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# “PRESSING” OUT THE WRINKLES IN MARYLAND’S SHIELD LAW FOR JOURNALISTS

Bruce L. Bortz† and Laurie R. Bortz‡

*Little has been written about Maryland’s shield law<sup>1</sup> for journalists in the eighty-three years that it has existed. In this Article, the authors provide a history and analysis of the law, along with recommendations for its improvement.*

## I. MARYLAND BREAKS GROUND

During the first weeks of 1896,<sup>2</sup> John T. Morris, a reporter for the *Baltimore Sun*, stumbled upon information<sup>3</sup> strongly suggesting that some of Baltimore’s elected officials and policemen were on the payrolls of illegal gambling establishments.<sup>4</sup> Morris incorporated this information in an article that the newspaper published. Among those who read it were the members of a Baltimore City grand jury investigating the seamy alliance between those violating gambling laws and those sworn to enforce them.<sup>5</sup> In fact, the grand jury had recently heard testimony practically identical to the information that appeared in the *Sun* story.

Suspecting that someone had leaked the story to Morris, the grand jury subpoenaed him, and demanded to know his source. When the reporter refused to divulge it, the judge, who happened to be a friend of Morris,<sup>6</sup> decided that he was not guilty of contempt, but advised the grand jury that it could send Morris to prison on its

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1. “Shield law” is a term “commonly and widely applied to statutes granting newsmen and other media representatives the privilege of declining to reveal confidential sources of information.” *In re Farber*, 78 N.J. 259, 269, 394 A.2d 330, 335 (1978).
2. The actual date is uncertain. *Baltimore Sun* editor Hamilton Owens once suggested Morris might have come upon the information in 1895 or even the year before. Letter from Hamilton Owens to Matthew Page Andrews (September 22, 1928) (on file in the Maryland Room, Enoch Pratt Free Library, Baltimore, Maryland). The Sunpapers’ official history says that Morris acquired it early in 1896. JOHNSON, KENT, MENCKEN, & OWENS, *THE SUNPAPERS OF BALTIMORE* 215 (1937). [hereinafter cited as JOHNSON, KENT, MENCKEN, & OWENS].
3. One source suggests a friend of Morris’ tipped him off. Letter from Harold E. West to Matthew Page Andrews (September 26, 1928) (on file in the Maryland Room, Enoch Pratt Free Library, Baltimore, Maryland).
4. Letter from Hamilton Owens to Matthew Page Andrews (September 20, 1928) (on file in the Maryland Room, Enoch Pratt Free Library, Baltimore, Maryland).
5. *Baltimore American*, March 8, 1937.
6. Letter from Harold E. West to Matthew Page Andrews, *supra* note 3.

motion. It did so,<sup>7</sup> and Morris spent the next five days in the city jail. When the grand jury's term ended, so did the reporter's prison stay.<sup>8</sup>

Though doubtless pleased with their colleague's quick release from jail, the Journalists' Club, an organization of newspapermen, was nonetheless convinced that the interests of its profession would be ill-served if its members could be forced to choose between their freedom or the disclosure of the names of their confidential sources.<sup>9</sup> Thus, the club set its sights on persuading the newly elected, Republican dominated, General Assembly and Republican Governor Lowndes to enact legislation to protect Maryland reporters unwilling to reveal their confidential sources. The club's efforts paid off. On April 2, 1896, Maryland's legislature changed the common law then applicable to journalists and replaced it with an evidentiary privilege enabling reporters to refuse to disclose their sources of information. The law the club so strongly pushed became the nation's first "press shield law."<sup>10</sup>

That legal commentators did not universally hail the new law would be a gross understatement. Professor Wigmore did not mince words when he called the enactment "as detestable in substance as it is crude in form,"<sup>11</sup> noting that "for more than three centuries, it has been recognized as a fundamental maxim that the public is entitled to every man's evidence."<sup>12</sup> A law this much at variance with precedent, he predicted, would "probably remain unique."<sup>13</sup>

For almost thirty years, Wigmore's prognostication proved correct.<sup>14</sup> Not a single state followed Maryland's ground-breaking example. That did not mean, however, that the press and law enforcement personnel did not clash during these years. They did,

7. JOHNSON, KENT, MENCKEN, & OWENS, *supra* note 2, at 215.

8. *Lightman v. State*, 15 Md. App. 713, 717 n.2, 294 A.2d 149, 152 n.2 (1972), *aff'd*, 266 Md. 550, 295 A.2d 212 (1972). See generally Note, *The Right of a Newsmen to Refrain From Divulging the Sources of His Information*, 36 VA. L. REV. 61 (1950); EDITOR & PUBLISHER, Sept. 1, 1934, at 9; Baltimore Sun, June 24, 1972, at A14, col. 4. The reporter spent nights with his family at home, thanks to a compassionate warden who released him every evening at dark on the condition that he return each morning at dawn for lockup.

9. Letter from Harold E. West to Matthew Page Andrews, *supra* note 3.

10. Law of April 2, 1896, ch. 249, 1896 Md. Laws 437 (now codified at MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1974)). The 1896 law read as follows:

No person engaged in, connected with or employed on a newspaper or journal shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper on and in which he is engaged, connected with or employed.

11. J. WIGMORE, EVIDENCE § 2286 (2d ed. 1923).

12. *Id.* § 2192. *Accord*, *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

13. J. WIGMORE, EVIDENCE § 2286 (2d ed. 1923).

14. New Jersey was the first state after Maryland to act. See H. ZUCKMAN & J. GAYNES, MASS COMMUNICATIONS LAW (1977). [hereinafter cited as ZUCKMAN & GAYNES].

particularly at the state and local levels.<sup>15</sup> Typically, a reporter would write an exposé on official corruption, gambling, prostitution, or the like. After such a story was published the local prosecutor would be spurred to conduct an investigation, or risk the appearance of shirking his duties. If he subpoenaed anyone else ahead of the reporter, however, it would appear that the prosecutor himself knew of the crime all along. Thus, he would subpoena the reporter first, demanding that he provide him with the names of his informants. Although the press usually had the prestige or the political muscle to reach an out-of-court accommodation with the prosecutor, in a number of states, especially after World War II, such confrontations prompted the passage of shield laws.<sup>16</sup> Most of these laws did little more than give reporters the right not to disclose the identities of confidential sources.<sup>17</sup> They did not protect information gathered by newsmen.

Still well ahead of the pack in 1949, Maryland put even more distance between itself and most other states with shield laws by extending to radio and television the statutory protection it had earlier granted the purely print media.<sup>18</sup> Well into the fifties and sixties most other states continued to heed Wigmore and more modern legal critics, who maintained that state shield laws were both "unhealthy" and "unnecessary."<sup>19</sup> In part because journalists found merit in this argument, leaders of the journalistic community as recently as 1963 were advocating that the states adopt a uniform law that would afford newsmen only partial protection. For example, the "Model Confidential Communications Statute" of Sigma Delta Chi, the national journalism society, prohibited the compelled disclosure of a newsman's sources, but it did not so much as suggest a privilege for information gathered by a newsman.<sup>20</sup>

## II. CONGRESS TRIES ITS HAND

At the federal level, there was less tension between the government and the media. Only infrequently did the federal

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15. See generally F. Graham, *Press Freedoms Under Pressure*, Background Paper for the Twentieth Century Fund 65 (1972). [hereinafter cited as Graham, *Paper*].

16. E.g., ALA. CODE tit. 12, § 21-142 (1977); ARK. STAT. ANN. § 43-917 (1977); KY. REV. STAT. ANN. § 421.100 (Baldwin 1978); OHIO REV. CODE ANN. §§ 2739.04, 2739.11, 2739.12 (Page Supp. 1977). These states enacted shield laws within eight years after the end of World War II.

17. Graham, *Paper*, *supra* note 15.

18. Law of April 29, 1949, ch. 614, 1949 Md. Laws 1477. Arkansas was the first state to provide protection to television and radio authority.

19. See, e.g., Comment, *Journalists' Testimonial Privilege*, 9 CLEV.-MAR. L. REV. 311 (1960). See also Note, *The Right of A Newsman to Refrain From Divulging the Sources of His Information*, 36 VA. L. REV. 61 (1950).

20. Graham, *Paper*, *supra* note 15, at 66.

government seek the media's help,<sup>21</sup> and when it did, the press more often than not quietly furnished the Justice Department with the information it sought. In a few instances, however, preliminary media-government negotiations ended in agreements that the government would issue subpoenas with which the media would comply.<sup>22</sup> Cooperation of this sort took place in at least two types of federal investigations: those aimed at organized crime and those aimed at violence against civil rights advocates.<sup>23</sup>

In 1969, the picture began to change drastically.<sup>24</sup> No longer were Justice Department subpoenas of newsmen rare. Beginning that year, federal authorities investigating radical groups suddenly became eager to coerce the cooperation of the media.<sup>25</sup> More significant than the increased number of demands placed on the media were the new and varied forms these demands were taking. While the federal government once had been interested solely in compelling the disclosure of a newsman's confidential sources, it now demanded notes, tapes, film, photographs, financial records and personal testimony from reporters serving newspapers, news magazines, and the broadcast media.<sup>26</sup> From 1969 until mid-1971, the National Broadcasting Company (NBC), the Columbia Broadcasting System (CBS) and the stations they owned and operated

21. *Id.* at 67. See also ZUCKMAN & GAYNES, *supra* 14, at 167. Prior to 1970 there were fewer than forty reported contempt cases for newsmen's refusal to testify. H. NELSON & D. TEETER, *LAW OF MASS COMMUNICATIONS* 351 (2d ed. 1973).

22. See Graham, *Paper*, *supra* note 15. A 1975 Justice Department study revealed that reporters complied willingly with subpoenas in eighty percent of the cases in which they were subpoenaed. In fact, many reporters requested that the court or government agency issue the subpoena in the first place. See BROADCASTING, June 2, 1975, at 54.

23. See Graham, *Paper*, *supra* note 15.

24. For a detailed discussion on the more recent proliferation of subpoenas, see text accompanying notes 57-62 *infra*.

25. Graham, *Paper*, *supra* note 15, at 82. Writes Graham:

Newsmen had occasionally complained that prosecutors called them to testify before grand juries to dignify a case that was otherwise based on questionable witnesses. Sometimes, too, their testimony was not actually needed, but their prestigious names and publishers lent credibility to the government's case.

Graham believes that such tactics by the government do not advance the truth-finding process of the courts. *Id.* at 83. Zuckman and Gaynes suggest a number of reasons why prosecutors, judges, legislators and other government officials began

to seek unpublished information of interest to them in the hands and heads of newsmen. Mutual distrust and even enmity between public officials and reporters began to grow, particularly in the large urban areas, fueled at least in part by the Vietnam war, a troubled economy, widespread graft and corruption at all levels of government, leaks of secret government information, doubtful media coverage of government and its personnel and what some might characterize as anti-establishmentarianism by some elements of the Media.

ZUCKMAN & GAYNES, *supra* note 14, at 167-68.

26. Graham, *Paper*, *supra* note 15, at 62.

received 124 subpoenas, mostly from federal and state prosecutors.<sup>27</sup> Over the same two and one-half year span, the federal government served twenty subpoenas on a single Chicago newspaper publishing company — Field Enterprises Incorporated.<sup>28</sup> A reluctance to displease influential publishers and broadcasters hardly characterized the federal prosecutors of the time.

All the while, it was, as writer Theodore White has noted, "accepted in American politics that a reporter's protection of his sources could not be violated. No law said so; no ruling said so; it was simply taken for granted."<sup>29</sup> Many thoughtful journalists believed that the Supreme Court tacitly shared their belief that state shield laws were largely unnecessary because of the broad language of the first amendment.<sup>30</sup> Yet, the Court's failure to recognize expressly a constitutional privilege for newsmen caused some to doubt whether it truly believed in the existence of such a first amendment protection. To resolve newsmen's lingering concern, United States Congressmen in 1970, 1971, and 1972 tossed a total of 32 bills relating to newsmen's privileges into the Congressional hopper.<sup>31</sup> Despite such efforts, no federal shield law was enacted during this period.

### III. THE SUPREME COURT TAKES A STAND

In 1970 in *Caldwell v. United States*,<sup>32</sup> the Ninth Circuit Court of Appeals ruled that the first amendment conferred a qualified privilege on a newsman. The court held that in the absence of a

27. *Id.* at 64. A handful of defense counsel, not prosecutors, was responsible for a small number of these subpoenas. See *Hearings on Newsman's Privilege Before Subcommittee No. 3 of the House of Rep. Comm. of the Judiciary*, 92d Cong., 1st Sess. 204 (Oct. 24, 1972).

28. Graham, *Paper*, *supra* note 15, at 62.

29. White, *Why The Jailing of Farber 'Terrifies Me'*, *New York Times Magazine*, Nov. 29, 1978, at 76. Until the *Branzburg* decision, the Supreme Court had displayed a marked reluctance to address the issue of the newsman's privilege. Certiorari was denied on at least three occasions when the issue was raised. *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *Murphy v. Colorado* (Colo. Sup. Ct. No. 19604 unreported opinion), *cert. denied*, 365 U.S. 843 (1961); *State v. Buchanan*, 250 Or. 244, 436 P.2d 726, *cert. denied*, 392 U.S. 905 (1968).

30. See, e.g., Note, 77 HARV. L. REV. 556, 558-59 (1964), in which the author makes a strong argument that the remedy to the uncertainty is best left to the courts, not to the legislatures.

31. E.g., H.R. 1604, 91st Cong., 2d Sess. (1970); H.R. 16328, 91st Cong., 2d Sess. (1970); S. 1131, 92d Cong., 1st Sess. (1971). See also H.R. 5928, 93d Cong., 1st Sess. (1973); S. 1128, 93d Cong., 1st Sess. (1973); H.R. 215, 94th Cong., 1st Sess. (1973). H.R. 215, introduced by Rep. Kastenmaier, contained only minor limitations on the privilege and was the most widely debated of these bills. *Broadcasting* endorsed this bill when it emerged from the House Judiciary Subcommittee N. 3 in June, 1973.

For a detailed discussion of the need for a federal shield law, see Landau & Graham, *The Federal Shield Law We Need*, COLUM. JOURNALISM REV. (March/April 1973) 26. [hereinafter cited as Landau & Graham, *Federal Law*].

32. 434 F.2d 1081 (9th Cir. 1970).

compelling governmental interest, a reporter could not be forced to appear before a grand jury to disclose confidential information. Subsequently, the Supreme Court granted certiorari to resolve the conflict between *Caldwell* and two state court decisions, *Branzburg v. POUND*<sup>33</sup> and *In re Pappas*,<sup>34</sup> which had refused to extend to reporters the privilege to defy grand jury subpoenas. In response, newsmen from around the country contributed affidavits and amicus curiae briefs, hoping to persuade the Court to recognize a constitutional privilege for newsmen. J. Anthony Lukas, then a reporter for the *New York Times*, told the Court: "Violate one man's confidence and sources start drying up all over the place."<sup>35</sup> In his affidavit, CBS newsman Dan Rather referred to a long-time friend and confidential news source:

This honest, decent citizen, who cares deeply about his country, has now told me that he feels that pressure from the Government, enforced by the courts, may lead to violations of confidence, and he is therefore unwilling to continue to communicate with me on the basis of trust which existed between us.<sup>36</sup>

Gilbert Noble, at the time of his affidavit a reporter covering the black community for the American Broadcasting Company (ABC), said that if he were to comply with a government subpoena, it would be impossible for him to go back to that beat.<sup>37</sup> The affidavit of ABC reporter Timothy Knight asserted that some groups were becoming aware of the increasing threat government subpoenas posed for them. In the late sixties, Knight had done a news feature on the Black Panthers of San Francisco Bay, with the group's cooperation. In early 1970, however, when he returned to do another story on the Black Panthers, they refused to cooperate for fear that the government would subpoena ABC's "outtakes," portions of film edited out of the story actually aired. Knight's project ended when ABC refused to accede to the Panthers' request that it pledge to fight any government subpoenas.<sup>38</sup>

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33. 461 S.W.2d 345 (Ky. 1971).

34. 358 Mass. 604, 266 N.E.2d 297 (1971).

35. Amicus Curiae Brief for Appellee at 39, *United States v. Caldwell*, 408 U.S. 665 (1972).

36. *Id.* at 59.

37. *Id.* at 37.

38. *Id.* at 28. Though they did not contribute affidavits to the Court, several other prominent newsmen have commented on the central issue involved. Walter Cronkite, the "dean" of broadcast journalism, once offered this wry comment: "Advice for a modern lawman: let the reporters do it for you." I. FANG, *TELEVISION NEWS* 354 (1972). On the subject of "off the record" conversations, Eric Sevareid said that "[s]hould a widespread impression develop that my information is subject to claim by government investigators, this traditional

The view articulated in newsmen's affidavits was countered by the argument that there was scant empirical proof that the lack of a judicially proclaimed newsmen's privilege significantly dissuaded sources from communicating information to reporters.<sup>39</sup> Newsmen, it was asserted, could still convince their sources that newsmen would go to jail before betraying a confidence. Moreover, even if reporters chose to disclose the sources of their information rather than be thrown behind bars, the flow of news would be little affected. Many news sources would be so insistent that their information appear before the public that they would be willing to risk being identified,<sup>40</sup> or so it was argued.

On June 29, 1972, the Supreme Court ruled on the existence vel non of a newsmen's privilege. Its 5-4 decision in *Branzburg v. Hayes*<sup>41</sup> was at once a landmark decision and a supreme shock to the journalistic community.<sup>42</sup> The *Branzburg* Court held that a federal or state grand jury *could* compel a newsmen to appear and testify before it concerning information that sources revealed to him in confidence. The common law and the Constitution, said the Court, afforded the newsmen, like the ordinary citizen, no special privilege to keep such information to himself. Justice Byron White apparently was not convinced by the newsmen's affidavits. In his majority opinion, he wrote that "from the beginning of our country, the press has operated without constitutional protection for press informants and the press has flourished. The existing common law rules have not been a serious obstacle to either the development or retention of confidential news sources by the press."<sup>43</sup>

Criticism of the decision and Justice White's reasoning swiftly came from journalistic organizations around the country. This

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relationship, essential to my kind of work, would be most seriously jeopardized. I would be less well-informed myself, and of less use to the general public as an interpreter or analyst of public affairs." E. Severeid, BROADCASTING, May 20, 1970, at 50. Dr. Frank Stanton, president of CBS for 26 years and nicknamed "Mr. Integrity" by his colleagues in the industry, once remarked: "Certainly everyone believes in a fair trial. But only those who want to restrict that freedom believe responsibility should be enforced by law." Remarks before the annual Abe Lincoln awards dinner of the Radio and Television Commission of the Southern Baptist Convention (Feb. 7, 1974). For an excellent discussion by newsmen and jurists of the ethical and legal problems surrounding the use of subpoenas to force disclosure of confidential sources, see *The Southern California Conference on the Media and the Law* 55-104 (Times Mirror Press 1977).

39. See *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972).

40. Graham, *Paper*, *supra* note 15, at 17.

41. 408 U.S. 665 (1972).

42. Ironically, *Branzburg* came a mere twelve days after the Watergate break-in; without the assistance of investigative reporting and the use of confidential sources, the Watergate scandal might never have been revealed. Friedman, *The Freedom of the Press Under Siege*, NEW TIMES, Dec. 11, 1978, at 41. [hereinafter cited as Friedman, *Siege*].

43. *Branzburg v. Hayes*, 408 U.S. 665, 698-99 (1972).



criticism would have been more strident had Justices Burger, Rehnquist, Blackmun, and White prevailed in their contention that even a qualified press privilege should not exist. When balancing law enforcement's needs against the first amendment, said these four, the latter should always give way. Fortunately, so far as the press was concerned, five justices felt otherwise, recognizing the importance of granting the press at least a qualified privilege.<sup>44</sup> Justices Brennan, Douglas, Marshall, Powell and Stewart agreed that the Constitution accorded Congress and the respective state legislatures the power to fashion laws establishing such a privilege.

#### IV. AFTER *BRANZBURG*: CONGRESS FAILS AGAIN

Following the Court's advice, Congress intensified its effort to pass a federal shield law. In the fall of 1972 a House subcommittee conducted extensive hearings on the subject.<sup>45</sup> Then, in the first two weeks of the 1973 session, Congressmen introduced twenty-four bills drafted to counteract the potential effects of *Branzburg*. All sought to protect from judicially compelled disclosure both the source and content of confidential information, whether or not the information was ever published or broadcast; as well as the source and content of nonconfidential information, such as television outtakes or a reporter's notes from a purely public event.<sup>46</sup>

In the spring of 1973, Congress again held hearings on bills proposing a federal privilege. Rather than demonstrating the overwhelming need for a federal shield law, these hearings made evident the media's overwhelming lack of agreement on the subject of federal protection.<sup>47</sup> Eventually, the American News Publishing Association endorsed a model bill drafted by its Ad Hoc Drafting Committee.<sup>48</sup> Still, there remained dissension in the media's ranks, caused in part by a dispute over whether to apply a newsman's privilege only to federal proceedings or to extend its protection to the state level as well.<sup>49</sup> Not only could the various factions not agree on how expansive a federal shield law ought to be, but they also differed

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44. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring). Also mentioned by the Court was the states' power to construe their constitutions "so as to recognize a newsman's privilege." *Id.* at 706.

45. See Landau & Graham, *Federal Law*, *supra* note 31, at 27.

46. Collins, *Congress Grapples With Press Bill*, Milwaukee Journal, March 25, 1973, at 16.

47. QUILL, April, 1973, at 37. Three views emerged: one favored an absolute privilege; another argued for nothing aside from the first amendment; still another urged that reporters should not be given too broad an exemption. EDITOR & PUBLISHER, March 15, 1975, at 23.

48. QUILL, *supra* note 47.

49. *Id.* at 34. Some federal courts have resolved this dispute, in part, by regarding state shield laws as persuasive authority in the absence of a federal statute. See, e.g., *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975); *Baker v. F & F Invest.*, 470 F.2d 778, 781 (2d Cir. 1972).

on whether there was a need for such a law at all.<sup>50</sup> One group stated its belief that the first amendment conferred all the protection they, as reporters, would ever need. The Supreme Court, they felt confident, would someday reverse its decision in *Branzburg*, and adopt their construction of the Constitution.<sup>51</sup>

Many in the media who sensed the impact *Branzburg* was beginning to have on them were not content to sit idly by.<sup>52</sup> The then-president of the CBS television network, Arthur Taylor, contended, for example, that the decision had triggered a "devastating proliferation of subpoenas and jailings."<sup>53</sup> Though the first few years after *Branzburg* witnessed a diminution in America's Southeast Asian involvement and in the activities of various militant organizations, the frequency with which newsmen were subpoenaed nonetheless increased. One newsman noted that the Justice Department issued more subpoenas during the first eighteen weeks of 1975 than during the preceding three and one-half years.<sup>54</sup>

Almost to a man, media figures began to claim that the subpoenas were having a disastrous effect on the practice of their profession. Principally, they said, the subpoenas were drying up their sources.<sup>55</sup> In a July 25, 1978 editorial the *New York Times* expressed this point of view:

When, as frequently occurs around the White House or a courthouse, an informant offers us news in exchange for a

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50. Graham, *Paper*, *supra* note 15, at 16. One federal court noted that Congress had only "flirted" with the notion of a federal shield law. *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

51. In a 1974 editorial, *Broadcasting Magazine* commented that the American Bar Association may have done journalism a service in February, 1974, when its House of Delegates voted 157-122 to reject the proposition that a reporter's privilege was essential "to protect the public interest." Afraid that the law would become so riddled with exceptions that the free press would be more hampered than helped, *Broadcasting* stated that "the wisest course is to abandon the effort to forge a legislative shield. Let the First Amendment stand as the primary word." *BROADCASTING*, Feb. 18, 1974, at 9. See also Dixon, *The Constitution Is Shield Law Enough For Newsmen*, 60 A.B.A.J. 707 (1974).

52. The American Newspaper Publisher's Association expressed what was probably the sentiment of most journalists when it succinctly said that "reliance on the First Amendment guarantees is not enough." *BROADCASTING*, April 29, 1974, at 43.

53. *BROADCASTING*, June 3, 1975, at 54. At the time, Mr. Taylor was also chairman of the First Amendment Research and Defense Fund of the Reporters' Committee for Freedom of the Press, a Washington-based group that has assisted in the formulation of federal and state shield laws. To date, however, the steering committee of the Reporters Committee has yet to form a consensus on what, if anything, would constitute a model statute for either the states or the federal government.

54. *Sharing the News with Justice*, *COLUM. JOURNALISM REV.* (Sept./Oct., 1975) at 18.

55. This deterrent effect is much stronger than that which might exist in the lawyer/client or doctor/patient relationship, since the informant in those relationships is strongly motivated to reveal information out of the urgency of his need for medical or legal help. See Comment, *The Newsmen's Privilege*:

pledge of confidentiality, we give priority to the information. . . . Without our bond of trust, the information might never be known. That is how we get our best stories — the ones that touch the most sensitive nerves of state, that identify an injustice or break open a conspiracy, and that for reasons of luck or skill come only to one newspaper and to no other. A frightened citizen, an angry government official, a disillusioned conspirator — they reach out periodically to the press or respond honestly to our questions to reveal what others seek to hide. They dare not risk their jobs or reputations or safety by speaking out in public, but they have learned to trust in the promise of protection that can be had from most reporters. “Don’t just take it from me,” they will say. “Go see if what I tell you is not right. Don’t print it if you can’t prove it. But don’t ever tell who told you.”<sup>56</sup>

What would become of a working press unable to assure confidentiality to such sources?, asked A.M. Rosenthal, managing editor of the *New York Times*.<sup>57</sup> *Branzburg* portended increasing dependency on the self-serving press releases of government and business. According to media critic Ben Bagdikian, the American press was already dangerously close to being a “handout press.”<sup>58</sup> His studies showed that eighty-two percent of all news stories originated with the source itself.

Part of the media’s comments about *Branzburg*’s impact centered on the degree to which investigative reporting had benefited the public over the years. The muckraker’s tradition was a venerable one in America, they said, pointing to Lincoln Steffens and *Shame of the Cities*, to Upton Sinclair and *The Jungle*, and to Ida Tarbell and her numerous attacks on America’s oil trusts.<sup>59</sup>

*Government Investigations, Criminal Prosecution and Private Litigation*, 58 CALIF. L. REV. 1198, 1215 (1970). See also Goldstein, *Newsmen and Their Confidential Sources*, NEW REPUBLIC, March 21, 1970, at 14. The informant is particularly deterred where his information is of an incriminating nature, because the newsman is without standing to assert his informant’s privilege against self-incrimination.

56. *The Times in the Dock*, The New York Times, July 25, 1978, at A14, col. 1.  
 57. Carbine, *The Issue of Protection for Newsperson Sources, Raised by Agnew and also Lowered, Lurks There Still*, Baltimore Evening Sun, Jan. 22, 1974, at A8, col. 1 (paraphrasing Mr. Rosenthal).  
 58. B. BAGDIKIAN, *THE EFFETE CONSPIRACY* 27 (1972).  
 59. White, *Why the Jailing of Farber ‘Terrifies Me,’* New York Times Magazine, Nov. 29, 1978, at 76. Many years after the investigative reporting of Steffens, Sinclair and Tarbell, and many years before investigative reporting became fashionable, Judge Joseph Sherbow of the Supreme Bench of Baltimore, Maryland acknowledged that “many instances of crime and corruption have been brought to light by newspaper investigations . . . when complacent public officials or grand juries have failed to act.” Address by Judge Sherbow at 53d Annual Maryland State Bar Association Meeting (June 24, 1948). In 1969, somewhat before the heyday of investigative reporting, the Managing Editor of the *San Francisco Chronicle* remarked in much the same vein: “An absolutely staggering number of news stories, political and non-political, arise from the digging of the

Columnist James Reston succinctly called to mind more recent examples of such reporting when he wrote that "[a]ll the information that exposed the facts about the Vietnam tragedy and the Watergate conspiracy came into the press from insiders who were determined to tell the truth as they saw it."<sup>60</sup>

Perhaps because their arguments are intuitive or speculative, respected members of the press have been able to influence Congress to a lesser extent than they hoped. The plethora of proposed shield law bills seeking to accord legal status to a newsman's privilege that characterized earlier Congresses is conspicuously absent from the 96th Congress.<sup>61</sup>

Advocates of shield laws, however, have been far more successful in the state legislatures, twenty-six of which have passed laws that grant the press a privilege in its news-gathering activities.<sup>62</sup> Almost one-third of these states passed shield laws or amended existing ones after the Supreme Court issued its *Branzburg* decision.<sup>63</sup>

reporter after he has been confidentially informed that there was something to dig for." Guest & Stenzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NEV. U.L. REV. 18, 60-61 (1969).

60. Reston, *A Letter to Mr. Justice Whizzer*, Baltimore Evening Sun, June 2, 1978 at A8, col. 4.

61. As of this writing, no new shield law bills have been introduced.

62. ALA. CODE tit. 12, § 21-142 (1977); ALASKA STAT. §§ 09.25.150, 09.25.160 (1973); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1978); ARK. STAT. ANN. § 43-917 (1977); CAL. EVID. CODE § 1070 (West Supp. 1979); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1975); ILL. ANN. STAT. ch. 51, §§ 111-119 (Smith-Hurd Supp. 1979); IND. CODE ANN. § 2-1733 (Burns 1968); KY. REV. STAT. ANN. § 421.100 (Baldwin 1969); LA. REV. STAT. ANN. §§ 45.1451-.1454 (West Supp. 1979); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1974); MICH. COMP. LAWS § 767.5a (1968); MINN. STAT. § 595.021 (Supp. 1978); MONT. REV. CODES ANN. §§ 26-1-901 to -903 (1978); NEB. REV. STAT. §§ 20-144 to -147 (1977); NEV. REV. STAT. § 49.275 (1973); N.J. REV. STAT. §§ 2A.84A-21, .84A-21a (Supp. 1978-79); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. §§ 2739.04, 2739.11, 2739.12 (Page Supp. 1979); OKLA. STAT. ANN. tit. 12, § 2506 (Supp. 1978-79); OR. REV. STAT. § 44.510 (1975); PA. CONS. STAT. ANN. tit. 28, § 330 (Purdon Supp. 1978-79); R.I. GEN. LAWS §§ 9-19-1-1 to -19.1-3 (Supp. 1977); TENN. CODE ANN. § 24-113 (Supp. 1977).

63. At the state level, bills were before a dozen legislatures at the same time. FOI Digest *passim*, Aug. 1972 — July 1973 (University of Missouri). Many of the bills introduced gave protection without loophole or condition, but almost always the shield was weakened in the course of the legislative process. Cook, *Battle over News 'Shield' Shifted to Legislature*, Capital Times (Madison, Wis.), Apr. 26, 1973, at 5. The states that have acted since *Branzburg* include California, Delaware, Indiana, Minnesota, Nebraska, New Mexico, Nevada, Oregon and Tennessee.

In 1975, the National Conference of Commissioners on Uniform Laws ended work on a proposed Uniform Act that would have included an unqualified privilege not to identify confidential sources and, in some instances, to withhold "confidential information." A press release stated that "[t]he conference voted to end consideration [of the proposal] when members could not agree on details or that a need existed." EDITOR & PUBLISHER, Aug. 30, 1975, at 18.

V. THE *LIGHTMAN* CASE

It was not *Branzburg* that caused the Maryland General Assembly to reconsider the state's shield law for journalists. Legislative activity in Maryland, rather, came as a response to 1972 decisions of the state's courts in *Lightman v. State*,<sup>64</sup> the only appellate case thus far to interpret the statute since it was first enacted in 1896.<sup>65</sup>

The *Lightman* case had its roots in July, 1971 when David Lightman, a reporter for the *Baltimore Evening Sun*, was sent to Ocean City, Maryland to investigate illegal drug traffic in the ocean resort. The resulting article was published under the banner headline "Ocean City: Where The Drugs Are?" The article described two incidents, based upon Lightman's personal observations, which aroused special interest. The first was that an unnamed Ocean City shopkeeper had offered a customer some marijuana to use in testing a pipe she was trying to sell him. The second raised even more eyebrows. Though a uniformed police officer was in the shop at the time, Lightman's article recounted that the shopkeeper assured the customer that there was no reason to worry because the police "don't come sniffing around."<sup>66</sup>

At the time Lightman's story was published, drug trafficking in Ocean City was also the subject of a Worcester County, Maryland grand jury investigation. As a result of its investigation, the grand jury subpoenaed Lightman, and asked him to identify the shopkeeper and the indifferent police officer, and to give the location of the shop referred to in his article.<sup>67</sup> The reporter refused to answer and was held in contempt.

On appeal, Lightman contended that the shopkeeper was the source of the information for his story, and thus the information sought by the grand jury was privileged by the Maryland press shield statute, which provided that a news reporter could not be compelled to disclose the source of any published information.<sup>68</sup> Were he to provide even the barest facts, Lightman said, the grand jury would be able to discover the name of his source.

In response, the state argued that the source of the news story was not the shopkeeper, but the reporter who had personally observed the transaction.<sup>69</sup> Contending that the newsmen's privilege

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64. 15 Md. App. 713, 294 A.2d 149, *aff'd per curiam*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973).

65. *But see* State v. Sheridan, 248 Md. 320, 236 A.2d 18 (1967) (an earlier case involving the predecessor statute, MD. ANN. CODE art. 35, § 2 (1965), which was dismissed for mootness).

66. 15 Md. App. at 715, 294 A.2d at 151.

67. *Id.*

68. MD. ANN. CODE art. 35, § 2 (1965) (now codified as MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1974)).

69. 15 Md. App. at 723-24, 294 A.2d at 156.

statute protects only the source of information and not the information itself, the state claimed that the statute did not apply to the information in Lightman's article. The state also claimed that the statute only protects the source of information when the information is received in confidence.<sup>70</sup> Because Lightman had not introduced himself as a reporter, and the shopkeeper did not provide any information with the knowledge that Lightman was a reporter,<sup>71</sup> the statute was, according to the state, inapplicable.

Although the Maryland Court of Special Appeals rejected the state's argument that the Maryland law shields from disclosure the source of published information only when a confidential relationship exists between a newsman and his source,<sup>72</sup> it ruled in favor of the state and upheld the contempt order. The court held that when a newsman personally observes criminal activity, that newsman, and not the person observed, is the "source" of the information, and, consequently, he may be lawfully compelled to disclose the location of the commission of the criminal activity and the identity of the participants before a grand jury. In a *per curiam* opinion the court of appeals affirmed the ruling in *Lightman*.<sup>73</sup>

## VI. THE MARYLAND GENERAL ASSEMBLY REACTS TO *LIGHTMAN*

In response to the *Lightman* decision, enactment of a Maryland law with added protections for reporters like Lightman became the goal of at least some journalists in the state. James Day, president of the Maryland Professional Chapter of Sigma Delta Chi, declared that "[w]e need specific guidelines to determine in what areas the reporter is entitled to privileged information and in what areas law enforcement agencies can infringe on that right."<sup>74</sup> In January, 1973, Delegates Robey, Blumenthal, and Hutchinson each introduced similar bills protecting confidential information, whether supplied to the newsman or personally observed by him, as well as protecting sources to whom the newsman promised confidentiality.<sup>75</sup> The three delegates soon consolidated their efforts into a single bill.<sup>76</sup> On February 16, the House Judiciary Committee began consideration of House Bill 475 by voting down an amendment that would have provided protection only if the reporter openly identified himself as a professional newsman.<sup>77</sup> Also rejected was a suggested

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70. *Id.*

71. *Id.* at 716-17, 294 A.2d at 152.

72. *Id.* at 724, 294 A.2d at 156.

73. 266 Md. 550, 295 A.2d 212 (1972).

74. Hurwitz, *How Free Is America's Press?*, BALTIMORE MAGAZINE, Feb. 1973, at 30.

75. H.B. 353 (1973); H.B. 336 (1973); H.B. 382 (1973).

76. H.B. 475 (1973).

77. *Journal of Proceedings of the House of Delegates of Maryland* 584 (1973).

definition of a source as "an actual person who wishes to expose a wrongdoing to a known newsperson and who does not wish his identity to be known."<sup>78</sup>

On February 21, the committee passed an amendment denying protection to information that newsmen had of criminal conspiracy.<sup>79</sup> On February 23, as the bill headed for third reading and the House floor, one delegate proposed that the General Assembly provide no protection to reporters with confidential information beneficial to a grand jury investigating any one or more of the crimes of murder, rape, assault, narcotics violations, vice, extortion, graft, blackmail, or subversive activities. This attempt to weaken the bill was defeated by a vote of 61-39.<sup>80</sup> Later, another delegate offered an amendment that would have forced newsmen to reveal to a judge who required, it any information the judge believed would lead the court to the source whose confidence the newsperson was protecting.<sup>81</sup> On February 28, 1973, with this amendment still pending, House Bill 475 died quietly, the members of the House voting to refer it back to the House Judiciary Committee, where it received no further attention.<sup>82</sup>

## VII. FLAWS IN THE MARYLAND LAW

Six years after the 1973 session, Maryland reporters continue to practice their calling protected only by a law that, at age 83, is a flawed relic. Its limitations, some more apparent than others, are numerous. As *Lightman* amply illustrated, for example, a reporter citing Maryland's shield law can refuse to disclose a confidential news source, but he can be forced to divulge the information his source provided him.<sup>83</sup> The practical effect of this is, in some cases,

78. *Id.* at 610. In their version of House Bill 475, Delegates Robey, Blumenthal and Hutchinson did not include a definition of a "source."

79. *Journal of Proceedings of the House of Delegates of Maryland* 631 (1973).

80. *Id.* at 651.

81. *Id.* at 652.

82. *Id.* at 697. The Maryland General Assembly did, however, amend the Maryland shield law for journalists, albeit in a very minor way, while recodifying it and making it a part of the Courts and Judicial Proceedings Article of the Maryland Annotated Code. Law of August 22, 1973, ch. 2, 1st Sp. Sess., 1973 Md. Laws 288. The law's requirements are still mandatory, not permissive. Compare MD. ANN. CODE art. 35, § 2 (1965) with MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1974). See MD. ANN. CODE art. 1, § 26 (Supp. 1978) ("may not" has a mandatory negative effect).

83. *Lightman v. State*, 15 Md. App. 713, 724, 294 A.2d 149, 156 (1972) ("The Legislature may have enacted the statute with the primary purpose in mind of protecting the identity of newsmen's confidential sources."). Louisiana, like Maryland, has a statute which protects the source but not the information, with similar results as the *Lightman* case. LA. REV. STAT. ANN. §§ 45.1451-.1454 (West Supp. 1979). See also *Dumez v. Houma Municipal Fire and Police Civil Serv. Bd.*, 341 So. 2d 1206 (La. App. 1976).

self-evident: it protects neither the source nor his information, as his information would often reveal the identity of the informant himself.

The law is also deficient because of the different treatment it accords different sources. When a newsman writes about occurrences he personally observes, the law considers him to be his own source. Though the state might be able to obtain the same information from another source, the law still allows it to compel him to reveal all his information.<sup>84</sup> A truly effective shield law would protect information whether its source is the reporter himself or someone else.

Though these drawbacks in the law hurt the media the most, there are others almost as harmful. While Maryland led the way in applying shield law protection to the electronic media,<sup>85</sup> it failed to protect a host of persons who gather and disseminate the news, and who, as the Supreme Court has long recognized, also serve the public.<sup>86</sup> Maryland's statute now protects "a person engaged in, connected with or employed on a newspaper or journal or for a radio or television station."<sup>87</sup> Excluded, however, are writers for news services, news letters, news syndicates, and press associations, as well as freelance writers<sup>88</sup> and writers or producers of documentary films.<sup>89</sup> If the press shield law protects television and radio employees, there is no logical reason why it should not also protect these other bona fide news-gatherers.

Equally lacking in logic is the distinction Maryland's law makes between published and unpublished information. Under Section 9-112 of the Maryland Courts and Judicial Proceedings Code Annotated, a reporter who has spent considerable time and effort obtaining information for a news story may have to reveal both his information and his informant's identity simply because his story has yet to go to print or on the air.<sup>90</sup> The state's interest in

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84. *Lightman v. State*, 15 Md. App. 713, 725-26, 294 A.2d 149, 157 (1972) (information involved a crime in progress).

85. Law of April 29, 1949, ch. 614, 1949 Md. Laws 1477.

86. See *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

87. MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1974).

88. Because some people are afraid that anyone conducting purely personal investigations could also claim the benefits of the privilege, "freelance writer" could be construed strictly as a person qualified by either training or experience to be employed by or connected with the news media. Even with such a strict construction, the journalism student just out of school would be protected, as would a veteran freelance reporter.

89. In a recent Oklahoma case, the Tenth Circuit Court of Appeals held that an unsalaried documentary filmmaker who did not regularly engage in gathering and disseminating the news could still invoke his newsman's privilege not to reveal sources, even though the film was never distributed. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

90. In addition, the government body with subpoena power would be able to obtain such items as a reporter's original notes, sound and video tape recordings, film outtakes, slides, photographs, memoranda, letters, edited drafts, and expense account records.



compelling disclosure understandably increases when there is little likelihood that the information the media gathers will ever be disseminated. Still, to compel disclosure of all unpublished information and sources, regardless of how far the reporter's investigation has progressed, is to do serious damage to the media's ability to gather information.

Only a minority of state shield laws distinguish between published and unpublished information as Maryland's does. Maryland Attorney General Francis B. Burch made this clear in the summer of 1978 when he responded to a request for an advisory legal opinion on the subject from Montgomery County Delegate Marilyn Goldwater.<sup>91</sup> Though the General Assembly had not said so specifically, Attorney General Burch concluded that it had meant to require publication or broadcast before the Maryland media could assert legal protection for information confidential sources had supplied them.<sup>92</sup> Only three other states — Alabama, Arkansas, and Kentucky — have a similar requirement.<sup>93</sup>

It did not take long for the media to voice its disagreement with the Attorney General. News director Tom Beckerer, of WBAL-TV in Baltimore, Maryland commented, for example, that "they are getting right into the gut level of the journalistic process. If sources don't feel protected, it will dry up that avenue of information."<sup>94</sup> The *Baltimore Sun's* ardent response followed Beckerer's by a day:

Maryland's shield law, oldest in the nation, will certainly become worthless if this week's opinion by the Attorney General is not overruled by the courts or the legislature. He said that sources may be protected only if the information they provide is published or broadcast. Since reporters almost never use everything an informant tells them, this would mean that no secret source could be protected. And consider what would happen to an investigation in progress of, say, something like the Watergate conspiracy or the Pallotine fraud. Before the newspaper has enough to publish any articles, the target of the investigation gets wind of it, gets a court to order that the sources of the unpublished allegations be identified. Result: either the reporters go to jail for contempt or the sources are revealed — and silenced. Either way, no stories. Who would be the loser in that

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91. 63 Md. Att'y Gen. Op. 347 (1978).

92. *Id.*

93. ALA. CODE tit. 12, §21-142 (1977); ARK. STAT. ANN. §43-917 (1977); KY. REV. STAT. ANN. §421.100 (Baldwin 1969). Even states that do not protect unpublished information have required partial in camera disclosure of that information. See *CBS v. Superior Court*, 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (1978).

94. *Baltimore Morning Sun*, Aug. 29, 1978, at C1, col. 6.

situation? The press, of course. And the sources. And, especially, the public.<sup>95</sup>

The public may yet be a greater loser because of an ambiguity present in the current statute. Maryland's shield law prohibits compelled disclosure "in any legal proceeding or trial or before any committee of the legislature or elsewhere."<sup>96</sup> If "elsewhere" is read in light of the preceding list, it may not mean, under the doctrine of *eiusdem generis*, all official bodies with the power to cite newspeople for contempt. Thus, the newsmen's shield law might extend to inquiries by legislative or judicial committees, but not to state administrative and executive bodies, which would have free rein to compel disclosure. Whether the courts would construe "elsewhere" as meaning state but not federal bodies is a question dealt with recently by the United States District Court for the District of Maryland. In *Jenoff v. Hearst Corp.*,<sup>97</sup> the federal court recognized and applied the Maryland shield law, holding that a *Baltimore News American* reporter being sued for libel could use the law to safeguard confidential sources who provided him four specific statements appearing in his news article. This interpretation aside, however, there remains the possibility that a state court would apply the law in a less expansive fashion. Conceivably, then, the law could yet mean that a wide range of federal bodies could compel disclosure while the corresponding state bodies could not.

Nowhere in Section 9-112 does there appear a requirement that the newsman actually promise confidentiality to a source before he can claim the shield law privilege. In dictum, the *Jenoff* court interpreted the absence of any such provision to mean that "the statutory privilege [is] broad enough to encompass any source of news or information, without regard to whether the source gave his information in confidence or not."<sup>98</sup> To convert this judicial gloss into more concrete protection, though, would require a provision expressly stating that a newsman's privilege does not hinge upon whether he promises confidentiality to his news sources.

Section 9-112 also fails to discuss if and when a newsman may waive his statutory privilege. Courts in other jurisdictions have held

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95. *Baltimore Morning Sun*, Aug. 30, 1978, at A14, col. 1.

96. MD. CTS. & JUD. PROC. CODE ANN. §9-112 (1974).

97. No. H-75-692 (D. Md., filed Feb. 20, 1978). The reporter did identify non-confidential sources. Judge Harvey wrote that "[t]he Court does not sit as a superlegislature to determine policy or evidentiary privileges. In a particular case in which state law controls, this Court is bound by the unequivocal language of the Maryland statute." *Id.*

98. *Id.* See also *Lightman v. State*, 15 Md. App. 713, 724, 294 A.2d 149, 156 (1972). *But see Andrews v. Andreoli*, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (1977) (must be express or implied agreement of confidentiality between newsman and source before privilege may be asserted); *People v. Dupree*, 88 Misc. 2d 791, 388 N.Y.S.2d 1000 (1976).

that once a reporter discloses some of his confidential information, he has "waived" the privilege.<sup>99</sup> While the United States District Court for the District of Maryland has specifically rejected this approach,<sup>100</sup> it might ease the minds of many state journalists to see a non-waiver provision written into the Maryland statute.

One way for the Maryland General Assembly to cure the numerous defects existing in the state's current shield law would be to enact a statute providing nearly absolute protection to news-gatherers.<sup>101</sup> Though such a law might incorporate the changes mentioned above, news-gatherers' rights should be narrowly limited in the area of defamation. Somehow a balance must be struck between, on the one hand, allowing plaintiffs too easy access to reporters' confidential material<sup>102</sup> and, on the other hand, making it too easy for a journalist defendant to take refuge behind a shield law that permits him to hold his tongue and force the dismissal of the case against him. Before he obtains access to a reporter's protected sources and information, a plaintiff in a defamation suit should be required to make some showing that the defendant acted out of actual malice, defined by the Supreme Court in *New York Times v. Sullivan*<sup>103</sup> as knowledge of the communication's falsity or reckless disregard for its truth or falsity.<sup>104</sup> The unhampered flow of information to the public requires that a plaintiff be unable to reach a reporter's sources and information unless the plaintiff presents some evidence of the defendant's malice.<sup>105</sup>

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99. *E.g.*, *In re Lewis*, 384 F. Supp. 133 (C.D. Cal. 1974) (dictum); *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A.2d 473 (1956). *See also The News Media and the Law* (Report of Committee for Freedom of the Press, Dec. 1977) at 9 (discussing *State v. De La Roche*, No. 2657-76 (N.J. Sup. Ct., filed Nov. 28, 1977)), which held that by publishing portions of a recorded interview with an accused murderer, the newspaper had waived its privilege under New Jersey's very broad shield law for reporters). *But cf. Saxton v. Arkansas Gazette Co.*, 569 S.W.2d 115 (Ark. 1978) (no waiver of all sources by disclosure of one source).
100. *Jenoff v. Hearst Corp.*, No. H-75-692 (D. Md., filed Feb. 20, 1978) ("Such a theory of waiver is much too expansive and would subvert the legislative purpose of the Maryland statute.").
101. See discussion Section XII *infra*.
102. *I.e.*, a person seeking a reporter's confidential sources could simply bring a libel suit, dropping the suit once he received what he wanted.
103. 376 U.S. 254 (1964).
104. *Id.* at 280. *Accord, Sindorf v. Jacron Sales*, 27 Md. App. 53, 341 A.2d 856 (1975), *aff'd*, 276 Md. 580, 350 A.2d 688 (1976); *General Motors Corp. v. Piskor*, 27 Md. App. 95, 340 A.2d 767 (1975), *aff'd in part, rev'd in part*, 277 Md. 165, 352 A.2d 810 (1976), *aff'd*, 281 Md. 627, 381 A.2d 16 (1977).
105. Actual malice should be required where a public official or public figure is involved. *See Gertz v. Welch*, 418 U.S. 323, 342 (1974); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 153 (1967); *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966). *See also Saxton v. Arkansas Gazette Co.*, 569 S.W.2d 115 (Ark. 1978) (reporter-defendant in defamation suit not required to disclose his source until plaintiff makes showing of actual malice).

Showing malice is not an easy proposition, as the Supreme Court recognized in the recent case of *Herbert v. Lando*.<sup>106</sup> Primarily because proof of malice is essential to a public figure's recovery in defamation, the Court held that the thoughts and editorial processes of an alleged media defamer are not beyond the reach of pre-trial discovery.<sup>107</sup> Dissenting Justices did not challenge the "state of mind" inquiry approved by the majority so much as they did the relevance of inquiry into the editorial process. In the view of Justice Marshall, the chilling effect of allowing editorial inquiry is compounded by several factors: "Faced with the prospect of escalating attorney's fees, diversion of time from journalistic endeavors, and exposure of potentially sensitive information, editors may well make publication judgments that reflect less the risk of liability than the expense of vindication."<sup>108</sup> Most members of the media shared Justice Marshall's view.<sup>109</sup>

#### VIII. OTHER WAYS TO IMPROVE THE MARYLAND LAW

The lesson of Maryland's 1973 legislative session may well be that lawmakers, as well as some journalists,<sup>110</sup> look with disfavor on a shield law that places only minor qualifications upon the privilege it grants. With this political reality in mind, the authors believe that the General Assembly might consider several other suggestions that fall short of creating a near absolute privilege and yet afford an added measure of protection to the press. For example, absent from Section 9-112 is any language which ensures that official bodies will issue subpoenas to newsmen *only* if the authorities have failed to

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106. 99 S. Ct. 1635 (1979).

107. Justice Powell, who joined in the majority opinion, also filed a concurrence. Filing separate dissenting opinions were Justices Stewart, Marshall and Brennan (dissenting in part).

108. 99 S. Ct. at 1664. "The deposition of Lando alone consumed 26 days and close to 3,000 pages of transcript." *Id.* at 1664 n.3. Apparently Justice Marshall was so disturbed by the majority's opinion in *Herbert* and other constitutional rights cases that he engaged in "a rare public display of sarcasm, bitterness and pique at his Supreme Court colleagues" during a judicial conference on the press in late May, 1979. *Marshall Criticizes Colleagues*, Baltimore Sun, May 28, 1979, at A3, col. 3.

109. See, e.g., *The Hazards of Libel*, The New York Times, April 23, 1979, at A20, col. 1; *Public May Be The Loser In Libel Ruling, Newsmen Say*, Baltimore Evening Sun, April 19, 1979, at A2, col. 1. But see *Are Current Court Decisions Scaring Off The Media*, TV GUIDE, June 9, 1979, at 39-42. Herbert Mitgang, author of the *TV Guide* article and correspondent for *The New York Times*, noted that the *Herbert* decision "might have a beneficial effect without getting into a courtroom; journalists would strive for greater accuracy. And there is nothing wrong with that." *Id.* at 40.

110. For example, Gary Wills, a syndicated columnist, has been an outspoken opponent of a journalist's absolute right or duty to protect his sources. See Wills, *Legalizing Dirty Tricks*, Baltimore Sun, June 7, 1978, at A13, col. 1.

acquire the same essential information from all other sources.<sup>111</sup> The United States District Court for the District of Virginia has expressly recognized only one situation which warrants subpoenaing newsmen — when the state's "only practical access to crucial information necessary for the development of the case is through the newsman's sources."<sup>112</sup> Maryland's judiciary has not similarly limited the power to subpoena newsmen. Consequently, the press in Maryland may be unnecessarily burdened with requests for information readily available elsewhere.

The Maryland legislature should also clearly set forth the criteria that the state shall consider before issuing subpoenas to newsmen. The authors suggest that there be a requirement that newsmen be compelled to appear before a government body only when absolutely necessary. A reduction of the friction between government and press would likewise result if Maryland were to adopt and follow the Justice Department's written policy, which states that negotiations with newsmen are a necessary prelude to any government attempt to compel their testimony.<sup>113</sup>

Once it becomes apparent through negotiations that a reporter's testimony is vital, he should have a reasonable time in which to prepare affidavits in support of a motion to quash the subpoena. A close examination of the Maryland rules governing the summoning of witnesses and their materials<sup>114</sup> reveals that to ensure a

111. Note that a similar requirement exists in Maryland's Wiretapping and Electronic Surveillance Act, which provides that an application for an order authorizing the interception of wire or oral communications shall include the following information: whether other investigative procedures have been tried and failed or why they appear to be unlikely to succeed or to be too dangerous. Md. Cts. & JUD. PROC. CODE ANN. § 10-408(a)(3) (Supp. 1978).

112. *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 510 (E.D. Va. 1976). Justice Stewart has suggested that a reporter should not be compelled to disclose confidences before a grand jury unless the government "(1) show[s] that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate[s] that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate[s] a compelling and overriding interest in the information." *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting) (footnotes omitted). See also *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972); *Democratic Nat'l Committee v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973); *Rosarto v. Superior Court of Fresno County*, 51 Cal. App. 3d 190, 237, 124 Cal. Rptr. 427, 463 (1975) (Frason, J., concurring); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977); *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 99 S. Ct. 598 (1978); *State v. Peter*, 132 Vt. 266, 315 A.2d 254 (1974); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, cert. denied, 419 U.S. 966 (1974).

113. See 28 C.F.R. § 50.10 *et. seq.* (1978); Dep't of Justice Memo No. 692 (Sept. 2, 1970). Journalists have been quick to note, however, that the Justice Department has observed the Attorney General's guidelines as much in the breach as in the practice. "[T]here have been occasions when a federal prosecutor's concept of a 'negotiation' has been to approach a reporter with a demand for testimony or documents, coupled with the threat of issuance of a subpoena." *Sharing the News With Justice*, COLUM. JOURNALISM REV. at 18, (Sept./Oct. 1975).

114. See, e.g., Md. Rules 103, 104, 114, 115, 400, 405, 406, 731, 742 (1977).

reasonable period of time, it may be necessary that newsmen be specially notified before subpoenas are issued to them.

Rule 742 of Maryland's Rules of Civil Procedure, which fixes the procedure criminal trial courts are to follow in issuing subpoenas, illustrates the need for special notice to the press. Presumably, it also applies to grand juries. Under that rule, subpoena requests must be in the court clerk's hands nine business days before the witnesses are to appear in court.

The rule's foremost failing is that it does not stipulate precisely how much time to allot recipients from the time the subpoenas are served on them until the time they must appear in court. Currently, this is a matter lying within the court's discretion. If the time decreed is too short, a judge may, on request, issue a protective order.<sup>115</sup> Such an order allows the subpoenaed party a reasonable time to obtain an attorney, who may try to quash the subpoena or limit its scope. Even though it may choose not to issue any protective orders, a court in Maryland generally will hold a journalist in contempt only after an unsuccessful show cause hearing.

## IX. TOWARD THE IDEAL SHIELD LAW

Despite its ambiguities and inadequacies, Maryland's shield law reflects in many respects an enlightened approach to the protection of the flow of information to the public. Unlike the laws of some other states,<sup>116</sup> it protects more than newspapers alone; it imposes no minimum circulation requirement on the newspapers it protects;<sup>117</sup> it allows newsmen to plead the privilege before a comparatively large number of governmental bodies; and it does not make the privilege contingent upon the good faith of the reporter.<sup>118</sup> The wording of the Maryland law, moreover, leaves no doubt that official bodies must

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115. For example, William B. Reinckens, a reporter for the Prince George's County, Maryland *Sentinel*, wrote five articles about a county sheriff, which led to the sheriff's indictment on charges of fraud and perjury. The reporter was served a summons demanding that he appear before the Circuit Court for Prince George's County, Maryland within a single business day and bring with him all newspaper articles, notes, tape recordings, memos, documents, records, letters, receipts, literature, slides, photos, and other material directly or indirectly related to the charges against the sheriff. *State v. Ansell*, Crim. No. 18539, 18543 (Cir. Ct. for Prince George's County, Maryland).

116. See, e.g., MICH. COMP. LAWS § 767.5a (1968). See also Note, *State Newsmen's Privilege Statutes: A Critical Analysis*, 49 NOTRE DAME L. REV. 150 (1973).

117. See, e.g., IND. CODE ANN. § 2-1733 (Burns 1968). To be a newspaper within its statute's protection, Indiana requires a newspaper to be issued at intervals of no less than once a week, that it be published in the same city or county for at least five consecutive years, and that it have a paid circulation of at least two percent of the population of the county in which it is published. Obviously, this would exclude all but the most successful publications. About one-half the states protect press associations, and slightly less than one-half shield periodicals. See Graham, *Paper*, *supra* note 15, at 77.

118. See, e.g., ARK. STAT. ANN. § 43-917 (1977).

respect a newsman's rights under the statute.<sup>119</sup> Finally, there is no provision in Maryland's statute which expressly states that a newsman waives his privilege upon partial disclosure.<sup>120</sup>

While such strengths may make Maryland's law better than those of some other states, it is unquestionably worse than those of several other states, notably New Jersey and California, whose shield laws journalists believe to be the most liberal in the nation.<sup>121</sup> Both these states protect information as well as the source of that information, and both shield from government reach unpublished as well as published information.<sup>122</sup> From the standpoint of many journalists, each state's statute has positive features that the other lacks. For example, New Jersey's law, the more recent of the two, goes further than California's in granting a privilege to those "on whose behalf news is gathered."<sup>123</sup> This gives standing to members of the public at large to oppose a compelled disclosure. California's law, on the other hand, defines "news-gatherers" in a far broader fashion than New Jersey's. A news-gatherer in California is one "who is or has been connected with or employed by a publication,"<sup>124</sup> a definition which reduces the number of persons the state may hold in contempt.<sup>125</sup>

In drafting an ideal shield law for Maryland, the legislature should look to the California and New Jersey shield laws as models. As good as they are, however, even these statutes may not sufficiently protect a newsman's interests. The recent, much publicized New Jersey case of *Farber v. State*<sup>126</sup> makes this point plain.

#### X. PIERCING THE SHIELD: THE *FARBER* CASE

In 1968, thirteen people died mysteriously at a New Jersey hospital. A grand jury looked into these unexplained deaths but decided not to bring charges. Ten years later, *New York Times*

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119. See note 82 *supra*.

120. *E.g.*, New Mexico expressly provides for waiver. N.M. STAT. ANN. § 20-1-12.1C (Supp. 1975).

121. CAL. EVID. CODE § 1070 (West Supp. 1979); N.J. REV. STAT. § 2A.84A-21 (Supp. 1978-79). The strength of the New Jersey statute was recognized by the New Jersey courts in *In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 99 S. Ct. 598 (1978). See text accompanying notes 136 and 137 *infra*.

122. *But see* CBS v. Superior Court, 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (1978) (where underlying purpose of agreed confidentiality between network and undercover police officers had been lost, unpublished video and audio "outtakes" ordered disclosed notwithstanding California shield law, which protected disclosure of "unpublished information").

123. N.J. REV. STAT. §§ 2A.84A-21, .84A-21a (Supp. 1978-79).

124. CAL. EVID. CODE § 1070 (West Supp. 1979).

125. The statute, however, fails to consider the freelance writer who has just embarked upon a journalistic career. See note 88 *supra*.

126. 78 N.J. 259, 394 A.2d 330, *cert. denied*, 99 S. Ct. 598 (1978).

reporter Myron Farber continued the investigation the grand jury had abandoned. In his reports, Farber quoted unnamed sources who said the person responsible for the deaths was a certain "Dr. X." Probably in direct response to the Farber articles, a New Jersey prosecutor had Dr. Mario Jascelovich indicted for murder. Farber testified at length about his own investigation at the ensuing murder trial. Not satisfied with Farber's testimony, Jascelovich's attorney demanded from Farber all notes, tapes, and names of anonymous sources, as well as the contents of interviews Farber had conducted with people he freely identified. Jascelovich's attorney claimed this material was necessary to his client's defense.<sup>127</sup> Rather than accede to the demand, Farber cited the New Jersey shield law, which grants a "privilege to refuse to disclose, in any legal or quasi-legal proceeding . . . a) The source, author, means, agency, or person from or through whom any information was procured . . . and b) Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated."<sup>128</sup>

Before deciding if this requested material was relevant, material, and necessary to the defense and unattainable under the New Jersey shield law, the judge announced that he would examine Farber's documents in camera.<sup>129</sup> Once again, both Farber and the *Times* refused to cooperate. In a statement, Farber explained why:

If I, as a journalist, accept information on a confidential basis, I cannot disavow that agreement later, not without destroying my integrity. If I was willing to permit any devaluation of my ethical currency, I would soon find that my worth had eroded completely. And I could not work that way.<sup>130</sup>

To give legal weight to these ethical objections, Farber continued to rely upon the shield law and the first amendment. Held in contempt, jailed 139 days, and fined \$1000, Farber yet held fast to his convictions, aided in no small part by the financial and legal support of his employer.<sup>131</sup> Farber's tenacious stand was to no avail; the New Jersey Supreme Court affirmed the lower court's contempt citations against him and the *Times*,<sup>132</sup> holding that the New Jersey

127. *Id.* at 289, 394 A.2d at 345 (Pashman, J., dissenting). See generally White, *Why the Jailing of Farber 'Terrifies Me,' supra* note 29, at 27.

128. N.J. REV. STAT. §§ 2A.84A-21, .84A-21a (Supp. 1978-79).

129. 78 N.J. at 264, 394 A.2d at 332.

130. The New York Times, July 25, 1978, at B6, col. 5.

131. A fine of \$5,000 per day was imposed upon the *New York Times* for every day that Farber and the *Times* refused to comply with the lower court's order to produce the subpoenaed materials. 78 N.J. at 264, 394 A.2d at 332. Thus, the *Times* paid a total of \$285,000 in fines. *The Court Ducks*, Baltimore Sun, Dec. 6, 1978, at A22, col. 1.

132. 78 N.J. at 270, 394 A.2d at 341.



shield law must bow to the defendant's sixth amendment right to a fair trial.<sup>133</sup> Before a bona fide newsman like Farber could be compelled to submit subpoenaed materials to a trial judge for a preliminary in camera inspection, the *Farber* court, however, would require the defense to satisfy certain threshold requirements at a full hearing. Jascelovich would have to demonstrate by a fair preponderance of the evidence, including all reasonable inferences, that there was a reasonable probability that the information sought by the subpoena was material and relevant to his defense, that it could not be secured in any less intrusive manner, and that the defendant had a legitimate need to see it.<sup>134</sup>

The *Farber* court's balancing approach illustrated that even a virtually unqualified shield law such as New Jersey's cannot protect the press from compulsory disclosure when constitutionally protected rights are threatened. It also called to mind Justice Douglas' eloquent dissent in *Branzburg*, when he alone voiced the view that reporters, with one exception, should never be compelled to testify before grand juries. That single exception applied to circumstances when newsmen themselves were directly involved in crimes. Douglas wrote:

My belief is that all of the "balancing" was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the government and the *New York Times* advance in this case. . . . Sooner or later, any test which provides less than blanket protection . . . will be twisted and relaxed so as to provide virtually no protection at all.<sup>135</sup>

Echoing the words of Justice Douglas was dissenting Judge Pashman of the *Farber* court. According to him, the New Jersey law

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133. *Id.* at 272, 394 A.2d at 336-37. The court restated the maxim that "where Constitution and statute collide, the latter must yield." *Id.* at 272, 394 A.2d at 336. The court also found that the New Jersey shield law violated Article 1, ¶ 10 of the New Jersey Constitution, which provides as follows:

In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

The court cited *United States v. Nixon*, 418 U.S. 683 (1974), as support for the proposition that compulsory process is fundamental to the functioning of our criminal justice system.

134. 78 N.J. at 276-77, 394 A.2d at 338. In his concurring opinion, Chief Judge Hughes stressed that the information sought in *Farber* was "demonstrably inaccessible." *Id.* at 281, 394 A.2d at 341 (Hughes, C.J., concurring). In his dissent, Judge Handler emphasized that "the court's insistence upon the requisite showing of need should be unyielding and meticulous." *Id.* at 305, 394 A.2d at 353 (Handler, J., dissenting).

135. *Branzburg v. Hayes*, 408 U.S. 665, 713 (Douglas, J., dissenting).

"is not an irritation. It is an act of the Legislature."<sup>136</sup> As a legislative enactment drafted in absolute terms, the statute gives the court "no discretion to determine on a case-by-case basis whether the societal importance of a free and robust press is 'outweighed' by other assertedly more compelling interests."<sup>137</sup>

Like Douglas and Pashman, former Yale Law School Professor Thomas I. Emerson has advocated an impenetrable shield protecting the confidentiality of reporters' sources and information. Says Emerson:

If you have a partial shield, then the courts have to decide every case, and that, inevitably, entails balancing. One of the major arguments about the First Amendment is whether or not you can devise legal doctrine that doesn't have the disadvantage of balancing because balancing leaves everything completely open. Without flat rules, without real units to balance on each side, the courts can do anything they want, as can the police, the prosecutors or any government official. And of course the reporter doesn't know in advance any more where he stands. He can't possibly pledge confidentiality, because it may turn out later that the balance will tilt against him.<sup>138</sup>

There are others in the law and in the media who make similar points. Associate Professor Vincent A. Blasi of the University of Michigan Law School suggests, for example, that it should be as clear as possible to both newsman and informant just what data can pass between them without either one fearing that the reporter will later be forced to reveal his source or his information.<sup>139</sup> For Blasi, the ideal shield law would not keep newsmen from testifying on planned, future crimes of violence, the whereabouts of fugitive felons, or observations of crimes to which they were the only eyewitnesses.<sup>140</sup> To allow judges the discretion to compel journalists' testimony in situations of "overriding government need," however, would render any shield law almost useless, according to Blasi. Given such discretion, judges would too frequently choose to waive the shield.<sup>141</sup>

Like Blasi, Jack Landau, Director of the Reporters' Committee for Freedom of the Press, finds judges ingenious in discovering

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136. 78 N.J. at 286, 394 A.2d at 343 (Pashman, J., dissenting).

137. *Id.* at 288, 394 A.2d at 344.

138. Friedman, *Siege*, *supra* note 42, at 48.

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

140. *Id.*

141. See Paul, *Why A Shield Law?*, 29 U. MIAMI L. REV. 459 (1975), on how drafting difficulties can be overcome. See also O'Neil, *Shield Laws: Partial Solution to a Pervasive Problem*, 20 N.Y.L.F. 515, 521-22 (1975).

statutory loopholes that will permit them to force reporters to testify or face stiff consequences if they do not.<sup>142</sup> He notes, for example, that in *Branzburg* a judge ordered newsman Paul Branzburg to tell a grand jury the source of his drug abuse story despite Kentucky's firm shield law that purported to protect reporters' sources. There the judge found a loophole identical to that found in *Lightman*; Branzburg was said to have been his own source of information. Likewise, the strong California law protecting reporters' sources failed to protect newsman William Farr. By waiting until Farr was temporarily unemployed, a Los Angeles judge was able to order Farr to talk, finding him outside the statutory definition of a "news-gatherer."<sup>143</sup> The moral of such stories, states Landau, "is that shield laws should be as broad and tight as words will permit or judges will find ways to evade the intent of the statutes."<sup>144</sup>

Broad exceptions, such as those necessary "to prevent a miscarriage of justice" or "to protect the public interest," if made part of a Maryland shield law, might so weaken the privilege that the exceptions would swallow the rule. This is the view of the Twentieth Century Task Force on the Government and the Press.<sup>145</sup> Qualifications of the shield law, it is thought, rather than being necessary, might lead to newsmen being easily divested of the privilege. Moreover, the Task Force trusts that newsmen will usually volunteer information before a true "miscarriage of justice" can occur.<sup>146</sup>

## XI. THE *STANFORD DAILY* CASE: THE SHIELD DESTROYED?

Regardless of how absolute an evidentiary privilege for journalists might be, it can provide no more than minimal protection if the government, through means other than subpoena, can force them to furnish the information they have gathered. An absolute shield law might be useless, for example, if police could obtain an ex parte search warrant and scour a newsroom for evidence of possible wrongdoing by persons other than the newsroom staff. In May, 1978, the United States Supreme Court held that the police may do exactly that. The Court's 5-3 decision in *Zurcher v. Stanford Daily*<sup>147</sup> came

142. Landau & Graham, *Federal Law*, *supra* note 31, at 33. Arthur Taylor, as newly appointed chairman of First Amendment Research and Defense Campaign of the Reporters' Committee for Freedom of the Press, made a speech on May 30, 1975, in which he said that "[s]tate laws designed to protect journalists [from such efforts] have been interpreted so narrowly as to be virtually useless against forced disclosure." PUBLISHER'S WEEKLY, June 9, 1975, at 28.

143. See text accompanying note 124 *supra*.

144. Landau & Graham, *Federal Law*, *supra* note 31, at 34.

145. *Press Freedoms Under Pressure*, Twentieth Century Task Force on the Government and Press (N.Y. 1972) at 12.

146. Graham, *Paper*, *supra* note 15, at 80.

147. 436 U.S. 547 (1978).

as a severe shock to those in the media who had been watching the case's eight-year odyssey to the high court.

The *Stanford Daily* case stemmed from the April, 1971 demonstrations at the Stanford University Hospital during which nine Palo Alto police officers were injured. The day after the demonstrations, the *Stanford Daily* published photographs of the tumultuous happenings, unwittingly giving police the hope that the newspaper could identify those persons who had injured the officers. Three days later, the police sought and were granted a warrant to search the newspaper's offices for all pictures and negatives the *Stanford Daily* had retained. Outraged at the unannounced search, the newspaper filed suit against the police. For a long time thereafter, it appeared that the judiciary would side with the *Stanford Daily*. Both the district court<sup>148</sup> and the circuit court of appeals<sup>149</sup> reached decisions in its favor, holding that police could obtain warrants to search newspaper premises only after convincing a court that it was otherwise "impractical" for them to subpoena the sought-after items. Writing for the Supreme Court's majority in *Stanford Daily*, Justice White saw matters altogether differently:

We decline to reinterpret the [Fourth] Amendment to impose a general constitutional barrier against warrants to search newspaper premises. . . . Nor are we convinced . . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. . . . In deciding whether to issue warrants, judges and magistrates are nonetheless free to consider the impact on press freedom.<sup>150</sup>

A disappointed media took what solace it could from the dissenting words of Justice Stevens: "This holding rests on a misconstruction of history and of the Fourth Amendment's purposely broad language."<sup>151</sup> The majority's holding, continued Stevens, expanded the number and type of law-abiding persons who might become the subject of unannounced police searches. More important, at least from the media's standpoint, it allowed prosecutors to inspect privileged documents that "could not be examined if advance notice gave the opportunity to object."<sup>152</sup> The decision did away with the requirement that a need be shown before such information could be made available. This requirement was stressed by majority and dissenting judges alike in the *Farber* case decided a few months

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148. *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972).

149. *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977).

150. *Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978).

151. *Id.* at 577 (Stevens, J., dissenting).

152. *Id.* at 579.

later.<sup>153</sup> After *Stanford Daily*, Stevens wrote, police could win approval for a forced search without stating under oath that advance notice would result in the hiding or destruction of the sought-after evidence.<sup>154</sup>

The media reacted to the majority's decision as they would to other major catastrophes. Suddenly, it seemed, the authorities had discovered a new weapon to use against them, a weapon more speedy and destructive than the lengthy and sometimes unsuccessful process of using a subpoena to force a reporter to disclose his sources.<sup>155</sup> Howard K. Smith, ABC-TV commentator, called the decision "nazi-like" and the "worst and most dangerous" opinion the "Court has made in memory."<sup>156</sup> The *New York Times'* James Reston responded to the *Stanford Daily* decision with a letter and column to Justice White. In them Reston noted the devastating impact the opinion would have had on investigative journalism had the Court issued it several years earlier:

It would have been easy for Nixon to get a court order to raid the *New York Times*. He knew precisely where the Pentagon Papers were. . . . Under this Supreme Court ruling, he would have been able to seize them and block the publication of the Vietnam story. If your majority judgment, Justice White, had been in place as the law at the time of the Watergate break-in, Nixon would probably have been able to coverup the whole political and moral mess. The cops would have been able to come into the *Washington Post*, armed with court orders, and have been in a position to intimidate everybody in command.<sup>157</sup>

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153. See note 134 and accompanying text *supra*. Judge Handler wrote that it is not satisfactory merely to "disclose some likelihood that some material sought is somewhat relevant, [or to present] a bare conclusion as to its necessity, [or to remain] silent as to alternative sources and . . . indifferent to matters of overbreadth, oppressiveness and unreasonableness." Judge Handler would require that there be a showing that the information sought is specifically material as to guilt, necessary to the search for truth and that no other feasible means of procuring the same information be available, a far cry from the procedure that *Stanford Daily* approves. *In re Farber*, 78 N.J. at 306, 394 A.2d at 353 (Handler, J., dissenting). The ramifications of the *Stanford Daily* decision reflect the warning of the *Farber* majority: "We wish to make it clear, however, that this opinion is not to be taken as a license for a fishing expedition in every criminal case where there has been investigative reporting, nor as permission for an indiscriminate rummaging through newspaper files. *Id.* at 277, 394 A.2d at 338-39. The New Jersey court is not the only one to exhort against the use of such "fishing expeditions." See note 112 *supra*.

154. 436 U.S. 547, 583 (1978) (Stevens, J., dissenting).

155. Jack Landau, Director of the Reporters' Committee for the Freedom of the Press, has commented that "[i]f you're concerned about the destruction of editorial power, the scope of that [Stanford Daily] type of intrusion, compared with a subpoena to disclose a single confidential source, is enormous." Landau, *New TIMES*, Dec. 11, 1978, at 42.

156. H. Smith, Commentary, May 2, 1978, ABC World News Tonight.

157. Reston, *A Letter to Mr. Justice Whizzer*, Baltimore Evening Sun, June 2, 1978, at A8, col. 4.

Critics of *Stanford Daily* were not found exclusively in the media's ranks, however.<sup>158</sup> Within a few weeks after the Court acted, Congress took action. As chairman of the Subcommittee on the Constitution, Senator Birch Bayh began hearings on several bills drafted to cope with the problems *Stanford Daily* had raised.<sup>159</sup> In the House of Representatives, similar hearings began at about the same time, through the leadership of Representative Richardson Preyer, chairman of the Subcommittee on Government Information and Individual Rights.<sup>160</sup>

The bills each subcommittee reviewed differed substantially.<sup>161</sup> Several required subpoenas rather than warrants for searches of innocent third parties, but even these bills disagreed on how to define "innocent third parties." In some, "innocent third parties" included only newspapers and broadcasters; in others, they included almost everybody. However defined, "innocent third parties" in all these bills would nonetheless be entitled to receive subpoenas, which they could either comply with or contest. Warrants would issue only if there was reason to believe the party would conceal or destroy evidence. In short, said the bills' sponsors, enactment would foreclose the unsavory prospect of the surprise knock on the door, the waving of the all-purpose, non-specific search warrant, then the search itself.

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158. Maryland Senator Charles Mathias made the same point as Reston when he noted that "[p]olice searching the offices of the *Washington Post* might well have found memos, phone numbers or other clues to the identity of the anonymous Watergate witness, 'Deep Throat.' And if 'Deep Throat' knew that, he probably never would have spoken," said Mathias. Wicker, *The Knock at the Door*, *New York Times*, June 25, 1978, at E21, col. 1 (quoting Senator Mathias).

159. The first hearing on *Stanford Daily* was convened on June 22, 1978, by the Subcommittee on the Constitution of the Senate Judiciary Committee. Letter of April 23, 1979, from Kevin O. Faley, General Counsel to the Subcommittee on the Constitution. Together with Senators Metzenbaum and Percy, Senator Bayh had introduced "The Citizen's Privacy Protection Amendment of 1978" earlier that month. S. 3164, 95th Cong., 2d Sess. (1978). Aimed specifically at "the dangers posed by Zurcher," Senate Bill 3164 was to be a "message to the Supreme Court that its whittling away of the Fourth Amendment has gone too far." *Id.* (editorial to bill).

The bill is not limited only to protection of the media's privacy. It would require a subpoena duces tecum before state seizure of potentially crime-related evidence from a "person in possession," unless there is probable cause to believe that that person might be involved in the crime or that the evidence would be destroyed, hidden or delayed before a subpoena could be procured. The Bayh legislation would also give a civil cause of action for general damages, as well as punitive damages "not to exceed \$10,000 for each violation."

160. *House Urges Protection of Press From Searches*, EDITOR & PUBLISHER, Sept. 9, 1978, at 11.

161. See, e.g., H.R. 12952, 95th Cong., 2d Sess. (1978); S. 3162, 95th Cong., 2d Sess. (1978); S. 3164, 95th Cong., 2d Sess. (1978); H.R. 13017, 95th Cong., 2d Sess. (1978); H.R. 13113, 95th Cong., 2d Sess. (1978); H.R. 13619, 95th Cong., 2d Sess. (1978); H.R. 13232, 95th Cong., 2d Sess. (1978); H.R. 13710, 95th Cong., 2d Sess. (1978); H.R. 13909, 95th Cong., 2d Sess. (1978); H.R. 13918, 95th Cong., 2d Sess. (1978); H.R. 13936, 95th Cong., 2d Sess. (1978); S. 3261, 95th Cong., 2d Sess. (1978); S. 3222, 95th Cong., 2d Sess. (1978); S. 3358, 95th Cong., 2d Sess. (1978); H.R. 13168, 95th Cong., 2d Sess. (1978).

During these hearings, members of both the House and Senate subcommittees learned that, though there had been but twelve searches of American newsrooms in 203 years, all twelve had occurred in the last eight years, and three in the past year alone. In Montana, for example, a sheriff armed with a search warrant had recently demanded a tape recording that an Associated Press reporter had made during a telephone conversation with a jailed man charged with murder. In California, a District Attorney had obtained a warrant to search three San Francisco television stations for film clips allegedly in their possession and allegedly showing homeowners demonstrating against a proposed marina. In Rhode Island, police used a search warrant to rifle a television station's film looking for footage showing a picketing member of a teacher's union assaulting a person who crossed the picket line.<sup>162</sup>

Despite the infrequency of newsroom searches, Philip Heymann, a special assistant to Attorney General Griffin Bell, admitted during the hearings that the *Stanford Daily* decision might "look like an invitation" to conduct more such searches.<sup>163</sup> The Court's decision, he said, might usher in a new era. On August 7, 1978, Congressman Preyer's House subcommittee released its recommendations in a report called "Search Warrants and the Effects of the Stanford Daily Decision."<sup>164</sup> The subcommittee agreed that there was need for legislation to protect *all* third parties from search warrants whenever police lack probable cause to connect those parties with a crime they are investigating. Similarly, said the subcommittee, searches under warrant should not be made by police if they lack a reasonable expectation that the third parties will destroy the sought-after material. Though it seemed persuaded that the *Stanford Daily* decision would have a chilling effect on the confidential sources upon whom the press relies, the subcommittee chose to treat the press no differently from any other innocent third party. Doctors, lawyers, merchants, consumers, and bystanders all deserve protection, the subcommittee said, so long as they do not threaten legitimate law enforcement. Ironically, the subcommittee's report had the backing of Palo Alto's mayor, whose police conducted the search that gave rise to the *Stanford Daily* decision.<sup>165</sup>

The bill the House subcommittee recommended was one of thirteen the Justice Department cast aside in favor of a bill it formulated itself. That bill would require police, in all but exceptional circumstances, to use subpoenas, not warrants, to secure material in the hands of newspapers, television stations, book

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162. Wicker, *The Knock at the Door*, New York Times, June 25, 1978, at E21, col. 1.

163. *Id.*

164. H.R. Rep. No. 95-1521, 95th Cong., 2d Sess. (1978).

165. *House Urges Protection of Press From Searches*, EDITOR & PUBLISHER, Sept. 9, 1978, at 11.

publishers, and the like. For the Carter Administration, the bill represented something of a policy shift. The Administration had stood behind the Justice Department when it filed an amicus brief on behalf of Zurcher of the Palo Alto police.<sup>166</sup> Locally as well as nationally, the Carter Administration bill has drawn considerable praise, the *Baltimore Evening Sun* calling it "A forward step . . . passage of which will be an effective demonstration of Congress's good sense."<sup>167</sup>

While Maryland and other states await Congressional action on the Carter bill, the media already has begun to feel the actual impact of *Stanford Daily*, or so it says. A mere two and one-half months after the decision, William Small, news director of the CBS television network, remarked that it "has scared a hell of a lot of reporters."<sup>168</sup> Also, in late July, 1978, Robert Healy, editor of the *Boston Globe*, noted that one source ended his contacts with a reporter for that newspaper because he feared that law enforcement authorities could learn his identity through the use of a search warrant.<sup>169</sup> Even Robert Leonard, president of the National District Attorneys Association and himself a prosecutor, was quick to admit that some news sources had dried up because of *Stanford Daily*.<sup>170</sup> The *Baltimore Evening Sun* likewise expressed despair over the impact of the decision: "To an immeasurable extent, the confidential sources who tell reporters what goes on have been lying low, not relishing the exposure of being named in reporters' notes that happen to be scooped up in a blanket, or search warrant raid."<sup>171</sup>

## XII. MARYLAND'S SHIELD LAW AFTER *STANFORD DAILY*: A PROPOSAL

Drafting the ideal shield law is not easy. Both the Congress and the Maryland General Assembly have discovered that repeatedly. We propose the following draft. If nothing else, it fills certain gaps and

166. Friedman, *Siege*, *supra* note 42, at 47-48. The President's draft of the "First Amendment Privacy Protection Act of 1979" was proposed on April 2, 1979 and was accompanied by several other bills designed to protect other areas of personal privacy.

167. *Press Shield*, *Baltimore Evening Sun*, Dec. 23, 1978, at 4, col. 1. In its generally favorable editorial on the Carter proposal, *The Washington Post* cautioned that any proposed legislation must be carefully screened by Congress. "[B]ecause privacy is illusive — one man's privacy is another man's cover-up — figuring out whether these proposals go far enough, or too far, is an arduous task." *Grasping for Privacy*, *The Washington Post*, April 7, 1979, at A12, col. 1. So illusive is "privacy" that some believe the press is not the party to be protected, but the party to be protected from. Nearly one-third of those questioned in a recent Louis Harris poll believe that newspapers, magazines and television ask for too much personal information. UPI Release, May 2, 1979.

168. *Court Decision Cools Sources, Newsmen Say*, *Baltimore Evening Sun*, July 18, 1978, at A6, col. 1.

169. *Id.*

170. *Id.*

171. *Press Shield*, *Baltimore Evening Sun*, Dec. 23, 1978, at 4, col. 1.



clarifies the ambiguities present in the current version of the Maryland law:

§9-112

- (a) This section grants the news media a virtually unqualified privilege not to reveal sources of information or to disclose information, whether published or unpublished, transmitted or not transmitted. This privilege is granted: (1) to promote the overall freedom of this State's gatherers and disseminators of information; (2) to give the news media a free and unfettered flow of information; (3) to perpetuate the necessarily confidential relationship between the news-gatherer and his sources of information; (4) to protect the public interest.
- (b) For the purposes of this section, "News Media" means:
  - (1) Newspapers,
  - (2) Magazines,
  - (3) Press Associations,
  - (4) News Agencies,
  - (5) Wire Services,
  - (6) Radio,
  - (7) Television, or
  - (8) Similar printed, photographic, mechanical or electronic means of disseminating news and information to the public.
- (c) The following persons shall qualify for the protection this section provides:
  - (1) Anyone whom the news media employs in any news gathering or news disseminating capacity;
  - (2) Anyone whose training or experience qualifies him for news media employment, though he may never achieve that employment.
- (d) Any judicial, legislative, or administrative body, or any body that has the power to issue subpoenas may not compel any person included in subsection (c) of this section to disclose:
  - (1) The source of any information he procures, whether or not he has promised the source confidentiality; and
  - (2) Any news or information he procures for communication to the public but which is not so communicated, in whole or in part, including, but not limited to: all notes, outtakes, photographs, video and sound tapes, film or other data of whatever sort not itself disseminated to the public through a manner of communication.
- (e) When a member of the news media disseminates part of the information he procures from his source of informa-

tion, this does not mean that he has waived the protection this section provides.

- (f) When a member of the news media is a defendant in a civil action for defamation, and asserts a defense based on the content or source of the allegedly defamatory communication, he cannot assert his privilege under this subsection. If the plaintiff is a "public figure" or "public official", this section's privilege is available to the member of the news media until the plaintiff makes some initial showing of "actual malice."
  - (1) For purposes of this section, a "public figure" is: a) one who has achieved pervasive fame or notoriety; b) one who assumes special prominence in the resolution of a public question; or c) one who voluntarily injects himself or is drawn into a particular public controversy.
  - (2) For purposes of this section, a "public official" is an official whose position in government is such that the public has an independent interest in his qualifications and performance.
  - (3) For purposes of this section, one is said to defame with "actual malice" when one makes his communication knowing that it is false or with reckless disregard for its truth or falsity.
- (g) The protection of this section shall not be available to a member of the news media if his testimony has to do with: (1) planned, future crimes of violence; (2) the whereabouts of fugitive felons; (3) observations of crimes to which he is the only eyewitness.

### XIII. GETTING THE GENERAL ASSEMBLY TO ACT

Section XII of this Article presents one possible version of a new and improved shield law for Maryland journalists. Other versions can and should be drafted by the A. S. Abell Corporation, the Hearst Corporation, the Maryland Press Association, Sigma Delta Chi, and the news directors of the state's radio and television stations. Unlike the legislators who will pass upon these drafts, the members of the media have the combined practical experience necessary to make the fine distinctions that should become the core of any new statute.<sup>172</sup>

It should also fall on the leaders of Maryland journalists to develop a legislative consensus for the version agreed upon by members of the media. This will not be easy, because resistance in the General Assembly will doubtless come from proponents of strict law enforcement, from "balancers," and, to a lesser extent, from "constitutional absolutists." Those who fall into this last group

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172. Note, 77 HARV. L. REV. 556, 558-59 (1964).

ignore the fact that a legislative response is far better suited to creating a more detailed privilege<sup>173</sup> than is constitutional protection of journalists. It could be years before the Supreme Court affirms the primacy of the first amendment. It could also be years before the Supreme Court decides, for example, whether to protect records of telephone calls, disbursements, expense accounts or other records that can disclose the identity of a source "as unerringly as the compelled testimony of a reporter."<sup>174</sup> A statute, on the other hand, can specifically and immediately shield this material from disclosure.<sup>175</sup>

We believe that most Maryland legislators, like most Maryland journalists, are generally satisfied with how the current law has worked thus far. Ignored, however, is the possibility that the shield law as written does not deal adequately with everyday situations arising in journalism in Maryland and elsewhere in the country. Also ignored is the fact that the shield law's protection has fallen far short of that intended. The *Farber* and *Stanford Daily* decisions, moreover, have heightened the underlying tension between the government and the press. For example, now that the New Jersey Supreme Court has held that a criminal defendant's sixth amendment rights can take priority over a journalists shield law privilege,<sup>176</sup> it becomes increasingly likely that Maryland defense attorneys will try to obtain reporters' material and testimony in criminal cases running the gamut from shoplifting to murder. Should Maryland's courts follow *Farber* and allow this to happen, Maryland's shield law for journalists would offer scant protection in the context of criminal trials. In a search and seizure context, *Stanford Daily* stands for the proposition that the first amendment

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173. *Press Freedoms Under Pressure*, Twentieth Century Fund Task Force on the Government and the Press (N.Y. 1972) at 16.

174. *See Reporters Committee for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 1431 (1979). Certiorari was sought by the Reporters Committee following a decision in the United States Court of Appeals for the District of Columbia. On August 11, 1978, that court ruled 2-1 that where the government was conducting a "good faith" criminal investigation, it could subpoena reporters' telephone records without notifying them in advance and allowing them to challenge the subpoena in court. In his 79-page majority opinion, Judge Malcolm Wilkey held that reporters surrendered their first or fourth amendment rights against such subpoenas the moment they made their records known to the telephone company, for in doing so they were revealing their confidential sources to a third party.

175. The constitutional absolutists have wielded only momentary influence and then in only one state legislature. On December 6, 1976, 28 representatives and senators in the California Assembly began formal efforts to make the state shield law a part of the state constitution. *Assem. Const. Amend. No. 4, 1977-78 Reg. Sess.* (1977). The Assemblymen hoped that in this form the state's judges would be more likely to give full meaning to the shield's protections, which had been narrowly construed because they are in derogation of the common law. After it was amended on April 27, 1977, Assembly Constitutional Amendment 4 was referred to the Committee on the Judiciary and never heard from again.

176. 78 N.J. 259, 394 A.2d 330, *cert. denied*, 99 S. Ct. 598 (1978).

does not confer upon the press special fourth amendment rights; in effect, the protections afforded journalists against searches and seizures have all but vanished.

While the constitutional absolutists in the General Assembly may be converted to the cause of an improved shield law, there is little chance the same can be done with those who advocate stronger law enforcement. Perhaps the most that can be hoped for is to neutralize their opposition. This can be done by stressing the frequency with which the government enlists the investigative help of the media. It should be pointed out that, in the long run, allowing the press an expansive privilege to preserve the confidences of whistleblowers will yield greater numbers of prosecutions.

The public's view of shield laws can be best described as ambivalent. On the one hand, they have turned to the media with increasing frequency. On the other hand, there is some distrust of the fourth estate due to the power and influence it exerts. The public has learned the lesson, taught by the media itself, that secrecy is to be abhorred. Favoring sunshine and freedom of information laws that regulate the government, the public may not wish to see preferential treatment accorded the media.

Journalists, legislators, and the public can be convinced of the need for a better Maryland shield law. Yet, unfortunately, the shield law is still too often viewed as nothing more than a favorite topic of conversation by members of the media. It is now time to recognize the shortcomings in Maryland's shield law and to begin drafting, organizing and lobbying. By pressing out the wrinkles in its own shield law for journalists, Maryland could again set an example for the nation.