Volume 88
Issue 1 *Dickinson Law Review - Volume 88, 1983-1984*

10-1-1983

# Recent Case

EVIDENCE — FAIR TRIAL/FREE PRESS—ABSOLUTE PRIVILEGE AGAINST DISCLOSURE OF SOURCES OR EDITORIAL PROCESSES IN LIBEL ACTION—NO COUNTERVAILING CONSTITUTIONAL RIGHT LIMITS NEWSPAPERMAN'S PRIVILEGE ACT. *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376 (1982).

In *Maressa v. New Jersey Monthly*,[1] the New Jersey Supreme Court held that the New Jersey Newspaperman's Privilege Act[2] allows newspersons sued for libel to refuse to disclose the sources and editorial processes that led to publication of the alleged libel.[3] Further, the court found that a plaintiff seeking money damages in a civil suit for defamation[4] had no constitutional rights, under either the United States Constitution[5] or the New Jersey Constitution,[6]

---

1. 89 N.J. 176, 445 A.2d 376 (1982).

2. The present version of the New Jersey Newspaperman's Privilege Act, N.J. STAT. ANN. 2A:84-A-21 (West 1982) provides in pertinent part as follows:

> Subject to Rule 37, a person engaged on, engaged in, connected with or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public . . . has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body . . .[:]
>
> a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and
>
> b. Any news or information obtained in the course of pursuing his professional activities, whether or not it is disseminated.

3. The court also held that protection under the Act is waived for only those specific materials that are knowingly and voluntarily disclosed. Thus, partial disclosure or assertion of affirmative defenses does not constitute a waiver. Maressa v. New Jersey Monthly, 89 N.J. 176, 194, 445 A.2d 376, 386 (1982).

4. Criminal trials, grand jury proceedings and civil suits are the three broad areas in which the question of news media privilege has arisen. The outcomes in each area have varied greatly. *See generally* Comment, *Shield Laws: The Legislative Response to Journalistic Privilege*, 26 CLEV. ST. L. REV. 453, 454-57 (1977) [hereinafter cited as *Shield Laws*].

5. Paul v. Davis, 424 U.S. 693, 702 (1976), mandated that "[r]eputation alone, apart from some more tangible interest such as employment, was neither 'liberty' nor 'property' by itself sufficient to invoke the procedural protection of the due process clause. . . ." *See also* Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980); Mazzella v. Philadelphia Newspapers, 479 F. Supp. 523 (E.D.N.Y. 1979).

6. Justice Schreiber, in his dissenting opinion, argued that art. I, ¶ 6 of the New Jersey Constitution provides a constitutional basis for a defamation action. Maressa v. New Jersey Monthly, 89 N.J. 176, 202, 445 A.2d 376, 390 (1982) (Schreiber, J., dissenting). The pertinent constitutional provision follows:

> Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right*. . . . In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

that would limit the newsperson's privilege. By granting an absolute privilege of nondisclosure to defendant newspersons, *Maressa*, for the first time, raises troubling questions about a plaintiff's ability to maintain a cause of action for libel.[7]

In October 1979, the *New Jersey Monthly* magazine published an article entitled *Rating the Legislature*. The article discussed several categories of state representatives including "The Best," "The Worst" and "The Drones."[8] The plaintiff, Senator Joseph Maressa, appeared under "The Worst" category.[9] Describing Maressa as "callous, stupid, and just plain devious," the article's authors listed several incidents upon which they based the Senator's low rating.[10] The article concluded, "Maressa's problem is not so much that he is evil as that he is sneaky, self-interested, and basically unprincipled."[11]

Maressa filed a libel action in the New Jersey Superior Court, Law Division, alleging that the defendants[12] had published defamatory falsehoods without making reasonable inquiries as to their accuracy and thereby had defamed him in reckless disregard of the truth.[13] During pretrial discovery proceedings, the plaintiff sought a broad range of information[14] which the defendants, claiming that the information was privileged, refused to supply. The plaintiff sought and the trial court granted an order compelling a more specific answer. The appellate division granted the defendants leave to appeal the disclosure order, but the New Jersey Supreme Court directly

---

N.J. CONST. art. I, ¶ 6 (emphasis added).

7. Since the landmark case of New York Times v. Sullivan, 376 U.S. 254 (1964), a public figure must show that the libel defendant acted with "actual malice" in publishing the defamatory material. Actual malice was defined as knowing falsity or reckless disregard for the truth. *Id.* at 287. A defendant possesses a reckless disregard for the truth when he, in fact, entertains serious doubts as to the truth of his publication. St. Amant v. Thompson, 390 U.S. 727, 731 (1968). The recklessness may be inferred if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Id.* at 732. *See* Comment, *News-Source Privilege in Libel Cases: A Critical Analysis*, 57 WASH. L. REV. 349, 350-51 (1982) [hereinafter cited as *News-Source Privilege*].

8. Maressa v. New Jersey Monthly, 89 N.J. at 182, 445 A.2d at 379.

9. *Id.* The plaintiff was described as a "floundering and ineffectual" man whose shortcomings went unnoticed by scores of extremists who, "appealing to Maressa's considerable ego, managed to enlist him as their advocate this term." *Id.*

10. The article claimed that during a senate debate of the death penalty, Maressa whined and attempted to cut off debate, that he smuggled an anti-gay lobbyist on to the senate floor and then told the sergeant at arms that the lobbyist was his aide, that he was called before the Legislative Ethics Committee and that he was "shot down" by the Supreme Court Advisory Committee. *Id.*

11. *Id.*

12. Suit was brought against the magazine's owner, publisher and editor-in-chief and against the three reporters who wrote the article. *Id.* at 182, 445 A.2d at 379.

13. Maressa conceded that he is a public figure who must meet the *New York Times* standard of proof to recover damages for libel. *Id.* at 183 n.1, 445 A.2d at 379 n.1. *See supra* note 7 and accompanying text.

14. Through interrogatories and depositions the plaintiff sought the names and addresses of all sources interviewed, as well as copies of all rough drafts, notes, questions and memoranda pertaining to the article. *Id.* at 183, 445 A.2d at 380.

certified the matter on its own motion before the appeal was heard.

*Maressa v. New Jersey Monthly* draws into conflict two fundamental interests that often have competed in the past.[15] These interests are the policy of allowing the press unfettered access to sources of information[16] and the judicial goal of assuring free access to testimony and relevant information essential to a search for the truth.[17]

Although American courts at common law have long recognized certain testimonial privileges,[18] those courts historically have rejected claims for protection of confidential news sources and editorial processes.[19] The rules of evidence strongly favor the principle that every competent person is required to testify,[20] and courts traditionally have regarded exceptions to this doctrine with disfavor.[21] Nevertheless, the controversy surrounding an evidentiary privilege for journalists has continued, and some states, including New Jersey, have chosen to address the problem through legislative enactments of "shield laws."[22]

New Jersey first enacted a newspaperman's privilege statute in 1933,[23] and its courts have followed the general trend of strict con-

---

15. The duty of a witness to testify in courts of law has roots as deep in history as does the guarantee of freedom of the press. Garland v. Torre, 259 F.2d 545, 548 (2d Cir. 1958), *cert. denied*, 79 U.S. 237 (1958).

16. Freedom of the press has been recognized as an essential element of a democratic government. This concept was expressed by James Madison in his classic statement that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors must arm themselves with the power which knowledge gives." Letter from James Madison to W. T. Barry (August 4, 1822), *reprinted in* NINE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

17. "The right to sue and defend in court is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907). *See generally* 8 J. WIGMORE, EVIDENCE §§ 2190-2191 (McNaughton rev. 1961) (outlining the development and history of testimonial compulsion in English law) [hereinafter cited as 8 J. WIGMORE].

18. Common law privileges include those protecting attorney-client and husband-wife relationships. C. MCCORMICK, EVIDENCE §§ 78-105 (2d ed. 1972).

19. *See, e.g., In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (1913); People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936); *see generally* Annot., 7 A.L.R.3d 591 (1966) (discussing the privilege of a newspaper or magazine and persons connected therewith not to disclose communications to or information acquired by such a person).

20. 8 J. WIGMORE, *supra* note 17.

21. Wigmore favors no testimonial privilege against disclosure of communications and would allow such a privilege only if the following four prerequisites are met:

> (1) The communications must originate in confidence; and (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; and (3) the relationship must be worthy of community protection; and (4) injury resulting from disclosure must be greater than the benefit gained from correct disposal of litigation.

*Id.* at § 2285.

22. Statutes recognizing a newsperson's privilege are popularly referred to as shield laws. Twenty-six states have enacted shield laws including: Alabama, Alaska, Arizona, Arkansas, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island and Tennessee. *Shield Laws*, *supra* note 4, at 466 n.83.

23. The 1933 statute provided as follows: "No person engaged in, connected with or

struction.[24] The holding in *Maressa*, however, represents a significant departure from precedent.[25]

The Supreme Court of New Jersey considered its shield law[26] in a libel case for the first time in *Brogan v. Passaic Daily News*.[27] In *Brogan*, the defendants[28] asserted that they were protected from disclosing their source of information for an allegedly libelous article by the New Jersey Shield Law[29] and that the common law defense of fair comment and good faith[30] barred the plaintiff's recovery.

The court held that the shield law should not be construed to permit defendants either to give or to withhold information when their own acts have raised a question of their liability to others.[31] The court recognized that permitting defendants to exercise such discretion effectively would deny punitive damages to a plaintiff in a suit for libel.[32] The court further held that the defendant editor had waived his privilege against disclosure by testifying that he had based his information upon a reliable source and by revealing the substance of his information.[33] The court's rationale indicated that if a newspaper may libel, defend by stating that the information came from a reliable source, and then bar further inquiry into the source by pleading the statutory privilege, recovery would be denied in most, if not all, cases.[34] Essentially, the plaintiff would be precluded from obtaining favorable information to combat the defenses of good

---

employed on any newspaper shall be compelled to disclose, in any legal proceeding . . ., the source of any information procured or obtained by him and published in the newspaper on which he is engaged, connected with or employed." 1933 N.J. LAWS, ch. 167, §§ 1, 2 (codified in N.J. STAT. ANN. § 2:97-11) (repealed 1960).

24. Comment, *Journalist Privilege: In re Farber and the New Jersey Shield Law*, 32 RUTGERS L. REV. 545, 550 (1979).

25. *See, e.g.*, Central N.J. Jewish Home for the Aged v. New York Times Co., 183 N.J. Super. 445, 444 A.2d 80 (1981); Resorts Int'l, Inc. v. New Jersey Monthly, 180 N.J. Super. 459, 433 A.2d 778 (1981). *See also supra* note 20 and *infra* note 104.

26. The shield law construed in *Brogan* was repealed in 1960. *See supra* note 2 and 23.

27. 22 N.J. 139, 123 A.2d 473 (1956). The New Jersey Superior Court thirteen years earlier had considered the statute's application to a grand jury proceeding in State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943). The Court held that the managing editor of the *Jersey Journal* was required to answer questions regarding an article alleging criminal conduct by Hudson County authorities.

28. The action was brought against both the newspaper's publisher and its managing editor. 22 N.J. 139, 145, 123 A.2d 473, 476 (1956).

29. *See supra* notes 23 and 26.

30. 22 N.J. 139, 146, 123 A.2d 473, 476-77.

31. *Id.* at 152, 123 A.2d at 480.

32. At the time *Brogan* was decided, a libel plaintiff had to demonstrate only that the published information was untrue and that it had damaged her reputation in the community. *See News-Source Privilege, supra* note 7, at 350. Once this burden was met, a plaintiff was entitled to recover compensatory damages. A showing of malice or ill will was required for recovery of punitive damages. *See* W. PROSSER, LAW OF TORTS § 112 at 751-54 (4th ed. 1971). Since 1964, however, the first amendment has been interpreted as requiring a showing of actual malice (knowing falsity or reckless disregard for the truth). New York Times v. Sullivan, 376 U.S. 254 (1964). *See supra* note 7 and accompanying text.

33. Brogan v. Passaic Daily News, 22 N.J. 139, 151, 123 A.2d 473, 481 (1956).

34. *Id.* at 152, 123 A.2d at 480.

faith, fair comment and lack of malice.[35]

In response to *Brogan*, the New Jersey Legislature amended the shield law[36] and specifically noted that only disclosure of privileged material, consent to disclosure, or a contract not to claim the privilege would constitute a waiver of the privilege.[37] Despite the new legislation, the New Jersey Superior Court found *Brogan* to be controlling in *Beecroft v. Point Pleasant Printing & Publishing Co.*[38] The plaintiff in *Beecroft* sought damages caused by publication of an allegedly defamatory editorial in defendant's newspaper. The editorial stated that the plaintiff had performed his duties as chief of police in an unlawful, partial and dictatorial manner, without regard for the rights of the public and in violation of his oath of office.[39] The court held that a newsperson, who alleged the defenses of fair comment, good faith and reasonable belief in the truth of an allegedly libelous editorial, had waived the statutory privilege of refusing to divulge his sources of information.[40]

Both *Brogan* and *Beecroft* were decided before the landmark libel case of *New York Times v. Sullivan.*[41] Currently, under the law, a public figure[42] must prove actual malice[43] to recover not only

---

35. *Id.*

36. *See supra* notes 2 and 23.

37. Rule 37, N.J. STAT. ANN. § 2A:84A-29 (1976) defines the conditions under which a journalist will be held to have waived his or her statutory privilege as follows:

> A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege, or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.
>
> A disclosure which is itself privileged or otherwise protected by the common law, statutes, or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to one question shall not operate as a waiver with respect to any other question.

38. 82 N.J. Super. 269, 197 A.2d 416 (1964).

39. *Id.* at 271, 197 A.2d at 417. The defendant moved to strike several interrogatories propounded by the plaintiff that asked for information and the source of the information on which the allegedly defamatory news editorial was based. *Id.* at 271, 197 A.2d at 417.

40. The court noted that the only material change in the newly enacted statute was the word "source," which was expanded to include "source, author, means, agency or person." *Id.* at 276, 197 A.2d at 419. Finding that this change was made to circumvent the decision in State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943) (grand jury proceeding), the court held that, even by implication, the statutory language could not be enlarged to encompass the situation in *Beecroft*. *See supra* note 27.

41. 376 U.S. 254 (1964). *See supra* note 7.

42. There are two categories of public figures. The first category includes those who occupy positions of "such persuasive power and influence that they are deemed public figures for all purposes." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). The second category consists of "limited" public figures. Limited public figures are those persons who voluntarily have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id. See* Wolston v. Readers Digest Ass'n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979).

43. *See supra* note 7 and accompanying text.

punitive damages, but any damages at all. Thus, the conclusion reached in *Brogan* and *Beecroft*, that the New Jersey Shield Law must yield in certain situations, is even more compelling today. At stake is the survival of the libel cause of action itself.[44] The *New York Times v. Sullivan* Court recognized a qualified first amendment right in news gathering and dissemination[45] and intended to afford greater protection to "those who would give voice to public criticism."[46] After *New York Times*, the defendant newsperson would appear to need less protection under a state shield law, while the libel plaintiff would seem to have a more compelling need for disclosure of sources and editorial processes.

Finally, in the 1972 case of *Branzburg v. Hayes*,[47] the United States Supreme Court addressed the issue of news-source protection.[48] Justice White, speaking for a majority of five,[49] declined to grant journalists an evidentiary privilege to withhold the identities of confidential news sources when testifying before grand juries.[50] Although nine Justices recognized that a journalist's cultivation of confidential sources is a form of newsgathering that deserves protection,[51] the majority concluded that the public interest in law enforcement and effective grand jury proceedings outweighed any

---

44. *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 170 (1979), in which Justice White commented on the far-reaching effects of precluding a plaintiff from discovering editorial processes.

45. 376 U.S. 254, 278.

46. *Id.* at 279. The court reasoned that punishing all error resulting from exercise of first amendment rights induces suppression of truthful information and therefore is intolerable.

47. 408 U.S. 665 (1972). *Branzburg* was a consolidation of four cases. Two of the cases, Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970), and Branzburg v. Meigs, 503 S.W.2d 748 (Ky. 1971) involved *Louisville Courier Journal* reported Paul Branzburg. The earlier case arose after Branzburg had written a story on his observations of two unnamed youths synthesizing hashish from marijuana. The latter case arose out of a story that provided a comprehensive survey of the local "drug scene." In both instances the court of appeals ruled that Branzburg had no privilege to refuse to answer questions about his stories before a grand jury. The third case, *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), involved a television reporter who had been allowed to remain at Black Panther Headquarters. The Supreme Court of Massachusetts rejected his attempt to quash a grand jury summons on first amendment grounds. The final case, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), concerned a *New York Times* reporter assigned to cover the Black Panthers and other militant groups. When the reporter, Caldwell, refused to appear before the grand jury that was investigating the Panthers, the court ordered him jailed for contempt. The Ninth Circuit reversed the order, citing a qualified first amendment privilege.

48. The United States Supreme Court has not yet ruled on the constitutionality of shield laws. *In re* Bridge, 120 N.J. Super. 460, 466, 295 A.2d 3, 6 (1972), *cert. denied*, 410 U.S. 911 (1973). *See Shield Laws, supra* note 4, at 470.

49. Justice White authored the opinion of the Court, in which Chief Justice Burger and Justices Blackmun, Powell and Rehnquist joined. Justice Stewart filed a dissenting opinion in which Justices Brennan and Marshall joined. Justice Douglas filed a separate dissenting opinion.

50. 408 U.S. at 690.

51. Justice White wrote that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. Justice Douglas, dissenting, noted that "confidential relationships . . . are indispensable to their [journalists'] work of gathering, analyzing, and publishing the news." *Id.* at 711-12 (Douglas, J., dissenting).

burden on reporters that might result from disclosure.[52]

*Branzburg* left undecided the issue of whether first amendment values underlying protection of news sources should be subordinate to interests other than law enforcement.[53] Most courts have interpreted *Branzburg* as recognizing a qualified first amendment privilege in newspersons and have advocated a case-by-case balancing approach with other conflicting interests.[54]

Three months after the Supreme Court's *Branzburg* decision, the New Jersey Superior Court in *In re Bridge*[55] interpreted *Branzburg* as a rejection of both a constitutionally based privilege and a case-by-case balancing approach.[56] The court refused to grant a first amendment testimonial privilege to reporter Peter Bridge[57] and further found that he was not protected under the New Jersey Shield Law because his disclosure of part of the requested information was a waiver of the privilege.[58]

As a direct response to *Bridge*, the New Jersey Legislature again amended the state's shield law, in an attempt to protect a reporter who encounters the circumstances presented in *Bridge*.[59] The amended statute provided that a reporter could refuse to disclose both the name of a source and any information provided by a source, whether the information was published or not. Disclosure of the identity of the informant would not waive the rest of the privilege. In addition, the legislature extended the coverage of the shield law to

---

52. *Id.* at 690-91.

53. *See* Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 743 (1975).

54. Nearly all courts have settled on a three part test that allows a plaintiff to overcome a defendant's qualified constitutional privilege. A plaintiff must show the following:

1. The information is relevant to prove critical elements of the cause of action; and
2. The claim is meritorious or not frivolous; and
3. There is no other way of obtaining the information.

*See, e.g.*, Miller v. Transamerican Press, 621 F.2d 721, 726 (5th Cir. 1980); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977); DeRoburt v. Gannett, Inc., 507 F.Supp. 880, 886 (D. Hawaii, 1981); Senear v. Daily Journal-American, 97 Wash. 2d 148, 155, 641 P.2d 1180, 1183 (1982); Gagnon v. City of Fremont, 632 P.2d 567, 569 (Colo. 1981). *But see* Cervantes v. Time, Inc., 464 F.2d 986, 992 (8th Cir. 1972); Dow Jones & Co. v. Superior Ct., 364 Mass. 317, 320, 303 N.E.2d 847, 849 (1973); *In re* Bridge, 120 N.J. Super. 460, 467, 295 A.2d 3, 6 (1972), *certif. denied*, 62 N.J. 80, 299 A.2d 78 (1972), *cert. denied*, 410 U.S. 991 (1973). The United States Supreme Court did not rule on this issue as it relates to a defamation plaintiff until seven years after *Branzburg*. *See* Herbert v. Lando, 441 U.S. 153 (1979); *see also infra* note 68 and accompanying text.

55. 120 N.J. Super. 460, 295 A.2d 3 (1972), *certif. denied*, 62 N.J. 80, 299 A.2d 78 (1972), *cert. denied*, 410 U.S. 991 (1973).

56. *Id.* at 467-68, 295 A.2d at 6.

57. *Id.*

58. *See supra* note 37 and accompanying text. The shield law allowed a reporter to refuse to disclose the source of published matter. Bridge argued that the word "source" protected both the identity of the informant and the unpublished information and that disclosure of the former did not affect the right to confidentiality of the latter. *In re* Bridge, 120 N.J. Super. at 466, 295 A.2d at 5-6.

59. The legislature amended the statute in 1977. *See supra* notes 2, 23 and 37.

all members of the news media in all legal or quasi-legal proceedings.

*In re Farber*[60] represents the court's first test of the 1977 shield law amendment.[61] The New Jersey Supreme Court recognized that the shield law provided Farber and the *New York Times* with a testimonial privilege,[62] which the legislature intended to be as broad as possible within the context of the state and federal constitutions.[63] The court concluded, however, that because confidential information was relevant to a murder trial, the criminal defendant's constitutional right to compulsory process[64] prevailed over Farber's shield law privilege.[65]

Both *Farber* and *Branzburg* involved interpretations of a journalist's privilege in situations other than a civil suit for libel. In 1979, the United States Supreme Court rendered its first opinion concerning discovery in defamation cases. In *Herbert v. Lando*[66] the Court held that a journalist in a defamation action did not have an absolute privilege to block discovery of the editorial process that resulted in an allegedly defamatory report about a public figure.[67] The plaintiff in *Herbert*, a retired army officer, commenced a defamation action against Columbia Broadcasting System for suggesting that he had lied in a television report in which he claimed that superior officers had covered up war crimes. During discovery the plaintiff deposed the producer of the report and inquired about his state of mind during the editorial process to discover evidence of recklessness to satisfy the *New York Times* standard. The reporter refused to disclose the requested information on first amendment grounds.

The *Herbert* Court reasoned that *any* editorial privilege, qualified or absolute, would impose too great a burden on a plaintiff's ability to prove actual malice under the *New York Times* standard.[68] Since the plaintiff must prove that the defendant had a "subjective

60. 78 N.J. 259, 394 A.2d 330, *cert. denied sub nom.*, 439 U.S. 997 (1978). The New Jersey Supreme Court upheld criminal and civil contempt judgments entered against the defendants, the *New York Times* and reporter Myron Farber. These judgments resulted from the defendants' failure to comply with two subpoenas duces tecum directing them to produce certain materials gathered during an investigation of the murder trial of Dr. Mario Jascalevich. *Id.* at 264, 394 A.2d at 332.

61. *See supra* notes 2 and 23.

62. 78 N.J. at 270-71, 394 A.2d at 335.

63. *Id.* at 270, 394 A.2d at 335.

64. U.S. CONST. amend. VI provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." *See also* N.J. CONST. art. I, ¶ 10.

65. 78 N.J. at 272, 394 A.2d at 339-40.

66. 441 U.S. 153 (1979).

67. *Id.* at 156.

68. *Id.* at 170. *See supra* note 7 and accompanying text. In his dissent, Justice Brennan proposed a qualified editorial privilege for journalists, allowing discovery into editorial thought processes only after a prima facie showing of defamatory falsehood. 441 U.S. at 197-98 (Brennan, J., dissenting).

awareness of probable falsity,"[69] the Court concluded that an editorial privilege barring discovery into the journalist's thought processes would foreclose the plaintiff's ability to prove his case.

*Maressa v. New Jersey Monthly*[70] represents the first time[71] that the New Jersey Supreme Court has addressed the issue of the extent to which the current shield law[72] protects the news media from disclosure of sources and editorial processes in libel actions. The holding in *Maressa*[73] is based on the court's finding that the legislature, by amending the shield law twice in recent years,[74] intended to provide comprehensive protection for all aspects of news gathering and dissemination.[75] This conclusion emanated from the holding in *In re Farber*,[76] in which the court stated: "[w]e read the legislative intent in adopting the statute in its present form as seeking to protect the confidential sources of the press . . . to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey."[77]

Nevertheless, the *Maressa* court distinguished *Farber* and found *Farber* not dispositive because *Farber* dealt with a criminal defendant's right to compel witnesses to testify and to produce evidence[78] and thus raised constitutional issues absent in a civil suit for defamation. Justice Pashman wrote for the majority and declared that defamation, being entirely a matter of state law, enjoyed no constitutional protection.[79] Although the court acknowledged the importance of a defamation claim,[80] the majority found no right to maintain a defamation action in either the Constitution of the United States or of New Jersey.[81]

---

69. Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974).

70. 89 N.J. 176, 445 A.2d 376 (1982).

71. The issue had been considered by the New Jersey Superior Court just prior to the *Maressa* decision in the cases of Central N.J. Jewish Home v. New York Times, 183 N.J. Super. 445, 444 A.2d 80 (1981), and Resorts Int'l Inc. v. New Jersey Monthly, 180 N.J. Super. 459, 433 A.2d 778 (1981). *See also infra* note 98.

72. *See supra* note 2.

73. Absent any overriding constitutional interests, the newsperson's privilege against disclosure is absolute. 89 N.J. 176, 189, 445 A.2d 376, 382.

74. *See supra* notes 2 and 23 and accompanying text.

75. 89 N.J. 176, 186, 445 A.2d 376, 382.

76. 78 N.J. 259, 394 A.2d 330, *cert. denied sub nom.*, 39 U.S. 997 (1978). *See supra* note 61 and accompanying text.

77. *Id.* at 270, 394 A.2d at 335.

78. This is a constitutionally guaranteed right. *See* U.S. CONST. amend. VI; N.J. CONST. art. I, ¶ 10. *See supra* note 64.

79. 89 N.J. 176, 191, 445 A.2d 376, 384. *See supra* note 5 and accompanying text.

80. *Id.* at 190, 445 A.2d at 383. *See, e.g.*, Rainier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 557, 117 A.2d 889, 891 (1955), in which the court stated that defamation "embodies the important public policy that individuals and business entities should generally be free to enjoy their reputations unimpaired by false and defamatory attacks." *See generally* W. PROSSER, LAW OF TORTS, § 111 at 739 (4th ed. 1971).

81. The court rejected the plaintiff's contention that to deny discovery of material potentially crucial to his claim is a violation of due process. 89 N.J. at 193, 445 A.2d at 385.

In a lone dissent, Justice Schreiber argued that Article I, paragraph 6 of the New Jersey Constitution safeguards an individual's right to a cause of action for defamation.[82] The dissent recognized that certain limitations to a defamation action exist under the United States Supreme Court's interpretation of the first amendment.[83] Nonetheless Justice Schrieber stated that the New Jersey Legislature could not pass laws that would further limit or possibly eliminate a public figure's defamation cause of action.

The majority, however, found no constitutional limitations on the shield law in a libel situation[84] and held that the plaintiff's motion to compel discovery of sources and editorial processes must fail unless the defendants had waived their privilege.[85] The court disposed of this issue by interpreting recent changes in the shield law and increased constitutional protection of libel defendants since *Brogan*[86] as indicating that partial disclosure or assertion of affirmative defenses no longer should constitute a waiver of the shield law privilege. The court held that waiver under the shield law operates only on those specific materials that are knowingly and voluntarily disclosed.[87]

The practical effect *Maressa* will have on libel plaintiffs attempting to meet the *New York Times* burden of proof is apparent. As Justice Schrieber stated, "[i]n most cases a plaintiff's ability to develop evidence relative to the state of mind of the defendant will have been eliminated and . . . his . . . cause of action will have been obliterated."[88] Such an effect had been noted earlier in *Herbert v. Lando* by both Justice White[89] in his majority opinion and by Justice Brennan in his dissenting opinion.[90] The major problem with finding an absolute privilege of nondisclosure in the shield law is simply that "it [is] anomalous to turn substantive liability on a journalist's subjective attitude and at the same time shield from disclos-

82. 89 N.J. 176, 202, 445 A.2d 376, 390 (Schreiber, J., dissenting). *See supra* note 6 and accompanying text.

83. *Id.*

84. *Id.* at 194, 445 A.2d at 385-86.

85. The plaintiff, relying on Brogan v. Passaic Daily News, argued that the defendants waived their privilege by partial disclosure and by assertion of affirmative defenses including truth, fair comment, good faith, honest belief and lack of malice. 89 N.J. 176, 194, 445 A.2d 376, 386. The court held that the 1977 amendments tightened the requirements for waiver. *See supra* note 38 and accompanying text.

86. *See supra* notes 2, 7, 23, 32 and 37 and accompanying text.

87. 89 N.J. at 194, 445 A.2d at 386. The New Jersey Shield Law was amended again in 1979. The 1979 amendments apply only to discovery requests by criminal defendants. Nevertheless, the *Maressa* court interpreted the amendments as indicative of a legislative intent to apply waiver principles to *all* proceedings. The 1979 amendments provide that "[p]ublication shall constitute a waiver only as to the specific materials published." N.J. STAT. ANN. 2A:84A-21.3(b) (West 1982).

88. 89 N.J. at 209, 445 A.2d at 393 (Schreiber, J., dissenting).

89. 441 U.S. at 170.

90. *Id.* at 198.

ure the most direct evidence of that attitude."[91] In *Herbert*, the United States Supreme Court refused to reach the precise result sanctioned by the court in *Maressa*, the elimination of a public figure's cause of action for defamation.

The *Maressa* majority indicated that an absolute shield law privilege does not foreclose entirely a prospective plaintiff's right to maintain a cause of action.[92] The rationale of this argument is that, in some circumstances, public figures will be able to establish by inferential evidence the recklessness necessary to sustain a libel judgment. The court did not outline the circumstances that might make this possible, but vaguely asserted that a defendant might choose to reveal his or her sources to rebut an inferential showing of actual malice.[93] This reasoning overlooks the fact that a rebuttal would not be necessary unless the issue of actual malice goes to the jury, which would not be possible if the plaintiff were foreclosed at the discovery phase from obtaining evidence crucial to the establishment of a cause of action.

While the majority recognized that its holding might be unfair,[94] it is convinced that such a result is required by the legislative intent behind the shield law. The court refused to weigh the conflicting interests and to assess the resultant hardships in holding the shield law absolute, reasoning instead that the New Jersey Legislature already has done so by enacting the statute. The shield law theoretically represents the legislative determination that society's interest in a free press outweighs the possibility of damage to an individual's reputation.[95] According to the majority, defamation is a common law action without a constitutional foundation; the legislature, therefore, has the power to eliminate that action to protect freedom of the press.

*Maressa v. New Jersey Monthly* thus conflicts with the long standing policy of construing testimonial privileges strictly[96] and marks a major break with precedents of both the New Jersey courts[97] and the United States Supreme Court.[98] Maressa had petitioned the United States Supreme Court for a writ of certiorari,[99] and the Court might take this opportunity to clarify both the consti-

---

91. *Id.* at 192.
92. 89 N.J. 176, 198, 445 A.2d 376, 388.
93. *Id.*
94. *Id.* at 200, 445 A.2d at 389.
95. *Id.*
96. "If there be any guide it is that the Legislature is aware of the principle that evidentiary privileges are not favored, precluding as they do a rational means for ascertaining the truth." Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).
97. *See supra* note 25.
98. *See, e.g.*, Herbert v. Lando, 441 U.S. 153 (1979).
99. A Petition for a Writ of Certiorari was filed on July 28, 1982.

tutionality of shield laws and their appropriate impact on libel actions. Alternatively, the New Jersey Legislature may feel compelled once again to amend the New Jersey Shield Law when the effect of the *Maressa* court's interpretation on libel plaintiffs becomes apparent. Indeed the court appears to expect precisely that result. The majority stated that "the balance we adopt can always be changed by the Legislature."[100] With the increasing impact of the news media on public perception,[101] it is more important than ever that this issue be resolved in a manner that encourages an open *but responsible* press. One thought remains clear—a press immune from all legal responsibility for defamatory publications is not likely to be a responsible press.

100. 89 N.J. at 192, 445 A.2d at 385.

101. Statistics indicate that 99.8% of the homes in America have radio *and* television. United States Census Bureau, *Statistical Abstract of the United States* 795 (1978). This widespread electronic communications network vests a relatively small group of people with the ability to blanket the nation with statements within minutes that might cause serious injury to individual citizens.

[Casenote by Ann M. Caldwell].