



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

---

Volume 51 | Number 6

Article 12

---

10-1-1973

# Constitutional Law -- Evidence -- Testimonial Reprieve for Newsmen in Civil Litigation

Diana Carter Pradka

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

Diana C. Pradka, *Constitutional Law -- Evidence -- Testimonial Reprieve for Newsmen in Civil Litigation*, 51 N.C. L. REV. 1550 (1973).  
Available at: <http://scholarship.law.unc.edu/nclr/vol51/iss6/12>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

pel the executive to increase the funding allotment for the penal system. To a large degree, the effectiveness of judicial intervention in the area of prison reform is circumscribed by the courts' inability to marshal financial commitments for that purpose. But the major difficulty confronting the courts and those who envision social rehabilitation as a constitutional right lies in changing the public conceptualization of the penal system. The eighth amendment can only reflect the normative values of the American people. The future of the eighth amendment rests not so much with thoughtful jurists but rather with an informed and concerned public.

RONALD H. ROSENBERG

### Constitutional Law—Evidence—Testimonial Reprieve for Newsmen in Civil Litigation

Until recently newsmen appeared to be fighting a losing battle to obtain a privilege to withhold confidential sources and information in legal proceedings. By mid-1972 only eighteen states had statutes granting an evidentiary privilege to newsmen,<sup>1</sup> and the Supreme Court had decided in *Branzburg v. Hayes*<sup>2</sup> that newsmen enjoy no first amendment right to withhold information from grand juries. After *Branzburg*, several newsmen who refused to divulge their sources were held in contempt, and a few journalists<sup>3</sup> were jailed.<sup>4</sup> Several news-

---

1. ALA. CODE tit. 7, § 370 (1960); ALASKA STAT. §§ 09.25.150, 09.25.160 (Supp. 1970); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE ANN. § 1070 (West, 1966); ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1972); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. ANN. § 421.100 (1969); LA. REV. STAT. §§ 45:1451-54 (Supp. 1970); MD. ANN. CODE art. 35, § 2 (1971); MICH. STAT. ANN. § 28.945(10) (1954); MONT. REV. CODES ANN. §§ 93-601 to -602 (1964); NEV. REV. STAT. § 49.275 (1969); N.J. STAT. ANN. §§ 2A-84A-21,29 (Supp. 1969); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1970); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1970); OHIO REV. CODE ANN. § 2739.12 (Page 1953); PA. STAT. ANN., tit. 28, § 330 (Supp. 1970).

2. 408 U.S. 665 (1972), reporting the disposition of three cases: *Branzburg v. Pound*, 461 S.W.2d 345 (Ky.), cert. granted sub nom. *Branzburg v. Hayes*, 402 U.S. 942 (1971); *In re Pappas*, 358 Mass. 614, 266 N.E.2d 297, cert. granted, 402 U.S. 942 (1971); and *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), cert. granted, 402 U.S. 942 (1971).

3. Throughout this note, "journalist" appears interchangeably with the terms "newsmen" and "reporter." The term "newsmen" encompasses persons involved in all phases of journalism, including news reporting and editing. Whether a privilege should extend also to college newspaper reporters and editors or to authors of current

men still face subpoenas and possible imprisonment.<sup>5</sup> Yet despite *Branzburg*, or perhaps in reaction against that decision, the tide seems to have shifted in recent months. Federal, state, and local officials issued relatively fewer subpoenas in the latter part of 1972 and in the beginning of 1973.<sup>6</sup> Furthermore, approximately fifty-eight bills calling for some type of evidentiary privilege for newsmen have been introduced in Congress during the current session.<sup>7</sup> Since *Branzburg*,

---

books, for example, is a hotly debated question. The extent of a reportorial privilege, however, is an issue beyond the scope of this note.

4. N.Y. Times, Feb. 28, 1973, at 38, col. 5; *id.*, Feb. 22, 1973, at 10, col. 4.

Peter Bridge was held in contempt of court and jailed for 20 days for refusing to disclose confidential information relating to a story about official corruption that appeared in the Newark Evening News; Edwin Goodwin received a 30-day sentence, of which he served 44 hours, for refusing to deliver WBAI-FM tapes of a prison riot; William Farr spent 46 days in jail for refusing to disclose his source for a Los Angeles Times article about the Charles Manson murder trial. See, e.g., NEWSWEEK, Oct. 16, 1972, at 60; TIME, Jan. 1, 1973, at 44; N.Y. Times, Feb. 19, 1973, at 46, cols. 5-7; *id.*, Feb. 8, 1973, at 19, col. 1.

John Lawrence, Washington bureau chief for the Los Angeles Times, was jailed briefly (2 hours) after his initial refusal to release recordings of an interview with a key figure in the Watergate bugging case. The contempt citation and the jail sentence ended when the source of the interview agreed not to bind the Times to its promise of confidentiality and when the newspaper consequently handed over the tapes to the court. NEWSWEEK, Jan. 1, 1973, at 58; TIME, Jan. 1, 1973, at 44; N.Y. Times, Dec. 22, 1973, at 1, cols. 1-3.

5. Among these reporters are Caldwell, Pappas, and Branzburg. No effort has yet been made to recall either Caldwell or Pappas before grand juries; but Branzburg is under a state six-month contempt sentence and refuses to return to Kentucky. He currently works for the Detroit Free Press. Governor Wendell Ford of Kentucky has moved to extradite him from Michigan. TIME, Oct. 16, 1972, at 44; Hume, *A Chilling Effect on the Press*, N.Y. Times, Dec. 17, 1972, § 6 (Magazine), at 79.

Other possible contempt proceedings confront South Carolina newsmen who were subpoenaed to testify about a story on misconduct by officials and guardians at a local detention center. Hume, *supra* at 82.

In Memphis, Tennessee, a reporter faces a contempt charge by a state legislative subcommittee for refusing to disclose the source of an article about the abuses of a state-operated home for retarded children. NEWSWEEK, Oct. 16, 1972, at 60; Hume, *supra* at 82.

6. THE NEW REPUBLIC, Feb. 24, 1973, at 6.

7. S.J. Res. 8, S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 917, S. 1128, 93rd Cong., 1st Sess. (1973); H.R. 717, H.R. 1263, H.R. 1735, H.R. 1794, H.R. 1813, H.R. 1818, H.R. 1819, H.R. 1985, H.R. 2002, H.R. 2015, H.R. 2101, H.R. 2187, H.R. 2200, H.R. 2230, H.R. 2231, H.R. 2232, H.R. 2233, H.R. 2234, H.R. 2433, H.R. 2563, H.R. 2584, H.R. 2651, H.R. 3143, H.R. 3181, H.R. 3369, H.R. 3460, H.R. 3482, H.R. 3520, H.R. 3595, H.R. 3725, H.R. 3741, H.R. 3811, H.R. 3964, H.R. 3975, H.R. 4020, H.R. 4035, H.R. 4135, H.R. 4275, H.R. 4383, H.R. 4423, H.R. 4456, H.R. 4749, H.R. 5060, H.R. 5167, H.R. 5194, H.R. 5198, H.R. 5227, H.R. 5317, 93rd Cong., 1st Sess. (1973).

Bills range from those calling for absolute protection to those suggesting a qualified newsman's privilege. Many bills list crimes involving foreign aggression or threat to life as areas in which the newsman's immunity should not apply. A critical point of difference is also whether or not Congress should pre-empt state laws on newsmen's privilege. See, N.Y. Times, Feb. 23, 1973, at 5, col. 1.

two states have passed "shield" laws for newsmen,<sup>8</sup> most of the remaining states are pressing for similar legislation,<sup>9</sup> and the Commissioners on Uniform State Laws are working on a model law to protect newsmen.<sup>10</sup>

Lower courts may also choose to limit the application of *Branzburg*, as demonstrated by the Second Circuit in *Baker v. F & F Investment*,<sup>11</sup> which declined to extend the *Branzburg* rule to civil cases. The court recognized a newsman's first amendment right to withhold from discovery the identity of confidential news sources in limited circumstances. This note will examine *Baker* in the context of prior law on testimonial privilege for newsmen and will weigh its significance as one of the first circuit court decisions clearly to recognize a first amendment claim to a reportorial privilege.<sup>12</sup>

Unlike many reporters who have faced grand jury subpoenas, journalist Alfred Balk in *Baker* faced demands for disclosure of confidential sources in civil litigation. In a federal class action plaintiffs, Chicago blacks charged local realtors with discrimination in the sale of housing.<sup>13</sup> Several years before the Chicago suit, journalist Balk had written an article on housing discrimination in Chicago entitled "Confessions of a Block-Buster," which appeared in the *Saturday Evening Post*.<sup>14</sup> Information for the article was provided by a local realtor who agreed to describe Chicago "blockbusting" practices on the condition that his identity be kept secret. When Balk refused to reveal the identity of the Chicago realtor in a deposition taken in New York, plaintiffs moved for an order under Rule 37 of the Federal Rules of Civil Procedure to compel discovery. A federal district court in New York denied the motion,<sup>15</sup> and plaintiffs appealed the order to the Second Circuit.<sup>16</sup>

---

8. N.D. CENT. CODE § 31-01-06.2 (1973); R.I. GEN. LAWS ANN. §§ 9-19.1-1 to -2 (1973).

9. N.Y. Times, Feb. 11, 1973, at 58, cols. 3-6.

10. Blasi, *The Justice and the Journalist*, THE NATION, Sept. 18, 1972, at 199.

11. 470 F.2d 778 (2d Cir. 1972), cert. denied, 93 S. Ct. 2147 (1973).

12. Two other circuit courts have recognized a qualified privilege for newsmen: *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970).

13. *Contract Buyers League v. F & F Investment*, Civil No. 69-15 (N.D. Ill. filed 1969).

14. July 14-21, 1962, at 15.

15. *Baker v. F & F Investment*, 339 F. Supp. 942 (S.D.N.Y. 1972).

16. Generally, interlocutory appeals from discovery orders are not permitted, see, e.g., *Alexander v. United States*, 201 U.S. 117 (1906); *Bordern Co. v. Sylk*, 410 F.2d 843 (3d Cir. 1969); *United States v. Fried*, 386 F.2d 691 (2d Cir. 1967). Orders

In a unanimous decision, the Second Circuit upheld the lower court's order. While declining to find either New York or Illinois "shield" laws<sup>17</sup> controlling in *Baker*, the court recognized the first amendment interests in the public's receiving news and in the newsman's gathering news implicit in those laws and held those interests controlling. The Second Circuit applied a conventional first amendment balancing approach, weighing the journalist's first amendment right to disseminate and gather information and the public's need to be informed against the plaintiffs' and the public's interest in compelling testimony in judicial proceedings. The court found no "overriding and compelling interest" to which the first amendment interests must yield.<sup>18</sup>

The Second Circuit distinguished *Branzburg* since it was confined to grand jury investigations of criminal activity.<sup>19</sup> The court in *Baker*

---

compelling discovery in a district other than the district in which the main action is brought are ordinarily non-appealable interlocutory decisions, *see, e.g.*, *National Nut Co. v. Kelling Nut Co.*, 134 F.2d 532 (7th Cir. 1943). An order denying discovery in an "outside" jurisdiction, however, is immediately reviewable. *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967). *See also Baker v. F & F Investment*, 470 F.2d 778, 780 (2d Cir. 1972); 9 J. MOORE, FEDERAL PRACTICE ¶ 110.13[2], at 157 (2d ed. 1973).

17. N.Y. CIVIL RIGHTS LAW § 79-h (McKinney Supp. 1972) provides:

Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature or other body having contempt powers, for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is professionally employed or otherwise associated in a news gathering capacity. . . .

ILL. ANN. STAT., ch. 51, §§ 111-19 (Smith-Hurd Supp. 1972) provide for a privilege only to withhold disclosure of confidential sources. Section 111 states: "No court may compel any person to disclose the source of any information obtained by a reporter during the course of his employment except as provided in this Act."

Further limitations restrict the privilege. Section 111 provides: "The privilege conferred by this Act is not available in any libel or slander action in which a reporter or news medium is a party defendant." Section 117 provides that the court may divest the privilege if it finds:

(a) that the information sought does not concern matters, or details in any proceeding, required to be kept secret under the laws of this State or of the Federal government; and

(b) that all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved.

18. 470 F.2d at 783.

19. The Supreme Court stated in *Branzburg*: "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." 408 U.S. at 682.

emphasized that “[n]o such criminal overtones color the facts in this civil case.”<sup>20</sup> The Second Circuit also declined to follow *Garland v. Torre*,<sup>21</sup> the leading civil case concerning a journalist’s first amendment claim to testimonial privilege. *Garland* had rejected the reporter’s first amendment argument, but the *Baker* court contended that the case was distinguishable since the plaintiff in *Garland* had taken unsuccessful independent action to discover the identity of the defendant’s source and the identity of the source was essential to the plaintiff’s suit. In the *Baker* fact situation, persons other than Balk might have disclosed the identity of the source, yet the plaintiffs made no attempt to exhaust this possibility. Furthermore, the court asserted that the identity of Balk’s source did not go to the heart of the case. Also, Balk was not a party to the underlying action.<sup>22</sup>

The ease with which the Second Circuit distinguished *Baker* from *Branzburg* and *Garland* and the court’s facility in finding a basis in the first amendment for Balk’s refusal to disclose his source should not mask the truly innovative approach of the *Baker* court. The court’s finding first amendment grounds for reportorial “privilege” appears unusual in light of prior development of the law in this area.

The common-law rule recognizes no evidentiary privilege for newsmen similar to that enjoyed by physicians and attorneys in their professional capacities.<sup>23</sup> Thus, newsmen may be compelled to reveal information given to them in confidence and to disclose the identity of confidential sources. This rule is uniformly observed in all types of legal proceedings: grand jury investigations,<sup>24</sup> judicial investigations relating to grand jury proceedings,<sup>25</sup> criminal trials,<sup>26</sup> legislative investigations,<sup>27</sup> and civil litigation.<sup>28</sup> Generally, courts have been unreceptive to the newsman’s argument that an evidentiary privilege is essential to the maintenance of the journalist’s livelihood,<sup>29</sup> although courts

---

20. 470 F.2d at 784.

21. 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

22. 470 F.2d at 783-84.

23. See Annot., 7 A.L.R.3d 591 (1966).

24. *Clein v. State*, 52 So. 2d 117 (Fla. 1950) (en banc); *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); *People ex rel. Phelps v. Fancher*, 2 Hun 226 (N.Y. Sup. Ct. 1874).

25. *Joslyn v. People*, 67 Colo. 297, 184 P. 375 (1919).

26. *People v. Durrant*, 116 Cal. 179, 48 P. 75 (1897); *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911); *Pledger v. State*, 77 Ga. 242, 3 S.E. 320 (1887); cf. *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951).

27. *Ex parte Lawrence*, 116 Cal. 298, 48 P. 124 (1897) (per curiam).

28. *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957).

29. See, e.g., *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911).

regularly exclude relevant evidence as a method of protecting other confidential relationships (husband-wife, attorney-client, physician-patient, and informer-police).<sup>30</sup> Likewise, the Proposed Federal Rules of Evidence include no newsmen's privilege.<sup>31</sup>

Many cases that rely on the common-law rule give no reason for its application.<sup>32</sup> When a reason is given, the most frequent explanation for the rule denying a newsmen's privilege is the superior interest of the public in compelling testimony over any private considerations that exist between newsmen and their sources.<sup>33</sup> The courts often cite Wigmore, who disfavors privileges as "so many derogations from a positive general rule [that everyone is obligated to testify when properly summoned]" and as "obstacle[s] to the administration of justice."<sup>34</sup>

Only twenty states so far have legislated evidentiary privileges for newsmen,<sup>35</sup> in derogation of the common-law rule. Even where statutes exist, however, journalists receive little protection, since many of these laws provide heavily qualified privileges.<sup>36</sup> Furthermore, "shield"

---

30. See, e.g., *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291, 199 N.E. 415 (1936).

31. PROPOSED FED. R. EVID. (although the Supreme Court approved the new Federal Rules of Evidence on November 20, 1972, to become effective July 1, 1973, the Rules are still "Proposed" because Congress passed legislation which requires express Congressional approval before the Rules can become effective. Act of March 30, 1970, Pub. L. No. 93-12, 87 Stat. 9. At the time of this writing, Congress had not yet approved the Rules).

32. *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957); *People v. Durrant*, 116 Cal. 179, 48 P. 75 (1897); *Pledger v. State*, 77 Ga. 242, 3 S.E. 320 (1887).

33. See, e.g., *Plunkett v. Hamilton*, 136 Ga. 72, 83, 70 S.E. 781, 786 (1971); *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936).

34. 8 J. WIGMORE, EVIDENCE § 2192, at 70, 73 (McNaughton rev. 1961).

35. See jurisdictions cited in notes 1 and 8 *supra*.

36. ALASKA STAT. §§ 09.25.160 (Supp. 1970) requires disclosure of sources if the withholding of testimony would result in a "miscarriage of justice" or is "contrary to the public interest." In Arkansas, under ARK. STAT. ANN. § 43-917 (1964), the newsmen must disclose his source if his article containing confidential information was published "in bad faith, with malice, and not in the interest of the public welfare." In Illinois, ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1972) withdraws the newsmen's privilege in libel and slander actions in which the newsmen is a party defendant and may require disclosure of confidential sources if "the information sought does not concern matters . . . required to be kept secret" under state or federal law or if "all other available sources of information have been exhausted and disclosure . . . is essential to the protection of the public interest involved." In Louisiana, LA. REV. STAT. §§ 45:1451-54 (Supp. 1970) requires disclosure of confidential sources when "essential to the public interest." In New Mexico, under N.M. STAT. ANN. § 20-1-12.1 (Supp. 1970) disclosure of sources is required when "essential to prevent injustice."

In six states the newsmen enjoys a privilege to withhold his source only after publication of an article based on confidential information. See ALA. CODE tit. 7,

laws in derogation of the common law are strictly construed; courts that have interpreted existing statutes have frequently denied the privilege altogether. Strict construction of newsmen's statutory privileges has been the rule in both criminal proceedings<sup>37</sup> and civil litigation.<sup>38</sup> In only a limited number of cases has the journalist been successful.<sup>39</sup> The present uncertainty as to the applicability of state law in federal courts poses another hazard to the journalist if the question of statutory privilege arises in federal question cases. *Baker*, for example, chose to ignore both the "shield" laws of Illinois (the forum state) and New York (the state where Balk's deposition was taken).<sup>40</sup>

The first amendment claim to a newsman's privilege was presented initially in *Garland v. Torre*,<sup>41</sup> a civil action in which actress Judy Garland brought suit against newspaper columnist Marie Torre

---

§ 370 (1960); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); CAL. EVID. CODE ANN. § 1070 (West 1966); KY. REV. STAT. ANN. § 421.100 (1969); MD. ANN. CODE art. 35, § 2 (1971); N.J. STAT. ANN. §§ 2A-84A-21, -29 (Supp. 1969).

Three states protect *confidential communications* received from sources, see MICH. STAT. ANN. § 28-945(1) (1954); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1970); PA. STAT. ANN., tit. 28, § 330 (Supp. 1970). Other states which permit the newsman to withhold the identity of sources require disclosure of confidential communications.

37. *Branzburg v. Hayes*, 408 U.S. 665 (1972); *State v. Donovan*, 129 N.J.L. 478, 30 A.2d 421 (1943).

California's statute was strictly construed in the case of William Farr, when the court held the statute inapplicable. See note 4 *supra*. Peter Bridge was cited for contempt and jailed despite the New Jersey statutory privilege for newsmen. *In re Bridge*, 120 N.J. Super. 460, 295 A.2d 3 (1972), *cert. denied*, 93 S. Ct. 1500 (1973).

38. *In re Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964) (Cal. statute); *Deltac, Inc. v. Dun. & Bradstreet, Inc.*, 187 F. Supp. 788 (N.D. Ohio 1960) (Ohio statute); *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A.2d 473 (1956); *Beecroft v. Point Pleasant Printing & Publishing Co.*, 82 N.J. Super. 269, 197 A.2d 416 (1964).

39. *Ex parte Sparrow*, 14 F.R.D. 351, (N.D. Ala. 1953) (libel action, Alabama statute); *In re Howard*, 136 Cal. App. 2d 816, 289 P.2d 537 (1955) (labor dispute); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963) (grand jury investigation).

40. In deciding whether to apply the federal or state law on privilege, the rule is clear in cases arising in federal courts under diversity jurisdiction: state law is determinative, see *Cervantes v. Time Inc.*, 464 F.2d 986, 989 (8th Cir. 1972). Courts are divided, however, as to the obligation of federal courts to follow state privilege rules when the underlying action arises in federal question cases. See Annot., 95 A.L.R.2d 320 (1964); Comment, *Evidentiary Privileges in the Federal Courts*, 52 CAL. L. REV. 640 (1964). Although the Second Circuit in *Baker* held state law nondeterminative, the Ninth Circuit ruled in *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960), that if state laws of privilege are regarded as not mere rules of evidence but as substantive rights, the *Erie* principle should apply and state law should be followed even in federal question cases. In the Proposed Federal Rules of Evidence, rule 501, however, the Advisory Committee's note indicates that federal law will henceforth control in cases arising under federal question jurisdiction, *i.e.*, newsmen will enjoy no evidentiary privilege.

41. 259 F.2d 545 (2d Cir. 1958).

for publishing defamatory remarks allegedly made by CBS officials. The plaintiff moved to compel Miss Torre to reveal the source of the alleged statements, but the columnist refused on the grounds that disclosure of confidential news sources would encroach upon freedom of the press. Miss Torre contended "it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public."<sup>42</sup> In dictum the court accepted the journalist's argument that compulsory disclosure of confidential news sources may entail an abridgement of press freedom. Nevertheless, the court rejected Miss Torre's claim to privilege in holding that first amendment considerations were not absolute and would yield under the Constitution "to a paramount public interest in the fair administration of justice."<sup>43</sup> The *Garland* rule, which has since become the majority view, resurfaced in two other civil cases: *In re Goodfader*<sup>44</sup> and *Adams v. Associated Press*.<sup>45</sup> In both cases the courts emphasized the importance of compulsory testimony as opposed to first amendment interests in nondisclosure.

At least seven decisions involving grand jury investigations have echoed similar rejections of a newsman's first amendment privilege,<sup>46</sup> the most important of which was the Supreme Court's ruling in *Branzburg*. Although journalists in these cases argued for a privilege based on the public's right to the news, the news editor in *State v. Buchanan*,<sup>47</sup> as well as reporters Branzburg, Pappas, and Caldwell, claimed a privilege also grounded on a newsman's right to gather news.<sup>48</sup> In rejecting this claim, the *Buchanan* court stated that a newsman has no constitutional right to information that is not accessible to the public generally and that granting special privileges to newsmen would violate notions of equal protection.<sup>49</sup> The Supreme Court reiterated this view

---

42. *Id.* at 547-48. The argument that the first amendment exists to preserve an "untrammelled press as a vital source of public information" has received Supreme Court approval, *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *cf. Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

43. 259 F.2d at 549.

44. 45 Hawaii 317, 367 P.2d 472 (1961).

45. 46 F.R.D. 439 (S.D. Tex. 1969).

46. *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1971); *In re Pappas*, 358 Mass. 614, 266 N.E.2d 297 (1971); *In re Bridge*, 120 N.J. Super. 460, 295 A.2d 3 (1972); *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963); *State v. Knops*, 49 Wis. 2d 647, 183 N.W.2d 93 (1971).

47. 250 Ore. 244, 436 P.2d 729 (1968).

48. *Id.* at 247, 436 P.2d at 730.

49. *Id.* at 247-49, 436 P.2d at 731.

in *Branzburg*.<sup>50</sup> In rejecting newsmen's alternative first amendment claims based on the public's right to news, the courts either placed a higher value on the public's "right to everyman's evidence"<sup>51</sup> than on the public's "need to know" or considered the relationship between the protection of news sources and the gathering of news excessively tenuous.<sup>52</sup>

Prior to *Baker*, few decisions had granted newsmen a qualified right to withhold information.<sup>53</sup> Among those decisions, the opinion of the Ninth Circuit in *Caldwell v. United States*<sup>54</sup> was subsequently overturned by the Supreme Court. Two civil libel cases, *Alioto v. Cowles Communications, Inc.*<sup>55</sup> and *Cervantes v. Time, Inc.*,<sup>56</sup> although they affirmed reporters' first amendment claims of privilege, involved issues different than those that the *Baker* court confronted,<sup>57</sup> neither could serve as exact precedent to *Baker*.

In giving effect to qualified constitutional privilege, *Baker* seems to be a clear departure from the mainstream of law. Yet this case appears in some aspects to follow *Branzburg* and *Garland*. Although the *Branzburg* rule was strictly confined to grand jury investigations, the Supreme Court indicated that in general only "compelling" or "paramount" interests would override first amendment rights.<sup>58</sup> Similarly, *Garland* asserted that "compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom"<sup>59</sup> and that any infringement of first amendment rights would be justified only in view of an overriding public interest in compelling testimony.<sup>60</sup> The court in *Baker* could have easily reached its decision

---

50. 408 U.S. at 684.

51. See note 34 *supra*.

52. See, e.g., 408 U.S. at 693-94.

53. *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970); *Air Transport Ass'n v. Professional Air Traffic Controllers Organization*, Crim. Nos. 70-400, -410 (E.D.N.Y. April 6, 1970 at 21, 38-39, 149-50) cited in Comment, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 318 n.7 (1970) [hereinafter cited as *Reporters*]; *Alioto v. Cowles Communications, Inc.*, C.A. 52150 (N.D. Cal. Dec. 4, 1969 at 165-67) cited in *Reporters* 318 n.7; *People v. Dohrn*, Crim. No. 69-3808 (Cir. Ct. Cook Cty., Ill. May 20, 1970) cited in *Reporters* 318 n.7; *People v. Rios*, No. 75129 (Super. Ct. San Francisco Cty. 1970) cited in *Reporters* 318 n.7.

54. 434 F.2d 1081 (9th Cir. 1970).

55. C.A. 52150 (N.D. Cal. Dec. 4, 1969 at 165-67) cited in *Reporters* 318 n.7.

56. 464 F.2d 986 (8th Cir. 1972).

57. See text accompanying notes 86 and 87 *infra*.

58. 408 U.S. at 700.

59. 259 F.2d at 548.

60. *Id.*

within the framework of Justice Powell's concurring and controlling opinion in *Branzburg*,<sup>61</sup> which asserted the legitimacy of resisting demands that bear only a "remote and tenuous relationship to the subject of the investigation. . . ."<sup>62</sup> The identity of Balk's news source was tangential to the thrust of the *Baker* plaintiffs' complaint. The necessity for disclosing the confidential source was in no way "compelling" or "paramount." In fact, it paled in significance to the importance of unearthing information for grand jury investigations. According to this view, *Baker* reached a different result because it was factually distinguishable from *Branzburg*. The same conclusion may apply in comparing *Baker* to *Garland*. The court in *Baker* apparently accepted the view expressed in *Garland* that when disclosure of a newsman's confidential sources goes "to the heart of the . . . claim" a compelling need may be found sufficient to override first amendment interests.<sup>63</sup> The court may have affirmed the newsman's position because the identity of the news source "simply did not go to the heart of appellants' case. . . ."<sup>64</sup>

Nevertheless, the congruence between *Baker* on the one hand, and *Branzburg* and *Garland* on the other, is superficial and should not mask the real disparity between *Baker*'s language and approach and that of *Branzburg* or *Garland*. The court in *Baker* recognized what *Branzburg* and *Garland* accepted only as an hypothesis: "[c]ompelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis."<sup>65</sup> *Garland* postulated only an "hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news."<sup>66</sup> The Second Circuit at the time of the *Garland* decision was unconvinced that first amendment interests were involved. So was the Supreme Court in deciding *Branzburg*. It asserted that its decision in no way threatened the vast bulk of confidential relationships between reporters and their sources<sup>67</sup> and

---

61. 408 U.S. at 709-10. Since the Court was split five to four in its decision, Powell as the fifth and pivotal member of the majority carried, in his concurring opinion, the controlling view.

62. *Id.* at 710.

63. 470 F.2d at 783-84.

64. *Id.* at 783.

65. *Id.* at 782 (emphasis added).

66. 259 F.2d at 548 (emphasis added).

67. 408 U.S. at 691.

contended that the existing rules denying a newsman's privilege "have not been a serious obstacle to either the development or retention of confidential news sources by the press."<sup>68</sup> The Court ruled that the burden on news gathering that results from forced disclosures was at best uncertain.<sup>69</sup>

*Baker* went one step further than *Garland* or *Branzburg* by reaffirming the *Buchanan* claim that the press, independent of the public's right to information, has a constitutional right to gather news.<sup>70</sup> *Garland* had refused to elevate the press's interest beyond a mere private stake in withholding news, and *Branzburg* flatly rejected the notion of a newsman's right to gather news.<sup>71</sup> *Baker* further transformed the terms in the balancing analysis by relabelling the interests involved in civil litigation. *Garland* had asserted that the balancing test in civil actions pitted a *public* interest in compelled testimony against a newsman's *private* interest in withholding information.<sup>72</sup> *Baker*, on the other hand, alluded to the "public and private interests" in nondisclosure rivalling the litigants' "private interest" in compelled disclosure.<sup>73</sup>

*Baker* not only transformed the terms of the balancing equation but also modified the weight given those terms. Whereas *Garland* and *Branzburg* emphasized the "paramount public interest in the fair administration of justice,"<sup>74</sup> *Baker* stressed the preferred position of the first amendment.<sup>75</sup> Underlining the "paramount public interest in the maintenance of a vigorous, aggressive and independent press,"<sup>76</sup> *Baker* asserted that only in "rare" cases, "few in number," will first amendment rights yield to competing interests.<sup>77</sup> The contrary presumption prevails in both *Branzburg* and *Garland*.

---

68. *Id.* at 699.

69. *Id.* at 693.

70. 470 F.2d at 782.

71. "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." 408 U.S. at 684. If the Court's statement is a rejection of the newsman's private claim as a balancing test factor in *all* legal proceedings, the Second Circuit may have exceeded its jurisdiction by violating the Supreme Court's dictum. If, on the other hand, one accepts literally the Supreme Court's assertion that its opinion in *Branzburg* was strictly confined to grand jury proceedings, *Baker* may easily be distinguished from *Branzburg*. *Baker* may be viewed as recognizing a newsman's private first amendment interest in the context of *civil litigation* only.

72. 259 F.2d at 549.

73. 470 F.2d at 782, 785.

74. 259 F.2d at 549.

75. 470 F.2d at 783.

76. *Id.* at 782.

77. *Id.* at 783.

Most significantly, *Baker* demonstrates the potential of lower courts to limit *Branzburg* by refusing to apply its rule outside grand jury proceedings. Lower courts seeking to overcome the Supreme Court's ruling may do so not only because the Court confined its decision strictly to grand jury investigations,<sup>78</sup> but also because the first amendment balancing equation varies significantly with the legal context in which the newsman's claim is presented. The argument for a newsman's testimonial privilege has been asserted generally in five basic types of legal proceedings: (1) grand jury investigations, (2) criminal trials, (3) civil litigation, not including defamatory actions, (4) civil defamatory litigation, and (5) legislative hearings. Although the balance of interests that determines the success of a newsman's first amendment claim is decided on a case-by-case basis,<sup>79</sup> the character of the proceedings in which the claim is asserted will be a major determinant in the balancing test. Under that test, the claims on the newsman's side—the public's right to information and the newsman's interest in gathering news—are constant, independent of the nature of the legal proceedings. The interests on the opposite side of the scales vary, however, with the nature of the legal context.

In grand jury investigations the obligation to appear and testify is especially strong and the scope of permissible inquiry is broad.<sup>80</sup> The Supreme Court noted in *Branzburg* that the scope of inquiry is necessarily far-reaching because the task of the grand jury "is to inquire into the existence of possible criminal conduct and to return only well-founded indictments. . . ."<sup>81</sup> Grand jury investigations, it observed, are "constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes,"<sup>82</sup> and "[t]he adoption of the grand jury 'in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice.'"<sup>83</sup>

In criminal trials since the prosecution's interest in compelling testimony approximates that of the prosecution in grand jury investigations, one may speculate that the scales will generally be weighted against the newsman. Another factor weighing against the newsman's

---

78. 408 U.S. at 682.

79. *Id.* at 710 (Powell, J., concurring).

80. *Id.* at 688.

81. *Id.*

82. *Id.* at 687.

83. *Id.*, quoting *Costello v. United States*, 350 U.S. 359, 362 (1956).

first amendment claim is that the defendant in criminal cases has a constitutional right ". . . to have compulsory process for obtaining witnesses in his favor. . . ."84

In civil litigation the newsman stands a far greater chance of successfully arguing a constitutional testimonial privilege than in grand jury investigations or criminal trials. He may rely on the Supreme Court's assertion of the superior status of the grand jury in distinguishing his case. Also, in civil litigation, unlike grand jury investigations and criminal trials, the interest in compelling testimony is exclusively that of a private litigant.<sup>85</sup> Pitted against the newsman's argument in favor of a public right to nondisclosure, the private litigant in civil litigation may have difficulty in compelling confidential information from newsmen.

In civil defamatory action, however, the outcome of the balancing test is less clear. On one hand, recognition of a newsman's privilege in defamatory actions could destroy libel actions against news media. Plaintiffs are required to prove that news-defendants acted with "reckless disregard of the truth,"<sup>86</sup> a difficult requirement if newsmen can hide behind anonymous sources. On the other hand, if newsmen are denied a testimonial privilege in defamatory actions, the danger exists that public figures could get access to reporters' sources merely by filing libel suits.<sup>87</sup>

In legislative hearings the newsman must overcome a tradition of broad legislative investigatory powers, but he may point to the Court's assertion in *Branzburg* of the superior status of the grand jury in distinguishing his case. The newsman may also rely on a few cases that suggest first amendment limitations on legislative powers to investigate.<sup>88</sup>

*Baker* leaves at least two critical questions unanswered. First, should a qualified privilege for newsmen vary with the nature of the news reported? Arguably, the courts should grant greater protection

---

84. U.S. CONST. amend. VI.

85. *Baker v. F & F Investment*, 470 F.2d at 783, 785.

86. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

87. See Blasi, *The Justice and the Journalist*, THE NATION, Sept. 18, 1972; Hume, *A Chilling Effect on the Press*, N.Y. Times, Dec. 17, 1972, § 6 (Magazine) at 82; *id.*, Feb. 22, 1973, at 10, cols. 4-5.

88. See, e.g., *DeGregory v. Attorney Gen.*, 383 U.S. 825 (1966); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *Watkins v. United States*, 354 U.S. 178 (1957) (dictum); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

to coverage of governmental misconduct, civil corruption, foreign aggression, and serious crimes, rather than to gossip items or articles covering the private lives of public figures, for example. On the other hand, this type of distinction could engage the judiciary in a dangerous arbitration of what news the public needs to know. Secondly, how can *Baker's* qualified privilege approach, which relies on such incalculable contingencies as whether the information sought "goes to the heart of . . . the case," whether the identity of the news source will be demanded in a civil trial or a grand jury investigation, or whether the party seeking confidential information will have recourse to another available source, help the newsman at the critical moment when the source is approached? Unless the newsman, who cannot know the answer to such variables prior to litigation, is able to guarantee confidentiality, his source may refuse to talk.

Despite its shortcomings, *Baker* represents a judicial giant-step toward recognition that a newsman's privilege is today necessary to protect the free flow of information to the public. Events subsequent to *Branzburg* have shown that the Supreme Court's ruling has had a chilling effect on the press,<sup>89</sup> retarding precisely that type of reflective and socially relevant news coverage that the Second Circuit sought to protect in *Baker*. Hopefully, the *Baker* decision will serve as a model to lower courts in limiting *Branzburg's* application and as a guide to federal and state legislatures in drawing up statutory privileges for newsmen. In the growing number of civil actions in which private litigants demand disclosure of confidential news sources,<sup>90</sup> *Baker* will have its greatest impact as precedent.

It would be misleading, however, to exaggerate *Baker's* importance, since the question of privilege depends greatly on the factual nuances of each case. Uncertainty in the area of a constitutional testimonial privilege for newsmen outside grand jury investigations awaits resolution by the Supreme Court.

DIANA CARTER PRADKA

---

89. See generally, Hume, *A Chilling Effect on the Press*, N.Y. Times, Dec. 17, 1972), § 6 (Magazine), at 13.

Reporter Earl Caldwell has stated, for example: "From now on no newspaper can hope to cover effectively an organization such as the Panthers. I don't care how black a reporter is, he won't get close. He won't and he shouldn't try. He won't because he cannot be trusted as a reporter." *Ask me, I Know. I was the Test Case*, SATURDAY REVIEW, Aug. 5, 1972, at 5.

90. Blasi, *Privilege in a Time of Violence*, THE NATION, Dec. 21, 1970, at 655,