Reporter/Source Confidentiality and Constitutional Right

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In 2006, Mark Fainaru-Wada and Lance Williams found themselves being held in civil contempt with an eighteen-month prison sentence resting in their laps. The two journalists, writers for the *San Francisco Chronicle*, were being held in contempt for refusing to give up the name of a confidential source that they used when writing a series of articles pertaining to the steroid-use controversies that were prevalent in the summer of 2007. Within their articles, Fainaru-Wada and Williams outed the Bay Area Laboratory Cooperative (BALCO) for participating in the “manufacturing of exotic steroids” to professional baseball players such as Barry Bonds (Ugland 113). According to United States Attorney, Debra Wong Yang, their articles “provided compelling evidence that Bonds… was one of BALCO’S steroid clients” and that this information was pertinent in the ongoing grand jury investigation against the company (Ugland 113). However, after Fainaru-Wada and Williams refused to break their promise of confidentiality, the court issued a subpoena to the reporters in order to collect this evidence (Ugland 113).

Luckily for Fainaru-Wada and Williams, defense attorney Troy Ellerman came forth and admitted to the court that he was in fact their confidential source. Otherwise, the subpoena would have been upheld and the two *San Francisco Chronicle* reporters would have been forced to live out their eighteen-month sentence. The Reason: Thirty-seven years ago, the U.S. Supreme Court determined that there is no First Amendment-based journalistic privilege to protect sources and confidential information.

The decision can be traced back to the all-important Branzburg v. Hayes case in 1972. During this case, the Supreme Court ruled in a 5-4 decision that, like the Mark Fainaru-Wade and Lance Williams’s case, there was no privilege under the First
Amendment for journalists to refuse to reveal the names of confidential sources or other information when called to testify before a grand jury.

Byron White, who led four of the justices in the vote against journalist privilege, felt that reporters should not receive any special privileges.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor other constitutional provisions protect the average citizen from the disclosing to a grand jury information that he had received in confidence (Branzburg v. Hayes 1972).

Of the four dissenters, Justice William O. Douglas had the most extreme view on trial, stating that “the First Amendment provides the press with an absolute and unqualified privilege. In any circumstance, under any condition, the reporter should be able to shield the identity of a confidential source” (Pember 371).

The remaining three dissenters of Justice Potter Stewart, William Brennan and Thurgood Marshall took on a variation of that view, writing that “reporters should be protected by privilege that is qualified, not absolute” (Pember 371).

Justice Lewis Powell’s stance on the matter, despite being anti-reporter privilege in his vote, seems to encompass the general standard held by most states today – a happy medium stance that is arguably the most considerate to all parties. Powell argued that “a balance must be struck between freedom of the press and the obligation of all citizens to give relevant testimony” (Pember 371).
The fact that this decision was so close (5-4) and the fact that there were so many varying degrees of the amount of protection they believed journalists and their confidential sources should have, led to the amount of elasticity that exists in court decisions today. While White’s and Powell’s views remain the basis for most court decisions, several reporters have successfully avoided subpoenas and jail time due to the possibility of reporter privilege. Several federal courts, for instance, only apply the standards/precedent set by the Branzburg case to grand jury settings, while the rulings within any other court may vary from state to state.

According to the Reporter’s Committee for Freedom of the Press, which set up a Web site that details a complete index or listing of the different laws and their varying degrees of reporter privilege, “32 states and the District of Columbia have shield laws” and “almost all federal circuits and many state courts have acknowledged at least some form of a qualified constitutional privilege,” despite the Branzburg ruling (Reporter’s Committee 2). However, the reporter’s privilege does not typically come from the same source. Between these 33 states, the privilege may come from state constitution laws, common law, or possibly the manufacturing of new court “rules of procedure” (Reporter’s Committee 2). In the case of Ammerman v. Hubbard Broadcasting, the Supreme Court adopted a rule, despite the fact that the New Mexico shield law had been considered unconstitutional for the past five years, that gave “a qualified privilege of confidentiality to reporters,” thereby showcasing the different avenues in which reporter privilege may be granted (Reporter’s Committee 2). However, reporter privilege and shield laws only go so far with the issue of source confidentiality.
The earliest reported case of a journalist’s refusal to disclose his sources of information took place in 1848. A reporter from the *New York Herald* refused to reveal the name of the person who had given him a secret copy of the treaty that Mexico and the U.S. were negotiating to end the Mexican-American War. This was also the first instance in which a journalist was held in contempt and jailed for maintaining a promise of confidentiality.

Following his sentence, from 1911 to 1968, only seventeen cases involving a reporter’s confidential sources were reported according to an article from the California Law Review called “The Newsman’s Privilege: Government Investigations, Criminal Prosecutions, and Private Litigation.” However, toward the end of the 1960’s and 1970’s, requests to reveal the names of sources escalated due to the social turmoil and political unrest that characterized the era (Pember 363). The press played a significant role in documenting the confrontation between several opposing groups, such as the protestors during the Vietnam War with police officials and the developing counter-culture (such as the Black Panther movement) that was rising in the face of conformity (Pember 363). The government wished to obtain this information to keep a handle on the changing world.

Today, reporters continue to use confidential sources, but to a lesser degree. An article by *New York Times* journalist Katharine Q. Seelye states that, according to a study by the Project for Excellence in Journalism, between 2003 and 2004 there has been a “significant drop in the use of anonymous sources… Only seven percent of the stories published in 2004 used anonymous sources, compared with 29 percent… in 2003” (Seelye C6). Nobody felt the wrath of the subpoena during this time period more strongly than *New York Times* reporter, Judith Miller. Miller attempted to quash – or have set
aside – a subpoena that demanded she reveal the identity of undercover CIA agent, Valerie (Plame) Wilson, in a grand jury setting. Wilson’s significance was related to Special Prosecutor Patrick Fitzgerald’s ongoing investigation into illegal leaks at the White House” (Ugland 113). Fitzpatrick was investigating whether a number of reporters, including Miller, had been told “Plame’s” identity by government officials, and he called upon these individuals to release the names of their government source(s). Despite the fact that Miller never published a single article containing Wilson’s name, her request to quash the subpoena was rejected on the basis that “journalists do not have a First Amendment right to refuse to comply with grand jury subpoenas” (In re Grand Jury Subpoena, Judith Miller 2005).

In October, 2004, Miller was held in contempt for refusing to give up her source and spent eighty-five days in prison. It was only until I. Lewis “Scooter” Libby, Chief of Staff to Vice President Richard Cheney, came forward as Miller’s confidential government source and waived her promise of confidentiality that Miller was freed from prison. After confessing his involvement, “Libby was convicted of perjury and obstruction of justice for lying to the grand jury and FBI officials about this role in the case” in March of 2007 (Goldstein 2007).

Journalists have little more than their credibility. Their credibility is what maintains the constant flow of information from their sources. The press, in turn, maintains that constant flow of information to the general public. After Scooter Libby was convicted of perjury and obstruction of justice, people – especially journalists – began to realize how detrimental breaking that confidentiality promise may be, not only to the source, but to their credibility. This would, in effect, hinder a reporter’s abilities to
gather news and ultimately affect the flow of information to the public. The effects could potentially be that news crews wouldn’t be welcome at protest rallies, reporters wouldn’t receive information from anyone who wished to be disassociated with the article (for any reason), and investigative journalism would be impaired.

There are several reasons why someone would wish to remain anonymous, such as Libby’s wish to be anonymous when talking to Miller. Those involved in criminal activity, those who don’t want to be outed as a company whistleblower, and those who simply would rather not have their name associated with a particular issue will all want a confidentiality agreement before speaking to a journalist. However, if they know that they may suffer the same fate as Libby, then they will not want to participate as a source of information – regardless of how socially significant a story may be.

Furthermore, the press is supposed to represent a neutral entity. When the government impedes that boundary, crossing over into the “fourth branch of government” with its attempts to regulate it, it compromises the press’s ability to be a watchdog and remain unbiased or objective in its news reporting. Autonomy from the government is especially important in journalism because, otherwise, “potential sources come to see them as agents of the state, or supporters of criminal defendants, or as advocates for one side or the other in civil disputes” (Reporter’s Committee 1). When a journalist is forced to take the stand, they are placed in a situation that forces them to take a position – either for or against the defendant. Through this, they lose their credibility with future sources (who may not agree with their “stance”) as well as their credibility with their readers who expect their news to be unbiased. According to The Reporter’s Committee for Freedom of the Press, when the government intrudes upon the editorial process and the
dissemination of information, it “violates [the journalist’s] First Amendment right to speak without fear of state interference” (Reporter’s Committee 1).

In contrast, it is clearly the obligation of every citizen to do what’s right and give up a name or confidential information in order to give someone else a fair shake with the judicial system. In his book, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1904) – a encyclopedic survey of the development of the law of evidence - John Henry Wigmore wrote that “the public has a right to every man’s evidence” (Pember 366). The Sixth Amendment of the U.S. Constitution enforces this idea, guaranteeing the right to have witnesses and that those witnesses testify during the trial. In 1919, the Supreme Court wrote that:

> It is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which everyone within the jurisdiction of the government is bound to perform upon being properly summoned… the personal sacrifice involved is a part of the necessary contribution to the public welfare. (Blair v. U.S. 1919)

Judges, grand juries and state legislatures all have the power to issue subpoenas – writs for summoning a witness or the submission of evidence before a court to try to force reporters to reveal confidential sources or unpublished information (Pember 362). Additionally, government officials may get a warrant to search a newsroom or a reporter’s home if they believe that the reporter has information that’s pertinent to a case. The reporter is required to testify for three reasons: 1) if the reporter has information that is relevant to the case 2) if the reporter has information that may deeply impact the
outcome of the case 3) if the reporter has information that isn’t available from any other source.

According to the Reporter’s Committee for Freedom of the Press, “1,326 subpoenas were served on 440 news organizations in 1999 and forty-six percent of all news media [that responded to their study] said they received at least one subpoena during 1999” (Reporter’s Committee 1). In most cases, the reasoning behind the subpoena is that the Sixth Amendment trumps the First Amendment. This was the conclusion in Miller’s request to have her subpoena quashed during the Fitzgerald investigation. According to Ugland in his footnotes at the bottom of his article, “Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment” the court in Miller’s case:

… neither accepted nor rejected Miller’s second argument that she was entitled to journalist’s privilege protection under the federal common law. The court was divided on the question of the existence of common law privilege, but concluded that even if one does exist, the government had provided sufficient evidence to overcome it. (Ugland 113).

In 2001, of all the issued subpoenas, criminal litigation generated 56 percent, civil cases brought about 36 percent, and nine percent were issued by the federal court. Of those subpoenas issued in 2001, the press succeeded in quashing 75 percent of them (Pember 374).

If a journalist is issued a subpoena, they can either cooperate and reveal the desired information or attempt to have it quashed. Fifty-four percent of the time a subpoena will be quashed under a shield law, while constitutional privilege accounts for
eighteen percent of the won challenges, information not being needed for the case accounts for thirty-one percent of the cases, being able to get the information from another source accounts for thirty-one percent of the cases and a lack of relevance counts for eighteen percent of the won challenges (Agents of Discovery 2003).

If the journalist is not protected under a shield law or they do not receive reporter’s privilege, they will be held in contempt, fined, and possibly serve jail time for refusing to testify in a grand jury setting. Anything that is said to interfere with “the orderly process of justice” is considered reason enough for a judge to exercise his/her power of contempt (Pember, 396). From maintaining control over a courtroom to keeping someone from tampering with the jury, the power of contempt can be used in several situations. Concerning the press, “a reporter who refuses to reveal the name of a source critical to the defense of a person charged with larceny could endanger the person’s right to a fair trial” (Pember 396). This was the case with freelance videographer and blogger, Joshua Wolf. After being held in contempt for refusing to give up non-confidential video footage of a San Francisco protest in which a police car was burned, Wolf attempted to “contest his duty to comply with a grand jury subpoena, claiming that the request violated his First and Fifth Amendment rights” (Wolf v. United States 2006).

However, because the information was non-confidential, the video was directly relevant to the case, and Wolf had no journalistic privilege, the grand jury rejected the idea that his evidence being used in court would affect his ability to gather news. As a result of his disobedience, “Wolf was imprisoned for 226 days – the longest sentence ever served by a journalist for refusing to comply with a subpoena” (Ugland 113).
Even more daunting than the idea of going to jail for refusing to respond to a subpoena or for refusing to give up source confidentiality is the prospect that reporters can be sued if they break their promise of secrecy – a ruling that places reporters into a lose-lose situation. The case of Cohen v. Cowles Media, Inc. in 1991 determined that “the First Amendment does not bar or prevent a lawsuit against a journalist who breaches a promise of confidentiality to a source when the source suffers direct harm from reliance on the breached promise” (Pember 367).

During the case, journalists from Cowles Media, Inc. talked to Republican Dan Cohen about a rival candidate. Cohen proceeded to dish out the dirt on his opponent, out of a belief that his identity would remain anonymous. However, after the journalists decided his information lacked newsworthiness, they instead used his interview to write about Cohen, personally, as the politician who spreads malevolent information about his competition. Cohen lost his job and proceeded to sue Cowles Media, Inc. for breach of contract and fraud.

Originally, the jury awarded compensatory and punitive damages to Cohen on the grounds that Cowles Media, Inc. breached their contract and committed fraud. However, when his case reached the Court of Appeals of Minnesota, the judgment of fraud was reversed “after concluding that [the] plaintiff failed to establish a fraud claim, the only claim that would support such an award” (Cohen v. Cowles Media, Inc. 1991). Nonetheless, the court decided to uphold the award of compensatory damages, “on the ground that there was sufficient evidence to support the breach of contract claim” (Cohen v. Cowles Media, Inc. 1991).
“A breach of contract,” in terms of confidentiality, deals with a term known as “promissory estoppel.” In the Cohen v. Cowles Media, Inc. case, the Supreme Court of Minnesota ruled that “the defendant newspaper publisher had no special immunity from the application of general laws and was therefore liable, just as any other, for breach of contract based on promissory estoppel” (Cohen v. Cowles Media, Inc. 1991). Additionally, the court ruled that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news” (Cohen v. Cowles Media, Inc. 1991). Therefore, even though the main premise of promissory estoppel is to “prevent injustice when someone fails to keep a promise that someone else has relied on,” the term allows no protection in terms of injustices against the reporter (Pember 368).

In order to charge someone with promissory estoppel, the plaintiff must prove 1) that the defendant made a clear and definite promise to the plaintiff, 2) that the defendant intended to induce the plaintiff’s reliance on that promise, 3) that the plaintiff, in fact, reasonably relied on that promise to his or her detriment and harm, 4) and that the promise must be enforced by the court in the interests of justice to the plaintiff (Pember 368). In the case of Cohen v. Cowles Media, Inc., Cohen was able to prove that Cowles Media, Inc. promised confidentiality, that Cohen’s job relied on that promise of confidentiality, and that Cohen would have suffered some form of injustice had the courts not ruled in his favor.

Another example of the application of promissory estoppel is during the case of Rusizka v. Conde Nast Publications. Journalist Claudia Dreifus of *Glamour Magazine* had been writing an article on therapist-patient sexual abuse when she asked Jill Ruzicka
– a woman who had previously sued her therapist and the state agency that sanctioned her therapist’s practice – if she would agree to give her information on her situation. Prior to the interview, Ruzicka agreed to participate, as long as she was guaranteed complete confidentiality.

However, after the story was published, Ruzicka sued Conde Nast Publications, claiming that, “even though her name was never mentioned in the article, the reporter’s description of her in the story made her identity obvious to most readers” (Pember 369). Identifying details had been incorporated into the story after Ruzicka had proofread it, going against Dreifus’s original agreement of confidentiality and providing enough information to confirm that she had broken her promise. In the end, “the court held that there was a promise not to identify the promisee in the article and that the resultant harm to promisee required a remedy to avoid an injustice” (Ruzicka v. Conde Nast Publications 1993).

The only time a reporter cannot be sued for breaking a promise of confidentiality is within a grand jury setting, since whatever is said within a grand jury setting is not released to the public, in theory. Everyone, from the defendant to the jury, is sworn to secrecy. This is why, in the case of Ventura v. Cincinnati Enquirer, George G. Ventura was not sued for promissory estoppel. Ventura worked as legal counsel for Chiquita Brands International, Inc., but left the company under “less than amicable circumstances” (Pember 369). Afterwards, Cincinnati Enquirer writer, Michael Gallagher was writing a story in which Ventura gave him “private passwords and secret codes to illegally invade the Chiquita voice-mail system” under the promise of confidentiality (Pember 369).
Gallagher was fired from the newspaper for his conduct and asked to testify in front of a grand jury where he provided tape recordings that proved the guilt of Ventura.

Ventura then went on to sue Gallagher for promissory estoppel, but came up empty handed. The reason: “the sixth Circuit recognized an absolute privilege or immunity of Gallagher to give up Ventura’s name without facing civil liability because such a privilege will encourage the reporting of criminal activity by removing any threat of reprisal in the form of civil liability” (Pember 370). In order to prevent the impediment of the administration of justice, the courts ruled that promissory estoppel would not apply in civil cases or trials that took place within a grand jury setting.

Continuing towards the positive end of the spectrum for news gatherers, journalists receive a certain degree of protection through the reporter’s privilege and shield laws. The reporter’s “privilege” requires that a reporter share valuable information with the parties that need it, but only in those rare circumstances when severe harm might result without this cooperation – similar to Justice Lewis Powell’s stance.

Depending on the state, this privilege may stem from the U.S. or state constitution or it may stem from common law or state structure. Privilege is more easily achieved with a journalist who’s involved in a civil suit than with one who’s called to testify before a grand jury. Additionally, privilege is often more easily granted to someone who wishes to keep their confidential source a secret, as opposed to someone who has actually witnessed the crime being committed. Moreover, as previously stated, a reporter is required to testify in a case if the reporter has information that is relevant to the case, has information that may deeply impact the outcome of the case, and has information that isn’t available from any other source. If the information isn’t relevant, has little
significance, and can be found somewhere else, than newsman privilege is more likely to be awarded.

Along the same line as reporter privilege, thirty-three U.S. states have enacted a statutory protection called a shield law. This law, despite the fact that it doesn’t hold up in a federal grand jury, offers reporters some protection against being forced to reveal the identities of confidential sources and “in more or less terms, outline the reporter’s privilege that has been established by the state” (Pember 387).

Maryland courts were the first to enact the shield law in 1896. After John T. Morris of the Baltimore Sun was imprisoned for a period of five days (the grand jury’s term expired five days after his conviction) for refusing to name a source, Baltimore’s journalist club “persuaded the General Assembly to enact legislation that would protect them from having to reveal sources’ identities in court” (Reporter’s Committee 3). Ever since then, and despite a few amendments, the Maryland shield law has withstood the test of time.

Shield laws are not invincible, however, and several limitations hinder their ability to protect a reporter completely. Consistency is one barrier that shield laws have yet to overcome. There is no single form of shield law that stretches across all of the thirty-three participating states, meaning that a reporter who’s protected in (for example) Pennsylvania may not be protected in Connecticut. An additional issue is the diverse definitions of who a “journalist” is and whether or not the law applies to their situation. Freelance writers, book authors, cable television operators, and bloggers are often excluded from shield law protection, despite being prolific news gatherers.
Furthermore, the specificity and exact wording of a shield law could make or break a subpoena appeal. This was the case in Price v. Time, Inc. when *Sports Illustrated* magazine published an article “alleging that [Mike Price], the head coach of the University of Alabama's Crimson Tide football team, made sexual advances towards female students in a bar and apartment in Tuscaloosa and engaged in sexual acts with two women from a strip club in Pensacola” (Price v. Time, Inc. 2005). Price demanded that *Sports Illustrated* give up the name of the confidential source that leaked this information, and the court issued a subpoena.

Because of the wording of the Alabama shield law, which only protected “information procured … and published in the newspaper, broadcast by any broadcasting station, or televised by any television station” (Alabama Code, 12-21-142, 2003), *Sports Illustrated* magazine did not fall under this protection and they were forced to give up their source. The appellate court did conclude, however, “that the motion to compel under the First Amendment was premature because the coach had not proven that he was unable to find a reasonable alternative means to learn the name of the confidential source” (Price v. Time, Inc. 2005). Therefore, while the shield law didn’t hold up in the hearing, reporter’s privilege still held some merit in the decision.

While there are some legal standards that protect journalists, that protection is at a minimum. That’s not to say, however, that federal courts are in the wrong when they force a journalist to give up their confidential sources. There are many instances where, ethically-speaking, the appropriate course of action is to force someone to break their promise of confidentiality. The Sixth Amendment guarantees the right to have witnesses and to compel them to testify and it’s possible that a reporter’s reluctance to testify could
stand in the way of fairness. Despite the fact that the courts have “taken a jaundiced view of reporter-source confidentiality,” they do so in order to maintain that no citizen suffers from injustice (Reporter’s Committee 1). In cases where journalist testimony can determine guilt, it’s essential that the Sixth Amendment be upheld.

At the same time, there is no doubt that journalists may also suffer from some form of injustice when forced to testify, such as those who are placed into the lose-lose situations of testifying and being sued for promissory estoppel, or refusing to testify and being sent to prison. Furthermore, a breach of confidentiality may hurt the source as much as the journalist, adding more misfortune to the already complicated matter. While confidential sources may be an important medium for receiving crucial information that may not be available otherwise, it is a tricky situation that may leave the journalist, the source, or a bystander of the article in an unfortunate circumstance.

Nonetheless, what is restricted most of all through constitutional law that grants no special privilege to the reporter is the dissemination of information. Not only do these laws compromise a reporter’s relationship with their sources, but they also compromise the reporter’s integrity (in both keeping their word and maintaining autonomy and objectivity). Reporters have little more than their credibility. If they are forced to go against their word and betray the trust that they have worked so hard to build and maintain, then their ability to collect news is greatly impaired and the available information to the public is constrained. Therefore, while there is a time and place for the Sixth Amendment to be upheld, there are also times when a reporter’s First Amendment rights to produce information without fear of government involvement should be protected.
Creating standardized guidelines pertaining to shield laws and definitions of reporter’s privilege are perhaps two areas that should be given more attention in the years to come. With the establishment of more news sources, such as Internet blogs and Web journals, certain news-gatherering mediums are being excluded from the privileges that many “journalists” receive. In the issue of fairness and in light of the effects that subpoenas may have on the dissemination of news, it could be said that the current laws are inadequate in their protection of justice and the First Amendment right to freedom of speech and information. So while some measures have been taken to prevent journalists from compromising their credibility, to many individuals and many reporters, those measures have not been enough.
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