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Constitutional Law--Disclosure of Journalist's Confidential News Sources

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Graham: Constitutional Law--Disclosure of Journalist's Confidential News

V. Conclusions

The new law will probably cure many of the abuses practiced by unscrupulous creditors. Regarding the dischargeability of debts, the most notable change is that the creditor will not be able to use the ignorance or poverty of the debtor to obtain judgments in the state courts. However, due to the fact that many details are left out of the new law, especially with regard to jury trial and collateral issues which may be considered in determining dischargeability,[51] a good deal of case testing and practical application will be needed before the precise contours of the law can be discerned.

Stephen P. Swisher

[51] Consider for example the issue of whether the bankruptcy count will have jurisdiction to determine tax issues as they come up in dischargeability.

Constitutional Law—Disclosure of Journalist's Confidential News Sources

Earl Caldwell, a black newspaper reporter for the *New York Times,* was subpoenaed to testify before a federal grand jury concerning his knowledge of activities of the Black Panther Party. The information sought by the government was secured by Caldwell through interviews with various party officers and spokesmen. Caldwell and the *Times* contended the first amendment precluded disclosure, and that compelled appearance before the grand jury would have a chilling effect on first amendment freedoms. Accordingly, they asked that the subpoena be quashed; or in the alternative, be limited to protect Caldwell's confidential news sources. After making a preliminary standing ruling,[1] a California District Court held that Caldwell, as everyone else, had a public duty to appear before a grand jury when subpoenaed; but that under the circumstances he was entitled to a qualified privilege of confiden-

[1] The district court initially referred to the now familar "personal stake in the outcome" standing criteria of *Baker v. Carr,* 369 U.S. 186 (1962). Yet the court upheld the standing of the *New York Times* to join with Caldwell on the basis of *Ass'n of Data Processing Serv. Organizations v. Camp,* 397 U.S. 150 (1970). In *Camp,* the Court held the personal "stake" need not be a strict legal interest, such as a property interest. Accordingly, for the purpose of standing, it was held sufficient for the party seeking relief to show the challenged action has and will cause him "injury in fact, economic or otherwise." *Id.* at 152.

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tiality for the protection of his news sources. Specifically, the order of the district court stated: (1) that Caldwell would not be required to reveal confidential associations, sources, or information received except information given for public disclosure; and (2) that the court would sustain a government motion for modification of its order upon the showing of a compelling and overriding national interest requiring Caldwell's testimony which could not be served by alternate means.[2]

The district court decision apparently constituted a major victory for journalists. Precedent in this area had indicated that a journalist must not only attend grand jury proceedings when subpoenaed but also must answer *all* questions asked of him by counsel as well. Yet, unsatisfied with an apparently favorable ruling from which the government failed to appeal,[3] Caldwell refused to appear before the grand jury and was cited for contempt by the district court. Caldwell and the *Times* appealed the contempt citation, contending that Caldwell should not have been ordered to attend the grand jury proceeding. Parting with precedent, the Ninth Circuit Court of Appeals held the public's first amendment right to be informed may outweigh a governmental request for the journalist's appearance before a grand jury; and that under the circumstances, Caldwell's mere appearance before the grand jury might destroy his capacity to report on activities of the Black Panther Party. *Caldwell v. United States,* 434 F.2d 1081 (9th Cir. 1970).[4]

Anyone familiar with the complicated development of journalist privilege law will recognize that *Caldwell* marks a significant departure from prior decisions. Never before has a federal court held that first amendment freedoms outweigh a journalist's duty to appear before a grand jury. The decision was not based on a journalist privilege statute, nor was it consistent with common law precedent.

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

[3] The failure of the government to appeal may be explained by a press release from Attorney General Mitchell. This release contained new Department of Justice guidelines for subpoenas to members of the news media. Address by John N. Mitchell (House of Delegates of the American Bar Association, August 10, 1970). Among other things, Attorney General Mitchell stated that the Department of Justice would no longer utilize the press as a springboard for investigations.

[4] The case name was changed from *Application of Caldwell* to *Caldwell v. United States* upon appeal to the circuit court. An appeal from the circuit court holding was filed in December, 1970, and the Supreme Court granted certiorari.

Prior to *Caldwell* the leading journalist privilege case was *Garland v. Torre*.[5] Although an apparently contrary result was reached in *Garland*, the two cases are factually distinguishable. In *Garland* the identity of the news source was an essential element of the cause of action, and alternate means of identifying the news source had been exhausted. In comparison, the government did not disclose the subject, direction, or scope of the grand jury examination of Caldwell. The government's only justification for its examination of Caldwell was that members of the Black Panther Party had *possibly* engaged in criminal activities. Furthermore, the government did not contend that alternative investigative procedures had been exhausted. In *Caldwell* the court recognized that citizens normally have a duty to appear when subpoenaed and that grand jury proceedings are typically secret, wide-ranging and open-ended affairs. Nevertheless, the court effectively held that a specific crime must be charged, and that alternative investigative methods must be exhausted before freedom of the press could be jeopardized. Because *Caldwell* was a case of first impression, the court stressed the narrowness of its holding, noting: (1) the Black Panther Party was an unusually sensitive news source; (2) Caldwell enjoyed a unique relationship with the Black Panther Party; and (3) news of Black Panther activities was of great public importance in a time of widespread national dissent.[6]

Since the *Caldwell* decision only partially defined the phrases "compelling and overridding national interest" and "alternate means," one can only speculate as to how these concepts will be applied.[7] In *Caldwell* the court distinguished the *Garland* decision and acknowledged that evidence which related to the heart of a claim would constitute an overriding interest. The author of a proposed legislative draft evidently believed a compelling and overriding national interest would exist if national security were at stake, or if an important public interest were threatened.[8] Based upon *Garland* a compelling and overriding national interest would be

[5] 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). In this famous case Judy Garland attempted to sue a CBS executive who allegedly had made defamatory remarks about her to journalist Marie Torre. When questioned in court, Marie Torre refused to identify the CBS executive and was sentenced for contempt.

[6] Caldwell v. United States, 434 F.2d 1081, 1090 (9th Cir. 1970).

[7] Resolution of conflicting governmental and first amendment claims always involves a balancing of competing interests. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 51 (1961); Barenblatt v. United States, 360 U.S. 109, 126 (1959).

[8] 6 HARV. J. LEGIS. 341 (1969).

demonstrated if another constitutional provision outweighed conflicting first amendment interests, or if the identity of the news source or his information were *essential* to the maintenance or defense of a civil or criminal case. The meaning of "alternate means" is much easier to grasp—all other known means of obtaining the desired information must have been exhausted before a journalist could be compelled to testify. The inference from this principle is that freedom of the press should be impaired only as a last resort.

The underlying premise supporting the holding of *Caldwell* is that newsgathering is entitled to first amendment protection. Never before has a judicial decision explicitly supported this proposition. Until this decision, only publication and circulation have been expressly included within the scope of the first amendment.[9] The *Caldwell* opinion scarcely mentioned the controversy regarding this premise, suggesting it was an accepted fact that newsgathering was entitled to constitutional protection. However, prior decisions reached an opposite conclusion.[10]

The main arguments against recognizing constitutional protection of newsgathering are: (1) a journalist privilege was not recognized under common law; (2) everyone has a duty to appear before a grand jury; and (3) evidentiary privileges should be restricted.[11] Proponents of constitutional protection for newsgathering have pointed out that the first amendment provided greater protection to freedom of the press than existed under common law[12] and that compelled disclosure would jeopardize confidential journalist-source relationships which are indispensable to gathering, analyzing, and publishing news articles.[13] Moreover, elementary logic dictates that news must be gathered before it can be published

[9] *See, e.g.,* Talley v. California, 362 U.S. 60 (1960); Near v. Minnesota, 283 U.S. 697 (1931).

[10] *See, e.g.,* Assoc. Press v. United States, 326 U.S. 1 (1945); State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied,* 392 U.S. 905 (1968). In *Buchanan* a student newspaper editor subjected to district attorney questioning before a grand jury was required to reveal the names of seven confidential news sources who were users of marijuana. This recent case is representative of precedent prior to *Caldwell.* Miss Buchanan used a similar constitutional argument to no avail.

[11] *See* 8 J. WIGMORE, EVIDENCE (McNaughton rev. 1961).

[12] James Madison wrote: "the state of the press . . . under the common law, cannot . . . be the standard of its freedom in the United States." VI WRITINGS OF JAMES MADISON 1790-1802, 387. In *Bridges v. California,* 314 U.S. 252, 265 (1941), the Court said "[t]he only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."

[13] Siebert & Ryniker, *Press Winning Fight to Guard Sources,* 67 Editor and Publisher 9 (Sept. 9, 1934).

and disseminated.[14] Support for constitutional protection has been expressed in the past in dissenting opinions.[15] The recognition of a journalist privilege under proper circumstances would seem a reasonable extension of recent Supreme Court decisions granting publishers wider freedom to publish news without fear of libel suits.[16]

Of great significance in the *Caldwell* decision was the fact that the government had the burden of showing a compelling and overriding national interest before first amendment considerations were outweighed. The court could have placed the burden on the journalist to show why he should not be compelled to testify in a given situation. This would have been more in line with precedent and possibly more reasonable since the journalist would always be in a better position to know why testimony should be withheld. Nevertheless, the court decided to place the burden on the government, thereby strongly favoring freedom of the press over competing interests.

Even with a full appreciation of the importance of first amendment freedoms, one could have a lingering doubt about the desirability of a journalist privilege.[17] The news media has seemed robust enough without a journalist privilege—so much so that some favor more press restrictions rather than greater press freedom.

Everyone is aware of the serious congestion problems plaguing our state and federal courts. A complicated, time-consuming case-by-case weighing of competing interests can only lead to increased court congestion. Furthermore, would a journist privilege have any real effect if some sources are identified in court and some are not? A news source could never be sure of remaining anonymous the next time he gave a journalist information. If a journalist cannot *constantly* insure the anonymity of his sources, of what value is the privilege? It may be a privilege of illusory value at best.

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[14] In Guest & Stanzler, *The Constitutional Argument For Newsmen Concealing Their Sources*, 64 NW. U. L. REV. 18, 31 (1969), the authors stated: "If newspapers are restrained in gathering news, obviously they cannot print the news which they were prevented from gathering."

[15] *See, e.g.*, Assoc. Press v. United States, 326 U.S. 1 (1945); *In re* Goodfader's Appeal, 45 Hawaii 317, 367 P.2d 472 (1961) (Justice Mizuha's dissenting opinion is an excellent review of opposing arguments); *In re* Mack, 386 Pa. 251, 126 A.2d 679, *cert. denied*, 356 U.S. 1002 (1956).

[16] *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (a public figure bringing a libel action must show an extreme departure from normal publishing standards); New York Times v. Sullivan, 376 U.S. 254 (1964) (a public official must prove actual malice in a libel action).

[17] *See generally* Beaver, *The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 ORE. L. REV. 243 (1968).

On the other hand, there are additional arguments in support of recognizing a journalist privilege. Without a privilege, journalists are placed in a dilemma; they can either violate their code of ethics and identify their news sources, or they can refuse to identify their sources and suffer a contempt sentence.[18] If they identify their news sources, they risk losing future stories and in some cases subject themselves to possible harm. Journalists have, in the past, elected to accept contempt sentences almost without exception. However, judges have apparently recognized this can be unfair to journalists and have made the contempt sentences relatively light. It could be argued that a journalist privilege is analogous to a criminal informer privilege. The criminal informer privilege has existed for a long time without adversely affecting judicial administration.[19] For a number of years privilege advocates have been talking about the deterrent effects of compulsory disclosure on freedom of expression[20] and the importance of anonymity where unpopular views are involved.[21] Paradoxically, as pointed out in *Caldwell,* prosecuting attorneys in many instances would never be aware of criminal activities if it were not for articles by journalists. Yet, prosecuting attorneys expect journalists to reveal their news sources, thereby probably eliminating future articles based on information from those sources. Journalists are not Department of Justice investigators, neither are they policemen. Perhaps such functions should not be imposed upon them.[22]

The entire journalist privilege question might be more properly settled through legislation.[23] Recognizing the arguments for and against a journalist privilege, the author of a well-drafted statute could resolve the great bulk of the disagreements. At the

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[18] *See* Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information,* 36 VA. L. REV. 61, 62 (1950).

[19] The criminal informer privilege is the government's privilege to withhold from disclosure the identity of persons who furnish information concerning violations of law to officers charged with the enforcement of that law. The purpose of the privilege is the furtherance of the public interest in effective law enforcement. Roviaro v. United States, 353 U.S. 53, 59 (1957).

[20] *See* Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil,* 70 YALE L. J. 1084 (1961).

[21] *See* Talley v. California, 362 U.S. 60, 64-65 (1960); Comment, 82 HARV. L. REV. 1384 (1969).

[22] Caldwell v. United States, 434 F.2d 1081, 1086 (9th Cir. 1970).

[23] At least thirteen states now have some form of journalist privilege statute:

ALA. CODE, tit. 7, § 370 (1958);
ARIZ. REV. STAT. ANN. § 12-2237 (Cum. Supp. 1966);
ARK. STAT. ANN. § 43-917 (1964);
CAL. EVIDENCE CODE, § 1970 (1966);
IND. ANN. STAT. §2-1733 (Cum. Supp. 1966);

Graham: Constitutional Law--Disclosure of Journalist's Confidential News

present time West Virginia does not have a journalist privilege statute, nor has the writer found any decisions involving a journalist privilege controversy.[24] However, an examination of the index to the West Virginia Code discloses numerous statutory privileges, including the familiar attorney-client[25] and husband-wife[26] privileges, and numerous less familiar privilege relationships.[27] It would not be surprising if a journalist privilege bill were introduced at a session of the legislature in the near future. It is almost a certainty that some West Virginia cases will appear involving journalist privilege questions.

In the absence of a statute, courts are left with the balancing of competing interests.The Supreme Court has granted certiorari in *Caldwell* and will shed more light on this controversial subject in the near future. It will be especially interesting to analyze the position of Mr. Justice Stewart because he wrote the *Garland* opinion as a judge for the United States Court of Appeals for the Second Circuit. In that opinion he suggested the following guidelines for resolving conflicts in this sensitive area:

KY. REV. STAT. § 421.100 (1963);
LA. REV. STAT. § § 45:1451 to 45:1454 (Cum. Supp. 1965);
MD. CODE ANN. art. 35, § 2 (1965);
MICH. STAT. ANN. §28.945 (1) C. L. Mich. 1948, 767.5a [P. A. 1951, No. 276] (1954);
MONT. REV. CODE, § §93-601-1, 93-601-2 (1964);
N. J. STAT. ANN. § § 2A:84A-21, 2A:84A-29 (Cum. Supp. 1966);
OHIO REV. CODE ANN. § § 2739.04, 2739.12 (Supp. 1966);
PA. STAT. ANN. tit. 28, § 330 (Cum. Supp. 1965).

[24] Lack of West Virginia cases may be accounted for by the previously well-settled rule against a journalist privilege.

[25] W. VA. CODE ch. 50, art. 6, § 10 (Michie 1966) (Justices' Courts).

[26] W. VA. CODE ch. 57, art. 3, §4 (Michie 1966).

[27] The following is a listing of privileged communications:

1. Accidents (Accident reports to be confidential), W. VA. CODE ch. 17c, art. 4, § 13 (Michie 1966);
2. Adoption (Records and papers), W. VA. CODE ch. 48, art. 4, §4 (Michie 1966);
3. Attorney at Law, W. VA. CODE ch. 50, art. 6, § 10 (Michie 1966);
4. Hospitals (Information not to be disclosed by health department), W. VA. CODE ch. 16, art. 5B, § 10 (Michie 1966);
5. Husband and Wife, W. VA. CODE ch. 57, art. 3, § 4 (Michie 1966); and W. VA. CODE ch. 48, art. 9, § 18 (Michie 1966);
6. Income Tax (Secrecy of returns), W. VA. CODE ch. 11, art. 21, § 80 (Michie 1966);
7. Inheritance and Transfer Taxes (Reports to tax commissioner), W. VA. CODE ch. 11, art. 11, § 13 (Michie 1966);
8. Labor (Confidential information), W. VA. CODE ch. 21, art. 8, § 11 (Michie 1966); (Reports of department), W. VA. CODE ch. 21, art. 1A, § 1 (Michie 1966);
9. Narcotics (Divulging knowledge obtained from inspection prohibited), W. VA. CODE ch. 16, art. 8A, § 16 (Michie 1966);
10. Physicians and Surgeons (Justices' courts), W. VA. CODE ch. 50, art. 6 §§ 10, 11 (Michie 1966);

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But freedom of the press, precious and vital through it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom. That kind of determination often presents a 'delicate and difficult' task.[28]

Roger D. Graham

11. Prenatal Examinations (Report of laboratory), W. VA. CODE ch. 16, art. 4A, § 3 (Michie 1966);
12. Prostitution (Procuring female for house of prostitution W. VA. CODE ch. 61, art. 8, § 7 (Michie 1966); (Marriage of prostitute and accussed), W. VA. CODE ch. 61, art. 8, § 8 (Michie 1966).
13. Public Assistance and Relief (Lists and records), W. VA. CODE ch. 9, art. 11, § 16 (Michie 1966);
14. Records and Papers (Confidential records), W. VA. CODE ch. 5, art. 8, § 13 (Michie 1966);
15. Religious Organizations (Communications to clergy), W. VA. CODE ch. 50, art. 6, §§ 10, 11 (Michie 1966);
16. Sales Tax (When information obtained is confidential), W. VA. CODE ch. 11, art. 15, § 27 (Michie 1966);
17. Tax Commissioner (No disclosure as to individual business information), W. VA. CODE ch. 11, art. 1, § 4a (Michie 1966);

[28] Garland v. Torre, 259, F.2d 545, 548 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

Constitutional Law—Does A Private College's Response To State Legislation Constitute State Action?

"College authorities stand in loco parentis concerning the physicial and moral welfare, and mental training of the pupils, and . . . to that end they may . . . make any rule or regulation for the government, or betterment of their pupils that a parent could for the same purpose."[1]

Wagner College, a privately supported Lutheran-affiliated liberal arts institution, expelled twenty-four of its students for refusing to vacate the office of the Dean. Plaintiffs were members of "Black Concern", a campus group organized to promote the interests of black students. Plaintiffs visited the Dean's office to arrange a meeting with Wagner College's president. When they failed to ar-

[1] Gott v. Berea College, 156 Ky. 376, 379, 161 S.W. 204, 206 (1913) (emphasis added). A rigid doctrine *in loco parentis* is probably no longer a viable principle in the student–college relationship. *See* Moore v. Student Affairs Comm., 284 F. Supp. 725, 729 (M.D. Ala. 1968); Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 756 (W.D. La. 1968). *See also* Note, *An Overview: The Private University and Due Process*, 1970 DUKE L. J. 795, 804 (1970).