REPORTER DENIED PRIVILEGE AGAINST DISCLOSURE OF NEWS SOURCE

Garland v. Torre,
259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958)

The plaintiff, actress Judy Garland, brought a defamation action against the Columbia Broadcasting System in the United States District Court for the Southern District of New York. The plaintiff alleged that the broadcasting system had made false and defamatory statements about her and had authorized their publication in appellant Marie Torre's newspaper column. C.B.S. denied making the statements or causing them to be published. The columnist refused, in the course of a pre-trial deposition hearing, to divulge the name of the "network executive" at C.B.S. to whom her column attributed the statements. Upon her refusal to obey an order of the district court that she reveal the name of the source of her information, she was held in criminal contempt. The court of appeals affirmed, holding that the first amendment guarantee of freedom of the press did not relieve the journalist from the testimonial duty to answer questions concerning the source of news printed, and denying the columnist's assertion of an evidentiary privilege against the order to disclose the name of her confidential source.[1]

Though conceding the validity of appellant's contention that compulsory disclosure of a journalist's confidential sources of information entails an abridgement of press freedom by imposing some limitation upon the availability of news, the court's opinion eloquently maintains the position that this liberty must be subordinated under the Constitution when it threatens to impinge upon the orderly functioning of the judicial process, fundamental to and conservative of all rights in a free society.[2]

The civil liberties questions raised by the case of Marie Torre involve a sharp conflict of principle between the vital public right, implied by the first amendment, to the freest and fullest flow of public information, much of which information becomes available only because the informants are confident that their identities will not be disclosed, and the vital public and private right to the unhampered administration of justice, including the right of a litigant to enlist the judicial compulsion of relevant testimony.[3] By withholding the identity of a source, the

[1] 259 F.2d 545 (2d Cir. 1958).

[2] See, *e.g.*, Bridges v. California, 314 U.S. 252, 291 (1941) (dissenting opinion); Chambers v. Baltimore & O.R.R., 207 U.S. 142, 148 (1907).

[3] United States v. Bryan, 339 U.S. 323, 331 (1950). The instant opinion, *supra* note 1, at 549, maintains that "whether or not the freedom to invoke this judicial power be considered an element of Fifth Amendment due process, its essentiality to the fabric of our society is beyond controversy." 8 WIGMORE, EVIDENCE § 2191 (3d ed. 1940), takes the position that the fifth amendment does

question which goes to the heart of the instant plaintiff's case, the journalist defeats this public and private right of access to due process. The journalist's proposed constitutional justification of that silence which renders remedy unavailable to the injured party is invalidated by the exclusion of libelous and defamatory statements from the pale of protection afforded by the first amendment freedom.[4]

No such evidentiary privilege as that asserted by appellant to protect her refusal to disclose the name of her informant has been held to exist in the absence of a statute creating it.[5] Some trend of legislation is apparent to extend the privilege for confidential communications to afford reporters a statutory right to decline to identify in court, grand jury or legislative investigatory proceedings the sources from whom they had obtained published information. The number of bills which have been introduced and the statutes effected by twelve states[6] all purport to establish an absolute privilege. This is tantamount to a legislative decision that the public interest under the first amendment in a free flow of information shall be paramount to the public interest in due process in cases where the two come in conflict. Leading authorities in the field of evidence have been emphatic in denouncing the tendency to thus extend the privilege to suppress relevant evidence[7] except in cases in which the consequent harm of such interference with the rights of the litigant and society to compel the disclosure of pertinent facts is greatly outweighed by accompanying social benefits realized from the preservation of a confidential relationship.[8]

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secure the right to compulsory process for their witnesses to defendants, the sixth amendment then giving the ordinary practice special recognition in the special case of criminal defendants.

[4] Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

[5] See, *e.g.*, Rosenberg v. Carroll, 99 F. Supp. 629 (D.C.S.D.N.Y. 1951); People *ex rel.* Mooney v. New York County, 269 N.Y. 291, 199 N.E. 415 (1936); 58 AM. JUR. *Witnesses* § 546 (1948).

[6] The states which have enacted such statutes are: Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Michigan, Montana, New Jersey, Ohio and Pennsylvania.

[7] Morgan, *Foreword* to MODEL CODE OF EVIDENCE 22-30 (1942); 8 WIGMORE, EVIDENCE §§ 2192, 2286 (3d ed. 1940).

[8] Morgan, *id.* at 7, argues that "Such a privilege [against disclosure of relevant data] suppresses valuable evidence to which the trier of fact is competent to give its proper weight. . . . If [so serious an interference with a rational inquiry as] privilege to suppress the truth is to be recognized at all, its limits should be sharply determined so as to coincide with the limits of the benefits it creates. . . ." REPORT, NEW YORK LAW REVISION COMMISSION 134 (1949), recommends qualifying such privilege, suggesting that the public interest in news of entertainment personalities should readily give way in the face of conflicting policies. Some bills would qualify the privilege by excepting instances in which disclosure is held necessary in the interests of national security. It is arguable, however, that there is more reason for granting the privilege in cases involving this interest than in those involving the interests of the administration of justice, since the public's right to information is perhaps most urgent in cases where the "interests of national

No privilege protecting the reporter from disclosing his source having been created by New York[9] or by federal statute, there was no legal right upon which appellant Torre could base her suppression of evidence. It was unnecessary for the federal district court sitting in New York to decide whether federal or state law was determinative of the question. This issue, however, assumes paramount importance when considered as it might arise in a federal court sitting in Ohio[10] or any one of the other eleven states which have granted the journalist this immunity by statute.

The state law seems to control the disposition of the question under the doctrine of *Erie R.R. v. Tompkins*,[11] which would ensure that "the outcome of the litigation in the federal court should be the same, *so far as legal rules determine the outcome of the litigation*, as it would be if tried in a state court."[12] The rule as to privilege allowing the admission or exclusion of the testimony under the instant facts, however, would not be determinative of the ultimate legal and factual issues in the case, the defamatory character of the statements alleged to have been made and the network's liability therefor. It does determine whether or not the issues can be framed for litigation. If plaintiff cannot discover the network source and establish the necessary agency relationship, she is unable to counter the network's denial of responsibility for the statements. The matter of privilege has nevertheless been classified as sub-

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security" can be claimed by investigators or prosecutors—a right to information probably obtainable in such cases only by the reporter's pledge of anonymity to his source.

[9] REPORT, NEW YORK LAW REVISION COMMISSION, *supra* note 8, at 23-168, comprehensively treats the issues raised by the enactment of such legislation and disapproves the proposal to enact a statute granting the privilege in New York.

[10] OHIO REV. CODE § 2739.12 (1953), grants newspaper reporters the privilege against revealing the source of their information.

[11] 304 U.S. 64 (1938).

[12] Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). (Emphasis added.) Joiner, *Uniform Rules of Evidence for the Federal Court*, 36 MICH. S.B.J. 34 (1957), suggests that the courts in their attempt to define the rule-making power must go beyond the substance-procedure analysis and examine the policy behind the proposed rule to determine whether or not the purpose and effect of the rule involves the orderly dispatch of judicial business or is predicated on another broader policy of the state. And Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 483 (1957), offers this rationale: "When legislatures draft codes of procedure, they frequently, if not usually, include rules governing . . . the privileges of witnesses, and when they include rules as to evidence . . . they make provision for the use of privileged communications. This warrants the conclusion that when a legislature . . . delegates to the courts the function of regulating procedure, it intends to include the subject of privileges and privileged communications. . . . They are nothing more or less than privileges to suppress the truth, and no officers . . . other than the judiciary have the constant opportunity to observe them in operation and the skill to determine how far and in what respects they interfere with the orderly and effective administration of justice."

stance in terms of the *Erie* substance-procedure dichotomy, and thus declared beyond the rule-making power.[13]

Federal Rule 43 rejects this as the sole test and requires the application of a three-pronged test of admissibility:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs. . . .[14]

As the policy of the rule favors the admission of evidence, and testimony as to a journalist's source being "admissible under the statutes of the United States" absent a statute providing for its exclusion, it would appear that a federal rule denying the privilege should control over a state statute restricting admissibility.[15] Rule 43 has been interpreted to indicate that the *Erie* doctrine does not preclude the adoption of federal evidence rules,[16] but in the field of privilege state law has been held to be supreme.[17] One federal district court, though stating it did not consider the matter one of substance and thus was not bound by *Erie* to apply the state law in determining whether evidence was privileged under the federal rule relating to the scope of examination of deponents, felt itself nevertheless bound to recognize the state statute creating the privilege as the "clear and unequivocal pronouncement of the public policy of the state in which [the federal court] sits."[18]

Putting aside considerations of the wisdom or folly of the state legislatures in clothing the sources of a journalist's information with secrecy, it is submitted that such statutory grants of privilege should be considered as no more than a part of the judicial machinery and method

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[13] *E.g.*, Berdon v. McDuff, 15 F.R.D. 29 (D.C.E.D. Mich. 1953).

[14] FED. R. CIV. P. 43(b).

[15] See Green, *The Admissibility of Evidence under the Federal Rules*, 55 HARV. L. REV. 197, 203-05 (1941), which under this analysis would allow the federal court to use its discretion as to whether the privilege would apply in any given case.

[16] Sibbach v. Wilson, 312 U.S. 1 (1941), sustained the federal requirement for a physical examination against the contention that one would not be available in the state courts.

[17] *Supra* note 12. 5 MOORE, FEDERAL PRACTICE ¶ 43.07, at 1332-33 (3d ed. 1951), argues that state statutes would control since the state statutes were followed by the federal equity courts. Green, *supra* note 14, questions the validity of this premise.

[18] *Ex parte* Sparrow, 14 F.R.D. 351 (D.C.N.D. Ala. 1953). In this first federal case dealing with the claim of privilege by a journalist with respect to the sources of his information, the court stated that it was not bound to apply Alabama law granting the privilege in interpreting Rule 26, which permits examination of deponents "regarding any matter *not privileged* which is relevant to the subject matter involved in the pending action. . . ." (Emphasis added.)

which the state devises because it has adjudged the particular procedure to contribute to the most efficient operation of its particular judicial machine. Considering the validity of federal evidence rules, the United States Supreme Court has declared the test to be "whether a rule really regulates procedure, . . . the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. . . ."[19]

In diversity cases the federal courts are vested with the power to enforce substantive rights as recognized by the state and to justly administer relief. It would seem to strip the gears of the federal judicial machinery to require it to conform, under what is well-criticized as a misapplication of the *Erie* decision, to state statutes at variance with its judgment as to the manner and means by which it can most efficiently function to give operational effect to the state's substantive law.

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[19] *Supra* note 16, at 14.