8-1-1984

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Court-Ordered Disclosure of Journalists' Confidential News Sources in England: British Steel Corp. v. Granada Television, Ltd.

1. Introduction

The ability of journalists\(^1\) to protect the confidentiality of their news sources by refusing to disclose the source in a court proceeding is an unsettled area of English law.\(^2\) Courts and legislators in England must evaluate a journalist's claim of confidentiality of news sources in light of the media's increasingly important role in society.\(^3\) In recent years, journalists have urged that the news-gathering profession deserves a special privilege under the law.\(^4\) In support of their claim, journalists point to the massive growth of the news media and its increased influence over the public.\(^5\) Furthermore, in democratic nations journalists are viewed as a public watchdog against official abuse of power and therefore have adopted the status of the "fourth estate" among the executive, legislative, and judicial branches of government.

The arguments for and against the claim that journalists should be privileged not to disclose confidential sources of information reflect two different public interests.\(^6\) Journalists claim that unless their informants can be assured that their identity will not be revealed, information concerning the government will not be available.\(^7\) Journalists also urge that the public interest in a free press and a free

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1. In this Note, "journalists" refers to persons in both the print and broadcast media.
2. This Note concerns English law. For a definition of English law, see D. Walker, *The Oxford Companion To Law* 403 (1980). English law is contained in Acts of Parliament, statutory requirements (administrative regulations, rules, and orders) and reported cases. *Id.* at 403-11.
4. *Id.* at 158.
5. *Id.*
6. *Id.* at 159.
7. The Times (London), July 31, 1980, at 15, col. 1. The Times of London expressed this view in an editorial. "Informants will be more wary of providing information to journalists fearing disclosure of their identity, and reporters, in turn, may no longer feel themselves confident in making promises of confidentiality." *See also* Goldsworthy, *supra* note 3, at 158-59.
flow of information outweighs the need for the disclosure of news sources. Opponents of the privilege assert that despite the public interest in an unrestricted flow of information, the more important public interest lies in the due administration of justice: the source should be disclosed so as to afford plaintiffs a legal remedy against the source. This Note discusses the law in England relating to journalists' privilege not to disclose confidential sources of information. First, this Note traces the historical development of the Newspaper Rule, which first enabled English journalists to successfully assert the privilege. The author then examines three cases which rejected this common law development, the so-called “Vassall Inquiry Cases.” The author then analyzes several British government publications concerning the press. The publications are the equivalent of congressional debates in the United States and offer insight into the rationale of judicial decisions on the issue of whether journalists are privileged not to disclose confidential news sources. The Note then analyzes the most recent English case concerning the law of disclosure, British Steel Corp. v. Granada Television, Ltd. In British Steel, the courts considered whether journalists may protect the confidentiality of their news sources by refusing to disclose the source despite a court order compelling disclosure. The case rejected the claim that journalists are privileged in law to refuse to disclose news sources. Although there is little precedent indicating that journalists have a legal privilege not to disclose their sources, this Note concludes that courts in England nevertheless are reluctant to force journalists to disclose sources of information. If a right not to disclose is to be recognized in England, the author theorizes that the right should belong to the confidential source, not to the journalist.

II. THE NEWSPAPER RULE

In England, a court will not order the disclosure of a confidential source of information during the discovery stage of defamation cases against journalists and newspapers. Consequently, courts will not allow an interrogatory as to the journalist's source. This rule is known as the "Newspaper Rule." The Rule represents a judicial determination that it is not in the public interest that the name of an informant be disclosed when a plaintiff seeking the name of that source has an adequate remedy in damages against the newspaper without

9. Goldsworthy, supra note 3, at 159.
13. Id.
disclosure of the source. The Rule is contained in a rule of the Supreme Court and exists as a result of recommendations by the Porter Committee on the Law of Defamation.

The Porter Committee believed that the plaintiff's legitimate interests are adequately satisfied by the opportunity at trial to cross-examine the defendant journalist as to the identity of an informant. One commentator has characterized the Rule as "small and curious" because it applies only in defamation cases. Wigmore has described the Newspaper Rule as an exceptional practice, attributable to the special status of libel actions in English social life, which exempts a newspaper publisher, in an action of libel, from disclosing the identity of his informant. Apart from Wigmore's analysis, the Newspaper Rule is scarcely mentioned in any of the leading English treatises on the law of evidence. Nonetheless, the Rule is important since journalists have attempted to stretch its applicability to non-defamation cases, forcing the courts to evaluate the entire disclosure issue.

The Newspaper Rule originated in the 1888 case of Hennessy v. Wright (No. 2), in which the publisher of The Times of London was sued for libel. The defendant pleaded fair comment and that the publication was made under circumstances giving rise to a qualified privilege. The Court of Appeal refused to order the defendant to answer certain interrogatories involving disclosure of the names of confidential sources of information. It did so because it felt that the identity of the informants was irrelevant to the libel charge. The importance of the case lies in the fact that it was decided in terms of relevance and not in terms of whether journalists were privileged in law not to disclose sources of information.

15. Id. at 803.
16. Rules of the Supreme Court 1965, Ord. 82, r. 6. The rule states:
   In an action for libel or slander where the defendant pleads that the words or matters complained of are fair comment on a matter of public interest or were published on a privileged occasion, no interrogatories as to the defendant's source of information or grounds for belief shall be allowed.
18. Id.
20. 8 J. Wigmore, Evidence § 2286, at 537 n.13 (3d ed. 1940).
22. See infra § 111.
24. Fair comment is defined as "[a] term used in the law of libel, applying to statements made by the writer in an honest belief of their truth... even though the statements are not true in fact." Black's Law Dictionary 536 (rev. 5th ed. 1979).
26. Id. at 447-48.
27. Id. at 447.
In *Gibson v. Evans*, the *Hennessy* rule was followed. The court in *Gibson*, considering the issue of disclosure of confidential sources as one of relevance, excused the defendant newspaper publisher from revealing in answers to interrogatories the author of an allegedly libelous letter published in the newspaper. Later, in *Hope v. Brash*, the Court of Appeal applied the *Hennessy* rule and excused a newspaper proprietor from producing the contributor's original manuscript for inspection. In 1902, however, in *Elliott v. Garrett*, the Court of Appeal, again treating the matter as one of relevance, allowed an interrogatory requiring the defendant, who was not part of the press, to disclose his source of information. Although the action was for slander, the court did not limit the *Hennessy* rule as protecting exclusively newspaper publishers. Instead, the court accepted the Newspaper Rule as being based solely upon considerations of relevance.

This approach was followed three years later in the libel action of *White & Co. v. Credit Reform Ass'n & Credit Index, Ltd.* Defendants, who again were not affiliated with the press, pleaded qualified privilege in law not to disclose their source of information. Again, the court treated the issue as one of relevance and not privilege, allowing interrogatories and requiring the defendants to disclose the identity of their informants.

In 1906, however, the basis of the Newspaper Rule began to shift from relevance to privilege. In *Plymouth Mutual Co-operative & Industrial Society, Ltd. v. Traders' Publishing Ass'n Ltd.*, a libel action against the publishers of a trade journal, the defendants pleaded fair comment. The Court of Appeal allowed the defendants not to answer an interrogatory concerning the identity of their informants. The court indicated that privilege was the more accurate basis for the Newspaper Rule. The court felt that the relevance of a journalist's answer concerned the libel litigation itself, and not the privilege issue which may arise during the libel suit. The court regarded *Hennessy* as establishing a rule that in libel cases the court should not compel disclosure of a journalist's confidential source of information at the interrogatory stage of litigation.

29. Id. at 386-87.
30. [1897] 2 Q.B. 188.
33. Id.
34. [1905] 1 K.B. 653.
35. Id. at 657-60.
38. Id.
39. Id. at 403-04.
40. Id. at 407. See also Carter, *supra* note 12, at 1117.
42. Id. at 407.
Eight years later, in Adam v. Fisher, the Court of Appeal acknowledged that newspaper publishers had achieved a special position in the law. The court held that judges could exercise discretion to refuse to allow the defendant in a libel case to be interrogated as to the source of information or to require disclosure of a source. The Court of Appeal wrote that the factors which a judge should weigh in exercising discretion were whether the plaintiff sought disclosure of the source merely to sue the informant, which was seen as an improper reason since damages could be recovered from the newspaper, or whether the plaintiff sought disclosure in order to establish malice. The court viewed this as a proper ground for ordering disclosure.

In Lyle-Samuel v. Ollhams, Ltd., however, the court accepted the Newspaper Rule and the privilege it afforded journalists not to disclose confidential sources. Finally, in South Suburban Co-operative Society, Ltd. v. Orum, the Court of Appeal refused to extend the Newspaper Rule to the writer of a letter published in a newspaper, finding that the Rule was the exclusive privilege of newspaper publishers and journalists. The court indicated that the "special newspaper immunity" did not rest on any principle of law, but instead was an exception in the law.

The Newspaper Rule is limited in scope in that it applies only in libel suits. Furthermore, it applies only at the interrogatory stage of litigation. Thus, a newspaper editor cannot claim a privilege not to disclose a confidential source of information at the trial stage of a libel action. This was established in McGuinness v. the Attorney-General of Victoria, an Australian decision which influenced the courts in England. McGuinness expressly distinguished the earlier English Newspaper Rule cases as being concerned with interlocutory matters and not the trial of an action.

44. Id. at 288-89.
45. Id.
46. Id. at 288.
47. [1920] 1 K.B. 135.
48. The judge, Bankes, was at a loss to find a justification for the Newspaper Rule. He stated: All I say is that this is an action of libel against the publishers of a newspaper, that it is well established that in the case of newspapers there is an exception to the rule requiring a defendant to disclose the source of his information where he pleads either privilege or fair comment.
49. [1937] 2 K.B. 690.
50. Id. at 703.
51. Carter, supra note 12, at 1118.
52. Id. at 1119.
55. See infra text accompanying notes 83-85.
The Newspaper Rule represents a judicial willingness to permit silence in libel actions when the effect of an answer to an interrogatory would force a journalist to disclose confidential sources. The Rule may be based more upon the desirability of protecting contributors of information from unnecessary disclosure of their names than on protecting journalists, since the informant is not a party to the litigation in libel actions.

III. VASSALL INQUIRY CASES

The disclosure issue next arose in Britain in the early 1960s in the "Vassall Inquiry Cases" when journalists refused to disclose confidential sources of information to the British government and the courts. The cases highlight the limitations of the Newspaper Rule and expand the principle that it is within the discretion of the court to order disclosure at the trial stage of litigation.

In the Vassall Inquiry Cases, journalists wrote "sensational" newspaper articles concerning the trial of British admiralcy clerk Williams Vassall. Vassall faced charges, under the Official Secrets Acts of 1911, of breaching national security arrangements by spying for foreign governments. Two journalists, Mulholland and Foster, accused the British government of neglecting its official duty in not ascertaining that Vassall was working as a spy for foreign governments. A third journalist, Clough, asserted that Vassall's spying led to Soviet trawler fleets spying in the area of secret NATO sea exercises.

Due to the controversial nature of these newspaper articles, the British government established a tribunal to inquire into the articles under provisions of the Tribunals of Inquiry (Evidence) Act. The tribunal was to inquire into whether

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58. Id. at 162.
59. The cases are Attorney-General v. Clough, [1963] 2 W.L.R. 343; Attorney-General v. Mulholland, Attorney-General v. Foster, [1963] 2 W.L.R. 658 (reported together). The cases received the name "Vassall Inquiry cases" because the subject of the journalists' articles was a British admiralty official William Vassall, and the government inquired as to the journalists' sources of information concerning Vassall. See Tapper, Freedom and Privilege, 26 Mod. L. Rev. 571 (1963).
60. See supra § II.
61. Tapper, supra note 59, at 574.
62. Id. at 571.
63. 1 & 2 Geo. 5, ch. 28 (1911).
64. Clough, [1963] 2 W.L.R. at 345
67. Tribunals of Inquiry (Evidence) Act, 1921, 11 & 12 Geo. 5, ch. 7 [hereinafter cited as Tribunals of Inquiry Act]. The Act provides:

Where it has been resolved . . . by both Houses of Parliament that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance, and in pursuance of the Resolution a tribunal is appointed for the purpose . . . the tribunal shall have all such powers, rights, and privileges as are vested in the High Court . . . in respect of . . . enforcing the attendance of witnesses and examining them . . . and compelling the production of documents.

Id. § 1.
the allegations made by the journalists were true. Over one hundred witnesses, including Clough, Mulholland, and Foster, were questioned by the tribunal. The tribunal asked all three journalists to reveal the sources of their news articles. The journalists, however, refused to disclose what they asserted were confidential sources of information. Consequently, the journalists faced suit for contempt of court under the Tribunals of Inquiry (Evidence) Act. The journalists argued before the Tribunal that the names of their sources were not relevant to the Tribunal and that, even if relevant, the journalists had a privilege in law not to disclose their confidential sources of information. The Tribunal disagreed, however, holding that the information was relevant and that no privilege excused the journalists from disclosing the sources. The Tribunal felt that it had the discretion to order disclosure and would accept the privilege claim only if it were able to obtain the desired information from other witnesses. The Tribunal therefore certified the case to the court.

In the Clough case, the court agreed with the Tribunal, holding that the name of the source was relevant and that Clough had no privilege in law to refuse to disclose his source. Chief Justice Parker cited two reasons for rejecting Clough's argument that the Newspaper Rule protected Clough from disclosing his source. First, no public policy existed that would justify applying the Rule to the Clough case. Second, recognizing a privilege would impede the discovery of truth and the due administration of the law. The court concluded that Clough

The Act further provides that the Chairman of the Tribunal may certify to the High Court that a witness has refused to answer a question to which the Tribunal may legally require an answer, and the court after inquiring into the alleged offense, and after hearing any witnesses and statement that may be offered in defense, may "punish . . . that person in like manner as if he had been guilty of contempt of the court." Id.

69. Id. at 2.
70. Id. at 5.
71. Id.
72. Id.
73. See Tribunals of Inquiry Act, supra note 67.
74. Tapper, supra note 59, at 572.
75. REPORT OF THE TRIBUNAL APPOINTED TO INQUIRE INTO THE VASSALL CASE AND RELATED MATTERS, CMND. No. 2009 at 5 (1963). The report stated that since the Tribunal was unable to examine the sources, it was unable to obtain direct information so as to satisfy the Tribunal as to the truth or falsity of the news articles; therefore, it could not accept claims of professional privilege. Id.
76. Id.
77. Id. at 1. The Tribunal took this step according to the Tribunals of Inquiry Act, supra note 67.
was in contempt of court for refusing to disclose his source to the tribunal. However, if Clough later disclosed the source, or if the tribunal obtained the information from some other individual, then the court could justify the remission of his jail sentence. Subsequently, Clough's source disclosed himself to the tribunal, thus freeing Clough from his obligation of confidence and a jail sentence for contempt. This decision marked the limits to which the Newspaper Rule could be applied. Chief Justice Parker held that the Rule only applied to the interlocutory stage of a law suit and not to the trial of an action, and he relied upon the Australian case of McGuinness v. Attorney-General of Victoria to support this conclusion. Parker also stated that although journalists could not refuse to disclose the names of their sources, the court nevertheless has discretion to permit non-disclosure in cases where the Rule may apply. Parker dismissed Clough's contention that the Rule applies to all cases because public policy demands that journalists be immune from disclosing sources; he held instead that in this case it was more important that the Tribunal have the name of the source.

In the Mulholland and Foster cases, Lord Denning expanded upon the principle that the court has discretion to order disclosure. Lord Denning stated that judges must weigh the conflicting interests which encompass the disclosure issue, and if the judge determines that a journalist must disclose a source, then the journalist has no privilege to withhold a name. The court also held that the Newspaper Rule did not apply to Mulholland and Foster since the public interest demanded disclosure of the sources and there was no rule of law, despite the Newspaper Rule, allowing journalists to withhold their sources at trial. Denning developed the concept that responsible newspapers and journalists may deserve protection from the courts on the disclosure issue. The only way for the court to ascertain the degree of responsibility exercised by Mulholland and Foster, however, was to know the names of their sources.

80. Id. at 353.
82. See supra § II.
83. Black's Law Dictionary defines “interlocutory stage” as “[s]omething intervening between the commencement and end of a suit which decides some point or matter but is not a final decision of the whole controversy.” Black's Law Dictionary 731 (rev. 5th ed. 1979).
84. [1940] Argus L.R. 110. See supra notes 53-55 and accompanying text.
86. Id. at 349.
87. Id. at 352-53.
89. Id.
90. Id. at 659-65.
91. Id.
92. Id. Lord Denning's critique of a responsible press is important, for he later relied upon it to explain his decision in the British Steel case. See infra § VI. One commentator has suggested that Lord
Foster received three and six month jail sentences respectively for refusing to disclose their sources. Parliament debated their sentences shortly after the Court of Appeal decision. The debates, however, did not result in any changes in the law concerning court-ordered disclosure of journalists' confidential sources of information.

IV. Government Reports

The British government has published many reports regarding the press. The reports consist of bills and documents published by Royal Commissions and Parliamentary Committees. The reports often provide the rationale for judicial decisions and may be cited in court to show the previous state of the law and its defects. In one Command Paper entitled Royal Commission on Tribunals of Inquiry, the Commission reviewed the power of a Tribunal to force a journalist to disclose a source. The Commission did not recommend a change in the law concerning disclosure of news sources. It concluded instead that the law clearly requires that witnesses before Tribunals of Inquiry should, in the national

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Denning should not have created, and then adopted, the principle that judges have discretion to order disclosure since judicial discretion may confuse the law of disclosure:

The apparently universal view that the court has a discretion in each case . . . is less acceptable. There is an increasing tendency in the modern law of evidence to leave everything to the judges. It is suggested that in the law of evidence, perhaps more than in any other branch of the law it is essential that justice be seen to be done. This will be impossible unless the rules are readily accessible and clearly stated. Every effort should be made to make all relevant evidence admissible. The creation of a new and undefined exclusionary discretion seems a step in the wrong direction.

Tapper, supra note 59, at 574.


96. See D. Walker, The Oxford Companion to Law 931 (1980). Some government reports are required by law to be given to Parliament (Act Papers), others are ordered to be printed by Parliament (House of Lords Papers, House of Commons Papers), and others are ordered to be printed by the departments of Parliament concerned with the subject matter of the report (Command Papers). Command Papers are presented to Parliament by a minister of the Crown, legally by command of Her Majesty. They include reports on the work of government departments, evidence to and reports of Royal Commissions and Departmental Committees, and materials relative to matters of policy which may be the basis for debate or legislation. Id.

97. See Brief for British Steel [1980] 2 W.L.R. 774 at 3. The House of Lords discussed the reports in the British Steel decision. See infra § V.


99. Id. at 42.
interest, disclose confidential sources of information if the Tribunal considers the source vital to its inquiry.100

In 1977, a report by the Royal Commission on the Press101 made no reference to the protection of press sources from court-ordered disclosure,102 nor was there any evidence in the report suggesting that recommendations were made to the Commission for a change in the law relating to disclosure.103 However, the report did discuss the tensions which exist in Britain, as a result of government intervention in the press.104 In Britain, two other Royal Commissions on the Press also have been published.105 The reports did not discuss the disclosure issue, but the fact that within a thirty-year period three such Commissions have studied and published reports on the press reflects the British government's anxiety over the power of the press.106

In 1974, the Phillimore Committee on Contempt of Court107 considered the question whether journalists are privileged not to disclose confidential sources of information.108 The Committee's report recommended no change in the law as it existed after the Clough, Mulholland, and Foster cases.109 The Committee analyzed the disclosure issue in terms of the law of contempt of court under which Clough, Mulholland, and Foster were adjudged guilty.110 The Committee stated

100. Id. at 41. The Tribunal stated: "In the ultimate analysis, it is unthinkable that a great institution such as the Press would seek to defy the law." Id.
101. ROYAL COMMISSION ON THE PRESS, FINAL REPORT, CMND. No. 6810 (1977). The Commission was established to study the economic factors affecting the press and press editorial standards in Britain. Id. at 2.
102. Id. at 183.
103. Id.
104. Id. at 9. The intervention consists of government ownership of some media and, in some instances, strict censorship. Id. For a recent analysis of tensions which arise due to government censorship, see THE HANDLING OF THE PRESS AND PUBLIC INFORMATION DURING THE FALKLANDS CONFLICT, SESSION 1981-82, HOUSE OF COMMONS, DEFENSE COMMITTEE (JULY 21, 1982).
107. REPORT OF THE PHILLIMORE COMMITTEE ON CONTEMPT OF COURT, CMND. No. 5794 (1974) [hereinafter cited as PHILLIMORE COMMITTEE].
108. Id. at 18.
109. Id.
110. Id. For an analysis of the law of contempt in Britain, see R.C. SMITH, PRESS LAW 92-94 (1978).
that the law of disclosure was a question of evidence which had been previously considered by the Law Reform Committee.111

The Law Reform Committee112 had stated in 1967 that it was satisfied with the policy, developed in the Vassall Inquiry Cases, of allowing the court the discretion to order disclosure of journalists' confidential sources of information.113 The Law Reform Committee rejected replacing judicial discretion with a comprehensive statutory classification of privileges.114 The Committee stated that statutory classifications of privileges would not be in the interest of justice because courts would not be able to impose limitations concerning the use of information disclosed to a particular party, whereas a judge using discretion may order that the disclosed information cannot be used outside of the particular proceedings in which it is disclosed.115 The Committee believed that judicial discretion, as developed in the Vassall Inquiry Cases, allowing a witness to refuse to disclose information if disclosure would force the witness to breach an ethical or social value,116 would not result in injustice to the party seeking the information.117 The Committee defined "injustice" as instances when a party seeking disclosure of information is unable to obtain the information and consequently may be unable to ascertain facts relevant to an issue which that party is litigating.118 The Committee discussed other privileges not to disclose information recognized by English law, such as the privilege against self-incrimination.119 The Committee did not, however, mention a journalist's claim to a similar privilege.120

The government reports have never recommended extending to journalists the privilege to refuse to disclose sources of information.121 The reports are important because they influence judicial decisions.122 The reports also reflect

111. Phillimore Committee, supra note 107, at 18.
113. Id. at 3.
114. Id.
115. Id.
116. For an analysis of other ethical and social values involved with the law of disclosure, see Breach of Confidence (Law Commission Working Paper No. 58, 1974).
117. Law Reform Committee, supra note 112, at 3.
118. Id.
119. Id. at 5-8. The Committee discussed other examples of recognized privileges not to disclose information such as in aid of litigation, in aid of settlement and conciliation, concerning husband and wife, priest and penitent, and doctor and patient. Id. at 8-22.
120. This may be explained by the fact that no news media appear in the list of organizations and individuals submitting evidence to the Committee. See Law Reform Committee, supra note 112, at 24. A commentator suggests that one reason why the Committee did not recommend extending the privilege to journalists was the desirability of keeping the number of recognized privileges at a minimum. See Goldsworthy, supra note 3, at 159.
121. Goldsworthy, supra note 3, at 159.
122. Id.
the history of the law of disclosure. 123 When Granada Television attempted to withhold its source of information from British Steel despite disclosure orders, it faced government reports and case precedent which indicated that journalists have no legal right to refuse to disclose sources of information.

V. BRITISH STEEL CORP. V. GRANADA TELEVISION LTD.

In 1980, the English courts again considered the issue of court-ordered disclosure of journalists' confidential sources of information. British Steel Corporation v. Granada Television, Ltd. 124 prompted the courts to review the entire law of disclosure. Their review indicated that despite earlier case law and numerous government reports, the law of disclosure was in turmoil due primarily to the fact that judges have broad discretion to order disclosure. However, despite the lengthy British Steel decision, 126 the law of disclosure in England remains confused. 127

A. Factual Background

For several years the government-owned 128 British Steel Corporation (B.S.C.) was in perilous financial condition, with closures, strikes, and a record for poor productivity and staggering losses. 129 For years, the corporation was the source of ridicule in the British press. 130 Then, on February 4, 1980, during the first national steel strike by B.S.C. employees since 1926, 131 the Granada Television Company aired a program about the strike. 132 A few days before the program, called "World in Action," a Granada reporter received copies of 250 secret and confidential documents from B.S.C.'s files. The documents dealt with high-level
discussions and actions within B.S.C. and discussions between B.S.C. and the
government. 133

Granada never solicited the documents; the materials were obtained from an
unofficial source who was apparently a B.S.C. employee. 134 The documents
reflected poorly on the management of B.S.C. 135 Granada's feature news story,
entitled "The Steel Papers," included a number of quotations made by the
Secretary of State for Industry and a live interview with Sir Charles Villiers,
Chairman of B.S.C. 136 The program advanced the view that B.S.C.'s declining
productivity resulted from not only the poor productivity of steel workers, but
also from poor management and government intervention. 137 The documents
played a key role in the program, with some "secret" documents broadcast to
viewers. 138 B.S.C. never consented to the documents being given to Granada or
being used by them in any way. 139

On February 5, the day after the broadcast, B.S.C. sent Granada a telex stating
that the documents were confidential and that publication was a breach of
confidence 140 and a breach of B.S.C.'s copyright in them. 141 Therefore, in a
notice of motion on February 6, 1980, B.S.C. demanded that Granada cease
publication of the documents and return the documents to B.S.C. 142 Granada

133. Appendix, supra note 128, at 8.
135. Appendix, supra note 128, at 8.
136. Before interviewing Sir Charles, the reporter dramatized the steel papers. He said:

   Last week a number of documents came into the possession of World in Action. They are
   letters, memos and internal reports from B.S.C. They were drawn up over the last five
   years and none of them was ever intended for publication. Tonight we examine these papers and the
   new light they appear to throw on the corporation strategy and the Government's declared
   policy of non-intervention.

British Steel, [1980] 3 W.L.R. at 800.

Then, during his interview with Sir Charles Villiers, the B.S.C. Chairman, the reporter stated:

   "Several documents have your officials and executives referring to the fact that they have to consult the
   Government on this and on that. Does that not make it sound a little strange [given the government's
   policy of non-intervention] in the steel dispute?" Sir Charles Villiers replied: "I don't know what
   documents you're referring to and we shall see perhaps before long." Id.

137. Id. at 780.
138. Id. B.S.C. claimed that publication of the documents would damage B.S.C. in its business in
general, as well as in its relations with its employees. Appendix, supra note 128, at 8.
139. Appendix, supra note 128, at 5. See also British Steel, [1980] 3 W.L.R. at 780-81.
140. See Breach of CONFIDENCE supra note 116 and accompanying text.
141. Appendix, supra note 128, at 15. In the telex, B.S.C.'s Director of Legal Services stated:

   I do not know how you (Granada) obtained possession of the B.S.C. documents. However,
you certainly did not receive the B.S.C. documents with the consent or approval or knowledge
of B.S.C. In the circumstances your possession of the B.S.C. documents is unlawful, your
publication of the B.S.C. documents is a breach of confidence and a breach of copyright.

Id.

142. Notice of Motion in the High Court of Justice, Chancery Division. Appendix, supra note 128,
at 4.
refused to comply \textsuperscript{143} with B.S.C.'s demands. \textsuperscript{144} On the same day the Chancery Division, Oliver J., granted an \textit{ex parte} injunction restraining the publication or reproduction of the documents. \textsuperscript{145} Granada officials subsequently delivered the documents to B.S.C. but, upon examination, B.S.C. discovered that many of the documents were mutilated, making it impossible for B.S.C. to determine the identity of the person responsible for giving the documents to Granada. \textsuperscript{146} Consequently, on March 6, 1980, B.S.C. issued a notice of motion against Granada ordering that Granada supply B.S.C. with an "affadavit setting forth the names of all persons responsible for supplying them [Granada] with or who have offered to supply them with documents being the property of the plaintiffs or with any copies thereof." \textsuperscript{147}

\textbf{B. Chancery Division Holding}

Granada refused to comply with B.S.C.'s motion of March 6, 1980, and consequently B.S.C. sued Granada in the Chancery Division. \textsuperscript{148} In defense, Granada contended that it did not have to disclose its source of information to B.S.C. Granada's arguments were that Granada was protected against B.S.C.'s demands for disclosure of its source by the privilege against self-incrimination \textsuperscript{149}

\textsuperscript{143} In response to B.S.C.'s demands, Granada stated in a telex:

\begin{quote}
We have no immediate plans to repeat our World in Action programme. We would of course reserve our rights to deal with this programme in a similar manner to other Granada programmes but agree without prejudice to take no further action as requested for 72 hours to allow consultation and consideration.
\end{quote}

\textit{Id.} at 16.

\textsuperscript{144} \textit{Id.} Granada's reply was considered by B.S.C. to be "unsatisfactorily vague because [the reply was] not expressly in terms requested." \textit{Id.} B.S.C. required "unequivocal undertakings. . . . Your undertaking must encompass all B.S.C. documents in your possession without B.S.C. consent." \textit{Id.} at 16-17.

\textsuperscript{145} \textit{Id.} at 5-6.

\textsuperscript{146} \textit{Id.} at 17-18. In an affidavit, James Siddons, Director of the Secretariat for B.S.C., swore as follows:

\begin{quote}
On examination [of the documents] I found that a substantial number of the documents, I should say approximately 20\%, had been mutilated in some way. Most of the mutilations consisted of the cutting off of the top left or right hand corners of documents, I presume for the purpose of . . . excising manuscript markings on documents which may have given clues as to the identity of the person responsible for the removal of the documents from the plaintiff's [B.S.C.] offices.
\end{quote}

\textit{Id.}

\textsuperscript{147} \textit{Id.} at 6-7.

\textsuperscript{148} \textit{British Steel}, [1980] 3 W.L.R. 774.

\textsuperscript{149} In its brief to the House of Lords, Granada argued that it was entitled to rely on the privilege against self-incrimination, and therefore could refuse to disclose the identity of its source, "because such disclosure would tend to increase the probability of Granada's [being] charged with and/or convicted of one or more criminal offenses." Brief for Granada Television Company at 18, \textit{British Steel}, [1980] 3 W.L.R. 774 [hereinafter cited as Brief for Granada]. Granada relied upon Rank Film Distributors v. Video Information Centre, [1981] 2 W.L.R. 668, to support this argument. In \textit{Rank Film}, the court held that the defendant's compliance with the plaintiff's request for the defendant's source would tend to incriminate the defendants of an offense under the Copyright Act of 1965. \textit{Id.}
and that the court had the discretion to refuse to order disclosure of documents where disclosure would be in breach of some ethical or social value.\textsuperscript{150} Granada argued that the confidential relationship between the media and its sources of information was an ethical or social value which the court ought to protect by refusing to order disclosure.\textsuperscript{151}

The Chancery Division disposed of Granada's first contention by ruling that there was no chance that Granada could incriminate itself since there was no indication that criminal proceedings might result against both the source and Granada.\textsuperscript{152} The Chancellor, however, dealt at length with Granada's second contention. Granada claimed that it was in the public interest that the media not be forced to disclose their sources of information since such disclosure would impair the freedom and effectiveness of the press.\textsuperscript{153} However, the court, per Megarry, V.C., stated that Granada had no absolute privilege against disclosing the source of its information.\textsuperscript{154} It held that the Newspaper Rule\textsuperscript{155} did not apply at the trial stage of a suit.\textsuperscript{156} The court further held that it did not have the discretion to excuse the press from disclosing its source of information since no public interest in non-disclosure at the trial stage had been recognized in the law.\textsuperscript{157} For these and other reasons,\textsuperscript{158} the court ordered that Granada serve to B.S.C. the names of all persons who supplied Granada with the documents belonging to B.S.C.\textsuperscript{159} The court granted leave to appeal the decision.\textsuperscript{160}

\textbf{C. Court of Appeal Decision}

The Court of Appeal\textsuperscript{161} affirmed the Chancery Division holding, and, as a result, received criticism from both the press and some commentators.\textsuperscript{162} The

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\bibitem{150} Brief for Granada, \textit{supra} note 149, at 15-17.
\bibitem{151} Granada cited the Vassall Inquiry Cases, \textit{see supra} \textsection{} III, in its brief to the House of Lords to support this argument. Granada maintained that the cases were the first in which a court rejected the journalist's ethical duty to his source in order to forward the private interests of a plaintiff seeking the name of the source. \textit{See} Brief for Granada, \textit{supra} note 149, at 13-14. \textit{See also} the National Union of Journalists' \textit{Code of Professional Conduct}, \textsection{} 7 (available from the National Union of Journalists, Acorn House, 314 Gray's Inn Road, London WC1X 8DP, England). The clause states: "A journalist shall protect confidential sources of information." \textit{Id.} Clause 2(B) states: "A journalist shall at all times defend the principle of freedom of the press . . . ." \textit{Id.}
\bibitem{152} \textit{British Steel}, [1980] 3 W.L.R. 782-85.
\bibitem{153} Brief for Granada at 12, \textit{British Steel}, [1980] 3 W.L.R. 774.
\bibitem{154} Megarry cited the \textit{Clough}, \textit{Mulholland}, and \textit{Foster} cases to support this conclusion. \textit{See British Steel}, [1980] 3 W.L.R. at 786.
\bibitem{155} \textit{See supra} \textsection{} II.
\bibitem{156} \textit{British Steel}, [1980] 3 W.L.R. at 786-87.
\bibitem{157} \textit{Id.} at 788-95.
\bibitem{158} For a complete review of the Chancery Division's decision, \textit{see Press's Right not to Disclose Source of Information, 130 New L.J.} 463 (1980).
\bibitem{159} \textit{British Steel}, [1980] 3 W.L.R. at 796 (1980).
\bibitem{160} \textit{Id.}
\bibitem{161} \textit{Id.} at 797-818.
\bibitem{162} \textit{See The Press and the Public Interest, 130 New L.J.} 426 (1980). "The decision of the court of
Master of the Rolls, Lord Denning, expanded on Granada's claim that a responsible press might be entitled not to disclose its sources. However, Denning supported B.S.C.'s request for disclosure of Granada's source of information. He wrote that, in general, newspapers should not be compelled to disclose their sources of information by means of discovery before trial or at the trial itself. Thus, Denning appeared to be willing to stretch the applicability of the Newspaper Rule to the British Steel case. Denning felt that if press sources are disclosed, then the press would be unable to report on illegalities in government since investigative journalism would "dry up." He characterized the Vassall Inquiry Cases, in which the court ordered disclosure of news sources, as "exceptional." Denning qualified the "rule by which a journalist should not be compelled to disclose its source of information" by stating that journalists may refuse to disclose sources provided the journalist acts responsibly.

Denning believed that by mutilating B.S.C.'s documents Granada had forfeited its right not to disclose its source and had abused its power. One criticism of Denning's view regarding a responsible press is that although journalists may have a legal right not to disclose sources, that right is merely perfunctory; it is rarely recognized in practice. Other critics have suggested that Denning's opinion left the law in a very uncertain state which would deter newspapers from informing the public of important issues. Another commentator suggested that the disclosure issue is too important to be treated as an equitable right that can be accorded only to journalists who come into court with clean hands. After Denning's opinion was announced, Granada contended...
that its program was responsibly made in the public interest.\textsuperscript{175} One year after he authored his Court of Appeal decision, Lord Denning wrote in his memoirs that he decided the case on an incorrect basis.\textsuperscript{176} In retrospect, Denning stated that since only a Granada journalist knew the name of the source and had refused to reveal the name to Granada officials who did not know the name, it was not in the public interest for courts to order disclosure of the source.\textsuperscript{177} These facts were not available to Denning when he authored his opinion.\textsuperscript{178} Denning concluded that his opinion, and the opinion of the House of Lords, discredited the legal system in Britain because the courts attempted to enforce disclosure orders with which Granada could not comply.\textsuperscript{179} On reconsideration, Denning felt that Granada should not have been ordered to disclose its source.\textsuperscript{180}

\section*{D. House of Lords Decision}

Granada appealed the Court of Appeal decision to the House of Lords. The House of Lords dismissed Granada's appeal on July 30, 1980, but did not issue opinions until November 7, 1980. The Lords' delay may have been an indication of the uncertainty surrounding the law of disclosure.\textsuperscript{181} Critics believe, however, that what is most important about the House of Lord's decision is the refusal by three of the Law Lords to treat the case as even marginally connected with the freedom of the press.\textsuperscript{182} For example, Lord Wilberforce believed that journalists have no immunity which protects them from the obligation to disclose sources upon court order.\textsuperscript{183} He rejected Lord Denning's view that it was Granada's conduct which prevented Granada from invoking the privilege not to disclose confidential sources.\textsuperscript{184} Lord Wilberforce also wrote that the \textit{British Steel} case did

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\bibitem{175} Statement by Sir Dennis Forman, Chairman of Granada Television, Ltd., May 7, 1980. Forman made the statement in the form of a press release, which was obtained by this author from Norman Frisby of Granada Television, Ltd. Mr. Frisby stated that Mr. Forman's statement had not been reported accurately by the press in England. Letter from Norman Frisby (October 13, 1982) (discussing the \textit{British Steel} case).
\bibitem{176} A. \textsc{Denning}, \textit{supra} note 127, at 250-52.
\bibitem{177} \textit{Id}.
\bibitem{178} \textit{Id}.
\bibitem{179} \textit{Id}. at 251. Granada could not comply with B.S.C.'s request because the officials sued by B.S.C. did not know the name of the source. Only the reporter knew the name. He was not made a party to the suit and had refused to give the name of the source to Granada officials. \textit{Id}.
\bibitem{180} \textit{Id}. at 251.
\bibitem{181} The New Law Journal editorialized:
\begin{quote}
Though willing to make public their decision on July 30, their Lordships then declined, for want of time in which to formulate them, to reveal the reasons for their decision. That they did only on November 7. Lord Salmon, more consistently, stated on July 30 that he had had time to formulate neither his decision nor his reasons, and handed down both together on November 7.
\end{quote}
\textit{Confusion, supra} note 125, at 1053.
\bibitem{182} Hutchinson, \textit{Moles and Steel Papers}, 44 \textsc{Mod. L. Rev.} 320 (1981).
\bibitem{183} \textit{British Steel}, [1980] 3 \textsc{W.L.R.} at 822.
\bibitem{184} \textit{Id} at 821.
\end{thebibliography}
not concern the freedom of the press because freedom of the press concerned only the laws of libel, prior-restraint, and censorship.\textsuperscript{185} For similar reasons, Lords Dilhorne and Russell agreed that the \textit{British Steel} case did not involve the freedom of the press.\textsuperscript{186}

First, the Law Lords held that the Newspaper Rule could not be used by Granada to prevent disclosure of its source.\textsuperscript{187} Second, they interpreted the Vassall Inquiry Cases as indicating that journalists are not immune from disclosing their sources.\textsuperscript{188} Most importantly, the Law Lords held that when a plaintiff seeks disclosure of a source from a defendant, a court order to disclose the information is an equitable remedy which the court, in its discretion, may grant.

The Law Lords upheld the Court of Appeal order that Granada disclose its source because they felt that B.S.C. had suffered a wrong.\textsuperscript{189} The ability of a court to exercise this discretion, according to the Lords,\textsuperscript{190} rests upon \textit{Norwich Pharmacal Co. v. Commissioners of Customs and Excise}.\textsuperscript{191} That case established that English law places a duty upon a person to disclose the identity of a wrongdoer to a person who has been injured by the wrongdoing.\textsuperscript{192} Lord Wilberforce held that the \textit{Norwich Pharmacal} rule applied in \textit{British Steel} because B.S.C. had established a cause of action against the source who supplied Granada with B.S.C.'s documents.\textsuperscript{193} Lord Fraser agreed.\textsuperscript{194} Moreover, Lord Dilhorne considered that Granada was "clearly a wrongdoer, if not a thief."\textsuperscript{195}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{185} Id.
\item \textsuperscript{186} Id. at 828-29.
\item \textsuperscript{187} Id. at 830-33, 848-50, per Lords Dilhorne and Fraser respectively.
\item \textsuperscript{188} Id. at 822-24, 831-33, 847-49, per Lords Wilberforce, Dilhorne, and Fraser, respectively.
\item \textsuperscript{189} Id. at 827.
\item \textsuperscript{190} Id. at 824-27, 834-36, 847, 850, per Lords Wilberforce, Dilhorne, and Fraser, respectively.
\item \textsuperscript{191} [1973] 3 W.L.R. 164.
\item \textsuperscript{192} Id. In its brief submitted to the House of Lords, B.S.C. contended that "the only novel feature of the [Norwich Pharmacal] case was the decision that disclosure could be obtained even from a party against whom there was no independent cause of action." Brief for British Steel Corporation at 6, \textit{British Steel}, [1980] 3 W.L.R. 774. B.S.C. also asserted that it had a cause of action against Granada and that B.S.C. was unable to identify the source. Thus, B.S.C. contended that the \textit{Norwich Pharmacal} remedy should be invoked. \textit{Id}.
\item Granada submitted in its brief to the House of Lords that the \textit{Norwich Pharmacal} discretion should be employed in favor of Granada, since the discovery action would be used as a "weapon against the press." Brief for Granada, supra note 149, at 8. Granada also contended that the \textit{Norwich Pharmacal} discovery remedy was intended to assist the party seeking information to find a legal action against a wrongdoer, but since B.S.C. intended only to fire the wrongdoer (a private action), discovery should not be ordered. \textit{Id} at 11. "That B.S.C. has no real intention to sue the source is further apparent from the fact that . . . it has abandoned all its claims against Granada for damages, despite Granada's being in a better position than any possible source to meet such claims." \textit{Id}. Granada contended in the alternative that the public interest in protecting press sources "indicates that discovery should be refused" since the court had the discretion to order discovery for the reasons stated in \textit{Norwich Pharmacal}. \textit{Id}.
\item \textsuperscript{193} British Steel, [1980] 3 W.L.R. at 826.
\item \textsuperscript{194} Id. at 851.
\item \textsuperscript{195} Id. at 835.
\end{itemize}
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Critics of the House of Lords decision have suggested that the Lords applied the *Norwich Pharmacal* discretion theory to *British Steel* in order to avoid issues concerning disclosure and freedom of the press. Lord Wilberforce asserted that it was unnecessary for the court to consider issues concerning freedom of the press since B.S.C. could, had they acted in time, have obtained an injunction restraining Granada from publishing or reproducing any of the B.S.C. documents.

One Lord dissented in the *British Steel* case. Lord Salmon felt that there was no reason why the Newspaper Rule should be confined to libel actions. He wrote that if B.S.C. had sued for libel, as it was entitled to given the nature of Granada's broadcast, then Granada could legally have refused to disclose its source. Instead, B.S.C. sued in an action for discovery. Lord Salmon felt that it was "absurd" that B.S.C. could overcome the Newspaper Rule by bringing an action for discovery. Salmon interpreted the Vassall Inquiry Cases as exceptional instances in which the security of the state required disclosure of journalists' confidential sources of information. He wrote that the *Norwich Pharmacal* case was distinguishable since the defendant in that case gave no promise of confidentiality, nor could the defendant or the public be prejudiced by the disclosure of the information, as was the case in *British Steel*.

The House of Lords dismissed Granada's appeal and ordered the television company to disclose its confidential source. Granada officials refused to obey the House of Lords order and would have been sued for contempt but for the fact that the source revealed himself to journalists affiliated with the *Times of London*. B.S.C. subsequently dropped its claim against Granada, and Granada dropped its appeal in *British Steel* to the European Court of Human Rights, thus terminating the case.

196. See Hutchinson, supra note 182, at 320.
197. *British Steel*, [1980] 3 W.L.R. at 821. One commentator has stated that the rationale behind Lord Wilberforce's belief "begs the question of what importance ought properly be accorded to the freedom of the press and more particularly to the public interest in disclosure." Confusion, supra note 125, at 1054.
199. Id. at 839.
200. Id.
201. Id. at 839-40.
202. Id. at 841-42. "My Lords, I confess, with the greatest respect, that I cannot understand how it can be erroneous to hold that in [the Vassall Inquiry Cases] the disclosure of the identity of the journalist's informant was ordered because the security of the state required it." Id. at 842.
203. Id. at 843-44.
204. Id. at 854.
205. The source, Dougal Mackenzie, revealed himself to reporters with the Sunday Times (London), which published an "exclusive" full page story on why the so-called "mole" gave B.S.C.'s documents to Granada. See Why I Did It — By The Steel Mole, The Sunday Times (London), Nov. 2, 1980, at p. 15, col. 1.
VI. THE LAW OF DISCLOSURE AFTER BRITISH STEEL

The *British Steel* case drew considerable criticism from the press in Britain. The press viewed the decision as impairing its ability to function freely in a democratic society. Critics have also suggested that the decision will have profound and far-reaching significance because of its impact on the ability of the press to withhold its sources and because of the negative effect this will have upon a free press. The fact that Lord Wilberforce and Lord Salmon reached conflicting interpretations of the law despite their reliance on similar precedent, principally the Newspaper Rule and the Vassall Inquiry Cases, demonstrates that the law of disclosure continues to be poorly defined and consequently is susceptible to future conflicting interpretations. For example, *British Steel* would appear to stand for the proposition that journalists have no right in law to refuse to disclose their sources. In a subsequent case, however, the court of Criminal Appeal held that a journalist did not have to disclose his source because disclosure of the source was irrelevant to the litigation. Because the law of disclosure is uncertain, other commentators have suggested that *British Steel* will have only a marginally inhibitive effect on the press. The rationale behind this view is that since disclosure orders are within the judges' discretion, the judges will hesitate to order disclosure.

In order to clarify the law of disclosure and the law of contempt by which journalists who refuse to disclose sources are found guilty, Parliament enacted a revised Contempt of Court Act after the *British Steel* case. The Act states that the courts may not require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, a source of information contained in a publication unless the court establishes that disclosure is necessary in the interests of justice or national security. Lord Denning suggests that the Act leaves the law of disclosure as it was after the Vassall Inquiry Cases, and that the *British Steel* decision merely affirmed his judgment in those cases. He interprets the language of the Act, "necessary in the interests of justice," as being a virtual

207. In a leading editorial, the Times of London stated that in similar circumstances the newspaper would decline to disclose the name of its source and would suffer the legal consequences that might follow. The Times called the decision restrictive, reactionary, and clearly against the public interest. The Times (London), July 31, 1980, at 15, col. 1.
208. *Confusion*, supra note 125, at 1053.
209. *Id.*
211. *Id.* at 99.
212. Tettenborg, supra note 174, at 6.
213. *Id.* at 6-7.
215. *Id.* § 10.
216. A. DENNING, supra note 127, at 252.
repetition of his judgment in the Vassall Inquiry Cases. Because the Act leaves
the law of disclosure holding that courts will order disclosure only in the interests
of justice or national security, Denning asserts that in the future it will be very
rare for the courts in England to order a journalist to disclose a source. Courts
will tend to respect the confidence which journalists give to sources of informa-
tion and will override obligations of confidence only when absolutely neces-
sary. Plaintiffs with merely vexatious or oppressive aims will not succeed in
obtaining disclosure.

Therefore, in England, plaintiffs seeking disclosure of a journalist's confidential
source of information may base the disclosure argument on two principal
grounds. First, the plaintiff may rely on the Vassall Inquiry Cases and assert that
the source should be disclosed for reasons of national security. Second, the
plaintiff may assert that the source should be disclosed in the interests of justice.
The second alternative was significantly expanded as a result of the British Steel
decision. The Contempt of Court Act simply codifies the Vassall Inquiry
Cases and the British Steel decision in this respect, leaving the law as it was after
British Steel.

The law of disclosure presently places journalists refusing to disclose a source
in the position of being held in contempt of court if the court finds that the
source should be disclosed in the interests of justice or national security. A
journalist's promise to disobey a court order to reveal a source might reasonably
be construed as a promise to submit to the consequences of such action. However, imprisonment is not a satisfactory penalty for contempt. One of the
undesirable aspects of imprisonment for contempt is that it makes martyrs.
Proponents of the view that journalists should be privileged not to disclose their
sources contend that the martyr problem underscores the need for extending
preferential treatment to journalists. Proponents point to the special undesir-
sability of creating a profession which is capable of highlighting its martyrdom
to the general public. But if journalists are to be granted a general privilege

218. A. Denning, supra note 127, at 252.
219. Id.
220. Tettenborg, supra note 174, at 7. Another commentator states that English courts endeavor not
to demand that witnesses reveal more than they can in conscience reveal. See Reporters' Privilege
Worldwide, supra note 8, at 5.
221. Tettenborg, supra note 174, at 7.
222. See supra notes 198-203 and accompanying text.
226. Id. at 1122.
227. Id.
228. Id. at 1123.
229. Id.
230. Id.
not to disclose sources of information, such a privilege should proceed from Parliament. 231 Parliament had the opportunity to define the privilege in the Contempt of Court Act, but it chose to leave the law as it remained after British Steel. 232 A proposal for a shield law, 233 made during debates on the Contempt of Court Act, 234 was rejected because of Parliament's intransigence on the disclosure issue. 235 The proper way to deal with such an unsatisfactory sanction is to change it; 236 it is not simply to exempt certain professional classes such as journalists from the law. 237 In all cases in which disclosure has been ordered, journalists have argued that it is journalists who are privileged not to disclose sources. The courts have rejected this argument. The journalists' argument is perhaps flawed; the privilege should belong instead to sources and not to journalists. 238 It is the sources who should have the privilege not to have their names revealed. 239 The disclosure issue would then center on whether informants have the right to insist that their identities, as the suppliers of information, be kept secret, notwithstanding the possibility of a denial of justice to an innocent party to legal proceedings. 240

This argument carries weight, for informers should have the right to waive their own anonymity. 241 By placing the right in the sources, their sense of security would be enhanced. 242 Most importantly, by placing the right in informants through a statute, the courts would no longer deal with the disclosure issue on a discretionary basis. With clearly defined statutory bases for non-disclosure, the law and its application would be more predictable in each case. The rationale of a law of privilege which places the right in the source would be similar to the rationale of the Newspaper Rule, which supports the right of sources to have their names withheld. 243 By removing the court's discretion, and by supporting the right of informants to have their names remain silent, the law of disclosure would not directly impact journalists. Instead, it would directly impact sources. Thus, journalists could report on the news without questioning whether they may be forced to disclose the names of their sources of information.

233. Shield laws confer a legislative immunity on journalists to refuse to disclose confidential sources. See Nicol, supra note 129, at 166-67.
237. Id.
238. Carter, supra note 12, at 1124.
239. Id.
240. Id. at 1124-25.
241. Id.
242. Id.
243. Id.
VII. Conclusion

The law of disclosure in England remains unsettled due to the fact that judges have broad discretion whether to order disclosure. The Newspaper Rule indicates that, at the interrogatory stage of libel actions, journalists have the right to refuse to disclose sources of information. The Vassall Inquiry Cases demonstrate that journalists may not withhold their services from the government or the courts in the interest of national security. The British Steel holding expanded this concept by ordering disclosure in a civil suit where the object of the suit did not concern libel or national security. The Contempt of Court Act affirmed the holding of British Steel by stating that courts may order disclosure in the interests of justice.

Thus, English courts have discretion to order disclosure on a case-by-case basis in the interests of "justice." What constitutes justice is subject to many interpretations. For example, the courts in British Steel felt that it would be a denial of justice if B.S.C. could not have the name of its employee who supplied Granada with documents belonging to B.S.C. The law of disclosure, however, remains uncertain since a court has discretion to decide what constitutes justice and whether disclosure should be ordered to effect justice. For example, in British Steel, the courts could not identify any law which supported disclosure of the source. Consequently, the justices "made up" their own law. 244

As a result, there is no predictability or stability with the present law. Alternatively, it should be news sources, and not journalists, who should be able to claim the privilege not to have their names disclosed. Unless the anonymity of sources can be assured, they will no longer be willing to supply information to journalists. This would impede the free flow of information and consequently, the freedom of the press — a stronger argument than the journalists' position that they will not be able to report on the news unless they can assure sources that their names will not be revealed. If the courts in England discard what appears to be an entrenched discretionary policy in favor of vesting the right in the source, the law of disclosure could be clarified since it would be more predictable. Journalists could then report on the news without questioning whether they may later be forced to disclose the name of a source of information. The Parliament should change the law of disclosure in a revised Contempt of Court Act.

Geoffrey G. Nathan

244. The Times (London), August 2, 1980, at 13 col. 2.