rejecting state shield law claim); State v. De La Roche, 3 Med. L. Rep. (BNA) 2317 (N.J. Super. Ct., 1977). *Contra* People v. Marahan, 81 Misc. 2d 637, 368 N.Y.S.2d 685 (Sup. Ct. 1975) (distinguished *Liddy*). *See also* New York v. Zagarino, 4 Med. L. Rep. (BNA) 1693 (Sup. Ct., 1978) (distinguished *Marahan*).

[146] *See* Florida v. Morel, 4 Med. L. Rep. (BNA) 2309 (Cir. Ct. 1979); Florida v. Hurston, 3 Med. L. Rep. (BNA) 2295 (Cir. Ct. 1978); People v. Monroe, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (Sup. Ct. 1975).

[147] 81 Misc. 2d 637, 368 N.Y.S.2d 685 (Sup. Ct. 1975).

[148] *Id.* at 643-44, 650-51, 368 N.Y.S.2d at 692, 699.

[149] For one account of how both the *Jascalevich* and *Farber* cases developed out of the reporter's initial investigation and stories, see N.Y. Times, Nov. 28, 1978, § B, at 8, col. 1.

[150] *See id.*, Jan. 7, 1976, at 1, col. 1; *id.*, Jan. 8, 1976, at 1, col. 5.

[151] *See id.*

[152] *Id.*, July 25, 1978, § B, at 6, col. 4. Also, author's interview with Sybil Moses, assistant prosecutor, Bergen County, New Jersey.

[153] *See* State v. Jascalevich, Indictment No. S-495-76; N.Y. Times, May 20, 1976, § A, at 1, col. 2.

[154] State v. Jascalevich, 158 N.J. Super. 488, 386 A.2d 466 (1978).

[155] State v. Jascalevich, No. S-495-76, oral opinion on motion to quash subpoena duces tecum (N.J. Super. Ct. June 30, 1978). *See also* N.Y. Times, May 25, 1978, § B, at 4, col. 3.

[156] *See* note 149 *supra*.

Woodcock had given Farber permission to examine the state's files on the deaths; (2) Farber had discovered, during his research, a copy of the missing 1966 Jascalevich deposition and then turned it over to the prosecutor; and (3) Farber had signed a contract to write a book about the case. The defense argued that the conviction of Jascalevich would stimulate sales of the book and would thus enrich the reporter.[157]

Farber had repeatedly denied any collusion with the prosecutor and also had insisted that there was nothing in his files that would prove either the defendant's guilt or innocence.[158] But, because his files contained the names of persons who had been promised confidentiality in return for their agreement to be interviewed, Farber said he would not permit his notes to be examined.[159]

In May, in an ex parte action, the defense applied to the trial court for a subpoena duces tecum directed against Farber and the New York Times Co. The defense affidavit requested "all statements, pictures, memoranda, recordings and notes of interviews of witnesses for the defense and prosecution ... as well as information delivered to the Bergen County Prosecutor's office and contractual information relating to the above which are in the possession, custody or control of" Farber and the *Times*.[160] In effect, the defense was asking for everything Farber had compiled in the course of his investigation. The defense argued that Jascalevich would be deprived of his sixth amendment right to compel testimony and confront his accusers if Farber were not required to produce all the information.[161]

The trial court accepted the defense arguments and agreed to seek the subpoenas. Since Farber lived in New York State and his newspaper's principal place of business was there, it was necessary for the judge to issue a certificate of materiality under the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.[162] This certificate was submitted to the New York Supreme Court.

Attorneys for Farber and the *Times* appeared before the New York County Supreme Court on May 31, 1978, to contest the application for the subpoenas. They argued that the defense affidavit provided insufficient legal grounds for the trial court's certificate of materiality and that the files sought were privileged under both the first amendment and the New York and New Jersey shield laws.[163] The New York court would not permit an offer of proof of these contentions[164] an . three days later, issued the subpoenas duces tecum.[165] The opinion accompanying the subpoena indicated that the responsibility for hearing Farber's substantive constitutional and statutory objections lay with the New Jersey courts which were bound to allow full faith and credit to the laws of New York to protect the statutory entitlements of New York citizens.[166]

The order was appealed to the appellate division of the supreme court and then to Judge Fuchsberg of New York's highest judicial body, the court of appeals, but the court at both levels held that such an order could not be appealed under New York law.[167] The motion to quash a subpoena duces tecum had to be made in the court in which the subpoena was returnable—in this case, the New Jersey Superior Court.

Attorneys for Farber and the *Times* argued in the New Jersey Superior Court that the subpoenas should be quashed because (1) they were overbroad, especially in light of the first amendment considerations involved; (2) there had been no showing of materiality or necessity for the documents sought; and (3) Farber's files were protected from compelled disclosure by the Constitution and New York and New Jersey shield laws.[168] The court refused to hear the appellants' arguments or rule on the merits of the motions to quash until it had an opportunity to examine the subpoenaed materials in camera.[169] One of the *Times'* attorneys on the case responded that submitting Farber's notes, even for an in camera inspection, would be "invading the very rights we seek to protect" because the judge, as a representative of the judiciary, was also

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *See In re* Superior Court, subpoena duces tecum No. 8867/78 (N.Y. Sup. Ct. 1978). *See also* New York Times Co. v. Jascalevich, —U.S.—, —, 99 S. Ct. 6, 11 (1978).

[161] *See* note 10 *supra.*

[162] *See* N.J. STAT. ANN. §§ 2A:81-18 to -23 (West 1976); N.Y. CRIM PROC. LAW § 640-10 subd. (2) (McKinney 1971).

[163] *See* Brief for Appellants at 4–5, *In re* Farber, No. A-4741-77 (N.J. App. Div. 1978).

[164] *Id.*

[165] *See* Superior Court v. Farber, 94 Misc. 2d 886, 405 N.Y.S.2d 989 (Sup. Ct. 1978).

[166] *Id.* at 886, 405 N.Y.S.2d at 989.

[167] *See* N.Y. CIV. PRAC. LAW § 2304 (McKinney 1974). *See also* Brief for Appellants at 5.

[168] *See* Brief for Appellants at 6.

[169] *See* State v. Jascalevich, No. S-495-76, oral opinion on motion to quash subpoena duces tecum (N.J. Super. Ct. June 30, 1978).

an agent of the government.[170] The appellants urged a threshold determination by the court on their arguments, prior to the in camera examination, but the judge refused to do this and instead set a deadline for compliance with his order to produce.[171]

In the next week, both the Appellate Division of the Superior Court and the New Jersey Supreme Court refused to hear appeals of the judge's ruling. The case was then taken before Justices of the United States Supreme Court for the first time and on July 11 and 12, 1978, both Justice White and Justice Marshall refused applications for a stay of the trial court's order, holding that the case was not yet ripe for review.[172] Justice White, the author of the *Branzburg* plurality opinion, found reason to refer to that case in his ruling:

> Motions to quash subpoenas are not usually appealable in the federal court system.... The applicants insist that as a constitutional matter, the rule must be different where, as here, the subpoena runs against a reporter and the press.... There is no present authority in this Court that a newsman need not produce documents material to the prosecution or defense of a criminal case, cf. *Branzburg v. Hayes* ..., or that the obligation to obey an otherwise valid subpoena served on a newsman is conditioned upon the showing of special circumstances.[173]

Farber and the *Times* still refused to turn their records over to the court without a full hearing on the substantive challenges to the subpoena. An order returnable before a different Bergen County Superior Court judge was issued directing the appellants to show cause why they should not be held in criminal contempt of court for their failure to comply with the order to produce.[174]

During the initial hearing on the criminal contempt order, attorneys for Farber argued that the order had been served on him illegally in New York rather than New Jersey. The court then ordered the defense to apply to the trial court for an additional order to show cause in aid of a litigant.[175] A failure to comply with this order would mean an additional penalty for the appellants, this time for civil contempt of court.

With this directive, the entire process began anew. Again the trial court issued a certificate of materiality directed to the New York County Supreme Court. The certificate included a provision, as required by the Uniform Witness Attendance Act, that "Myron Farber, upon coming into the State of New Jersey, will be given protection from arrest or service of process upon him, civil or criminal, as set forth in the New Jersey Statute Annotated 2A:8-18 *et. seq.*"[176] Again without addressing the substantive issues, the supreme court ordered Farber to appear.[177]

Farber returned to New Jersey. While he was appearing in regard to the civil order in aid of a litigant, a deputy state attorney general sought permission to serve the earlier issued criminal contempt order. Although attorneys for the reporter argued that he was appearing pursuant to the requirements of the Uniform Witness Attendance Act and was immune from service under both the explicit language of the Act and the trial court's certificate, the judge still permitted the order to be served upon Farber.[178]

On July 24, the Bergen County Superior Court found both Farber and the *Times* guilty of criminal and civil contempt. The newspaper was fined $100,000 for criminal contempt and Farber was sentenced to six months in jail and fined $1,000 for the criminal conviction. In an effort to compel production of the subpoenaed documents for Jascalevich, the court also ordered a civil contempt fine of $5,000 a day for the *Times* and another $1,000 for Farber. The reporter was sentenced to remain in jail until he complied with the civil order.[179] The jail sentence for criminal contempt would not begin until after Farber produced his files, and the time served for civil contempt would not be applied to the criminal sentence.

Later that day, the appellate division of the superior court granted a stay of the criminal contempt orders, but denied a stay of the orders for relief of a litigant. Farber spent seven hours in jail July 24 and was freed only after a member of the state's supreme court ordered his release pending further consideration of the case.[180]

On July 25, the New Jersey Supreme Court, by identical five-to-one votes, declined to stay the civil

[170] Statement by Eugene Scheiman; N.Y. Times, July 7, 1978, § B, at 3, col. 3.

[171] *See* State v. Jascalevich, No. S-495-76, oral opinion on motion to quash subpoena duces tecum (N.J. Super. Ct. June 30, 1978).

[172] *See* New York Times Co. v. Jascalevich, —U.S.—, 98 S. Ct. 3058, 3060 (1978).

[173] —U.S.—, *id.* at 3059-60.

[174] *See In re* Farber, 78 N.J. 259, 394 A.2d 330, 332 (1978). *See also* Brief for Appellants at 8-9.

[175] Brief for Appellants at 8-9.

[176] *Id.* at 10.

[177] *Id.* at 11.

[178] *Id.* at 11-12.

[179] 78 N.J. —, 394 A.2d at 332.

[180] *See* N.Y. Times, July 26, 1978, § A, at 1, col. 1.

contempt conviction and denied a motion for direct certification, thus refusing to speed up the state appellate process. The justices did permit, however, a temporary stay so that once again, Farber and the *Times* could appeal to the United States Supreme Court.[181]

The case again went before Justice White. He declined to intervene. This time, the Justice cited not only *Branzburg*, but also *Zurcher v. Stanford Daily*,[182] apparently for the proposition that the press was not entitled to any special protection under the first amendment.

> 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. Cf. *Branzburg v. Hayes* . . . ; see *Zurcher v. Stanford Daily*. . . .[183]

The *Times* next took its appeal to Justice Marshall, but he also refused to intervene. The Justice expressed support on the merits for the positions taken by the appellants, but said they had not met the criteria for the granting of a stay since they had not demonstrated "a balance of hardships in their favor," nor had they shown that "the issue was so substantial that four Justices . . . would likely vote to grant a writ of certiorari."[184]

Justice Marshall did, however, express serious reservations about the way in which the case had been handled in the New Jersey courts. He noted that the appellants had been found guilty of contempt and sentenced without any hearing on the substantive issues raised by Farber and the *Times*. Then, citing *United States v. Nixon*,[185] *Carey v. Hume*,[186] *Baker v. F & F Investment*,[187] and *Democratic National Committee v. McCord*,[188] the Justice indicated that he felt some threshold showing of materiality, relevance, and necessity ought to have been made by the trial judge before he issued a certificate or before he ordered in camera inspection. The single defense affidavit, asserting only a general need for the materials subpoenaed, did not provide an adequate factual basis upon which the trial court could have determined materiality, necessity, or relevance.[189]

Following the refusal of the Supreme Court justices, Myon Farber returned to jail on August 4.

On August 18, Farber turned over the incomplete and unedited manuscript of his book on the Jascalevich case to the trial court. The *Times* also surrendered all of the newspaper's files on the case. Farber indicated in a letter to the judge that he was making the manuscript available merely to disprove charges that he was profiteering from the murder trial and its release was not intended as a waiver of his right to protect his files.[190] The newspaper's records only dealt with contractual arrangements which had been made public through other sources.[191]

On August 30, the New Jersey Supreme Court agreed to hear the reporter's case without prior review by the appellate division.[192] Farber was freed after twenty-seven days in jail and the fines were stayed temporarily. Oral argument was heard September 5, and on September 21, the court announced its decision. By a vote of five-to-two, the contempt convictions of the newspaper and the reporter were upheld.[193] The opinions in that case are examined and analyzed in the next sections of this comment.

Farber was to return to jail the next day, but Justice Stewart granted a temporary stay pending a decision by the U.S. Supreme Court on a motion for certiorari.[194] Meanwhile, the Jascalevich trial was nearing a conclusion and defense counsel asked the Supreme Court to end the stay because the time for forcing compliance with the subpoena was running out. Without reaching any decision on whether it would hear the case, the Court vacated the stay.[195]

Farber went to jail for the third time on October 12. Eleven days later, the Jascalevich murder trial

[181] *See id.*

[182] 436 U.S. 547 (1978).

[183] New York Times Co. v. Jascalevich, —U.S.—, —, 99 S. Ct. 6, 10 (1978) (White, J., denial of stay).

[184] New York Times Co. v. Jascalevich, —U.S.—, —, 99 S. Ct. 11, 15 (1978) (Marshall, J., denial of stay).

[185] 418 U.S. 683 (1974).

[186] 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974). *See* note 97 & accompanying text *supra*.

[187] 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *see* note 105 & accompanying text *supra*.

[188] 356 F. Supp. 1394 (D.D.C. 1973); *see* note 105 *supra*.

[189] — U.S. at —, 99 S. Ct. at 14-15.

[190] 4 MED. L. REP. (BNA) ¶ 5 (Aug. 29, 1978) (News Notes section, back cover, *Farber Turns Over Manuscript, Times Yields Files*). *See also* Reply Brief for Appellants at Appendix, *In re* Farber, No. A-4741-77 (N.J. Sup. Ct. 1978).

[191] *Id.*

[192] 78 N.J. at —, 394 A.2d at 332. *See also* note 149 *supra*.

[193] *In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied*, —U.S.—, 99 S. Ct. 598 (1978).

[194] *See* New York Times Co. v. New Jersey, —U.S.—, 99 S. Ct. 241 (1978) (memorandum opinion).

[195] *Id.*

ended and the case went to the jury. The next day, the Bergen County Superior Court ordered the reporter released on the civil contempt penalty because his notes were no longer needed. The judge also suspended the six-month criminal contempt sentence.[196]

An hour after Farber's release, the jury reached its verdict: Dr. Jascalevich was found not guilty on all charges. Medical experts called to testify at trial had disagreed on the critical question of whether curare could be detected in a body ten years after death. The jurors had heard thirty-four weeks of testimony, but had deliberated less than three hours.[197]

On November 28, the United States Supreme Court added the final note in the case, declining, without comment, to review the New Jersey Supreme Court's decision in *In re Farber*,[198] thus leaving the contempt convictions intact.[199] The *New York Times* had paid $285,000 in fines.[200] Myron Farber had spent forty days in jail, the second longest incarceration for a reporter claiming the protection of a newsman's privilege, but had never surrendered his confidential files.

V. What The New Jersey Supreme Court Decided

The New Jersey Supreme Court heard oral argument in the *Farber* case on September 5, 1978. Just sixteen days later, the seven-member court announced its decision, in four separate opinions.[201] Writing for a five-to-two majority, Justice Mountain announced that both the criminal and civil contempt judgments against Farber and the *Times* were to be upheld. The Court held that neither the first amendment nor the state's news media shield law would sanction Farber's refusal to turn over his files when a defendant's constitutional rights in a murder trial were at stake.[202]

A. The Opinion of the Court

1. *The First Amendment*

The majority opinion initially addressed the claim of first amendment protection. The opinion outlined the journalist's argument that the gathering and dissemination of news would be "seriously impaired" without a press privilege to keep information and sources confidential, because informants would be less willing to confide in reporters. This would result in a "substantial lessening" of the flow of news on issues of public concern and the ensuing injury to the public interest would violate the first amendment's guarantee of a free press.[203] The court rejected this argument. Referring to *Branzburg*, the opinion indicated that "[i]n our view the Supreme Court of the United States has clearly rejected this claim and has squarely held that no such First Amendment right exists."[204] Furthermore, the court emphasized that the *Branzburg* decision had since been "underscored and applied directly to this case by Justice White in a brief opinion filed ... upon ... his denial of a stay sought by these appellants."[205]

Having rejected the first amendment claim, the majority opinion suggested the press was not without first amendment protections, including the right "to refrain from revealing its sources except upon legitimate demand. Demand is not legitimate when the desired information is patently irrelevant to the needs of the inquirer or his needs are not manifestly compelling."[206]

Farber and the *Times* had urged the court to consider Justice Powell's concurring opinion in *Branzburg* as supporting a balancing test under which the validity of subpoenas would be determined on a case-by-case basis. The New Jersey court rejected that approach:

> The particular path that any Justice may have followed becomes unimportant when once it is seen that a majority have reached the same destination.
> ... [W]e do no weighing or balancing of societal interests in reaching our determination that the First Amendment does not afford appellants the privilege they claim. The weighing and balancing has been done by a higher court.[207]

Finally, the majority concluded, *Branzburg* must be binding here because "the obligation to appear at a criminal trial on behalf of a defendant who is enforcing his Sixth Amendment rights is at least as compelling as the duty to appear before a grand jury."[208]

[196] Washington Post, Oct. 25, 1978, § A, at 1, col 2; Washington Star, Oct. 24, 1978, § A, at 1, col 2.
[197] *See* note 149 *supra*.
[198] New York Times Co. v. New Jersey, —U.S.—, 99 S. Ct. 598 (1978) (certiorari denied).
[199] *See* N.Y. Times, Nov. 28, 1978, § A, at 1, col. 5.
[200] *Id.*
[201] *In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied*, —U.S.—, 99 S. Ct. 598 (1978).
[202] *Id.* at —, —, 394 A.2d at 334, 337.
[203] *Id.* at —, 394 A.2d at 333.
[204] *Id.*
[205] *Id.* at —, 394 A.2d at 334.
[206] *Id.*
[207] *Id.*
[208] *Id.*

2. *The Shield Law and the Sixth Amendment*

The court next addressed the claims raised under the New Jersey shield law.[209] The opinion noted that no shield law had been involved in the resolution of the *Branzburg* cases, but acknowledged that the state law invoked here was "said to be as strongly worded as any in the country."[210] The court then emphasized that it was "abundantly clear" Farber and the *Times* came fully within the protection of the law and that "[v]iewed on its face, considered solely as a reflection of legislative intent to bestow upon the press as broad a shield as possible to protect against forced revelation of confidential source materials, this legislation is entirely constitutional."[211]

However, the shield law had to be examined in light of the sixth amendment to the United States Constitution[212] and article 1, paragraph 10, of the New Jersey Constitution.[213] Dr. Jascalevich based his demands for information on these constitutional provisions. "He invokes the rather elementary but entirely sound proposition that where Constitution and statute collide, the latter must yield.... [W]e find this argument unassailable."[214]

The majority opinion emphasized that the sixth amendment's compulsory process clause is binding upon the states.[215] The opinion pointed out that the New Jersey state constitution contained "exactly the same language" on compulsory process as the federal constitution.

> We interpret it [Article 1, paragraph 10] as affording a defendant in a criminal prosecution the right to compel the attendance of witnesses and the production of documents and other material for which he may have, or may believe he has, a legitimate need in preparing or undertaking his defense. It also means that witnesses properly summoned will be required to testify and that material demanded by a properly phrased *subpoena duces tecum* will be forthcoming and available for appropriate examination and use .... We hold that Article 1, ¶ 10 of our Constitution prevails over this statute.[216]

The majority conceded that other unspecified testimonial privileges, whether derived from common law or statute, would appear to conflict with the same constitutional provision. The court ventured no further opinion on such privileges, but said it was confining its consideration to the media shield law only.[217]

3. *Procedural Mechanism for Disclosure*

Having determined that neither the first amendment nor the state shield law could shelter Farber from the subpoena's demands, the court next addressed the problem of procedural mechanisms for disclosure. Attorneys for the *Times* had repeatedly insisted that their clients were entitled to a full hearing on the issues of relevance, materiality, and overbreadth of the subpoena before contempt penalties could be imposed. The court agreed that such a hearing was necessary, but said the appellant had "aborted" it by refusing to submit the subpoenaed materials for in camera inspection.[218]

The majority saw the in camera examination in a completely different light than the *Times*. While the newspaper contended there must be a full showing and definitive judicial determination of need, relevance, and the absence of less intrusive means of obtaining the information prior to the trial judge's inspection, the state supreme court felt such a rule would "effectively stultify" the judicial criminal process.[219] The court maintained that in

[209] The New Jersey Newspaperman's Privilege Law, provides, in pertinent part:

> Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.
>
> a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and
>
> b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

N.J. STAT ANN. § 2A:84A-21 (West Supp. 1979-80).

[210] 78 N.J. at —, 394 A.2d at 335.

[211] *Id.* at —, 394 A.2d at 336.

[212] *See* note 10 *supra.*

[213] N.J. CONST. art. 1, ¶ 10, provides, in pertinent part: "In all criminal prosecutions the accused shall have the right... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor...."

[214] 78 N.J. at —, 394 A.2d at 336.

[215] The court cited Washington v. Texas, 388 U.S. 14 (1967), as authority for this proposition.

[216] 78 N.J. at —, 394 A.2d at 337.

[217] *Id.*

[218] *Id.*

[219] 78 N.J. at —, 394 A.2d at 338.

camera inspection "is no more than a procedural tool [and]... is not in itself an invasion of the statutory privilege. Rather it is a preliminary step to determine whether, and if so to what extent, the statutory privilege must yield to the defendant's constitutional rights."[220]

Despite this view, however, the court still agreed the appellants ought to be afforded a preliminary determination before being compelled to submit their materials for in camera examination. The court did not base this conclusion upon any first amendment considerations, but rather upon an "obligation to give as much effect as possible, within... constitutional limitations, to the very positively expressed legislative intent" manifested in the shield law.[221]

To meet this threshold determination, the court said a defendant seeking disclosure would have to satisfy the trial judge "by a fair preponderance of the evidence, including all reasonable inferences," that he had met the requirements of a three-part test. The defendant must show: (1) there was a reasonable probability or likelihood that the information sought was material and relevant to his defense; (2) the materials could not be secured from any less intrusive source; and (3) the defendant had a legitimate need to see and use the information.[222] This three-part test is derived from Justice Stewart's dissent in *Branzburg*.[223]

The *Farber* court emphasized that its opinion was not to be taken as "license for fishing expeditions" in every criminal case, nor as permission for "indiscriminate rummaging" through newspaper files.[224] However, the majority concluded it still was unnecessary in this case to remand for a formal "threshold determination."[225] Instead, the court, operating under state rules that permitted it to exercise limited original jurisdiction for factfinding purposes,[226] examined the record before it and ruled that there was sufficient evidence to meet its test. The majority noted that the Jascalevich case had been in progress eighteen weeks at the time the in camera inspection was challenged. The trial judge's knowledge of the issues and facts involved afforded a "more than adequate factual basis upon which to rest a conclusion" that the prerequisites established by the court had been fully met—even though he had not articulated them in the specific fashion prescribed by the court.[227] The majority found support for this conclusion in its review of the trial record and of documentation filed on behalf of defendant Jascalevich. Considered particularly significant was the trial judge's knowledge of the "close association" Farber had allegedly enjoyed with the prosecutor's office since before the indictment of the doctor. "This glaring fact of their close working relationship may well serve to distinguish this case from the vast majority of others in which defendants seek disclosure from newsmen in the face of the Shield Law."[228]

The other three opinions in the case focused, for the most part, on this final procedural issue. Chief Justice Hughes, in a brief concurrence, conceded that it would have been better for the trial court to have made a formal threshold determination of the competing claims. But the trial court's failure to do so "should not be conclusive in the face of [appellants'] intransigence."[229]

B. DISSENTING OPINIONS

Two dissenting opinions were filed. Justice Handler dissented "with misgivings" because he found himself in "substantial accord" with much of the majority's reasoning. He agreed with the *Branzburg* view that the existence of a newsman's privilege was not to be inferred from the first amendment and he also felt the state's shield law should not be interpreted as providing absolute or unqualified protection. In camera inspection of confidential materials might be necessary to settle a "legal tug of war," but, a remand should have been ordered in this instance because of "the inadequacy of the present record to justify" the contempt judgments.[230] In his view, the certificates of materiality issued by the trial court disclosed some likelihood that some of the material sought was relevant, but yielded only "a bare conclusion" as to its necessity. Furthermore, they were silent as to alternative sources and "indifferent as to matters of overbreadth, oppressiveness and unreasonableness."[231] Such findings were insufficient for contempt judgments because the trial court's "insistence upon the requisite showing of need should be unyielding and meticulous."[232]

[220] *Id.* at —, 394 A.2d at 337-38.
[221] *Id.* at —, 394 A.2d at 338.
[222] *Id.*
[223] A number of other states have adopted similar tests. *See* notes 75 & 135 & accompanying text *supra*.
[224] 78 N.J. at —, 394 A.2d at 339.
[225] *Id.*
[226] N.J. SUP. CT. R. 2:10-5.
[227] 78 N.J. at —, 394 A.2d at 339.
[228] *Id.*
[229] *Id.* at —, 394 A.2d at 341 (Hughes, C.J., concurring).
[230] *Id.* at —, 394 A.2d at 348 (Handler, J., dissenting).
[231] *Id.* at —, 394 A.2d at 353 (Handler, J., dissenting).
[232] *Id.*

Justice Pashman's dissent was more vehement, but still focused on the procedural issue and urged a remand so that the appellants might have a hearing on the merits of their objections.

> The majority's assertion that appellants were indeed accorded a due process hearing prior to *in camera* inspection is simply without foundation in the record.... I find it totally unimaginable that the majority can even consider allowing a man to be sent to jail without a full and orderly hearing at which to present his defenses.[233]

Justice Pashman saw no need to deal with the appellants' first amendment claims because their claim of privilege under the state shield law was meritorious.[234] The statute was amended after the Supreme Court had announced in *Branzburg* that state legislatures were free to set their own standards as to testimonial privileges for the press. The new law was thus "New Jersey's response to the Court's invitation." It reflected the "legislature's judgment that an uninhibited news media is more important to the proper functioning of our society than is the ability of either law enforcement agencies, the courts or criminal defendants to gain access to confidential news data."[235] He concluded that the shield law granted journalists absolute immunity from disclosure, including in camera inspection. Courts were given no discretion to decide in an individual case that the societal importance of a free and robust press was outweighed by other interests. The "weighing and balancing" already had been done by the state legislature which had decided that the right to nondisclosure was paramount in every instance.[236]

However, the justice conceded that no statute could be applied so as to abridge an individual's constitutional rights and so he too urged a remand for the purpose of a formal hearing. His opinion contained detailed recommendations as to the procedure that should be followed, including suggestions that the trial judge prepare findings of fact and conclusions of law at each stage of the proceedings and that all parties be permitted to appeal the judge's decisions, either as to the necessity for in camera inspection, or the release of information after the judge's examination.[237] He stressed that throughout the entire process the trial court must "constantly keep in mind the strong presumption against disclosure of protected materials. All doubts concerning disclosure should be resolved in favor of non-disclosure."[238]

[233] *Id.* 343 (Pashman, J., dissenting).
[234] *Id.* at 345.
[235] *Id.* at 344.
[236] *Id.*
[237] *Id.* at 347.

VI. Analysis of the Farber Decision

The procedures followed by the New Jersey and New York courts, taken as a whole, resulted in a significant deprivation of the constitutional due process protections to which Farber and the *New York Times* were entitled. Important distinctions may be drawn between *Farber* and other criminal cases involving claims of newsman's privilege.

When the New York County Supreme Court initially ruled on the application for subpoenas duces tecum sought against the reporter and his newspaper, the court made it clear that it was issuing the subpoenas with the full expectation, based upon the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings and the certificate of materiality submitted by the New Jersey trial court, that a full hearing would be held in the New Jersey court "at which all issues of privilege, statutory and constitutional, may be raised."[239] The New York court did not permit offers of proof as to the alleged insufficiency in law and fact of the certificate[240] since absent an abuse of discretion or evidence of arbitrariness on the part of the issuing judge, the court was bound to allow the certificate "full faith and credit."[241] By the terms of the Act, the certificate of the requesting state was prima facie evidence of the materiality and need alleged therein.[242]

The New York appellate courts refused to review the order because under state law, the motion to quash the subpoenas has to be made in the court

[238] *Id.*
[239] Superior Court v. Farber, 94 Misc. 2d 886, 405 N.Y.S.2d 989, 991 (Sup. Ct. 1978).
[240] It should be noted that the constitutionality of the entire Uniform Act to Compel Witnesses from Without the State in Criminal Proceedings was sharply attacked by two Justices on the only occasion in which the United States Supreme Court has considered the law. *See* New York v. O'Neill, 359 U.S. 1, 12 (1959) (Douglas, J., dissenting, in an opinion in which Black, J., concurred). The Supreme Court, in a narrow holding, ruled that the Act was not unconstitutional on its face and upheld its application in the particular case, in part, because of the stringent procedural safeguards it was designed to provide.
[241] 405 N.Y.S.2d at 991. U.S. Const. art. IV, § 1, provides in pertinent part: "Full Faith and Credit shall be given in each state to the public Acts, records, and judicial Proceedings of every other State."
[242] *See* N.Y. Crim. Proc. Law § 640.10 subd.(2) (McKinney Supp. 1978), *cited in* 405 N.Y.S.2d at 990.

to which the subpoenas are returnable[243]—even if that means an appearance in a court outside the state. Since Hackensack, New Jersey, was just across the state line, the court concluded there would be no inordinate hardship involved in requiring Farber to seek his relief there.

Unfortunately, the expectations of the New York judges who ordered Farber and the *Times* to comply with the subpoenas were never realized. Farber and the *Times* were never permitted to brief or to argue the substantive challenges to the subpoenas.

To satisfy the requirements of due process, the appellants were entitled to, and should have been granted, "a full hearing on the issues of relevance, materiality and overbreadth of the subpoenas."[244] No one on any side of this conflict ever questioned that conclusion. Farber and the *Times* continually sought such a hearing. The New York judges assumed they would receive it. Justice Marshall emphasized its necessity in his August 4th ruling on the *Times'* application for a stay.[245] The state attorney general charged with prosecuting the criminal contempt judgment on appeal also acknowledged the obligation in his appellate division brief and in his oral argument before the New Jersey Supreme Court.[246] Both dissenting New Jersey justices argued that the denial of a hearing was violative of fourteenth amendment due process rights.[247] Indeed, the majority opinion of the New Jersey Supreme Court recognized that the trial court had a responsibility to conduct such a hearing, but concluded that the newspaper and its reporter had waived their right to the hearing by refusing to turn the subpoenaed files over for *in camera* inspection.[248] That judgment was in error.

The issue in dispute was not *whether* such a hearing was required, but *when* it had to be held. Five members of the New Jersey Supreme Court did not believe that it was necessary to conduct the hearing until after the trial judge had been given the opportunity to examine Farber's files privately in chambers. That conclusion, however, disregards a crucial component of the due process problem since one of the issues being contested, prior to an in camera inspection, was the legitimacy of, and necessity for, that very in camera inspection. The language of the New Jersey shield law, taken on its face, left no question that Farber and the *Times* were protected from forced disclosure not only to the defendant, but to the trial judge as well.[249] Due process required resolution of these claims prior to an order to produce and certainly prior to the imposition of penal sanctions. Even the attorney general in his brief admitted that "the wording of [the shield law] would indicate that the court of first impression should determine the applicability of the rule, including a lack of waiver, before ordering production, even *in camera*, of all documents or items subpoenaed."[250]

The New Jersey Supreme Court rejected the argument because requiring a hearing before in camera inspection might "stultify the judicial criminal process since it is not rational to ask a judge to ponder the relevance of the unknown."[251] In so doing, the court ignored the important role the legislature plays, not only in enacting the laws that define and prohibit criminal conduct, but also in establishing the rules and guidelines that govern the adjudication and punishment of crime. The passage of shield laws for the press, or the establishment of testimonial privileges to protect other relationships, is a legitimate and constitutional exercise of legislative power and represents a prior balancing of societal interests with the resulting conclusion that the public benefits derived from the privileged relationship outweigh the impact of a restraint upon the judicial process.

Furthermore, as post-*Branzburg* cases have clearly demonstrated, the trial judge is not required to "ponder the relevance of the unknown" in conducting a predisclosure hearing. *People v. Marahan*,[252] *State v. St. Peter*,[253] and *Brown v. Commonwealth*[254] in the criminal area, and *Baker v. F & F Investment*,[255] *Carey v. Hume*,[256] and *Democratic National Committee v. McCord*[257] in the civil area, all have

[243] N.Y. Civ. Prac. Law § 2304 (McKinney Supp. 1978).

[244] 78 N.J. at —, 394 A.2d at 337.

[245] *See* —U.S. at —, 99 S. Ct. at 15.

[246] Brief for Attorney General at 31, *In re* Farber, No. A-4741-77, (N.J. App. Div. 1978). Statement by Attorney General John Degnan, Washington Post, Sept. 6, 1978, § A, at 2, col. 2.

[247] 78 N.J. at —; 394 A.2d at 342-43 (Pashman, J., dissenting); id. at 354 (Handler, J., dissenting).

[248] 78 N.J. at —, 394 A.2d at 337.

[249] *See* note 209 *supra*.

[250] Brief for Attorney General at 31.

[251] 78 N.J. at —, 394 A.2d at 338.

[252] 81 Misc. 2d 637, 368 N.Y.S.2d 685 (Sup. Ct. 1975); *see* note 147 & accompanying text *supra*.

[253] 132 Vt. 266, 315 A.2d 254 (1974); *see* note 135 & accompanying text *supra*.

[254] 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974); *see* notes 133, 135 & 138 & accompanying text *supra*.

[255] 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *see* note 105 & accompanying text *supra*.

[256] 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *see* note 97 & accompanying text *supra*.

[257] 356 F. Supp. 1394 (D.D.C. 1973); *see* note 105 *supra*.

held that the initial responsibility for showing that disclosure of a newsman's sources or confidential information is necessary lies with the party seeking the disclosure—in this instance, with defendant Jascalevich. It was he who should have been required to narrow the focus and indicate to the court some logical and reasonably specific grounds for believing that the reporter had information that was material, relevant, unavailable from alternative sources, and compelling. The vague, essentially conclusory affidavits submitted by Jascalevich's attorney did not meet these standards.

At a hearing a newsman also would be able to submit evidence, thus providing the judge with additional information upon which to base his decision. Then, if the party seeking disclosure has not met his burden, the trial court would be justified in assuming that the request for revelation was nothing more than a "fishing expedition" and was not sufficient to warrant an abridgement of rights under the first amendment or legislatively enacted shield protection. This is a far cry from "pondering the relevance of the unknown." Indeed, it is the balancing test given birth to in Justice Powell's *Branzburg* concurrence and nurtured by a dozen courts since then.[258]

The New Jersey Supreme Court did recognize the necessity for this sort of threshold determination, but held that the test would apply to "those who in the future may be similarly situated"[259]—but not Farber and the *Times*. Instead of remanding the case and ordering a full determination of the constitutional and statutory issues involved, as both the *Times* and the state attorney general had recommended,[260] the court invoked its original jurisdiction for the limited purpose of making findings of fact necessary to the disposition of the case. By so doing, the justices deprived the *Times* of notice, of any opportunity for response through briefing, and of any chance to present evidence or witnesses or to cross-examine defense witnesses—all possible abridgements of due process. The majority's "fact-finding" was nothing more than a dependence upon the conclusions of the trial judge based "solely" on his "examination of a handful of newspaper articles"[261] and "conclusory allegations" "taken substantially verbatim" from the brief for defendant Jascalevich.[262] As Justice Pashman concluded in dissent: "This amalgam of *post hoc, ex parte* and newspaper article 'factfinding' is not my idea of what a Shield Law hearing is all about."[263]

Another due process concern not even addressed by the New Jersey court was the manner in which Farber was served with notice of the criminal contempt charge. Interpretation of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings is beyond the scope of this comment. But in light of the due process problems in this case, it bears noting that Farber was originally served with notice of the criminal contempt charge in New York. At a later hearing in the New Jersey Superior Court, Farber's attorneys argued that the court lacked jurisdiction over him because the order to show cause had been served outside New Jersey. The court then ordered Jascalevich's counsel to seek an order in aid of a litigant and to pursue this remedy in New York under the Uniform Witness Attendance Act. Under both the language of that statute,[264] and the court's certificate of materiality in aid of a litigant, Farber was promised immunity from service of criminal process while he was in New Jersey. Acting upon those assurances, a New York Supreme Court justice on July 18 ordered Farber to respond to the civil contempt proceeding that had been initiated in Jascalevich's behalf. And yet, while Farber was in the New Jersey courtroom later that same day, the trial court allowed service upon Farber in the criminal contempt matter, even though he protested that he was in New Jersey only under compulsion and should be immune from service. The attorney general argued that the civil and criminal proceedings were so intertwined that Farber's pres-

[258] *See, e.g.*, United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976); Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); United States v. Liddy, 478 F.2d 586, 587 (D.C. Cir. 1972); United States v. Orsini, 424 F. Supp. 229, 232 (E.D.N.Y. 1976), *aff'd without opinion*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977); State v. Sandstrom, 224 Kan. 573, 581 P.2d 812, 815 (1978), *cert. denied*, —U.S.—, 99 S. Ct. 1265 (1979); State v. St. Peter, 132 Vt. 266, 269–70, 315 A.2d 254, 255 (1974); Zelenka v. State, 83 Wis. 2d 601, 618–19, 266 N.W.2d 279, 287 (1978).

[259] 78 N.J. at —, 394 A.2d at 338.

[260] Remand brief for Attorney General at 12. Reply brief for Appellants at 13.

[261] 78 N.J. at —, 394 A.2d at 347 (Pashman, J., dissenting).

[262] *Id.*

[263] *Id.*

[264] N.J. STAT. ANN. § 2A:81-21 (West 1976) provides in pertinent part:

> If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not, while in this state pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

ence in the state for one action was sufficient to validate service for the other, but the whole chain of events raises serious questions as to the motivation for seeking a second contempt citation. Indeed, it would seem a clear violation of due process if the Uniform Witness Attendance Act and a judge's certificate were actually used to accomplish the equivalent of extradition in order to effect service of a criminal citation.

Finally, it should be noted that the New York court originally issued the subpoena duces tecum only after emphasizing that "New Jersey courts are bound to allow full faith and credit to the laws of New York when necessary to protect the statutory entitlement of New York citizens."[265] Section 79-h of the New York shield law specifically provides that, "no professional journalist... shall be adjudged in contempt by any court... for refusing or failing to disclose any news or the source of any such news...."[266] *People v. Marahan*[267] and *People v. Monroe*[268] held that before a newsman can be deprived of the protection of section 79-h, he must be granted a hearing on the issues, including relevancy and materiality.[269] Myron Farber received no such hearing and, despite the unequivocal language of the New York law, he spent forty days in jail for contempt of court.

It is the contention of this comment that there were several procedural errors in the Farber litigation at the trial level that warranted a reversal of the newsman's contempt convictions by the New Jersey Supreme Court. Furthermore, this comment argues that the state supreme court decision did not accurately reflect the development of judicial thinking since *Branzburg*.

The most critical flaw of *In re Farber* lies in its interpretation of *Branzburg*. Responding to the appellants' argument for a newsman's privilege grounded in the first amendment, the court declared: "[I]n our view the Supreme Court of the United States has clearly rejected this claim and has squarely held that no such First Amendment right exists."[270] The court also refused to acknowledge the significance of Justice Powell's concurrence in *Branzburg*. "We do not read Justice Powell's opinion as in any way disagreeing with what is said by Justice White."[271] These denials were crucial, for they enabled the *Farber* majority to ignore Justice White's declaration that news-gathering is entitled to first amendment protection[272] and Justice Powell's concluding recommendation of case-by-case balancing.[273] Having deprived the media of its first amendment defense, the New Jersey court was no longer confronted with a clash of competing constitutional values. It was able to decide the dilemma as a simple matter of statute-versus-Constitution, with the New Jersey shield law predictably giving way to the assertion of a paramount sixth amendment interest.

Furthermore, the court failed to distinguish adequately between the different circumstances under which *Branzburg* and *Farber* arose. *Branzburg* involved grand jury appearances by reporters who had either witnessed actual criminal activity or who were believed to have direct, personal knowledge of crimes. Because of their investigatory function, grand juries are less restricted in seeking evidence and in the procedures they must follow. *Farber*, on the other hand, arose in the context of a criminal trial in which the reporter was a third party who had not personally witnessed the commission of any crime.

The court ignored the limited nature of the *Branzburg* holding emphasized by both Justice White and Justice Powell, and disregarded Justice White's suggestion in *Branzburg* that state legislatures dissatisfied with the Court's ruling were free to enact or amend existing shield laws to provide greater protection for newsmen[274]—an invitation the New Jersey State Assembly had obviously accepted.[275]

Since *Branzburg* there has been an evolution in support of recognition of a newsman's privilege.[276] In the area of criminal trials, most, though not all, courts today accept the existence of such a privilege, and trace its source to the first amendment and its recognition to *Branzburg*.[277] This is true even in instances where the charge has been murder. The Virginia, Wisconsin, and Kansas state supreme courts all have been faced with appeals from murder trials in which the defendant had sought to learn the identity of a reporter's news source,

[265] 405 N.Y.S.2d at 991.

[266] N.Y. Civ. Rights Law § 79-h (McKinney Supp. 1978).

[267] 81 Misc. 2d 637, 368 N.Y.S.2d 685 (Sup. Ct. 1975).

[268] 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (Sup. Ct. 1975).

[269] 81 Misc. 2d at 643-44, 650-51, 368 N.Y.S.2d at 692, 698. 82 Misc. 2d at 856-57, 370 N.Y.S.2d at 1013-14.

[270] 78 N.J. at —, 394 A.2d at 333.

[271] *Id.* at —, 394 A.2d at 334.

[272] 408 U.S. at 681.

[273] *Id.* at 710.

[274] *Id.* at 706.

[275] *See* note 235 & accompanying text *supra*.

[276] *See* notes 97, 100, 105, 112, 121, 128, & 131 & accompanying text *supra*.

[277] *See* note 129 *supra*.

but the reporters refused to testify.[278] In each of those cases, the courts cited *Branzburg* as providing the foundation for newsman's privilege. In two of the three appeals, the state court affirmed the convictions and upheld the reporter's right to protect his sources.[279] All three state supreme courts applied a balancing test to the defendant's demand for disclosure and all three utilized the "materiality/relevancy" standard in weighing the competing values. In the one case in which the reporter was ordered to testify, the appellate court affirmed the trial court finding that the defendant's need for the information "outweighed" the claim of privilege.[280] The approach followed in these cases is far different from the indiscriminate, all-encompassing order issued without a hearing to determine materiality or relevance in the Jascalevich trial which was upheld by the New Jersey Supreme Court.

None of these three states had a newsman's privilege statute. Their recognition of a protection for the press was based on the first amendment and, in the Wisconsin case, the corollary freedom of the press section of the state constitution.[281] It is ironic that in a state where the legislature had taken a bold statutory step specifically designed to further safeguard this right, the state's highest court would find the shield law to be an unconstitutional abrogation of the sixth amendment. Such an interpretation was unnecessary, for the New Jersey shield law as written did not have to be construed as a violation of a defendant's rights.

Myron Farber was not called to testify before the grand jury that indicted Mario Jascalevich, nor were any of his notes or files examined by the grand jury. Farber also was never called as a witness by the state during Jascalevich's criminal trial and none of his files were entered in evidence by the prosecution.[282] The copy of the missing Jascalevich deposition the reporter had uncovered during his investigation—the only thing he ever turned over to the prosecutor[283]—was available to both state and defense counsel before and during trial, and could have been secured under discovery rules. In this respect, the statutory privilege Farber invoked did not violate the defendant's right "to be confronted with the witnesses against him." As far as the right "to have compulsory process for obtaining [w]itnesses in his favor," the fact remains that Farber had never been present during any of the events of 1965 and 1966 that led to Dr. Jascalevich's indictment, and there was absolutely no indication that anyone Farber had interviewed who might be qualified to testify in the doctor's behalf was not otherwise available to the defense through application of the sixth amendment.[284] Serious questions about hearsay evidence and the admissibility of his interview notes also would have been raised had the reporter been compelled to appear on behalf of the defendant. To require Farber's testimony under such circumstances would be to make the reporter an arm of the defense and certainly would constitute an infringement of first amendment rights.

Although *In re Farber* was decided incorrectly by the New Jersey Supreme Court, there will be no review or reversal of that decision for the United States Supreme Court declined to grant certiorari in the case.[285] *Farber* thus remains the law in New Jersey. Of greater concern now is the impact *Farber* will have on journalists, judges, and criminal attorneys nationwide. Because the case involved the nation's best-known and most-respected newspaper, it attracted enormous publicity. The defeat of the *New York Times* in this case could have a much greater effect than the many successful newsman's privilege cases brought by other less well-known newspapers in recent years. It could result in more demands upon reporters to testify or turn over their notes. Smaller, less wealthy newspapers, aware of the $500,000 the *Times* spent in fines and legal fees[286] and of the forty days Farber spent in jail, may be reluctant to even challenge subpoenas. It also may motivate more decisions like that made by the editors of the *Sacramento Bee*, who announced they would no longer print information from confidential sources because they feared the possibility of their reporters being jailed.[287] Such an anouncement brings to mind the words of Justice Douglas, who wrote in *Branzburg* that the specter of forced in

[278] State v. Sandstrom, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied*, —U.S.—, 99 S. Ct. 1265 (1979); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974); Zelenka v. State, 83 Wis. 2d 601, 266 N.W.2d 279 (1978).

[279] 214 Va. at 758, 204 S.E.2d at 431; 83 Wis. 2d at 619-21, 266 N.W.2d at 287-88.

[280] 581 P.2d at 816.

[281] WIS. CONST. art. I, § 3.

[282] Author's interview with Sybil Moses, assistant prosecutor, Bergen County, New Jersey.

[283] Appellants' Petition for Writ of Certiorari at 4, New York Times Co. v. New Jersey, —U.S.—, 99 S. Ct. 598 (1978) (denial of certiorari). *See also* trial testimony of former Bergen County, New Jersey, Prosecuting Attorney Joseph Woodcock, Washington Post, Sept. 17, 1978, § B, at 1, col. 1.

[284] *See* note 10 *supra*.

[285] New York Times Co. v. New Jersey, —U.S.—, 99 S. Ct. 598 (1978) (denial of certiorari).

[286] *See* note 149 *supra*.

[287] Sacramento Bee, Sept. 29, 1978, § B, at 4, col. 5.

camera disclosure would "cause editors and critics to write with more restrained pens."[288]

At the same time, *Farber* may motivate more state legislatures to consider the adoption, or amendment, of more protective shield laws. At the appellate level, *Farber* may prove to be merely an aberration in what appeared to be, prior to the New Jersey decision, a developing judicial trend toward recognition of a qualified newsman's privilege. Other jurisdictions may simply choose to ignore *Farber*. It could, however, spark a shift in the delicate balance between the constitutional rights of free press and fair trial, and there is some initial sign that this is occurring. Both the New Jersey Supreme Court opinion and the language of Justice White's refusal to grant a stay in the case were recently cited in a reported lower court decision denying a newsman's privilege to a reporter in Vermont.[289] And, according to the national Reporters Committee for Freedom of the Press, *Farber* was cited approvingly in an unreported federal bench decision.[290]

As has been noted, trial courts have tended to construe state shield laws strictly rather than generously, even in states where legislators have attempted to fashion broad or "absolute" privilege statutes. One possible response to *Farber* might be for legislators to formulate procedures for automatic or expedited appeal of mid-trial orders by judges involving disclosure of a reporter's confidential sources or information. Such a system might not have affected the result in *Farber*, but it could have kept the reporter out of jail or at least reduced the length of his incarceration.

A more comprehensive response to the entire newsman's privilege problem might be derived by applying a formula similar to the "exclusionary rule" doctrine of *Weeks v. United States*[291] and *Mapp v. Ohio*[292] to the disclosure criteria enunciated by Justice Stewart in his *Branzburg* dissent and since adopted in part by several other courts.[293]

Under the terms of the exclusionary rule, the Supreme Court, and the many state courts that adopted it prior to *Mapp*,[294] held that the fourth amendment's right of privacy from arbitrary intrusion is so essential to a free society and so worthy of protection that the courts would exclude from trial evidence that had been illegally obtained by the police from a defendant in derogation of his constitutional protection from unreasonable search and seizure. In reality, this often results in the dismissal of charges or the reversal of convictions, because the preservation of constitutional rights is deemed to be more important to our society than the conviction and punishment of a single criminal.

It certainly can be argued that the freedoms guaranteed by the first amendment are just as essential to a free society as those of the fourth amendment. And so, when the first and sixth amendments collide, the solution might well lie in another type of exclusionary rule. Thus, if a defendant were able to demonstrate with sufficient precision that a reporter's notes or sources were absolutely essential to his defense, and he could meet the relevancy, materiality, exhaustion of alternative sources, and compelling need tests adopted in such cases as *State v. St. Peter*,[295] *Brown v. Commonwealth*,[296] *Zelenka v. State*,[297] and *Florida v. Hurston*,[298] the court would be required to dismiss the charge, or upon appeal, reverse the conviction. The rationale for such an approach would be that the preservation of the constitutional rights of the accused person, the press, and the public are more important to our society than the conviction of a single defendant. The factual situations and decisions in criminal cases involving claims of newsman's privilege since *Branzburg* suggest that such a constitutional confrontation would not arise often and, given the burden of proof the defendant would have to meet, it is doubtful that many guilty men or women would go free. It might well be a small price to pay to insure the preservation of a free press.

VII. Conclusion

Judicial acceptance of the newsman's privilege has been grudging and gradual over the past 130 years, but an examination of the cases decided since *Branzburg v. Hayes* in 1972 suggests that rec-

[288] Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting).

[289] *In re* Powers, 4 Med. L. Rep. (BNA) 1600 (Vt. Dist. Ct. 1978).

[290] United States v. Digilio, No. 74-313 (D.N.J. 1978) (magistrate's opinion).

[291] 232 U.S. 383 (1914).

[292] 367 U.S. 643 (1961).

[293] *See* notes 75 & 135 & accompanying text *supra*.

[294] 367 U.S. at 651; *see, e.g.*, Elkins v. United States, 364 U.S. 206, 224-32 app. (1960); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955); City of Chicago v. Lord, 7 Ill. 2d 379, 130 N.E.2d 504 (1955); People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924).

[295] 132 Vt. 266, 315 A.2d 254 (1974); *see* note 138 & accompanying text *supra*.

[296] 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974); *see* notes 133, 135 & 138 & accompanying text *supra*.

[297] 83 Wis. 2d 601, 266 N.W.2d 279 (1978); *see* text accompanying note 282 *supra*.

[298] 3 Med. L. Rep. (BNA) 2295 (Fla. Cir. Ct. 1978).

ognition of a qualified or conditional privilege, grounded in the first amendment, has been achieved in a majority of the jurisdictions where the issue has been considered. The fact that the privilege is now acknowledged however, does not mean that its exercise is always permitted.

A reporter's right to refuse to disclose the identity of his sources or confidential information has been accepted most often in civil litigation, especially when the newsman is not a party to the case. It also has been recognized in criminal cases, including murder trials, when the defendant is unable to demonstrate that the journalist's knowledge is material and relevant to the central issue of guilt or innocence. Other tests, including exhaustion of alternative sources and "compelling need," have been employed by some judges in attempting to determine whether disclosure should be ordered in criminal cases.

Following *Branzburg*, courts still require newsmen to appear and testify before grand juries, especially when they have witnessed a crime. But even in this area, some judges have suggested first amendment limitations on the questions a grand jury can pose to a reporter.

Since 1972, seventeen states have enacted or amended news media shield laws, bringing to twenty-six the number of states with privilege statutes for journalists. Despite this flurry of legislative activity Congress has never taken any final action on any of the proposals for a federal shield law, and state courts sometimes interpret the local laws quite strictly, thus depriving reporters of their protection.

The most noted newsman's privilege case in recent years has been *In re Farber*, the judicial battle that resulted in the jailing of a reporter for forty days. It is the contention of this comment that the *Farber* case was poorly decided at both the trial and appellate levels. The trial judge's refusal to conduct a hearing on the substantive issues before ordering in camera inspection of the reporter's confidential files or before contempt of court judgments were entered was improper. The New Jersey Supreme Court did not correct this serious error. That court failed to recognize the growing legal acceptance of a constitutional basis for the newsman's privilege. The state court also struck down one of the nation's most comprehensive shield laws when Supreme Court precedents did not suggest that such a ruling was necessary.

There have been at least forty contempt judgments handed down against reporters in the years since *Branzburg*, resulting in at least a dozen actual jailings lasting from a few hours to several weeks.[299] The trend in the last few years has appeared to be more favorable toward journalists' claims of privilege, but the *Farber* decision now raises serious questions about whether the pendulum is once again swinging away from protection for the press.

Almost forty years ago, in *Bridges v. California*,[300] Mr. Justice Black wrote that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."[301] That statement acknowledges the possibility of conflict between the two freedoms, but more importantly, it recognizes the constitutional foundations of both—a realization that has been too often lacking in cases involving newsman's privilege. Accommodation based on balancing is the key to preserving these rights and that can best be achieved through a case-by-case approach, as Justices Powell and Stewart suggested in their *Branzburg* opinions. This comment supports that approach, but it also has attempted to advance some alternative policies and procedures that might further safeguard the newsman's privilege and the public's right to a vigorous and informative free press.

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[299] N.Y. Times, July 25, 1978, § B, at 7, col. 1.
[300] 314 U.S. 252 (1941).
[301] *Id.* at 260.