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Douglas H. Frazer

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# THE NEWSPERSON'S PRIVILEGE IN GRAND JURY PROCEEDINGS: AN ARGUMENT FOR UNIFORM RECOGNITION AND APPLICATION

## I. INTRODUCTION

More than a decade ago, the United States Supreme Court, in *Branzburg v. Hayes*,<sup>1</sup> first recognized a qualified newsperson's privilege based on the first amendment. Since *Branzburg*, federal and state courts have decided scores of cases involving the newsperson's privilege.<sup>2</sup> Despite its overwhelming acceptance among federal courts and among many state courts, the nature and scope of the privilege remain unclear.<sup>3</sup> Most of the confusion results from the courts' varying treatments of the privilege in different contexts. Thus, the recognition and application of the privilege frequently turns on whether the privilege arises in a civil action, a defamation action, a criminal trial, or a grand jury proceeding.<sup>4</sup> This Comment will focus on the use of the newsperson's privilege in grand jury proceedings.

Newsgatherers depend heavily on confidential sources to provide newsworthy information.<sup>5</sup> Compelled disclosure of confidential sources and confidential information injures the media by deterring potential news sources, particularly those who desire to remain anonymous, from

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<sup>1</sup> 408 U.S. 665 (1972).

<sup>2</sup> See, e.g., *Tofani v. State*, 297 Md. 165, 465 A.2d 413 (1983), and cases cited therein.

<sup>3</sup> See, e.g., *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983) (recognizing the first amendment privilege in criminal trial proceedings); *Riley v. Chester*, 612 F.2d 708 (3d Cir. 1979) (recognizing the first amendment privilege in civil trial proceedings); *Tofani v. State*, 297 Md. 165, 465 A.2d 413 (1983) (rejecting the first amendment privilege in grand jury proceedings); *Andrews v. Andreoli*, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977) (rejecting the first amendment privilege in grand jury proceedings).

<sup>4</sup> See, e.g., *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976) (recognizing the first amendment privilege in criminal trial proceedings); *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975) (rejecting the first amendment privilege in grand jury proceedings).

<sup>5</sup> Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, 57-61 (1969); Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 858 (1974).

divulging sensitive information to the news media.<sup>6</sup> The news media experiences a chilling effect when a reporter testifies about confidential sources. Not only does such testimony inhibit confidential sources from talking to the media, but, because reporters also fear revealing their confidential contacts, such testimony diminishes the zeal with which newsmen investigate matters of acute public interest.<sup>7</sup> Forced disclosure of newsmen's sources and information may contravene both the letter and spirit of the first amendment guarantee of freedom of the press.

The public ultimately shares the injury to the media. A democratic system depends on a well-informed citizenry able to fulfill the responsibilities and obligations of self-government.<sup>8</sup> Because the news media is the major source of the public's day-to-day information, the first amendment freedom of the press provides the means by which the media is able to keep the public well-informed.<sup>9</sup>

The efficient and effective functioning of the grand jury is often at odds with the newsmen's privilege. Historically, the law gave the grand jury dual functions: to investigate and to accuse.<sup>10</sup> As investigator, the grand jury uses subpoenas, grants of immunity, and contempt orders to coerce witnesses to testify concerning criminal activity and those perpetrating it.<sup>11</sup> As accuser, the grand jury checks the prosecutor by screening unfounded charges<sup>12</sup> and returning indictments when "probable cause" exists that the accused committed the crime charged.<sup>13</sup> In federal cases, the fifth amendment guarantees the criminal defendant a right to an indictment by a grand jury.<sup>14</sup> Despite the grand jury's powers to gather information,<sup>15</sup> however, including a long standing right to "everyman's testimony,"<sup>16</sup> the Constitution does not guarantee the grand jury's ability to compel testimony to indict a criminal defendant. In many circumstances, therefore, a qualified constitu-

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<sup>6</sup> *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting); *id.* at 736 (Stewart, J., dissenting); *United States v. Criden*, 633 F.2d 346, 355-56 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

<sup>7</sup> The existence and extent of this chilling effect has been empirically confirmed. See BLASI, *PRESS SUBPOENAS: AN EMPIRICAL AND LEGAL ANALYSIS* (1972).

<sup>8</sup> *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide-open"); *see generally* A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

<sup>9</sup> *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (newsgatherers stand "as surrogates for the public").

<sup>10</sup> *United States v. Calandra*, 414 U.S. 338, 343 (1974).

<sup>11</sup> *Blair v. United States*, 250 U.S. 273, 282 (1919).

<sup>12</sup> *United States v. Ciambone*, 601 F.2d 616, 629 (2d Cir. 1979).

<sup>13</sup> *Branzburg*, 408 U.S. at 686-87.

<sup>14</sup> U.S. CONST. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."

<sup>15</sup> *See Branzburg*, 408 U.S. at 668.

<sup>16</sup> *Calandra*, 414 U.S. at 345.

tionally derived newperson's privilege should allow reporters to refuse to reveal confidential information in grand jury proceedings.

Courts have applied a balancing test when reporters assert a first amendment privilege in criminal proceedings.<sup>17</sup> In balancing criminal defendants' sixth amendment right to obtain evidence in their favor with a newperson's qualified first amendment privilege, courts have compelled a newperson to reveal sources or confidential information only upon the defendant's showing that (1) the information sought is material and relevant; (2) alternative sources for obtaining the information have been exhausted; and (3) the reporter's testimony is essential to a fair resolution of the proceeding.<sup>18</sup>

This Comment will first argue that courts should use a similar balancing test when a reporter asserts the first amendment privilege in a federal grand jury proceeding. Because a grand jury has no constitutional right to a newperson's testimony, no competing constitutional interests exist when a reporter claims the newperson's privilege. It is inconsistent for courts to recognize a qualified first amendment privilege in criminal proceedings, therefore, but deny the same qualified privilege in grand jury proceedings.

This Comment will next argue that state "shield laws" do not provide a reporter's privilege in grand jury proceedings equivalent to the first amendment qualified privilege. Twenty-six states have enacted "shield laws" that allow newpersons to refuse to disclose information obtained in the course of their newsgathering in any judicial, legislative, or administrative proceeding, including grand jury proceedings. Such statutory privileges, however, are almost never absolute. The vast majority of state shield laws provide a qualified statutory privilege that affords less protection than the first amendment privilege. Consequently, the existence of a statutory newperson's privilege does not mitigate the need to recognize a first amendment privilege in state grand jury proceedings.

Finally, this Comment will show that a qualified first amendment privilege extends to grand jury proceedings in states that have not enacted shield laws. Once shield law and non-shield law states recognize the first amendment privilege, courts should apply the identical balancing test advocated for use in federal grand jury proceedings. Only in states whose shield laws confer greater protection to reporters than the

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<sup>17</sup> See, e.g., *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974).

<sup>18</sup> See, e.g., *United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982); *United States v. Hubbard*, 493 F. Supp. 202 (D.D.C. 1979).

qualified first amendment privilege is the suggested balancing test unnecessary.

## II. THE DEVELOPMENT OF THE CONSTITUTIONAL NEWSPERSON'S PRIVILEGE

In order for courts to recognize a newsmen's privilege in grand jury proceedings, the privilege must be established either by common law, by statute, or by the Constitution. At common law, courts historically did not recognize a testimonial privilege for newsmen in any form.<sup>19</sup> Jealously guarding the common law rule requiring all persons to testify, courts traditionally held that a grand jury's inquisitorial mission outweighed any interest of newsmen in maintaining the confidentiality of their sources.<sup>20</sup> Congress periodically has proposed, but never enacted, federal legislation statutorily guaranteeing a newsmen's privilege.<sup>21</sup> Based on the watershed case of *Branzburg v. Hayes*, courts in most federal jurisdictions have recognized a constitutionally derived newsmen's privilege.<sup>22</sup> Federal courts, however, have only in-

<sup>19</sup> See *Williams v. American Broadcasting Co.*, 96 F.R.D. 658 (W.D. Ark. 1983); 23 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5426 (1980). Recently, however, several jurisdictions have recognized a newsmen's federal common law privilege. See, e.g., *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Los Angeles Memorial Coliseum Comm'n v. N.F.L.*, 89 F.R.D. 489, 492 (C.D. Cal. 1981); *infra* notes 80-81 and accompanying text.

<sup>20</sup> See, e.g., *Adams v. Associated Press*, 46 F.R.D. 439 (S.D. Tex. 1969); *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D.C. Mass. 1957); *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); *In re Grunow*, 84 N.J.L. 235, 85 A. 1011 (1913); *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291, 199 N.E. 415 (1936).

<sup>21</sup> See, e.g., H.R. 6213, 94th Cong., 2d Sess. (1976); H.R. 172, 94th Cong., 1st Sess. (1975); S. 870, 93d Cong., 1st Sess. (1973); S. 1311, 92d Cong., 1st Sess. (1971); S. 3552, 91st Cong., 2d Sess. (1970).

<sup>22</sup> The District of Columbia Circuit, First Circuit, Second Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, Eighth Circuit, Ninth Circuit, and Tenth Circuit have recognized the privilege. See, e.g., *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983) (privilege recognized in criminal action); *Zerelli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (privilege recognized in civil action); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (privilege recognized in libel action); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (privilege recognized in criminal action); *Miller v. Trans-American Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (privilege recognized in libel action); *Silkwood v. Kerr-McGee*, 563 F.2d 433 (10th Cir. 1977) (privilege recognized in civil action); *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976), *aff'd en banc*, 561 F.2d 539 (1977) (privilege recognized in civil action); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (privilege recognized in criminal action); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (privilege recognized in libel action). In the Sixth and Seventh Circuits, the privilege has been recognized at the district court level. See *Gulliver's Periodicals, Ltd. v. Chas. Levy Cir. Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978) (privilege recognized in civil action); *McArdle v. Hunter*, 7 MEDIA L. REP. (BNA) 2294 (E.D. Mich. 1981) (privilege recognized in civil action). The Eleventh Circuit has yet to confront the issue.

frequently extended the privilege to grand jury proceedings.<sup>23</sup>

In *Branzburg*,<sup>24</sup> a divided Supreme Court addressed, but did not resolve, a qualified first amendment reporter's privilege. The case involved a story about the illegal production of hashish written by Paul Branzburg, a reporter for the *Louisville Courier-Journal*. Branzburg personally witnessed the hashish production.<sup>25</sup> Subpoenaed by a Kentucky grand jury, Branzburg appeared before the grand jury but claimed a first amendment reporter's privilege and refused to reveal whom he had seen make the hashish.<sup>26</sup> The Supreme Court granted certiorari on the

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<sup>23</sup> See *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *Zerelli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972).

<sup>24</sup> 408 U.S. 665 (1972). The Supreme Court, in *Branzburg*, consolidated three cases involving reporters claiming a first amendment privilege to withhold information before a grand jury. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970), *aff'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972); *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971), *rev'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

In *Caldwell v. United States*, the petitioner, Earl Caldwell, was a black reporter for the *New York Times* covering activities of the Black Panther Party in California. He not only refused to reveal confidential information before a grand jury, but also refused to attend the grand jury's secret sessions, arguing that his mere appearance would harm his confidential relationships and make it impossible for him to fulfill his first amendment responsibilities as a journalist. 434 F.2d at 1084. The Ninth Circuit Court of Appeals accepted both arguments. The court recognized Caldwell's qualified first amendment privilege and held that a grand jury could not compel a reporter to appear before it when the government had proven no compelling need for his testimony. *Id.* at 1089.

In *In re Pappas*, the petitioner, Paul Pappas, a reporter for a Providence, Rhode Island television station, had been inside a Black Panthers' headquarters at the time of riots in New Bedford, Massachusetts. A Bristol County grand jury twice subpoenaed Pappas; although he appeared the first time, he moved to quash the second subpoena on the authority of the district court's opinion in *Caldwell*. 358 Mass. at 606, 266 N.E.2d at 298. The Supreme Judicial Court of Massachusetts held that a reporter could not refuse to appear before a grand jury and denied Pappas' motion to quash the subpoena. *Id.* at 612, 266 N.E.2d at 302-03.

Justice White, in his plurality opinion in *Branzburg*, disposed of *Pappas* and *Caldwell* by rejecting a reporter's first amendment privilege to refuse to answer questions asked by a grand jury. Justice White concluded that *a fortiori* no privilege could exist to refuse to appear before a grand jury. 408 U.S. at 708. Justice Powell, in his concurring opinion, agreed: "The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him." *Id.* at 710 (Powell, J., concurring).

<sup>25</sup> *Branzburg*, 408 U.S. at 667-68.

<sup>26</sup> *Id.* at 668. *Branzburg* and its companion cases were not the first to raise the issue of a first amendment reporter's privilege. Fourteen years before *Branzburg*, the United States Court of Appeals for the Second Circuit recognized a constitutional testimonial privilege for newsgatherers in *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). Sued for defamation, reporter Torre refused to reveal the identity of her source on first amendment grounds. The court agreed that forced disclosure might unconstitutionally abridge the freedom of the press. *Id.* at 548. Noting, however, that the plaintiff was seeking limited disclosure of relevant and material information that went to the "heart of the plaintiff's claim," the court concluded that the need for the evidence outweighed the first amendment interests of Ms. Torre. *Id.* at 550. Until *Branzburg*, few courts accepted the qualified first amendment protection acknowledged in *Torre*. See *In re Goodfader's Appeal*, 45 Hawaii 317,

issue of whether a reporter who had witnessed criminal activity could, under a qualified first amendment privilege, refuse to testify before a grand jury as to what he had seen.<sup>27</sup>

Writing for a four-member plurality, Justice White rejected a first amendment privilege for reporters. Although he acknowledged that newsgathering may claim some first amendment protection,<sup>28</sup> Justice White concluded 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."<sup>29</sup> The plurality held that a reporter cannot invoke a first amendment newsperson's privilege to withhold eyewitness testimony of a crime before a grand jury even if that testimony would reveal the identity of the reporter's source.<sup>30</sup>

In a dissenting opinion joined by Justices Brennan and Marshall, Justice Stewart argued that newsgatherers do have a qualified first amendment testimonial privilege.<sup>31</sup> According to Justice Stewart, the privilege can be defeated only upon a showing by the government that (1) the information sought is clearly relevant to a specific probable violation of the law; (2) alternative sources for obtaining the information have been exhausted; and (3) a compelling and overriding interest in the information exists.<sup>32</sup> Justice Douglas, in a separate dissent, stated that newsgatherers have an absolute privilege under the first amendment to refuse to identify confidential sources and disclose any confidential information received therefrom.<sup>33</sup>

In a three-paragraph concurrence, Justice Powell explained his deciding vote in the case. Agreeing with the plurality that reporters who

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359, 367 P.2d 472, 480 (1961); *State v. Knops*, 49 Wis. 2d 647, 659, 183 N.W.2d 93, 99 (1971) (plaintiff's need for reporter's confidential information outweighed reporter's first amendment interests).

<sup>27</sup> None of the parties in *Branzburg*, *Caldwell*, or *Pappas* argued for an absolute privilege. *Branzburg*, 408 U.S. at 702. Each conceded that the qualified privilege could be overcome by the state's demonstration that a compelling need for the information existed. *Id.*

<sup>28</sup> *Id.* at 708. The first amendment protections Justice White discussed, however, applied only to harassment by a grand jury or grand jury investigations conducted in bad faith: "Grand juries are not subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Id.*

<sup>29</sup> *Id.* at 682. The plurality accepted the argument that compelling reporters to aid the grand jury in a criminal investigation would create a chilling effect on reporters' ability to gather news. The plurality did not believe, however, that the chilling effect would be great. "[T]he evidence fails to demonstrate that there would be 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." *Id.* at 693.

<sup>30</sup> *Id.* at 692.

<sup>31</sup> *Id.* at 725 (Stewart, J., dissenting).

<sup>32</sup> *Id.* at 743 (Stewart, J., dissenting).

<sup>33</sup> *Id.* at 722 (Douglas, J., dissenting).

witness a crime may be compelled to testify before a grand jury as to whom and what they saw, Justice Powell nevertheless argued that reporters are "not without constitutional rights with respect to the gathering of news or in safeguarding their sources."<sup>34</sup> Justice Powell proposed a case-by-case reviewing process whereby courts would balance the newsmen's privilege against the obligation of all citizens to testify about alleged criminal conduct.<sup>35</sup> Thus, the *Branzburg* dissenters together with Justice Powell's swing concurrence formed a five-vote majority recognizing a qualified first amendment newsmen's privilege.<sup>36</sup>

After *Branzburg*, federal courts have recognized a newsmen's qualified first amendment privilege in all judicial proceedings except grand jury proceedings.<sup>37</sup> Largely because no competing constitutional rights are involved, courts have given the privilege greatest effect in civil actions in which the media is not a party.<sup>38</sup> Most courts have followed

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<sup>34</sup> *Id.* at 709 (Powell, J., concurring).

<sup>35</sup> *Id.* Justice Powell did not clearly articulate his balancing scheme. See Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 717-18 (1975) (concluding that little, if any, conflict exists between Justice Powell's concurrence and Justice Stewart's dissent).

<sup>36</sup> Justice Powell subsequently amplified his *Branzburg* opinion in *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). Underscoring that his concurrence with the *Branzburg* plurality was limited to the narrow facts of the case, Justice Powell observed that "a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated." *Id.* at 859-60 (Powell, J., dissenting).

<sup>37</sup> See *supra* note 22. The overwhelming majority of academic commentaries likewise have construed *Branzburg* to recognize a qualified first amendment privilege. See, e.g., Goodale, *supra* note 35, at 717-18; Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 858 (1974); *Significant Development, Constitutional Law—The Newsmen's Privilege*, 53 B.U.L. REV. 497 (1973); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1137 (1972); Comment, *The Fallacy of Farber: Failure to Acknowledge the Constitutional Newsmen's Privilege in Criminal Cases*, 70 J. CRIM. L. & CRIMINOLOGY 299 (1979); Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166 (1975). But see Yarbrough, *Press Privilege Claims and Balancing Doctrine*, 31 ALA. L. REV. 523 (1980) (construing *Branzburg* to reject any first amendment reporter's privilege).

<sup>38</sup> See, e.g., *McGraw Hill v. Arizona*, 680 F.2d 5 (2d Cir. 1982) (multidistrict litigation brought against seventeen oil companies alleging Sherman Act violation); *Zerelli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (action against U.S. Attorney General alleging illegal electronic surveillance); *Riley v. Chester*, 612 F.2d 708 (3d Cir. 1979) (42 U.S.C. § 1983 action by mayoral candidate alleging civil rights violations); *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976), *aff'd en banc*, 561 F.2d 539 (1977) (contempt trial of union members charged with violating restraining order); *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (class action alleging discriminatory real estate practices); *Los Angeles Coliseum Comm'n v. N.F.L.*, 89 F.R.D. 489 (C.D. Cal. 1981) (federal antitrust and state tort claims arising from transfer of Oakland Raiders to Los Angeles); *Montezuma Realty Corp. v. Occidental Petroleum Corp.*, 494 F. Supp. 780 (S.D.N.Y. 1980) (private class action alleging violation of federal securities laws); *Altemose Constr. Co. v. Building and Constr. Trades Council*, 443 F. Supp. 489 (E.D. Pa. 1977) (federal civil action); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973) (action arising from Watergate break-in of Democratic National Headquarters).



Justice Stewart's approach in *Branzburg* and required a showing of materiality, exhaustion of alternative sources, and necessity by the party requesting the information.<sup>39</sup> In defamation cases in which the newsgatherer is a defendant, most courts have applied the Stewart balancing test, but often rule that the identity of the defendant's confidential sources is so critical to the plaintiff's claim that the privilege must yield.<sup>40</sup>

More complex are criminal cases in which defendants attempt to subpoena information in the possession of the press by contending that the information sought is necessary for their defense. In such cases, the defendant's sixth amendment right to compulsory process, which includes the right to exculpatory evidence,<sup>41</sup> collides with a reporter's first amendment privilege to protect confidential sources and information. Most federal courts have granted the newsgatherer a qualified first amendment privilege to refuse disclosure of the information.<sup>42</sup>

The qualified first amendment privilege will be upheld in criminal trial proceedings unless the defendant successfully meets the Stewart balancing test.<sup>43</sup> In *United States v. Burke*,<sup>44</sup> for example, a grand jury indicted the defendant on a point-shaving charge. The defendant, in an attempt to impeach the testimony of the prosecutor's chief witness, re-

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<sup>39</sup> See *supra* note 38.

<sup>40</sup> See, e.g., *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976).

Following the Supreme Court's decision in *Herbert v. Lando*, 441 U.S. 153 (1979) (declining to extend first amendment protection to the "editorial process" of a media defendant in a defamation action), a few courts veered sharply from the Stewart balancing test. These courts subsumed "confidential sources" within "editorial process," and interpreted the *Lando* Court's rejection of a privilege protecting editorial processes as an implicit rejection of a privilege for confidential sources. See, e.g., *DeRobert v. Gannett Co.*, 507 F. Supp. 880 (D. Hawaii 1981). A second line of cases held that a court could not compel a media defendant to disclose a source, but, as a consequence, the media defendant could not rely on the source's existence to contest actual malice. See, e.g., *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979). Other courts continued to require that the plaintiff's case be non-frivolous, the journalists' information be highly relevant, and the plaintiff must exhaust alternative sources before the privilege will fall. See, e.g., *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Miller v. Transamerica Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Dowd v. Calabrese*, 577 F. Supp. 238 (D.D.C. 1983); *Travoulares v. Piro*, 93 F.R.D. 11 (D.D.C. 1981); *Mize v. McGraw Hill, Inc.*, 86 F.R.D. 1 (S.D. Tex. 1980).

<sup>41</sup> The sixth amendment states: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." U.S. CONST. amend. VI. See *Washington v. Texas*, 388 U.S. 14 (1967); Note, *Sixth Amendment Limitations on the Newsgatherer's Privilege*, 13 *RUTGERS L.J.* 361, 378-84 (1982).

<sup>42</sup> See, e.g., *Tofani v. State*, 297 Md. 165, 465 A.2d 413 (1983).

<sup>43</sup> See *infra* text accompanying notes 44-55. See also *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *United States v. Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977).

<sup>44</sup> 700 F.2d 70 (2d Cir. 1983).

quested the trial court to subpoena the unpublished notes and drafts of a *Sports Illustrated* reporter who had interviewed the witness.<sup>45</sup> The Court of Appeals for the Second Circuit quashed the subpoena, noting that a court may order newsgatherers to disclose their sources only when the information is (1) highly material and relevant; (2) necessary or critical to the maintenance of the claim; and (3) not obtainable from other available sources.<sup>46</sup> The Second Circuit agreed with the trial court that the defendant had not met his burden.<sup>47</sup> Further, the Second Circuit found "no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence."<sup>48</sup>

The Third Circuit Court of Appeals has applied a similar balancing scheme. In *United States v. Cuthbertson*,<sup>49</sup> a grand jury indicted the defendants on counts of criminal conspiracy and fraudulent fast food franchising. The trial court subpoenaed CBS News, demanding outtakes and documents of a "Sixty Minutes" segment entitled "From Burgers to Bankruptcy" that focused on the defendants' operations.<sup>50</sup> The defendants claimed that the "Sixty Minutes" segment contained unspecified exculpatory information and potentially inconsistent statements that the defendants could use to impeach government witnesses.<sup>51</sup> CBS, citing its first amendment privilege, refused to produce the materials and was judged in contempt.<sup>52</sup> On appeal, the Third Circuit reversed the trial court's decision, holding that journalists possess a

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<sup>45</sup> *Id.* at 76.

<sup>46</sup> *Id.* at 77.

<sup>47</sup> *Id.* at 78. Balancing the defendant's sixth amendment right to "the broadest possible opportunity to cross examine [adverse] witnesses" against the reporter's qualified first amendment privilege "to maintain the integrity of its news gathering and editorial functions," *id.* at 76, the trial court had noted that the defendant already possessed "a substantial arsenal of impeachment material" including grand jury testimony, interviews with government agents, and material relating to the witness' prior criminal convictions and plea bargaining agreements. *Id.*

<sup>48</sup> *Id.* The court further stated:

To be sure, a criminal defendant has more at stake than a civil litigant and the evidentiary needs of a criminal defendant may weigh more heavily in the balance. Nevertheless, the standard of review should remain the same. Indeed, the important societal interests in the free flow of information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases. Reporters are to be encouraged to investigate and expose, free from unnecessary government intrusion, evidence of criminal wrongdoing.

*Id.* at 77. See also, *United States v. Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977) (criminal defendant's subpoena of reporter's confidential information quashed on first amendment grounds for lack of relevance).

<sup>49</sup> 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

<sup>50</sup> *Id.* at 142.

<sup>51</sup> *Id.* at 144.

<sup>52</sup> *Id.*

qualified constitutional privilege not to divulge confidential sources or to disclose unpublished information in criminal cases.<sup>53</sup> Distinguishing potential exculpatory information from information that is potentially valuable for impeachment purposes, the court, after hearing a second interlocutory appeal, ruled that as to the former, the defendants had failed to exhaust alternative sources as required by the reporter's privilege.<sup>54</sup> The court stated that it would allow the subpoena of information valuable for impeachment only after the witnesses had testified.<sup>55</sup>

Because a press that is at all times compelled to reveal confidential sources and information to criminal defendants is less likely to pursue stories involving criminal wrongdoing, many criminals will remain undetected and unpunished.<sup>56</sup> Consequently, a criminal defendant's sixth amendment right to compulsory process may not overcome, in every instance, a reporter's qualified first amendment privilege.<sup>57</sup> Constitutional rights are often not absolute.<sup>58</sup> When conflicts arise between two constitutionally based claims, courts attempt to resolve the conflict by

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<sup>53</sup> *Id.* at 147. The court reasoned that:

A defendant's sixth amendment and due process rights certainly are not irrelevant when a journalist's privilege is asserted. But rather than affecting the existence of the qualified privilege, we think that these rights are important factors that must be considered in deciding whether, in the circumstances of an individual case, the privilege must yield to the defendant's need for the information.

*Id.*

The *Cuthbertson* court also found a qualified newsperson's privilege on the basis of federal common law. See *infra* notes 80-81 and accompanying text.

<sup>54</sup> *United States v. Cuthbertson II*, 651 F.2d 189, 194, *cert. denied*, 454 U.S. 1056 (1981).

<sup>55</sup> *Id.* at 196. Other federal courts have recognized the first amendment privilege in criminal trial proceedings. See, e.g., *United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982) (reporter's privilege includes sources and unpublished information); *United States v. Hubbard*, 493 F. Supp. 202 (D.D.C. 1979) (reporter's privilege includes sources and unpublished information); *United States v. Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977) (reporter's privilege includes sources only). But see *New York Times v. Jascavich*, 349 U.S. 1301, 1302 (1978) (White, J., in chambers) ("[T]here is no present authority in this Court that a newsman need not produce documents material to the prosecution or defense of a criminal case . . . or that the obligation to obey an otherwise valid subpoena served on a newsman is conditioned upon the showing of special circumstances").

<sup>56</sup> See, e.g., *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (reporters uncover fast food franchising fraud); *United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982) (reporter uncovers illegal distribution of controlled substance); *Hammarley v. Super. Ct.*, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979) (reporter reveals assailants in California homicide); *State v. Siel*, 122 N.H. 254, 444 A.2d 499 (1982) (reporters uncover drug-related activity of homicide victim).

<sup>57</sup> See, e.g., *United States v. Hubbard*, 493 F. Supp. 202 (D.D.C. 1979) (criminal defendant's subpoena of reporter's research material quashed).

<sup>58</sup> *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (first amendment rights of press not absolute); *Estes v. Texas*, 381 U.S. 532 (1965) (first amendment rights of press not absolute); *Korematsu v. United States*, 323 U.S. 214 (1944) (fourteenth amendment right of equal protection not absolute).

means of a balancing test.<sup>59</sup> The United States Supreme Court has stated:

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other . . . [I]f the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.<sup>60</sup>

The right of a criminal defendant to subpoena exculpatory evidence is fundamental to insuring a fair trial. At the same time, reporters should be free to investigate and expose evidence of criminal wrongdoing without unnecessary intrusion. Indeed, the societal interests that justify the newsperson's privilege—the maintenance of a vigorous, aggressive, and independent press capable of participating in robust, unfettered debate<sup>61</sup>—are particularly compelling in criminal cases.

### III. APPLYING THE NEWSPERSON'S PRIVILEGE TO GRAND JURY PROCEEDINGS

A citizen's duty to testify before a grand jury is a fundamental obligation difficult to overcome.<sup>62</sup> The Supreme Court has held that the

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<sup>59</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (mother's fourteenth amendment right to privacy versus fetus's fourteenth amendment right to life); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (first amendment right of press to cover trial versus criminal defendant's fourteenth amendment right to fair trial).

<sup>60</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

<sup>61</sup> *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>62</sup> Historians have traced the origins of the grand jury back to 12th century England. Although originally established by the Crown as a counterforce to the ecclesiastical courts and as an additional means for tax collection, the grand jury evolved into a quasi-independent citizens panel to provide a fair method for instituting criminal proceedings against criminal suspects. Historically, the grand jury acted both as a "sword" and a "shield." Given the power to subpoena and grant immunity, the grand jury investigates criminal activity and, upon a threshold finding of "probable cause," indicts those persons perpetrating it. A grand jury may, however, refuse to indict if it believes the prosecutor's attempt to bring criminal charges is unfounded.

The founding fathers, sensitive to the potential for politically motivated prosecutions, insured the continued existence of the grand jury by giving it constitutional sanction in the Bill of Rights. The grand jury is thus the sole method for bringing federal charges in serious criminal cases. The grand jury's continued constitutional status underscores the belief that the power to prosecute is susceptible to abuse if left to the unbridled discretion of the prosecutors. See generally M. FRANKEL & G. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* (1977).

A grand jury's ability to pursue its mission is unhampered by rigid procedural or evidential rules. Its investigative powers are broad, and the scope of its inquiry is neither predetermined nor predirected. Over the years, the law has strengthened and even expanded the grand jury's vast inquisitorial powers. For example, a grand jury may base an indictment solely on hearsay evidence. *Costello v. United States*, 350 U.S. 359 (1956). A grand jury can subpoena any party within its jurisdiction upon short notice and without prior justification of its need for the evidence. See *Blair v. United States*, 250 U.S. 273, 282 (1919). The grand jury

public's right to "everyman's testimony"<sup>63</sup> is "particularly applicable to grand jury proceedings."<sup>64</sup> The power of the grand jury to compel testimony, however, is limited: "A grand jury may not violate a valid privilege, whether established by the Constitution, statutes, or the common law."<sup>65</sup> Likewise, grand jury proceedings may not compromise a witness' constitutional rights and protections. A grand jury cannot require witnesses to testify against themselves in violation of the fifth amend-

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can conduct "fishing expeditions" to detect possible criminal activity without first establishing the likelihood that any offense has been committed. *See id.*; *Hendricks v. United States*, 223 U.S. 178, 184 (1911). The grand jury also can compel witnesses' testimony by granting immunity and using the court's contempt power to force compliance with the immunity order. *See Kastigor v. United States*, 406 U.S. 441, 448 (1972). If witnesses persist in their silence, a court may hold them in contempt and imprison them. *See, e.g.*, 28 U.S.C. § 1826 (1976).

The limited rights of grand jury witnesses further enhance the grand jury's extraordinary powers. In many jurisdictions, grand jury witnesses have no right to prior notice of the subject matter under investigation, *Blair*, 250 U.S. at 282-83; no right to be told whether they are the target of the investigation, *United States v. Washington*, 431 U.S. 181 (1977); no absolute right to be informed of their privilege against self-incrimination, *Lawn v. United States*, 355 U.S. 339 (1958); no right to refuse to answer questions based on evidence obtained in an unlawful search and seizure, *United States v. Calandra*, 414 U.S. 338 (1974); no right to counsel's assistance in the grand jury room, *see In re Groban*, 352 U.S. 330, 335 (1957); and no right to have their testimony recorded, *see Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE* 1026 (5th ed. 1980), and sources cited therein.

Courts tolerate weak or erroneous grand jury indictments because the indictee still is entitled at trial to a strict observance of all the rules designed to bring about a fair verdict. Requiring the observance of evidentiary rules "would saddle the grand jury process with mini-trials and preliminary showings [that] would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States v. Dionisio*, 410 U.S. 1, 17 (1973). *See generally* L. CLARK, *THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER* (1975); Arenella, *Reforming the State Grand Jury System*, 13 RUTGERS L. REV. 2 (1981); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701 (1972).

Despite its formidable powers, the grand jury is almost always dependent on the prosecutor for information, advice, and direction. Grand jurors frequently do not understand their rights and responsibilities. With no judicial oversight, the prosecutor, acting through the grand jury, is able to wield the extraordinary powers reserved for the grand jury alone. Indeed, most commentators agree that the modern investigating grand jury is no more than an arm of the prosecution. *See generally* L. CLARK, *THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER* (1975); M. FRANKEL & G. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* (1977); Arenella, *Reforming the State Grand Jury System*, 13 RUTGERS L. REV. 2 (1981); Geratein & Robinson, *Remedy for the Grand Jury: Retain but Reform*, 69 A.B.A. J. 337 (1978); McGough, *Trials of a Grand Juror*, 65 A.B.A. J. 725 (1979).

<sup>63</sup> *United States v. Bryan*, 339 U.S. 323, 331 (1950).

<sup>64</sup> *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972). In *United States v. Calandra*, the Court stated that:

The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as "so necessary to the administration of justice" that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure.

414 U.S. 338, 345 (1974).

<sup>65</sup> *Calandra*, 414 U.S. at 346. In *Calandra*, the Court held that the fourth amendment exclusionary rule does not apply to grand jury proceedings.

ment guarantee against self-incrimination.<sup>66</sup> The fourth amendment also protects legitimate privacy interests from grand jury invasion. A grand jury's subpoena duces tecum,<sup>67</sup> for instance, is invalid if it is "far too sweeping in its terms to be regarded as reasonable" under the fourth amendment.<sup>68</sup>

Grand jury proceedings do not command the same constitutional imperatives as criminal trials. The fifth amendment requires a grand jury indictment as a condition precedent to a federal criminal trial.<sup>69</sup> The right to have a jury of one's peers consider the evidence before the commencement of a criminal prosecution belongs to the criminal suspect.<sup>70</sup> On the other hand, the fifth amendment does not give the grand jury the right to compel testimony. The efficient and effective operation of the grand jury, including broad investigatory powers and the judicially sanctioned right to everyman's testimony, although important, is not guaranteed, therefore, by the constitution.

A criminal defendant's need for exculpatory information is weightier than the government's interest in prosecuting crime because the former, through the sixth amendment, is constitutionally protected and the latter is not.<sup>71</sup> Yet, despite the constitutional guarantee of compulsory process, a criminal defendant's attempt to compel disclosure of confidential information from a newsgatherer does not automatically succeed. Courts routinely apply the Stewart balancing test when a reporter asserts a first amendment privilege in criminal proceedings, and frequently deny a criminal defendant's request for a reporter's confidential information when the defendant is unable to demonstrate that the desired information is necessary, material, and unavailable from an alternative source.<sup>72</sup> At the same time, courts routinely refuse to extend the first amendment privilege to grand jury proceedings even though the grand jury's ability to force disclosure of a reporter's testimony, although at times compelling, is not constitutionally guaranteed.<sup>73</sup>

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<sup>66</sup> *Id.* Similarly, a grand jury cannot require witnesses to produce private books and records that would incriminate them. *See Boyd v. United States*, 116 U.S. 616, 633-35 (1886).

<sup>67</sup> A subpoena duces tecum requires production of books, papers, and other things. BLACK'S LAW DICTIONARY 1279 (5th ed. 1979).

<sup>68</sup> *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

<sup>69</sup> U.S. CONST. amend. V.

<sup>70</sup> *Calandra*, 414 U.S. at 343.

<sup>71</sup> *See supra* note 41.

<sup>72</sup> *See, e.g., United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *United States v. Hubbard*, 493 F. Supp. 202 (D.D.C. 1979); *United States v. Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977); *Hammarley v. Super. Ct.*, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979); *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974).

<sup>73</sup> *See, e.g., Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975); *Tofani v. State*, 297 Md.

Courts have recognized that the interest of criminal defendants in securing relevant information for their trials is greater than the prosecutor's interest in investigating criminal activity through a grand jury.<sup>74</sup> If courts recognize and weigh a qualified first amendment privilege when a competing constitutional interest is at stake, *a fortiori* courts should recognize and weigh the privilege when no competing constitutional interest exists. Thus, the refusal to extend the reporter's privilege to grand jury proceedings while simultaneously recognizing the privilege in criminal trial proceedings is at best anomalous, at worst constitutionally inconsistent.<sup>75</sup>

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165, 465 A.2d 413 (1983); *Andrews v. Andreoli*, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977).

<sup>74</sup> For example, in *United States v. Liddy*, a District of Columbia district court observed that "while the public has a crucial interest in the investigation and punishment of criminal activity, it must have an even deeper interest in assuring that a defendant receives a fair trial." 354 F. Supp. 208, 215 (D.D.C. 1972). Because the *Liddy* court interpreted *Branzburg* as rejecting a first amendment privilege in grand jury proceedings, the court rejected *a fortiori* a first amendment privilege in criminal trial proceedings. Similarly, in *Brown v. Commonwealth*, the Virginia Supreme Court stressed that "[t]he Sixth Amendment rights of a citizen accused of a crime . . . to 'call for evidence in his favor' are rights of no less dignity than the right to the government to prosecute." 214 Va. 755, 757, 264 S.E.2d 429, 431, *cert. denied*, 419 U.S. 966 (1974).

<sup>75</sup> The Ninth Circuit Court of Appeals, the only federal circuit that has directly confronted the claim of a first amendment privilege in grand jury proceedings, illustrates this inconsistency. In *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975), the general manager of a Los Angeles radio station refused to comply with a federal grand jury subpoena for production of an original "communique" from the Symbionese Liberation Army. The trial court held Lewis in civil contempt and the Ninth Circuit affirmed, concluding that under *Branzburg* "the first amendment does not afford a reporter a privilege to refuse to testify before a federal grand jury as to information received in confidence." *Id.* at 238.

The *Lewis* panel, curiously, ignored their colleague's holding in *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972), that the first amendment privilege extended to grand jury proceedings. *Burse* involved a grand jury subpoena of two reporters from *Black Panther* newspaper. The reporters appeared before the grand jury but refused to answer questions relating to information received in confidence or relating to the management of the paper. The Ninth Circuit held that the government could overcome the reporter's first amendment privilege only upon a showing of relevance, compelling need, and exhaustion of alternative sources.

The *Burse* court went on to point out that:

When the collision occurs in the context of a grand jury investigation, the Government's burden is not met unless it establishes 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 information is not more drastic than necessary to forward the asserted governmental interest.

*Burse*, 466 F.2d at 1083.

Because the *Burse* court released the case the day following the *Branzburg* decision, and thus probably wrote the opinion before *Branzburg*, the government moved for a rehearing on the ground that the *Burse* holding was inconsistent with *Branzburg*. The court denied the motion, noting that nothing in its holding would permit "a grand jury witness to refuse on First Amendment grounds to identify a person whom he has seen committing a crime." *Id.* at 1090-91. The court concluded:

Courts have interpreted *Branzburg* to preclude the use of the news-person's privilege in grand jury proceedings for a number of reasons. The primary reason is that courts have misapplied *Branzburg's* narrow holding. In *Branzburg*, the Supreme Court made clear that reporters who observe a crime must testify before a grand jury as to whom and what they saw.<sup>76</sup> Courts, however, have overextrapolated this holding and refused to extend a qualified first amendment privilege to grand jury proceedings when reporters receive confidential information about, but do not personally witness, a crime. *Branzburg* does not stand for the proposition that the first amendment privilege does not apply to any grand jury proceeding; a majority of the justices in *Branzburg* recognized that the privilege may extend to grand jury proceedings.<sup>77</sup>

A second argument is that some courts might distinguish grand jury from criminal proceedings because, unlike criminal proceedings, grand juries operate in secret and do not adjudicate guilt or innocence. Because of the secrecy of grand jury proceedings, therefore, reporters' testimony before a grand jury does not compromise their sources.<sup>78</sup> The

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We have reexamined our analysis of the factors involved in balancing the First Amendment rights against the governmental interests asserted to justify compelling answers to the questions here involved, and we have concluded that the balance we struck is not impaired by *Branzburg*.

*Id.* at 1091.

Four months later, in *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), the Ninth Circuit recognized the first amendment privilege in criminal trial proceedings. *Farr*, a reporter for the *Los Angeles Herald Examiner*, covered the Charles Manson trial. He obtained and published a description of a witness' confidential statement from a party subject to a gag order. After the verdict, the trial judge attempted to uncover the identity of the individuals violating the gag order by ordering *Farr* to appear before him and reveal his confidential sources. *Id.* at 466. *Farr* refused on first amendment grounds and was held in contempt. *Id.*

The Ninth Circuit affirmed the contempt citation, but nevertheless interpreted *Branzburg* to recognize a first amendment privilege in civil and criminal proceedings. *Id.* The court stated that the "First Amendment privilege and the opposing need for disclosure [should] be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest." *Id.* Without further defining the balancing test, the court ruled that in order to guarantee a fair trial, the newsperson's privilege must yield to the more important and compelling need for disclosure.

<sup>76</sup> *Branzburg v. Hayes*, 408 U.S. 665, 692 (1972). Even though invited to a crime by a third-party "source," reporters who actually witness the crime themselves become sources of information. Reporters, therefore, are not privileged to refuse to reveal the identities of those they personally observe committing crimes. *In re Ziegler*, 550 F. Supp. 530 (W.D.N.Y. 1982); *Pankratz v. Colorado District Court*, 609 P.2d 1101 (Colo. 1980); *People v. Dan*, 41 A.D.2d 687, 342 N.Y.S.2d 731, *appeal dismissed*, 34 N.Y.2d 764, 344 N.Y.S.2d 955 (1973). Assertion of the privilege in this relatively uncommon situation, where the reporter is an information source, is in contrast to the assertion of the privilege to protect sources who relate information to a reporter who has no first-hand knowledge of the crime.

<sup>77</sup> See *supra* text accompanying notes 24-36.

<sup>78</sup> In his *Branzburg* plurality opinion, Justice White made a similar argument:

Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers, and have their



secrecy argument fails, however, because a reporter's disclosures before a grand jury are not a secret to the prosecutor or the government.<sup>79</sup> No evidence exists that newsgatherers believe that disclosure of confidential information before a grand jury is less damaging than disclosures of confidential information in other judicial proceedings.

Another reason against extending the qualified first amendment privilege to grand jury proceedings is the existence of a federal common law newsperson's privilege. The Third Circuit Court of Appeals has recently recognized such a federal common law privilege and applied it to grand jury proceedings.<sup>80</sup> As interpreted by the Third Circuit, the fed-

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own methods for protecting them without interference with the effective administration of justice. There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would, in fact be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.

*Branzburg*, 408 U.S. at 695.

<sup>79</sup> In *Bursey v. United States*, the Ninth Circuit pointed out:

The secrecy of the grand jury proceedings did little to soften the blow to the First Amendment rights. The public did not know what the grand jury learned, but the proceedings were no secret to the Government. A Government lawyer initiated the investigation. A Government lawyer presented the evidence to the grand jury. Political dissidents who criticize the Government may well have more to fear about disclosure to the Government than to anyone else, and the Government heard every word.

466 F.2d at 1086.

<sup>80</sup> *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979). This second ground for recognition is a relatively recent development. Scholars universally concede that no journalist's privilege existed at common law. See C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5426 (1980); see also *Williams v. American Broadcasting Co.*, 96 F.R.D. 658 (W.D. Ark. 1983).

Notwithstanding this lack of precedent, the Court of Appeals for the Third Circuit, in *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979) (recognizing reporter's privilege in a federal civil rights action), concluded that reporters have a federal common law privilege to refuse to divulge information collected in the process of newsgathering. The *Riley* court based this conclusion on Rule 501 of the Federal Rules of Evidence, which provides in part that "[e]xcept as otherwise required . . . the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." FED. R. EVID. 501. The *Riley* court reasoned:

The legislative history of Rule 501 manifests that its flexible language was designed to encompass, *inter alia*, a reporter's privilege not to disclose a source. The original draft of the rule defined nine specific non-constitutional privileges, but failed to include among the enumerated privileges one for a reporter or journalist. The Advisory Committee gave no reason for the omission. This was one of the primary focuses of the congressional review of the proposed evidentiary rules, stemming in part from the "nationwide discussions of the newspaperman's privilege." Following testimony on behalf of groups such as the Reporter's Committee for Freedom of the Press, the privilege rule was revised to eliminate the proposed specific rules on privileges and to leave the law of privilege in its current state to be developed by the federal courts.

612 F.2d at 714 (emphasis in original). Because the proposed rule did not include the newsperson's privilege in its original list of privileges and because the draftsmen later deleted the

eral common law privilege confers protection identical to the constitutional privilege. Although the creation of a federal common law privilege circumvents the need to interpret and apply the *Branzburg* decision, only one federal district court outside the Third Circuit has recognized a similar common law privilege.<sup>81</sup> The federal common law privilege's most fatal shortcoming, however, is that it does not apply to the states.

A final argument against extending the qualified first amendment privilege to grand jury proceedings is the existence of a federal administrative newsperson's privilege.<sup>82</sup> The federal administrative newsperson's privilege is inadequate because it is no more than guidelines issued by the United States Attorney General regulating federal prosecutors' power to issue subpoenas to the media.<sup>83</sup> The privilege does not have the force of law.<sup>84</sup> The Attorney General may excuse a federal prosecutor from complying with the guidelines or rescind the requirements at any time.<sup>85</sup> The guidelines are not, of course, binding on state prosecutors.

A small number of federal courts have recognized the need to ex-

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enumerated privileges, the Third Circuit inferred that Congress' ultimate desire was for the courts to develop such a privilege.

The federal common law privilege may be overcome upon a showing of relevance, necessity, and exhaustion of alternative sources—in short, upon satisfaction of Justice Stewart's test. Thus, the Third Circuit has interpreted the common law privilege to provide protection identical to that of the first amendment privilege. *Cuthbertson*, 630 F.2d at 143.

<sup>81</sup> *Los Angeles Memorial Coliseum Comm'n v. N.F.L.*, 89 F.R.D. 489 (C.D. Cal. 1981).

<sup>82</sup> The *Branzburg* decision resulted in the creation of an administrative reporter's privilege covering federal government subpoenas. 28 C.F.R. § 50.10 (1979). In 1973, the United States Attorney General issued guidelines regulating the government's power to issue subpoenas to the media, as well as to interrogate, arrest, or indict reporters. These guidelines apply to both criminal trials and grand jury proceedings. The guidelines bear a striking similarity to Justice Stewart's three-part balancing test. Federal prosecutors can subpoena members of the media only if the desired information is not obtainable through alternative sources or investigative steps. *Id.* Federal prosecutors can subpoena members of the media only in criminal cases, and then only if the government has independent reason to believe that the information sought is essential to the successful investigation or prosecution of a crime. *Id.*

The guidelines instruct government lawyers to attempt to accommodate the media's interest by negotiating with newsgatherers when a subpoena is contemplated. Absent exigent circumstances, government lawyers are not to question, arrest, or indict reporters for offenses arising out of reporter's newsgathering activities without the Attorney General's prior consent. *Id.*

<sup>83</sup> 28 C.F.R. § 50.10 (1979).

<sup>84</sup> Although the guidelines do not have the force of law, courts occasionally take cognizance of the guideline requirements. *See Maurice v. NLRB*, 691 F.2d 182 (4th Cir. 1982) (quashing NLRB subpoena for failure to comply with administrative guidelines); *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975) (refusing to overturn contempt citation in part because administrative guidelines were followed); *United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982) (quashing subpoena of reporter in part because federal prosecutor did not comply with guideline requirements of exhaustion of sources and good faith negotiation).

<sup>85</sup> 28 C.F.R. § 50.10 (1979).

tend the qualified first amendment privilege to grand jury proceedings. In *United States v. Burke*, the Second Circuit Court of Appeals admitted the need "to balance first amendment values even where a reporter is asked to testify before a grand jury."<sup>86</sup> Similarly, in *Zerelli v. Smith*, the Circuit Court of Appeals for the District of Columbia concluded that "a qualified privilege would be available in some circumstances even where a reporter is called before a grand jury to testify."<sup>87</sup> Neither *Burke* nor *Zerelli*, however, were grand jury cases. The courts' recognition of a constitutional privilege in grand jury proceedings, therefore, has only the force of dicta.<sup>88</sup>

Constitutional rights and protections afforded a witness are not subject to compromise in grand jury proceedings. Courts should recognize the current inconsistency involving the first amendment newsperson's privilege, and, by extending the privilege to grand jury proceedings, resolve this inconsistency.

The first amendment privilege is, however, a qualified privilege.<sup>89</sup> Thus, courts must formulate a balancing test to weigh the privilege when a reporter asserts the privilege in grand jury proceedings.

#### IV. THE BALANCING TEST

The first amendment privilege recognized by the *Branzburg* Court and, subsequently, by lower courts in civil and criminal proceedings, is a qualified privilege.<sup>90</sup> Thus, courts have adopted the Stewart balancing test to weigh the privilege against the competing interests involved.<sup>91</sup>

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<sup>86</sup> 700 F.2d 70, 77 (2d Cir. 1983).

<sup>87</sup> 656 F.2d 705, 711 (D.C. Cir. 1981).

<sup>88</sup> In *In re Grand Jury Subpoenas*, 8 MEDIA L. REP. (BNA) 1418 (D. Colo. 1982), a federal court seemingly did extend the privilege to grand jury proceedings. A federal grand jury was investigating charges that a secret service agent improperly removed pictures of John Hinckley, Jr. during a search of Hinckley's parents' home. *Id.* United Press International allegedly obtained the pictures, and the government subpoenaed a UPI employee to testify. *Id.* The court granted a motion to quash the subpoena after weighing the employee's first amendment rights against the government's interest in pursuing a criminal investigation. *Id.* at 1420.

<sup>89</sup> See, e.g., *Zerelli*, 656 F.2d at 711; *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

<sup>90</sup> Courts have uniformly recognized that the newsperson's privilege, like other first amendment rights, is not an absolute, but a qualified right. See *Tofani v. State*, 297 Md. 165, 465 A.2d 413 (1983), and cases cited therein. Justice Douglas is the only member of the Supreme Court who has argued that nothing short of an absolute privilege for reporters will satisfy the first amendment. *Branzburg v. Hayes*, 408 U.S. 665 (1972) (Douglas, J., dissenting).

<sup>91</sup> See, e.g., *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983) (Stewart test applied in criminal proceeding); *Zerelli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (Stewart test applied in civil action); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (Stewart test applied in libel action); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979) (Stewart test applied in civil action); *United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982) (Stewart test applied in criminal proceeding).

Because the privilege in grand jury proceedings also will be a qualified privilege, courts will require a balancing test to weigh the privilege against the competing interests of the grand jury. Justice Stewart's balancing test is the best test to apply in grand jury proceedings. The Stewart test, requiring a three-fold showing of relevance, exhaustion of alternative sources, and necessity, equitably balances the rights of both the reporter and the grand jury.

The initial inquiry into the materiality of the privileged information insures that before a grand jury can compel a newsperson to reveal confidential information, the grand jury must establish that the information is relevant to an investigation of a probable criminal violation. Although grand juries have broad powers of investigation,<sup>92</sup> an inquiry into the materiality of the information sought does not deny grand juries the opportunity to investigate and detect criminal misconduct. Because the reporter's privilege is a constitutionally protected interest, the materiality requirement merely insures that interference with the privilege is related to an investigation into real, rather than imaginary, criminal wrongdoing. Thus, the materiality requirement provides a useful threshold for a grand jury to cross before a court will consider further the grand jury's challenge to the newsperson's privilege.

Second, the grand jury must exhaust alternative sources of the desired information before subpoenaing a reporter. Like the materiality requirement, the exhaustion requirement will not significantly hinder grand jury investigations. Individuals who actually participate in or witness an alleged crime will often be better sources of information than reporters. In other cases, the testimony of alternative sources who are not eyewitnesses to the alleged crime may be just as useful to a grand jury investigation as a reporter's testimony.<sup>93</sup>

By permitting a court to compel a reporter to reveal confidential information only when other sources are unavailable, the exhaustion requirement attempts to avoid a first amendment confrontation. If alternative sources are reasonably identifiable and available, the grand jury must take steps to subpoena them.<sup>94</sup> Conversely, the exhaustion requirement is satisfied when alternative sources are inaccessible or ques-

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<sup>92</sup> For a discussion of the investigatory powers and limits of the grand jury, see *supra* notes 62-68 and accompanying text.

<sup>93</sup> For instance, a non-reporter who receives information from an eyewitness to a crime will likely be as useful to a grand jury as a reporter who receives information from the same eyewitness.

<sup>94</sup> See, e.g., *Burke*, 700 F.2d at 77 (third-party witness to reporter's interview available as alternative source); *Zerelli*, 656 F.2d at 713 (Justice Department employees available as alternative source); *Carey v. Hume*, 492 F.2d 631, 638 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974) (alternative source unidentifiable, thus exhaustion requirement satisfied).

tioned without success.<sup>95</sup>

A more difficult question arises when the number of potential alternative sources is so great that questioning them all is burdensome. Courts have held that in civil proceedings, deposing even more than fifty alternative sources is not an unreasonable burden.<sup>96</sup> Because the first amendment issues are the same in grand jury proceedings as in civil proceedings,<sup>97</sup> a similar rule should extend to grand jury proceedings.

Third, the balancing test requires the prosecutor to show a compelling and overriding interest in obtaining a newsgatherer's confidential information. This requirement is in accord with the established doctrine that absent a compelling state interest, a first amendment right may not be infringed.<sup>98</sup> The most useful way of applying this test is to ask whether the information sought goes to the heart of the claim.<sup>99</sup> In a grand jury proceeding, a compelling interest would require that the information be necessary or essential for the grand jury's determination whether or not to indict.<sup>100</sup>

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<sup>95</sup> See *Trautman v. Dallas School Dist.*, 8 MEDIA L. REP. (BNA) 1088 (N.D. Tex. 1981) (reporter held in contempt for refusing to reveal confidential information after plaintiff satisfied exhaustion requirement); *United Liquor v. Gard*, 88 F.R.D. 123 (D. Ariz. 1980), *appeal dismissed*, 685 F.2d 446 (9th Cir. 1982) (reporter compelled to reveal confidential information after plaintiff satisfied exhaustion requirement).

<sup>96</sup> See *In re Roche*, 448 U.S. 1312 (1980) (Brennan, J., in chambers) (sixty-five subpoenas not unreasonable to satisfy exhaustion requirement); *Zerelli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (sixty depositions not unreasonable to satisfy exhaustion requirement); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1972), *cert. dismissed*, 417 U.S. 938 (1974) (sixty depositions not unreasonable to satisfy exhaustion requirement). *But see* *United States v. Steelhammer*, 561 F.2d 539 (4th Cir. 1977) (reporter attending union rally compelled to testify notwithstanding availability of alternative sources).

<sup>97</sup> *Burke*, 700 F.2d at 77.

<sup>98</sup> *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 546 (1963); *NAACP v. Button*, 371 U.S. 415, 438 (1963).

<sup>99</sup> *Miller v. Transamerican Press Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Carey*, 492 F.2d at 636.

<sup>100</sup> A number of courts in non-grand jury proceedings have ordered *in camera* inspection of subpoenaed information. In some situations, it may be difficult for a court to determine whether a party has a compelling interest in obtaining subpoenaed information unless the court is able to examine that information. Although *in camera* inspection has a superficial appeal, *in camera* production still compromises the first amendment rights of the press, particularly if the court requires no preliminary showing of relevance and exhaustion of other sources. On several occasions, Justice Marshall has noted that forced disclosure, even to a judge for an *in camera* inspection, might well have a deleterious effect on the ability of the press to gather news. See *New York Times v. Jascavich*, 439 U.S. 1331 (August 4, 1978) (Marshall, J., in chambers); *New York Times v. Jascavich*, 439 U.S. 1304 (July 12, 1978) (Marshall, J., in chambers).

*United States v. Cuthbertson* highlighted one danger to the press posed by *in camera* inspection. In *Cuthbertson*, the trial court ordered CBS to submit tapes of interviews for an *in camera* determination of whether the tapes contained material for impeachment. CBS complied with the order. *United States v. Cuthbertson II*, 651 F.2d 189, 192 (3d Cir.), *cert. denied*, 454 U.S. 1056 (1981). After the *in camera* inspection, the trial court concluded that the produced materials would materially aid the defendants in the preparation of their case and ordered

Courts should extend the Stewart balancing test to grand jury proceedings because the test is fair and easy to apply. Although the test shields reporters from most grand jury subpoenas, the test is not so impervious as to frustrate effective grand jury investigations of criminal activity. If a grand jury requires a reporter's testimony to resolve an investigation of a probable criminal violation, the grand jury can compel the reporter's testimony.

In addition, the balancing test does not require a court to weigh normative judgments regarding the public's interest in a case, the magnitude of the chilling effect on first amendment rights, or the nature of the crime the grand jury is investigating against the strength of the first amendment claim. Rather, courts applying the balancing test need consider only factors that involve the resolution of the grand jury's investigation. Of course, judging whether the requirements of relevance, exhaustion of alternative sources, and necessity are met will not come about through wholly objective analyses. Determining whether a reporter's confidential information will resolve a grand jury investigation, however, should invite far more predictability and objectivity than a judgment that attempts to measure the degree to which the disclosure of a reporter's confidential information compromises the freedom of the press. The three-part test strikes a balance between the important interest of the prosecutor and the grand jury in pursuing criminal investigations on the one hand, and the media's constitutionally protected interest in gathering and disseminating information on the other.

## V. THE STATUTORY NEWSPERSON'S PRIVILEGE

Although the Supreme Court in *Branzburg* failed to resolve the issue of the constitutional reporter's privilege,<sup>101</sup> the Court made clear that states may legislate their own newsmen's privilege, even in grand jury proceedings.<sup>102</sup> This holding is consistent with the established doctrine that states may provide stronger protections than those afforded by the United States Constitution.<sup>103</sup> Indeed, state statutory testimonial privi-

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CBS to produce the materials to the defendants before trial. *Id.* The trial court neglected, however, to reapply the balancing test before releasing the exculpatory tapes. The Third Circuit reversed the order in *Cuthbertson II*. *Id.*; see *supra* notes 49-55 and accompanying text.

<sup>101</sup> See *supra* notes 24-56 and accompanying text.

<sup>102</sup> *Branzburg*, 408 U.S. at 706:

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 require a newsmen's privilege, either qualified or absolute.

<sup>103</sup> *San Antonio Indep. School Dist. v. Rodriguez*, 441 U.S. 1 (1973).

leges, or "shield laws," have existed for many years.<sup>104</sup> At present, twenty-six states have enacted shield laws of various types.<sup>105</sup> Shield laws vary greatly in the scope and qualifications of the newsperson's privilege. Most of the statutes apply to all formal state proceedings, including administrative hearings, trial proceedings, legislative committee hearings, and grand jury proceedings.<sup>106</sup>

Although shield laws in most states extend to grand jury proceedings, shield laws do not mitigate the need to recognize the qualified first amendment privilege in state grand jury proceedings. Because the first amendment applies to the states,<sup>107</sup> the existence of a qualified first amendment privilege that extends to grand jury proceedings also applies to the states. Yet, few shield laws provide newsgatherers with protection that equals or exceeds the constitutional privilege. Thus, in virtually all states, the statutory newsperson's privilege is an insufficient substitute for the recognition of the constitutional privilege.

Four states have legislated an absolute newsperson's privilege.<sup>108</sup> In these states, a grand jury cannot compel a reporter to reveal confidential information that is obtained in newsgathering-related activities. Presumably, this absolute privilege applies even when a reporter observes criminal activity. Despite its potentially unlimited protection, the absolute privilege is in reality not nearly so far reaching. Only in New Jersey

<sup>104</sup> Maryland enacted the first shield law in 1893. Law of April 2, 1886, ch. 249, 1886 Md. Laws 437 (now codified as MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1980)).

<sup>105</sup> ALA. CODE § 12-21-142 (1975); ALASKA STAT. §§ 09.25.150-220 (Supp. 1982); ARIZ. REV. STAT. ANN. § 12-2237 (1982); ARK. STAT. ANN. § 43-917 (Repl. 1977); CAL. EVID. CODE § 1070 (West 1983); DEL. CODE ANN. tit. 10, §§ 4320-26 (1974); ILL. REV. STAT. ch. 110, §§ 8-901 to -909 (1983); IND. CODE ANN. § 34-3-5-1 (Burns 1982); KY. REV. STAT. ANN. § 421.100 (Baldwin 1971); LA. REV. STAT. ANN. §§ 45:1451-1454 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. §§ 9-112 (1980); MICH. COMP. LAWS ANN. § 767.5a (West 1982); MINN. STAT. ANN. §§ 595.021-025 (West Supp. 1978); MONT. CODE ANN. § 93-601-2 (Supp. 1977); NEB. REV. STAT. §§ 20-144 to -147 (1977); NEV. REV. STAT. §§ 49.275, .385 (1981); N.J. STAT. ANN. §§ 2A:84A-21.2 to .8 (West Supp. 1982); N.M. STAT. ANN. § 38-6-7 (1982); N.Y. CIV. RIGHTS LAW § 79-h (Consol. 1981); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. § 2739.04 (Page Supp. 1982); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. §§ 44.510-540 (1979); PA. STAT. ANN. tit. 42, § 942 (Purdon 1982); R.I. GEN. LAWS §§ 9-19.1-1 to .1-3 (Supp. 1982); TENN. CODE ANN. § 24-1-208 (1980).

<sup>106</sup> No shield law statute specifically excludes grand jury proceedings. No reported cases have construed a shield law to deny the privilege in grand jury proceedings. Although one Michigan court has construed its shield law to apply solely to grand jury proceedings, *Michigan v. Smith*, 9 MEDIA L. REP. (BNA) 1753 (Mich. Cir. Ct. 1978), another Michigan court has recognized the first amendment privilege, *In re Photo Marketing Assoc. Int'l*, 120 Mich. App. 527, 327 N.W.2d 515 (1982).

<sup>107</sup> *Gitlow v. New York*, 268 U.S. 652 (1925) (the United States Supreme Court applied the first amendment to the states through the Due Process Clause of the fourteenth amendment).

<sup>108</sup> ARIZ. REV. STAT. ANN. § 12-2237 (1982); NEB. REV. STAT. §§ 20-144 to -147 (1977); N.J. STAT. ANN. §§ 2A:84A-21.1 to .8 (West Supp. 1982); OHIO REV. CODE ANN. § 2739.04 (Page Supp. 1982).

has a court stated that the shield law affords an absolute privilege in all proceedings absent a conflicting constitutional right.<sup>109</sup> Appellate courts in Arizona, Nebraska, and Ohio have yet to consider the extent of a shield law's protection in grand jury proceedings.<sup>110</sup> Consequently, a reporter in these states has no assurance that courts will give a literal interpretation to the shield law's language.<sup>111</sup>

The remaining twenty-two states have a qualified statutory testimonial privilege.<sup>112</sup> Many of the shield laws afford newsgatherers less protection than the qualified first amendment privilege. The qualified first amendment privilege can be overcome only by a showing of rele-

<sup>109</sup> *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376 (1982) ("New Jersey Shield Law affords newsmen an absolute privilege not to disclose confidential sources and editorial processes, absent any conflicting constitutional right"). Shield laws sometimes yield to competing federal and state constitutional concerns. When criminal defendants subpoena a newsgatherer to obtain confidential information, courts have surrendered the reporter's statutory privilege to the defendant's sixth amendment rights to compulsory process and a fair trial. *United States v. Homer*, 411 F. Supp. 972 (W.D. Pa. 1976) (Pennsylvania shield law not permitted to stand in the way when inquiry goes to heart of the matter in a criminal case in federal court); *Hammarley v. Super. Ct.*, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979) (statutory privilege must yield to defendant's sixth amendment right of compulsory process); *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978) (statutory privilege must yield to defendant's sixth amendment right of compulsory process); *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906 (1978) (New Mexico shield law conflicts with court established rule of evidence and thus violates the separation of powers clause of the New Mexico Constitution); *In re McAuley*, 65 Ohio App. 2d 5, 408 N.E.2d 697 (1979) (requiring criminal defendant to prove that 1) the reporter had information relevant to guilt or innocence; 2) the defendant had exhausted all other available sources; 3) the defendant made an effort to obtain related, nonconfidential information from reporter; and 4) the defendant had requested an *in camera* inspection of information).

<sup>110</sup> No reported cases exist in Nebraska regarding any aspect of the shield law.

<sup>111</sup> A Maricopa County Circuit Court judge has ruled that the Arizona shield law does not extend to a reporter's personal observation of an alleged crime that a grand jury is investigating. *In re O'Neill*, No. 49 G.J. 440 (Ariz. Dist. Ct. Sept. 9, 1983).

<sup>112</sup> Two states have shield laws that grant newsgatherers immunity from contempt citations rather than a privilege against disclosure. CAL. EVID. CODE § 1070 (West 1983); N.Y. CIV. RIGHTS LAW § 79-h (Consol. 1981). Thus, courts may impose other sanctions on the media in civil cases where the reporter is a party. See *KSDO v. Superior Court of Riverside County*, 136 Cal. App. 3d 383, 186 Cal. Rptr. 211 (1982) (court sanctions under California shield law include striking reporter's defense or entering default judgment); *Rancho la Costa v. Penthouse*, 6 MEDIA L. REP. (BNA) 1540 (1980), cert. denied and appeal dismissed, 450 U.S. 902 (1981) (court sanctions under California shield law may include preclusion of a reporter's defense); *Oak Beach Inn v. Babylon Beacon*, 62 N.Y.2d 158, 476 N.Y.S.2d 269 (1984) (court sanctions under New York shield law should be no more drastic than necessary to protect legitimate interests of the press).

Some states allow the privilege to be overcome upon the satisfaction of certain elements similar to those proposed by Justice Stewart in his *Branzburg* dissent. MINN. STAT. ANN. §§ 595.021-.025 (West Supp. 1978) (showing of relevance, exhaustion of alternative sources, and necessity required); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980) (same showing, with respect to unpublished information only); R.I. GEN. LAWS §§ 9-19.1-1 to .1-3 (Supp. 1982) (privilege may be overcome only if disclosure is necessary for the criminal prosecution of a specific felony or to prevent a threat to human life); TENN. CODE ANN. § 24-1-208 (1980) (showing of relevance, exhaustion of alternative sources, and necessity required).



vance, exhaustion of alternative sources, and necessity.<sup>113</sup> By contrast, the shield laws in four states may be overcome simply by a court's determination that justice or policy require the privilege to yield.<sup>114</sup>

The Delaware and Illinois shield laws enumerate several factors that courts may consider in determining whether the privilege must yield.<sup>115</sup> These statutes, however, do not assign a burden of proof and are silent as to the weight a court should give each factor. Moreover, Delaware and Illinois courts are not required to consider the statutory factors in every case.<sup>116</sup>

Alaska, Arkansas, and Kentucky have statutory privileges that apply only when the information obtained by a source is published or

<sup>113</sup> See *supra* note 91.

<sup>114</sup> ALASKA STAT. §§ 09.25.150-220 (Supp. 1982); LA. REV. STAT. ANN. §§ 645:1451-1454 (West 1982); N.M. STAT. ANN. § 38-6-7 (1982); N.D. CENT. CODE § 31-01-06.2 (1976).

<sup>115</sup> DEL. CODE ANN. tit. 10, §§ 4320-4326 (1974) (factors include relevance, exhaustion of alternative sources, the circumstances in which newsgatherer obtained the information, and effect of disclosure on newsgathering process); ILL. REV. STAT. ch. 110, §§ 8-901 to -909 (1983) (required factors include finding that secrecy of information is nonessential and exhaustion of alternative sources). A number of states restrict or disallow the privilege when a media defendant claims the privilege in a defamation action. ILL. REV. STAT. ch. 110, §§ 8-901 to 8-909 (1983) (privilege not available to media defendants in defamation actions); LA. REV. STAT. ANN. §§ 45:1451-1454 (West 1982) (burden of proof on reporter with regard to good faith); MINN. STAT. ANN. §§ 595.021-.025 (West Supp. 1978) (privilege overcome by showing of relevancy and exhaustion of sources); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980) (privilege disallowed in defamation actions when media defendant asserts defense based on privileged information); OR. REV. STAT. §§ 44.510-.540 (1979) (same); R.I. GEN. LAWS §§ 9-19.1-1 to .1-3 (Supp. 1982) (same); TENN. CODE ANN. § 24-1-208 (1980) (same). See also *Greenberg v. Columbia Broadcasting System*, 69 A.D.2d 693, 419 N.Y.S.2d 988 (1979) (interpreting New York shield law to protect confidential sources as long as such sources are not relied on as evidence of verification).

A statute also may refuse to allow a newsperson to shield the source of the details of secret proceedings. R.I. GEN. LAWS §§ 9-19.1-1 to .1-3 (Supp. 1982) (restriction includes grand jury proceedings).

In some instances, narrow judicial interpretation has limited the scope and effect of shield laws. For example, several courts have strictly construed the definition of "source" to exclude persons engaged in illegal activity observed by a reporter. See *Branzburg v. Pound*, 461 S.W.2d 245 (Ky. 1970), *aff'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972); *accord Lightman v. State*, 15 Md. App. 713, 294 A.2d 149, *aff'd*, 266 Md. 550, 295 A.2d 212, *cert. denied*, 411 U.S. 951 (1972); *In re Ziegler*, 550 F. Supp. 530 (W.D.N.Y. 1982); *Solargen Elec. Motor Car Corp. v. American Motors Corp.*, 506 F. Supp. 546 (N.D.N.Y. 1981); *In re Dan*, 80 Misc. 2d 399, N.Y.S.2d 493 (Sup. Ct. 1975). But see *Beach v. Shanley*, 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984) (New York shield law does not except situations where the reporter observes a criminal act).

This narrow definition of "source" parallels the *Branzburg* holding that no first amendment privilege will protect a reporter's source when the reporter has personally seen the source engage in criminal conduct. But see Note, *Sixth Amendment Limitations on the Newsperson's Privilege*, 13 RUTGERS L.J. 361, 391 (1982) (courts should protect a promise of confidentiality when informants allow reporters to observe them perform criminal acts).

<sup>116</sup> DEL. CODE ANN. tit. 10, §§ 4320-4326 (1974); ILL. REV. STAT. ch. 110, §§ 8-901 to -909 (1983).

broadcast.<sup>117</sup> In these states, then, the privilege depends in large part on the editorial judgments of the journalist's editors. A grand jury may compel a reporter to reveal a source simply because the reporter's story was never printed or aired. Applying the shield law only to published or broadcast stories does not offer reporters the same investigative opportunity granted by the first amendment privilege because reporters, unable to guarantee publication or broadcast of their stories, cannot assure their sources that a newsperson's qualified privilege protects the sources' disclosures.<sup>118</sup>

Furthermore, although most federal courts have recognized that the newsperson's first amendment privilege extends to unpublished information,<sup>119</sup> eleven states restrict their shield laws to sources alone.<sup>120</sup> Consequently, a significant body of information under the purview of the first amendment testimonial privilege, including outtakes, reporter's notes, documents, photographs, and tape recordings, is outside the scope and the protection of state shield law statutes.<sup>121</sup> Similarly, the Nevada shield law's stipulation that a reporter waives the privilege upon the disclosure of part of a confidential matter,<sup>122</sup> and the New York shield

<sup>117</sup> ALASKA STAT. §§ 09.25.150-220 (Supp. 1982); ARK. STAT. ANN. § 43-917 (Repl. 1977); KY. REV. STAT. ANN. § 421.100 (Baldwin 1971).

<sup>118</sup> The first amendment privilege, by contrast, protects a newsgatherer's confidential information regardless of whether the newsgatherer's story was published or aired.

<sup>119</sup> See, e.g., *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *In re Consumers Union*, 495 F. Supp. 582, 586 (S.D.N.Y. 1980) ("discovery [of unpublished information] would represent a substantial intrusion on fact gathering and editorial privacy which are significant aspects of a free press"); *Altomose Constr. Co. v. Building and Constr. Trades Council*, 443 F. Supp. 489, 491 (E.D. Pa. 1977) ("privilege can even apply when . . . a portion of the withheld writing [is] not confidential"); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975) (compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants).

<sup>120</sup> ALA. CODE § 12-21-142 (1975); ALASKA STAT. §§ 09.25.150-220 (Supp. 1982); ARIZ. REV. STAT. ANN. § 12-2237 (1982); ARK. STAT. ANN. § 43-917 (Repl. 1977); IND. CODE ANN. § 34-3-5-1 (Burns 1982); ILL. REV. STAT. ch. 110, §§ 8-901 to -909 (1983); KY. REV. STAT. ANN. § 421.100 (Baldwin 1971); LA. REV. STAT. ANN. §§ 45:1451-1454 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1980); OHIO REV. CODE ANN. § 2739.04 (Page Supp. 1982); PA. STAT. ANN. tit. 42, § 5942 (Purdon 1982). The Pennsylvania Supreme Court has extended the Pennsylvania shield law to unpublished information although, on its face, the shield law protects only sources. See *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

<sup>121</sup> See, e.g., *Williams v. American Broadcasting Co.*, 96 F.R.D. 658 (W.D. Ark. 1983) (shield law does not protect outtakes that would not reveal a source).

<sup>122</sup> NEV. REV. STAT. §§ 49.275, .385 (1981). Several state courts also have found a waiver of the privilege when reporters disclose a portion of their confidential information. See *In re Dan*, 80 Misc. 2d 399, 363 N.Y.S.2d 493 (Sup. Ct. 1975); *People v. Wolf*, 69 Misc. 2d 256, 329 N.Y.S.2d 291 (Sup. Ct. 1972), *aff'd*, 39 A.D.2d 864, 333 N.Y.S.2d 299 (1972). But see *Lal v. Columbia Broadcast System*, 551 F. Supp. 304 (E.D. Pa. 1982), *aff'd*, 726 F.2d 97 (3d Cir. 1984) (under Pennsylvania shield law, disclosure of informant does not waive privilege regarding informant's statements); *Saxton v. Arkansas Gazette*, 569 S.W.2d 115 (Ark. 1978) (disclosure of sources does not waive privilege); *People ex rel. Scott v. Silverstein*, 89 Ill. 2d

law's requirement of confidentiality between reporters and their sources<sup>123</sup> do not parallel first amendment privilege qualifications.<sup>124</sup>

The majority of states that statutorily recognize the newsperson's privilege, therefore, have not enacted shield laws that replace the constitutional privilege.<sup>125</sup> Most often, statutory testimonial privileges confer to journalists a less dependable and less predictable shield than the first amendment privilege. Consequently, the recognition of a qualified first amendment privilege in state grand jury proceedings is necessary because state shield laws have failed to provide a privilege that reflects and protects newsgatherers' constitutionally guaranteed interests.

## VI. STATES WITHOUT SHIELD LAWS

Just as the qualified first amendment newsperson's privilege must

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167, 429 N.E.2d 483 (1981) (disclosure of sources does not waive privilege); *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376 (1982) (waiver operates only as to specific materials knowingly and voluntarily disclosed).

<sup>123</sup> See, e.g., *Solargen Elec. Motor Car Corp. v. American Motors Corp.*, 506 F. Supp. 546 (N.D.N.Y. 1981); *New York v. Korkala*, 121 Misc. 2d 291, 467 N.Y.S.2d 517 (Sup. Ct. 1983), *aff'd as modified*, 99 A.D.2d 161, 472 N.Y.S.2d 310 (1984); *Andrews v. Andreoli*, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977); *People v. Dupree*, 88 Misc. 2d 791, 388 N.Y.S.2d 1000 (Sup. Ct. 1976). But see *Wilkins v. Kalla*, 118 Misc. 2d 34, 459 N.Y.S.2d 985 (Sup. Ct. 1983) (interpreting 1981 amendments to shield law as conferring privilege whether or not information obtained was confidential); *New York v. Iannoccone*, 112 Misc. 2d 1057, 447 N.Y.S.2d 996 (Sup. Ct. 1982) (interpreting 1981 amendments to shield law as conferring privilege whether or not information obtained was confidential).

<sup>124</sup> Most federal courts have concluded that the first amendment privilege does not depend on any express or implied agreement of confidentiality between reporters and their sources. See *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983) (privilege applicable regardless of whether information is confidentially obtained); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (privilege applicable even though no confidential sources were involved and the government had obtained waivers from all sources permitting disclosure of their statements); *Maughan v. NL Indus.*, 524 F. Supp. 93 (D.D.C. 1981) (subpoena quashed even though "no confidential source or confidential information was involved in the newsgathering activities in question"); *Los Angeles Memorial Coliseum Comm'n v. N.F.L.*, 89 F.R.D. 489 (C.D. Cal. 1981) (privilege is "broader" than the mere protection of confidential sources); *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1203 (N.D. Ill. 1978) ("the mere fact that the source of an article is known is irrelevant to the disposition of a claim that the underlying materials need not be produced"); *Altomose Constr. Co. v. Building and Constr. Trades Council*, 443 F. Supp. 489, 491 (E.D. Pa. 1977) (privilege available where "the news source and, perhaps, a portion of the withheld [information], are not confidential").

Further, federal courts have held that the first amendment privilege applies even when a reporter is subpoenaed to testify about published information and revealed sources. See *United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975).

<sup>125</sup> At least two courts in states with shield laws have rejected the first amendment privilege. See *In re Bridge*, 120 N.J. Super. 460, 295 A.2d 3 (Super. Ct. App. Div.), *cert. denied*, 62 N.J. 80, 229 A.2d 78 (1972), *cert. denied*, 410 U.S. 991 (1973); *Andrews v. Andreoli*, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977). But see *CBA Elec. v. Ellenberg*, 10 MEDIA L. REP. (BNA) 1095 (N.Y. Civ. Ct. 1983).

extend to states with shield laws, *a fortiori* the privilege must extend to states that do not have shield laws. In twenty-four states, reporters have no statutory privilege.<sup>126</sup> Courts in seven of these non-shield law states have recognized the first amendment privilege,<sup>127</sup> while courts in three of the states have recognized the privilege based on other considerations.<sup>128</sup> The recognition and acceptance of the first amendment newspaper's privilege in the remaining fourteen non-shield law states is overdue. Once recognized, all non-shield law states, along with federal jurisdictions, should extend the privilege to grand jury proceedings.

Of the seven non-shield law states that have recognized the first amendment privilege, only Texas has extended the privilege to grand jury proceedings. In *In re Grand Jury Subpoena*,<sup>129</sup> a Texas district court quashed a grand jury subpoena of a television reporter's outtakes. The court held that although the press has no absolute constitutional privilege against giving testimony before a grand jury, "disclosure [before a grand jury] should not be compelled in the absence of a concern so compelling as to override the rights of freedom of speech and press."<sup>130</sup> The remaining six states have limited their recognition of the constitutional privilege to criminal trial proceedings. In *State v. St. Peter*, for instance, the Vermont Supreme Court held that a criminal defendant could compel a reporter's testimony only if the defendant could demonstrate that the information was relevant and material to guilt or innocence and

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<sup>126</sup> Colo.; Conn.; Fla.; Ga.; Hawaii; Idaho; Iowa; Kan.; Me.; Mass.; Miss.; Mo.; N.H.; N.C.; S.C.; S.D.; Tex.; Utah; Vt.; Va.; Wash.; W. Va.; Wis.; Wyo.

<sup>127</sup> *Gadsden County Times, Inc. v. Horne*, 426 So. 2d 1234 (Fla. Dist. Ct. App. 1983) (privilege recognized in criminal and civil proceedings); *In re Pennington*, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied*, 440 U.S. 929 (1979) (privilege recognized in criminal proceeding); *North Carolina v. Hagaman*, 9 MEDIA L. REP. (BNA) 2525 (N.C. Dist. Ct. 1983) (privilege recognized in criminal and civil proceedings); *Dallas Oil and Gas, Inc. v. Mouer*, 533 S.W.2d 70 (Tex. Civ. App. 1976) (privilege recognized in civil proceeding); *State v. St. Peter*, 132 Vt. 226, 315 A.2d 254 (1974) (privilege recognized in criminal proceeding); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974) (privilege recognized in criminal proceeding); *Zelenka v. Wisconsin*, 83 Wis. 2d 601, 266 N.W.2d 279 (1978) (privilege recognized in criminal proceeding).

Three non-shield law states have considered the first amendment privilege and rejected it. See *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P.2d 472 (1961); *Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 101 Idaho 795, 623 P.2d 103 (1980); *Commonwealth v. Corsetti*, 387 Mass. 1, 438 N.E.2d 805 (1982).

<sup>128</sup> *State v. Siel*, 122 N.H. 254, 444 A.2d 499 (1982) (privilege based in part on New Hampshire Constitution); *Senear v. Daily Journal-American*, 97 Wash. 2d 148, 641 P.2d 1180 (1982) (privilege based on common law); *Zelenka v. Wisconsin*, 83 Wis. 2d 601, 266 N.W.2d 279 (1978) (privilege based in part on Wisconsin Constitution).

<sup>129</sup> 5 MEDIA L. REP. (BNA) 1153 (Tex. Dist. Ct. 1979).

<sup>130</sup> *Id.* Texas has also recognized the first amendment privilege in civil proceedings, *Trautman v. Dallas School Dist.*, 8 MEDIA L. REP. (BNA) 1088 (N.D. Tex. 1982); *Dallas Oil and Gas, Inc. v. Mouer*, 533 S.W.2d (Tex. Ct. Civ. App. 1976), and in criminal trial proceedings, *In re Grand Jury Subpoena*, 5 MEDIA L. REP. (BNA) 1153 (Tex. Dist. Ct. 1979).

that no other adequate available source existed.<sup>131</sup>

Three states have found alternative means for recognizing the newsperson's privilege. The Washington Supreme Court created a qualified newsperson's privilege based on the court's authority to re-evaluate the common law.<sup>132</sup> Both the Wisconsin<sup>133</sup> and New Hampshire Supreme Courts<sup>134</sup> have relied in part on state constitutional provisions to create a newsperson's privilege. In none of these cases, however, is it clear that the privilege extends to grand jury proceedings.

Because the first amendment privilege applies to the states, state recognition of the first amendment privilege is mandatory. Despite the universal recognition of the first amendment newsperson's privilege in federal jurisdictions, however, recognition of the first amendment privilege in non-shield law states has proceeded as if such recognition were optional. In the states that have recognized the first amendment privilege, state courts, like their federal counterparts, have been reluctant to extend the privilege to grand jury proceedings. As in federal jurisdictions, such reluctance is inconsistent with the recognition of the privilege in criminal trial proceedings.<sup>135</sup>

A state court's reasons for refusing to extend the privilege to grand

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<sup>131</sup> 132 Vt. 266, 271, 315 A.2d 254, 256 (1974).

In *Brown v. Commonwealth*, 214 Va. 755, 757, 204 S.E.2d 429, 431 (1974), the Virginia Supreme Court held that the privilege would yield "only when the defendant's need is essential to a fair trial." The court limited this test to situations when the defendant believes the information is material to proof of an element of the crime or an asserted defense. *Id.*

The Kansas Supreme Court, in *In re Pennington*, 224 Kan. 573, 577, 581 P.2d 812, 815 (1978), *cert. denied*, 440 U.S. 929 (1979), ordered disclosure in criminal cases where the reporter's information is material to prove an element of the offense, to prove a defense asserted by the defendant, to reduce the classification of the offense charged, or to mitigate or lessen the imposed sentence.

The Wisconsin Supreme Court, in *Zelenka v. Wisconsin*, 83 Wis. 2d 601, 266 N.W.2d 279 (1978), recognized the first amendment privilege in criminal proceedings and applied a balancing test almost identical to the test applied by Justice Stewart.

<sup>132</sup> *Senear v. Daily Journal-American*, 97 Wash. 2d 148, 641 P.2d 1180 (1982). The Washington Supreme Court declined to follow an intermediate court's recognition of the first amendment privilege, stating that "when we can decide a case on other than constitutional grounds, we should do it." *Id.* at 152, 641 P.2d 1182. Because *Senear* was a libel case, the privilege created is limited to civil actions, but the court left open whether the privilege would extend to criminal cases. A party attempting to obtain a newsgatherer's confidential information may defeat the privilege by a showing of nonfrivolousness, necessity, and exhaustion of alternative sources. In addition, a court is to consider "how the reporter received the information and whether the source has [a] reasonable expectation of confidentiality." *Id.* at 156, 641 P.2d at 1184.

The Massachusetts Supreme Judicial Court has noted its "willingness" to consider a common law privilege in future cases, *In re Roche*, 381 Mass. 624, 411 N.E.2d 466 (1980), but again recently declined to recognize such a privilege. *Commonwealth v. Corsetti*, 387 Mass. 1, 438 N.E.2d 805 (1982).

<sup>133</sup> *Zelenka v. Wisconsin*, 83 Wis. 2d 601, 266 N.W.2d 279 (1978).

<sup>134</sup> *State v. Siel*, 122 N.H. 254, 444 A.2d 499 (1982).

<sup>135</sup> See *supra* notes 69-77 and accompanying text.

jury proceedings are weakened further by the Supreme Court's refusal to apply the fifth amendment grand jury requirement to the states through the due process clause of the fourteenth amendment.<sup>136</sup> Because a grand jury is constitutionally mandated for criminal indictments in federal courts but is not constitutionally required for state criminal indictments, the first amendment privilege should command more weight when balanced against a state—rather than a federal—grand jury's attempt to subpoena a reporter's confidential information.

Once state courts accept and extend the first amendment privilege to grand jury proceedings, several strong arguments exist for adopting the three-part Stewart test. First, the utilization of the identical test in all proceedings—criminal, civil, and grand jury, federal and state—guarantees all parties consistent and predictable outcomes when newsgatherers assert the qualified first amendment privilege. In grand jury proceedings, prosecutors will know in advance that to overcome the privilege, they must show relevancy, exhaustion of alternative sources, and necessity. The newsgatherer is assured that the identical first amendment privilege adheres regardless of the forum.

Second, the three-part test is understandable and easy to apply.<sup>137</sup> Lastly, the three-part test is fair. Although the test shields reporters from most grand jury subpoenas, the test is not so strict as to frustrate effective grand jury investigations of criminal activity. Thus, the grand jury's interest in investigating crime is appropriately balanced against the media's first amendment right to gather information.

## VII. CONCLUSION

The free flow of information to the public is the cornerstone of a free society. Frustrating a newsperson's ability to gather the news jeopardizes the public's right to know. For this reason, the first amendment accords to journalists special protection in the form of a qualified privilege. When the grand jury's investigation of a probable criminal offense collides with first amendment rights, the government has the burden of establishing that its interests are legitimate and compelling, and that the infringement on first amendment rights is no greater than is essential to vindicate its task of investigating a probable criminal offense.

The state and federal jurisdictions that currently recognize a newsperson's privilege do not recognize the same privilege. Federal courts have overwhelmingly accepted a first amendment or federal common law privilege, but have refused or neglected to extend it to grand jury proceedings. State shield laws statutorily create and apply the privilege

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<sup>136</sup> *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>137</sup> *See supra* notes 90-100 and accompanying text.

to grand jury proceedings, but the protection conferred by the statutory privileges often falls below that guaranteed by the first amendment privilege. A weakened newsperson's privilege also exists in states that have created the privilege from state common law or from state constitutional provisions. It is not clear, however, that even these state common law or state constitutional law privileges extend to grand jury proceedings. Fourteen states do not recognize a reporter's privilege in any form.

The reporter's first amendment privilege is a constitutionally derived right, albeit a qualified right, that deserves judicial acceptance. In criminal trial proceedings, where a defendant's sixth amendment right to compulsory process competes with a newsgatherer's refusal to reveal confidential information, courts have recognized the qualified first amendment privilege. A grand jury, on the other hand, does not have a constitutional right to subpoena information, and yet courts have refused to extend the qualified first amendment privilege to the grand jury room. Because the first amendment privilege extends to criminal trial proceedings, the qualified first amendment privilege should extend to grand jury proceedings as well. Courts should address and correct the inconsistency of recognizing a qualified first amendment privilege in criminal trial proceedings but not in grand jury proceedings. The first amendment requires no less.

—DOUGLAS H. FRAZER