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On February 4, 1970, Walter Cronkite, of the Columbia Broadcasting System (CBS), bruskly stated: "We cannot function. Our people cannot be informed if we have to work under these conditions."[1] Frank Reynolds, of the American Broadcasting Company (ABC), cogently set forth the attendant argument: "We've got to make it very clear we're not defending our right to broadcast but the people's right to know."[2] This was the response of the news media to a recent surge of federal subpoenas issued to newsmen, in an attempt to coerce the disclosure of secret information which they possessed.[3] This recent plague of governmental subpoenas was viewed by the news executives as "an increasing effort by the authorities to collect intelligence about radical movements from the news media."[4]

INTRODUCTION — A POLEMIC SITUATION

Newsmen have consistently relied upon confidential sources of information as a means of obtaining newsworthy information.[5] Traditionally, however, the journalists' use of "secret-informer" relationships has not been legally protected.[6] Consequently, newsmen have been subject to compulsory testimony as to the identity of their secret sources, resulting in distrust and increased caution by informers. The reason for this quandary is that the newsman-informer relationship, unlike the attorney-client relationship,[7] is not deemed privileged.[8]

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1 Statement by Walter Cronkite at the International Radio and Television Society in New York on Feb. 4, 1970, *as quoted in* N.Y. Times, Feb. 5, 1970, at 26 col. 2.

2 *Id.; see generally* Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970).

3 Prior to these statements the Justice Department had subpoenaed the unedited files and unused pictures of *Time, Life* and *Newsweek* magazines relating to the Weathermen faction of Students for a Democratic Society (SDS). *See* N.Y. Times, Feb. 1, 1970, at 24, col. 1. Another incident that has aroused much concern was the February subpoenaing of *New York Times* correspondent Earl Caldwell. The government subpoena requested the production of notes and tape recordings of interviews conducted with spokesmen of the Black Panther Party. *See* N.Y. Times, Feb. 3, 1970, at 20, col. 1. In view of the importance of the Caldwell incident, it will be viewed with increased detail in a subsequent section of this paper.

4 N.Y. Times, Feb. 1, 1970, at 24, col. 1.

5 *See* Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, Appendix at 57 (1969); Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 75-82 (1950).

6 As stated in Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951), "the prevailing rule is that a newspaper correspondent must answer pertinent questions and disclose the sources of his information that he has published or caused to be published if the questions be relevant to the proceeding. . . ."

7 *See* 7 THE WORKS OF JEREMY BENTHAM 473-79 (Bowring ed. 1842).

Unsuccessful in their attempts to secure the cloak of privileged communication, journalists have resorted to a constitutional first amendment argument, under which the secrecy of their sources of information is allegedly protected by the ubiquitous "freedom of the press." Until recently however, this fact has failed to win judicial approval.[9]

The purpose of this note is to analyze the newsman's contended first amendment right to conceal his confidential information and sources of information[10] in light of his acknowledged obligation to reveal his information for the promotion and fair administration of justice.

HISTORICAL DEVELOPMENTS

The Evanescent Common-Law Argument

The tradition of journalists to withhold their sources was established by John Peter Zenger.[11] In attempting to follow his example newsmen continued to argue for the application of a common-law privilege to conceal their confidential sources of information.[12] This argument for an exception to the established common-law rule of compulsory testimony[13] is based upon (1) the public interest in the free flow of news, and (2) the analogous privileged relationship of an attorney and his client.[14] How-

8 *See* 8 J. WIGMORE, EVIDENCE § 2286 (McNaughton rev. 1961). For a collection of cases denying the privilege see Semeta, *Journalist's Testimonial Privilege*, 9 CLEV.-MAR. L. REV. 311, 315 (1960).

9 *See* Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963); *In re* Goodfader's Appeal, 45 Hawaii 317, 367 P.2d 472 (1961). *But see In re* Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

10 The two related areas of concern intrinsic to the newsman's fight for constitutional protection are: (1) the concealment of a newsman's source of information (*i.e.*, the identity of his informer), and (2) the concealment of actual information that a newsman possesses but refuses to reveal (*i.e.*, unpublished notes, tapes, records, photographs and film "take-outs").

11 JONES, FREEDOM OF THE PRESS 18-22 (1944).

12 Newsmen have also offered the argument that to reveal their sources would be a violation of their professional code of ethics. The following was adopted as part of the newsman's code of ethics by the American Newspaper Guild in 1934: "[N]ewspapermen shall refuse to reveal confidence or disclose sources of confidential information in court or before other judicial or investigating bodies . . . ." BIRD & MERWIN, THE NEWSPAPER AND SOCIETY 567 (1942), *cited in* Guest & Stanzler, *supra* note 5, at 29.

13 It is a basic premise of our judicial system that a witness properly summoned before a tribunal must give his testimony unless a privilege or exemption can be shown. 8 J. WIGMORE, EVIDENCE §§ 2190-92 (McNaughton rev. 1961).

14 Wigmore lists four conditions that have been recognized as essential to the establishment of a privileged communication. They are:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

ever, this claimed privilege has been repeatedly denied judicial recognition.[15] Nevertheless, legislative response has been manifested by the passage of protective legislation in sixteen states.[16]

Non-recognition of a journalistic privilege has been based upon a paramount public interest in the proper administration of the law.[17] The leading case denying recognition is *People ex rel. Mooney v. Sheriff of New York County*,[18] wherein a newspaper reporter had been subpoenaed before the New York County grand jury to answer questions relating to a series of articles he had written concerning the "policy racket." The reporter remained silent, contending that the source of his information, which he obtained as a newspaper reporter, should be considered confidential and privileged. This contention was rejected by the court, and the reporter was adjudged guilty of contempt of court for refusing to reveal names and addresses of persons and places mentioned in his articles.[19]

A Return Bout — Via the Constitution

Undaunted, other reporters launched a new attack premised upon a first amendment right authorizing concealment of news sources in or-

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.
Id. § 2285.

15 Confidential communication between a lawyer and his client for legal purposes was the only professional privilege adopted at common law.
Id. §§ 2285-86.

16 ALA. CODE RECOMPILED tit. 7, § 370 (1960); ALASKA STAT. §§ 09.25.150-.220 (Supp. 1970); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE ANN. § 1070 (West 1966); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1969); LA. REV. STAT. §§ 45:1451-54 (Cum. Supp. 1968); MD. ANN. CODE art. 35, § 2 (1971); MICH. STAT. ANN. § 28.945(1) (1954); MONT. REV. CODES ANN. tit. 93, ch. 601-2 (1964); NEV. REV. STAT. § 48.087 (1969); N.J. STAT. ANN. § 2A:84A-21-29 (Supp. 1971); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1970); OHIO REV. CODE ANN. § 2739.12 (1964); PA. STAT. ANN. tit. 28, § 330 (Supp. 1970).
In *Ex parte* Sparrow, 14 F.R.D. 351 (D.C. Ala. 1953) the federal district court rejected the argument that such a state privilege statute is unconstitutional under the fourteenth amendment.

17 An inquiry of law enforcement officials in states that had newsman privilege statutes indicated that the laws were acceptable and that the reporters did not impair the law enforcement and prosecution of criminals. *See* 1949 N.Y. LAW REVISION COMM'N REP. 165-68. Nevertheless, New York rejected the proposal of a newsman's privilege statute in 1949.
Cases adopting the administration of the law concept are: *People ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936); *In re* Grunow, 84 N.J.L. 235, 85 Atl. 1011 (1913); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911). *See also* 8 J. WIGMORE, EVIDENCE 2192 (McNaughton rev. 1961).

18 269 N.Y. 291, 199 N.E. 415 (1936). For a list of other cases rejecting such a privilege see *In re* Goodfader's Appeal, 45 Hawaii 317, 332, 367 P.2d 472, 482 (1961).

19 The court refused to grant such a privilege, basing its decision on prior American cases, and added that any extension should be implemented by the Legislature. *See* 269 N.Y. at 294-95, 199 N.E. at 415-16.

der to assure the free flow of news to the public.[20] But, this attempt to gain the protection of a constitutional recognition has also been thwarted by the courts.[21]

Basic to this judicial denial of a first amendment right is the belief that the essential rights granted by free speech and press are not absolute.[22] An accepted justification for infringement of the first amendment is the public interest in preservation and protection of peace and order[23] as well as in the fair administration of justice.[24]

An early guide utilized by the Supreme Court for determining whether expression is protected under the first amendment was the "clear and present danger" rule.[25] In essence, the rule provided that "any attempt to restrict those liberties [of free speech and press] must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."[26]

Subsequently, the Supreme Court devised and implemented a balancing test, which provides that the determination of whether first amendment protection is controlling depends upon a weighing of conflicting interests by the court.[27] In applying this test when confronted with alleged violations of individual freedoms, the court will evaluate competing individual and governmental interests.[28]

Prior cases concerning first amendment freedoms indicate the liberal tendency of the Supreme Court in this area. The Court has emphasized that the first amendment freedoms of speech and press are to receive broad and preferred protection.[29] Although not absolute, restraints on the first amendment rights through the use of contempt

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

21 The Supreme Court has denied certiorari to cases concerning this question and thus far has not issued a formal ruling on the question. *See* Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

22 *See, e.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Whitney v. California, 274 U.S. 357 (1927).

23 United Public Workers v. Mitchell, 330 U.S. 75, 95 (1947).

24 Bridges v. California, 314 U.S. 252, 270 (1941).

25 In Pennekamp v. Florida, 328 U.S. 331 (1946), the Court held that a contempt punishment given to a newspaper for its criticism of a court is violative of the constitutional guarantees of freedom of speech and press unless it can be shown that the utterances complained of created a "clear and present danger" to the administration of justice.

26 Thomas v. Collins, 323 U.S. 516, 530 (1945).

27 *See* Konigsberg v. State Bar of California, 366 U.S. 36 (1961) (both majority and dissenting opinions) for an analysis of the balancing test and the unaccepted contention of the absoluteness of the first amendment.

28 *See* Uphaus v. Wyman, 360 U.S. 72 (1959).

29 *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 20 (1945); Bridges v. California, 314 U.S. 252, 265 (1941). The intention of the framers of the Constitution was to make the first amendment guarantees broader than those that existed in England. See Z. CHAFEE, FREEDOM OF SPEECH AND PRESS 10, 41-45 (1955).

citations,[30] city nuisance ordinances,[31] and a state tax on newspapers[32] have been held unconstitutional. Justification for a broad interpretation of the first amendment is attributed to the necessity of free public discussion of issue and of criticism and investigation of public bodies as essential requirements for the maintenance of the American political system and a free society.[33]

In conformity with the expanded application of the first amendment rights is the Supreme Court decision in *Lamont v. Postmaster General.*[34] In that case, Post Office officials, acting under a federal statute, created a system under which a local post office, upon the receipt of "communist political propaganda" to be finally delivered to a specific addressee, would retain the item and send notice to the addressee. If he wished to obtain the item, the addressee would have to submit a request to the post office. The Post Office contended that the only purpose for the system was to prevent delivery of propaganda to persons who did not wish to receive it. Consistent with this purpose, all subsequent requests were honored and a list of those persons desiring the propaganda was not maintained. Nevertheless, the Supreme Court held that the system was unconstitutional under the first amendment. In his majority opinion, Justice Douglas reasoned that "[t]he addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect . . . ."[35]

The Supreme Court, in *NAACP v. Alabama,*[36] took notice of the negative effects which tend to result from forced disclosure requirements. The Court held that coerced disclosure of the members of the NAACP in accordance with a state statute[37] violated the members' rights of freedom of speech and of assembly.

When analogized to the precarious situation facing the newsmen, *Lamont* and *NAACP v. Alabama* present strong arguments for a balancing of the interests in favor of the newsmen to conceal his sources

30 Pennekamp v. Florida, 328 U.S. 331 (1946).

31 Lovell v. City of Griffin, 303 U.S. 444 (1938).

32 Grosjean v. American Press Co., 297 U.S. 233 (1936).

33 Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); wherein the Supreme Court, in analyzing the beneficial attributes of the first amendment guarantees of freedom of speech and the press, stated: "[T]hose guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and open society."

34 381 U.S. 301 (1965).

35 *Id.* at 307 (1965).

36 357 U.S. 449 (1958).

37 In this case, the disclosure was the result of a forced filing of a membership list with the State Attorney General.

of information. A logical justification for such a proposition lies in the essential reasoning that the forced revelation of sources by newsmen would deter informers from relaying newsworthy information. The ensuing result is inhibition of "the free flow of news to the public in violation of the first amendment."[38]

The tenor of judicial refusal to grant the first amendment protection to newsmen was initiated in *Garland v. Torre*.[39] This case was the result of a civil action which Judy Garland had brought against CBS for breach of contract and defamation of character. During pre-trial discovery proceedings Marie Torre refused to answer questions relating to the identity of a CBS executive whose alleged defamatory statements appeared in Miss Torre's column in the *New York Herald Tribune*. Miss Torre's failure to comply with a federal district court order to reveal the name resulted in her citation for contempt of court.[40] On appeal, the Court of Appeals for the Second Circuit,[41] by Justice Stewart, sitting as the Circuit Justice, ruled that even if the newsman's right to conceal his sources comes under the first amendment, it must necessarily yield to the overriding "public interest in the fair administration of justice."[42] The court recognized the hypothesis that compulsory disclosure of confidential sources of information may act as "an abridgment of press freedom by imposing some limitations upon the availability of news."[43] To justify its decision, the court reasoned that the first amendment is not absolute and that judicial compulsion of testimony is basic to the "fair administration of justice." Where the identity of the source "went to the heart of the plaintiff's claim," Stewart wrote, ". . . the Constitution conferred no right to refuse an answer."[44] Certiorari was denied by the Supreme Court, and Miss Torre served her ten-day jail sentence.

In 1961, the Hawaii Supreme Court adopted the *Torre* rule *In re Goodfader's Appeal*.[45] Therein, information was sought by a public

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38 Guest & Stanzler, *supra* note 5, at 34.

39 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

40 The district court sentenced the defendant to ten days in prison, but Miss Torre was released pending determination of her appeal. *See id.* at 547 n.2.

41 Appellant based her refusal to testify on three grounds: (1) freedom of the press should permit non-disclosure; (2) federal public policy should act to create the recognition of a privileged communication; (3) the trial court should have utilized its discretion to limit the scope of pre-trial discovery under Federal Rule 30. In view of the purpose of this paper only the first argument will be considered. However, the subsequent result of the court's decision was the rejection of all three arguments.

42 259 F.2d at 549.

43 *Id.* at 548.

44 *Id.* at 550.

45 45 Hawaii 317, 367 P.2d 472 (1961). For a fine commentary on this case see Comment, 61 MICH L. REV. 184 (1962).

official who desired reinstatement as personnel director of the Civil Service Commission of the City and County of Honolulu, alleging that her ouster was arbitrary and illegal. The reporter attended the meeting in which plaintiff was ousted from the Commission. He admitted that his attendance was prompted by information which he had received from a confidential source. For failing to obey a court order to identify this source he was held in contempt. This case differs from *Torre,* in that the information related to actions of public officials and there was no finding that the information sought went to the heart of plaintiff's complaint. Instead, the court concluded that the information requested "could be considered likely enough to lead to the discovery of sufficiently important admissible evidence"[46] for plaintiff's reinstatement action to warrant the denial of the alleged privilege.

The presence of a state privilege statute for newsmen creates a viable basis for non-disclosure of information apart from the first amendment. Such was the situation in *In re Taylor,*[47] where a judicial interpretation of a state privilege statute was held to protect a newspaper from producing documentary sources of information used in the writing of newspaper articles. The Pennsylvania Supreme Court rejected the newspaper's first amendment claim, but interpreted the existing Pennsylvania statute[48] to extend to documentary evidence as well as sources of information.[49]

Annette Buchanan, a writer for the University of Oregon student newspaper, promised seven alleged marijuana users that in exchange for an interview with them for publication she would not reveal their names. Her first amendment contention for refusing to divulge that information before a grand jury investigation was rejected by the Oregon Supreme Court,[50] which affirmed the trial court's decision finding Miss Buchanan guilty of contempt and subjecting her to a three-hundred dollar fine.[51]

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46 45 Hawaii at 338, 367 P.2d at 484-85.

47 412 Pa. 32, 193 A.2d 181 (1963).

48 PA. STAT. ANN. tit. 28 § 330 (1958).

49 With reference to civil actions (normally actions for defamation) courts have exhibited a tendency to strictly construe such privilege statutes. For a narrow construction of state privilege statutes see Cepeda v. Cohane, 233 F. Supp. 465 (S.D.N.Y. 1964); Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956); State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943).

50 State v. Buchanan, 250 Ore. 244, 436 P.2d 729 (1968). Although avoiding an elaborate discussion of the problem, the court noted the possibility that such a first amendment claim of the freedom of press may be in conflict with the equal protection and equal privilege rights present in the Constitution. For an excellent commentary on this case see Recent Case, 82 HARV. L. REV. 1384 (1969).

51 N.Y. Times, June 29, 1966, at 23, col. 1, for a criticism of the lower court decision.

More recently, an order was issued by a federal district court[52] forcing a newsman to reveal the confidential source of his information, the identity of which was found to be of sufficient importance in a pending defamation suit. In denying the constitutional argument based upon freedom of the press, the court relied heavily on the *Torre* decision; it justified impairment of freedom of the press by stating that the information sought was of "sufficient relevance or materiality"[53] to the related defamation cases.

The Resurrection of an Argument

The Newsman's Despair

The widespread publicity surrounding the subpoenaing of newsmen and news sources[54] has revitalized the constitutionally premised first amendment argument. A series of major subpoenas[55] have been issued,[56] commencing in January with the subpoenaing of CBS's tapes and outtakes, *i.e.*, unused film, pertaining to a television program dealing with the Black Panthers.[57] In addition, the federal government subpoenaed the unedited files and unused photographs of *Time, Life* and *Newsweek* magazines, which dealt with reports about the Weatherman faction of Students for Democratic Society.[58] And then a subpoena was served upon New York Times correspondent Earl Caldwell, re-

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52 Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969).

53 The person whose identity was sought allegedly said that the son of a high city official and the daughter of an elected county official used marijuana and drugs.

54 Of minor importance, was the subpoenaing by the Antitrust Division of the Justice Department of confidential information concerning a *Fortune* magazine interview with James J. Ling, head of the Ling-Temco-Vought, Inc. conglomerate. The effect of this particular subpoena was negligible since Ling volunteered to reveal the desired information to the Justice Department. N.Y. Times, Feb. 10, 1970, at 24, col. 3.

55 Such subpoenas have been ominously referred to as "dragnet subpoenas." Elmer Lower, President of ABC News, described them as demanding "a newsman . . . testify and bring into court with him not only that which he printed or aired, but also those portions of his research or filming which did not see public exposure." From a speech at Loyola University (New Orleans) to the National Institute for Religious Communications, *as quoted in* N.Y. Times, June 6, 1970, at 20, col. 3.

56 The Senate Internal Security Subcommittee was barred from obtaining a subpoena for the book records of the Liberation News Service and the Students for a Democratic Society. Judge Mansfield of the United States District Court for the Southern District of New York issued a temporary restraining order prohibiting the Chemical Bank from issuing the records to the subcommittee. N.Y. Times, Feb. 21, 1970, at 27, col. 2.

57 N.Y. Times, Jan. 26, 1970, at 1, col. 1. The reason given for the issuance of this subpoena was the Government's allegation that Panther, David Hilliard had threatened the life of President Nixon during a Nov. 15, 1969 speech. Upon consideration of the purported Government reasons for desiring the requested information, CBS agreed to cooperate with the government officials. N.Y. Times, Jan. 27, 1970, at 87, col. 1.

58 N.Y. Times, Feb. 1, 1970, at 24, col. 1. In response to media protestations, the Justice Department eased its demands by dropping its request for the identity of the confidential informants concerning the Weathermen. N.Y. Times, Feb. 5, 1970, at 1, col. 5.

questing him to produce notes and tape recordings of interviews with officers and spokesmen of the Black Panther party.[59]

A consequence of these incidents has been the strong opposition and criticism voiced by the major news media organizations,[60] a result of which has been the promulgation of a new argument. This argument can be succinctly stated as follows: Government coercion metamorphically transforms the newsman from employee for a news service, seeking relevant, newsworthy information to be channeled to the general public — to government agent, supplying the non-published fruits of his research and inquiries.[61]

One can easily imagine the concern that this wave of subpoenas engendered among the news media.[62] In response to service upon him, *New York Times* corespondent Earl Caldwell steadfastly refused to succumb to the "government inquisition" and moved in a federal district court to quash the subpoenas that were issued against him.[63] The district court ruled[64] that Caldwell must appear before the grand jury, but issued a protective order limiting the interrogation of him.[65] While refusing to quash the subpoena, the court in effect negated its force by inserting the stipulation that Caldwell would not have to disclose any confidential information which would

> [i]mpinge upon the effective exercise of his First Amendment right to gather news for dissemination to the public through the press or other recognized media until such time as a compelling and overriding national interest which cannot be alternatively served has been established to the satisfaction of the court.[66]

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59 N.Y. Times, Feb. 3, 1970, at 20, col. 1. Caldwell, a black reporter, was transferred to the San Francisco headquarters of the New York Times and assigned to cover and report upon Black Panther activities.

60 The president of CBS, Dr. Frank Stanton, expressed his concern over this sensitive issue by stating that the existence of a broad unrestricted subpoena power over unpublished materials "can have a direct and seriously adverse effect on the free flow of information, and access to news sources." *Quoted in* N.Y. Times, Feb. 4, 1970, at 21, col. 1.

61 *Id.* at 21, col. 1, 2.

62 *Id.* at 21, col. 2, reporting that twenty-three reporters for the Wall Street Journal signed a petition stating: "The subpoenas are a dangerous devise which could be used to make us betray virtually any source in the future. We urge the entire profession to join us in defending press freedom against this destructive practice."

63 Two subpoenas were issued against Caldwell. The first, issued Feb. 2, 1970, requested Caldwell to present before a federal grand jury investigation of the Black Panthers, tapes and notes of interviews with Black Panther leaders. The second, issued Mar. 16, 1970, was issued to compel Caldwell to personally testify before the grand jury. N.Y. Times, Mar. 17, 1970, at 30, col. 3. *The New York Times* joined with Caldwell in his action to challenge the subpoenas.

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

65 Prior to the district court's decision on the motion, the Justice Department voluntarily dropped the first subpoena that was issued to Caldwell. *Id.* at 359.

66 *Id.* at 360.

Denial of a carte blanche rejection of the subpoena was based upon the ground that every person within the jurisdiction of the Government has an obligation to give testimony before a grand jury.[67]

Although the district court decision appeared to be a victory for Caldwell,[68] he nevertheless remained displeased with the necessity of his appearance before the grand jury.[69] He refused to appear,[70] for which he was found to be in contempt of court.[71]

The dispute between Caldwell and the Justice Department resulted in a ruling by the United States Court of Appeals for the Ninth Circuit to vacate the district court contempt judgment and order which required Caldwell to appear before the grand jury.[72] Circuit Judge Charles M. Merrill stated that "where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance."[73] The court in effect stated that the Government must show a pressing need for the evidence before it can order a journalist to testify before a secret grand jury investigation.

The court explicitly limited its holding to the *Caldwell* case. Judge Merrill conceded the court's inability to establish a blanket rule and expressed the view that each case must be determined according to its own facts.[74]

The *ratio decidendi* of this decision is based on judicial recognition of the special circumstances attendant in Caldwell's case. A factor

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67 *Id. citing* Blair v. United States, 250 U.S. 273 (1919).

68 In commenting upon the district court order, Caldwell's attorney, Anthony G. Amsterdam, a law professor at Stanford University, stated that "[w]hat the court has done by this ruling is to protect any and all confidential disclosures that members of the Black Panthers may have made to Earl Caldwell." N.Y. Times, Apr. 4, 1970, at 1, col. 3, 4.

69 Caldwell's appeal of the district court's order to appear before the federal grand jury was dismissed without comment by the United States Court of Appeals for the Ninth Circuit. N.Y. Times, Apr. 14, 1970, at 37, col. 1.

70 Caldwell was served with another subpoena on May 22, 1970 to appear before the grand jury on June 3, 1970 relating to an investigation of the Black Panther Party. This subpoena was identical to that which he was previously ordered to comply with and the same restrictive order was also applicable. N.Y. Times, May 28, 1970, at 35, col. 1. On June 4, 1970 Caldwell was ordered to show cause why he should not be held in contempt of court for refusing to appear before a federal grand jury. N.Y. Times, June 5, 1970, at 70, col. 7.

71 Caldwell was finally found guilty of civil contempt by Judge Zirpoli (the federal judge who decided Caldwell's original motion to quash the government subpoena) for his refusal to testify before the grand jury. But, he was allowed to remain free pending the appeal of his contempt order. N.Y. Times, June 6, 1970, at 20, col. 2.

72 Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

73 *Id.* at 1089.

74 *Id.* at 1089-90.

of prime concern was the suspicious manner in which the Black Panther party had viewed the press, labelling it as a vehicle for the "establishment."[75] The unique trust and rapport that Earl Caldwell had established with the Panthers would be vitiated should he be compelled to appear before a grand jury investigation of their activities.[76] Such a consequence was viewed as an impairment of a journalist's abilities to obtain newsworthy information to be disseminated among the public.[77]

Importantly, the court accepted the newsman's "government-agent" argument. Governmental use of the fruits of a journalist's efforts as a news gatherer was viewed as an abuse of power. In conclusion, the court viewed the autonomy of the news media as endemic to the concept of "freedom of the press."[78] Such autonomy entitles the news media to enjoy the benefits of their investigative pursuits without fear of governmental intervention.

The Issuance of Guidelines

In response to the strong criticism of the Justice Department's subpoenaing practices, Attorney General John N. Mitchell issued *Guidelines* to the Department of Justice for the issuance of subpoenas to the news media,[79] the effect of which is to limit the discretion of Government attorneys in subpoenaing newsmen.[80] This result is attained through the restrictive stipulations set forth in the *Guidelines*.[81]

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75 The Court of Appeals relied upon affidavits of other newsmen which were submitted in order to substantiate the "chilling effect" upon first amendment rights, alleged to be a result of the issuance of government subpoenas. *Id.* at 1084, 1087-88.

76 The use of secret and coerced testimony of newsmen presents additional onerous burdens upon a black reporter. Such government coercion results in a deterioration of the reporter's relationship with the black community and his ability to abstract newsworthy information from the community. N.Y. Times, Feb. 4, 1970, at 21, col. 2.

77 A possible area of future concern is the collateral area involving the subpoenaing of television and movie script writers as well as the authors of books. Whether the function performed by such people will be viewed in the same light as that of newsmen is doubtful. Nevertheless, they do perform an analogous service of informing the public of social conditions and corruption, with the entertainment media as the mode of communicating their message.

78 Amici curiae briefs were submitted by the news media (*The Washington Post, Newsweek*, and *The New York Times*) in support of Caldwell's position. Caldwell v. United States, 434 F.2d at 1082-83.

79 N.Y. Times, Aug. 11, 1970, at 24, col. 1.

80 Attorney General Mitchell claims that the Justice Department has successfully negotiated with the news organizations to obtain important information without the use of subpoenas. Special reference was made to the aid that had been given by the news media with respect to the antiriot cases. N.Y. Times, Aug. 11, 1970, at 24, col. 1, 2.

81 Mitchell's Guidelines are as follows:

> First: The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh the limiting effect against the public interest to be served in the fair administration of justice.
> Second: The Department of Justice does not consider the press "an investigative

Concisely stated, the *Guidelines* require that the Justice Department attorneys must obtain the Attorney General's permission before subpoenaing a newsman. Before requesting subpoenas, efforts must first be made to otherwise obtain the information. If this is unsuccessful, negotiations must be initiated to convince the reporter to provide the information voluntarily.

Apparent reasons for the issuance of the guidelines are appeasement of newsmen and avoidance of a major legal confrontation which might result in judicially imposed limitations to the Government's subpoena power.[82] In view of the fact that the *Guidelines* were issued

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arm of the Government." Therefore, all reasonable attempts should be made to obtain information from nonpress sources before there is any consideration of subpoenaing the press.

Third: It is the policy of the department to insist that negotiations with the press be attempted in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the grand jury with the interests of the news media. In these negotiations, where the nature of the investigation permits, the Government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the news media.

Fourth: If negotiations fail, no Justice Department official should request, or make any arrangements for, a subpoena to the press without the express authorization of the Attorney General. If a subpoena is obtained under such circumstances without this authorization, the department will — as a matter of course — move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization.

Fifth: In requesting the Attorney General's authorization for a subpoena, the following principles will apply:

A. There should be sufficient reason to believe that a crime has occurred, from disclosures by nonpress sources. The department does not approve of utilizing the press as a springboard for investigations.

B. There should be sufficient reason to believe that the information sought is essential to a successful investigation — particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential or speculative information.

C. The Government should have unsuccessfully attempted to obtain the information from alternative nonpress sources.

D. Authorization for requests for subpoenas should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

E. Great caution should be observed in requesting subpoena authorization by the Attorney General for unpublished information, or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged.

F. . . . . .

G. . . . .

These are general rules designed to cover the great majority of cases. It must always be remembered that emergencies and other unusual situations may develop where a subpoena request to the Attorney General may be submitted which does not exactly conform to these guidelines.

Id. at col. 1, 2, 3.

82 Attorney General Mitchell requested that the American Bar Association conduct a major study of the controversy. He specifically suggested that the A.B.A. formulate a conclusion as to whether the newsmen's contention, that their ability to obtain the news would be vitiated if they were forced to testify against their informants, should outweigh the Government's need for evidence. N.Y. Times, Aug. 11, 1970, at 1, col. 6. However, a privilege from disclosure is recognized for the concealment of the identity of government informers. *See* McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S.

subsequent to the district court decision in *Caldwell*, one can safely intimate that apprehension was a primary motivating force for their issuance.[83]

ANALYSIS

Criticism of Guidelines

Although the *Guidelines* have been viewed as "a constructive step toward narrowing the field of potential conflict,"[84] they do not satisfy the demands of newsmen.[85] First, their issuance implicitly asserts the Government's right to subpoena in order to obtain unpublished information which was received in confidence.[86] Second, a subpoena may be issued which transcends the *Guidelines*. Third, the Attorney General, is not permanently bound by his guidelines. Fourth, the boundaries established by the *Guidelines* are vague, *e.g.*, the *Guidelines* state that the Government must first reasonably attempt to obtain the information from nonpress sources, but fail to define "reasonable attempt". Fifth, and perhaps most importantly, the *Guidelines* are pervasively subjective.

Aftermath of Caldwell — *A Change of Balance*

Although of limited immediate effect, *Caldwell* conceptually represents a definite shift in judicial attitude. The initial impression projected by *Caldwell* is its impregnation upon the bastion of coerced testimony.[87] But of greater importance is the implicit shift of balance that is manifested in the decision.

The courts in *Torre* and in those decisions adopting its position have viewed the need for the information sought to be disclosed in order to promote the fair administration of justice as outweighing the possible limitation on the exercise of first amendment rights, *i.e.*, abridgment of the free flow of news to the public.[88] *Caldwell* is an exception to this line of reasoning, for it required the Government to

53 (1957); Scher v. United States, 305 U.S. 251 (1938); *see also* 8 J. WIGMORE, EVIDENCE § 2374(f) (McNaughton rev. 1961).

83 The subsequent *Caldwell* court of appeals decision also acts to limit the use of government subpoenas; but the final decision as to whether the prerequisites were met lies with the court and not with the Attorney General.

84 N.Y. Times, Aug. 12, 1970, at 40, col. 2 (editorial).

85 For a politically oriented criticism see N.Y. Times, Aug. 12, 1970, at 28, col. 7.

86 The Government's refusal to completely surrender its subpoena power is supported by its claim that "secrecy can cloak irresponsible journalism and that the public's right to effective law enforcement should come first." N.Y. Times, Feb. 5, 1970, at 26, col. 7.

87 *See* note 13 *supra*.

88 *See* notes 39-53 and accompanying text *supra*.

show (1) a compelling need for the information requested, and (2) the unavailability of the information elsewhere. These prerequisites must be satisfied before the court will require a limitation of first amendment rights. These additional requirements provide a shift of balance in favor of the newsmen, the result of which is the establishment of a test of *national compelling interest* plus *inaccessibility.*

At this juncture a caveat must be interposed: *Caldwell* and the *Guidelines*[89] only apply to criminal cases and investigations involving the Government. However, present conditions do not preclude eventual extension of this protection to civil cases[90] where substantial reasons for the protection can be shown.[91]

A potent argument for judicial extension of a newsman's protection to civil actions[92] can be derived from *Time, Inc. v. Hill.*[93] Therein, *Life* magazine published an article concerning a recent play entitled the *The Desperate Hours.* The article deliberately related the play to the actual experience of members of the Hill family, who were held as hostages in their home by three escaped convicts. Certain offensive scenes in the play did not actually occur to the Hill family. Hill sued the magazine company for invasion of privacy under a New York statute which provided a cause of action to a person whose name or picture is used by another without consent for purposes of trade or advertising. The Court set the standard by applying the rule that in order for a publisher to be held liable for false reports of newsworthy matters the plaintiff must prove that the publisher knew of their falsity or acted in a reckless disregard of the truth. The Court stated that misstatements of matters of public interest that are innocently or negligently made are protected by the first amendment.

The conclusion derivable from *Hill* is that the danger to the free flow of the news generally outweighs the right to recovery for injury

89 *See* note 81 *supra.*

90 On August 13, 1970 a bill was introduced in the House of Representatives, H.R. 18,983, 91st Cong., 2d Sess. (1970) (The Newsmen's Privilege Act of 1970). The bill, in addition to providing for Government actions and investigations, also pertains to civil actions. It proposes that a newsman not be required to reveal his sources in civil actions unless it can be shown that a "substantial injustice" would be incurred by the other party if the source remained undisclosed. The bill applies to a newsman's source of information as well as the information. The bill is under consideration by the Judiciary Committee. In view of the fact that similar bills have never been reported out of committee, it does not seem likely that this bill will be so reported. *See* S. 1851, 88th Cong., 1st Sess. (1963); H.R. 8519, 88th Cong., 1st Sess. (1963); H.R. 7787, 88th Cong., 1st Sess. (1963).

91 *See* the necessary requirements proposed in Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

92 However, such a protection would not exonerate newspapers from libel actions imposed against them. See 1 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 77-130 (1947).

93 385 U.S. 374 (1967).

to one's reputation. In acknowledging the importance of the freedom of the press the Court noted that:

> We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter.[94]

Analogy can be made to a situation in which a litigant in a civil action desires confidential information possessed by a newsman. Assuming that revelation of such information would impede the free flow of the news to the public, the newsman should be constitutionally protected from forced disclosure.[95]

CONCLUSION

Although the first amendment is not absolute, the need for some protection of a newsman's sources of confidential information is obvious. As recognized by the Supreme Court, the purposes of the first amendment include presentation of issues, investigation of public bodies and presentation of news to the public.[96] The function of the news media is to perform a public service by informing the public of newsworthy events.

Society is confronted with the increasing presence of radical and insurgent elements. Since law enforcement officials are handicapped in establishing a basis of communication and rapport with these elements, we must look to another group for the accomplishment of this goal. The newsman can perform this function. By establishing a relationship of trust and confidence with radicals, newsmen are able to report relevant newsworthy information to the public. Concededly, this situation is at best tenuous. Although the coercion of testimony has been justified by the necessary interests in the fair administration of justice, it seems plausible that such governmental coercion may handicap the enforcement of justice. This would be a logical result should newsmen be forced to breach the quasi-fiduciary relationship that exists between them and their informants and estranged radical groups existent in society.

The test offered by the Ninth Circuit in *Caldwell — national compelling interest* plus *inaccessibility* — appears to be a salutory one.

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94 385 U.S. at 389.

95 *See* Guest & Stanzler, *supra* note 5, at 35-36.

96 *See* Time, Inc. v. Hill, 385 U.S. 374, 388, 406-07 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 266-73 (1964), for cases supporting this statement.

This test provides an acceptable form of protection for newsmen while at the same time serving the needs of justice when the situation necessitates disclosure. *Caldwell* is a vehicle for persuasion that should be adopted by other jurisdictions. A national standard must be established by the Supreme Court to resolve current non-uniformity in this area.

Moreover, in the area of civil law newsmen should also have the right of a non-disclosure, unless substantial injury (to be determined by the judge) would result therefrom.