Marquette Law Review

Volume 55
Issue 1 *Winter 1972*

Article 9

1972

Constitutional Law: Testimonial Privilege of Newsmen

James A. Baxter

fore, is not inconsistent with the fundamental purpose of the Act, promotion of industrial peace.

The *Libby* case establishes a threshold test for determining whether a particular decision is a unique management prerogative because of its bearing upon the ability of private enterprise to manage and be responsible for its own affairs. Only when this threshold issue of whether the decision is one which affects the direction of the corporate enterprise, involving the commitment of invested capital, is resolved in the negative can consideration be given to the question of whether the decision itself is bargainable because of its effects upon terms and conditions of employment. When the threshold issue is answered affirmatively, the interests of the bargaining unit are considered sufficiently protected under the Wisconsin Employment Peace Act by requiring bargaining solely with regard to the decisions's "effects."

ROBERT J. BOIVIN

Constitutional Law: Testimonial Privilege of Newsmen—It has long been recognized that there is incumbent upon each citizen a duty to testify when summoned by a court exercising its lawful jurisdiction. The imposition of such a testimonial duty is thought to be a natural and elementary obligation which must be met if our judicial system is to function in the fair and orderly manner demanded by both individual litigants and society.[1] Although the parties to a very small and select group of relationships have been granted testimonial privileges protecting confidential communications, the courts have been very reluctant to elevate the relationship of a newsman with his confidential sources to a similar status.[2] Unlike doctors, lawyers, and other professionals who enjoy such a privilege,[3] newsmen are often forced to choose between incurring a

1. As the United States Supreme Court has stated: "[P]ersons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery." United States v. Bryan, 339 U.S. 323, 331 (1950). *See also* Blackmur v. United States, 284 U.S. 421 (1931); and Blair v. United States, 250 U.S. 273, 281 (1918).

2. The case most often cited for the common law rule that no privilege exists in favor of communications made to newsmen is People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936). *See also* 58 AM. JUR. *Witnesses* § 546 (1948); 97 C.J.S. *Witnesses* § 259 (1957); Annot., 7 A.L.R.3d 591 (1966).

3. MODEL CODE OF EVIDENCE rules 209-223 (1945).

contempt citation with possible incarceration and violating the oath of confidentiality[4] taken by them to protect their sources of information.

In the case of *State v. Knops*,[5] the Supreme Court of Wisconsin appears to have taken a step toward partially saving the newsman from his plight by granting to him, on the basis of the first amendment guarantee of freedom of the press, a qualified testimonial privilege to refrain from disclosing sources of information received by him in a confidential relationship. While this decision is significant insofar as it represents only the second reported case to find first amendment protection to exist in such a situation,[6] close examination reveals that there remain, unanswered, questions having a direct bearing upon the practical application of the qualified privilege created.

Mark Knops, editor of the Madison *Kaleidoscope*,[7] asserted his testimonial privilege when he was subpoenaed to appear before a Walworth County grand jury, which had been convened originally on July 1, 1970, to investigate the alleged arson of Old Main Hall on the campus of Wisconsin State University at Whitewater. Less than two months later, following the bombing of Sterling Hall on the University of Wisconsin campus, the grand jury began investigating the possibility that a conspiracy to perpetrate the Sterling Hall crime was committed in Walworth County. Because *Kaleidoscope*, two days after the bombing, printed a front page story entitled, "The Bombers Tell Why and What Next—Exclusive to Kaleidoscope," Knops was confronted before the grand jury with specific questions[8] as to the identity of the person or persons

4. The American Newspaper Guild has adopted the following as part of the newsman's code of ethics:

> Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigative bodies.

BIRD & MERWIN, THE NEWSPAPER AND SOCIETY 567 (1942).

5. 49 Wis. 2d 647, 183 N.W.2d 93 (1971).

6. The first case to find constitutional protection was Application of Caldwell, 311 F. Supp. 359 (N.D. Cal. 1970). Prior to this, several courts had rejected the argument that the free press guarantee provided protection for newsmen: Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958); *In re* Goodfader's Appeal, 45 H. 317, 367 P.2d 472 (1961); State v. Buchanan, ___ Ore. ___, 436 P.2d 729 (1968), *cert. denied*, 392 U.S. 905 (1968); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

7. For purposes of this appeal, the court recognized *Kaleidoscope* to be a newspaper, and Knops to be a newsman. 49 Wis. 2d at 651, 183 N.W.2d at 95.

8. Knops appeared before the grand jury twice. On the first occasion, he asserted his fifth amendment right against self-incrimination, despite the fact that he had been granted immunity. Having been found in contempt, he petitioned the Wisconsin Supreme Court for

from whom this information was obtained. Having refused to answer, the editor was found to be in contempt pursuant to section 295.01(5) of the Wisconsin Statutes[9] and sentenced to imprisonment in the county jail for five months and seven days, or until such time as he purged himself by answering the questions.[10]

Throughout the proceedings, the defendant argued that disclosure of identities would result in an abridgement of first amendment liberty.[11] The court summarized his position as follows:

> Knops contended that if he breached his promise of confidentiality, his sources would dry up, and he would no longer have access to information which the public has a right to know. Consequently, the freedom of the press would be abridged and diminished.[12]

While accepting this argument in principle,[13] the supreme court recognized that such a right, like the free press guarantee itself, cannot be absolute.[14] Consequently, rather than adopt an absolute testimonial privilege, the court established a case-by-case ap-

---

a writ of habeas corpus, alleging violation of his constitutional right under the first amendment to refuse to divulge the information sought. The supreme court denied the petition on the ground that the questions asked were merely preliminary, in no wise inquiring about the identity of his sources. On his second appearance before the grand jury, Knops purged himself of the first contempt citation by answering the preliminary questions; however, when asked specifically drawn questions concerning the identity of his sources of information, he refused to answer and was, again, held in contempt. 49 Wis. 2d at 649-50, 183 N.W.2d at 94-95.

9. WIS. STAT. § 295.01 (1969):

> Every court of record . . . shall have the power to punish by fine and imprisonment, or either, any neglect or violation of duty . . . in the following cases:
>
> . . . .
>
> (5) All persons summoned as witnesses . . . for refusing . . . to answer as such witnesses.

10. With regard to the length of the sentence, it is interesting to note that the right to trial by jury is guaranteed to all persons cited for contempt who have been sentenced to more than six months in jail. Bloom v. Illinois, 391 U.S. 194 (1968).

11. For a thorough analysis of the constitutional questions involved in a case such as this, see Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969).

12. 49 Wis. 2d at 649-50, 183 N.W.2d at 94.

13. Without addressing itself specifically to the proposition, the court apparently assumed that under the first amendment, Knops had a right to gather news. Although this interpretation of the Constitution has never been directly sustained, certain decisions seem to indicate that such a holding is not an unreasonable extension of the first amendment. *See* Lamont v. Postmaster General, 381 U.S. 301, 308 (1965); and Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

14. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Gitlow v. New York, 268 U.S. 652 (1925); Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

proach, which would require a balancing of the various interests involved before determining whether a privilege should exist under the particular facts of each case.[15] In the words of the court:

> We conclude that a weighing of competing values is involved here. The court must consider on the one hand the interest of free flow of information, and on the other, the interest of a fair and effective administration of the judicial system.[16]

Thus, the court held that unless the state can affirmatively demonstrate both a compelling need for the testimony sought and the lack of an alternative method of gaining such information, a newsman cannot be required to give testimony regarding the identity of confidential sources. If, on the other hand, such compelling need and lack of alternative sources are established, the newsman will be required to testify regardless of any possible effects upon the free flow of information to the public.[17]

Having applied this test to Mr. Knops' situation, the supreme court found the scale to weigh more heavily in favor of the state's interest in effective administration of the judicial system and, thus, held the newly established qualified privilege inapplicable to the facts of this case. Unlike *Application of Caldwell*,[18] the first American court decision recognizing a constitutional privilege to refrain from disclosing news sources, the *Knops* case did not, in the evaluation of the court, present facts which justified invocation of the privilege. Whereas in *Caldwell* the grand jury did not have any specific crime to investigate or any specific questions to ask the newsman involved, in *Knops* the Walworth County grand jury was concerned with a particular crime and had framed specific questions. Further, the sources involved in *Caldwell* were members of the Black Panther Party—a group "much more sensitive to possible breaches of confidence than were most groups."[19] From such

15. Whenever the United States Supreme Court has been confronted with a claim of constitutional protection against the exercise of governmental powers, it has employed the test of balancing the respective public and private interests involved. Konigsberg v. State Bar, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Speiser v. Randall, 357 U.S. 513 (1958).

16. 49 Wis. 2d at 658, 183 N.W.2d at 99.

17. *Id.* at 657, 183 N.W.2d at 98.

18. In *Caldwell*, the test established was whether there exists "a compelling and overriding national interest that cannot be served by an alternative means." 311 F. Supp. at 360.

19. Affidavits presented at Caldwell's trial showed that Black Panther sources all over the nation had "shut up" at the mere threat of a newsman's being called before a grand jury. *Id.* at 360.

language, one might conclude that the court considered, as a factor in the baiance, the overall value to the public of the information conveyed to a newsman by his informer. In essence, did not the court find a substantial value in having the public learn more about such an important, yet often secretive, group as the Black Panther Party? Can it not be fairly said, on the other hand, that the court found no such value to the public in obtaining such information as that contained in the *Kaleidoscope* article? As the court put it:

> In this case the public was treated . . . to a long polemic on how property destruction and murder were simply necessary steps en route to a higher goal—the restructuring of society.
>
> . . . .
>
> . . . If the public were faced with a choice between learning the identity of the bombers or reading their justifications for anarchy, it seems safe to assume that the public would choose to learn their identities.[20]

In light of this language, the question arises as to whether the court has, in fact, supplemented, or even supplanted, the "compelling-need" test with one based upon a judicial determination as to whether a source of information should be protected because the reading public would be significantly interested in or benefited by the dissemination of such information. Contending that the majority did not, in fact, apply the "compelling-need" test it had just established,[21] Justice Heffernan, in his partial dissent, pointed out that records of the state and the United States Department of Justice indicated that the knowledge sought concerning the Sterling Hall bombing had already been attained by alternative means.[22] Consequently, had the "compelling-need" test alone been applied, the court would have had no alternative but to find the state without a compelling interest in acquiring testimony concerning the identity of the bombers.

---

20. 49 Wis. 2d at 657-58, 183 N.W.2d at 98.

21. In the words of Justice Heffernan:

> The majority's stated generality does not do justice to its own sound position—which is not one approving the curtailment of information, but compelling, in the case of overriding state interest, the production of information by proper legal process.

49 Wis. 2d at 660-61, 183 N.W.2d at 100. This position was bolstered by the United States Supreme Court which, speaking through the late Mr. Justice Black, stated: "No suggestion can be found in the Constitution that the freedom there granted for speech and the press bears any inverse relation to the timeliness and importance of the ideas seeking expression." Bridges v. California, 314 U.S. 252, 268 (1941).

22. 49 Wis. 2d at 661, 183 N.W.2d at 100.

Another question raised as a resultof this case is that of determining what constitutes a "compelling need" for knowledge of the identity of confidential sources. According to the court, such a need exists where successful administration of criminal justice is dependent upon disclosure.[23] Is the court, in dicta, saying that the mere bringing of a criminal charge satisfies the state's burden of establishing a compelling interest? Will the court make a distinction between crimes of violence and those of a less serious nature? Or will the mere designation of an action as "criminal" satisfy the requirement of "compelling need," regardless of whether or not the crime involved has any seriously disruptive effects upon society?

Further, as the court limited itself strictly to questions involving the applicability of the privilege in criminal cases, the problem arises as to its application in civil cases, particularly those which arise out of an alleged libel. While those few courts which even suggest the possibility that a privilege may exist are still quite divided on the question of determining the appropriate standard to be applied in ruling upon the need for disclosure,[24] there is much authority for the proposition that regardless of what is deemed to be the appropriate civil standard, it should in no event duplicate that applied in a criminal prosecution.[25]

While the general rules announced by the court may, on their face, appear to offer relief to those in the situation of Knops, newsmen and their confidential sources are undoubtedly questioning their effectiveness in application, particularly in view of the court's suggestion that Knops, himself, provide the alternative methods of acquiring the information sought. The court presumed that because "the culprits are still at large" the state had satisfied any burden it may have had of showing lack of an alternative source.[26] Thus, unlike the approach of the federal court in *Caldwell*,

23. *Id.* at 659, 183 N.W.2d at 99.

24. One court has established a loose standard, requiring disclosure of sources whenever their identity would be "relevant in that it would have some bearing and may lead to some admissible evidence." Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416, 417 (D. Mass. 1957). Another court has set the standard as requiring disclosure whenever the identity of sources goes "to the heart" of the claim being litigated. Garland v. Torre, 259 F.2d 545, 549-50 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958). As stated previously, the court in *Caldwell* established the strict standard of compelling disclosure only when the party seeking the information can demonstrate a compelling and overriding need which cannot be served by alternative means. 311 F. Supp. at 360.

25. *See* Guest & Stanzler, *supra* note 11; Comment, *Confidentiality of News Sources under the First Amendment*, 11 STAN. L. REV. 541, 545 (1959); 61 MICH. L. REV. 184, 186 (1962).

26. 49 Wis. 2d at 659, 183 N.W.2d at 100 (dissenting opinion).

it appears that the Wisconsin court has, in effect, shifted the burden from the state, in proving lack of an alternative source, to the newsman, in proving the existence of one. Under this approach, a newsman could avoid both a contempt citation and violation of his oath of secrecy by leading those seeking disclosure to those possessing the same information, but not having newsman status. Would not knowledge of this among sources restrict the amount of information they would supply and, thus, result in an indirect burden upon the free flow of news—an interest the privilege purports to protect?

Apparently in response to the holding in *Knops*, and following the example of seventeen other states,[27] the Wisconsin legislature is now considering passage of a newsman's privilege statute.[28] This proposed legislation[29] is sharply qualified, however, by excluding from its protection "the source of any allegedly defamatory information in any case where the defendant, in a civil action for defamation, asserts a defense based on the source of such information."[30] The clear intent of the legislature, as evidenced by this important qualification, is to deter those who disseminate "libelous" information from using the statute as a "shield" to prevent their detection. Well-founded as such a consideration might be, the legislature seems to have taken a blanket approach toward all defa-

27. For a list and analysis of these statutes, see D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307 (1969). *See also* ALASKA STATS. § 09.25150 (1967), and NEW YORK L. 1970, Ch. 615 § 79-A, which were not in force at the publication of the D'Alemberte article. For examples of cases which have denied a newsman a testimonial privilege in jurisdictions which have a non-disclosure statute, see Bronzburg v. Pound, 461 S.W. 2d 345 (Ky. 1970), and *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

28. S. 585: An Act to Create § 885.225 of the Statutes Relative to a Newsman's Privilege, introduced June 8, 1971.

29. In terms of who will enjoy the status of "newsman" and under what circumstances the privilege will exist, the scope of the proposed statute is quite broad. Section 885.225(1) of S. 585 provides:

> [N]o person shall be required by any court, grand jury, agency, department or commission of this state or of a municipality or by the senate or assembly or any committee of the legislature or of a municipal legislative body to disclose any confidential information received or obtained by him in his capacity as a reporter, editor, commentator, journalist, writer, correspondent, photographer, announcer or other person directly engaged in the gathering or presentation of news for any newspaper, periodical, press association, newspaper syndicate, wire service or radio or television station.

30. Section 885.225(3)(b) of S. 585. Subsection (3)(a) of the proposed statute excludes "any information which has at any time been published, broadcast or otherwise made public by the person claiming the privilege."

mation actions, regardless of whether the identity of the sources is in any way required by the plaintiff to prove his cause of action.[31]

Under the statute, the testimony which would be compelled in criminal cases and civil actions, other than those specifically excluded, would be that for which there exists a "compelling and overriding national interest which cannot be served by an alternative means." What considerations, if any, went into the selection of the *Caldwell* wording, rather than that which the Wisconsin court used, cannot be determined. What is significant, however, is that the proposed statute, like the *Knops* holding itself, makes no differentiation in terms of how the privilege will be applied to various degress of criminal conduct, thereby providing no greater guideline.

CONCLUSION

While the case of *State v. Knops* will stand as a landmark decision in terms of its interpretation of the first amendment guarantee of freedom of the press, there still remain many unanswered questions concerning application of the privilege. When will a "compelling need" for knowledge of the source of information be deemed to exist? Will this be determined according to the court's estimation of the overall value of the information to the public? Will the state always have a "compelling interest" in any evidence relative to the prosecution of criminal activity, regardless of how minor the particular charges might be? The result of this uncertainty is a situation wherein lower courts, newsmen, and, most importantly, confidential news sources are left in substantial doubt as to how the privilege will be applied in their particular cases—a doubt uncleared by any legislation that has, thus far, been proposed in this state.

JAMES A. BAXTER

Evidence: The Wisconsin Electronic Surveillance Control Law: Evidentiary Limitations—In 1969, the Wisconsin Legislature passed what is now referred to as the Wisconsin Electronic Surveillance Control Law.[1] This enactment is patterned after a similar provision

31. *See* note 24 *supra.*

1. Wis. Laws 1969, ch. 427; WIS. STAT. §§ 968.28-.34 (1969).