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## Evidence-Newsman's Privilege-Legislatively Enacted Newsman's Privilege Invalid as Infringement on Judicial Rulemaking Power- Ammerman v. Hubbard Broadcasting, Inc.

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**Evidence—NEWSMAN'S PRIVILEGE—LEGISLATIVELY ENACTED NEWSMAN'S PRIVILEGE INVALID AS INFRINGEMENT ON JUDICIAL RULE-MAKING POWER—*Ammerman v. Hubbard Broadcasting, Inc.*, 551 P.2d 1354 (N.M. 1976).**

The plaintiffs in this case sought recovery from the defendants for allegedly slanderous radio broadcasts. The district court ordered the defendants to disclose the names of all their claimed confidential informants and to produce, or make available to plaintiffs, all information defendants claimed to have received from those informants. The defendants appealed the order pursuant to a provision of the New Mexico newsman's privilege statute.<sup>1</sup> The plaintiffs filed a motion to dismiss the appeal upon the grounds that the statutory provision under which the appeal was taken was unconstitutional. At the request of the district court, the question of the constitutionality of the appellate procedure and the broader question of the constitutionality of the newsman's privilege itself were briefed for review.<sup>2</sup> The supreme court dismissed the appeal, holding that the privilege in general was invalid in judicial proceedings and that the statute's appeal provision was largely invalid.<sup>3</sup>

## I. BACKGROUND

### A. General Overview

Although hotly debated a few decades ago,<sup>4</sup> the question of

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1. N.M. STAT. ANN. § 20-1-12.1(C) (Supp. 1975):

If the proceeding in which disclosure is sought is in the district court, that court will determine whether disclosure is essential to prevent injustice. . . . Disclosure shall, in no event, be ordered except upon written order of the district court stating the reasons why disclosure is essential to prevent injustice. Such an order is appealable to the Supreme Court if the appeal is docketed in that court within ten [10] days after its entry. . . . and shall be heard de novo . . . .

2. *Ammerman v. Hubbard Broadcasting, Inc.*, 551 P.2d 1354, 1356 (N.M. 1976).

3. *Id.* This case note will only deal with the issue of the constitutionality of the privilege itself, and not with the issue of the validity of the appeal procedure.

4. Stein, *To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 639, 645 (1940); see Gertner, *The Inherent Power of Courts to Make Rules*, 10 U. CIN. L. REV. 32, 58 (1936); Hirschman, *The Power to Regulate Court Procedure—Is It a Legislative or a Judicial Function?*, 71 UNITED STATES L. REV. 618 (1937); Pound, *The Rule-making Power of the Courts*, 12 A.B.A.J. 599 (1926); Sunderland, *Character and Extent of the Rule-making Power Granted U.S. Supreme Court and Methods of Effective Exercise*, 21 A.B.A.J. 404 (1935); Tyler, *The Origin of the Rule-making Power and Its Exercise by Legislatures*, 22 A.B.A.J. 772 (1936); Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). Two exhaustive lists of sources may be found in Curd, *Substance and Procedure in Rule*

whether the judiciary has or should be given power to make rules of procedure has long been resolved, generally in the courts' favor.<sup>5</sup> The methods or doctrines, however, used to support or implement this result have varied from state to state. Generally, courts have claimed rulemaking authority upon one of three bases: (1) an historically existing, inherent judicial power to promulgate procedural rules;<sup>6</sup> (2) an enabling act passed by the legislature authorizing the courts to make rules of procedure;<sup>7</sup> or (3) a constitutional provision specifically delegating to the supreme court the right to create procedural rules for judicial proceedings.<sup>8</sup>

### 1. *Rulemaking as an inherent power of the courts*

Dean Roscoe Pound, an early twentieth century champion of the theory that courts have inherent rulemaking power, outlined three rationales in support of the theory.<sup>9</sup> First, Pound maintained that at the time the American Constitution was adopted, the King's Court in England had power to make general rules of procedure, and American courts inherited this power, although it remained dormant for many years. During this period of dormancy, the rulemaking power was exercised by legislatures as they enacted codes and practice acts. This period of judicial apathy, however, did not negate the courts' inherent power.<sup>10</sup> Second, Pound reasoned that in making its own procedural rules a court can formulate and discard rules as it deems necessary. Because of the particularized way it reacts to each case, a court is better suited than a legislature to deal with procedural matters. Courts need this inherent flexibility in order to effectively perform their duties.<sup>11</sup> Third, Dean Pound observed that the rules governing the operation of a governmental branch ought to be made by that branch. The judiciary knows best what rules are necessary and appropriate for the judicial process and thus is best suited to formulate those rules.<sup>12</sup>

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*Making*, 51 W. VA. L.Q. 34, 54-55 app. (1948), and *The Rule-making Power: A Bibliography*, 16 A.B.A.J. 199, 199-202 (1930).

5. Stein, *supra* note 4, at 645.

6. See *People v. Callopy*, 358 Ill. 11, 192 N.E. 634 (1934); *Little v. State*, 90 Ind. 338, 339 (1883).

7. See *State ex rel. Wilson v. County Court*, 145 W. Va. 435, 114 S.E.2d 904, 909 (1960); *Fleming v. Dent*, 120 W. Va. 691, 693-94, 200 S.E. 35, 36 (1938).

8. See *Buscaino v. Rhodes*, 385 Mich. 474, 478-79, 189 N.W.2d 202, 204 (1971); *Tomlinson v. Tomlinson*, 338 Mich. 274, 276, 61 N.W.2d 102, 103 (1953).

9. Pound, *supra* note 4.

10. *Id.* at 601-02; see *Curd*, *supra* note 4, at 38-39.

11. Pound, *supra* note 4, at 602-03.

12. *Id.*

## 2. *Rulemaking as a statutory power*

Legislative acts, delegating to the jurisdiction's highest court the power to regulate procedure in its own and all lower court proceedings, are a second basis for judicial rulemaking authority. Such an enabling act may indicate that the authority is to be exercised exclusively by the court<sup>13</sup> or concurrently with the legislature.<sup>14</sup> It may also prescribe the status of former statutory rules of procedure.<sup>15</sup>

## 3. *Rulemaking as a constitutional power*

An express mandate in the form of a state constitutional provision is another ground upon which some courts have been able to claim rulemaking power.<sup>16</sup> When rulemaking authority is based on a constitutional provision, arguments against vesting the authority in the judiciary, such as judicial usurpation of a legislative function and the unconstitutional delegation of legislative authority, lose their cogency.<sup>17</sup> Occasionally, when an express constitutional mandate for rulemaking is absent, courts have bolstered assertions of implied constitutional power with arguments of inherent power.<sup>18</sup>

13. *E.g.*, W. VA. CODE §§ 51-1-4 to 4a (1966):

The supreme court of appeals may, from time to time make and promulgate general rules and regulations governing pleading, practice and procedure in such court and in all other courts of record of this State. All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified, suspended or annulled by rules promulgated pursuant to the provisions of this section. . . .

. . . .

. . . When and as the rules of the court herein authorized shall be prescribed, adopted, and promulgated, all laws and parts of laws that conflict therewith shall be and become of no further force or effect, to the extent of such conflict.

14. For a discussion of those jurisdictions that had statutory or constitutional limitations on judicial rulemaking, see Paul, *The Rule-making Power of the Courts*, 1 WASH. L. REV. 163, 176-80 (1926). Since 1926, however, most of these jurisdictions have removed or lessened those restrictions.

15. *See, e.g.*, N.M. STAT. ANN. § 21-3-2 (1953).

16. *E.g.*, MICH. CONST. art. VI, § 5: "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." *See note 8 supra*.

17. *See Morgan, Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 483 (1957); Peterson, *Rule Making in Colorado: An Unheralded Crisis in Procedural Reform*, 38 U. COLO. L. REV. 137, 149-64 (1966).

18. *E.g.*, State *ex rel. Anaya v. McBride*, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975).

### B. Rulemaking in New Mexico

In 1933 the New Mexico legislature passed an enabling act declaring that New Mexico's Supreme Court had the power to regulate the rules of pleading, practice, and procedure in judicial proceedings of all the courts of New Mexico.<sup>19</sup> Section 2 of this act specified that previous statutory procedural rules and subsequent legislative acts would become rules of the court unless suspended or modified by the court.

In *State v. Roy*,<sup>20</sup> the supreme court first interpreted the enabling act. The court stated that the act was not a grant of power to the court, but rather a legislative declaration of abdication from the field of procedural rulemaking.<sup>21</sup> Following *Roy*, the court reaffirmed its position that it had inherent and implied constitutional power to promulgate procedural rules.<sup>22</sup> Finally, in *Anaya v. McBride*,<sup>23</sup> the court held that the power to prescribe procedural rules was vested exclusively in the judiciary and that any statutory attempt to enact such rules would not be binding.<sup>24</sup> The court pointed to its constitutional, supervisory authority over inferior courts<sup>25</sup> and reasoned that the grant carried with it the inherent power to make procedural rules.<sup>26</sup> Thus, in light of the

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19. 1933 N.M. Laws ch. 84, §§ 1-2 (codified at N.M. STAT. ANN. §§ 21-3-1, -2 (1953)):

The Supreme Court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

....

All statutes relating to pleading, practice and procedure, now existing, shall, from and after the passage of this act, have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto.

20. 40 N.M. 397, 60 P.2d 646 (1936).

21. *Id.* at 419, 60 P.2d at 660. The court concluded that "[w]hen the legislature enacted chapter 84, it merely withdrew from a field wherein it had functioned as a coordinate branch of our government with the court in the promulgation of rules of pleading, practice, and procedure." *Id.* Finding that the New Mexico Constitution's grant of supervisory authority over lower courts meant that it must have rulemaking power, the court asserted that it had both constitutional and inherent power to promulgate procedural rules. *Id.* at 421-22, 60 P.2d at 661-62.

22. *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973); *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973); *Sitta v. Zinn*, 77 N.M. 146, 420 P.2d 131 (1966); *State v. Arnold*, 51 N.M. 311, 183 P.2d 845 (1947); *City of Roswell v. Holmes*, 44 N.M. 1, 96 P.2d 701 (1939).

23. 88 N.M. 244, 539 P.2d 1006 (1975).

24. *Id.* at 246, 539 P.2d at 1008.

25. N.M. CONST. art. 6, § 3: "The Supreme Court . . . shall have a superintending control over all inferior courts . . ."

26. 88 N.M. at 246, 539 P.2d at 1008.

1933 enabling act, *Roy*, its progeny, and *McBride*, it seems clear that the New Mexico Supreme Court has rulemaking power and that this power may be exclusive.<sup>27</sup>

C. *Rulemaking and the Substance-Procedure Dichotomy*

Even though it may have exclusive power to make procedural rules, a state supreme court has no rulemaking authority with respect to substantive matters. It is therefore critical to a discussion of rulemaking power to distinguish between procedural and substantive matters. Although the line between substance and procedure is difficult to draw,<sup>28</sup> the distinction has been made in some contexts.<sup>29</sup>

The distinction is important in differentiating between legislative and judicial responsibilities.<sup>30</sup> In this context, the legislature is viewed as being empowered to create the substantive rights of individuals and the judiciary is considered as having the power to enforce those rights by means of rules promulgated to that end. Thus, the legislature is to enact laws "which have for their purpose to determine the rights and duties of the individual and to regulate his conduct and relation with the government and other individuals," and the judiciary is to formulate rules "which have for their purpose merely to prescribe machinery and methods to be employed in enforcing these positive provisions."<sup>31</sup>

The substance-procedure dichotomy and the resulting division between legislative and judicial responsibilities and powers is particularly confusing in the area of the law of evidence. Although rules governing the admission or exclusion of evidence seem to be procedural in nature, certain evidentiary rules are substantive declarations of policy because of their inextricable involvement with legal rights and duties. Such rules are probably beyond a court's rulemaking power.<sup>32</sup>

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27. See *Curd*, *supra* note 4, at 36.

28. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945); Green, *To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 482 (1940).

29. The distinction between substance and procedure has perhaps been most important in the area of choice of laws. The determination whether a given rule is substantive or procedural is vital to a decision whether to apply federal or state law in a federal diversity action. See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

30. See Green, *supra* note 28, at 483-86; Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 653 (1957).

31. Riedl, *To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 601, 605 n.31 (1940).

32. 3 J. HONIGMAN & C. HAWKINS, MICH. CT. RULES ANN. 403 (2d ed. 1965). Honigman

Of various evidentiary rules,<sup>33</sup> privileges appear to be more substantive than procedural. Because they represent both considerations of public policy that are extrinsic to judicial concerns of evidence preservation and policy determinations that the fostering of certain relationships is preferable to the orderly dispatching of litigation,<sup>34</sup> privileges are substantive declarations of certain individual's rights, vesting in these persons rights not otherwise possessed. As has been noted:

While framed as rules of evidence, [privileges] are not based upon policies concerned with the reliability or relevance of proof or the orderly dispatch of judicial business. Rather they are concerned with the interests to be served by encouraging uninhibited action within the particular situation or relationship. The advancement of the privileged interest is declared more important than the availability of one item of proof in the course of litigation.<sup>35</sup>

## II. INSTANT CASE

In the instant case, the New Mexico Supreme Court reasoned that the statute enacting the newsman's privilege "did nothing more nor less than attempt to create a rule of evidence, comparable to other privileges."<sup>36</sup> Citing Professor Edmund Morgan's rationale for categorizing privileges as evidentiary rules within the court's rulemaking power,<sup>37</sup> the court asserted that there was "no

and Hawkins refer specifically to the parol evidence rule and the Statute of Frauds as examples of rules that appear to be procedural and evidentiary while actually being substantive in nature. For example, the parol evidence rule operates as a substantive rule of contract law marking the bounds of what constitutes a contract between parties and defining their duties and rights. See RESTATEMENT (SECOND) OF CONTRACTS § 239, Comment a (1973); Green, *supra* note 28, at 484. Although having procedural aspects similar to the parol evidence rule in that it operates to exclude evidence, the Statute of Frauds is also substantive in nature because it guides people in the formation of contracts and defines certain essential contractual elements.

33. Burden of proof requirements, true evidentiary rules, may also be more substantive than procedural. These requirements provide a method of assuring the orderly presentation of evidence at trial. See Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 572 & n.123 (1956); Green, *supra* note 28, at 484. In the sense that judicial action cannot be taken unless the proof rises to a certain level, however, a substantive right and duty are constituted by burden of proof rules.

34. 3 J. HONIGMAN & C. HAWKINS, *supra* note 32, at 403-04; Joiner & Miller, *supra* note 30, at 651; Riedl, *supra* note 31, at 604. But see Clapp, *supra* note 33, at 569-71; Morgan, *supra* note 17, at 483-84; Stein, *supra* note 4, at 646. See generally Levin & Amsterdam, *Legislative Control Over Judicial Rule-making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 22-24 (1958).

35. 3 J. HONIGMAN & C. HAWKINS, *supra* note 32, at 403-04.

36. *Ammerman v. Hubbard Broadcasting, Inc.*, 551 P.2d 1354, 1356 (N.M. 1976).

37. *Id.* at 1357.

real question about rules of privilege being rules of evidence."<sup>38</sup> While cautioning that the line between procedural and substantive matters was elusive, the court concluded that the rules of evidence are "very largely, if not entirely, procedural" because of their function in the judicial process.<sup>39</sup> Pointing to the adoption of the New Mexico Rules of Evidence, the court declared that the Rules must be procedural because the court had power only to promulgate procedural rules.<sup>40</sup>

Having decided that the privilege was procedural, the court turned to the question of which governmental branch had the authority to prescribe procedural rules. Reviewing the line of cases beginning with *Roy*, the court concluded that the exclusive power to prescribe procedural rules was vested in the judiciary. Observing that the New Mexico Rules of Evidence specifically exclude any privilege not expressly granted therein, the court held that the legislatively enacted newsman's privilege was invalid in judicial proceedings<sup>41</sup> because no legislative enactment could conflict with the judicially promulgated procedural rules.<sup>42</sup>

### III. ANALYSIS

#### A. *Privileges—Substantive or Procedural?*

Essential to the court's conclusion in the instant case was the reasoning that all rules of evidence are procedural. Clearly, the court was correct in characterizing privileges, including the newsman's privilege, as rules of evidence.<sup>43</sup> Less supportable, however, is the court's assertion that rules of evidence are procedural.

In light of scholarly views noting the substantive nature of some rules of evidence, including privileges, it would have been proper for the court in the instant case to have entertained some doubt as to whether the newsman's privilege was a procedural rule. The court, however, never questioned its general determina-

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38. *Id.* at 1356.

39. *Id.* at 1357. Quoting from *McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924), the court stated that "rules of evidence do no more than regulate the method of proceeding by which substantive duties are determined."

40. 551 P.2d at 1357.

41. The question of the statute's validity with respect to legislative, executive, or administrative proceedings was not before the court. *Id.* at 1359.

42. *Id.* at 1357-60.

43. See 3 S. GARD, *JONES ON EVIDENCE, CIVIL AND CRIMINAL* § 21:1, at 744 (6th ed. 1972); *MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 72, at 151 (2d ed. E. Cleary 1972); 1 J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 264 (1898); 8 J. WIGMORE, *EVIDENCE* § 2285, at 527 (J. McNaughton rev. 1961).



tion that the privilege, as a rule of evidence, must be procedural. Failing to discuss the possibility that substantive rights had been vested in newsmen by the statute, the court bluntly and summarily concluded that all privileges are procedural.

The authorities cited by the court to support its reasoning are not conclusive. Only one, Judge Alfred C. Clapp writing in 1956, unconditionally takes the position that all privileges are procedural.<sup>44</sup> In citing Professor Morgan for the proposition that privileges are within the court's rulemaking authority, the court failed to consider his caveat. According to Morgan, a court may not abrogate a legislatively enacted common law privilege even though it was originally created by court decision.<sup>45</sup>

Moreover, the previous New Mexico case law does not support the result reached by the court in the instant case. For example, in *Kreigh v. State Bank*,<sup>46</sup> the court indicated that certain legislation modifying burden of proof requirements was valid. Although the court's reasoning in *Kreigh* is unclear, it is difficult to reconcile the case with the disparate result in the instant case. If the *Kreigh* court refused to disturb the legislatively enacted burden of proof, which it termed a rule of evidence,<sup>47</sup> because it was a substantive matter, then the result in the instant case is disturbing. Because burden of proof requirements are more clearly associated with the orderly dispatch of justice, normally the touchstone in distinguishing between substance and procedure, than are privileges,<sup>48</sup> *Kreigh* would indicate that privileges are substantive matters within the legislature's power to adopt or modify. If, however, the *Kreigh* court decided that the burden of proof was a procedural matter, then the case must stand for the

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44. Clapp, *supra* note 33, at 570-71. Clapp pointed to Justice Brandeis' dicta in *McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924), that the privilege against self-incrimination "relates to the adjective law." Thus, reasoned Clapp, "if this privilege against self-incrimination is procedural, then there can be no doubt as to other privileges, and indeed all rules of evidence, are also procedural." Clapp, *supra* note 33, at 570-71.

Clapp's line of argument fails to note that the fifth amendment privilege is founded on different policies than are other privileges. The privilege against self-incrimination governs an individual's relationship with the courts, not with other individuals. A newsman's privilege, however, fosters a nonjudicial relationship—the uninhibited flow of information between a newsman and his sources. See Carter, *The Journalist, His Informant and Testimonial Privilege*, 35 N.Y.U.L. Rev. 1111 (1960).

45. Morgan states that the "so-called common law privileges of witnesses were created by judicial decision . . . and in the absence of statute, can be disregarded or abolished by judicial decision." Morgan, *supra* note 17, at 483 (emphasis added).

46. 37 N.M. 360, 23 P.2d 1085 (1933).

47. *Id.* at 367, 23 P.2d at 1089.

48. See note 33 *supra*.

proposition that the New Mexico legislature has concurrent authority with the court even as to procedural matters.<sup>49</sup> Thus, if the legislature could properly modify a burden of proof requirement, it could also add to the privileges granted to witnesses.

A later New Mexico case cited by the court, *State v. Arnold*,<sup>50</sup> also does not support the result reached in the instant case. *Arnold* was cited for the proposition that legislatively enacted procedural rules that conflict with judicially promulgated rules must yield to the latter. In *Arnold*, the court was faced with a statute that directly conflicted with a court rule limiting the appeal time in civil actions.<sup>51</sup> The instant case, however, did not involve inconsistent procedural rules. The only possible conflict of the newsman's privilege is with Rule 501 of the New Mexico evidentiary rules, which provides that no privileges are to be recognized except as required by the constitution, the other rules of evidence, or rules adopted by the supreme court.<sup>52</sup> Because it conflicts with no other privilege in the Rules, the newsman's privilege conflicts with Rule 501 only by negative implication, if at all.<sup>53</sup> Because a legislative enactment of a substantive nature does not upset other positive rules established by the court, there may in fact be no conflict with Rule 501.

Finally, by referring to the adoption of the New Mexico Rules of Evidence for support of the conclusion that the newsman's privilege was procedural and therefore within its exclusive power, the court resorted to circular reasoning based upon labelling. Since it had properly promulgated the Rules, the court argued, then those Rules, including privileges, must be procedural. Thus, the court declared, the newsman's privilege was a procedural rule within the court's sole adoptive power. Again the court's reasoning is clearly faulty, for, as noted above, not all rules of evidence are procedural.

If the controverted newsman's privilege is substantive rather than procedural, the New Mexico Supreme Court should have

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49. This would directly contradict the holding in *Anaya v. McBride*, 88 N.M. 244, 539 P.2d 1006 (1975).

50. 51 N.M. 311, 183 P.2d 845 (1947).

51. *Id.* at 314-15, 183 P.2d at 846-47.

52. N.M. STAT. ANN. § 20-4-501 (Supp. 1975): "Except as otherwise required by constitution, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to: (1) Refuse to be a witness; or (2) Refuse to disclose any matter; or (3) Refuse to produce any object or writing . . ."

53. The conflict exists, the court apparently believed, because the Rules are comprehensive. See 551 P.2d at 1359.

recognized that the legislative enactment was constitutionally authorized. The court instead used a mechanical approach to label all privileges as rules of evidence and to define all rules of evidence as being procedural. The court simply used the terms "procedural" and "substantive" to give a result, not a reason.

*B. Rulemaking and the Balance of Legislative and Judicial Power*

*1. Rules in the "twilight zone" between substance and procedure*

The court in the instant case recognized that the line between substance and procedure is an elusive one.<sup>54</sup> The court, however, failed to discuss the question of which governmental branch—the legislature or the judiciary—should appropriately make the determination.

The New Mexico Supreme Court had earlier addressed the question. In *Southwest Underwriters v. Montoya*,<sup>55</sup> Chief Justice Noble, writing for the court, stated:

The distinction between substantive law and those rules of pleading, practice and procedure which are essential to the performance of the constitutional duties imposed upon the courts is not always clearly defined. There may be areas in which procedural matters so closely border upon substantive rights and remedies that legislative enactments with respect thereto would be proper.<sup>56</sup>

If not clearly substantive rules, privileges certainly qualify as rules that border closely upon substantive rights. Indeed, because it establishes and attempts to foster a nonjudicial relationship of confidentiality between a newsman and his sources, the newsman's privilege in question borders closely upon substantive rights. Thus, under Noble's formulation, the privilege would be proper for legislative enactment.

Charles Anthony Riedl has also explained the reason for empowering the legislature to deal with substance-procedure determinations:

As to those rules which may fall in the "twilight zone," the doubt is to be resolved in favor of the legislature, because all

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54. *Id.* at 1357.

55. 80 N.M. 107, 452 P.2d 176 (1969).

56. *Id.* at 109, 452 P.2d at 178 (dicta).

power not essential to the independent exercise of its constitutional function by one of the three departments of government is vested in the legislature by virtue of it being the law making department.<sup>57</sup>

Application of Riedl's formulation yields the same result as does application of Noble's language—the conclusion that the newsman's privilege was appropriate for legislative enactment. Because it can hardly be asserted that the exclusive power to enact a newsman's privilege is necessary for the court in order to exercise its constitutional supervisory power over lower courts, the legislature could properly enact the questioned privilege, since, under Riedl's test, it fell within the "twilight zone." Thus, under either formulation, the legislature could enact the privilege in question because it clearly borders on substantive rights and does not involve matters necessary for the fulfillment of the court's constitutional functions.<sup>58</sup>

## 2. *Public policy decisions as the legislative domain*

As a test for determining whether an evidentiary rule should be created by the court or by the legislature, one commentator has suggested the following:

The test we propose is whether a given rule of evidence is a device with which to promote the adequate, simple, prompt and inexpensive administration of justice in the conduct of a trial or whether the rule, having nothing to do with procedure, is grounded upon a declaration of a general public policy.

... *If the rule is an expression of general public policy, then it can be prescribed only by the legislature.*<sup>59</sup>

A reading of the New Mexico statute reveals that the legislature made a policy decision in favor of the newsman-informant relationship and the uninhibited gathering of news. The statute calls for a policy of nondisclosure on the part of the newsmen as

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57. Riedl, *supra* note 31, at 604 (emphasis added). See also Curd, *supra* note 4, at 48-49; Note, *The Rule Making Power of the Florida Supreme Court: The Twilight Zone Between Substance and Procedure*, 24 U. FLA. L. REV. 87 (1971).

58. The newsman's privilege was not intended to aid in what Pound termed "the orderly dispatch of judicial business, the saving of public time, and maintenance of the dignity of tribunals." See Wells, *Criminal Sanctions Imposed Against Newsmen: Shield Protection Needed*, 2 AM. J. CRIM. L. 309, 323 (1974); Note, *Newsman-Source Privilege: A Foundation in Policy for Recognition at Common Law*, 26 U. FLA. L. REV. 453, 464, 469-70 (1974). See generally Comment, *Journalists in the Courts: Toward Effective Shield Legislation*, 8 U.S.F.L. REV. 664 (1974).

59. Riedl, *supra* note 31, at 604 (emphasis added).

to their sources and their unpublished information collected in the newsgathering process.<sup>60</sup> Furthermore, an earlier version of the statute itself indicated that it represented a policy decision by the legislature.<sup>61</sup>

Even one of the authorities cited by the court recognized that the privilege represents a policy decision.<sup>62</sup> P.B. Carter, in arguing against the newsman's privilege, states that any justification for the privilege must be found in policy. Carter characterizes the usual policies supporting the privilege as encouragement of the free flow of news and respect for the "conscience" of the journalist-confidant. Indeed, Carter points out that the privilege inhibits the administration of court business because it blocks the search for truth.<sup>63</sup> Surely the decision to favor nondisclosure at the expense of finding truth involves a public policy decision. If, as Carter suggests, the privilege inhibits the search for truth, then it cannot be a rule to promote the "adequate . . . and inexpensive administration of justice."<sup>64</sup> Thus, the privilege is clearly a statute declaring public policy and not one aimed at the orderly dispatch of judicial business.

New Mexico statutes creating privileged communications have existed since 1880. The right of the state legislature to enact witnesses' privileges has gone unchallenged until the instant case.<sup>65</sup> In fact, no other case has been discovered where a court has invalidated a legislatively created newsman's privilege.<sup>66</sup> Apparently, the New Mexico Supreme Court is alone in asserting that the power to create such a privilege is exclusively vested in the judiciary. In view of the fact that at least twenty-four other states have newsman's privilege statutes,<sup>67</sup> the court's position in the instant case is suspect. Because the creation of the privilege involved a determination of public policy, the legislative enact-

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60. There is, however, a stipulation that disclosure may be required if it is essential to prevent injustice. N.M. STAT. ANN. § 20-1-12.1(A) (Supp. 1975).

61. N.M. STAT. ANN. § 20-1-12.1(A) (1953) (repealed 1973):

It is hereby declared to be the public policy of New Mexico that no reporter shall be required to disclose before any proceeding or by any authority the source of information procured by him in the course of his employment as a reporter for a news media unless disclosure be essential to prevent injustice.

62. Carter, *supra* note 44, at 1121-22.

63. *Id.*

64. Riedl, *supra* note 31, at 604; Joiner & Miller, *supra* note 30, at 635.

65. Brief for Defendants-Appellants at 7, *Ammerman v. Hubbard Broadcasting, Inc.*, 551 P.2d 1354 (N.M. 1976).

66. *Id.*

67. *Id.* at 9, 17-19. See Wells, *supra* note 58, at 323-28.

ment should have been upheld.<sup>68</sup> In invalidating the statute, the court violated a long-standing maxim that the judiciary should not strike down a statute unless the court was completely satisfied that the legislature had acted beyond its constitutional limits.<sup>69</sup>

#### IV. CONCLUSION

In reaching the conclusion that the legislatively enacted newsman's privilege was an unconstitutional infringement on its power to promulgate procedural rules, the New Mexico Supreme Court used a mechanical lockstep approach. While correctly categorizing the privilege as an evidentiary rule, the court incorrectly decided that all rules of evidence are procedural and thus within the court's exclusive power to promulgate. In so doing, the court failed to consider substantive aspects of the privilege that made it appropriate for legislative enactment.

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68. Typical of the language of courts which have dealt with the issue is this from an Alabama federal district court:

It is not a matter of judicial concern that the Legislature of Alabama was either prudent or unwise in clothing the sources of a journalist's information with secrecy. So far as this is concerned, the public policy of the State of Alabama in this regard was crystallized by enactment of the statute involved.

*Ex parte Sparrow*, 14 F.R.D. 351, 353 (N.D. Ala. 1953).

69. *Hovey Concrete Prod. Co. v. Mechem*, 63 N.M. 250, 251-52, 316 P.2d 1069, 1070 (1957).