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THE CLAIM TO SECRECY OF NEWS SOURCE:
A JOURNALISTIC PRIVILEGE?

PETER J. GOLDSWORTHY*

INTRODUCTION

The recent report of the Senate of Canada on the Mass Media1 declines to recommend any modification of the common law position denying the claim by newsmen to maintain, before official bodies, secrecy of news source.2 The case for recognition of the claim has been argued stridently by the mass media, and recent cases have once again stimulated the controversy: in the United States, important news media have been confronted by governmental demands that they release, in the course of judicial proceedings, unpublished notes, files, films and other material relating to certain political organizations; in Canada, journalists have, in some well-publicized cases, kept silent when questioned as to the identity of the sources of their information.3

Generally there has been a lack of legislative and judicial response to the newsman’s claim, apart from several states of the United States where legislative action has been taken.4 It is clear that recognition of a privilege for newsmen must proceed from the legislature; the common law is set against

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1 Report of the Special Senate Committee on Mass Media “The Uncertain Mirror” (Ottawa: Queen’s Printer, 1970) 105-06 [hereinafter the DAUEX Committee].
2 The main concern of this paper will be with the claim to privilege in judicial proceedings, but it is acknowledged that legislative bodies and tribunals may also be involved. For a classic illustration of the claim before a legislative body, see the Deutsch Case, reported N.Y. Times, May 19, 1945 at 8; 91 Congressional Record, Appdx. 2554 May 28, 1945.
3 On 18th March 1969, a Canadian Broadcasting Corporation television journalist, John Smith, was cited for contempt of court for having refused to reveal the identity of a confidential source of information. Smith had apparently interviewed a young man claiming to be a member of the F.L.Q. (Front de Liberation du Quebec). See, Memoire de la Federation Professionelle des Journalists du Quebec au Comite Special du Senat sur les moyens de communications de masse, le 13 avril 1970 at 3. Bills have been presented to the Ontario Legislature by members of the New Democratic Party in order to give newspaper reporters the right to preserve anonymity of source: see Toronto Daily Star, Oct. 8, 1970 at 6. Recently, two reporters refused to identify their sources before a Commission of Inquiry in Toronto (the “Duke Inquiry”). The Commissioner decided not to take action against the reporters, because the information the reporters could provide was obtained from other witnesses: see Toronto Daily Star, Oct. 9, 1970 at 4. See also Report, supra note 1 at 105, for reference to the Smith case.

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a privilege, although the common law always upheld a discretion in the judge to aid the reluctant journalist. This was an illustration of the principle, expressed by Wigmore, that there should be no general privilege of confidential communications. "The investigation of facts, for reaching the truth in the administration of justice, would be intolerably obstructed by such a general privilege."  

It has been urged, with perhaps undue romanticism, that newsmen today have a new role and deserve a special treatment to which members of other occupational groups are not entitled. The massive growth and increased public influence of traditional media (newspaper, magazines) in this century, together with the gargantuan development of radio and television, has inspired the emergence of a myth of the newsmen as guardian of democratic freedoms; he is seen as the public watchdog against official and bureaucratic abuse of power. A measure of the change in status and public position of the newsmen is the dignity, now accorded the profession of journalists, of "the fourth estate". It is therefore urged that the newsmen in this quasi-public role should be entitled to preserve secrecy of source before official bodies demanding information from him. Newsmen fear professional emasculation; they fear lest their function and efficiency as gatherers of news for the information of the public be impeded by compulsory disclosure of sources of information.

It is customary to commence an examination of a claim to privilege by quoting Wigmore. Wigmore named four conditions which he considered to be essential prerequisites to the recognition of a professional privilege:

1. the communications must originate in a confidence that they will not be disclosed;
2. this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. the relation must be one which in the opinion of the community ought to be sedulously fostered;
4. the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Wigmore opposed the creation of any privilege in favour of journalists. However it has been urged that newsmen do meet the four conditions. First, there is no doubt that the relationship between newsmen and informant is

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5 Apart from the attorney-client relationship (see Wigmore on Evidence [McNaughton Revision] (Boston: Little, Brown, 1961) s.2282 at 541 [hereinafter Wigmore]) which has been privileged for centuries, and is now recognized by statute in many jurisdictions, some legislatures have extended privileged protection of other confidential relationships. These include physician-patient, priest-penitent, patient-psychologist, and other relationships (see Id. s.2286 at 536). Most of the moves to establish occupational privileges outside the attorney-client privilege have been in the United States. In Canada, Newfoundland recognizes a priest-penitent privilege by statute (Evidence Act R.S.N. 1952, c.120 s.6.). But in England, the trend against the granting of privilege is more pronounced: some old privileges were abolished by the Civil Evidence Act 1968 c.64, s.16 (U.K.). On the physician-patient and priest-penitent privileges, see Nokes, Professional Privilege (1950), 66 L.Q.R. 88 at 94.

7 VII Wigmore, s.2285 at 527. The conditions were quoted, with little discussion, in the Report supra note 1 at 106.

8 Id. s.2286, n.9.
confidential; secondly, the informant often relies on an express or implied promise of confidentiality maintained by the newsman; thirdly, it is argued that the public has a vital interest in the maintenance of a satisfactory relationship between the newsman and informant, because the public is vitally interested in the information yielded by the relationship; community opinion must therefore favour the privilege; lastly, it is urged that the faculty of the newsman to acquire confidential information deserves protection at the expense of judicial and other authorities to demand disclosure.

The fourth condition presents the crux of the dispute: it juxtaposes the two principal interests in conflict. On the one hand, the public has an interest in the free and unrestricted flow of information and in accurate reporting; on the other hand, there is quite clearly an opposing public interest in the due administration of justice. The treatments accorded the newsman's claim to privilege in the United Kingdom, Canada and the United States will be examined to determine what weight should be accorded the various interests at play in order to reach a fair evaluation of the claim.

The United Kingdom

In 1967, the United Kingdom Law Reform Committee reported on the topic of privilege in civil proceedings. The Committee discussed at length the classic privileges — against self-incrimination; in aid of litigation, settlement and conciliation; and concerning husband and wife. Then, under "confidential relationship", the Committee considered claims to privilege between priest and penitent, and doctor and patient. The Committee did not mention the claim to privilege affecting newsmen, although it did note the existence of claims by "accountants, bankers, many servants and agents." In relation to the latter claims the Committee reported that the duty of non-disclosure was recognised by the courts "and given effect to by the judges so far as is consistent with the overriding claims of the interests of justice." In the circumstances the Committee did not recommend the extension of a statutory privilege to these relationship. It is obvious that the Committee was influenced to its decision by the desirability of keeping the number of recognised privileges at a minimum, and by the belief that the better solution is to grant a wide discretion to courts to permit non-disclosure "where disclosure would be a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed."

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9 See, for example, the views of Dr. F. S. Siebert quoted in School of Journalism, University of Missouri, Reporters' Privilege Worldwide (Freedom of Information Center Publication No. 116, February 1964) 4. This pamphlet should be consulted as an excellent resume of the position, particularly for its journalistic publications references. It also gives a brief survey of the position in countries other than Great Britain, Canada and the United States; id. at 5-6, mentioning, inter alia, cases in Norway (secrecy of source permissible if there had not been a breach of official secrecy) Puerto Rico (privilege available). Austria gives a right of professional secrecy to the journalist. 10 Law Reform Committee (U.K.), Sixteenth Report (London: H. M. Stationery Office, 1967).
11 Id. para. 54 at 23. It is curious that no news media appear in the list of organizations and individuals which submitted evidence to the Committee (Annex 1, at 25).
12 Id. para. 54 at 23.
13 Id. para. 1 at 3.
The position of the privilege at common law was clarified by three cases decided in 1963 arising out of the Vassall spy scandal. A tribunal had been set up to investigate, in very broad terms, the circumstances in which offences under the Official Secrets Act had been committed by Vassall, an Admiralty official. Shortly after Vassall's trial a newspaper published a statement to the effect that Vassall's spying had led to Russian trawlers being in the vicinity of secret N.A.T.O. sea exercises. The reporter who wrote the passage, and acknowledged full responsibility therefore, was called by the tribunal and asked to name the source of his information. He refused to do so and, ultimately, was found guilty of contempt. In the other cases, the reporters had published statements of such a nature that a source within Admiralty was clearly indicated. Again, the reporters declined to disclose the sources of their information and were eventually found guilty of contempt.

In all the cases, the courts first decided that the questions put to the reporters were relevant. The courts then held that the journalists could claim no privilege, although in particular cases a court could hold that public policy demanded immunity for the journalist. In the Clough case, Parker C.J. added that the former rule of practice that in interlocutory proceedings for discovery the press would never be required to reveal the source of information had hardened into a rule of law. His Lordship reasoned thus from a consideration of the wholly discretionary character of discovery, which has nothing to do with what may have to be ordered at the trial itself. In the Mulholland and Foster cases, Donovan L.J. added that disclosure will not be ordered unless the answer will serve a useful purpose in the instant proceedings, a matter wholly within the discretion of the judge. Donovan L.J. also alluded to the possible existence of other considerations which might lead a judge to conclude that more harm than good would result from compelling a disclosing or punishing a refusal to answer. His Lordship declined to give any examples, but Lord Denning M.R. suggested the case where, in a libel action, the plaintiff wants the defendant newspaper to reveal the source of its information before the trial. In such a case the court will not as a rule compel disclosure because it may open others to suit.

The Foster case provides an interesting variation. The respondent reporter in that case did not remember the source of his information. All he refused to disclose was the type of the source. Lord Denning M.R. pointed out that the question of type of source was relevant to the investigation of the tribunal encompassing possible neglect of duty by those responsible for Vassall, as knowledge of the type of source could have led to pinpointing the actual source.


17 Id. at 490, [1963] 1 A11 E.R. at 771.

18 Id. at 488, [1963] 1 A11 E.R. at 770.
These three cases relied heavily on a leading Australian decision, *McGuiness v. Attorney General of Victoria.* There a commission, established to investigate bribery of a member of Parliament, found a journalist guilty of contempt under a statutory provision relating to its proceedings. On appeal, the High Court of Australia unanimously refused to recognise any claim to privilege by the journalist. Dixon J. spoke of “the inevitable conflict” that had to be resolved between “the necessity of discovering the truth in the interests of justice” and “the obligation of secrecy or confidence” to another person by the witness. However, except for the few relations where “general policy” required the existence of a privilege, such as husband and wife, attorney and client, and, where applicable by force of statute, physician and patient, priest and penitent, the rule was inflexible that no mere obligation of honour could hinder the public policy inherent in requiring answers in the witness box.

Early in English law the claim to privilege based on point of honour was dismissed. On the trial of the Duchess of Kingston, a physician’s claim to privilege was dismissed along with a claim by another witness based on an obligation of honour. In dismissing the first claim the Court convinced itself that while the revealing of secrets by a physician would ordinarily be counted a breach of honour and indiscreet, it was otherwise when the revelation was made in the course of a legal proceeding. The second claim was treated with less seriousness; the Court was dealing with a criminal case, and the etiquette of honour could not be observed at the same time as the Court was trying lives and liberties. This potential restriction to criminal cases was forgotten by later courts.

Another line of cases demonstrates a judicial readiness to permit silence when the effect of the answer would be to disclose the name of a writer of an allegedly libellous article or of the sources he has relied upon. It seems that the rule is based upon consideration of the desirability of protecting

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20 (1940), 63 C.L.R. 73 at 92-105.

21 The relationships of doctor and patient and priest and penitent are the subjects of statutory privilege in certain parts of the British Commonwealth, such as New Zealand, Victoria, Tasmania, Newfoundland and British Honduras, and in some states of the United States. See Report, supra note 10, para. 41 at 17.

22 (1776), 20 Howell St. Tr. R. 355.

23 See *O’Brennan v. Tally* (1935), 69 I.L.T. 115 where a newspaper editor refused to reveal the name of a correspondent with the newspaper and was found guilty of contempt. A report in *The Times,* 20th Feb. 1889, at 8, cols. 3-6 reports a case during the proceedings of the Parnell Commission, when The Times editor refused to disclose the names of the writers of certain articles, and was compelled to answer the specific questions put to him.

24 It seems, however, that English courts are reluctant to compel newsmen to reveal their sources, and will only do so, as the “Vassall cases” indicate, when overwhelming considerations of public policy or justice so dictate. It is rarely, if ever, that a judge will compel a clergyman to reveal the details of a penitential conversation, although the privilege of the confessional is in theory denied. See *Wilson v. Rastall* (1792), 4 T.R. 759; 100 E.R. 1283 and *R. v. Hay* (1860), 2 F. & F. 4, 175 E.R. 933.

contributors from unnecessary disclosure of their names. It has been established that, as a rule of practice, in the absence of special circumstances, reporters need not disclose their sources in the context of litigation against newspapers.25

Canada

(a) At common law

Agitation in Canada has grown recently for a privilege for newsmen and their informants in respect of their communications. The matter has been highlighted by some recent cases,26 and bills may be introduced into the Ontario legislature to give journalists the right to preserve anonymity of news source.27 However, the Report of the Ontario Royal Commission into Civil Rights recommends that no changes be made in the common law position, on the ground “that the injury that would be done to the administration of justice”28 by such a privilege “far outweighs” the alleged benefits.28 The Report notes favourably the operation of judicial discretion in this area. In addition the Canadian Senate Committee on the Mass Media has recommended that no change be made in the common law.29

It is worth noting that some difference exists between the various provincial jurisdictions as to the possibility of a claim to privilege in the context of litigation against a newspaper. In Reid v. Telegram Publishing Co. Ltd. and Drea,30 an action for libel against a newspaper, the Court refused to grant discovery of the identity of the newspaper’s informants on the grounds of public policy. The defences of justification, qualified privilege and fair comment had been raised by the newspaper, and the informants would have to be called at the trial to prove truth in fact and lack of malice. This view accords with the English exception, noted above,31 to the obdurate refusal of English courts to grant an occupational privilege to journalists in respect of their sources in all cases. However, a different conclusion was reached in McConachy v. Times Publishers Ltd.,32 another libel action against a newspaper. Both the editor and the reporter were asked to name the sources of their information for the alleged defamatory article during a discovery proceeding. The British Columbia Court of Appeal compelled both the editor and the reporter to disclose their sources, holding that the English rule had no application in British Columbia. Davey J.A. thought that it was unnecessary to consider the question of “a residual discretion to restrict cross-examination as to a newspaper’s source of information”,33 because the newspaper article in question referred to information the reporter asserted he had

26 See, e.g., the Smith case discussed supra note 3.
28 See Royal Commission Into Civil Rights (Report Number One) Vol. 2 (Toronto: Queen’s Printer, 1968) 826.
29 Report of the Special Senate Committee on Mass Media, supra note 1.
30 (1961), 28 D.L.R. (2d) 6 (H.C. of Ont.).
31 Supra note 15.
33 Id. at 352, 50 W.W.R. at 391.
received from other persons. The Court refused to allow the Reid case, first, because it had been decided contrary to prior decision of the British Columbia Court of Appeal and, secondly, because judgment had been given before the decisions in Attorney-General v. Clough, Attorney-General v. Mulholland and Attorney-General v. Foster. It is difficult to perceive any strength in the second reason given, as those English cases support the Reid case on the question of discovery in libel actions against newspapers. It is well to note that the Reid case was referred to approvingly by the Alberta Supreme Court in Red Deer Nursing Home Ltd. v. Taylor, where the defendant in a libel action was a political candidate. The Alberta Supreme Court considered that the defendant should receive the same special treatment as newspapers in libel actions, and he was permitted to refuse to answer a question directed to the name of a person to whom the alleged defamatory matter was communicated. In effect, the Court sought to give a candidate in an election campaign "as much freedom of comment as would be given to a newspaper."

(b) The Constitutional Aspect

The Bill of Rights, in section 1 (f), guarantees "freedom of the press". What effect does this provision have on the existence of a privilege in favour of newsmen? The famous Alberta Press Bill case has been regarded by some as establishing Dominion control over the media; by others, as providing flimsy authority for such control. For instance, Professor Tollefson says:

While it would be practically convenient for the federal government to have exclusive jurisdiction over the press because of the national nature of some publications and the boundless nature of news itself, it cannot be stated with any degree of confidence that the constitution so provides.

The Press Bill of Alberta, which provided inter alia that newspapers must, upon request of a government agency, disclose sources of information, was one of three bills by which the government of Alberta tried to establish the machinery of Social Credit in the province. Four of the Supreme Court justices found the Press Bill ultra vires as part of the general scheme of legislation; it fell as ancillary and dependent legislation. The fifth justice (Cannon J.) concluded that the legislation was ultra vires because it invaded

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34 Reid v. Telegram Publishing Co. Ltd. and Drea, supra note 30.
35 Supra note 14 for the references to the three cases.
37 Id. at 500, 67 W.W.R. at 13.
41 Duff, C.J.C., Hudson, Kerwin, Crocket JJ.
the sphere of the criminal law reserved to the Dominion. There is nothing in the case which affirms exclusive Dominion control of the mass media.42

It is apparent that some matters concerning the press are subject to provincial control.43 At the same time, some jurisdiction over the media inheres in the Dominion. As Rand J. once pointed out, the rights of free opinion, public debate, and discussion are necessary to Parliamentary government.44 Those powers which may yield a basis for some media control, direct or indirect, by the provinces include the constitutional categories of "Property and Civil Rights", "Matters of a merely local or private Nature", and section 92 (14) of the British North America Act. The latter provision is of particular significance in the present context, for it gives the provinces exclusive authority in relation to:

The administration of justice in the province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.46

It is probable that freedom of the press, or any of the other freedoms mentioned in the Bill of Rights, is not a class of subject which is by the B.N.A. Act given either to the provincial legislatures or to the federal Parliament. It can be a "matter" falling within a class of subject within provincial jurisdiction or a class of subject within federal jurisdiction.

The right of a province to regulate the rights and privileges of witnesses in civil proceedings would probably authorize provincial statutes granting testimonial privilege to journalists in such proceedings. Newfoundland has granted a privilege of secrecy of communication between priest and penitent.47 This privilege is very doubtful at common law, and its validity must depend solely on the power of the Newfoundland legislature. A statutory privilege of secrecy given to newsmen would find a similar justification. In criminal proceedings, the Dominion would, it is submitted, clearly have the power to determine the rights and privileges of newsmen witnesses. To

42 The statements of their Lordships which suggest Dominion control must be read in the context in which they were delivered, viz., a concern that "the mandatory and prohibitory provisions of the Press Bill ... interference with the free working of the political organization of the Dominion" (Cannon J. supra note 39, [1938] 2 D.L.R. at 119, [1938] S.C.R. at 146), and the need for a parliament working under the influence of public opinion and public discussion (Duff C.J.C. supra note 39, [1938] 2 D.L.R. at 108-109, [1938] S.C.R. at 134-135). Obviously, these broad statements were inspired by a fear that the character of the provincial press regulation in question was such that the working of parliamentary institutions was gravely threatened.

43 See, e.g., the opinion of Duff C.J.C., supra note 39, [1938] 2 D.L.R. at 108, [1938] S.C.R. at 134, that "there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers."


45 British North America Act, 30 & 31 Vict. c.3, s.92 (14); s.92(13) "property and civil rights"; s.92(16) "local matters in the province".

46 The Evidence Act, R.S.N. 1952, c.120, s.6.
ensure uniformity in civil and criminal proceedings throughout Canada, a concerted plan of legislation would be necessary.47

Professor Laskin points out that

[T]he test of legislative power, in relation to political liberties lies not in any enactments which recognize them for particular purposes (as does, for example, provincial defamation legislation) but rather in legislation which compels obedience to them or which limits their exercise.48

It is obvious that a provincial statute granting a privilege of secrecy of news source to journalists in civil proceedings would involve recognition of the freedom of the press for a particular purpose. That purpose, related as it is to the administration of justice within the province, may be implemented by provincial authorities. It is probably a very different matter for a province to legislate to protect the right of freedom of discussion. It may be persuasively argued that that is a matter in respect of which the Federal Parliament alone has power to legislate.50

The United States

(a) The Statutes

The subject of claim to secrecy by newsmen has received more publicity and has provoked more discussion, and action, in the United States than elsewhere. Fifteen states now recognise a privilege of non-disclosure in

Canada, of course, could only provide with reference to all proceedings over which it had legislative authority and the provincial legislature with reference to proceedings over which it had such authority.

48 Laskin, An Inquiry Into the Diefenbaker Bill of Rights (1959), 37 Can. Bar Rev. 120.


50 As Professor Laskin indicates, (supra note 48 at 116) Saumur v. Quebec and Attorney-General of Quebec, [1953] 4 D.L.R. 641, [1953] 2 S.C.R. 299 supports a contention for provincial power of political freedoms, including freedom of the press, but an analysis of the judgments shows that there is no clear majority in favour of an exclusive competence. Three of the judges (Rinfret, C.J.C., Taschereau and Kerwin J.J.) considered that the political freedoms (in this case, freedom of religion) came within Section 92(13) of the B.N.A. Act. Four judges (Rand, Kellock, Estey and Locke J.J.) thought that the political freedoms were not within provincial competence. The remaining two (Cartwright and Fauteux J.J.) thought that both province and Dominion could deal with political freedom in certain respects. So, only four judges deny any provincial competence in respect of the political freedoms. But note the cases invalidating provincial legislation compelling Sunday observance — Hamilton Street Railway case [1903] A.C. 524; Henry Birks & Sons (Montreal) Ltd. v. Montreal and Attorney-General of Quebec, [1955] 5 D.L.R. 321, [1955] S.C.R. 799.

It is a question of classification. In the above cases, the question is whether the provincial law is best described as one with respect to store closing hours (then competence) or with respect to religious observance (then incompetence).
favour of journalists and other newsmen in respect of their sources. In 1970, New York became the fifteenth state. Congress has had before it many times bills seeking to confer a privilege of non-disclosure, but all attempts have so far proved abortive. The statutes provide, in effect, that no person connected with specified media in a capacity involving the collecting, gathering, editing or publishing of news should be required to disclose, in a legal proceeding or investigation, the source of any information obtained by him. However, the significant differences of treatment accorded the privilege by the various states require elaboration.

First, at least two statutes in their terms restrict the privilege to those connected, in the capacity described in the preceding paragraph, with newspapers. The other statutes extend the privilege to those associated with other media, particularly radio and television. Note the exhaustive New York definition: "any newspaper, magazine, news agency, press association, wire service, radio or television . . ." The tendency is in fact towards an all-inclusive definition. There is no good reason for restricting the privilege to those associated with newspapers.

Secondly, at least five states clearly require that the communication for which privilege is sought must have been published. Other states use ambiguous language in this connection, for example, "procured or obtained by him (the newsgatherer) for publication"; "used as the basis for an article he may have written, published or broadcast"; "coming into his

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61 The statutes are:
Ala. Code Ann. tit. 7 §370 (West 1958)
Cal. Evidence Code §1070 (West 1966)
Ind. Sta. Ann. tit. 2 §1733 (West 1966)
Ky. Rev. Stat. §421.100 (West 1963)
Michigan Compiled Laws, §767.5a (West 1968)
Mont. Rev. Code Ann. tit. 93 ch.601.2 (West 1964)
N.Y. Civil Rights Law §79(b) (effective May 12, 1970)
Ohio Rev. Code Ann., §2739.12 (West 1966)

It appears that, in the absence of statute, no privilege of this kind exists in any state of the United States. In the absence of statute, the matter is left to judicial discretion. A recent decision (infra note 74) indicates constitutional difficulties of equal protection in the way of judicial creation of a privilege in favour of particular newsmen. The statutes are discussed in numerous excellent articles. See, Note, The Right of a Newsmen to Refrain from Divulging the Source of His Information (1950), 36 Va. L. Rev. 61; and other articles cited, supra note 3. See also: Note, Privilege of Newspapermen to Withhold Sources of Information from the Court (1935), 45 Yale L. J. 357; Comment, Confidentiality of News Sources Under the First Amendment (1955), 1 Stan. L. Rev. 541.

62 Arkansas (includes radio, but not T.V.) and New Jersey, supra note 51. The privilege granted to radio and T.V. newsmen is qualified under the Pennsylvania statute --- supra note 51, §330(b).

63 Supra note 51.

64 Alabama, Kentucky, California, Maryland and New Jersey, supra note 51. Arkansas is a doubtful sixth: see, infra note 56.

65 Arizona, supra note 51.

66 Arkansas, supra note 51.
possession . . . for publication or to be published".\(^{57}\) One state explicitly provides a privilege in respect of material "whether published or not published".\(^{58}\)

The Arkansas statute,\(^{59}\) unlike those in most other states, grants a limited privilege only. The privilege is inapplicable where publication is in bad faith, with malice, and not in the public interest. The New York law contains no such qualification, although a similar provision had been incorporated in the bill unsuccessfully recommended by the New York Law Reform Commission in 1949.\(^{60}\) The Louisiana statute provides for a challenge to the initial granting of a privilege to a newsman in a particular case.\(^{61}\) The New Mexico statute contains a vague qualification to the privilege; it is not available if disclosure be essential to prevent injustice, and any order compelling disclosure is appealable, and subject to stay.\(^{62}\)

The list of bodies before which the privilege may be claimed is, generally, exhaustive. New York, for example, refers to "any court, the legislature or other body having contempt powers",\(^{63}\) and most of the existing statutes contemplate the claim of privilege in a great variety of situations. An exception to this breadth of definition is the Michigan statute which applies only in respect of criminal proceedings.\(^{64}\)

(b) The Cases

The most important judicial pronouncement on the statutory privilege is Re Taylor,\(^{65}\) a decision of the Supreme Court of Pennsylvania. A majority of the court defined "source" in the relevant Pennsylvania statute to include not only the identity of the informant, but also documents, inanimate objects and all sources of information generally. On the facts of the case, a newspaper successfully claimed a privilege of non-production, before an investigating grand jury, of documents and tape recordings relating to an interview with a person claiming knowledge of corruption in city government. Cohen J., in a strong dissent, restricted "source" to the name of the informant, and not the information itself.

On the other hand, there is a distinct tendency for the courts to construe the statutes strictly by employing generally the rule of construction that statutes in derogation of the common law must be strictly construed. In

\(^{57}\) New York, supra note 51.
\(^{58}\) Indiana, supra note 51.
\(^{59}\) Supra note 51.
\(^{61}\) Supra note 51.
\(^{62}\) Supra note 51. The factors to be considered by New Mexico Courts include: ... the nature of the proceeding, the merits of the claim or defense, the adequacy of the remedy otherwise available the relevancy of the source, and the possibility of establishing by other means that which the source is offered as tending to prove.
\(^{63}\) Supra note 51.
\(^{64}\) Supra note 51.
\(^{65}\) (1963), 412 Pa. 32, 7 A.L.R. (3d) 580. The cases are collected and discussed in Annotation, Privilege of Newspaper or Magazine and Persons Connected therewith not to disclose communications to or information acquired by such a person, 7 A.L.R. (3d) 591. This note supersedes one in 102 A.L.R. 171.
State v. Donovan⁶⁸ a New Jersey court was asked to compel newspapers to disclose some information concerning press releases printed by them. The names of the informants were known, but not the means by which the newspapers had obtained the information. The Court held that the statute granted a privilege only in respect of the sources, not in respect of the identity of the messenger from whom the information was obtained. On the facts of the case, the identity of the messenger was crucial to the issues, because the publication of the releases in question was alleged to be an act in furtherance of conspiracy to obtain an indictment, a principal defence raised by the defendants.

Again, in Re Howard⁷⁷ a newspaperman had written a story which included quotations from a union official, and was called in a labour dispute case to state whether or not he had a conversation with the official on a particular day. The lower court held that as the published article referred to the source, the privilege could not be claimed; the privilege had been waived. On appeal, the claim to privilege was upheld, but on the ground that the story did not necessarily disclose the source. In Brogan v. Passaic Daily News⁶⁸ the Supreme Court of New Jersey, in a libel action against a newspaper, found that the privilege had been waived. The editor of the offending article, asked upon what information it had been based, replied that it was information obtained from a “reliable source”, and the information had been later verified. The Court considered that this statement, and the fact that the editor had disclosed some of his sources of information, amounted to a waiver. To testify that alleged defamatory matter came from a “reliable source” is to waive the privilege of non-disclosure, if defences of fair comment and good faith are raised.

Some courts have adopted extremely literal interpretations of the statutes to defeat the privilege. In one case the writer who claimed the privilege wrote for a biweekly magazine, and the California statute only protects persons connected with newspapers, press associations or wire services. The claim to privilege was defeated.⁶⁹

Where statutes conferring a privilege do not exist, the interest most frequently invoked by the courts in disallowing claims to privilege is the public interest in the due administration of justice.⁷⁰ Where the question asked of the newsman goes to the very heart of a party’s case, the court will compel an answer. Silence will not be permitted when there is a clear and direct conflict with the interests of justice. The Court would not usually compel an answer when the information, or its source, are not relevant to the principal proceeding.⁷¹

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⁶⁸ (1943), 129 N.J.L. 478, 30 A.2d 421.
⁶⁷ (1955), 136 Cal. App. (2d) 816, 289 P.2d 537 (District Ct. of App.).
⁶⁸ (1956), 22 N.J. 139, 123 A.2d 473.
Where no statute is available, and it is apparent that the newsmen will not succeed with arguments of irrelevance or social policy, it may still be possible in some cases, for a plea of possible self-incrimination by the journalist to succeed. In Burdick v. United States, a newspaper had published articles about customs frauds. The editor who wrote the articles was asked by a grand jury his sources of information for the articles, and he refused to answer on the ground that his answer might tend to incriminate him. His claim was respected. As Chafee points out, the claim was probably unfounded in fact. Even after the editor was given a pardon absolving him of any crime in this connection he remained silent; he could not be forced to accept the pardon. Learned Hand J. delivered a strong contrary opinion in the lower Court to the effect that a witness only needs protection, and he has protection when the means of safety, in this case a pardon, are at hand.

Attempts to persuade the Courts that newsmen have a constitutionally protected right to privilege have failed. In one of the latest cases, the Supreme Court of Oregon stated that

\[\text{[I]t would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as new gatherers which would not conflict with the equal-privileges and equal-protection concepts also found in the Constitution. Freedom of the press is a right which belongs to the public, it is not the private preserve of those who possess the implements of publishing.}\]

But the Court went on to say that it did not hold that the Constitution forbids statutes conferring “reasonable privileges to withhold evidence.” If the claimed privilege is to be found in the Constitution, its benefits could not be limited to the members of a particular class. The court left open the possibility of legislative experimentation with definitions restricting the class of those able to claim the privilege. Generally, the courts have held that even if the claim to privilege does involve a First Amendment liberty, the public interest in the due administration of justice must prevail. But the cases tacitly acknowledge that the compelled disclosure of confidential information is, to some extent, an impairment of the freedom of the press.

\[\text{72 (1915), 236 U.S. 79.}\]
\[\text{73 Z. Chafee, Government and Mass Communications (Hamden, Conn.: Archon Books, 1967) 497.}\]
\[\text{74 United States v. Burdick (1914), 211 Fed. Rep. 492.}\]
\[\text{75 State v. Buchanan (1968), 436 P. 2d 729; 250 Or. 244 (S. Ct. of Oregon); cert. denied 392 U.S. 905. See also Murphy v. Colorado (1961), 365 U.S. 843, cert. denied (S. Ct. of Col.). For evaluation of the constitutional aspect see J. Guest and A. Stanzler, The Constitutional Argument for Newsmen Concealing their Sources (1969-70), 64 N.W.U. L. Rev. 18.}\]

\[\text{76 See, e.g., Re Goodfader's Appeal, supra note 70, a leading case on the law of the subject where no statute exists and see Garland v. Torre, supra note 70.}\]

For a discussion of the Buchanan case, supra note 75, see J. E. Beaver, The Newsman’s Code, The Claim of Privilege and Everyman’s Right to Evidence (1969), Oregon L. Rev. 243 at 238, the author concludes that the claim to privilege based on the First Amendment is rightly rejected for otherwise the courts would be faced with “the task of determining who was in fact a newsgatherer entitled to the privilege”.}
Evaluation

The proponents of the newsman's claim to privilege emphasize the public interest in the unrestricted flow and wide dissemination of news information. In Associated Press v. United States,77 Black J. insisted that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . . a free press is a condition of a free society."78 It is often urged that those sources upon which the media rely to keep themselves aware of events or of opinions of which society should properly be informed would vanish if newsmen were compelled to publicize sources of information in giving evidence before courts, or legislative or administrative tribunals. The public is entitled to have available to it the full facts on any matter of public interest.

The interest in freedom of information may be defined in terms of the value accruing to society in the political, social and cultural progress of a healthy and viable community (the social interest) or in terms of its critical importance to the individual in providing the sine qua non of a bountiful existence as a free member of a civilized community. This latter individual interest is translatable into a profound social interest in the general well-being, in a broad sense, of the individual members of society. At times, other social interests, such as the interest in the administration of justice, conflict with the individual interest in freedom of information. When such a conflict occurs, the conflicting interests ought to be placed "on the same level" for adjustment, as Roscoe Pound insisted.79 Otherwise, the personal preferences of the decisionmaker may be influenced by the verbal symbols "social" and "individual". Thus, as Professor Julius Stone has pointed out,80 the right of free speech has normally been conceived as a conflict between society and the individual. "Yet on a true analysis society as a whole is also deeply concerned in the preservation of the claim of individuals to freedom of speech."81 The conflict between the claims involved in freedom of information, in its specific expression as the unimpeded flow and wide dissemination of news information, should be stated as one between the social interest in the due administration of justice and the integrity of existing institutions, and the social interest in political, social and cultural progress.

There is, undoubtedly, in freedom of information a fundamental safeguard of the democratic process and of the effective functioning of the democratic state.82 This effective functioning is only possible if organs of opinion yield the most accurate information essential to each individual to ascertain his position vis-à-vis the society and his fellow citizens. At the world level, the Universal Declaration of Human Rights affirms the right to information

77 (1944), 326 U.S. 1.
78 Id. at 20.
79 Pound, Survey of Social Interests (1943), 57 Harv. L. Rev. 2.
81 Id.
82 As Stone points out, id. at 348, there is a "special value for political progress attaching to wide public discussion stimulated by the press."
inhering in the individual. In the context of freedom in Canada, Monsieur Lépine comments:

La liberté de l'information est un concept très vaste: il comprend le droit d'informer et d'être informé; il signifie donc pour l'individu le droit de dire et d'exprimer les faits, les événements et ses idées; le droit d'avoir accès aux idées et aux opinions des autres; il signifie le droit pour l'individu de discuter; de critiquer les faits, les événements et la conduite des autres hommes.

The claim to freedom of information is rarely explicitly recognized, but oblique reference is apparent in such fundamental freedoms as speech, press association and religion. In Stanley v. Georgia, the Supreme Court of the United States recently affirmed that "this right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." In the context of the Leviathan state, with its immense powers remote from the influence or control of the individual, the right to freedom of information is crucial. The interests that seek to disrupt or displace freedom of information should be overwhelming before granting recognition.

But is the free flow of information in fact restricted by the absence of a privilege of secrecy in favour of newsmen and their informants? It has not been reliably demonstrated that the absence of such a privilege hinders freedom of information; or, more to the point, that the creation of such a privilege increases the information gained by reporters. It has been suggested that "the interference with the flow of information . . . is imperceptible or non-existent." Reference has been made to the superiority of information found in the New York Times, although until 1970 the State of New York did not have a privilege statute. Again, it is said that better news reporting is not guaranteed by a statute for two reasons. First, the newsman will not refrain from publishing confidential information out of fear that he might later be cited for contempt for failing to reveal his informant. Second, even though no statute exists, the newsman will not reveal his inform-
A countervailing interest may, at times, be found in the public need to ensure the integrity and authority of legislative, judicial, and administrative bodies. The number of privileges recognized at common law was severely limited. It was no doubt considered that only overriding social policy could justify silence by a witness in legal proceedings, for otherwise the integrity of the court of law as an impartial and accurate arbiter would be eroded. As has been noted, this interest in the administration of justice is that most frequently enlisted by courts to justify refusal to permit silence by newsmen. It may be noted that this same interest plays some part in the refusal of the English and Canadian courts to compel newspapermen to answer questions directed to source in discovery proceedings in the course of litigation against newspapers: the courts will not permit their procedures to be used by plaintiffs as a device for finding other defendants.

Another interest that might be weighed against this interest in the freedom of information is the maintenance of law and order. This is related to, but distinct from, the interest in the integrity of institutions. As distinct from the later interest, it is more specifically concerned with disclosure by newsmen in criminal proceedings; or, in civil proceedings, information relating to criminal activities. At times, this interest has been suppressed in the face of overriding public policy, as in the refusal of the law to compel a spouse to testify against the other spouse. The privilege against self-incrimination was originally inspired by public policy considerations but has been weakened by statute; generally, an answer must be given to a question, although it cannot later be used against the witness. In this case the public policy inherent in the privilege against self-incrimination is not of such a magnitude as to require the total suppression of information contrary to the interest in law and order.

A number of individual interests range themselves against these public interests in the administration of justice, and law and order. First, the informant often has an interest in keeping his identity hidden, whether for reasons of personal safety, or economic security, or social position. But it cannot be said that in every case such an interest exists. Should a newsmen be allowed to be the arbiter of the existence of the interest? It has been said that the privilege, where it exists, belongs to the newsmen. The cases on waiver of the privilege suggest this. It has been said that "[T]he informant's protection .... is purely derivative; he has not recourse of any kind

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80 See Note, 36 Va. L. Rev., supra note 4 at 82, but see Guest and Stanzler, supra note 75 at 56.
81 See cases cited supra notes 14, 27.
82 See, e.g., Canada Evidence Act, R.S.C. 1952, c.307, as am. by S.C. 1952-53 c.2, ss.41 and 5.
83 See Note, 36 Va. L. Rev., supra note 4 at 82, but see Guest and Stanzler, supra note 75 at 56.
84 See cases cited supra note 4 at 82, but see Guest and Stanzler, supra note 75 at 56.
85 Several states of the United States which have privilege statutes clearly grant the privilege to the newsmen, e.g., New Jersey, supra note 51. It has been held that the Indiana statute grants the privilege to the reporter and can only be claimed by him. See Lipps v. State (1970), 238 N.E. 2d 622. Note also the Report of the Canadian Senate Committee, supra note 1 at 105-06. But see Pais v. Pais, [1970] 3 All E.R. 491 (Baker J., P.D. & A.).
if the reporter elects to reveal his identity." This "rule" is anomalous. As Professor Cross says, "it is of the essence of a privilege that it may be waived by the person who enjoys it." If the privilege belongs to the newsman, the informant has no protection beyond an obligation of honour. The American statutes already discussed adopt ambiguous language, providing that no person "shall be compelled" or "shall be required" to disclose. If the social interest to be protected is freedom of information, in the dissemination of news, surely the only person able to waive the privilege should be the informant. If it is purely a matter in the discretion of the journalist, then it is arguable that the confidence of informants would not be encouraged in any more than it is now when no privilege exists. On the other hand, it is arguable that the confidence of informants will be guaranteed because they know that their confidants need not disobey the law to preserve the confidence, and hence the danger of disclosure is certainly minimized. But it is apparent that the maximum protection of informants will only be achieved if the privilege belongs to the informant. Further, as has been noted, there is sometimes a danger of implied waiver of privilege in the testimony given by the newsman which can best be avoided by granting the privilege to the informant.

It has been suggested that the newsman is entitled to claim a professional or economic interest in gathering news information that deserves protection. In most cases where the argument has been made, it has been roundly dismissed. The courts emphasize that this interest cannot prevail against the public interest in the due administration of justice. The claim has usually been framed in terms of forfeiture of estate and, as such, is clearly untenable because the newsman's answer would not result in forfeiture by law. However, the argument has been successful in encouraging a judicial leniency in some cases.

Any rule which seeks to strike a balance between the interests at play should be carefully considered. Precision in the definition of terms should be sought: key terms such as "source" should be carefully defined and the class of those benefiting should be defined in the most exact terms possible. In this way, the effect of judicial discretion on the question of the legitimacy of the claimed privilege is minimized. But a judicial discretion should be retained to deal with certain exceptional cases which it is submitted, may not be entitled to the privilege, although prima facie within the terms of the statute. For example, the Arkansas limit in the privilege is desirable: the privilege should not, for reasons of public policy, be claimable where publication consequential on the obtaining of secret information is in bad faith.

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84 Supra note 6 at 225.
85 Supra note 51.
86 On implied waiver, see Brogan v. Passaic Daily News, supra note 68.
87 See, e.g., Plunkett v. Hamilton (1911), 136 Ga. 72, 70 S.E. 781; and see Note, 36 Va. L. Rev. supra note 4 at 68-69. Similarly, claims to privilege based on a code of professional ethics have been dismissed. See e.g., Re Wayne (1914), 4 Hawaii Dist. F. 475.
88 Plunkett v. Hamilton (1911), 136 Ga. 72, 70 S.E. 781.
89 See unreported case discussed Note, 36 Va. L. Rev. supra note 4 at 69.
malicious and not in the public interest. Another desirable limitation on the privilege derives from the public interest in the general security: a newsman should not be allowed to remain silent when the source of the information he is seeking to hide, bears on a subject of national security. A limitation as to information relating to the details of any proceeding required to be secret under state or federal law is in the public interest. However, it is submitted that any further limitation compelling an answer simply because the newsman is the only source available and the trial cannot be concluded without his testimony, is unreasonable. The effect of such a limitation would be to vest too large a discretion in the judge sufficient to enable the conservative judiciary to nullify the privilege in most cases.

As suggested above, the privilege should belong to the informant, not to the newsman. Just as, in the attorney-client relationship, it is the client who enjoys the privilege, in the present situation the informant enjoys the privilege in the same sense. The newsman should not have a power of waiver. If the chief interest to be protected is, as is urged, the public interest in the unrestricted flow and wide dissemination of information, the strongest protection will be provided only if the right of waiver belongs to the informant. If the newsman may waive, the argument for statutory protection is weakened, if not destroyed. For where, prior to the statute, the informant relied on an express or implied promise by the newsman not to reveal, he would now, after the statute, rely on an express or implied promise by the newsman not to waive the privilege. In other words, the principal justification for a privilege statute — to encourage informants by giving a guarantee of privilege upon which the state will renege only in exceptional circumstances and which cannot be waived by anyone other than the informant — would be destroyed. Finally, the term “privilege” is inaccurate unless the informant has the right of waiver, for the historical connotation of a legal privilege includes a power in the person who has made the confidential communication to prevent disclosure.

It is important that the terms of a privilege statute be as precise as possible. First, the category of newsman entitled to refuse to answer must be unambiguous. It is submitted that all newsmen should be included; there is no valid reason for the exclusion of, say, reporters for underground or student newspapers. The New York statute contains broad definitions of “professional journalist” and “newscaster”. In the modern age there is, again, no valid reason for excluding the latter from the benefit of a privilege statute which extends beyond the written press to radio and television.

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100 Supra note 51.
102 The “informer” privilege is exceptional. There, the recipient, rather than the communicant, possesses the privilege. This is of course due to the special position of the State as recipient. The privilege is not absolute; it is unavailable where disclosure is necessary to show the innocence of an accused — see R. v. Blain (1960), 33 C.R. 217, 31 W.W.R. 693, 127 C.C.C. 267 (Sask. C.A.).
103 Supra note 51.
As the circumstances of Re Taylor\textsuperscript{104} suggest, the term “source” should be defined with greater accuracy. That case extended the statutory protection to material compiled by the newspaper and which was, in a broad sense, a source. A possible distinction might be desirable between news obtained from a source, in the sense of an informant, and news obtained without the aid of any informant but by reporter “scouting” and “probing.” If the interest mainly protected is the public interest in the continued flow of information, then, logically, only cases in which information has been obtained from an informant on a promise of confidentiality, express or implied, ought to come within the protection of a statute granting a privilege. For example, suppose a newsman writes a story on the activities of some criminal group, from bootleggers to drugtakers to gangsters, after having infiltrated the group in disguise. Assuming he has not committed a crime in the course of gathering the information, should the newsman be compelled to answer questions directed to a disclosure of the sources of his information? One can say that the public interest in freedom of information is at stake in this situation, but if so, a change of emphasis is then necessary, for there is no informant who is relying on an express or implied promise of non-disclosure. It then must be argued that newsmen will be less zealous about embarking on such fact-finding activities if disclosure is forced because, for instance, they fear reprisals from resentful members of the group they have been investigating or that it will, in the future, be more difficult to infiltrate such groups. But it is clear that the traditional argument that newsmen must protect their “leaks”, or they will “dry up”, is weak in this type of case.

It is therefore suggested that only the source, as informant, ought to receive protection. As the dissenting opinion in Re Taylor said, “it is the name of the informant and not the information itself which is protected.”\textsuperscript{105} In Re Taylor itself the informant was already known, yet the Court protected the material associated with that informant. What possible reason can be adduced for continuing protection when the name of the informant is known? In such a case the public interest in the administration of justice, in the correct disposal of litigation, is not confronted with the public interest in the free flow of information. The criterion for ascertaining the relevance of the latter interest must be the possibility of the intimidation of future informants. Such a possibility is non-existent in a case like Re Taylor. The criterion upon which all information and material ought to be tested for qualification to privilege is whether the tendency of the information and material is to disclose the informant. Once the informant is known all claims to privilege or information and material connected with the information ought to fall. Thus, the Maryland Court of Appeals has intimated that it would not uphold a newsman’s claim to privilege in respect of the details of the information when he had revealed the name of the source.\textsuperscript{106} The Maryland statute in question protects only “the source of any news or information” and not the “news or information.”\textsuperscript{107}

\textsuperscript{104} Supra note 65.

\textsuperscript{105} Supra note 65 at 589, per Cohen J.


\textsuperscript{107} Supra note 51.
A final suggestion relates to the model law prepared by the Harvard Students Legislation Research Bureau. The model extends protection to a wide variety of newsmen, and establishes procedures for challenge to the protection by any "body, officer, person or party." With a similar intent, the Louisiana statute provides that the persons seeking the information may apply for an order revoking the privilege. The application must state "the reason why the disclosure is essential to the protection of the public interest." Revocation of the privilege may only be granted when "disclosure is essential to the public interest." These types of procedural safeguards are desirable.

Conclusion

The principal trends in the major common law countries in relation to the newsmen's claim to secrecy of news source have been defined. In the result, it appears that a persuasive case can be made for the legal recognition of the claim, subject to limitations in the best interests of public policy. While it is not yet certain, because of a lack of empirical data, that freedom of information is protected and advanced by giving a privilege to newsmen or their informants, some part at least of the newsmen's fear of emasculation occasioned by the absence of the privilege may be justified. It is considered that the matter should no longer be left entirely to judicial discretion as it is in the United Kingdom and Canada. Further, it is not sufficient to dismiss the claim by saying, as did the Canadian Senate Committee on Mass Media, that the traditional privileged relations, such as attorney and client, are not "analogous to that between newsmen and informant." To do so is to rely on narrow categories and definitions, and to fail to take account of changing social, political and cultural conditions. If it is objected that, unlike the usual privileged relationship, the privilege in this case may be claimed by the newsmen, a statute could provide in unequivocal terms that the privilege belongs to the informant and may be waived by him alone. If some American statutes have seen fit to repose the privilege in the newsmen alone, it does not follow that Canada should slavishly adopt this philosophy. If it is objected that, unlike the traditional privileged relationship, this claim is made in respect of any information, whether a confidential communication or not, a simple statutory provision could restrict the privilege to traditional concepts. Finally, it is not sufficient to dismiss the claim by pleading, as did the Canadian Senate Committee, that there is a problem of definition; who is, and who is not, entitled to the privilege. Again, the necessity for precise definition of terms, discussed above, is apparent and would solve this alleged problem. The Report of the Canadian Senate Committee is, on the point of privilege, unconvincing in its reasons for refusing to recommend a change in the law. The shocking flippancy of the Committee in saying that if gaol terms imposed on newsmen were short, most newsmen would find the


109 Supra note 51, §1453. See also the New Mexico statute, supra note 51, which makes any order for disclosure appraisable, and subject to stay of proceedings.

110 Supra note 1.

111 Id. at 107.
experience "refreshing, educational and possibly even profitable\textsuperscript{112} must cast doubt on the seriousness with which the newsman's claim has been considered.

A statute should ideally set forth the privilege as precisely as possible. The United States' experience has taught that interpretation will be aided by thoughtful and careful definition of terms. A statute should be liberal in its application, granting the privilege to all members of news media who gather or edit the news; the privilege should be claimable before any bodies having contempt powers.

Some restriction of the privilege is nevertheless desirable. Even where there is a prima facie entitlement to the privilege the availability of the privilege should be conditioned by reference to "the public interest."\textsuperscript{113} It is considered that this concept of the public interest should be restricted to clearly defined cases to avoid the possibility of judicial emasculation of the privilege in cases where no serious public interest is involved. The interests of the national security would, of course, be one criterion upon which to determine the availability of the privilege. The privilege should likewise be inapplicable where the publication of the information sought to be privileged is in bad faith, with malice and not in the public interest. However, it should be made clear that the concept of public interest does not extend to cases where the newsman is the only available source of the information and without his testimony the proceedings, whether before legislative, judicial, or administrative bodies, cannot be successfully concluded without his testimony. To impose such a limitation would be tantamount to returning the claim to secrecy to the untrammelled discretion of the judge.

Two trends in the United States should be avoided in Canada by careful drafting in any new statute. First, the privilege of secrecy ought to be restricted to the name of the informant and any material tending to disclose the identity of that informant. The news or information should not in itself be privileged. Secondly, the privilege should, by clear definition, be granted to the informant, not to the newsman. The legal conception of an occupational privilege would seem to require that the informant alone be entitled to the right of waiver; and, logically, the public interest in freedom of information is best served, if it is served at all, by the granting of the privilege to the informant who will alone have the power to reveal or not to reveal, subject of course to the tentative limitations on the availability of the privilege outlined in the preceding paragraph.

\textsuperscript{112} \textit{Id.} at 107.

\textsuperscript{113} \textit{See supra} note 108. \textit{See s. 2} of the draft statute there referred to.