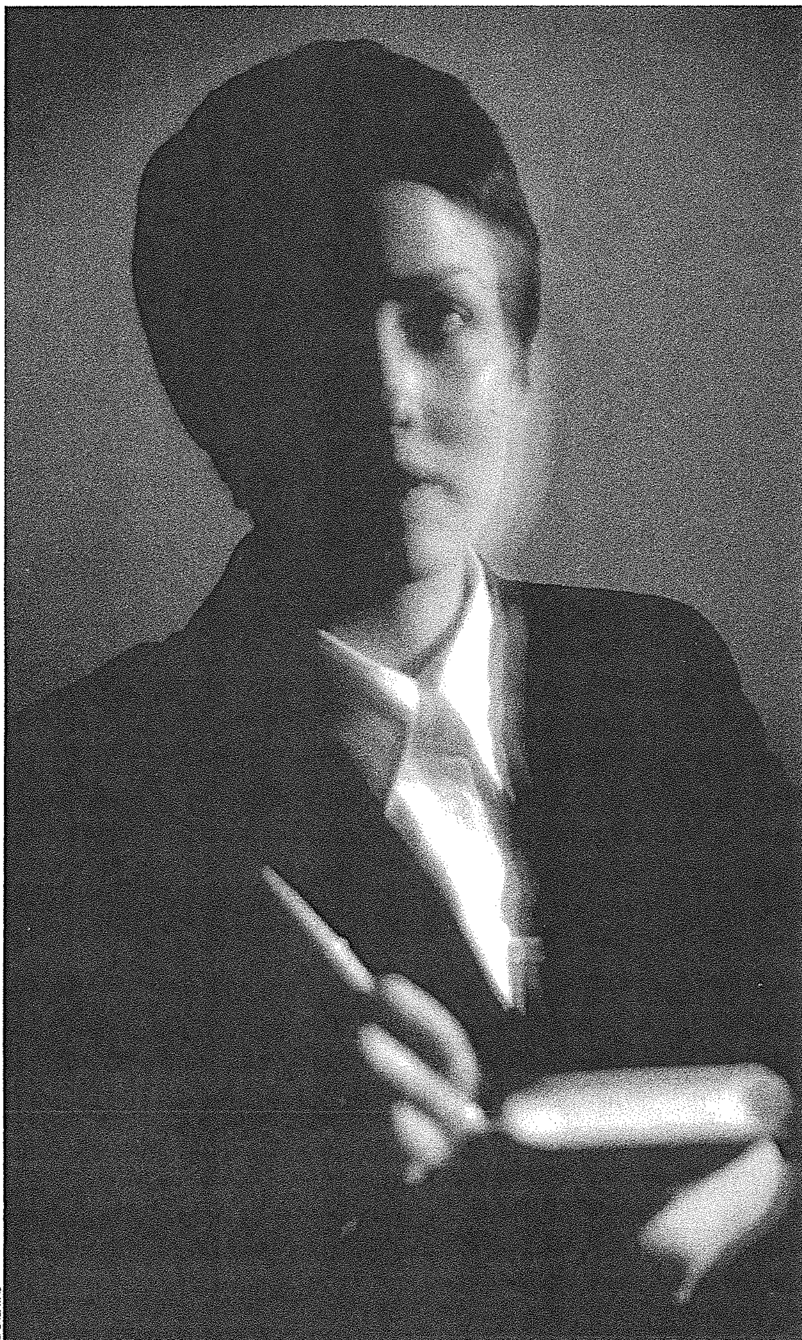
Is the Reporter's Privilege a Barometer of Free Speech's Health in 2005?

by Bruce S. Rosen


©CREATAS

The crusading journalist may be headed for extinction in the federal system, but in New Jersey (and many other states) he or she is still receiving protection as an endangered species.

This has not been a good year for journalists across the country. Free speech—as exemplified by the journalist's privilege against compelled testimony—is suffering its worst year in decades. The established media in the United States has faced a U.S. Justice Department and federal judiciary far more willing than ever before to try to compel journalists to reveal sources. The result? Over the past year or so several news reporters have been prosecuted and found guilty of contempt of court for refusing to reveal sources, or they are facing subpoenas or the threat of subpoenas.

It may seem ironic that free speech can be so enhanced by a law or privilege that allows a journalist *not* to speak, but (despite some abuses and overuse), over the past 40 years or so, the use of anonymous sources has produced hundreds of inside stories about government, the military, corporations and the judiciary. These stories exposed corruption and cover-ups from Watergate to the cigarette industry, stories that may never have seen the light of day had sources not been able to depend on journalists to protect their identities. Cognizant of the importance of a free flow of information to the

media, 31 states and the District of Columbia enacted shield laws that have allowed journalists to assert a privilege against revealing confidential sources. However, the federal reporter's shield, while based upon First Amendment principles, is only qualified, and it varies significantly from circuit to circuit.

The situation appears to have deteriorated to a point where reporters and judges now believe they are acting as bulwarks for their respective institutions. These types of clashes have occurred from time to time over the years, but have taken on a new tone and frequency in recent months, largely involving coverage of criminal justice issues touching upon the Justice Department.

Although New Jersey did not escape its own clash over media coverage of criminal trials (a 2002 contempt order against several *Philadelphia Inquirer* reporters resulted in the Court's tortured *State v. Neulander*[1] decision, and ultimately exoneration for the reporters), New Jersey's courts continue to bolster common law and First Amendment access to courts and documents filed in courts, as well as supporting one of the nation's strongest shield laws protecting reporters from testifying under almost any circumstance. Ironically, had the New Jersey shield law been in place across the nation, many, if not most of the contempt charges faced by reporters across the nation, would not have been possible.

For whatever reason, respect and the audience for established news outlets are on the decline. Any sense that the media's mission was sacrosanct has dissipated, and with it the longstanding tacit agreement among prosecutors, the judiciary and the media that the media and its sources will not be dragged into proceedings as witnesses or for confidential sources. In the last couple of years, federal prosecutors have become far too willing to attempt to co-opt journalists into becoming part of their investigative teams.

Many courts faced with these issues have been dismissive of democracy's stake in the press's ability to resist the prosecutors. Reporters, on the other hand, are standing on principles that are sometimes thin reeds, and manifest themselves in 30-year-old cases like *Branzburg v. Hayes*,[2] where a Supreme Court plurality declined to recognize an absolute federal reporter's privilege, but acknowledged that the First Amendment provided some degree of constitutional protection against the disclosure of confidential sources. That qualified shield is showing itself far too weak to protect journalists against an aggressive Justice Department and judges who do not seem to respect the media's role in the checks and balances of free speech.

Tension Between Media and Judiciary

New Jersey's experience with *Neulander* had nothing to do with a shield law, but was indicative of the nasty underbelly of relations between judges who feel disrespected and reporters who believe they are on a constitutional mission. In a nutshell, the case involved coverage of the trial of a philandering Cherry Hill rabbi accused of murdering his wife. The trial judge issued an order prohibiting identification of jurors and prohibiting media representatives from contacting or attempting to interview jurors. After the trial ended in a mistrial, an *Inquirer* team of reporters published a story questioning whether the forewoman of the jury was a Camden County resident, and one or more of the team attempted to contact her for comment on that issue (not about why the jury deadlocked).

The judge referred the matter for a contempt hearing, and the reporters, despite the fact that some of them had little or no role in reporting the story, were found guilty before a Criminal Division judge in a scathing unpublished decision. Each was given a suspended sentence and/or community service and fines. The tension between the judges, the reporters, and their counsel was so palpable that at one point when a defense lawyer's motion was denied and he asked to make his record, the judge actually left the courtroom while the attorney made his remarks.

On appeal, the N.J. Supreme Court ruled that U.S. Supreme Court precedent clearly provided that the order prohibiting mention of the jurors' names, which had been revealed in open court, was unconstitutional. However, in a bizarre and unexpected twist, the Court ruled 5–2 that the order prohibiting juror interviews should stand through a retrial because it would jeopardize the defendant's Sixth Amendment rights if the prosecution had a chance to hear why the jury could not reach a verdict. Then, as if the collective court system realized that any punishment of the reporters under the circumstances would be an embarrassment, the Appellate Division, in later considering the sentences, dismissed the contempt convictions, ruling that a close review of the language of the order actually signed by the trial judge showed that none of the reporters violated it.

To find another confrontation like this between the courts and the press in New Jersey, one would probably have to go back to the time of the state Supreme Court's decision in 1978's *In re Farber,*[3] in which *New York Times* reporter Myron Farber refused to provide materials subpoenaed by the defense in a widely publicized murder trial of a physician accused of poisoning patients. As a result, he spent months in the Bergen County jail on contempt charges.

In *Farber,* the Court held that a criminal defendant must be allowed to obtain exculpatory evidence through compulsory process, even at the expense of the protections normally afforded the press.[4] *Farber* also established procedures whereby *only* the criminal defendant may overcome the newsperson's privilege.[5]

A Tough Shield Law

New Jersey's privilege, embodied in statute[6] and Evidence Rule 508, protects both the source and the information. The privilege may only be pierced by a criminal defendant where the source or information sought is "relevant, material and necessary to the defense," and cannot be obtained from any less intrusive source. Once a criminal defendant satisfies this criterion, a court is required to examine the materials *in camera* to determine admissibility at trial. If the court determines the materials are admissible, an order to produce only those materials that satisfy both aspects of the test will be issued.

Civil defendants and prosecutors cannot overcome the shield unless the reporter is an eyewitness to, or participant in, any act involving physical violence or property damage. Even this eyewitness exception has been construed narrowly so that a reporter cannot be compelled to testify if there are other witnesses.

Even following *Neulander*, the New Jersey Judiciary has returned to its unequivocal support of the shield law. In 2003's *Kinella v. Welch*,[7] involving claims of invasion of privacy against a television production company that filmed a trauma reality show in a hospital emergency room, the Appellate Division dispelled the trial court's notion that non-confidential material from the newsgathering process was not covered by the shield law, and further rejected the trial court's ruling that the plaintiff's claim had a "constitutional foundation" that could be invoked to override the protections of the shield law. In fact, the Court postulated that the shield might even be effective against real constitutional claims.

Compare these safeguards, which have made subpoenas on reporters in New Jersey a rarity, with the journalists around the United States who now face sentencing or have been sentenced for refusing to reveal sources,and whose states have no shield law or rely upon *Branzburg's* qualified shield, which differs significantly among the federal circuits. In the Third Circuit, where the privilege is relatively strong, the qualified privilege requires those seeking to subpoena either confidential or non-confidential information from a journalist to satisfy a three-part test before compelled disclosure will be allowed. In order to overcome the privilege, the party seeking disclosure must make a "strong showing" that: 1) the information sought is relevant; 2) the information is "necessary" and "crucial" to the claim; and 3) there is "no other source for the information requested."[8] To be necessary, the information sought must "provide a source of crucial information going to the heart of the [claim]."[9]

The situation is not so sanguine in other circuits and states. Especially problematic is the government's increasing tendency to attempt to use journalists as witnesses, despite the availability of other evidence. Here are a few examples of the crossed swords in other jurisdictions.

The Valerie Plame Investigation

Columnist Robert Novak revealed CIA officer Valerie Plame's identity in a July 2003 column. Several other journalists reported they had received the information because the leak had been alleged to be politically motivated. A special prosecutor was appointed to determine if criminal charges should be brought against the leaker(s). The prosecutor subpoenaed at least five journalists. The federal court, again in the District of Columbia, has held at least two reporters in contempt while forcing others to testify on a limited basis, fining them $1,000 a day and imposing jail time until they testified. On February 15, 2005, a federal appeals court rejected any special privilege for journalists despite Justice Powell's statement in *Branzberg* that a privilege would exist against a grand jury subpoena if a reporter were called to testify about information that was "remote and tenuous" to an investigation or where law enforcement has no legitimate need for the information.[10] Despite the reliance on Justice Powell's words by many circuits to justify a federal reporter's privilege, the D.C. Circuit ruled "there was no reason to believe that Justice Powell intended to elevate the journalistic class above the rest." The appeals court also ruled that Department of Justice guidelines governing when and how journalists were subpoenaed were not binding or enforceable. The court also upheld the district court's ruling that the contempt ruling could be based upon secret evidence submitted to the grand jury but unavailable to the journalists.

Hatfill v. Ashcroft[11]

Dr. Stephen Hatfield, named a "person of interest" by Attorney General John Ashcroft in the 2001 anthrax investigation but never charged, sued Ashcroft and the Justice Department under the Privacy Act of 1974[12] in federal court in the District of Columbia. In October, a U.S. District Court judge approved the use of subpoenas against the news media, and then ordered as many as 100 federal agents to waive any confidentiality agreements they had with the media. In December, five national news organizations received subpoenas; another 10 subpoenas are expected to be served.

Wen Ho Lee

In 2000, former Los Alamos, N.M. nuclear physicist, Dr. Wen Ho Lee, also sued the government in the District of Columbia under the Privacy Act for releasing information about him without his consent during a 1999 espionage investigation against him, which was later dropped. A U.S. District Court judge ordered five reporters from

national news organizations who had written about Lee to reveal their confidential sources. The reporters refused, and the judge found them in contempt and fined them $500 per day, which was stayed pending an appeal to the D.C. Circuit.

Providence, R.I., Corruption

A Providence television reporter received and broadcast a videotape from a confidential source showing a city official taking a bribe from an undercover informant in an FBI sting. The Providence mayor was ultimately convicted in the case. The videotape, it turns out, was leaked to the reporter in violation of a protective order issued by a federal judge in the criminal case. The judge appointed a special prosecutor and ordered the reporter to reveal the source of the videotape. The reporter refused, appealed, was convicted of contempt, and appealed. The First Circuit rejected the appeal, and the reporter was sentenced to six months of home confinement rather than prison (because he had a serious heart condition) in December 2004. Following the conviction, the special prosecutor announced he had deduced the identity of the source to be an attorney for one of the defendants in the criminal case.

Global Relief Grand Jury

A Chicago federal grand jury is investigating the leak of a planned FBI raid on an Islamic charity suspected of funding terrorism. Charity officials said they were called the day before the 2001 raid by *New York Times* reporters looking for comment. Despite being initially refused Department of Justice permission to subpoena (DOJ regulations require all reasonable alternatives be attempted before issuing a subpoena to the news media), the special prosecutor, who is also the prosecutor in the Valerie Plame investigation, subpoenaed the telephone records of the two reporters. It is not known whether the records were turned over by the telephone company, but in September 2004 the *Times* sued to block the subpoena.

Lynne Stewart Trial

Federal prosecutors subpoenaed four reporters to testify in the trial of defense attorney Lynne Stewart for aiding terrorism by publicizing the statements of her client, Sheik Omar Abdel Rahman, against court orders in 2000. In that case only one reporter actually testified before the prosecution closed its case in December 2004, and only to verify the accuracy of his story, which the judge permitted "as a last resort." Stewart was convicted in February 2005.

BALCO Grand Jury

Prosecutors presenting to a federal grand jury in San Francisco investigating illegal steroid distribution to professional athletes sent letters to five Bay Area reporters asking them to cooperate. They refused, and no subpoenas followed. However, after sealed testimony from Major League baseball players was leaked in December, prosecutors asked the Justice Department to investigate the leaks.

What the Future Holds

Much like public policy reasons had led courts to establish spousal, attorney-client or priest-penitent privileges, the public interest is certainly served by the robust and uninhibited flow of information that must be protected to safeguard confidential relations between source and journalist. Recognizing this, 2004 ended with a proposal for a federal shield law from Senator Christopher Dodd (D-Conn.), aptly titled the Free Speech Protection Act of 2004.[13] The bill would protect journalists from disclosing sources, and provide a qualified immunity against compelled disclosure of news or information, much like the Third Circuit's three-part test from *Riley*.[14]

In announcing the proposal in a *Washington Post* op-ed piece, Dodd made clear that people should not underestimate the importance of the media in our nation's recent history.

> Those of us who lived through the early 1970s remember how Bob Woodward and Carl Bernstein uncovered the sordid saga of Watergate with help from a confidential informant known as Deep Throat. Does anyone truly believe that Deep Throat would have lifted the veil of secrecy from the Nixon White House without a guarantee of anonymity? Had he thought for a moment that his identity might be revealed, he probably would have kept quiet—and serious wrongs harmful to our country might have gone undetected.[15]

The current unconsidered attack on journalists by federal prosecutors and judges for protecting the flow of news is a bad omen for free speech. Unfortunately, despite the many calls from news organizations and academics for this type of legislation, it would require the approval not only of the Republicans in control of Congress, but the Bush Administration, whose Justice Department is permitting these invasive subpoenas to proceed.

While these battles over whether to change the very character of investigative reporting are played out in the courts and Congress, the only solace is that so long as they stick to non-federal issues, reporters in states like New Jersey can continue to do their jobs without fear of subpoenas. ⚖

Endnotes

1. 173 N.J. 193 (2002).
2. 408 U.S. 665 (1972). Following *Branzburg*, the circuit courts of appeal are in virtual agreement in holding that a qualified privilege applies. *E.g., Zerilli v. Smith*, 656 F.2d

705 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *LaRouche v. NBC*, 780 F.2d 1134 (4th Cir. 1986); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *United States v Caporale*, 806 F.2d 1487 (11th Cir. 1986).

3. 78 N.J. 259, *cert. denied*, 439 U.S. 997 (1978).
4. *Id.* at 274.
5. *Id.* at 276-77.
6. N.J.S.A. 2A:84A-21.
7. 362 N.J. Super. 11143, 151 (App. Div. 2003).
8. *Riley v. City of Chester*, 612 F.2d 708, 716-17 (3d Cir. 1979).
9. *Id.* at 717.
10. *In re Grand Jury Subpoena, Judith Miller*, 04-3138 __F.3d.
11. These summaries are adopted from a report on the Reporters Committee for Freedom of the Press website: www.rcfp.org/standup/subpoenas.html.
12. 5 U.S.C. §552a.
13. S-3020, 108th Congress, Second Session.
14. Section 4: (a) NEWS OR INFORMATION—A court may compel disclosure of news or information described in section 3(a)(2) and protected from disclosure under section 3 if the court finds, after providing notice and an opportunity to be heard to the person or entity from whom the news or information is sought, that the party seeking the news or information established by clear and convincing evidence that—(1)the news or information is critical and necessary to the resolution of a significant legal issue before an entity of the judicial, legislative, or executive branch of the Federal Government that has the power to issue a subpoena; (2) the news or information could not be obtained by any alternative means; and (3) there is an overriding public interest in the disclosure.
    (b) SOURCE—A court may not compel disclosure of the source of any news or information described in section 3(a)(1) and protected from disclosure under section 3.
15. Dodd, Christopher, "Reporting at Risk" *Washington Post*, December 28, 2004.

Bruce S. Rosen, *a former journalist, is a partner with Chatham's McCusker, Anselmi, Rosen, Carvelli & Walsh, PC, where he practices a wide variety of civil and criminal litigation, with an emphasis on media and First Amendment law.*

This article was originally published in the April 2005 issue of New Jersey Lawyer Magazine, a publication of the New Jersey State Bar Association, and is reprinted here with permission.