Notes

Reporters and Their Sources: The Constitutional Right to a Confidential Relationship

During the past year, federal and state prosecutors across the country have issued subpoenas to newsmen and their employers in order to gain access to confidential information obtained in the process of gathering news about highly controversial topics.[1] This use of the subpoena power has substantially increased the likelihood of a conflict between the administration of justice and the public's First Amendment interest in a free flow of information.[2] Government officials have justified their actions by pointing to the dangerous activities about which newsmen

1. Federal grand juries have subpoenaed the unedited files and unused pictures of *Time, Life,* and *Newsweek* magazines relating to the Weathermen faction of Students for a Democratic Society. Files relating to disturbances at the 1968 Democratic Convention have been subpoenaed from four Chicago newspapers by a federal grand jury. The Antitrust Division has issued a subpoena to *Fortune* magazine demanding all interview notes, tape recordings, documents, and successive drafts of an article appearing in the magazine concerning an alleged violator of the antitrust laws. A federal grand jury has subpoenaed tapes and non-televised films of a program on the Black Panthers from the Columbia Broadcasting System. Earl Caldwell, a San Francisco correspondent for the *New York Times* has been summoned before a federal grand jury investigating activities of the Black Panther Party. The issuance of these subpoenas, which seems to represent a divergence from previous Justice Department policy, are discussed in *New York Times* articles on Feb. 1, 1970 at 24, col. 1; Feb. 3, 1970 at 20, col. 1; Feb. 4, 1970 at 1, col. 1; Feb. 5, 1970 at 1, col. 5; Feb. 6, 1970 at 1, col. 7.

This practice has also been used by state prosecutors. A Wisconsin grand jury has subpoenaed a reporter to testify about a bombing on the University of Wisconsin campus. State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971). A Massachusetts grand jury has subpoenaed a reporter to testify about activities witnessed by him in the local Black Panther headquarters during a time of civil disorder. *In re* Pappas, No. 14,690 (Mass. Sup. Ct. Jan. 29, 1971). In Kentucky, a prosecutor has sought disclosure of the identities of those persons whom a reporter observed manufacturing hashish. Branzburg v. Pound, 39 U.S.L.W. 1088 (Ky. Ct. App. Nov. 27, 1970).

2. This conflict has been analyzed by previous commentators. *See* Comment, *Constitutional Protection For the Newsman's Work Product,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 119 (1970); D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information,* 6 HARV. J. LEGIS. 307 (1969); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources,* 64 NW. U.L. REV. 18 (1969); 82 HARV. L. REV. 1384 (1969); Beaver, *The Newsman's Code, the Claim of Privilege and Everyman's Right to Evidence,* 47 ORE. L. REV. 243 (1968); Note, *Privileged Communications—News Media—A "Shield Statute" for Oregon,* 46 ORE. L. REV. 99 (1966); 61 MICH. L. REV. 184 (1962); Carter, *The Journalist, His Informant and Testimonial Privilege,* 35 N.Y.U. L. REV. 1111 (1960); Note, *Journalist's Testimonial Privilege,* 9 CLEV.-MAR. L. REV. 311 (1960); 11 STAN. L. REV. 541 (1959); 8 BUFFALO L. REV. 294 (1959); *Note, The Journalist and His Confidential Informants—Should They Be Privileged from Compulsory Disclosure?,* 32 TEMP. L.Q. 432 (1959); Note, *The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed?,* 35 NEB. L. REV. 562 (1956); Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information,* 36 VA. L. REV. 61 (1950); Note, 45 YALE L.J. 357 (1935).

may have knowledge.[3] In response, the press has argued that informers, fearing disclosure of their identities or their off-the-record communications, will be deterred from talking with newsmen and that this loss of information will critically limit news available for dissemination to the public.[4]

In the past, courts have found that the interest in compulsory disclosure in the circumstances before them outweighed the potential impairment of the news flow to the public; they accordingly have interpreted both the common law[5] and the Constitution[6] to deny the press the right to withhold information in the face of a compulsory disclosure requirement. Within the last year, however, both federal and state courts have found that, in some circumstances, a newsman's right to protect his source is guaranteed by the First Amendment.[7] Yet, that right has not yet been affirmed by the Supreme Court nor is its nature clear.[8]

This Note will argue that, subject to carefully delineated exceptions applicable to criminal trials and certain libel actions, the First Amendment should guarantee a broad right to keep communications and the identities of informants confidential when news gatherers are summoned

3. *See* Statement of Attorney General Mitchell, New York Times, Feb. 6, 1970 at 40, col. 4.

4. *See, e.g.*, Frankel, *Mitchell and Press Problems*, New York Times, Feb. 6, 1970 at 40, col. 4, discussing the threat to reporting posed by the subpoena.

5. For a discussion of cases denying the newsman a common law right of nondisclosure, see Annot. 7 A.L.R. 3d 591, 592-96 (1966).

6. Garland v. Torre, 295 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971); *In re* Pappas, No. 14,690 (Mass. Sup. Ct. Jan. 29, 1971); Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969); 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); *In re* Goodfader, 45 Hawaii 317, P.2d 472 (1961); Murphy v. Colorado, unreported, *cert. denied*, 365 U.S. 843 (1961). Dicta in the *Torre*, *Knops*, *Adams*, and *Goodfader* decisions indicate that a constitutional right of nondisclosure might be found in other circumstances.

7. *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970), *petition for cert. filed sub nom.* U.S. v. Caldwell, 3905 U.S.L.W. 3273 (U.S. Dec. 16, 1970) (No. 1114). Air Transport Ass'n v. Professional Air Traffic Controllers Organization, Crim. Nos. 70-C-400, 410 (E.D.N.Y. 1970) (transcript of April 6, 1970 at 21, 38-39, 149-50); Alioto v. Cowles Communications, Inc., C.A. 52150 (N.D. Cal. 1969) (unreported hearing, Dec. 4, 1969, Tr. 165-67); People v. Dohrn, Crim. No. 69-3808 (Cir. Ct. Cook Cty., Ill. May 20, 1970); People v. Rios, No. 75129 (Super. Ct. San Francisco Cty. 1970).

8. The Supreme Court has denied certiorari three times: State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968); Murphy v. Colorado, unreported, *cert. denied*, 364 U.S. 843 (1961); Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). The government has recently filed a petition for certiorari in *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970). *petition for cert. filed sub nom.* U.S. v. Caldwell, 3905 U.S. L.W. 3273 (U.S. Dec. 16, 1970) (No. 1114). The Supreme Court has granted stays in two recent cases concerning this issue, an indication that it might grant certiorari. *In re* Pappas, No. 14,690 (Mass. Sup. Ct. Jan. 29, 1971), *stay granted sub nom.* Pappas v. Smith by Mr. Justice Brennan (Feb. 4, 1971); Branzburg v. Pound, 39 U.S.L.W. 1088 (Ky. Ct. App. Nov. 27, 1970), *stay granted sub nom.* Branzburg v. Hayes by Mr. Justice Stewart (Jan. 26, 1971).

before courts, grand juries, and legislative committees. An evaluation of the conflicting positions will suggest that the First Amendment interest of the newsman and his source in knowing with *certainty* when the confidentiality of their relationship will be respected (and when it will not) should be accorded substantially greater weight than the government's claim for a roving commission to gain access to communications arising from this relationship. This evaluation also provides guidance in deciding the scope of protection, who may claim the right of nondisclosure, what types of information the right protects, and when the right may be invoked.

I. Current Approaches to the Right to a Protected Relationship

A. *Competing Interests*

The duty to testify at judicial proceedings is a venerable instrument of justice which was recognized early in the development of English law[9] and has been clearly acknowledged by the Supreme Court.[10] A necessary function of the judicial process in both civil and criminal litigation is to provide a forum where all facts relevant to the controversy at issue may be presented. The theory of the adversary method of conflict resolution demands that each party have the fullest opportunity to acquire and present those facts which advance its interests.

Disclosure requirements are also important to grand jury proceedings; they provide the means for investigating possible criminal conduct and thereby protect society by facilitating the administration of the prosecutorial system.[11] The testimony of newsmen, especially those supported by the financial resources of the larger press institutions, is particularly useful to a public prosecutor, since reporters' independent investigative activities often overlap areas under official scrutiny. Because the possession of information by newsmen is easily recognized through published work, prosecutors may turn to reporters as the most immediate sources

9. *See* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 325-26 (7th ed. 1966); 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 192-93 (7th ed. 1966).

10. It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.
Blackmer v. United States, 284 U.S. 421, 438 (1932); for a history of the duty to testify, see Blair v. United States, 250 U.S. 273, 279-80 (1919).

11. The grand jury serves two important functions: "to examine into the commission of crimes" and "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." Hale v. Henkel, 201 U.S. 43, 59 (1906). Compulsory disclosure is important to both of these functions.

from which to obtain disclosure of material necessary for indictments and arrests.

A slightly different rationale explains the duty to testify at legislative hearings. Article I of the Constitution invests Congress with "all legislative powers" granted to the United States and with power "to make all laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United States or in any officer. The Supreme Court has held that the power to secure needed information is an attribute of the power to legislate.[12] The requirement of compulsory disclosure facilitates the passage of effective laws by providing Congress with access to a full range of relevant fact and opinion. The power to compel testimony is also needed by state legislatures in order that they may secure information necessary for informed lawmaking at that level of government.[13]

From the press's perspective, however, the unrestrained use of subpoenas issued to newsmen impairs the flow of news to the public, because compulsory testimony poses dilemmas for both news sources and news gatherers which prevent establishment of the confidential relationships necessary for obtaining information. The potential informant must speculate as to whether his identity or other off-the-record aspects of his communications with a reporter will be subject to official scrutiny through the subpoena process. The potential source is therefore forced to choose either to give information, thus risking exposure to official investigatory efforts, or to avoid the risk by remaining silent. The reporter must speculate as to whether publication of certain material will lead to a subpoena. If a subpoena is issued, the newsman must then either disclose confidential information, which could impair his reputation and resourcefulness as a reporter, or receive a contempt citation for his refusal to testify.

B. *Attempted Resolutions*

Current state and federal law resolves the conflict between the public's interest in compelled disclosure and its interest in a free flow of information in a variety of ways.

12. McGrain v. Daugherty, 273 U.S. 135, 175 (1927):
A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so that some means of compulsion are essential to obtain what is needed.

13. *See* Annot. 50 A.L.R. 21 (1927); Annot. 65 A.L.R. 1518 (1930). Administrative agencies may also be granted subpoena power by statute in order to perform effectively their functions. *See, e.g.*, 26 U.S.C. § 7608(a)(2) (1964).

No Privilege. The common law requires a reporter to testify concerning information received in confidence and to disclose the identity of informants, for it does not recognize that communication between news gatherer and informant merits special protection.[14]

Statutory Privilege for Informant's Identity. Sixteen states have made the legislative determination that protection of the *identities* of newsmen's informants from disclosure before judicial and legislative proceedings is necessary to maintain a flow of information to the public and will not unduly hamper the judicial and legislative processes.[15] In twelve of these states, the newsman may refuse to disclose the identity of his informant regardless of the importance of disclosure to the particular subject of inquiry.[16] However, in half of these twelve states, the communication with an informer must be published before a reporter may claim the nondisclosure right regarding the source of information.[17] Only three of the state statutes protecting the identities of news sources from disclosure also protect *confidential communications* received from informants.[18] The other state statutes require that con-

14. 8 J. WIGMORE, EVIDENCE § 2286 (McNaughton ed. 1961). *See* 11 STAN. L. REV. 541 (1959); Comment, *Compulsory Disclosure of a Newsman's Source: A Compromise Proposal*, 54 NW. U.L. REV. 243 (1959); Galleys, *Further Consideration of a Privilege for Newsmen*, 14 ALBANY L. REV. 16 (1950); Note, 45 YALE L.J. 357 (1935).

15. Ala. Code tit. 7, § 370 (1960); Alas. Comp. Laws Ann. §§ 09.25.150, 160 (Supp. 1970); Ariz. Rev. Stat. Ann. § 12-2237 (Supp. 1970); Ark. Stat. Ann. § 43-917 (1964); Cal. Evid. Code § 1070 (1966); Ind. Stat. Ann. § 2-1733 (1968); Ky. Rev. Stat. Ann. § 421.100 (1960); La. Rev. Stat. tit. 45 §§ 1451-53 (Supp. 1970); Md. Code Ann. art. 35 § 2 (1965); Mich. C.L. 767.5a (1968); Mont. R. Code Ann. tit. 93 §§ 601-03 (1947); N.J. Rev. Stat. § 2A:84A-21 (Supp. 1970); N.M. Stat. Ann. § 20-1-12.1 (Supp. 1970); N.Y. Civil Rights Law § 79-h (1970); Ohio Rev. Code Ann. § 2739.12 (1953); Pa. Stat. Ann. titl. 28 § 330 (1958). For a general discussion of these statutes, see D'Alemberte, *supra* note 2.

16. *See* statutory provisions, *supra* note 15, for Ala., Ariz., Cal., Ind., Ky., Md., Mich., Mont., N.J., N.Y., Ohio., and Pa. These statutes indicate a legislative determination that any protection short of this broad right to maintain the secrecy of informants' identities would significantly impair the newsgatherer-informer relationship because of the uncertainties attending a qualified right.

Four states have a qualified newsman's right of nondisclosure. *See* statutory provisions, *supra* note 15, for Alaska, Ark., La., and N.M. In Alaska, disclosure may be required if the withholding of testimony would result in a "miscarriage of justice" or is "contrary to the public interest." The Arkansas statute requires disclosure if it can be shown that an article containing information from a confidential source was published "in bad faith, with malice, and not in the interest of public welfare." The Louisiana statute requires disclosure when "essential to the public interest." In New Mexico, disclosure is required when "essential to prevent injustice."

17. *See* statutory provisions, *supra* note 15, for Ala., Ariz., Cal., Ky., Md., and N.J. Publication is required in order to assure that the right of nondisclosure is only granted when the public has had the opportunity to benefit from the informer's communication.

18. *See* statutory provisions, *supra* note 15, for Mich., N.Y., and Pa. The Michigan statute protects from disclosure all "communications" between reporters and informants. The New York statute provides for nondisclosure of "any news or the source of any such news." This statute was passed in May, 1970, subsequent to the issuance of a number of Justice Department subpoenas to newsmen requiring diclosure of information communicated in confidence. *See* p. 317 and note 1 *supra*. The Pennsylvania Supreme Court has construed the word "source" in the Pennsylvania statute to include confidential information, as well as the identities of sources. *In re* Taylor, 412 Pa. 32, 40, 193 A.2d 181, 184-85 (1963).

fidential communications be disclosed even though the identity of the source may be protected.

A number of federal statutes shielding the newsman from compulsory disclosure have been proposed in an effort to achieve uniform standards of protection for news gathering.[19] In the past, these proposals have been limited to protecting the identities of news informants from disclosure.[20] However, in 1970, legislation was proposed which protects both the identities of informants and confidential communications received from them, unless disclosure is required in the interests of national security.[21]

Reasonable Likelihood Test. One state court has suggested that compulsory revelation of informants or confidential information might raise First Amendment problems, but it proceeded to hold that disclosure of a newsman's information and sources is constitutional when there is a "reasonable likelihood" that the desired information will be relevant to the judicial subject of inquiry.[22] This test aims to eliminate groundless "fishing expeditions" and to restrict disclosure to situations in which there is reason to believe the disclosed information will aid the administration of justice.[23]

Heart of the Matter Test. The Second Circuit's opinion in *Garland*

19. *See, e.g.*, S. 1851, 88th Cong., 1st Sess. (1963); H.R. 8519, 88th Cong., 1st Sess. (1963); S. 965, 86th Cong., 1st Sess. (1959); H.R. 355, 86th Cong., 1st Sess. (1959). For an analysis of proposed Congressional legislation, see STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS., THE NEWSMAN'S PRIVILEGE (Comm. Print 1966).

20. A typical proposal reads:

> A witness who is employed by a newspaper, news service, newspaper syndicate, periodical, or radio or television station or network, as a writer, reporter, correspondent, or commentator or in any other capacity directly involved in the gathering or presentation of news, shall not be required in any court of the United States to disclose the source of any information obtained in such capacity unless in the opinion of the court such disclosure is necessary in the interests of national security.

STAFF OF SENATE COMM. ON THE JUDICIARY, *supra* note 19, at 1.

21. S. 3552, 91st Cong., 2d Sess. (1970); H.R. 16328, 91st Cong., 2d Sess. (1970); H.R. 16704, 91st Cong., 2d Sess. (1970).

22. In a case before the Hawaiian Supreme Court, *In re* Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961), a plaintiff was suing for reinstatement on the Civil Service Commission, claiming that her dismissal was the result of prior conspiracy among the Commission members. She sought disclosure of the source from whom a reporter had received advance warning of her dismissal. The court recognized that disclosure would create some deterrent effect but held that disclosure could be constitutionally allowed because the reporter's source might have knowledge as to the cause of her dismissal and aid her claim. It reasoned:

> There, of course, can be no assurance that if the plaintiff is permitted to pursue her inquiry, she will obtain from deponent's answers the identity of anyone who can substantiate the basic point of her alleged case. . . . [W]e can only say that it is our best judgment that the inquiry desired to be made by the plaintiff in this case could be considered likely enough to lead to discovery of sufficiently important admissible evidence to warrant the trial court's permitting her to pursue it . . . .

Id. at 338, 367 P.2d at 484-85.

23. Presumably this standard, determined in a trial context, could also apply to grand jury and legislative investigations; disclosure could be required if there were reason to believe that the desired information would aid the investigation.

v. Torre can be read to require that the constitutionality of compulsory disclosure of a newsman's confidential sources be determined by whether the information sought by subpoena goes "to the heart of the . . . claim."[24] In this case, Judy Garland had sued the Columbia Broadcasting System for libel because of an allegedly defamatory comment published in a newspaper column, but attributed to an unnamed C.B.S. executive. The identity of the author of the comment was crucial to her claim, for only if he were proven to be a C.B.S. executive would she have grounds for action against the broadcasting network. The court reasoned that because the action would be defeated if the informer's identity were not revealed, "the paramount public interest in the fair administration of justice" outweighed the potential injury to the free flow of news.[25] It indicated that in other situations, as "where the identity of the news source is of doubtful relevance or materiality," the source might not be constitutionally compelled to testify.[26] This is perhaps a stricter test than the demand for "reasonable likelihood." The *Torre* rationale suggests that disclosure should not be compelled unless the information possessed by the reporter appears important to the resolution of the judicial controversy.

A variant of the "heart of the matter" test has been proposed by recent Justice Department guidelines for the issuance of federal investigatory subpoenas.[27] As with the "heart of the matter" test, the theory of this proposal is that testimony should not be compelled before governmental bodies unless the desired information appears necessary to the inquiry. These guidelines state that "[t]here should be sufficient reason to believe that the information sought is essential to a successful investigation"; they explicitly recognize that "[t]he subpoena should not be used to obtain peripheral, nonessential or speculative information."[28] The Attorney General's permission is required for issuance of a subpoena to a reporter, and the guidelines further recommend that, before issuance of such a subpoena, "reasonable" attempts should be made

24. 259 F.2d 545, 550 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). The Wisconsin Supreme Court interpreted the *Torre* decision in this manner. State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971).

25. *Id.* at 549.

26. *Id.* at 549-50.

27. Address by Attorney General John N. Mitchell, A.B.A. House of Delegates, Aug. 10, 1970, in 7 CRIM. L. REP. 2461 (Sept. 2, 1970). Previously there were no express guidelines, although it was Justice Department policy to negotiate with the publisher prior to the issuance of a subpoena. *See* Statement of Attorney General Mitchell, New York Times, Feb. 6, 1970 at 40, col. 4.

28. Address by Attorney General John N. Mitchell, *supra* note 27.

to obtain the desired information from nonpress sources or to persuade the reporter to convey voluntarily the desired material.[29]

Miscarriage of Justice. A constitutional test requiring disclosure by a newsman only when a miscarriage of justice would otherwise result appears to be a somewhat stricter standard than a determination whether the information goes "to the heart of the matter." An Illinois court recently adopted this test in *People v. Dohrn.*[30] The court held that the Illinois subpoena statutes violated the First Amendment rights of newsmen by requiring them to appear before judicial bodies regardless of the importance of the testimony desired from them. The court reasoned that because of the "inherently" inhibiting effect of subpoenas on reporters, the party desiring such a subpoena must show substantial cause for compelling the reporter's testimony. It then quashed subpoenas which had been served on newsmen by the defendants in a criminal suit and held that no such orders may be issued without a preliminary hearing at which the party desiring to compel the reporter's testimony must prove: (1) there is probable cause to believe that the reporter has information relevant to the subject of investigation; (2) the subpoena is the only method by which the evidence may be obtained; and (3) a "miscarriage of justice" would result if the information sought were not provided.[31]

Compelling Need. The Ninth Circuit recently adopted a somewhat similar constitutional test as a prerequisite for compelling a journalist to appear before a grand jury.[32] The district court had held that *New York Times* reporter Earl Caldwell must appear before the grand jury investigating the Black Panther Party, but it had granted him a protective order stating that he was not required to *testify about matters transmitted to him in confidence* until such time as a "compelling and overriding national interest which cannot be alternatively served has been established to the satisfaction of the court."[33] The court of

29. *Id.* These guidelines would be applicable for the issuance of subpoenas by all Justice Department officials whether in a trial or grand jury context. However, neither Congress, state legislatures, state prosecutors, nor individual litigants would be bound by the guidelines.

30. People v. Dohrn, Crim. No. 69-3808 (Cir. Ct. Cook Cty., Ill. May 20, 1970).

31. *Id.* This standard entails judicial enforcement of an "alternative means" test suggested by the Justice Department guidelines; disclosure may be required only when the confidential information appears necessary to a non-frivolous claim or investigation and the desired information cannot be obtained in an alternative fashion. It is applicable to both the government and private parties, and presumably applies in both a judicial and legislative setting; however, it is difficult to determine how the "alternative means" test will function in a criminal trial in those circumstances in which there is need for cumulative evidence.

32. *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

33. Application of Caldwell, 311 F. Supp. 358, 360 (N.D. Cal., 1970).

appeals agreed with the district court that "compelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze, and publish the news."[34] However, because of the potential deterrence created by Caldwell's mere appearance before a secret investigatory body, the court of appeals held that the First Amendment provided Caldwell with a right not to *appear* before a grand jury until the state had demonstrated a "compelling need" for his testimony.[35] While the court did not set guidelines as to what would constitute such a showing, it referred to those standards formulated in *People v. Dohrn* as possible criteria for a state showing of "compelling need."[36] The Ninth Circuit did not indicate whether "compelling need" had a meaning different from the phrase, a "compelling and overriding national interest," although the concurring opinion suggested that no distinction was intended.[37]

II. First Amendment Protection for the Reporter-Informant Relationship

The newsman's right to protect his sources and their communications flows from the freedom of the press clause of the First Amendment.[38] However, those cases[39] which have found constitutional protection for the newsman-informer relationship have not, in construing the free

34. *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970) (quoting district court opinion).
35. The Ninth Circuit reasoned:
> [W]e find guidance in the Supreme Court decisions regarding conflicts between First Amendment interests and legislative investigatory needs; the Court has required the sacrifice of First Amendment freedoms only where a compelling need for the particular testimony in question is demonstrated.

Id. (footnotes omitted).
36. *See* p. 324 *supra.*
37. Judge Jameson, concurring, stated:
> In my opinion the order of the district court could properly be affirmed, and this would accord with the customary procedure of requiring a witness to seek a protective order after appearing before the grand jury. I have concluded however, that Judge Merrill's opinion properly holds that the same result may be achieved by requiring the Government to demonstrate the compelling need for the witness's presence prior to the issuance of a subpoena and in this manner avoid any unnecessary impingement of First Amendment rights.

In re Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970) (concurring opinion).
38. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The First Amendment is not only applicable to legislative action, but also to action by the federal executive and judiciary, including the issuance of subpoenas in connection with federal investigations and proceedings. *See, e.g.*, Watkins v. United States, 354 U.S. 178, 187-88 (1957). The First Amendment applies to state government by reason of the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Sweezy v. New Hampshire, 354 U.S. 234 (1957).
39. *See* note 7 *supra.*

press clause, enunciated a coherent set of principles which justify the right of nondisclosure. Nor have they provided much guidance for future decisions, since they are usually based on an ad hoc balance of interests. For example, in the recent *Caldwell* case, the court of appeals held that a reporter did not have to appear before a grand jury because the political group he covered was extremely sensitive to the possibility of disclosure of certain information the reporter had obtained.[40] The court recognized that, because of the potential deterrence of informers in that particular situation and because the government had not shown a "compelling need" for his testimony, the First Amendment provided the reporter with a right of nondisclosure. However, uncertainty still surrounds the newsman-informer relationship, since the court offered no guidelines to measure the requisite potential deterrence or the quantum of need to be demonstrated by the government. In light of the divergent approaches adopted by lower courts and the stunted rationales of those decisions which have given constitutional protection to the informer-reporter relationship, a coherent First Amendment argument for the constitutional right to a confidential relationship must be developed before the proper reconciliation of the competing interests can be determined.

A. *"Freedom of the Press" Implies the Right to Gather News*

Democratic society is premised on the idea of individual autonomy and requires that citizens make informed decisions of a political, social, and economic nature. This conception of personal development and participation in societal processes, which is a core tenet of democratic theory, is based, in turn, on a presumption that the fullest range of information should be available to individuals so that they will be ade-

40. The court reasoned:

> Finally we wish to emphasize what must already be clear: the rule of this case is a narrow one. It is not every news source that is as sensitive as the Black Panther Party has been shown to be respecting the performance of the "establishment" press or the extent to which that performance is open to view. It is not every reporter who so uniquely enjoys the trust and confidence of his sensitive news source.

In re Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970). Uncertainty as to the use of this test in other newsman-informer relationships is exemplified by a comparison of recent decisions by the supreme courts of Massachusetts and Wisconsin. The Massachusetts court rejected the test altogether, arguing that "there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury." *In re* Pappas, No. 14,690 (Mass. Sup. Ct. Jan. 29, 1971). The Wisconsin court, acknowledging the test, held that a newsman could be required to disclose before a grand jury the identities of those who had allegedly bombed a building because the "administration of criminal justice itself is a sufficient substantial interest of the state." This interpretation of the "compelling need" test suggests that disclosure could always be compelled during an investigation into possible criminal conduct. State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971).

quately equipped to make both personal and political decisions.[41] Such access to opinion and fact may only be provided if there is a flow of information to the public, unconstrained (insofar as possible) by either public or private forces. A free press plays a crucial role in preserving this information flow, for in a large and complex society where face-to-face communication is often impossible on a meaningful scale, information must usually be disseminated through the press.[42] In giving meaning to the First Amendment's mandate for a free press, the Supreme Court has, therefore, defined freedom to print as a right basic to the existence of a democratic society.[43]

The Court has also delineated a set of corollary rights to "freedom to print" which must be protected in order to ensure the continued vitality of the information flow to the public. A basic freedom is the *right to publish without prior governmental approval.*[44] The Court has recognized, however, that government action less drastic than prior censorship may curtail the dissemination of news to the public. In *Grosjean v. American Press Co.*, the Court found it necessary to recognize explicitly a *right of circulation* in order to ensure the preservation of an "untrammeled press as a vital source of public information."[45] Other Supreme Court decisions have recognized the *right to distribute* literature freely[46] and the *right to receive* printed matter without state restrictions which might impair the free flow of information.[47]

41. *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3-15 (1963). Emerson states four reasons for maintaining a system of free expression: (1) to assure individual self-fulfillment; (2) to attain the truth; (3) to secure the participation of the members of society in social decision-making; and (4) to maintain a balance between stability and change in society. *Id.* at 3. *See generally* A. MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

42. The First Amendment freedom of the press provision applies to radio and television broadcasting as well as to publications. *See, e.g.*, Red Lion Broadcasting Co. v. F.C.C. 395 U.S. 367 (1969).

43. *See, e.g.*, Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

44. Near v. Minnesota, 283 U.S. 697 (1931).

45. 297 U.S. 233, 250 (1936). A special license tax applicable only to newspapers with circulation in excess of 20,000 copies per week was held unconstitutional as a restraint upon both publication and circulation. The Court recognized that the tax would deter circulation in excess of 20,000 and therefore limit the flow of news to the public.

46. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939).

For example, in *Martin v. City of Struthers, supra*, the Court held unconstitutional an ordinance which forbade door-to-door distribution of handbills because those accustomed to circulating material in this manner would be restrained in their activities, and, as a consequence, the public would be the recipient of less information. The ordinance was passed for substantial reasons, *viz.* prevention of crime and protection of privacy in an industrial community where many worked night shifts. However, the Court determined that the reasons advanced to support the statute were insufficient to justify such a limitation on the means of distribution.

47. Lamont v. Postmaster General, 381 U.S. 301 (1965). The case involved a challenge

The right to gather news is as basic to a free press as the right to distribute and receive printed materials, because without freedom to gather information the right to print would be severely diminished in value. The general principle that news must not be unnecessarily cut off at its source is fundamental to the concept of a free flow of information to the public. The framers of the Bill of Rights recognized that the right to gather news was implicit in the First Amendment. Madison wrote:

> A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both.[48]

Modern commentators have also emphasized the fundamental importance of the news gathering function of the press:

> If the public opinion which directs conduct of governmental affairs is to have any validity and if the people are to be capable of real self-rule, access to all relevant facts upon which rational judgments may be based must be provided.[49]

The right to gather material for publication has never been explicitly recognized by the Supreme Court. However, the Court, in recognizing specific exceptions to a right of access in the interests of national security, has implicitly acknowledged the existence of a general right to gather information.[50] The existence of some right to gather news (what-

to legislation which required the Postmaster General to detain unsealed foreign mailings of "communist political propaganda" and deliver only upon the addressee's request. The statute was held to violate the addressee's First Amendment right to receive information because it imposed upon him an affirmative obligation of requesting delivery, and he might be deterred from performing the necessary steps in order to receive the information. Mr. Justice Brennan concurring, reasoned that the First Amendment protected dissemination of ideas and that "such dissemination can accomplish nothing if otherwise willing addressees are not free to receive and consider them." 381 U.S. at 308.

48. 6 WRITINGS OF JAMES MADISON 398 (Hunt ed. 1906).

49. Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209, 211 (1952).

50. *See* Zemel v. Rusk, 381 U.S. 1 (1965). The Supreme Court held that the Secretary of State's denial of a passport for travel to Cuba did not violate a citizen's First Amendment right to acquire information concerning that country. The Court recognized that the Secretary's refusal to validate passports for Cuba rendered less than wholly free the flow of information concerning that country; however, it reasoned that the Secretary's refusal was a restraint of action, and that under certain circumstances actions were subject to regulation. Implicitly recognizing some right to gather information, the Court concluded that the "right to speak and publish does not carry with it the *unrestrained* right to gather information," and that "the weightiest considerations of national security" necessitated this particular restraint. *Id.* at 17, 16 (emphasis added).

See also Associated Press v. United States, 326 U.S. 1 (1945). In this case, certain by-laws of the Associated Press were held to be in violation of the Sherman Act because they prevented non-member newspapers from purchasing news from the Associated Press or its publisher members and thus curtailed publication of competitive newspapers. The Court noted, however, that the First Amendment provided a substantial argument in

ever its exact dimensions) is thus derived both from the central position a free press occupies in democratic theory and from its relation to other rights established by the existing cases interpreting the freedom of the press clause.[51]

B. *The Right to Gather News Implies the Right to Protect News Sources*

The right to confidential informer-reporter relationships follows logically from the right to gather news when four factual assumptions are accepted: (1) newsmen require informants to gather news; (2) confidentiality (the promise that names and certain aspects of communications will be kept off-the-record) is essential to the establishment of a relationship with many informers; (3) the use of an unbridled subpoena power will deter potential sources from divulging information; and (4) the use of an unbridled subpoena power will deter reporters from gathering or publishing information which might lead to a demand for complete compulsory disclosure. If these factual assumptions are correct, the press will be less effective in uncovering criminal activity, corruption, government mismanagement, and other matters of public interest unless a right to protect the confidentiality of news sources is created. Much discussion will be stifled concerning socially controversial activities, such as illegal abortion and drug usage, for individuals will avoid the possibility of public identificaton with illegal conduct.[52] Some persons will be reluctant to voice their opinions without assurances of anonymity for fear of harassment and reprisal.[53]

support of the application of the antitrust laws because the by-laws denied non-member newspapers access to news:

> That 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, and that a free press is a condition of a free society. Surely a command that the government itself shall not impede the flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

Id. at 20.

51. The right to gather information raises a number of complex issues such as an individual's right to travel, discussed in Zemel v. Rusk, 381 U.S. 1 (1965), and an individual's right of access to government information. However, discussion in this Note is limited to the right to confidential informer-reporter relationships as derived from the right to gather information.

52. *See, e.g.*, State v. Buchanan 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968), which required disclosure of several informants who, under an express promise that their identities would not be revealed, had provided information to a reporter relating to the use of marijuana on a university campus.

53. The Supreme Court has recognized the importance of guarantees of anonymity to assure free expression. In *Talley v. California*, a statute prohibiting distribution of anonymous handbills was held void on its face because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." 362 U.S. 60, 65 (1960).

It is obvious that the first assumption is valid. However, courts that have denied the constitutional right to confidential informer-reporter relationships have often not accepted the validity of either the second, third, or fourth assumptions from which the right is logically derived.[54] Yet, available data suggests that those who deny *any* validity to these three assumptions are wrong to do so.

Surveys of the press indicate that a substantial number of newspaper stories are based on information which could only be secured through confidential informer-reporter relationships.[55] Erwin D. Canham, editor-in-chief of the *Christian Science Monitor,* estimates that from 33% to 50% of that newspaper's major stories involve confidential sources, and the *Wall Street Journal* states that 15% of its articles are based on information from confidential informants.[56] The managing editor of the *San Francisco Chronicle* writes that "an absolutely staggering number of stories, political and non-political, arise from information received in confidence."[57] "Systematic" empirical evidence has not been developed, in part because reporters and editors do not keep records of the confidential nature of sources and therefore must make educated guesses as to the incidence of confidentiality. But it is still clear from available data that some leading newsmen regard confidentiality as essential for development of many news stories.

The issuance of subpoenas to news gatherers also appears to silence potential informants who fear that their identity or their off-the-record communications may have to be revealed by the newsman. Even some courts that have denied the constitutional right to a confidential relationship have taken judicial notice that compulsory disclosure of information will deter informers and limit sources available to newsmen.[58] Recognizing that a broad guarantee of confidentiality is essential to the

54. *See* note 6 *supra.* In the Massachusetts case, *In re* Pappas, No. 14,690 (Mass. Sup. Ct. Jan. 29, 1971), the court stated: "Any effect on the free dissemination of news is indirect, theoretical, and uncertain, and relates at most to the future gathering of news."

55. For the most extensive survey to date, see the Appendix to Guest & Stanzler, *supra* note 2, at 57-61. In Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970), eighteen affidavits by such prominent newsmen as Walter Cronkite and Eric Sevareid were submitted with the Caldwell and amicus briefs stressing the importance of informer-reporter relationships in the gathering of news and the necessity of guaranteeing confidentiality for the maintenance of these relationships. The Court of Appeals relied heavily on these affidavits:

> The fact that subpoenas would have a "chilling effect" on First Amendment freedoms was impressively asserted in affidavits of newsmen of recognized stature, to a considerable extent based upon recited experience.

In re Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

56. Guest & Stanzler, *supra* note 2, at 43-44, 61.

57. *Id.* at 60.

58. Garland v. Torre, 259 F.2d 545, 548 (2d. Cir.), *cert. denied,* 358 U.S. 910 (1958); *In re* Taylor, 412 Pa. 32, 41, 193 A.2d 181, 185 (1963).

maintenance of informer-reporter relationships, the American Newspaper Guild has adopted the following rule as part of the newsman's code of ethics:

> Newspaper men shall refuse to reveal confidence or disclose sources of confidential information in court or before other judicial or investigative bodies.[59]

Although again no "systematic" empirical evidence of a deterrent effect is available, the inhibiting effect of subpoenas to newsmen on the willingness of informants to talk to newsmen has been demonstrated by the reaction of militant groups to the recent increase in subpoenas issued by federal grand juries. The Oakland Black Caucus, an organization representing major black groups in the Oakland area, refused to co-operate with the American Broadcasting Company in the filming of a documentary on the Black Panthers when A.B.C. admitted it was unable to provide an assurance that its newsmen would remain silent in the face of possible government subpoenas.[60] In this and other cases,[61] fear generated by the issuance of a subpoena to *New York Times* reporter Earl Caldwell was expressly stated as the reason for the informants' unwillingness to co-operate with newsmen. The impediment to news gathering caused by a reporter's testimony under subpoena before a legislative committee has also been recently demonstrated. When a *New York Times* reporter was required to testify before the House Committee on Internal Security investigating militant activities, militant groups thereafter refused to talk with either him or other *Times* reporters, asserting that those newsmen could not be trusted with confidential information.[62]

The silencing effect caused by the increase in government subpoenas has not been confined to militant groups. A *Newsweek* reporter's affidavit submitted in the *Caldwell* trial asserts:

59. G. Bird and F. Mervin, The Newspaper and Society 567 (1942).

60. Affidavits of Gilbert E. Noble and Timothy C. Knight accompanying Petitioner's Brief, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

61. A Los Angeles *Newsweek* correspondent who had previously maintained good relations with the Panthers was refused an interview until *Newsweek* agreed to contest judicially any subpoenas the correspondent received, but by the time this agreement was secured, the subject of the interview had left Los Angeles. Affidavit of Nicholas C. Proffitt, accompanying Brief for *Newsweek* as Amicus Curiae, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970). In New York, a *New York Times* reporter found previous news sources unwilling to discuss Black Panther activities. Affidavit of David Burnham, accompanying Petitioner's Brief, Application of Caldwell, *supra*. In Massachusetts, a former source of information on black militant groups was highly reluctant to cooperate with a *Newsweek* Bureau Chief. Affidavit of Frank Morgan, accompanying Brief for *Newsweek* as Amicus Curiae, Application of Caldwell, *supra*.

62. Affidavits of Anthony Ripley, John Kifner, Thomas A. Johnson, Earl Caldwell, & Gerald Fraser, accompanying Petitioner's Brief, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

> Particularly disturbing to me has been a marked increase recently, in the reticence of my confidential sources in government itself. These sources, some of whom have in the past been instrumental in exposing instances of governmental abuse or corruption, now tell me that, because of the increasingly widespread use of subpoenas to obtain names and other confidential information from reporters, they are fearful of reprisals and loss of jobs if they are identified by their superiors as sources of information for newsmen.[63]

It also appears likely that some reporters will be deterred from seeking and publishing information that could lead to a subpoena which would force them to disclose confidential information or to receive a contempt citation. Again, it is difficult to reach any precise conclusions as to the extent of this deterrence, but the acceptance of contempt citations by newsmen in the past indicates an unwillingness to place themselves in a position of losing their reputation through disclosure of information intended to be kept confidential.[64] It is not unreasonable to assume that some reporters, especially those who cannot count on the support of their editors or publishers or who cannot otherwise command resources for legal defense, will be reluctant to print stories likely to lead to subpoenas and possible contempt citations.[65]

Nonetheless, the validity of the factual assumptions has not been established "conclusively," in part because of the inherent ambiguity, in this context, of the concept of "conclusiveness," a word which necessarily has reference to values as well as to facts. For example, what

63. Affidavit of Jon Lowell, accompanying Brief for *Newsweek* as Amicus Curiae, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970). *See also* affidavits of Walter Cronkite and Mike Wallace, accompanying Brief for C.B.S. as Amicus Curiae, Application of Caldwell, *supra*, for examples of the importance of confidential informers in gathering news concerning government activities. In his affidavit, Cronkite cites five recent examples of important stories he could have secured only through confidential informants:

> A member of the staff of a United States Senator advised me, far in advance of the announcement, that his employer did not plan to run for re-election. Another person in a similar position tipped me to his employer's intention to seek higher office. An officer high in Pentagon circles recently offered evidence of pressure high in the military command structure to get the President to cut back on his Viet Nam withdrawal commitments. A bartender told me of fraud in restaurant inspection in New York City. A scientist asserted that the Atomic Energy Commission's safety standards for atomic energy installations were not adequate. None of these persons would have volunteered this information if they thought they would be exposed as the source of this information.

64. *See* notes 5 and 6 *supra*. There has not been extensive research in this area, however, to determine the extent that reporters are deterred by the absence of a broad right of confidentiality.

65. The threat of a deterrence of reporters was recognized in the *Caldwell* case:

> [I]t 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. The First Amendment guards against governmental action that induces self-censorship.

In re Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

would it mean to show "conclusively" that Assumption #2—confidentiality is essential to the establishment of many reporter-informer relationships—was valid for "constitutional purposes"? First, it would require a difficult factual inquiry to determine what percentage of all reporter-informer relationships are confidential. But, even assuming it were possible to find a methodologically satisfying answer to that question, when would the finding be "conclusive enough" to require that the right to a confidential relationship be given constitutional protection: when 10% are confidential, 50%, "some," "many"? Obviously, the second question can only be answered with reference to value choices.

Similarly, determining the validity for constitutional purposes of Assumption #3 or #4—the use of an unbridled subpoena power will deter potential sources from divulging information or reporters from gathering and printing certain kinds of information—requires a prediction about the occurrence of factual sequences in the future. If X occurs, Y or Z will result N per cent of the time. Again, even if one could produce a proposition in that form that was defensible in methodological terms (and there is substantial reason to doubt that such an achievement is possible),[66] the value question of when N per cent was sufficiently great to require constitutional protection for the right would still be open. If such a proposition cannot be produced, then one's assessment of the assumption—one's presumption about its validity and the degree of "incidence" deemed important—would even more starkly depend upon value preferences.

The reason for determining the validity of the four assumptions isolated above is to help resolve two issues: first, the one posed in this subsection—should *some* right to a confidential relationship exist?; second, the one posed in the next two subsections—how far should that right extend (how important is it compared to other interests)? But the question of factual validity regarding the *existence of confidential relationships* (Assumption #2) and the scope and incidence of *deterrent effects* that result from use of the subpoena power (Assumptions #3 and #4) must be inevitably linked with the value question of the *importance* of the First Amendment interests. Clearly, given the "inconclusive" state of available facts *and* the likelihood that they will in important respects remain "inconclusive,"[67] resolution of the two issues must rest

66. Establishing the empirical basis for the deterrence assumption is complicated by determining what constitutes "unbridled subpoena power," when such power has existed, and when informants have been aware of its existence.

67. An empirical study is presently being conducted by the Field Foundation under the direction of Vince Blasi of the University of Michigan Law School, and Richard Baker and W. Phillips Davison of the Columbia School of Journalism. While additional

on articulated value choices—on a presumption for or against the First Amendment interests in this setting.

This Note proposes that the facts presently known rebut the charge of invalidity previously attached to the four assumptions by some courts and warrant the establishment of *some* right to a confidential reporter-informer relationship. This conclusion—which is the fulcrum of the subsequent argument—rests on two beliefs.

First, the demonstration of some factual validity of the four assumptions *and* common sense are sufficient grounds for presuming that these assumptions will have some validity in the future. For example, it seems clear that sources within government, who are willing to divulge information to the press about alleged government misfeasance, will dry up if they have reason to believe their names can be compelled.

Second, a relationship, (a) whose protection is consistent with First Amendment theory[68] and (b) that has some basis in fact, should be given constitutional protection if "unnecessary" deterrent effects can be shown. The word "unnecessary" does not have reference to a finely calibrated evaluation of empirically validated behavior in which the "benefits" of the right are quantified and weighed against its "costs."[69]

As will be discussed in the next subsections, both these beliefs draw strength from the Supreme Court's sensitivity to deterrent effects on First Amendment freedoms. This sensitivity is based clearly on value preferences arising out of common sense predictions, since it is extremely difficult for the Court to "prove" the existence of those effects or to demonstrate their "rate of incidence" with any precision.

data will provide helpful information concerning confidential informer-reporter relationships and the deterrent effects caused by the issuance of subpoenas to reporters, such data can by no means be conclusive and is not necessary for a judicial decision that the informer-reporter relationship should receive constitutional protection. Reporters questioned in a survey cannot determine the number of potential informants who have refrained from contacting newsmen because of the absence of a right of nondisclosure, and it is doubtful whether they can determine the extent to which their informants refrain from fully disclosing information to them because of the absence of a nondisclosure right. If a survey attempts to question informants, it will be extremely difficult to obtain a random sample of confidential informants willing to respond to such an inquiry. Furthermore, it will be difficult to build the requisite objectivity into a survey where all persons questioned have a vested interest in the results of the study. Therefore, courts must rely on logical reasoning, present knowledge of the newsman-informer relationship, and presumptions based on First Amendment values, to decide that a constitutional right to confidential informer-reporter relationships is necessary to the maintenance of a free flow of information.

68. *See* pp. 326-29 *supra.*

69. At this point, the Note assumes some "unnecessary" effects exist. An extended discussion of this value judgment occurs at pp. 345-60 *infra.*

C. *The Right to Protect News Sources Must Be Broad and Subject Only to Clear Exceptions*

Establishing the necessity for judicial recognition of some First Amendment right to protect informer-reporter relationships, however, does not define its precise nature or scope. Two general principles derived from other First Amendment cases will provide an orientation to help further delineate the dimensions of this right: (1) permissible governmental regulation of First Amendment conduct may not be vague in scope or application; and (2) First Amendment rights are accorded special protections and may be restricted only because of a compelling government interest. Although the First Amendment speaks in terms of "law," the protections of the Amendment are available not only against legislation but against government action in other forms.[70]

In areas where the Supreme Court has recognized that the government may regulate First Amendment conduct, the Court has insisted upon precision and specificity of the prohibitions so that parties will not unnecessarily forego the exercise of First Amendment rights.[71] It is well settled that a statute which is so indefinite in its language or is interpreted to permit the punishment of incidents which are within the protection of the First Amendment is void on its face.[72] Similarly, stricter standards of permissible vagueness are applied to governmental action which has a potentially inhibiting effect on speech or the press than are applied to governmental regulation of economic activity:[73] "A man may the less be required to act at his peril here because the free dissemination of ideas will be the loser."[74] Administrative or executive action would seem logically subject to similar prohibitions regarding overbreadth, vagueness, and abuse of discretion if exercise of this action (*e.g.*, issuance of subpoenas) impinges upon First Amendment rights.

70. Freedman v. Maryland, 380 U.S. 51, 56 (1965). Standards of permissible statutory vagueness are particularly high when a state empowers an administrative or executive agency to take action which may infringe First Amendment rights. *Cf.* United States v. Robel, 389 U.S. 258, 275-76 (1967) (Brennan, J., concurring):

> [T]he numerous deficiencies connected with vague legislative directives . . . are far more serious when . . . the exercise of fundamental rights [is] at stake.
>
> . . . Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree . . . .

71. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

72. *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369 (1931). *See generally*, Note, *The Void for Vagueness Doctrine in the Supreme Court* 109 U. PA. L. REV. 67 (1960).

73. Winter v. New York, 333 U.S. 507, 517-18 (1948).

74. Smith v. California, 361 U.S. 147, 151 (1959).

The Supreme Court has frequently emphasized the need for certainty in the exercise of First Amendment rights, even though precision increases the likelihood that libelous and obscene materials (which the state has a legitimate interest in suppressing) will be published and distributed.[75] This certainty is necessary to effectuate the free press guarantee of the First Amendment because, without certainty, parties responsible for the dissemination of information to the public will be unable to predict when the state can suppress their activities. Thus, there is a substantial possibility that they will unduly censor their publications to avoid punishment. The Court has determined that the mere prospect of self-censorship of activity protected by the First Amendment is sufficient to hold such statutes unconstitutional on the ground of vagueness even though the exact extent of self-censorship is empirically uncertain.[76]

The deterrent effect of an unbridled subpoena power may be analogized to the inhibiting effect of vague and overbroad statutes affecting First Amendment freedoms.[77] Unless reporters and informers can predict with some certainty the likelihood that newsmen will be required to disclose names or information obtained in confidential relationships, there is a substantial possibility that many reporters and informers will be reluctant to engage in such relationships.[78] As a result of this deterrence, the flow of information to the public will be diminished regardless of whether disclosure could have actually been compelled. Thus, to prevent this unconstitutional deterrent effect once the right to a confidential relationship has been established, occasions on which the state may compel a newsman to disclose names or information obtained in a confidential relationship must be defined with specificity.

75. In *New York Times Co. v. Sullivan*, for example, the Court recognized that the common law standard for libel actions, requiring truth as a defense to a claim of libel, would deter the press from publishing matters difficult to establish as true, whether libelous or not. To prevent self-censorship by the press, the Court required a showing of actual malice by the plaintiff in libel actions against public officials. 376 U.S. 254 (1964).

76. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51, 56 (1965); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964).

77. In *Freedman v. Maryland*, the statute to which the vice of vagueness attached was MD. ANN. CODE art. 66A, § 2 (1957), which required films shown in Maryland to be "duly approved and licensed" by a state board of censors before exhibition. 381 U.S. 51 (1965). It is here argued that a similar defect of vagueness (as well as overbreadth) inheres in the statutes which authorize reporters to be subpoenaed before grand juries, legislative committees, and civil and criminal tribunals, but which do not provide for nondisclosure of confidential information and the names of confidential informants. For example, 2 U.S.C. § 190b (1964) provides that a Senate standing committee may require "by subpoena [sic] or otherwise the attendance of such witnesses . . . to take such testimony . . . as it deems advisable." A judicial gloss will later be suggested which will avoid the vagueness and overbreadth of such subpoena statutes. *See* p. 339 *infra*.

78. *See* pp. 330-32 *supra*.

The second general principle that may be used in defining the scope of the news gatherer's right to protect his confidential relations with informants is that First Amendment rights are traditionally "protected against government curtailment at all points, even where the results of expression may appear to be in conflict with other social interests which the government is charged with safeguarding."[79] The rationale for specially protecting First Amendment rights is that freedom of speech and of the press are the indispensable preconditions for the exercise of other freedoms.[80] The Supreme Court once spoke of these rights as being "preferred"[81] in relation to other legal rights, and although this language has been abandoned,[82] the concept of special safeguards still survives in a number of First Amendment doctrines.[83] Correlatively, the Court has explicitly recognized that these rights are "delicate and vulnerable"[84] and must be vigilantly safeguarded because they are particularly susceptible to government inhibition. Their exercise is easily deterred or "chilled" by government action because the economic self-interest that may be relied upon for the vindication of other legal rights is lacking in the First Amendment area.[85]

This principle of broad scope for First Amendment rights is translated into a presumption that any governmental restriction of First Amendment rights is impermissible.[86] The Supreme Court has consistently held that only a "compelling,"[87] "substantial,"[88] "subordinat-

79. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970). The Court has held that these rights must be taken as a "command of the broadest scope that explicit language, read in the context of a liberty loving society, will allow." Bridges v. California, 314 U.S. 252, 263 (1941).

80. Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967).

81. This doctrine originated in U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), with the cautious assertion that "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments" than when legislation regulates economic activity. *Cf.* Marsh v. Alabama, 326 U.S. 501, 509 (1946). The preferred freedoms doctrine has been formulated in terms of First Amendment rights, however, because freedom of speech and of the press have been viewed as basic for democratic government. Thomas v. Collins, 323 U.S. 516, 530 (1945). The preferred freedoms language seems to have been primarily a rhetorical device to emphasize the importance the Supreme Court attaches to First Amendment freedoms. Note, *A Uniform Valuation of the Religion Guarantees*, 80 YALE L.J. 77, 81 n.20 (1970).

82. *Cf.* Justice Frankfurter's criticism of the "preferred freedoms" doctrine in Kovacs v. Cooper, 336 U.S. 77, 90-94 (1949) (concurring opinion).

83. The clear and present danger rule (*see, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)), the alternative means test (*see, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500, 512 (1964)), negative presumptions (*see, e.g.*, Speiser v. Randall 357 U.S. 513, 526 (1958)), and the overbreadth doctrine (*see, e.g.*, U.S. v. Robel 389 U.S. 258, 265-66 (1967)) all indicate the survival of a special "preference" for First Amendment rights in modern constitutional theory.

84. NAACP v. Button, 371 U.S. 415, 433 (1963).

85. Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965).

86. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 106-07 (1968).

87. NAACP v. Button, 371 U.S. 415, 438 (1963).

88. NAACP v. Alabama, 357 U.S. 449, 464 (1958).

ing,"[89] "paramount,"[90] "cogent,"[91] or "strong"[92] state interest in the regulation of a subject within the government's constitutional power to regulate can justify limiting these freedoms. Even the advocacy of law violation or the use of force may only be proscribed when such advocacy is directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action.[93] It is not possible, however, to use these adjectival tests to catalogue the situations in which First Amendment rights must yield to other governmental interests because in each case, speech and non-speech elements may be combined in the same course of conduct.[94] This requirement of an extraordinary government interest seems to be primarily a rhetorical device used to emphasize that only in rare circumstances may First Amendment rights be restricted.

Moreover, the Supreme Court has consistently held that the exercise of First Amendment rights may not be restricted by indirect inhibitions or secondary prohibitions. For example, the Court has recognized that the primary First Amendment right of free association may be impaired by government investigation of membership lists[95] and has therefore prohibited such investigations even though they did not directly prevent individuals from joining any organization.[96] The Court has also struck down tax statutes which indirectly prohibited the exercise of First Amendment rights.[97] The mere threat of sanctions may deter the exercise of free speech or free association almost as much as the actual application of sanctions.[98] Thus, since the right to a confidential news gatherer-informant relationship has been found to be within the First Amendment press freedom, this right should be protected from indirect restrictions, subject to limitation only because of "compelling state interests."

D. *Nature and Further Justification of the Right*

1. *The Proposed Rule*

In light of the argument thus far, this Note suggests the following rule as being sufficiently broad and specific to satisfy the First Amend-

89. Bates v. Little Rock, 361 U.S. 516, 524 (1960).
90. Thomas v. Collins, 323 U.S. 516, 530 (1945).
91. Bates v. Little Rock, 361 U.S. 516, 524 (1960).
92. Sherbert v. Verner, 374 U.S. 398, 408 (1963).
93. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
94. *Cf.* United States v. O'Brien, 391 U.S. 376-77 (1968).
95. NAACP v. Alabama, 357 U.S. 449 (1958).
96. Bates v. Little Rock, 361 U.S. 516 (1960).
97. Grosjean v. American Press Co., 297 U.S. 233 (1936).
98. NAACP v. Button, 371 U.S. 415, 433 (1963).

ment freedom of the press requirements. The proposed rule consists of the following elements:

a. The right lodges in *news gatherers* to withhold
b. *informants' names* and *information received from informants*
c. except at a *criminal trial* and in civil trials when the newspaper is a defendant to a libel action covered by the rule of *New York Times Co. v. Sullivan.*[99]
d. At a criminal trial, the reporter is only required to give information, according to the rules of evidence, relevant to the alleged elements of the crime charged to an *informer-defendant* and
e. may withhold the *names of third party sources* and *information received from such sources.*
f. Before testifying in the criminal trial context, the reporter may require the party seeking compulsory testimony to *show cause* that the reporter had reason to possess information about the defendant and the alleged criminal acts.
g. In the civil trial setting, the reporter should only be required to testify when he or his publication is a defendant in a libel action under the *Times* rule and when substantial evidence of *defamation*
h. and *falsehood* have been shown by the plaintiff and
i. when the defendant *cannot bear the burden of proving lack of actual malice or reckless disregard of the truth*
j. *regardless* of the source's identity or the content of his communication, *i.e.,* assuming the source is anonymous and thus unreliable.

In effect, this rule means that newsmen will not be required to give information at a preliminary hearing or (except in a very limited case) civil trial or before a grand jury or legislative committee.[100] Testimony at a criminal trial will be restricted by the rules of evidence to relevant information concerning the acts and statements of the defendant-informer;[101] the requirement to appear at all is qualified by a showing that it is reasonable to assume that the reporter has knowledge of relevant facts.[102] In the criminal trial setting, only those informants who fear that they will be indicted or arrested as a result of information stemming from sources other than the reporter will be uncertain about the

99. 376 U.S. 254 (1964). See pp. 360-63 *infra.*
100. *See* pp. 348-63 *infra.*
101. *See* pp. 346-48 *infra.*
102. *See* pp. 363-65 *infra.*

likelihood of compelled disclosure. The proposed rule further limits the material which must be revealed to a sphere of information that surrounds the alleged criminal act.[103] The limited civil trial exception should, in practice, result in very few (if any) compelled disclosures.[104]

In general, this formulation of the right is justified because it is the only way in which uncertainty can be reduced, the unlimited power of compulsory disclosure checked, and vital interests in the administration of justice still served. Justifications for specific elements of the proposed rule follow.

2. *Where the Right Should Lodge and the Primary Discretion Rest*

Once it has been determined that a right to a confidential relationship exists and the power to compel disclosure is to be curbed, a decision must be made about who should have the greatest role in shaping the contours of that right—a judge, the reporter, or the informant.[105] In formulating a right to a confidential informer-reporter relationship, three basic approaches may be taken after analyzing and valuing the deterrent effects on First Amendment freedoms: (a) the right may be determined by the *importance of the subject about which testimony is sought,* that is, by choosing a point on the spectrum ranging from misdemeanor cases to situations involving national security; or (b) the right may be determined by the *degree of relevance the information sought bears to the subject under investigation or at issue,* that is, by choosing a point on the spectrum ranging from "possibly related" to "highly relevant"; (c) the right may be determined by the *importance of the stage of the legislative or judicial process at which the information is to be used,* that is, by comparing the function of the preliminary hearing, grand jury deliberations, legislative inquiry, or criminal or civil trial with the function of the right itself.

The tests thus far developed for reconciling the competing interests have been based on the first two approaches.[106] The difficulty with both approaches is that they necessarily vest substantial discretion in the judge and therefore do not meet the requirements of specificity and predictability which should attach to a definition of the right. Courts must determine in each case whether disclosure of an informant's confidential information or identity should be required according to a

103. *See* pp. 364-65 *infra.*
104. *See* pp. 360-63 *infra.*
105. A prosecutor should not possess the discretion in criminal actions for obvious reasons. *See* note 108 *infra.*
106. *See* pp. 320-25 *supra.*

developing standard of "importance" or "relevance." Under the case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of "importance" or "relevance" in relation to the free press interest. A "general" deterrent effect is likely to result. This type of effect stems from the vagueness of the tests and from the uncertainty attending their application. For example, if a reporter's information goes to the "heart of the matter" in Situation X, another reporter and informant who subsequently are in Situation Y will not know if "heart of the matter rule X" will be extended to them, and deterrence will thereby result. Leaving substantial discretion with judges to delineate those "situations" in which rules of "relevance" or "importance" apply would therefore seem to undermine significantly the effectiveness of a reporter-informer privilege. (The "specific" deterrent effects which result from requiring disclosure in Situation X—reporters and informers in all future situations of the type X will not disseminate information—are discussed in the next subsection.[107]) Because of the prospect of such "general" deterrence, the approaches to a constitutional right recently adopted by state and lower federal courts fail to provide the journalist and informant with sufficient certainty to safeguard adequately the public's First Amendment interest in a free flow of information.[108]

The strictest test yet advanced, a requirement that disclosure only be made when a compelling state interest is shown,[109] still leaves the judge with a substantial amount of discretion and is likely to cause "general" deterrent effects of the type described above. It would seem likely that in many situations the test would not be strictly applied, partic-

107. "General" deterrence is thus differentiated from "specific" deterrence. *See* pp. 349-55 *infra* for an extended discussion of both terms.

108. The "reasonable likelihood," "heart of the matter," and "miscarriage of justice" tests are all based on an ad hoc balancing of interests, and thereby fail to provide the informant and reporter with any assurance of nondisclosure at the time of the reporter-informant communication. As a result of this uncertainty, many reporters and informers will be deterred even though their communications would never have been necessary to the administration of justice, either because no proceeding related to the subject of communication took place, or because the reporter's testimony was not required for a determination of the case.

The Justice Department guidelines, suggesting that the desired information should be necessary to the investigation, in fact leave the Department free to subpoena a reporter whenever it determines a need for his testimony, and the guidelines give little indication of what factors other than "reasonableness" and "sufficiency" must be weighed in making this determination. Furthermore, there is an express option to permit, in unusual situations, the issuance of a subpoena under circumstances not conforming to the guidelines. Thus, the reporter and informer can never be assured that the Department will not seek disclosure of their confidential communications. *See* Address by Attorney General John N. Mitchell, *supra* note 27.

109. *See* pp. 324-26 *supra*.

ularly in those situations where the judge is confronted with evidence from the state that disclosure is relevant to a government investigation.[110] And although an "overriding and compelling national interest" or "national security" requirement[111] may further limit the number of subpoenas issued to reporters, precise guidelines will also be difficult to develop for the administration of this rule. Informers and reporters would thus be unable to predict the situations in which disclosure would be required. Many groups and individuals that considered themselves potential targets of "national security" investigations would probably be deterred from talking with members of the press—especially informants within the government or of an "extreme" political stripe.[112] Moreover, the "compelling state interest" or "national security" tests do not limit the range of material which a reporter must reveal. Not all communications received by the reporter from a "national security" source would be relevant to protection of that state interest, but once the source's reports may be disclosed because of his status, it will be difficult to limit the parts of the communications to be revealed.

The basic responsibility for defining the dimensions of the right should not be left to the informant either. In part, this judgment is based on existing practices. Although specific requests for confidentiality are often made, the informer ultimately gives the reporter discretion over what aspects of the communication will be published. In other words, the informer and the reporter negotiate, and then the informer assumes a risk that the reporter will not disclose more information than the informer intended. Although there are no precise studies of the workings of the reporter-informer relationship,[113] informants have clearly been willing to assume this risk in the past; informants talk and the reporter is under pressure of his profession's ethics to honor the in-

110. Under an ad hoc balancing test, the judge would balance the importance of disclosure to a particular investigation against the probable deterrent effect caused by disclosure in that situation. Under such a balancing approach, it would be difficult for the deterrence caused by disclosure in a single case to outweigh the importance of disclosure once the government has shown some need for the desired information. *See* State v. Knops, No. 146 (Wis. Sup. Ct., Feb. 2, 1971).

111. *See* pp. 324-25 *supra*.

112. The Ninth Circuit has recognized the importance of maintaining communications between members of the press and dissenting groups:

> The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communications with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy.

In re Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

113. *See* note 67 *supra*.

formant's request. It is also in the interest of a reporter to honor the confidence so that his relationships with informants are not impaired and he can have continued access to confidential information.

The newsman-informer relationship is different from that of other relationships whose confidentiality is protected by statute, such as the attorney-client and physician-patient relationships.[114] In the case of other statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by strong assurances of confidentiality to seek such relationships which contribute to his personal well-being. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the public interest is thus advanced by creating a zone of privacy that the individual can control.[115] However, in the case of the reporter-informer relationship, society's interest is not in the welfare of the informant per se, but rather in creating conditions in which information possessed by news sources can reach public attention.

As indicated, the current practices employed by newsmen and informers (absent unrestrained use of the subpoena power) seem to produce a substantial flow of news. However, regardless of how one evaluates current practices, it can be argued that vesting the source with the discretion to invoke the right could only have an adverse impact on the free flow of information, since one who initially sought anonymity would be forced to come forward and identify himself in an effort to prevent the compelled disclosure of information obtained by the newsman. A prosecutor could thus "flush" out a source by subpoenaing the reporter. In fact, sources probably would prefer to have the newsman function as a shield, protecting them from official scrutiny. Further, if the informer attempted to restrain the newsman from voluntarily publishing material gathered, a problem of prior restraint would arise.[116] If the informer could only invoke a right of nondis-

114. For a general discussion of the attorney-client and physician-patient privileges, see 8 WIGMORE, *supra* note 14, at §§ 2290-2329 and §§ 2380-2391.

115. Wigmore asserts that four criteria should be met to enact a statutory privilege of the attorney-client or physician-patient type:

(1) The communications must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would inure to the relation by disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

8 WIGMORE, *supra* note 14, at § 2285.

116. Furthermore, proof of confidentiality would often be impossible, as the only available evidence would be the conflicting views of the informant and reporter. Often,

closure to prevent a reporter's testimony (either voluntary or compelled) at judicial and legislative proceedings subsequent to publication, the situation would develop in which material had been published and widely circulated and yet was still not available for use in the administration of justice. This practice would largely frustrate accomplishment of state interests without substantially aiding First Amendment concerns.[117]

Therefore, the *right* of nondisclosure should lodge in the reporter, not the source. Similarly, as argued, the *primary discretion* in deciding whether the right applies should not rest with the judge. The decision to give such discretion to the newsman occurs in part because there is no better alternative. In part, it must rest on an assumption that, generally speaking, the interests of the newsman are congruent with First Amendment values. Since his professional success depends upon presenting fresh, important information to the public, the reporter will presumably act in a manner that will contribute to the full flow of information. Finally, the right of nondisclosure is constructed in a fashion which protects the newsman when he acts in a professional but not a personal capacity.[118]

3. *Protecting the Informant and His Communication*

The reporter should possess the right to protect from compulsory disclosure both the identities of his informants *and* communications received from them.[119] Disclosure of private communications may make

there is not even an express request for confidentiality by the informer, for he relies on the reporter's judgment as to what is not intended for publication. *See, e.g.*, Affidavit of Earl Caldwell, accompanying Petitioner's Brief, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

117. The informant could not protect his identity regardless of whether he was a criminal defendant or third party source. Either his name would have already been publicly disclosed or he would have to come forth in order to claim his right. If he were a third party, his confidential communications could probably be protected at a criminal trial by the hearsay rule. However, if he were a defendant, there would be little justification for protecting his communications. At both grand jury and legislative investigations, an informer's right of nondisclosure of confidential communications could be easily circumvented because of the breadth of the investigation and absence of strict evidentiary rules. If the reporter wanted to disclose the informer's communication, this information could always be conveyed by someone else in a manner that did not directly link the communication to the reporter.

118. Only that information is protected which was gathered in the course of preparing material for publication. *See* pp. 365-69 *infra*.

119. The majority of cases, statutes, and commentary concerning the newsman's claim of nondisclosure have limited their discussion to the question of protection of the identities of confidential informants although no justification has been offered for this limitation. Apparently few cases have arisen in which newsmen have resisted disclosure of confidential communications although it is impossible to determine whether this is because newsmen have been willing to disclose such information or because disclosure has not been asked of them. *See* notes 2, 5, 6, and 15 *supra*.

it possible to trace the informer. Furthermore, protection of off-the-record communications is as important as protection of names in terms of preserving informer-reporter relationships, for informers may be deterred from talking with newsmen unless they are assured that their off-the-record communications will not be disclosed. Empirical evidence[120] and the recent *Caldwell* case[121] indicate that off-the-record communications are a significant part of news gathering, for reporters often use background information in order to evaluate material for publication.[122] A confidential informer-reporter relationship can only be honored, and deterrence minimized, if such confidential background communications are protected from compulsory disclosure.

When a newsman invokes the right, he need not demonstrate that the relationship or the material sought was confidential. Again, substantial discretion must lodge in the newsman in the form of a strong presumption of confidentiality.[123] An intent of confidentiality will often be elusive of proof without revelation of the identity of the informant. It will also be virtually impossible for the newsman to distinguish between off-the-record confidential material and on-the-record material for publication without revealing the material that deserves protection. Only in situations in which the party desiring disclosure can almost conclusively show non-confidentiality should disclosure of communications be required.[124]

4. *Absolute Right at Grand Jury Proceedings and Legislative Hearings*

This Note has argued that the primary danger to First Amendment values posed by unrestrained use of the subpoena power is that informers and reporters will be deterred from revealing or gathering information. Unless one can predict with relative certainty when communications must be divulged and when they are privileged, activity protected by the First Amendment will be restrained. These deterrent effects are especially likely to occur during legislative investigations and

120. *See* Affidavits of eighteen reporters submitted with Petitioner's Brief and Amicus Briefs in Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

121. *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970). *See* pp. 324-26 *supra.*

122. For example, Walter Cronkite asserts:

> 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. Without such materials, I would be able to do little more than broadcast press releases and public statements.

Affidavit of Walter Cronkite accompanying Brief for Columbia Broadcasting System as Amicus Curiae, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

123. *See* pp. 342-43 and note 116 *supra.*

124. *See* pp. 367-69 *infra.*

at grand jury proceedings, when the government will be tempted to use the press as an informal investigative arm of the state and to make fishing expeditions for information.[125] Such effects may also result at civil trials, where broad discovery is allowed and evidentiary standards are relaxed.[126]

Restricting compulsory disclosure to criminal trials and to defendant-sources meets these salient dangers. To justify this approach to the problem concerning the informer-reporter relationship, it is necessary, first, to show that the proposed rule is consistent with the First Amendment values discussed thus far and, second, to demonstrate that these values, when compared with the interests served by compelled disclosure at legislative hearings, grand jury (or preliminary hearing) proceedings and civil trials, do not require disclosure of sources' names or informer-reporter communications.

Obviously, a rule that protects the newsman-source relationship at civil trials, legislative hearings and grand jury proceedings advances the First Amendment values of limiting deterrence of protected activities and insuring the free flow of information. (Justification for the limited civil trial exception with respect to First Amendment values will be given below.)[127] The rule is both broad and, more important, certain. An informer need only establish a relationship of trust with a reporter through a private bargaining process, following practices that currently exist.[128]

Making the confidential communications between a defendant-source and a reporter open to scrutiny at criminal trial, however, should not cause substantial deterrent effect on the flow of information. First, the source cannot have his identity revealed merely by the subpoenaing of a reporter, since an indictment is obviously prerequisite to trial. Nor can the reporter be used to uncover the whereabouts of the source. The reporter cannot thus be used for investigative purposes. Second, the defendant-source can often predict with some certainty whether or not he is going to be indicted. He can thus choose not to talk about his own criminal acts to a reporter if he fears that he will be indicted, arrested and brought to trial. (The source is not likely to do this in any event, unless he has enormous trust in the reporter; the more common occurrence would seem to be for the source to give information about third parties.) Third, the defendant-source is assured, by the rules of

125. *See* pp. 354, 358, and note 152 *infra.*
126. *See* pp. 358-59 *infra.*
127. *See* pp. 360-63 *infra.*
128. *See* pp. 342-43 *supra.*

evidence, that the reporter's revelations at the trial proceedings will be circumscribed to information relevant to his own alleged criminal conduct. (He need not worry that the party seeking information at trial can explore his unrelated activities or those of his colleagues.)[129]

An exception to the reporter-informer privilege is justified at criminal trial not simply because the potential deterrent effect is sharply reduced by the relative certainty provided by the rule, but also because the source has been linked with some specificity to allegedly criminal acts. Although the indictment does not function perfectly as a screen, keeping the innocent from trial,[130] nonetheless, at criminal trial there is probable cause to believe that the source did commit a crime. With diminished deterrent effects and the subject matter of compelled disclosure limited to specifically alleged criminal behavior, there is much less reason to shield the informer-reporter relationship.

On the other hand, communications from third parties and identities of third party sources must be protected even during criminal trial.[131] Of course, the rules of evidence will often make inadmissible, as hearsay, information about the defendant received by a reporter from a third party.[132] However, there may be occasions when the hearsay rule does not apply.[133] In these instances, third parties should be protected; the reporter should not be compelled to disclose identities or information. Again, the primary reason for protecting third party sources is that without such protection deterrence of future sources is likely to result. A third party will not have been indicted and thus his identity is not known. When talking with a reporter, a third party source will be unable to determine whether the indictment of someone else will result in disclosure of the source's identity. Where the identity of the third party source is known, the reporter still should not be required to divulge con-

129. *See* pp.364-65 *infra.*

130. *See* A. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960).

131. A criminal defendant could subpoena a reporter if he wanted the reporter to testify about prior defendant-reporter communications. However, the reporter's right of nondisclosure of confidential information obtained from third parties is also applicable when a criminal defendant seeks information, for the deterrent effects caused by disclosure would be similar. Although the Sixth Amendment grants the defendant the right of compulsory process, that Amendment was adopted to guarantee the defendant the same right of process as that provided the prosecution by common law. This right to compulsory process does not override exemptions from disclosure protected by the Constitution, statutes, and common law. 8 WIGMORE, *supra* note 14, at 2191.

132. *See* C. MCCORMICK, LAW OF EVIDENCE §§ 223-29 (1954).

133. With no constitutional right of nondisclosure, information received from a third party informer might be admissible under an exception to the heresay rule. For example, a declaration against interest by a third party would be admissible if the declarant were not available at the time of trial. *Id.* at § 253.

fidential information;[134] the deterrent effects may still result, since potential sources may not want any off-the-record communications revealed for a variety of reasons and compelled disclosure of such information—even information controlled by the rules of evidence—will contravene this desire. Moreover, if there is no diminution of deterrent effects regarding third party sources at criminal trial, there is also no increase in the interests of the state, since the third party source is not yet formally accused of any crime (though he may, obviously, fear such an accusation).[135]

While disclosure at a criminal trial limited to communications received from an informer-defendant is consistent with First Amendment values, disclosure of information obtained through confidential informer-reporter relationships should not be compelled in other settings. At grand jury investigations, legislative investigations, and civil trials, the interests served by compulsory disclosure of confidential sources or information are not as substantial when compared with the potential impairment of the public's First Amendment interest in a free flow of information.

Because of the extremely broad scope of a *grand jury investigation*,[136] there is the danger of a substantial deterrent effect on informants if reporters are compelled to appear before it. The function of a grand jury investigation is twofold: to investigate possible areas of criminal conduct and to serve as a pre-trial safeguard to insure that an individual is not tried for a crime on the basis of inadequate evidence.[137] In order that it can effectively perform these functions, grand jury investigations are not limited in scope to specific criminal acts[138] nor are they confined to strict evidentiary rules of admissibility.[139] Furthermore, they are con-

134. Obviously the party desiring testimony as to a known source's confidential communications will try to get direct testimony from the source. But should that fail, the reporter must still be protected so that his confidential communications cannot be admitted under an exception to the hearsay rule.

135. The confidential relationship should not be violated solely for investigative purposes. *See* p. 354 and note 152 *infra*. However, if the third party source is indicted in another proceeding, the reporter should obviously not be able to invoke the right with regard to this source at that proceeding.

136. *See* Hale v. Henkel, 201 U.S. 43 (1906); Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 591-92 (1961).

137. *See* note 11 *supra*.

138. The grand jury may summon and examine witnesses with no defendant or crime specifically in mind. *See, e.g.*, Wilson v. United States, 221 U.S. 361 (1911). It can pursue all ramifications of a particular subject of inquiry. *See, e.g.*, United States v. Johnson, 319 U.S. 503, *rehearing denied*, 320 U.S. 808 (1943).

139. *See* Note, *Exclusion of Incompetent Evidence From Federal Grand Jury Proceedings*, 72 YALE L.J. 590, 596 (1963):

> Attempts to limit the basis of grand jury decisions to evidence admissible at trial are complicated by the fact that the issues and direction of the case have not yet been

ducted in secret in order to protect the effectiveness of the grand jury process and to insure that information about persons suspected of crime is not publicly revealed unless there is some cause to believe them guilty.[140]

Two types of deterrent effects may result from grand jury subpoenas to newsmen. First, *general effects due to vague rules* will occur when the newsman or informant can neither predict when the identities of sources will be disclosed nor determine what will, in fact, be revealed when a reporter who has been subpoenaed actually appears before a grand jury. The rule most obviously plagued by vagueness is a "compelling need" or "heart of the matter" test used to decide whether the newsman should appear at all. "Importance" or "relevance" tests must be decided on the facts of each case, and the informant and the newsman may often not be able to determine whether the facts of their case will justify a value judgment of "compelling need" by the judge. The rules regulating the grand jury itself and the secrecy requirement also make prediction difficult. Second, *specific effects result from a judicial decision that an inquiry into a particular type of activity creates a compelling need*—for example, a ruling that investigation of a violent criminal act, such as murder, justifies an abrogation of the right to a confidential relationship. This ruling would deter publication of stories that occur after murders and depend upon confidential informants, since the right would not be available to protect the source.

If we are concerned about preventing the general deterrent effects caused by the breadth and secrecy of the grand jury inquiry, the use of the subpoena to compel testimony concerning confidential informant-reporter relationships must be circumscribed, much as an overbroad statute must be more narrowly drawn so that constitutional rights are not infringed. As noted,[141] courts have recently adopted a "compelling need" test to so circumscribe the subpoena power. However, as indicated above,[142] use of this test, no matter how narrowly interpreted, will still result in some general deterrent effects. In spite of this, it could be argued that, although there will be some deterrent effects of a general nature, there will also be some clear cases where

fully developed. Because the precise nature of the charges is not defined prior to indictment, questions about the admissibility of evidence at trial which turn on the content of the accusation cannot be answered before the grand jury acts; questions concerning evidence whose admissibility depends on a particular situation developing at trial are likewise unanswerable at this pretrial stage.

140. *See generally*, Note, *Defense Access to Grand Jury Testimony: A Right in Search of a Standard*, 1968 DUKE L. J. 556 (1968); 8 WIGMORE, *supra* note 14, at § 2360.

141. See pp. 324-25 *supra*.

142. *See* pp. 341-42 *supra*.

compelling need exists, and thus this sort of test must be available for judges to utilize when necessary despite the potential abuse of such a test and the uncertainty that will result even from careful use. In order, first, to rebut that argument—that the compelling need test (or a compelling need test with some form of alternative means rule) must be available despite its defects—and, second, to justify an absolute right of nondisclosure before the grand jury, it is necessary to argue the following point: the specific deterrent effects which result from a judicial decision that inquiry into a particular kind of activity creates a "compelling need" for a reporter's confidential information are of sufficient importance, and the benefits to the administration of justice are so slight, as to make inappropriate the use of a "compelling need" test.

Such an argument can most effectively be made in the context of a hypothetical case. Let us assume the following facts.[143] On Monday, a science building at a major state university is bombed, killing one person and causing several million dollars worth of damage. On Wednesday, an "underground" paper on campus prints a story headlined, "The Bombers Tell Why and What Next—Exclusive." The story includes an account of the reasons for the act and states that future bombings may occur, but does not identify the informants. On Thursday, the editor of the paper is called before a county grand jury, presumably to be asked to identify the persons interviewed and to discuss the nature of the interviews. The editor either seeks a protective order or, upon appearing before the grand jury, refuses to answer questions of the type mentioned. For purposes of discussion, it should be assumed that the "underground" paper is a part of the "press" within the First Amendment meaning of that term, that the editor is a "journalist," and that the information sought by the grand jury was obtained by the editor only after a promise of nondisclosure by him.[144]

It seems clear, on these facts, that if there is ever to be a finding of "compelling need" for the testimony, this is the case. A violent crime, resulting in loss of life and substantial property damage, has been committed; the newsman purports to know the identities of the criminals and to have information about the crime. Why should the reporter be able to invoke the right of nondisclosure? For the moment, let us consider this question with regard to the *past actions* discussed in the hy-

143. This hypothetical is similar to the recent Wisconsin Case, State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971).

144. For general treatment of these issues, see pp. 365-69 *infra*.

pothetical story, and not with reference to the future acts also mentioned.

The fundamental reason for allowing the newsman to invoke the right is that to require disclosure in this case is to say, in effect: no story, based on confidential sources, may ever be printed after commission of the "same type of crime" or a "similar crime." After a ruling requiring disclosure in this particular case, if such a story is printed after the commission of a similar crime, the newsman and the source can know with relative certainty that their relationship will not be protected when the newsman is subpoenaed. In all likelihood, the story will not then be printed, since the story was predicated on the maintenance of confidentiality.

To put the same point in a slightly different way, the result of the ruling in this case will be to bar effectively the publication of such stories in the future. The *general* administration of justice will not be served in the future since newsmen will not print stories based on "after the act" interviews with people who call themselves fugitives or with third parties who seek protection from disclosure. Without the publication of the story, it is unlikely that the newsman would be linked with the act and called to testify.[145] At the same time, there will be a substantial impairment of the flow of information to the public, information which is of special importance given the seriousness of the events. Alternatively, the future effect of the ruling will be to exact a penalty—a criminal contempt citation—from a newsman who is able to get such a story, and who is willing to publish it while honoring the request for confidence. Again, the administration of justice will not be served since nothing will be revealed and the newsman will take a sentence for contempt. This contempt sentence might serve some purpose if it could force the newsman to reveal names or information, but the probability that the story will either be left unpublished or that the newsman will choose to suffer the contempt penalty would seem high in such future cases that follow the first ruling. Since there is a strong likelihood that such a story will have been based on trust between the reporter and the source, the newsman will either not print or be willing to absorb a contempt citation rather than reveal the names.

145. The fact that the newsman had previously written stories about individuals suspected of the crime would be insufficient reason for subpoenaing a reporter. *See* pp. 363-64 *infra*. It is conceivable, although highly unlikely, that police informers would know that the reporter possessed information concerning the alleged criminal acts. In any event, if no story were published, it might be difficult for newsmen, particularly those of the underground press, to prove that they were gathering information for publication purposes. *See* pp. 365-67 *infra*.

The argument may be advanced that these future effects are uncertain and that the administration of justice must be served in this particular case. However, since there is a strong likelihood that the reporter will take the contempt citation,[146] the administration of justice will not be served in the instant case by a subpoena. And there are very plausible further grounds for believing that there will be future deterrent effects of the kind described in the above paragraphs. First, it would seem likely that courts facing future cases involving the right of nondisclosure will construe "the same type of crime" or "similar crime" to include crimes of violence generally. Thus, a grand jury inquiry into a broad range of behavior will lead to a finding of "compelling need" and the demand for testimony; many stories based on confidential informants may thus be "specifically deterred" and not published as a result. Second, the general deterrent effect caused by vague rules may also result, since the probable extension of a "compelling need" finding in the hypothetical case to subsequent crimes of violence would leave other areas uncertain.[147]

The addition of an "alternative means" inquiry does not cure the "compelling need" test of its significant deficiencies. The government may always argue after commission of a violent act that the reporter has information it cannot get elsewhere; a judge will have difficulty denying that claim.[148] Moreover, the inevitable vagueness that surrounds the administration of so elastic a rule as the alternative means test suggests that "general" deterrent effects will result. The source and the reporter will obviously have a difficult time predicting whether their communications will be shielded by an alternative means test at the time they must decide whether to begin communication.

The value of an absolute right before grand juries is that deterrent effects on First Amendment interests will not occur. A corollary benefit is that an absolute right allows a judge in a controversial case to resist the political pressures that inevitably build around unsolved violent crimes. Although the long-range view might require granting the right

146. In the recent Wisconsin decision, the reporter took the contempt citation rather than disclose the desired information which he had received from confidential informants. State v. Knops, No. 146 (Wis. Sup. Ct. Feb. 2, 1971).

147. For example, the Wisconsin court found the "administration of criminal justice" itself to be a sufficiently compelling need. *Id.*

148. The concurring opinion in the Wisconsin case attempted to narrow the "compelling need" test through application of an alternative means standard. However, an alternative means standard cannot in fact be applied. For example, federal indictments had been issued in the Wisconsin case, but the state could seek information from the reporter in order to deliver further indictments. Furthermore, even if those suspected of the crime had already been indicted, a grand jury could seek information from the reporter to determine if others were implicated. *Id.*

to the newsman even in the hypothetical case, it could be difficult for a judge to resist the public outcry against such a violent crime and grant immunity to a newsman— especially a newsman of the "underground" press. The existence of an absolute privilege would allow local judges who believed in the position developed here to rely on a standard adopted nationally, at a time removed from commission of the act under investigation.[149]

A further argument may be advanced against the adoption of a right to nondisclosure in this hypothetical case and in all grand jury settings. One reason for a court to compel a reporter's testimony at trial was that the defendant-source had been indicted (*i.e.*, there was probable cause to believe he had committed a crime). In the hypothetical case, it could be argued that the reporter clearly has "probable cause" to believe the informant has committed a crime because the informant has "confessed" to him, and that, given one part of the rationale advanced above for the criminal trial exception, he should be required to testify before the grand jury.

There are several possible responses to this argument. First, the person being shielded by the reporter may be a third-party source, an informant protected—even by the proposed rule—at criminal trial. Second, a probable cause finding must be delivered by the grand jury; a reporter, however likely that the crime has been committed, is of course not able to make a judicially reviewable probable cause finding, and he should be primarily concerned with publishing information as effectively as possible. (He can, of course, always give evidence about his source if he wishes.) Third, the "at criminal trial" exception was predicated not just on an increased state interest (resulting from the formal issuance of an indictment) with regard to an informer-defendant, but also on diminished deterrence of First Amendment interests. The diminution of these deterrent effects was based on the relative certainty that a source would feel in talking to a reporter, knowing that this reporter would not have to testify until the source was indicted, arrested, and brought to trial. In the hypothetical case, there has been

149. In some instances indictment may precede arrest. In such a situation, the state may seek disclosure of a party's whereabouts through a reporter who has acquired information from the indicted party for publication purposes. Disclosure may be sought from the reporter at grand jury proceedings, by means of a special court order, or perhaps by an attempt to indict the reporter under an "obstruction of justice" statute. However, the reporter should possess the constitutional right of nondisclosure until the criminal trial. If disclosure were required in a post-indictment but pre-trial setting, reporters would probably be unable to obtain information from indicted parties prior to their arrest, and the public would be deprived of valuable information concerning criminal conduct.

no indictment and no arrest. Only when the defendant-source appears at trial as a result of the state expending investigatory resources should a reporter's testimony be compelled. Only then can the press function so as not to impair First Amendment interests by acting as an investigative arm of the state.[150]

The reporter in the hypothetical case should also not be required to testify before the grand jury about *future acts* based on information from confidential informants. Again, the basic justification is that it is more valuable to have information made public and the news gathering processes unimpaired than to require disclosure or cite newsmen for contempt and, in effect, bar newsmen in analogous future cases from disseminating information which they are able to gather through confidential sources.

If the reporter publishes an account of a "general" nature regarding future events,[151] then a general deterrent effect in the future will result, since it will be very difficult to predict when disclosure will be compelled after publication of a story in which sources indicate generally that a crime may occur. Moreover, this finding of compelling need on the basis of a general dicussion regarding future action legitimizes the quintessential fishing expedition, in which the government uses the press as an investigative arm. Such use significantly undermines the autonomy of the press, as the Ninth Circuit has noted.[152]

If the newsman published a report of "specific" nature regarding a future act,[153] a compelling need for subpoenaing the newsman should not be found. First, specific deterrent effects of the type discussed above

150. *See* pp. 346-47 *supra*.

151. A "general" account regarding future events might be: "The X faction of the militant Y party said Thursday that, in the future, violence could be used to change the structure of American society." This account is "general" as regards time, place, methods, and persons involved. It is distinguished from a "specific" account not in any precise sense, but only for the purposes of argument. In actuality, the line would be difficult to draw (although there would be clear cases of either "type"). In any event, under the theory of this Note such line-drawing would not be necessary since the publication of neither type of account should result in a subpoena.

152. The court of appeals reasoned:

> If the Grand Jury may require appellant to make available to it information obtained by him in his capacity as news gatherer, then the Grand Jury and the Department of Justice have the power to appropriate appellant's investigative efforts to their own behalf—to convert him after the fact into an investigative agent of the Government. The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference, and that they should be able to protect their investigative processes.

In re Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

153. A "specific" account regarding future events might be: "The X faction of the militant Y party said Thursday that within five days a major government building in New Haven would be blown up by party members."

would result.[154] Second, there would be general deterrent effects resulting from uncertainty about how far the rule in the particular case would be extended. Third, other preventive measures could be taken as a result of the story.[155] Also, the administration of justice in instances involving both "general" and "specific" reports of future actions is not likely to be served, in general, since information will dry up, or, in particular, since a contempt citation is likely to result.

No matter how one varies the facts of this "hard case" (*i.e.*, with regard to the newsman's relation to the informer, the nature of the event, the place published, or the relation in time of the published account and the actual occurrence of the event itself),[156] the basic arguments advanced in the paragraphs above apply. Therefore, the surest way to preserve the public's interest in a free flow of information is to give reporters a right of nondisclosure concerning informer-reporter communications applicable before all grand jury proceedings.[157] This right, thus defined, not only advances First Amendment values, but should not significantly impair the grand jury's functions. The very reason that grand jury subpoenas are generally harmful to an independent press—the breadth of the grand jury investigatory process—minimizes the loss to the grand jury created by exempting reporters from testifying as to confidential informer-reporter relationships. With vast resources

154. For example, once a compelling need had been found for forcing disclosure of identities and information regarding a possible future bombing, stories that were necessarily based on such information would probably cease since neither sources nor reporters could be certain of maintaining a confidential relationship.

155. There should be no exception to a reporter's right of nondisclosure when he has knowledge about future actions, in part because such situations can be adequately handled through other procedures. For example, if a reporter published an article stating that he had learned from a confidential source that a building was to be bombed the following day, several courses of action would be open to law enforcement officials. First, they could try to convince the reporter to disclose the identity of his informant. Presumably most newsmen would disclose such information in order to save human life. However, if the reporter refused to disclose the needed information, the police might have sufficient independent evidence to indict suspects. If no such evidence existed, they could begin their own emergency investigative efforts in order to obtain sufficient information. Furthermore, they would be able to inspect the building in order to prevent the danger. Had the reporter and informant been deterred by threat of a disclosure requirement, this information might not have been available to law enforcement officials. Of course, the right of nondisclosure might be abused by individuals and groups attempting to create fear and panic by publishing false threats, supposedly based on reliable confidential information. However, this situation is best remedied by government investigations establishing the falsity of such reports.

156. *See* pp.365-69 *infra*.

157. With this absolute right of nondisclosure concerning confidential informer-reporter relationships, the reporter should be required to appear before a grand jury to testify concerning information not acquired for public dissemination purposes. However, if all that is required of a reporter is verification of his published works, it would seem that such verification could be accomplished through affidavit to prevent impairment of First Amendment interests caused by the reporter's appearance before a secret investigatory body. This conclusion is consistent with that reached by the Ninth Circuit, *In re* Caldwell, No. 26,025 (9th Cir. Nov. 16, 1970).

at their disposal through the subpoena process and the need only to establish probable cause for an indictment, there is a substantial likelihood that adequate information will be available from other sources to satisfy the purposes of the grand jury investigation, whether the purpose be a general investigation or a pre-trial screen.[158]

Furthermore, it is not clear that an explicit right of nondisclosure will not be more helpful to the investigatory process in the long run than a diluted privilege. There are a number of situations in which the exemption of newsmen from compulsory disclosure will aid the administration of justice. A New York study indicates that those states which have granted reporters some statutory exemption from compulsory testimony have experienced no detrimental effect on law enforcement but rather have found the privilege to be of aid in securing information through the press concerning illegal activities.[159] In instances of governmental corruption, the value of the press as a recipient of such information is particularly important, for it is possible that the government will ignore reports of internal corruption unless disclosure of such information is made public.[160] Unless sources inside government are protected, an especially important flow of news will be impaired.

The arguments in favor of recognizing the newsman's privilege at grand jury investigations apply with even more force when reporters are subpoenaed before *legislative committees*. The function of a legislative committee is purely investigatory, and to the extent that the press is allowed to become an investigatory arm of Congress and state legislatures, its freedom and independence are further eroded.

The likelihood of general deterrent effects is substantial if informants fear that a newsman may be called before a legislative committee because such committees are not bound by the evidentiary rules that protect parties and witnesses and check abuses of power in judicial

158. The same reasoning requires that reporters have a right of nondisclosure at preliminary hearings, for again, probable cause to believe an individual has committed a crime must be established.

159. NEW YORK LAW REVISION COMMISSION, REPORT, RECOMMENDATIONS AND STUDIES 109-10, 143-46 (1949). Statements from attorneys-general and police chiefs in those states with a reporter's statutory privilege of nondisclosure are presented asserting that the existence of the privilege statute has had no detrimental effect on law enforcement and criminal prosecution, and that, on occasion, law enforcement has been assisted because of the privilege statute.

160. The Supreme Court has recognized the importance of the press in preventing governmental corruption:

> Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.

Mills v. Alabama, 384 U.S. 214, 219 (1966).

trials.[161] Wigmore notes that legislative inquiries are sometimes conducted for partisan purposes and personal aggrandizement. Also, a temptation often exists for such committees to pursue the inquiry beyond what is required for enactment of contemplated legislation and to assume improperly the function of grand juries.[162] The informer and reporter thus cannot determine with any certainty the likelihood of a forthcoming legislative investigation, nor can they predict the scope of inquiry if such an investigation does occur. Even with the use of a limiting test, such as the compelling need rule, specific deterrent effects will result and news sources will probably dry up.

Although a legislature and its committees have power to investigate matters and conditions relating to contemplated legislation,[163] the Supreme Court has recognized that this broad power is subject to certain limitations.[164] Extending the right of news gatherers to refuse disclosure of the names of their informants to legislative committees is supported by the rationale of cases holding that the legislative power to investigate excludes any powers of law enforcement.[165] The theory of these cases is that apprehension of crimes are properly the functions of, respectively, the Executive and the Judiciary. Legislative committee inquiry has been held unconstitutional when it has been judicially determined that the committee was primarily concerned with determining the guilt or innocence of a committee witness.[166]

A news gatherer must also have the right before a legislative committee to refuse disclosure of information obtained from informants in the course of news gathering. Although there are no reported cases concerning a reporter refusing to disclose confidential communications,[167] it

161. 8 WIGMORE, *supra* note 14, at § 2185.
162. *Id.*
163. *See* p. 320 and note 12 *supra.*
164. A legislative committee cannot inquire into "private affairs unrelated to a valid governmental purpose." McGrain v. Daugherty, 273 U.S. 135, 173 (1927). The power to investigate does not extend to an area in which the government is forbidden to legislate. Quinn v. United States, 349 U.S. 155, 161 (1955). The power to investigate is subject to limitations imposed by the specific guarantees of the Bill of Rights. For example, the Supreme Court has held that a witness before a Congressional committee may refuse to answer questions by claiming the Fifth Amendment's privilege against self-incrimination. Quinn v. United States, *supra.* Legislative investigating committees are also subject to the Fourth Amendment prohibition of unreasonable searches and seizures. Watkins v. United States, 354 U.S. 178 (1957). *See generally,* Note, *The Power of Congress to Investigate and to Compel* Testimony, 70 HARV. L. REV. 671 (1957); S. Doc. No. 99, 83d Cong., 2d Sess. (1954); STAFF OF SENATE COMM. ON THE JUDICIARY *supra* note 19, at 57-60.
165. *See, e.g.,* Kilbourn v. Thompson, 103 U.S. 168 (1880).
166. United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956).
167. On several occasions, reporters have been held in contempt for failure to disclose the identities of informants to legislative committees. These incidents are discussed in STAFF OF SENATE COMM. ON THE JUDICIARY, *supra* note 19, at 60-61, although no rationale for these decisions is offered.

will often be possible for a committee to discover identities of sources if the reporter, though allowed to conceal specific names, is nevertheless forced to testify concerning the details of his meeting with informants. Also, the rule that legislative committees can only inquire into fit subjects for legislation is not strictly enforced by the courts,[168] and legislative committees can frequently embark upon broad "fishing expeditions" whose purpose is to discredit the organization or individual under investigation.[169] The threat of a news gatherer having to testify at such a far-ranging inquiry has the potential to deter many informants from communicating with reporters if they fear they are a likely target for such an investigation.[170]

Extension of the right of nondisclosure to legislative committees will not seriously impair legislative investigations necessary for lawmaking. Such committees have other resources at their disposal and broad subpoena powers enabling them to obtain information necessary for legislation from a variety of sources other than the press.[171] Furthermore, information which the press has obtained through confidential informants and which is disclosed publicly should provide legislators with a better understanding of the problems confronting society.

5. *The Right at Civil Trial and the Limited Exception*

A right of nondisclosure concerning informant relationships must also be available in civil litigation. The general effect of compulsory disclosure of confidential sources and information has already been noted:[172] informants become less willing to communicate with newsmen and the flow of news to the public is restricted. Although the focus of inquiry at civil trials is narrower than at grand jury or legislative investigations, there are still reasons to fear substantial general and specific deterrent effects in civil litigation—effects that do not result from creating an exception to the right at criminal trials. The broad discovery provisions of Rule 26 of the Federal Rules of Civil Procedure enable a party to obtain information that will not be used at trial; the almost unlimited investigation permitted by Rule 26 has frequently

168. *See* Note, *The Power of Congress to Investigate and to Compel Testimony*, *supra* note 164, at 671-72.

169. Tests that go to the "importance of the subject" under investigation or "relevancy of the testimony" sought are subject to abuse in a legislative inquiry, as in grand jury proceedings, because the breadth of inquiry is not sufficiently focused to eliminate broad deterrent effects. *See* pp. 349-55 *supra*.

170. *See* pp. 331-32 *supra*.

171. *See* p. 320 and note 12 *supra*.

172. *See* pp. 331-32 *supra*.

led to "malicious, as well as over-extended, questioning."[173] Since a party may discover "any matter not privileged, which is relevant to the subject matter involved in the pending action" and since discovery extends to "the identity and location of persons having knowledge of relevant facts,"[174] the identity of informants may become the subject of discovery.[175] The impact of this extensive discovery machinery is magnified by the fact that any person may initiate a civil suit. In the federal court system, for example, the number of civil cases filed is over twice the number of criminal cases filed.[176] Attempts to limit the range of the subpoena power in civil trial through use of a judicial test (*e.g.*, a "heart of the matter" rule) are, once again, likely to result in both general and specific effects of the type discussed above.[177]

Although a reporter's right of nondisclosure at a civil trial may exclude relevant testimony and bring about an occasional miscarriage of justice, the penalties accompanying such a miscarriage are not as substantial in civil as in criminal litigation. Unlike a criminal action which involves an attempt by society to impose its collective judgment on an individual, a civil action involves only private parties. Thus the cost of defeat does not include the stigma of social condemnation and the possibility of imprisonment.[178] The judicial system itself recognizes that imprisonment is a relatively more severe sanction than payment of monetary damages by requiring proof of guilt beyond a reasonable doubt for imprisonment. In addition, the Constitution and Supreme

173. 4 J. MOORE, FEDERAL PRACTICE ¶ 26.02[3] (1970), quoting from Comment, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1133 n.3 (1951).

174. FED. R. CIV. P. 26(b). The great majority of states also have extremely liberal discovery rules for civil trials. As of January 1, 1963, no fewer than forty-three states adopted, either by statute, supreme court rules, or case law, part or all of the federal discovery procedures. Comment, *Discovery—the Work Product Protection*, 13 KAN. L. REV. 125, 129 (1964). For a complete list of state provisions as of January 1, 1963, see *id.* at 129 n. 33. At least four states have not followed the Federal Rules but have adopted other extremely broad discovery procedures. Comment, *The Work Product Doctrine in the State Courts*, 62 MICH. L. REV. 1199, 1205 (1964). There is a tendency in the few states with limited discovery procedures to adopt the federal provisions; Ohio, for example, recently adopted the new revised Federal Rules on discovery. Beirne, *Discovery*, 39 U. CINN. L. REV. 497, 499 (1970). *See generally Developments in the Law—Discovery*, 74 HARV. L. REV. 940 (1961).

175. *See* St. Paul Fire & Marine Ins. Co. v. King, 45 F.R.D. 521 (W.D. Okla. 1968), holding that a party must divulge the names of all persons contacted who had knowledge of relevant facts.

176. Between July 1 and December 31, 1969, 42,361 civil cases and 18,740 criminal cases were filed in the United States district courts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 3 (1970).

177. *See* pp. 340-42, 349 *supra*.

178. See A. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1150 (1960); H.M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 404 (1958).

Court have recognized a number of other procedural safeguards applicable in criminal, but not civil litigation,[179] in order to minimize the opportunity for wrongful decisions in those situations where a state attempts to incarcerate an individual.

The Supreme Court has already indicated its willingness to deprive civil litigants of recovery in order to protect First Amendment interests in a free press. In *New York Times Co. v. Sullivan*,[180] the Court placed an extremely difficult burden of proof on the public official plaintiff in libel actions in order to assure a free flow of information to the public. And in *Time, Inc. v. Hill*, an individual plaintiff was denied the right of recovery for an invasion of privacy that caused injury to his reputation because of his inability to prove that the error was made with "knowing or reckless falsity."[181]

The only time that the name of a confidential informant should possibly be disclosed at a civil trial is in a libel action which falls under the *New York Times Co. v. Sullivan* doctrine.[182] Here, unlike other civil trial, criminal process or legislative hearing situations in which the right applies, the reporter or paper is a party to the suit. When a public official sues for libel, he must prove that the allegedly defamatory publication was both false and made with "actual malice."[183] The requirement of actual malice is satisfied if the plaintiff proves that the defamatory statement was made with *knowing* falsity or with a reckless disregard for the truth.[184] Although the Supreme Court has restricted

179. *See* A. Goldstein, *supra* note 178, at 1150-51.
180. 376 U.S. 254 (1964).
181. 385 U.S. 374, 397 (1967).
182. 376 U.S. 254 (1964). Since the *Times* case, the privilege of the media to make false statements has been extended to include not only government officials, but also to "public figures," Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and to persons who are involuntarily newsworthy, Time, Inc. v. Hill, 385 U.S. 374 (1967). The Supreme Court recently granted certiorari to three cases involving the question of whether the *Times* rule extends to cases involving the defamation of private individuals as well. Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3rd Cir. 1969), *cert. granted*, 397 U.S. 904 (1970) (No. 947, 1969 Term; renumbered No. 66, 1970 Term); Roy v. Monitor Patriot Co., 109 N.H. 441, 254 A.2d 832 (1969), *cert. granted*, 397 U.S. 904 (1970) (No. 891, 1969 Term; renumbered No. 62, 1970 Term); Ocala Star-Banner Co. v. Damron, 221 So.2d 459 (Fla Dist. Ct. App. 1969), *cert. granted*, 397 U.S. 1073 (1970) (No. 1373, 1969 Term; renumbered No. 118, 1970 Term). For a discussion of the manner in which the newsworthiness doctrine may eventually extend a protective umbrella against libel suits over all that ultimately appears in the media, see Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?* 18 U.C.L.A. L. REV. 371, 381 (1970).

An evaluation of the correctness of the *New York Times* rule is beyond the scope of this Note. For purposes of argument, it is assumed that the rule should not be changed or abolished. Mr. Justice Black and Mr. Justice Douglas, however, advocate an "unconditional right to say what one pleases about public affairs." New York Times Co. v. Sullivan, *supra* at 297.
183. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).
184. *Id.*

libel recoveries in cases of good faith error, it has inveighed against the use of the "calculated falsehood":

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity . . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.[185]

Proof of actual malice is exceedingly difficult under Supreme Court standards because a plaintiff must prove with "convincing clarity"[186] a newspaper's recklessness or its "high degree of awareness of probable falsity."[187] Such a demonstration is usually made by showing that a newspaper has deviated substantially from "standards of good investigation and reporting."[188] Proof of actual malice will often depend on knowing the identity of the newspaper's informant, since a plaintiff will have to demonstrate that the informant was unreliable and that the newspaper violated proper reportorial practices by failing to verify his story. In one of the few cases where the Supreme Court has affirmed a finding of actual malice, the plaintiff proved that a magazine had relied on the affidavit of an informant without checking his character (he had been placed on probation in connection with bad check charges) or the circumstances of his story.[189] Had the plaintiff been unable to obtain the informant's identity (his identity was revealed in the magazine story), proof of actual malice would have been impossible.

Thus, since a plaintiff has the burden of proof in a libel suit that falls under the *New York Times Co. v. Sullivan* rule, if a newspaper which is a defendant in the suit is given the right to conceal the identity of its confidential informants and if, as this Note recommends,[190] a strong presumption of confidentiality attaches to any transactions between a news gatherer and informant, recovery will frequently be impossible because

185. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
186. New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).
187. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).
188. Curtis Publishing Co. v. Butts, 388 U.S. 130, 138 (1967).
189. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The informant stated in his affidavit to the magazine that he had accidentally overheard a telephone conversation in which a college athletic director gave away football secrets to an opponent. When the magazine printed a story containing this information, the athletic director sued the magazine for libel. It was revealed at trial that the magazine had not checked the informant's notes of the conversation, had not checked the value of the information the plaintiff athletic director allegedly gave away, and had not viewed the films of the game that it was asserted plaintiff's college lost because of the breach of secrecy.
190. *See* pp. 342-44 and note 116 *supra*.

of the plaintiff's failure to prove actual malice. On the other hand, if disclosure is compelled in every instance where defamatory falsehood has been demonstrated, substantial deterrent effects could result. A source who is not entirely certain about the veracity of his information would be reluctant to reveal it to a reporter, since, if it subsequently were proven to be false, his identity would necessarily be revealed. Such an informer might have made a good faith effort to check his information, but still not be certain;[191] thus a type of communication which the First Amendment should protect could be deterred if disclosure is compelled in all *Times* situations where defamatory falsehood is shown.

The proper resolution of this dilemma in a *Times*-type libel case[192] would be the following rule: once enough evidence has been introduced by the plaintiff to establish the probable falsity of the information, the trial judge may order disclosure of the informant's name.[193] However, the defendant may resist disclosure by demonstrating that regardless of the reliability of the informer—even assuming, for example, that the informer was a known congenital liar—it made a good faith effort to check independently the basis and truth of the information. In other words, the defendant may assume the burden of proving lack of malice, rather than revealing an informant's name.[194]

The reason for this rule is that, although disclosure must be allowed or else the *Times* rule would, in effect, be defeated, it may well be possible for a newspaper to prove that it had adequately checked the reliability of a story given by a confidential informant and had good faith reason to believe the story true independent of the informer's

191. The *New York Times* case explicitly asserted that erroneous statements made in good faith are "inevitable in free debate and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964).

192. This solution will also apply to breach of privacy cases in situations such as that in *Time, Inc. v. Hill*, for here also a plaintiff must prove either knowing use of falsity or a reckless disregard for the truth. 385 U.S. 374 (1967).

193. Because great variations are possible in factual circumstances, it is difficult to define in advance exactly how the discretion of the trial court should be exercised in requiring disclosure of the identity of a confidential informant. Since the issue of falsity is decided by the jury, it is clear that the judge cannot make an actual finding of falsity before the jury returns its verdict. Libel trials under the *Times* rule are not conducted as "split" trials, with the jury first determining falsity and then actual malice. A judge will necessarily have to predict the point at which the plaintiff has introduced enough evidence to prove falsity; he may wish to reserve decision on a motion to compel disclosure of the identity of an informant until later in the trial. It would appear that a plaintiff could successfully move for a mistrial if a jury found falsity but was unable to find actual malice because the identity of an informant was not disclosed.

194. This test resembles the determination which must be made when a civil defendant moves to dismiss a complaint for failure to state a cause of action: all the allegations in the plaintiff's complaint are assumed to be true and the court decides whether, as a matter of law, the plaintiff could win the suit.

reliability. The degree of checking on a story would of course vary with the circumstances, but it does not seem unreasonable to encourage the newspaper to follow minimal verification procedures when the story it prints may be defamatory.

Even with such a rule, there may still be some slight deterrent effect. There may be a class of sources whose information cannot be checked and yet whose reliability would justify printing the story. Within such a class, there may be an informer not quite certain of his information who may be deterred from revealing a story. However, the paper can either promise to take a libel judgment or ask him to verify with a greater degree of certainty the information which is being revealed. In such a situation, where by hypothesis there is no way for a paper to check on the information, requiring the informer to have a high degree of certainty about his allegations seems desirable, if the paper wants to avoid the risk of either a libel judgment or forced disclosure of an informant's name.

In a libel case which falls outside the *Times* rule, the general policy of not compelling disclosure at civil trial applies. The burden of proof would be on the defendant newspaper to prove the truth of the printed story. Thus, it could choose either to reveal the source of its information (perhaps putting the informant on the stand) or to protect its source and suffer a possible adverse judgment if it can prove "truth" in no other way. It should be noted, however, that both in cases which fall under the *Times* rule and in those which do not, courts have increasingly interposed stringent qualifications limiting the scope of the action for libel,[195] so this civil trial exception to the general newsman's privilege will be very narrow. Of the modern difficulty in maintaining a libel action, a recent commentator has written: "No other formula of the law promises so much and delivers so little."[196]

III. Administration of the Right

A. *Quashing a Subpoena Requiring Appearance at Criminal Trial*

Subsequent to the issuance of a subpoena to appear at a criminal trial, the newsman desiring to protect his confidential relationships may

195. Limitations which make libel recovery difficult include the exclusion of groups and organizations from access to the suit, the absolute immunity granted to judges, legislators, and executive officials in connection with anything remotely connected with their official duty, and the privilege of fair comment. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 519 (1970).

196. Green, *The Right to Communicate*, 35 N.Y.U. L. REV. 903, 907 (1960).

move to quash the subpoena. Under current practice, the judge may "quash or modify the subpoena if compliance would be unreasonable or oppressive."[197] This determination is based on judicial discretion and involves a balancing of the materiality and relevancy of the party's testimony against the burden that would be placed on the party by requiring him to testify.[198] In most situations the subpoena will not be quashed if there is any reason to believe the party possesses information that may be related to the cause of action before the court.[199] However, a stricter standard should be required in order to compel a newsman to testify at criminal trial.

If reporters could be subpoenaed merely because it appeared that they might possess relevant information, such use of the subpoena power would lead to unnecessary questioning by prosecutors who had no factual reason to believe the reporter possessed information concerning the alleged offense. With the limited criminal trial exception, prosecutors may wish to call reporters at trial in an attempt to investigate other activities under the guise of seeking relevant evidence. Therefore, in order to insure that the subpoena is being used to prosecute the particular crime and not to investigate generally, and to protect the newsman from having to appear unncessarily, a concomitant of the right to a protected relationship should be the requirement that the party seeking the newsman's testimony show cause that the reporter has reason to know about the defendant *and* his allegedly criminal acts. Such a showing is difficult to define with precision beyond saying that it should be more rigorous than the current standard. A newsman's general reports about the political party of the accused or the fact that the reporter at some time had written a story about the accused should not constitute sufficient reason to believe he has information concerning the alleged criminal act. Rather, the requisite showing should include specific evidence, such as the reporter's own writings or testimony of government informers, that the reporter has information relating to elements of the alleged crime. Of course, if the requisite showing is made, the reporter would have to appear at trial and disclose all information received from the defendant relating to his alleged criminal behavior, insofar as it is relevant by trial standards.

In the case of an indictment for conspiracy, special caution must be shown in requiring a reporter to testify. Because of the difficulty in proving a secret agreeement to conspire, the standard of relevance of

197. FED. R. CRIM. P. 17(c).
198. *See, e.g.*, United States v. Camp, 285 F. Supp. 400 (N.D. Ga. 1967).
199. *See, e.g.*, State v. Edwards, 68 Wash.2d 246, 412 P.2d 747 (1966).

testimony is substantially reduced and other rules of evidence are relaxed at conspiracy trials.[200] Under the proposed rule, a substantial danger exists that conspiracy indictments may be used as weapons to require full disclosure of a journalist's communications with alleged conspirators regardless of whether they further the conspiracy charge. This wholesale disclosure could result in a widespread deterrent effect, particularly among radical groups fearful of conspiracy charges. Conceivably, reporters should be exempted from testifying at conspiracy trials altogether.[201] The breadth of inquiry creates dangers to the free news flow similar to those found at grand jury and legislative invesigations, and neither the proposed rule, nor other disclosure tests addressing themselves to the "importance" of the inquiry or "relevance" of the testimony sought, are able to curtail such inquiry.[202] However, if no such exemption at conspiracy trials is granted the newsman, the judge should exercise care in requiring a reporter to appear at trial and should not require his testimony unless he believes the reporter's testimony will clearly further the adjudication of the conspiracy charge.

B. *Who May Invoke the Right*

A key element of the right of nondisclosure is that the person invoking it must be a "reporter" or "newsgatherer." Given the broad protection and discretion afforded a "reporter," there may be attempts to avoid compulsory discloscure requirements by those who would pose as news gatherers. In determining the authenticity of persons who claim that they deserve to invoke the right, the following rule should be used:

> The person invoking the right must have intended to use material, gathered through a confidential informer relationship, in a process aimed at disseminating information to the public.

This "process" may eventuate in a newspaper or magazine article, book, broadcast media presentation, pamphlet, or handbill.[203] However, the person claiming the right must have the burden of establishing

200. *See* Note, *Conspiracy and the First Amendment*, 79 YALE L. J. 872, 877 (1970); Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 984, 988 (1959).

201. A precise delineation of the impairment to First Amendment interests caused by subpoenaing reporters at conspiracy trials or a detailed argument about the extension of the newsman's right to a conspiracy setting is beyond the scope of this Note. The latter analysis would rest on the deterrent theories developed here.

202. *See* pp. 348-58 *supra*.

203. The First Amendment applies to broadcasting and all forms of publication. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Marsh v. Alabama, 326 U.S. 501 (1945).

his specific intent to use the material sought by the subpoenaing party in order to contribute to the public information flow. The general nature of that material will come out at a hearing when the subpoenaing party seeks information and the individual seeks a protective order as a newsman. The person claiming the right must introduce evidence that the information sought was gathered for use in an actual or planned news story or as background information for such a story.[204]

This rule, in essence, turns on a factual inquiry, going to the question of intent to disseminate, given the breadth of the First Amendment's definition of the press and the presumptions recommended by this Note regarding the confidentiality of the relationship and the communications.[205] It will be considerably easier for a professional journalist to satisfy this showing because of his access to publishing facilities and the frequency with which he contributes to the public news flow. However, a reporter for other forms of publication must be able to invoke the right if he can show that it was "more probable than not" that the information sought was acquired for dissemination purposes. Normally, actual dissemination of information related to the subject of the informer's communication will satisfy this showing. However, even if no publication has occurred, the reporter must be protected if he can introduce evidence, such as the testimony of others, that he was gathering information which was to be disseminated. Of course, even the actual publication of a story may be an insufficient showing if other evidence indicates that public dissemination was not the purpose of a relationship with an informant, but rather a contrivance to escape compulsory disclosure. Otherwise, anyone anticipating a subpoena could write an article relating to information which may be sought and then claim a right of nondisclosure of sources and background information.

Various factors that a judge could use in making the requisite factual determination include: (1) affiliation with an organization engaged in disseminating information to the public; (2) access to publishing or broadcasting facilities; (3) previous journalistic experience—past contributions to the public information flow; (4) proof of intent to publicize the acquired information as evidenced by testimony from others; (5)

204. *See* pp. 344-45 *supra*. A reporter's superiors in the publishing process who need access to confidential sources and materials for editing and verification purposes must also be protected by this right of nondisclosure.

205. *See* pp. 343-45 *supra*.

livelihood earned through the process of disseminating news to the public; and (6) fact of public disclosure.

C. *Material Covered by the Right*

The right of nondisclosure concerning an informer-reporter relationship should be applicable to information and identities of sources acquired in the course of gathering material for public dissemination through publication or radio and television broadcasting. It should apply both to oral testimony by the reporter and to notes, files, and other materials possessing confidential information which may be demanded by a subpoena *duces tecum.* As noted, the right should be claimed at the discretion of the reporter.[206] Actual public dissemination cannot be required before the reporter may assert a nondisclosure right, for, at the time of the reporter-informant communication, the informant could not be certain of nondisclosure since he has no assurance that his communication will actually be used in a publication. The court may not require proof of confidentiality because of the difficulties in establishing the intent of an undisclosed informant. However, the presumption of confidentiality is rebuttable, and disclosure may be required if the party requesting it is able to show clearly that confidentiality was not intended by the informant.[207]

There are three obvious situations where no confidential informer-reporter relationship is involved and where a court may therefore require disclosure by a reporter. Two of these relate to news gathering. First, no claim of nondisclosure should be permissible before judicial and legislative bodies concerning materials already published, and the reporter should be subject to subpoena for the purpose of verifying the accuracy of his published articles.[208] This verification should include authentication of published quotations and a representation that the article in question accurately reflected what the reporter observed and was told. If the reporter testifies that his article contained inaccuracies, a highly unlikely event since such testimony would impair his reputation for reliable reporting, the reporter must then be able to assert a First Amendment right of nondisclosure. Otherwise, the court could probe more deeply into the situation, and the effectiveness of any non-disclosure right would be destroyed.[209]

206. *See* p. 344 *supra.*
207. *See* p. 345 *supra.*
208. *See* note 157 *supra.*
209. The reporter should be under substantial pressure to account for any errors he is willing to admit, for unaccountable error would probably damage his reputation for reliable reporting even more severely than the admission of error.

Another instance of verification would occur when a news gatherer is called before a grand jury, civil trial court, or legislative committee to corroborate information revealed at criminal trial. Here, public disclosure has already taken place so there is no confidentiality left to protect, and it would therefore be quixotic to deny this same information to another properly constituted tribunal. Of course, under no circumstances could the reporter be required to reveal more information than he had previously disclosed at criminal trial.

The second situation in which no informer-reporter relationship exists, and thus no right of nondisclosure obtains under the proposed rule, concerns activities witnessed by the newsman in public. The test for the non-applicability of the right of confidential informer-reporter relationships is a determination whether or not the reporter was in a situation in which he could have been excluded. Thus, a newsman would have to testify as to his observations of demonstrations on city streets, but would not be required to disclose information relating to a meeting of a dissident group which could have excluded him from the meeting and which admitted him only because he promised to keep the proceedings off-the-record.[210] This distinction would also apply to all taped and filmed materials. Films and tapes of private interviews, or that concern situations in which the informer's permission was required, should not be subject to disclosure. If films and tapes either have already been made public, or concern events that occurred in public, they cannot be protected under a rule protecting confidential informer-reporter relationships. However, a persuasive constitutional argument could be made that, even though no confidential informer-reporter relationship exists, such materials should be exempted from disclosure because of the impairment to a free news flow caused by compulsory disclosure.[211]

The third situation in which there is no right of nondisclosure occurs when information is sought from reporters concerning their private lives, information which was not acquired for public dissemination purposes. For example, if a reporter were being sued for

210. *See In re* Pappas, No. 14,690 (Mass. Sup. Ct. Jan. 29, 1971).

211. This Note is limited to an analysis of the constitutional right to confidential informer-reporter relationships. However, there is a potential deterrent effect caused by compulsory disclosure of information gathered by reporters at public events. For example, at violent demonstrations photographic equipment may be destroyed if demonstrators believe the film will later be used for government investigatory purposes. Furthermore, demonstrators who might otherwise co-operate with newsmen at later interviews may be deterred if the reporters have aided the government in the past through production of such films. Thus, it could be argued that the threat of this deterrence is sufficient to justify a constitutional right of nondisclosure of all information acquired by reporters while acting in a news gathering capacity.

divorce and, at trial, were asked to account for his activities on a certain evening, he should not be able simply to respond that he was with confidential informants. Rather, he should have to introduce evidence to establish a reasonable relationship between his activities on that night and a story on which he was working. If, in fact, he were on a social engagement, he should not be able to claim a right of nondisclosure.

Although no specific exception is necessary, the reporter would be unable to use a First Amendment nondisclosure right to conceal his own criminal conduct. The right is limited to informer-reporter relationships and does not protect disclosure of a reporter's own activities. If a newsman is a party to an indictment involving others, such as conspiracy, the criminal trial exception would prohibit him from claiming a First Amendment right of nondisclosure of information concerning the others also indicted.[212]

D. *Waiver*

Recognition of the right of a news gatherer to protect the confidentiality of his relations with informants raises the question whether this right may be waived. Since the major reason for recognizing this right is the deterrent effect of compulsory disclosure on informants, an informant should be able to waive the newsman's right of nondisclosure if confidentiality is no longer desired. Such a situation might occur when a party in a civil trial wishes, at the trial, to corroborate an assertion made by him by showing that he had previously told the reporter the same information. Or, in another situation, an informant might want a reporter to testify before a grand jury or legislative committee as to their communications.

In order to waive the newsman's right of nondisclosure, the informant should appear at court or at a hearing brought about by the newsman's motion to quash the subpoena and testify that confidentiality of his communications with the reporter is no longer desired. The court would then determine the voluntariness of the informant's waiver, based on an evaluation of the "totality of circumstances" surrounding it.[213] If it appears that the waiver was made in voluntary fashion by an informant who understood the newsman's right of nondisclosure, the

212. *See* pp. 346-47 *supra.*

213. Prior to Miranda v. Arizona, 384 U.S. 436 (1966), "totality of circumstances" was the standard applied to determine the voluntariness of a confession. Haynes v. Washington, 373 U.S. 503 (1963). The court, in applying this standard to an informant's waiver, should consider such factors as physical abuse, threats, and ability of the informant to understand his waiver.

reporter must then be required to disclose all information communicated to him from that informant.

Since the reporter is given the discretion to claim the right of nondisclosure, he has the right to claim nondisclosure of specific information in one action and later disclose the same information in another action. In every situation, the reporter is given the discretion to balance the deterrent effect that would probably occur if he were to disclose confidential information against the interests to be served by disclosure. It has been suggested that once a reporter claims a right of nondisclosure concerning certain information, he should not later be able to disclose that information as a defense to a libel action.[214] However, the fact that he has an interest in the outcome of the libel action does not appear to be sufficient reason for denying him the right of disclosure in this action if he chooses to risk a deterrent effect and harm to his professional stature in order to defend himself properly.[215]

E. *An Evidentiary Problem*

For purposes of impeachment, the scope of admissible cross-examination is considerably broader than the scope of testimony given on direct examination.[216] Therefore, a situation might arise in which a newsman claims a right of nondisclosure to a question asked on cross-examination to show the newsman's bias. For example, the cross-examiner might desire disclosure of information concerning the newsman's relationships with third party informants in an attempt to establish the newsman's bias. If the newsman were to claim a right of nondisclosure on cross-examination, the judge could strike the reporter's direct testimony in the exercise of his judicial discretion because the cross-examiner had been denied his right to a full cross-examination.[217] However,

214. NEW YORK LAW REVISION COMMISSION, *supra* note 159, at 7.

215. The apparent inconsistency of this position stems from the fact that the reporter, by refusing to disclose in the first case, is presumably acting in the "public interest" by assuring a free flow of information, but in disclosing at the libel action, he is acting in a "self-interested" fashion. The theory for prohibiting disclosure would seem to be that since the newsman had "frustrated the administration of justice" in the first case (albeit in the name of the First Amendment), he should have to pay a penalty in the second. However, whether the administration of justice was frustrated in the first case is uncertain. More important, the basic theory of this Note is that newsmen, of all shades of opinion, are the best judges of how to insure a full flow of information to the public. If disclosure is permitted in the second case, the paper which chooses to so disclose may have its credibility with sources injured and may not be able to function as effectively as a news gatherer. However, this should be the paper's decision. Neither the specific nor general deterrent effects of the kind discussed above would result from disclosure, insofar as they affect the press at large, since only the particular paper in question would have its news gathering function impaired.

216. *See* C. MCCORMICK, LAW OF EVIDENCE § 22 (1954).

217. *Id.* at §§ 19 and 24.

a more common practice would be for the judge to caution the jury to take into account the inadequate cross-examination in evaluating the newsman's direct testimony.

IV. Conclusion

The values promoted by the free press clause of the First Amendment are of paramount importance to the just functioning of democratic society. These values may only be secured by guaranteeing the newsman the right to gather, to print and to circulate information—and, by necessary implication, to shield a confidential relationship with his source from compulsory disclosure requirements. Recognizing the primary importance of this relationship, the state legislature of New York, in May, 1970, enacted a "Freedom of Information Act for Newsmen."[218] This legislation grants newsmen an absolute privilege to withhold *any* information (whether obtained in confidence or not) at *any* judicial, legislative or administrative proceeding without fear of a contempt citation.[219] The First Amendment may not mandate so sweeping an interpretation of the informer-newsman relationship. Yet, if the flow of information to the public is not to be unnecessarily impaired, the relationship between reporters and their sources must be given more protection, as a matter of constitutional right, than is currently afforded by state and federal courts.

218. New York Civil Rights Law 79-h (1970).

219. *Id.* The statute, however, does not protect all who disseminate information to the public. Rather, it specifically defines such terms as "professional journalist" and "newspaper," in effect limiting a right of confidentiality to those reporters who earn their livelihood through employment with broadcasting stations and publications which appear regularly.