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THE NEWSPERSON'S PRIVILEGE AND THE RIGHT TO COMPULSORY PROCESS—ESTABLISHING AN EQUILIBRIUM

INTRODUCTION

The Supreme Court has declined to recognize a first amendment privilege for newsmen to protect the confidentiality of their sources.¹ One rationale offered for this nonrecognition is the alleged conflict of such a privilege with a criminal defendant's sixth amendment right to obtain compulsory process of witnesses² for his defense.³ The refusal to protect confidentiality, however, necessarily restricts the press's newsgathering ability because informants, reasonably fearing reprisals, are willing to disclose "information valuable to the public discourse . . . only in confidence."⁴ These restrictions substantially curtail the exercise of the press's first amendment rights⁵ because newsgathering and the corresponding need to guarantee anonymity to informants are practical prerequisites to effective information dissemination.

The Supreme Court must protect both first and sixth amendment rights in accordance with its role as the ultimate guardian of constitutional guarantees.⁶ Characterization of a privilege of confidentiality as an infringement on the right to compulsory process overlooks the possibility of providing equivalent safeguards for both. Nevertheless, the Supreme Court has viewed the full exercise of these rights as conflicting.⁷ This Comment suggests an approach for resolving the alleged incompatibility of a newsmen's privilege of confidentiality and the right to compulsory process. Protection of the rights of the press and of the defendant should require discontinuance of a prosecution when a defendant establishes that production of an anonymous source is necessary for the adequate presentation of a defense.

Part I of this Comment establishes that the framers of the Constitution intended to encompass newsgathering within the freedom of the press clause and shows that the proper constitutional role of the press is to serve as an unfettered investigative and informational agent of the public. Part II discusses recent judicial limitations imposed on the press and demonstrates the need for a newsmen's privilege of confidentiality. Part III outlines the scope of the proposed privilege and offers standards and limitations to prevent abuse. The Supreme Court's inconsistent treatment of these first and sixth

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

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

3. The Supreme Court has concluded that the first amendment interest of a newsmen in maintaining the confidentiality of his sources is outweighed by the general obligation of all citizens to give information when subpoenaed to appear before a grand jury or at trial. *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972).

4. *Id.* at 729 (Stewart, J., dissenting).

5. "Congress shall make no law . . . abridging the freedom . . . of the press . . ." U.S. Const. amend. I.

6. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803); see *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (implicitly overruled in *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 488 (1955), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397-400 (1937)).

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

amendment rights, which has turned on the identity of the party asserting the right, is analyzed in Part IV. Finally, Part V establishes the propriety of discontinuing a prosecution when the defendant establishes a critical need for the newsperson's privileged information.

I. THE MEANING OF THE FREEDOM OF THE PRESS CLAUSE

A. *Historical Underpinnings*

Although no writing from the time of the proposal and adoption of the Constitution expressly includes newsgathering within the concept of a free press,⁸ both the context in which the press function emerged, and the general purpose of the Bill of Rights⁹ indicate the framers' intent to proscribe government interference with the press.¹⁰ In the early colonial period, press freedom was initially interpreted as permitting only truthful criticism of government.¹¹ When revolutionary controversy intensified in the mid-1700's,

8. A free press was thought necessary to secure popular control of government by keeping citizens informed about governmental activities. The Federalist No. 84, at 576-77 (A. Hamilton) (Ford ed. 1898); Letter from Thomas Jefferson to John Tyler (June 28, 1804), *reprinted in* L. Levy, *Freedom of the Press from Zenger to Jefferson* 361-62 (1966). It is obvious that the press cannot disseminate information that it is prohibited from acquiring. Newsgathering is a right so intertwined with freedom of the press and so basic to the meaning of the free press clause that the drafters did not specifically enumerate it. Justice Stewart, dissenting in *Branzburg v. Hayes*, 408 U.S. 665, 725-52 (1972), noted that newsgathering is a corollary to dissemination and gives meaning to the right to publish. *Id.* at 727-28. "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." 9 Writings of James Madison 103 (G. Hunt ed. 1910) (emphasis added). The Supreme Court, however, has failed to reach a similar conclusion, a result possibly attributable to the increasingly adversarial relationship of press and government. *See* pt. II *infra*.

9. According to Madison, the Bill of Rights was added to the Constitution because "the great mass of the people who opposed [the Constitution] disliked it because it did not contain effectual provisions against encroachments on particular rights." 1 Annals of Cong. 450 (Gales & Seaton eds. 1789). Congressman Goodhue said that it was intended to "secure in a stronger manner [individual] liberties from the inroads of power." *Id.* at 443.

10. The prohibition against government restriction of the press in the Bill of Rights was intended to encompass all branches of government. "The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly." *New York Times Co. v. United States*, 403 U.S. 713, 716 (1971) (Black, J., concurring). The Supreme Court has noted that the spirit of the first amendment prevents the state from "contract[ing] the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *see New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring). References to "government" in this Comment include the executive, legislative, and judicial branches. Parts II-V deal specifically with the judiciary and the press.

11. L. Levy, *Legacy of Suppression* 64-67 (1960). In 1734, Peter Zenger published an allegedly seditious article criticizing public officials. Zenger's defense attorney admitted his client's responsibility, but asserted that truthful criticism of government warranted acquittal. I. Brant, *The Bill of Rights* 176-77 (1965); L. Levy, *supra* note 8, at 43. Popular support of Zenger, stemming partially from mounting dissatisfaction with colonial government, defeated the attempts to punish him for his publication. I. Brant, *supra*, at 176-80. Zenger and his defense attorney, Andrew Hamilton, became celebrated for their defense of unrestrained political discussion. The effects of the Zenger trial were attributable to the developing concept among an increasingly vocal part of the population that free persons possess a natural right to express their

however, patriot leaders and the colonial press and public began defining press freedom, upon discovery of its revolutionary power,¹² in libertarian terms.¹³ Unrestrained government criticism was extolled, even if libelous or seditious.¹⁴ Concurrently, this ability to incite political unrest led to more vigorous, although increasingly unsuccessful, attempts by the British government to curtail press freedom.¹⁵ The adoption of the Bill of Rights¹⁶ rep-

thoughts without prior restraint or fear of subsequent reprisal. *Id.* at 179-80. Zenger had also refused to reveal the identity of his sources despite government attempts to force disclosure. Although the confidentiality of his sources was not an issue in the trial, the case may have established the first precedent subsequently relied on in asserting a right to maintain the anonymity of press informants against government attempts at compelling disclosure. M. Van Gerpen, *Privileged Communication and the Press* 6 (1979). It is contrary to the American Newspaper Guild's Code of Ethics for newsmen to disclose the identity of confidential informants in courts or other judicial or investigative bodies. Beaver, *The Newsmen's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 Or. L. Rev. 243, 244 n.2 (1968); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 29 n.54 (1969).

12. Although the right to criticize government had not previously been recognized, the argument set forth in Zenger's case became the law. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273-76 (1964); L. Levy, *supra* note 8, at xxxii-xxxiii; L. Levy, *supra* note 11, at 258-60. The case set a precedent of allowing journalists to expose practices of public officials to hold them accountable to the public. M. Van Gerpen, *supra* note 11, at 6.

13. *See* L. Levy, *supra* note 11, at 64-69. The libertarian political viewpoint of colonial times is reflected in a contemporary article stating that "[p]olitical liberty consists in a freedom of speech and action, so far as the laws of a community will permit, and no farther: all beyond is criminal, and tends to the destruction of Liberty itself.—That Society whose laws least restrain the words and actions of its members, is most free." *Id.* at 68-69 (quoting Boston Gazette, Mar. 9, 1767).

14. L. Levy, *supra* note 11, at 64-67.

15. *See id.* at 18-87. Newspapers in Britain had been subject to control from the time of King Henry VIII, who had granted a monopoly to the "Stationer's Company" over the privilege of printing and keeping presses. As an additional means of regulation, the Court of Star Chamber had a general censorship power over the Company. American Newspaper Publishers Ass'n, *Free Press and Fair Trial* 15-16 (1967). Publication of seditious libel against the government was a capital offense, and no truth defense was available. *Id.* at 16. Two years after abolition of the Star Chamber in 1641, Parliament assumed control of publication by passing Licensing Acts. These Acts required licensing and registration before publication under penalty of forfeiture of the presses for noncompliance. This practice was eliminated in 1695 when Parliament unsuccessfully attempted to reenact the Licencing Acts. *Id.* at 16-17. Freedom of the press evolved to mean freedom from prior or direct restraint. In 1715, Parliament devised a new method of controlling the press through a stamp tax on newspapers and advertising. American colonists called these levies "taxes on knowledge." *Id.* at 17. The purpose was to curtail the circulation of newspapers, particularly cheaper ones that were generally read by the masses. Although the taxes were ostensibly passed for the purpose of raising revenue, the actual motivation was to restrict citizen acquisition of information concerning government affairs. *Grosjean v. American Press Co.*, 297 U.S. 233, 246 (1936). Restrictions on publication in England continued until 1869 when the newspaper stamp tax was repealed, ending indirect restraints on press freedom. American Newspaper Publishers Ass'n, *supra*, at 18-19.

In 1768, the Boston Gazette printed an unsigned criticism of the colonial governor of Boston. Chief Justice Hutchinson of the Massachusetts Bay Province persistently sought to have the grand jury indict the author for criminal libel, which he analogized to treason. The grand jury, on three separate occasions, refused to indict the author for seditious libel. L. Levy, *supra* note 11, at 69-70. By the 1770's, popular support for unrestrained criticism of colonial officials made it

resented a recognition of the natural tendency of government to silence

impossible for the government to prosecute allegedly seditious statements. *Id.* at 72-73. In the actual revolutionary period, the press was unfettered by the British colonial regime. *Id.* at 73-74. Attempts to curtail press freedom continued in the early years of the Republic. Four years before the first amendment was proposed, the Massachusetts legislature imposed a stamp tax on all magazines and newspapers. This was followed in 1786 by a tax on advertisements. *Grosjean v. American Press Co.*, 297 U.S. at 248. The Sedition Act of 1798, ch. 74, 1 Stat. 596, passed subsequent to the ratification of the Constitution, is indicative of the natural tendency of government to act habitually to "destroy the rights of its citizens" by drawing power to a centralized point. W. Berns, *Freedom, Virtue & The First Amendment* 68 (1957). The Act made it a crime, punishable by five years in prison and a fine "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with intent . . . to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States." Sedition Act of 1798, § 2, ch. 74, 1 Stat. 596, 596. Despite the existence of the Constitution and the Bill of Rights as a counterbalance to the strength of the centralized federal system, the government persisted in attempting to stifle political criticism by making publication of such information illegal. Although the attempt proved unsuccessful, the Sedition Act exemplifies government efforts at continuing the pre-Constitution policy of curtailing political freedom by silencing critics. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 204-05. The Sedition Act was short-lived and led to the final repudiation of prosecutions for seditious libel. Fears that the stifling of political criticism and control of public opinion would hinder informed citizen choice in the election of 1800 prompted the adoption of a broad concept of free speech and press. L. Levy, *supra* note 11, at 258-60. Prosecution under the Act had "a direct tendency to produce the very state of things it sought to repress" and resulted in the "destruction of the party by which it was adopted." 2 T. Cooley, *Constitutional Limitations* 900 (8th ed. W. Carrington 1927); see *The Virginia Report of 1799-1800, reprinted in* L. Levy, *supra* note 8, at 197. See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 276-77 (1964). The Sedition Act expired in 1801 and was not reenacted. *Id.* The practice of curtailing the free flow of information concerning government activities by means of "taxes on knowledge" was attempted as late as the 1930's. *Grosjean v. American Press Co.*, 297 U.S. at 244-45. Huey Long caused the levy of a 2% tax on the gross advertising receipts of every newspaper with a circulation of 20,000 copies a week or more. This tax affected 13 papers, 12 of which had opposed Long's hegemony in Louisiana politics. Senator Long apparently had indicated that the tax would "help [the newspapers'] lying some." H. Nelson, *Grosjean v. American Press Company*, in *Freedom of the Press from Hamilton to the Warren Court* 347, 347 (H. Nelson ed. 1967) [hereinafter cited as *Freedom of the Press*]. The Supreme Court invalidated the tax, recognizing that it was designed to limit the circulation of information to the public and not primarily for the financial support of the government. *Grosjean v. American Press Co.*, 297 U.S. at 250. The Court noted that the primary problem was not the burden of paying the tax, but rather the resulting adverse consequences to the right of the people to full information regarding the activities of the government. *Id.* The Court has reversed its position by holding that press freedom and the detrimental effects accruing to the press from government interference are issues considerably removed from that of the public's right to information. See notes 109-14 *infra* and accompanying text.

16. A general feeling existed that explicit protection was required in the Constitution against government restriction of popular rights. I. Brant, *supra* note 11, at 3; Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 869 (1960). Alexander Hamilton felt that a bill of rights was superfluous because the American Constitution was "professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and, as they retain everything, they have no need of particular reservations." *The Federalist* No. 84, at 573 (A. Hamilton) (Ford ed. 1898). Nevertheless, the absence of a bill of rights was an unyielding obstacle to ratification of the Constitution. See 1 B. Schwartz, *The*

opponents.¹⁷ The first amendment's guarantee of freedom of the press provided a means to truth ascertainment, a necessary prerequisite to the reasoned decisionmaking inherent in a republican form of government.¹⁸

According to Alexander Hamilton,¹⁹ the importance of the press resulted

Bill of Rights: A Documentary History 384, 443-44 (1971); Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 96 (1974).

17. W. Berns, *supra* note 15, at 68. The Supreme Court recognized this tendency in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), in which it held that the state could not compel disclosure of the NAACP's membership lists because it was an impermissible attempt to abridge the members' first amendment right to freedom of association. *Id.* at 461-63. The Court stated that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action . . . particularly where a group espouses dissident beliefs." *Id.* at 462.

18. "The most effectual [means to truth] hitherto found, is the freedom of the press." Letter from Thomas Jefferson to John Tyler (June 28, 1804), *reprinted in* L. Levy, *supra* note 8, at 362; *see New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). In this case, the United States sought to enjoin publication of the Pentagon Papers. The Court issued six concurring and three dissenting opinions, after holding, *per curiam*, that the government had not met the high burden required to uphold the imposition of a prior restraint on publication. *Id.* at 714. Justice Black noted that "[t]he Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unstrained press can effectively expose deception in government." *Id.* at 717 (concurring opinion). In concurring, Justice Douglas stated: "It should be noted at the outset that the First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' That leaves, in my view, no room for governmental restraint on the press." *Id.* at 720. Justice Brennan's concurring opinion focused on the impermissibility of judicially imposed prior restraints on publication absent wartime conditions, a threat of nuclear holocaust, or other circumstances posing a grave and immediate danger to national security. *Id.* at 724-27. Justices Stewart, White, and Marshall viewed the matter as being within the Executive's province because the Government argued that foreign affairs and national defense were involved. Therefore, it was the constitutional duty of the executive, not the judiciary, to preserve the confidentiality necessary for effective national security and international relations. *Id.* at 727-48 (concurring opinions). Chief Justice Burger's dissent focused on the insufficiency of the record due to the stay of the district court trial when the Court granted certiorari. He felt that the merits should not have been reached. *Id.* at 751-52. Justice Harlan dissented, stating that the Court should be more deferential to the Executive's conclusion that national security was threatened by publication of the Pentagon Papers. *Id.* at 756-57. Justice Blackmun stated that the suit had proceeded too quickly for a proper balancing of the press's right to print against the government's right to prevent publication. *Id.* at 761-62 (dissenting opinion).

19. The Federalist No. 84, at 574 (A. Hamilton) (Ford ed. 1898). Alexander Hamilton considered the Bill of Rights unnecessary because the Constitution enumerated powers granted to the government, and the drafters of the Bill of Rights did not envision any power to restrain or regulate the rights specifically granted therein. Hamilton feared that inclusion of the Bill of Rights, might raise a "plausible pretense" that the government had some regulatory power over these basic freedoms. *Id.*; *see* I. Brant, *supra* note 11, at 3-15. He thought it patently absurd to include a prohibition against the abuse of an authority that had not been given and feared that a doctrine might arise acknowledging the existence of constructive government powers. The Federalist No. 84, at 574 (A. Hamilton) (Ford ed. 1898). Conversely, it may be argued that the adoption of the Bill of Rights precluded any argument that the government had constructive regulatory power because of the absence of express prohibition. Both views, however, support the same conclusion—government interference with the free press was foreclosed.

from its function as the "expeditious messengers of intelligence to the most remote inhabitants of the Union,"²⁰ to insure widespread involvement in our representative form of government.²¹ Hamilton also emphasized the need for the public to receive politically essential information from sources other than the government to prevent undue control of public opinion.²² Hamilton's statements, examined in conjunction with the ultimate inclusion of the Bill of Rights in the Constitution, indicate that the drafters anticipated the existence of an unfettered, adversarial press that gathers news and freely disseminates information as an agent of the public²³ to ensure a true government by the people.²⁴ Clearly, the press was intended to be an entity totally independent

20. The Federalist No. 84, at 577 (A. Hamilton) (Ford ed. 1898). He particularly emphasized the importance of a free press in a society in which the citizens are geographically removed from the central government. *Id.* Justice Douglas recognized the same function in his dissenting opinion in *Branzburg v. Hayes*, 408 U.S. 665, 722 (1972).

21. The Federalist No. 84, at 576-77 (A. Hamilton) (Ford ed. 1898). Justice Brennan reiterated Hamilton's view of the press's function when he stated that "[a] democracy depends upon the existence of a public life and culture, and in a country of some 220 million, this would scarcely be possible without the press." Brennan, *The Symbiosis Between the Press and the Court*, Nat'l L.J., Oct. 29, 1979, at 15, col. 1.

22. The Federalist No. 84, at 576-77 (A. Hamilton) (Ford ed. 1898).

23. M. Van Gerpen, *supra* note 11, at 5-6. The press's function is to investigate events, expose harmful government practices, and inform the populace about the operations of bureaucracies, officials, and departments of government. *See Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2914 (1979) (Powell, J., concurring); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 856 (1974) (Powell, J., dissenting).

24. The system of checks and balances provided another protection against the centralization of power. Concern for the preservation of state powers indicates the framers' fear that democracy could be jeopardized if freely functioning, independent sources of information did not exist. The Federalist No. 59, at 395-96 (A. Hamilton) (Ford ed. 1898). The *Federalist* further supports the characterization of the press as an agent of the public when functioning as newsgatherer. Opponents of the federal system argued that it was improper to confer expansive powers on a national government that would be too remote from many states to allow the constituents to obtain adequate knowledge of the conduct of the representative bodies. *Id.* No. 84, at 576-77 (A. Hamilton) (Ford ed. 1898). In response, Hamilton stated that a responsible government depended more on the facility of communication than on citizen proximity. *Id.* He cited the existence of three agents of the remote citizenry who would watch over the actions of the federal government—the executive and legislative bodies of each state, those citizens in close proximity to the seat of federal government, and the press. *Id.* In *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), Justice Powell agreed that the role of the press "[i]n seeking out the news," is that of "an agent of the public at large." *Id.* at 863 (dissenting opinion). He rearticulated this position in *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2914 (1979) (concurring opinion). *See also Nixon v. Warner Communs., Inc.*, 435 U.S. 589, 609 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 722 (1972) (Douglas, J., dissenting). This intended status is incompatible with that of a government tool, a role that could result when dissemination is protected but newsgathering is substantially controlled and chilled. Moreover, the agent of the public function assumes greater importance as government becomes progressively more complex. *See Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In *Near*, the Court stated that "the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great

of the government.²⁵ It is unlikely that the framers intended the contradiction that "Congress shall make no law abridging the freedom of the press, which freedom, however, is to be regulated by law."²⁶ The Supreme Court also recognized the press's function as agent of the public when it stated that "[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."²⁷

cities." *Id.* at 719-20. The newsgathering aspect, of which the privilege of confidentiality is an essential element, is more crucial today than it was in the 1700's. Brennan, *supra* note 21, at 15.

In *Associated Press v. United States*, 326 U.S. 1 (1945), the Supreme Court emphasized that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, [and] that a free press is a condition of a free society." *Id.* at 20. The legislative branch has similarly recognized the importance of public access to government controlled information as antecedent to the exercise of other constitutional rights. See Freedom of Information Act, 5 U.S.C. § 552 (1976). In enacting this statute, Congress's basic premise was that the people "in the words of Federalist No. 49 . . . 'are the only legitimate fountain of power, and it is from them that the constitutional charter . . . is derived.' Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf. In a theoretical sense, the agencies in the executive branch are already accountable to the people through the President . . . and the Congress This theoretical accountability, though, leaves agency commissioners far removed from the public view in their day-to-day activities. Absent special circumstances, there is no reason why the public should not have the right to observe the agency decisionmaking process first-hand." H.R. Rep. No. 880, 94th Cong., 2d Sess. 2, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2183, 2184. See also Note, *The Right of the Press to Gather Information*, 71 Colum. L. Rev. 838 (1971) [hereinafter cited as *Right of the Press*]. Justice Stewart expressed concern that requiring newsmen to testify in grand jury proceedings concerning information received from confidential sources would be an invitation to the government "to try to annex the press as an investigative arm." *Branzburg v. Hayes*, 408 U.S. 665, 744 n.34 (1972) (dissenting opinion). Government use of the press in such a manner severely impinges on first amendment freedoms. *Id.* at 744. The Justice Department established guidelines for press subpoenas, stating that "[t]he Department of Justice does not consider the press 'an investigative arm of the government.'" *Id.* at 707 n.41. Annexation of the press as an investigative branch of government would leave the public with only official versions of crucial events. *Newsmen's Privilege: Hearings on S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 917, S. 1128 and S.J. Res. 8 Before the Subcomm. on Const'l Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 553 (1973) [hereinafter cited as *Hearings*] (statement of the Citizen's Right to News Committee); see Z. Chafee, *Free Speech in the United States* 497-516 (1941). Justice Douglas has recognized that "[s]ecrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors." *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (concurring opinion). Most confidential sources problems have arisen in connection with such issues as the Pentagon Papers, the My Lai massacre, thalidomide, Watergate, the ITT scandal, and illegal CIA activities—matters in which government self-interest is best served by nondisclosure. *Hearings, supra*, at 553; see Comment, *The Newsmen's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 U.C.L.A. L. Rev. 160, 174 (1976) [hereinafter cited as *Federal Shield Law*].

25. See notes 22-24 *supra* and accompanying text.

26. G. Hay, *An Essay on the Liberty of the Press*, 1799, *reprinted in* L. Levy, *supra* note 8, at 190.

27. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

B. *The Proper Role of Press Freedom in the Constitutional Framework*

By characterizing infringements on a free press as a method of safeguarding other constitutional rights,²⁸ the Supreme Court has inverted the framers' intent that the press act as a guardian against the abridgment of constitutional rights by government abuse of its powers.²⁹ Diminution in public support of the press has enabled the Court to sanction infringements on press freedom.³⁰ By utilizing press abuses to rationalize curtailment, the Court purports to be protecting the individual from the press.³¹ Although the press occasionally oversteps its function,³² governmental curtailment of press freedom is unjustified. The framers recognized the potential for abuse and declined to provide for government restrictions to curb such abuse.³³

Although the free press clause protects against government restraint,³⁴ even a literal and absolutist reading of the first amendment³⁵ recognizes that press

28. See *Wolston v. Reader's Digest Ass'n*, 99 S. Ct. 2701, 2704 (1979) (press liable for defamation of convict despite lack of "actual malice"); *Branzburg v. Hayes*, 408 U.S. 665, 697 (1972) (private system of press informants would pose threat to citizen's expectations of privacy).

29. See *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring); *id.* at 714 (Black, J., concurring); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 719-20 (1931). The government, by enforcement of statutory and common law, prevents private infringement of rights and provides remedies when such infringement occurs. For example, a subsequent damage remedy is available when defamation or invasion of privacy has occurred. *Wolston v. Reader's Digest Ass'n*, 99 S. Ct. 2701 (1979), is indicative of the Court's view that restraint on the free press preserves individual rights. In *Wolston*, the Court held that the press was liable for defamation of a convict, despite the absence of proof of actual malice as required by *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Surprisingly, the constitutional guarantee of a free press was given lesser importance than an individual's reputational interest that the Supreme Court previously held to be neither a liberty nor a property interest worthy of constitutional protection. See *Paul v. Davis*, 424 U.S. 693, 701-10 (1976). One rationale for the *Paul* decision is that the individual was claiming a reputational injury by the state rather than by the press. *Id.* at 695-97. Constitutional rights, however, are to be protected by the government from government infringement. See notes 9-10 *supra*.

30. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 548-51 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-48 (1974); *Brennan, supra* note 21, at 15, 31. But see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720 (1931).

31. See 1947 Commission on Freedom of the Press, *The Problem and the Principles of Freedom and Responsibility*, in *Freedom of the Press, supra* note 15, at 387. The Commission concluded that unless the media improved its performance and acted more responsibly, government would undertake measures of control and regulation that the public would not oppose. See *id.* at 388-92 (quoting the Commission's findings). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 719-20 (1931); M. Van Gerpen, *supra* note 11, at 181.

32. See notes 50-61 *infra*, and accompanying text.

33. James Madison stated that "[s]ome degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." 4 *Elliot's Debates on the Federal Constitution* 571 (1876).

34. See *New York Times Co. v. United States*, 403 U.S. 713, 716-19 (1971) (Black, J., concurring); Brant, *The Madison Heritage*, 35 N.Y.U. L. Rev. 882, 898-99 (1960); Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 252.

35. See *New York Times Co. v. United States*, 403 U.S. 713, 720 (1971) (Douglas, J., concurring); *id.* at 714-20 (Black, J., concurring); Meiklejohn, *supra* note 34.

freedom is not limitless in scope. Natural limitations exist due to the presence of other rights³⁶ that may delineate the extent to which any freedom is enjoyed. The government, however, may not establish its own parameters for the people's exercise of constitutional guarantees.³⁷

Despite the existence of these natural limitations, constitutional rights are not inherently inimical.³⁸ A clash may arise, however, from overstepping the natural limits of constitutional freedoms. For example, a "media trial" of a defendant in which information tending to prejudice him is dramatized, with unnecessary emphasis on unnewsworthy aspects of the prosecutorial investigation and the defendant's personal life, would constitute an abuse of first amendment rights. Information of this kind provides the public with little insight into matters relevant to political operations. Rather, it merely satisfies the public's thirst for the sensational. When the sensational aspect infringes on the right to a fair trial, the newspaper is not functioning within the protected constitutional role of the press.³⁹

In analyzing the extent of the first amendment's protection of the press, a central issue involves determining when the press acts in its constitutionally conceived capacity so as to be free from government control and afforded government safeguards. Two functions emerge from examining the historical development of the free press concept—investigation and dissemination. Investigation by the press should be unrestrained to allow exposure of government misfeasance⁴⁰ and to provide the means for voters to "acquire the

36. Brant, *supra* note 34, at 899; notes 215-16 *infra* and accompanying text.

37. See Black, *supra* note 16, at 866-67, 874-76. History indicates that the first amendment prohibition against abridging press freedom should be strictly applied against the government. *Id.* The government's proper role is to coordinate and protect the people's free exercise of constitutionally guaranteed rights, rather than to inhibit, restrain, or control. Such actions will be struck down as long as the Supreme Court "know[s] how to read the language of liberty." I. Brant, *supra* note 11, at 8. When governmental curtailment of rights has occurred, it has ostensibly transpired within the context of protecting other rights. For example, prior restraints on publication may be imposed when there is a grave threat to national security, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931), or when disclosure of information will result in "direct, immediate, and irreparable damage to our Nation or its people." *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring). The government cannot properly assert that it is the sole protector of societal interests, however, after having first determined what the protectable interests should be, as well as determining their relative importance. The danger is too great that the interests of the people could rapidly be sublimated to government self-interest.

38. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The Supreme Court, in invalidating a ban on dissemination of news concerning a criminal trial, noted the infrequency of clashes between first amendment rights and sixth amendment guarantees of a fair trial. *Id.* at 554. The Court stated that "tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment" when the press sensationalizes the events of the case. *Id.* at 551. In such instances, the news media oversteps its zone of constitutional protection by impermissibly intruding on the rights of other individuals. See notes 56-61 *infra* and accompanying text. Although the Court's holding in *Nebraska Press* is favorable to the press, this may be attributable to the Nebraska courts' imposition of a prior restraint. *Id.* at 563-65. Courts have traditionally disfavored direct government restraints on publication. See, e.g., *Vance v. Universal Amusement Co.*, 48 U.S.L.W. 4273 (Mar. 18, 1980); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

39. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

40. See Meiklejohn, *supra* note 34, at 259; note 27 *supra* and accompanying text.

intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."⁴¹ Additionally, press circulation and dissemination of information must not permissibly be infringed on by government action. Circulation ensures the operation of other constitutional guarantees by keeping the public aware of government activities. In this respect, the press performs a function analogous to the system of checks and balances within the federal government and within the state-federal government structure.⁴²

Newsgathering, as a prerequisite to the effective performance of the press's functions, should be afforded a high degree of first amendment protection under the free press clause.⁴³ Refusal to protect the information gathering process requisite to dissemination would result in the total evisceration of the press's operation. In *Branzburg v. Hayes*,⁴⁴ the Supreme Court recognized the irrationality of safeguarding freedom of the press without corresponding protection of newsgathering.⁴⁵ The Court minimized the protection of newsgathering, however, by stating that the right to gather news is protected only when it involves information to which the general public has access.⁴⁶

The sixth amendment further delineates and clarifies the press's boundaries of protected operation. A criminal defendant is entitled to a fair trial, including the right to the compulsory process of witnesses favorable to his defense.⁴⁷ The government is charged with securing this right⁴⁸ as part of its role of safeguarding constitutional rights from government infringement.⁴⁹

41. Meiklejohn, *supra* note 34, at 255. See also 2 T. Cooley, *supra* note 15, at 886.

42. In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court stated: "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Id.* at 250.

43. "A corollary of the right to publish must be the right to gather news. . . . No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised." *Branzburg v. Hayes*, 408 U.S. 665, 727-28 (1972) (Stewart, J., dissenting).

44. 408 U.S. 665 (1972).

45. *Id.* at 707-08.

46. *Id.* at 684. This ignores the press's "watchdog" role that forces government to remain responsive to the people. Furthermore, the Court held that although the press was free to gather news from any source and by any means within the law, any court could compel disclosure of sources. *Id.* at 708. Thus, the protection recognized by the Court was effectively removed by stating that the government has an equal right to acquire the information discovered by members of the press, thereby annexing the press as an arm of government. The Court recognized protection of newsgathering only insofar as such protection did not run afoul of the government's interests. *Id.* at 690-91.

47. In *Washington v. Texas*, 388 U.S. 14 (1967), the Court held that the sixth amendment right of an accused is a fundamental element of due process. *Id.* at 17-19. Compelling testimony of witnesses is coexistent with the right of a defendant to present a defense and equal in importance to the right to confront adverse witnesses. *Id.*

48. See *id.* at 22-23.

49. See note 29 *supra*.

Conflict allegedly arises when government action or inaction causes denigration of a defendant's rights. Such government inaction occurred in *Sheppard v. Maxwell*,⁵⁰ in which a trial judge, by failing to curb press behavior, permitted a criminal proceeding to take place in a "carnival atmosphere,"⁵¹ and failed to insulate the jury properly from prejudicial publicity.⁵² The Supreme Court reversed the conviction because the judge insufficiently protected the defendant's rights.⁵³ Although the public has the right to information concerning judicial proceedings,⁵⁴ *Sheppard* recognized that sensationalism is of no value to democracy.⁵⁵ Therefore, action by the trial judge to guarantee the defendant's rights would not have conflicted with the first amendment because the press had functioned irresponsibly. The press spectacularized the courtroom proceedings⁵⁶ rather than fulfilling its constitutional function by gathering and disseminating newsworthy information without injury to the defendant.⁵⁷

50. 384 U.S. 333 (1966).

51. *Id.* at 358. The trial judge allowed the press to virtually control the courtroom during the trial and to harass the participants. A press table was set up near the jury box and counsel table. The movement in and out of the courtroom of the large number of reporters covering the trial caused confusion and disruption of the proceedings. Additionally, jurors were insufficiently insulated from the publicity given the proceedings. This, combined with the prejudicial and sensationalized attention given to the murder in the pre-trial phase, led the Court to conclude that the defendant had been deprived of his sixth amendment rights. *Id.* at 354-55.

52. *Id.* at 358-62.

53. *Id.* at 363.

54. *Id.* at 350. *See also* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

55. The framers sought to protect the free press because of its value to democracy. *See* notes 8-15 *supra* and accompanying text.

56. *Sheppard v. Maxwell*, 384 U.S. 333, 354-55 (1966).

57. This tendency to sensationalize is attributable to the press's status as a moneymaking venture, aside from its role as a tool of democracy. Judicial claims that a press privilege would unnecessarily favor business enterprises should not undercut constitutional arguments. The moneymaking aspect of the news media increases the flow of information to the public. Guest & Stanzler, *supra* note 11, at 41-43. *See also* Beaver, *supra* note 11, at 249. The Supreme Court has used the business aspect of the press to deny constitutional protection. *Zurcher v. Stanford Daily*, 436 U.S. 547, 576 (1978) (Stewart, J., dissenting) (absent constitutional role, press deserves no greater protection from government than doctor or bank). When the news media have claimed that the first amendment exempts the press from business regulation, however, the Court has found that the Constitution does not protect the capitalistic aspect of the press. *See, e.g., Associated Press v. NLRB*, 301 U.S. 103 (1937) (press must comply with the National Labor Relations Act because it is engaged in interstate commerce); *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913) (requirements that newspapers supply information concerning their internal structure to the Post Office Department and that paid for matter be marked advertisement as a prerequisite to use of the mails does not violate the first amendment). In *Associated Press v. United States*, 326 U.S. 1 (1945), the Court held that the first amendment protects liberty of thought and expression but does not serve as "a shield for business publishers who engage in business practices condemned by the Sherman Act." *Id.* at 7. The Court stated that first amendment interests were actually protected by prohibitions against news media monopolies because such restraints fostered the flow of information to the public from "diverse and antagonistic sources." *Id.* at 20; *see* *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139-40 (1969) (application of antitrust laws to the press does not violate the first amendment); Lorain

*In re Farber*⁵⁸ provides another example of the press overstepping the natural scope of first amendment protection and infringing on other rights. Myron Farber, a New York Times reporter, investigated alleged murders committed by Dr. Mario Jascalevich⁵⁹ and instigated his prosecution. The court noted that the newsperson had acted as an arm of the prosecution and, therefore, protection did not adhere under the New Jersey shield law.⁶⁰ A consensus exists among newspersons and the courts that the press was not intended to be an agent of the criminal justice system while retaining its first amendment protections.⁶¹ The judiciary, however, has not confined limitations on the press to instances in which the press acts beyond its protected scope. The restrictions imposed strike at the heart of the press's first amendment rights.

II. JUDICIAL LIMITATIONS ON AND HOSTILITY TOWARD THE PRESS

Although freedom of the press, like other freedoms, has natural limitations,⁶² the proper constitutional boundaries differ sharply from judicially imposed strictures. The cumulative effect of the restrictions emerging from recent Supreme Court decisions⁶³ is a substantial curtailment of the free flow of information to the public. The adversarial relationship between the government and the press has led to only partial recognition of constitutional

Journal Co. v. United States, 342 U.S. 143, 155-56 (1951) (same). *See also* *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (agency rules prohibiting cross-ownership by newspapers of broadcast media do not violate first amendment).

58. 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978).

59. Dr. Mario Jascalevich was charged with murdering five hospitalized patients by lethal injections of curare in 1965 and 1966. At that time, these deaths, along with eight others, were attributed to natural causes. Years later, Myron Farber conducted a lengthy investigation that culminated in the publication of a number of articles in the New York Times raising the question of whether the deaths were actually homicides. Dr. Jascalevich had been experimenting with curare, a powerful muscle relaxant drug, at the time of the deaths. Farber's investigation led the prosecutor to seek a grand jury indictment, although Dr. Jascalevich was eventually acquitted. *State v. Jascalevich*, 158 N.J. Super. 488, 386 A.2d 466 (Super. Ct. Law Div.), *aff'd sub nom. In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978).

60. *In re Farber*, 78 N.J. at 277, 394, A.2d at 339. The New Jersey shield law extends a broad confidentiality privilege to a newsperson engaged "in the course of pursuing his professional activities," meaning "any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public." N.J. Stat. Ann. §§ 2A:84A-21 to -21a (West 1976 & Supp. 1977). Farber clearly had a strong pecuniary interest in the defendant's conviction because he was writing a book based on the trial. Members of the news media who supported his refusal to identify the confidential sources withdrew their support when they learned he was writing a book, the success of which depended largely on a conviction of Dr. Jascalevich. A newsperson's investigation undertaken for financial gain at the defendant's expense constitutes an abuse of first amendment protections. Mowlana & Logue, *Fair Trial vs. a Free Press: A New Phase in an Old Conflict*, USA Today, Jan., 1979, 28, 31.

61. *See Hearings*, *supra* note 24, at 553; Mowlana & Logue, *supra* note 60, at 30-31.

62. *See* notes 34-37 *supra* and accompanying text.

63. *See* N.Y. Times, Mar. 5, 1980, § A, at 16, col. 1 (fear of adverse judicial precedent caused ABC news to surrender tapes subpoenaed by grand jury); notes 83-88 *infra* and accompanying text.

rights by the Court.⁶⁴ For example, the Court has refused to acknowledge the importance of anonymity to investigative newsgathering.⁶⁵ This unwillingness is partially attributable to the political circumstances out of which press subpoenas arose.⁶⁶

A. *Origins of the Recent Conflict*

The use of press subpoenas became a "hot issue" when the press was informing the public on topics relevant to popular political decisionmaking,⁶⁷ and when the government status quo was threatened by public knowledge of corrupt or inept practices and policies.⁶⁸ In the late 1960's and early 1970's, the emphasis on "law and order" increased the investigative curiosity of the

64. Justice Douglas recognized that "[t]he Court has not always been consistent in its protection of . . . First Amendment rights and has sometimes allowed a government interest to override the absolutes of the First Amendment." *Branzburg v. Hayes*, 408 U.S. 665, 716 (1972) (dissenting opinion).

65. *Branzburg v. Hayes*, 408 U.S. 665, 693-95 (1972). *But see* *Talley v. California*, 362 U.S. 60 (1960). In *Talley*, the Court struck down a city ordinance forbidding public distribution of any handbill not bearing the name and address of the author. The Court noted the importance of anonymity to first amendment freedoms: "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. . . . Even the Federalist Papers . . . were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." *Id.* at 64-65. In *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), the Court held unconstitutional a municipal ordinance requiring any person desiring to canvass or solicit from house to house for charitable causes or for political campaigns or causes to give advance written notice to the local police department for purposes of identification. Justice Brennan, in a concurring opinion, stated that "apprehension of reprisal by the average citizen is too often well founded. The national scene in recent times has regrettably provided many instances of penalties for controversial expression in the form of vindictive harassment, discriminatory law enforcement, executive abuse of administrative powers, and intensive government surveillance." *Id.* at 626 (footnote omitted). Furthermore, policymaking government officials often use anonymity to advance or criticize a government program by speaking to newsmen "off the record." M. Van Gerpen, *supra* note 11, at 93.

66. *Branzburg v. Hayes*, 408 U.S. 665 (1972) (press investigations concerning the drug culture and Black Panther party); *Anderson v. Nixon*, 444 F. Supp. 1195 (D.D.C. 1978) (Watergate investigation); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973) (break-in at the offices of the Committee); *Andrews v. Andreoli*, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977) (confidential information concerning official improprieties).

67. For example, reporters involved in the investigation of the Watergate break-in were subpoenaed by the Committee to Re-elect the President. Although the district court refused to recognize an absolute newsmen's privilege because of the Supreme Court's decision in *Branzburg*, it quashed the subpoenas because the Committee had failed to demonstrate a compelling and overriding interest in the information sought. *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973).

68. In *Andrews v. Andreoli*, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977), a reporter who received information from an informant about purported official improprieties on the express condition that the source's identity be kept confidential was held to possess no privilege of confidentiality under the Constitution or the New York shield law, N.Y. Civ. Rights Law § 79-h (McKinney 1976 & Supp. 1979), despite the public interest in exposing official misfeasance.

press.⁶⁹ Hostility between the government and the press intensified⁷⁰ as press privilege was increasingly viewed as an obstacle to the law and order sentiment.⁷¹ For example, the press had access to dissident groups that were totally closed to government infiltration.⁷² Press subpoenas were the only way for the government to acquire information about these groups' activities.⁷³ To subdue the conflicts that arose from a strong assertion of individual rights of free expression by citizens discontented with government policies and determined to effect change, the government attempted to restrict the press in a struggle over the acquisition and dissemination of information.⁷⁴

The areas of news that are almost exclusively dependent on confidentiality include coverage of minority, radical, and fringe groups⁷⁵ and the exposition of government corruption, waste, secrecy, and distortion.⁷⁶ Disclosure enables government infiltration of these groups by employing the press as an investigative arm of the government.⁷⁷ Infiltration through forced disclosure raises

69. See *Federal Shield Law*, *supra* note 24, at 162-64. The 1969 trial of the "Chicago Seven" was the first sign of the growing use of press subpoenas. The government subpoenaed four major Chicago newspapers and three television networks for their notes, film footage, rough drafts, stories, and other materials connected with the Democratic convention. *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

70. The frequency of press subpoenas increased during the Nixon administration. In its first 30 months, 30 subpoenas were served on the Chicago Sun Times and the Chicago Daily News, two-thirds of which were on the government's behalf. *Hearings*, *supra* note 24, at 542 (statement of Rep. Abzug). One reporter was served in 11 separate proceedings within a year and one half. *Id.* During the same two and one half years, NBC and CBS were subpoenaed 124 times by federal and state prosecutors, as well as by defendants. *Id.*

71. *Branzburg v. Pount*, 461 S.W.2d 345 (Ky. 1971), concerned stories about the synthesis of hashish from marijuana in a comprehensive survey of drug use. Branzburg wrote two articles based on interviews with and observations of local drug users. He was subpoenaed by a grand jury and asked to identify the parties he had observed. Branzburg claimed a first amendment newsperson's privilege to keep his sources confidential. The Kentucky court rejected his claim. *Id.* at 348. *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971), involved press access to a Black Panther news conference at Panther headquarters during a time of civil disorder. Pappas had promised not to reveal what he had observed in Panther headquarters. He was subpoenaed by a grand jury and the Massachusetts Supreme Judicial Court refused to quash the summons. *Id.* at 614-15, 266 N.E.2d at 303-04. *In re Caldwell*, 311 F. Supp. 358 (N.D. Cal.), *rev'd and remanded*, 434 F.2d 1031 (9th Cir. 1970), arose from subpoenas issued to a New York Times reporter assigned to cover the Black Panther Party and other militant groups. Caldwell was ordered to appear before the grand jury with notes and recordings of interviews with officers of the Black Panther Party concerning the aims, purposes, and activities of the organization. The district court held that Caldwell was required to respond to the subpoenas but need not reveal confidential associations until the government demonstrated a "compelling and overriding national interest that cannot be served by alternative means." *Id.* at 360. The three cases were joined in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The Supreme Court refused to recognize a press privilege to maintain the anonymity of sources and held that the newsmen could be compelled to testify before the grand jury. *Id.* at 709.

72. See note 71 *supra*.

73. See M. Van Gerpen, *supra* note 11, at 29-57.

74. *Hearings*, *supra* note 24, at 560 (statement of Dick Fogel); *id.* at 361 (statement of Paul Branzburg).

75. See note 71 *supra*.

76. See notes 67-68 *supra*.

77. *Hearings*, *supra* note 24, at 553 (statement of the Citizen's Right to News Committee).

fears of reprisal by politically and socially dissatisfied groups and destroys press access to those groups.⁷⁸ This, in turn, causes an effective silencing of government opponents by depriving them of a public forum, as well as the destruction of the press's ability to check government through publicizing dissident viewpoints.⁷⁹ The government is able to halt investigations into official corruption and misfeasance by silencing subordinates who might have come forward if newsmen could have assured confidentiality.⁸⁰ Forced disclosure also aids the cover-up of police and prosecutorial abuses or unknown areas of crime that threaten the populace.⁸¹ The government can therefore silence dissent and disagreement concerning government policies within both the bureaucratic structure and dissident groups nationwide.⁸²

The ramifications of government policy toward the press are not imaginary. In 1973, the Senate Judiciary Committee conducted hearings on a proposed newsmen's privilege.⁸³ A substantial number of reporters filed affidavits to support allegations that attempts to force disclosure of confidential sources have inhibited press freedom.⁸⁴ Inhibition of the free flow of information to the public has resulted from (1) stories cancelled because an absolute promise of confidentiality could not be offered;⁸⁵ (2) stories unpublished;⁸⁶ and (3)

78. *See id.* *See also* note 65 *supra*.

79. Without confidential informants, the public would not have learned about the Bobby Baker scandal, the Pentagon Papers, the ITT scandal, thalidomide, the My Lai massacre, or the Watergate cover-up, unless the government decided to release an official version of these events. *Hearings, supra* note 24, at 553 (statement of the Citizen's Right to News Committee).

80. *Id.* at 552-54. The Supreme Court recognized that police informants will not come forward without a promise of anonymity. The Court found that the purpose of the police informants privilege is to encourage citizens to come to law enforcement officials with information to promote effective law enforcement. *Branzburg v. Hayes*, 408 U.S. 665, 698 (1972). The Court has refused, however, to recognize the public's need for information concerning government activities and politically significant matters that is fulfilled by a press privilege of confidentiality. *See* note 109 *infra*. The Court apparently wants information to flow freely from the citizens to the government, but wants to restrict the flow of information about the government to the citizens. Justice Stewart disagreed with the Court's position. He felt that a right of confidentiality between a newsmen and his informant implicitly follows from recognition of a right to newsgather. *Branzburg v. Hayes*, 408 U.S. at 728 (dissenting opinion). His conclusion was based on recognition of three factual predicates: "(1) newsmen require informants to gather news; (2) confidentiality . . . is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power . . . will either deter sources from divulging information or deter reporters from gathering and publishing information." *Id.*

81. *Hearings, supra* note 24, at 553. Additionally, deterrence of press informants by denial of the privilege hinders detection of crime. Without press sources, no one, including law enforcement officials, would ever have learned that certain crimes had occurred. *Federal Shield Law, supra* note 24, at 165.

82. *See Hearings, supra* note 24, at 553 (statement of the Citizen's Right to News Committee).

83. *Id.* Eight bills were offered to create a newsmen's testimonial privilege. *Id.* at 407-62.

84. *Id.* at 752-58.

85. CBS news was forced to cancel an interview with a woman who offered to disclose how she cheated on welfare because it could not promise her confidentiality. *Id.* at 755. ABC news declined to film interviews with Black Panthers in their headquarters because a promise of confidentiality could not be given. *Id.* The Boston Globe terminated an investigation of official corruption because sources told the newsmen they were afraid of having their identities revealed. *Id.*

stories not begun.⁸⁷ Evidence before the Judiciary Committee also cited instances of press harassment by government officials when the reporter sought "to be something other than a cheerleader for [the] government."⁸⁸

B. *The Supreme Court's Position*

Once it is established that the government has abridged the press's constitutional rights, the ultimate issue is whether a subsequent remedy is adequate and, as a practical matter, effective.⁸⁹ The Supreme Court maintains that the burden on the press of compelled disclosure is insubstantial and speculative, and that no evidence exists to support claims of a chilling effect on the press.⁹⁰ Analysis of the entire trend of Supreme Court restrictions on the press, however, reveals that government power is increasingly intensified in proportion to the degree that the press is harnessed.⁹¹ Furthermore, the

86. Publication is frequently foregone because of the fear of incurring crippling legal fees in resisting subpoenas. M. Van Gerpen, *supra* note 11, at 98.

87. Although it is impossible to determine precisely how many sources would have come forward with important information if assured of anonymity, many reporters feel that a significant number are being deterred. A.M. Rosenthal, New York Times Executive Editor, noted that "[y]ou always know when the phone rings, but you never know when it might have rung and was silent." M. Van Gerpen, *supra* note 11, at 97 (footnote omitted).

88. *Hearings*, *supra* note 24, at 559 (statement of William Eginton).

89. See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979); note 91 *infra*.

90. See *Branzburg v. Hayes*, 408 U.S. 665, 682, 693 (1972). In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Court rejected contentions that confidential sources will disappear and the press will suppress news if searches of newsrooms are allowed. The Court characterized the effect of search warrants as "incremental." *Id.* at 566. Justice Stewart expressed concern about the effects the Court's holding would have on the press's ability to fulfill its constitutionally designated function of informing the public. He found the Court's position that sources will not disappear to be illogical, because a person who gives information only on the condition that his identity will not be revealed will naturally be less likely to give that information if he knows his identity may in fact be revealed. *Id.* at 572 (dissenting opinion).

91. The result in *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), exemplifies the strengthening of the government's power to curtail the free press. A federal district court judge issued a preliminary injunction restraining publication of a magazine article showing how to construct a hydrogen bomb. Courts had previously viewed prior restraints as virtually impermissible because they infringed so greatly on first amendment liberties. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). A prior restraint was justifiable only when a grave threat to national security existed and a showing of direct and irreparable harm could be made. Such criteria are more easily shown during times of war. *Schenck v. United States*, 249 U.S. 47, 52 (1919). The alleged harm resulting from publication of the *Progressive* article was speculative and uncertain. The court stated that the article might allow a medium-sized nation "to move faster in developing a hydrogen weapon. It could provide a ticket to by-pass blind alleys." 467 F. Supp. at 993. This justification is seriously weakened by the existence of a published thesis by a Princeton University physics student demonstrating how to make your own plutonium bomb. The student stated that his aim was to show "that any undergraduate with a physics background can [design and build an atomic bomb], and therefore that it is reasonable to assume that terrorists could do it, too." *N.Y. Times*, Oct. 9, 1976, at 16, col. 5. The *Progressive* court balanced free press interests against government contentions of threats arising from publication. The government interest won, although, according to the defendant, the interest was the suppression of information concerning weaknesses in its security system. 467 F. Supp. at 994. The relevance of this

Court has seemingly ignored empirical information concerning actual limitations on the free flow of information.⁹²

In *Branzburg v. Hayes*,⁹³ the Court held that no first amendment privilege attaches to newsmen desiring to maintain the confidentiality of their sources,⁹⁴ thereby allowing the government to subpoena reporters and compel disclosure.⁹⁵ The Court subordinated the public interest in obtaining information through the use of anonymous informants to the interests of law enforcement officials in uncovering the sources of information.⁹⁶ This result overlooks the ramifications of government access to confidential press sources.⁹⁷ Although *Branzburg* dealt specifically with grand jury subpoenas,⁹⁸ it has been interpreted by several lower courts as precluding any constitutional press privilege.⁹⁹

The Court's decision in *Zurcher v. Stanford Daily*¹⁰⁰ further restricts press independence and curtails the flow of information to the public. The Court sanctioned searches of newspaper offices for evidence of crime reasonably believed to be on the premises.¹⁰¹ This decision chills press freedom because usually, the evidence of crime sought is material acquired through anonymous sources.¹⁰² Additionally, unannounced police searches of newsrooms provide a means for the government to discover confidential information and the identities of press sources totally unrelated to the crime for which evidence is sought.

In *Zurcher*, the Court rejected, as it did in *Branzburg*,¹⁰³ the argument

information to the public exists in the public's right to full information to aid decisionmaking on future policy. Information revealing the ineffectiveness of government efforts at secrecy in relation to nuclear weapons is clearly relevant. Previously, the government attempted to use prior restraints to conceal embarrassing information. *New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring). In that case, the Court declined to enjoin publication of the Pentagon Papers. *Id.* at 714 (per curiam). Presently, the *Progressive* case illustrates the effect of the Court's increasing activism in infringing on press freedom. The district court felt that destruction of a free press is a reparable harm. 467 F. Supp. at 996. The unaddressed rhetorical question is, however, who will restore the press once it is destroyed: the government that has acted to wrest this power from the public?

92. See notes 85-87 *supra*; cf. Guest & Stanzler, *supra* note 11, at 57-61 (survey of editors of daily newspapers nationwide). See also Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 Yale L.J. 317, 330-32 (1970) [hereinafter cited as *Reporters and Their Sources*].

93. 408 U.S. 665 (1972).

94. *Id.* at 690.

95. *Id.* at 690-91.

96. *Id.* at 686-88, 690, 695.

97. *Id.* at 735-36, 744 n.34 (Stewart, J., dissenting).

98. *Id.* at 682.

99. *United States v. Liddy*, 354 F. Supp. 208, 213-15 (D.D.C. 1972); *In re Farber*, 78 N.J. 259, 268, 394 A.2d 330, 334, *cert. denied*, 439 U.S. 997 (1978); *People v. LeGrand*, 67 A.D.2d 446, 453, 415 N.Y.S.2d 252, 257 (2d Dep't 1979); *People v. Monroe*, 82 Misc. 2d 850, 853-54, 370 N.Y.S.2d 1007, 1010-11 (Sup. Ct. 1975).

100. 436 U.S. 547 (1978).

101. *Id.* at 563-67.

102. *Id.* at 574-75 (Stewart, J., dissenting).

103. 408 U.S. 665, 693 (1972).

that the disappearance of confidential sources and the voluntary suppression of news to avoid the burdens of government harassment would threaten the press's tripartite function to gather, analyze, and disseminate news.¹⁰⁴ The Court emphasized the lack of direct or prior restraints and ignored the impact of so-called "indirect" restraints.¹⁰⁵ While recognizing the value of the press to society,¹⁰⁶ the Court justified its position by stating that the press is not easily intimidated.¹⁰⁷ Therefore, the Court said that any resolution of the problems of harassment and chill could be deferred until the impact was clear.¹⁰⁸

In addition to the restrictions imposed by these decisions, the Court has curtailed the public's right to information.¹⁰⁹ A decision such as *Gannett Co. v. DePasquale*,¹¹⁰ holding that the right to open court proceedings adheres only to the defendant's benefit and not to the public's, is a departure from the historic view that a defendant's rights are often protected by public knowledge of the proceedings.¹¹¹ Without a right of access to court proceedings,

104. 436 U.S. at 565-66 (Stewart, J., dissenting).

105. See *American Communs. Ass'n v. Douds*, 339 U.S. 382 (1950) (Court noted that lack of direct restraints does not determine the free speech question and indirect measures can have the same coercive effects as imprisonment, fines, injunctions, or taxes); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973) (freedom of the press may be stifled by direct or indirect restraints, neither of which are tolerated absent a compelling government interest); *Garland v. Torre*, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958) (court recognized that to compel disclosure of newsperson's confidential sources in defamation action would encroach on press freedom by imposing an important practical restraint on the free flow of information to the news media and public). See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (abridgment of constitutional liberties may inevitably follow even when direct government action not involved).

106. *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978).

107. *Id.*

108. *Id.* But see *N.Y. Times*, June 17, 1978, at 26, col. 4 (Senate consideration of ways to limit the *Zurcher* decision).

109. The Court had previously recognized that the freedoms of speech and press necessarily protect the right to receive information. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), the Court stated that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences That right may not constitutionally be abridged . . . by Congress" Presently, the existence of a right to know is an unsettled proposition. See *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (press and general public have no general right of access to prisons and inmates); *Pell v. Procunier*, 417 U.S. 817 (1974) (same); *Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding restrictions on travel to Cuba); Emerson, *Legal Foundations of the Right to Know*, 1976 Wash. U. L.Q. 1; Gellhorn, *The Right to Know: First Amendment Overbreadth?*, 1976 Wash. U. L.Q. 25.

110. 99 S. Ct. 2898 (1979).

111. See, e.g., *id.* at 2922-24 (Blackmun, J., dissenting); *Sheppard v. Maxwell*, 384 U.S. 333, 349-50 (1966); *In re Oliver*, 333 U.S. 257, 268-71 (1948). This view stems in part from fears of secret trials and Star Chamber justice that are facilitated by closed proceedings. See *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2936 (1979) (Blackmun, J., dissenting). The New York Court of Appeals recently interpreted *Gannett*, a New York case, as not requiring closure of all pretrial hearings. It invalidated a closure order of a pre-trial competency hearing. The Court of Appeals emphasized that pre-trial proceedings are presumptively open to the public. *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 439-40, 399 N.E.2d 518, 523-24, 423 N.Y.S.2d 630, 635-36 (1979).

there is no protection of the public's interest in open proceedings.¹¹² Moreover, *Gannett* considerably lowers the criteria for a permissible infringement of public access to information from the compelling interest standard¹¹³ by allowing exclusion of the public even when it is "not strictly and inescapably necessary."¹¹⁴

The Court has also been inconsistent in its view of the public interest in the fair administration of justice.¹¹⁵ The dissent in *Gannett* noted that the majority had "cast aside as of little value or significance" the important interest of the public and the press in open judicial proceedings.¹¹⁶ The Court, however, has asserted the same public interest to override the press's interest in maintaining the confidentiality of sources.¹¹⁷ Furthermore, *Gannett* creates the potential for widespread secrecy in the criminal justice system,¹¹⁸ thereby fostering many avenues for abuse by law enforcement officials.¹¹⁹

The Court's assertion that the effects of these decisions are speculative and uncertain has been refuted by the enactment of shield laws in more than half

112. The public has an interest in the fair administration of justice that is facilitated by first hand knowledge of the activities of the criminal justice system. To formulate informed policy decisions, the public must know whether prosecutions are becoming means of persecution and whether law enforcement officials are effectively and impartially fulfilling public expectations. *Gannett Co. v. DePasquale*, 99 S. Ct. at 2922, 2939 (1979) (Blackmun, J., dissenting). *Gannett* left broad discretion in the hands of the trial judge to exclude the public from pre-trial suppression of evidence hearings, at the defendant's request, and with the agreement of all participants in the litigation, if publicity may threaten the selection of an impartial jury. *Id.* at 2913. Broad discretion provides many avenues for coercing the defendant to surrender his constitutional rights. A corrupt, biased, or incompetent judge may wish to be insulated from public scrutiny. The prosecution may wish to hide police or prosecutorial misconduct. A judge or prosecutor who seeks to obtain a conviction free from error may have no incentive, as a result of *Gannett*, to assert the public interest when the accused moves to close a proceeding. *Id.* at 2935-36.

113. *DeGregory v. Attorney Gen.*, 383 U.S. 825, 829 (1966); *NAACP v. Button*, 371 U.S. 415, 439 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); see *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

114. 99 S. Ct. at 2904.

115. Compare *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979) (public has no constitutional right of access to attend courtroom proceedings) with *Estes v. Texas*, 381 U.S. 532 (1965) (public right to be informed is satisfied by media's attendance at court proceedings).

116. 99 S. Ct. at 2919 (Blackmun, J., dissenting).

117. See *Branzburg v. Hayes*, 408 U.S. 665, 688-91 (1972).

118. The reality of potential abuse has been demonstrated in at least one case in which an entire trial was conducted behind closed doors. *Richmond Newspapers, Inc. v. Virginia* (Va. Sup. Ct. July 9, 1979), *jurisdiction postponed to hearing on the merits*, 100 S. Ct. 204 (1979) (No. 79-243). The possibilities engendered by such a standard are ominous. Attempts to close criminal proceedings increased after *Gannett*. See Goodale, *Gannett Means What It Says; But Who Knows What It Says?* Nat'l L.J., Oct. 15, 1979, at 20, col. 1; N.Y. Times, Sept. 10, 1979, § A, at 27, col. 1; N.Y. Times, Aug. 4, 1979, § A, at 1, col. 5. See also Keefe, *The Boner called Gannett*, 66 A.B.A. J. 227 (1980).

119. Many press groups and the American Civil Liberties Union had joined with *Gannett* in appealing the state court decision, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977). They feared the holding might "signal routine establishment of secret pretrial proceedings." N.Y.L.J., July 3, 1979, at 24, col. 2.

the states in response to the Court's invitation in *Branzburg* to determine the existence of a privilege independently.¹²⁰ The use of state shield laws to protect newsgathering, however, is unsatisfactory in two respects. First, the news media have generally become national, not statewide, enterprises.¹²¹ The inconsistent response of the several states to the confidential source dilemma has resulted in the creation of a "checkerboard" privilege, varying in scope from nonexistent to absolute according to geographic location.¹²² Second, state law is subject to constitutional attack.¹²³ It is virtually impossible for a newsperson, at the time the promise of confidentiality must be given, to

120. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972). Twenty-six states presently have shield laws. M. Van Gerpen, *supra* note 11, at 126. These statutes vary in the degree of protection they afford the press. For example, New Jersey's shield law extends a testimonial privilege to the entire news media "to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere. a. the source, author, means, agency or person from or through whom any information was procured . . . ; and b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated." N.J. Stat. Ann. § 2A:84A-21 (West Supp. 1979). As a result of *In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978), the New Jersey legislature amended the shield law to provide added protection for newspersons against attempts to compel disclosure by criminal defendants. N.Y. Times, Feb. 28, 1980, § B, at 2, col. 1. The Arkansas statute apparently excludes television from its coverage. It grants a privilege against compelled disclosure, subject to divestment on a showing "that such article was written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare." Ark. Stat. Ann. § 43-917 (1947). The Michigan legislature has granted a testimonial privilege only to media representatives of "newspapers or other publications." Mich. Comp. Laws Ann. § 767.5a (1968). Although the New Jersey shield law protects both the source of information and the information itself, some statutes, such as Arizona's, apply only to disclosure of the informant's identity. Ariz. Rev. Stat. Ann. § 12-2237 (Supp. 1979). Despite the strong wording in a shield law, the statutory language is subject to judicial construction, which has at times removed testimonial protection. For example, Ky. Rev. Stat. § 421.100 (1970) provides: "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the general assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected." The Kentucky Court of Appeals construed this statute as affording a newsperson the privilege of refusing to disclose the identity of an informant who supplied him with information, but held that it did not permit a reporter to refuse to testify about events he had personally observed, including the identities of those involved. *Branzburg v. Pound*, 461 S.W.2d 345, 347 (Ky. 1970), *aff'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

121. See Dep't of Justice, *Hearings on Media Concentration Before the Subcomm. on General Oversight and Minority Enterprise of the House Comm. on Small Business*, 96th Cong., 2d Sess. 15-16 (1980) (statistics reflecting national increase in concentration in newspaper business) (testimony of Sanford Litvack). These materials are presently unpublished. This testimony is on file with the *Fordham Law Review*.

122. See Edelstein & LoBue, *Journalist's Privilege and the Criminal Defendant*, 47 *Fordham L. Rev.* 913, 924 (1979); 23 *Cath. L. Rev.* 41, 42-43 (1977).

123. See *In re Farber*, 78 N.J. 259, 271, 394 A.2d 330, 336, *cert. denied*, 439 U.S. 997 (1978); Note, *A Study in Governmental Separation of Powers: Judicial Response to State Shield Laws*, 66 *Geo. L.J.* 1273 (1978).

know whether his privilege will be upheld.¹²⁴ Although the newsperson may stand by his pledge of confidentiality and refuse to disclose his informant's identity, the dual threats of fines and imprisonment may have a significant adverse impact on the reporter's enthusiasm to investigate a story. The threats to American democracy that lurk behind press curtailment mandate the finding that a constitutional privilege of confidentiality between a newsperson and a press informant adheres under the free press clause of the first amendment.

III. THE SCOPE OF THE PRIVILEGE

The contours of a newsperson's privilege should be drawn in light of those press functions that primarily serve the public interest. When acting in this capacity, the societal benefits derived from a truly free press outweigh any incidental conflicts that may arise. A distinction should be made between reports involving public and private figures, based on that used by the Supreme Court in defamation cases.¹²⁵ Other requirements for claiming the privilege, and limitations on its application, are necessary to alleviate difficulties that a press privilege would allegedly create.¹²⁶ Furthermore, a procedure whereby certain criminal defendants may require judicial divestment of the privilege is also necessary.

A. *Circumstances Under which the Privilege Should Be Applicable*

1. Facilitation of Democratic Processes

When the newsperson is gathering information on matters that are public questions¹²⁷ and that "enable the members of society to cope with the exigencies of

124. For example, in *Farber*, the newsperson claimed a privilege of confidentiality under the first amendment and the New Jersey shield law "said to be as strongly worded as any in the country." *In re Farber*, 78 N.J. 259, 270, 394 A.2d 330, 335, *cert. denied*, 439 U.S. 997 (1978). The court held that the sixth amendment right of the defendant to compulsory process took precedence over the shield law, although it found that Myron Farber came within the language of the law. *Id.* at 269-74, 394 A.2d at 335-37. *See also In re Hadenguest*, N.Y.L.J., Jan. 21, 1980, at 13, col. 4 (N.Y. Sup. Ct. 1980). In *Farber*, it is possible that Myron Farber may not have had a constitutionally based privilege because of his unusual degree of responsibility for the prosecution of Dr. Jascalevich. 78 N.J. at 289, 394 A.2d at 345 (Pashman, J., dissenting); *see notes 59 supra*, 159 *infra*.

125. *Wolston v. Reader's Digest Ass'n*, 99 S. Ct. 2701, 2706 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974); *see New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

126. *See Branzburg v. Hayes*, 408 U.S. 665, 691, 705 (1972). The requirements for invoking the privilege, and the corresponding limitations on its exercise, should circumvent several suggested problems of abuse by the newsperson or the defendant. *See pts. III (A)-(C) infra*. First, there is the suggested possibility of collusion between the defendant and a purported newsperson. *See Branzburg v. Hayes*, 408 U.S. 665, 705 n.40 (1972) (Court concerned that "sham" newspapers would claim testimonial privileges); M. Van Gerpen, *supra* note 11, at 172. Second, there is the possible nonexistence of an actual confidential source. *Id.* Third, the possibility exists that the person seeking to avoid testifying is not genuinely a member of the press. The Court has expressed concern that any person who publishes virtually anything—papers, periodicals, pamphlets, or leaflets—could claim a newsperson's privilege of confidentiality. *Branzburg v. Hayes*, 408 U.S. 665, 704-05 (1972). This problem is averted, however, by requiring the claimant to be a bona fide newsperson.

127. Public questions should include reports on official actions, conduct, or misconduct,

their period,"¹²⁸ the newsperson should be privileged to maintain the anonymity of his source. The threshold inquiry, therefore, is whether the newsperson is functioning in the capacity to which the framers sought to extend the highest degree of constitutional protection. It is impossible to define precisely all areas of investigation that involve matters of importance to public decisionmaking.¹²⁹ The concept of politically relevant matters, however, should be construed broadly.¹³⁰

The definition of a public question should accord with the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹³¹ The privilege should adhere when the information disclosed by the investigation is recognizable as a means to check government honesty, competence, and receptiveness to the people.¹³² Investigation into areas relevant to the health, safety, or welfare of the public, or those affecting public policy-making should also be within the scope of the privilege.

In making the threshold determination, a distinction must be drawn between matters of public interest—those facilitating the political operation of a democratic society—and matters of public curiosity. The disparity of treatment between these two areas is logical when viewed within the historical rationale for protecting the free press.¹³³ Although esoteric and sensational stories concerning diverse and isolated events may be "of public interest," their relevance in terms of informed involvement in democratic processes is minimal. No privilege should be available in these instances.

2. Public Versus Private Defendants

Once the threshold inquiry has been satisfied, the privilege should only adhere when the criminal defendant is a public figure. The Supreme Court has

government policy and practices, and matters bearing on the effectiveness of American representative democracy, such as responsiveness to the electorate, and corrupt or suspect corporate dealings.

128. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

129. Professor Meiklejohn's example is illustrative of the difficulty of precise definition: "In cases of private defamation, one individual does damage to another by tongue or pen; the person so injured in reputation . . . may sue for damages. But, in that case, the First Amendment gives no protection to the person sued. His verbal attack has no relation to the business of governing. If, however, the same verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment. And the same principle holds good [for] . . . 'public' issues concerning which, under our form of government, he has authority, and is assumed to have competence, to judge." Meiklejohn, *supra* note 34, at 259.

130. See Green, *Political Freedom of the Press and the Libel Problem*, 56 Tex. L. Rev. 341 (1978).

131. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *accord*, *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); see *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Herbert v. Lando*, 568 F.2d 974, 975 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

132. See *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

133. See pt. I(A) *supra*.

employed the public figure/private figure distinction in civil litigation and has allowed the press greater freedom regarding public figures.¹³⁴

The rationale underlying the distinction stems from a recognition that the press must be protected by the first amendment when it is reporting on matters of public concern.¹³⁵ The press, however, occasionally oversteps its constitutionally protected role and abuses its resources to the detriment of a private individual who is more easily injured and less able to defend himself than a public figure.¹³⁶ Additionally, information concerning private figures on matters not of public concern "has little to do with the political ends of a self-governing society."¹³⁷ Furthermore, the private individual who is suspected of criminal conduct is more likely to be zealously investigated by the criminal justice system.¹³⁸ In these instances, the press need not be afforded a great degree of protection to serve the public interest because, presumably, the government is serving the public. The proposed distinction is justified because a public figure is more likely to have resources at his disposal to conduct his own investigation and to uncover the same information discovered by the newsperson, without forcing disclosure of the source's identity.¹³⁹ This is not true of an obscure criminal defendant, however, who may not have the resources to hire an attorney or to conduct an extensive investigation. Therefore, he is even more disadvantaged by nondisclosure.¹⁴⁰ Moreover, past cases in which investigative reporting

134. Compare *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-47 (1974) (lower standard of proof required of private plaintiff to recover damages for defamation) with *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (public official must prove "actual malice" to recover damages for defamatory falsehood relating to official conduct).

135. See notes 22-28 *supra* and accompanying text.

136. *Time, Inc. v. Hill*, 385 U.S. 374, 391 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 272-73, 282-83 (1964).

137. *New York Times Co. v. Sullivan*, 376 U.S. 254, 301 (1964) (Goldberg, J., concurring).

138. Justice Blackmun has noted that the prosecutor and the judge cannot always adequately protect the public interest. Speaking in reference to closure of court proceedings, he stated: "The specter of a trial or suppression hearing where a defendant of the same political party as the prosecutor and the judge—both of whom are elected officials perhaps beholden to the very defendant they are to try—obtains closure of the proceeding without any consideration for the substantial public interest at stake is sufficiently real to cause me to reject the Court's suggestion that the parties be given complete discretion to dispose of the public's interest as they see fit." *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2935 (1979) (dissenting opinion).

139. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-48 (1974). The Court determined that requiring different standards of proof for private and public figures would provide maximum protection for those individuals least able to protect themselves, "while simultaneously producing a minimum of self-censorship for press discussion of public interest matters." Note, *Public Figures, Private Figures and Public Interest*, 30 Stan. L. Rev. 157, 157 (1977). See also Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 Tex. L. Rev. 829, 892-98 (1974).

140. Although there may appear to be an equal protection problem in recognizing a privilege only when public figures are the subject of press investigation, the rationales offered for the distinction constitute a rational basis sufficient to overcome assertions of a denial of equal protection. See *Maher v. Roe*, 432 U.S. 464, 478-80 (1977) (refusal by state to fund nontherapeutic abortions does not violate equal protection clause because it bears rational relationship to legitimate state interest in encouraging normal childbirth); *Bellotti v. Baird*, 428 U.S. 132, 150 (1976) (permissibility of distinction dependent on its degree and the justification for the classification); *Jimenez v. Weinberger*, 417 U.S. 628, 632-33 (1974) (classifications presumed

required the use of confidential sources were generally matters of public concern.¹⁴¹ When prosecution ensued, either as the result of a newsmen's investigation, or independently, most defendants fit within the characterization of public figures.¹⁴² Therefore, a privilege of confidentiality will rarely prejudice a criminal defendant.¹⁴³

When the press investigates public figures or issues of public concern, when the government is directly the subject of investigation, or when the individual is in a position to exert either political or economic influence over those normally charged with investigation of suspect conduct, the diminished motivation of law enforcement officials to conduct an investigation supports attachment of the privilege.¹⁴⁴ Self-preservation tendencies may initially lead to less vigorous investigation, or to an inquiry that is chilled by threats or payoffs. When the public interest in disclosure is not being furthered by the government, the press should be free to function independently in conducting investigations.¹⁴⁵ Under these circumstances, the press acts as a check on government activities.¹⁴⁶

As the distinction between the public and private sectors becomes blurred, the difficulty of making the public figure determination increases.¹⁴⁷ Public figures would, at least, include all government officials, political candidates, corporate officers, labor leaders, and figures of general notoriety,¹⁴⁸ when the subject of the investigation has "political" significance to the public.¹⁴⁹ The term political significance should be defined expansively because exposure to a broad range of information is necessary for the formulation of knowledgeable opinions.¹⁵⁰

The privilege should withstand the defendant's assertion of an inability to receive a fair trial because he cannot compel process of a witness. Failure to

rational when no fundamental right or suspect criteria are involved if any facts exist that would justify the classification); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (rational relationship to legitimate state purpose is test of classification, absent presence of a suspect class or infringement on a fundamental right, both of which require strict scrutiny). The degree to which the public interest would be furthered, the accessibility of public figures to resources for conducting an independent, in depth investigation, and the potential prejudice to obscure individuals suspected of crime support the classification in this instance.

141. See note 66 *supra*.

142. See *Hearings*, *supra* note 24, at 556-57.

143. See *id.* at 557; *Guest & Stanzler*, *supra* note 11, at 51; *Murasky*, *supra* note 139, at 866-70; notes 245-47 *infra* and accompanying text.

144. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 n.11 (1978).

145. See note 138 *supra*.

146. See notes 23, 138 *supra*.

147. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163-64 (1967) (Warren, C.J., concurring).

148. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974), the Court considered "public figures" to be individuals who achieve pervasive fame or notoriety, as well as those who voluntarily inject themselves or are drawn into a public controversy. Figures of general notoriety would therefore include "persons [who] assume special prominence in the resolution of public questions . . . and pervasive involvement in the affairs of society." *Id.* at 351-52.

149. *New York Times Co. v. Sullivan*, 376 U.S. 254, 301-02 (1964); see *M. Van Gerpen*, *supra* note 11, at 95.

150. See *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (exposure to vast range of information "is a concomitant of life in a civilized community").

obtain a witness does not automatically constitute a denial of sixth amendment rights.¹⁵¹ Compulsory process has never been recognized as an absolute right because of the existence of common law and constitutional testimonial privileges.¹⁵²

The privilege should be presumptively available to avoid the chill inherent in ad hoc determinations, subsequent to the time the guarantee of confidentiality was given, of whether a communication was privileged. It should also be expansive in view of the importance of the press function, the potential dangers from infringement, and the undesirability of leaving open numerous avenues for government harassment if the privilege is too weak.¹⁵³ The privilege should not automatically adhere, however, even when the defendant is a public figure and the investigation concerns a public matter; other requirements must be imposed.

B. *Protection Limited to Bona Fide Newspersons*

To minimize the instances in which recognition of a privilege may prejudice a defendant, and to avoid abusive claims of confidential relationships, the privilege should extend only to bona fide newspersons. A Senate bill proposing the creation of a newsperson's testimonial privilege included criteria defining "a legitimate member of the professional news media."¹⁵⁴ The legislation defined a bona fide newsperson as "an individual regularly engaged in earning his or her principal income, or . . . gathering, collecting, photographing, filming, writing, editing, interpreting, announcing, or broadcasting local, national, or worldwide events or other matters of public concern, or public interest, or affecting the public welfare, for publication or transmission through a news medium."¹⁵⁵ Although the legislative criteria would have

151. *Washington v. Texas*, 388 U.S. 14, 23 (1967).

152. *Kastigar v. United States*, 406 U.S. 441, 444 (1972). See also *Hearings*, *supra* note 24, at 557 (Statement of the Citizen's Right to Know Committee); *Zion, High Court vs. the Press*, N.Y. Times, Nov. 18, 1979, § 6 (Magazine), at 76, col. 1, at 145, col. 3.

153. Government harassment that may result from loopholes includes exploratory investigation at the expense of the press that creates uncertainty between reporters and sources; annexation of the press as an investigative arm of the government; and intimidation of sources by vindictive prosecutors. *Branzburg v. Hayes*, 408 U.S. 665, 744 n.34 (1972) (Stewart, J., dissenting).

154. S. 318, 93d Cong., 1st Sess. § 3(a) (1973), reprinted in *Hearings*, *supra* note 24, at 422.

155. *Id.* at 422-23. S. 318 defined news medium as "any individual, partnership, corporation, or other association engaged in the business of—(1) publishing any newspaper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, or has a paid general circulation and has been entered at a United States post office as second-class matter, and that contains news, or articles of opinion (as editorials), or features, or advertising, or other matter regarded as of current interest; or (2) publishing any periodical containing news, or advertising, or other matter regarded as of current interest which is published and distributed at regular intervals, and has done so for at least one year, or has a paid general circulation and has been entered at a United States post office as second-class matter; or (3) collecting and supplying news, as a 'news agency,' for subscribing newspapers, and/or periodicals, and/or news broadcasting facilities; or (4) sending out syndicated news copy by wire, as a 'wire service,' to subscribing newspapers, and/or periodicals, and/or news broadcasting facilities; or (5) gathering and distributing news as a 'press association' to its members as an association of newspapers, and/or periodicals, and/or news broadcasting facilities; or (6) broadcasting as a

defined the press more restrictively than the Supreme Court, which focuses more on a personal right of self expression than on the institutional press,¹⁵⁶ the sharper delineation is necessary to allay judicial fears that anyone who prints any item could unjustifiably claim the press privilege.¹⁵⁷

Any defendant may assert that the reporter did not come within the meaning of a bona fide newsperson. The privilege of confidentiality is intended to protect free press rather than to provide added protection for free speech. Therefore, the institutional press must be distinguished from the "press" that emerges from the Supreme Court's free expression rubric that combines the freedoms of speech and press.¹⁵⁸

C. Other Limitations on the Privilege's Availability

The motive underlying recognition of a press privilege of confidentiality is the need to preserve and increase the free flow of politically relevant information to the public. The privilege should not provide a license for irresponsibility by the news media insofar as the existence of the privilege may render it increasingly more difficult to check the accuracy of press reporting. Therefore, the privilege should be limited to newsmen who conduct investigations in "good faith." No privilege should attach when a substantial probability can be shown that the newsmen began the investigation for personal reasons or solely to profit from publication.¹⁵⁹

commercially licensed radio station; or (7) broadcasting as a commercially licensed television station; or (8) broadcasting as a community antenna television service; or (9) regularly making newsreels or other motion picture news for paid general public showing." *Id.* § 3 (b), at 423-24. The requirements for a bona fide newsmen should be more stringent than the Supreme Court's definition of the press as including pamphlets, leaflets, and "every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). The more limited definition, such as the one given in S. 318, lessens the likelihood that reliance on the privilege will be abused.

156. *Lovell v. City of Griffin*, 303 U.S. 444, 450, 452 (1938).

157. See *Branzburg v. Hayes*, 408 U.S. 665, 704-05, 705 n.40 (1972). The Supreme Court's fear that recognition of a press testimonial privilege would give rise to substantial difficulties in excluding certain publications from the privilege's protection is attributable to the Court's merger of speech and press into a general right of freedom of expression. *Id.* at 704. The Court views press freedom as an extension of individual freedom. As a result, pamphlets, leaflets, and other similar printed material are considered encompassed by the press clause, along with the institutional press—newspapers, magazines, television, and radio. *Id.* This failure to distinguish between personal expression and the press has caused the Court's dilemma in determining to whom the privilege should apply. It has also created the potential problem that any member of society could print anything and claim the first amendment privilege of confidentiality to elude testifying. *Id.* at 705 n.40. This difficulty does not arise when speech and press are not equated. The free speech clause secures to the people the freedom of expression. The press clause, on the other hand, should be interpreted as applying only to the institutional press. When free expression is divided into the two concepts specified in the first amendment, the difficulty of drawing the line as to who may claim the press privilege is removed.

158. See Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 Sup. Ct. Rev. 225, 225-28; note 157 *supra*.

159. The judge in *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997

The privilege should apply only if the newsperson promised confidentiality¹⁶⁰ to the informant and if nondisclosure is necessary because there is a recognizable potential for reprisals. Underlying these requirements is the concern that the privilege should attach only when it is required to secure the full constitutional guarantee of a freely functioning press.¹⁶¹ When the defendant can demonstrate that confidentiality has not been promised, or that it would serve only to insulate the informant from lawful sanctions for disclosing information, there is no reason to determine whether the accused is a public or private defendant.

The newsperson's privilege should also be unavailable when the newsperson functions as an agent of the prosecution with the obvious purpose of bringing about an indictment and conviction,¹⁶² and with no primary interest in informing the public, even when the defendant is unmistakably a public figure involved in a matter of public concern.¹⁶³ Because the framers sought to protect press independence from government,¹⁶⁴ when the press becomes an extension of government, the first amendment protection should yield to the sixth amendment right of the accused.

(1978), felt that the success of Myron Farber's book on the investigation of the murders was dependent on a conviction of Dr. Jascavech. See Mowlana & Logue, *supra* note 60, at 31. A reporter should not be able to claim the privilege when he is apparently using confidentiality to mask inaccuracies in his news stories that lend a sensational tone to the events, thereby attracting greater public attention and sales. Malice is another example of bad faith. The newsperson may not claim the benefits of the privilege to inflict injury vindictively.

160. For example, in *Andrews v. Andreoli*, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977), the court held that the newsperson had not expressly or implicitly promised confidentiality to the source.

161. See *Branzburg v. Hayes*, 408 U.S. 665, 729-31 (1972) (Stewart, J., dissenting) (rationale underlying press-informant privilege).

162. Myron Farber's investigation led to the publication of approximately 14 articles in the New York Times suggesting that Dr. Mario Jascavech may have been responsible for the deaths. During the pre-indictment period, Farber was closely associated with the prosecutor's office and was instrumental in bringing about the indictment. *In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978); see Mowlana & Logue, *supra* note 60, at 30-31. At the time the investigation was conducted and the indictment instigated, Farber was under contract to write a book about the alleged curare murders. The likelihood of the book's success, based on the sensational and bizarre circumstances of the deaths, would apparently have been enhanced by Dr. Jascavech's conviction. Although he refused to provide information for the defense, Farber apparently had gone to the prosecutor with sources of information sufficient to cause the case to be reopened. 78 N.J. at 279-80, 394 A.2d at 340. Therefore, his interest was not primarily in protecting sources of information from disclosure, but in keeping potentially helpful material from the defendant. The lack of objectivity on the reporter's part in conducting the investigation, the presence of a special interest overriding the public interest involved, and a close alignment of the press with the government against an accused, demonstrated a primary motivation other than that of informing the public.

163. See notes 58-59 *supra* and accompanying text. This limitation will rarely result in disclosure of an anonymous source because it is infrequently shown that the newsperson acted as an arm of the prosecutor. More often, the press is wary of government attempts to annex the news media as an investigative arm, thereby destroying its independence and eviscerating its function. See note 153 *supra*.

164. See notes 17-27 *supra* and accompanying text.

D. Criteria Requiring that the Privilege Yield

When the individual asserting a sixth amendment right against a newsperson is a private defendant,¹⁶⁵ the privilege may be overcome. The determination of whether the privilege should yield is, necessarily, an ad hoc decision requiring judicial inquiry into the facts of each case. The defendant should be required to show a high degree of necessity to be entitled to disclosure. He must demonstrate the existence of several criteria. First, the information sought must appear to go to the heart of the action.¹⁶⁶ There must be a strong likelihood that the information will be relevant and material on the issue of guilt or innocence.¹⁶⁷ Second, alternative means of acquiring the information must have been exhausted.¹⁶⁸ Third, he must be seeking disclosure in good faith. This prohibits defense counsel from gambling on the newsperson's refusal to disclose the informant's identity, thereby allowing for an acquittal or an appeal on the ground that the trial was unfair, even though he knows the information the newsperson possesses will not aid his case.¹⁶⁹

165. See notes 139-40, 148 *supra* and accompanying text.

166. See *Carey v. Hume*, 492 F.2d 631, 634 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Garland v. Torre*, 259 F.2d 545, 547, 551 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). A number of jurisdictions employ an ad hoc determination termed a "heart of the claim" test. *M. Van Gerpen*, *supra* note 11, at 123. The existence of a newsperson's privilege depends on the necessity of the confidential information to the lawsuit. This in turn requires the party seeking disclosure to demonstrate the relevance of the information and the unavailability of alternative sources. See *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1398 (D.D.C. 1973); *Baker v. F & F Inv.*, 339 F. Supp. 942, 943 (S.D.N.Y.), *aff'd*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

167. *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1398 (D.D.C. 1973); *State v. St. Peter*, 132 Vt. 266, 270, 315 A.2d 254, 256 (1974).

168. *Carey v. Hume*, 492 F.2d 631, 638 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974). See also *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1398 (D.D.C. 1973). It has been suggested that the burden of showing the exhaustion of alternate means be placed on the prosecution. See *M. Van Gerpen*, *supra* note 11, at 78. It is illogical to put the burden on the press because it may trap the newsperson into inadvertently revealing his source to those seeking reprisal or harassment. Presumably, the defendant, an obscure private figure, is unable to conduct the type of investigation necessary to satisfy this criterion. The government is in the best position to safeguard both the defendant's and the press's rights and to further the public's interest in a fair and accurate adjudication of the issue. Additionally, it is in the prosecution's best interest for all essential information to surface to stop the defendant from claiming a sixth amendment violation. *Id.*

169. See *Mowlana & Logue*, *supra* note 60, at 31. In *In re Farber*, 78 N.J. 259, 276-77, 394 A.2d 330, 338-39, *cert. denied*, 439 U.S. 997 (1978), the court held that a newsperson could refrain from revealing his sources except on legitimate demand. A demand is clearly not legitimate when the desired information is patently irrelevant to the inquiring party's needs or when his needs are not manifestly compelling. Other tests have been proposed or used by courts. They are: (1) The privilege yields only if the information is "the missing link in the chain of evidence" to prove guilt or innocence." *M. Van Gerpen*, *supra* note 11, at 172. Vagueness is an inherent difficulty with this test. Additionally, it is difficult to determine the relevance of the information to such a precise point without using in camera disclosure to weight the evidence. See *In re Farber*, 78 N.J. at 284-85, 394 A.2d at 343 (Pashman, J., dissenting) (illogic of requiring in camera disclosure before privilege of nondisclosure will be upheld); *Mowlana & Logue*, *supra*

The proposed press privilege would permit first and sixth amendment rights to exist in tandem while allowing maximum recognition of the respective guarantees. The Supreme Court's present interpretation of first and sixth amendment rights, however, fails to recognize the possibility of harmonious coexistence.¹⁷⁰ Furthermore, the Court is inconsistent, fluctuating according to the identity of the party exercising a right and the party—whether it be a criminal defendant, the government, or the press—asserting a superficially incompatible interest.

note 60, at 31. (2) The privilege yields when there is a compelling and overriding interest that cannot alternatively be served. See *Loadholtz v. Fields*, 389 F. Supp. 1299, 1302 (M.D. Fla. 1975). This standard is too high. It is generally employed only when a substantial chill of first amendment rights is involved. When such a compelling and overriding interest exists, the bulk of the threatened press burden has already been removed by recognition of the constitutional privilege. (3) Whether the privilege must yield is dependent on the type of crime being prosecuted. See Note, *Chipping Away at the First Amendment: Newspapermen Must Disclose Sources*, 7 Akron L. Rev. 129, 148 (1973). A defendant's rights, however, should not depend on the degree of seriousness that society attaches to the alleged criminal act. The test is inconsistent because a defendant charged with a more serious crime would have an advantage in gaining defense witnesses over a defendant charged with a lesser infraction. *State v. Sandstrom*, 224 Kan. 573, 576, 581 P.2d 812, 815 (1978), *cert. denied*, 440 U.S. 929 (1979) (court rejected ideas that a criminal prosecution automatically requires disclosure or that the crime charged is dispositive of whether disclosure could be compelled). (4) The *Branzburg* test examines whether the information sought is relevant to issues before the tribunal. *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972); *State v. Sandstrom*, 224 Kan. 573, 576, 581 P.2d 812, 815 (1978), *cert. denied*, 440 U.S. 929 (1979). This raises a problem of precisely defining "relevant." For example, Federal Rule of Evidence 401 defines as relevant "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevance can thus be construed in almost any way. (5) One court recognized a qualified privilege that would be defeated whenever it conflicts with a criminal defendant's right to a fair trial. This conflict exists when there are reasonable grounds to believe a reporter's information is material to establish an element of a crime, a defense to a reduction in the classification of the crime charged, or mitigation of the penalty. *Brown v. Commonwealth*, 214 Va. 755, 757, 204 S.E.2d 429, 431, *cert. denied*, 419 U.S. 966 (1974). (6) Proposals of Senator Schweiker in S. 36 combine elements of all the prior tests. S. 36 makes the newsperson's privilege absolute but subject to divestment. The criteria that must be met to divest the privilege are stringent. See S. 36, 93d Cong. 1st Sess. (1973), *reprinted in Hearings, supra* note 24, at 409-11. (7) When the future ability of the press to obtain information would be adversely affected by disclosure and the party has not shown that the information is unavailable through other sources, the reporter is privileged to maintain anonymity. See *Apicella v. McNeil Labs, Inc.*, 66 F.R.D. 78, 85 (E.D.N.Y. 1975).

170. Despite claims that the two interests cannot coexist, the Supreme Court does have the means to accommodate both freedom of the press and the sixth amendment guarantee of compulsory process of witnesses. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587-88 (1976) (Brennan, J., concurring). Justice Brennan rejected the idea that first and sixth amendment rights conflict in a manner "that cannot be resolved without essentially abrogating one right or the other." *Id.* at 612. Courts should not choose between them, "[f]or although there may in some instances be tension between uninhibited and robust reporting by the press and fair trials for criminal defendants, judges possess adequate tools [short of curtailing rights] for relieving that tension." *Id.* See also *Brant, supra* note 34, at 898-99; *Meiklejohn, supra* note 34, at 245.

IV. THE SUPREME COURT'S INCONSISTENCY IN INTERPRETING FIRST AND SIXTH AMENDMENT RIGHTS

A. The First Amendment

1. Pure Speech

The Court has often asserted that freedom of the press is a mere subdivision of the more important, fundamental right of free speech that encompasses the expression of concepts and opinions.¹⁷¹ Under this analysis, newsgathering is characterized as activity merely supportive of speech¹⁷² and is therefore considered "speech plus."¹⁷³ The Court affords pure speech or expression¹⁷⁴ a high degree of constitutional protection that is denied to "incidental activities."¹⁷⁵ Because the Court views newsgathering as only facilitating free press,¹⁷⁶ and confidentiality as a mere aid to newsgathering, confidentiality is considered even further removed from speech and its protections.¹⁷⁷

171. According to the traditional pure speech analysis, "the primary purpose of the First Amendment is more or less absolutely to prohibit any interference with freedom of expression. . . . Indeed, this model sometimes depicts the press as simply a collection of individuals who wish to speak out and broadly disseminate their views." Brennan, *supra* note 21, at 15; see Blanchard, *supra* note 158, at 226 (in 1977 term, the Supreme Court reinforced single standard for rights and privileges afforded to press and speech).

172. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 563-67 (1978); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972).

173. *Branzburg v. Hayes*, 408 U.S. 665, 715 (1972) (Douglas, J., dissenting) (speech or belief not connected with action is beyond rightful concern of government); *In re Stolar*, 401 U.S. 23, 30 (1971) (state may not penalize individual for beliefs absent conduct); *Baird v. State Bar*, 401 U.S. 1, 7 (1971) (determining competence to practice law is legitimate state interest, but inquiries into beliefs are precluded by first amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (first amendment precludes government intrusion into "sphere of intellect" but is not a rigid bar to state regulation of conduct).

174. See *Right of the Press*, *supra* note 24, at 840-41; Note, *The Rights of the Public and the Press to Gather Information*, 87 Harv. L. Rev. 1505, 1507 (1974) [hereinafter cited as *Rights to Gather*].

175. See *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972).

176. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 565-66 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 680-82 (1972).

177. See *Right of the Press*, *supra* note 24. In *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974), the court stated that "as a news-gathering mechanism, a newsman's privilege of confidentiality of information and identity of his source is an important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment. Unknown at common law, it is a *privilege* related to the First Amendment and not a First Amendment *right*, absolute, universal, and paramount to all other rights." *Id.* at 757, 204 S.E.2d at 431 (emphasis in original). The Second Circuit strained to find that the Supreme Court was using the traditional first amendment analysis regarding the press, under which there are few cases that hold first amendment rights must yield to a compelling and overriding interest. The court rationalized the *Branzburg* holding by stating that the Supreme Court, in applying the traditional first amendment doctrine, found the interest in the integrity of the grand jury as an investigative arm of the criminal justice system to be a compelling government interest. Therefore, the first amendment rights yielded. *Baker v. F & F Inv.*, 470 F.2d 778, 783-85 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); see *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975), in which the court held that a plaintiff in a civil litigation would have to demonstrate a compelling interest to force discovery of information regarding a news-

In other circumstances, the Court has recognized a peripheral sphere of freedoms under the penumbra of enumerated rights.¹⁷⁸ The Court has properly noted that such rights could not otherwise be meaningfully exercised nor secured from abridgment.¹⁷⁹ The penumbra rationale is as strong when applied to freedom of the press. Newsgathering and confidentiality must be safeguarded to make dissemination an effectively exercisable right. The illogic of subordinating freedom of the press to freedom of speech is evident from the specific incorporation of a free press clause in the Bill of Rights.¹⁸⁰ The Court has never treated other enumerated freedoms as subdivisions of more fundamental ones.¹⁸¹ The existence of the Bill of Rights should prohibit the Court from creating a hierarchy dependent on the party asserting the right.¹⁸² Furthermore, it is inherently inconsistent to have virtually limitless rights to express opinions and to debate public issues when public access to information¹⁸³ necessary for the intelligent and significant exercise of these rights is restricted or denied.¹⁸⁴

The Court's preoccupation with pure expression has led to a pure speech/speech plus analysis in free press areas.¹⁸⁵ Pure expression is protected from

paper article if the reporter refused to supply the material sought. The court held that such discovery would have a chilling effect on the reporter's functioning and on the free flow of information that the first amendment protects. *Id.* at 1303. Compare *Riley v. City of Chester*, No. 79-2528 (3d Cir. Dec. 14, 1979) (journalists have federal common law privilege to refuse to disclose sources) with *Brown v. Commonwealth*, 214 Va. 755, 757, 204 S.E.2d 429, 431, cert. denied, 419 U.S. 966 (1974) (noting that newsmen's privilege is unknown at common law).

178. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969) (framers considered right to travel so fundamental to existence of a strong Union that it was not specifically enumerated); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965) (right of privacy included in penumbra of first, third, fourth, fifth, and ninth amendment rights, though not expressly mentioned); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (right of privacy in one's association necessarily included within the constitutional guarantee of freedom of association); *Martin v. City of Struthers*, 319 U.S. 141, 143-44 (1943) (freedom to distribute literature necessarily protects the right to receive it).

179. The Court felt that without recognition of these "peripheral" rights, the specifically enumerated rights would be less meaningful and secure. *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965); see *Reporters and Their Sources*, *supra* note 92, at 327-34.

180. See notes 16-26 *supra* and accompanying text.

181. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("[t]here 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 . . ."). The Court has labelled the guarantees in the Bill of Rights as "preferred" rights. *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). Government power has been excluded from the spheres of freedom of expression, association, and religion, and the right of privacy, absent a compelling justification for intrusion. See *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

182. The Federalist No. 84, at 573-74 (A. Hamilton) (Ford ed. 1898). See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 572-73, 587-88, 611 (1976) (Brennan, J., concurring).

183. *American Communs. Ass'n v. Douds*, 339 U.S. 382, 402 (1950) (recognition that newspapers cannot print news that they are prevented from gathering).

184. The right to gather news as a corollary to a meaningful right to disseminate is analogous to protecting the right to receive literature as an essential component of the freedom to distribute. The Supreme Court protected the right to receive in *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

185. The free speech/free press dichotomy results in a disparity in the protection afforded the

any restraint absent a showing of a compelling government interest.¹⁸⁶ Expression combined with other activities is protected only from direct burdens.¹⁸⁷ To invalidate an indirect restraint, a substantial and certain chilling of the speech itself must be proved, rather than mere adverse effects on the activities preparatory or incidental to the pure expression.¹⁸⁸

Unlike freedom of speech, the press clause centers on dissemination of politically valuable information to the public.¹⁸⁹ The press, however, cannot properly disseminate if it cannot effectively gather. Restraint on newsgathering vitiates a substantial part of press freedom. What the Court labels permissible "indirect" restraints on newsgathering activities are not, as a practical matter, at all indirect.¹⁹⁰

By employing the pure speech/speech plus analysis that arose in free speech, not free press cases, the Court has held that newsgathering is a mere incident to pure speech.¹⁹¹ In *Branzburg v. Hayes*,¹⁹² the Court characterized denial of a press privilege as a permissible indirect restraint on newsgathering.¹⁹³ It continues to label the media's fears as uncertain and speculative.¹⁹⁴ The Court has apparently been more reluctant than Congress and various state legislatures to view the right to know as equivalent in importance to the right of free expression, and to recognize the threat resulting from compelled disclosure of press sources.¹⁹⁵

Although the Court purports to protect newsgathering by precluding direct or prior restraints, unlimited indirect inhibition is upheld. Because most of the

respective rights. See Brennan, *supra* note 21, at 15, 31; *Right of the Press*, *supra* note 24, at 840-41; *Rights to Gather*, *supra* note 174, at 1507.

186. See *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

187. Indirect burdens are justified by the showing of a rational basis. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 115-19 (1972) (reasonable regulation of means of expression permissible to further legitimate state interest); *Police Dep't v. Mosley*, 408 U.S. 92, 98 (1972) (picketing may be subject to reasonable time, place, and manner restrictions).

188. See notes 171-77 *supra* and accompanying text.

189. See notes 22-25 *supra* and accompanying text.

190. See *American Communs. Ass'n v. Douds*, 339 U.S. 382, 402 (1950) (indirect restraints may be as coercive as direct restraints); cf. *Zurcher v. Stanford Daily*, 436 U.S. 547, 566-67 (1978) (warrant to search newspaper's offices does not constitute threat of prior or direct restraint and Court would deal with problem of press intimidation in the future when effects of warrants are concretely manifested); *Branzburg v. Hayes*, 408 U.S. 665, 682, 694-95 (1972) (burden of grand jury subpoena of newsmen held to be incidental, with uncertain and speculative effects).

191. *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979) (although closure of courtroom to press and public restrains access to information, it does not violate the Constitution); *Herbert v. Lando*, 441 U.S. 153 (1979) (reporter's inner thoughts and discussions with editors concerning published information held discoverable by plaintiff in libel suit); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (police searches of newsrooms do not violate first amendment); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (grand jury subpoenas of reporters are permissible despite threat of disappearance of confidential informant).

192. 408 U.S. 665 (1972).

193. *Id.* at 680-81. But see *American Communs. Ass'n v. Douds*, 339 U.S. 382, 402 (1950).

194. *Branzburg v. Hayes*, 408 U.S. 665, 693-99 (1972).

195. See notes 83-88 *supra* and accompanying text. See also *N.Y. Times*, Feb. 21, 1980, § A, at 1, col. 4 (Senator Moynihan proposing the elimination of a section from pending bill that makes it a criminal act for press to disclose names of intelligence agents).

chill to newsgathering results from indirect government actions, the asserted protection of newsgathering amounts to little. Furthermore, direct restraints are rarely found, except in cases of prior restraint, because of the high degree of harm that must be demonstrated.¹⁹⁶ If newsgathering was recognized as a fundamental right adhering to the news media under the free press guarantee, rather than a subordinate part of free speech, interference would be precluded under traditional first amendment analysis unless the government could demonstrate a compelling and overriding interest.¹⁹⁷

2. The Public Right/Private Right Dichotomy

A second dichotomy used by the Court when plotting constitutional freedoms on a hierarchical scale is that of public versus private right.¹⁹⁸ The Court attaches greater importance to those rights that it considers public.¹⁹⁹ For example, the public has the right to express opinions on official conduct and activities;²⁰⁰ to have access to matters of public record;²⁰¹ and, under certain circumstances, to attend trials.²⁰² Such rights are considered exercised for the benefit of the public at large. Other rights are considered private because they benefit the party receiving the "special privilege."²⁰³

Applying these principles to the press, private rights are considered those that facilitate the business of printing the news. This analysis overlooks any

196. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 566-67 (1978); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

197. *DeGregory v. Attorney Gen.*, 383 U.S. 825, 829 (1966); *NAACP v. Button*, 371 U.S. 415, 439 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 464 (1958); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Schneider v. State*, 308 U.S. 147, 161 (1939).

198. The public figure/private figure distinction deals with the significance of particular information to the public. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163-64 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 301-02 (1964). The Supreme Court's private right/public right dichotomy, however, refers to the ability and the extent to which a party may exercise a constitutional right. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 782-85 (1978); *Nixon v. Warner Communs., Inc.*, 435 U.S. 589, 609 (1978).

199. The Supreme Court is reluctant to find that the press has rights in addition to or varying from those of the public generally. Blanchard, *supra* note 153, at 226. The Court has consolidated first amendment rights under the speech and press clauses into a fundamental right to freedom of expression. See note 173 *supra*. The press has rights under the free press clause coextensive only with the public's rights under the *free speech* clause, which amounts, essentially, to freedom from restraint on pure expression absent a compelling state interest. If, however, the Court followed the reasoning that the press is an agent of the public, the so-called "special" or "private" rights that the press seeks under the free press clause would be identical to rights of the public under the *free press* clause. The problem is not one of determining whether rights, such as a newsperson's testimonial privilege, are public or private, but one of recognition by the Court that the free press and free speech clauses are separate guarantees. Blanchard, *supra* note 158, at 227.

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

201. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

202. *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

203. *Landmark Communs., Inc. v. Virginia*, 435 U.S. 829 (1978); *Associated Press v. NLRB*, 301 U.S. 103 (1937).

public interest being served. For example, exceptions to the general rule governing search warrants²⁰⁴ and exemptions from administrative procedures for access to sources of information²⁰⁵ are viewed as protecting only newsmen engaged in their occupation.²⁰⁶ Public rights, on the other hand, are those adhering to the press because of the benefits that accrue to the public.²⁰⁷ Press activities that foster democracy by facilitating informed citizen participation are protected as public rights.²⁰⁸

The distinction is crucial because the Court has held that newsmen are not entitled to rights beyond those to which the public is entitled.²⁰⁹ If the Court viewed the press as serving the public interest and analogized the rights of the press to those of the public,²¹⁰ the Court's allegation that the press is seeking special privileges, and its insistence on identical rights for press and public under the speech and press clauses,²¹¹ would be undercut.²¹²

As a result of the private right/public right dichotomy, the Court has rejected the contention that the right to publish newsworthy information inexorably requires protection of the right to acquire that newsworthy information.²¹³ The Court has reasoned that access to information is limited because of the existence of instances in which neither the press nor the public is entitled to information.²¹⁴ For example, both are excluded from eaves-

204. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

205. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

206. *Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972). Justice Stewart has taken an opposite view of the newsmen's privilege. Constitutional protection of this privilege exists not "for the purely private interests of the newsmen or his informant, nor even, at bottom, for the First Amendment interests of either partner in the newsgathering relationship. Rather, it functions to insure nothing less than democratic decisionmaking through the free flow of information to the public" *Id.* at 737-38 (dissenting opinion) (footnote omitted).

207. See *Landmark Commun., Inc. v. Virginia*, 435 U.S. 829, 837-39 (1978).

208. *Id.* at 839.

209. *Branzburg v. Hayes*, 408 U.S. 665, 682-86 (1972). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court held that the news media could not be restricted from disseminating information that is a matter of public record. Justice Powell stated that "[o]ur decision in that case merely affirmed the right of the press to publish accurately information contained in court records open to the public." *Nixon v. Warner Commun., Inc.*, 435 U.S. 589, 609 (1978). In *Nixon*, the Court reversed a District of Columbia Circuit decision ordering release of Nixon's tapes to the news media for dissemination of their contents to the public. *Id.* at 610. The Court stated that the press was asking for access to actual tapes for broadcasting, reproduction, and sale "to which the public ha[d] never had *physical* access." *Id.* at 609 (emphasis in original).

210. Justice Powell articulated this view when he stated that constitutional protection of the press does not arise from any special status of newsmen, but because the press is an "agent of the public." *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2914 (1979) (concurring opinion).

211. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 781-83 (1978); *Nixon v. Warner Commun., Inc.*, 435 U.S. 589, 609 (1978).

212. See *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (newsmen's privilege is a fundamental personal right well founded in the first amendment); *United States v. Steelhammer*, 539 F.2d 373, 375 (4th Cir. 1976) (court found privilege to be that of the public, with recognition not afforded primarily to protect the reporter).

213. See *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883, 885 (3d Cir. 1958).

214. See, e.g., *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2907-11 (1979) (no public right to open trial in view of fact that other sixth amendment guarantees are personal to the accused);

dropping on private conversations by means of wiretapping²¹⁵ and from entering another's land without permission.²¹⁶ The rationale is flawed, however, because both these limitations arise from the presence of other rights, not from government fiat. The Constitution protects against government limitations on access to information.²¹⁷ The Court has also established a hierarchy of interests contingent on the identities of the parties. When the government, criminal defendant, and press are involved, government self-interest is paramount, followed by the rights of the criminal defendant, and then by those of the press, with no recognition that the Constitution affords the latter two joint, rather than alternative protection.²¹⁸ The government's interests have been given precedence over freedom of the press.²¹⁹ In *Branzburg v. Hayes*,²²⁰ the asserted government interest in the integrity of the grand jury as an investigative arm of the criminal justice system²²¹ outweighed the first amendment rights of the press.²²²

The Court's hierarchical approach has filtered down to lower courts. In *United States v. Pretzinger*,²²³ the Ninth Circuit balanced the press's interests against those of the criminal justice system.²²⁴ The court determined that the trial judge, who had made a factual finding that the informant was a government agent,²²⁵ did not err in refusing to require disclosure of the actual

Landmark Communs., Inc. v. Virginia, 435 U.S. 829, 837-42 (1978) (information from confidential hearings leaked to press may be disseminated without fear of criminal prosecution, although no right of access exists to hearings themselves); *Nixon v. Warner Communs., Inc.*, 435 U.S. 589, 598 (1978) (right to inspect and copy judicial records not absolute); see note 109 *supra*.

215. See *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931); *LaCrone v. Ohio Bell Tel. Co.*, 114 Ohio App. 299, 182 N.E.2d 15 (1961).

216. See *Herrin v. Sutherland*, 74 Mont. 587, 241 P. 328 (1925); *Brame v. Clark*, 148 N.C. 364, 62 S.E. 418 (1908).

217. See notes 29-33 *supra* and accompanying text.

218. For a general example of the Court's double standard, see note 29 *supra*. In *Michigan v. DeFillippo*, 99 S. Ct. 2627 (1979), the Court held that an arrest by a police officer made in "good-faith reliance" on an ordinance subsequently declared unconstitutional was valid. *Id.* at 2631-34. Therefore, evidence obtained in the search following the arrest should not be suppressed. *Id.* In *re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978), a newsperson asserted good faith reliance on a shield law as granting a privilege of confidentiality. *Id.* at 265, 394 A.2d at 333. The court held that the shield law conflicted with the sixth amendment right to compulsory process of witnesses. *Id.* at 268, 394 A.2d at 350. Therefore, the newsperson was required to disclose his source. See *Zion*, *supra* note 152 at 144.

219. Justice Douglas noted the inconsistency of the Court toward first amendment rights, at times allowing a government interest to override absolute guarantees. *Branzburg v. Hayes*, 408 U.S. 665, 716 (1972) (dissenting opinion).

220. 408 U.S. 665 (1972).

221. *Id.* at 687-88.

222. *Id.* at 690-91; see Note, *The Rights of Sources—The Critical Element in the Clash Over Reporter's Privilege*, 88 Yale L.J. 1202 (1979) (discussing the government's right to compel newsmen's testimony) [hereinafter cited as *The Rights of Sources*].

223. 542 F.2d 517 (9th Cir. 1976).

224. The defendant asserted that an undisclosed source provided the government with advance knowledge of the drug exchange that resulted in his arrest. He contended that the government should have obtained a warrant to search his truck and that the testimony of the undisclosed source would help establish this assertion. *Id.* at 519-20.

225. *Id.* at 521.

identity of the press informant.²²⁶ This decision against compelling disclosure allowed the warrantless search to be upheld and maintained the anonymity of a government agent.²²⁷ Apparently, confidentiality was protected only because of the government interest involved. In *Farr v. Pitchess*,²²⁸ the Ninth Circuit upheld the incarceration of a newsperson for contempt for refusing to reveal the identity of a source who violated a gag order²²⁹ by disclosing proposed trial testimony and evidence to the newsperson.²³⁰ The court, seeking to vindicate its authority by discovering who had breached the gag order, held that the newsperson was required to reveal the source's identity.²³¹ According to the court, the interest in the power of a court to enforce restraints on publicity outweighed the newsperson's interest in protecting the informant.²³²

B. The Sixth Amendment

The Court is frequently inconsistent in its view of a defendant's sixth amendment rights. When the government seeks to compel testimony, the Court assumes that the public right to every person's testimony is absolute. For example, in *Branzburg v. Hayes*,²³³ the Court treated the general rule as being one without exceptions, ignoring the existence of testimonial privileges.²³⁴ Conversely, when the defendant asserts the same right to compel testimony under the sixth amendment,²³⁵ the Court has held that the power is not absolute, citing the existence of numerous privileges—husband-wife, attorney-client, self-incrimination, and executive.²³⁶ Furthermore, the Court denies the privilege of confidentiality to the press despite the mandate of the

226. *Id.*

227. *Id.*

228. 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

229. A gag order is a prior restraint on publication of information in criminal cases. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 541 (1976).

230. 522 F.2d at 466.

231. The *Farr* controversy arose from the highly publicized Charles Manson murder trial. The trial judge imposed a gag order on the attorneys and witnesses to insure a fair trial by controlling the release of prejudicial information to the public. Farr obtained information violative of the gag order from two separate individuals. The trial judge invited Farr to disclose the identities of the individuals who violated the order. Farr refused because he had promised confidentiality. Several months later, after the conviction of Manson, the court instituted proceedings to discover who had breached the court order. Farr was adjudged to be in contempt and was incarcerated when he persisted in refusing to divulge the names. *Farr v. Pitchess*, 522 F.2d 464, 466 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). Farr served 40 days under the indefinite contempt sentence. The length of Farr's incarceration illustrates why the absence of press insulation from government attempts at compelled disclosure of sources can severely inhibit investigations by newsmen.

232. *Id.* at 469. In *Farr*, a privilege of confidentiality may not have been appropriate since there was no apparent threat of unlawful reprisals against the informant. The privilege is intended to protect press freedom, not to enable sources to elude legal sanctions for unlawful activity. Thus, Farr should have disclosed the identity of the person who breached the gag order. The result, therefore, was correct.

233. 408 U.S. 665 (1972).

234. *Id.* at 682.

235. *Kastigar v. United States*, 406 U.S. 441, 443-45 (1972).

236. *Id.*; see *The Rights of Sources*, *supra* note 222, at 1204 n.16; *cf.* *United States v. Bryan*,

first amendment, while simultaneously maintaining that the sixth amendment right only serves to make the testimonial duty a practical reality rather than an absolute, fundamental right.²³⁷ Thus, the Court uses the existence of testimonial privileges as a double-edged sword that inevitably favors government interests.²³⁸

When the press's first amendment rights are involved, the Court places more emphasis on the defendant's sixth amendment guarantees.²³⁹ The criminal defendant's rights have diminished in magnitude when the government asserts the supposed protection of the public interest in the free flow of information²⁴⁰ or in the fair administration of justice through enforcement of a nondisclosure policy against an individual's right to prepare his defense.²⁴¹ Because the Court has declined to recognize a right to know when someone other than the government is claiming the right on behalf of the public,²⁴² the assertion results in a further anomaly. The interest in the free flow of information seemingly magnifies in importance when it is asserted by the government.

The Supreme Court's opposition to finding a first amendment privilege of confidentiality between a newsperson and an informant²⁴³ has resulted in lower courts repeatedly holding that such a privilege is totally inimical to the criminal defendant's sixth amendment rights.²⁴⁴ It is rare, however, that a newsperson conducts a full scale investigation into a single criminal act by an obscure individual, thereby gaining information essential to his defense.²⁴⁵ It

339 U.S. 323, 331-32 (1950) (Court held that exemptions are exceptional situations to otherwise pervasive general rule).

237. *Kastigar v. United States*, 406 U.S. 441, 444 (1972); *Washington v. Texas*, 388 U.S. 14, 23 & n.21 (1967).

238. See *Zion*, *supra* note 152, at 76.

239. See *Estes v. Texas*, 381 U.S. 532 (1965). The Court in *Estes* held that a defendant's right to a fair trial overrides first amendment protection of newsgathering. Therefore, the news media is not entitled to unlimited access to the courtroom to televise a trial. The Court noted, however, that the public's right to be informed was not infringed because reporters could still be present in the courtroom and were free to report what occurred in court. *Id.* at 541-42.

240. See *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957).

241. *Id.* at 62.

242. See *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2904-05, 2911-12 (1979); *Nixon v. Warner Communs., Inc.*, 435 U.S. 589, 597-99 (1978).

243. See *Branzburg v. Hayes*, 408 U.S. 665, 702-06 (1972) (ramifications of testimonial privilege on right to compulsory process at criminal trials).

244. *United States v. Liddy*, 354 F. Supp. 208, 213-15 (D.D.C. 1972); *In re Farber*, 78 N.J. 259, 268, 394 A.2d 330, 334, *cert. denied*, 439 U.S. 997 (1978); *People v. LeGrand*, 67 A.D.2d 446, 453, 415 N.Y.S.2d 252, 256-57 (2d Dep't 1979); *People v. Monroe*, 82 Misc. 2d 850, 854, 370 N.Y.S.2d 1007, 1011 (Sup. Ct. 1975).

245. Recognition of a newsperson's privilege will rarely and insubstantially disadvantage law enforcement or the criminal defendant. First, reporters seldom have information centrally related to specific crimes that would constitute relevant and admissible evidence. Reporters are usually not the sole possessors of such information. *Hearings*, *supra* note 24, at 227 (statement of John O'Hara); Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229, 276 (1971). Second, between one third and one half of reporters may actually testify despite the existence of an absolute privilege. *Hearings*, *supra* note 24, at 227 (statement of John O'Hara); Blasi, *supra*, at 256. Third, even when no privilege exists, up to one half of reporters subpoenaed accept contempt citations and incarceration rather than breach a promise of confidentiality. *Hearings*,

is also doubtful that crucial evidence would be forthcoming from a confidential source in these circumstances.²⁴⁶ Generally, confidential sources discuss criminal activity on a larger scale than that with which the usual criminal defendant is involved.²⁴⁷ Therefore, it seems unreasonable to deny the privilege on the basis that it would result in widespread unfairness in the trial of criminal defendants.

The Court's view that the interests protected by the first and sixth amendments are competing is generally inaccurate. The first and sixth amendments were intended to, and should, function in tandem, although occasionally there will be some incompatibility. When this occurs, and it is determined that the sixth amendment interests take precedence over the first amendment interests at issue, the government must act to protect the defendant's sixth amendment rights.

V. SAFEGUARDING SIXTH AMENDMENT RIGHTS BY DISCONTINUANCE OF THE PROSECUTION

When the defendant has met the threshold criteria of demonstrating his entitlement to disclosure of the newsperson's source,²⁴⁸ and when he has satisfied the court that he will be denied a fair trial unless he obtains process of the informant, the newsperson should be required to identify his source. A problem with safeguarding the defendant's recognizably jeopardized sixth amendment right may arise if the defendant cannot obtain the witness because the newsperson asserts his privilege and resists disclosure.

In first versus sixth amendment cases, the Supreme Court has asserted that a privilege of confidentiality hinders the goal of fairness in the judicial system.²⁴⁹ When this interest in fairness to the defendant equals the first amendment considerations,²⁵⁰ the Court should proceed so as to achieve fairness. If the basis for denying the privilege is the alleged conflict between the privilege and the sixth amendment that precludes the defendant from receiving a fair trial, it is inconsistent for a court to allow the prosecution to continue despite the witness' absence.²⁵¹ The Supreme Court's position on the respective rights and abilities of the government and the defendant to compel testimony²⁵² may be responsible for its failure to insist on the discontinuance of prosecution when a witness cannot be obtained.

The prosecutor and the court must not deny a defendant his constitutional right and, after the court has unsuccessfully exercised its coercive powers against a newsperson, then decline to forego the prosecution. In *Webb v. Texas*,²⁵³ a trial judge intimidated the defendant's only defense witness,

supra note 24, at 227 (statement of John O'Hara); Blasi, *supra*, at 276-77. See also Guest & Stanzler, *supra* note 11, at 51.

246. See *Hearings*, *supra* note 24, at 557; note 245 *supra*.

247. See notes 75-82 *supra* and accompanying text.

248. For a discussion of these criteria, see pt. III *supra*.

249. *Branzburg v. Hayes*, 408 U.S. 665, 682-702 (1972).

250. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551-56 (1976); *id.* at 612 (Brennan, J., concurring).

251. See *Westen*, *supra* note 16, at 174; Guest & Stanzler, *supra* note 11, at 51 n.159.

252. See pt. IV(B) *supra*.

253. 409 U.S. 95 (1972).

effectively depriving him of his right to present a defense. The Supreme Court held that the defendant's right to a fair trial was sufficiently prejudiced to warrant reversal of the conviction.²⁵⁴ The decision reflects the Court's frequently articulated policy that the public interest is in the fair administration of justice,²⁵⁵ and not merely in the conviction of indicted defendants. The Court in *Webb* found that the absence of the witness prevented an accurate assessment of the defendant's guilt or innocence.²⁵⁶ Therefore, the public had no interest in an improperly obtained conviction.²⁵⁷ If the Court were to employ this reasoning, a similar result would be reached in instances in which the courts' coercive measures against the newsperson fail to obtain the witness for the defense.

The situation is closely analogous to cases in which the government has used confidential informants and chooses to maintain anonymity at the cost of dismissal of a prosecution.²⁵⁸ In such cases, the government may have convincing evidence of a defendant's guilt, if police informants are as effective as the Supreme Court asserts.²⁵⁹ The Court has held that a defendant is entitled to disclosure of a government informant's identity when the defendant demonstrates that disclosure is "relevant and helpful" to his defense.²⁶⁰ If the government nevertheless withholds the information, the prosecution must be stopped.²⁶¹ The government uses a policy of nonprosecution every day "in many cases where evidence essential to the defense would require disclosure."²⁶² The practice is justified by law enforcement officials' need to preserve the viability of the informant in future investigations requiring police infiltration.²⁶³ Presumably, the benefit of maintaining anonymity in the long-range picture of criminal apprehension outweighs the number and scope of prosecutions that are foregone. The instances in which a criminal defendant demonstrates entitlement to compelled disclosure of the press informant's identity, combined with the newsperson's refusal to comply, will be similarly infrequent.²⁶⁴ Therefore, the public's interest in safety and effective curtailment of criminal activity will not be significantly hampered. Moreover, a policy of nonprosecution when a newsperson chooses to maintain anonymity would not be an unprecedented procedure²⁶⁵ uniquely contrary to the public

254. *Id.* at 98.

255. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961); *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957); *Bridges v. California*, 314 U.S. 252, 271 (1941).

256. 409 U.S. at 98.

257. *Id.*

258. *See Roviaro v. United States*, 353 U.S. 53 (1957).

259. *Branzburg v. Hayes*, 408 U.S. 665, 697-98 (1972).

260. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957).

261. *See id.* at 61.

262. *Id.* at 67 (Clark, J., dissenting).

263. *Branzburg v. Hayes*, 408 U.S. 665, 697-98 (1972).

264. Furthermore, confidential press-informant relationships foster detection of illegal activity. *See* notes 79-85 *supra* and accompanying text.

265. In 1977, a grand jury investigated the possibility of bringing an indictment of perjury and obstruction of justice against former CIA director Richard Helms. The Justice Department considered foregoing prosecution of the felony because material concerning the CIA and its covert Chilean operations would have to have been introduced at trial. *N.Y. Times*, Feb. 15, 1977, at

interest. The prospect of criminals being turned loose to preserve constitutional rights may not appear to be in furtherance of societal interests. It is important to remember, however, that an indicted defendant is not necessarily guilty. Therefore, nonprosecution will not always involve freeing criminals. In addition, if our judicial system is to be fair, its primary goal must be truth ascertainment. When truth ascertainment is frustrated, society's interest in continuing prosecution disappears.²⁶⁶

The defendant's interest in obtaining information from the press is equally important to his interest in obtaining information from a government informant.²⁶⁷ The government, in both instances, is trying the defendant and, if that trial is unfair, is denying the defendant his constitutional rights. The identity of the party possessing the information sought, whether it is the press or the government, should not be the relevant factor. The important issue lies in the impermissibility of government abridgment of constitutional rights under the sixth amendment. The discrepancy in treatment of a defendant on the basis of the identity of the possessor of the source's name is arbitrary and unfair.

CONCLUSION

The Supreme Court's treatment of a newsperson's privilege is inadequate. Neither state shield laws nor ad hoc determinations of whether a privilege adheres under a particular set of facts remove the dangers of government harassment of the press, of a substantial chill of the free flow of information to the public, or of government secrecy on matters of importance to popular

15, col. 1. Although Helms was indicted, the Justice Department negotiated an agreement whereby Helms pleaded nolo contendere to a misdemeanor charge and received a suspended sentence. The Justice Department balanced its perception of national security against law enforcement interests and allowed a "big-shot crook" to go virtually free. *N.Y. Times*, Nov. 6, 1977, § 4, at 1, col. 1. More recently, the Justice Department dropped perjury charges against former ITT executive Robert Berrellez to avoid disclosing information about United States intelligence activities in Latin America. The government allegedly dropped the prosecution in the interest of national security. It had been suggested, however, that the information was more embarrassing to the government than vital to security, particularly because the national security interests asserted were never elaborated. *N.Y. Times*, Feb. 9, 1979, § A, at 1, col. 3.

The government has occasionally "lost" evidence to keep the accused from discovering it. *United States v. Bryant*, 439 F.2d 642, 646 (D.C. Cir. 1971); see *Westen*, *supra* note 16, at 174-75. Courts have held that when evidence discoverable by a defendant in a criminal proceeding becomes unavailable to the accused because of its "loss," whether through intentional nonpreservation, destruction, or negligent or good faith loss by the government, a new trial, dismissal of the indictment, or exclusion of testimony may be appropriate. See *United States v. Perry*, 471 F.2d 1057, 1062-63 (D.C. Cir. 1972) (good faith of government in nonproduction of evidence not determinative of government's liability and admissibility of testimony against defendant); *United States v. Bryant*, 439 F.2d 642, 650, 653 (D.C. Cir. 1971) (government "loss" of evidence may result in dismissal of indictment); *Johnson v. State*, 249 So. 2d 470, 472 (Dist. Ct. App. 1971), *writ discharged*, 280 So. 2d 673 (Fla. 1973) (prosecution witness barred from testifying because prosecutor failed to produce lost bullet).

266. Wright, *Fair Trial—Free Press*, 38 F.R.D. 435 (1965).

267. *Washington v. Texas*, 388 U.S. 14, 17-20 (1967) (accused's right to compel testimony of defense witnesses is equivalent to the right to present a defense).

policy formation and democratic decisionmaking. Although the Court maintains that it is protecting sixth amendment rights through nonrecognition of a first amendment press privilege, continuance of a prosecution despite the unavailability of a crucial witness is inconsistent with this assertion. Upholding the fundamental rights of both the press and the defendant requires recognition of a broad privilege of confidentiality and dismissal of a prosecution when presentation of a meaningful defense is impossible without disclosure of an informant's identity.

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