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## THE "SHIELD" STATUTE: SOLUTION TO THE NEWSMAN'S DILEMMA?

### INTRODUCTION

Peter Bridge, a reporter for the now defunct *Evening News of Newark*, published a revealing story of possible corruption within the Newark Housing Authority.<sup>1</sup> The product of intensive research and investigation, the story relied to a large extent upon information received from one of the Authority's members who claimed a bribe had been offered her in an attempt to influence the vote in the election of the board's new executive director. Public indignation was aroused, prompting an official investigation. In the ensuing grand jury inquiry, Bridge was required to testify. Although he responded to the majority of the questions asked of him, Bridge declined to answer a few of the jury's interrogatories. Relying on an alleged newsmen's privilege allowing a reporter to refuse to answer questions which would reveal the source of the newsmen's information, Bridge refused to answer certain questions which he felt went beyond the authority of the jury and which, more precisely, would have destroyed his effectiveness as an investigative news reporter.<sup>2</sup> Answers to these inquiries would have revealed unpublished research and the confidential sources of his investigation. As a consequence, those sources and sources yet untapped would have disappeared.<sup>3</sup>

For his action Peter Bridge was incarcerated in the Essex County Jail in Newark. Though his stay behind bars lasted only 20 days, it was clear from the contempt citation that his time there could have been indefinitely longer if the grand jury's term had not expired.<sup>4</sup>

Recently, many members of the news media have been forced either to suffer similar penalties or to flee from their home states to avoid such punishment.<sup>5</sup> This note examines the urgent need for adequate statutory protections which would limit the instances in which a newsmen must disclose his confidential sources and the corresponding treat-

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1. *In re Bridge*, 120 N.J. Super. 460, 295 A.2d 3 (1972).

2. See Indianapolis Star, Oct. 25, 1972, at 18; for a more detailed treatment of Mr. Bridge's philosophy, see Bridge, *Peter Bridge: A Reporter Protects His Sources*, Chicago Tribune, Oct. 29, 1972, § 1A (Perspective), at 3 [hereinafter cited as Bridge].

3. Bridge, *supra* note 2.

4. See Indianapolis Star, *supra* note 2.

5. See Landau, *Enough "Blood" Now In Newsmen's Fight*, Indianapolis Star, Nov. 23, 1972, at 40; see also NEWSWEEK, Oct. 16, 1972, at 60, col. 2.

ment such legislation may encounter from a judiciary which seems determined to scrutinize this legislation on a highly technical basis.<sup>6</sup>

### THE PRIVILEGE: A BRIEF HISTORY

#### *The Non-existent Privilege*

It should be noted at the outset that the evidentiary privilege claimed by Peter Bridge and his fellow journalists exists only in the canon of ethics espoused by the news media.<sup>7</sup> As pointed out by legal scholars, no such privilege existed at the common law,<sup>8</sup> and efforts to construct such a privilege under the provisions of the first amendment have failed for the most part.<sup>9</sup>

#### *The Constitutional Exclusion*

Though a myriad of legal writers have debated the existence of a journalistic privilege under the first amendment<sup>10</sup> and the news media has generally assumed that such a privilege existed as an integral element of freedom of the press, the Supreme Court, in *Branzburg v. Hayes*,<sup>11</sup> recently settled the debates and disposed of any constitutional basis for the media's assumptions. Because of this decision, it is now quite clear that newsmen have no first amendment privilege to withhold the identities of their news sources when such disclosure is demanded in judicial, legislative or administrative hearings.<sup>12</sup>

### THE STATUTORY ANSWER: THE "SHIELD" STATUTE

With only certain constitutional<sup>13</sup> and common law<sup>14</sup> exceptions,

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6. Definitional problems for such terms as "source," "newsman," "newspaper," etc. are not treated within the scope of this note.

7. See Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. L. REV. 18 (1969) [hereinafter cited as Guest and Stanzler]. Therein the following is noted:

In 1934 the American Newspaper Guild adopted the following as part of the newsman's code of ethics: "Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies."

BIRD AND MERWIN, *THE NEWSPAPER AND SOCIETY* 567 (1942).

8. 8 J. WIGMORE, *WIGMORE ON EVIDENCE* § 2286 (McNaughton ed. 1961).

9. C. MCCORMICK, *MCCORMICK ON EVIDENCE* § 77, at 159 (Cleary ed. 1972).

10. For one of the better treatments of the constitutional debate, see Guest and Stanzler, *supra* note 7.

11. 408 U.S. 665 (1972).

12. *Id.*

13. *E.g.*, the fifth amendment privilege against self-incrimination.

14. *E.g.*, the husband-wife and attorney-client privilege against disclosure of confidential communications.

it is clear that the judiciary has the power to compel the testimony of witnesses.<sup>15</sup> Similar powers have been extended to grand jury investigations;<sup>16</sup> it is primarily this extension which most alarms the reporting industry since, under normal grand jury proceedings, witnesses are not allowed counsel and the questions are as "wideranging and freewheeling as the District Attorney and the individual jurors choose to make them."<sup>17</sup>

Since constitutional avenues are now closed, any semblance of an evidentiary privilege for newsmen must come from the state and federal legislatures where, on the basis of regular debate and a "full consideration of competing values," a decision may validly be made.<sup>18</sup> Such a determination should not be left to the courts but to the legislatures.<sup>19</sup>

Indeed, despite the negative aspects of the Court's decision in *Hayes*,<sup>20</sup> a certain elasticity was evident which may yet afford recognition of the privilege espoused by the news media. In this respect the Court acknowledged the authority of the state and federal lawmakers to "fashion their own [evidentiary] standards."<sup>21</sup> Consequently, legislative creativity could institute a valuable privileged status for newsmen through the establishment of "shield" statutes. Such statutes, currently possessed in some degree by at least 17 states,<sup>22</sup> would limit the conditions under which a journalist could be forced to reveal his confidential news sources. It is submitted that such statutory protection, absent the protection of the first amendment and in view of the recent deluge of subpoenas demanding testimonial disclosures by newsmen,<sup>23</sup> is vitally necessary to preserve the value and effectiveness of a free press.

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15. Guest and Stanzler, *supra* note 7, at 24-25.

16. *Id.*

17. Brief for Petitioner at 29, *In re Pappas*, 408 U.S. 665 (1972).

18. Brief for United States as Amicus Curiae at 9, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

19. *Id.*

20. 408 U.S. 665 (1972).

21. *Id.* at 706.

22. ALA. CODE RECOMPILED tit. 7, § 370 (1960); ALASKA STAT. § 09.25.150 (1971 Cum. Supp.); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1972-73); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE ANN. § 1070 (West 1966); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1969); LA. REV. STAT. §§ 45.1451-54 (Cum. Supp. 1972); MD. ANN. CODE art. 35, § 2 (1971); MICH. STAT. ANN. § 28.945 (1) (1954); MONT. REV. CODES ANN. tit. 93, ch. 601-2 (1964); NEV. REV. STAT. § 48.087 (1969); N.J. STAT. ANN. § 2A: 84A-21 (Supp. 1972-73); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1970); N.Y. CIV. RIGHTS § 79-h (McKinney Supp. 1972-73); OHIO REV. CODE ANN. § 2739.12 (1954); PA. STAT. ANN. tit. 28, § 330(a) (Supp. 1972-73).

23. See Nelson, *The Newsmen's Privilege Against Disclosure of Confidential Sources and Information*, 24 VAND. L. REV. 667 (1970). See also Note, *The Newsmen's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970) [hereinafter cited as *Investigations*], where the writer notes that especially since 1969, the increase

### *Beneficiaries of a Shield Statute*

One journalist has observed that the primary beneficiary of a shield statute would be the public rather than the reporter:<sup>24</sup>

The justification for a shield law is in protection of the public's right of access to a free flow of information about the actions of government and other matters of vital public concern. Very often the only way to get certain kinds of information, about criminal acts or corruption in government, for example—is to get it from persons who will reveal the information only if they can do so without being identified.

. . . .

Thus, forcing a reporter to reveal his confidential sources will cause those sources to disappear. The public will be deprived of the information such sources could provide.<sup>25</sup>

This contention, which aptly summarizes the views of the media, is similar to that propounded by counsel in a recent newsman's appeal before the Supreme Court.<sup>26</sup> Both views clearly underscored the need for protective legislation to sustain the press as a vibrant and effective source of information.<sup>27</sup>

### LEGISLATIVE INTENT VERSUS A CRIPPLING JUDICIAL INTERPRETATION

As previously noted, at least 17 states have responded to media pleas.<sup>28</sup> In addition, at least 24 proposals are presently before the United States Congress in an effort to implement a federal shield statute.<sup>29</sup> Although the trend seems favorable for a statutory creation of a journalistic privilege, any legislation thus produced faces a judiciary which has chosen to construe the scope and effect of existing legislation along narrow boundaries and has rendered most shield statutes virtually im-

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in subpoenas issued to members of the news media has steadily eroded what privilege the profession may once have had.

24. Indianapolis Star, Dec. 20, 1972, (Editorial), at 32, col. 1.

25. *Id.*

26. Brief for Petitioner at 29, *In re Pappas*, 408 U.S. 665 (1972).

27. See generally *Investigations*, *supra* note 22. See also Thomas, *Press Freedom Is Your Cause. Too*, Chicago Tribune, Jan. 13, 1973, § 1 (Perspective), at 10. For an indication of public opinion in regard to the newsman's dilemma, see *infra* note 78.

28. See note 22 *supra*.

29. NEWSWEEK, Jan. 15, 1973, at 60, col. 3. For examples of similar legislation which failed in the recent past, see: H.R. 16704, 91st Cong., 2d Sess. (1970); H.R. 16328, 91st Cong., 2d Sess. (1970); S. 3552, 91st Cong., 2d Sess. (1970); S. 1311, 92d Cong., 1st Sess. (1971).

tent. Most past legislative efforts to extend an evidentiary privilege to newsmen thereby seem to have been thwarted.<sup>30</sup>

One writer, in commenting upon Indiana's shield statute<sup>31</sup> (yet to be fully tested in court), observed that the Indiana General Assembly, by enacting the statutory shield, clearly preferred the policy of protecting newsmen in order to insure full disclosure of information to the public to that of endangering the identities of the news media's sources in any inquisitional hearing.<sup>32</sup> It is contended that such is the intent and preference of all legislative bodies in establishing their respective evidentiary protections.

### *A Matter of Interpretation*

Though there is a paucity of case law dealing with existing shield statutes, the restrictive approach of most tribunals illustrates the extent to which a judge-made doctrine<sup>33</sup> of strict construction has become entrenched in the majority of jurisdictions.<sup>34</sup> A deeply ingrained opinion that newsmen are to enjoy little or no evidentiary privilege has taken such a firm grasp on the majority of courts that "even legislative fiat is not . . . successful in extirpating it."<sup>35</sup>

For the most part, it seems that the judiciary has ignored the

30. See Comment, *Newsman's Privilege—Statute Held to Prevent Forced Disclosure of Documents and Other Materials*, 39 NOTRE DAME LAWYER 489 (1964).

31. IND. ANN. STAT. § 2-1733 (1968):  
*Newspapers, television, and radio stations—Press associations—Employees and representatives—Immunity.*

Any person connected with a weekly, semiweekly, triweekly or daily newspaper that conforms to postal regulations, which shall have been published for five [5] consecutive years in the same city or town and which has a paid circulation of two per cent [2%] of the population of the county in which it is published, or a recognized press association, as a bona fide owner, editorial or reportorial employee, who receives his or her principal income from legitimate gathering, writing, editing, and interpretation of news, and any person connected with a commercially licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives his or her principal income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news, shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of his employment or representation of such newspaper, press association, radio station or television station, whether published or not published in the newspaper or by the press association or broadcast or not broadcast by the radio or television station by which he is employed.

32. Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256, 271 (1952).

33. Comment, *Caldwell v. United States—Journalistic Privilege: A New Dimension to Freedom of the Press*, 37 BROOKLYN L. REV. 502, 509 (1971).

34. *Id.*

35. *Id.*

legislative mandate. Utilizing the fact that no journalistic privilege existed at the common law,<sup>36</sup> the courts have rationalized a series of decisions on the following basis:

The critical attitude which the courts . . . have taken serves . . . to emphasize the rule of . . . [statutory] construction that statutes in derogation of common law rights are to be strictly construed and that courts are not to infer that the legislature intended to alter the common law principles further than is clearly expressed or than the case absolutely requires.<sup>37</sup>

A federal court used this rationale, for example, to construe the California shield statute.<sup>38</sup> The court declared that a reporter for the late *Look* magazine could not invoke the evidentiary advantages afforded by the statute because of the failure of the word "magazine" to appear explicitly within the provisions of the statute.<sup>39</sup> This desire for undue precision on the part of the court, if universally followed, seems certain to produce unfavorable results for such news gathering publications as *Time*, *Newsweek*, *U.S. News and World Report*, and the like.<sup>40</sup>

In *Branzburg v. Pound*,<sup>41</sup> the Kentucky Court of Appeals effectively avoided the provisions of what has been described as an "absolute"<sup>42</sup> shield statute<sup>43</sup> in finding that a reporter, by personally observ-

36. See note 8 *supra*.

37. *State v. Donovan*, 129 N.J.L. 478, 486, 30 A.2d 421, 426 (1943).

38. *Cepeda v. Cohane*, 233 F. Supp. 465 (S.D. N.Y. 1964).

39. CAL. EVID. CODE ANN. § 1070 (West 1966):

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.

Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television.

40. See generally *TIME*, Oct. 16, 1972, at 44.

41. 461 S.W.2d 345 (Ct. App. Ky. 1970), *aff'd*, 408 U.S. 665 (1972).

42. See D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307, 328 (1969) [hereinafter cited as D'Alemberte].

43. KY. REV. STAT. § 421.100 (1969):

*Newspaper, radio or television broadcasting station personnel need not disclose source of information.*

No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio

ing a group of persons manufacturing illegal drugs, became the source of the information published. The court stated that, since the source was clearly identified, there remained no reason to invoke the privilege of source concealment afforded by the state legislature. The intent to create the privilege must be clear, announced the court, before the bench would recognize an immunity that did not exist at the common law.<sup>44</sup>

Utilizing the rationale of *Pound*, the Maryland Court of Appeals construed the Maryland shield statute in a like manner.<sup>45</sup> In *Lightman v. State*,<sup>46</sup> a case involving a factual situation similar to *Pound*, the court held that a newsman who personally observed the selling and exchange of marijuana had no statutory privilege to conceal the identity of the owner of the premises even though the latter may have been the reporter's confidential source of information.<sup>47</sup>

Another construction problem, involving a supposedly "absolute"<sup>48</sup> shield statute,<sup>49</sup> occurred in *State v. Donovan*<sup>50</sup> where a New Jersey

or television broadcasting station by which he is engaged or employed, or with which he is connected.

44. 461 S.W.2d at 347.

45. MD. ANN. CODE art. 35, § 2 (1971):

*Employees on newspapers or for radio or television stations cannot be compelled to disclose source of news or information.*

No person engaged in, connected with or employed on a newspaper or journal or for any radio or television station shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper or disseminated by the radio or television station on and in which he is engaged, connected with or employed.

46. 15 Md. App. 713, 294 A.2d 149 (Ct. Spec. App. 1972), *aff'd*, 295 A.2d 212 (Ct. App. 1972).

47. This possibility was also recognized in *Pound* where the court conceded that the case was complicated in that in all probability the person the reporter observed manufacturing the drugs was also the reporter's confidential informant. Still, the court ignored the statute and required the reporter to testify. 461 S.W.2d at 348. *Accord*, *State v. Sheridan*, 248 Md. 320, 236 A.2d 18 (Ct. App. 1967) (dictum).

48. See D'Alemberte, *supra* note 42, at 329.

49. N.J. STAT. ANN. § 2A: 84A-21 (Supp. 1972):

*Newsman's privilege.*

Rule 27.

Subject to Rule 37 [§ 2A: 84A-29], a person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished, or delivered.

Rule 37.

A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

court technically construed the statute to exclude the messengers of confidential information. Shortly after the verdict was rendered, in response to what it obviously considered an unwarranted intrusion into lawmaking, the state legislature amended its shield statute to include those messengers specifically.<sup>51</sup> However, 30 years later in the case of *In re Bridge*,<sup>52</sup> the appellate court of that same state once again ignored legislative guidelines. In response to the court's decision, the New Jersey legislature took immediate steps to strengthen further the provisions of its supposed "absolute" shield statute<sup>53</sup> weakened by repetitive assaults from a judiciary too mechanical in its approach.<sup>54</sup> By taking such action, the lawmakers clearly indicated their displeasure with the court's apparent ignorance and continued misinterpretation of legislative intent.

### *Libel and the Shield Statute*

As the state with the greatest number of cases interpreting a shield statute, New Jersey has demonstrated the narrow approach utilized by most courts in determining the scope of protection offered by a shield statute. Two cases, *Brogan v. Passaic Daily News*<sup>55</sup> and *Beecroft v. Point Pleasant Publishing Co.*,<sup>56</sup> illustrate that narrow approach. Both cases involved libel actions in which the newspapers refused to disclose the source of allegedly libelous material. The defense raised was that the material was published in "good faith" and that the underlying sources were "reliable." In both cases the courts deemed such defenses to constitute a "waiver" of the statutory privilege.<sup>57</sup> These findings were largely based on a fear that the media would abuse its statutory privilege by printing libelous stories if the privilege were construed to deprive the victim of any legal recourse.<sup>58</sup> Such an abuse is, of course, a distinct possibility under some shield statutes, but it is doubtful that an industry-

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A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to 1 question shall not operate as a waiver with respect to any other question.

50. 129 N.J.L. 478, 30 A.2d 421 (1943).

51. The legislative response mentioned is noted in *Beecroft v. Point Pleasant Publishing Co.*, 82 N.J. Super. 269, 276, 197 A.2d 416, 419 (1964). The present wording of the New Jersey statute, quoted previously, owes its existence to the judicial interference.

52. 120 N.J. Super. 460, 295 A.2d 3 (1972).

53. See D'Alemberte, *supra* note 42, at 329.

54. This reaction on the part of the legislature is noted in *What's News Is Privileged*, TRIAL, Sept.-Oct. 1972, at 6, col. 2.

55. 22 N.J. 139, 123 A.2d 473 (1956).

56. 82 N.J. Super. 269, 197 A.2d 416 (1964).

57. N.J. STAT. ANN. § 2A: 84A-21 (Supp. 1972). The statute is quoted at note 49 *supra*.

58. 82 N.J. Super. at 278, 197 A.2d at 420.

wide loss of integrity will occur as a consequence of the recognition of such an essential evidentiary privilege.

*Waiver: A Fair Evaluation*

In a recent New York case, *Wolf v. People*,<sup>59</sup> the court established the criteria for invoking the statutory privilege. Therein an inmate of the Tombs prison wrote an article in which he allegedly admitted his criminal participation in prison rioting. After the publishers refused to produce the manuscripts in subsequent litigation, they were cited for contempt. On appeal, the New York Supreme Court upheld the contempt charges and declared:

[I]n order to raise successfully the claim of privilege, two essential elements must be established: first, the information or its sources must be imparted to the reporter under a cloak of confidentiality, i.e., upon an understanding, express or implied, that the information or its sources will not be disclosed; and second, that the information or its sources must be obtained in the course of gathering of [*sic*] news for publication.<sup>60</sup>

The inmate's failure to satisfy the first qualification motivated the court to affirm the contempt citations. Such a decision seems logical since shield statutes merely purport to protect confidential relations between newsmen and their sources. Subsequent confidences were not in danger of disclosure since the source of news waived his anonymity; thus, the need for any evidentiary privilege was eliminated.

It should be noted that a shield statute need not create an insurmountable barrier to all litigation. Indeed, the waiver qualifications established in *Wolf* seem most equitable both to the news media and to the judicial system. While protecting the "work product" of the newsman and the identity of his sources, the *Wolf* holding also predeter-

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59. 69 Misc. 2d 256, 329 N.Y.S.2d 291 (Sup. Ct. 1972), *aff'd*, 333 N.Y.S.2d 299 (1972).

60. *Id.* at 261, 329 N.Y.S.2d at 297. The statute so construed was N.Y. CIV. RIGHTS § 79-h(b) which reads as follows:

(b) *Exemption of professional journalists and newscasters from contempt.*

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.

mines the applicability of the shield statute in a situation where the newsman personally witnesses an event or occurrence. Simply, when the reporter observes a crime on a firsthand basis, *without the aid of a confidential source*, his testimony could be justifiably compelled, if not expected on a voluntary basis.<sup>61</sup>

## THE LIBERAL JUDICIARY

### *A Matter of Interpretation*

Although the majority of courts tend to construe their shield statutes in an overly restrictive manner, some jurisdictions have refused to adopt such a narrow approach to the problem. A few courts have realized that where "reason and experience" call for the recognition of a privilege, the "dead hand" of the common law should not be allowed to impede the necessary progress.<sup>62</sup>

*In re Taylor*<sup>63</sup> serves as an example of that minority view. Therein the trial court held a reporter in contempt for refusing to produce documents (parts of which were published) which contained interviews with his confidential source. However, the Pennsylvania Supreme Court overturned the contempt charges on the basis of the state's shield statute.<sup>64</sup> The court reasoned that, in order to realize the purpose of enacting the statutory privilege, the confidential information should be as closely guarded as the actual identity of the source, since the disclosure of the information could easily lead to discovery of the informer's identity. In explanation, the court said:

[I]f there were any doubt as to the interpretation, the *Statute must be liberally construed in favor of the newspapers and*

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61. See *Bridge*, *supra* note 2, at col. 4, where the author stresses the civic responsibility of news reporters to step forward with such information.

62. Comment, *Constitutional Law—Evidence—Compulsory Disclosure of Newsmen's Informant Is Not Violative of First Amendment Or Any Testimonial Privilege*, 34 NOTRE DAME LAWYER 259, 260 (1959).

63. 412 Pa. 32, 193 A.2d 181 (1963).

64. PA. STAT. ANN. tit. 28, § 330(a) (Supp. 1972):

*Confidential communications to news reporters.*

No person, engaged on, connected with, or employed by any newspaper of general circulation as defined by the laws of this Commonwealth, or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any court, grand jury, traverse or petit jury, or any officer thereof, before the General Assembly or any committee thereof, before any commissioner, department, or bureau of this Commonwealth, or before any county or municipal body, officer, or committee thereof.

*news media*. . . . [I]ndependent newspapers are today the principal watchdogs and protectors of honest, as well as good, Government. They are . . . the principal guardians of the general welfare of the Community. . . . They are, in the best sense of the maxim, "pro bono publico."<sup>65</sup>

Such an interpretation undoubtedly promotes confidence between newsmen and informers who have information for public dissemination but fear public exposure. A statute so construed allows the flow of news to remain unfettered by preserving the confidentiality of the relationship between such parties.

In accordance with *Taylor* is the view expressed in *Ex parte Sparrow*<sup>66</sup> wherein the court decided that forced disclosure of a newsman's sources in a civil action was repugnant to the purpose of the protective statute enacted by the Alabama legislature.<sup>67</sup> The court announced that it was not concerned with the wisdom or prudence of the legislature in the latter's decision to clothe the news media with an evidentiary privilege.<sup>68</sup> Rather, the court regarded its duty in terms of recognizing and supporting a "crystallized" public policy as expounded by the elected lawmakers.<sup>69</sup> Clearly, the court refused to sit as a superlegislative body; instead it chose to enforce the established guidelines and to give deference to the will and intent of the legislature. Though in the minority, *Sparrow* and *Taylor* outlined the proper role for the judiciary in the determination of a much-needed privilege for the media. Both courts found that their legislatures, in enacting their respective shield statutes, placed more emphasis on the protection of the news gathering process than upon the power of fact-finding assemblies to utilize the press as an investigatory tool.<sup>70</sup>

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65. 412 Pa. at 42, 193 A.2d at 185 (emphasis added); cf. *In re Howard*, 136 Cal. App. 2d 816, 289 P.2d 537 (Dist. Ct. App. 1955).

66. 14 F.R.D. 351 (N.D. Ala. 1953).

67. ALA. CODE RECOMPILED tit. 7, § 370 (1960):

*Newspaper, radio and television employees.*—No person engaged in, connected with, or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news gathering capacity shall be compelled to disclose, in any legal proceeding or trial, before any court or before a grand jury of any court, or before the presiding officer of any tribunal or his agent or agents, or before any committee of the legislature, or elsewhere, the sources of any information procured or obtained by him and published in the newspaper (or broadcast by any broadcasting station or televised by any television station) on which he is engaged, connected with, or employed.

68. 14 F.R.D. at 353.

69. *Id.*

70. 412 Pa. at 43, 193 A.2d at 185-86. This critical observation of overzealous law enforcement finds agreement in some quarters of the United States Senate as well. Senator Sam J. Ervin

## SOURCE DISCLOSURE: TWO OTHER VIEWS

*Ramifications: A View From the Press Box*

As recognized by the minority of courts, the extension of an evidentiary privilege to newsmen is not an idle gesture on the part of the legislature. Such an extension demonstrates the realization that the free flow of information will be curtailed unless limits are placed upon the powers of inquisitional bodies to extract information from reporters.

However, as a consequence of the demonstrated attitude of the majority of the judiciary, adverse ramifications have already surfaced.<sup>71</sup> In addition to the many incidents of incarcerations for contempt, many reporters have experienced a "drying up" of confidential information and a subsequent loss of investigatory effectiveness.<sup>72</sup> Some reporters have resorted to destroying their records upon publication of their stories;<sup>73</sup> still others have begun to avoid "the kind of story that might cause them trouble."<sup>74</sup> Such reactions and their consequences can only infringe upon the public's right and need to be informed.<sup>75</sup>

*Public Opinion: A Brief Synopsis*

Contrary to court interpretations, the American public, in accordance with the views espoused by the *Taylor*<sup>76</sup> and *Sparrow*<sup>77</sup> courts, has expressed the opinion that a reporter should have the right to remain silent when pressed to reveal his confidential sources.<sup>78</sup> A recent Gallup poll revealed that 57 percent of the American population supports the establishment of shield statutes and the liberal interpretation thereof.<sup>79</sup>

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(D-N.C.), chairman of the Subcommittee on Constitutional Rights, has declared that top priority is to be given new legislation which would bolster newsmen's privileges to detour attempts "to turn journalists into investigators" for the benefit of the courts. *Indianapolis Star*, Oct. 20, 1972, at 22.

71. See generally *NEWSWEEK*, Jan. 15, 1973, at 47, col. 2.

72. *Id.* This fact could have been easily predicted by William Jones, a Pulitzer Prize investigative reporter for the *Chicago Tribune*, who could not "stress strongly enough the importance of confidential sources" and declared anonymity to be essential. *Chicago Tribune*, Jan. 14, 1973, § 2 (Perspective), at 4, col. 1.

73. See generally *NEWSWEEK*, *supra* note 71.

74. Thomas, *Press Freedom Is Your Cause, Too*, *Chicago Tribune*, Jan. 13, 1973, § 1 (Perspective), at 10, col. 3.

75. *Id.*; see also note 71 *supra*.

76. 412 Pa. 32, 193 A.2d 181 (1963).

77. 14 F.R.D. 351 (N.D. Ala. 1953).

78. See Gallup, *Majority Favors Reporter Right To Stay Silent*, *Indianapolis Star*, Dec. 3, 1972, § 1, at 18, col. 1.

79. *Id.* The Gallup poll and its results were based on personal interviews with over 1,400 adults in over 300 scientifically selected locations. The question posed was:

Suppose a newspaper reporter obtains information for a news article he is writing

Seemingly, the public has observed that the judiciary, by its restrictive interpretation of shield statutes, has contravened legislative mandates and has taken upon itself the functions and duties of a superlegislature. In so doing, most courts have deprived the public of an essential avenue of information.<sup>80</sup>

### CONCLUSION

It should be evident at this point that shield statutes have done little to solve the newsman's dilemma. Though some specific shield statutes may, on their face, fall short of providing adequate protection to the media, it seems clear that the major inadequacies are due primarily to a judiciary which has thus far ignored, or at least failed to observe, the import of the news media's plight.

Although the drafting of a model shield statute might be helpful in alleviating the newsman's dilemma, it is contended that a number of seemingly adequate statutes already exist but are hampered in vitality by a judiciary resigned to a doctrine of strict construction. Still, a statute enacted by the United States Congress which would compel source disclosures only under limited circumstances<sup>81</sup> would "insure the public's right to know by legislatively shoring up the rights the First Amendment was intended to protect."<sup>82</sup>

Despite the efforts of a substantial number of state legislatures, it seems clear that attempts to afford adequate evidentiary protection to the news media have fallen far short of intended results. State shield statutes, even those considered absolute in their provisions, have proven to be, for the most part, inadequate.<sup>83</sup>

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from a person who asks that his name be withheld. Do you think that the reporter should or should not be required to reveal the name of his man if he is taken to court to testify about the information in his article?

Percentiles on responses to the question were as follows:

	Should	Should Not
National	34%	57%
College Background	27%	68%
High School	37%	55%
Grade School	35%	48%

80. See generally note 74 *supra*.

81. Guidance for such a statute may well be found in guidelines drafted by former Attorney General John Mitchell for government issuance of subpoenas to members of the news media in 1969. Among the provisions were requirements that: (1) the material sought must be absolutely essential to the case; (2) the subpoena be specific and limited; and (3) possible alternative sources of the information, other than those of the newsman, be first exhausted. *Fighter For A Free Press*, Chicago Tribune, Oct. 18, 1972, (Editorial), at 16, col. 1.

82. *Securing Press Freedom*, Chicago Sun-Times, Jan. 27, 1973, (Editorial), at 25, col. 1.

83. *Id.*

Whether a shield statute will be enacted at the federal level depends upon legislative recognition of the ultimate impact of the newsman's plight—a severe infringement upon the public's right to know. Whether existing shield statutes can be strengthened to correspond to original legislative intentions seems to depend upon a judicial re-examination of the value of a truly free press in a democratic society. The public has expressed its desire to protect the media by means of a pervasive shield statute.<sup>84</sup> It remains for the courts to respond to such a prevalent desire in order to afford any such legislation, federal or state, its full legal significance.

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84. See note 78 *supra*.