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I. INTRODUCTION

The occasional subpoena to appear and testify before a grand jury ceased to be a sometime problem for American newsmen in 1969 and 1970, when a sharp increase in subpoenas faced reporters across the nation.[1] In particular demand before grand juries were newsmen who had been reporting widespread social and political turmoil. The grand juries wanted these journalists to reveal their confidential sources as well as to surrender their unpublished notes and records, unused photographs, tape recordings, and television film "outtakes." Newsmen responded with intensity and solidarity, asserting that their ability to continue as effective news gatherers would be damaged or destroyed if they betrayed their confidential sources by testifying.[2] Moreover, they said, compulsory disclosure of news sources made them agents of government investigation. As for turning over unused film, files, photos, and notes, some media adopted the policy of early destruction of unpublished materials after *Time, Life, Newsweek,* CBS, NBC, the *Chicago Sun-Times,* and others were called upon by subpoena, or in the name of cooperation with government, to deliver large quantities of news materials.[3] According to Attorney General Mitchell, the newsmen's

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1. COLUM. JOURNALISM REV., Spring 1970, at 2-3; EDITOR & PUBLISHER, Feb. 7, 1970, at 12; FOI DIGEST, May-June 1970, at 1.

2. S. Res. 3552, 91st Cong., 2d Sess., 116 CONG. REC. 4129-31 (1970); Noyes & Newbold, *The Subpoena Problem Today,* AM. SOC'Y NEWSPAPER EDITORS BULL., Sept. 1970, at 7-8; EDITOR & PUBLISHER, Feb. 7, 1970, at 12; *see* Comment, *Constitutional Protection for the Newsman's Work Product,* 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 119 (1970); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship,* 80 YALE L.J. 317 (1970).

3. COLUM. JOURNALISM REV., Spring 1970, at 2-3; STRAUS EDITOR'S REPORT, July 6, 1970,

willingness to accept contempt convictions and jail terms rather than reveal confidences, along with their unyielding protests to government, made the controversy "one of the most difficult issues I have faced . . . ."[4]

When the barrage of subpoenas began in early 1969, statutes of some states recognized an evidentiary privilege of journalists not to reveal confidential sources.[5] In April 1970, the possibility of an additional protective avenue opened when the United States District Court for the Northern District of California granted constitutional protection under the first amendment's freedom of the press clause.[6] By March 1971, this decision had been upheld and extended; the highest courts of three states had ruled upon the claim to constitutional protection with widely divergent results; and at least three petitions had been filed for Supreme Court review of these decisions in the hope that certiorari, uniformly denied in earlier similar cases, now would be granted.[7]

This article will examine the decisions since April 1970 and suggest some implications flowing from them, particularly as they bear on the constitutional issues. As a prelude, it will seek to summarize the state of the law on newmen's privilege prior to April 1970.

II. COMMON LAW AND STATUTORY BACKGROUND OF THE NEWSMEN'S PRIVILEGE

At common law, the journalist could be compelled to reveal his sources of information when subpoenaed to testify before a grand jury, court, or legislature.[8] This rule was based on the theory that every man owed his testimony when called by his government to give evidence in his possession. Although exceptions were sometimes made for the priest-penitent, attorney-client, physician-patient, and a few other

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at 3; *see* Gould, *House Panel Bids C.B.S. Yield Films,* N.Y. Times, Apr. 9, 1971, at 1, col. 1 (city ed.); NEWSWEEK, Apr. 19, 1971, at 95, col. 1.

4. EDITOR & PUBLISHER, Aug. 15, 1970, at 9-10; FOI DIGEST, May-June 1970, at 1.

5. *See* notes 11-19 *infra* and accompanying text.

6. Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970); *see* note 34 *infra* and accompanying text.

7. *See* note 79 *infra* and accompanying text. For previous denial of certiorari see notes 28 & 32 *infra*.

8. People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 293-94, 199 N.E. 415 (1936); Annot., 7 A.L.R.3d 591 (1966); 8 J. WIGMORE, EVIDENCE § 2285 (J. McNaughton rev. ed. 1961). For the most exhaustive study of newsmen's privilege, including its historical development and analysis of reported and unreported cases, see A. Gordon, Protection of News Sources: The History and Legal Status of the Newsman's Privilege, Dec., 1970 (unpublished dissertation on file in the University of Wisconsin Library).

relationships, the privilege was slow to emerge for newsmen.[9] Beginning in Maryland in 1896, statutes intruded on the common-law position,[10] and by 1970 seventeen states[11] provided a newsmen's privilege. The degree of protection under these statutes varies from an absolute privilege in thirteen states, including Pennsylvania, Nevada, and Ohio,[12] to a privilege qualified by exceptions grounded in malice and bad faith[13] or by a judicial finding that disclosure is essential to the public interest.[14] The media included range from newspapers only[15] to newspapers, radio and television, magazines, news agencies, press associations, and wire services.[16] Six states protect only the sources of published information;[17]

9. 8 J. WIGMORE, *supra* note 8, §§ 2286, 2290 (attorney-client); *id.* § 2394 (priest-penitent).

10. D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307, 324 (1969).

11. ALA. CODE tit. 7, § 370 (1960); ALASKA STAT. §§ 09.25.150-.220 (Supp. 1970); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West 1966); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. ANN. § 421.100 (1969); LA. REV. STAT. ANN. §§ 45:1451-54 (Supp. 1971); MD. ANN. CODE art. 35, § 2 (1971); MICH. STAT. ANN. § 28.945(1) (1954); MONT. REV. CODES ANN. §§ 93-601-1 to -2 (1964); NEV. REV. STAT. § 48.087 (1968); N.J. STAT. ANN. § 2A:84A-21 (Supp. 1970); N.M. STAT. ANN. § 20-1-12.1 (1970); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1971); OHIO REV. CODE ANN. § 2739.12 (Baldwin 1970); PA. STAT. ANN. tit. 28, § 330 (Supp. 1971).

In addition, Senator Pearson (Kansas) has introduced a bill into Congress to provide certain privileges against disclosure of confidential information and the sources of information obtained by newsmen. S. 1311, 92d Cong., 1st Sess. (1971). The Newsmen's Privilege Act of 1971 provides that newsmen shall not be required by any court, grand jury, agency, department, or commission of the United States, or by either House of Congress, to disclose any confidential information obtained by them in their capacity as newsmen. The newsmen's privilege to maintain the confidentiality of news sources is subject to reasonable qualifications: (1) the privilege does not extend to the source of any allegedly defamatory information if the defendant, in a civil action for defamation, asserts a defense based upon the source of the information; (2) the privilege does not extend to the source of any information concerning the details of any grand jury or other proceeding that is required to be secret under the laws of the United States; and (3) the privilege may be removed when there is substantial evidence that disclosure is required to prevent a threat to human life, of espionage, or of foreign aggression. 117 CONG. REC. 3535 (daily ed. Mar. 23, 1971).

12. ALA. CODE tit. 7, § 370 (1960); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); CAL. EVID. CODE § 1070 (West 1966); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. ANN. § 421.100 (1969); MD. ANN. CODE art. 35, § 2 (1971); MICH. STAT. ANN. § 28.945(1) (1954); MONT. REV. CODES ANN. §§ 93-601-1 to -2 (1964); NEV. REV. STAT. § 48.087 (1968); N.J. STAT. ANN. § 2A:84A-21 (Supp. 1970); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1971); OHIO REV. CODE ANN. § 2739.12 (Baldwin 1970); PA. STAT. ANN. tit. 28, § 330 (Supp. 1971). For analysis of these and other privilege statutes see D'Alemberte, *supra* note 10, at 327-34.

13. ARK. STAT. ANN. § 43-917 (1964).

14. ALASKA STAT. §§ 09.25.150- .220 (Supp. 1970); LA. REV. STAT. ANN. §§ 45:1451-54 (Supp. 1971); N.M. STAT. ANN. § 20-1-12.1 (1970).

15. N.J. STAT. ANN. § 2A:84A-21 (Supp. 1970).

16. N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1971).

17. ALA. CODE tit. 7, § 370 (1960); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); CAL. EVID. CODE § 1070 (West 1966); KY. REV. STAT. ANN. § 421.100 (1969); MD. ANN. CODE art. 35, § 2 (1971); N.J. STAT. ANN. § 2A:84A-21 (Supp. 1970).

others shield sources of information whether published or not.[18] Only three statutes grant immunity from testifying about the information gathered as well as about the sources of information.[19]

Reported cases under these statutes are found in Pennsylvania, California, and New Jersey.[20] The Pennsylvania Supreme Court, in *In re Taylor*,[21] expansively construed the statutory phrase "source of information" to include documents and tape recordings in the possession of the newspaper as well as the identity of the newspaper's sources. The court found that the Act must be construed broadly and that the legislature had determined that the gathering of news and the protection of the source were of greater importance to the public interest than the disclosure of the alleged crime or the alleged criminal.[22]

In *Application of Howard*,[23] the California Court of Appeals ruled that when a reporter attributes a statement to a named individual, it does not follow that the individual was the reporter's "source of information" for the statement. Since the reporter might have obtained the statement from others or from a press release, the court ruled that the reporter had not waived his privilege by attributing the information to a named individual.[24]

The New Jersey statute was the basis for a plea of privilege in *State v. Donovan*.[25] A newspaper's managing editor, in testifying before the New Jersey Supreme Court Commission, refused to say who had delivered certain press-release information to the newspaper, although the newspaper stories themselves had named certain individuals as the sources of information contained in the press releases. The editor relied on the statute's privilege against disclosing "the source of any information procured or obtained . . . and published in the newspaper . . . ."[26] The court, however, insisting that statutes in derogation of the

18. *E.g.*, OHIO REV. CODE ANN. § 2739.12 (Baldwin 1970).

19. MICH. STAT. ANN. § 28.945(1) (1954); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1971); PA. STAT. ANN. tit. 28, § 330 (Supp. 1971).

20. For other cases interpreting newsmen's privilege statutes see Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970) (discussed at note 44 *infra*), and Lipps v. State, 258 N.E.2d 622 (Ind. 1970), which held that a criminal defendant could not object to a reporter's testifying about information disclosed to him in confidence since the privilege could be invoked only by the newsman.

21. 412 Pa. 32, 193 A.2d 181 (1963).

22. *Id.* at 36-38, 193 A.2d at 184-86.

23. 136 Cal. App. 2d 816, 289 P.2d 537 (1955).

24. *Id.* at 817-18, 289 P.2d at 538.

25. 129 N.J.L. 478, 30 A.2d 421 (Sup. Ct. 1943).

26. N.J. STAT. ANN. § 2:97-11 (1939).

common law be strictly construed, required the editor to answer since the inquiry went "not to the source, but to the messenger."[27]

III. The Constitutional Question

Constitutional protection for newsmen's privilege under the first amendment guarantee of freedom of the press was first sought in 1958. In *Garland v. Torre,*[28] a reporter, questioned in a libel suit, refused to reveal the identity of a broadcasting official she had quoted in her newspaper column. The reporter was found in contempt of court, and on appeal she argued that forcing her to reveal her sources of information would encroach upon the freedom of the press under the first amendment because it would restrain the flow of news from source to press to public.[29] The Second Circuit Court of Appeals, however, held that the question "went to the heart of the plaintiff's claim"[30] and that if freedom of the press were involved, it "must give place under the Constitution to a paramount public interest in the fair administration of justice."[31] Subsequent decisions followed *Torre* in denying first amendment protection to the privilege, and, as in *Torre,* cases appealed to the United States Supreme Court were denied certiorari.[32]

Constitutional protection for the privilege was first clearly recognized in 1970 in *Caldwell v. United States.*[33] *New York Times* reporter Earl Caldwell, a black journalist and a specialist in reporting on the Black Panther Party, raised the privilege in refusing to appear and testify about the Party in answer to a federal grand jury subpoena. Caldwell moved to quash the subpoena, arguing that if he testified he would lose the confidence of his sources, and that the flow of news to the public would thus be impeded. The federal district court denied his motion, but gave him a protective order, holding that when the grand jury power of testimonial compulsion may impinge upon or repress first amendment rights, the power shall not be exercised "until there has been a clear showing of a compelling and overriding national interest that

27. 129 N.J.L. at 487, 30 A.2d at 426. Subsequently, the New Jersey legislature broadened the statute to protect not only the source, but also "the author, means, agency, or person from or through whom" information was obtained. N.J. STAT. ANN. § 2A:84A-21 (Supp. 1970).

28. 259 F.2d 545, *cert. denied,* 358 U.S. 910 (1958). *See generally* Annot., 7 A.L.R. 3d 591 (1966).

29. 259 F.2d at 547-48.

30. *Id.* at 550.

31. *Id.* at 549.

32. *E.g.,* Buchanan v. Oregon, 392 U.S. 905, *denying cert. to* 250 Ore. 244, 436 P.2d 729 (1968); Murphy v. Colorado, 365 U.S. 843 (1961).

33. 434 F.2d 1081 (9th Cir. 1970).

cannot be served by alternate means."[34] The court ruled that Caldwell was not required to reveal confidential sources *or information.* Specifically, he was not required to answer questions about information given to him by the Panthers.

Although partially protected, Caldwell appealed, seeking not only to avoid testifying before the grand jury but also to avoid appearing. The Ninth Circuit Court of Appeals ruled for Caldwell.[35] The court initially agreed that forcing disclosure of information obtained in confidence from the Black Panthers would drive a wedge of distrust and silence between the media and the militants, hampering the news-gathering process.[36] In weighing the loss to the grand jury's investigative function against injury to first amendment freedoms, the court stressed the societal interest served by freedom of the press—the public's right to information. Compelling the news gatherer to make his product available, it said, is "to convert him after the fact into an investigative agent of the Government,"[37] invading the autonomy of the press. "To do so where the result is to diminish their future capacity as news gatherers is destructive of their public function."[38]

After the Ninth Circuit affirmed the requirement that the government must show a compelling national interest that could not be served by alternative means before insisting upon testimony from the reporter, the court addressed itself to Caldwell's appeal of the judgment that he must appear before the grand jury to answer questions not privileged. Again it sketched the suspicion and loss of trust among Black Panthers that would attach to the process, this time merely by reason of the reporter's *attending* a secret investigation. The privilege not to answer certain questions, the court said, did not adequately protect first amendment freedoms at stake in this case. The court found that the privilege must be implemented as Caldwell requested or it would fail in its purpose.[39] The real issue was whether the government's need for Caldwell's testimony on unprivileged subjects justified the injury threatened to first amendment freedoms by requiring his mere attendance. Caldwell's affidavit averred that except for what he had already made public, there was nothing to which he could testify that was not protected by the district court's order. The court said: "If this is

34. Application of Caldwell, 311 F. Supp. 358, 360 (N.D. Cal. 1970).

35. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *noted in* 84 HARV. L. REV. 1536 (1971).

36. *Id.* at 1084.

37. *Id.* at 1086.

38. *Id.*

39. *Id.* at 1088-89.

true . . . appellant's response to the subpoena would be a barren performance—one of no benefit to the Grand Jury. . . . Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized."[40] The court recognized that secret interrogation is essential to the grand jury process, but reasoned that "implicit in the extraordinary nature of secret interrogations, is the possibility of conflict with basic rights."[41] On a showing "that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance."[42] The court emphasized that the rule of this case was a narrow one. Not all news sources are as sensitive as the Black Panther Party, and not every newsman enjoys the trust of a sensitive source.

As the handle of constitutional protection afforded in the *Caldwell* decisions was being seized by attorneys for other reporters caught in the wave of subpoenas, a controversy under a newsmen's shield law was in progress in the Kentucky Court of Appeals. Paul Branzburg, *Louisville Courier Journal* reporter, watched two men convert marijuana to hashish and wrote a story about it. When summoned to testify before the grand jury, he refused to reveal the men's identity, pleading privilege under the Kentucky shield law.[43] He was held in contempt for his refusal, and the Kentucky Court of Appeals affirmed only eleven days after the *Caldwell* decision.[44] Branzburg had asked for a broad construction of the statutory phrase "source of information," to include all knowledge received by a newsman. The highest court of Kentucky, however, held that "information" in the statute refers to the matters that a reporter learns, and "source" refers to the method by which, or the person from whom, the information is obtained.[45] The court found that the source alone is privileged. Since the testimony sought by the grand jury involved the personal observations of the reporter, no privilege existed.

Less than two months later, Branzburg was again under subpoena. This time the grand jury was seeking his testimony about articles

40. *Id.* at 1089.
41. *Id.*
42. *Id.*
43. KY. REV. STAT. ANN. § 421.100 (1969).
44. Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970).
45. *Id.* at 347.

appearing in the Louisville newspaper concerning the illegal use of drugs. Branzburg filed in circuit court a motion to quash the subpoena and sought to be excused from appearing before the grand jury. His motion was denied and he appealed.[46] This time Branzburg sought constitutional protection, relying on *Caldwell*. The Kentucky court, however, distinguished *Caldwell* on two grounds. First, Caldwell had produced substantial evidence that his appearance before a grand jury would have a chilling effect upon his sources, but Branzburg merely alleged that the drug-using portion of the public would stop furnishing information to him. Secondly, Caldwell's affidavit said that the only information he had would be privileged by the protective order granted him and his appearance would thus be an exercise in futility, but Branzburg filed no similar affidavit.[47]

Although the court concluded that Branzburg was not within the Ninth Circuit principle, it went on to state that it had misgivings about the *Caldwell* decision, terming it "a drastic departure from the generally recognized rule . . . ."[48] The Kentucky court noted that the express language of the first amendment prohibits the enactment of any law abridging freedom of the press or freedom of speech whereas the *Caldwell* opinion rests on the public's first amendment right to be informed. The court balanced the questioned first amendment interest against the interest inherent in the grand jury, an instrument that insulates citizens from overzealous prosecution and investigates crime and matters detrimental to the public interest. It is much less evident, the court concluded, that compulsory attendance before a grand jury infringes first amendment rights than it is that restricting the power to compel attendance directly and obviously impedes the grand jury's functioning.[49] The decision to deny Branzburg's petition was unanimous.

Within a week after the *Branzburg* decision, the Massachusetts Supreme Judicial Court, in *In re Pappas*,[50] flatly denied the constitutional protection that the Kentucky court had merely questioned. Paul Pappas, a New Bedford television newsman, refused to tell a grand jury what he had seen and heard at Black Panther headquarters during civil disturbances in New Bedford. On motion to quash a second subpoena, the superior court ruled that he had no privilege and must respond and testify. On appeal, the Supreme Judicial

46. Branzburg v. Meigs, No. W-29-71 (Ky., Jan. 22, 1971).
47. *Id.* at 5-6.
48. *Id.* at 6 (relying upon the *Torre* decision).
49. *Id.* at 7.
50. 266 N.E.2d 297 (1971).

Court found that the cases in general supported the view that privileges against disclosure are serious interferences with rational investigation and are justified only if accompanied by valuable social benefits.[51] The court expressed no concern that requiring a newsman to testify about facts within his knowledge would infringe first amendment rights, stating that any effect on the free flow of news is "indirect, theoretical, and uncertain, and relates at most to the future gathering of news."[52] In the court's view, the *Caldwell* case largely disregarded important government interests in enforcing criminal law for the public benefit. The newsmen's protection lies not in the Constitution, but in judicial supervision to prevent "oppressive, unnecessary, irrelevant, and other improper inquiry and investigation . . . ,"[53] and the burden rests on a witness to establish that the grand jury inquiry is improper.

Now twice rejected, the *Caldwell* reasoning within a week was recognized in a state without a privilege statute. The Wisconsin Supreme Court, in *State v. Knops,*[54] recognized constitutional protection for the newsmen's privilege in general, but denied its application to the facts of the case. A grand jury was investigating alleged arson at Whitewater State University and an explosion at the University of Wisconsin that killed one person. *Kaleidoscope,* an "underground" newspaper, printed a story entitled "The Bombers Tell Why and What Next . . . ." Knops, editor of the underground paper, appeared in response to subpoena, but refused on first amendment grounds to answer five questions concerning persons with whom he had talked about the alleged arson and the bombing. Appealing a contempt conviction, Knops did not ask immunity from appearance before the grand jury but argued that he should not be required to reveal confidential sources and information. He relied on *Caldwell* in alleging that disclosure would inhibit the free flow of news to the public, thereby damaging first amendment interests. The court reasoned that even if the premises underlying the *Caldwell* decision were accepted, the need for answers to the five questions was overriding. "[T]he appellant's information could lead to the apprehension and conviction of the person or persons who committed a major criminal offense resulting in the death of an innocent person."[55] Although the court conceded that curtailment of the free flow

51. *See Preface* to MODEL CODE OF EVIDENCE at 7.

52. 266 N.E.2d at 302.

53. *Id.* at 303. In his supervisory role in relation to the grand jury, the judge has discretion to prevent excessive or unnecessary interference with the legitimate interests of witnesses.

54. 183 N.W.2d 93 (1971).

55. *Id.* at 99.

of information could occur, it reasoned that "in a disorderly society such as we are currently experiencing it may well be appropriate to curtail in a very minor way the free flow of information, if such curtailment will serve the purpose of restoring an atmosphere in which all of our fundamental freedoms can flourish."[56] A fundamental freedom that the public presently lacks, it said, "is the freedom to walk into public buildings without having to fear for one's life."[57]

Apart from an absolute constitutional privilege, Knops argued that the state must demonstrate the lack of an alternative method, less restrictive of first amendment rights, by which the objective could be served. In discussing this contention, the Wisconsin court rejected the *Caldwell* determination that the state must show there are no alternative means by which the information can be obtained. "We think that if there are alternative methods of gaining this information, appellant should point them out. He asks too much when he asks the court to presume that state officers could gain this information elsewhere . . . . The mere fact that the culprits are still at large is nearly conclusive proof that the state does not know who they are."[58]

Justice Heffernan, concurring in part and dissenting in part, approved the findings of constitutional protection for a newsman's privilege, and agreed with the finding of contempt, but strictly on the basis of the arson at Whitewater State University. He argued that since official records showed Wisconsin and United States officials had said under oath that they knew who caused the explosion at the University of Wisconsin, and since the United States Attorney had stated that Knops's testimony in that regard was now superfluous, there was no compelling need for Knops's testimony about the bombing. He also found a contradiction in the majority's willingness to "curtail in a very minor way the free flow of information" while at the same time compelling "the *production* of information" in the case of overriding state interest.[59]

IV. OVERVIEW

For the reporter on the firing-line, the case for an absolute newsmen's privilege under the Constitution is likely to have strong appeal.[60] Nevertheless, newspapers as well as the courts have shown that

56. *Id.* at 98.
57. *Id.*
58. *Id.* at 99.
59. *Id.* at 100 & n.1.
60. For a discussion of the "absolute" position see Elliott & Osborn, *The Case for Total*

they realize the need to balance first amendment rights against others. In Wisconsin, where the privilege sought by the underground editor would have seemingly blocked access to information about violent deaths, bombing, and alleged arson, eleven of the state's 36 daily newspapers editorialized on the *Knops* case.[61] Nine expressed approval of the decision, usually on grounds that freedom of the press places "an extra burden on a journalist to be responsible to the public interest,"[62] while two disapproved. One editorial, criticizing the majority's determination that it was "appropriate to curtail in a very minor way the free flow of information"[63] so that all freedoms could flourish, said: "This has been the eternal cry of totalitarians since man left the caves."[64] This editorial suggested that "the court found it easy to rationalize its decision because it was dealing with a radical underground journalist."[65] A second newspaper found the decision a "legal landmark" because no state supreme court had previously held that the Constitution protects the journalist's confidential sources; but the editorial criticized the majority's application of its rule and agreed with the partial dissent.[66]

In summarizing the implications of decisions since Earl Caldwell went before the federal district court, some newsmen's negatives are an appropriate starting point. The constitutional protection has not penetrated Massachusetts. There is not even the concession of *Torre* that freedom of the press, even though subordinate to the principle of the fair administration of justice, might be involved in a newsman's claim to privilege. For now, Massachusetts newsmen will have to rely on presiding judges' supervision to keep investigations from becoming oppressive, unnecessarily broad, or irrelevant. There is not quite so flat a denial in Kentucky. Nevertheless, the Kentucky court doubted the *Caldwell* rule and questioned whether the public has a first amendment

Privilege, AM. SOC'Y OF NEWSPAPERS EDITORS BULL., Sept. 1970, at 4-7. Several state statutes restrict the range of circumstances in which the privilege applies, but apparently make it absolute. *See* note 12 *supra*.

61. Appleton-Neenah-Menasha Post-Crescent, Feb. 9, 1971, § A, at 4, col. 1; Beloit Daily News, Feb. 4, 1971, at 6, col. 1; Green Bay Press-Gazette, Feb. 4, 1971, § A, at 6, col. 1; LaCrosse Tribune, Feb. 3, 1971, at 6, col. 1; Madison Capital-Times, Feb. 4, 1971, at 38, col. 1; Milwaukee J., Feb. 4, 1971, at 20, col. 1; Milwaukee Sentinel, Feb. 4, 1971, at 16, col. 1; Rhinelander Daily News, Feb. 5, 1971, at 4, col. 1; Waukesha Freeman, Feb. 8, 1971, at 8, col. 1; Wausau Record-Herald, *quoted in* Antigo Daily J., Feb. 10, 1971, at 4; Wisconsin State J., Feb. 4, 1971, at 10, col. 1. Of the 36 daily papers, 34 were examined.

62. Milwaukee Sentinel, Feb. 4, 1971, at 16, col. 1.

63. 183 N.W.2d at 98.

64. Madison Capital-Times, Feb. 4, 1971, at 38, col. 1.

65. *Id.*

66. Milwaukee J., Feb. 4, 1971, at 20, col. 1.

right to be informed. Kentucky newsmen must rely on their state statute, freshly construed to hold their privilege tightly to the *source,* not to the information. As for the *Caldwell* decision itself, it provides a constitutional protection heavily qualified and distinctly less protective of *source* confidentiality than some state statutes. Several state statutes contain absolute prohibitions against compelling reporters to disclose the sources of any information procured by them for publication.[67] Caldwell's protection, however, was issued only after careful consideration of the facts in the case and a finding that his special relation to a highly sensitive source warranted the shield. Further, a balancing of interests approach, with its attendant uncertainty, was a clear factor in both *Caldwell* and *Knops.* In *Knops,* the reporter's side of the scale was outweighed. Under the "absolute" privilege statutes, however, there is no reason for courts to balance the claim to source protection against the demands of the proper administration of justice.

The *Knops* decision, finally, contains language that the news media may consider the unkindest cut of all. The Wisconsin majority turned the concept of "the public's right to know" against the newsman in holding that he may not keep secret his knowledge of major, specific crimes; ironically, the "public's right to know" has been the rallying-cry, slogan, and banner for journalists attacking secrecy in government for the past twenty years.[68] It is probably safe to say that no professional undertaking during this period has so occupied newsmen as their drive for an end to secrecy, cast as a battle in the name of the public and variously called "access to government information," "freedom of information," and "the public's right to know." This is not to say that the societal value in the future free flow of information never justifies the journalist's secrecy, but rather to suggest that in this confrontation with government, the secrecy shoe is plainly on the other foot. The government, as well as the press, has warrant to argue that its functions advance the "public's right to know."

On the positive side, the *Caldwell* decision contradicts the uniform holdings against a constitutional protection and goes beyond the privilege statutes to shield the reporter from even *appearing* before a grand jury. Further, it privileges him not to reveal "confidential associations, sources or information," a broader range of material than

67. *See* statutes cited note 12 *supra.* In addition to these statutes, Pennsylvania and California courts have construed "source" broadly, to the advantage of the privilege. *See* notes 21 & 23 *supra* and accompanying text.

68. H. CROSS, THE PEOPLE'S RIGHT TO KNOW (1953); J. WIGGINS, FREEDOM OR SECRECY (rev. ed. 1964).

is covered by most statutes, which generally protect only the "source of information."[69]

In addition, the *Knops* decision went briefly to the troublesome question of who is a journalist.[70] Statutes uniformly specify that the privilege is limited to persons who gather news for one or more of the "recognized" news media. Did Knops, editor of an "underground" paper, which often featured radical polemic and ridiculed religious and sexual mores, warrant protection? Was his publication a "newspaper?" The Wisconsin court noted it was undisputed that *Kaleidoscope* was a newspaper and that Knops was a journalist.[71]

Perhaps most importantly, the language of the *Caldwell* decision unmistakably identifies the news-gathering function as a part of the journalistic process entitled to first amendment protection.[72] Constitutional protection for news-gathering has advanced slowly.[73] It has been denied in earlier decisions on privilege,[74] supported occasionally in the context of access to government,[75] but ordinarily denied there,[76] and supported by analogy in circumstances not involving news media.[77] News-gathering, a complex process itself, in turn embraces other

69. The New York statute may furnish protection for almost as broad a range of material. It provides that no newsman shall be judged in contempt for refusing "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 . . . or for broadcast . . . ." N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1971) (emphasis added). Moreover, the Pennsylvania Supreme Court, in *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963), construed the word "source" in the statute broadly. *See* note 21 *supra.*

70. *See* Comment, *supra* note 2, at 129.

71. 183 N.W.2d at 95. It may be doubted that journalists of "establishment" media would necessarily count protection for unorthodox practitioners a "positive" development in privilege. While the *Knops* decision was pending, this writer heard several editors question whether an "underground" journal could qualify for the protection.

72. *See* 434 F.2d at 1086, 1089. For support for this position see Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources,* 64 NW. U.L. REV. 18, 29 (1969).

73. The historical development in the United States is treated in Nelson, *Introduction* to FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT at xix-l (H. Nelson ed. 1967).

74. *See* note 32 *supra.*

75. Associated Press v. KVOS, Inc., 80 F.2d 575 (9th Cir. 1935), *rev'd on other grounds,* 299 U.S. 269 (1936); Providence Journal Co. v. McCoy, 94 F. Supp. 186 (D.R.I. 1950), *aff'd on other grounds,* 190 F.2d 760 (1st Cir. 1951); Lyles v. State, 330 P.2d 734 (Okla. Crim. App. 1958).

76. Seymour v. United States, 373 F.2d 629 (5th Cir. 1967); Worthy v. Herter, 270 F.2d 905 (D.C. Cir. 1959); Tribune Review Pub. Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958); Trimble v. Johnson, 173 F. Supp. 651 (D.D.C. 1953); *In re* Mack, 386 Pa. 251, 126 A.2d 679 (1956); United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

77. *See* Guest & Stanzler, *supra* note 72 at 29-36; Comment, *supra* note 2, at 124-29. First amendment protection, of course, has come more quickly to other parts of the publishing process, granting protection from prepublication censorship, from interference with printing and distribution, and from punishment after publication.

complex processes, such as obtaining access to information, interviewing, researching records, and the use of devices such as cameras, microphones, and tape recorders. If news-gathering deserves constitutional protection, many of its components await future consideration under the first amendment.

Take access, for example. If the Constitution protects a news gatherer's privilege to conceal his sources in the name of his future capacity to obtain information for the public, it may as well arm a news gatherer with the power to gain access to government records and meetings in the name of his present and future capaeity to obtain information for the public about what its servants do. Newsmen have argued unsuccessfully for years, that a constitutional right of access is a necessary part of gathering the news.[78] It is conceivable that *Caldwell* could serve as an instrument to force reappraisal of first amendment protection for access and consideration of a range of other news gatherers' practices.

In the name of the public's need for a free flow of information, why should constitutional protection stop at supporting access to government information? May there not also be a newsmen's right of access to the records of industry, labor, and privately owned hospitals? Is it less important that the public know "the facts" about industrial pollution than that it know "the facts" about the continuing activity of the Black Panther Party?

Perhaps such speculation is frivolous at a moment when three petitioners have been granted Supreme Court review of constitutional protection for the news gatherer who labors in the name of the public.[79] Yet the Supreme Court's elevation of the "public" principle in other first amendment spheres of recent years has been striking. The chief vehicle has been the doctrine first expressed in *New York Times Co. v. Sullivan,*[80] a case heavily restricting the individual's right to recover libel damages in view of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

78. H. CROSS, *supra* note 68, at xiii-xiv; M. KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE 192-93 (1957); J. WIGGINS, *supra* note 68; Scher & Jacob, *Access to Information: Recent Legal Problems,* 37 JOURNALISM Q. 41 (1960).

79. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted,* 39 U.S.L.W. 3478 (U.S. May 4, 1971) (No. 1114); Branzburg v. Meigs, No. W-29-7 (Ky., Jan. 22, 1971), *cert. granted sub nom.* Branzburg v. Hayes, 39 U.S.L.W. 3478 (U.S. May 4, 1971) (No. 1381); *In re* Pappas, 266 N.E.2d 297 (Mass. 1971), *cert. granted,* 39 U.S.L.W. 3478 (U.S. May 4, 1971) (No. 1434).

80. 376 U.S. 254 (1964).

open . . . ."[81] Under the *Sullivan* doctrine, only the malicious untruth—not the negligent or careless error—can be the basis for recovery when various "public" factors are involved.[82] Limiting first the public official's right to recovery, the doctrine subsequently was expanded to include "public figures,"[83] and private individuals swept unwillingly into public prominence.[84] Now decisions are following in spirit the concurring opinion of Mr. Justice Douglas in *Rosenblatt v. Baer,*[85] in which he said "the question is whether a public *issue* . . . is involved."[86] Recent cases have reinforced the pre-eminence of the public's need for information about matters of great public interest over the right of the corporation or citizen to recover in libel.[87] May industry, like nonofficial citizens who take active part in public affairs, be "as much in the public domain as any so-called officeholder?"[88]

As the *Sullivan* doctrine extends constitutional protection for printing under the "public" rationale, *Caldwell* extends it for news-gathering under the same principle. If *Caldwell* survives Supreme Court review, it seems likely that journalists will carry its reasoning beyond the realm of newsmen's privilege to seek first amendment support for the right of access and other aspects of news-gathering.

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81. *Id.* at 270.

82. *Id.* at 279-80.

83. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966); Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964).

84. Time, Inc. v. Hill, 385 U.S. 374 (1967).

85. 383 U.S. 75, 88 (1966).

86. *Id.* at 91.

87. Time, Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970); Bon Air Hotel v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Time, Inc. v. McLaney, Inc., 406 F.2d 565 (5th Cir. 1969); United Medical Laboratories v. CBS, 404 F.2d 706 (9th Cir. 1968), *cert. denied,* 394 U.S. 921 (1969). The first amendment thrust of the *Sullivan* case and its successors goes to "the right of the public to have an interest in the matter involved and its right therefore to know or be informed about it." *Id.* at 710.

88. Rosenblatt v. Baer, 383 U.S. 75, 89 (1966) (Douglas, J., concurring).