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A Comparative Look at the Reporter's Privilege in Criminal Cases: United States, Federal Republic of Germany, and Switzerland

The reporter's privilege allows journalists to withhold the identity of news sources during investigatory proceedings.¹ This controversial privilege has received considerable attention from legislative bodies, courts and scholars in the United States, the Federal Republic of Germany,² and Switzerland. Unique national ideas of the press and its role have caused each of these countries to reach different conclusions about granting a reporter's privilege.

The major developments involving the reporter's privilege in the United States, West Germany, and Switzerland occurred approximately ten years ago. However, questions about the existence and scope of the privilege have continued to trouble the lower courts and scholars of each country. This comment compares the availability of the reporter's privilege in criminal actions in the three countries and examines the structural and ideological developments leading to the enactment of their present laws.³

I. REPORTER'S PRIVILEGE IN THE UNITED STATES

A reporter in the United States has little protection against judicially compelled disclosure of the identity of his sources in a criminal prosecution because there is no federal statutory or ju-

1. The terms reporter's privilege and *Zeugnisverweigerungsrecht* (the German term) are used in civil, administrative, and criminal proceedings. However, this comment discusses only the criminal procedure aspect. The reporter's privilege is not limited to reporters. The term is used here to refer to all those working in the news media who are accorded privileges by statutes and judicial decisions. (Translations of all German materials are the author's.)

2. The Federal Republic of Germany will hereinafter be referred to as West Germany.

3. Much of the discussion about the present state of the law will center around landmark judicial decisions. The use of judicial decisions to explain the approaches of the various countries is not intended to emphasize the importance of the judiciary in formulating the reporter's privilege. The role of the judiciary has varied in the different countries, but the court opinions can serve as official statements about the reporter's privilege in the various legal systems.

cially recognized reporter's privilege.⁴ Congress has considered reporter's privilege legislation several times, but has never adopted a federal reporter's privilege statute.⁵ The judiciary has been hindered in developing a common law reporter's privilege by *Branzburg v. Hayes*,⁶ a 1972 Supreme Court decision holding that there is no constitutional basis for a reporter's privilege.

Branzburg v. Hayes is the only Supreme Court decision that discusses the reporter's privilege.⁷ In *Branzburg*, the Court considered the appeals of three journalists who had been subpoenaed by grand juries to answer questions concerning the journalists' reports on certain criminal activities. On three occasions the journalists refused to appear before the grand juries. On two other occasions the journalists appeared, but refused to answer questions relating to the identity of their sources after claiming a reporter's privilege under the first amendment.⁸ The Court rejected the journalists' argument and held that requiring journalists to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the first amendment.⁹

4. See generally Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. ON LEGIS. 307 (1969); Eckhardt & McKey, *Reporter's Privilege: An Update*, 12 CONN. L. REV. 435 (1980); Edelstein & LoBue, *Journalist's Privilege and the Criminal Defendant*, 47 FORDHAM L. REV. 913 (1979); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969); Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829 (1974); Nelson, *The Newsmen's Privilege Against Disclosure of Confidential Sources and Information*, 24 VAND. L. REV. 667 (1971); Note, *Reporter's and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970).

5. See, e.g., *Newsmen's Privilege: Hearings on S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 917, S. 1128 and S.J. Res. 8 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); *Newsmen's Privilege; Hearing on H.R. 717 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973). See also *Branzburg v. Hayes*, 408 U.S. 665, 689 n.28 (1972).

6. 408 U.S. 665 (1972).

7. The only other time the entire Court has considered similar issues was in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), which involved the search and seizure of newsroom materials. Individual justices have, on occasion, stated opinions on reporter's privilege. See, e.g., *In re Roche*, 448 U.S. 1312 (1980) (Brennan, J., opinion in chambers).

8. *Branzburg*, 408 U.S. at 667-78. This was not the first time a first amendment claim had been made. However, such claims have generally been unsuccessful. See, e.g., *Garland v. Torre*, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958); *In re Goodfader*, 45 Hawaii 317, 367 P.2d 472 (1961); *State v. Buchanan*, 250 Or. 244, 436 P.2d 729, cert. denied, 392 U.S. 905 (1968); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

9. *Branzburg*, 408 U.S. at 667.

Justice White's plurality opinion noted that "[t]he heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information."¹⁰ The Court weighed the importance of "the right to every man's evidence,"¹¹ especially in criminal grand jury proceedings, against the possible harm to a journalist's ability to gather news, and found the evidentiary interest more compelling.¹² Although newsgathering does qualify for first amendment protection, the Court held that journalists are afforded no greater protection than the average citizen.¹³ The Court particularly emphasized that "[f]rom the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press."¹⁴

The Court did not grant journalists a conditional first amendment privilege because of the difficulty in (1) defining the terms and scope of the privilege, (2) distinguishing between different crimes, and (3) providing journalists with a reliable rule.¹⁵ According to the Court, the Constitution offers protection only when grand jury investigations are undertaken in bad faith to harass and "disrupt a reporter's relationship with his news sources."¹⁶

Justice Powell's pivotal concurring opinion articulated a less rigorous standard that has been applied by many courts to limit the impact of *Branzburg*. Justice Powell stated the rule:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a *case-by-case* basis ac-

10. *Id.* at 681.

11. *Id.* at 688 (quoting 8 J. WIGMORE, EVIDENCE § 2192 (rev. ed. 1961)).

12. *Branzburg*, 408 U.S. at 690. In considering the possible negative effects of compelled disclosure of the source's identity, the Court looked at articles by Blasi and Guest & Stanzler that contained surveys and empirical studies of the use of confidential information by journalists. *Branzburg*, 408 U.S. at 694 nn.32 & 33. Some commentators feel the Court misread the data in favor of its finding. See, e.g., Murasky, *supra* note 4.

13. *Branzburg*, 408 U.S. at 681-85.

14. *Id.* at 698-99.

15. *Id.* at 702-04.

16. *Id.* at 707-08.

cords with the tried and traditional way of adjudicating such questions.¹⁷

Courts have used the Powell approach to limit *Branzburg* to its facts. However, no common law reporter's privilege has been granted in criminal proceedings unless the investigation was undertaken in bad faith to harass the reporter or state statutory provisions specifically granted the privilege.¹⁸

Although the *Branzburg* decision has been uniformly criticized, neither the Court nor Congress has been persuaded to grant a reporter's privilege in criminal cases.¹⁹ However, the Court in *Branzburg* did recognize that state statutes may provide for a reporter's privilege.²⁰ At the time *Branzburg* was decided nineteen states accorded some form of statutory reporter's privilege.²¹ Today twenty-five states have reporter privilege statutes that grant varying degrees of privilege.²² However, despite

17. *Id.* at 710 (emphasis added).

18. See S. METCALF, RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS AND REPORTERS § 3.09 (1982).

19. The principles of the *Branzburg* decision appear to have been reinforced by *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). Nonetheless, Justice Brennan stated in *In re Roche*, 448 U.S. 1312, 1315 (1980) (Brennan, J., opinion in chambers), that he did "not believe that the Court has foreclosed news reporters from resisting a subpoena on First Amendment grounds."

20. 408 U.S. at 688-89.

21. See Comment, *The Fallacy of Farber: Failure to Acknowledge the Constitutional Newsmen's Privilege in Criminal Cases*, 70 J. CRIM. L. & CRIMINOLOGY 299, 304-08 (1979).

22. ALA. CODE § 12-21-142 (1977) (absolute privilege as to identity of source); ALASKA STAT. §§ 09.25.150-.220 (1983) (qualified privilege); ARIZ. REV. STAT. ANN. § 12-2237 (1982) (absolute privilege as to identity of source); ARK. STAT. ANN. § 43-917 (1977) (must be an initial showing of publication with malice to require disclosure); CAL. EVID. CODE § 1070(a) (West Supp. 1984) (only protects newsmen from contempt); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1974) (qualified privilege); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1983) (limited to identity of source); KY. REV. STAT. ANN. § 421.100 (Bobbs-Merrill 1970) (directed only to identity of source of published information); LA. REV. STAT. ANN. §§ 45:1451-1454 (West 1982) (qualified privilege); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1984) (absolute privilege as to the identity of sources); MICH. COMP. LAWS ANN. § 767.5a (West 1982) (absolute privilege); MINN. STAT. ANN. §§ 595.021-.025 (West Supp. 1984) (qualified privilege); MONT. CODE ANN. §§ 26-1-901 to -903 (1983) (absolute privilege); NEB. REV. STAT. §§ 20-144 to -147 (1977) (absolute privilege); NEV. REV. STAT. § 49.275 (1981) (absolute privilege); N.J. STAT. ANN. § 2A:84A-21, -21a, -21.1 to -21.9 (West Supp. 1983-84) (qualified privilege); N.M. STAT. ANN. § 38-6-7 (Supp. 1983) (privilege does not apply to judicial proceedings: *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976)); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1983-84) (absolute privilege); N.D. CENT. CODE § 31-01-06.2 (1976) (qualified privilege); OHIO REV. CODE ANN. §§ 2739.04, .12 (Page 1981 & Supp. 1984) (protects only identity of source: *State v. Geis*, 2 Ohio App. 3d 258, 441 N.E.2d 803 (1981)); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980) (limited privilege); OR. REV. STAT. §§ 44.510-.540 (1981) (limited

the existence of numerous state reporter's privilege statutes, the judiciary has continued to restrict the privilege in criminal cases.²³

Thus, a reporter in the United States has little protection against being compelled to disclose the identity of sources. The Supreme Court's decision in *Branzburg*, which held that there is no constitutional basis for a reporter's privilege, has limited judicial development of the reporter's privilege to a case by case balancing of law enforcement interests against the function of the press. Law enforcement interests have predominated. Therefore, Congress's failure to enact a federal reporter's privilege statute has left reporters dependent on state laws that often do not provide adequate protection in criminal cases.

II. REPORTER'S PRIVILEGE IN WEST GERMANY²⁴

The reporter's privilege has also been the subject of considerable discussion in West Germany²⁵ because of legislation

privilege); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1982) (broad protection); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (Supp. 1983) (qualified privilege); TENN. CODE ANN. § 24-1-208 (1980) (qualified privilege). A characterization of the statutes is found in S. METCALF, *supra* note 18, at § 3.02.

23. See, e.g., H. NELSON & D. TEETER, *LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA* 372-75 (4th ed. 1982). Reporters who have personally witnessed a crime, as had two of the journalists in *Branzburg*, do not appear to be eligible to claim a reporter's privilege. *Id.*

24. In German the term used to describe the reporter's privilege is *Zeugnisverweigerungsrecht*.

25. See, e.g., P. CRAMER, *DAS ZEUGNISVERWEIGERUNGSRECHT VON PRESSE UND RUNDFUNK* (1968); L. HENNEMANN, *PRESSEFREIHEIT UND ZEUGNISVERWEIGERUNGSRECHT* (Berliner Abhandlung zum Presserecht Heft 23, 1978); H. HUPPERTZ, *ZEUGNISVERWEIGERUNGSRECHT, BESCHLAGNAHME- UND DURCHSUCHUNGSVERBOT ZUGUNSTEN DES RUNDFUNKS IM STRAFPROZESS* (Instituts für Rundfunkrecht an der Universität zu Köln Band 8, 1971); U. KLUG, *PRESSESCHUTZ IM STRAFPROZESS. EIN RECHTSGUTACHTEN IM "SPIEGEL" -VERFAHREN* (1965); Gross, *Zum Zeugnisverweigerungsrecht der Mitarbeiter von Presse und Rundfunk*, in *FESTSCHRIFT FÜR GERHARD SCHIEDERMAIR ZUM 70. GEBURTSTAG* 223 (1976); Gross, *Neuregelung des journalistischen Zeugnisverweigerungsrecht*, 1975 *NEUE JURISTISCHE WOCHENSCHRIFT [N.J.W.]* 1763; Kaiser, *Die Verfassungsmäßigkeit des Zeugnisverweigerungsrechts der Presse*, 1968 *N.J.W.* 1260; Kohlhaas, *Das Zeugnisverweigerungsrecht der Journalisten*, in *PRESSERECHT UND PRESSEFREIHEIT: FESTSCHRIFT FÜR MARTIN LÖFFLER ZUM 75. GEBURTSTAG* 143 (1980); Kunert, *Das Gesetz über das Zeugnisverweigerungsrecht der Mitarbeiter von Presse und Rundfunk*, 1975 *MONATSSCHRIFT FÜR DEUTSCHES RECHT* 885; Löffler, *Lücken und Mängel im neuen Zeugnisverweigerungs- und Beschlagnahmerecht von Presse und Rundfunk*, 1978 *N.J.W.* 913; Rengier, *Die Reichweite des § 53 Abs. 1 Nr. 5 StPO zum Schutze des namentlich preisgegebenen, aber unauffindbaren Informanten*, 1979 *JURISTENZEITUNG [J.Z.]* 797; Van Gelder, *Die Verfassungswidrigkeit des landespresserechtlichen Zeugnisverweigerungsrechte*, 1969 *J.Z.* 698; Note, *Das Neue Zeugnisverweigerungs-*

passed by the German Bundestag (parliament). Of the three countries considered in this comment, West Germany is the only one that has a federal statutory reporter's privilege.

The origin of the West German reporter's privilege statute can be traced to statutes enacted in 1868 by three of the German Länder (states).²⁶ These first statutes were enacted in response to the Prussian government's failure to pass a similar law that would have applied to all the German Länder controlled by Prussia. A federal reporter's privilege statute was not enacted until 1926, even though the unified German Reichstag had first considered passing such a federal law in 1874.²⁷ By 1965, the federal reporter's privilege statute stated:

Editors, publishers, distributors, printers and others who have worked in the production or publication of a periodic publication [are permitted to withhold testimony] about the identity of an author, source or informant of a publication of punishable contents, when an editor of the publication is punished or nothing prohibits his punishment.²⁸

This formulation of the law gave reporters little protection from compelled disclosure for four reasons. First, there was no privilege for reporters who were not directly involved in the production or publication of a periodical.²⁹ This left many reporters, especially free-lance reporters, without protection. Second, even reporters granted the privilege could not withhold the identity of their sources unless their editor would be liable under the law if the material were published. A reporter's sources were protected if an article was false or libelous, but not if the article was accurate. Consequently, only unreliable informants, whose information is of little value to society, were protected under the law.³⁰ Third, the privilege did not arise until the information

Beschlagnahmerecht im Presse und Rundfunkbereich, 1978 N.J.W. 1617; Note, *Die Verfassungsmässigkeit des Zeugnisverweigerungsrechts der Presse*, 1968 N.J.W. 2368.

26. H. MÖHL, *DAS ZEUGNISVERWEIGERUNGSRECHT DER PRESSE IM STRAF- UND DISZIPLINARVERFAHREN* 23-24 (Zeitungs-Verlag und Zeitschriften-Verlag Band 2, 1963).

27. *Id.* at 25-26, 34. The federal law was not applied to the broadcast media until 1953. *Id.* at 39-42.

28. Strafprozessordnung [StPO] § 53(1)(5), 1965 Bundesgesetzblatt [BGBl] I 1374 (W. Ger.). Because this law was contained in the criminal procedure code it was only applicable to criminal procedure. Other statutes exist for other types of procedure. Punishment in this context would apparently be for violation of the press laws. See generally H. MÖHL, *supra* note 26, at 60-74.

29. See L. HENNEMANN, *supra* note 25, at 18.

30. See P. CRAMER, *supra* note 25, at 19; L. HENNEMANN, *supra* note 25, at 16; U. KLUG, *supra* note 25, at 21.

supplied by the informant was published. Thus, authorities could compel disclosure before publication, even if the material was subsequently published.³¹ Fourth, only the name of the source could be withheld. Information about the location of the informant had to be revealed even though such information might easily lead to the identification of the protected source.³²

In response to this weak federal statutory privilege, by 1966 every West German Land had adopted a reporter's privilege statute. These state statutes appeared to grant journalists a broader privilege.³³ However, the scope of the state statutory privilege was unclear because of differences between the state statutes.³⁴ This confusion, combined with decisions by the Bundesverfassungsgericht (Federal Constitutional Court) and a vast amount of scholarly work condemning the existing privilege, eventually persuaded the Bundestag to enact a more inclusive and comprehensible statute.

The first decision of the Bundesverfassungsgericht that encouraged the enactment of a new federal statute was the *Spiegel* decision in 1966.³⁵ *Spiegel* primarily involved the search and seizure of editorial material from a German magazine, but the opinion also discussed the federal reporter's privilege.³⁶ The court stated that the federal reporter's privilege statute was constitutional and partially protected editorial secrecy. However, since the statute was not comprehensive, the court had to balance editorial secrecy against law enforcement interests, giving editorial secrecy as much weight as possible until a new federal statute could be enacted.³⁷

The need for a new federal statute was underscored again in

31. See R. GROSS, GRUNDZUEGE DES DEUTSCHEN PRESSERECHTS 146 (1969). *But see* P. SCHNEIDER, PRESSEFREIHEIT UND STAATSSICHERHEIT 166. *See generally* L. HENNEMANN, *supra* note 25, at 17.

32. L. HENNEMANN, *supra* note 25, at 17.

33. *See, e.g., id.* at 25-26; 1 LÖWE-ROSENBERG, DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ: GROSSKOMMENTAR § 53 ¶ 37 (23d ed. 1976); *see also* Judgment of Aug. 5, 1966, Bundesverfassungsgericht, W. Ger., 20 Bundesverfassungsgericht [BVerfG] 162, 189.

34. L. HENNEMANN, *supra* note 25, at 24.

35. Judgment of Aug. 5, 1966, Bundesverfassungsgericht, W. Ger., 20 BVerfG 162, 189 [hereinafter cited as *Spiegel*].

36. West Germany has a separate statute according protection against searches and seizures of media material in criminal procedure. It is codified under StPO § 97(5). The federal reporter's privilege in criminal procedure discussed above and mentioned by the Court is codified at StPO § 53(1)(5).

37. *Spiegel*, *supra* note 35, at 189.

1973 when the Bundesverfassungsgericht held that the reporter's privilege statutes of two Länder, Hesse and Hamburg, were unconstitutional in criminal actions.³⁸ The court held that because the federal government had already enacted legislation in the area, articles 72 and 74 of the West German Basic Law (constitution) did not give the Länder power to promulgate criminal procedure laws.³⁹ In dicta, the court also stated that a privilege to withhold testimony did not flow directly from the freedom of the press clause in the Basic Law.⁴⁰

In 1975 the Bundestag enacted a new federal reporter's privilege statute applicable to criminal proceedings. The statute states:

Persons, who in their profession participate or have participated in the preparation, production or distribution of a periodic publication or broadcast [are permitted to refuse to testify] about the identity of an author or source of contributions or documents, as well as about the statements made by them about their activity, to the extent that it concerns contributions, documents and statements for the editorial portion [of the publication or broadcast].⁴¹

In a 1978 decision, the Bundesgerichtshof in Strafsachen (the highest West German federal court for criminal matters) discussed the new statute and noted that it eliminated three of the limitations found in the previous reporter's privilege statute.⁴² First, no violation of the press laws was required. Second, the editor did not have to be personally liable under the new law

38. Judgment of Nov. 28, 1973, Bundesverfassungsgericht, W. Ger., 36 BVerfG 193 [hereinafter cited as *Hesse*]; Judgment of Feb. 13, 1974, Bundesverfassungsgericht, W. Ger., 36 BVerfG 314 [hereinafter cited as *Hamburg*].

39. *Hesse*, *supra* note 38, at 317. Among other rules, GRUNDGESETZ [GG] arts. 72(1), 74(1) (W. Ger.) provide that the states have power to promulgate criminally and judicially related laws only if there are no conflicting federal laws. StPO § 53(1)(5), the federal reporter's privilege statute, was a criminal procedure statute, thus making the state legislation unconstitutional. See also *Spiegel*, *supra* note 35, at 202.

40. *Hamburg*, *supra* note 38, at 317. This dicta was a response to the theory, proposed by numerous scholars, that a reporter's privilege could be derived from the Basic Law. See, e.g., P. CRAMER, *supra* note 25, at 36 ff.; R. GROSS, *supra* note 31, at 152; U. KLUG, *supra* note 25, at 52-66; H. MÖHL, *supra* note 26, at 103; Kaiser, *supra* note 25; Note, 1968 N.J.W. 2368. Some of the speculation appears to have been fostered by the language of the *Spiegel* decision that appeared to indicate the privilege could be derived directly from the Basic Law. *Spiegel*, *supra* note 35, at 176.

41. StPO § 53(1)(5), 1975 BGBl I 1973 (W. Ger.).

42. Judgment of Dec. 28, 1978, Bundesgerichtshof in Strafsachen, W. Ger., 28 Bundesgerichtshof in Strafsachen [BGHSt] 240, 245-246 (hereinafter cited as *Frankfurt*).

before the privilege attached. And third, identifying information, as well as the identity of the reporter's source could be withheld. The court stated that the new statutory privilege was intended to be "friendly to the press."⁴³ It is an absolute privilege because there are no exceptions that relate to the type of crime involved. However, the statute does not protect journalists who have personally witnessed criminal activity.⁴⁴ Additionally, after a journalist has revealed some information about the identity of the informant, the statute no longer provides automatic protection.⁴⁵ Instead, the court must weigh the competing law enforcement and confidentiality interests to determine if the privilege should be granted. The privilege will be extended only when (1) the interest in maintaining confidentiality clearly outweighs the interest in criminal justice, and (2) an "extraordinary publicity interest" is involved.⁴⁶ The court also indicated that, although the new law approaches the constitutional limits of the reporter's privilege, the Bundestag's formulation must be respected because of the judicial principle: "When in doubt decide in favor of the freedom of the press."⁴⁷

The new "absolute" reporter's privilege is not perfect. The most prominent problem that remains is identifying persons who qualify for the privilege. The statute requires a journalist to participate by profession in the publication or broadcast media in order to qualify for protection.⁴⁸ Commentators have postulated that this wording will continue to deny the privilege to

43. *Id.* at 247.

44. *Id.* at 247-48, 253.

45. *Id.* at 244-45.

46. *Id.* at 248-49. This standard appears to give courts discretion, but with emphasis on the criminal prosecution interest. The court described an extraordinary publicity interest as being when, at least at the time of decision, the publication of the article serves in the general interest to protect especially major rights and when the publication is an appropriate means to protect those rights. *Id.* at 249. This explanation offers little help in understanding what an extraordinary publicity interest is. However, in the case before it the court decided that a judicially granted privilege was not appropriate. The case involved an article based on an interview with a person who was purported to have participated in a mass murder. The article pointed out that the source, still unknown to authorities, was a "Frankfurt chap". The court held that the statutory privilege had been waived by this disclosure, and the crime involved weighed against a judicially granted privilege. The strictness of this holding has been criticized. *See, e.g.,* Rengier, *Die Reichweite des § 53 Abs. 1 Nr. 5 StPO zum Schutze des namentlich preisgegebenen, aber unauffindbaren Informanten*, 1979 J.Z. 797.

47. *Frankfurt*, *supra* note 42, at 248. *See generally* Judgment of May 10, 1983, Bundesverfassungsgericht, W. Ger., 1984 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT [EuGRZ] 90 (explanation of the extent of a constitutionally based reporter's privilege).

48. The German word used in the statute is *berufsmässig*.

part-time and free-lance journalists.⁴⁹ A second problem is that only those who work on a periodic publication or broadcast are granted the privilege. Scholars have contended that the term "periodic" is too restrictive.⁵⁰ The term appears to exclude those involved in publishing a book based on research done for a periodical publication, documentary filmmakers, and possibly others. However, despite its defects, the new reporter's privilege statute gives West German reporters a solid and broad basis for protecting confidential sources.

III. REPORTER'S PRIVILEGE IN SWITZERLAND

In Switzerland the reporter's privilege has not received the same amount of attention it has in West Germany. Unlike the West German Bundestag, the Swiss Bundesversammlung (Federal Assembly) has refused to grant a federal reporter's privilege. Therefore, much as in the United States, the fate of the privilege has been left to the individual cantons (the Swiss equivalent of states). Some of the Swiss cantons have enacted reporter's privilege statutes. However, for purposes of comparison, this section will focus on the canton of Zurich which does not recognize the reporter's privilege.⁵¹

In 1972, the case of *Danuser v. Bezirksanwaltschaft Zürich*⁵² came before the highest federal court in Switzerland. Several juveniles who had escaped from a reformatory were interviewed on television while their whereabouts were unknown to law enforcement authorities. The show's producer was questioned by the authorities regarding the location of the juveniles, but he refused to answer.⁵³ Although the canton had not enacted a statutory reporter's privilege, the producer claimed a privilege derived directly from the freedom of the press clause of the

49. See, e.g., L. HENNEMANN, *supra* note 25, at 48-50; Löffler, *supra* note 25, at 913-14.

50. See, e.g., Löffler, *supra* note 25, at 913-14.

51. Zurich is emphasized for two reasons. First, the Zurich canton is dealt with in the major decision by the highest national court and other informative decisions involving reporter's privilege. Second, the purpose for including the Swiss system in this comment is to compare and contrast how systems with almost identical backgrounds can reach totally different results. Zurich, one of the cantons to deny reporter's privilege, is a good tool for comparison and contrast.

52. Judgment of June 28, 1972, Bundesgericht, Switz., 98 Entscheidungen des Schweizerischen Bundesgerichts, Amtliche Sammlung [BG] I 418 [hereinafter cited as *Danuser*].

53. *Id.* at 420.

Swiss constitution.⁵⁴ The court rejected the producer's claim for a reporter's privilege by relying on section 128 of the Züricher Strafprozessordnung (Zurich Criminal Procedure Code), which requires full disclosure, with limited exceptions, to investigating authorities. The court held that the producer had to disclose the whereabouts of the youths.

A general reporter's privilege cannot be derived from either the freedom of the press or freedom of expression because the guaranteed basic rights are not directly affected by the obligation to testify. Whether the journalistic worth of anonymous informants is of greater importance than the clarification of particular fact situations so that the anonymity of the informant should be preserved in criminal proceedings, is a question whose solution cannot be derived from the constitution, but rather should be *handled by the proper legislature*.⁵⁵

The court concluded that because neither the Zurich Criminal Procedure Code nor the federal code contained a reporter's privilege, the constitutional guarantees of freedom of the press and freedom of expression were not violated by requiring the producer to answer questions about the youths.⁵⁶ The court reaffirmed this holding in another case in 1981.⁵⁷

The Züricher Obergericht in Strafkammer (Zurich Superior Criminal Court) also confronted the reporter's privilege issue in a case involving the seizure of photocopies of arrest warrants from a newsroom.⁵⁸ Although seizure rather than nondisclosure of the identity of news sources was involved, the court discussed the reporter's privilege in detail. First, the court reiterated much of the *Danuser* decision and pointed out that only doctors, lawyers, and clergy have the privilege not to testify. The court admitted that the confidential relationship between the press and informants was protected by the freedom of the press clause, but held that the Swiss Constitution does not provide an unlimited privilege.⁵⁹ Freedom of the press is only a part of the general freedom of expression that is granted to all citizens and cannot be used to avoid obligations that are common to all citizens.

54. BUNDESVERFASSUNG [BVERF] art. 55 (Switz.).

55. *Danuser*, *supra* note 52, at 422 (emphasis added).

56. *Id.*

57. Judgment of July 1, 1981, Bundesgericht, Switz., 1982 EuGRZ 29.

58. Judgment of Sept. 4, 1979, Obergericht in Strafkammer, Zurich, Switz., 76 SCHWEIZERISCHE JURISTENZEITUNG 317 [hereinafter cited as *Zurich*].

59. *Id.* at 320.

Only the legislature can sanction withholding the identity of news sources in criminal investigations.⁶⁰ As a result, the court held that reporters have no greater constitutional protection from testifying than nonreporters.

The court did acknowledge that the confidentiality between informant and reporter cannot be totally disregarded. Under some circumstances the relationship may be considered by the court, but the anonymity of sources does not require any special protection.⁶¹ The court stated: "The press in Switzerland survived up until now without a statutory privilege. Despite that, or perhaps because of that, the press has prevailed in its important assignment."⁶² The defendant, citing a West German case as authority,⁶³ urged the court to balance the interest in the collection of the news against the interest in prosecution in deciding whether to grant a reporter's privilege. However, even after considering the role of the press the court found that (1) the criminal offense involved in the case was no less important than the reporter's privilege, and (2) no extraordinary interest in publication was present in the case.⁶⁴

As this case illustrates, the Swiss have relied on the legislature to decide whether or not to grant a reporter's privilege. The Swiss constitution does not expressly grant a reporter's privilege and the courts in the canton of Zurich have been unwilling to interpret the constitution or criminal code as requiring a privilege. With few cantonal reporter's privileges and no uniform federal reporter's privilege, the reporter's position in Switzerland remains precarious.

IV. ANALYSIS AND COMPARISON

The federal reporter's privilege accorded the press in West Germany is vastly different from that found in the United States and Switzerland. In West Germany, journalists for periodic publications and broadcasts have an absolute privilege to protect their sources without regard to the seriousness of the crime involved. In contrast, in the United States and Switzerland, although some states and cantons have enacted reporter's

60. *Id.*

61. *Id.* To emphasize its point, the court stated that a source should not expect his identity to be protected.

62. *Id.*

63. The German case referred to is apparently *Frankfurt*, *supra* note 42.

64. *Zurich*, *supra* note 58, at 320-21.

privilege statutes, reporters in over half of the states and cantons have no significant privilege to withhold testimony in criminal proceedings. This difference is a result of the unique constitutional and philosophical theories of the three countries.

A. Constitutional Analysis

Journalists in all three countries claim a reporter's privilege derived directly from a constitutional freedom of the press clause.⁶⁵ The journalists' argument is based on two premises. First, the press has a constitutionally granted function to inform the public and stimulate public opinion. Second, a reporter's privilege is necessary to carry out the press function. Journalists argue that, without a reporter's privilege, sources are hesitant to inform and consequently the function of the press is inhibited.

The journalists' first premise has been accepted in all three countries.⁶⁶ However, the assertion that a reporter's privilege is necessary in order to perform the press function has been rejected by the United States Supreme Court in *Branzburg*⁶⁷ and by the Züricher Obergericht in Strafkammer.⁶⁸ The West German courts, on the other hand, have been reluctant to reject the second argument.

Two cases that were discussed earlier illustrate the West German position. First, in the *Hamburg* case the Bundesverfassungsgericht specifically denied the constitutional argument while invalidating a state-level reporter's privilege statute, but only after weighing the particular facts of the case.⁶⁹ Second, in the *Frankfurt* decision the Bundesgerichtshof in Strafsachen re-

65. For the claim of journalists' privilege in the United States see, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972). In West Germany see, e.g., *Spiegel*, *supra* note 35; *Frankfurt*, *supra* note 42. In Switzerland see, e.g., *Danuser*, *supra* note 52; *Zurich*, *supra* note 58.

66. For the United States see generally *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Estes v. Texas*, 381 U.S. 532, 539 (1965). For West Germany see generally P. SCHNEIDER, PRESSE- UND MEINUNGSFREIHEIT NACH DEM GRUNDGESETZ 118-29 (1962). For Switzerland see generally P. SALADIN, GRUNDRECHTE IM WANDEL: DIE RECHTSPRECHUNG DES SCHWEIZERISCHEN BUNDESGERICHTS ZU DEN GRUNDRECHTEN IN EINER SICH ANDERNDEN UMWELT 43-48 (1970).

67. 408 U.S. at 698-99. Justice Powell's concurrence appears to give more weight to the second premise than does Justice White's plurality opinion. The Court's handling of empirical evidence on the importance of reporter's privilege has also been criticized. See *supra* note 12 and accompanying text.

68. *Zurich*, *supra* note 58, at 320. The concept is also implied in *Danuser*, *supra* note 52.

69. *Hamburg*, *supra* note 38, at 317.

fused to apply the federal statute because the journalist had already revealed some information about his source.⁷⁰ However, the court held that under some circumstances a journalist may refuse further disclosure even when the federal statute is inapplicable.⁷¹ This limited privilege is arguably derived from the constitution.

The reporter's privilege cases in West Germany demonstrate a friendliness toward the press not found in the United States and Switzerland. This difference cannot be explained by the history of the constitutional guarantees of free press in the three countries. The history of the press in all three countries is filled with struggles against government censorship and control. As the governments' awareness for the need of an informed public became more acute, and the efforts of the press to eliminate the shackles of government control correspondingly intensified, the three countries established constitutional guarantees of a free press.⁷² However, the free press provisions of the Swiss and United States constitutions and the West German Basic Law have had dissimilar effects on the reporter's privilege.

In Switzerland and the United States the judiciary has interpreted the pertinent constitutional guarantees as requiring the government to remain neutral in matters dealing with the press.⁷³ Despite a constitutionally guaranteed freedom of the press, the press is granted no more rights or privileges than the average citizen, who is guaranteed freedom of expression. Freedom of the press is only a subpart of freedom of speech and expression. Therefore, a journalist enjoys no more rights than a nonjournalist.⁷⁴

70. *Frankfurt*, *supra* note 42; *see supra* note 46 and accompanying text.

71. *Frankfurt*, *supra* note 42; *see supra* notes 45-46 and accompanying text. For application of this concept *see Advertisement*, *supra* note 47.

72. U.S. CONST. amend. I; B. VERF. art. 55 (Switz.); GG art. 5 (W. Ger.). The citation for the West German Basic Law is the new version, but varies little from the older versions. For a brief history of the press, *see, e.g.,* H. NELSON & D. TEETER, *LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA* 26-56 (4th ed. 1982); M. LÖFFLER & R. RICKER, *HANDBUCH DES PRESSERECHT* 20-28 (1978); C. LUDWIG, *SCHWEIZERISCHE PRESSERECHT* 63-81 (1964). One German commentator has noted that the government began compelling disclosure of sources and information once censorship was no longer allowed in order to retain some control over the press. In effect, the granting of freedom of the press caused a need for reporter's privilege. H. MÖHL, *supra* note 26, at 22-23.

73. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 761 (1977); *see also* Blanchard, *The Institutional Press and its First Amendment Privileges*, 1978 SUP. CT. REV. 225, 226.

74. *Contra* Meiklejohn, *The Courts, the Press, and the Public: The Case of Myron*

The West German Basic Law contains a provision that could justify a similar result. The Basic Law states that freedom of the press can be limited by general laws, i.e., laws that apply to all persons, and not just the press.⁷⁵ This provision essentially gives the legislature constitutional authority to regulate the press to the same extent that it regulates the rest of society. Thus, there is constitutional authority for requiring the press to testify as long as the rest of society is also required to do so.⁷⁶

Although journalists in the United States, West Germany, and Switzerland are all guaranteed the right to a free press by the constitution or Basic Law, that right can be regulated to the same extent the rest of society is regulated. However, in all three countries legislative power exists to grant special privileges. West Germany is the only country that has legislatively enacted a federal statutory privilege. There is nothing notably different about the West German concept of freedom of the press that explains this more liberal approach with the exception of a possible government "friendliness" toward the press.

B. The Philosophies of the Three Systems and the Effect of the "Performance State" on the Reporter's Privilege

Although freedom of the press exists in all three countries, the enactment of a federal statutory reporter's privilege in West Germany may reflect the more encompassing legal theory espoused in that country. Scholars suggest that West Germany has developed into a "performance state" that not only formally acknowledges basic rights by not allowing government interference with those rights, but also places an affirmative duty on the state to implement programs to secure and protect those rights.⁷⁷ In essence, the performance state extends the concept

Farber and The New York Times, 30 SYRACUSE L. REV. 789 (1979).

75. GG art. 5 § 2 (W. Ger.). For explanation of "general law" see, e.g., R. GROSS, *PRESSERECHT: EINFÜHRUNG IN GRUNDZÜGE UND SCHWERPUNKTE DES DEUTSCHEN PRESSERECHTS* 50-53 (1982); M. LÖFFLER & R. RICKER, *HANDBUCH DES PRESSERECHTS* 51-53 (1978).

76. All three countries allow privileges to be granted to some groups, e.g. doctors and clergy, without requiring that the same privilege be given journalists. All three allow the press to also receive special treatment from the law, but that special treatment may not necessarily be derived from the constitutions or Basic Law.

77. See Häberle, *Grundrechte im Leistungsstaat*, 30 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRICHTSLEHRE [VVDStRL] 43 (1972) (Professor Dr. Peter Häberle was one of the instigators of the term "performance state"); see also Benda, *New Tendencies in the Development of Fundamental Rights in the Federal Republic of Germany*, 11 J. MAR. J. PRAC. & PROC. 1 (1977); Kommers, *The Jurisprudence*

of the welfare state beyond the obligation to distribute welfare benefits to the poor to include an affirmative duty to the entire legal system.

One West German scholar has stated that in a performance state the "performance law" sets the profile of the social constitutional state and, without such a performance law, basic rights would be socially ineffective.⁷⁸ Merely granting freedom of the press and formally acknowledging that right offers the journalist little protection. However, the performance state brings about the maximal actualization of that right by enacting affirmative legislation, e.g., a statutory reporter's privilege.

The reporter's privilege in West Germany is an example of a performance state carrying out its affirmative duty to protect rights. In contrast, in most areas of the law, the United States does little more than not interfere with basic rights.⁷⁹ The emergence of a welfare or performance state in the United States or Switzerland may bring about changes in the reporter's privilege.

V. CONCLUSION

West Germany has enacted a national statutory reporter's privilege that offers extensive protection from compelled disclosure. In the United States and Switzerland some of the states and cantons have enacted reporter's privilege statutes, but there is no uniform, nationally applicable law. There are no formal constitutional interpretations that explain this difference. It may result from the different legal philosophies of the three nations, in particular the concept of a performance state. Whatever the underlying differences of the three systems, the West German reporter's privilege can serve as a model for a federal reporter's privilege statute in the United States and Switzerland.

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of Free Speech in the United States and the Federal Republic of Germany, 53 S. CAL. L. REV. 657, 673-77 (1980).

78. Häberle, *supra* note 77, at 47.

79. In the United States, the performance state concept has apparently only been extended in limited economic situations and some areas of civil rights. *See generally* A. MILLER, SOCIAL CHANGE AND FUNDAMENTAL LAW: AMERICA'S EVOLVING CONSTITUTION (Contributions in American Studies No. 41, 1979).