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THE BIG CHILL: THIRD-PARTY DOCUMENTS
AND THE REPORTER'S PRIVILEGE

Bradley S. Miller*

In the wake of Philip Morris' multi-billion dollar libel suit against ABC, a Virginia court has sanctioned a new method of discovery that promises to have an unsettling impact on the reporter's privilege to protect confidential sources. In Philip Morris Cos. v. American Broadcasting Cos., the tobacco giant moved to compel disclosure of the identity of a former R.J. Reynolds manager who suggested on ABC's Day One news program that tobacco companies add nicotine to the cigarettes they manufacture. At the same time, Philip Morris issued subpoenas for the expense records of two ABC employees who wrote and produced the story, in a novel effort to discover the source's identity. In a preliminary order issued before the parties settled, the judge hearing the case denied ABC's motion to quash the subpoenas. This Note argues for an expansion of the reporter's privilege to documents held by third parties. Specifically, this Note first summarizes the reporter's privilege under existing law and examines First Amendment justifications for the reporter's privilege. This Note then surveys the present law concerning discovery of third-party records and scrutinizes the policy arguments both in favor of and against extending the reporter's privilege to documents held by third parties. Finally, this Note suggests an alternative analysis to that adopted by the Virginia court when litigants seek discovery of third-party records in libel actions.

INTRODUCTION

On February 28, 1994, Day One, an ABC newsmagazine, launched a serious assault on the integrity of the tobacco industry. With the burden of defending product liability lawsuits and the prospect of new federal regulations on tobacco, the cigarette lobby found itself answering new charges that its leading manufacturers "artificially add[] nicotine to cigarettes to keep people smoking and boost profits."1

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Following the Day One broadcast, Philip Morris, the nation's largest tobacco company, filed a $10 billion libel suit against the network, reporter John Martin, and producer Walt Bogdanich in Virginia Circuit Court. Much of the credibility of ABC's report rested on a statement made by a former manager of R.J. Reynolds Tobacco that the manufacturers add nicotine to their product "to keep the consumer happy." The manager, who would later become known only as "Deep Cough," asked to be interviewed in silhouette to conceal her identity. Philip Morris, R.J. Reynolds, and ABC eventually settled the case in August 1995, with ABC agreeing to issue an apology and to pay legal fees for Philip Morris and R.J. Reynolds. The apology, which ran during the ABC World News Tonight and Day One broadcasts, stated that ABC "should not have reported that Philip Morris and [R.J.] Reynolds add significant amounts of nicotine from outside sources."

Although the parties eventually settled, prior to settling, they filed pre-trial motions and conducted discovery. During discovery, Philip Morris issued subpoenas to third parties for documents that would reveal the identity of "Deep Cough." The manager's identity was essential to Philip Morris' libel case in several respects. First, to succeed in a libel case, Philip Morris, as a public-figure plaintiff, would have needed to demonstrate actual malice. To do this, the tobacco company would have been required to prove either that ABC knew that the report was false or that the network acted with a reckless disregard for the truth. The strength of Philip Morris' case, therefore, depended on the credibility of Deep Cough. If ABC had had any reason to know that the former R.J. Reynolds

3. Day One, supra note 1.
4. Id.
6. Id.; Mark Landler, Critic Pushes Tobacco Case Settled by ABC, N.Y. TIMES, Aug. 24, 1995, at D8. At the same time, "the carefully worded apology said ABC believed the primary focus of the story was correct." Gail Appleson, ABC Libel Pact Bodes Ill for Journalism, Experts Say, REUTER BUS. REP., Aug. 22, 1995, available in LEXIS, Nexis Library, Busrpt File.
9. See id. at 280, 286.
manager lied about the levels of nicotine in cigarettes, then Philip Morris would have been in a stronger position to demonstrate a reckless disregard for the truth. Without knowing the identity of Deep Cough, however, Philip Morris would have struggled to make a case for actual malice.

Second, by discovering the identity of Deep Cough, Philip Morris could have brought a separate libel action. Although the source may not have had deep pockets like ABC, winning a libel judgment against a former R.J. Reynolds manager would have helped to vindicate the tobacco manufacturer in the eyes of government regulators concerned about the effects of smoking.10

As is typical in high-stakes libel cases, Philip Morris petitioned the court to force ABC's Martin and Bogdanich to name their confidential source.11 In a preliminary ruling, Judge T.J. Markow granted the tobacco company's request to compel disclosure of the former R.J. Reynolds employee's identity.12 At the same time, Judge Markow denied ABC's motion to quash Philip Morris' subpoenas for third-party documents.13

Philip Morris' effort to subpoena records from companies such as American Express and AT&T14 to track the activities of the journalists while they were researching the tobacco industry is said to be the first move of its kind.15 In a brief submitted by ABC in support of its motion to quash, its lawyers argued that allowing the subpoenas for the reporters'
financial records would "trample" an important privilege based on the First Amendment.  

In this modern world, reporters cannot gather news from across the nation without making telephone calls, boarding airplanes, renting cars, staying in hotels, and using credit cards. A reporter's privilege that provides reliable protection only where reporters gather news on foot and by word-of-mouth would be no privilege at all.  

This Note analyzes the arguments for and against a libel plaintiff's right to subpoena third-party documents. The *Philip Morris* case may be one of first impression, but the tactic of using third-party documents to discover the identity of a confidential source is likely to be employed and challenged in future libel cases. Because a reporter's privilege to protect a confidential source is defined differently in every state, it could take years and multiple cases to establish the law in this area. Although *Philip Morris* may provide a glimpse of how courts will handle this issue, it is of limited precedential value. This case, therefore, may be only the beginning of what could be a long and arduous debate over the reporter's privilege.  

This Note will argue for an expansion of the reporter's privilege to cover third-party documents. Part I will outline the reporter's privilege under current law. Part II will provide an overview of the traditional First Amendment justifications for the reporter's privilege. Part III will analyze current law on third-party discovery. Part IV will present a policy argument for extending the privilege to third-party documents. Finally, Part V will propose a test to determine when to apply an expanded privilege.  

17. *Id.*  
18. *See* Paul L. Glenchur, Note, *Source Disclosure in Public Figure Defamation Actions: Toward Greater First Amendment Protection*, 33 HASTINGS L.J. 623, 636 (1982) (suggesting that "[c]ourts deciding whether to order disclosure of a source in defamation actions are provided with little judicial guidance").
I. OUTLINE OF THE REPORTER’S PRIVILEGE

The reporter’s privilege typically focuses on the reporter’s right to refuse to disclose a source in court proceedings. Many jurisdictions, however, expand the privilege to cover information gathered by a reporter in the course of writing a story. Only one court has actually considered the effect of the privilege on third-party documents—information not gathered from a source but which nonetheless would have a tendency to reveal the source’s identity.

A. The Reporter’s Privilege and the First Amendment

Prior to 1958, American courts did not recognize the reporter’s privilege. In that year, lawyers for the New York Herald Tribune made a constitutional argument for the recognition of this privilege. Garland v. Torre involved allegedly libelous statements about actress Judy Garland reported by Marie Torre and attributed to a CBS executive. Garland sued CBS and eventually deposed Torre in an effort to identify the source. As is now customary in forced disclosure actions, Torre refused to reveal the source and was cited with criminal contempt. In an opinion authored by then Judge, and later Supreme Court Justice, Potter Stewart, the court upheld the contempt charge, finding that Garland’s questions to Torre went to the heart of the litigation. As a result, the relevance

20. See id.
22. See Monk, supra note 19, at 18.
25. Id. at 547.
26. Id.
27. Id.
28. Id. at 550.
of the questions outweighed any interest Torre possessed in refusing to identify her source.\textsuperscript{29} The court recognized, however, that forced disclosure of confidential sources could have an impact on the newsgathering process.\textsuperscript{30} In doing so, the court created a balancing test that would eventually become the constitutional standard.\textsuperscript{31} Although several subsequent cases have endorsed the recognition of a First Amendment privilege, as in Garland, a majority of courts have declined to grant reporters such a privilege, and inconsistencies remain in lower court interpretations.\textsuperscript{32}

The Supreme Court issued the next important opinion concerning the existence of a reporter’s privilege almost fifteen years later in Branzburg v. Hayes.\textsuperscript{33} In Branzburg, the Court held that a grand jury may require a reporter to breach an agreement of confidentiality if the source is alleged to have witnessed or participated in a crime.\textsuperscript{34} Nonetheless, the opinion recognized that First Amendment protection may extend to the newsgathering process.\textsuperscript{35}

Justice Stewart, dissenting with Justices Brennan and Marshall, also recognized a qualified privilege.\textsuperscript{36} Justice Stewart would have applied a three-part test to determine the applicability of the reporter’s privilege.\textsuperscript{37} To force disclosure of a confidential source, argued Justice Stewart, the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.\textsuperscript{38}

\begin{thebibliography}{99}
\bibitem{29} Id. at 551.
\bibitem{30} Id. at 548.
\bibitem{31} See Monk, supra note 19, at 18.
\bibitem{33} 408 U.S. 665 (1972).
\bibitem{34} Id. at 708–09.
\bibitem{35} Id. at 681; see also id. at 709 (Powell, J., concurring). Justice Powell advocated a qualified privilege entailing a balancing of interests on a case-by-case basis. Id. at 710.
\bibitem{36} Id. at 728 (Stewart, J., dissenting).
\bibitem{37} Id. at 743.
\bibitem{38} Id. (citations omitted).
\end{thebibliography}
Thus, including Justice Powell’s concurrence and the obvious approval of the privilege by the four dissenting justices, a majority of the Court did recognize a qualified privilege.

B. Lower Court and State Court Application of Branzburg

Since Branzburg, the Supreme Court has not explicitly ruled on the reporter’s privilege. Lower federal courts, however, have read Branzburg to create a qualified privilege. The First Circuit employs a balancing approach, judging a reporter’s need for confidentiality against a litigant’s need for information. The Third Circuit has adopted a similar standard, noting that Branzburg “acknowledged the existence of First Amendment protection for ‘newsgathering’” and that “[t]he interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring.”

While Garland and Branzburg established the boundaries of the reporter’s privilege in the federal system, individual states have adopted a variety of approaches. At least half of the states have adopted shield laws that lend some protection to reporters and their confidential sources. State shield laws focus on protecting journalists from compelled disclosure, but the coverage varies both in statutory construction and in

39. Justice Douglas dissented in a separate opinion advocating an absolute privilege to refuse disclosure of a confidential source. Id. at 721 (Douglas, J., dissenting).
41. See Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979).
42. Id.
judicial interpretation. In those states without a privilege statute, courts have recognized a qualified privilege arising from the common law. These states commonly use a balancing test similar to that proposed by Justice Stewart in his Branzburg dissent.

C. Application of the Privilege in Defamation Actions

The application of the reporter's privilege can be divided into three substantive areas. The first of those areas is the grand jury proceeding. After the Supreme Court's decision in Branzburg, there is no constitutional protection for journalists who wish to shield their sources from a grand jury. Consequently, reporters must rely on state law for protection.

The second area includes criminal proceedings in which the defendant seeks to force disclosure of a source. In these cases, a reporter may have information that would exculpate the defendant or at least assist in the defense. The courts, using Justice Stewart's balancing test, will side with the defendant if the information sought is relevant to a violation of the law, the information cannot be obtained elsewhere, and the defendant has an overriding interest in the information. In these cases, a defendant's Sixth Amendment right to compel testimony is especially relevant.

The third area covers public figure defamation actions, which are the focus of the remainder of this Note. Public

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45. Id. at 93.
46. For an analysis of how state common law privileges have been based on interpretations of Branzburg in Idaho, Iowa, Maryland, Massachusetts, Missouri, and New Hampshire, see id. at 93-99.
50. The reporter's privilege also may be invoked in non-defamation actions, but the number of cases in this category is dwarfed by the sheer number of libel cases in which a reporter is asked to reveal a confidential source. Nonetheless, the protection available to journalists is great in non-defamation civil actions, because the litigants often are not in a position to demonstrate a compelling interest in the information
figure libel cases present a tactical problem that is absent from the analysis in other civil cases because the plaintiff must offer proof of the publisher's subjective state of mind. In *New York Times v. Sullivan*,\(^{51}\) the Supreme Court redefined a publisher's liability in libel cases involving public officials. The Court held that a public official must prove that the publisher acted with actual malice, defined either as known falsity or reckless disregard for the truth.\(^{52}\) Three years later, the Court extended the actual malice standard to public figures in general in *Curtis Publishing Co. v. Butts*.\(^{53}\) Attempting to give more substance to the standard, the Court next noted in *St. Amant v. Thompson*\(^{54}\) that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."\(^{55}\) Providing such evidence may be difficult, if not impossible, because the defendant may be the only person capable of giving knowledgeable testimony.

The Court addressed this dilemma in *Herbert v. Lando*\(^{56}\) by analyzing the boundaries of discovery in public figure defamation cases.\(^{57}\) Reversing the lower court ruling, the Supreme Court held that reporters do not have an absolute privilege to impede discovery into the editorial process.\(^{58}\) The case arose after CBS reported that Colonel Anthony Herbert, a retired army officer, lied in claiming that superior officers had covered up war crimes.\(^{59}\) During discovery, Herbert's lawyers deposed Barry Lando, a producer for CBS, to ask Lando about his state of mind during the editorial process.\(^{60}\) Herbert argued that knowledge of the defendant's state of mind was necessary to prove recklessness under the *New York Times* in

when that interest is weighed against the journalist's First Amendment right in newsgathering. See Maressa v. New Jersey Monthly, 445 A.2d 376, 383 (N.J. 1982) (holding that the reporter's privilege is absolute in civil libel action because the plaintiff has no countervailing constitutional interests at stake).

52. *Id.* at 280.
55. *Id.* at 731.
57. *Id.* at 165–75; *see also* Glenchur, *supra* note 18, at 638.
59. *Id.* at 156.
60. *Id.* at 157.
v. Sullivan standard. Lando refused to answer any questions, asserting his First Amendment privilege to promote uninhibited editorial discussion in the newsroom. In rejecting Lando's argument, the Court concluded that an editorial privilege would limit a plaintiff's ability to prove actual malice.

The analysis in forced disclosure actions is similar because of the inherent difficulty in proving actual malice without knowing the identity of a confidential source. As Judge Markow suggested in Philip Morris, because a confidential source may be the only person with alleged firsthand knowledge regarding the truth of a statement, such that the credibility of a report rests with the confidential source, the identity of the source and what the source did or did not say shapes the broadcaster's state of mind.

To assist plaintiffs, some jurisdictions have forced disclosure after the plaintiff has created an issue of fact on the remaining elements of the case. In these jurisdictions, a plaintiff must create a material issue of fact for the jury regarding the falsity of the alleged libelous statement. Finally, a minority of jurisdictions have adopted a "no-source" presumption. In these jurisdictions, when a reporter refuses to disclose the identity of a source, the court will presume that the source does not exist.

61. Id. at 156–57.
62. Id. at 171.
66. E.g., Bruno & Stillman, 633 F.2d at 597.
II. THE FIRST AMENDMENT ARGUMENT FOR A REPORTER’S PRIVILEGE

Before examining the impact of third-party discovery in defamation actions, it is necessary to review the justifications for the reporter’s qualified privilege. “The Supreme Court has interpreted the first amendment’s commitment to a free press as a constitutional safeguard for the widest dissemination of information about public issues to an enlightened citizenry . . . .”\textsuperscript{69} The press plays a central role in the dissemination process. As Justice Douglas remarked in \textit{Branzburg v. Hayes}, “effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination.”\textsuperscript{70} At the same time, the press is seen as the investigative arm of the people, monitoring all facets of American life.\textsuperscript{71} Newspaper and broadcast reporters routinely uncover government corruption, corporate wrongdoing, and individual vice.\textsuperscript{72}

To continue to provide coverage of newsworthy issues, the press should be free of governmental restrictions.\textsuperscript{73} Recognizing this principle, the Supreme Court has struck down a variety of laws that have sought to restrict freedom of the press.\textsuperscript{74} The Court has overturned legislation enacting prior restraints on publication,\textsuperscript{75} limiting press access to court proceedings,\textsuperscript{76} and regulating editorial control.\textsuperscript{77}

Although the Court has not explicitly recognized a First Amendment right in newsgathering, it has given implicit

\textsuperscript{69} Glenchur, \textit{supra} note 18, at 627.
\textsuperscript{71} A reporter’s task is commonly analogized to that of a watchdog, keeping an investigative eye on the government. \textit{E.g.}, \textsc{Daniel L. Brenner & William L. Rivers, Free But Regulated} 77 (1982).
\textsuperscript{72} Bob Woodward and Carl Bernstein’s reports on the unfolding Watergate scandal are a memorable example of how the press can expose non-public information by promising confidentiality to a news source. \textit{See ABC Memorandum, supra} note 16, at 14.
\textsuperscript{74} \textit{See Glenchur, supra} note 18, at 627.
\textsuperscript{76} \textit{Richmond Newspapers, Inc. v. Virginia}, 448 U.S. 555, 580 (1980).
approval of such a right. Writing for the majority in Branzburg, Justice White noted that the decision was not meant to suggest that newsgathering does not qualify for First Amendment protection. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."

To facilitate newsgathering, the press must often rely on information supplied by people closest to or most involved in an unfolding story. "A reporter is no better than his source of information." When sensitive issues arise, sources may be less willing to volunteer information. By discussing what others are unwilling to reveal, confidential sources may face personal risks, such as the loss of a job or exposure to criminal sanctions. The information that confidential sources possess is nonetheless the kind in which the public has the greatest interest. As one journalist quipped, "A lot of big news stories might never come to light without information from people who don't want to reveal themselves publicly. So reporters promise to keep their identities secret, and the next thing you know you're reading Deep Throat's revelations about Watergate. It's a very good bargain."”

III. CURRENT LAW ON THIRD-PARTY DISCOVERY

The law on third-party documents as they relate to the identity of confidential sources is undeveloped. Nonetheless, courts have considered related questions that may have some bearing on the third-party document issue. In Reporters' Committee for Freedom of the Press v. AT&T, the United States Court of Appeals for the District of Columbia Circuit considered whether media litigants have a First Amendment interest in third-party documents in the face of a government investigation. The case arose through the

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78. Glenchur, supra note 18, at 627.
80. Id.
81. Id. at 722 (Douglas, J., dissenting).
82. ABCs of Bullying, NEWSDAY, Feb. 11, 1995, at A18.
83. See supra note 21 and accompanying text.
85. Id. at 1036.
efforts of journalists who wrote to AT&T seeking assurances that their toll-billing records would not be released to government investigative agencies without prior notice.\textsuperscript{86} Unsatisfied with the telephone company's response, the journalists brought a complaint against AT&T asking for a declaration that AT&T's policy was unlawful.\textsuperscript{87} The court rejected the notion that law enforcement officials must give journalists notice before issuing subpoenas, because the First Amendment does not immunize information from a good faith criminal investigation that otherwise adheres to Fourth and Fifth Amendment protections.\textsuperscript{88}

Although the court's decision in \textit{Reporter's Committee} speaks to the First Amendment implications of a government investigation into the identity of a confidential source through third-party business records, it does not lend any guidance in the civil context.\textsuperscript{89} In such cases, several courts have considered the power of a trial judge to limit discovery to avoid unnecessary threats to First Amendment rights. In \textit{Bruno \& Stillman, Inc. v. Globe Newspaper Co.},\textsuperscript{90} a manufacturer of commercial fishing boats brought a libel action against a newspaper publisher.\textsuperscript{91} During discovery, the \textit{Boston Globe} produced 1500 pages of notes taken by the reporter but not the notes containing the names of and information from three sources who had been interviewed with the expectation that their names would be kept confidential.\textsuperscript{92} Citing Justice Powell's opinion in \textit{Herbert v. Lando},\textsuperscript{93} the United States

\textsuperscript{86.} \textit{Id.} at 1038.
\textsuperscript{87.} \textit{Id.} at 1036.
\textsuperscript{88.} \textit{Id.} at 1053. \textit{But cf.} State v. Hunt, 450 A.2d 952 (N.J. 1982) (holding that the state constitution protected an individual's privacy interest in his telephone toll records). The D.C. Circuit's decision in \textit{Reporter's Committee} envisions the scenario in which a reporter's contact with a confidential source could be revealed by the discovery of business records that reflect telephone calls, airline flights, hotel stays, and taxicab rides. See 593 F.2d at 1048-49. The court's hypothetical bears an uncanny resemblance to ABC's concern about the private records of Martin and Bogdanich but in the context of a good faith criminal investigation. \textit{See id.} With respect to subpoenas for business records in the course of bad faith criminal investigations, the court acknowledged that a theoretical infringement of First Amendment rights exists. \textit{Id.} at 1064.
\textsuperscript{89.} While discussing good faith criminal investigations, Judge Wilkey did suggest, in dicta, that the First Amendment may give rise to a privacy-type interest in non-criminal cases. \textit{Id.} at 1054.
\textsuperscript{90.} 633 F.2d 583 (1st Cir. 1980).
\textsuperscript{91.} \textit{Id.} at 584-85.
\textsuperscript{92.} \textit{Id.} at 585.
\textsuperscript{93.} 441 U.S. 153, 178 (1979) (Powell, J., concurring) (arguing that a district court has a duty to consider First Amendment interests as well as the private interests of the plaintiff in public figure libel actions).
Court of Appeals for the First Circuit held that courts must balance the potential harm to the free flow of information against the need for the requested information. The court, however, did not address the specific question of first- or third-party records. Although the documents sought in discovery had the potential to reveal the identities of the sources, the documents were notes taken by the reporter, not records created and held by a third party.

In *Philip Morris Cos. v. American Broadcasting Cos.*, the Virginia Circuit Court preliminarily ordered ABC to reveal the name of Deep Cough, allowing Philip Morris to discover the identity of the source without searching through third-party documents. Nonetheless, the court cleared the way for Philip Morris to subpoena documentary and electronically compiled evidence produced by the reporters' newsgathering activities. In his decision, Judge Markow emphasized that this type of third-party discovery must be held to the same standard that is applied in deciding whether a reporter can be compelled to disclose the identity of a source.

IV. THE CHILL OF THIRD-PARTY DISCOVERY

Third-party discovery poses an unmistakable threat to source confidentiality. If a litigant subpoenas the proper documents, it can easily discover the identity of a source. “The subpoena of third party records in order to trace a reporters [sic] movements and thereby identify confidential sources is tantamount to asking the reporter directly . . . .”

95. *Id.* at 593.
96. Judge Markow preliminarily held that there is a reporter's privilege against disclosure of confidential sources in public figure defamation cases but found that Philip Morris had a compelling interest in the identity of Deep Cough that overcame the privilege. *Philip Morris* (Jan. 26, 1995), *supra* note 12, at 13.
97. *Id.*
98. *Id.* at 8.
99. For an in-depth hypothetical demonstrating the likelihood that a party will succeed in its efforts to uncover a source through third-party business records, see Judge Wilkey's opinion in Reporters' Comm. for Freedom of the Press v. AT&T, 593 F.2d 1030, 1048-49 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979).
A. The Philip Morris Decision

Judge Markow recognized the potential harm in allowing discovery of reporter's documents:

A reporter's promise to maintain confidentiality would be meaningless if his movements while investigating were open to scrutiny to glean the identity of his confidential source.

Further, if the reporter's privilege were subject to this type of discovery, then why not other privileged relationships, for example, the attorney/client privilege? The court cringes at the thought of an attorney's credit card records, telephone billing records, etc., being subject to discovery in order to determine the identity of his client or the possible theory of his case to be gleaned from his travels and the witnesses he contacts.101

Judge Markow further predicted that if Philip Morris were allowed discovery of third-party records "it would be an open invitation for every plaintiff in libel suits, not to mention the potential in other litigation contexts, to make a pro forma request for this type of discovery whenever a confidential source is known to exist."102 As a result, Judge Markow found that the permissibility of third-party discovery should be subject to the same balancing approach applied to forced disclosure.103

Given his unfavorable depiction of third-party discovery, Judge Markow's preliminary order denying ABC's motion to quash the subpoenas duces tecum104 is difficult to understand. Judge Markow apparently gleaned a compelling interest based on Philip Morris' inability to prove actual malice without knowledge of Deep Cough's identity. The analysis of the court, however, focused on forced disclosure without specifically judging the relevance, availability of information, and

101. Id. at 6.
102. Id.
103. Id. at 8.
104. Id. at 13.
compelling nature of the evidence in relation to third-party discovery,\textsuperscript{105} as suggested by the Supreme Court.\textsuperscript{106}

**B. Arguments in Support of Philip Morris**

Opponents of a reporter's privilege to shield third-party documents could raise several arguments to support Judge Markow's preliminary opinion. First, the ability of a libel plaintiff to track down a confidential source may not be a valid concern because many courts eventually will force the reporter to reveal the source.\textsuperscript{107}

Second, libel plaintiffs may have a legitimate interest in third-party documents that is unrelated to the identification of a confidential source. Under the liberal federal discovery rules, for example, a private litigant may have discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . . including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.\textsuperscript{108}

Furthermore, a litigant may not object to a discovery request on the grounds that the information sought will be inadmissible at trial if the information appears "reasonably calculated to lead to the discovery of admissible evidence."\textsuperscript{109} Records of phone calls, meals, and hotel stays (or the absence thereof) may go directly to the issue of whether a reporter has investigated a story with an eye toward satisfying the actual malice standard. For example, if a libel plaintiff can demonstrate that the defendant published a defamatory statement with "armchair" knowledge without engaging in any outside investigation, a jury could find that the defendant acted with a reckless disregard for the truth.

\textsuperscript{105} Id. at 12.
\textsuperscript{107} For a summary of federal and state court approaches to forced disclosure, see supra notes Part I.
\textsuperscript{108} FED. R. CIV. P. 26(b)(1).
\textsuperscript{109} Id.
Third, discovery of third-party documents may be required by the test suggested in Justice Stewart's *Branzburg* dissent.\textsuperscript{110} Under that test, libel plaintiffs must demonstrate that the information they seek cannot be obtained by alternative means which are less destructive of First Amendment rights.\textsuperscript{111} Under this test, third-party discovery may be less destructive of First Amendment rights than forced disclosure.

C. Justifications for Expanding the Reporter's Qualified Privilege to Third-Party Records

Although the arguments outlined above deserve consideration, the counterarguments are more compelling because they form the foundation for an expansion of the reporter's privilege to third-party discovery. First, in many libel cases, the court will force the reporter to disclose a confidential source once the plaintiff creates an issue of material fact on the truth or falsity of the alleged defamatory statement.\textsuperscript{112} When courts force disclosure in this manner, the rationale for allowing third-party discovery disappears. Once the identity of the confidential source is known, the plaintiff's interest in the documents correspondingly becomes suspect. Whatever plaintiffs had hoped to learn on the issue of actual malice, they now can learn directly from the confidential source.

Second, plaintiffs who cannot demonstrate a compelling interest in discovering the identity of a confidential source often will be unable to demonstrate an independent reason to justify discovery of third-party records. In the wake of *Philip Morris*, reporters, dubious of the intent of libel plaintiffs in their efforts to obtain third-party records,\textsuperscript{113} view the tobacco company's strategy as nothing less than an effort to silence its detractors.\textsuperscript{114} Indeed, before settling the case with

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  \item \textsuperscript{110} *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting).
  \item \textsuperscript{111} *Id.*
  \item \textsuperscript{112} *See supra* note 65 and accompanying text.
  \item \textsuperscript{113} *See Martin Schram, Smoking Out the Destroyers of Rights*, NEWSDAY, Nov. 30, 1994, at A37 ("Philip Morris has carefully aimed its smoking-gun subpoenas to strike at all Americans: Those of us who don't like crooked dealings we see in our daily life and want to do something about it, and those of us who like living in a democracy and depend upon a free flow of information to make our election-day decisions.").
  \item \textsuperscript{114} *See ABCs of Bullying*, supra note 82, at A18. An unsigned editorial in *Newsday* suggests that as a result of the ruling in the *Philip Morris* case, "whistle-blowers
ABC, Philip Morris had an incentive to learn the names of all persons in the tobacco industry, specifically those working at Philip Morris, who spoke with Day One reporters. Had the case proceeded to trial, Philip Morris could have used this information to intimidate the employees into giving favorable testimony.

Finally, third-party documents may further threaten the newsgathering process by silencing journalists. As one newspaper editorial argued, Philip Morris' discovery demands look "like an attempt to harass ABC and intimidate journalists elsewhere." Some reporters do not seem to recognize the silencing effect that third-party discovery could have on their own reporting techniques. If a court endorses discovery of credit card and telephone records, it will be granting libel plaintiffs access to the reporter's private activities. The records may reveal embarrassing or even illegal facets of a reporter's life.

Knowing that a future libel plaintiff might seek their private records, reporters are less likely to pursue controversial stories. Their concern could shift from protecting confidential sources to protecting themselves by choosing those stories that are least likely to invite a libel suit, regardless of the validity or usefulness of the story to the public.

Despite his decision concerning the business records of Martin and Bogdanich, Judge Markow predicted that third-party discovery "will deter sources from divulging information and deter reporters from gathering and publishing infor-

everywhere will be reluctant to rely on reporters' assurances of confidentiality." Id. A recent decision by CBS executives to cancel a 60 Minutes story by Mike Wallace involving an interview with Jeffrey Wigand, a former executive of the Brown & Williamson Tobacco Corporation, because of the threat of litigation indicates that the tobacco industry's tactics are working. See Frank Rich, Fear and Favor, N.Y. TIMES, Nov. 15, 1995, at A23. CBS eventually aired the story, but only after the substance of Wigand's interview already had been disclosed as part of his deposition in a separate lawsuit between Wigand and Brown & Williamson. Bill Carter, CBS Broadcasts Interview with Tobacco Executive, N.Y. TIMES, Feb. 5, 1996, at B8.

115. ABCs of Bullying, supra note 82, at A18.

116. See Schram, supra note 113, at A37. Martin Schram identifies those people who will be harmed by Judge Markow's decision regarding third-party discovery. Id. He includes any person who had contact with an ABC reporter, anyone who may have spoken on the telephone with anyone calling from the home of an ABC reporter, and any person in the future who chooses to confide in a reporter. Id. Noticeably missing from his list are the reporters themselves. For a discussion on the impact of Philip Morris' legal tactics on investigative reporting, see Reliable Sources (CNN television broadcast, Nov. 27, 1994) (transcript at 3-4, on file with the University of Michigan Journal of Law Reform).
One commentator has noted that a favorable decision for libel plaintiffs in the Philip Morris case "would become precedent used by all who have desperate reason to muffle, muzzle, and mute potential future whistle-blowers." But who are the whistle-blowers: the confidential sources who are more likely to be uncovered or the journalists seeking out the confidential sources? One might presume that the reference is to the former, but the observation is equally true of investigative journalists.

The similarities between the reporter's qualified privilege to protect a confidential source and the proposed expansion of the privilege to third-party discovery becomes more obvious if one traces the policy behind the privilege. The purpose of the qualified privilege to protect confidential sources is to foster the newsgathering process. Were it not for our interest in promoting zealous newsgathering through the First Amendment, the law would care little for informants who wished to maintain their anonymity.

V. A Test for the Application of an Expanded Privilege

Because freedom of the press depends on journalists' abilities to obtain information, courts should recognize a right to deny discovery of third-party records that threaten to reveal information regarding the private lives of reporters. If society intends to foster the newsgathering process, the judicial system must provide more protection for a reporter's private documents than the Virginia Circuit Court provided in Philip Morris.

Judge Markow held in Philip Morris that third-party discovery requests are subject to the same limitations imposed

119. See Reliable Sources, supra note 116 (transcript at 4). The suggestion by commentators that reporters, like public figures, assume the risks of exposing their private lives to public scrutiny by participating in investigative journalism is unpersuasive because the public has a First Amendment interest in investigative reporting that is greater than a libel plaintiff's interest in a reporter's business records.
120. See, e.g., Garland v. Torre, 259 F.2d 545, 548 (2d Cir.), cert. denied, 358 U.S. 910 (1958).
on plaintiffs who attempt to force disclosure of a confidential source.\textsuperscript{121} Courts must do more to protect the newsgathering process. At the same time, plaintiffs must be given an adequate opportunity to subpoena documents which would otherwise be discoverable. The goal should be to shape discovery to allow plaintiffs to obtain relevant documents and to protect journalists from undue harassment.

With these objectives in mind, a court hearing a libel action involving a public figure should order third-party discovery requests of a reporter’s private records only when: (1) the information sought is relevant to proving a disputed issue at trial; (2) the information sought cannot be obtained by alternative means, including forced disclosure; (3) the plaintiff demonstrates a compelling and overriding interest in the information; and (4) the plaintiff’s interest in the information is based on a good faith belief that the information sought will lead to admissible evidence other than the identity of a confidential source.\textsuperscript{122} The plaintiff should carry the burden of persuasion on these four elements of the test. If the plaintiff can meet this burden, the defendant then should be permitted to show that the plaintiff’s reasons are only pretext for harassing a confidential source or investigative journalist.

This approach would cure several problems presented by Judge Markow’s analysis. First, plaintiffs like Philip Morris would not be allowed to fish for additional information once they have learned the identity of a source. Admittedly, it is impossible to predict all the purposes for which future libel plaintiffs will seek to use third-party discovery. In Philip Morris, however, the intention of the plaintiff to discover the name of Day One’s confidential source was obvious.\textsuperscript{123} Thus, once Judge Markow ordered disclosure, there was no relevant information to be discovered by searching through the reporters’ phone and travel records. The second element of the proposed test would prevent future libel plaintiffs from pursuing both strategies because the test requires that plaintiffs seek forced disclosure first. Given the similarity between the

\begin{itemize}
  \item \textsuperscript{121} Philip Morris (Jan. 26, 1995), supra note 12, at 8.
  \item \textsuperscript{122} The Second Circuit suggested a similar approach 13 years before the Supreme Court’s decision in Branzburg, commenting that courts should consider whether discovery is being requested “in good faith and not in such manner as to unreasonably annoy, embarrass or oppress the witness.” See Garland, 259 F.2d at 551.
  \item \textsuperscript{123} See ABC Memorandum, supra note 16, at 16.
\end{itemize}
proposed test and the general test for forced disclosure, if a plaintiff cannot compel disclosure, third-party discovery as a means of discovering the identity of a confidential source also will be denied. This conclusion does not mean, however, that a libel plaintiff may not seek third-party discovery on some other issue.

Second, the proposed test provides protection against unnecessary harassment since a defendant may challenge the intent of third-party discovery. The burden will fall on the plaintiff to demonstrate that the suggested rationale for seeking a reporter's private telephone and travel records is not pretext for some other purpose. Plaintiffs are in the best position to carry this burden because only they may make an affirmative showing of proper intent. For example, a plaintiff might be entitled to discovery upon a showing to the court that third-party records have the potential to yield relevant information in which the plaintiff has a compelling interest. Upon a showing of pretext by the defendant and a rebuttal by the plaintiff, a judge then may decide whether a plaintiff has a legitimate interest in third-party records or whether the discovery is merely intended to harass the defendant. When faced with a tough case, a judge could inspect the records in camera, deleting information irrelevant to the case that would tend to embarrass a reporter.

These extra levels of protection would minimize the impact of third-party discovery on the newsgathering process. The identity of sources would remain confidential when the plaintiff fails to meet the requirements of a forced disclosure action, and third-party discovery of a reporter's private records would not be used as an alternative means for determining the identity of a source. Thus, reporters would be able to engage in investigative journalism without the fear that discovery in a libel suit will reveal the details of their private lives.

CONCLUSION

The Philip Morris case has created a new avenue of attack on the First Amendment and investigative journalism. The Virginia Circuit Court's preliminary decision sent a message to libel plaintiffs that aggressive third-party discovery of
reporters' private documents is an effective method of deter-
ring future whistle-blowers from telling their story.

Without promises of confidentiality, journalists would lose
the ability to interview people who otherwise would remain
silent. For this reason, American courts have sought to pro-
tect the newsgathering process by recognizing a reporter's
qualified privilege to shield the identity of a confidential
source. Allowing unlimited discovery of third-party records
gives libel plaintiffs a method to overcome this judicially-
created obstacle. Moreover, this type of discovery threatens
to reveal private information that could eliminate a journal-
ist's incentive to pursue newsworthy investigations.

The proposed test for third-party discovery offers a different
perspective for courts that will consider the issue in years to
come. If society wishes to protect the values inherent in the
First Amendment, litigants and judges alike should consider
the merits of this proposal.