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## Coopting the Journalist's Privilege: Of Sources and Spray Paint

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# COOPTING THE JOURNALIST'S PRIVILEGE: OF SOURCES AND SPRAY PAINT

## I. INTRODUCTION

"Public sympathy may well be on the side of the police. The U.S. Constitution may not be,"<sup>1</sup> the radio talk show host opened his show. He then told of how an Albuquerque police officer's impersonation of a television news reporter resulted in the arrest of a graffiti vandal.<sup>2</sup> It was a story with which the listeners were familiar—a hot item in the New Mexico print and broadcast media.<sup>3</sup> The listeners filled the next hour with on-air telephone calls, discussing the matter with the show's guest, a media lawyer.<sup>4</sup>

Undercover work has become an indispensable technique for modern law enforcement investigative agencies.<sup>5</sup> Still, certain undercover practices raise important issues: the First Amendment<sup>6</sup> right to a free press; the safety of journalists who report on crime; and ethical questions concerning the role of the journalist in society. This article examines the controversy surrounding, and the ramifications of, the Albuquerque graffiti incident.

## II. THE CONTROVERSY

### A. *The Albuquerque Incident*

While covering news for KGGM-TV (now KRQE), Reporter Dave Brown developed a relationship with members of the Albuquerque Police Department's gang unit.<sup>7</sup> Knowing that, APD Officer Leonard Garcia called KRQE on August 7, 1992.<sup>8</sup> Garcia said he was going to try to arrest the vandal who spray-painted the mark "Dumbo" on many locations in Albuquerque.<sup>9</sup> Garcia planned to pose as a reporter and asked Brown to take part in the operation.<sup>10</sup> Brown responded, "We really have reservations about you posing as a journalist, for one thing, and we don't want to be part of an operation where you're using us to pose . . . as [a] journalist[]." <sup>11</sup> Nonetheless, Brown and Videographer Paul Burt went with Garcia.<sup>12</sup> "We didn't want to be part of the operation

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1. *Terry Leedom Show* (KKOB-AM radio broadcast, Sept. 10, 1992).

2. *Id.*

3. See Mike Gallagher, *Media See Dangers in Police Posing as Reporters*, ALBUQUERQUE J., Aug. 30, 1992, at A1.

4. *Terry Leedom Show*, *supra* note 1.

5. 75 AM. JUR. 2D *Trial* § 37 (1991).

6. U.S. CONST. amend. I.

7. Gallagher, *supra* note 3, at A4.

8. Telephone Interview with Dave Brown, Reporter, KRQE-TV (Nov. 6, 1992).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

but we wanted to observe the situation happening,"<sup>13</sup> said Brown. "[Garcia] still wanted us to be part of the operation and we declined."<sup>14</sup>

Garcia assumed his cover as a reporter, then went to interview sixteen-year-old Jose Lopez at a park.<sup>15</sup> Without Lopez knowing, Burt shot video of the meeting.<sup>16</sup> Burt and Brown then followed Garcia and Lopez to a graffiti-defaced highway bridge.<sup>17</sup> Concluding that Lopez was not "Dumbo", Garcia instead went to Lopez's home on August 27 to arrest him for painting the graffiti mark "Shade."<sup>18</sup> Burt and Brown were at the police station to shoot video when Garcia brought in Lopez.<sup>19</sup>

Brown's News Director, Jim Loy, joined in Brown's denial of any participation in the operation: "I don't believe the teenager could see our camera until after the arrest. We were not part of the officer's disguise . . . . We didn't have access to the telephone conversations [between Garcia and Lopez] and [Garcia] was not wearing a microphone during the arrest."<sup>20</sup> KRQE's report of the incident included the issue of the journalist impersonation.<sup>21</sup>

### B. Other Incidents

The Albuquerque incident is not isolated. A survey volume on police surveillance contains the following:

During the protests of the 1960's, the tactic of police posing as members of the media was often used, and it still occasionally is. A 1984 article reports 13 cases of police pretending to be members of the media in the preceding eight years. This is probably only a small fraction of the total number of cases, most of which are not discovered.<sup>22</sup>

Furthermore, incidents of police posing as television reporters at a marijuana-law protest and impersonating a newspaper reporter investigating narcotics are documented.<sup>23</sup>

Other reports include:

- 1979: "The arrest plan . . . involved posing as news reporters . . . . [The officer] called [the defendant] on the telephone and identified himself as a freelance writer."<sup>24</sup>

13. *Id.*

14. *Id.*

15. *Id.*; Gallagher, *supra* note 3, at A4.

16. Brown, *supra* note 8.

17. *Id.*

18. *Id.*

19. *Id.*

20. Gallagher, *supra* note 3, at A4.

21. *Id.*

22. GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 151 (1988).

23. *Id.*

24. Singer v. Wadman, 595 F. Supp. 188, 220 (D. Utah 1982).

- 1988: "While posing as reporters, several [Columbus, Ohio] undercover officers have worn bright yellow jackets emblazoned on the back with 'WOCB News.'"<sup>25</sup>
- 1988: "[The plaintiff] yelled . . . 'Death to Sid Kramer!' That day Montgomery County police officers went undercover to monitor the rally. Posing as a photographer and reporter, [defendants] approached [plaintiff] to question him about his statements."<sup>26</sup>
- 1991: "[T]wo undercover detectives posed as reporters at a news conference called by [a peace activist] . . . . The two Kansas City police officers carried fake press credentials, a camera and a note pad . . . ." <sup>27</sup>

Indeed, it may have been hard to separate fact from fiction in the newspaper "TV Highlights" for February 26, 1988. The listing for *Miami Vice* described Detective "Tubbs go[ing] undercover as a reporter to infiltrate the tribe . . . ." <sup>28</sup>

### C. Policies of Law Enforcement Agencies

Albuquerque Police Department policy permits officers to pose as journalists.<sup>29</sup> "The media has to do what it's going to do and I have to do what I have to do to arrest the crooks,"<sup>30</sup> explained Albuquerque Police Chief Bob Stover. "The use of a disguise or a character," added Albuquerque City Attorney David Campbell, "for purposes of legitimate law enforcement activities is not a prohibited kind of activity."<sup>31</sup>

Seventy-one days after the arrest of Lopez, Stover narrowed his department's policy somewhat.<sup>32</sup> Now, either Stover or a deputy chief must give prior approval for an officer to use the practice.<sup>33</sup> Furthermore, the practice is now reserved for "serious situations."<sup>34</sup>

The New Mexico State Police Department appears to have a policy similar to that of the Albuquerque Police Department.<sup>35</sup> Under some circumstances, New Mexico State Police Chief John Denko may even issue news credentials to undercover officers.<sup>36</sup>

Not all police departments, though, employ such practices. Mike Letz, Commander of the St. Louis Police Department's intelligence unit de-

25. Robert Ruth & Michael J. Berens, *Police Spied on Boyland Campaign, Ex-Aide Says*, COLUMBUS DISPATCH, Nov. 6, 1988, at 01A.

26. *Spratlin v. Montgomery County, Md.*, No. 90-2465, 1991 U.S. App. LEXIS 19111, at \*2 (4th Cir. Aug. 19, 1991).

27. Bill Bryan & Kim Bell, *Not Interested in Protesters, Authorities in Area Say*, ST. LOUIS POST DISPATCH, Feb. 13, 1991, at 1C.

28. Chris Rauser, *TV Highlights*, CHICAGO TRIBUNE, Feb. 26, 1988, at Tempo 4.

29. Gallagher, *supra* note 3, at A1.

30. *Id.* at A4.

31. Interview with David Campbell, Albuquerque City Attorney, in Albuquerque, N.M. (Oct. 26, 1992).

32. See Robert Rodriguez, *Officers Must Get OK from Brass to Pose as Reporters*, ALBUQUERQUE J., Nov. 7, 1992, at D1.

33. *Id.*

34. *Id.*

35. Gallagher, *supra* note 3, at A4.

36. *Id.*

clared, "I've never asked [an officer] to impersonate a newsmen."<sup>37</sup> Even the Kansas City police officers, who posed as reporters at the aforementioned 1991 news conference, were ordered to stop the practice the day after the *Kansas City Star* reported the incident.<sup>38</sup>

Federal law enforcement agencies also appear to disfavor the practice.<sup>39</sup> Drug Enforcement Administration rules prohibit agents from posing as reporters.<sup>40</sup> Albuquerque DEA Office Director Tom Smith said, "The guidelines are pretty clear . . . . We can't do it and we don't do it."<sup>41</sup> Special Agent in Charge of the FBI's Albuquerque office, Matt Perez, said his agency also prohibits the practice, except for emergencies.<sup>42</sup>

Still, reporter Don Devereux found that the FBI does allow agents to pose as reporters if approved by headquarters.<sup>43</sup> While working as a freelance reporter for the *Scottsdale Progress*, Devereux began a campaign to oppose the practice when he learned that a prisoner had requested to talk with him.<sup>44</sup> The FBI sent an agent posing as Devereux's attorney, however, after another prisoner tipped off the bureau.<sup>45</sup> The practice of government agencies impersonating reporters worried Devereux: "If we don't jump up and down vigorously now, this practice will just expand."<sup>46</sup>

#### D. The Arguments

The primary argument for allowing police to pose as reporters is simple: the police department's purpose is to catch criminals. If the practice aids that purpose and is not entrapment,<sup>47</sup> it is not prohibited.<sup>48</sup> The argument against the practice is more complex: police posing as reporters cause a chilling effect on the relationship between reporters and their sources, dampening freedom of the press.<sup>49</sup>

37. Bryan & Bell, *supra* note 27, at 1C.

38. *Cops Impersonate Journalists at Peace Rally*, NEWS MEDIA & THE LAW, Spring 1991, at 39.

39. Mike Gallagher, *Federal Rules Usually Forbid Agents to Pose as Reporters*, ALBUQUERQUE J., Aug. 30, 1992, at A1.

40. *Id.*

41. *Id.*

42. *Id.*

43. Marcia Gelbart, *False Pretenses*, COLUMBIA JOURNALISM REV., Nov.-Dec. 1992, at 19.

44. *Id.*

45. *Id.*

46. *Id.*

47. Entrapment is:

[t]he act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him. According to the generally accepted view, a law enforcement official, or an undercover agent acting in cooperation with such an official, perpetrates an entrapment when, for the purpose of obtaining evidence of a crime, he originates the idea of the crime and then induces another person to engage in conduct constituting such a crime when the other person is not otherwise disposed to do so.

BLACK'S LAW DICTIONARY 532 (6th ed. 1990).

48. Campbell, *supra* note 31.

49. See Gallagher, *supra* note 3, at A1, A4; *Terry Leedom Show*, *supra* note 1.

Even so, some who generally oppose the practice believe it may be warranted in an emergency.<sup>50</sup> An example of such an emergency occurred on April 11, 1992, at the United Nations headquarters in New York City.<sup>51</sup> A woman drove onto United Nations grounds and threatened to blow up the van she drove and set herself on fire to protest paying taxes for the Persian Gulf war.<sup>52</sup> A standoff resulted and two police, carrying a camera and posing as television reporters, approached the van.<sup>53</sup> Still, the practice did not end the standoff.<sup>54</sup> A petty misdemeanor such as graffiti painting<sup>55</sup> would not be considered an emergency.

### III. THE JOURNALIST'S PRIVILEGE

American journalists believe they have a privilege to refuse to reveal information gathered on the job.<sup>56</sup> Journalists argue that their privilege comes from three sources: common law, statutes, and the Constitution.<sup>57</sup>

The common law journalist's privilege is based on an expansion of the recognized common law privileges such as attorney-client and doctor-patient.<sup>58</sup> Society's benefit from the journalist's privilege is a freer flow of information.<sup>59</sup>

Strong opposition to the privilege, though, is embodied in the public's "right to every man's evidence."<sup>60</sup> The fewer the recognized evidentiary privileges, the more evidence is available to policy makers and courtroom factfinders.<sup>61</sup>

#### A. History

Commentators note that as an alternative to the common law argument, journalists began persuading legislatures that they needed statutory protection.<sup>62</sup>

The first so-called newsmen's shield law was enacted in Maryland in 1898 to protect the confidentiality of news sources. It remained unique for more than three decades before New Jersey adopted a similar statute. Thereafter, lobbying campaigns by the newspaper industry have resulted in the enactment of shield statutes of one type or another in approximately half the states.<sup>63</sup>

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50. See *Terry Leedom Show*, *supra* note 1.

51. Dennis Hevesi, *Standoff At U.N. With a Protester*, N.Y. TIMES, Apr. 12, 1992, at sec. 1, pt. 1, 44.

52. *Id.*

53. *Id.*

54. *Id.*

55. N.M. STAT. ANN. § 30-15-1.1 (Cum. Supp. 1992).

56. Sharon K. Malheiro, Note, *The Journalist's Reportorial Privilege—What Does it Protect and What Are its Limits?*, 38 DRAKE L. REV. 79 (1989).

57. *Id.*

58. HARVEY L. ZUCKMAN ET AL., MASS COMMUNICATIONS LAW IN A NUTSHELL 293 (1988).

59. *Id.*

60. *Id.*

61. *Id.*

62. ZUCKMAN ET AL., *supra* note 58, at 294.

63. *Id.*

New Mexico's legislature enacted a shield law in 1973, providing for a journalist's privilege.<sup>64</sup> The statute's effect was short-lived, though, as the New Mexico Supreme Court declared it unconstitutional in 1976 in *Ammerman v. Hubbard Broadcasting, Inc.*<sup>65</sup> Chief Justice Oman's *Ammerman* opinion stated that the shield law was a rule of evidence created by the legislature.<sup>66</sup> The court ruled that the legislature constitutionally lacks the power to prescribe rules of evidence and procedure.<sup>67</sup>

The New Mexico Supreme Court filled the gap in 1982 with a new shield law through what commentators called "a novel method—court rule."<sup>68</sup> The supreme court created a rule of evidence that embodies the journalist's privilege.<sup>69</sup> The legislature then reasserted its original shield law to apply to nonjudicial governmental proceedings.<sup>70</sup>

64. N.M. STAT. ANN. § 38-6-7 (1978). New Mexico's shield statute states:

A. Unless disclosure be essential to prevent injustice, no journalist or newscaster, or working associates of a journalist or newscaster, shall be required to disclose before any proceeding or authority, either:

(1) the source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public; or

(2) any unpublished information obtained or prepared in gathering, receiving or processing of information for any medium of communication to the public.

B. For the purpose of this act:

(1) "proceeding or authority" includes any proceeding or investigation before, or by, any legislative, judicial, executive or administrative body or person;

C. If the proceeding in which disclosure is sought is in the district court, that court will determine whether disclosure is essential to prevent injustice. In all other proceedings, application shall be made to the district court of the county in which the proceeding is being held for an order of disclosure. Disclosure shall, in no event, be ordered except upon written order of the district court stating reasons why disclosure is essential to prevent injustice. Such an order is appealable to the Supreme Court if the appeal is docketed in that court within ten [10] days after its entry. The matter shall be considered as an extraordinary proceeding and shall be heard de novo and within twenty [20] days from date of docketing. The taking of an appeal shall operate to stay proceedings as to the prevention of injustice issue only in the district court.

*Id.*

65. 89 N.M. 307, 551 P.2d 1354 (1976).

66. *Id.* at 309, 551 P.2d at 1356.

67. *Id.* at 311, 551 P.2d at 1358.

68. James C. Goodale et al., *Reporter's Privilege Cases*, in COMMUNICATIONS LAW 1991, at 559, 610 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 323, 1991).

69. N.M. R. EVID. 11-514(B)-(C) provides that:

[a] person engaged or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose:

(1) the confidential source from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered in the course of pursuing his professional activities; and

(2) any confidential information obtained in the course of pursuing his professional activities.

There is no privilege under this rule in any action in which the party seeking the evidence shows by a preponderance of evidence, including all reasonable inferences,

The Federal Rules of Evidence do not specifically provide for any privileges, leaving that function to legislation, common law, and constitutional interpretation.<sup>71</sup> Federal shield laws have been proposed since 1929 but have never been enacted.<sup>72</sup>

The first constitutional argument for a journalist's privilege was made in 1958.<sup>73</sup> *Garland v. Torre*<sup>74</sup> was a libel action by singer Judy Garland against New York radio-television columnist Marie Torre.<sup>75</sup> Torre refused to reveal the names of CBS executives whose statements she quoted.<sup>76</sup> Torre claimed the First Amendment<sup>77</sup> granted her a privilege of confidentiality.<sup>78</sup> The Second Circuit embraced Torre's argument, holding "compulsory disclosure of a journalist's confidential sources of information may entail an abridgement of press freedom by imposing some limitation upon the availability of news."<sup>79</sup> The court stopped short of recognizing an absolute privilege for journalists, requiring a balancing of the public's "interest in the fair administration of justice."<sup>80</sup>

The journalist's privilege provides reporters with an invaluable tool; however, journalists should be aware of the responsibility that it demands.<sup>81</sup> In *Cohen v. Cowles Media Co.*, the plaintiff provided politically-sensitive information to the defendant's two Minnesota newspapers.<sup>82</sup> Reporters from the papers promised Cohen anonymity, but the newspapers named Cohen as the source.<sup>83</sup> Cohen lost his job after the publication of his name, then sued for fraudulent misrepresentation and breach of contract.<sup>84</sup> On appeal, Cohen lost the fraud claim.<sup>85</sup> The Supreme Court held, however, that Cohen could successfully argue promissory estoppel on the contract claim.<sup>86</sup>

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that:

- (1) a reasonable probability exists that a news media person has confidential information or sources that are material and relevant to the action;
- (2) the party seeking disclosure has reasonably exhausted alternative means of discovering the confidential information or sources sought to be disclosed;
- (3) the confidential information or source is crucial to the case of the party seeking disclosure; and
- (4) the need of the party seeking the confidential source or information is of such importance that it clearly outweighs the public interest in protecting the news media's confidential information and sources.

*Id.*

70. Goodale et al., *supra* note 68, at 978.

71. FED. R. EVID. 501.

72. ZUCKMAN ET AL., *supra* note 58, at 294.

73. *Id.* at 295.

74. 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

75. *Id.* at 547.

76. *Id.*

77. U.S. CONST. amend. I.

78. *Garland*, 259 F.2d at 547.

79. *Id.* at 548.

80. *Id.*

81. See *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991).

82. *Cohen*, 111 S. Ct. at 2516.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 2520.

### B. State Shield Laws and Journalist's Privileges

By 1991, twenty-eight states had shield laws.<sup>87</sup> These statutes fall into three main groups: (1) unqualified protection against having to reveal sources but no express protection against having to reveal work product or unpublished information; (2) unqualified protection against having to reveal sources of information actually published or broadcast but no express protection against having to reveal information; and (3) narrow, conditional grants of privilege or bases for the waiver of the privilege.<sup>88</sup> New Mexico's shield law falls within the first group.<sup>89</sup>

According to the renowned evidence treatise *McCormick on Evidence*, the rationale asserted for the shield laws "is analogous to that underlying the long-standing governmental informers privilege and is exclusively utilitarian in character. Thus, it is contended that the news sources essential to supply the public's need for information will be 'dried up' if their identities are subject to compelled disclosure."<sup>90</sup>

Sociologist Gary T. Marx added:

[T]he relationship between reporters and their sources has clear implications for a free society. When the confidentiality of that relationship can be breached at will, whether by holding reporters in contempt of court if they refuse to reveal sources or documents or by police pretending to be reporters, the quality and independence of mass communication must suffer.<sup>91</sup>

Media lawyer and First Amendment authority William S. Dixon<sup>92</sup> finds merit in the utilitarian argument, relating it to the constitutional argument.<sup>93</sup> Referring to the *Washington Post's* role in President Richard Nixon's demise, Professor Dixon commented:

The press and the government are, and always should be, antagonists. The government is trying to withhold information, the press is trying to relate that information to the public . . . . If there isn't that antagonism and that conflict, the press isn't doing [its] job. I think that we can see, over the past twenty years . . . the oversight that the press has performed in its role as a surrogate for the public in reporting on information that the public wouldn't otherwise have access to. We've had some rather radical changes in personages who run our government and in the kinds of government we have.<sup>94</sup>

James Madison put it this way: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to

87. See Goodale et al., *supra* note 68, at 935-1003.

88. ZUCKMAN ET AL., *supra* note 58, at 312 (citing Freedom of Information Center of the University of Missouri School of Journalism).

89. See *id.*; Goodale et al., *supra* note 68, at 978.

90. 1 JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE § 76.2 (4th ed. 1992).

91. MARX, *supra* note 22, at 151.

92. Professor Dixon is a Visiting Professor at the University of New Mexico School of Law. He is also a Senior Partner in the Albuquerque law firm of Rodey, Dickason, Sloan, Akin & Robb, P.A., where his clients include the *Albuquerque Journal*.

93. See *Terry Leedom Show*, *supra* note 1.

94. *Id.*

a Farce or 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."<sup>95</sup>

The Framers of the Constitution felt it unnecessary to enact an express provision for freedom of speech.<sup>96</sup> A government limited to enumerated powers, they thought, could not enact a law opposed to free speech.<sup>97</sup> Popular pressure demanded guaranteed individual rights,<sup>98</sup> though, and it is no coincidence that the Bill of Rights lists the freedoms of speech and press among the first to be protected.<sup>99</sup>

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."<sup>100</sup> The Supreme Court interprets the First Amendment as requiring it to treat the freedoms of speech and the press identically.<sup>101</sup>

Without a shield statute, journalists cannot always rely on a privilege.<sup>102</sup> In the 1972 case of *Branzburg v. Hayes*,<sup>103</sup> reporters were subpoenaed to testify in criminal investigations.<sup>104</sup> The Supreme Court refused to interpret the First Amendment as implying a journalist's privilege.<sup>105</sup> Yet the Court acknowledged that "news gathering is not without its First Amendment protections."<sup>106</sup> Noting that *Branzburg* was a five-to-four decision,<sup>107</sup> at least nine federal circuits, including the tenth circuit, recognize a journalist's privilege.<sup>108</sup> A communications law handbook summarizes the relationship between the press and the judiciary, illustrated by *Branzburg*, as an "abrasive confrontation . . . prompt[ing] renewed interest in legislative approaches to the problem of the newsmen's privilege."<sup>109</sup>

#### IV. CONSEQUENCES

The Los Angeles Police Department's manual states:

The use of a news media cover by an officer to obtain intelligence information is not an acceptable form of undercover activity. Once a police officer is discovered in such a role, particularly in a crowd-control situation, legitimate members of the media become suspect

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95. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *quoted in* Environmental Protection Agency v. Mink, 410 U.S. 73, 110-11 (1973) (Douglas, J., dissenting).

96. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.5 (4th ed. 1991).

97. *Id.*

98. *Id.*

99. See Leslye DeRoos Rood & Ann K. Grossman, *The Case for a Federal Journalist's Testimonial Shield Statute*, 18 HASTINGS CONST. L.Q. 779, 783 (1991).

100. U.S. CONST. amend. I.

101. NOWAK & ROTUNDA, *supra* note 96, § 16.19.

102. See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

103. *Id.*

104. *Id.* at 668-69.

105. *Id.*

106. *Id.* at 707.

107. See *id.* at 709-11; McCORMICK, *supra* note 90, § 76.2.

108. See Goodale et al., *supra* note 68, at 919-20.

109. ZUCKMAN ET AL., *supra* note 58, at 310.

and could possibly be exposed to danger. In addition, such undercover activity does damage to the trust which should exist between members of a free society and the news media which serves them.<sup>110</sup>

Concerns over damage to the news media's ability to do its job prompted Radio-TV News Directors Association President David Bartlett to protest the Albuquerque incident to Albuquerque Mayor Louis Saavedra.<sup>111</sup> Bartlett's letter urged the city "to make sure that no Albuquerque police officer is ever again tempted to hide behind a phony press card . . ."<sup>112</sup> Also, Robert Richardson, news director of Albuquerque's KOB-TV, promised to seek legislation banning police officers posing as reporters.<sup>113</sup>

The strained relationship between the Albuquerque news media and police poses a possible threat to freedom.<sup>114</sup> "The media needs the police as a source of news, but the police need the support of the media to reach the public. This [incident] is the sort of thing that threatens that balance,"<sup>115</sup> surmised Hal Simmons, attorney for the New Mexico Press Association. "Do we retaliate and say we don't run Crime Stoppers?"<sup>116</sup> wondered KRQE's Jim Loy. "I don't think so. We run Crime Stoppers as a community service, but the police have to realize we represent the community, the people they serve."<sup>117</sup>

#### A. *Danger to Journalists*

Police officers impersonating reporters may pose other dangers. "I'm sure it never occurred to anyone at [the Albuquerque Police Department] that posing as a news reporter has much wider implications,"<sup>118</sup> observed Bernalillo County District Attorney, Bob Schwartz. "Have [the police] put someone at risk? I don't know."<sup>119</sup>

Contemplating the attacks on reporters during the 1992 Los Angeles riots, Jane Kirtley of the Reporters Committee for Freedom of the Press expressed concern that police activities, such as posing as reporters, subject reporters to physical danger.<sup>120</sup> Presumably, a criminal source may want to hurt a reporter who the source believes to be a police officer.

To protect reporters from danger, Kootenai County, Idaho Sheriff, Pierce Clegg, adopted a policy in 1989 against his undercover officers posing as reporters.<sup>121</sup> The action came after a Kootenai County captain

110. Los Angeles Police Department Manual, *reprinted in* MARX, *supra* note 22, at 151.

111. COMMUNICATIONS DAILY, Sept. 2, 1992, at 5.

112. *Id.*

113. *Id.*

114. See Gallagher, *supra* note 3, at A1.

115. *Id.*

116. *Id.* at A4. "Crime Stoppers" reports are public service television spots designed to solicit evidence from the public on certain crimes that have been recently committed.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Idaho Lawmen Posed As Reporter*, SACRAMENTO BEE, May 5, 1989, at B8.

used a journalist cover at a Seattle anti-racism rally.<sup>122</sup> "We do understand the situation it puts [reporters] into,"<sup>123</sup> Clegg said.

In Israel, journalists maintained their lives were endangered when police and soldiers impersonated reporters to apprehend Palestinian protesters.<sup>124</sup> Despite Israel's lack of constitutional guarantees of the freedoms found in our First Amendment, Israeli police promised to stop using the tactic.<sup>125</sup> The promise came after a telecast showed two plainclothes police officers arresting Palestinian teenagers in East Jerusalem.<sup>126</sup> The Jerusalem Journalists Association threatened to stick "Police on Duty" signs in reporters' car windows unless the police abandoned the tactic.<sup>127</sup>

Bob Stover, too, recognized the danger to reporters. "I never really thought about the possibility of putting a reporter's life in danger . . . . I don't want to take the chance of getting someone hurt," said Stover when he narrowed his department's policy.<sup>128</sup>

### B. *The Journalist-Source Relationship*

Professor Dixon has stated that "[t]he function of the press under the Constitution is to not only print information that is handed out by the government . . . but to go out and to acquire information . . . ."<sup>129</sup> According to him, performance of that function requires the media to persuade sources to talk.<sup>130</sup> "One of the most important functions of the press is the investigation of criminal activity . . . . Some [sources] would not talk to the press under any circumstances without a belief in the confidentiality of what they're saying."<sup>131</sup>

One commentator summed it up by stating that "[c]learly anonymity has become a commodity in which both journalists and their sources traffic."<sup>132</sup> The importance of anonymity is illustrated by instances of non-privileged reporters going to jail to protect their sources.<sup>133</sup> Trust is vital to the relationship between a reporter and his source, especially if the source requires anonymity. Police posing as reporters can diminish that trust.

### C. *Comparison to Other Privileges*

New Mexico's Rules of Evidence include these privileges: lawyer-client;<sup>134</sup> physician-patient;<sup>135</sup> husband-wife;<sup>136</sup> communications to clergymen;<sup>137</sup>

122. *Id.*

123. *Id.*

124. *Israeli Police Pledge to Stop Posing as Journalists*, REUTERS, Mar. 29, 1989, at 4.

125. *Id.*

126. *Id.*

127. *Id.*

128. Rodriguez, *supra* note 32, at D1.

129. *Terry Leedom Show*, *supra* note 1.

130. *Id.*

131. *Id.*

132. Kathryn M. Kase, *When a Promise Is Not a Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources*, 12 HASTINGS COMM. & ENT. L.J. 565, 571 (1990).

133. See Monica Langley & Lee Levine, *Broken Promises*, COLUMBIA JOURNALISM REV., July/Aug. 1988, at 21.

134. N.M. R. EVID. 11-503.

135. N.M. R. EVID. 11-504.

identity of informer;<sup>138</sup> and the journalist's privilege.<sup>139</sup> Recognizing this, radio host Terry Leedom told his talk show listeners: "Totally facetiously, last week I mentioned that perhaps a lot of people in Albuquerque didn't go to church over the weekend because they feared that the priest that was hearing confession might well be a police officer."<sup>140</sup> Leedom's guest, Professor Dixon, responded: "This would directly interfere with the First Amendment right to free exercise of religion and nobody would tolerate it . . . . It's exactly the same principle as the newsperson who has a constitutional right to receive information from the public."<sup>141</sup>

Many believe the journalist's privilege is most analogous to the privilege protecting the identity of informers.<sup>142</sup> Those who believe the reporter's role includes exposing corruption are likely to believe such a purpose is valuable enough to warrant the privilege.<sup>143</sup> Professor Blasi epitomized the analogy: "[T]he [journalist's] privilege . . . would most closely resemble that possessed by police informers. The privilege is justified only when it helps a governmental institution—in the one case the prosecutor, in the other the electorate—obtain the information it needs if it is to fulfill its responsibilities."<sup>144</sup> Further, this link between the journalist's privilege and the informer's privilege took an interesting turn in a Detroit incident.<sup>145</sup> There, an undercover officer went to prison for refusing to reveal to a federal grand jury the names of informers whom he cultivated with as much as \$300,000 of police funds.<sup>146</sup>

The analogy to the informer's privilege is not apparent, however, to City Attorney Campbell.<sup>147</sup> He does not believe the lack of such a privilege would cause police sources to dry up.<sup>148</sup> Campbell tried to explain his position by citing another clause in the First Amendment.<sup>149</sup> "[R]ights of association are also important in the Constitution,"<sup>150</sup> argued Campbell. "The graffiti . . . vandal wanting to associate with a news reporter, and not with a police officer, that's his right."<sup>151</sup> Campbell's argument is

136. N.M. R. EVID. 11-505.

137. N.M. R. EVID. 11-506.

138. N.M. R. EVID. 11-510.

139. N.M. R. EVID. 11-514.

140. *Terry Leedom Show*, *supra* note 1.

141. *Id.*

142. MAURICE VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS 68 (1979).

143. *Id.*

144. *Hearings on Newsmen's Privilege Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary*, 93d Cong., 1st Sess. 745 (1973) (statement of Vince Blasi, professor at Columbia University School of Law), *reprinted in* VAN GERPEN, *supra* note 142, at 69.

145. See Jim Finkelstein, *Officer Won't Talk, Is Jailed*, DETROIT FREE PRESS, Jan. 12, 1991, at 3A.

146. *Id.*

147. See Campbell, *supra* note 31.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

unpersuasive, but it is clear he does not believe police posing as reporters is wrong.<sup>152</sup>

#### D. Due Process Concerns

The practice of police posing as reporters raises several due process concerns, including whether evidence gathered through the practice should be admissible at trial.<sup>153</sup> "The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence," stated the Supreme Court in the 1961 obscenity case of *Mapp v. Ohio*.<sup>154</sup> In *Mapp*, evidence gathered in an unconstitutional search and seizure was deemed inadmissible in a state court.<sup>155</sup> The reasoning was that the Fourth Amendment's prohibition of unreasonable searches and seizures links with the Fourteenth Amendment's due process requirement.<sup>156</sup>

A due process/fair trial issue was at the heart of *United States v. Outler*.<sup>157</sup> In *Outler*, the defendant was a physician under investigation for unlawfully dispensing and possessing controlled drugs.<sup>158</sup> Investigating agents used hidden microphones to record their conversations with Dr. Outler.<sup>159</sup> Oddly, one agent was a reporter for an Atlanta television station, temporarily working with law enforcement officials.<sup>160</sup> Products of the investigation later appeared in a two-part television report on unethical doctors.<sup>161</sup>

"The deliberate use of a news-reporter as an undercover agent in an investigation by federal law enforcement officials, coupled with resulting adverse publicity prior to an arrest and trial, is inconsistent with our notions of due process and unnecessarily endangers a defendant's right to a fair trial,"<sup>162</sup> warned Fifth Circuit Judge Morgan. The warning was as far as Morgan went, though.<sup>163</sup> Satisfied with the jury's impartiality, the Fifth Circuit refused to reverse Dr. Outler's conviction.<sup>164</sup>

152. *Id.*

153. The Due Process clause of the Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime . . . without due process of law . . ." U.S. CONST. amend. V.

154. 367 U.S. 643, 657 (1961).

155. *Id.* at 656-57. The exclusion of evidence gathered in violation of the Fourth Amendment was required of federal courts even before *Mapp*. See *McNabb v. United States*, 318 U.S. 332 (1943).

156. *Id.* at 657. The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

157. 659 F.2d 1306 (Former 5th Cir. 1981).

158. *Id.* at 1308.

159. *Id.*

160. *Id.*

161. *Id.* at 1311.

162. *Id.* at 1312.

163. *Id.*

164. *Id.*

Apparently, there have been no cases where the defendant has argued for the exclusion of evidence gathered by a police officer posing as a reporter. *Outler* was the closest, but there the due process issue focused on the government's involvement in publicity adverse to the defendant.<sup>165</sup> For a defendant to use the journalist's privilege to exclude evidence, the defendant must invoke the privilege on his behalf. Thus, this question must be answered: Whose privilege is it?

Except for the journalist's privilege, evidentiary privileges are for the benefit of the source, such as the client or patient.<sup>166</sup> Courts view the journalist's privilege as a journalist's tool, for the journalist's benefit, and allow only the journalist to invoke it.<sup>167</sup> Some commentators believe the journalist's privilege belongs "to the public although it is exercised on the public's behalf by the journalist."<sup>168</sup>

The source, too, is a member of the public. When making a disclosure to a reporter, the source relies on the privilege—the source's liberty is at stake. Criminal defendant-sources tried to invoke the journalist's privilege in the cases of *Lipps v. State*<sup>169</sup> and *Hestand v. State*.<sup>170</sup> The defendants in those cases (which arose out of the same incident) were convicted of inflicting physical injury while attempting robbery.<sup>171</sup> Both appealed, contending that newspaper reporter Richard Johnson should not have been allowed to testify as to admissions the defendants made to Johnson while in jail.<sup>172</sup> According to the defendants, the statements were given in confidence.<sup>173</sup> The Indiana Supreme Court upheld the trial court's overruling of the defendants' objections:<sup>174</sup>

[S]ince the very nature of the reporter's work requires him to divulge the information he receives, albeit not the source, anyone wishing to rely on the confidential status of information given to a newspaper reporter must do so at his own peril. While Indiana does have a statute protecting a newspaper reporter from being compelled to disclose the source of his information . . . the statute creates a right personal to the reporter which only he may invoke . . . [The privilege] cannot be invoked by the person who communicated with the reporter and now seeks to prevent the reporter from testifying.<sup>175</sup>

Criminal defendants do not, however, divulge information to doctors or lawyers at their own peril. By invoking the proper privilege, defendants may prevent those professionals from testifying as to the defendants'

165. *See id.*

166. Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 Mo. L. REV. 1, 49 (1986).

167. *See id.*

168. VAN GERPEN, *supra* note 142, at 69.

169. 258 N.E.2d 622 (Ind. 1970).

170. 273 N.E.2d 282 (Ind. 1971).

171. *Id.* at 283; *Lipps*, 258 N.E.2d at 623.

172. *Hestand*, 273 N.E.2d at 283.

173. *Lipps*, 258 N.E.2d at 625.

174. *Id.*

175. *Id.* at 626.

confidential statements. The *Lipps* and *Hestand* court did not address that important point.<sup>176</sup>

Judge Jackson's *Lipps* opinion did contain some potential Fifth Amendment<sup>177</sup> opposition to the admission of evidence gathered by police officers posing as reporters, at least if the source is in custody.<sup>178</sup> Judge Jackson cited *Miranda v. Arizona*,<sup>179</sup> the famous case that requires advice of certain constitutional rights before custodial questioning:<sup>180</sup> "[If] a third person [is] acting as an agent for the police . . . a Miranda warning would conceivably be required . . ." <sup>181</sup> The same reasoning should apply when the questioner is not an agent for the police, but a police officer posing as a reporter.

### E. State Exclusionary Rule

The best argument for the exclusion of evidence gathered by a police officer posing as a reporter in New Mexico may be that admission would be contrary to the reason for New Mexico's supreme court-created journalist's privilege. In *McNabb v. United States*,<sup>182</sup> the United States Supreme Court stated that "[t]he principles governing the admissibility of evidence in . . . criminal trials have not been restricted . . . to those derived solely from the Constitution."<sup>183</sup> The *McNabb* rule applies only to federal cases,<sup>184</sup> but state courts also have the power to adopt similar policies by making and applying their exclusionary rules.<sup>185</sup>

Simply put, if the New Mexico Supreme Court decides certain evidence was gathered while acting in a manner contrary to its policy, the court can declare such evidence inadmissible.<sup>186</sup> The supreme court created New Mexico's journalist's privilege, so excluding evidence gathered by police officers posing as journalists would make sense.

## V. CONCLUSION

An Albuquerque police officer posed as a reporter to arrest a graffiti vandal, sparking a controversy that involved several areas of the law. Criminal, constitutional, evidentiary, as well as ethical and safety concerns loomed in the opinions expressed by observers and those involved. The Albuquerque Police Department's policy on the practice has since been narrowed, but not abated.

The relationship between the police impersonation of reporters and the journalist's privilege is at the heart of the controversy. The policy behind

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176. See *id.*; *Hestand*, 273 N.E.2d 282.

177. U.S. CONST. amend. V.

178. See *Lipps*, 258 N.E.2d at 626-27.

179. 384 U.S. 436 (1966).

180. *Lipps*, 258 N.E.2d at 626.

181. *Id.* at 627.

182. 318 U.S. 332 (1943).

183. *Id.* at 341.

184. *Id.*

185. McCORMICK, *supra* note 90, § 171.

186. See *id.*

the privilege may be constitutional or simply utilitarian. The constitutional argument appears to be the strongest: the journalist's privilege is crucial to a free press, as guaranteed by the First Amendment.

A defendant who faces adverse evidence obtained by a police officer posing as a reporter may argue that the evidence is inadmissible because of a due process violation. Such an argument may be aided by persuading the court that the defendant may invoke the journalist's privilege. Even without the constitutional argument for exclusion, a defendant may convince the court that a state exclusionary rule is appropriate.

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