

COMMENTS

The Dimensions of a Journalist's Shield—First Amendment Protection for the Confidentiality of News Sources Against Requests for Court-Ordered Disclosure in Civil Cases

Before the 1970's, courts refused to find any constitutional or common law protection for the confidentiality of news sources when journalists resisted disclosure requests.¹ Recently, however, both federal and state courts have begun denying disclosure requests in civil litigation, reasoning that unlimited disclosure deters the free flow of information from news sources to the public.² Viewing this free flow of information as a first amend-

1. Courts ordered disclosure in civil cases, such as libel suits. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958). More frequently, however, the court orders arose in a criminal context such as grand jury investigations. *People ex rel. Mooney v. Sheriff of New York County*, 245 A.D. 97, 280 N.Y.S. 904 (App. Div. 1936). Journalists, however, rarely complied with these orders. Only three journalists complied with court disclosure orders during the one hundred-year period prior to 1970. A.D. Gordon, *Protection of News Sources: The History and Legal Status of the Newsmen's Privilege* 916-18 (Dec., 1970) (unpublished thesis available in the University of Puget Sound Law School Library) [hereinafter cited as *Protection of News Sources*].

2. Eight circuits have recognized a qualified reporter's privilege to protect his sources from forced disclosure of his confidential sources in some circumstances. *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee*, 563 F.2d 433 (10th Cir. 1977); *United States v. Steelhammer*, 561 F.2d 539 (4th Cir. 1977); *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). The Seventh Circuit has not considered the issue, although a district court in that circuit has found a qualified privilege. *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978). The Sixth Circuit has not yet considered the issue. The Ninth Circuit has not formally recognized a qualified privilege, although it has indicated that there is a first amendment interest in protecting the confidentiality of news sources. "[T]he Supreme Court of the United States has considered the question and appears to have fashioned at least a partial First Amendment shield available to newsmen who are subjected to various demands to divulge the source of confidentially secured information." *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975), *cert. denied*, 472 U.S. 912 (1975).

Most states provide some statutory protection for confidential news sources. See

ment interest of the public, the courts have found that this interest warrants protection from the deterrent effect of court disclosure orders.³

Although journalists have won some protection for their news sources, this protection is not absolute.⁴ Employing various balancing tests, the courts have found that in some cases a civil litigant's need for the identity of the confidential source is greater than the first amendment interest in keeping the news source's identity secret.⁵ But in striking the balance between the state's interest in providing the litigant with an effective forum and the public's first amendment interest, the courts have failed to provide predictable protection for confidential news sources.⁶

infra note 11. States without "shield" laws may recognize protection under the first amendment, *Morgan v. State*, 337 So. 2d 951 (Fla. 1976); or through a common law privilege, *Senear v. Daily Journal-American*, 97 Wash. 2d 148, 641 P.2d 1180 (1982). A few states have refused to recognize any constitutional or common law protection for journalists' sources. *E.g.*, *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, *cert. denied*, 434 U.S. 930 (1977); *Dow Jones Co. v. Superior Court*, 364 Mass. 317, 303 N.E.2d 847 (1973). For a comprehensive list of statutory and court protection for news sources in state and federal courts, see NINTH ANNUAL COMMUNICATIONS LAW INSTITUTE 476-500 (Practicing Law Institute 1981).

3. Although court protection of news sources is a recent development in first amendment law, the limited protection is merely a new facet of an established judicial concern for the effect of compulsory process on areas protected by the first amendment.

There is no doubt that legislative investigations, whether on a federal or state level, are capable of encroaching upon the constitutional liberties of individuals. It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press. . . .

Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957).

4. *Branzburg v. Hayes*, 408 U.S. 665, 682-85 (1972). The absolutist theory of the first amendment is not without some adherents. *Id.* at 711 (Douglas, J., dissenting). At least one state legislature has enacted statutory protection for journalists' sources that is as absolute as constitutionally permissible. See *Maresca v. New Jersey Monthly*, 89 N.J. 176, 454 A.2d 376, *cert. denied*, 103 S. Ct. 211 (1982).

5. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. denied*, 417 U.S. 938 (1974).

6. One court has described the balancing test as "one that demands sensitivity, invites flexibility, and defies formula." *Bruno & Skillman, Inc. v. Globe Newspapers Co.*, 633 F.2d 583, 598 (1st Cir. 1980). It should not be surprising that a court test that invites flexibility and defies formula is unpredictable.

Interest balancing in other areas of first amendment law also has come under criticism, particularly when the content of the speech defines the relative weight of the first amendment interest. See Goldman, *A Doctrine of Worthier Speech: Young v. American Mini Theaters, Inc.*, 21 Sr. Louis U.L.J. 281, 301 (1977). The federal courts have never suggested that the content of the information acquired from the news source should determine the level of first amendment protection. But in practice, the content occasionally appears to have exactly that effect. The heaviest weight given to the first amend-

This comment suggests a test in civil cases that enables a court to determine if there is a first amendment interest in protecting the source's confidentiality.⁷ If the journalist can demonstrate this interest, then the burden shifts to the litigant seeking disclosure. This comment suggests three criteria through which the litigant must persuade the court that the state's interest outweighs the first amendment interest. By using this clear, concise test, the trial court need not engage in a separate interest balancing test in each case.⁸ The test suggested by this comment should increase protection for the first amendment interest by decreasing the number of disclosure orders issued and by giving journalists and their confidential sources a basis for predicting in advance of publication whether a disclosure order is likely.⁹

ment interest may well have occurred in a court ruling on a disclosure request related to reporting on the Watergate burglary. *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1396-97 (D.D.C. 1973).

7. This comment only discusses the first amendment protection for confidential sources in civil cases. The protection offered in criminal cases may be more restricted, at least in the context of grand jury investigations. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). In criminal trials, the first amendment may provide more protection than is available from court disclosure orders in response to grand jury requests. *United States v. Cuthbertson*, 651 F.2d 189, 195-96 (3d Cir. 1981). *Contra State v. Jascalevich* (*In re Farber and New York Times Co.*), 78 N.J. 259, 271-74, 394 A.2d 330, 336-37, *cert. denied*, 439 U.S. 997 (1978); *State v. Rinaldo*, No. 9976-1-I (Wash. Ct. App. Mar. 21, 1983) (court ordered disclosure of sources in camera prior to applying qualified common law privilege).

This comment also does not address the issue of whether information gained from nonconfidential sources merits protection. See *Loadholtz v. Fields*, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975). Compare *Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505, 511 (E.D. Va. 1976).

8. The Washington Supreme Court rejected the case-by-case balancing test for a specific set of criteria frequently used by the federal courts in conjunction with the balancing test. *Clampitt v. Thurston County*, 98 Wash. 2d 638, 658 P.2d 641 (1983); *Senear v. Daily Journal-American*, 97 Wash. 2d 148, 641 P.2d 1180 (1982). Although the Washington common law privilege does not require trial courts to balance the interests on a case-by-case basis, it relied on the first amendment analysis of the state appellate court and federal courts to determine the dimensions of the privilege.

[W]e believe the injury from failing to establish the privilege would be greater than the benefit to be gained by requiring the testimony in civil litigation. See *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977), *cert. denied*, 436 U.S. 905, 56 L. Ed. 2d 402, 98 S. Ct. 2234 (1978). While these cases all are concerned with whether there is a First Amendment qualified privilege, their statements as to the balancing of interests and the need for a qualified privilege are germane to the questions of a common law privilege for reporters.

Id. at 154-55, 641 P.2d at 1183.

9. One court has suggested limiting the deterrent effect of court disclosure orders by giving so much weight to the first amendment interest that the interest balancing test

Less frequent and predictable disclosure orders will reduce the deterrent effect of such orders,¹⁰ protecting the constitutional interest in the flow of information to the public.

In many states, a journalist and his news source have some statutory protection from forced disclosure.¹¹ However, language in the statutes¹² and potential constitutional limitations¹³ may reduce or nullify the statutory protection. In federal courts,¹⁴ and in states¹⁵ in which the statutory protection is inadequate or

would almost invariably support protecting the source's confidentiality. *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981).

10. This comment argues that the first amendment interest the courts should focus on is the public interest in removing the deterrent effect of disclosure orders on future potential news sources. This is the same deterrent effect that caused the Court to protect the identity of police sources in certain pretrial hearings. *McCray v. Illinois*, 386 U.S. 300, 310-11 (1967).

11. Twenty-five states currently have shield laws offering some degree of testimonial immunity as to a source's identity. Shield laws in some states also protect the journalist's unpublished notes. ALA. CODE § 12-21-142 (1975); ALASKA STAT. §§ 09.25.150-.220 (1973); ARIZ. REV. STAT. ANN. §§ 12-2214 to -2237 (1982 & Supp. 1982); ARK. STAT. ANN. § 43-917 (1977); CAL. EVID. CODE § 1070 (West Supp. 1982); ILL. ANN. STAT. ch. 110, § 8-901 to -909 (Smith-Hurd Supp. 1982); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1982); KY. REV. STAT. ANN. § 421.100 (Bobbs-Merrill 1977); LA. REV. STAT. ANN. §§ 45:1451 to -1454 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1980); MICH. COMP. LAWS ANN. § 767.5a (1982); MINN. STAT. ANN. §§ 595.021-.025; MONT. CODE ANN. §§ 26-1-901 to -903 (1981); NEB. REV. STAT. §§ 20-144 to -147 (1977); NEV. REV. STAT. § 49.275 (1981); N.J. STAT. ANN. §§ 2A:84A-21 to -21.13 (West 1976 & West Supp. 1982); N.M. STAT. ANN. § 38-6-7 (1982); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1982); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. §§ 2739.04, .11, .12 (Page 1981); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. § 44.510-.540 (1981); PA. CONS. STAT. ANN. § 5942 (Purdon 1982); R.I. GEN. LAWS 9-19.1-1 to -3 (1982); TENN. CODE ANN. § 24-1-208 (1980).

12. The California law protecting newspaper sources did not protect the sources for magazine journalists, although it protected sources for daily newspapers. *In re Cepeda*, 233 F. Supp. 465, 472-73 (S.D.N.Y. 1964). The state legislature subsequently expanded the law's protection. CAL. EVID. CODE § 1070 (West 1966 & Supp. 1982).

13. A defendant's sixth amendment compulsory process rights may nullify the protection of a shield law in a criminal trial. *State v. Jascalevich (In re Farber and New York Times Co.)*, 78 N.J. 259, 271-74, 394 A.2d 330, 336-37, cert. denied, 439 U.S. 997 (1978). A shield law would also have to yield to a constitutional provision in a civil trial.

14. *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1200 (N.D. Ill. 1978). The court did not apply the Illinois shield law in this case, because a private antitrust action involved a federal claim. See FED. R. EVID. 501. There is no federal shield law, so the first amendment is the sole source of protection for the public's interest in the flow of information when a party in a federal action seeks to force disclosure of a confidential news source. See *Ervin, In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233 (1974). Federal courts, however, may give some weight to a strong state policy for protecting news sources even though federal law controls. *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979).

15. Washington is the only state on the West Coast without a shield law. See *supra* note 11. In *Senear*, the journalist successfully sought protection for his source's confidentiality under the first amendment in the appellate court. *Senear v. Daily Journal-Ameri-*

nonexistent, journalists frequently resort to claims of first amendment protection.¹⁶ The United States Supreme Court, however, has never fully defined the parameters of first amendment protection for journalists' confidential news sources in civil cases.

In *Branzburg v. Hayes*,¹⁷ the Supreme Court did address the issue of first amendment protection for news sources, when a grand jury seeks the identity of the source in the context of a secret criminal investigation. Although the Court acknowledged that "without some protection for seeking out the news, freedom of the press could be eviscerated,"¹⁸ Justice White's majority opinion held that these journalists had no first amendment right to withhold testimony from a grand jury.¹⁹ Specifically, the Court found that existing grand jury procedures provided adequate protection for a newsman's sources.²⁰ The procedures

can, 27 Wash. App. 454, 618 P.2d 536 (1980). The Washington Supreme Court also provided limited protection, but established a common law, rather than a constitutional, qualified privilege. *Clampitt v. Thurston County*, 98 Wash. 2d 638, 658 P.2d 641 (1983); *Senear v. Daily Journal-American*, 97 Wash. 2d 148, 641 P.2d 1180 (1982); cf. *State v. Rinaldo*, No. 9976-1-I (Wash. Ct. App. Mar. 21, 1983) (before applying common law privilege in criminal case, the court ordered in camera disclosure to trial judge).

16. The first amendment, through the fourteenth amendment, only protects freedom of the press from state action. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). The state action is the court's disclosure order. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 560 (1980) (court order closing trial violated first amendment right to attend criminal trials). Although the Court in recent years has cut back on the scope of state action, see, e.g., *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), the Court has consistently found state action when either the judiciary or another branch of government impinges on a first amendment right through the use of compulsory process, *Globe Newspaper Co., Inc. v. Superior Court*, 102 S. Ct. 2613, 2618 (1982); see *supra* note 3. The state interest behind the action is in providing the litigant with a cause of action and the means to obtain evidence relevant to that cause of action. This comment will occasionally refer to the state's interest as the litigant's interest in obtaining disclosure of the confidential source.

A plurality of the Washington Supreme Court, however, recently held that the state constitution protects freedom of speech and the press from private actions. *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wash. 2d 230, 243, 635 P.2d 108, 115-16 (1981). See Note, *Alderwood Associates v. Washington Environmental Council: State Action and the Washington Constitution*, 5 U. PUGET SOUND L. REV. 331 (1982). This comment, however, is restricted to the protection through the first and fourteenth amendments of the United States Constitution.

17. 408 U.S. 665 (1972).

18. *Id.* at 681.

19. Justice White limited the holding in the first sentence of the opinion. "The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment." *Id.* at 667.

20. *Id.* at 695.

cited for this finding were the secrecy of grand jury proceedings, a prosecutor's charge to consider the public interest, and the prosecutor's experience in protecting police sources.²¹ These factors ensuring the confidentiality of a news source in a grand jury proceeding are not present in a civil case. Thus, the *Branzburg* majority's opinion should have limited application outside of the grand jury setting.²²

The concurring opinion of Justice Powell²³ and the four dissenting Justices²⁴ analyses further limit the precedential value of *Branzburg*. Although Justice Powell joined the majority opinion, his brief concurring opinion emphasized the limited scope of the majority opinion and agreed with the four dissenters that there was a first amendment interest in protecting the news source's confidentiality.²⁵ Justices Stewart's²⁶ and Douglas'²⁷ dissenting opinions placed even greater emphasis on the first amendment rights at stake when a journalist's confidential news source faces disclosure through a court order. Some courts²⁸ and commentators²⁹ have argued that the four dissenters together with Justice Powell represented a majority of the Court supporting constitutional protection of news sources in non-grand jury settings. Even if this "majority" does not form a basis for consti-

21. *Id.* Justice White's opinion appears to assume that a prosecutor would have as much interest in protecting a journalist's confidential source as a confidential source of the police. Regardless of the validity of this assumption, the protection is clearly unavailable when a party in a civil suit seeks disclosure of a confidential source. The scope of this comment is limited to the latter situation.

22. *See supra* note 7.

23. 408 U.S. 665, 709 (Powell, J., concurring).

24. Justice Stewart, joined by Justices Brennan and Marshall, would have held that the first amendment provides a qualified privilege in the grand jury context. *Id.* at 725 (Stewart, J., dissenting). Justice Douglas contended that the first amendment provides absolute protection for a journalist's confidential source. *Id.* at 711 (Douglas, J., dissenting).

25. *Id.* at 709 (Powell, J., concurring). Justice Powell's brief concurring opinion suggested restricting the Court's holding without developing a standard for future courts. Justice Stewart termed Justice Powell's opinion "enigmatic." *Id.* at 725 (Stewart, J., dissenting).

26. Justice Stewart would have held that the state must prove the compelling and overriding importance of the grand jury inquiry, show the precise relevance of the information sought to a precisely defined subject of the inquiry, demonstrate that the journalist has the information requested and prove that there are no alternative means of acquiring the information. *Id.* at 739-40 (Stewart, J., dissenting).

27. *Id.* at 711 (Douglas, J., dissenting).

28. *E.g.*, *New Hampshire v. Siel*, 122 N.H. 254, 444 A.2d 499 (1982).

29. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 718 (1975).

tutional protection of news sources, the Justices' reasoning at least reaffirms the limited applicability of the *Branzburg* holding.

Although *Branzburg* may not articulate the degree of first amendment protection for sources in civil cases, lower federal courts have suggested that the first amendment interest underlying a journalist's request for protection of his source's identity is the public's need to be fully informed.³⁰ The states adopted the first amendment at a time when an informed public was viewed as a prerequisite to a democratic system.³¹ The Court has recently held that "freedom of the press" protects those activities that ensure that the public has the information essential to a system of self-government.³²

Thus, first amendment protection goes beyond the direct exercise of the freedoms of speech and press to protect activities vital to the exercise of those freedoms.³³ Because the Court has clearly identified these first amendment rights as the public's,³⁴ the journalist seeking first amendment protection for his confi-

30. See, e.g., *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1978); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1397 (D.D.C. 1973).

31. "A popular government without popular information or the means of achieving it is but a prologue to a farce or tragedy or perhaps both." 6 WRITINGS OF JAMES MADISON 398 (Hunt ed. 1906).

32. The Court, for example, has held that the public has a first amendment right to attend criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Two years later a majority of the Court reaffirmed this holding on the basis of a first amendment interest in providing information to the public. "Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected discussion of governmental affairs is an informed one." *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613, 2619 (1982).

33. [W]e have long eschewed any "narrow, liberal conception" of the Amendment's terms, *NAACP v. Button*, 371 U.S. 415, 430 . . . (1963), for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.

Globe Newspaper Co. v. Superior Court, 102 S. Ct. at 2619 (1982). Protection of news-gathering activities qualified as one of those rights essential to the exercise of the first amendment freedoms of the press. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

34. The Court has generally adopted a marketplace of ideas rationale when articulating first amendment values. *New York Times v. Sullivan*, 376 U.S. 254, 270-71 (1964). The Court has interpreted the first amendment broadly to protect this marketplace of ideas. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967); *Talley v. California*, 362 U.S. 60, 64-65 (1960); *Bridges v. California*, 314 U.S. 252, 263 (1941); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Near v. Minnesota*, 283 U.S. 697, 722 (1931).

dential source is not exerting a right of journalists as a class³⁵ or of the source as an individual.³⁶ The extent of this public right of access to information or to unrestricted news gathering is not clear.³⁷ The Court, however, has held that the freedoms of speech and press must be vigorous enough to provide a check on the government, such a check being an "essential component in our structure of self-government."³⁸ If court-ordered disclosure of confidential news sources impairs the public's ability to acquire the information essential to effective self-government, the orders impinge on the public's first amendment rights.³⁹ If court orders deter future news sources from providing the public with information through the press, then the courts are impairing the exercise of first amendment freedoms.

Empirical data on the deterrent effect of disclosure orders

35. The Court has refused to recognize any first amendment rights of journalists or the news media generally beyond those available to the public as a whole. *Pell v. Procunier*, 417 U.S. 817, 833-35 (1973); see generally Comment, *News-Source Privilege in Libel Cases, A Critical Analysis*, 57 WASH. L. REV. 349, 364 (1982).

36. Some commentators, however, have argued that the courts should consider the sources' first amendment rights separately. Note, *The Rights of Sources-The Critical Element in the Clash Over Reporter's Privilege*, 88 YALE L.J. 1202, 1203 n.7 (1979). The Washington Constitution contains a provision that may provide protection for the source himself. WASH. CONST. art. I, § 7; *State v. Simpson*, 95 Wash. 2d 170, 177-78, 622 P.2d 1199, 1205-06 (1980).

37. The Court's willingness to protect the public's access to information in criminal trials has not been accompanied by a specific articulation of the nature of the right. "It is not crucial whether we describe this right to attend criminal trials to hear, see and communicate observations concerning them as a right of access . . . or a 'right to gather information'. . . ." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). Although the *Branzburg* Court did not find a threat to the first amendment when a journalist was forced to disclose his source in a secret grand jury proceeding, the Court did recognize a constitutional interest in protecting newsgathering activities. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); accord *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

38. [T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.

Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613, 2620 (1982)(footnotes omitted); see Blasi, *The Checking Value in First Amendment Theory*, A.B. FOUND. RESEARCH J. 521, 524 (1977).

39. See *supra* note 32.

are inconsistent and incomplete. Surveys of publishers⁴⁰ and affidavits from individual journalists⁴¹ indicate that guaranteed confidentiality is a critical element of the flow of information to the public. Other surveys⁴² find no deterrent effect. But even unanimity would not make these surveys determinative because journalists, rather than the sources, are the respondents to the surveys. A definitive finding could be obtained only by surveying those potential sources who decide not to give their information to the public via journalists, a concededly difficult, if not impossible, survey to implement.

In the absence of definitive data, the federal appellate courts have found the deterrent effect self-evident.⁴³ A self-evident finding is consistent with the Supreme Court's position that disclosure of confidential sources for law enforcement agencies would deter the flow of information essential for effective law enforcement. In *McCray v. Illinois*,⁴⁴ the Court found disclosure's deterrent effect on confidential police sources self-evident because of the personal safety concerns of the sources.⁴⁵ The Court has identified similar personal safety concerns for news sources unable to maintain their confidentiality.⁴⁶ These personal safety concerns are part of the apparent self-evident deterrent that federal appellate courts have inferred from the prospect of forced news source disclosure.⁴⁷

40. Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18 (1969).

41. *Branzburg v. Hayes*, 408 U.S. 665, 693 n.31 (1972).

42. Comment, *News-Source Privilege in Libel Cases: A Critical Analysis*, 57 WASH. L. REV. 349, 364 n.89 (1982).

43. The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. . . . This in turn will seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern to the public.

Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979). The Third Circuit's discussion here is more extensive than the typical federal decision on the topic of the deterrent effect of court disclosure orders.

44. 386 U.S. 300 (1967).

45. *Id.* at 308-09.

46. Although the *Branzburg* Court found that grand juries could protect the confidentiality of news sources, the Court acknowledged that news sources may fear widespread disclosure of their identity for reasons of "job security, personal safety, or peace of mind." *Branzburg v. Hayes*, 408 U.S. 665, 695 (1972).

47. Personal safety concerns are not restricted to the criminal context, as one might suspect. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980) (dissent

Furthermore, a source who fails to make confidentiality a prerequisite for parting with his information can hardly claim that he was unlikely to volunteer information if he subsequently faces forced disclosure. The first amendment concern for the flow of information from the news source to the public is present only if the source requires confidentiality before parting with the information.⁴⁸ There is no self-evident burden on the first amendment interest when, in the particular case, the prospect of a disclosure order did not concern the source.

The interest in protecting a news source's identity, although of great significance to the first amendment freedoms, is not absolute.⁴⁹ Balanced against the public's first amendment interest in the flow of information is the state's interest in a civil litigant's ability to obtain all the information necessary to the resolution of his case.⁵⁰ The state's interest in providing an effective forum to settle disputes depends on the importance of the information sought to the litigant's case.⁵¹ The state's interest in

Teamster members' publication sued for libel by Teamster officials who seek disclosure of sources for critical story on pension funds), *cert. denied*, 405 U.S. 1041 (1981).

48. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596-98 (1st Cir. 1980).

49. See *supra* note 4 and accompanying text.

50. While this comment is limited to civil litigation, several courts have found the state's interest greater in a criminal trial than a civil trial. This civil-criminal distinction is probably the primary reason that the rationale of *Branzburg* has not been applied by the federal courts when considering disclosure requests from civil litigants.

This is a civil libel suit rather than a grand jury inquiry into crime, and the dispute over disclosure is between the press and a private litigant rather than between the press and Government. This difference is of some importance, since the central thrust of Justice White's opinion for the Court concerns the traditional importance of grand juries and the strong public interest in effective enforcement of the criminal law. Justice White also relied on the various procedures available to prosecutors and grand juries to protect informants and on careful use by the Government of the power to compel testimony. Private litigants are not similarly charged with the public interest and may be more prone to seek wholesale and indiscriminate disclosure.

Carey v. Hume, 492 F.2d 631, 636 n.6 (1974). Regardless of whether the state's interest is greater in a civil or criminal case, the opportunities for disclosure of a confidential news source are greater in the criminal context due to the *Branzburg* decision and the defendant's sixth amendment right to compulsory process. See *State v. Jascalevich (In re Farber and New York Times Co.)*, 78 N.J. 259, 271-74, 394 A.2d 330, 336-37, *cert. denied*, 439 U.S. 997 (1978). Because a potential news source is likely to be able to predict whether his information could lead to a criminal versus a civil case, this comment suggests a qualified privilege in civil cases where the potential for minimizing the number of court disclosure orders and facilitating the flow of information is greatest.

51. Thus, the nature of the civil action will not affect the state's interest, although requests for disclosure have occurred in a broad variety of civil contexts. See, e.g., *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (privacy action); *Gulliver's Periodicals, Ltd. v.*

providing litigants with an opportunity, a forum, to peaceably adjudicate their claims may be stronger than the first amendment interest, if confidentiality totally frustrates a litigant's ability to prove his claim. If alternative sources exist or the importance of the news source's identity is marginal to the cause of action, the state's interest becomes less important relative to the public's first amendment interest. The state interest, however, will be greater than the first amendment interest in those exceptional cases in which the litigant's cause of action is totally dependent on the source's identity.

Libel suits also demonstrate that the first amendment interests may not arise in every case in which a journalist seeks to protect a confidential source. Under *New York Times v. Sullivan*,⁵² a public figure-plaintiff must prove in a libel case that the allegedly libelous material was printed with reckless disregard for the truth or with knowledge that it was false.⁵³ If an allegedly libelous story were totally based on unnamed sources, the plaintiff may need to force disclosure of the confidential sources to show that the sources either did not exist or were totally unbelievable. As there is no first amendment interest in the free flow of false information published recklessly or with knowledge of its falsity,⁵⁴ any news source privilege should not absolutely eliminate the civil litigant's power to force disclosure of a journalist's sources.

In deciding whether to protect a journalist's sources, federal courts⁵⁵ have developed a balancing of interests test, but the test

Chas. Levy Circulating Co., 455 F. Supp. 1197 (N.D. Ill. 1978) (private antitrust); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975) (civil rights action).

The courts also have declined to rank civil actions based on the relative importance to the state.

It would be inappropriate for a court to pick and choose in such gross fashion between different acts of Congressional legislation, labelling one "exceedingly important" and another less so, without specific directions from the Legislature. While we recognize that there are cases - few in number to be sure - where First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms.

Baker v. F & F Investment, 470 F.2d 778, 783 (2d Cir. 1972).

52. 376 U.S. 254 (1964).

53. *Id.* at 280.

54. "[T]here is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

55. See *supra* note 2. Every circuit that has considered the issue has found a qualified privilege in civil cases. *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981). A few state courts, however, have found Justice White's opinion in *Branzburg* equally applicable to civil cases. See *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 294, 562 P.2d 791,

provides an inadequate basis for future news sources to predict whether courts will protect their confidentiality.⁵⁶ Courts recognizing a limited testimonial privilege have not used criteria developed with the objective of limiting the deterrent effect on future news sources.⁵⁷ Most courts, for example, require litigants to seek out alternative sources,⁵⁸ but fail to specify that at a minimum those alternative sources must include those the journalist suggests. A news source should be able to retain his confidentiality if he can suggest, through the journalist, an alternative source for the information. Additionally, courts require that the information sought by the litigant "go to the heart of the matter,"⁵⁹ be critical to the cause of action,⁶⁰ or be of specific necessity to the litigant's case.⁶¹ These three definitions of this criterion are so imprecise that their application may vary from case to case. Finally, the typical judicial balancing test requires a

797 (1977); *Dow Jones & Co. v. Superior Court*, 364 Mass. 317, 320, 303 N.E.2d 847, 851-52 (1973). See also *Beaver, The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 OR. L. REV. 243 (1968).

56. The First Circuit's description of the interest balancing test is indicative of the lack of specific guidelines available to a trial judge.

The task is one that demands sensitivity, invites flexibility, and defies formula. While obviously the discretion of the trial judge has wide scope, it is a discretion informed by an awareness of First Amendment values and the precedential effect which decision in any one case would be likely to have.

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 598 (1st Cir. 1980).

57. At least one circuit has suggested that the balancing test should be so heavily weighted toward the first amendment that disclosure would require a truly exceptional case.

[I]n the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished. Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters.

Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981).

This comment, however, suggests that both the first amendment interest and the state interest will be better served by a set of specific criteria that enable a journalist and his source to predict in advance of publication whether a court is likely to grant a disclosure order in subsequent litigation.

58. *Id.* at 714-15.

59. *Garland v. Torre*, 259 F.2d 545, 550 (2d Cir. 1958).

60. *Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1978).

61. *Senear v. Daily Journal-American*, 97 Wash. 2d 148, 155, 641 P.2d 1180, 1183 (1982). The Washington court did not provide protection for the journalist's sources under the Constitution but created a common law privilege. The qualified privilege does not include an interest balancing test but rather adopts the criteria from the federal court's constitutional privilege without the interest balancing test. *Id.* at 157, 641 P.2d at 1183-84.

showing of undefined independent merit.⁶² Sometimes, courts may limit this criterion to protecting news sources only from litigants whose claims are frivolous.⁶³ Used in this way, the criterion is of questionable predictive value as a news source cannot tell in advance whether a litigant may file a cause of action frivolously or in good faith.

These imprecise standards undermine the predictability of the disclosure. It is the absence of predictability that infringes the first amendment interest in the flow of information from confidential news sources. When devising specific criteria, courts should focus on the news source with the objective of giving him a basis for predicting whether courts will protect his confidentiality. If the criteria did enable the news source to predict with confidence that in his case the journalist will not face a disclosure order, then disclosure orders in other cases will not have a deterrent effect on him, and the first amendment interest in the flow of information to the public will be protected.

In describing the dimensions of the privilege suggested by this comment, the facts of a specific case are helpful for reference and illustrative purposes. A recent Washington case, *Senear v. Daily Journal-American*,⁶⁴ illustrates the competing interests that arise when a civil litigant seeks a court order requiring disclosure of a confidential source, and the journalist claims first amendment protection. In 1977, John Senear, a business agent for a transit workers' local, was negotiating with the Seattle metropolitan transportation agency.⁶⁵ During the negotiations and accompanying "sick outs," the *Daily Journal-American of Bellevue*, a suburban newspaper, published a story quoting unnamed sources who were critical of Senear's leadership.⁶⁶ Senear filed a libel action against the newspaper and issued

62. *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

63. The Washington court, for example, failed to define meritorious specifically, thus leaving the possibility that trial courts would limit this criterion to cases brought frivolously or for harassment purposes. *Senear v. Daily Journal-American*, 97 Wash. 2d 148, 155, 641 P.2d 1180, 1183 (1982). Such an interpretation would not include suits brought in good faith that have little or no merit. Disclosure orders in cases of this type would create a deterrent effect, because future sources will not be in a position to predict whether a suit that lacks merit will be brought for harassment purposes, frivolously, or in good faith.

64. 97 Wash. 2d 148, 641 P.2d 1180 (1982).

65. *Id.* at 150, 641 P.2d at 1181.

66. *Id.*

interrogatories seeking the identity of the sources.⁶⁷ The Daily Journal-American refused to identify the sources but gave the names of three people who could confirm that the newspaper had accurately reported the accusations made by the confidential sources.⁶⁸ Senear then obtained a court order directing the Daily Journal-American to disclose the sources' names.⁶⁹ The paper appealed, maintaining that confidentiality was necessary to protect the sources from reprisals.⁷⁰ Disclosure of the sources' identities, the paper also argued, would deter future sources from volunteering information to journalists, thus endangering the flow of information to the public.⁷¹ Alleging that the Daily Journal-American published the article in reckless disregard of the truth, Senear claimed that he needed to know the sources' identities to rebut the newspaper's claim that it had made a reasonable investigation of the facts before publication.⁷² Because *Senear* presents the prototypical disclosure conflict over a confidential news source, this comment will refer to the case's factual background to demonstrate the importance of predictability of court disclosure orders to the flow of news to the public.

To provide the necessary predictability, courts should apply a specific test to disclosure motions that will (1) insure that disclosure only results when the state's interest is paramount and (2) give the journalist and source a basis for determining in advance of publication whether disclosure will occur. The first step in determining whether the first amendment interest is paramount is ascertaining whether the journalist is raising a first amendment interest.⁷³ Once the journalist establishes a first amendment interest, the burden then shifts to the litigant. The litigant must prove to the court that the state interest is paramount to the first amendment interest by proving the requested information and his case meet three specific criteria: the disclosure must be necessary to prove an element of the cause of action;⁷⁴ the information must not be available through alterna-

67. *Id.*

68. Brief for Respondent at 3-4, *Senear v. Daily Journal-American*, 97 Wash. 2d 148, 641 P.2d 1180 (1982) [hereinafter cited as Brief for Respondent].

69. *Senear*, 97 Wash. 2d at 151, 641 P.2d at 1181 (1982).

70. Brief for Respondent, *supra* note 68, at 3-4.

71. Brief for Appellant at 5, *Senear v. Daily Journal-American*, 97 Wash. 2d 148, 641 P.2d 1180 (1982).

72. Brief for Respondent, *supra* note 68, at 5.

73. See *infra* notes 77-83 and accompanying text.

74. See *infra* notes 84-89 and accompanying text.

tive means;⁷⁵ and the litigant's claim must have independent merit.⁷⁶

A journalist must first prove that he is collecting information to disseminate to the general public and that a promise of confidentiality was necessary to obtain the information. First amendment interests require a broad definition of "journalist" to include any person collecting information for dissemination to the general public.⁷⁷ The *Branzburg* majority was concerned that individuals masquerading as journalists would claim the protection to conceal evidence.⁷⁸ Subsequent courts, however, have had little difficulty determining whether someone was acting as a journalist or in some other capacity.⁷⁹

A more difficult issue is whether a journalist's relationship to the litigation should affect his ability to invoke the newsman's qualified privilege. In columnist Jack Anderson's suit against former President Nixon for tapping the columnist's telephone, the court refused to allow Anderson to invoke the privilege as both a "shield and sword."⁸⁰ The court correctly denied Anderson's request for protection for his source because Anderson voluntarily subjected his sources to the danger of disclosure by filing an action related to the information acquired from his sources.⁸¹ A defendant-reporter, however, is an involuntary participant in a court suit and should be able to seek protection for his sources.⁸²

After the subject of a disclosure order has proved that he qualifies as a journalist, he must establish a first amendment interest by showing that the news source demanded confidential-

75. See *infra* notes 90-93 and accompanying text.

76. See *infra* notes 94-99 and accompanying text.

77. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

78. *Branzburg v. Hayes*, 408 U.S. 665, 703-05 (1972).

79. Subsequent courts have been able to distinguish a newspaper owner's business activities from his journalistic pursuits, requiring disclosure when the former was involved. *Securities and Exchange Comm'n v. McGoff*, 647 F.2d 185, 187, 191 (D.C. Cir.), *cert. denied*, 452 U.S. 963 (1981).

80. *Anderson v. Nixon*, 444 F. Supp. 1195, 1199 (D.D.C. 1978).

81. *Id.* at 1200-01.

82. A journalist-defendant may have a self-serving motive in seeking protection for his source. However, a journalist who is not a party to a suit is likely to be concerned only with his journalistic ethics when refusing to disclose his sources. *Clampitt v. Thurston County*, 98 Wash. 2d 638, 642, 658 P.2d 641, 643-44 (1983). The criteria should bring greater protection to the non-party-journalist than the defendant-journalist. As a central figure in the litigation, the defendant-journalist is more likely to have been a source who is instrumental to an element of the cause of the action. The source of a non-party-journalist will probably have only a tangential relationship to the suit.

ity in return for his information.⁸³ If the confidentiality was a prerequisite to the information, the courts should not issue a disclosure order unless the party seeking disclosure can meet the three criteria discussed below.

Under the first criterion, the party seeking disclosure must show that the information is necessary, and not merely supplemental, to establish an element of his cause of action. This standard is more precise than the traditional test of information either "going to the heart of the matter,"⁸⁴ or compelling a finding of specific necessity,⁸⁵ or critical to the cause of action.⁸⁶ The proposed standard of "necessity" would require that the information be more than relevant or important—it must be indispensable to the cause of action. By applying this standard, courts will greatly restrict the availability of disclosure orders, requiring disclosure only when necessary to discover the only credible evidence available to prove an element of the cause of action. The granting of fewer orders reduces the cumulative deterrent effect of those orders on the flow of information. If the litigant is unable to show that the requested information does more than merely supplement other evidence proving an element, then a disclosure motion should fail.⁸⁷

This criterion enhances the predictability of disclosure orders by giving the journalist and his source a basis for predicting the context in which a disclosure order may arise. Obviously, predicting all the different causes of action in which disclosure may be requested is impossible, but the journalist and his source should be able to determine the types of litigation that have elements which may be proved only through disclosure of the source's identity. For example, the Daily Journal-American

83. See *supra* note 48 and accompanying text.

84. *Garland v. Torre*, 259 F.2d 545, 550 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

85. *Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1978).

86. *Senear v. Daily Journal-American*, 97 Wash. 2d 148, 155, 641 P.2d 1180, 1183 (1982).

87. One effect of this requirement would be to delay a court ruling on a disclosure motion until discovery had proceeded far enough to make an initial evaluation of the proof for the cause of action. Applying this criterion to *Senear*, the trial court would have denied the disclosure motion until the plaintiff had laid a foundation, through discovery, showing that the information was the only means of proving an element of the libel claim. To enable the plaintiff to do this, the trial court would first have to decide whether Senear was a public figure. Until a ruling on the question of public figure status is made, the plaintiff will not know what legal standard he must meet. *Miller v. Trans-American Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

reporter and his sources could easily have predicted that Senear might file a libel suit. Because the source's credibility might be a means of proving the standard of care in preparing the article,⁸⁸ the journalist and sources could predict that the identity of sources would be relevant to an essential element of a libel claim.⁸⁹ The journalist and source should be able not only to predict but also to control the degree of relevance of the confidential source's identity to the libel suit. If the journalist uses the source's information to corroborate other information in the story rather than to exclusively support the story, the journalist and source may limit the importance of the source's identity to future libel litigation.

But even if the information sought through disclosure is indispensable to prove an element of the cause of action, indispensability by itself would be insufficient to justify a disclosure order. Under the second criterion, the party requesting disclosure also would be required to prove that the essential information is not available from alternative nonconfidential sources. The court must exercise its discretion in assessing whether the requesting party has exhausted alternative sources.⁹⁰ At a mini-

88. The exact standard of care to be applied would vary depending on whether a trial court classified Senear as a private or public figure. Compare *Taskett v. KING Broadcasting Co.*, 86 Wash. 2d 439, 445, 546 P.2d 81, 85 (1976) with *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

89. Certainly there are other contexts in which a suit may arise that neither the source nor journalist could predict, but these unanticipated cases are unlikely to involve the source's identity directly. For example, the *Daily Journal-American* reporter and source might not be able to predict a suit by the union for breach of fiduciary duty by Senear for his alleged personal job inquiry through management officials during the contract negotiations, or a suit by Senear for discharge from his union job as a result of the allegations, or criminal charges out of a federal investigation of labor racketeering. In the first hypothetical suit, the identity of the sources would not involve an essential element of the claim. The sources' information about Senear's interviews with Metro officials for a job with the credit union might be an essential element, but the sources and journalist could predict that this information was available from the Metro officials themselves. *Senear v. Daily Journal-American*, No. 840-237, Plaintiff's Memorandum in Opposition to Motion for Summary Judgment at 13, *Senear v. Daily Journal-American*, 8 Media L. Rptr. 2489 (Wash. Super. Ct. Nov. 17, 1982). The alternative means of obtaining this information also would be available in a suit for unlawful discharge. See *infra* notes 90-93 and accompanying text. Finally, in the hypothetical criminal action, the journalist and source would know that their information did not involve any criminal activity, so any criminal litigation would not involve their confidential relationship.

90. Courts should require the party seeking disclosure to show that it has made some attempt to discover the information through alternative means. This requirement should only be waived if the alternative means are obviously too speculative or burdensome. *Zerilli v. Smith*, 656 F.2d 705, 714-15 (D.C. Cir. 1981). Cf. *Carey v. Hume*, 492 F.2d 631, 638-39 (D.C. Cir. 1974) (court placed much greater emphasis on the burden of

mum, a litigant should investigate alternative sources suggested by the journalist before a court considers granting a disclosure order. The trial court in *Senear*, for example, should have required Senear to depose the three union members whom the Daily Journal-American named, before ruling on Senear's request for a disclosure order.⁹¹ Strict compliance with this criterion should limit the deterrent effect of disclosure orders in two ways. First, the resulting decrease in disclosure orders will reduce the cumulative deterrent effect. Second, the strict compliance will assure the journalist and source that any reasonable alternative means they suggest will be investigated by the requesting litigant before the court orders disclosure.

The alternative source criterion does not offer absolute or permanent protection. The courts should use their discretion and not require a search made impractical by the number or location of alternative sources.⁹² Furthermore, a litigant denied a disclosure order may subsequently exhaust alternative sources without success and ultimately obtain a court disclosure order.⁹³

Under the third criterion, the party seeking disclosure must prove the independent merit of his claim. A court should not order disclosure, unless the litigant's claim alleges both a valid cause of action and enough facts to support the legal claim asserted.⁹⁴ The "independent merit" criterion represents the core of the state interest which all three criteria measure. Thus, if a litigant's cause of action does not have independent merit, there is no state interest behind the disclosure order to outweigh the first amendment interest in protecting the source's confidentiality.

A litigant may prove the independent merit of his claim by one of two methods. Typically, the litigant does this by with-

discovery to the litigant than did *Zerilli* court, which emphasized the importance of confidentiality).

91. See *supra* notes 67-70 and accompanying text.

92. *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1974). A few courts have suggested the number of sources that might be deposed. "[W]e see no reason why deposing 60 (and perhaps even more) planning employees was not a reasonable alternative to compelling reporter disclosure. *Clampitt v. Thurston County*, 98 Wash. 2d 638, 645-46, 658 P.2d 641, 645 (1983). See also *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981).

93. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 723, 727 (5th Cir.), cert. denied, 450 U.S. 1041 (1981).

94. *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972)(trial court properly granted summary judgment dismissing meritless libel claims against magazine before ruling on plaintiff's request to order disclosure of confidential news sources); cert. denied, 409 U.S. 1125 (1973).

standing a motion for summary judgment.⁹⁵ Absent a motion for summary judgment, the litigant produces the required evidence as part of his motion for disclosure. The latter method allows a litigant to prove the independent merit of his claim in cases in which his opponent does not bring a motion for summary judgment or cases in which an essential element of the cause of action is only available through disclosure of the confidential source's identity.⁹⁶

This criterion should enhance the predictability of disclosure orders in cases, such as libel suits, in which the journalist is a defendant. The journalist may exercise so much care in the preparation of a story that no plaintiff could possibly survive a summary judgment motion.⁹⁷ In the case of a public figure-plaintiff, such as *Senear*,⁹⁸ the reporter could demonstrate to the confidential source that he was preparing the article with such care that the public figure-plaintiff could not possibly prove that the allegedly defamatory article was published recklessly.⁹⁹

By requiring parties seeking disclosure to show the independent merit of their claims, exhaust alternative sources, and demonstrate that disclosure is necessary to prove an element of the cause of action, the trial court need not balance the interests in each case. When applying the criteria, the court must focus on enhancing the predictability of disclosure orders to safeguard the public's first amendment interest.¹⁰⁰ The court's sensitive application of the criteria will protect the public's first amendment interest in facilitating the flow of truthful information and

95. *Id.* at 992-93.

96. The trial court must exercise discretion and not deny a disclosure motion when a litigant cannot establish the independent merit of his claim, because the only way to prove an essential element is through disclosure of a confidential news source. *See supra* notes 84-89 and accompanying text.

97. *See supra* note 89.

98. After the Washington Supreme Court established a common law privilege in *Senear* and remanded the case, the trial court granted the Daily Journal-American's motion for summary judgment on remand. *Daily Journal-American v. Senear*, 8 Media L. Rptr. 2489, 2493 (Wash. Super. Ct. Nov. 18, 1982). The court also declined a request for disclosure, based partially on the lack of merit in the plaintiff's case. *Id.* at 2490-91.

99. *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). The substantial efforts that the publication made to verify its story permitted the trial judge in this case to dismiss the libel suit on a motion for summary judgment without ruling on the plaintiff's request for a disclosure order directed at the publication's confidential sources.

100. Thus, the test is not totally mechanical. The criteria of the test, however, rather than the court's balancing of interests, mitigate any deterrent effect from the disclosure orders that are granted. For a comparison, *see supra* note 57.

limit the deterrent effect of the remaining disclosure orders by increasing the predictability of those orders and by decreasing the number of disclosure requests and orders issued. The increase in predictability will foster the decrease in the number of disclosure orders. By predicting the likelihood of a disclosure order, news sources will provide the journalist with information when the first amendment interest is greatest and the likelihood of disclosure least, and will withhold the information when the state's interest is greatest and the likelihood of a disclosure order highest.¹⁰¹ The refusal of the news source to provide the public with information in the latter case not only recognizes the stronger state interest but also indirectly advances the public's interest in those cases in which the first amendment is dominant, because of a decrease in disclosure motions and orders in all cases.¹⁰²

Although the litigant's inability to obtain a disclosure order may cost him either the information sought or additional time and money to obtain the information elsewhere, the litigant faced as great a cost before the courts began protecting journalists' sources.¹⁰³ In the past, litigants who have obtained disclosure orders have almost invariably failed in enforcing them.¹⁰⁴ From 1870 to 1970, only three journalists are reported to have complied with court disclosure orders.¹⁰⁵ The resulting court-press confrontations have benefited no one.¹⁰⁶ For the journalist, protection of news sources is a matter of professional ethics.¹⁰⁷

101. Some disclosure orders are inevitable under a qualified privilege. *See supra* note 4 and accompanying text.

102. A decrease in the number of requests for disclosure has benefits beyond those to the parties directly involved. *See infra* notes 103-10 and accompanying text.

103. Even when courts routinely granted disclosure orders, journalists rarely complied. *Protection of News Sources, supra* note 1, at 916-18.

104. *Id.*

105. *Id.*

106. Because of the importance to the public of the underlying rights protected by the federal common law news writer's privilege and because of the "fundamental and necessary interdependence of the Court and the press. . .," trial courts should be cautious to avoid any unnecessary confrontation between the courts and the press.

Riley v. City of Chester, 612 F.2d 708, 718 (3d Cir. 1979).

107. "Journalists acknowledge the newsman's ethic of protecting confidential sources of information." Society of Professional Journalists, Sigma Delta Chi, Code of Ethics, § 5. It is an ethic that courts have acknowledged in other settings. A nineteenth century Michigan case upheld a libel judgment for a journalist falsely accused of violating a confidence. *Tyron Evening News Association*, 39 Michigan 636, *cited in* *Protection of News Sources, supra* note 1, at 27.

Although the cost of that ethic may mean a jail sentence for contempt, the jail term is a badge of honor that can lead to career advancement.¹⁰⁸ The cost of an unenforced disclosure order, however, is not limited to the press. The litigant does not obtain the evidence he is seeking, and the position of the courts is undermined.¹⁰⁹ The net result of an unenforced court order and contempt sentence is to "confer martyrdom on the newsman and scorn on the judicial system."¹¹⁰ A qualified privilege that will minimize these costly confrontations will serve the interests of both the courts and the public at no additional cost to the litigant.

Under the criteria this comment proposes, the journalist for the *Daily Journal-American* and his source could have predicted in advance of publication whether the source's information would be likely to result in a court disclosure order should Senear decide to file a libel suit against the paper. If the criteria indicate a disclosure order is likely, the source may decide to withhold his information. If the public's first amendment interests predominate, then the source may disclose his information for publication because the criteria indicate a disclosure order is unlikely. In both cases, the courts and the press avoid a possible costly confrontation. The journalist does not risk a contempt citation, fine, or jail term. The court avoids the risk of a loss of public respect. Senear will only fail to get the disclosure order if the information is available elsewhere, is not essential for his case, or is sought for a case that lacks merit. By placing more specific requirements on parties seeking disclosure of confidential sources in civil cases, the courts provide greater protection for the public's first amendment interest and reduce the risk of a costly clash with the press at no irreparable cost to the requesting party.

Frank Van Dusen

108. Protection of News Sources, *supra* note 1, at 27.

109. The rising number and intensity of press-court confrontations are a matter of national concern. National leaders for both the media and judiciary are calling for more understanding on both sides. See Brennan, *Address at the Dedication of the S.I. Newhouse Center for Law and Justice*, 32 *RUTGERS L. REV.* 173 (1979).

110. Note, *Constitutional Law—Branzburg v. Hayes—Must Newsmen Reveal Their Confidential Sources to Grand Juries?*, 8 *WAKE FOREST L. REV.* 567, 580 (1972).