**THE NEWSMAN'S PRIVILEGE: GOVERNMENT
INVESTIGATIONS, CRIMINAL PROSECUTIONS
AND PRIVATE LITIGATION**

The recent widespread use of governmental and defense subpoenas for newsmen's testimony and films has posed a grave threat to the ability of the press to gather and disseminate the news. This Comment explores the need for a newsman's privilege and the legal precedent upon which such a privilege would be based. The possible scope of the privilege is examined in connection with governmental and defense subpoenas and court orders in private litigation.

Legal commentators and appellate courts have long debated the advisability of a newsman's privilege. Most of these discussions bear only limited relevance to the contemporary problem of defining the press's role in litigation and governmental investigation, for the issue in the past has been the duty of the newsman to reveal the *source* of his information. Today newsmen are more often asked to reveal the *contents* of that information. Furthermore, a new question is now before the courts: the duty of the news media to produce their films in compliance with subpoenas duces tecum. Finally, whereas subpoenas or court orders were traditionally employed, usually by private litigants, to elicit particular pieces of information aimed toward the disposition of specific questions, subpoenas are now being used by federal, state and local governments as aids to large-scale investigatory and prosecutorial activities.¹ These subpoenas, employing the shotgun approach,² are often aimed at eliciting everything the newsman may know or all the films he may have concerning the subject matter or persons under investigation. Conversely, because of the rash of recent prosecutions for loosely defined crimes arising from political protest activity, the press has been served with an equal number of broadly worded subpoenas

1. See note 17 *infra* and accompanying text.

2. The subpoena issued in one recent case, for example, called for production of notes and tape recordings of interviews with "officers and spokesmen for the Black Panther Party," covering a period of over a year. *In re Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970), *aff'd in part and rev'd in part*, No. 26,025, (9th Cir. Nov. 18, 1970) [39 U.S.L.W. 2281], *petition for cert. filed* 39 U.S.L.W. 3273 (U.S. Dec. 6, 1970) (No. 1114). See text accompanying notes 46-77 *infra*. In another instance, *Newsweek* received a subpoena duces tecum from a federal grand jury, directing it to appear through a member or agent and to produce "all photographs of and interviews with members of Students for a Democratic Society taken during the period October 4 through October 13, 1969." Brief for Newsweek as Amicus Curiae at 2, *In re Caldwell*, *supra* [hereinafter cited as Brief for Newsweek].

from numerous defendants.³ Because the subject matter under investigation or the alleged offense is often extremely broad and ill defined, the information sought from the newsman may be correspondingly unlimited.

Today an analysis of the newsman's privilege without a careful examination of its factual context is no longer sufficient. To ignore the impact of the aggregate of subpoenas and court orders is to fail to perceive the problem altogether. When newsmen were called upon only occasionally to testify, the courts could dismiss any impairment to freedom of the press as slight or as "some limitation"⁴ on the availability of news. Today, the impairment and the corresponding limitation upon the availability of news is increasing.

The United States Supreme Court has never ruled on the question of newsman's privilege.⁵ Such a ruling is needed; the series of recent subpoenas and court orders necessitates formulation of guidelines to protect not only the rights of those directly involved, but more important, society's interest in a free and vigorous press. For when numerous subpoenas are issued by an administration avowedly and openly hostile to the news media,⁶ the possibility arises that putting a gag on the press may be as much an objective as eliciting information from it.⁷

3. See note 21 *infra*.

4. The Supreme Court of Hawaii, considering the privilege issue in 1961, brushed aside the impairment:

We will assume, for the purposes of this case, that the forced disclosure of a reporter's confidential source of information may, to some extent, constitute an impairment of freedom of the press. We nevertheless conclude . . . that such an impairment may not be considered of a degree sufficient to outweigh the necessity of maintaining the court's fundamental authority to compel the attendance of witnesses

In re Goodfader, 45 Hawaii 317, 329, 367 P.2d 472, 480 (1961). Three years earlier, in 1958, the Second Circuit had described the impairment in a similar manner: "[C]ompulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news." *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958) (emphasis added).

5. The Court has denied certiorari three times. *State v. Buchanan*, 392 U.S. 905, *denying cert.* to 250 Ore. 244, 436 P.2d 729 (1968); *Murphy v. Colorado*, 365 U.S. 843 (1961) (state court proceedings unreported); *Garland v. Torre*, 358 U.S. 910 (1958), *denying cert.* to 259 F.2d 545 (2d Cir. 1958).

6. See, e.g., *N.Y. Times*, Nov. 21, 1969 at 22, col. 1; *id.*, Nov. 14, 1969 at 24, col. 1.

7. In *In re Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970), an affidavit submitted to the district court by one of the government attorneys explained, or perhaps complained, that "leaders and spokesmen of the Black Panther Party and their associates reportedly make full use of coverage by the press and the facilities of commercial and educational radio and television to disseminate their messages to a wide audience." Affidavit of Francis L. Williamson, attached to the Government's Memorandum in Opposition to Motion to Quash Grand Jury Subpoenas at 4 [the memorandum is hereinafter cited as Opposition Memo]. The government in its Second Supplement to

This Comment explores the issue of newsman's privilege. Part I sets forth the factual context in which the issue arises, focusing on the recent case of *In re Caldwell*.⁸ Part II discusses the privilege cases decided to date, evaluating the factual and analytical conceptions on which various courts have relied. Part III suggests a theory for the constitutional protection of the interests asserted by the newsman, examining Supreme Court decisions dealing with these interests in other contexts. Part IV analyzes the form and scope the privilege should take.

I

FACTUAL BACKGROUND

A. *The Press and Legal Compulsion Past and Present*

The problem of the newsman's privilege is not a new one. News-men have been asked to divulge their information in the past. However, until recently only a relative handful of cases arose in which the issue of the privilege was raised,⁹ and only a few of these cases involved governmental subpoena.¹⁰ While the reason for this paucity is unclear,

Memorandum in Opposition to Motion to Quash Grand Jury Subpoenas explained at greater length:

The Black Panthers, a small violence-prone group of persons . . . , has gained nation-wide and world-wide prominence through the published utterances of their spokesmen.

. . . [P]ublished utterances of spokesmen of the Black Panther Party, when disseminated in their official publication, reach only a relatively small audience. However, when disseminated in the mass media, such as Newsweek, Time Magazine, the New York Times, and CBS, the statements reach a vastly more numerous audience.

Id. at 1-2.

8. 311 F. Supp. 358 (N.D. Cal. 1970), *aff'd in part and rev'd in part*, No. 26,025 (9th Cir. Nov. 18, 1970) [39 U.S.L.W. 2281], *petition for cert. filed* 39 U.S.L.W. 3273 (U.S. Dec. 6, 1970) (No. 1114).

9. There were 17 reported cases between 1911 and 1968: *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958); *In re Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964); *Deltec, Inc. v. Dun & Bradstreet, Inc.*, 187 F. Supp. 788 (N.D. Ohio 1960); *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951); *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957); *In re Howard*, 136 Cal. App. 2d 816, 289 P.2d 537 (3d Dist. 1955); *Clein v. State*, 52 So. 2d 117 (Fla. 1950); *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911); *In re Goodfader*, 45 Hawaii 317, 367 P.2d 472 (1961); *In re Wayne*, 4 Hawaii 475 (U.S.D.C. 1914); *Beecroft v. Point Pleasant Print. & Pub. Co.*, 82 N.J. Super. 269, 197 A.2d 416 (1964); *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A.2d 473 (1956); *State v. Donovan*, 130 N.J.L. 130, 30 A.2d 421 (1943); *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); *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

10. *Clein v. State*, 52 So.2d 117 (Fla. 1950); *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911); *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); *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729 (1968); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

one can conjecture several explanations. In the first place, since most courts impose only minimal penalties on recalcitrant newsmen,¹¹ a newsman adjudged in contempt may not bother to demand a hearing; hence, many incidents may have gone unreported. Second, and perhaps more important, while private litigants or criminal defendants would rarely hesitate trying to force information from a reluctant newsman, both local and federal government must maintain a working relation with the press. Consequently, government traditionally turned to the press only as a last resort.¹² In the past when government found it necessary to resort to the press, it usually entered into negotiations with the party from whom the information was sought in order to reach "a compromise acceptable to both parties."¹³ Conversely, newsmen, and especially those employed by local newspapers, radio and television stations which do not have the power or prestige of the national press media, often complied with requests for information, even without the issuance of a subpoena, and sometimes still do.¹⁴

The various representatives of the press are not usually willing to discuss how often they have cooperated with government requests, with or without the legal compulsion of a subpoena.¹⁵ Thus, the frequency and scope of past governmental requests for newsmen's information, and the press's response thereto, is unclear. However, whatever the situation in the past, it is clear that both federal and local governments are now making frequent demands for wholesale disclosure of information and films, and at least the national press is not uniformly complying.¹⁶

11. In *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729 (1968), for example, the editor of a university newspaper who had refused to reveal the names of seven drug users whom she had previously interviewed was fined 300 dollars. An association of newspaper publishers and editors paid the fine. See *N.Y. Times*, June 29, 1966, at 23, col. 1. Fines are almost always paid by the newsman's employer, who may be able to deduct the relatively small amount as a cost of doing business. The newsman himself, however, will have to serve any jail sentence. Sentences have been as long as ten days. See, e.g., *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958).

12. Interview with Tom Reddin, former Chief of Police of Los Angeles, California, in Los Angeles, California, July 23, 1970. Mr. Reddin explained that city officials usually had other sources of information and rarely found it necessary to turn to the press. When it was necessary, they did so only with the greatest reluctance.

13. Statement of Attorney General John N. Mitchell, Feb. 5, 1970, *N.Y. Times*, Feb. 6, 1970, at 40, col. 4.

14. Two sources were willing to admit and discuss this fact. One is legal counsel for a large and nationally prestigious newspaper. The other is a member of a law firm that represents a smaller publication, part of a large chain of newspapers. Both sources were emphatic that neither their names nor the name of their client papers were to be used. Most press representatives will not even discuss this topic on a confidential basis. See note 15 *infra*.

15. On three separate occasions, editors asked by this writer to discuss cooperation given by their newspapers to government agencies flatly refused and when pressed, terminated the conversation.

16. See note 45 *infra*.

There have been dozens, and probably hundreds, of such subpoenas in the last two years, most of which were issued in connection with investigations or prosecutions of dissident political groups.¹⁷ The reasons for this sudden rash of subpoenas are only partially apparent. Government agencies issue subpoenas because a subpoena is necessary to insure that the newsman or his films appear in court or in front of the grand jury or legislative investigating committee.¹⁸ The question is *why*, for the first time, is government finding it necessary to use the newsman's testimony or films in these proceedings so often? Several answers are possible. First, government for the first time since the labor disturbances of the 1930's is facing large scale social turmoil, and in its haste to restore order is trying to gather evidence from any available source.¹⁹ Second, the advent of subpoenas duces tecum issued for newsmen's film results from the fact that television coverage is a relatively recent phenomenon, and the cameraman's film is the most graphic—if not always the most accurate—record of what actually occurred. Third, in many cases the press itself is apparently no longer complying with discreet pre-subpoena governmental requests for information and films.²⁰ The press's reasons for non-compliance at the pre-subpoena stage are, again, a matter of conjecture. A press that has

17. The number of recent subpoenas is virtually impossible to document or even estimate accurately. The subpoenas have been issued by numerous different governmental agencies to numerous press organizations in various parts of the country, and there is no central file available containing all the subpoenas. Compiling a complete list would involve polling every court or press organization in the country. A partial list, documenting the issuance of several dozen subpoenas, is on file with the *California Law Review*.

18. The formality of a subpoena is at times apparently dispensed with. According to her attorney, a newswoman recently forced to appear in a San Francisco murder trial, received before her first appearance only a post card from the District Attorney's Office, instructing her to be in court on a certain date. A subpoena was, however, issued for her second appearance.

19. The Southern states were, of course, faced with large scale civil rights demonstrations in the late '50's and early '60's. The national press gave these demonstrations great coverage and obtained numerous interviews with the leaders of the movement. The Southern states instigated frequent prosecutions against both the leaders of and the participants in the demonstrations. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Adderly v. Florida*, 385 U.S. 39 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965). These states, however, apparently never attempted to subpoena any of the national press media. Had these states issued any subpoenas, the national press media, hostile to the segregationist position of Southern officials, would almost certainly have resisted the subpoenas and appealed any contempt citations. There are no recorded cases of any such incidents.

20. For example, in *In re Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970), the FBI made six separate attempts to question the newsman involved. Affidavit of Raymond N. Byers (Special Agent of the Federal Bureau of Investigation), attached to the Government's Second Supplement to Memorandum In Opposition to Motion to Quash Grand Jury Subpoenas at 1.

been the subject of hostile verbal abuse from the current Administration may be hesitant to cooperate in any way with the Federal Government. Furthermore, the press, because of the current social disorder, may be bombarded with pre-subpoena requests, and hence may believe some sort of stand is necessary. Moreover, the press may fear that if compliance results in any useful disclosures, federal and local government agencies will then not hesitate to subpoena the newsman or his films and force him to make a public appearance in court. Finally, the pressure on the press has been compounded by the increased demand for films by criminal defendants,²¹ who may be either the protestors or police officers themselves under indictment for violation of federal civil rights statutes.²²

Thus, although newsmen have always faced demands for disclosure of information, the problem today is of a different magnitude. Since government traditionally used restraint in the issuance of subpoenas, and since any demands government did make were met, on the whole, with quiet and inconspicuous compliance (or resistance), usually at the pre-subpoena stage, the public became aware of the pressure on newsmen only on those infrequent and usually non-political occasions when the newsman showed up in court. On those occasions, the newsman usually took the contempt citation in order to uphold the ethics of his profession²³ and accepted fine or imprisonment rather than disclose his source.²⁴ Thus the public might rely on the newsman's integrity, un-

21. Newspaper counsel and editors are unanimous in stating that defense subpoenas are probably more numerous than governmental ones. The *San Francisco Examiner*, for example, has received eleven defense subpoenas duces tecum since 1969. A list of these subpoenas is on file with the *California Law Review*. Individual *Examiner* reporters may have also received subpoenas ad testificandum, which would not be in the *Examiner's* records.

The press may find itself subpoenaed by both sides in a criminal case. For example, in one recent trial in which six youths were accused of killing a police officer, Defense Attorney R. J. Engel subpoenaed the *San Francisco Examiner* for production of its back files. Apparently, an examination of these files turned up nothing of use to the defense because no further action was taken. However, Deputy District Attorney Thomas Norman did subpoena an *Examiner* newswoman to testify regarding an interview with one of the defendants. The newswoman appeared in court, but refused to answer any questions and was cited for contempt. See S.F. Chronicle, Oct. 20, 1970, at 5, col. 6.

22. See note 222 *infra*.

23. In 1934 the American Newspaper Guild adopted the following as part of the newsman's code of ethics: "[N]ewspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies" G. BIRD & F. MERWIN, *THE NEWSPAPER AND SOCIETY* 567 (1942).

24. *In re Wayne*, 4 Hawaii 475 (U.S.D.C. 1914), is the only reported case in which a reporter revealed his source. Recently there have been several instances of reporters testifying under compulsion of governmental subpoena. See, e.g., N.Y. Times, June 4, 1969, at 16, col. 3 (*New York Times* reporter testifying about SDS before House Internal Security Committee).

aware that the newsman did at times indeed turn over at least some of his information. With the recent rash of subpoenas and court orders, and the newsman or his films regularly showing up in court, the public can no longer remain unaware of the pressure to which the press is subjected or of the likelihood that any given newsman may be forced to reveal his information and sources.

B. *The Chilling Effect of Forced Disclosure*

The press relies heavily on "confidential," off the record," and "not for attribution" information. In a survey taken in 1969²⁵ 27 out of 32 newspapers surveyed reported publishing stories stemming from confidential information. Newsmen unanimously stress the importance of such information to their work.²⁶ For example, a noted correspondent explains that in the course of reporting on diplomatic affairs:

I depend extensively on information which comes to me in confidence from sources whose anonymity must be maintained. Diplomacy is conducted as a private business. In my experience, diplomats detest publicity.²⁷

A prominent news commentator agrees on the importance of confidential information:

I regularly talk with government officials, former officials, military people and a wide spectrum of others who possess special infor-

25. Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, 57 (1969).

26. See text accompanying notes 165-73 *infra*. The government also relies heavily on confidential information—but in a slightly different way. Government officials are notorious for their 'off-the-record' and 'not for attribution' remarks. This tendency has become so pronounced recently that one news columnist was prompted to write the following tongue-in-cheek account:

Settling back in his chair the Anonymous High Official breathes heavily, glances around the oblong table, notes the poised pencils and makes his decision: will his information be—on-the-record; off-the-record; half-and-half; background; deep background; very deep background; formula attribution ("usually well-informed sources")—?

.
There's always the question whether it's "on or off"—the record, that is. . . . The Women's National Press Club put on a recent whingding where the Attorney General commented easily about "these stupid bastards who are running our educational institutions," and declared that with campus violence "this country is going so far right you are not even going to recognize it."

A reporter from Women's Wear Daily said she identified herself at the start of the conversation for an interview. . . . What she heard she reported.

A protest exploded instantly from the Department of Justice. Who issued it? "A Justice Department spokesman."

T.R.B. from Washington, *The Off-the-Record Administration*, S.F. Examiner & Chronicle, Oct. 11, 1970, Sunday Punch, at 3, col. 1.

27. Affidavit of Marvin Kalb at 1, attached to Brief for CBS as Amicus Curiae. *In re Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970) [the brief is hereinafter cited as Brief for CBS].

mation or expertise on public issues.

A great deal of this talk is of the 'off the record' or 'not for attribution' kind. It is for my own information.²⁸

Threat of exposure or disclosure of his confidential information dries up a previously talkative source. The source's motivation in talking to the newsman may be spite, money, a desire to improve his own public image or to justify his official actions, or an altruistic desire to be of public service. But whatever his motivation it is clear that in many cases his main concern is keeping his identity and, in some cases, confidential information secret: were he willing to have either made public, he would have held a public press conference in the first place. Hence, he is willing to talk to a newsman he knows and trusts, but only because he can rely on that reporter's integrity.²⁹

Most confidential information comes to newsmen from informants with whom they have had previous dealings.³⁰ The communications are, in other words, the product of a certain relationship between informant and newsman, the crux of which is the source's confidence in the newsman.³¹ The recent rash of subpoenas and the resulting pressure on newsmen has apparently destroyed much of this confidence. Many noted journalists report specific instances of former sources now declining to talk to them, expressly on the grounds of *fear* of forced disclosure.³² The newsmen are unanimous in stating that an *actual* instance of a newsman's disclosure would cost that newsman all his remaining sources.³³

In the case of dissident minority groups, the importance of the con-

28. Affidavit of Eric Severeid at 1, attached to Brief for CBS.

29. Walter Cronkite, a well known news analyst, states:

The material that I obtain in privacy and on a confidential basis is given to me on that basis because my news sources have learned to trust me and can confide in me without fear of exposure. In nearly every case their position, perhaps their very job or career, would be in jeopardy if this were not the case.

Affidavit of Walter Cronkite at 2, attached to Brief for CBS.

30. *Id.* at 2. See also Affidavit of Jon Lowell at 1, and Affidavit of Min S. Yee at 2, both attached to Brief for Newsweek.

31. See, e.g., Affidavit of Walter Cronkite and Affidavit of Eric Severeid, attached to Brief for CBS.

32. See, e.g., Affidavit of Jon Lowell at 2-3, Affidavit of Frank Morgan at 2-3, attached to Brief for Newsweek; Affidavit of Dan Rather at 2, attached to Brief for CBS; Affidavit of Gerald Fraser at 3, attached to Brief for Petitioner, *In re Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970) [the brief is hereinafter cited as Brief for Petitioner].

33. See, e.g., Affidavit of Eric Severeid at 1, Affidavit of Walter Cronkite at 3, attached to Brief for CBS; Affidavit of Earl Caldwell at 4, attached to Brief for Petitioner. Several reporters who have testified under the compulsion of a subpoena explain that after their testimony their former sources severed all relations with them. See, e.g., Affidavit of Anthony Ripley at 2-3, attached to Brief for Petitioner; Affidavit of Min S. Yee at 2-3, attached to Brief for Newsweek.

fidential relationship is accentuated. Dissident groups often feel oppressed by the 'establishment.' They therefore distrust outsiders generally and newsmen in particular.³⁴ Members of these groups refuse to talk freely with any newsman until he as an individual has satisfied them that he is a trustworthy and safe repository of their confidence.³⁵ When a newsman has gained the dissidents' confidence, their practice is to rely on his judgment and a sense of mutual understanding to determine which, among the disclosures made to him, he may publish, rather than to announce formally that something is "off the record."³⁶ The drying up of sources due to recent government pressure on the news media has been especially pronounced in the case of these dissident minority groups. Numerous newsmen report, for example, that Black Panther or Students for a Democratic Society sources previously open to them are no longer accessible for interview.³⁷

The newsman faces a vexing dilemma. Much information is no longer available to him, and that which is, he may be forced to reveal on pain of fine or imprisonment. If he gives in to the pressure to divulge his information, he faces, at best, the loss of confidence in him by his remaining sources, and at worst, physical retaliation by the source whose information he has revealed.³⁸

Newsmen relying on confidential information and relationships are not the only ones in trouble. The situation has become equally untenable for newsmen covering public protest activity. It is common for

34. This point was stressed in a conversation with this author by Black Panther Attorney Charles Garry, October 15, 1970 in San Francisco. See also Affidavit of Earl Caldwell at 2, attached to Brief for Petitioner; Affidavit of Thomas A. Johnson at 2, Affidavit of Wallace Turner at 2, attached to Brief for Petitioner.

35. Mr. Garry explained that Panther leaders will not talk with any newsman without first verifying the newsman's reputation and integrity with him. See also Affidavit of Gerald Fraser at 2, and Affidavit of Earl Caldwell at 2, attached to Brief for Petitioner.

36. Affidavit of Earl Caldwell at 3, attached to Brief for Petitioner.

37. See, e.g., Affidavit of Thomas A. Johnson at 2, Affidavit of John Kifner at 2-3, attached to Brief for Petitioner; Affidavit of Nicholas Charles Proffitt at 3, attached to Brief for Newsweek.

38. All of the affidavits in the *Caldwell* case from newsmen who have covered radical groups emphasize the possibility of physical retaliation. One reporter explained:

Based on my own experiences, being black and knowing the black community, I can say with certainty that any appearance by a black journalist behind closed doors, such as the appearance that Earl Caldwell . . . has been subpoenaed to make . . . , could be personally dangerous to him A reporter covering the black community . . . [is] dealing with a much smaller community than the white community and this smaller community contains a far greater percentage of activists.

Affidavit of Thomas A. Johnson at 3, attached to Brief for Petitioner. Another newsman explained that members of the Venceremos Brigade, whom he had accompanied to Cuba, threatened him with remarks such as "we're not worried We know where to find you." Affidavit of Min S. Yee at 4, attached to Brief for Newsweek.

reporters, photographers and television cameramen to operate amidst race riots, protest demonstrations, strikes, campus confrontations and other events which could later give rise to civil or criminal inquiry. Widespread use of newsmen's testimony and films in legal proceedings has exposed the newsmen covering these events to physical abuse from both police and dissidents. Aware of the possibility of the films or testimony later being used against them, law enforcement officers are in many cases no longer willing to cooperate with newsmen covering the protest activities, and indeed often attempt to prevent coverage altogether.³⁹ The dissidents have reacted similarly. In recent months, newsmen have been stoned, clubbed and beaten, and it has become commonplace for photographers and cameramen to have their cameras smashed by individuals—and police—accusing them of “working for the other side.”⁴⁰

Newsmen do not function well in this atmosphere. Perhaps equally important, the number of subpoenas and court orders to testify are becoming prohibitive in terms of sheer time and inconvenience.⁴¹ The newsman and especially the cameraman who covers any public confrontation can plan on spending a good many hours before a grand jury or in court. The newsman who establishes a relationship with any dissident group can expect a similar fate. These court and grand jury

39. In one typical incident, a photographer on assignment for the *San Francisco Chronicle* attempted to photograph Berkeley police officers arresting a young man. As the photographer approached the arrest scene, a sheriff's deputy ran toward him and blocked him from going any closer. The photographer identified himself as a member of the press and displayed his credentials. The deputy told him that “he didn't give a damn,” and warned the photographer in abusive, obscene language not to take any more pictures. Bay Guildsman, Aug. 1970, at 1, (newsletter of the San Francisco-Oakland Newspaper Guild).

40. The problem of physical assaults on newsmen, and especially cameramen, has become so significant that San Francisco newsmen have organized to demand that newspaper and television station management provide helmets to all newsmen sent to cover public confrontations and that management assign a reporter to stay with each photographer, to keep an eye out for “bricks, police clubs and attacks by militants.” Bay Guildsman, Feb. 1969, at 1, col. 5. The newsmen are also requesting management to provide self-defense training for reporters and cameramen. *Id.* An account of physical assault is given by a *San Francisco Chronicle* photographer: “I was standing . . . where the demonstrators built a bonfire, and I heard someone yell ‘Get the pig photographer’ and there was a hail of rocks. I turned and ran like hell. Luckily, I was only hit a couple of times in the leg.” Bay Guildsman, May 1970, at 1, col. 1.

41. The legal counsel for a large and nationally prestigious newspaper [see note 14 *supra*] explained that his newspaper's main objection to the subpoenas is probably the great amount of time and inconvenience ensuing therefrom. He said that because of the great number of recent subpoenas, the paper's records department (the newspaper's library) was spending many of its working hours going back through old files to find clippings and photographs for compliance with subpoenas *duces tecum*, and that the paper's legal department and individual newsmen were spending a great many hours either in court or before grand juries, or preparing for these appearances.

appearances may cut significantly into the newsman's working hours.⁴²

Such circumstances must inevitably hinder the ability of the press to gather the news. They apparently may also have a detrimental effect on some newsmen's willingness to disseminate the news. Reporters, because of their awareness of the risk of subpoena and the consequences ensuing therefrom, sometimes, and perhaps often, now hesitate to include in their articles or broadcasts certain types of information which they believe will induce a subpoena.⁴³ Similarly, it has become common for newspapers and television stations to destroy all their unpublished film in order to avoid having it available for production under compulsion of subpoenas duces tecum.⁴⁴

Thus, the greatly expanded use of subpoenas and court orders to testify has significantly impaired the press's ability to gather and disseminate the news. This is perhaps why, for the first time, the news media have mounted organized and massive resistance to the pressure upon them.⁴⁵

42. A reporter for the *San Francisco Examiner*, subpoenaed by the prosecution in a recent San Francisco murder trial, spent four full days in court before being sentenced to five days in jail for refusal to testify. See S.F. Chronicle, Oct. 20, 1970 at 5, col. 6.

43. Two of the courts recently recognizing a privilege have taken account of the possibility of self-censorship. An Illinois court explained:

The indiscriminate serving of such subpoenas necessarily has a chilling effect upon the operation and functioning of media in the City of Chicago. . . . Members of media necessarily become conscious in their news gathering activities of a potential later questioning concerning their conduct and the contents of their stories in relation to what was published and what was not published. In sum, the necessary consequences of indiscriminate subpoenaing could result in the evils inherent in self-censorship.

Order Quashing Subpoenas, *People v. Dohrn*, No. 69-3808 (Cir. Ct. of Cook County—Crim. Div. June 12, 1970). Similarly, the Ninth Circuit recognized that "it is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation." *In re Caldwell*, No. 25,025 (9th Cir. Nov. 18, 1970).

44. The St. Louis Post-Dispatch, for example, on June 25, 1970, dropped its appeal of a district court decision requiring it to turn over unpublished photographs of a demonstration at Washington University because of a compromise reached with the Justice Department. The paper, however, immediately ordered all its photographers henceforth to destroy all unpublished prints after one week. See *The Guild Reporter*, July 10, 1970, at 5, col. 5, (official organ of the American Newspaper Guild).

45. The media's decision to fight the pressure on a collective basis is quite apparent. For example, in *In re Caldwell*, 311 F. Supp. 358, (N.D. Cal. 1970), Earl Caldwell, a *New York Times* reporter, and the *Times* itself were parties at the district court; the *Times*, however, participated only as an amicus curiae at the Ninth Circuit. *Newsweek*, CBS and the Associated Press filed Amici Curiae briefs in the district court and on appeal to the Ninth Circuit, attaching to the briefs affidavits from many eminent newsmen. Each was represented in both the trial and appellate proceedings by counsel from prominent New York and San Francisco law firms. The willingness of CBS, *Newsweek* and the Associated Press to incur the expense of this legal work in an action to which they were not parties is some evidence of how strongly the media feel the need for a privilege.

C. *The Caldwell Case: The Problem in Microcosm*

In re Caldwell,⁴⁶ arising out of a San Francisco federal grand jury investigation of the Black Panther Party, typifies the events surrounding the recent series of government subpoenas. The *New York Times* had assigned Earl Caldwell, a black journalist, to cover certain militant and dissident groups including the Black Panthers.⁴⁷ Caldwell was given this assignment when it appeared that the *Times'* resident San Francisco correspondents, both of whom were white, were unable adequately to cover the activities and views of the black militants. The militants distrusted them, as whites, and refused to talk freely to them.⁴⁸ Caldwell had covered the Panthers almost since the Party's beginnings. Having grown to trust Caldwell, Panthers would discuss Party views and activities freely with him.⁴⁹ With this information, Caldwell had written a series of articles, based on material for the most part unavailable to other newsmen. Whenever he had felt that disclosures made to him were intended for publication, he had used them in his articles. Many disclosures were not used because he realized they were meant to be confidential.⁵⁰

Since the summer of 1969, if not earlier, a San Francisco federal grand jury had been conducting an investigation into various Black Panther activities. During the summer several subpoenas were served on Party members and records in connection with an investigation of possible criminal activity.⁵¹ In December the Black Panther Chief of Staff, David Hilliard, was indicted on a charge of threatening to kill President Richard Nixon.⁵² The alleged threat was uttered by Hilliard in a public speech broadcast on local radio and television stations.⁵³ On February 5, 1970, the Government filed a Notice of Motion to Com-

This feeling is also apparent at the level of the individual newsman. For example, the Seattle Convention of the American Newspaper Guild (the AFL-CIO union representing newsmen) recently, in response to requests from its membership, adopted a demand for employers to join in newsmen's defense, meet all their legal expenses and indemnify them against any monetary loss, including fines and loss of pay. The convention also called on the American Civil Liberties Union to convene a nation-wide conference to establish a legal-aid fund to help newsmen who choose to resist subpoenas. See *The Guild Reporter*, July 10, 1970 at 1, col. 1.

46. 311 F. Supp. 358 (N.D. Cal. 1970).

47. Affidavit of Earl Caldwell at 1, attached to Brief for Petitioner.

48. Affidavit of Wallace Turner at 2, attached to Brief for Petitioner.

49. Affidavit of Earl Caldwell at 1-2, attached to Brief for Petitioner.

50. *Id.* at 3.

51. According to the Justice Department, the grand jury was investigating possible violations of 18 U.S.C. §§ 2101, 231 ("Riots" and "Civil Disorders") & 1341 ("Frauds and Swindles"). Affidavit of Francis L. Williamson at 2, attached to Opposition Memo, *supra* note 7.

52. Affidavit of Francis L. Williamson at 2, attached to Opposition Memo.

53. *Id.* at 5.

pel Compliance with subpoenas served on several Party leaders, including one Raymond 'Masai' Hewitt, requiring the production of certain documents which related to publication of a number of issues of *The Black Panther*, a weekly paper published by the Party.⁵⁴ The Government informed the court "that threats to kill President Nixon had been published and disseminated in the aforesaid issues of *The Black Panther*, and the Grand Jury was inquiring into a possible violation of 18 U.S.C. 1751, captioned 'Presidential assassination, kidnapping and assault,' as well as other matters."⁵⁵

On December 14, 1969, Caldwell published an article in *The New York Times* in which he quoted David Hilliard as saying to him: "We are special. We advocate the very direct overthrow of the Government by way of force and violence The only solution . . . is armed struggle."⁵⁶ According to the Government, "[t]his statement, coming after the threat of the Panthers to kill President Nixon, . . . appeared relevant to an inquiry or investigation of a possible violation in connection with the publication of these statements and related activities of the responsible individuals."⁵⁷ Between December 23, 1969 and January 12, 1970, the FBI made six attempts to contact Caldwell, failing each time.⁵⁸ On January 30, 1970, a subpoena was issued to Caldwell requiring him to appear before the grand jury. The schedule attached to the subpoena ordered production of:

Notes and tape recordings of interviews covering the period from January 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization and activities of said organization, its officers, staff, personnel and members, including specifically, but not limited to, interviews given by David Hilliard and Raymond 'Masai' Hewitt.⁵⁹

After negotiation with Caldwell's attorney the Government continued indefinitely the return date of this subpoena, issuing instead a subpoena ad testificandum, stating that "[i]f Mr. Caldwell's personal testimony before the grand jury turns out to be sufficient for the needs of the grand jury, it may not be necessary for the grand jury to examine the

54. *Id.* at 2.

55. *Id.* at 3.

56. N.Y. Times, Dec. 14, 1969 at 64, col. 1.

57. Affidavit of Francis L. Williamson at 3, attached to Opposition Memo.

58. Affidavit of Raymond N. Byers at 1, attached to the Second Supplement to Opposition Memo.

59. Schedule attached to subpoena issued by the United States District Court for the Northern District of California, on application of the United States, January 30, 1970. Raymond Hewitt was one of the Black Panther leaders served with an earlier subpoena. See note 54 *supra* and accompanying text.

tapes and documents.”⁶⁰ Caldwell and the *Times* moved to quash the subpoenas. The district court refused to grant the motion, but issued a protective order limiting the scope of permissible inquiry. This order provided that Caldwell “need not reveal confidential associations that impinge upon the effective exercise of his First Amendment right to gather news for dissemination to the public through the press or other recognized media until such time as a compelling and overriding national interest which cannot be alternatively served has been established”⁶¹

Despite the protective order, Caldwell continued in his refusal to appear before the grand jury and was held in contempt.⁶² On appeal,⁶³ the Court of Appeals for the Ninth Circuit upheld the protective order but vacated the order requiring Caldwell to appear before the grand jury.⁶⁴ Affirming the district court’s finding of a privilege in the absence of an overriding national interest,⁶⁵ the Ninth Circuit held that mere attendance at secret grand jury proceedings would, in this case, violate that privilege because such an appearance, even under the shield of the protective order, would cause Caldwell’s Black Panther sources to sever their relationship with him.⁶⁶ The court explained that the “question is whether the injury to First Amendment liberties which mere attendance threatens can be justified by the demonstrated need of the Government for appellant’s testimony as to those subjects not already protected by the privilege.”⁶⁷ Because Caldwell could testify to nothing that was not either protected by the district court protective order or already disclosed in his published articles, his testimony would be superfluous. The court reasoned that since Caldwell’s “response to subpoena would be a barren performance—one of no benefit to the Grand Jury,”⁶⁸ destroying his “capacity as a news gatherer for such a return hardly makes sense.”⁶⁹ There was, in other words, “no public interest of real substance”⁷⁰ in competition with the jeopardized first amend-

60. Opposition Memo at 1.

61. 311 F. Supp. at 360.

62. Caldwell appeared in court on June 5, 1970 and made a formal statement that he would not testify before the grand jury, despite the protective order. He was cited for contempt, but sentence was stayed pending appeal. See N.Y. Times, June 6, 1970 at 20, col. 2.

63. The *Times* did not join Caldwell in taking the appeal, but rather participated only as an amicus curiae.

64. No. 26,025 (9th Cir. Nov. 18, 1970) (slip opinion).

65. *Id.* at 8.

66. *Id.* at 11.

67. *Id.* at 12.

68. *Id.*

69. *Id.*

70. *Id.*

ment freedoms.⁷¹

The court explained that if such a public interest were ever to arise, it would be on an occasion where a witness even with the protection of the privilege would still serve a useful purpose before the grand jury.⁷² The court indicated that such occasions would probably be rare⁷³ and held that: "[W]here it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness' presence"⁷⁴ The court expressly declined to specify the requirements of such a governmental showing,⁷⁵ and then, in an apparent contradiction of its earlier broad rule, carefully cautioned that the holding was a narrow one, confined to a "news source that is as sensitive as the Black Panther Party,"⁷⁶ and a "reporter who so uniquely enjoys the trust and confidence of his sensitive news source."⁷⁷

II

PRECEDENT AND THE PRIVILEGE

Except in jurisdictions where a privilege is granted by statute,⁷⁸ the courts until very recently have rejected both the common law and the constitutional claims of privilege, and with a single exception⁷⁹ even those courts in statutory-privilege jurisdictions have shown their disapproval of the privilege by construing the statutes as narrowly as possible.⁸⁰ The earlier cases presented only the question of the confidential source. With one exception,⁸¹ the privilege issue traditionally arose where the newsman published an explosive article and then refused to

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 13.

76. *Id.*

77. *Id.*

78. Fourteen states have adopted a statutory privilege. See ALA. CODE, tit. 7, § 370 (1958); ARIZ. REV. STAT. ANN. § 12-2237 (1956); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West 1966); IND. ANN. STAT. § 2-1733 (Supp. 1966); KY. REV. STAT. § 421.100 (1962); LA. REV. STAT. §§ 45:1351-54 (Supp. 1952); MD. CODE ANN., art 5 § 2 (1957); MONT. REV. CODES ANN. §§ 93-601-1 to -601-2 (1964); N.J. STAT. ANN. § 2A:81-10 (1951); N.M. STAT. ANN. § 20-1-12-1 (Supp. 1967); N.Y. CIV. RIGHTS LAW, § 79-H (McKinney Supp. 1970); OHIO. REV. CODE ANN. §§ 2739.04, 2739.12 (Supp. 1966); PA. STAT. ANN., tit. 28 § 330 (Supp. 1965).

79. *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

80. See, e.g., *In re Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964) (California statute); *Deltac, Inc. v. Dun & Bradstreet, Inc.*, 187 F. Supp. 788 (N.D. Ohio 1960) (Ohio statute); *State v. Donovan*, 130 N.J.L. 130, 30 A.2d 421 (1943).

81. *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

identify the source of his information. In the last year, however, questions involving the content of a newsman's information and of films have also reached the courts. Some courts have begun to recognize a qualified constitutional privilege.

A. *Precedent: the Common Law Claims*

Until the fifties, the proponents of a newsman's privilege raised only common law claims.⁸² They argued that their pledges of confidentiality should be respected either because their means of livelihood would be in jeopardy were they to break the pledge⁸³ or because the same policies underlying the establishment of the existing common law privileges⁸⁴ dictated recognition of a newsman's privilege.⁸⁵ The courts brusquely disposed of these contentions. Stressing that disclosure is required of all witnesses "in order that justice may prevail"⁸⁶ and that a newsman's privilege would be "detrimental to the due administration of law,"⁸⁷ the courts uniformly rejected the privilege, often citing Professor Wigmore:

In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege

Accordingly . . . a confidential communication . . . to a journalist . . . is not privileged from disclosure.⁸⁸

Wigmore's conclusion followed from his four requirements for the traditional establishment of a common law privilege: First, the communications must originate in a confidence that they will not be disclosed; second, the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; third, the relation must be one which in the opinion of the community ought to be sedulously fostered; and finally, the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.⁸⁹ Wigmore did not specify why he found the four conditions

82. The first reported case to raise the constitutional claim was *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

83. *See, e.g.*, *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911).

84. Common law recognized an attorney-client and a marital privilege. *See* 8 J. WIGMORE, *EVIDENCE* (McNaughton rev. 1961) §§ 2285, 2290-92, 2294-304, 2306-18, 2320-24 (attorney-client), 2227-28, 2230-32, 2334-36, 2239-43, 2245, 2332-41 (marital).

85. *See, e.g.*, *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291, 199 N.E. 415 (1936).

86. *Id.*, 199 N.E. at 416.

87. *In re Grunow*, 84 N.J.L. 235, 236, 85 A. 1011, 1012 (1913).

88. 8 J. WIGMORE, *supra* note 84, § 2286.

89. *Id.* § 2285.

lacking in the case of the journalist; rather, he dismissed the journalist's claim on the basis of a 1938 report of the American Bar Association Committee on Improvement of the Law of Evidence:

Of recent years, there have appeared on the statute books of several legislatures certain novel privileges [T]hey bear the marks of having been enacted at the instance of certain occupational organizations The demand for these privileges seems to have been due, in part to a pride in their organization and a desire to give it some mark of professional status, and in part to the invocation of a false analogy to the long-established privileges for certain professional communications.

The analogies are not convincing [W]e recommend against any further recognition of . . . privilege for information obtained by *journalists*.⁹⁰

Wigmore and the courts which cited him as authority assumed that journalists could satisfy only the requirement of confidentiality. They did not undertake seriously to consider whether the other requirements could be met. Failing in most cases to recognize the existence of continuing newsman-source relationships, they did not inquire whether forced disclosure resulted in any injury to that relationship or whether that relationship was one which the public interest dictated fostering. Part of this failure stems from the limited context in which the privilege issue usually arose. In earlier years the question presented usually concerned the newsman's duty to reveal the *identity* of his source of already published information, and the courts focused on the flow of information from source to newsman for publication. Since these early cases did not present a newsman's refusal to reveal the contents of information which the source did not intend be published, the courts were never exposed to the quality of the relationship at all. It is significant that the single early case which presented the question of privilege in regard to the contents of the information was the only case to approve and broadly construe an existing statutory privilege.⁹¹ This court recognized that "tips . . . will dry up . . . unless newsmen are able to *fully and completely* protect their sources of information."⁹² Since the courts rejecting the common law privilege failed to recognize the *existence* of any relationship, they did not have to deal with the third and fourth of Wigmore's requirements. They perceived no injury arising from the forced disclosure of communications.⁹³ Even had they seen

90. ABA COMM. ON IMPROVEMENT OF THE LAW OF EVIDENCE (1938), *cited in* 8 J. WIGMORE, *supra* note 84, § 2286.

91. *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

92. *Id.*, 193 A.2d at 185.

93. None of the courts considering the common law claim even mentioned that any injury might occur. *See, e.g., Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911).

such an injury, they probably would have concluded nevertheless that it was outweighed by the fundamental common law duty of every citizen to testify.⁹⁴

The reasoning of these courts seems deficient in several respects. It is curious that courts, and Wigmore himself, who zealously defended law enforcement's privilege to keep secret the identity of its informants⁹⁵ failed to see the parallel between the police-informant relationship and that of the newsman and his source. Courts have stressed the confidential nature of the police-informant relationship, emphasizing that a police informant relies on the discretion of the police officer to keep his identity secret, and justifying this secrecy on the grounds of the public interest in the flow of information.⁹⁶ This public interest is sufficient to overcome any duty to testify that the informant might have. Yet these courts have rejected out of hand the possibility that a similar confidential and continuing relationship is necessary to the effective gathering and reporting of news or that the public interest in the flow of news might be sufficient to outweigh the newsman's duty to testify. The courts seemed to attribute to this duty to testify a certain startling variability: it was a fundamental absolute for newsmen, but was only at times applicable to doctors, lawyers or ministers.⁹⁷ This dichotomy is

94. The courts had little patience with the newsman, brushing aside his claims as frivolous. One court, for example, dismissed the newsman's argument as follows: "A promise not to testify when so required is substantially a promise not to obey the law." *Plunkett v. Hamilton*, 136 Ga. 72, 84, 70 S.E. 781, 786 (1911). It is unlikely that these courts would have been swayed by any detailed sophisticated analysis showing compliance with Wigmore's four requirements.

95. Wigmore exhorted that "A genuine privilege . . . must be recognized for the identity of persons supplying the government with information concerning the commission of crimes. . . . That the government has this privilege is well established, and its soundness cannot be questioned." 8 J. WIGMORE, *supra* note 84, § 2374(f). See also *Morgan v. State*, 211 Ga. 172, 84 S.E.2d 365 (1954) (official communications statute interpreted as including privilege not to disclose informer's identity); *In re Langert*, 5 App. Div. 2d 586, 173 N.Y.S.2d 665 (1958) (commissioner not required to disclose informer's identity or communications); *First Nat'l Bank v. Williams*, 142 Ore. 648, 20 P.2d 222 (1933) (privilege based upon Treasury Department regulations recognized).

96. Wigmore explained:

Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity. . . . The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.

8 J. WIGMORE, *supra* note 84, § 2374(f). See also *In re Langert*, 5 App. Div. 2d 586, 173 N.Y.S.2d 665, (1958).

97. The common law and statutory privileges are extremely broad in terms of the communications they protect. An attorney, spouse or physician would have to

an odd one, for the public interest in the dissemination of news is served by the communications made by source to newsman, while only a private interest is served when an individual communicates to his doctor, lawyer or priest. Furthermore, a newsman's informant is much more likely to be deterred by the threat of forced disclosure than is the individual who makes communications to this doctor or lawyer. This argument was recently expounded by Dean Goldstein of the Yale Law School:⁹⁸ patients or clients communicate to a doctor or a lawyer because they need the benefit of the other's skill. Even if they were aware of the possibility of forced disclosure, they would probably still make the communication because their fear of disclosure is outweighed by the need for immediate aid. The newssource, on the other hand, is not motivated by the urgency of his own need for medical or legal advice; rather, he acts because of the usually less compelling motives of spite, hope of financial reward or a desire to be of public service. Hence, his communication is probably the result of a calculation and more likely to be deterred by the risk of exposure.

B. *The Constitutional Claims*

Beginning with *Garland v. Torre*⁹⁹ in 1958, newsmen began claiming a constitutional privilege. Marie Torre was a newspaper columnist who had quoted in her column an unnamed CBS executive as making certain statements about the actress Judy Garland. Miss Garland brought suit against CBS for breach of contract and libel and sought to force Miss Torre to reveal the source of the statements. Miss Torre refused, claiming that to compel newspaper reporters to disclose confidential sources of news would encroach upon the freedom of the press guaranteed by the first amendment, because "it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public."¹⁰⁰ Mr. Justice Stewart, then sitting on the Second Circuit, rejected this contention. He accepted the hypothesis that forced disclosure might entail an encroachment of press freedom, but reasoned that since freedom of the press is not absolute, the question to be determined was "whether the interest to be served by compelling the testimony of

testify only if the client, other spouse or patient waived the privilege [8 J. WIGMORE, *supra* note 84, §§ 2327-29, 2242, 2340, 2388-91], or if the communication fell within a few narrow exceptions. For example, an attorney must testify concerning communications made to him where his services had been sought or obtained in the commission of a crime. See, e.g., CAL. EVID. CODE § 956 (West 1966).

98. Goldstein, *Newsmen and Their Confidential Sources*, THE NEW REPUBLIC, Mar. 21, 1970, at 13-15.

99. 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

100. 259 F.2d at 547-48.

the witness in the present case justifies some impairment of this First Amendment freedom."¹⁰¹ He concluded that freedom of the press had to give way to the "paramount public interest in the fair administration of justice."¹⁰²

In 1961, the constitutional claim was again invoked. In *In re Goodfader*,¹⁰³ plaintiff, who was seeking damages against the Civil Service Commission of the City of Honolulu for wrongful ouster from her job, sought to force a newsman to reveal the source of his information that the Commission had been contemplating the ouster. Refusing to comply with the court order to disclose his source, the newsman claimed that the court order was an unconstitutional abridgment of freedom of press, since the interest served by compelling disclosure did not justify any impairment of press freedom. On appeal the Supreme Court of Hawaii recognized that the first amendment freedoms were to be given broad scope and that the forced disclosure may constitute an impairment of freedom of the press, but concluded that "such an impairment may not be considered of a degree sufficient to outweigh the necessity of maintaining the court's fundamental authority to compel attendance of witnesses and to exact their testimony"¹⁰⁴

In 1968 in *State v. Buchanan*¹⁰⁵ the Oregon supreme court also rejected the constitutional privilege. The editor of a campus newspaper who had published an interview with seven unnamed drug users was subpoenaed by the local District Attorney to appear before the grand jury. She refused to reveal the names of the drug users and was cited for contempt. On appeal she argued that freedom of the press necessarily includes freedom to gather the news, and that since certain news stories cannot be obtained unless the reporter can promise anonymity to a confidential informer, forced disclosure abridges a protected freedom. The court rejected this contention on the grounds that the newsman has no constitutional right to information which is not accessible to the public generally and that to give the newsman such special privileges would conflict with the equal protection clause of the Federal Constitution.¹⁰⁶

Where the courts dealing with the claims of a common law privilege brusquely dismissed the privilege, as the *Buchanan* court did in the constitutional context, the *Torre* and *Goodfader* courts made some attempt to analyze the claims asserted. Reluctantly willing to assume

101. *Id.* at 548.

102. *Id.* at 549.

103. 45 Hawaii 317, 367 P.2d 472 (1961).

104. *Id.* at 329, 367 P.2d at 480.

105. 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

106. *Id.* at 248-49, 436 P.2d at 731.

that forced disclosure may hinder the flow of news and hence constitute an impairment of freedom of the press, these courts nevertheless arrived at the same conclusion previous courts had: any rights or interests the newsman may have must give way to his duty to testify. The courts purported to reach this conclusion through a process of balancing the interests involved. However, the balancing process they employed was deficient in several respects. In the first place, they disregarded the Supreme Court's dictate to balance the interests and weigh the circumstances in *each particular case*.¹⁰⁷ Mr. Justice Stewart, in *Torre*, went as far as determining that he was not faced with "a case where the identity of the news source is of doubtful relevance"¹⁰⁸ and that "[t]he question asked of the appellant went to the heart of the plaintiff's claim,"¹⁰⁹ but he also used general language about the "right of a litigant to enlist judicial compulsion of testimony"¹¹⁰ and the "paramount public interest in the fair administration of justice."¹¹¹ He never did examine the actual consequences of disclosure to the newswoman involved. Hence, in the *Torre* case the newswoman Torre's interest was never weighed against the litigant Garland's actual needs and interests; rather, the general press interest in the availability of news was weighed against some general lofty interest in the administration of justice. *Goodfader*, while beginning with a statement that in the area of first amendment rights a balancing of the interests must be undertaken, never went on to explore those interests. The *Goodfader* court "readily perceive[d] the disadvantages"¹¹² to a newsman of forced disclosure, but denied that such disadvantages constituted an impairment of constitutional rights and concluded that even if constitutional rights were being impaired, the impairment was not sufficient to outweigh "the necessity of maintaining the court's fundamental authority to compel the attendance of witnesses and to exact their testimony"¹¹³ Thus the court weighed in the abstract the press's interest in non-disclosure against the necessity of maintaining the court's authority.

Second, in their balancing processes the *Torre* and *Goodfader* courts overestimated the weight of the interest in compelling testimony and underestimated the interest asserted by the press. The interest in compelling testimony has never been as "fundamental" or "paramount"

107. *Barenblatt v. United States*, 360 U.S. 109, 126 (1959); *Speiser v. Randall*, 357 U.S. 513, 520 (1958); *American Communications Ass'n v. Douds*, 339 U.S. 382, 399 (1950).

108. 259 F.2d at 549.

109. *Id.* at 550.

110. *Id.* at 549.

111. *Id.*

112. 45 Hawaii at 327, 367 P.2d at 479.

113. *Id.* at 329, 367 P.2d at 480.

as these courts assumed. Both common law and statute have long recognized numerous privileges against compelled testimony,¹¹⁴ and if these same cases had arisen in a statutory newsman's privilege state, the courts would have applied the privilege, any fundamental or paramount interest notwithstanding. Moreover, these courts labelled the litigant's right to compelled testimony a 'public' interest and the newsman's interest in non-disclosure a 'private' one.¹¹⁵ Logically this categorization makes little sense. In the case of civil litigation, the public has no interest in the outcome; only the litigants have anything at stake, and hence compelled testimony serves only their private interests. Conversely, the public has every interest in the newsman-source relationship, because from this relationship comes much of the flow of news.¹¹⁶ Hence, the question is not whether the newsman's private interest is sufficient to overcome the public's interest in compelled testimony, but rather, whether the *litigant's* private interest is sufficient to overcome the public interest in the flow of news.

A series of Supreme Court cases¹¹⁷ indicates that a private litigant's interests are normally subordinate to those of the press. In these cases, beginning with *New York Times v. Sullivan*,¹¹⁸ the Court severely restricted the power of the state to award damages in libel and invasion of privacy suits against the press because of the chilling effect of such damages. Plaintiffs in these suits can now recover only where actual malice or highly unreasonable conduct is shown. The interests of private litigants, then, must give way to those asserted by the press. *New York Times* was decided several years after *Torre* and *Goodfader*, and was apparently unanticipated by them. But whatever the validity of a pre-*New York Times* holding that the press's first amendment rights must give way to the litigant's interest in compelled testimony, such a

114. See note 84 *supra*. The common law privileges have been codified in almost all American jurisdictions. Numerous new privileges have also been statutorily recognized. See, e.g., CAL. EVID. CODE §§ 994 (physician-patient), 1033-34 (priest-penitent) (West 1966).

115. The *Goodfader* court, for example, discussed the interests as follows:

However, despite the broad scope and protective status of First Amendment freedoms and privileges, it is clear that none of them is absolute, and that whether, in any given case, an asserted right under that amendment will prevail or not depends upon the particular circumstances involved and the weighing and balancing of the protection afforded by the right asserted against the purposes that would be defeated or denied by recognition of the freedom or privilege. The *private* or *individual* interest involved must, in each case, be weighed in balance against the *public* interest affected.

45 Hawaii at 324-25, 367 P.2d at 478 (emphasis added).

116. See notes 25-31 *supra* and 185-92 *infra* and accompanying text.

117. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1966); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Greenbelt Coop. Publishing, Ass'n v. Bresler*, 398 U.S. (1970).

118. 376 U.S. 254 (1964).

holding, in light of the subsequent Supreme Court decisions, can no longer stand without some serious re-examination.

The interest in compelled testimony was apparently seen by the *Torre* and *Goodfader* courts to represent not only the litigant's interest in the outcome of the suit, but also the state's interest in the prestige or authority of its judiciary.¹¹⁹ However, this interest, in the absence of a clear and present danger to judicial proceedings, is still insufficient to override the press' first amendment claims, for the Supreme Court has consistently held that it must give way to freedom of the press. In 1941 in *Bridges v. California*,¹²⁰ a case involving a highly publicized and controversial trial, the Court upheld the right of a newspaper to publish, while sentences and a motion for a new trial were under consideration, virulent criticism of and political threats against the judge. The Court also upheld the right of one of the defendants to publish threats of a nationwide labor strike if the new trial were not granted. Six years later, in *Craig v. Harney*,¹²¹ the Court upheld, because of the absence of a clear and present danger to the proceedings, the right of a newspaper to publish highly critical and threatening editorials against a judge considering a motion for a new trial. In *Wood v. Georgia*¹²² the Court upheld the right of a county sheriff to publish harsh criticism of local judges who had just ordered a grand jury investigation into alleged vote-buying activities. The sheriff's campaign against the investigation included delivery of a letter repeating the criticism to members of the jury. In *Garrison v. Louisiana*¹²³ the Court denied to the state the right to punish by criminal libel, false, muckracking and demagogic statements made by a district attorney about the conduct of local judges.

In light of these cases, the question arises why both the *Torre* and *Goodfader* courts chose to subordinate the newsman's interest in non-disclosure to the not-so-hallowed 'public' interest in compelled testimony. The answer seems to be that neither court had any strong conviction that *newsgathering* is a constitutionally protected incident of freedom of the press.¹²⁴ *Bridges*, *Craig*, *Wood*, *New York Times* and

119. The *Torre* court spoke of the obligation to testify and the right of a litigant to compel testimony as "incidents of the judicial power of the United States." 259 F.2d at 549. The *Goodfader* court mentioned the necessity of maintaining "the court's fundamental authority to compel the attendance of witnesses and to exact their testimony" 45 Hawaii at 329, 367 P.2d at 480.

120. 314 U.S. 252 (1941).

121. 331 U.S. 367 (1947).

122. 370 U.S. 375 (1962).

123. 379 U.S. 64 (1964).

124. The *Goodfader* court was only willing to "assume, for the purposes of this case, that the forced disclosure of a reporter's confidential source of information may, to some extent, constitute an impairment of the freedom of the press." 45 Hawaii at 329, 367 P.2d at 480. Judge (now Justice) Stewart, in the *Torre* case, took a firmer

Garrison concerned the right to *publish*, which is the core of the first amendment freedom of press; there was, on the other hand, no precedent for the protection of newsgathering, rather only several lower court cases holding that newsgathering (or "access to the news") is *not* constitutionally protected.¹²⁵ The *Torre* and *Goodfader* courts were willing to proceed on the assumption that newsgathering could find some protection—but not enough constitutional protection to make any impairment of newsgathering a significant encroachment on freedom of the press. Thus, in the balancing process they were not willing to attribute any great weight to the interest asserted by the newsman. Because these courts saw in forced disclosure only a *slight* impairment to an *unprotected*—or *penumbra*—incident of freedom of the press, they reasoned that the interest in compelled testimony must prevail.

The factual context in which privilege cases arise has changed. Because of the recent widespread use of subpoenas and court orders, with the ensuing 'drying up' of sources and physical assaults on newsmen, the impairment—to both the aggregate flow of news and to the ability of the individual newsman to gather news—is no longer slight.¹²⁶ In consequence, newsgathering must be protected if the benefits of freedom to publish are to be realized. Perceiving this necessity, four courts have now recognized a qualified constitutional privilege. In *Alioto v. Cowles Communications, Inc.*¹²⁷ the Mayor of San Francisco brought a libel action in federal court for a magazine article accusing him of having Mafia connections. When the authors of the article refused to answer questions relating to the identity of their source, the Mayor filed a motion to hold them in contempt. The district court refused to grant the motion, affirming a "First Amendment claim of privilege and sustaining it in this case under these circumstances, because . . . there is a lack of reasonable necessity at this time, and . . . there

stand, but still seemed to hold some reservations: he accepted "the *hypothesis* that compulsory disclosure . . . may entail an abridgment of press freedom by imposing some limitation upon the availability of news." 259 F.2d at 548 (emphasis added). By 1965 Mr. Justice Stewart had apparently completely accepted newsgathering as a protected incident. Dissenting in *Estes v. Texas*, 381 U.S. 532 (1965), in which the majority held that the televising of trials is a violation of a defendant's right to due process, he wrote that "[t]he suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms." *Id.* at 614-15.

125. See, e.g., *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958); *United Press Ass'ns v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954); cf. *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967).

126. See text accompanying notes 32-44 *supra*.

127. C.A. No. 52150 (N.D. Cal. Dec. 4, 1969).

are other available methods of handling the situation."¹²⁸ In *People v. Dohrn*¹²⁹ an Illinois circuit court quashed six subpoenas duces tecum served on local newspapers and television stations by members of the militant Weatherman faction of the SDS, under indictment for charges stemming from a violent rampage in the streets of Chicago. This court recognized the privilege because "[t]he indiscriminate serving of such subpoenas necessarily has a chilling effect upon the operation and functioning of [the] media."¹³⁰ The court required the party issuing the subpoena to show: First, probable cause that the films sought contained relevant evidence; second, that the use of subpoenas was the only method available of obtaining that evidence; and, third, that the evidence was so important that non-production thereof would cause a miscarriage of justice.¹³¹ In the *Caldwell* case,¹³² the district and circuit courts perceived that the availability of news is not the only interest asserted by the newsman; rather the courts recognized that when a newsman refuses to reveal the identity of his source or the contents of that source's information, he may also be asserting the source's interests in freedom of speech and association.¹³³

The balancing process employed by *Alioto*, *Dohrn* and *Caldwell* differed in two major respects from the process earlier employed by the *Torre* and *Goodfather* courts: First, the degree of impairment to both the flow of news and the individual newsman; and, second, the protection to be accorded to newsgathering. In addition, the *Caldwell* courts weighed a new set of interests—the source's freedoms of speech and association—in the balance. When a source confides to a newsman, for whatever reasons he finds it advantageous or desirable to do so, his first amendment right of freedom of speech may come into play; when the source chooses to serve whatever objective he may have by putting his

128. Transcript of Proceedings at 167, *id.*

129. Order Quashing Subpoenas, No. 69-3808, (Cir. Ct. of Cook County—Crim. Div., June 12, 1970).

130. *Id.* at 2.

131. *Id.* at 3.

132. 311 F. Supp. 358 (N.D. Cal. 1970); see notes 46-77 *supra* and accompanying text.

133. "Congress shall make no law . . . abridging the freedom of speech" U.S. CONST. amend. I. The district court in *Caldwell* recognized that the relief sought by petitioner presented "issues that go to the very core of the First Amendment, the resolution of which may well be determinative of the scope of the journalist's privilege in sensitive areas of freedom of speech, press and association" 311 F. Supp. at 360. The court explained that when "the exercise of the grand jury power of testimonial compulsion . . . may impinge upon . . . First Amendment rights of freedom of speech, press and association . . . , such power shall not be exercised in a manner likely to do so until there has been a clear showing of a compelling and overriding national interest" *Id.* at 360. The Ninth Circuit agreed that "the First Amendment requires this qualified privilege" No. 26,025 (9th Cir. Nov. 18, 1970) (slip opinion) at 8.

trust in the newsman and making the confidential communication to him, the source may be exercising his right of freedom of association. The *Goodfader* and *Torre* courts had not grappled with these contentions—probably because they were never argued to them. Whatever the accuracy in 1958 and 1961 of the *Torre* and *Goodfader* courts' assessment of the impairment to the flow of news as slight, it is clear that the impairment in 1970 has become great.¹³⁴ The remaining questions, then, are first, whether it was the earlier courts, or the more recent ones, who used the more correct method to judge the weight of the interest of the press, and second, whether there is any constitutional basis for the *Caldwell* courts' recognition of a privilege based partially on the source's freedoms of speech and association.

III

A SUGGESTED THEORY FOR THE CONSTITUTIONAL PROTECTION OF INTERESTS ASSERTED BY THE NEWSMAN

In the process of gathering, publishing or broadcasting¹³⁵ the news, three sets of interests come into play:¹³⁶ *the interest of the source of the information*, if there is one, in making his information known to the newsman, the public, or both; *the interest of the newsman* in being free to gather and publish what information he chooses; and *the interest of society* in the dissemination and receipt of news. These interests are inseparable. Society receives news when the newsman gathers and disseminates it by publication or broadcast. The source, who normally does not have his own means of dissemination, reaches the public through the newsman's publication. The Supreme Court in discussing the goals of the constitutional guarantees of freedom of the press has

134. See notes 32-44 *supra* and accompanying text.

135. Television has become probably a more important medium for the distribution of news than the newspapers. The *New York Times*, the most prestigious publication in the country, has a daily circulation of approximately 890,000. *Time Magazine* has a circulation of approximately 3.9 million, 1970 *WORLD ALMANAC* 350, 351. The nationally televised network news programs have, on the other hand, audiences in the tens of millions. Hence, any discussion of the press must today include broadcasting as well as publishing.

136. A fourth set of interests also arises: that of the *subject* of the information. This subject—who may also be the source—is the person or group that the information concerns, for example, a rioter whom the newsman films, or a government official whom a confidential source accuses of accepting bribes. The interests of the subject of the information do not belong in a discussion of newsman's privilege. His interests are protected by the laws against libel, or invasion of privacy, or both; or if he will be subject to criminal prosecution, by the fourth, fifth, sixth and fourteenth amendments. If the subject happens also to be the criminal defendant or private litigant seeking to force disclosure or production of films, his interests may *override* the newsman's, but they have no bearing on the original determination of whether or not the interests asserted by the newsman are of constitutional stature.

succinctly recognized the inseparability of these interests: "Those guarantees are not for the benefit of the press so much as the benefit of all of us."¹³⁷ Mr. Justice Murphy, concurring in *Craig v. Harney*,¹³⁸ had earlier expounded in greater detail: "A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty. Any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to *print and to read* the truth."¹³⁹ This part analyzes these interests in three contexts: First, the constitutional protection of newsgathering, examined independently of the question of whether or not there is a confidential source; second, the constitutional protection of a news source's interests when he intends his communication to be published, but his identity kept secret; and, third, the constitutional protection of a confidential communication where the source intends that the contents of the communication be kept secret.

A. *The Constitutional Protection of Newsgathering*

The Supreme Court has held that both the dissemination and the receipt of information are constitutionally protected. In holding the Sherman Antitrust Act applicable to a news distribution association which prevented non-member newspapers from using information gathered by member newsmen, the Court said that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."¹⁴⁰ In *Martin v. Struthers*¹⁴¹ the Court struck down a city ordinance forbidding the door to door distribution of handbills because the "[f]reedom to distribute information to every citizen wherever he desires to receive it" is protected by the first and fourteenth amendments.¹⁴² In *Lamont v. Postmaster General*¹⁴³ the Court held held that a post office regulation requiring the Postmaster General to detain and deliver only upon the addressee's request certain communist propaganda abridged the addressee's right to receive the material. Hence, dissemination and receipt of news are squarely within the protection of the first amendment. This protection would seem to extend

137. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

138. 331 U.S. 367 (1947).

139. *Id.* at 383 (emphasis added).

140. *Associated Press v. United States*, 326 U.S. 1, 20 (1944). See also *Associated Press v. KVOB*, 80 F.2d 575 (9th Cir. 1935).

141. 319 U.S. 141 (1943).

142. *Id.* at 146. In 1968 in *Stanley v. Georgia*, 394 U.S. 557 (1968), the Court reaffirmed that freedom of speech and press "necessarily protects the right to receive." *Id.* at 564.

143. 381 U.S. 301 (1964).

to newsgathering, and not merely as a penumbra right, for unless the news is gathered, it cannot be disseminated and received.

Other Supreme Court cases support this conclusion. The dissemination and receipt of news is usually accomplished through the act of *publication*, the core of the first amendment guarantee—or, in the case of television or radio news, through the act of broadcasting which is also protected by the first amendment.¹⁴⁴ Restrictions on *publication* are traditionally recognized as encroachments on freedom of the press.¹⁴⁵ However, insisting that freedom of the press be broadly defined,¹⁴⁶ the Court has extended the first amendment protection to invalidate other types of restrictions where these restrictions would have an eventual chilling effect on publication. In *Grosjean v. American Press Co.*¹⁴⁷ the Court struck down a Louisiana statute placing a tax on newspapers. In *New York Times v. Sullivan*,¹⁴⁸ *Curtis Publishing Co. v. Butts*, and *Walker v. Associated Press*,¹⁴⁹ and *Time, Inc. v. Hill*¹⁵⁰ the Court severely limited the power of the states to award damages for libel and invasion of privacy because of the chilling effect of such damages.

These cases were concerned with the chilling effect on *future* publication. Newspapers that are taxed may go out of business; papers that are held liable on one story may fear to publish a similar one in the future. Restrictions on newsgathering, however, have a chilling effect on *present* publication—what is not gathered cannot be published.¹⁵¹ Furthermore, the chilling effect of a tax or civil liability is speculative. A newspaper may survive a tax, and it may risk liability if it believes a story will increase its circulation. The chilling effect of restrictions on newsgathering is, on the other hand, certain and measurable: the press can only publish what information it can gather; what it cannot obtain will not be published. Because of the direct cause-and-effect relationship between restrictions on newsgathering and restrictions on publication or broadcasting, the argument for first amendment protection from limitations on newsgathering is far stronger than the one for protection from taxation or civil liability. If the Court has granted the latter, pre-

144. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).

145. *See Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

146. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *Martin v. Struthers*, 318 U.S. 141, 143 (1942).

147. 297 U.S. 233 (1936).

148. 376 U.S. 254 (1964).

149. 388 U.S. 130 (1966) (companion cases).

150. 385 U.S. 374 (1967).

151. To this extent restrictions on newsgathering may be similar to forbidden prior restraints. For a discussion of these restraints see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-20 (1931) (invalidating as an unconstitutional previous restraint a state statute providing for the abatement, as a public nuisance, any any "malicious scandalous and defamatory newspaper, magazine or other periodical").

sumably when presented with an appropriate case, it would also grant the former. In the absence of other overriding interests, such protection would today necessarily have to include freedom from forced disclosure or production of films, because the omnipresent threat of forced disclosure or production of films is now a great hindrance to the newsman's ability to gather the news.¹⁵²

The Court has, in another context, indicated some limitation on the right of the press to gather news, and several lower courts have expressly denied any constitutional protection to newsgathering (or "access to the news").¹⁵³ However, this precedent is not determinative of the question of privilege. The lower courts' express denials of any constitutional protection of newsgathering are unsupported by any Supreme Court dicta or holdings, and the two Supreme Court cases indicating some limitations are easily distinguishable. In *Estes v. Texas*¹⁵⁴ the Court granted a new trial to a convicted defendant on the grounds that pre-trial publicity and the highly disruptive presence of numerous reporters, cameras, and microphones in the courtroom during the trial constituted a denial of due process. The Court indicated that such distracting press presence and the televising of trials is not to be permitted. In *Sheppard v. Maxwell*¹⁵⁵ the Court reversed a conviction on similar grounds, and again indicated that some control of press newsgathering activity is necessary.

These cases should not be taken as a rejection of constitutional protection for newsgathering. In the first place, the behavior of the press in both cases was patently outrageous,¹⁵⁶ and beyond legitimization on constitutional—or any other—grounds. Second, the thrust of the Court's language—and outrage—was at the state officials who encouraged the publicity and circus atmosphere for their own political purposes.¹⁵⁷ Third, and most important, the explicit fifth,¹⁵⁸ sixth¹⁵⁹

152. See notes 32-44 *supra* and accompanying text.

153. See *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958); *United Press Ass'ns v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954); *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729 (1968); cf. *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967).

154. 381 U.S. 532 (1965).

155. 384 U.S. 333 (1966).

156. For example, in the *Sheppard* case, involving the murder of a prominent socialite and the trial of her osteopath husband, the press had broadcast live the coroner's inquest complete with the five and one-half hour interrogation of the defendant about his unmarried life and a love affair with his nurse. The press covered the trial in such great numbers that the movement of reporters in and out of the courtroom made testimony almost impossible to hear, despite the installation of loud speakers. Reporters hovered so closely over the defense table that Sheppard and his lawyer had to leave the courtroom to speak confidentially. The newspapers repeatedly published out-of-court statements of witnesses concerning matters which were not admissible evidence. 384 U.S. at 339, 340, 344, 356-57.

157. The *Sheppard* case, for example, came on for trial two weeks before the

and fourteenth¹⁶⁰ amendment guarantees of a criminal defendant's right to a fair trial and an impartial jury were at stake. The Court did not reject a right to gather news; it never considered the right. Rather, the Court focused on and upheld a defendant's right to a fair trial. Because this same right is at stake when a criminal defendant seeks to compel the newsman's testimony or production of his films, the *Estes* and *Sheppard* limitation on the right of the press to gather news is relevant to the proper scope of the privilege. However, this limitation does not defeat the privilege in such cases altogether. The rule laid down by the Court in *Estes* and *Sheppard* was that "the presence of the press must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged."¹⁶¹ Hence, where a defendant could show prejudice or disadvantage by non-disclosure of information or non-production of films, there is presumably no grounds for a newsman's claim of privilege. On the other hand, the question of privilege where there is no showing of prejudice or disadvantage is not illuminated by anything in the *Estes* or *Sheppard* opinions.

Furthermore, *Estes* and *Sheppard* throw no light on the question of privilege in relation to government prosecutions and private litigants. Non-disclosure of information or non-production of films may work to the disadvantage of civil litigants, but their right to compel testimony, unlike the criminal defendant's sixth amendment right, and their right to a fair trial, unlike the criminal defendant's fifth and fourteenth amendment rights, lack constitutional stature and are, according to *New York Times*¹⁶² and the series of cases following it,¹⁶³ subordinate in any event to freedom of the press. Similarly, *Estes* and *Sheppard* are not helpful in relation to a privilege from government subpoena. The proposition that a defendant's fifth, sixth and fourteenth amendment rights override both the state's interest in convicting criminals and the press' interest in gathering news, gives no clue to the outcome when the press asserts its interest in gathering news against the state's interest in convicting criminals. Thus, with the exception of the privilege in relation to the

November general election at which the chief prosecutor was a candidate for judge and the presiding judge was a candidate to succeed himself. *Id.* at 342.

158. "[N]or shall any person be . . . deprived of life, liberty, or property, witnesses in his favor" U.S. CONST. amend. VI.

159. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to have compulsory process for obtaining witness in his favor" *Id.* amend. VI.

160. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" *Id.* amend. XIV.

161. 384 U.S. at 358.

162. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

163. *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Time, Inc. v. Hill*, 385 U.S. 1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

prejudiced criminal defendant, there is no precedent dictating rejection of newsgathering as a constitutionally protected function of the press.

*B. The Constitutional Protection of a Source's Interests
Where He Intends His Identity Be Kept Secret*

Threat of forced disclosure adversely affects the interests of a confidential source as well as the interests of the public. When the source communicates information to a newsman, intending that the information be published but his identity be kept secret, he too has an interest in the publication: whatever his reasons, he desires that information disseminated to the public and publication through the newsman is his means of dissemination. His communication to the newsman is an exercise of his right of freedom of speech, but he exercises that right only on condition that his anonymity be respected. The greater the threat of disclosure, the less his willingness to risk communicating to a newsman.¹⁶⁴ Therefore, the question is whether there is any constitutional basis for recognition of a right to anonymity as an incident of freedom of speech. Supreme Court precedent provides ample authority for such a right. The Court has recognized the right of the recipient of printed matter to remain anonymous. In *Lamont v. Postmaster General*¹⁶⁵ the Court held that the Post Office could not compromise the anonymity of recipients of "communist propaganda" by requiring them to request in writing that the material be delivered to them. In *United States v. Rumely*¹⁶⁶ the Court held that a witness could not be held in contempt for refusing to answer questions put to him by a house investigating committee pertaining to the identities of bulk purchasers of political lobbying material.

The Court has extended this right to anonymity to the author and the distributor of printed matter. In *Talley v. California*¹⁶⁷ the Court struck down a city ordinance making it a misdemeanor to distribute any handbill which did not identify its author. The Court held the ordinance void on its face because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."¹⁶⁸ The *Talley* ordinance prohibited any handbill distributed in any place under any circumstances and was thus void for overbreadth. The Court specifically declined to pass on the validity of an ordinance limited in purpose to identifying those responsible for fraud, false advertising and libel. Hence whether the *Talley* rule protects anonymity in all cir-

164. See text accompanying notes 29-37 *supra*.

165. 381 U.S. 301 (1965).

166. 345 U.S. 41 (1953).

167. 362 U.S. 60 (1960).

168. *Id.* at 65.

cumstances was left an open question, but it would seem to extend at least to all political expression and information about "public matters of importance." Since the Court in other contexts had admonished that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs,"¹⁶⁹ the areas of speech unprotected by the *Talley* rule are probably limited to those specifically mentioned by the *Talley court*: fraud, false advertizing and libel.

Talley provides a strong basis for the newsman's privilege to refuse to identify his source. *Talley* protects the anonymity of the news-source who chooses to print and distribute his information himself. This right to anonymity should not be denied simply because the source chooses to publish through an established press medium. To do so would penalize those who have not the means to print and distribute or broadcast themselves—and few sources do, at least on a large scale. A recent Supreme Court case seems to indicate that such penalization would be unconstitutional. In *Red Lion Broadcasting Co. v. FCC*¹⁷⁰ the Court upheld FCC regulations, promulgated under the "fairness" doctrine, which required radio and television broadcasters to allow equal times to advocates of each side of a public issue. The Court discussed the necessity, due to the shortage of air frequencies, of requiring licenses to broadcast and of limiting the number of licensees.¹⁷¹ The Court went on to hold that although the technological necessity of limiting the number of broadcasters made constitutional the government practice of requiring licenses and thereby giving control of the airwaves to a limited group of persons, neither the government nor the broadcasters themselves could constitutionally bar non-licensees from access to the air waves for the expression of their views.¹⁷² Under the holding of this case, those who do not themselves have the means to broadcast cannot be denied the right to disseminate through the established broadcasting media. This holding may indicate that the *Talley* right of anonymity cannot be limited to those who have the means to print and distribute or broadcast themselves.

The Supreme Court cases establishing the right of freedom of association further support the conclusion that newsmen should be free to protect the anonymity of their newssources. The Court has recognized a constitutional right of individuals who would be ineffectual acting separately to associate in order to assert their interests collectively. In *NAACP v. Button*¹⁷³ the Court held a state statute barring "im-

169. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

170. 395 U.S. 367 (1969).

171. *Id.* at 387-89.

172. *Id.* at 400-01.

173. 371 U.S. 415 (1963).

proper solicitation of any legal . . . business" unconstitutional as applied to the activities of the NAACP because "[i]n the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for the achieving of lawful objectives of equality of treatment by all government" ¹⁷⁴ Similarly, in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*¹⁷⁵ and *United Mine Workers v. Illinois Bar Association*¹⁷⁶ the Court struck down state regulations against the solicitation of legal business as unconstitutional as applied to the labor union practice of retaining lawyers and referring to them union members' injury claims. The Court explained that "the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if workers could not talk together freely as to the best course to follow."¹⁷⁷ An important incident to this right of association is the right to privacy of association, which confers on members of protected associations the right to anonymity. In *Sweezy v. New Hampshire*¹⁷⁸ six members of the Court¹⁷⁹ upheld the right of a witness in front of a state investigating committee to refuse to answer questions about the membership of the Progressive Party in New Hampshire. In a later series of cases¹⁸⁰ the Court struck down various state attempts to force disclosure of NAACP membership lists because "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association."¹⁸¹

174. *Id.* at 429.

175. 377 U.S. 1 (1964).

176. 389 U.S. 217 (1967).

177. *Brotherhood of R.R. Trainmen v. Virginia ex. rel. Virginia State Bar*, 377 U.S. 1, 5-6 (1964).

178. 354 U.S. 234 (1957).

179. There was no majority opinion. Justices Black, Douglas and Brennan joined in the opinion of Chief Justice Warren, upholding the witness' right to silence. Justices Frankfurter and Harlan concurred.

180. *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *Louisiana v. NAACP*, 366 U.S. 293 (1961); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). See also *Shelton v. Tucker*, 364 U.S. 479 (1960) (holding unconstitutional a state statute compelling every teacher, as a condition of employment, to file annually an affidavit listing all organizations to which he has belonged or contributed).

181. *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). In striking down a state statute imposing criminal sanctions on persons using contraceptives, the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), discussed the *NAACP* cases and concluded: "In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion." *Id.* at 483.

The *Trainmen*, *United Mine Workers* and *NAACP* cases provide a compelling argument for the news source's right to anonymity—either as an incident of his right of freedom of speech, or as an incident of a separate and distinct right of freedom of association.¹⁸² Since the news source lacks the means to exercise his right of freedom of speech because he has not the means to print and distribute, he associates with the newsman. Since his goal is the dissemination of information, an interest protected by the first and fourteenth amendments, his association with the newsman should be within the protection of these amendments. Since “inviolability of privacy” is indispensable to the preservation of this association, the news source, as a party to a protected association, should have the right to remain anonymous.¹⁸³ Alternately, the right may also be an incident of freedom of speech: *Talley* recognized a right of anonymity as an incident of freedom of speech in order to encourage public discussion of matters of importance. To limit this right to the few who have the means to print and distribute or broadcast themselves, makes the right futile for the majority who do not have the means themselves and effectively nullifies any encouraging effect on freedom of speech that *Talley* was intended to create. The states in *Trainmen* and *United Mine Workers* could not defeat the statutory rights of workers by prohibiting them from associating; a fortiori, the state should not be able to discourage free speech by defeating the source's

182. Freedom of association was implied to be a separate and distinct right as early as *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Four Justices explained that

[e]qually manifest as a fundamental principle of a democratic society is political freedom of the individual Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.

Id. at 250 (opinion of Chief Justice Warren; Justices Black, Douglas and Brennan joining). In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court for the first time isolated the right: “these [are] indispensable liberties, whether of speech, press or association” *Id.* at 461. By 1960, in *Bates v. City of Little Rock*, 361 U.S. 516 (1960), it was “now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by . . . the Fourteenth Amendment.” *Id.* at 523.

183. The source and the newsman may not have identical interests, but identity of interest has not been a requirement of the freedom of association. In the *Trainmen* and *United Mine Workers* cases, the right was upheld even though the parties to the association, the workers and the attorneys, may not have had identical interests.

The newsman would have standing to assert the source's right to anonymity. In the first of the *NAACP* cases the Court explained that if the members of the NAACP were constitutionally entitled to withhold their connection with the Association, the Association would have standing to assert this right for them, because “[t]o require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958). This reasoning would apply with equal force to the newsman asserting his source's right to privacy of association.

right of anonymity merely because he chooses to disseminate his information in association with the newsman.¹⁸⁴

C. The Constitutional Protection of a Confidential Communication Where the Source Intends the Contents of the Information Be Kept Secret

Where a newssource communicates to a newsman, desiring the contents of his communication be kept secret, the source can claim no interest in the dissemination of the information nor can the newsman assert society's interest in the receipt of that information. However, non-published confidential communications should still derive constitutional protection because of their indirect effect on the dissemination of news. The importance of these non-published, confidential communications cannot be overemphasized. Although this confidential information will not directly reach the public, it has a vital impact on that which is published. This information gives the newsman a wealth of background, enabling him to assess events as they happen, track down newsworthy stories and analyze and interpret the information which is given to him for dissemination.¹⁸⁵

A noted diplomatic correspondent explains that "[s]ecrecy, privacy, off-the-record, background, deep background—these are the words which describe the kind of work involved in the reporting of diplomatic nuance and detail and the building of a pattern which ultimately emerges as a story."¹⁸⁶ Another prominent newsman adds that:

[m]y work, and that of reporters generally, requires more than merely assembling facts. A reporter can know all the facts and still not know the truth. In order to understand the facts, reporters

184. Since the source would have the right to anonymity, citing the newsman for contempt when he refused to identify the source would be an unconstitutional form of state action. See *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

185. Walter Cronkite describes the importance of these communications as follows:

My work involves the preparation, through reading and talking with news sources, of the considerable volume of material necessary for such extemporaneous broadcasts as political conventions, elections and space missions, and for analytical broadcasts such as my daily radio program. It also involves participation in the determination of which stories should be covered on daily television news broadcasts and how they should be covered and participation in the selection of the news items to be broadcast and reading and correcting and, in some cases rewriting those items. All of this work entails the exercise of editorial judgment based on an extensive background of information and ideas gathered from a wide variety of sources.

In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and, equally important, in assessing the importance and analyzing the significance of public events.

Affidavit of Walter Cronkite at 1-2, attached to Brief for CBS, *supra* note 27.

186. Affidavit of Marvin Kalb at 1, attached to Brief for CBS.

must constantly appraise the accuracy and meaning of words and the significance of deeds. In that effort, reporters require a background of confidential judgements and observations obtainable only in privacy and in trust.¹⁸⁷

Mike Wallace, a well known reporter for the Columbia Broadcasting System, gives two examples of the role of this confidential background information. In the first instance, in preparing a broadcast on the production of a motion picture, the filming of which involved the use of large numbers of ships, airplanes and personnel, all supplied at great cost by the United States Navy, Wallace obtained a list of ten "particularly embarrassing questions" which certain officials within the Defense Department "believed the Navy should have been prepared to answer satisfactorily before permitting the use without charge of its facilities and equipment by the movie's producer."¹⁸⁸ Wallace explains that:

Those questions, which could not have been published without a breach of confidence, were nonetheless of great value in interviewing the officials responsible for that decision. The interviews in turn were critical in developing a report on the use of public property and funds for private purposes—a story which resulted in congressional investigation and remedial action by the Navy Department.¹⁸⁹

Similarly, confidential information contributed to an informative and balanced series of articles published by *the New York Times* about the Black Panthers.¹⁹⁰ During the year preceeding these articles, Earl Caldwell, the *Times* man assigned to cover the Panthers, had developed a close relationship with them, as a result of which he received great amounts of information in confidence. With this backlog of confidential information to sharpen his understanding, and probably his skepticism, of the information given to him for publication, Caldwell could attempt to explain the attitude of the Panthers, and more impor-

187. Affidavit of Dan Rather at 1, attached to Brief for CBS.

188. Affidavit of Mike Wallace at 2, 3, attached to Brief for CBS.

189. *Id.* at 3. Wallace also describes a series of informal conversations with President Nixon during the early stages of the 1968 campaign:

Because of the informality of such discussions the language used was more casual than the candidate would use in public. Moreover, ideas were discussed which were tentative and would later be refined or rejected. Had there been any thought at the time that I could be compelled to divulge a full report of some of these meetings, my presence would never have been permitted. As it was, I was able in the course of those sessions to acquire an understanding of the candidate which contributed significantly to my coverage of the campaign and, perhaps more important, an understanding of the President which has been invaluable in attempting to assess and analyze the present Administration.

Id. at 4.

190. See, e.g., *N.Y. Times*, Jan. 21, 1969 at 20, col. 1; *id.*, June 6, 1969 at 22, col. 1; *id.*, June 15, 1969 at 57, col. 2; *id.*, June 18, 1969 at 23, col. 1; *id.*, July 20, 1969 at 43, col. 2; *id.*, July 22, 1969 at 21, col. 1; *id.*, July 27, 1969, § E, at 6, col. 5; *id.*, Dec. 14, 1969 at 64, col. 1.

tant, the reasons for that attitude.¹⁹¹ Without such background information Caldwell could have done "little more than broadcast press releases and public statements."¹⁹²

Broadcasting press releases and public statements is not the role assigned to the press by the constitution. Underlying every freedom of the press case yet decided has been the belief that an informed and informative press is the mainstay of a democratic society. For example, in *Near v. Minnesota ex rel. Olson*,¹⁹³ while striking down a state statute allowing the state to enjoin publication of certain 'inlacious, scandalous and defamatory' publications, the Court recognized the abuses of such publications, but refused to allow prior restraints because:

[t]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press . . .¹⁹⁴

Similarly, in *Grosjean v. American Press Co.*¹⁹⁵ the Court struck down a state tax on newspapers because:

The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity, and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.¹⁹⁶

The theme running through these and all other freedom of the press cases is the vital role of the press in informing the public.¹⁹⁷ Be-

191. See, e.g., Caldwell's article, N.Y. Times, Dec. 14, 1969 at 64, col. 1. See also Affidavit of Earl Caldwell at 3, attached to Brief for Petitioner, *supra* note 33.

192. This phrase is Walter Cronkite's. It is an apt one. Cronkite used it in explaining that without a backlog of confidential information to enable him to track down stories and assess and interpret events as they happen, he would only be able to mouth the official version of the news. See Affidavit of Walter Cronkite at 2, attached to Brief for CBS.

193. 283 U.S. 697 (1931).

194. *Id.* at 719-20.

195. 297 U.S. 233 (1936).

196. *Id.* at 250.

197. It would be difficult to find a case where this idea is not expressed. In *Associated Press v. United States*, 326 U.S. 1 (1945), the Court held the provisions of the Sherman Anti-Trust Act applicable to a news distribution syndicate because the first amendment "rests on the assumption that the widest possible dissemination of information . . . is essential to the welfare of the public." *Id.* at 20. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court in limiting the right of the state to award damages in libel actions, considered the issue against "the background of a profound national commitment to the principle that debate on public issues should be uninhibited,

cause of the importance assigned to this role, the Court has protected the press from most encroachments upon it.¹⁹⁸ It is an obvious proposition that the press cannot inform the public until and unless it itself is informed. Confidential, not-for-publication communications may never directly reach the public, but they are a crucial factor in making a knowledgeable, informed press, capable of gathering, assessing and interpreting information that is for publication. The greater the threat of forced disclosure, the less this confidential information is available to the press.¹⁹⁹ To the extent that such information is withheld from the press, the public is indirectly but necessarily less well informed. The body of case law designed to protect the press because of the importance of the press' role in informing the public is of little value if the courts withhold protection from one of the key elements necessary to the press' ability to perform in that role. If the reason for constitutional protection of the press is a well informed public, confidential communications from source to newsman should fall within the scope of the protection.

IV

THE SCOPE AND EXTENT OF THE PRIVILEGE

If there is to be a privilege, the question arises: what kind of privilege and what scope is it to have? Various distinctions have been suggested: No privilege where the information sought goes "to the heart of the inquiry";²⁰⁰ no privilege where the government can show an over-

robust, and wide open" *Id.* at 270. In the companion cases, *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1966), involving libel actions brought by public figures, the Court reiterated and approved the *New York Times* rule as "an important safeguard for the rights of press and public to inform and be informed on matters of legitimate interest." *Id.* at 169. In *Estes v. Texas*, 381 U.S. 532 (1965), in reversing a criminal conviction on due process grounds because of pre-trial publicity and chaotic courtroom conditions, the Court said that "[t]he free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences" *Id.* at 539. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), upholding FCC regulations promulgated under the "fairness doctrine," the Court extolled "the First Amendment goal of producing an informed public capable of conducting its own affairs" *Id.* at 392.

198. In only two cases has the Court upheld restrictions on the press. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965). Both of these cases involved the right of criminal defendants to a fair trial. See notes 154-60 *supra* and the accompanying text. The Court has also indicated that the press is subject to the clear and present danger test. See *Craig v. Harney*, 331 U.S. 367 (1947); *Bridges v. California*, 314 U.S. 252 (1941). But the Court has yet to find such a danger in any case involving the professional press.

199. See text accompanying notes 29-37 *supra*.

200. *Garland v. Torre*, 259 F.2d 545, 549-50 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

riding state interest;²⁰¹ no privilege where the information is unavailable or not readily available elsewhere;²⁰² privilege limited to information imparted under a promise of confidence;²⁰³ privilege limited to information which has been published, or alternately, to information which has not been published.²⁰⁴ In light of the interests and considerations previously discussed, it is apparent that the kind of privilege and its scope must depend on the situation in which it is asserted.

A. *The Privilege Against Governmental Subpoena*

The Supreme Court has required *inter alia* that an overriding state interest be demonstrated before a state may encroach upon protected first amendment rights.²⁰⁵ This standard may, however, be inapposite in newsman's privilege cases. In the first place, the government usually cannot make enough of a factual showing for a court to determine if such an interest is involved. Second, even if the government can show the presence of an overriding state interest in the individual case, forced disclosure or production of film is, in the long run, detrimental to the state's interest. Third, if the privilege can be defeated for any reason, it will not serve to alleviate the chilling effect on the flow of news and is little better than no privilege at all. These reasons, which suggest that an absolute privilege against governmental subpoena may be appropriate, merit detailed examination.

The Supreme Court, in first amendment cases, has consistently required a careful examination of the state interest asserted to determine

201. The *Caldwell* district court granted the reporter Caldwell a protective order, but reserved jurisdiction to "entertain a motion for modification . . . at any time upon a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by alternative means" 311 F. Supp. 358, 362 (N.D. Cal. 1970). The Ninth Circuit affirmed this part of the lower court ruling. No. 26,056 (9th Cir. Nov. 18, 1970). See text accompanying notes 46-77 *supra*.

202. The court in *People v. Dohrn*, No. 69-3808, (Cir. Ct. of Cook County—Crim. Div. June 12, 1970) would allow defendants to subpoena news films "where the use of subpoenas was the only method available of obtaining that evidence." Order Quashing Subpoenas, *id.* at 3. See text accompanying notes 129-31 *supra*. The *Caldwell* court also allowed for the possibility of the government not being able to obtain its evidence elsewhere. See note 201 *supra*.

203. See text accompanying notes 230-31 *infra*.

204. Four of the statutory privileges are limited to information actually published or broadcast. See CAL. EVID. CODE § 1070 (West 1966); KY. REV. STAT. § 421.100 (1963); MD. ANN. CODE, art. 35 § 2 (1957); N.J. STAT. ANN. § 2A:81-10 (1952). The privilege in the *Caldwell* case, on the other hand, was limited to unpublished information. See text accompanying note 231 *infra*.

205. See, e.g., *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

whether it justifies the abridgment of the first amendment rights. Such an examination, however, is often impossible in newsman's privilege cases. For example, in the *Caldwell* case,²⁰⁶ the record of events available to all participants except, of course, the government, provides no indication as to what the government hoped to ascertain from Caldwell's testimony or notes, whom specifically the grand jury was investigating, or whether the information sought from Caldwell was available from other sources. Where a subpoena is issued in connection with secret grand jury proceedings, this factual vacuum is the normal state of affairs.²⁰⁷ In such a factual vacuum governmental action which encroaches on first amendment rights is impermissible, for the Court has set up a strict set of standards by which the state's interest is to be weighed, and satisfaction of these standards requires some sort of factual showing. First, where the state asserts such an interest it must make some sort of factual showing that such an interest does in fact exist, and that it is properly a matter of governmental concern.²⁰⁸ Where legislative authorizing resolutions have been loosely worded, the Court has required some indication from the investigating committee as to what the subject of an investigation conducted thereunder was, so that it could be determined whether any state interest was in fact involved.²⁰⁹ Where the information available to the Court was insufficient for such a determination, the Court has held that a witness was protected from questioning.²¹⁰ Second, in the area of constitutionally protected

206. *In re Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970).

207. This factual vacuum arises, of course, because of the traditional secrecy of grand jury proceedings and is compounded by the often very broad subject matter of grand jury investigations. A subpoena served on *Newsweek*, described at note 2 *supra*, is similarly uninformative.

208. For example, in *Watkins v. United States*, 354 U.S. 178 (1957), the Court upheld the right of a witness to refuse to answer questions put to him by a House investigating committee because neither the authorizing resolution nor the questions asked gave any indication of what governmental interest was being asserted. The Court explained:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress. . . . Nor is the Congress a law enforcement or trial agency Investigations conducted solely . . . to 'punish' those investigated are indefensible.

Id. at 187. Because the Court had "no doubt that there is no congressional power to expose for the sake of exposure" [*id.* at 200], and since the Government made no showing that a more legitimate interest was involved, the Court struck down the witness' contempt citation.

209. See, e.g., *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1962); *Scully v. Virginia ex rel. Comm. on Law Reform and Racial Activities*, 359 U.S. 344 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

210. See, e.g., *Scully v. Virginia ex rel. Comm. on Law Reform and Racial Ac-*

freedoms, overbreadth has always been recognized as a fatal deficiency in governmental action. The Court has consistently struck down statutes and regulations which attempt to reach a substantive evil properly a subject of governmental control but also restrict constitutionally protected conduct.²¹¹ To prevent a similarly overbroad effect in connection with the compulsory testimony of witnesses in legislative investigations, the Court has carefully examined the evidence set forth by the state to determine whether there was a reasonable relationship between the interest asserted by the state and the information it sought to ascertain.²¹² The Court has defined this requirement as follows:

We understand this to mean—regardless of the label applied, be it ‘nexus,’ ‘foundation,’ or whatever, that it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights . . . that the state convincingly show a substantial relationship between the information sought and a subject of overriding and compelling state interest.²¹³

Third, a corollary to the overbreadth doctrine is that where there are methods available to the state less destructive of first amendment freedoms, the state must use them.²¹⁴

In the *Caldwell* case the only showing the Government made was its assertion that: “[Hilliard’s statement as published by Caldwell] coming after the threat of the Panthers to kill President Nixon, made in the November 20, 1969 issue of *The Black Panther* . . . appeared relevant to an inquiry or investigation of a possible violation in connection with the publication of these statements and related activities of the responsible individuals.”²¹⁵ From such a showing no court could determine if the government’s subpoena to Caldwell was necessary or even relevant to any state interest. The grand jury, which meets only to determine if there is probable cause to believe that a crime has

tivities, 359 U.S. 344 (1959); *Watkins v. United States*, 354 U.S. 178 (1957). Cf. *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959).

211. See, e.g., *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Talley v. California*, 362 U.S. 60 (1960).

212. See, e.g., *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *DeGregory v. New Hampshire*, 383 U.S. 825 (1966); *Scull v. Virginia ex rel. Comm. on Law Reform and Racial Activities*, 359 U.S. 344 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Watkins v. United States*, 354 U.S. 178 (1957); cf. *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959).

213. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963).

214. See, e.g., *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1963); *Louisiana v. NAACP*, 366 U.S. 293 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Martin v. Struthers*, 319 U.S. 141 (1942).

215. Affidavit of Francis L. Williamson at 3, attached to Opposition Memo, *supra* note 7. See note 57 *supra* and accompanying text.

been committed and that the subject of the inquiry committed it, is unique in the almost total lack of limitations imposed upon its powers of inquiry.²¹⁶ However, where most challenges of grand jury proceedings pose fourth, fifth, sixth and fourteenth amendment questions, a claim of newsman's privilege raises first amendment issues; hence, the applicable standards should be those adopted in legislative investigation cases. If the *Caldwell* subpoena would not meet the requirements imposed upon legislative subpoenas, it should not be upheld simply because it was issued in connection with a grand jury proceeding.

Assuming the government were to supply enough information to make the necessary showing of a valid or even compelling state interest, it is questionable whether this interest would in the normal criminal case be overriding. The government's interest is *not* an interest in *national security*, but rather a relatively narrower one of *convicting criminals*. This distinction is an important one, for certainly the government's interest must be judged in relation to the magnitude of the harm asserted and shown. And although the number of government subpoenas has been increasing, the number of criminals who might escape conviction because of a newsman's privilege probably does not present a problem equal to one of national security.²¹⁷

Furthermore, in the great majority of the cases where the government has recently issued subpoenas, the governmental interest may be still narrower. The government often employs the device of "planting" informants in dissident groups. This practice is a matter of public record.²¹⁸ Hence, in the *Caldwell* case, for example, it is highly unlikely

216. For a detailed discussion of the grand jury system, see Comment, *The Rights of a Witness Before A Grand Jury*, 1967 DUKE L.J. 97, 111-22 (1967).

217. It is likely that few, if any, criminals would escape conviction because of a newsman's privilege. Films that the government could not subpoena as evidence would still contribute toward the eventual conviction of offenders. Since the published or televised films would be available to any government agency that spent the fifteen cents to buy the newspaper or took the time to watch the broadcast, they would still be of great use in identifying the offenders. Similarly, the loss of the newsman's testimony as to confidential information would probably not result in a significant number of criminals escaping punishment. In a great many cases where newsmen are subpoenaed, the government has other means of obtaining the evidence. See text accompanying note 218 *infra*. Police chiefs and attorneys-general from several statutory privilege jurisdictions, surveyed in 1949, unanimously concluded that the privilege had not hampered law enforcement in their jurisdictions. See note 221 *infra* and accompanying text.

218. See, e.g., N.Y. Times, June 4, 1969, at 16, col. 3 (police undercover agent testifying in congressional hearing about his infiltration of the SDS); *id.*, Dec. 14, 1969 at 1, col. 1 (FBI Director Hoover's testimony before congressional committee about intensification of FBI efforts to "penetrate" the Black Panthers by undercover agents). The role of these undercover agents is cogently illustrated by a recent series of events: on October 19, 1970 Assistant District Attorney Joseph A. Phillips, the prosecutor in a New York bombing trial, revealed that a police undercover agent had infiltrated the Black Panthers and in the course of his undercover work, found a cache of dynamite.

that Caldwell would have had more information than an informant Black Panther Party member. Thus, when the government chose to subpoena Caldwell, its interest was the convenience of obtaining evidence for prosecution without utilizing or revealing its own informants. Exposure of governmental informants may not be too steep a price to incur in order to avoid subpoenaing a newsman. Exposure of one informant does not prevent the government from utilizing another. Dissident groups have always been aware of the use of informants, but despite this awareness, the government still manages successfully to employ the device. Forced disclosure from a newsman, on the other hand, would do irrevocable harm to that newsman, for it would cost him all his remaining sources,²¹⁹ and its detrimental impact would be significantly felt by all other newsmen.²²⁰ Furthermore, any expectation of long range benefits to the administration of justice stemming from subpoenas to the professional press is almost entirely illusory. The more subpoenas issued compelling newsmen to disclose confidential communications, the fewer sources and the less confidential information there will be for reporters to divulge. The more subpoenas issued for newsmen to testify in court about events they have witnessed or to produce films thereof, the less able they will be to cover such events and shoot such films and the less information government will be able to derive from this source.

Where the governmental interest asserted is national security, exposure of governmental informants may not be too high a price to pay in order to preserve the press' ability to gather and disseminate the news. Forcing the newsman to testify may, in a given case, advance the state's interest, but by drying up the newsman's sources or hindering his ability to gather news in the future, it may also make impossible the publication of the very stories that alert the government and the public to the fact that national security or self-preservation is imperiled. Forced disclosure, then, is a hindrance to any long-range governmental interests. Privilege from forced disclosure, on the other hand, does not adversely affect these long-range interests. The New York Law Revision Commission, in its 1949 Report, gathered a series of statements from various attorneys general and police chiefs in jurisdictions where a privilege had been in force. These officials were unanimous in stating that the privilege had not interfered with law enforcement or the

The agent turned the dynamite over to bomb squad detectives, who replaced the explosives with simulated facsimiles. The agent then returned the package to its hiding place, from which it was later taken and used in an attempt to blow up a local police station. According to prosecutor Phillips, this dynamite, which, of course, did not explode, would be key evidence in the subsequent trial. *Id.*, Oct. 20, 1970, at 1, col. 6.

219. See notes 33 & 38 *supra* and accompanying text.

220. See notes 25-37 *supra* and accompanying text.

prosecution of criminals, and in fact had, on occasion, provided valuable assistance.²²¹

The overriding state interest standard would create a limited privilege, that is, one which could be defeated in individual cases. Apart from inadequacies of such a privilege due to the difficulties inherent in a governmental showing of such an interest, a limited privilege does little to alleviate the chilling effect of forced disclosure and production of films on the flow of news. No source can predict ahead of time whether there will be an overriding state interest in disclosure of his information or identity. No policeman²²² or political protester knows whether films taken of him or information written about him, will be related to an overriding state interest. A privilege that forces the newsman to appear and divulge all information in certain cases will do very little to accomplish the goals of the proposed privilege.

If the privilege is limited in scope, so that the newsman has only the right to refuse to answer *certain* questions or produce *certain* films, he will still be subject to grand jury appearances. Such proceedings are secret and no one will ever be sure of what was said or done therein. The newsman's assurance that only non-privileged information or film was divulged is apt not to inspire much confidence.²²³ Similarly, a

221. See letter from Sen. Thomas Desmond to the New York Law Revisions Commission, June 23, 1948, in 1949 N.Y. LAW REVISION COMM'N REPORT, at 131-32. Despite the recommendation of this committee, the New York Legislature rejected the privilege in its 1949 session. See *id.* at 28-29. The Legislature did, however, finally adopt a privilege in its 1970 session. See N.Y. CIV. RIGHTS LAW § 79-H (McKinney Supp. 1970).

222. Law enforcement officers, subject to prosecution under federal civil rights statutes, may have as much reason as protestors to fear the newsman's films. For example, a former deputy sheriff of Alameda County, California was indicted for the shooting of three persons during a May 1969 riot at Berkeley, California. S.F. Chronicle, Oct. 20, 1970, at 2, col. 1. In another instance, a *Los Angeles Times* reporter was killed by a tear-gas projectile fired into a bar by a Los Angeles sheriff's deputy during a riot. The Justice Department announced that a Deputy Assistant Attorney-General would be sent from Washington to help the local United States Attorney "monitor the sheriff's investigation," and that the Department would begin an investigation "should any discrepancies occur in the findings of the Sheriff's Department." L.A. Times, Sept. 1, 1970, at 1, col. 6.

223. The Ninth Circuit in *In re Caldwell* No. 26,025 (9th Cir. Nov. 18, 1970) recognized this problem:

The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainty in the minds of those who fear a betrayal of their confidences. These uncertainties are compounded by the subtle nature of the journalist-informer relation. The demarcation between what is confidential and what is for publication is not sharply drawn and often depends upon the particular context or timing of the use of the information. Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidences with quite the same sure judgment he invokes in the normal course of his professional work.

Id. at 10 (slip opinion).

privilege limited in application—for example, one which can be defeated where the information goes to the heart of the inquiry or where the state shows an overriding interest—is unsatisfactory. With such a privilege the policeman or protester knows that there will be times when the newsman must appear and divulge everything and he has no way of predicting whether his particular case will be one of the times: with the recent rash of subpoenas he may well assume that his case will indeed be one of the times.

The Supreme Court, in other contexts, has recognized the chilling effect of this sort of uncertainty, and has struck down procedural rules, otherwise constitutionally permissible, where the uncertainty of their operation would tend to restrain exercise of first amendment rights. In *Speiser v. Randall*²²⁴ the Court invalidated a state rule that a taxpayer, in order to obtain a tax exemption, must prove that he did not advocate violent overthrow of the government. The Court explained that the state could constitutionally deny exemptions where it proved that the claimant advocated violent overthrow, but it could not put the burden on the taxpayer of proving he did *not* engage in such advocacy. The Court discussed “the complexity of the proofs and the generality of the standards applied . . . [which provided] but shifting sands on which the litigant must maintain his position.”²²⁵ Because of these uncertainties, where “particular speech falls close to the line separating the lawful and the unlawful,”²²⁶ a taxpayer, aware of the difficult burden of proof he would later have to bear, “necessarily must steer far wider of the unlawful zone than if the State must bear these burdens.”²²⁷ Thus, because uncertainties inherent in the procedure would serve to deter lawful as well as unlawful advocacy, the regulation was unconstitutional.

Similarly, in *Dombrowski v. Pfister*²²⁸ the Court allowed individuals to seek a declaratory judgment of the invalidity of an overbroad statute, rather than forcing them to follow the normal procedure of undergoing prosecution in the hopes that state courts would narrow the statute's application to within permissible limits. The Court explained the reason for its holding as follows:

If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution By permitting determination of the invalidity of these statutes without regard to permissibility of

224. 357 U.S. 513 (1958).

225. *Id.* at 526.

226. *Id.*

227. *Id.*

228. 380 U.S. 479 (1965).

some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution, makes that case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution unaffected by the prospects of its success or failure.²²⁹

Dombrowski and *Speiser* suggest that, because of the particular context in which the privilege today arises, an absolute privilege may be appropriate in order to avoid the chilling effect of the uncertainties necessarily inherent in any limited privilege. Whatever might once have been the merits of a limited privilege, today it cannot suffice; there have simply been too many subpoenas. Where, in the past, pressure on newsmen was infrequent or, at least, not a subject of public knowledge, the source, policeman or protester had little reason to anticipate the possibility of forced disclosure. Consequently, the non-existence of a privilege or the uncertainties in an existing privilege were not of great moment. Today, because of the great number of recent subpoenas, public attention is directly focused on the frequency of governmental attempts to force disclosure or production of films. Hence, the uncertainties of the limited privilege become increasingly significant.

Many commentators advocating a privilege have suggested that it be limited to communications intended to be confidential and not for publication. The district court's protective order in the *Caldwell* case,²³⁰ for example, allowed the newsman to refuse to answer questions concerning statements made to him or information given to him "unless such statements or information were given to him for publication or public disclosure."²³¹ Such a privilege is insufficient and probably creates more problems than it solves. In the first place, a privilege limited to "confidential" information does not aid the reporter who covers public political protest activities. His information is obtained under circumstances involving no assurances of confidence, but compelled testimony or production of films nevertheless impairs his ability to cover these activities.²³² Second, much information is revealed under circumstances where the element of confidentiality, though present, is elusive of proof in a court of law. The record in the *Caldwell* case, for example, shows that Black Panther sources gave information to Caldwell only on an unspoken understanding that he would sense what was non-confidential and intended for publication, and what was not.²³³ In the *Torre*

229. *Id.* at 487.

230. *In re Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970).

231. *Id.* at 362.

232. See notes 39-42 *supra* and accompanying text.

233. See notes 34-36 *supra* and accompanying text.

case,²³⁴ the court noted with respect to the claim of confidentiality there asserted: "This confidentiality was apparently not explicit: 'Q. Did this network executive ask you to withhold giving his name? A. No, he did not. It is just that having worked in the business so long, in cases like this you don't mention the man's name.'" ²³⁵

To force the source to label each item "confidential" or "non-confidential," especially where he speaks at length to the newsman, would make the task of communicating to the newsman at times quite burdensome, and in any event, this approach does not solve the problem. Unless the newsman's word is to be accepted as proof that the communication was labeled "confidential," the proceedings would be at an impasse. The newsman, without bringing his source into court, cannot prove the confidentiality; nor, however, can the government disprove it. To accept, on the other hand, the newsman's unsupported word is, as a practical matter, not a wise policy. The average newsman would assume that the source did intend certain communications to be confidential whether or not the source remembered to label them as such. The newsman holds to his profession's ethics, which prohibit disclosure;²³⁶ at the same time, he has a self-interest in not being cited for contempt. Since he feels his source's communications are inviolate from any forced disclosure, he resents being put in the awkward position of having to testify about anything said to him, whether confidential or not. Under these circumstances, allowing the matter to be determined upon the newsman's unsupported word makes perjury an attractive proposition.

Any suggestion that the privilege be limited to published or, alternately, unpublished information, does not withstand close scrutiny. The published-unpublished distinction creates a vital uncertainty which might well nullify the proposed protective effect of the privilege: neither the source nor the newsman can predict what will be published. The source can *prevent* his information from being published by labeling it "not-for-publication," but neither he nor the newsman can be sure that information intended for publication will be published. The newsman's editors might decide that only a portion of the information is important enough to publish, or they might reject it altogether for lack of space, fear of libel or pre-emption by later events. Hence, the source cannot rely on the protection of the privilege, and he may still be deterred by the threat of forced disclosure.

The published-unpublished distinction has further flaws. Under a privilege limited to published information the newsman would have to

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

235. 259 F.2d at 547 n.3.

236. See note 23 *supra*.

disclose the source of unpublished information or the contents of such information or both. Under a privilege limited to unpublished information the newsman would have to testify as to the source of published information or the contents of such information, or both. In so far as either privilege is limited to the identity of the source, it is insufficient because it does not protect the equally important contents of the source's communications.²³⁷ In so far as the privilege does extend to the contents of the communications, the published-unpublished distinction is logically unsound. The privilege limited to published information²³⁸—the newsman would have to disclose unpublished information—is a useless safeguard, since it is the unpublished information which is at issue. Similarly, if a privilege is to be recognized, it is pointless to limit it to unpublished information. Under such a privilege the newsman would have to disclose published information, but published information is by definition already disclosed, and short of asking the newsman if he in fact wrote or broadcast the item, there would be nothing to inquire about without slipping back into the area of privileged unpublished information. Hence, a requirement that the newsman testify as to already published information accomplishes nothing.²³⁹

The limited privilege, then, whether limited in terms of the published-nonpublished—or broadcast—distinction, the confidential-non-confidential criterion, or the overriding state interest exception, is an unworkable and self-defeating safeguard. Aside from the difficulties in the mechanics of its application, the limited privilege does not alleviate the chilling effect of forced disclosure and the consequent impairment to the flow of news. At the same time, if the limited privilege, by at times allowing forced disclosure, may occasionally advance the governmental interest in the individual case, it can only hinder that interest over the long run. An absolute privilege, on the other hand, will encourage the flow of news without in the long run adversely affecting any governmental interest.

B. The Privilege as Against Subpoenas by Criminal Defendants

When a criminal defendant seeks the newsman's information, there is neither any reason nor any justification for an absolute privilege. Colliding with the first amendment right of the press is the defendant's sixth amendment right to compel testimony²⁴⁰ and his equally basic

237. See notes 185-92 *supra* and accompanying text.

238. Four of the statutory privileges are limited to published information. See statutes cited at note 204 *supra*.

239. The Ninth Circuit in the *Caldwell* case perceived the futility of such a requirement. See text accompanying notes 68-69 *supra*.

240. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

right to a fair trial.²⁴¹ The Supreme Court has recognized that where these rights collide, those of the press must give way.²⁴² Moreover, the chilling effect on confidential relationships present in forced disclosure under governmental pressure is much less in the case of forced disclosure from defense subpoenas. Information relevant to a criminal trial is either political information or information concerning unlawful or potentially unlawful activities. Sources who communicate this type of information usually fear forced disclosure because of government pressure. It is a rare case where a source anticipates his information being useful to a criminal defendant.²⁴³ Hence, defense subpoenas would not greatly dry up sources or hinder the ability of the press to maintain confidential relationships.

Even defense subpoenas do, however, to a certain extent hinder the ability of the press to cover public protests, strikes, or political activities. These subpoenas put the press in the position of taking sides. A newsman knows he is in court only because of legal compulsion; the public might well believe that the newsman's appearance results from his support of the defendant on trial. With the recent wave of political protest activity and the resulting arrests for such crimes as feloniously assaulting an officer and inciting to riot, the news media have been served with a large number of subpoenas from defendants hoping the films taken during the protest activity would prove their innocence.²⁴⁴ Partly as a result of these frequent court appearances, newsmen are facing increasing hostility from law enforcement officers, who in many cases no longer are willing to cooperate with newsmen covering the activities.²⁴⁵ Furthermore, in terms of sheer time and inconvenience, these court appearances are prohibitive.²⁴⁶ Thus, a balance must be struck between the conflicting interests of the press and the defense.

One solution is to limit the defense's right to subpoena newsmen to those cases where the defendant can show that the newsman's information or film is relevant and helpful to his defense and is not readily available elsewhere.²⁴⁷ That this scheme is constitutionally permissi-

241. See note 158 *supra*.

242. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); see text accompanying notes 154-55 & 161 *supra*.

243. The only sources who would fear defense subpoenas are law enforcement officials who make remarks about pending investigations or cases. There is no other category of sources whose remarks would be particularly helpful to the defense. Individual instances may occur, but they would be rare.

244. See note 21 *supra*.

245. See note 39 *supra* and accompanying text.

246. See notes 41-42 *supra* and accompanying text.

247. This approach was taken by one recent court recognizing a privilege. See *People v. Dohm* No. 69-3808 (Cir. Ct. of Cook County—Criminal Division June 12, 1970). This case is discussed in text accompanying notes 129-31 *supra*.

ble is seen from the fact that in the police-informant identity cases the Supreme Court has applied identical standards: the police must disclose the informant's identity only where the defendant can show that information to be relevant and helpful to his case.²⁴⁸ Any question raised by the extra requirement of non-availability from other sources can be justified by the fact that in the newsman's privilege case, it is a first amendment interest rather than the public interest of mere convenience in the flow of information to the police which is balanced against the defendant's right to a fair trial.

C. *The Privilege in Relation to Private Litigation*

*New York Times v. Sullivan*²⁴⁹ and the series of cases following it²⁵⁰ provide a useful insight into the proper scope of the newsman's privilege in ordinary civil litigation. In these cases the Supreme Court subordinated the rights of private litigants to the public interest in a free and vigorous press by severely limiting the right of recovery for libel and invasion of privacy. A plaintiff can recover only where he shows "actual malice," defined as knowing falsehood or reckless disregard for the truth,²⁵¹ or "highly unreasonable conduct."²⁵² The Court in these cases held that where vindication of private rights would have a chilling effect on the freedoms of speech and press, the press must prevail as long as its conduct is not deliberately mendacious, reckless or highly unreasonable. The press, in other words, is to be penalized only where it acts in ways not justified by legitimate news reporting considerations and is guilty of socially undesirable conduct. The reasoning of the Court in these cases would seem to apply to the question of forced disclosure of information or production of films, for the same competing interests and policy considerations are present. Threat of such disclosure deters confidential news sources, chilling their exercise of free speech rights and impairing the press' ability to gather and disseminate the news.²⁵³ Because of this chilling effect, the policies behind *New York Times* and its progeny seem applicable to the privilege issue.

248. *McCray v. Illinois*, 386 U.S. 300 (1967); *Roviaro v. United States*, 353 U.S. 53 (1957).

249. 376 U.S. 254 (1964).

250. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

251. *New York Times v. Sullivan*, 375 U.S. 254 (1964), applied an "actual malice" standard to libel suits brought by public officials against critics of their official conduct. *Id.* at 279-80. *Time, Inc. v. Hill*, 385 U.S. 374 (1967) applies the standard to invasion of privacy suits brought by any individuals. *Id.* at 387-88.

252. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), applies the "highly unreasonable conduct" standard to libel suits brought by "public figures who are not public officials." *Id.* at 155.

253. See notes 29-38 *supra* and accompanying text.

News films deserve special treatment under such a standard since filmtaking seldom constitutes malicious, reckless or highly unreasonable conduct. Hence under the *New York Times* series of cases the press should be privileged against production of films. Aside from the question of films, the problem of forced disclosure should be viewed in two contexts: libel actions and actions not involving libel. Where the action is one for libel, the conduct of both the press and the source is at issue. Neither should be able to use the first amendment as a shield against the consequences of wrongful conduct. *New York Times, Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*²⁵⁴ were all libel cases. Under their standards newsmen should have to reveal their sources or their sources' confidential information where plaintiff shows actual malice or highly unreasonable conduct.

In non-libel actions there is no allegation of undesirable press conduct. Rather, the fact that the press published or broadcast an item concerning the events in litigation is entirely fortuitous. It can be argued that the plaintiff's interests should prevail over those of the source where the suspected or probable source is himself a defendant, because under these circumstances the source's conduct might indeed be at issue. For example, in *In re Goodfader*²⁵⁵ plaintiff, suing civil service commissioners for wrongful ouster from her job, sought to force a newsman who had attended the commission's ouster session to reveal his source of information that the ouster was to be accomplished at that session. The issue in this case was the conduct of the commissioners. If one of the commissioners was in fact the source, his informing the newsman of the contemplated ouster may have been evidence of wrongful conduct. However, even in these circumstances, and whether or not the source is considered to have waived his rights by his own misconduct, the plaintiff should not be able to force disclosure from the newsman; to allow him to do so would penalize not only the source—who may have brought his misfortune upon himself—but the newsman too. Since the newsman is guilty of no misconduct, and because of the public interest in a free flow of news, the newsman's right to silence should be upheld. Where the suspected or probable source is not one of the parties to the action, the argument for prohibiting forced disclosure is even stronger, for then his interests are to be balanced, with the newsman's, against those of the litigant. Since, in non-libel actions, the interests of either the newsman, or both the newsman and the source, should prevail over those of the private litigant, an absolute privilege might be appropriate.

254. 388 U.S. 130 (1967) (companion cases).

255. 45 Hawaii 317, 367 P.2d 472 (1961).

CONCLUSION

The furor over the spate of federal subpoenas recently reached such proportions that Attorney General Mitchell was forced to instruct the Department of Justice to set forth guidelines for the issuance of subpoenas to the press. In an August 1970 press conference Mitchell explained that the "legal confrontation" over the subpoenas appeared to be escalating and that such confrontation could "seriously affect . . . press relationships with the Federal Government, the bar and the courts."²⁵⁶ He then announced a new set of Justice Department guidelines "to provide new and reasonable safeguards to protect the rights and privileges of the free press in a manner consistent with the paramount public interest in the fair administration of justice."²⁵⁷

The Justice Department guidelines were based on a recognition of "limiting effect on the exercise of first amendment rights."²⁵⁸ The Department announced as its general policy: First, in considering whether to issue a subpoena, the Department would "weigh [the] limiting effect against the public interest to be served in the fair administration of justice"; second, the Department did not consider the press as "an investigative arm of the Government"; hence it would try to obtain information from other sources before subpoenaing the press; third, the Department would negotiate before issuing the subpoena; and, finally, if negotiations failed, subpoenas could only be issued upon the express authorization of the Attorney General.²⁵⁹ The guidelines set forth specific requirements for Government officials requesting issuance of a subpoena.²⁶⁰

The new Justice Department policy called a halt to the rash of subpoenas, but the Department served warning on the press that the halt may not last. According to the announced guidelines, the press was to remember that "emergencies and other unusual situations may develop" where the issuance of subpoenas would not have to conform to the spe-

256. N.Y. Times, Aug. 11, 1970 at 24, col. 2.

257. *Id.*

258. *Id.* at 24, col. 1.

259. *Id.* at 24, cols. 1-2.

260. The specified requirements were that: First, there must be sufficient reason to believe that a crime has occurred from disclosure from non-press sources, so that the press will not be used as a "springboard for investigations"; second, there must be sufficient reason to believe that the information sought is essential to a successful investigation, particularly with reference to directly establishing the guilt or innocence of the persons under investigation; third, there must be an unsuccessful attempt to obtain the information from non-press sources; fourth, great care is to be used in requesting both unpublished information and, because of the harassment incurred by cameramen, publicly disclosed information; and, fifth, the subpoenas whenever possible are to be directed at material information regarding a reasonably limited period of time and should avoid requiring production of a large volume of unpublished material. *Id.*

cified standards.²⁶¹ The press and the Federal Government now co-exist in a state of uneasy truce. State and local governments, on the other hand, have yet to reach an agreement with the press, and there is no indication that the stream of subpoenas from these bodies is about to abate. Pressure from criminal defendants and private litigants has, similarly, not ceased.

Newsman's privilege is a constitutional issue; one that belongs in the courts. The only resolution of the issue thus far, however, has been in the political arena: the national news media was able to bring enough pressure to bear to force the federal government to reach a compromise. This compromise is not sufficient. In the first place, it is not binding on the Justice Department, and even within the terms of the agreement, there are loopholes left open.²⁶² Second, by publicly announcing a policy of "negotiation with the press," it calls public attention to the fact of press-government deals, a fact which cannot be reassuring to the source, policeman or protestor who wonders if his interests are being negotiated away. Third, and most important, the compromise does not lessen the pressure from criminal defendants, private litigants and state and local government. A judicial resolution is necessary. The courts which have considered the issue are in hopeless disagreement. Some courts persist in denying the privilege; four courts have recognized it, but have not agreed on the standards for its application. The Ninth Circuit, the highest court recently to grapple with the issue, adopted a standard of overriding state interest, but expressly declined to define the elements of a showing of this interest.²⁶³ Similarly, state legislatures are in disaccord: 14 legislatures have codified an evidentiary privilege;²⁶⁴ the rest have either never considered it or rejected it altogether. The press is equally uneven in its reaction. Some subpoenas and court orders have resulted in compliance; others in resistance. An important constitutional question should not be left in such chaos. It is time for the Supreme Court to clear the confusion. The need for a free and unimpeded flow of information to the public demands a workable and authoritative set of rules.

Margaret Sherwood

261. *Id.* at 24, col. 3.

262. For example, despite the new policy, the Justice Department announced on December 6, 1970 that it was seeking Supreme Court review of the Ninth Circuit's *Caldwell* ruling. 39 U.S.L.W. 3273 (Dec. 6, 1970) (No. 1114).

263. See note 75 *supra* and accompanying text.

264. See notes 78 & 221 *supra*.