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Constitutional Law - Privileged Communications - Effect of the Press Upon Grand Jury Investigations. *Caldwell v. United States*. 434 F.2d 1081 (9th Cir. 1970)

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in a rape case was found to be cruel and unusual punishment within the scope of the eighth amendment. By applying a test which encompasses "contemporary human knowledge," the court suggests a widening of the scope of the amendment, and provides a clear constitutional basis upon which similar cases can be determined.²⁸

JEFFREY L. MUSMAN

Constitutional Law—PRIVILEGED COMMUNICATIONS—EFFECT OF FREEDOM OF THE PRESS UPON GRAND JURY INVESTIGATIONS. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970).

Earl Caldwell, a *New York Times* reporter who specializes in reporting the activities of the Black Panthers, was subpoenaed by a grand jury to testify about his confidential interviews with Panther leaders.¹ Claiming that compliance with the subpoena would infringe upon the right of freedom of the press, Caldwell moved alternatively to quash the subpoena and to limit the scope of the investigation.²

The district court, although refusing to quash the subpoena, became the first court to hold that the first amendment protects a newsman from disclosing confidential information unless a compelling and overriding need for the information is clearly established.³ Caldwell, however, claimed that the ruling did not adequately protect his first amendment right to gather news because his tenuous relationship with the Panthers would be destroyed merely by requiring him to appear at the investigation. Accordingly, he refused to appear and was held in contempt.⁴ On appeal of the contempt citation, the Court of Appeals for the Ninth Circuit expanded upon the district court's decision by holding that Caldwell is not required to appear at the investigation until the party seeking disclosure establishes a compelling need for his presence.⁵

Whenever a court orders a newsman to disclose confidential informa-

28. For a discussion of possible applications of such a test see Goldberg, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

1. Application of Caldwell, 311 F. Supp. 358, 359 (N.D. Cal. 1970).

2. *Id.* at 360. The rationale underlying these motions was that Caldwell's constitutional right to gather and disseminate news would be violated by requiring his presence or by requiring him to disclose confidential information at the investigation because either requirement would destroy the sensitive relationship between Caldwell and the Panthers. *Id.* at 361.

3. *Id.* at 360, 362.

4. *Caldwell v. United States*, 431 F.2d 1081, 1082-83 (9th Cir. 1970).

5. *Id.* at 1089.

tion that was acquired in his news gathering capacity, he is placed in a dilemma. If he refuses to testify, the court may fine or imprison him for contempt; if he testifies, his confidential informants may lose trust in him and terminate their relationship.⁶ Therefore, attempts have been made to persuade the courts and legislatures to grant a privilege to refuse such disclosure.

Although many legislatures have rejected this plea, those of seventeen states have enacted laws granting a limited privilege.⁷ Newsmen maintain, however, that these statutes are of little assistance since they generally protect only the identities of confidential informants, not confidential information.⁸ Therefore, broader protection has been sought in the courts.

Over the years, in their appeal to the courts, newsmen have argued that their profession deserves a broad privilege for the same reasons that other professions enjoy privileged communications.⁹ When a court compels the disclosure of information, it has been urged, the newsman is thereby forced to breach his professional code of ethics,¹⁰ break his employer's regulations¹¹ or risk the possibility of economic reprisal.¹² The courts, however, have rejected these contentions because of a belief that the duty to testify is an essential element of the administration of justice.¹³ An exception would be justified only if a superior public

6. Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18, 18-20 (1969).

7. ALA. CODE tit. 7, § 370 (1958); ALASKA STAT. § 09.25.190 (Supp. 1970); ARIZ. REV. STAT. ANN. § 12-2237 (1956); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West 1966); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. ANN. § 421.100 (1969); LA. REV. STAT. ANN. §§ 45:1451-4 (Supp. 1970); MD. ANN. CODE art. 35, § 2 (1965); MICH. COMP. LAWS ANN. § 767.5a (1968); MONT. REV. CODES ANN. §§ 93-601-1, -2 (1964); N.J. STAT. ANN. § 2A:84A-21 (Supp. 1970); N.M. STAT. ANN. § 20-1-12.1 (1970); Ch. 615, [1970] N.Y. ACTS 1357 (McKinney); OHIO REV. CODE ANN. § 2739.04 (Supp. 1969); PA. STAT. ANN. tit. 28, § 330 (Supp. 1970). Nevada has recently enacted a similar statute. 39 U.S.L.W. 2111 (Aug. 25, 1970).

8. Only the statutes of Michigan and New York are broad enough to protect the content of confidential interviews as well as confidential identities.

9. *E.g.*, *People v. Sheriff of N. Y. County*, 269 N.Y. 291, 199 N.E. 415 (1936). The existing professional privileges are those of attorney-client, physician-patient, priest-penitent, accountant-client, and police-informant. R. WEINBERG, *CONFIDENTIAL AND OTHER PRIVILEGED COMMUNICATIONS* (1967).

10. *E.g.*, *Clein v. State*, 52 So. 2d 117, 120 (Fla. 1950).

11. *E.g.*, *People v. Fancher*, 2 Hun 226 (N.Y. 1874).

12. *E.g.*, *Plunkett v. Hamilton*, 136 Ga. 72, 81, 70 S.E. 781, 786 (1911).

13. *Blair v. United States*, 250 U.S. 273, 281 (1919):

[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person . . . is bound to perform upon being properly summoned. . . . The

policy were demonstrated,¹⁴ which the newsmen failed to accomplish.

In an attempt to overcome the deficiencies of past arguments, one based upon the first amendment was developed: compelling newsmen to disclose confidential information constitutes an incursion upon the right to gather and disseminate news, and to the public's right to receive news, in violation of the first amendment. Compulsory disclosure inhibits the ability to gather and to disseminate news by driving a wedge of distrust between newsmen and their sources of confidential information, which in turn results in the destruction of these relationships. Within the last twelve years, however, the highest courts of Colorado,¹⁵ Hawaii,¹⁶ Oregon,¹⁷ and Pennsylvania,¹⁸ as well as the Court of Appeals for the Second Circuit,¹⁹ have rejected this argument.

The courts have reiterated the belief that, although a citizen's duty to testify is not absolute, the courts should be reluctant to admit an exception which might lead to the obstruction of justice. The advocates of the privilege believe that the analyses of these courts reflect an unreasonable and "inherited prejudice" against a newsman's privilege of refusing to testify.²⁰ Although the first amendment is intended to enjoy the widest scope possible in a free society,²¹ the courts have held that it is not broad enough to permit newsmen to refuse to testify.²² The unaccepted countervailing argument is that because the first amendment protects the functions of publishing and disseminating news,²³ it must of necessity protect the function of news gathering or the former is of limited value.²⁴ Finally, courts have hypothesized that

personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice . . . is subject to mitigation in exceptional circumstances. . . .

14. The courts regard exceptions to these duties as obstructions to justice, and therefore, they grant exceptions rarely, if at all, and only on the basis of sound public policy. 8 J. WIGMORE, EVIDENCE § 2192 (J. McNaughton rev. 1961).

15. *Murphy v. Colorado*, — Colo. —, *cert. denied*, 365 U.S. 843 (1961). The Colorado Supreme Court has never reported this decision. For the facts and holding of the case see Guest & Stanzler, *supra* note 6, at 22.

16. *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P.2d 472 (1961).

17. *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

18. *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

19. *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

20. Guest & Stanzler, *supra* note 6, at 19, 26.

21. *Bridges v. California*, 314 U.S. 252, 265 (1941).

22. *E.g.*, *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

23. *Smith v. California*, 361 U.S. 147, 150 (1959).

24. Guest & Stanzler, *supra* note 6, at 31; *In re Mack*, 386 Pa. 251, 273, 126 A.2d 679, 689 (1956) (Musmano, J., dissenting): "Freedom of the press means freedom to

if the first amendment does permit newsmen to refuse to testify, the interest of the public in compelling testimony is clearly superior to such right.²⁵ Newsmen have countered by stating that these courts have only superficially considered the public interest involved and have failed to inquire into the realities of each case.²⁶ And, perhaps more importantly, these opinions fail to reflect the Supreme Court's great reluctance in permitting any limitation of first amendment freedoms.²⁷

Caldwell v. United States represents a complete departure from prior law. It is the only holding that the first amendment is broad enough to permit newsmen to refuse to testify if such testimony would inhibit their ability to gather news and to inform the public.²⁸ *Caldwell* places upon the litigant seeking disclosure the formidable burdens of establishing that his interest in disclosure is clearly more compelling than the first amendment rights at stake, and that his need for disclosure can only be served by compulsory testimony.²⁹ Finally, the decision recognizes that permitting newsmen to refuse to divulge confidential information may not adequately safeguard the first amendment rights involved in every case. It may be necessary, in addition, to permit a newsman to refuse even to appear.³⁰

The real importance of the *Caldwell* decision is that it represents a compromise between the judiciary's need for the best available evidence and the newsman's need for autonomy in gathering news. The judicial function of administering justice is not unduly hampered because the privilege can be defeated by establishing a compelling need for disclosure which cannot alternatively be served. The newsman's functions of gathering and disseminating news are protected, at least until this burden is met. On this basis the decision indicates the initiation

gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of the press becomes a river without water."

25. *Garland v. Torre*, 259 F.2d 545, 549 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *In re Goodfader's Appeal*, 45 Hawaii 317, 330, 367 P.2d 472, 480 (1961).

26. *Guest & Stanzler*, *supra* note 6, at 19, 37-38.

27. *See id.* at 19, 30-31. The Supreme Court has permitted restraints on freedom of expression only after a "clear and present danger" has been established. *Schenk v. United States*, 249 U.S. 47 (1919). Rather than restrain freedom of expression, it has permitted the unmalicious defamation of public figures and officials. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Rather than infringe upon the religious liberty granted by the first amendment, the Court has prohibited school prayers. *School District v. Schemp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

28. 434 F.2d at 1086.

29. *Id.*

30. *Id.* at 1089.

of a trend that may culminate in the widespread judicial recognition of this long-sought privilege.³¹ At the very least, *Caldwell* represents a check upon the increasing practice of "convert[ing] news gatherers into Department of Justice investigators. . . ." ³²

ROBERT A. HOLMES

Constitutional Law—PRIVATE DISTRIBUTION OF OBSCENE MATERIAL.
United States v. Dellapia, 433 F.2d 1252 (2d Cir. 1970).

A California couple placed a notice in a magazine announcing their desire to hear from "other photo-collectors and liberal-minded couples." Defendant Dellapia responded and correspondence, including an exchange of obscene films, ensued. One of the packages of film mailed by Dellapia at the request of the couple was intercepted by postal inspectors. Dellapia was subsequently arrested by federal authorities and convicted for sending obscene matter through the mail in violation of the Comstock Act.¹

On appeal, the Court of Appeals for the Second Circuit reversed the conviction, ruling that where there is no public distribution and when children are not involved the government cannot constitutionally prosecute an individual for mailing obscene material to adults who have requested it.² The court concluded that the right to possess and receive obscene matter established in *Stanley v. Georgia*³ would be mean-

31. Two cases dealing with this issue have recently been decided. In *State v. Knops*, — Wis. —, 183 N.W.2d 93 (1971), the court adopted the compelling need test as enunciated in *Caldwell*, but found that a compelling need for the newsmen's testimony did exist. In *In re Pappas*, — Mass. —, 266 N.E.2d 297 (1971), the court criticized and rejected the *Caldwell* test stating that such a privilege seriously interferes with law enforcement.

32. 434 F.2d at 1086.

1. The Comstock Act, 18 U.S.C. § 1461 (1964), declares in part that "[e]very obscene . . . article, matter, thing, device, or substance . . . is declared to be non-mailable. . . ." It provides that "[w]hoever knowingly uses the mails for the mailing . . . of [non-mailable matter] . . . shall be fined . . . or . . . imprisoned . . . or both. . . ." See also, 18 U.S.C. § 1465 (1964). For commentary on a Supreme Court decision bearing on the limitations of the Comstock Act see *Stanley v. Georgia*, 394 U.S. 557, 562 n.7 (1969). Cf. *United States v. Book Bin*, 39 U.S.L.W. 4120 (U.S. Jan. 14, 1971); *Public Clearing House v. Coyne*, 194 U.S. 497, 506-08 (1903); *Ex parte Jackson*, 96 U.S. 727 (1877).

2. *United States v. Dellapia*, 433 F.2d 1252, 1258-59 (2d Cir. 1970).

3. 394 U.S. 557 (1969). See generally 11 WM. & MARY L. REV. 261 (1969). During a search of Stanley's home three rolls of obscene film were found. The Supreme Court of Georgia upheld Stanley's conviction for violation of a Georgia obscenity statute, GA. CODE ANN. § 26-6301 (Supp. 1968), *repealed*, [1968] Ga. Acts 1249, 1346. *Stanley v. State*, 224 Ga. 259, 161 S.E.2d 309 (1968). In reversing, on appeal, the United States Supreme Court ruled that ". . . mere private possession of obscene matter cannot con-