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### III. WHY A SHIELD LAW?

DAN PAUL\*

I am talking about this rather shop-worn topic because I detect that the push by the media for a shield law<sup>1</sup> has been blunted and is floundering. There are two reasons for this. The first you can lay directly at the media's door: the media does not know what it wants, and some members of the media do not want a shield law at all. Prominent spokesmen, like Kathryn Graham<sup>2</sup> and John Knight,<sup>3</sup> have come out against any form of shield legislation on the ground that it may be compromising basic constitutional rights.

Second, there is a growing number of lower court cases which protect a reporter's source of information. Many members of the legal profession prefer to let the common law system run its normal course until the reporter's privilege becomes firmly established in the law and the effect of *United States v. Caldwell*<sup>4</sup> is dissipated. I, however, believe that a federal shield law is still a necessity.

The case-by-case method is impractical for a number of reasons. First, there are tremendous legal costs involved in such an approach. I am concerned about the small newspapers, the underground press, and the editor who cannot afford to defend his reporters. They may not print the story or may allow the reporter to reveal his sources in order to avoid the expenses involved in litigation. Similarly, an author such as a college professor who wants to guarantee his sources that their identities will be kept confidential may have financial difficulty in obtaining the kind of legal counsel necessary to protect himself.

In addition to being too expensive, the case-by-case approach is also too slow. It is an outrage to any sense of craftsmanship in contemporary society to think that the articulation of such a fundamental right must be left to the tedious, drawn out, case-by-case method.

Furthermore, as a result of "Watergate," there may be an increasingly hostile climate towards the press. Within the last month there

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1. A "shield law" is one which is designed to protect reporters and others from compelled disclosure of their sources. The term "shield law," however, does not describe the legislation and it leaves the public with the impression that somebody is trying to hide something—or hide behind something. This may be a question of semantics, but semantics can be very important when you are trying to get legislation adopted. For example, the "right to work" laws were obviously misnamed, but it was a marvelous name if you wanted to get the legislation adopted. If we are going to have shield legislation, we need a much sexier name.

2. Kathryn Graham is chairman of the board of the Washington Post Company.

3. John Knight is editorial chairman of Knight-Ridder Newspapers.

4. 408 U.S. 665 (1972). This case held that requiring reporters to appear and testify before state or federal grand juries does not abridge the freedom of speech and freedom of press guarantees of the first amendment and that a newsman's agreement to conceal the criminal conduct of his sources does not give rise to any constitutional privilege on the part of the newsman to refuse to testify concerning such activity. The effect of the case has been to make it more difficult for reporters to obtain information from certain sources.

have been enormous libel verdicts against two Florida newspapers, the *Palm Beach Post* and the *Today* newspaper. From a legal standpoint, these cases cannot possibly be squared with *New York Times v. Sullivan*;<sup>5</sup> summary judgments should have been granted long before the cases reached trial stage. Judges and juries alike are annoyed with the press and are prone to let their frustrations show in the litigation.

The case-by-case approach is also impractical because it has a chilling effect on the information-gathering process, an effect caused by reporters not knowing in advance where they stand. Many reporters have gone to jail and may continue to tell their informers that they would go to jail, rather than reveal a source; however, at what point do these confidential sources refuse to believe the reporter and become silent? At what point do good investigative reporters, under the recurrent threat of jail, leave that part of journalism? And at what point does the managing editor not pursue the story because he does not want to run the risk of leaving his reporter with the difficult choice of revealing his sources or going to jail? How many stories have not been written because the managing editor did not want to put his reporters to that impossible choice? The uncertainty of the case-by-case method does not permit a lawyer to give either reporter or managing editor the advance guarantee necessary to avoid a chilling tendency toward self-censorship.

Because of this uncertainty, the best constitutional way to attack the press may be to threaten reporters with jail if they do not reveal their sources whenever called upon to do so. Does this not explain the recent House committee's attempt to use its subpoena powers to force CBS to disclose non-broadcast materials used in connection with a documentary? Although opponents of the press have been unsuccessful in imposing prior restraints in cases like the *Pentagon Papers*<sup>6</sup> or in taking over the editorial process in cases like *Tornillo*,<sup>7</sup> this approach might be successful if the case-by-case method is retained. Legislation is clearly needed to curb the increasing attempt to attack the press by harassing litigation.

There is, however, the Graham-Knight argument which frets about compromising a basic constitutional right by allowing the legislature to tinker. This problem could be solved by adding two sentences to any shield legislation: "No provision of this act shall be construed to create or imply any limitations upon or otherwise affect any rights secured by the Constitution of the United States. The rights provided by this Act shall be

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5. 376 U.S. 254 (1964). The court held in this case that the fourteenth amendment requires recognition of a conditional privilege for honest misstatements of fact in publications concerning official conduct by requiring that actual malice be shown before damages are awarded in civil libel actions.

6. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

7. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The court held unconstitutional a Florida statute requiring newspapers which editorialized concerning political candidates to offer free space for the candidate to reply. The decision was grounded upon the first amendment guarantee of freedom of the press.

in addition to any rights provided by the Constitution." If people are concerned that basic rights are going to be compromised by letting the legislature act in this field, then insert the two sentences and eliminate the argument.

The Graham-Knight theorists are also worried about putting reporters in a special class. This ignores what the first amendment is all about. Gatherers and disseminators of information are already in a special class under the first amendment, as are people who insist on religious freedom. The founding fathers put them there. Of course it would be a terrible mistake to draw shield legislation so narrowly that it would apply only to reporters. A broad, one sentence shield law might serve the purpose:

No person shall be required in any federal or state proceeding to disclose either the source of any published or unpublished information obtained for any medium offering communication to the public, or any unpublished information obtained or prepared in gathering or processing information for any public medium of communication.

A shield law should be short, simple, and absolute because it must be a badge which a reporter can carry and completely understand without having to hire a lawyer or go to court. Some individuals, however, have argued that other factors should be balanced against the first amendment to justify shield law exceptions when: (1) the only way to prove that the defendant is innocent is to have the reporter testify; (2) the reporter is the only source concerning a committed crime; or (3) national security is involved. I do not accept any of these exceptions. They would create loopholes which would destroy the privilege and bring us back to the case-by-case method. While this might result in some miscarriages of justice, so does the privilege against self-incrimination. The fact that a person is the only witness to a crime does not mean he is required to waive his privilege against self-incrimination.

The dissent by Justice Douglas in the *Caldwell* case is the best answer to those who believe that the first amendment should be balanced against other factors. As Mr. Justice Douglas said, the balancing has already been done in absolute terms by those who wrote the first amendment.<sup>8</sup>

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8. 408 U.S. 711, 713 (1972). In his dissenting opinion, Justice Douglas pointed out that absent any involvement in a crime, the first amendment protects reporters against having to appear before a grand jury, but if a reporter is involved in a crime, the fifth amendment may permit him to refuse to testify. *Id.* at 712. Justice Douglas also cites a defendant's privilege of association under the penumbra of the first amendment and notes that if reporters are denied such protection, then, in effect, the people are denied the information which they need to participate intelligently in the affairs of the nation. *Id.* at 723.