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# Reporter's Privilege: Pankratz v. District Court

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# REPORTER'S PRIVILEGE: *PANKRATZ V. DISTRICT COURT*

## INTRODUCTION

Although the United States Supreme Court has recognized the importance of the first amendment as it relates to the freedom of the press,[1] it has stated that the protection is not absolute.[2] In its analysis, the Court will look to the rights implicated by the individual problem presented and the way in which they relate to the affected public interest.[3]

The concept of a reporter's privilege, not recognized at common law,[4] has only developed in recent years. The privilege presents a conflict between the importance of newsgathering and the right of the public to be informed as opposed to the duty to be a witness and the authority of the court to compel a witness' attendance and exact his testimony.[5]

This unresolved conflict has resulted in a trifurcated development of legal solutions. This comment will examine the three major approaches to the problem of reporter's privilege as they relate to the case, *Pankratz v. District Court*.[6]

## I. THE FACT SITUATION

In December 1978, a citation of contempt was issued for Robert C. Ozer,[7] Special Deputy District Attorney for the 1978 Statutory Grand Jury. An amended citation alleged, *inter alia*, that Ozer had violated rule 6.2 of the Colorado Rules of Criminal Procedure and rule 41(e) of the Local Rules of Practice of the District Court of the Second Judicial District[8] by disclosing information and details of the grand jury proceedings to Howard Pankratz, a reporter for the *Denver Post*.

In January 1979, a subpoena duces tecum *ad testificandum* was served on Pankratz commanding him to appear before the court, give testimony, and produce all documents related to the alleged meeting with Ozer.

Pankratz moved to quash the subpoena on the grounds that the requested information, which had never been published, was confidential and that the enforcement of the subpoena would represent an invasion of his constitutional rights.[9] Pankratz also asserted that the prosecutor had not

1. *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1971); New York Times v. Sullivan, 376 U.S. 254, 270 (1964); Roth v. United States, 354 U.S. 476, 484 (1957); Associated Press v. United States, 326 U.S. 1, 7 (1944) (citing Bridges v. California, 314 U.S. 252 (1941)).

2. Branzburg v. Hayes, 408 U.S. 665, 690 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130, 147 (1967); New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964); Associated Press v. United States, 326 U.S. 1 (1944).

3. Branzburg v. Hayes, 408 U.S. 665, 690 (1971).

4. 8 J. WIGMORE, EVIDENCE § 2286 (McNaughton's rev. ed. 1961).

5. *Id.*

6. 609 P.2d 1101 (Colo. 1980).

7. *In re* Robert C. Ozer and the 1978 Statutory Grand Jury, No. CR-11603 (Dist. Ct. Colo., filed December 13, 1978) (complaint for contempt).

8. Both rules pertain to the requirement of secrecy in grand jury proceedings.

9. U.S. CONST. amend. I; COLO. CONST. art. 2, § 10.

exhausted the alternative sources available to him,[10] and had failed to show a compelling state interest to justify the chilling effect which enforcement of the subpoena would have upon newsgathering and freedom of the press. In his affidavit, Pankratz admitted interviewing Ozer, but swore that the establishment of a confidential relationship was a condition precedent to that interview.

In February 1979, Judge Edward C. Day denied Pankratz' motion on the ground that there was no shield law in Colorado which would excuse a reporter from responding to a valid subpoena.[11] The court held that there was no support for the claim of such privilege according to well-settled rules regarding first amendment reporter privileges.[12] In the absence of a statutory privilege, Pankratz would qualify as a witness.[13] Accordingly, when a reporter has been an observer or participant in wrongful or criminal conduct, he must respond to a valid subpoena to testify or to produce documents relating to that transaction. He possesses no special privilege and is considered to be in "the same shoes as an ordinary citizen."[14]

Judge Day also examined Pankratz' balancing argument and found the state interest sufficiently compelling to burden Pankratz' first amendment rights since he was the only witness present during the entire interview.[15] The court stated that the testimony of Pankratz went to the heart of the allegations against Ozer and, therefore, all the available evidence must be produced. The court rejected the claim that enforcement of the subpoena would have a chilling effect on subsequent newsgathering activities.

Pankratz successfully moved to stay the proceedings. He then filed a Petition for Relief in the Nature of Prohibition with the Colorado Supreme Court.[16] In April 1980, the Supreme Court of Colorado discharged the rule to show cause why the subpoena should not be quashed, and stated that, under the circumstances of this case, there was no constitutionally based reporter's testimonial privilege. Justice Dubofsky did not participate. Justice Rovira, specially concurring, stated that while he agreed with the result, he would apply the three-pronged test promulgated in the dissent of Justice Stewart in *Branzburg v. Hayes*.[17] That is, there must be probable cause to believe that the reporter has information that is clearly relevant; such infor-

10. Gregory Fasing, staff attorney for the Medicaid Fraud Control Unit, was present during only part of the interview. Affidavit of Fasing, *In re* Ozer and the 1978 Statutory Grand Jury, No. CR-11603 (Dist. Ct. Colo., filed December 13, 1978) (complaint for contempt).

11. Judge Day also heard a motion filed by Ozer to dismiss both the citation and the amended citation and a motion of the Special Prosecutor to file the amended citation. The motions of Ozer were denied; the motion of the Special Prosecutor was granted.

12. Pankratz v. District Court, No. CR-11603 (Dist. Ct. Colo., Feb. 1, 1979) (citing Branzburg v. Hayes, 408 U.S. 665 (1972)).

13. COLO. REV. STAT. § 13-90-101 (1973) states that "[a]ll persons, without exception, other than those specified in §§ 13-90-102 to -108 [not applicable to the instant case] may be witnesses."

14. Pankratz v. District Court, No. CR-11603, slip op. at 8 (Dist. Ct. Colo., Feb. 1, 1979).

15. *Id.*

16. COLO. APP. R. 21(c). As a witness rather than a direct party, Pankratz alleged he had no plain and speedy remedy at law. *See, e.g.*, Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976); People *ex rel.* Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

17. 408 U.S. 665, 725 (1972).

mation cannot be obtained by alternative means; and there is a compelling need for the information.

## II. CONCEPTUAL DEVELOPMENT OF THE REPORTER'S PRIVILEGE

Wigmore developed a four-part test to justify recognition of privileged communications.[18] The communications must "originate in a confidence that they won't be disclosed;"[19] the confidentiality must be essential to the relationship between the parties; the relationship must be one which is recognized by the community as being of great importance; and, the potential injury to the relation must be greater than the benefit gained in litigation by the disclosure of the information. No special evidentiary privilege for reporters was formally recognized at common law.

Federal[20] and state[21] rules provide that no person has a privilege to refuse to be a witness, to refuse to disclose any matter or to produce any object or writing, or to prevent another from being a witness except as required by the state[22] or federal[23] constitution, rules promulgated by the Supreme Court of Colorado,[24] state statutes,[25] and common law.[26]

Recognition of a privilege is in direct conflict with the underlying purposes of the rules of evidence.[27] The rules are the embodiment of the principle that "the public . . . has a right to everyman's evidence" unless protected by common law or by statutory or constitutional privilege.[28] They are to be followed to ensure the fair administration of justice and the procurement of truth which will provide for a just determination of a given cause. The United States Supreme Court has held that it is "beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned."[29]

The issue of a reporter's privilege was first raised at the state level; the courts refused to recognize the need for any special treatment of representatives of the press.[30] In the first three cases presented to it by petition, the United States Supreme Court denied certiorari.[31]

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18. *See* 8 J. WIGMORE, *supra* note 4, § 2286.
19. *Id.*
20. FED. R. EVID. 501.
21. COLO. R. EVID. 501.
22. COLO. CONST. art. 2, §§ 7, 10, 18.
23. U.S. CONST. amends. I, IV, V.
24. COLO. R. CRIM. P. 26.
25. COLO. REV. STAT. § 13-90-107 (1973).
26. *See* 8 J. WIGMORE, *supra* note 4.
27. *See, e.g.*, COLO. R. EVID. 102.
28. United States v. Bryan, 339 U.S. 323, 331 (1950)(quoting 8 J. WIGMORE, *supra* note 4, § 2192).
29. Blackmer v. United States, 284 U.S. 421, 438 (1932)(quoting Blair v. United States, 250 U.S. 273, 281 (1919)).
30. *See Ex parte* Lawrence, 116 Cal. 298, 48 P. 124 (1897); Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); Clein v. State, 52 So. 2d 117 (Fla. 1950); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); *In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (1913); Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936).
31. Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *In re* Murphy, No. 19604 (Sup. Ct. Colo.), *cert denied*, 365 U.S. 843 (1961), *noted in In re* Goodfader, 45

In the first case, *Garland v. Torre*,[32] Judy Garland brought suit against CBS for breach of contract and defamation. The civil action in defamation stemmed from a story written by Marie Torre in which she credited a CBS network executive with making statements that Miss Garland asserted were false and damaging to her reputation. Miss Torre refused to divulge the source of her story and claimed that compelled disclosure violated the freedom of the press guaranteed by the first amendment and the requirement of a free society that there be an unrestricted flow of news. The lower court held that the freedom of the press was not absolute. The information sought went to the heart of the plaintiff's claim and, as such, there was no constitutional right to refuse to answer.

Again, in In re *Murphy*,[33] an unpublished Colorado case, the reporter's privilege was asserted and denied. The case arose as part of a disciplinary proceeding against a Colorado lawyer[34] who, in a petition filed with the Supreme Court, allegedly made defamatory statements against a former Chief Justice of the Colorado Supreme Court. The attorney was accused of giving the statements to a reporter prior to filing the petition. The reporter refused to answer as to whether she had received a copy of the petition. The Colorado Supreme Court compelled her testimony, holding that it was relevant and material to the state's case against the attorney.

The third case, *State v. Buchanan*,[35] involved published interviews with marijuana users. The student reporter was held in contempt after refusing to disclose the identity of her source of information during a grand jury investigation. The court held that, in the absence of a state statute, there was nothing in the state or federal constitution that would compel recognition of the reporter's privilege.

The United States Supreme Court, in 1972, chose to address the reporter's privilege by granting certiorari in four cases[36] consolidated for appeal in *Branzburg v. Hayes*.[37] The first three cases[38] each involved grand jury testimony by reporters who were subpoenaed because they were first-hand observers of the alleged criminal conduct. The reporters asserted that they had a constitutionally based privilege premised on the first amendment of the United States Constitution. In each case, the lower courts held that there was no absolute or qualified constitutional privilege that would accommodate a refusal to respond to the subpoenaes. The decisions were affirmed by the Supreme Court.

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Hawaii 317, 367 P.2d 472 (1961); State v. Buchanan, 250 Or. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

32. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

33. No. 19604 (Sup. Ct. Colo.), *cert. denied*, 365 U.S. 843 (1961).

34. People v. Gately, 147 Colo. 336, 363 P.2d 666 (1961).

35. 250 Or. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

36. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970); Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971); Branzburg v. Meigs (Ky. 1971) (unreported decision) (same factual issue as Branzburg v. Pound); *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971).

37. 408 U.S. 665 (1972).

38. Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971); Branzburg v. Meigs (Ky. 1971) (unreported decision); *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971).

In the fourth case,[39] the reporter was subpoenaed to testify about interviews with members of the Black Panther Party rather than about observed criminal conduct. The Court of Appeals for the Ninth Circuit held that, absent compelling reasons for requiring the reporter's testimony, he was privileged to withhold it. The Supreme Court rejected the finding of qualified privilege and also rejected, as burdensome to the judicial process, the requirement that the government show a compelling need for the reporter's testimony.[40]

In support of their assertions of a constitutionally protected privilege, the reporters cited, *inter alia*, the decisions reported in *New York Times Co. v. Sullivan*[41] and *Curtis Publishing Co. v. Butts*,[42] which supported the principle that official action that adversely affects first amendment rights must be justified by a compelling public interest. This had been the position taken by the Ninth Circuit in *Caldwell v. United States*.[43]

*Branzburg v. Hayes* was a five-four decision; the deciding, and somewhat qualifying, vote was cast by Justice Powell who emphasized both the limited nature of the Court's decision as well as the need to balance the individual constitutional interests and societal concerns on a case-by-case basis.[44] The majority opinion noted instances in which a qualified privilege would be recognized[45] and, in dicta, suggested that Congress and the state legislatures address the problem by enacting federal and state press shield laws.[46] Justice Douglas dissented on the ground that the privilege should be absolute.[47]

In their dissent,[48] Justices Stewart, Brennan, and Marshall promulgated a three-part test to apply in cases of this nature: 1) probable cause must be established which demonstrates that the reporter has information that is relevant to the alleged violation of the law; 2) the information sought is not available from alternative sources; and 3) there must be a compelling interest in the information.

## III. TRIFURCATED APPLICATION OF *BRANZBURG*

*Branzburg v. Hayes* stands as the leading case in the area of reporter's privilege. Because of the Supreme Court's complex response to this problem, however, the case has been applied in varying ways. Some courts have interpreted the majority opinion in a very narrow fashion. Others have given greater weight to the concurring opinion and have used the balancing test

39. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd*, 408 U.S. 665 (1972).
40. 408 U.S. at 678.
41. 376 U.S. 254 (1964).
42. 388 U.S. 130 (1967).
43. 434 F.2d 1081, 1086 (9th Cir. 1970), *rev'd*, 408 U.S. 665 (1972).
44. 408 U.S. at 709.
45. *Id.* at 707-08. The Court stated that some protections are recognized within the first amendment. A privilege will be recognized if the grand jury investigation is not instituted or conducted in good faith. There is also no justification for harassment of the press or purposeful disruption of a reporter's relationship with his news sources. Grand juries must operate within the limits of the first as well as fifth amendments.
46. *Id.* at 706.
47. *Id.* at 712 (Douglas, J., dissenting).
48. *Id.* at 743 (Stewart, J., dissenting).

proposed by Justice Powell. These cases further appear to give credence to the dissent by proposing the application of the three-part test that requires establishment of probable cause, use of available alternatives for procurement of the information, and establishment of a compelling interest in the information. The third approach, as suggested in the majority opinion, requires a legislative response in the form of the "press shield laws." This trifurcated application of *Branzburg* has resulted in a three-pronged approach to the problem of reporter's privilege for which resolution may require further consideration by the United States Supreme Court.[49]

The first approach follows the majority's opinion in *Branzburg*. In a decision arising from a murder case, *New York Times Co. v. Jascalevich*,[50] the Supreme Court reaffirmed *Branzburg* and stated there is "no present authority in this Court that a newsman need not produce documents material to the prosecution or defense of a criminal case."[51] In a second denial of reporter Farber's petition for a stay of execution, Justice White repeated this principle and also stated that there was no authority for the notion that "a defendant seeking the subpoena must show extraordinary circumstances before enforcement against newsmen will be had."[52]

In *Zurcher v. Stanford Daily*,[53] the Supreme Court upheld the constitutionality of a search warrant that authorized the search of a newsroom. The Court rejected *Stanford Daily's* argument that the warrant was overbroad because, in the course of a general or unspecified search, confidential information could be uncovered. Applying the logic of *Branzburg*, the Court stated that it was unconvinced that confidential sources would disappear or that the press would suppress news because of unwarranted searches.[54]

Lower courts have also followed *Branzburg*. In *Rosato v. Superior Court*,[55] the California Court of Appeals held that, as a matter of constitutional law and public policy, the argument that the press will be unable, without a privilege, to obtain secret information is without merit. Generally, courts find that when a reporter is an actual witness or participant in the events for which he has been subpoenaed to testify, there will be no privilege.[56]

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49. *See* Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969); Murasky, *The Journalist's Privilege:* Branzburg *and Its Aftermath*, 52 TEX. L. REV. 829 (1974); Nelson, *The Newsmens' Privilege Against Disclosure of Confidential Sources & Information*, 23 VAND. L. REV. 667 (1971); Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 COLO. L. REV. 1198 (1970); Note, *The Rights of Sources—The Critical Element in the Clash Over Reporter's Privilege*, 88 YALE L.J. 1202 (1979); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970).

50. 439 U.S. 1301 (1978).

51. *Id.* at 1302.

52. 439 U.S. 1317, 1322 (1978).

53. 436 U.S. 547 (1978).

54. *Id.* at 564-65; *see* Teeter & Singer, *Search Warrants in Newsrooms: Some Aspects of the Impact of* Zurcher v. Stanford Daily, 67 KY. L.J. 847 (1978-79); Note, *Constitutional Law—First Amendment Rights of Newspaper Are Adequately Protected by Search Warrant Requirement*, 27 KAN. L. REV. 653 (1979); Note, *Constitutional Law—First and Fourth Amendments Do Not Prohibit Use of Search Warrants Against Newspapers*, 53 TUL. L. REV. 1513 (1979).

55. 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976).

56. Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791, *cert. denied*, 434 U.S. 930 (1977); Dow Jones & Co. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973); *In re*

A qualified privilege, however, has been recognized when the information possessed by the reporter was not relevant to the prosecution.[57] It has also been allowed when the reporter did not actually witness any alleged criminal act.[58] A qualified privilege will be recognized if the court finds that the purpose of the subpoena was strictly to harass the news media,[59] or if the information to be obtained is cumulative or available from additional sources.[60]

The second approach following *Branzburg* emphasizes the balancing test used by the concurring opinion while strongly favoring the standards promulgated in the dissenting opinion. In 1979, the United States District Court for the District of Columbia granted a motion to quash in *United States v. Hubbard*.[61] A subpoena duces tecum was served on a reporter from the *Washington Post* to produce his writings and materials concerning an FBI search of the Church of Scientology. The court relied heavily on Justice Powell's concurring opinion in *Branzburg*[62] and invoked the balancing test. It held that there were alternative means to obtain the information concerning the pre-search briefing conducted by the FBI and that the testimony of the reporter was not necessary for a fair resolution of the case.

The Florida circuit court, in *Florida v. Silber*,[63] applied Justice Powell's balancing test to determine that a criminal bribery defendant must establish compelling interests that outweigh the broad first amendment privilege possessed by the press against compelled testimony and production of documents. The circuit court also applied standards which were very similar to those of the dissent in *Branzburg*.[64]

In *Riley v. Chester*,[65] the Court of Appeals for the Third Circuit reversed the finding of civil contempt of the lower Pennsylvania court and recognized a federal common law privilege to refuse disclosure of confidential sources. The court held that criminal or civil litigants must show that the information sought can be obtained from no other source and that the information is material, relevant, and necessary and goes to the heart of the litigant's claim. Although the action was filed under federal law, the court cited the Pennsylvania Shield Law[66] (which provides for a reporter's privilege) because the interests of the state and federal laws were congruent.[67] The court distinguished this civil action from the criminal case, *Branzburg*, yet recognized the strength of Justice Powell's concurring opinion and adopted the balancing test. The court also appeared, however, to apply the three-pronged test out-

Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978); *In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (1972); People v. Dupree, 88 Misc. 2d 791, 388 N.Y.S.2d 1000 (Sup. Ct. 1976).

57. Zelenka v. State, 83 Wis. 2d 601, 266 N.W.2d 279 (1978).
58. Florida v. Hurston, 3 Media L. Rep. 2295 (1978).
59. Morgan v. Florida, 337 So. 2d 951, 956 (Fla. 1976).
60. United States v. Steelhammer, 539 F.2d 373 (4th Cir. 1976).
61. 5 Media L. Rep. 1719 (1979).
62. 408 U.S. 665, 710 (1972) (Powell, J., concurring).
63. 5 Media L. Rep. 1188 (1979).
64. *Id.* at 1189-90.
65. 5 Media L. Rep. 2161 (1980).
66. 42 PA. CONS. STAT. ANN. § 5942 (Purdon Supp. 1980).
67. 5 Media L. Rep. at 2166.

lined in Justice Stewart's dissent. It found that there was no compelling need for the testimony; there were alternative sources from which the evidence could be obtained; and the "information sought to be disclosed appears to have only marginal relevance to the plaintiff's case."[68]

In 1980, the Court of Appeals for the Third Circuit extended, in *United States v. Cuthbertson*,[69] the principles promulgated in *Riley* to criminal cases. A contempt citation was issued against CBS for failure to produce notes and out-takes from the show "60 Minutes" on which was shown a story on a fast-food franchise, Wild Bill's Family Restaurants. (A grand jury later indicted the officers of the franchise for conspiracy and fraud.) The Third Circuit held that CBS was required to produce, for *in camera* inspection, all film, tapes, or transcripts of statements made by named prosecution witnesses and by approximately 100 named franchisees or potential franchisees. The Third Circuit upheld the contempt citation as it related to prosecution witnesses, but reversed the contempt order based on the disclosure of statements made by non-witnesses. The court of appeals noted that *Riley* was "persuasive authority" to extend the privilege to criminal cases.[70] It further stated that the privilege included both confidential sources and unpublished information. Applying the balancing test, the court found that the subpoena must be valid and that the information sought must not be available from alternative sources.

In October 1980, the Court of Appeals for the Third Circuit ruled on *United States v. Criden*.[71] The question decided in this case was whether a journalist, summoned as a defense witness in a criminal proceeding, may refuse to affirm or deny that she had a conversation with an individual who had already publicly testified that the conversation occurred and that certain matters relevant to the judicial inquiry were discussed. The issue involved the credibility of the single self-avowed source rather than the source of the reporter's information.

Factually, this case involved a charge of prosecutorial misconduct on the part of representatives of the Department of Justice and the United States Attorney's Office of the Eastern District of Pennsylvania. They were accused of releasing information concerning the ABSCAM investigation to the media. The defendants were seeking testimony from the reporter concerning the content of the conversation. The source and fact of the conversation had been stipulated to by the government.

The Third Circuit cited the concurring opinion of Justice Powell in *Branzburg* and stated that the assertion of the privilege must be balanced with the interest of the criminal litigant. The court further stated that it must look to the materiality, relevance, and necessity of the information sought. The moving party must show that the information cannot be obtained from alternative sources. After reviewing the circumstances of this case, the court affirmed the decision of the district court and stated that the

68. *Id.* at 2168.
69. 6 MEDIA L. REP. 1545 (1980).
70. *Id.* at 1549.
71. 6 MEDIA L. REP. 1993 (1980).

reporter's qualified privilege to refuse to disclose the contents of the conversation must yield to the defendant's need for the material.

Although these cases are not totally persuasive, they may represent a trend by which the standards of the concurring and dissenting opinions of *Branzburg* are gaining credibility. It is possible that the time is right for further review by the Supreme Court.

The third approach to the problem of the scope of reporter's privilege relates to the attempts by federal and state governments to enact press shield laws. In the *Branzburg* decision, the Court stated that:

> Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.[72]

At the time of this decision, seventeen states had passed shield law legislation. Today, there are twenty-six such statutes[73] that vary in the degree of protection that they offer. Of the total, eleven provide only for a conditional privilege that can be revoked under certain circumstances or by court order.[74] Some statutes, although appearing to confer an absolute privilege, have been interpreted by the courts as conditional in cases involving criminal activity or grand jury proceedings.[75] Furthermore, if a reporter does successfully assert the protection of a shield law, it can be circumvented by

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72. 408 U.S. at 706.

73. ALA. CODE § 21-142 (1977); ALASKA STAT. §§ 09.25.150, .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, -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, .12 (Page Supp. 1979); OKLA. STAT. ANN. tit. 12, § 2506 (West Supp. 1978-79); OR. REV. STAT. § 44.510 (1975); 28 PA. CONS. STAT. ANN. § 330 (Purdon Supp. 1978-79); R.I. GEN. LAWS §§ 9-19-.1-1 to -3 (Supp. 1977); TENN. CODE ANN. § 24-113 (Supp. 1977).

74. States with statutes providing only a conditional privilege include Alaska, Arkansas, Delaware, Louisiana, Minnesota, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, and Tennessee.

75. Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976); Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972); Lightman v. State, 15 Md. App. 713, 294 A.2d 149 (1972), *aff'd*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973); *In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (1972), *cert. denied*, 410 U.S. 991 (1973); Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976); Andrews v. Andreoli, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977).

obtaining a search warrant.[76]

California has amended the state constitution to include reporter's shield provisions. This amendment provides for an absolute privilege as it relates to the source of information and disclosure of unpublished information. The Colorado Legislature has not passed a shield law; several bills were introduced in 1973 but all were unsuccessful.[77] None have been introduced since.

At the federal level, numerous attempts have been made to provide a privilege to reporters.[78] The most recent effort came in reaction to the *Stanford Daily* case.[79] While initial attempts reflected a desire to include the concept of privilege, the form of the final bill may represent a compromise.[80]

It would appear that the trend is toward increased legislation. Whether a substantive privilege is actually afforded through this effort, however, is questionable. The shield statutes have been narrowly construed and may be of limited help to either the informant or the reporter.

## IV. RATIONALE OF *PANKRATZ V. DISTRICT COURT*

The issue to be resolved in *Pankratz v. District Court* was whether there was a constitutionally based privilege that would protect the petitioner and shield him from compliance with the subpoena issued by the district court. The Supreme Court of Colorado held that, "*under the circumstances of this case*"[81] and "*applied to the facts of this case*,"[82] a privilege does not exist.

The circumstances and facts of the Pankratz case are very limited. Mr.

76. Zurcher v. Stanford Daily, 436 U.S. 547 (1978); *see* text accompanying notes 52-53, *supra*.

77. H.B. 1327, 49th Gen. Ass., 1st Sess. (1973); H.B. 1034, 49th Gen. Ass., 1st Sess. (1973); H.B. 1016, 49th Gen. Ass., 1st Sess. (1973).

78. *See, e.g.*, S. 1128, S. 318, S. 36, H.R. 7984, H.R. 5928, H.R. 3595, H.R. 2280, H.R. 1263, H.R. 717, S.J. Res. 8, 93d Cong., 1st Sess. (1973); S. 3552, H.R. 18983, H.R. 16704, H.R. 16328, 91st Cong., 2d Sess. (1970); H.R. 5146, H.R. 5003, 83d Cong., 1st Sess. (1953); S. 919, 77th Cong., 1st Sess. (1941); S. 2175, S. 2110, H.R. 5403, H.R. 5281, 71st Cong., 1st Sess. (1929).

On June 14, 1973, a favorable report was given to the full committee by a subcommittee of the House Committee on the Judiciary. H.R. 5928, 93d Cong., 1st Sess. (1973). This bill gave journalists an absolute privilege to refuse to disclose to federal grand juries the identity of a confidential source or the content of any confidential communication obtained in their professional capacity. The privilege was extended to civil and criminal federal trials but was conditional and could be revoked if the party seeking the information could show that it was relevant and was not available from alternative sources. This bill was not passed.

H.R. 215, 94th Cong., 1st Sess. (1975), offered reporters and publishers limited protection from compulsory disclosure of news sources and information in federal and state courts. Known as the News Source and Information Protection Act of 1975, hearings were held to discuss the bill before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The bill was not passed by Congress.

79. H.R. 3486, 96th Cong., 1st Sess. (1979), was approved by the Courts, Civil Liberties, and Administration of Justice Subcommittee and sent to the full committee. H.R. 3486 requires federal and state authorities seeking materials in the possession of anyone engaged in first amendment activity to obtain a subpoena. A search warrant may be used if the person holding the materials sought is suspected of a crime or the materials are needed to prevent the immediate death or serious injury of a human being.

80. S. 115, H.R. 4181, S. 1790, and S. 1816, 96th Cong., 1st Sess. (1979), were considered to be broader in scope than H.R. 3486, 96th Cong., 1st Sess. (1979).

81. Pankratz v. District Court, 609 P.2d 1101, 1102 (Colo. 1980) (emphasis added).

82. *Id.* at 1103 (emphasis added).

Pankratz, a newspaper reporter, was a first-hand observer of criminal conduct. Although he was not the only observer, the trial court found that he was the one person who was present during the entire transaction. Pankratz submitted an affidavit stating that the meeting had taken place with the informant, Ozer, and confidential information had been exchanged. The problem, therefore, was not the identity of the informant, but rather the content of the unpublished information. Furthermore, the petitioner was not refusing to respond to questions of the grand jury, as in *Branzburg*. *Pankratz* involved criminal proceedings, and it was the defendant in the criminal trial who had allegedly violated the secrecy rules of the grand jury.

In refusing to recognize a privilege, the Colorado Supreme Court relied heavily on *Branzburg*. Quoting *Branzburg*, the court found that when a reporter has witnessed a crime, there is no substantial question concerning the existence of a privilege. "The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not."[83] The court found further support in *New York Times Co. v. Jascalevich*,[84] which reaffirmed the *Branzburg* decision. The court held that the public interest in law enforcement and effective grand jury proceedings is greater than the burden placed on newsgathering.

The court rejected the cases cited by Pankratz as inapplicable to the present situation. The first four cases[85] were civil, and therefore more appropriate vehicles for application of the balancing test. The fifth case[86] involved a crime that the reporter had not observed and for which the testimony of the reporter would have been only remotely relevant.

In his concurrence,[87] Justice Rovira agreed with the decision of the majority, but stated that he would have applied the three-pronged test and would have emerged with the same result. That is, the testimony of the petitioner went "to the very heart" of the charges against Ozer; the information, because Pankratz was the only witness to the entire transaction, could not be obtained by alternative means; and the testimony was relevant to the alleged violation of the law.

## V. IMPACT ON COLORADO LAW

The ultimate enforcement of the contempt citation against Howard Pankratz will never be tested. On August 10, 1980, Judge Day responded to a motion to quash the subpoena for deposition that was served on Pankratz by vacating the *ex parte* order for deposition. In applying rule 15 of the Colorado Rules of Criminal Procedure, Judge Day held that a deposition could only be taken if the witness were unable or unwilling to appear for trial. Counsel for Pankratz, Walter Steele, assured the court that the witness

83. 408 U.S. at 692.

84. 439 U.S. 1317 (1978).

85. Silkwood v. Kerr McGee, 563 F.2d 433 (10th Cir. 1977); Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973).

86. Zelenka v. State, 83 Wis. 2d 601, 266 N.W.2d 279 (1978).

87. Pankratz v. District Court, 609 P.2d 1101, 1103 (Colo. 1980) (Rovira, J., concurring).

would be present at trial. He was explicit in pointing out, however, that while Pankratz would be present at the trial, he could not promise the court that the witness would testify. The matter was set for trial.

On August 19, 1980, the district court heard a motion filed by Ozer in which he stated that he had briefed Pankratz about indictments he planned to seek from the grand jury. Ozer's action released Pankratz from his pledge of confidentiality.

Judge Day found Ozer in technical contempt and proceeded to purge the contempt and levy no fine or jail sentence. He dismissed the case and the subpoenas that had been issued, including the one that would have compelled Pankratz to testify at the trial.

The decision in *Pankratz* represents only an initial step in the resolution of the controversy over the reporter's privilege. It is a narrow holding and if, in fact, the information was not available from another source, a valid decision. Certainly, the public is entitled to "everyman's evidence," particularly in a criminal case.

It would appear, however, that a trend has developed that would support Justice Powell's proposed balancing test as well as the three-pronged test of the dissent. Because it appears that the contempt citations in cases like these will continue to be challenged, application of Powell's standards would probably be no more time consuming than the lengthy and predictable appeals.[88]

The court in *Pankratz* was very specific in pointing out that the ruling applies only to the facts presented to the court in that instance. This explicitly limited scope leaves many aspects of the question of reporter's privilege unresolved. For example, will the court recognize a privilege if the information sought relates to the identity of the informant? Are the standards presented by the court applicable to other types of hearings such as administrative or legislative committee hearings? Does the holding extend to all newsgatherers? Must the activity of the reporter be within the scope of his employment? Does it apply only to unpublished material? To what extent would a press shield statute be accepted by the court? These are questions that will remain unanswered until subsequently approved legislation or other cases are presented to the court.

*Joan Harcourt Cady*

88. Interview with Carol Green, attorney for the *Denver Post*, August 11, 1980. Ms. Green indicated that newspapers are, in many instances, requiring that a reporter obtain approval from his or her editor before a request for the establishment of a confidential relationship with an informant can be granted. This is sometimes done in the form of a written agreement which limits the scope of the relationship to the time that a matter may be presented for litigation.

Ms. Green also indicated that since the *Pankratz* case, there has been a reluctance on the part of public officials to disclose information. It would appear than an in-depth, sociological study is warranted to test the hypothesis promulgated by the Supreme Court in *Branzburg* that the flow of news to the public is not constricted by the failure to recognize a privilege for reporters.