



1987

# Disclosure of Confidential Sources in International Reporting

Lisa A. Kloppenberg

*Santa Clara University School of Law*, lkloppenberg@scu.edu

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>

---

## Recommended Citation

60 S. Cal. L. Rev. 1631

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

## NOTE

# DISCLOSURE OF CONFIDENTIAL SOURCES IN INTERNATIONAL REPORTING

Pulitzer prizewinning journalist Seymour Hersh currently is being sued for libel<sup>1</sup> by a former official of Indira Ghandi's cabinet whom Hersh describes as an operative for the Central Intelligence Agency in his book, *The Price of Power*.<sup>2</sup> The Indian politician seeks disclosure of the identities of confidential sources who supplied Hersh with information concerning the Nixon administration's role in the 1971 conflict between India and Pakistan. Like most libel plaintiffs, the politician claims that he must know the identity of each of the sources to prove that the information was published with actual malice. Journalist-defendants, on the other hand, generally contend that source identity should be protected because that information is not needed to prove libel and, even if it is, the newsgathering function of journalists deserves great protection under the first amendment.<sup>3</sup> The legal result of Hersh's refusal to reveal the identity of his sources, depending on the jurisdiction, could be jail, a default judgment entered against him, or other court measures which would affect the outcome of the trial.<sup>4</sup>

Courtroom controversies involving requests for disclosure of such sensitive information highlight the tension between the exercise of first amendment rights by journalists and the interests of libel plaintiffs in protecting their reputations. In another recent libel suit involving a foreign official and a media defendant, the Israeli Minister of Industry and Trade, Ariel Sharon, sued Time, Inc. as a result of a story implicating

---

1. N.Y. Times, June 19, 1983, § 1, at 5, col. 4.

2. S. HERSH, *THE PRICE OF POWER* 444-64 (1983). Hersh depicts libel plaintiff Moraji R. Desai as a paid informant for the CIA involved with the Nixon administration during the 1971 conflict between India and Pakistan. *See id.* at 459-60.

3. *See infra* text accompanying notes 26-62.

4. *See infra* text accompanying notes 62-74.

Sharon in the 1982 massacre of hundreds of Palestinians in refugee camps in West Beirut. Sharon called the story a "blood libel"<sup>5</sup> and sued for fifty million dollars.<sup>6</sup> The reporter-defendant attributed his story partially to a classified report by an Israeli investigating commission and relied on confidential sources for the information allegedly contained in the report's secret appendix.<sup>7</sup> At trial, Time lost on the falsity issue of the libel charge, but subsequently prevailed because Sharon could not prove that Time had known the story to be false.<sup>8</sup> This case exemplifies the controversy surrounding confidential sources in libel suits.<sup>9</sup>

Courts need guidelines for examining the materiality of libel plaintiffs' disclosure demands, as well as for screening journalists' assertions of the need for secrecy to preserve first amendment interests. The balancing test currently used by the federal courts to evaluate disclosure claims in libel suits is applied in an arbitrary and conclusory manner. Courts have failed to articulate when disclosure is mandated in a specific context. The result is a variety of outcomes in civil libel suits without adequate analysis of the competing interests. The balancing test as currently implemented does not allow libel plaintiffs, journalists, or potential sources the certainty necessary to adequately assess their risks before a suit is filed, a story is reported, or a confidential relationship is established.<sup>10</sup>

---

5. See R. SMOLLA, *SUING THE PRESS* 82 (1986).

6. *Sharon v. Time, Inc.*, 599 F. Supp 538 (S.D.N.Y. 1984); see also Dworkin, *The Press on Trial*, *New York Review of Books*, Feb. 26, 1987, at 29, col. 1 (reviewing R. ADLER, *infra* note 7). For an interesting proposal about the confidential source issue and discouraging such litigation, see *id.* at 36-37.

7. See, e.g., R. ADLER, *RECKLESS DISREGARD* 62-69 (1986).

8. Kelly, *Wrestling with Defamation and Truth*, *TIME*, Jan. 28, 1985, at 62-63.

9. See R. ADLER, *supra* note 7, at 23. "So the entire edifice of *Time* in this case was poised upon a single reporter, claiming to have access to unnamed sources, who in turn had access to official documents, which would remain forever secret, and which supported *Time's* paragraph—or else did not." For a different perspective of the value of confidential sources, see R. Dworkin, *supra* note 6, at 30, col. 4:

Though the use of confidential sources has proved . . . to be a valuable, perhaps even indispensable, means of uncovering official deceit, *Sharon* does show that editors must be particularly vigilant in supervising it. So long as the practice continues to be accepted by American journalists . . . it does not trivialize the First Amendment . . . for a journal not to retract what it still honestly believes its reporter learned from such a source, just because the story has been denied or because it has been sued.

10. See R. DWORKIN, *A MATTER OF PRINCIPLE, THE FARBER CASE: REPORTERS AND INFORMERS* 377 (1985).

So even now reporters cannot, or should not, flatly promise an informer confidentiality. Any such promise must be qualified, if the reporter is scrupulous, by the statement that under certain circumstances, *not entirely defined by previous court decisions, and impossible to predict in advance*, a court may legally compel disclosure.

*Id.* (emphasis added).

This Note will suggest a better test and demonstrate its application by analyzing the proper scope of protection for confidential sources in the international news context. This Note will show that the uncertainty of the current test is particularly grievous in the context of libel litigation because of the likelihood of harm to sources and the potential that arbitrary disclosure orders have for inhibiting the flow of international news to the public.

At the outset, this Note will examine the conflicting interests which arise when a person demands source disclosure, summarize the method now used by most courts when libel plaintiffs request disclosure, and then show why the balancing test currently employed to administer the qualified federal privilege is acutely inadequate. In the second Part, this Note will explore concerns about source disclosure in the international news context, following the lead of the United States Supreme Court in upholding a disclosure order only after a thorough analysis of the competing interests at stake in the grand jury context.<sup>11</sup> Finally, this Note will suggest a more effective method of analysis which could be applied as the qualified privilege is administered in other contexts.

## I. THE SCOPE OF CONFIDENTIAL SOURCE PROTECTION IN CIVIL LIBEL SUITS

### A. THE CONTROVERSY SURROUNDING REQUESTS FOR DISCLOSURE

Libel plaintiffs often request the identity of confidential sources or access to unpublished information to prove that the defendant published the allegedly defamatory information with knowledge that the source was unreliable, or that contradictory reports existed which the journalist chose not to use.<sup>12</sup> Many plaintiffs claim that such information is essential to meet the burden of proof established in *New York Times Co. v. Sullivan*.<sup>13</sup> In *Sullivan*, the Supreme Court created a qualified constitutional privilege for "those who would give voice to public criticism."<sup>14</sup>

The Court held in *Sullivan* that the first amendment protects persons who unintentionally supply false information to the public. If all such errors were punished, the Court reasoned, the truth would be suppressed.<sup>15</sup> To minimize self-censorship and maintain the flow of information in society, the Court held that to prove that a statement is

---

11. See *infra* text accompanying notes 75-102.

12. For further discussion see *infra* notes 18-21 and accompanying text.

13. 376 U.S. 254 (1964).

14. *Id.* at 278.

15. *Id.* at 279.

libelous, public officials and public figures must show that a defendant published false and defamatory information with "actual malice," which is defined as knowledge of falsity or reckless disregard of the truth or falsity of the information.<sup>16</sup> In contrast, a plaintiff who is not a public official or a public figure carries a lesser burden of proof, only having to prove falsity and negligence, rather than actual malice.<sup>17</sup> This Note will focus on litigation involving the actual malice standard, since it is presumed that those who claim that their reputational interests are damaged by journalists are often public officials.

### 1. *The Need for Disclosure of Confidential Sources to Meet Burdens of Proof*

A libel plaintiff can prove that the defendant published with actual malice by obtaining direct evidence, such as the defendant's statements about the editorial judgment used in preparing the information for publication, or through indirect evidence, such as the circumstances surrounding the publication.<sup>18</sup> A plaintiff also may prove that the defendant had a culpable state of mind by showing "that the defendant in fact entertained serious doubts as to the truth of his publication,"<sup>19</sup> or that the defendant had "subjective awareness of probable falsity."<sup>20</sup> Probable falsity may be found if "there are obvious reasons to doubt the veracity of the informant or the accuracy of the source's reports."<sup>21</sup>

A defendant can prevail by showing that the information is true, that it is not defamatory, or by refuting the charge of actual malice, through, for example, uncontradicted evidence of careful investigation.<sup>22</sup>

---

16. *Id.* at 279-80.

17. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (the heightened state interest in protecting the reputations of private individuals who do not have the same ease of access to the media as public figures held to require a lesser burden of proof).

18. *Herbert v. Lando*, 441 U.S. 153, 160 (1979).

19. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

20. *Gertz*, 418 U.S. at 335 n.6 (construing *St. Amant*, 390 U.S. at 727).

21. *St. Amant*, 390 U.S. at 732 (plaintiff able to show the source's statement "inherently improbable"). A plaintiff can prove malice or negligence by establishing that the journalist possessed a document contradicting the information given by the source. Also, obvious reason for doubt could be shown if nonconfidential sources gave the journalist accounts different from that of the confidential source. *Gleichenhaus v. Carlyle*, 226 Kan. 167, 169, 598 P.2d 611, 613 (1979). Malice or negligence might also be shown if defendant failed to contact the plaintiff for his or her side of the story after obtaining damaging information from a confidential source. *Akins v. Altus Newspapers, Inc.*, 609 P.2d 1263, 1266 (Okla. 1977), *cert. denied*, 449 U.S. 1010 (1980). Plaintiff may prevail if defendant contacted the plaintiff and failed to include those remarks in the article. *Holter v. WLCY T.V., Inc.*, 336 So.2d 445, 448-49 (Fla. Dist. Ct. App. 1978), *reh'g denied*, 373 So.2d 462 (Fla. 1979).

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

The question of liability, however, is always open to subjective interpretation; the judge and jury are given a great deal of discretion in deciding if a defendant knew or *should have known*. The Supreme Court only recently clarified that the plaintiff has the burden of presenting clear and convincing evidence to meet the actual malice standard when a defendant files a motion for summary judgment.<sup>23</sup> Such decisions are difficult when a journalist maintains that secrecy is necessary or that the identities of the sources are not relevant to proof of actual malice, while a plaintiff claims that the malice issue depends on disclosure of potentially biased or unreliable sources.<sup>24</sup>

A libel plaintiff will usually maintain that the identities of all sources are relevant evidence toward meeting the burden of proof required under the actual malice standard. A plaintiff thus has an interest in requesting broad discovery in order to obtain *any* information which might implicate the defendant's state of mind. If a plaintiff can implicate the credibility of a source by showing that the source was unreliable or had a particular grievance against the plaintiff, it is easier to prove that the defendant should have known of the falsity of the information.

A libel plaintiff's lawyer also may request such disclosure in an effort to zealously defend a client and to avoid the possibility of a future malpractice suit. The lawyer might also have strategic reasons for requesting disclosure of all confidential sources and information as well; if the client loses, the denial of the requested evidence can be brought up as an issue on appeal.<sup>25</sup>

## 2. *Need for Protection of Confidential Sources*

a. *Relevancy*: a reporter may refuse to disclose confidential sources because the identity of the source is not relevant to the plaintiff's claim. Courts have clearly shown that the journalist's liability does not hinge on the motives of the source<sup>26</sup> and some courts maintain that the

---

23. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).

24. *See, e.g., R. ADLER, supra note 7, at 22-23.*

25. *See R. DWORKIN, supra note 10, at 378-79.* In discussing *In re Farber*, 78 N.J. 259, 272, 394 A.2d 330, 336, *cert. denied*, 439 U.S. 997 (1978), Dworkin notes: "[I]t has been suggested that Brown [the lawyer seeking disclosure of journalist's notes] made his request not because he believed he would discover anything useful to his client, but because he hoped the request would be refused, so that he could later claim, on appeal, that the trial was unfair."

26. *See, e.g., Alioto v. Cowles Communication, Inc.*, 430 F. Supp. 1363 (N.D. Cal. 1977) (a journalist's culpability held not to be based on a source's "impure" motives but on whether the journalist took steps to verify the information gleaned from sources with such motives. If the defendant failed to obtain independent verification for such suspicious information, this fact alone might show actual malice); *see also Greenbelt Coop. Publishing Ass'n v. Bressler*, 398 U.S. 6, 10 (1970)

identity of a source is irrelevant to the question of malice.<sup>27</sup> In particular instances, if a source is the sole eyewitness to an event or has knowledge of politically oriented crimes, such information might be vital in a legal proceeding.<sup>28</sup> In most libel suits, though, the identity of the source is not crucial.<sup>29</sup> In many circumstances, however, with the subjectivity of the actual malice standard, the reliability of the source may remain a crucial issue.

b. *Retaliation and potential chilling effects:* the journalist may refuse to disclose the source's identity for fear that the individual source will be subject to retaliation from the plaintiff. The journalist may refuse to reveal the source, which would entail breaking a promise of confidentiality, because this source and others with sensitive information will be deterred from giving the journalist such information in the future. Courts have stated that compelling journalists to breach a confidence merely because a libel suit has been filed against them "would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity."<sup>30</sup> Journalists contend that compulsory disclosure would cause particular sources to dry up as well as deter other persons from giving information to the press.

c. *Public demand for information:* journalists regularly rely on confidential sources for a significant amount of the information they distribute to the public; one survey estimates that amount to be thirty percent.<sup>31</sup> Even well respected publications like the Wall Street Journal use confidential sources regularly.<sup>32</sup> Newspapers, news magazines, and national television network programs have become more reliant on confidential sources in recent decades for several reasons. In part, these journalists have turned to more investigative, analytical reporting because of the dominance of daily television news programs. The public

---

(spite, hostility, or deliberate intention to harm irrelevant to the issue of whether the defendant knew the information was false or doubted its truth).

27. See, e.g., *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Senear v. Daily J. Am.*, 27 Wash. App. 454, 473, 618 P.2d 536, 546 (1980).

28. Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 276 (1971).

29. *Id.*

30. *Cervantes v. Time, Inc.*, 464 F.2d 986, at 993 n.10 (8th Cir. 1972); *Riley v. Chester*, 612 F.2d 708, 714 (3d Cir. 1979); *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) ("Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis.").

31. Blasi, *supra* note 28, at 247.

32. Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. REV. 18, 57-61 (1969) (annually approximately 15% of the *Journal's* stories used confidential sources).

relies on television for the headline news and many readers demand more in-depth coverage from newspapers and magazines.<sup>33</sup>

Sources are used primarily for assessment, interpretation, and verification.<sup>34</sup> Other uses include: quotes about nonpublic material; confirmation of unpublished material; "fact dropping" (using information from one source to gain "on-the-record" information from other persons); advice on which parts of the story to emphasize; persuading editors about the credibility of a story; and providing readers with alternative views to public reports or official positions.<sup>35</sup> Reporters often base stories on inferences from confidential sources who are reluctant to provide more direct leads, as evidenced by the techniques used in the *Washington Post's* reporting on the Watergate cover-up.<sup>36</sup>

Journalists in one survey said they rely more on confidential sources for certain types of stories. Journalists tend to rely on these sources (in order of frequency) when covering the government, investigative stories, financial stories, radical or militant groups, and trials more than in other stories.<sup>37</sup> Use of confidential sources has become widespread—particularly for investigative stories.<sup>38</sup> This is necessitated partially by the judgments required in some complex types of reporting—when only competing versions of the truth exist and journalists seek to provide the best available subjective judgments.<sup>39</sup>

Journalists are aware of the dangers of compromising fairness and neutrality when relying on confidential sources and avoid close identification with the source or failure to be aggressive enough with the source.<sup>40</sup> Editors are involved with the confidential source decisions and often know the identities of sources. This practice is more common for very trusted, experienced reporters.<sup>41</sup> However, at least one highly respected journalist, I.F. Stone, published "investigative" reports without using any "off-the-record" information.<sup>42</sup>

---

33. Blasi, *supra* note 28, at 234, 249-50.

34. *Id.* at 284.

35. *Id.* at 245-46.

36. Dworkin, *supra* note 6, at 30, col. 3 (discussing comments of *Time's* Editor-in-Chief, Henry Grunwald).

37. Blasi, *supra* note 28, at 251-52.

38. Dworkin, *supra* note 6, at 30, col. 2.

39. R. SMOLLA, *supra* note 5, at 194 (discussing statements of *Washington Post* reporter Bob Woodward).

40. Blasi, *supra* note 28, at 241-45.

41. *Id.* at 244, 248.

42. *Id.* at 248-49; R. ADLER, *supra* note 7, at 22.

No conclusive data exists to verify that sources will dry up or to establish that sources would continue to be willing to supply journalists with sensitive information in the absence of a privilege against disclosure. The Supreme Court has stated that the relationship between journalists and their sources is "symbiotic" and that sources would not necessarily dry up completely, even if no privilege were afforded to the relationship.<sup>43</sup> It is logical to suppose, however, that many who request confidentiality out of fear for their security or safety would refuse to speak to the press.<sup>44</sup> The impossibility of obtaining empirical proof of sources drying up compounds the problem (you cannot measure what information a source is withholding if you do not know what information exists or how much the source knows). The reluctance of sources to provide information is often a subtle phenomenon, difficult for a reporter to link to particular legal rules.<sup>45</sup>

d. *Chilling effects*: journalists say that the mere threat of subpoenas interferes with their ability to report effectively, causing sources to refuse to grant information, delay in confirming reports, and a guardedness in both sources and journalists. But it is difficult to assess this self-reported chilling effect. "Drying up" can also occur for other reasons. For example, if a source is dissatisfied with the journalist's use of the information supplied or if other factors change, the amount of information a source is willing to give may diminish.<sup>46</sup> A source will often supply information in varying amounts during the course of a long-term relationship with a particular reporter.<sup>47</sup> One commentator describes the phenomenon of source reluctance to supply information because of a subpoena threat as a "poisoning of the atmosphere" rather than a complete "drying up."<sup>48</sup>

It is helpful to analyze specific incidents when sources have refused to give information to journalists or refused to be taped directly because of the threat of being subpoenaed later. Journalists specifically cite such

---

43. *Branzburg v. United States*, 408 U.S. 665, 594 (1972).

44. See Note, *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1475-76 (1985).  
o

45. See, e.g., BLASI, *supra* note 28, at 266-70.

46. *Id.* at 266-67.

47. For example, David Halevy, the *Time* reporter involved in the *Sharon* case, *supra* notes 5-8, had cultivated valuable sources in the Israeli government and military. He had been a military officer and remained a lieutenant colonel in the reserve, maintaining these relationships and using his sources for many accurate stories. He had filed one prior false report, for which he had been disciplined by *Time* editors. Dworkin, *supra* note 6, at 29, col. 1.

48. Blasi, *supra* note 28, at 284.

interference in stories concerning a bank failure, court corruption investigations in Chicago, draft dodgers in Canada, activities within federal prisons, Black Panther demonstrations at Yale University, anti-war demonstrations in Washington, and drug-related activities.<sup>49</sup> These might be the types of sources the Supreme Court had in mind when it noted that some sources have legitimate reasons to fear disclosure; or the type of information which the Court thought the public had an interest in receiving.<sup>50</sup> Although exact measurements of a chilling effect are impossible, courts can consider the probability of future deterrence by a closer examination of the type of source and type of information supplied.<sup>51</sup>

e. *Historical traditions:* journalists have a long tradition of protecting their confidential sources, even when a refusal to reveal a source's identity has kept them in jail.<sup>52</sup> Even Benjamin Franklin was questioned about confidential sources for an article which offended certain politicians.<sup>53</sup> Journalists zealously defend this ability to protect sources who request confidentiality as an integral part of a free press.<sup>54</sup> A source may

49. *Id.*

50. See *infra* text accompanying notes 87-88.

51. See *infra* text accompanying notes 93-98.

52. In 1734, New York journalist John Peter Zenger was jailed for allegedly libeling a colonial governor. Zenger declined to reveal the sources of his information. After nine months in jail, Zenger was tried and acquitted. M. VAN GERPEN, *PRIVILEGED COMMUNICATION AND THE PRESS* 5-6 (1979). In 1848, the United States Senate held a reporter from the *New York Herald* in contempt and arrested him after he refused to reveal his source for a copy of a secret treaty proposing to end the Mexican-American War. The journalist remained in jail, failing to secure a writ of habeas corpus. *Ex parte Nugent*, 18 F.Cas. 471 (D.C. Cir. 1848) (No. 10,375). In this century, the late William Farr, a reporter for the *Los Angeles Herald-Examiner*, spent 46 days in jail because he refused to reveal the source for a copy of a deposition in the Charles Manson murder trial. *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972).

53. See Blasi, *supra* note 28, at 229 n.1.

One of the Pieces in our News-Paper, on some political Point which I have now forgotten, gave Offence to the Assembly. He was taken up, censur'd and imprison'd for a month by the Speaker's Warrant, I suppose because he would not discover his Author. I too was taken up and examin'd before the Council; but tho' I did not give them any Satisfaction, they contend themselves with admonishing me, and dismiss'd me; considering me perhaps as an Apprentice who was bound to keep his Master's Secret.

*Id.* (quoting THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 69 (YALE UNIV. PRESS 1964)).

54. Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news-gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.

*Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); see also Blasi, *supra* note 28, at 284.

be unwilling to supply information on certain matters without an assurance of confidentiality, especially if the source is vulnerable to retaliation.<sup>55</sup> Even in the United States, vulnerable sources such as employees who provide information about government corruption,<sup>56</sup> persons who supply information about organized crime, or those who investigate unethical activities can be subject to harm.<sup>57</sup>

Forced disclosure is likely to discourage sources who particularly need confidentiality from imparting vital information to the public via the press.<sup>58</sup> Few can forget the importance of the confidential source "Deep Throat" to the *Washington Post's* investigation of the Watergate cover-up.<sup>59</sup> The threat to the individual sources and its potential effect on the public was especially notable when the identities of sources with information about the Watergate burglary were requested in *Democratic National Committee v. McCord*.<sup>60</sup> The court denied disclosure, saying that it "cannot blind itself to the possible 'chilling effect' the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public."<sup>61</sup>

---

55. "Such informants . . . may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarrassment." *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972).

56. "The news media rely upon confidential sources in the preparation of many stories, particularly those involving government or large organizations." *Sierra Life Ins. Co v. Magic Valley Newspapers, Inc.*, 4 MEDIA L. REP. 1689, 1773 (Idaho Dist. Ct. 1978), *rev'd*, 6 MEDIA L. REP. 1769 (Idaho 1980). The president and general manager of the Associated Press estimated that one-third of the important stories from Washington would not surface without anonymous sources. Comment, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 UCLA L. REV. 160, 174 n.74 (1976).

57. One reporter was murdered while investigating Arizona land fraud and the influence of organized crime in Phoenix. Jennings, *Quill*, July-Aug. 1976, at 13. A group of investigative reporters and editors later continued the investigation of organized crime and their material used confidential sources extensively. This information led to further investigation by a grand jury. Bondarook, *Quill*, Mar. 1977, at 13.

58. Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis. . . . The deterrent effect such disclosure is likely to have upon future undercover investigative reporting . . . threatens freedom of the press and the public's need to be informed.

*Baker v. F. & F. Investment*, 470 F.2d 778, 782 (2d Cir.), *cert. denied*, 411 U.S. 996 (1972).

59. C. BERNSTEIN & B. WOODWARD, *ALL THE PRESIDENT'S MEN* 73-75 (1974).

60. 356 F. Supp. 1394 (D.D.C. 1973).

61. *Id.* at 1397; *see also* *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 508 (E.D.Va. 1976) (radio station allowed to withhold identities of confidential sources who informed station of medical hazards at a local chemical manufacturing plant because disclosure would deter those sources and others from furnishing similar information in the future).

### 3. *Current Court Responses to Refusals to Disclose Confidential Source Identities*

Libel plaintiffs and journalists have competing interests at stake in some requests for disclosure. A variety of sanctions have been used as alternatives to jail sentences when journalists have refused to obey a court order to identify sources. In half the states and at the federal level there is no "shield law" to protect a reporter who declines to comply with a disclosure order. But half the states do protect a reporter from being adjudged in contempt of court for refusal to disclose confidential sources.<sup>62</sup> However, a shield law does not give complete immunity. Journalists who have refused to disclose sources in libel suits have been subjected to other sanctions, including the entry of judgment for the other party, a prejudicial jury instruction, or the withholding of evidence obtained from the source.<sup>63</sup> Thus, noncompliance with a request to reveal confidential sources sometimes can lead to liability even though the plaintiff has not met the burden of proving actual malice.

a. *Default judgment:* a court may order a default judgment based solely on the defendant's refusal to disclose. In one instance, a \$1.9 million verdict was ordered after a newspaper refused to identify sources used in preparing articles on a locally based insurance company which was under investigation in several states.<sup>64</sup> Although the award was eventually reversed, the media defendant still had to bear the expense of defending the suit and appealing under the threat of a huge award.

A court may threaten to enter judgment in plaintiff's favor if a defendant does not agree to reveal confidential information.<sup>65</sup> This alternative is problematic because it may be excessive punishment for a

---

62. The Third Circuit recently upheld the constitutionality of Pennsylvania's shield law in *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 780 F.2d 340 (3d Cir. 1985). See, e.g., CAL. EVID. CODE § 1070 (West Supp. 1985) ("A publisher, editor, reporter, or other person connected with or employed upon a newspaper . . . cannot be adjudged in contempt . . . for refusing to disclose . . . the source of any information . . . or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public."). For a listing of similar state statutes, see *Communications Law*, 2 PRACTICING LAW INST., 700, 700-40 (1982); see also Comment, *The Newsman's Qualified Privilege: An Analytical Approach*, 16 CAL. W. L. REV. 331, 368 n.284 (1980).

63. See, e.g., CAL. CIV. PROC. CODE 2034 (West Supp. 1985).

64. *Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 4 MEDIA L. REP. 1689, 1692 (Idaho Dist. Ct. 1978), *rev'd*, 101 Idaho 795, 623 P.2d 103 (1980).

65. See, e.g., *Rancho La Costa, Indus., v. Penthouse Int'l, Ltd.*, 6 MEDIA L. REP. 1540, 1541 (Cal. Super. Ct. 1980).

journalist's good faith attempt to exercise a first amendment right.<sup>66</sup> The default judgment remedy may also violate due process because other defenses which the media defendant might have are foreclosed because of the refusal to reveal sources.<sup>67</sup>

b. *Prejudicial jury instructions*: a court may also issue a prejudicial jury instruction in response to a defendant's refusal to reveal a confidential source.<sup>68</sup> Several courts have told juries that a presumption arises that no source exists when news media defendants refuse to reveal a source.<sup>69</sup> The jury can then infer that a defendant published with actual malice because a report is baseless.<sup>70</sup> Although this solution is preferable to the default judgment remedy because it allows a media defendant to assert other privileges and defenses, it too is problematic. The presumption that no source exists simply may be untrue, undermining any interest in accuracy that the parties and the public might have in ordering disclosure. This remedy also gives the judge full discretion, rather than letting the jury decide the veracity or reliability of a claim of confidentiality.<sup>71</sup> Another option is to put the reporter on the stand to testify *about* the source and let the jury decide the veracity of the journalist and the source.

c. *Exclusion of tainted evidence*: a court can preclude introduction of the evidence gathered from the source when a journalist refuses to reveal a source's identity. Although a reporter can testify that information was gathered from the source and describe the surrounding circumstances, the reporter cannot introduce evidence obtained from the source for benefit of the defense. The jury then assesses the credibility of the reporter and the surrounding circumstances.<sup>72</sup> One commentator views this method as most desirable because it allows a journalist to testify about a source without using evidence a plaintiff cannot evaluate. It also leaves the credibility decision for the actual malice determination with the jury.<sup>73</sup> However, the line between testimony about the source and

---

66. See Kirtley, *Discovery in Libel Cases Involving Confidential Sources and Non-Confidential Information*, 90 DICK. L. REV. 641, 663 (1986).

67. *Id.* at 663 & n.205.

68. *Rancho La Costa*, 6 MEDIA L. REP. at 1541.

69. *DeRobert v. Gannett Co., Inc.*, 507 F. Supp. 880, 884 (D. Hawaii 1981); *Downing v. Monitor Publishing Co. Inc.*, 120 N.H. 383, 386-87, 415 A.2d at 683, 686 (N.H. 1980).

70. *Downing*, 120 N.H. at 386, 415 A.2d at 685.

71. See Kirtley, *supra* note 66, at 664; see also *infra* text accompanying notes 176-78.

72. Kirtley, *supra* note 66, at 664-65 (citing *Greenberg v. CBS*, 69 A.D.2d 693, 708-09, 419 N.Y.S.2d 988, 997 (App. Div. 2d Dept. 1979)).

73. See *id.*

surrounding circumstances, and the identity of the source is sometimes unclear. Because of a desire to protect a source, a journalist may not be able to give complete details to a jury. For example, a libel plaintiff who is seeking the identity of a source for retaliatory purposes may be able to learn the identity from the journalist's testimony about the circumstances. A source can sometimes easily be traced if few have access to sensitive information.<sup>74</sup>

Since sanctions which can drastically alter the outcome of a libel case rest on the issue of confidential source protection, it is important to establish a well defined test which reflects an appropriate balance of the competing interests. Most federal courts state that a qualified privilege to withhold the identity of confidential sources exists, but the scope of protection afforded is extremely unclear. The next section summarizes the development of the current federal privilege.

#### B. THE DEVELOPMENT OF THE QUALIFIED FEDERAL PRIVILEGE

The Supreme Court squarely faced the issue of a press privilege against disclosure of confidential sources of information in *Branzburg v. Hayes*.<sup>75</sup> A reporter who had witnessed activities which were the subject of a grand jury investigation into criminal activities was subpoenaed to testify. The Court denied an unconditional privilege for newsmen to refuse to testify, stressing that all citizens have a duty to appear before grand juries to uphold the strong public interest in law enforcement. The Court also noted that there was no common law privilege to refuse to answer grand jury questions.<sup>76</sup>

The majority agreed in *Branzburg*, however, that a journalist's cultivation of confidential sources is *somewhat* protected by the first amendment as a form of newsgathering.<sup>77</sup> The Court left room for a qualified privilege and suggested that the amount of protection to be accorded sources would vary with the situation. In this case, the grand jury subpoenas were ruled legitimate, and society's fundamental interest in law

---

74. See Blasi, *supra* note 28, at 277-78.

75. 408 U.S. 665 (1972). The Supreme Court has declined several cases concerning confidential sources since *Branzburg*. *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. denied*, 417 U.S. 938 (1974); *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, *cert. denied*, 434 U.S. 930 (1977); *Brown v. Traub*, 5 MEDIA L. REP. 2041 (N.M.), *cert. denied*, 444 U.S. 979 (1979); *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d 1258 (Ct. App.), *cert. denied*, 436 U.S. 906 (1977).

76. See *Branzburg*, 408 U.S. at 684.

77. *Id.* at 681. This has been interpreted further as a right to gather information. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

enforcement overrode the first amendment interests involved.<sup>78</sup> The Court reasoned that a grand jury's ability to summon witnesses is essential,<sup>79</sup> and information about crime does not deserve protection in a context where societal interests in the unobstructed functions of law enforcement and the assignment of criminal justice prevail.<sup>80</sup>

The Court also provided guidelines to distinguish source disclosure in the grand jury context from source disclosure in other contexts. The Court in *Branzburg* made three assumptions about the chilling of sources and the disruption of news flow which disclosure would have in the grand jury context. First, the Court assumed that the sources had valuable information about criminal activities which would aid the grand jury in its law enforcement function. Thus, supplying the information would be a valuable service to the public. Second, the Court asserted that the sources would be disclosing this important information to friendly parties only, such as law enforcement officers, who could certainly protect the sources from any feared retaliation. The sources were asked to trust public officials who were concerned with the informant's welfare.<sup>81</sup> Third, the Court analyzed the deterrence of sources and concluded that the *Branzburg* defendants did not sufficiently prove that disclosure to a grand jury would deter other sources from giving such information "always or very often."<sup>82</sup>

The Court's first concern was the public interest in law enforcement, which, in this context, coincides with a public interest in disclosure of the information. The Court narrowly described the type of source which the journalist was protecting in the grand jury context. The Court envisioned the sources as desiring anonymity either to unjustifiably escape prosecution for their own connection with criminal activities<sup>83</sup> or to avoid being witnesses at a criminal trial or grand jury investigation.<sup>84</sup> Neither reason qualifies a source as having a justifiable fear of retaliation

---

78. *Branzburg*, 408 U.S. at 690.

79. The Court expressed concern that if a conditional privilege not to testify were established, a large number of people could claim exemption from the obligation to give testimony and the grand jury system would be threatened while claims were adjudicated. *Id.* at 705. Thus, a governmental function mandated by the Constitution would be disrupted, affecting the government's law enforcement duties. *Id.* at 687-88.

80. *Id.* at 696.

81. "We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his." *Id.* at 695.

82. *Id.*

83. *Id.* at 691.

84. *Id.* at 693.

because of disclosure to the grand jury. The Court reasoned that if the informants' identities were known, they would be required to respond to a subpoena.<sup>85</sup> The Court feared that the criminal justice system might be greatly hindered by numerous claims of confidentiality, and that the viability of the grand jury system would be threatened.<sup>86</sup>

The Court in *Branzburg*, however, acknowledged that some sources are particularly sensitive to the threat of exposure.<sup>87</sup> Here the Court considered that an informant might justifiably fear that disclosure would threaten "job security, personal safety or peace of mind."<sup>88</sup> An informant with news about official misconduct, criminal activities, or human rights abuses, for example, may especially require confidentiality. The Court envisioned that such sources would be protected when their identities were revealed to a grand jury. The Court found that the traditional responsibility of the law enforcement officers to protect informants mitigated the chilling effect of disclosure orders in the grand jury context.<sup>89</sup>

In a libel suit, however, a source may have a more justified fear of retribution from disclosure of his or her identity than in disclosure to a grand jury.<sup>90</sup> Many requests for disclosure in libel suits are for retaliatory purposes<sup>91</sup> and requests also can be used for harassment purposes in other contexts. Some libel plaintiffs bring a suit to discover the identity of a source rather than to seek compensation for reputational damage.<sup>92</sup> For example, when a powerful official from another country demands disclosure in a libel suit, the defendant's sources are not necessarily afforded the due process protection American citizens enjoy, nor the law enforcement protection for sources which the Court described in *Branzburg*. Foreign confidential sources may be subject to harassment, physical harm, or criminal prosecution as a result of information disclosed through a libel suit discovery order. A detailed analysis of the special factors to consider in the international news context will follow in Part II. For now it is enough to note the narrow type of source the

---

85. *Id.* at 695.

86. *Id.* at 705.

87. *Id.* at 693.

88. *Id.* at 695.

89. *Id.* at 695.

90. *Miller v. Transamerican Press*, 621 F.2d 721, 725 (5th Cir.), *modified*, 628 F.2d 932 (5th Cir. 1980).

91. See R. SMOLLA, *supra* note 5, at 240 (noting the "grudge match overtone" of current libel suits); Note, *Source Protection in Libel Suits After Herbert v. Lando*, 1981 COL. L. REV. 338, 354 n.108 (citing, *Name that Source—or Else*, COLUM. JOURNALISM REV. 16, 19, (1980) ("It is not uncommon for the subjects of controversial articles or broadcasts to file libel suits for the sole purpose of uncovering the source.")).

92. *Kirtley*, *supra* note 66, at 644.

journalist was protecting at the expense of the public interest in law enforcement in *Branzburg*, and the protection the Court envisioned for such a source when it ordered disclosure.

In addition to considering the danger to the particular sources, the Court in *Branzburg* also undertook an analysis of the deterrence the disclosure order would have on future sources. The Court had difficulty in measuring the chilling effect that disclosure of a reporter's sources to a grand jury would have on other news sources. The Court found nothing to indicate that a *large* percentage of *all* confidential news sources would be affected by requiring those who had provided information about criminal activity to a journalist to testify before a grand jury.<sup>93</sup> Yet, in *New York Times Co. v. Sullivan*,<sup>94</sup> the Court did not require any empirical proof that the state libel law resulted in actual deterrence of the press or sources. The *Sullivan* Court found the fear of costly litigation and potential damage awards sufficient to produce a chilling effect on first amendment rights if liability was imposed for false statements or statements that a defendant could not prove true.<sup>95</sup> Courts also have been willing to assume a chilling effect on first amendment rights in other areas.<sup>96</sup> But the Court in *Branzburg* seemed to require some evidence of a chilling effect in order to protect the identities of confidential sources in the grand jury context.

Although the Court recognized that some sources would be inhibited about giving information to journalists because of the threat of compelled disclosure, it found only an "incidental burdening" in the grand jury context.<sup>97</sup> The grand jury disclosure requirement would not "threaten the vast bulk of confidential relationships between reporters and their sources."<sup>98</sup> Arguably, identification of certain types of sources in libel suits constitutes more of a threat to the flow of information than the Court imagined here. For example, it is certainly probable that a large percentage of foreign sources who request confidentiality are unlikely to speak to journalists if their identities will later be revealed to an official in their own country through a libel suit.

It is evident that analyses of the issues in other contexts will differ from the assessment of the concerns which the Court voiced in

---

93. *Branzburg*, 408 U.S. at 691.

94. 376 U.S. 254 (1964).

95. Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 853-56 (1974).

96. *Id.* at 853-84.

97. *Branzburg*, 408 U.S. at 682.

98. *Id.* at 691.

*Branzburg*. This Note focuses on the international news context as an example, but thorough analyses need to be undertaken by courts in other contexts where source disclosure requests arise. Before undertaking a detailed contextual analysis, however, it will be helpful to see how subsequent courts have implemented the method of analysis laid out in *Branzburg* when considering the issue of confidential source disclosure in civil libel suits.

### C. THE APPLICATION OF THE QUALIFIED PRIVILEGE

#### 1. *The Branzburg Balancing Test as Applied To Newsgathering and Newsprocessing*

The Court in *Branzburg* narrowed the issue by emphasizing the strong law enforcement interest at stake in the grand jury context.<sup>99</sup> Justice Powell, who concurred with the 5-4 majority, stressed that: “[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.”<sup>100</sup> As later courts have noted, this leaves room for a qualified privilege in civil cases where a strong public interest in the protection of confidential sources or information overrides any duty to disclose.

If . . . instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists’ confidential news sources will often be weightier than the private interest in compelled disclosure.<sup>101</sup>

Thus, most courts have reasoned that Powell’s position is the “minimum common denominator”<sup>102</sup> of the *Branzburg* majority, and have established that a qualified federal privilege against disclosure exists, using a balancing test to evaluate the claim of a privilege in each fact situation.<sup>103</sup>

---

99. *Id.* at 682. (“The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime.”).

100. *Id.* at 709 (Powell, J. concurring); see also *id.* at 681 (“without some protection for seeking out the news, freedom of the press could be eviscerated.”).

101. *Baker v. F & F Inv.*, 470 F.2d 778, 785 (2d Cir.), cert. denied, 411 U.S. 996 (1972) (discussing the concurring opinion of Justice Powell in *Branzburg*, 408 U.S. at 179-80).

102. *Gilbert v. Allied Chem. Corp.*, 411 F.Supp. 505, 510 (E.D. Va. 1976).

103. See, e.g., *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594 (1st Cir. 1980); *Baker*, 470 F.2d at 784-85; *Loadholtz v. Fields*, 389 F.Supp. 1299, 1301 (M.D. Fla. 1975); *Mitchell v. Super. Ct.* 37 Cal.3d 268, 277, 690 P.2d 625, 630, 208 Cal. Rptr. 152, 157 (1984).

To determine if disclosure is mandated, a court weighs the interest in disclosure against the first amendment interests at stake. Courts now rely on a three-pronged test to evaluate disclosure requests: "(1) is the information [sought] relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?"<sup>104</sup>

The uncertainty surrounding the qualified privilege was compounded when the Supreme Court considered another case involving disclosure of journalists' sources, *Herbert v. Lando*.<sup>105</sup> A retired army officer sued CBS, Inc., *Atlantic Monthly* magazine, producer Barry Lando, and correspondent Mike Wallace for libel over a "60 Minutes" television program and magazine article which the officer claimed labeled him a liar.<sup>106</sup> As a public figure, he had to prove actual malice to recover for the alleged defamation. To prove this, Herbert maintained that he needed to know the reporter's thoughts and conversations in preparing the program and article to prove the actual malice element.

The Court held that the defendants must disclose this information about the editorial process, but did not extend the holding to require disclosure of confidential sources.<sup>107</sup>

To maintain the *Sullivan* standard, the Court in *Herbert* found that such information, particularly journalists' conclusions about the veracity of their source material, can be of substantial importance to the libel plaintiff and is logically interwoven with the actual malice standard.<sup>108</sup> The Court was reluctant to create a new evidentiary privilege which would allow a journalist to erect an "impenetrable barrier" to a plaintiff's ability to prove actual malice with direct state-of-mind evidence.<sup>109</sup>

---

104. *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir.), modified, 629 F.2d 932 (5th Cir. 1980) (referring to *Garland v. Torre*, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958)).

105. 441 U.S. 153 (1979).

106. *Id.* at 156.

107. The issue was: "What effect should be given to the First Amendment protection of the press with respect to its exercise of editorial judgment in pre-trial discovery in a libel case governed by *New York Times Co. v. Sullivan*?" *Id.* at 158 n.3. The second circuit opinion which the Supreme Court overruled had held that the journalist's thoughts and conversations were protected pre-publication activities, and an inquiry into those would violate the first amendment and have a chilling effect on the media. See *Herbert v. Lando*, 568 F.2d 974, 984 (2d Cir. 1977), rev'd, 441 U.S. 153 (1979).

108. *Herbert*, 441 U.S. at 169-70.

109. *Id.* at 170. This has been interpreted by other courts to mean that denial of the information requested by the plaintiff in *Herbert* would impose an additional editorial privilege which would upset the *Sullivan* balance and make it nearly impossible for a plaintiff to prove actual malice. See, e.g., *Mitchell v. Superior Court*, 37 Cal. 3d 268, 278-79, 690 P.2d 625, 631, 208 Cal. Rptr. 152, 158 (1984).

The Court in *Herbert* allowed inquiries into a journalist's mental state so that a libel plaintiff could meet the actual malice standard of proof. The Court reasoned that these inquiries would not prohibit frank exchanges or chill the journalist's first amendment rights because the inquiries simply deterred error and suppressed false information.<sup>110</sup> The Court in *Herbert* deemed it a minor imposition to require responsible journalists to take precautions in evaluating a story so that disclosure of their own thoughts and conversations would not lead to liability. However, it is *not* within the journalist's control to mitigate the chilling effect which the threat of disclosure has on sources. It is more reasonable to impose liability under the *Sullivan* standard through *Herbert* inquiries (newsprocessing) than to limit journalists' *newsgathering* abilities by imposing legal rules which might deter the amount of information sources are willing to give journalists. If we believe the truth will emerge from robust debate, it is not in the public interest to inhibit newsgathering. It is in the *newsprocessing*, the interpretation and editing of facts, that journalists need to be careful to assure accuracy and lack of bias.

Further, libel plaintiffs have a much more legitimate interest in the direct state-of-mind evidence which *Herbert* type inquiries can provide than in the circumstantial evidence of actual malice which disclosure of the identity of a source might offer.<sup>111</sup> Confidential sources often only provide the tips that begin an investigation; their identities will not be central to proving that the defendant acted with actual malice.<sup>112</sup> Plaintiffs often have access to other types of state-of-mind proof and are not prejudiced by withholding of sources.<sup>113</sup> The journalist's thoughts and conversations are more likely to be material in proving actual malice,<sup>114</sup> and have been accepted by courts as direct state-of-mind evidence.<sup>115</sup>

Although most courts recognize that some privilege now exists for confidential sources, some do not recognize *any* privilege for journalists to withhold confidential sources or information in libel suits after

---

110. *Herbert*, 441 U.S. at 172-74.

111. Note, *supra* note 91, at 359-62.

112. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 599 (1st Cir. 1980).

113. See *supra* text accompanying notes 15-22; see also *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) (holding that disclosure of a confidential source may be compelled only if there is no other means to prove malice); Note, *supra* note 91, at 359-60.

114. *Herbert*, 441 U.S. at 170; cf. *Rancho La Costa, Inc. v. Penthouse Int'l*, 6 MEDIA L. REP. 1540 (Cal. Super. Ct. 1980).

115. *Herbert*, 441 U.S. at 160 n.6, 165 n.15.

*Branzburg* and *Herbert*.<sup>116</sup> Some courts have interpreted *Herbert* as negating any constitutional privilege that might have existed after *Branzburg*.<sup>117</sup> These courts, however, have misinterpreted *Herbert*, have failed to distinguish between newsprocessing and newsgathering, and have failed to properly evaluate the contribution of source identity to the actual malice determination.<sup>118</sup> It is important to distinguish *Herbert* before determining the appropriate scope of the qualified privilege.

The confusion over *Herbert* has led some courts to conclude that discovery of sources in libel suits should be regarded as normal civil discovery requests,<sup>119</sup> thus giving improper weight to the first amendment interests by disregarding potential chilling effects which disclosure orders might engender. This problem is compounded by the trend of expanding discovery,<sup>120</sup> particularly noticeable during the last two decades because of the changes in libel law.<sup>121</sup> Some courts have reacted to the changes in libel law with a bias against the institutional power of the media and attacks on the scope of first amendment freedoms for journalists.<sup>122</sup>

More highly publicized libel suits in recent years have exhibited the anti-media biases of litigants, jurors, and courts.<sup>123</sup> One commentator notes that a new type of libel suit has developed since *Herbert*, which is designed to harass and intimidate the media rather than seek compensation for reputational damage.<sup>124</sup> Another commentator suggests that suits like the *Sharon* case are not evidence of a defect in libel law (that it is too favorable to journalists) "but that a trial's publicity and prospect of enormous damages make it too tempting for plaintiffs to try to take history to court."<sup>125</sup> Such litigation is often an "ideological weapon" for political groups more concerned with issues than individual claims.<sup>126</sup>

---

116. See, e.g., *Dow Jones & Co. v. Superior Court*, 364 Mass. 317, 320, 303 N.E. 2d 847 (1973); *Dalitz v. Penthouse Int'l*, 168 Cal. App. 3d 468, 474-75, 214 Cal. Rptr. 254, 258 (1985).

117. See Note, *supra* note 91, at 357 n.137.

118. See Kirtley, *supra* note 66, at 656.

119. *Rancho La Costa Inc. v. Penthouse Int'l*, 6 MEDIA L. REP. 1249, 1250 (Cal. Super. Ct. 1980).

120. *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964).

121. *DeRobert v. Gannett Co.*, 507 F. Supp 880, 882 (D. Hawaii 1981).

122. See, e.g., *Miller v. Transamerican Press, Inc.* 621 F.2d 721, 725 (5th Cir. 1980).

123. See, e.g., R. SMOLLA, *supra* note 5, at 23, 51, 62; see generally Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983) (explaining recent changes in defamation law and the resulting effects on attitudes toward American mass media).

124. Kirtley, *supra* note 66, at 643.

125. Dworkin, *supra* note 6, at 28, col. 4.

126. R. SMOLLA, *supra* note 5, at 246 ("Conservative public interest groups have become vendors in the emerging libel industry.").

Plaintiffs often threaten suits without regard to the truth or falsity of a particular story in order to discourage a publisher or broadcaster from making a story public. Some smaller news organizations have been financially harmed by libel claims<sup>127</sup> and even national television networks may be influenced by threats of libel suits before publishing.<sup>128</sup>

Courts have denounced "fishing expeditions" which seek disclosure of confidential sources in overbroad discovery requests. "[D]iscovery which seeks disclosure of confidential sources, and information supplied by such sources, is not ordinary discovery. Judicial concern is not limited to cases of harassment, embarrassment or abusive tactics; even a limited narrowly drawn request may impinge upon First Amendment considerations."<sup>129</sup> However, courts have sometimes disregarded those interests in applying the qualified privilege.

## 2. *Conflicts in Standards of Proof in the Balancing Test for a Qualified Privilege*

Courts have employed a variety of standards as the balancing test in the civil libel context. Under the first standard applied, there is no privilege to keep the identity of a source confidential if a libel plaintiff shows that a genuine question of fact exists as to the truth of a statement.<sup>130</sup> Here, the plaintiff only has to make a minimal factual showing and needs no proof that the information is necessary to prove actual malice before a court orders disclosure. One court using this standard reasoned that the press has enough protection under the *Sullivan* standard, and any additional protection in the form of a stronger privilege would be too burdensome for libel plaintiffs.<sup>131</sup>

---

127. Kirtley, *supra* note 66, at 644 n.26; *see also* Green v. Alton Telegraph Co., 107 Ill. App. 3d 755, 438 N.E.2d 203 (1982) (a small town telegraph company appealed from a \$9.2 million dollar libel judgment which forced the company to file for bankruptcy).

128. Kirtley, *supra* note 66, at 643 n.21. Kirtley discusses an incident in which then Nevada Senator Paul Laxalt filed a \$250 million suit against a newspaper because of a story linking him to organized crime. His attorneys also wrote letters to ABC and CBS television networks, which were planning broadcasts on the story. Neither broadcast ever aired, perhaps because of the letters. This is not surprising with the cost to defend the *Sharon* suit, *supra* notes 5-8, estimated at between five to seven million dollars. Kirtley *supra* note 66, at 643 n.23 (citing Baer, *The Am. Law.*, Nov. 1985, at 69). Smolla suggests such libel suits impose heavy societal costs in time, money, judicial resources and the attendant spectacle. R. SMOLLA, *supra* note 5, at 98.

129. Mitchell v. Superior Court, 37 Cal.3d 268, 600 P.2d 625, 208 Cal. Rptr. 152 (1984); *see also* Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977) (compulsory disclosure in the course of a "fishing expedition" held to be precluded by the first amendment).

130. *See* Kirtley, *supra* note 66, at 656-57 (citing Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); Sierra Life Ins. v. Magic Valley Newspapers, 101 Idaho 795, 623 P.2d 103 (1980); Downing v. Monitor Publishing, 120 N.H. 383, 415 A.2d 683 (1980)).

131. *Downing*, 120 N.H. at 385-87, 415 A.2d at 685-86.

Another standard used by courts is one which emphasizes the second prong of the balancing test:<sup>132</sup> Does the information sought go to the "heart" of the claim? If a libel plaintiff's case is prejudiced by the journalist's refusal to disclose the identity of a source, disclosure can be ordered.<sup>133</sup> Although this standard protects confidential sources whose identities are not central to a plaintiff's case, it is primarily concerned with the merits of a plaintiff's claim. It is very similar to the standard used in *Garland v. Torre*,<sup>134</sup> when a journalist first argued that the first amendment protects source identity, long before the Supreme Court adopted the *Sullivan* standard and considered the issue of confidential source disclosure in *Branzburg*. In *Garland*, actress Judy Garland sued for libel over a column that claimed she was overweight and the court ordered disclosure of the columnist's sources. The same circuit later clarified the heart of the matter standard, providing more protection for journalists in the civil libel context in light of *Sullivan* and *Branzburg*.<sup>135</sup> Thus, the simple heart of the matter standard overemphasizes the private interest in disclosure by equating it with the public interest in protection of sources. In addition, the standard fails to acknowledge that the public interest may override the private interest in disclosure in some situations.<sup>136</sup>

Most courts use a three-part balancing test, weighing the relevance of the request, less restrictive alternatives, and the plaintiff's need for the information to prove falsity and actual malice.<sup>137</sup> When assessing relevance, courts often say that a libel plaintiff must demonstrate falsity with substantial evidence, thus requiring more than the simple relevance required under the first standard discussed above.<sup>138</sup> The second part of the test involves an examination of reasonable alternatives before ordering disclosure.<sup>139</sup> Courts use the third prong to determine if knowledge of

---

132. See *supra* note 104 and accompanying text.

133. See Kirtley, *supra* note 66, at 657-58 (citing, inter alia, *Mize v. McGraw Hill*, 82 F.R.D. 475, 477 (S.D. Tex. 1979); *Liberty Lobby, Inc. v. Anderson*, 96 F.R.D. 10 (D.D.C. 1982)).

134. *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir.), modified, 628 F.2d 932 (5th Cir. 1980) (citing *Garland v. Torre*, 259 F.2d 545 (2nd Cir.), cert. denied, 358 U.S. 910 (1958)).

135. See *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977) (discussing *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973)).

136. See Kirtley, *supra* note 66, at 658.

137. See, e.g., *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983); *Miller*, 621 F.2d at 721; *Seinlich v. Herald Co.*, No. 84-281C(5) (E.D. Mo. 1985); *Continental Cablevision, Inc. v. Storer Broadcasting Co.*, 583 F. Supp. 427 (E.D. Mo. 1984); *Dowd v. Calabrese*, 577 F. Supp. 238 (D.D.C. 1983); *Gadsden County Times, Inc. v. Horne*, 426 So.2d 1234 (Fla. Dist. Ct. App. 1983).

138. See, e.g., *Miller*, 621 F.2d at 726.

139. For more information about this part of the test, see *infra* text accompanying notes 212-13.

the source's identity is necessary to meet the *Sullivan* standard. The identity of the source should be withheld unless the plaintiff's claim would be precluded because of the withholding.<sup>140</sup> However, this test is still problematic because it fails to consider situations in which the public interest in nondisclosure outweighs the private interest in disclosure.<sup>141</sup> Once plaintiff has met a threshold showing in a libel case, there is no assessment of the public interest and the private interest at stake in a particular context, such as the Supreme Court undertook in *Branzburg*. Thus, courts are failing to properly evaluate the first amendment interests implicated in the source disclosure controversy.

In the leading case defining the qualified privilege, *Carey v. Hume*,<sup>142</sup> a federal district court balanced the need for the testimony in question and the claim of the reporter that the public's right to know would be impaired by disclosure.<sup>143</sup> A journalist was ordered to reveal the identities of witnesses to an alleged theft by the General Counsel of the United Mine Workers' Union's (UMW) when these witnesses were the only source the reporter had for the story. Employing the three-pronged test, the court said disclosure was required because the information sought was not frivolous. The court in *Carey* narrowly defined a frivolous claim as the type in *Cervantes v. Times, Inc.*<sup>144</sup> Subsequent courts can gain little guidance from the *Carey* court's use of the *Cervantes* example because the suit was so blatantly frivolous—the mayor was very unlikely to be able to establish the falsity of the *Life* article. At the other extreme, other courts have suggested that a libel plaintiff should clearly establish the falsity of the publication before a request for source disclosure is considered.<sup>145</sup>

The *Carey* court discussed the second part of the balancing test, exhaustion of alternative means of discovering the information, and concluded that it was unreasonable to ask the plaintiffs to interview all the UMW employees to determine who had provided the information to the

---

140. Kirtley, *supra* note 66, at 660-61.

141. *See id.* at 661; *see also infra* text accompanying notes 214-18.

142. 492 F.2d 631 (D.D.C. 1974).

143. *Id.* at 636.

144. 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). Here, the plaintiff mayor took exception to four of 87 paragraphs in a *Life* magazine article which linked him to organized crime. *Id.* at 991. The truth of the other 83 paragraphs was "either admitted or not expressly denied." *Carey*, 492 F.2d at 637.

145. *See infra* Part III.

journalist.<sup>146</sup> Since the source-employees were eyewitnesses to the alleged theft and were the only source for the story, no other alternative seemed feasible. The court hardly discussed the third element of the balancing test, the compelling interest in disclosure which merited the revelation of the employee-witnesses' identities to the union's general counsel. The court equated the public's interest in accuracy in a libel suit with the public's strong interest in law enforcement identified in *Branzburg*.<sup>147</sup>

The *Carey* court failed to be as specific as the Court in *Branzburg* had been when analyzing the competing interests in the grand jury context. The *Carey* court acknowledged that differences exist in the interests involved but when it applied the traditional balancing test, it essentially equated the interests in accuracy in the libel context with the law enforcement interests in the grand jury context.<sup>148</sup> *Carey* exemplifies the way courts disregard the full first amendment analysis when the public interest in nondisclosure counterbalances the private interest in disclosure in a libel suit.<sup>149</sup>

In the grand jury proceedings, the journalist and the government were on the same side, rather than on opposing sides, as are parties in libel suits.<sup>150</sup> Further, the Court in *Branzburg* noted that the question of

---

146. *Carey*, 492 F.2d at 638-39 (unreasonable to require one plaintiff to interview all the UMW employees to discover the source); see also *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980). A high-ranking officer of the Teamsters union sued over a story which said he swindled money from a pension fund. The court held that a plaintiff in a libel suit can compel disclosure of the identity of a journalist's confidential source if knowing the informant's identity is the only way plaintiff can establish malice and show that the defendant's news story was false or that the journalist was reckless in relying on that source. See also Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L. J. 709, 739 (1975). Unfortunately, courts have applied the *Garland* test haphazardly, giving unsatisfactory guidelines as to what level of investigation is necessary before a libel plaintiff exhausts the alternative means of obtaining the requested information. In *Carey*, only one phone call was made to check the source's information before the story went to print. *Carey*, 492 F.2d at 638. The journalists in *Cervantes* had conducted months of research, with numerous people spending countless hours on the article. *Id.* at 637-38. It remains unclear what a court should do with a case somewhere between these two extremes. In *Dalitz v. Penthouse Int'l*, 168 Cal. App. 3d 478, 481, 214 Cal. Rptr. 254, 262 (1985), although the journalists furnished the court with a "voluminous mass of books, articles and newspaper clippings," the court still dismissed the journalists' ability to refute the claim for disclosure.

147. The *Carey* court limited its holding because of the limited record in the case. It could not say that no purpose was served by the disclosure order, i.e., that the plaintiff was so unlikely to meet the actual malice standard that disclosure served no purpose. *Carey*, 492 F.2d at 638.

148. *Id.* at 635-36.

149. A later court did attempt to distinguish the interests in the grand jury context from those involved in a civil libel suit. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir.), *modified*, 628 F.2d 932 (5th Cir. 1980).

150. *Miller*, 621 F.2d at 725.

a reporter's privilege in the grand jury context places two distinct *public* interest at odds—the interest in law enforcement and the interest in an unfettered flow of information.<sup>151</sup> A later court concluded that the policies supporting a privilege in libel cases is stronger than in *Branzburg* or *Herbert*.<sup>152</sup> In a libel case, there is merely the private interest in disclosure. There is no public interest at stake comparable to the importance of law enforcement in *Branzburg*. The government and the press in *Branzburg* were both attempting to ferret out wrongdoing, while a plaintiff and a media defendant have opposite interests during a libel case. The *Miller* court noted that “a defamed plaintiff might relish an opportunity to retaliate against the informant” through a source disclosure request.<sup>153</sup>

The *Carey* court found that the public interest in accuracy in civil litigation justified the disclosure. There was little assessment in *Carey* to compare the weight of the public interest in accuracy in libel suits with the public interest in law enforcement discussed at length in *Branzburg*.<sup>154</sup> There was no consideration of any danger to the source-employees or the deterrence of such reports in the future which might result from a disclosure order. Although the *Carey* court acknowledged that compelling disclosure could restrict the scope of legitimate newsgathering activity,<sup>155</sup> the court's inquiry focused on the plaintiff's heavy burden of proof after *Sullivan*. The court said that the plaintiff needed to know the identity of the confidential sources to prove they were not reliable or that the defendant misrepresented the sources or relied recklessly on the sources.<sup>156</sup>

Although the result reached in *Carey* is not clearly unreasonable because of the circumstances—the reporter was able to present little evidence of careful research to refute the charge of actual malice<sup>157</sup>—the case is troubling because of the anti-media bias evident in the concurring opinion. Questions of what evidence is necessary to establish actual malice are extremely difficult. Courts often mention the tension which the *Sullivan* standard imposes, providing protection to the media, but erecting a heavy burden of proof for the plaintiff. Courts have referred to

---

151. *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972).

152. *Miller*, 621 F.2d at 725.

153. *Id.*

154. The *Carey* court did note the strong prosecutorial interest in disclosure in the *Branzburg* context, but failed to justify the importance of accuracy in civil trials which similarly mandated the disclosure in the civil libel context. See *Carey v. Hume*, 492 F.2d 631, 632, 636 n.6 (D.D.C. 1974).

155. *Id.* at 639.

156. *Id.* at 637.

157. See *supra* note 143.

actual malice as a heavy, sometimes unfair, burden of proof for the plaintiff which makes discovery of sources critical.<sup>158</sup> This obscures the confidential source issue and leads to unnecessarily subjective balancing.

### 3. *The Effect of Anti-Media Bias in the Application of the Branzburg Balancing Test*

One of the dangers with vague criteria such as those used in the balancing test is the influence of subjective preferences. Dislike of the protection given defendants under the *Sullivan* standard is often evident in the application of the balancing test. The judge who wrote the concurring opinion in *Carey* admonished the media for taking advantage of what the judge considered broad new found freedoms afforded by *Sullivan*.<sup>159</sup> Combined with advances in technology and concentrated ownership of media outlets, the judge felt this gave great power to the press.<sup>160</sup> Ronald Dworkin, on the other hand, notes that the power of the press has increased, but has done so along with the growth of power of the government and other powerful institutions it is supposed to check.<sup>161</sup> The institutional press has been termed an "institutional counterweight to the presidency."<sup>162</sup> Some media critics fail to realize that the growing power of the press is also checked by increasing public skepticism of the press.<sup>163</sup>

The concurring judge in *Carey* viewed a privilege against disclosure as a shield of anonymity for the press.<sup>164</sup> He was concerned about the public's lack of protection against a powerful press, failing to realize that when journalists raise the first amendment defense, they are equating

---

158. See *Carey*, 492 F.2d at 634; see also *DeRoburt v. Gannett*, 507 F. Supp. 880, 884 (D. Hawaii 1981) ("The media defendant cannot have it both ways: he cannot enjoy the protection afforded by the heavy burden imposed upon the public official plaintiff by *Sullivan* and at the same time enjoy a privilege that prevents the plaintiff from obtaining the evidence necessary to carry that burden.").

159. *Carey*, 492 F.2d at 639-40 (MacKinnon, J., concurring); see also *id.* at 635 (discussion of whether *Sullivan*, in light of *Garland*, "so downgraded their [libel suit's] social importance that a plaintiff's interest in pressing such a claim can rarely, if ever, outweigh a newsman's interest in protecting his sources").

160. *Id.* These same sentiments are echoed in R. DWORKIN, *supra* note 10, at 376.

161. Dworkin, *supra* note 6, at 34, col. 4.

162. Interview with William Schneider, American Enterprise Institute, on the MacNeil/Lehrer News Hour (Feb. 11, 1987).

163. R. SMOLLA, *supra* note 5, at 9 (seventy percent of the public believes the institutional press is biased and only twenty percent had a great deal of confidence in the media).

164. Others voice similar concerns. See, R. Dworkin, *supra* note 6, at 27, col. 2 (discussing Adler's critical assessment of two recent libel trials in RECKLESS DISREGARD, *supra* note 7 ("Adler seems to question the actual malice standard, "which she believes grants the press almost a sovereign immunity from the consequences of its mistakes."); see also Dworkin, *supra* note 6, at 34, col. 3.

their interest with the public interest in a vigorous press and the unfettered flow of information in a free society.<sup>165</sup> Public interests are implicated when source disclosure requests by an individual in a libel action threaten to harm particular sources or deter sources from giving journalists information in the future.<sup>166</sup>

Some people oppose any privilege against disclosure of confidential sources by claiming that if journalists are allowed to rely less on confidential sources, they will only be more cautious, and it is healthy to encourage caution among journalists. They cite stories which journalists have attributed to non-existent confidential sources.<sup>167</sup> But it is uncertain that caution about using sources is a good thing to encourage. Confidential sources can be a means of correcting false or incomplete stories before they go to print, because sources are often used to confirm or guide journalists.<sup>168</sup> The aggressive competitiveness of the post-Watergate press is another rationale for curtailing confidential source use. But it is debatable whether the press had been aggressive enough as investigators. For example, the press failed to discover any of the facts surrounding the arms deals between the Reagan Administration and Iran until a foreign newsweekly published the story. This has been attributed, in part, to the lack of sources in Congress and the Administration's unwillingness to provide information. It is difficult to quantify the amount of caution and aggressiveness we want to encourage in journalists, but, as argued above, irresponsible journalism can be checked more effectively through evidentiary findings at the newsprocessing stage, rather than the newsgathering stage.<sup>169</sup>

Journalists have other incentives to be extremely hesitant before printing a story using confidential sources, and often censor material of their own accord. The formal rules and informal checks now present in newsrooms reflect this caution. The public does not trust stories attributed to anonymous sources and editors are thus cautious about their use.<sup>170</sup> Media outlets often require that a reporter reveal any confidential source to editors, and stories are often checked with an attorney if they

---

165. See, e.g., *Carey v. Hume*, 492 F.2d 631, 636, 639-40 (D.D.C. 1974).

166. See *supra* text accompanying note 101.

167. The fabrication of a confidential source by a *Washington Post* reporter surfaced only after the story based on the source won a Pulitzer prize. Journalists became concerned over ethical problems in response. See Friendly, *Paper's False Article is a Major Topic at a Convention of Newspaper Editors*, N.Y. Times, Apr. 23, 1981, at A16, col. 2.

168. See *supra* text accompanying notes 34-35.

169. See *supra* text accompanying notes 111-18.

170. See Blasi, *supra* note 28, at 244; see also *supra* text accompanying notes 40-41.

contain sensitive material. Editors are more likely to entrust the credibility of their paper to experienced reporters with well developed sources. Often journalists and sources engage in long-term relationships and a publication is thus able to assess the reliability of a source over time.<sup>171</sup> Journalists are also increasingly concerned with ethics and have developed codes dealing with the use of confidential sources.<sup>172</sup> Moreover, the Supreme Court has recognized that the threatening cost of defending libel suits also has a restraining effect on the press.<sup>173</sup> Even if statements are true, media defendants may not want to defend them in "expensive and protracted litigation brought by public figures financed by political groups seeking political goals."<sup>174</sup> With such restraints already in place, and in light of the press' role as a check on powerful government branches, courts need to be careful not to implement new rules for journalists in libel suits because of any bias against the institutional media and its power. Courts need to be particularly careful because confusion and bias often cause juries to disregard the complex standards in libel cases.<sup>175</sup>

One case particularly exemplifies the disregard for first amendment interests which can be engendered by the current balancing approach and the lack of contextual specificity with which it is used. The president of Nauru, an island republic in the Pacific, filed a libel suit over an article written in a Guam daily newspaper.<sup>176</sup> The story concerned an alleged loan from the plaintiff to a group from the Marshall Islands who sought separation from Micronesia. The plaintiff maintained that the article defamed him by linking him to a serious crime under Nauru law and by implying that he interfered with the internal political affairs of a foreign nation in violation of diplomatic standards.<sup>177</sup> The court summarily granted his request for disclosure, ruling that no source exists when a journalist refuses to talk, thus leading to the inference that actual malice

---

171. See *supra* text accompanying notes 47-48.

172. See also, D. ANDERSON & B. ITULE, CONTEMPORARY NEWS REPORTING 348-57 (1984); Sigma Delta Chi Code of Ethics (Society of Professional Journalists) (1973).

173. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

174. Dworkin, *supra* note 6, at 34, col. 4.

175. See, e.g., R. SMOLLA, *supra* note 5, at 188 ("[T]he First Amendment's protective rules for the press often get lost once the jury is ensconced behind closed doors."). Smolla discusses the case in which the president of Mobil Oil, William Tavoulaareas, sued because a story said that he set his son up in business. Citing an *American Lawyer* investigative piece, Smolla concluded that the jury in the case totally ignored the actual malice standard in its \$2.05 million verdict against the *Washington Post*. Although the judge overturned the verdict, an appellate court reinstated it and the case is currently being reviewed en banc by the District of Columbia Circuit. *Id.*, at 194-95.

176. *DeRoburt v. Gannett*, 507 F. Supp. 880 (D. Hawaii 1981).

177. *Id.* at 882.

could be proven because the story was baseless. As shown earlier, the court seems to have used a standard that completely omits consideration of first amendment interests.<sup>178</sup>

The court did not discuss the public interest in information and instead focused on the plaintiff's interest in defending his reputation. This is troubling since the Supreme Court has previously stated that reputation must sometimes yield to the public welfare if the public benefit of the information is great.<sup>179</sup> Moreover, the importance of this type of knowledge also may counterbalance the private inconvenience or injury to the plaintiff.

Some subjectivity is inherent in the method set out by the Court in *Branzburg*, because it leaves room for a balancing of competing interests, which is desirable perhaps to both libel plaintiffs and journalists.<sup>180</sup> However, the potential for subjective interpretation with a balancing test, has permitted courts to use the discretionary elements of the test to disregard first amendment interests. Some courts virtually ignored the first amendment<sup>181</sup> or applied the *Branzburg* test haphazardly, finding "relevance" without requiring an adequate demonstration of the necessity of the information.<sup>182</sup>

Further, courts have failed to follow the *Branzburg* lead by failing to look to the factors of a particular case and articulate the balance of interests with contextual specificity. This reluctance to fully calculate contextual balances has resulted in a disregard for the *Sullivan* standard, leaving important interests unprotected. It is imperative that courts attempt to better articulate contextual analyses to provide more predictability, thus ensuring less self-censorship and encouraging the flow of news to the public. If the special problems in one context of civil libel suits—the context of international reporting—are specifically assessed, courts can use such an analysis to evaluate disclosure claims in that context and draw similarities or distinctions between that context and others.

---

178. See *supra* text accompanying notes 69-71.

179. *New York Times Co. v. Sullivan*, 376 U.S. 254, 281 (1964).

180. See, e.g., Blasi, *supra* note 28, at 284.

181. See Note, *supra* note 91, at 353, citing *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 435 (10th Cir. 1977) (commenting that the trial court conceded a first amendment privilege against disclosure, but then did not give "any consideration to the existence of a qualified privilege").

182. See, e.g., *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, No.78-268 (D.N.H. 1979), *vacated and remanded*, 633 F.2d 583 (1st Cir. 1980).

## II. SPECIAL CONCERNS IN THE INTERNATIONAL NEWS CONTEXT

The inadequacy of the current balancing approach and the lack of specific contextual applications by the courts are especially grievous in the international news context. The importance of international news to the American public and the greater likelihood of harm to sources, with the resultant interruption in the flow of news, need to be analyzed. Lawsuits similar to those mentioned in the introduction, pitting the exercise of first amendment rights against the reputational interests of foreign libel plaintiffs, can only be expected to increase with the continual expansion of international news coverage.

### A. PUBLIC AWARENESS

The media plays an indispensable role in increasing public awareness of international events. Such knowledge is critical today to enable citizens to participate effectively in a democratic society. The public needs to acquire information about links between foreign events or foreign politicians and our own government, corporations, or organizations if we are to make informed political choices and intelligently exercise our rights of citizenship.

News about the United States' role in world affairs and the impact of international events on American life needs to be fostered for the public interest. We need to know about international affairs because events in foreign countries are having an increasing effect on our daily lives. The Middle East oil glut and the embargo in 1973-74 demonstrated the increasing interdependence of the United States and other nations. The rise in terrorist attacks against Americans abroad also demonstrates how vulnerable the United States is to international pressures today. Within the last decade, numerous Americans have been held hostage in Iran and Lebanon; airlines have been hijacked; Americans have been killed by terrorists who have grievances against the United States' foreign policies. In assessing the conduct of our government, information about our involvement in foreign countries is essential. For example, the recent arms deals with Iran contradicted the official reports of the Reagan Administration.<sup>183</sup>

With some 170 countries in the world, there is a great range and amount of information which could affect Americans. We have been unprepared for certain crises in the past and have not fully understood the

---

183. See Dworkin, *supra* note 6, at 34, col. 4.

complex international tensions which have contributed to the development of some of these crises. A press which provides extensive coverage of economic, social, and political developments abroad is necessary to alleviate some of this uncertainty and enable Americans to effectively participate in our representative system of government, as the United States functions in an interdependent world.

The American public particularly needs extensive reports on foreign nations with which we have political and economic relationships. Congress allocates billions of dollars of foreign aid each year, and it is important for Americans to keep abreast of changes or problems in countries which are dependent on or affected by our foreign aid decisions. The press has a responsibility to maintain its watchdog function because it is unrealistic to rely solely on the official news reports of a foreign government which has an interest in gaining or retaining aid from the United States. Nor is it the sole responsibility of the United States Department of State to decide which countries are deserving of foreign aid. Those decisions demand the participation of an informed public. Vigorous international news coverage can keep the American public informed by presenting a more neutral view of the overall situation in a country and by monitoring developing problems so we can assess how our interests are being affected.

The press has a responsibility to meet the informational needs of the public by responding to the current global interdependence and the rising American interest in international affairs.<sup>184</sup> The press must serve as the global eyes and ears of the American public overseas. The press has the resources and technology to compile facts and investigate international events in a way which private citizens cannot.

An abundance of sources is especially valuable in the international news context because Americans often need to learn about a multitude of factors to fully understand a foreign news story. Journalists need to provide more background information in these stories than in most domestic stories to explain the complexity of a situation and its implications. A story with important implications for Americans may occur in London, and readers can readily understand the report because of the similarities in the social and political structures of England and our own country.

---

184. M. ROSENBLUM, *COUPS AND EARTHQUAKES* 8 (1981). Recent polls suggest that the public is concerned about world affairs coverage. Forty-one percent of those polled across the nation in 1978 expressed deep interest in international reporting. A *Washington Post* readership survey recently rated news about international affairs above domestic news or White House news. *Id.*

But an important story can just as easily occur today in countries like Pakistan or Malaysia, which hold less familiarity for most Americans.

Interpretation and depth are needed to put the facts in the proper socio-political context for a faraway American reader. To be accurately informed, a reader must understand the patterns within the country, the relationship between that country and its neighbors, its religious heritage, its history, its economic situation, and recent developments which have contributed to a given situation. Journalists have an obligation to provide a variety of perspectives in this context so that the public does not receive merely a modified police report or a public relations speech from a foreign official. To demonstrate the full range of contrasting opinions, journalists often must promise confidentiality to a source in opposition to a government who can offer a contrast to the more readily available official reports. A responsible journalist finds the appropriate balance to describe the facts by including a variety of alternative sources.

It even can be misleading for an international journalist who has been an eyewitness to an event to rely solely on his or her own perspective. Surface appearances in a foreign country are not as trustworthy or familiar as they might be in most domestic news contexts.<sup>185</sup> Journalists often seek to rely on a combination of sources for a story—including official sources, secret reports, diplomatic sources, scholars, church leaders, workers, and foreign journalists.<sup>186</sup> A church leader may have as much to fear in some countries as someone from within a government's security force who leaks information. So although these persons would be reliable, nonconfidential sources in most domestic news reports, they are often unwilling to identify themselves to the American press. An executive in a multinational company overseas is also more likely to request secrecy before giving information to a journalist because of a legitimate fear of retaliation than is an executive of an American corporation in a domestic news story.<sup>187</sup> These sources can provide tips or confirm certain facts for a journalist, but may be unwilling to be named because of fears that they will later be subject to retaliation in their own country for supplying such information.<sup>188</sup>

---

185. *Id.* at 49-52.

186. *Id.* at 35-42.

187. *Id.*

188. *Id.* at 193-202.

## B. PROTECTION OF SOURCES FROM RETALIATION AND CHILLING EFFECTS

In all types of reporting, persons who are willing to identify themselves lend credibility to an account. However, in a foreign country, especially one with an authoritarian regime, a story attributed to an official source is likely to yield a propagandized version of the facts.<sup>189</sup> Journalists are more reliant on confidential sources in such a situation, but they still must use caution. A foreign journalist, often unfamiliar with a country, has to employ selective belief with all sources. If startling information comes from a new, unknown source, it is thoroughly checked against reports from other trusted sources or confirmed "off the record" to the journalist's satisfaction by, for example, someone inside a government agency or embassy.<sup>190</sup> But foreign officials, diplomats, or State Department personnel sources are often constrained by their official capacities and cannot relay sensitive or potentially volatile information.

The reasons for requiring confidentiality can be more legitimate in this context because the source may be a member of a political organization opposed to a foreign government or particular officials in power. In other countries, a source is not guaranteed the same due process protection which our society gives to those whose opinions conflict with government officials. If the identity of such a source were revealed in a libel trial, the source could subsequently be charged with an offense for speaking to the American public via the press. In some countries it is a criminal act to urge changes in the government's structure to noncitizens.<sup>191</sup>

Journalists also need to rely on confidential sources in the international news context frequently because they lack access to accurate, unbiased information. Access is often barred by governments who are hostile to negative news in the foreign press. Some politicians feel that a robust public debate in the foreign newspapers will intensify domestic unrest or strengthen an opposition party. Many countries also fear that aggressive coverage of their affairs may lead to negative reactions from American citizens and politicians, resulting in crippling cuts in the foreign aid they receive from the United States. Foreign governments sometimes exercise

---

189. *Id.* at 42-47.

190. *Id.* at 47-48.

191. For example, Nobel Peace Prize recipient Bishop Desmond Tutu could be charged with treason for advocating through the media that the international community support certain political organizations which seek to reform the current government in South Africa. Speech at University of Southern California, Jan. 26, 1986. For a description of numerous South African restrictions on speech, assembly and the press, see generally Tutu, *The United States and South Africa: Human Rights and American Policy*, 17 COLUM. HUM. RTS. L. REV. 1 (1985).

control of information by restricting the entry visas of journalists, or by interrogating and harassing journalists who offend them.<sup>192</sup> All access for foreign journalists within China was severely restricted until 1979 and, despite recent liberalizations, a respected journalist was recently accused of spying and suddenly expelled. He maintained he was merely talking to sources active in recent student protests urging democratic reforms.<sup>193</sup> It is still difficult to gain access to information and unofficial reports in many African and Latin American countries. American journalists, bolstered by their domestic constitutional watchdog function and a societal tradition of free and vigorous debate, can pose threats for communist countries, "friendly" countries, and non-aligned countries.

If a government controls all the domestic media outlets in a country and does not guarantee that its citizens can speak without recrimination, a journalist must often turn to confidential informants to balance the publicly available official account of an incident. Attempts are made to verify information with documents, but this may not always be feasible in foreign countries where the state owns the media outlets and materials like our congressional records are not publicly available. Thus, reliance on sources with a great need for secrecy, such as refugees and political dissidents, is often necessary when access to information is restricted.

A chilling effect on the dissemination of news is already present because of the restrictions of civil liberties in many countries. This effect can be increased by journalists' hesitancy to pursue stories which require investigation through the use of confidential sources. A source may be subject to harm because of disclosure through a libel suit discovery order. Other sources may be deterred from giving information in the future and the American public's interest in international news dissemination may be pitted against the libel plaintiff's interests.

The importance of international news, the likelihood of harm to particular sources, and the potential chilling effect which arbitrary violations of promises of confidentiality would yield, can be shown by examining a common type of international news story. Over the last decade, American audiences have come to regard human rights reporting as increasingly important. When the public hears of human rights abuses,

---

192. *Freedom Under Attack Around the World*, WORLD PRESS REPORT 44-48, (1987) (excerpt from 74 nation survey of press restrictions worldwide citing expulsions, licensing, visa limitations, censorship, murders, and jailings). See also M. ROSENBLUM, *supra* note 184, at 93-109 (discussing the many direct and indirect methods used to influence and control information and dissemination); S. KELLY, *ACCESS DENIED—THE POLITICS OF PRESS CENSORSHIP* (1978) (discussing the international politics of press and information control).

193. L.A. Times, Jan. 27, 1987 at A5, col. 1.

tremendous pressure can be put on our government. This pressure immediately can affect United States' support for a country.<sup>194</sup> In this area of reporting it is often impossible to find sources who can document torture or abuse publicly. Yet the reports of a government dependent on aid from the United States or the reports given by those opposed to a regime accused of human rights violations cannot be fully believed. The partial or delayed reports submitted to human rights agencies are not always adequate. Surviving torture victims are difficult to find. Those who have escaped to the United States may be reluctant to speak to the press for fear that retaliation will be taken against their families still residing in the country or that they will be deported if they are here illegally.

For example, one journalist tells of a story he wrote where the information he was able to confirm on record was an extremely watered down version of the truth. In Argentina, after the 1976 coup, reports surfaced that the military routinely disposed of Argentines who had "disappeared" by dumping the persons alive (or dead from torture) into the ocean from military helicopters. One source the journalist trusted told him the details and he was able to confirm this information with an air force officer. Because none of his sources were willing to speak without a guarantee of confidentiality, he could only write a general story—one which did not contradict the false military accounts, and which did not reveal that the bodies washed ashore were Argentines murdered by their own government.<sup>195</sup>

Foreign politicians are certainly entitled to a fair forum in which to pursue claims for damage to their reputations. But limits need to be imposed so courts can screen out meritless or retaliatory requests for disclosure of confidential sources. To minimize disruption in the flow of news and discourage the dissipation of an excessive amount of resources in this type of litigation, certain threshold requirements should be met by a plaintiff before a court reviews a request for disclosure of a confidential source. Then, courts need to analyze carefully the competing interests at stake in a particular context before compelling disclosure.

---

194. M. ROSENBLUM, *supra* note 184, at 193-202.

195. *Id.*

### III. A PROPOSAL FOR EVALUATING REQUESTS FOR DISCLOSURE

First, a threshold requirement is necessary to screen some of the frivolous or retaliatory requests for discovery that are likely to be fostered in certain contexts. Frivolous or retaliatory discovery requests may be particularly common in libel suits.<sup>196</sup> The threshold inquiry when requests for disclosure of confidential sources arise in libel suits should be to determine first that the action is not frivolous (in other words, "a pretense for using discovery powers") and second, the "plaintiff should show that it can establish jury issues on essential elements of its case not the subject of the contested discovery."<sup>197</sup> The burden should be placed on the plaintiff to establish falsity as a jury issue before disclosure is granted.

Although the information sought in *Mitchell v. Superior Court*<sup>198</sup> went to "the heart" of the plaintiff's claim, and thus might be necessary for the plaintiff to prove actual malice, the California court did not order disclosure. The plaintiffs had not made a prima facie showing that the alleged defamatory statements were false. Similarly, in *Sierra Life*,<sup>199</sup> the Idaho Supreme Court reversed a lower court's disclosure order because the plaintiffs failed to show that inability to discover confidential sources obstructed the plaintiffs' ability to prove the article's falsity.<sup>200</sup> The Supreme Court recently affirmed that the plaintiff bears the burden of proof in establishing the falsity of an allegedly defamatory publication.<sup>201</sup> Several federal courts have suggested such a threshold requirement,<sup>202</sup> and some state courts also recognize this requirement in ordinary civil libel litigation.<sup>203</sup>

Courts should also require the plaintiff to show that the identity of a confidential source is *necessary* to prove actual malice. Disclosure should not be ordered unless the plaintiff can show that the verdict is likely to

---

196. See *supra* text accompanying notes 91-92.

197. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597-98 (1st Cir. 1980).

198. 37 Cal.3d 268, 283, 609 P.2d 625, 634-35, 208 Cal. Rptr. 152, 161-62 (1984).

199. *Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 6 MEDIA L. REP. 1769 (Idaho 1980).

200. See *id.* at 1769.

201. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1563 (1986).

202. See *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d. 563, 597 (1st Cir. 1980); *Cervantes v. Time, Inc.*, 464 F.2d. 986, 993 (8th Cir. 1972); *Downing v. Monitor Publishing Co.*, 120 N.H. 383, 386-88, 415 A.2d 683, 686 (1980). But some courts interpret *Herbert* as denying such a prima facie falsity requirement. *Herbert v. Lando*, 441 U.S. 153, 174-75 n. 23.

203. *Mitchell v. Superior Court*, 37 Cal. 3d 268, 690 P.2d 62, 208 Cal. Rptr. 152 (1984); *Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 4 MEDIA L. REP. 1689 (Idaho Dist. Ct. 1978), *rev'd*, 6 MEDIA L. REP. 1769 (Idaho 1980).

turn on the presence or absence of the evidence which the identities of confidential sources would supply. Disclosure should be compelled only when it is essential for proving actual malice, not when it would provide only cumulative evidence.<sup>204</sup> The Supreme Court recently clarified that a plaintiff needs to present clear and convincing evidence to meet the actual malice standard at the summary judgment stage in a libel suit.<sup>205</sup> The plaintiff in *Anderson v. Liberty Lobby* said that a story in *The Investigator* defamed him by implying he was a neo-Nazi, anti-Semitic, racist, and fascist.<sup>206</sup> The plaintiff said the author, Jack Anderson, had used patently unreliable sources and failed to adequately verify the information before publication. However, the author showed careful research and numerous sources in an affidavit, and therefore the Court required more evidence from the plaintiff to meet the actual malice standard—enough so that a jury could reasonably find for the plaintiff.<sup>207</sup> This parallels the *certain* relevance standard discussed by some courts.<sup>208</sup>

In addition to these threshold requirements for a plaintiff, a defendant should make an initial showing of a publication's truth or a refutation of any possibility of actual malice. If the defendant established that the published statements were true or not defamatory, or if the defendant could refute the possibility of actual malice with a demonstration of careful investigation, he or she could then prevail immediately on the issue of source disclosure. The case law yields no conclusive guidelines for what constitutes adequate investigation to refute any possibility of actual malice,<sup>209</sup> but if the defendant can show that it is highly unlikely that the identity of the source will furnish enough evidence to contradict the careful research presented, a court could fairly hold that it would be unlikely that the plaintiff can prove actual malice.

In a situation where it is difficult to determine how the evidence would affect a plaintiff's ability to establish actual malice, a court could consider ordering a journalist-defendant's notes to be sealed while the

---

204. See Note, *supra* note 91, at 363.

205. *Anderson v. Liberty Lobby*, 106 S. Ct. 2505 (1986).

206. *Id.* at 2508.

207. *Id.* at 2512-13.

208. See *supra* text accompanying notes 132-36; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1972). Judge Bork recently stated that trial courts should determine if a claim has merit before allowing broad discovery. He noted that a pleading defeating a motion for summary judgment is not a license to harass, suggesting that the trial court attempt to minimize the "burden a possibly meritless claim is capable of imposing upon free and vigorous journalism." *McBride v. Merrell Dow Pharmaceuticals, Inc.*, 717 F.2d 1460, 1461-62 (D.C. Cir. 1983).

209. See *supra* text accompanying note 145.

plaintiff develops evidence on the defendant's state of mind under *Herbert* type inquiries.<sup>210</sup> A court also could review a journalist's notes for inferences of actual malice and to determine if disclosure is likely to lead to evidence essential for meeting the *Sullivan* standard. Alternatively, a court could conduct an *in camera* review of sensitive material without revealing the source's identity to determine its relevance to the mental culpability requirement.<sup>211</sup> These remedies, however, like some of the alternatives to jailing a reporter for failure to disclose the identity of a source, remove central issues from the jury.

Perhaps a thorough examination by the court of alternative sources of information is a better solution. The *Mitchell* plaintiffs' request was determined to be overbroad because they failed to show they had sufficiently exhausted all alternative sources of information. The fourth circuit recently affirmed the denial of an order for source disclosure, ruling that alternative sources had not been fully exhausted.<sup>212</sup> The court in *LaRouche v. NBC* required the plaintiff to demonstrate exhaustion of all reasonable alternative means of obtaining the information. Because the plaintiff failed to meet this requirement, the defendant television network did not have to disclose the sources and could rely on them at trial.<sup>213</sup>

After a thorough assessment of all reasonable alternatives, a court can proceed to evaluate specific contextual factors. Once the plaintiff has met the threshold requirements of falsity and essential evidence, and after the defendant has failed to prevail on the actual malice issue, a court is ready to undertake such an evaluation. As demonstrated in Part II for the international news context, a court should consider the potential harm to a particular source, the likelihood of deterrence of other sources, and the importance of the information to the public. A journalist could provide evidence on the human rights record of a country, or show that a person in the position of the confidential source might be particularly vulnerable. The defendant could establish particular vulnerability by showing that there is a physical threat or possibility of other harm to sources disproportionate to plaintiff's litigation needs.<sup>214</sup> A journalist also might show that confidential sources are particularly valuable for certain types of stories and a disclosure order is likely to deter similar

---

210. See *supra* notes 105-15 and accompanying text.

211. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 727 (5th Cir. 1980).

212. *Mitchell v. Superior Court*, 37 Cal. 3d 268, 282, 690 P.2d 625, 633-34, 208 Cal. Rptr. 152, 160-61 (1984).

213. *LaRouche v. National Broadcasting Corp.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 107 S.Ct. 79 (1986).

214. *But see supra* text accompanying notes 43-48.

sources from giving such information in the future.<sup>215</sup> If problems are prevalent in a particular context, such as the lack of access to information and the denial of due process protection in the international news context, courts should consider them in determining the public interest in nondisclosure.

If a media defendant can establish that the request for discovery interferes excessively with its ability to report in the foreign country, disclosure could be denied.<sup>216</sup> A media defendant needs to prove some chilling effect after *Branzburg*, but exact empirical information is often difficult to present.<sup>217</sup> A journalist might show the interference which disclosure would cause. Some courts have noted that disclosure may disrupt the ability of the media to do its job.<sup>218</sup> If it is necessary to cultivate certain sources in a particular context, perhaps more protection is justified.

This is not true just for international news. The Court in *Branzburg* made certain assumptions about the type of source desiring protection, the danger to the source, and the kind of deterrence that disclosure to a grand jury might cause.<sup>219</sup> The *Mitchell* court acknowledged that if the information given by a source resembles information about political corruption, criminal activities, or unethical activities which are of critical importance in maintaining an informed society—such as “whistle-blowers” give about domestic activities<sup>220</sup>—courts should be careful that the plaintiff bears the burden of substantial threshold requirements so that frivolous suits, or suits brought merely for retaliatory purposes, are deterred.

---

215. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597-98 (1st Cir. 1980).

216. *See supra* text accompanying notes 183-95.

217. *See supra* text accompanying notes 43-48, 87-98.

218. Some courts emphasize that a disclosure privilege should be designed to reduce interference or disruption which could harm the flow of important news to the public. *See, e.g., Bruno*, 633 F.2d. at 595-98.

Why should a party to a suit be allowed to tap into the hard-earned knowledge of a reporter whose whole career is based on his ability to gather information? Why should the media be required to interrupt its newsgathering and disseminating activities to assume the burden of providing what is in essence its work product to litigants, except upon the most compelling reasons? The opportunity for exploitation is great.

Fawley v. Quirk, 11 MEDIA L. RPTR., 2340 (1985) (George, J., concurring); *see also* *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir.), *cert. denied*, 417 U.S. 938 (1974).

219. *See supra* notes 75-98 and accompanying text.

220. *Branzburg v. Hayes*, 408 U.S. 665, 689 n.28. There have been some congressional attempts at legislation protecting whistleblowers. *See* Civil Serv. Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978); *see also* Note, *The Rights of Sources—The Critical Element in the Clash over Reporter's Privilege*, 88 YALE L.J. 1202, nn. 7, 8, 42 (1979).

The California rule in *Mitchell* states that if the information in a standard civil libel suit relates to matters of great public importance, and the risk of harm to the source is a substantial one, a court can refuse to require disclosure even though the plaintiff has no other way of obtaining the information.<sup>221</sup> The court in *Mitchell* used a five-part test to evaluate a claim for source disclosure:

- (1) the nature of the litigation and whether the reporter is a party;
- (2) the relevance of the information sought to the plaintiff's cause of action;
- (3) the plaintiff's exhaustion of all alternative sources;
- (4) the importance of protecting confidentiality in the case at hand; and
- (5) a prima facie showing that the alleged defamatory statements are false.<sup>222</sup>

After a case-by-case balancing, the *Mitchell* court noted that the determination of the public interest in nondisclosure should be examined and might override a strong private interest in disclosure. Thus, at this stage, courts need to examine the public interest in the information by examining the specific contextual factors involved in a case.

In summary, disclosure should *only* be ordered when the plaintiff makes a preliminary showing that falsity is a jury issue and that the identity of the source is necessary to prove actual malice. The defendant also should bear part of the burden by refuting the possibility of actual malice. After thoroughly examining the three branches of the balancing tests through the threshold requirements for certain relevance, the least restrictive alternative, and the compelling interest in disclosure, courts are ready to consider the request in context and analyze first amendment considerations such as any public interest in nondisclosure. Courts should take account of special factors in the particular context, such as the legitimacy of the source's claim for secrecy and the likely deterrent effect of a disclosure order on that type of source in the future, as the Court did in *Branzburg*. If the defendant demonstrates that great harm and deterrence will result from a disclosure order, the public interest may prevail over the private interest in obtaining the source's identity. The danger of frivolous or retaliatory discovery requests will thus be mitigated. Information is of great public importance in an informed democracy, so it is imperative to consider the potential harm to sources and the possibility of future restricted access to information in certain contexts before ordering disclosure of confidential sources.

---

221. *Mitchell v. Superior Court*, 37 Cal.3d 283, 282-83, 690 P.2d 625, 634-35, 208 Cal. Rptr. 152, 161 (1984).

222. *Id.* at 283, 690 P.2d at 632-35, 208 Cal. Rptr. at 159-62.

## CONCLUSION

Libel suits with the potential of million dollar judgments are bound to have a practical chilling effect on the press' use of confidential sources. But the exercise of first amendment freedoms may be more susceptible to a chilling effect in certain libel contexts where confidential sources are heavily relied upon to provide the public with important news.

The concerns in each context deserve critical scrutiny after a thorough demonstration of threshold relevance, exploration of less restrictive alternatives, and the examination of the private and public interests involved. Judges need to adapt the specific analysis which the Court undertook in *Branzburg* to other contexts as claims for disclosure arise. By articulating a contextual analysis, courts will provide better guidance for jurists, information sources, and journalists regarding the extent to which the first amendment protects those who supply information on a confidential basis.

*Lisa Kloppenberg\**

---

\* I would like to thank Erwin Chemerinsky, William Genego, and Jonathan Kotler for their comments and guidance, and Linda Beres and Mark Zurich for their unfailing support.

