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SHIELD LAWS: PARTIAL SOLUTION
TO A PERVERSIVE PROBLEM

ROBERT M. O'NEIL*

Confidential communications have always been vital to a free press because journalists must frequently rely upon information gained in confidence from persons who do not wish that their identities be revealed.1 Governmental bodies and private litigants occasionally seek to compel the disclosure of such information, but conscientious reporters have characteristically resisted this pressure, even at considerable personal jeopardy.2 The importance of confidential communications to the media has increased during the recent political scandals, civil disorders, and other challenges to civic authority.3 Thus, the pressures imposed upon a reporter to reveal the sources of confidential information seem to be mount-
ing. While the number of journalists actually held in contempt of court represents but a tiny fraction of the working press, the problem is growing and of sufficient importance to warrant the considerable study it has recently received by legal scholars and commentators.4

Beset by such great pressures in the courts to disclose their sources, journalists have quite naturally turned to state legislatures for relief. The number of states recognizing the reporter's right to withhold at least the identity of his source of confidential information continues to grow steadily,5 and shield laws6 are under consideration in many of the remaining states. Much attention has also been devoted to the possibility of a federal shield law which would preempt existing state laws and provide a uniform, national protection for the journalist's confidential communications. A number of bills have been introduced in Congress to create such a protection, but none has yet been adopted and the prospects for an early enactment now appear rather dim.7 Moreover, the legal community also appears to be divided over the desirability of national


6. The origin of the term "shield law" is not clear. It has been used popularly and colloquially since enactment of the first such "shield law" in Maryland in 1896. See Md. Ann. Code art. 35, §2 (1971):

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 . . . in which he is engaged, connected with or employed.


7. See Cincinnati Enquirer, Mar. 31, 1974, at 3-D, col. 1. The lack of legislation is somewhat puzzling in view of the rather strongly expressed popular support for protection of journalists' sources. A Gallup poll found 57 percent of in-
legislation to protect newsmen's sources. Since the issue is still very much open, discussion of its merits and shortcomings will afford an opportunity for the analysis of several wider questions of public policy and constitutional law.

The case for a national shield law is superficially persuasive. While the data are not conclusive, journalistic reliance upon confidential communications does seem to be extensive. Forced disclosure of sources may very well serve to deter future confidences to a particular journalist and may place him in an extremely difficult (and possibly dangerous) position. While a number of states have enacted their own privilege laws, both the variations between, and the lacunae within, these laws cause them to fall far short of providing optimal protection. The lack of uniformity has been compounded by widely differing state court decisions; unlike other areas of testimonial privilege, common principles appear not to have been accepted even among the states that do protect journalists' sources. Given the increasingly interstate and national character of the major media, the value of a single standard of confidentiality is evident.

Apart from these recurrent arguments for federal legislation, the Supreme Court itself has recently invited congressional action. In *Branzburg v. Hayes* the journalists' claim to constitutional protection for confidential communications was rejected by a narrow margin. Speaking for the majority, Mr. Justice White stressed

terviewees supporting a newsmen's right to protect the confidentiality of his sources when called to testify. N.Y. Times, Dec. 3, 1972, at 48, col. 1.

8. See American Bar Group Opposes a New Shield Law, N.Y. Times, Feb. 5, 1974, at 26, col. 1. The House of Delegates of the American Bar Association had voted 157 to 122 against the shield law proposals pending before Congress. See also, for a report on the division of opinion, FoI Digest, Jan.-Feb. 1974, at 8.


10. See the discussion of the practical consequences of forced disclosure of sources in Comment, *supra* note 4, at 1204-08.

11. In both the attorney-client and the physician-patient areas, the protection of privileged communications has long been recognized. There is perhaps no better authority on the history, nature, and extent of these privileges than Wigmore. As to the attorney-client privilege see 8 J. Wigmore, *Evidence* §§ 2290-2399 (McNaughton rev. 1961); as to the physician-patient privilege see id. §§ 2380-2391. See generally Barker, Toward a New York Evidence Code: Some Notes on the Privileges, 19 N.Y.L.F. 791 (1974).


the practical problems inherent in defining such a privilege:

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. . . .

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or as broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. . . .

Not surprisingly, this invitation has increased the pressure for some sort of federal protective legislation and partly explains the rapid rise in the number of pending shield bills. Since Branzburg, legislation has seemed to become, if only by default, the most promising protector of confidential communication.

There are, however, many serious reasons to question the wisdom of federal shield legislation. The grounds for skepticism are partly practical and partly theoretical. On the practical side, the costs to newsmen of gaining the protection must be carefully weighed against the uncertain benefits. At the theoretical level, the many other types of confidential relationships that might be adversely affected by legislation protecting only newsmen must be considered. This broader perspective reinforces the practical doubts about the wisdom of having federal shield legislation. The remainder of this article will examine both the practical and theoretical concerns, beginning with the former.

I. THE PRACTICAL CASE AGAINST FEDERAL LEGISLATION

Even if one grants all the reasons favoring the adoption of a federal shield law, it is still far from clear that the press should pay the price. First, it is hazardous for the press to seek special protection—especially in so controversial an area. For most sectors of the economy, additional regulation can be absorbed with relative equanimity. But for the press, any new legislative intrusion carries particular dangers. Certain forms of governmental regula-

14. Id. at 703-04, 706.
tion, such as control of wages and hours\textsuperscript{16} or prohibition of sex differ-
entiation in employment advertising,\textsuperscript{17} have been held to apply
to the media as well as other sectors of the economy.\textsuperscript{18} But pressure
for a special new protection might open the door to further
regulation, perhaps in the areas of content and substance. Thus,
the press that truly wishes to remain free might best be advised
to seek as few favors as possible from legislatures and administra-
tive agencies.\textsuperscript{19}

There is a second practical concern. The most logical constitu-
tional basis for a federal shield law would be the commerce clause.\textsuperscript{20}
In view of past Supreme Court decisions defining the scope of
Congress' power under that clause,\textsuperscript{21} there seems to be little doubt
about the legal foundation for a national shield law. The relation-
ship between the media and the flow of commerce could amply
be demonstrated in ways that would support a pervasive and pre-
emptive federal law.

But there may be those to whom it seems somehow inappro-
priate to gain protection for so pure an interest as freedom of ex-
pression through the mundane medium of interstate commerce. The
commerce clause is not, of course, the sole potential source of
support for such a law. Congress might find such legislation neces-
sary or appropriate for the protection of first amendment guarantees,
and rely on the enforcement provision of the fourteenth amend-
ment to insure those guarantees.\textsuperscript{22} Such an exercise of the imple-

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where the Court declared invalid as a first amendment violation a Florida statute
which required newspapers to grant equal space (for reply) to political candidates
who had been assailed in the newspapers' columns. The Court stated:

If it is governmental coercion, this at once brings about a confrontation
with the express provisions of the First Amendment and the judicial gloss
on that amendment developed over the years.

\textit{Id.} at 254.


\textsuperscript{17} See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n On Human Relations,

\textsuperscript{18} See also Associated Press v. United States, 326 U.S. 1 (1945), where the
Court held that the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1970), applies to
newspaper publishers as well as non-media corporations.

\textsuperscript{19} See ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY

\textsuperscript{20} U.S. CONST. art 1, § 8, cl. 3. See SCHMIDT, supra note 4, at ¶7.

\textsuperscript{21} E.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964);

\textsuperscript{22} U.S. CONST. amend. XIV, § 5 provides: "The Congress shall have power
to enforce, by appropriate legislation, the provisions of this article." The freedom
of press guarantee of the first amendment was incorporated into the due process
clause of the fourteenth amendment by Near v. Minnesota, 283 U.S. 697, 723 (1931).
menting power of Congress has been sustained by the Supreme Court in the analogous context of civil rights legislation.\(^2\)

There are, however, two troublesome distinctions with the analogy. First, in the civil rights setting, the protective legislation came in the absence of any judicial declaration on the matter, whereas any federal shield law would follow the Supreme Court's express holding in *Branzburg* that the first amendment does not afford comprehensive protection to a newsman's claim of confidentiality.\(^2\) \(^3\) Secondly, the congressional power to effectuate any fourteenth amendment guarantee under the equal protection clause may be broader than its power to implement any Bill of Rights guarantee merely incorporated under the due process clause.\(^2\) \(^4\) The first amendment route thus seems somewhat precarious; a wise draftsman of such federal legislation would best rely chiefly on the commerce clause with no more than incidental resort to the first amendment.

Perhaps the most substantial practical objection to a federal shield law is the very complexity and variety of the terrain it must cover. Many journalists would doubtless prefer an absolute privilege—that is, the right to refuse to appear or testify at all whenever a confidential relationship is endangered. But it seems most

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24. 408 U.S. at 685. The Court found that authority weighed heavily against exempting the newsmen from a basic duty of appearing before a grand jury or testifying at trial:

> These courts have applied the presumption against the existence of an asserted testimonial privilege . . . and have concluded that the First Amendment interest asserted by the newsmen was outweighed by the general obligation of a citizen to appear before a grand jury or at trial pursuant to a subpoena, and give what information he possesses. . . .

*Id.* at 686 (citation omitted).

25. The case law is somewhat ambiguous on this point. In Katzenbach v. Morgan the issue was whether it was constitutional for Congress to pass a law abrogating New York's literacy test voting requirement for certain citizens of Puerto Rican descent. The Court held Congress has such power under section 5 of the fourteenth amendment (set forth in note 22 supra). 384 U.S. at 658.

It construed section 5 to be analogous to the necessary and proper clause, U.S. Const. art. I, § 8, cl. 18, in that it was "a positive grant of legislative power" to Congress. 384 U.S. at 650-51. Thus, even if the voting requirement had been able to "pass muster under the Equal Protection Clause," section 5 still gave Congress the power to determine that the requirement's abrogation was necessary and proper in order to "enforce" the Clause. See *Oregon v. Mitchell*, 400 U.S. 112, 145 (1970) (opinion of Douglas, J.). Of course, it is questionable whether the Court would extend its holding with regard to the applicability of section 5 to due process matters, as well as equal protection.
unlikely the Congress would ever enact so sweeping a safeguard for the media. Instead, the privilege would almost certainly be qualified—that is, the journalist would be obliged to appear and subject his claim for the privilege to the judgment of the court rather than simply make his own unilateral subjective judgment.\(^{26}\) Even if the privilege were absolute in its subject matter, some definition of the persons entitled to claim it would still be required—as Mr. Justice White pointed out in his *Branzburg* opinion.\(^{27}\) Thus, the task of drafting a comprehensive federal shield law would be far more complex than that of enacting a federal statute creating an attorney-client or a physician-patient privilege. This complexity is, in fact, partly responsible for the absence to date of any congressional consensus on the subject.\(^{28}\)

A brief examination of the major topics will suggest how many difficult issues must be resolved in enacting a shield law. There is, first, the matter of who may invoke the privilege—should it be limited to regularly employed full-time reporters, or should it extend to freelance reporters, college editors, members of the underground press, not to mention such more remote claimants as scholars and researchers working with confidential sources? Such a law would also have to specify the type of proceeding in which the privilege could be invoked—grand jury hearing, criminal trial, civil suit, administrative hearing, etc.—as well as the stage of each type of proceeding at which the claim could be made, and perhaps the process by which the claim would be adjudicated and resolved. The scope of the shield would have to be indicated—whether only the identity of a confidential informant would be protected, or the content of the communication as well. (Most state laws protect only the former, although a few go further and shield the content as well.)\(^{29}\)

In addition, the legislature should give consideration to the status of journalists' "raw material," such as tapes and notes. The recent controversy over the CBS outtakes for the "Selling of the

\(^{26}\) See *FOI Digest*, Mar.-Apr. 1973, at 2. In one of the cases reviewed by the Supreme Court in the Spring of 1972, the reporter did refuse to appear at all before the grand jury, fearing that even his appearance might jeopardize his relations with highly sensitive sources. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *revd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

\(^{27}\) 408 U.S. at 702-05.


Pentagon" program suggests one type of new threat.\(^{30}\) Recent demands for the surrender of tapes in the possession of radio stations,\(^{31}\) or for the delivery of reporters' notes to prosecutors or defense attorneys\(^{32}\) underscore the need for some definition of the reach of the privilege in this dimension as well.

If the protection were to be qualified at all, in short, a clear definition of its limits would seem essential. The range of possibilities might run from a broad privilege, which would protect the confidentiality of all information (except, for example, information about a threat to life), to a very narrow privilege, which would have to yield upon a demand for all relevant information sought in any civil or criminal proceeding.

This wide array of issues bears directly on the desirability of federal legislation. It might be possible (as many states have done) for Congress to enact a broad, vague shield law without resolving the hard definitional and coverage questions. Such a law would afford protection so uncertain that the quest for its passage would hardly be worth the effort. On the other hand, Congress could grapple with the facts and issues, but the likelihood of consensus would accordingly be reduced considerably. Thus, one comes to the view expressed over a year ago by Washington Post publisher Katherine

\(^{30}\) The story is a long and complex one. The House Interstate and Foreign Commerce Committee served a subpoena on the Columbia Broadcasting System, demanding that it turn over to the Committee the "outtakes," in addition to the material actually televised, on which the controversial program was based. N.Y. Times, Apr. 9, 1971, at 1, col. 1. Later, the Committee voted to cite the network and its president for contempt of Congress. N.Y. Times, July 2, 1971, at 1, col. 5. The full House never did vote contempt orders, but the case caused much anxiety in the media and threatened a serious breach in relations between Congress and the media. For a more general comment, see O'Connor, Suppose "The Selling of the Pentagon" Had Been a Newspaper Article, N.Y. Times, Apr. 18, 1971, § 2, at 17, col. 1.

\(^{31}\) The manager of a Los Angeles radio station was jailed for refusing to turn over to government investigators a tape recording relating to the kidnapping of Patricia Hearst. N.Y. Times, June 20, 1974, at 36, col. 4. Later he was released by an order of Mr. Justice Douglas, pending appeal. N.Y. Times, Aug. 4, 1974, at 40, col. 7.

\(^{32}\) Defense attorneys in an illegal wiretap suit attempted to force a New York Times reporter to release the notes from which he derived a story about the wiretapping (authorized by persons connected with the Nixon Administration) in connection with the drowning of Mary Jo Kopechne in Senator Edward Kennedy's car. N.Y. Times, Dec. 6, 1973, at 21, col. 1. Earlier, the Village Voice lost its attempt to protect from surrender the original manuscript of an article which it had published in an edited form. The manuscript was to be used as evidence against its author, an ex-convict on trial for his alleged involvement in prison riots. N.Y. Times, Jan. 28, 1972, at 26, col. 1:
Graham: "Any shield law which a majority of both houses would endorse would be limited, qualified or hedged. And . . . whatever a legislature gives, it can take away."  

It is evident that the practical problems of securing federal statutory protection are great: Two additional conclusions will emerge: First, the actual extent of protection afforded by a shield law is easily exaggerated; and second, the present need for such protection may be less critical than initially it appears to be.

A shield law would be worth the effort expended in obtaining it only if very substantial protection could be ensured. In fact, the practical value of such a safeguard is uncertain. No case better illustrates the permeability of the statutory shield than Branzburg itself. The petitioner had resisted disclosure in the state courts, claiming that he was protected by a Kentucky statute which provides that no journalist will be required to reveal in any proceeding "the source of any information procured or obtained by him" following publication or broadcasting of that information. 34 The Kentucky Court of Appeals held, however, that the shield law protects only the identity of the source of confidential communications; since Branzburg sought to withhold the identity of persons he had personally observed making and distributing illegal drugs, the law afforded him no protection. 35

Since the Branzburg decision, other courts have reached a similar conclusion about the reach of state shield laws. State courts in New York, 36 Maryland, 37 and Ohio 38 have all held that similar

37. Lightman v. State, 15 Md. App. ___, 294 A.2d 149 (1972). In Lightman, a newspaper reporter, engaged in the preparation of a series of articles dealing with illicit use of drugs by young people, was compelled to reveal the identity of the location of the pipe shop referred to in his article even though the shopkeeper was the source of the information. In addition, there was a high degree of probability that such information would lead to the actual disclosure of his source of information. The court held that
statutes protect only the identity of the confidential informant and not the content (including identity) of information gleaned through personal observations in the process of gathering news. These cases suggest that the statutory shield—at least the common variety which protects only the identity of the source but not content—is a rather weak form of protection after all. 39

This does not mean that the journalist is without protection from compulsory disclosure. To return again to the Branzburg decision, limiting features of that holding should be noted. For one, the inquiries which the Court sanctioned were by grand juries investigating suspected criminal activity. Much stress was placed on the “investigative powers” of the grand jury 40 and the citizen’s obligation to further the process of criminal justice:

[T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called “bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification. . . .” 41

The Branzburg majority limited the force of the holding even further by cautioning that “grand jury investigations if instituted

39. The state statutes under consideration typically protect the “source of information” procured by a newsman. The distinction made in this “personal observation” line of cases is between the “source” in a typical informant situation and in the observation situation. In the latter instance, the source of the information, even if that information is merely the identity of the actors or the nature of their actions as well, is the reporter’s personal observation, and is not privileged. Branzburg v. Pound, 461 S.W.2d at 347.

40. 408 U.S. at 668. Branzburg v. Pound, 461 S.W.2d 345, was joined for decision with In re Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), and Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

Branzburg was a reporter who wrote an article about two persons who made hashish from marijuana. He refused to divulge their identity to a grand jury. For another article, Branzburg had interviewed drug users and observed them smoking marijuana. In this instance, Branzburg refused to appear before the grand jury when subpoenaed; instead, he made a motion to quash the subpoena.

Pappas was a television reporter who was afforded an opportunity to enter Black Panther headquarters. Although he appeared before the grand jury, he refused to answer questions as to what took place inside the headquarters while he was there.

Caldwell was a reporter for the New York Times covering black militant groups. He moved to quash a subpoena ordering him to testify and produce his notes and tape recordings concerning his interviews with Black Panther members.

or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. . . ."42 (No claim of bad faith was made in any of the three cases consolidated for review in Branzburg. In all three, moreover, the published writings of the respective reporters supplied the only “nexus” between the general inquiry and the calling of the particular witness.) The majority continued its warning:

Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news source would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. . . .43

Since the decision was by a vote of 5 to 4, the brief concurring opinion of Mr. Justice Powell assumes a particular importance. Stressing the “limited nature of the Court’s holding,”44 Justice Powell urged a case-by-case approach to such questions—“striking . . . a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. . . .”45 Under this test:

[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. . . .46

Thus, concluded Justice Powell, “the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection. . . .”47

The alignment of the Court in Branzburg suggests strongly that under certain circumstances the Supreme Court could probably muster a majority for constitutional protection of newsmen’s confidential sources. If, for example, the same information had been sought in a civil, rather than in a criminal, proceeding, the

42. 408 U.S. at 707.
43. Id. at 707-08.
44. Id. at 709 (Powell, J., concurring).
45. Id. at 710.
46. Id.
47. Id.
governmental and judicial interests would have been substantially weaker and the balance might well have tipped the other way.\textsuperscript{48} A majority of the Court would be likely to insist upon a showing of not merely a valid grand jury inquiry, but a substantial governmental need for the information requested.\textsuperscript{49} While the \textit{Branzburg} majority disagreed with the petitioners that a "compelling state interest" must be shown,\textsuperscript{50} Justice Powell implied such a standard by invoking a "legitimate need of law enforcement" as the criterion.\textsuperscript{51}

There is a final limiting factor in the \textit{Branzburg} decision. All three reporters sought to invoke an absolute privilege and refused to answer any questions. (One of them, in fact, even refused to appear at all before the grand jury. The other two appeared but refused to answer any questions in the area of alleged confidentiality.) As Professor Benno Schmidt observes, Justice Powell "seems to suggest that the balance can better be drawn when actual questions are asked and the reporter refuses to testify."\textsuperscript{52} What the \textit{Branzburg} cases lacked—and what Justice Powell presumably would have found persuasive—was an ad hoc demonstration that the particular questions were improper.\textsuperscript{53} Thus, the \textit{Branzburg} decision may actually relate more to the \textit{timing} and \textit{manner} of the journalist's plea than to its \textit{merits}. At least it would be well to await a more sharply joined issue in a later case before concluding that the Supreme Court will not protect the confidentiality of newsmen's sources.

Recent lower court decisions tend to confirm this sanguine view of \textit{Branzburg}. Before examining the particular decisions, a few words about the legal context may be helpful. Until about fifteen years ago, courts did not even treat a journalist's plea for confidentiality as a constitutional issue. In the absence of a shield law no protection existed whatever.\textsuperscript{54} Claims to withhold sources were summarily rejected. Courts usually cited Wigmore's decla-

\textsuperscript{48} See Baker v. F & F Inv., 470 F.2d 778, 784-85 (2d Cir. 1972), a civil case which does in fact distinguish \textit{Branzburg} partly on this ground.
\textsuperscript{49} See Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), a libel action in which the plaintiff sought to compel disclosure of defendant's sources for a magazine article. The court refused to order disclosure, stating the plaintiff had presented "no genuine issue to be tried." \textit{Id.} at 993.
\textsuperscript{50} 408 U.S. at 667.
\textsuperscript{51} \textit{Id.} at 709-10 (Powell J., concurring).
\textsuperscript{52} \textbf{SCHMIDT} at 44.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} See \textit{Comment}, supra note 4, at 1213.
ration that a confidential relationship is irrelevant to a claim of privilege, and that "[a]ccordingly . . . a confidential communication to a journalist . . . is not privileged from disclosure."\(^{55}\) The constitutional issue surfaced for the first time in \textit{Garland v. Torre}, \(^{56}\) a libel suit in which the United States Court of Appeals for the Second Circuit concluded that the plaintiff’s interest in knowing the identity of the allegedly defamatory source outweighed a columnist’s claim of privilege.\(^{57}\) Although the journalist did serve ten days in jail for contempt of court following the unsuccessful appeal, the constitutional principle was at least presented and the way paved for future cases.\(^{58}\)

Since this initial resort to constitutional doctrine, the balancing of conflicting interests has become increasingly sophisticated. Regardless of the outcome, and whether or not a shield law exists, courts do weigh carefully the interests for and against compelling disclosure.\(^{59}\) Very recently, the Supreme Court of Vermont reviewed the issue as a matter of first impression and announced the following test:

\begin{quote}
[\text{W}hen a newsgatherer, legitimately entitled to First Amendment protection, objects to inquiries put to him in a deposition proceeding conducted in a criminal case, on grounds of First Amendment privilege, he is entitled to refuse to answer unless the interrogator can demonstrate to the judicial officer appealed to that there is no
\end{quote}

\(^{55}\) 8 J. Wigmore, \textit{Evidence} § 2286 (McNaughton rev. 1961).

\(^{56}\) 250 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

\(^{57}\) Id. at 549-50. Actress Judy Garland brought suit against CBS. Plaintiff annexed to the complaint an article written by Marie Torre which quoted a statement made by a "network executive" of CBS which plaintiff alleged to be defamatory. In pre-trial discovery Torre refused to divulge the name of the source claiming a confidential privilege. Plaintiff then instituted proceedings to compel Torre to reveal the information. Upon Torre’s refusal to do so after a court order, she was held in criminal contempt. \textit{Id.}

\(^{58}\) \textit{See} Comment, 72 Harv. L. Rev. 768 (1959).


In \textit{Goodfader}, a newspaper reporter was ordered to divulge his confidential source of information concerning the discharge of the Personnel Director of the Civil Service Commission of the City and County of Honolulu. In his deposition the reporter, Alan Goodfader, disclosed that approximately one week before the Director was fired he received confidential information that an attempt to fire her was being considered. On cross-examination Goodfader refused to disclose the source of this information on the ground that to do so would be a serious breach of his professional ethics.
other adequately available source for the information and that it is relevant and material on the issue of guilt or innocence. . . . 60

A review of several recent decisions suggests the extent of current judicial concern for the protection of journalists' confidential sources. The Second Circuit recently returned to the issue of the Garland case and reached a somewhat different conclusion. In Baker v. F & F Investment, 61 the plaintiffs alleged discrimination and deception in the sale of houses to black families in Chicago. They sought to discover the journalist's source of information for an expose on "blockbusting" which attributed to an anonymous Chicago realtor statements about the very practices that formed the basis of the suit. The author of the article (who had since become editor of the Columbia Journalism Review) declined to name his source. The plaintiffs moved to compel disclosure, but the district court refused to grant the order. 62 The plaintiffs took an interlocutory appeal, 63 and the court of appeals had before it—for the first time since Garland, fourteen years earlier—the confidential source question.

The two cases are superficially quite similar. Indeed, the equities of plaintiffs' civil rights claim in Baker may well be more appealing than those of the defamed singer in Garland. But the court found several distinguishing qualities. 64 For one, Garland involved a news item that went to the heart of the plaintiff's case—the identity of the person who made the key damaging statement to the columnist. Secondly, the plaintiffs in the Baker case had apparently made no attempt to obtain the information through other channels, which might have availed. The Second Circuit also distinguished Baker from Branzburg 65 on the ground that the latter was a criminal case involving strong governmental interests not at stake in Baker: the integrity of the grand jury and the safety and security of the community. By applying essentially the balancing test suggested by Mr. Justice Powell in his Branzburg concurrence, 66 the Second Circuit held in favor of the journalist, dis-

62. Id. at 945.
64. Id. at 784.
65. Id.
66. 408 U.S. at 710 (Powell, J., concurring).
tinguishing both its own prior decision and the Supreme Court's intervening judgment. Surely this order of events should suggest that *Branzburg* has not weakened, and may in fact have strengthened, reporters' constitutional claims.

Other cases provide further support for this view. One of the many "Watergate" cases centrally involved a claim of journalistic privilege. In *Democratic National Committee v. McCord,*⁶⁷ the district court quashed a subpoena seeking depositions and materials from national magazine and newspaper reporters relating to the Watergate break-in. Here, as in the *Baker* case, a court felt the proper approach was the balancing formula suggested by Justice Powell in *Branzburg.* The result was in favor of the journalists for several reasons: One, because "there [had] been no showing by the parties that alternative sources of evidence [had] been exhausted or even approached;"⁶⁸ two, because there had been no strong showing of the materiality of the documents requested; three, because (unlike *Branzburg*) this was not a criminal proceeding; and four, because of an overriding public interest in protecting confidential communications—

This Court cannot blind itself to the possible "chilling effect" the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public. This Court stands convinced that if it allows the discouragement of investigative reporting into the highest levels of government no amount of legal theorizing could allay the public suspicions engendered by its actions . . . ⁶⁹

One other recent case⁷⁰ deserves mention because it illustrates another dimension of Justice Powell's *Branzburg* concurrence. A reporter for a small community newspaper in Ohio was deposed in a civil suit following publication of an allegedly defamatory story. He refused to answer five questions, claiming a journalistic privilege. Three of the five questions were ruled out on the basis of the state shield law,⁷¹ since they called for identification of source

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⁶⁸. *Id.* at 1398.
⁶⁹. *Id.* at 1397.
The remaining two questions were clearly not barred by the shield statute. After careful examination, however, the judge concluded that both lacked the requisite showing of relevance to the subject matter of the inquiry, and did not have to be answered. Thus, while an abstract claim of privilege or a blanket refusal to testify would surely have failed in this case, the protection eventually afforded by careful review of the particular questions proved to be effective. This decision confirms the view that Branzburg may only have been criticizing the prematurity of the claim of privilege, and that refusal to answer particular questions may stand somewhat differently from refusal to answer any.

Despite some encouraging signs, it would be quite misleading to suggest that the investigative reporter is out of danger. Indeed, several recent causes célebres suggest that the risks of using confidential sources may have intensified. The misfortunes of Los Angeles Times reporter William Farr are illustrative. Cited for contempt of court for refusing to name the source of a story he wrote in 1970 about the Charles Manson murder trial, Farr was sentenced to jail. After 46 days of incarceration—apparently a modern record for a journalist—he was eventually freed when a California state judge held that indefinite commitment was an inappropriate sanction. The judge acknowledged Farr's "commitment to the principle of confidentiality and to the promises he has made" and found that there was "no substantial likelihood that further incarceration . . . will result in his compliance with the court's order . . . ." About the same time, Will Lewis, manager of Los Angeles radio station KPFK, completed his second week in jail for refusing to turn over to federal authorities materials sought in the Patricia Hearst-SLA investigation. (Significantly, California is one of the states which recently amended its shield law, after Branzburg, to immunize reporters who withhold confidential

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72. 37 Ohio Misc. at ____, 66 Ohio Op. 2d at ____, 302 N.E.2d at 597.
73. Id.
74. See note 2 supra.
75. See N.Y. Times, June 21, 1974, at 21, col. 1.
76. N.Y. Times, June 20, 1974, at 70, col. 5. The manager was later released on the order of Mr. Justice Douglas, pending appeal. N.Y. Times, July 6, 1974, at 40, col. 7. See In re Lewis, 501 F.2d 418 (9th Cir. 1974).

Mr. Lewis was again convicted of civil contempt for withholding from a grand jury a communiqué which he received in October 1974 from the New World Liberation Front. This latter decision explores the balancing of interest in some depth. In re Lewis, 384 F. Supp. 133 (C.D. Cal. 1974).
sources during grand jury investigations.\footnote{77} The New York Times, commenting editorially on an earlier phase of the Farr litigation, lamented that the California courts' interpretation of the shield law "presents a powerful new threat"—the more so because of the indeterminate jail sentence.)\footnote{78}

We have, then, a troublesome dilemma: On the one hand, there seems to be little doubt about the need for legal protection of journalists' sources. Reliance on confidential information is a vital ingredient of vigorous, effective reporting. On the other hand, it is far from clear that federal shield legislation would be effective in meeting these needs. Meanwhile, there are tentative signs that the courts may do what the legislatures are failing to do, and there are persuasive reasons for favoring the judicial approach, despite the Supreme Court's apparent preference for legislation.

II. THE LARGER CONTEXT: CONFIDENTIALITY
AS A TRANSCENDENT CONSTITUTIONAL ISSUE

Perhaps the most forceful reason for preferring "judicial legislation" to that of Congress is that the issue goes far beyond just the protection of newsmen's sources. The probing of confidential relationships may jeopardize freedom of expression, association, and the press in a variety of other contexts. While the compelled disclosure of a reporter's source may be the most familiar threat, it is by no means the only one. If energy and effort are devoted to the enactment of a federal law specially protecting the journalist's sources, the other needs may well be neglected. Even worse, enactment of legislation covering confidentiality in just one relationship may imply lesser protection elsewhere. The specific danger inheres in the legal maxim, \textit{expressio unius exclusio alterius est}. If Congress were to pass legislation to protect one particular confidential relationship, this action would strongly imply that

\footnote{77. The California shield law now provides, in part:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper.


\footnote{78. N.Y. Times, Nov. 17, 1972, at 46, col. 1. According to the editorial, the court held that immunity from contempt was cancelled by Farr's "willful violation of a court order."}
other confidential relationships enjoy little or no legal protection. Before creating such an inference through inadvertence, it would be well to survey the broader field.

A. Representative Problems of Confidentiality

A series of recent cases (some litigated and others not) may suggest the broader context of confidentiality.

(1) We begin with the case of Professor Samuel Popkin, a young Harvard political scientist who had done extensive research in Vietnam and was an expert on Vietnamese village life. When he was called before a grand jury investigating the release of the “Pentagon Papers,” he refused to answer several questions which may have required the disclosure of names of Americans and Vietnamese whom he had interviewed in his research.79 He also refused to tell the grand jury whether he had ever discussed the study with Daniel Ellsberg. He was cited for contempt of court and sentenced to up to 18 months in jail. With the official backing of Harvard University, Popkin appealed unsuccessfully through the federal courts.80 Popkin, however, was freed after about a week in jail when the judge suddenly and unexpectedly dismissed the grand jury whose questions he had refused to answer.81

The Popkin case is not unique. Sociology professor Albert A. Reiss of Yale, a specialist in the study of police conduct, “refused to reveal information about police crimes he had obtained during his studies.”82 Professor James Vorenberg of the Harvard Law School expressed his concern about the potentially adverse “effects of his vulnerability to subpoena on a project he [was] conducting to determine the extent to which drug addicts are involved in the commission of crimes.”83 The relationship between researcher and subject is always a fragile and sensitive one, whether or not confidentiality has been promised or even assumed. Yet there presently appears to be no legal protection for communications between them, and no prospect of legislative safeguards even of the shield law variety.

81. N.Y. Times, Nov. 29, 1972, at 1, col. 1.
83. Id.
The researcher-subject relationship is not the only vulnerable confidence in the academic community. Inquiries into communications between teacher and student, or teacher and administrator, may raise similar problems. Several years ago, just such an issue came before the New York courts. Shortly after the massive drug raid in January 1968 at the State University of New York at Stony Brook, a grand jury began investigations into campus use of narcotics. Several faculty members were subpoenaed by the district attorney. Although the precise scope of the inquiry had not been announced, the professors understood they would be asked whether they had used drugs with students, whether they had advocated to students the use of drugs, and whether they had discussed with university officials either the use or advocacy of drugs. Government employees, including teachers, could not refuse with impunity to appear before a grand jury, although the Supreme Court had held that New York state officers could not constitutionally be forced to choose between their jobs and the right to invoke the self-incrimination privilege.

The subpoenaed professors argued that the anticipated questions would violate their first amendment right to academic freedom by requiring them to breach confidential relations within the academic community. They argued that such inquiries infringed upon individual rights which the Supreme Court had recently

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85. Id. at 140-42, 247 N.E.2d at 137-38, 299 N.Y.S.2d at 166-68.
86. In Gardner v. Broderick, 392 U.S. 273 (1968), a police officer appearing before a grand jury refused to answer questions about his performance of official duties after having been advised of his privilege against self-incrimination, and after having been requested to sign a waiver of immunity upon penalty of being fired. In a suit for reinstatement, the Supreme Court ruled that his employment could not be terminated solely for refusing to execute a waiver of a constitutional right. Id. at 278-79.

In Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968), twelve employees of the Sanitation Department were discharged for refusing to testify before the Commissioner of Investigation concerning their official conduct on the grounds of self-incrimination. Three other employees had answered questions, but when they appeared before a grand jury and were requested to sign waivers of immunity, they refused. The Court held that public employees cannot be subjected to a choice between their jobs or their constitutional rights. Id. at 284-85.

Although no person may be dismissed from a job for refusing to waive his constitutional rights, in both cases the Court implied that a person may be dismissed from public employment for refusing to answer specific questions relating to his official duties, provided he is not required to waive his constitutional rights. 392 U.S. at 278; 392 U.S. at 284.
recognized in the disclaimer loyalty oath cases.87 The New York Court of Appeals rejected the analogy, however, finding the challenge to the grand jury investigation to be inapplicable.88 Much like Justice Powell’s view of Branzburg, the majority deferred consideration of first amendment issues until specific questions were posed which might threaten a confidential relationship. In a concurring opinion, Chief Judge Fuld cautioned:

We would have to be blind to reality not to recognize that a subpoena commanding a teacher to appear before the Grand Jury—a body not given, ordinarily, to academic discussion—to testify, against his will, concerning his talks with students or his lectures in class is suppressive and intimidating in effect, even though the questions may not be designed to expose him as a criminal but merely as the holder of unpopular views. How better to inhibit open discussion, the vital quickening current of education itself, than by such means? . . . Were District Attorneys to take encouragement, from the court’s opinion, to summon before Grand Juries teachers whose utterances were unorthodox, though not criminal, we might well have a shadow cast over classrooms and universities of the very kind the First Amendment was designed to avert . . . .89

3) There is still another threat to confidential relationships which arises in the academic community. When a faculty member brings to the national office of the American Association of University Professors a complaint of academic freedom violation, an informal inquiry precedes any formal investigation. During the initial phase, views may be sought from campus officers of the AAUP chapter, members of the administration, and others knowledgeable about the case. Frequently, the Association will either arrange an informal settlement or decide that no formal action is warranted. In one recent case, where a faculty member had been denied a salary increase, the AAUP conducted an informal inquiry and decided against a formal probe. The faculty member then re-

87. E.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967). Appellants, university professors and a non-faculty employee, were fired or threatened with dismissal when they refused to take a loyalty oath. The Court held that academic freedom is “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” Id. at 603.
89. Id. at 145-46, 247 N.E.2d at 140, 299 N.Y.S.2d at 170-71.
tained an attorney and brought suit in the federal district court.\textsuperscript{90} The college instituted discovery proceedings against various third persons, including the national AAUP. Since the informal inquiry had resulted in no formal action, the college believed the AAUP investigative file might contain information favorable to its position in the suit.

The original request to the AAUP was almost limitless. Lawyers for the college sought, \textit{inter alia}, all memoranda, correspondence, documents or writings of any kind whatsoever showing, dealing with, or discussing the employment of the professor at the college. Had the national organization been forced to surrender to the college administration confidential communications received from campus chapter officers and other faculty members, future informal inquiries would have been virtually impossible once the vulnerability of the resulting file was known. The parties eventually reached an accommodation and the court granted a limiting order which protected all those communications the AAUP deemed confidential. Prior to this agreement, the court had indicated its inclination to narrow the scope of the subpoena, more on practical than on constitutional grounds.

\textsuperscript{4} In the spring of 1970 a group of 45 faculty members at the State University of New York at Buffalo was arrested for conducting a peaceful Sunday morning demonstration in the office of the University’s president.\textsuperscript{91} Soon after criminal charges were filed, the district attorney served on the university administration subpoenas calling for production of personnel records of the arrested faculty members and other teachers involved in the incident. The administration was to produce all personnel files including but not limited to letters of recommendation and correspondence with previous employers. The District Attorney sought the University’s complete files on several experimental colleges thought to be centers of radical faculty and student activity, and demanded other information, such as the amount of university support to the student newspaper.

The faculty members immediately took steps to protect the confidentiality of their personnel files. Their attorney obtained a show cause order. Some weeks later, the prosecutor agreed to a stipula-

\textsuperscript{90} The suit was eventually reported as Jervey v. Martin, 336 F. Supp. 1350 (W.D. Va. 1972).

tion whereby the university would have to produce only the signed loyalty oath cards—which were, after all, a matter of public record. Personnel files which had already been given the district attorney were to be returned without being examined. Thus, the case had a happy ending and there was no occasion for a decision on the extremely sensitive issue of compelled disclosure of confidential communications.\footnote{22. Long after the subpoena issue had been resolved, the Appellate Division reversed the contempt citation against the 45 faculty members. State Univ. v. Denton, 35 App. Div. 2d 176, 316 N.Y.S.2d 297. The initial arrests had been based on alleged violation of a general trial court injunction which was issued following earlier student disorders on the Buffalo campus.}

(5) Public libraries have also experienced major threats to confidential records. In the summer of 1970, Internal Revenue Service agents began asking libraries in several cities for records of all borrowers of books about explosive devices. The Service justified the practice as “routine—just a continuous building of information . . . in line with the proliferation of bombings across the country.”\footnote{23. N.Y. Times, July 31, 1970, at 28, col. 3.} Earlier in the summer, the Secretary of the Treasury publicly stated that no agency of the Treasury Department was undertaking such an investigation. In addition, he expressed the Treasury Department’s strong opposition to such methods of gathering information, and to such conduct by its agents.\footnote{24. N.Y. Times, July 30, 1970, at 30, col. 7.} (There were also some practical problems. It turned out that one of the publications on the “suspect” list was a pamphlet about explosives obtainable for a quarter from the Government Printing Office.) While the searches were discontinued, some damage had already been done. In Milwaukee, one of the three major target cities, the director of the public library system had been ordered to release to Treasury agents borrowing slips for a fifteen month period for all books labelled “explosives.” The city attorney ruled that “there is no such thing as private records” in a public library, and the library board did not resist.\footnote{25. N.Y. Times, July 3, 1970, at 8, col. 6.} Thus, the investigative purpose was accomplished despite the Treasury Department’s own repudiation of these demands.

The American Library Association strongly opposed these inquiries and urged librarians to take additional steps to resist them in the future. Among the recommendations was the suggestion that each library “[f]ormaly adopt a policy which specifically rec-
recognizes its circulation records to be confidential in nature." The Association also urged that information should not be made available to any governmental investigator or body except under compulsory process. Further, librarians should "resist the issuance of any such process, order or subpoena until such time as a proper showing of good cause has been made in a court of competent jurisdiction."

(6) Bank records may appear less sensitive than library borrower lists or university personnel files, but difficult questions have arisen in this context as well. At the height of governmental concern over antiwar protests and demonstrations, investigators sought to obtain information about radical groups by gaining access to their bank deposits. The most notable case involved the Fifth Avenue Peace Parade Committee, an antiwar group from whom some 15,000 people bought tickets for bus rides to Washington for the November 1969 moratorium march. The Committee claimed that FBI agents were given access to its bank deposits. The bank denied the charge. A spokesman for the American Bankers Association conceded that no law precluded such disclosures, but insisted that banks maintained "a very, very strong policy of keeping information confidential." Nonetheless, the Committee brought suit against the FBI, charging that agents had obtained from the bank's records the names of individuals who purchased the moratorium tickets. The case apparently never came to trial, for there is no report of further proceedings.

(7) Shortly after United States Circuit Judge (and former Governor) Otto Kerner was indicted on charges of bribery, the Justice Department sought certain information from the American Bar Association. Specifically, government attorneys had a subpoena issued for records of the ABA Committee on the Federal Judiciary which had reviewed Kerner's qualifications prior to his appointment to the bench. The declared purpose of the Justice Department inquiry was to find out whether the Bar Association had uncovered any evidence of the wrongdoing which eventually resulted in Kerner's indictment and conviction. The records were in the possession of Chicago lawyer Albert E. Jenner (later minority counsel for the House Judiciary Committee in the Nixon impeachment

96. 19 NEWSLETTER ON INTELLECTUAL FREEDOM 65 (1970).
97. Id.
99. Id.
proceeding). Jenner refused, on the Committee’s behalf, to release the Kerner file, claiming that the Committee’s role in screening judicial candidates and nominees would be “finished” if disclosure of the resulting data could be compelled. This, explained Jenner, “is very much like the privilege being claimed by reporters—if you can’t protect the confidentiality of your sources, nobody will talk to you.”

The ABA-Kerner case brings us full circle. Clearly, the situations we have reviewed resemble the newsmen’s confidential source cases in several respects. Many of the arguments advanced by the journalist against a subpoena or a grand jury interrogation find striking parallels in the cases of the researcher, the professor, the public librarian, the political group, or the ABA judicial qualification committee. Just as clearly, however, none of the analogous claims to confidentiality enjoys any form of statutory protection; nor is any legislature likely to extend the shield law to these other contexts. Even if every one of these cases were to be covered by specific legislation other threats would soon emerge beyond the borders of an extended “shield.” It would be neither practical nor possible to anticipate all the situations in which a confidential relationship might be jeopardized by a governmental demand for information. Thus, the very breadth and complexity of the issues cited by the Branzburg Court to emphasize the need for legislative action is, in fact, a basis for the opposite conclusion when the total constitutional context is perceived.

As an alternative to the unsatisfactory quest for protection through legislation, a sharper delineation of the constitutional issues is needed. The concluding sections of this article offer a preliminary analysis of those issues.

B. The Constitutional Case for What the Shield Cannot Do

In order to bring together a number of rather diverse strands, it may be useful to identify the common ingredients of a comprehensive constitutional standard.

(1) The Common Elements

What do the claims of the Harvard researcher, the Milwaukee librarian, the New York political group, the Buffalo professor, the

100. N.Y. Times, Feb. 9, 1972, at 44, col. 1.
Stony Brook instructor, and Mr. Jenner's ABA committee have in common with one another and with the claims of the journalist seeking to withhold sources? Several similarities emerge.

First, in every case a confidential relationship clearly exists. Whether or not there has been an explicit promise of confidentiality, the expectation of secrecy has undoubtedly contributed to the decision to impart sensitive information. Sometimes an expectation of confidentiality is just inherent in the relationship, and at other times it arises out of the situation or past practice. To insist that a pledge of secrecy be made explicit would run quite counter to human experience; indeed, the need for protection may be greatest in the very situation where trust and confidence make an explicit guarantee inappropriate or superfluous.

Second, compelling disclosure of confidential communication in cases such as those above would have detrimental effects, both immediate and long term. Initially there could be hazards both for the persons involved in the communication and for innocent third parties. In some cases disclosure might even endanger the life of the holder of the information—as in the case of a reporter who has gained information in confidence about radical political organizations, underground criminal activity, or Black Panther Party operations. Even more serious are the long term effects upon the future capacity for confidential relations of the person who is forced to divulge on even a single occasion. A reporter who reveals confidential sources can no longer be trusted, nor can a professor who discloses what his students have told him in confidence, nor an ABA committee that reveals data gathered in the course of screening a judicial nominee. While the consequences of breaching a confidence may not always jeopardize the practice of one's profession they are, nonetheless, likely to be extremely serious.

102. Several affidavits submitted by the petitioner in the Caldwell case at the district court level attest to these concerns. 311 F. Supp. 358. An affidavit of one black reporter stated that a black journalist in Caldwell's position could be placed in personal danger by his appearance before a grand jury. Comment, supra note 4, at 1206 n.38, quoting Affidavit of Thomas A. Johnson, at 3, attached to Brief for Petitioner, In re Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970). Another newsman stated that he had been threatened by members of a group with whom he had gone to Cuba. Id., quoting Affidavit of Min S. Yee, at 4, attached to Brief for Newsweek as Amicus Curiae, In re Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

103. See Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 YALE L.J. 317, 320 (1970) [hereinafter cited as Note].
Third, compelled disclosure in all these cases would deter or chill the exercise of first amendment rights of expression or association.\textsuperscript{104} In the case of a journalist and his confidential sources the potential effect of disclosure upon the newsgathering function of the press is substantial and direct.\textsuperscript{105} The relationship between compelled disclosure and first amendment freedoms may be less obvious in the other cases, yet the connection does exist. For example, if federal agents or legislative committees could freely obtain the bank records of an active political group, then several consequences might follow. The political organization could, of course, avoid all banks and conduct its business strictly in cash by relying upon individual officers for the safekeeping of funds. But such an approach would severely limit an organization's activities and make impractical, for instance, the sale of tickets to 15,000 peace marchers—as in the case of the Fifth Avenue Peace Parade Committee.\textsuperscript{106} Alternatively, if the organization continued to use a bank it would have to warn contributors that their identities might be revealed if investigators should demand access to the bank records. The almost certain effect of such an admonition would be to deter many potential contributors who might desire to support the group and its goals but would not risk public identification. By analogy to cases in which the Supreme Court has sustained claims to anonymity—especially where membership in unpopular organizations was at stake—this result would seem to make the demand for disclosure constitutionally unacceptable.\textsuperscript{107}

The interest of a library patron in being able to borrow controversial books without having FBI agents looking over his shoulder seems obvious. While the library might be able directly to restrict circulation of a particular volume, or even withdraw it altogether,\textsuperscript{108}


105. \textit{Id.} at 722 (Douglas, J., dissenting).

A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. . . . \textit{Id.}


107. \textit{See}, e.g., Lamont v. Postmaster Gen., 381 U.S. 301 (1965); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958), all of which suggest the unconstitutionality of requiring public disclosure of membership in an unpopular organization or cause.

it is quite another matter to accomplish the same result indirectly by holding the constant threat over borrowers that their literary preferences might turn up in a congressional committee report.\textsuperscript{109} If there is a constitutional right to read material that cannot be banned,\textsuperscript{110} then the application of the first amendment to the disclosure of borrower slips should clearly follow.

The constitutional interests militating against disclosure should be plainly apparent in the case of a researcher. If a scholar must warn all subjects that information they give may be freely subpoenaed, there is likely to be much less inquiry into highly sensitive areas of the social sciences. Although scholars and researchers have a strong obligation to be candid and accurate about their data, sources, and research methods, there are times when information should be withheld. The comment of Professor John K. Fairbank in connection with the \textit{Popkin} case is pertinent:

My observation is that a subpoena has an effect of intimidation both on the person subpoenaed and on those who might have contact with him. I can testify from personal knowledge that in the early 1950’s . . . the widespread subpoena of China scholars had the public effect of inhibiting realistic thinking about China, and I believe the result carried over into unrealistic thinking about Chinese relations with Vietnam and helped to produce our difficulties there.\textsuperscript{111}

The constitutional interest in free communication between student and teacher should also be apparent. Although the Supreme

\textsuperscript{109} The situation is analogous to that in Lamont v. Postmaster Gen., 381 U.S. 301, where the Supreme Court unanimously struck down a statute requiring that persons wishing to receive mail from Communist countries must fill out a signed card for each such piece of mail. This disclosure requirement was held to violate the first amendment.

\textsuperscript{110} See O’Neil, \textit{supra} note 108, at 239.

The basis for a constitutional right to read seems logically compelling, but it is not squarely embedded in constitutional law. There are many useful fragments and analogies, but nothing precisely in point, even in the lower federal and state courts. The Supreme Court has often spoken approvingly of the right to receive information as a corollary of free expression, but has never based a decision solely on the reader's or listener's claims. Where first amendment interests have been sustained, the writer or speaker has always been present. Since precedent does not fully suffice, we must continue to reason partly from logic.

\textsuperscript{111} This statement is quoted in Lewis, \textit{The Grand Jury}, N.Y. Times, Apr. 24, 1972, at 35, col. 3.
Court has never defined academic freedom in precisely this way, it has frequently indicated its deep concern for free discussion within the classroom and has made academic freedom an explicit basis for striking down several disclaimer oaths required of teachers.\textsuperscript{112} Perhaps the most explicit reference to academic freedom as a constitutionally protected freedom came in the decision halting the investigation and prosecution of students and faculty involved in the Kent State University tragedy of May 1970. The district court enjoined further criminal proceedings and ordered a highly inflammatory grand jury report to be destroyed.\textsuperscript{113} Much of the essential proof came from faculty members who testified that their freedom to teach had been impaired by the grand jury and its accusations. The court found this evidence compelling:

When thought is controlled, or appears to be controlled, when pedagogues and pupils shrink from free inquiry at a state university because of a report of a resident Grand Jury, then academic freedom of expression is impossibly impaired. This will curb conditions essential to fulfillment of the university’s learning purposes.\textsuperscript{114}

Thus, it should be clear that confidence and trust between professor and student are vital to education. Forced disclosure which serves to poison or chill that relationship renders the educational process a sterile and formal dialogue. Since communication within the classroom enjoys a measure of constitutional protection, little doubt should remain about the status of faculty-student discussions outside of class, whether the subject be philosophy, physics, or (as in the Stony Brook case) marijuana.

The nature of the constitutional interest in the personnel record cases—both the case of the Buffalo subpoena and the AAUP inquiry—has already been suggested. Clearly, the candid evaluation of a faculty member by his peers should constitute a protected expression. Just as clearly, forced disclosure of these evaluations would make future confidential evaluations virtually impossible. It would be difficult to imagine a system of academic promotion

\textsuperscript{114} Id. at 350. For other expressions of judicial concern for the scope of academic freedom in the classroom, see Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Farducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970).
and tenure where every report written by one faculty member (or dean, or department chairman) about another might become a matter of public record. This situation would make honest evaluation impossible. Either there would have to be a system of "instant tenure," in which everyone receives job security at the time of initial hiring or, more likely, a system in which promotions and rewards were subject to personal whim, changing enrollments, individual popularity, and other such ephemeral factors. Thus, the confidentiality of academic personnel files is absolutely vital to effective academic personnel administration.115

The constitutional interest in the ABA judicial selection committee's confidentiality is subtle. But there is a plausible first amendment claim here, to be sure, which is closely analogous to that of a journalist. Besides the first amendment, there may be a separate interest in insuring the most careful review of judicial nominees. Surely there is a general governmental interest in the high quality of the federal judiciary—an interest which probably finds its roots in the Constitution.116 The role and responsibility of the organized bar in the process of selection should be substantial. If the bar were no longer able to play a role in evaluating proposed judges, the quality of the judiciary might not directly suffer, but surely the confidence of the practicing bar in the judiciary would be adversely affected. Thus, the compelled disclosure of files such as the one Mr. Jenner so vigorously protected would undoubtedly have grave constitutional implications.

The wide variety of constitutional interests raised by these cases casts additional doubt on the wisdom of special legislation to protect any of them. While the Supreme Court has not given great cause for optimism, even in the seemingly most appealing case of the journalist, neither has it ever denied protection in the analogous contexts we have reviewed. Few of these issues have ever been presented to the courts at all, much less to the Supreme Court. What we need now is a constitutional framework within which to fit the various pieces of the puzzle.

115. This comment is not meant to suggest that faculty members should be denied access to their own files under appropriate conditions. Most universities have policies which permit at least knowledge of the contents of the faculty member's own personnel file, and sometimes an opportunity to inspect those contents. Moreover, the Supreme Court has suggested that under some conditions a faculty member has a right to know the reasons for an adverse personnel decision. Perry v. Sindermann, 408 U.S. 593, 599 (1972); see Board of Regents v. Roth, 408 U.S. 564 (1972).

116. U.S. CONST. art. III.
(2) Factors in a New Constitutional Test

A constitutional test to cover these various problems of confidentiality should be composed of three major factors: (a) The nature and strength of the constitutional interests which would be jeopardized by disclosure; (b) the nature and strength of the countervailing interests, either governmental or private; and (c) the availability of alternative means by which to obtain the information without breaching the confidence. Each element will be analyzed briefly.

(a) Constitutional Interests Affected by Disclosure. Much has already been written about the impact of compelled disclosure on the work of the journalist.¹¹⁷ Not only may such disclosure adversely affect freedom of the press, but it may also hinder the ability of sources to communicate freely—especially where controversial or unpopular causes seek an outlet. It has been seen in the preceding section that similar impairments of constitutional rights may result in other confidential relationships—student-teacher, bank depositor, library-patron, researcher-subject, etc.—if disclosure is compelled. In each case, there appears to be not only a substantial constitutional interest in confidentiality, but also a major threat to that interest by compelled disclosure.

The analysis of such constitutional interests should be the starting point in this overview. Only evidence of a substantial interest can support a valid claim for legal protection.¹¹⁸ To some degree every revelation of a confidential communication may restrict freedom of expression or association. But surely, the Constitution does not prevent a court from probing into communications among criminal conspirators simply because "speech" is involved. No constitutional scholar would seriously argue that a confidence should be protected before a grand jury simply because the parties so believed or intended it to be.¹¹⁹

¹¹⁷. See, e.g., Comment, supra note 4; Note, supra note 103.
¹¹⁸. There is no simple or easy definition of the term "substantial" in this context. Obviously those interests that claim clear constitutional protection are "substantial." But other interests falling short of first amendment stature may also merit consideration. The issue of substantiality must be determined in each case, as objectively as possible. Since the application of any test in this area requires a weighing of several elements, the strength and clarity of the interest in protecting or withholding information may remain flexible.
¹¹⁹. Clearly beyond the scope of this requirement is the vaguely analogous criminal informant's privilege, which would be recognized without regard to any constitutional interest in confidentiality. See, e.g., McCray v. Illinois, 386 U.S. 300 (1967).
Appraisal of the constitutional claim should not be confined to the interests of the immediate parties to the communication. Consideration should also be given to larger public interests that may be implicated in the confidential communication. In the cases of reporter and researcher, for example, the most compelling basis for a first amendment privilege may be the great value of keeping the public or the scholarly community well informed about matters of vital interest. Even if it is decided that newsgathering or social science research per se is beyond the reach of the first amendment, reporters and researchers might nevertheless be entitled to claim constitutional protection on behalf of their sources.

Assessment of the larger public interest is more difficult in some of the other cases we have examined. Where the bank records of the antiwar group were subpoenaed, for example, the interests would appear to be confined to the parties. Yet if such surveillance had deterred substantial numbers of people from joining antiwar protests and demonstrations—and this may well have been the goal of the FBI—then surely the public would have been hurt by having been misled as to the extent of anti-Vietnam War feeling in this country. There is a similar public interest in having a complete and candid evaluation of candidates for college and university teaching positions and for appointments to the federal bench. If the evaluation processes are truncated or diluted by compelled disclosure of files then the general public, as well as the immediate parties, would certainly suffer.

Thus, in determining whether a confidential communication should enjoy immunity from compulsory disclosure one must consider more than simply the nature of the immediate relationship. One must also judge the possibility of adverse effects on connected relationships and, more broadly, upon related public interests. Only if there is a substantial constitutional interest in protecting the particular source or content of the communication would the inquiry proceed to the next stage.

120. See Hendel & Bard, supra note 82, at 398.

Accordingly, any problem of standing to sue becomes illusory. Reporters and researchers, under this theory, are able to claim a first amendment protection of confidentiality belonging to their sources because any demand for revelation of such sources violates their personal right to hear these sources.
(b) Countervailing Governmental and Private Interests. It is essential to balance the claim of confidentiality with the reasons requiring disclosure. Where a grand jury seeks evidence of major criminal activity, the countervailing interest may be compelling. But where a private litigant simply seeks confirmation of the facts of his case the reason is obviously less compelling. Between these two situations fall most of the cases we have reviewed.

Consider, for example, the Treasury Department’s attempts to determine who had borrowed books about explosives from the Milwaukee public library. If the object of the inquiry were to compile a list of suspects who had been, or were, likely to become involved in the bombing of campus and public buildings, the rationale seems tenuous indeed. Surely, evidence that a person has borrowed a book about explosives does not justify the invocation of his criminal prosecution. Even as a rational basis for placing certain persons under surveillance there is considerable doubt about both the efficacy and the propriety of detective work such as this.

If, on the other hand, the purpose were to reduce the circulation of literature about bombs—either by causing librarians to withdraw such materials or by scaring away potential borrowers—then the goal would be wholly illegitimate. Even the Secretary of the Treasury, when confronted with evidence of what his agents in the field had done, could offer no plausible rationale.

The Government’s interest in finding out what the American Bar Association knew about Governor Kerner’s malfeasance similarly seems tenuous. The state of the ABA’s pre-appointment knowledge could have no bearing upon the criminal trial. Moreover, since the primary responsibility for screening potential judges is that of the Justice Department, not the organized bar, the true objective of requesting disclosure may very well have been to protect the Justice Department from charges that it should have done a better job of checking Kerner’s background, or to get additional leads that would bolster the prosecution. Neither interest seems at all substantial. It is not surprising, therefore, that the United States Attorney acquiesced when the subpoena was challenged.

One of our cases involved a private, rather than a public, interest in compelling disclosure. The demand for information from

123. See O’Neil, supra note 108, at 239-41.
the national AAUP files in the professor's nonreappointment suit was made by the administration of the college. Although the request offered no supporting reasons, it may be inferred that the college hoped the file would contain information damaging to the faculty member's claim or favoring the administration's. This interest is not without substance, and seems entitled to greater weight than, for example, the interest of the Buffalo district attorney in seeing the full contents of faculty personnel files. Thus, the college's interests may weigh more heavily in the balance than others would, although the constitutional claim against disclosure also seems to be an unusually strong one.

It is obviously neither possible nor appropriate to list here a hierarchy of interests favoring disclosure. The Supreme Court suggested in *Branzburg* that the orderly administration of the criminal law should rank high on the disclosure side of the balance.\(^{125}\) Quite recently this suggestion seems to have been underscored in the presidential tapes case,\(^ {126}\) where the President's claim to confidentiality under the rubric of executive privilege was recognized by the Court. But that claim was overridden by "a subpoena essential to the enforcement of criminal statutes" and "the legitimate needs of the judicial process."\(^ {127}\) The Court's discussion of the particular balance between conflicting interests strongly implies that a lesser claim to access—the needs of a private litigant in a civil suit, for example—would be insufficient to override a valid claim of executive privilege. Apart from the particular balance struck in the presidential tapes case, the Court's general approach seems more consistent with Justice Powell's "case-by-case balancing" than with the rather rigid formula of the *Branzburg* plurality.\(^ {128}\)

The foregoing should not suggest, however, that a private plaintiff may never overcome a substantial claim of confidentiality. In defamation cases, for example, there may be times when withholding the identity of an anonymous source will produce a serious miscarriage of justice. In the *Garland* case the United States Court of Appeals for the Second Circuit ordered a columnist to reveal the source because this information was held to be essential to the plaintiff's ability to redress a very substantial injury.\(^ {129}\) Recently,

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125. 408 U.S. at 690.
127. *Id.* at 707.
128. 408 U.S. at 667.
129. 259 F.2d at 551.
in an action for defamation, the United States Court of Appeals for District of Columbia reached a similar result and found Garland to be unimpaired by Branzburg. The proper approach, said the court,

is that the court will look to the facts on a case-by-case basis in the course of weighing the need for testimony in question against the claims of the newsman that the public's right to know is impaired.

On the other hand, another federal appellate court recently declined to order disclosure of an anonymous source in a libel suit brought by a public official after finding little likelihood that the information sought by the plaintiff would enable him to prove the requisite degree of "malice" to get his case to the jury. And, it will be remembered, the Second Circuit itself upheld the reporter's claim in the Baker case, since the information sought appeared less central to the case than the information at issue in Garland. These and other recent civil cases do suggest substantial acceptance of Justice Powell's "balancing" approach. A critical element of that formula, whether in a criminal proceeding or a civil suit, is the nature and strength of the countervailing interest. Only a careful weighing of the claims on both sides—precisely as the Supreme Court did in the presidential tapes case—will adequately recognize the difficulty and complexity of these cases.

(c) Availability of the Information from Alternative Sources. Even where a countervailing interest is substantial, and appears to outweigh the protective claim, the party seeking disclosure should first be required to exhaust all other avenues of obtaining the information he seeks. The application of this principle to confidential communications is analogous to the principle that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Thus, if the information is obtainable from a non-

131. Id. at 636.
132. Id.
134. Baker v. F & F Inv., 470 F.2d at 784.
confidential source, or in ways that would not jeopardize a confidential relationship, the argument for compelled disclosure is weakened considerably.

There is some support for the application of this precept to the context of confidentiality. The Justice Department guidelines on press subpoenas, issued by then Attorney General Mitchell in the summer of 1970, require that before resort to compulsory process "[t]he government should have unsuccessfully attempted to obtain the information from alternative non-press sources." In the Baker case, the court stressed this as a factor lacking in its own fact pattern but present in Garland: "Miss Garland had taken active steps independently to determine the identity of the confidential news source" before bringing the columnist into court. An Illinois trial court, while refusing to order newsreel cameramen to surrender films of radical political demonstrations, did suggest that the result might have been different if "the use of subpoenas was the only method available of obtaining that evidence. . . ."

In the several cases presented above, a provision requiring the party seeking disclosure to exhaust all alternative sources would have had considerable impact. The case where there was a demand for information from the national AAUP office illustrates the point. While the interest of the college administration in obtaining the information was substantial, sources other than AAUP investigation files clearly did exist and should have been exploited first. Since the college made no effort to obtain the same information from other persons on campus, its case for access to the AAUP's confidential materials was substantially weaker than it might have been. Had the parties been unable to reach an accommodation, that factor possibly would have tipped the balance.

Enough has been said to suggest the nature of this third element of the formula. Even if a court finds that an interest in confidentiality would be outweighed by the need for disclosure, a confidential relationship should not be breached unless the information can be obtained in no other way. Failure to apply this additional criterion in the balancing process would be inconsistent with a general Supreme Court constitutional doctrine developed

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138. 470 F.2d at 784.
139. Comment, supra note 4, at 1222.
in analogous settings.\textsuperscript{140} Surely, the constitutional interest in preserving and protecting confidential relationships deserves no less a degree of solicitude.

**CONCLUSION**

The problem of confidentiality will not soon disappear. The demands by public officials, grand juries, and private litigants for sensitive information are likely to increase, rather than decrease. The resolution of the resulting conflicts will be aided only in small part by the enactment of shield laws protecting the journalist's source. Such laws are of limited value for several reasons—courts tend to construe them rather narrowly; they protect only one type of confidential information-holder; and their presence diverts attention from the more basic constitutional and public policy questions. Thus, no one should be lulled into a false sense of security by the presence of such laws, or by legislative commitments to enact them in jurisdictions where they do not now exist. While such laws may solve easy cases, they are of little value in more complex situations. The most serious threats to the journalist's first amendment interests have, after all, occurred in shield law states. Therefore, it would be wise to look to the Constitution for protection.\textsuperscript{141}

\textsuperscript{140.} See, e.g., Aptheker v. Secretary of State, 378 U.S. 500; Shelton v. Tucker, 364 U.S. 479.

\textsuperscript{141.} Congressional hearings on federal legislation continue to take place. N.Y. Times, Apr. 24, 1975, at 25, col. 4.