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Constitutional Law-Freedom of the Press-Right of News Media Personnel to Refuse to Disclose Confidential Sources of Information

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CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—RIGHT OF NEWS MEDIA PERSONNEL TO REFUSE TO DISCLOSE CONFIDENTIAL SOURCES OF INFORMATION—A former personnel director of a local Civil Service Commission instituted an action for reinstatement to that position, alleging that her recent ouster was illegal. In preparing for trial, defendant commission members took the deposition of a reporter for a local newspaper. Appellant reporter stated on direct examination that his suspicions regarding a contemplated attempt to fire plaintiff were in part based on certain information received from a confidential source. On pre-trial cross-examination appellant refused to disclose the source of this information, and plaintiff obtained a court order directing him to do so. On interlocutory appeal, *held*, order affirmed, one justice dissenting. Absent a statutory grant, a newsman has no evidentiary privilege of non-disclosure as to confidential news sources; and a court order requiring disclosure does not constitute an unconstitutional abridgment of the freedom of the press.¹ In balancing the relative interests involved, the duty of witnesses to testify in judicial proceedings predominates, under the circumstances, over any right of a newsman to refuse to divulge the identity of confidential sources of information. *In re Goodfader's Appeal*, 367 P.2d 472 (Hawaii 1961).

Assertions by news media personnel that a right of non-disclosure as to confidential news sources sought in legal proceedings is encompassed within the scope and protection of freedom of the press are of recent vintage.² Historically, claims of a right to refuse to identify news sources have arisen only in the context of an asserted evidentiary or testimonial privilege. Absent a statutorily-created privilege,³ courts have consistently refused to

¹ As noted by the court in the principal case, at 476, since the order appealed from was rendered prior to Hawaii's admission as a state, the constitutional issue is determinable only under the freedom of the press provision in the first amendment of the federal constitution.

² A constitutionally-grounded freedom of the press immunity for news media from compulsory source disclosure was apparently first hinted at in legal publications in Note, 45 YALE L.J. 357, 360 (1935), citing in this regard Siebert and Ryniker, *Press Winning Fight To Guard Sources*, 67 Ed. and Pub. 9 (Sept. 1, 1934). In the most comprehensive study yet made on this subject, 1949 N.Y. LAW REVISION COMM'N REPORT 23-168, it is stated at 27, that "the present absence of a privilege to newsmen does not infringe on the freedom of the press. Constitutional guarantees when enacted did not themselves grant the privilege. The power to compel disclosure has stood side by side with the constitutional guarantee of freedom of the press since the enactment of the Bill of Rights. There is no more infringement of constitutional rights in compelling a newsman to disclose the sources of his information than there is in compelling any other person to make a disclosure. No limitation whatever on the right to publish is imposed." Significantly, this passage is quoted in the majority opinion in the principal case at 480. This constitutional question was apparently first raised in litigation in *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), and then again in an unreported Colorado case, discussed in the principal case at 498, *Murphy v. Colorado*, *cert. denied*, 365 U.S. 843 (1961).

³ Twelve states (Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Michigan, Montana, New Jersey, Ohio and Pennsylvania) currently have such privilege

recognize such claims,⁴ determining that the public interest in the proper administration of justice outweighs any considerations of interference with valuable channels of information for the news-gathering media.⁵ Apparently dissatisfied with only limited success in obtaining legislative recognition of a source non-disclosure privilege,⁶ journalists have now begun to resort to the prospectively greener pastures of a constitutional basis for such a claimed privilege.⁷

Such a shift in tactical approach is apparent in the principal case. Both the majority and the dissent give exhaustive consideration to the relevant constitutional precedents and the operative policy factors, with the difference in conclusions resulting principally from divergent value judgments

statutes. See Semeta, *Journalist's Testimonial Privilege*, 9 CLEV.-MAR. L. REV. 311, 313 (1960); Note, 5 VAND. L. REV. 590, 601 (1952). Though differing somewhat in language and content, these statutes generally create a broad and unqualified privilege, and have been frequently criticized as being too inflexible and mechanical in operation. Suggestions for creation of a qualified privilege, admitting of the use of judicial discretion, have often been made. Courts have usually applied a rather narrow construction to the unqualified privilege statutes. See *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A.2d 473 (1956); *State v. Donovan*, 129 N.J.L. 478, 30 A.2d 421 (1943). No perceptible difference in news flow between states with privilege statutes and those without has been noticed.

⁴ Leading cases reaching this result are collected in Semeta, *supra* note 3, at 315, and 1949 N.Y. LAW REVISION COMM'N REPORT 59-100. See also Annot., 102 A.L.R. 771 (1936). A large number of cases on this subject are unreported, and are collected in 1949 N.Y. LAW REVISION COMM'N REPORT 59-100. See also ARTHUR & CROSMAN, *THE LAW OF NEWSPAPERS* 257-59 (1940); JONES, *THE LAW OF JOURNALISM* 23 (1940). Evidentiary privileges are strictly exceptions to the general testimonial rule, and the preferred modern tendency is to restrict rather than to extend them. See 8 WIGMORE §§ 2285-86 (McNaughton rev. 1961), stating that most of the occupational group privilege statutes are "crude in formulation and excessive in scope," and listing the well-recognized criteria for the traditional evidentiary privileges. The generally recognized privileges relate to non-disclosure of the privileged communication, while the statutory source privileges serve to keep the identity of the source of the information secret, with the information itself disclosed and usually published. A distinction between the conventionally recognized and the statutory source privilege has also been made as to the existence or lack of supervisory control over members of the profession involved, such as licensing, present in the case of lawyers and physicians, but absent as to journalists.

⁵ The duty of all properly summoned witnesses to attend and give testimony in judicial proceedings is recognized as fundamental to the orderly adjudication of both criminal and civil litigation, as is a private litigant's right to judicial aid, if necessary, in compelling such attendance and testimony. See, e.g., *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Blair v. United States*, 250 U.S. 273, 281 (1919). Although the precise constitutional basis of this testimonial duty and the concomitant judicial power to enforce it is not definitively settled (though sometimes held as included within the scope of due process of law), history, tradition and logic support the view that such a principle is essential and basic to the operation of this country's legal system.

⁶ Proposed privilege statutes have been rejected by a number of state legislatures, and by Congress, though frequently submitted. See Semeta, *supra* note 3.

⁷ In the two most comprehensive law review discussions of the subject prior to the *Garland* case, freedom of the press was never mentioned as a basis or justification for a journalist's source privilege. Note, 35 NEB. L. REV. 562 (1956); Note, 36 VA. L. REV. 61 (1950).

regarding the balance of interests perceived to be involved.⁸ Significant factual differences in the principal case, as pointed out in the dissenting opinion, raise the constitutional question more directly than in *Garland v. Torre*,⁹ and the majority's reliance on the *Garland* case is seemingly excessive and somewhat misplaced.¹⁰ Where the identity of the source of certain information goes to the heart of the litigant's suit, an arguably different situation is presented than when the identity of the source is only of remote or problematical importance. And a perceptible distinction exists between a situation where the information disclosed relates to the actions of public or governmental officials or bodies, and when it concerns only the activities of a private individual.¹¹ Whether such distinctions are sufficient to present a constitutional issue is not definitively decided in the instant case. Rather, the majority adopts a hypothetical approach toward constitutional relevancy prior to indulging in a balancing of the perceived interests.

When evaluating the validity of claims of constitutional protection for news media personnel in the non-disclosure of source context, initially necessary is an inquiry whether, under the freedom of the press guarantee, there is *any* constitutionally-protected right to *gather* news, as distinguished from publishing or disseminating news.¹² Despite implications to the con-

⁸ In the principal case at 480, the majority stated that absent an authoritative ruling by the United States Supreme Court on the matter, it would be hypothetically assumed that forced disclosure of information sources may, to some extent, constitute an impairment of the freedom of the press. In the dissenting opinion at 492, the postulate that news gathering and news dissemination are inseparable aspects of a single publishing process is readily accepted. The significance attributed by the dissenting justice, at 498, to the fact that no state court case, with the exception of the *Murphy* case, nor any federal court decision, except for the *Garland* case, has previously ordered forced disclosure of confidential news sources when balanced against the freedom of the press guarantee, seems of little merit in view of the fact that freedom of the press had never been asserted as a basis for a claimed non-disclosure privilege in any prior litigation, until in these mentioned cases. The very fact that all of the previous pertinent cases were litigated only on the basis of a claimed evidentiary privilege, with no mention whatsoever of a constitutionally-protected right, is a potent argument sustaining the actual remoteness of the presently asserted constitutional protection against source disclosure.

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

¹⁰ Interestingly, since there was no publication of the information communicated by the undisclosed source in the instant case, several of the privilege statutes would have afforded no protection to the reporter. Significantly, the privilege statutes do not directly protect news sources, as the reporter and not the source can generally waive the privilege.

¹¹ Differences in the nature of the judicial proceeding, as criminal or civil, also would seemingly be relevant in this context, but the public interest in society's protection from criminal activity is hardly more worthy of protection than the general public interest in the maintenance of effective machinery to adjudicate private disputes.

¹² See Comment, 11 *STAN. L. REV.* 541, 542-46 (1959), where this question is ably discussed. See also Note, 8 *J. PUB. L.* 596 (1959), concluding that there is no such constitutionally-protected right. *But see* DOUGLAS, *THE RIGHT OF THE PEOPLE* 81 (1958); KONVITZ, *FUNDAMENTAL LIBERTIES OF A FREE PEOPLE* 192-93 (1957), stating that the "First

trary in the principal case, there has been no definitive Supreme Court holding on this point.¹³ Decisions in other jurisdictions in analogous situations have not been uniform in the handling of the question.¹⁴ Even with the broad scope accorded to the first amendment guarantees, and the extended application thereof in varying contexts,¹⁵ freedom of the press has traditionally been construed as principally a protection of freedom of expression, to prevent prior restraints on or censorship of the publication of information.¹⁶ And even this protected right to publish is not absolute, but is limited by considerations of other valid and conflicting interests.¹⁷ Although it can hardly be refuted that total or substantial denial of access

Amendment provides for freedom to acquire the news as well as to publish and to distribute the news.”

¹³ *Associated Press v. United States*, 326 U.S. 1, 20 (1945), cited in support, hardly approaches a definitive holding that news gathering, as such, is within the constitutional freedom of the press protection. In the celebrated case of *Burdick v. United States*, 236 U.S. 79 (1915), the recognition of a newspaper editor's privilege not to disclose a news source was based on a claim of the privilege against self-incrimination under the fifth amendment, as distinguished from the first amendment protections.

¹⁴ See *United Press Ass'n v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954), expressly holding that freedom of the press has never been held to confer upon the press a constitutionally-protected right of access to sources of information not available to others; *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958); *In re Mack*, 386 Pa. 251, 126 A.2d 679 (1956), in which Bell, J., concurring and dissenting in part, at 265, 126 A.2d at 685, stated that “while gathering of the news is an indispensable part of the privately owned newspaper business, it is important to point out that freedom of the press does not give a constitutionally protected right to gather news.” *But see id.*, in which Musmanno, J., dissenting, stated at 273, 126 A.2d at 689, that freedom of the press “means freedom to gather news, write it, publish it, and circulate it.” *Associated Press v. KVOS, Inc.*, 80 F.2d 575 (9th Cir. 1935), *rev'd on jurisdictional grounds*, 299 U.S. 269 (1936); *Brannon v. State*, 29 So. 2d 916 (Miss. 1947); *Lyles v. State*, 330 P.2d 734 (Okla. Crim. App. 1958), all supporting the view that news gathering is constitutionally protected. The aforementioned cases related principally to restrictions on courtroom photography and on the right of newsmen to attend trials. See also Note, *supra* note 12.

¹⁵ Freedom of the press has been held to include within its protection the solicitation of subscriptions, *Robert v. City of Norfolk*, 188 Va. 413, 49 S.E.2d 697 (1948) [*but see Breard v. City of Alexandria*, 341 U.S. 622 (1951)], and the distribution and circulation of what is published, *Winters v. New York*, 333 U.S. 507 (1948); *Lovell v. City of Griffin*, 303 U.S. 444 (1938), and relates to all sorts of publications, including those of no social or informative value. In relation to the first amendment freedoms generally, the fact that no direct restraint is imposed does not determine the question of abridgment, *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); it is essential not to limit the protection of rights to any particular way of abridging them, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); and abridgment of such rights, even though unintended, may inevitably follow from varied forms of government action, *NAACP v. Alabama*, 357 U.S. 449 (1958).

¹⁶ *E.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931).

¹⁷ Libel [*Beauharnais v. Illinois*, 343 U.S. 250 (1952)] and obscenity [*Roth v. United States*, 354 U.S. 476 (1957)] are not within the protection of the freedom of the press guarantee. In other areas, valid governmental and public interests have been held to justify some abridgment of protected freedoms, with evolution of the so-called “clear and present danger” and “balancing” tests relating thereto.

to news information would be an effective abridgment of freedom of the press, since the freedom to publish that which cannot be obtained is meaningless,¹⁸ restrictions on news gathering differ significantly from restraints on publication and dissemination. Sometimes overlooked is the duality of the nature and function of the various news media. They are not only servants of the public interest in disseminating information of various persons and events, but are also private businesses conducted for economic gain.¹⁹ Although varied arguments have been made to sustain the proposition that freedom of the press includes the right to gather news,²⁰ it cannot be seriously contended that news media organizations are to be granted immunities from general duties borne by other of society's economic components.²¹ And governmental regulation of the business aspects of the news media cannot be completely divorced from its effect upon the news gathering and publishing aspects. Arguably, constitutional protection of a right of access to information for a special and limited occupational class is discriminatory, while recognizing that its work is important and beneficial to the general welfare.²² Significantly, other widely recognized and universally protected rights of all citizens, whatever their particular calling, insure a sufficient access of information to the news media to fulfill their news-disseminating duties to the public.²³ Though news gathering is perhaps commonly regarded as somewhat generally protected by freedom of the press, with particular restraints thereon as reasonable to protect

¹⁸ See Comment, *supra* note 12, at 543. Although literally the first amendment applies only to Congress and not to the judiciary, this distinction is seldom made, and it would be grossly incongruous to hold that federal courts may with impunity impair constitutionally-protected rights which Congress and the states cannot.

¹⁹ See, e.g., Snyder, *Freedom of Press—Personal Liberty or Property Liberty?*, 20 B.U.L. REV. 1 (1940).

²⁰ See THAYER, *LEGAL CONTROL OF THE PRESS* 178 (3d ed. 1956), stating that since not expressly granted, the right to gather news is reserved to the people. Although this analysis is questionable, it would seem that, if accurate, then such right is reserved to all the people, not to a special limited group.

²¹ See Comment, *supra* note 12, at 544. News media have been held subject to general nondiscriminatory taxation, licensing statutes, libel laws, labor legislation and regulation, and antitrust laws.

²² Questions of the news media's access to official or governmental records and other such information, while analogous, present somewhat different constitutional and policy problems, and the necessity for protection of news gathering rights in this limited area is insufficient to justify any sweeping coverage of a right to gather news generally. See, e.g., CROSS, *THE PEOPLE'S RIGHT TO KNOW* (1953). Since it is certainly in this particular area of publishing information regarding activities of public and governmental officials and agencies that the wisely envisaged press function as the principal restraint on and protection against corruption, maladministration, and misgovernment is properly realized and accomplished, the instant case seems to raise the constitutional question rather sharply.

²³ Such general rights include the basic freedoms of speech, assembly, contract, mobility, enterprise, use and enjoyment of property, and, generally, that vast area of protection embraced within the "due process" and "equal protection" provisions of the fourteenth amendment.

weightier public interests,²⁴ the existence and extent of judicial recognition of a constitutionally-protected right of the press to *gather* news remains an unsettled issue.

Assuming *arguendo* some constitutional protection for general news gathering as such, the propriety of inclusion and recognition thereunder of a reporter's right of non-disclosure of confidential sources of news information is dubious. While it is familiarly argued that the gathering and dissemination of news are inseparable parts of the same publishing process, it hardly follows logically therefrom that the denial of a constitutionally-protected right of non-disclosure of the identity of news sources effectively impairs the free flow of news from source to public. Stating the problem as one of balancing the interests of the public in obtaining information secured by the news media from confidential information sources with the interests of the public in the effective administration of justice through compelled disclosure of all relevant testimony, analytically considered, can easily lead to judicial self-deception. Confidential sources are decidedly minor in number and importance when compared with the vast areas of information available in this modern, open, pluralistic society. News media personnel do not refrain from publishing information received from confidential sources because of any apprehension regarding the extremely remote possibility of a later contempt citation. The identity of sources of information, as distinguished from the information itself, is seldom judicially relevant, with the paucity of cases on this particular problem bearing this out only too strikingly. Importantly, news media personnel, abiding by the tenets of their professional code of ethics, invariably refuse, as a practical matter, to disclose the identity of confidential sources of information,²⁵ regardless of judicial compulsion in the form of contempt citations or threats thereof.²⁶ Journalistic obstinacy supplants the need for constitutional or statutory protections to prevent restraints on the flow of news from confidential sources to the public,

²⁴ See Comment, *supra* note 12, at 543.

²⁵ In only one of the reported cases involving refusals to disclose confidential sources of information did the threat of a contempt citation result in disclosure. *Matter of Wayne*, 4 U.S.D.C. Hawaii 475 (1914). Source disclosure resulted from threatened contempt proceedings in one other unreported case. See 2 CHAFEE, *GOVERNMENTAL AND MASS COMMUNICATIONS* 497 (1947), stating that "the consequences of threats of imprisonment for contempt are likely to be met by obstinate silence or by evasions and subterfuges." See also Carter, *The Journalist, His Informant and Testimonial Privilege*, 35 N.Y.U.L. REV. 1111, 1122 (1960); Note, 35 NEB. L. REV. 562, 578 (1956); Note, 36 VA. L. REV. 61, 82-83 (1950).

²⁶ The contempt device utilized by courts in these situations sometimes embodies elements of both criminal and civil contempt, as a means of punishment to preserve and vindicate an affront to judicial dignity, and also, hopefully but mistakenly, as a method of coercing disclosure of the identity of an information source. Maximum fines or jail sentences are usually prescribed by constitutional or statutory provisions.

and informants are adequately protected thereby.²⁷ Claims of a protected source privilege, then, are not in reality based on the public interest in the free flow of information, but rather on the interest of a limited number of individuals in a certain occupational group in avoiding imprisonment or payment of fines when held in contempt of court for refusal to identify news sources.²⁸ Such fines or imprisonment are, in effect, but risks of a particular trade and costs of doing business therein. Little altruism is perceived in a reporter's refusal to disclose; rather, it is an eminently practical and economic question of job and professional security for the individual involved. And the professional and economic interests of news media personnel seem to be only remotely related to the news reading interests of the general public.²⁹

A realization that the press is the only private industry specifically singled out for protection in the Constitution leads to the conclusion that this protection is essentially for the people, and not for the press as a separate economic unit of society. The real danger and significance of the recent case decisions where freedom of the press has been invoked as a basis for a reporter's non-disclosure of the identity of sources lies in the tacit judicial recognition of some validity in the stated proposition.³⁰ By stating hypothetically that compelled disclosure of news sources entails some abridgment of freedom of the press in limiting the availability of news, the door is opened to allowing undue extensions of the freedom of the press guarantee to accomplish primarily economic aims of a powerful occupational group, to the detriment of the public generally when resulting in an effective denial of the orderly administration of justice. Recognition of the necessity of a free and informative press in a democratic society is unchallenged. Discrimination in favor of news media, as a certain private enterprise segment of society, presents markedly different questions. If a balancing of interests is to be accomplished as to a right of news gather-

²⁷ It is at least conceptually anomalous to base a refusal to extend constitutional protections on the practical conduct of newsmen which serves in itself adequately to guard the public interest involved. Practically considered, however, since the public interest is the only feasible basis for granting a constitutionally-protected right of non-disclosure to newsmen, and this is otherwise adequately insured, the anomaly pales in the light of applied experience.

²⁸ See Comment, 54 Nw. U.L. REV. 243, 247-48 (1959).

²⁹ Seemingly, more flexible use of the contempt device can achieve propitious results, while avoiding the public expense of keeping unanswering reporters in jail unnecessarily. Allowance of judicial discretion in utilizing the money paid as fines partially to recompense parties effectively denied recoveries, to which they would otherwise apparently be entitled, may have some merit as a possible remedial device.

³⁰ In the *Garland* case, at 549-50, the court intimated that a different question might be presented if the judicial process were being used to force a wholesale disclosure of confidential news sources, or where the identity of the news source is of doubtful relevance or materiality, with Judge Stewart writing the opinion; Mr. Justice Douglas favored granting of certiorari in both the *Garland* and the *Murphy* cases.

ing, if judicially recognized, it is necessarily a balancing at a different and lower level than that done in regard to the right to disseminate news, since it inevitably involves some discrimination in granting and protecting the right of access to certain information. Acceptance of the proposition that a right to gather news generally, if constitutionally protected, embraces within its scope a right of non-disclosure as to the identity of confidential sources of information, without a close analysis of its pragmatic validity, will seemingly result in situations in which any rights asserted to be constitutionally protected, though raised in only a most attenuated and distant fashion, are brought into the main stream of first amendment freedoms' litigation, with all the weighing, balancing and preferring attendant thereto. When the basic interests of an orderly society conflict with protected individual rights and freedoms, balancing of these considerations provides the only rational solution. But prior to indulging in any such balancing, it is essential that a basic conflict actually be presented. Extensions of basic freedoms beyond their proper and necessary scope, with little or no perceptible public benefit therefrom, is a dangerous and unwise course to follow, easily leading to a gradual watering down and erosion of the essence of these protected liberties.

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