PRIVACY OF INQUIRY AND THE FIRST AMENDMENT: TOWARDS A TESTIMONIAL PRIVILEGE FOR INFORMATION GATHERING

I

INTRODUCTION

The journalist's privilege has generated considerable controversy for a number of years. Most of its advocates see it primarily as a tool to be used by the press. The advocates of the journalist's privilege argue that the "predominant purpose" of the first amendment is "to preserve an untrammeled press as a vital source of public information."[1] They claim that its primary justification rests on the belief that it encourages confidential sources to confide in professional journalists, thereby furthering the utilitarian objective of increasing the flow of sensitive information to the public.[2] The privilege is less important for nonprofessional journalists and authors, because they are not engaged in the full time occupation of conveying information to the public.[3]

The courts have responded tepidly to the suggestion that society should grant professional journalists a special testimonial privilege not available to members of the general public. There are two reasons for this lack of enthusiasm. First, the courts reject the utilitarian justification advanced by advocates of the journalist's privilege because society will not necessarily be better off, and in fact might be worse off, if journalists have the privilege to refuse to testify in court. For example, the societal interest in information flow carries little weight when, in a criminal proceeding, a party needs the journalist's confidential information to establish the guilt or innocence of

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1. *See* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (predominant purpose here of first amendment was as a source of public information).

2. *See generally*, Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 284 (1971) (empirical evidence indicates a journalist's privilege would enhance information flow to the public); Dworkin, *The Rights of Myron Farber*, New York Review of Books, Oct. 26, 1978, at 34 (journalist's privilege is not a right, but is justified because it increases the amount of information available to the public); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, 43-49 (1969) (the lack of a first amendment privilege severely impairs the ability of journalists to collect news for public consumption); Note, *Reporters and their Sources; The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 320 (1970) (same).

3. Even those few commentators who recognize that private authors deserve protection for their sources' confidentiality similar to that accorded the institutional press by the journalist's privilege justify such a testimonial privilege by citing society's essentially utilitarian interest in increasing information flow to the public. *See, e.g.* Comment, *Academic Researchers and the First Amendment; Constitutional Protection for their Confidential Sources?*, 14 SAN DIEGO L. REV. 876, 895-902 (1977) (academic researchers should also receive the protection of a privilege).

the defendant.[4] Second, since the privilege traditionally is intended only for professional journalists, it is inconsistent with the fundamental egalitarianism inherent in the first amendment.[5]

There is another theory on which to base the journalist's privilege which suffers from neither of these inherent weaknesses. This theory shall be called a rights-based rationale because it posits that the privilege is a right which all individuals enjoy regardless of whether society benefits. Since the privilege would not serve utilitarian ends, opponents could not argue for limitation on its application in order to make society incrementally better off. Moreover, since the privilege would be available to anyone engaged in information gathering for professional or personal reasons, it would be consistent with the fundamental equality which underlies the first amendment. Although the courts have institutional reasons for not recognizing the privilege's full reach in the absence of a statute,[6] a well-drawn statute which creates an information gatherer's privilege based on this new rights-based rationale might receive a warmer reception than have statutes based on the traditional utilitarian rationale.

This note will explore the information gatherer's privilege as it applies in the context of a criminal proceeding. After summarizing a case in which an author sought first amendment protection for his sources and notes, the note will analyze the traditional utilitarian rationale for the journalist's privilege in order to expose its weaknesses. The note will then attempt to weave from existing commentary and legal precedent the basis for a much broader rights-based information gatherer's privilege. Hopefully, this will lead to the development of some views on the appropriate roles of legislatures and the courts in administering the privilege. The legislatures should enact, and the courts should respect, privilege statutes which protect the first amendment right of all citizens to withhold from arbitrary exposure before a grand jury or trial court private papers and sources relating to the formulation and expression of their political views.

II

JUDICIAL TREATMENT OF PRIVILEGE CLAIMS BY NONPROFESSIONAL NEWSGATHERERS

Courts familiar only with the traditional justification for the journalist's privilege have given an unenthusiastic response to analogous claims by

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4. *See, e.g.*, United States v. Liddy, 478 F.2d 586, 587-88 (D.C. Cir. 1972) (where subpoenaed tapes are essential to the defendant's efforts to impeach a prosecution witness, the journalist's first amendment privilege must yield to the defendant's sixth amendment rights).

5. *See infra* text accompanying notes 40-42.

6. *See infra* text accompanying notes 111-117.

nonprofessional newsgatherers.[7] Typical is the New York case, *People v. Le Grand*.[8] There, an author contracted with a publisher to write a book on organized crime.[9] The author conducted a number of interviews with organized crime figures, one of whom became a key prosecution witness against the defendant in this criminal proceeding. In the course of the trial, the defendant issued a subpoena compelling the author to provide evidence necessary to impeach the witness.[10] The author refused to honor the subpoena, asserting, among other things, a first amendment right not to divulge information intended for publication which an author has obtained pursuant to an agreement of confidentiality.[11]

The Appellate Division of New York Supreme Court rejected the author's claim.[12] Pointing out the importance of the defendant's sixth amendment right of confrontation,[13] and the utility of prior inconsistent statements in cross examination,[14] the court found that the first amendment considerations underlying the privilege had to give way.[15] As the Supreme

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7. The issue has arisen in very few cases. Besides the court which decided *People v. Le Grand*, 67 A.D.2d 466, 415 N.Y.S.2d 252 (1979), only one other court has faced the issue squarely. In Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388 (N.D. Cal. 1976), a federal district court saw a close analogy between a private researcher claiming confidentiality for his sources and a professional journalist entitled to a limited constitutional privilege. Finding that compelled disclosure of a researcher's sources "would without question severely stifle research into questions of public policy," the court recognized a limited, non-constitutional privilege for academic researchers not to disclose their sources in judicial proceedings. *Id.* at 390. *Cf.* Apicella v. McNeil Laboratories, 66 F.R.D. 78, (E.D.N.Y. 1975) (protection extended to a medical newsletter). Most other courts confronted by the issue have managed to sidestep it. *See* United States v. Doe, 460 F.2d 328, 333-34 (1st Cir. 1972), *cert. denied sub nom.*, Popkin v. United States, 411 U.S. 909 (1973) (purported researcher's privilege enhances information flow by protecting confidential sources, and so does not apply when confidential information does not involve a source); United States v. International Business Machines Corp., 83 F.R.D. 92, 95-96 (S.D.N.Y. 1979) (where author does not rely on confidential sources, and where subpoena does not intrude on privacy of association to any significant extent, author must reveal sources' names); Wright v. Patrolman's Benevolent Assoc., 72 F.R.D. 161, 163-64 (S.D.N.Y. 1976) (where sources and information are not confidential, author is not entitled to privilege).

8. 67 A.D. 2d 446, 415 N.Y.S.2d 252 (1979).

9. *Id.* at 448-49, 415 N.Y.S.2d at 254.

10. *Id.* at 449, 415 N.Y.S.2d at 254.

11. *Id.* at 450, 415 N.Y.S.2d at 254. The author also claimed a privilege under the New York statutory shield which exempts from contempt in any legal proceeding a "professional journalist or newscaster" who refuses to divulge confidential sources of information obtained in the course of newsgathering, N.Y. Civ. Rights Law § 79-h(b) (McKinney 1976), and under Article 1, Section 8 of the New York State Constitution, which provides free speech rights similar to those protected by the first amendment to the United States Constitution. The court rejected both the statutory claim, *id.* at 451, 415 N.Y.S.2d at 255-56, and the state constitutional claim. *Id.* at 454, 415 N.Y.S.2d at 257.

12. *Id.* at 454, 415 N.Y.S.2d at 257.

13. *Id.* at 452, 415 N.Y.S.2d at 256, *quoting* Douglas v. Alabama, 380 U.S. 415, 418 (1965).

14. *Id.*

15. *Id.* at 454, 415 N.Y.S.2d at 257.

Court did in *Branzburg v. Hayes,*[16] the Appellate Division disagreed with "the argument that . . . there would be a significant constriction of the flow of news to the public" if the courts did not recognize a journalist's privilege.[17] The court found the defendant's interest in a fair trial to be more important than any impact that forced disclosure of confidential sources might have on the flow of news to the public.[18]

Declaring that in New York this was "the first case in which *an author* has claimed a constitutional privilege to withhold duly subpoenaed documents and tapes material to the defense of a criminal case,"[19] the court found the claim of privilege to be even less compelling than in most journalist's privilege cases:

> [T]he author's interest in protecting the confidential information is manifestly less compelling than that of a journalist or newsman. To report the news and remain valuable to their employer and the public, professional journalists must constantly cultivate sources of information. Newsmen must also maintain their credibility and trustworthiness as repositories of confidential information.
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> However, . . . (most authors') success invariably depends more [sic] on the researching of public and private documents, other treatises and background interviews, rather than on confidential rapport with his sources of information. Thus, his contacts with confidential sources, being minimal vis-a-vis those of an investigative journalist, would be far less likely to have any impact on the free flow of information which the First Amendment is designed to protect.[20]

The *Le Grand* case exemplifies the fixation which courts and commentators have on the traditional utilitarian justification for the journalist's privilege. The decision presumes that the only reason for protecting confidential sources and information from disclosure in a criminal proceeding is that such protection enhances the quantity and quality of news which flows to the general public. The *Le Grand* case also suggests how narrow and weak this justification is. It is narrow in application because it protects only professional journalists. It does not protect other members of the general public, such as the author in this case, who gather and interpret information to formulate and express their views on important issues. The traditional view is also weak because courts will refuse to apply the privilege any time the societal benefit of disclosure of confidential sources or information exceeds the cost to the individual.

16. 408 U.S. 665 (1972).
17. People v. Le Grand, 67 A.D.2d at 453, 415 N.Y.S.2d at 256.
18. *Id.*
19. *Id.* at 454, 415 N.Y.S.2d at 257 (emphasis in the original).
20. *Id.* at 454-55, 415 N.Y.S.2d at 257-58.

III

THE PROBLEMATIC TRADITIONAL JUSTIFICATION FOR THE JOURNALIST'S PRIVILEGE

Like all testimonial privileges, the journalist's privilege is an exception to the ancient maxim that "the public . . . has a right to every man's evidence."[21] This maxim expresses the general duty to testify, which is the correlative of the defendant's sixth amendment rights and the prosecutor's need for evidence in criminal trials. Wigmore believed that testimonial privileges could exist only if four conditions were met: 1) communications must originate in a confidence that they will not be disclosed; 2) confidentiality must be essential to the full and satisfactory maintenance of the relationship; 3) the relationship must be one which the community believes ought to be maintained; and 4) the injury that would result from disclosure must be greater than the benefit derived from the correct disposal of litigation.[22] The traditional understanding of Wigmore's views holds that privileges exist in order to encourage individuals to engage in socially beneficial relationships. Thus, legislators and judges traditionally balance the aggregate benefits to society through the protection of those confidences against the harm of impaired litigation resulting from nondisclosure.[23]

Ever since journalists first sought constitutional protection for their confidential sources in *Garland v. Torre*,[24] they have relied on a utilitarian justification for the privilege. The press has traditionally sought protection as an institution, relying upon reporters' institutional role as purveyors of information to the public rather than their individual right to withhold from arbitrary disclosure before governmental bodies information upon which they based their political views.[25] Advocates of the privilege argue that, by increasing the flow of information to the general public and thereby making people more informed than they otherwise would be, journalists increase societal welfare by improving the quality of self-government.[26] Proponents of the privilege point out that, by guaranteeing confidentiality, a reporter can induce an undisclosed source to share sensitive information which he might otherwise be unwilling to divulge.[27] Consequently, the privilege

21. 8 J. WIGMORE, EVIDENCE § 2192 at 70 (McNaughton rev. 1961).

22. *Id.* § 2285.

23. Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privilege*, 30 STAN.L.REV. 935, 941-42 (1978).

24. 259 F.2d 545 (2d Cir. 1958). *cert. denied*, 358 U.S. 910 (1958).

25. *See supra* note 2.

26. *See* Dworkin, *supra* note 2; Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 115-18 (1977). Although some commentators speak of the public's "right to know" as forming the basis of the journalist's privilege, Ronald Dworkin has pointed out that the privilege is not grounded in such a right, but in society's utilitarian interest in information flow. *See* Dworkin, *Is the Press Losing the First Amendment?* New York Review of Books, Dec. 4, 1980, at 52.

27. *See* Brief for Petitioner, at 26-27, Branzburg v. Hayes, 408 U.S. 665 (1972). *See also* Blasi, *supra* note 2; Note, *supra* note 2, at 330-32.

would not be available to most individuals, since they do not provide information to the general public on a regular basis.[28] A classic formulation expresses the traditional justification for the privilege in these terms:

> The primary interest to be served is not the personal privacy or professional advantage of the reporter, but the flow of information from sensitive sources to the reading public . . . . [M]uch information simply would not be shared with the media, and thus would never reach the public, if disclosure [of confidential sources] could be indiscriminately compelled.[29]

This argument has not fared particularly well in the courts. While applying the privilege in some cases, courts have refused to do so in others, especially where the evidence is essential to the proper disposition of the case.[30] Generally, the courts have refused to recognize the privilege for two

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28. *See* Dworkin, *The Rights of Myron Farber*, *supra* note 2, at 34-35.

29. Final Report, The First Amendment and the News Media, Annual Chief Justice Earl Warren Conference on Advocacy in the United States sponsored by the Roscoe Pound-American Trial Lawyers Foundation, June 8-9, 1973, at 11.

30. Prior to Branzburg v. Hayes, 408 U.S. 665 (1972), most courts refused to recognize the existence of a journalist's privilege in either a criminal or civil context. *See, e.g.*, Garland v. Torre, 259 F.2d 545 (2d Cir.) (when, in a civil action, the confidential information goes to the heart of the claim, there is no privilege), *cert. denied*, 358 U.S. 910 (1958); *In re* Goodfader's Appeal, 45 Hawaii 317, 329, 367 P.2d 472, 480 (1961) (if plaintiff's inquiry "likely enough to lead to the discovery of sufficiently important admissible evidence," there is no privilege); State v. Buchanan, 250 Ore. 244, 251, 436 P.2d 729, 732, (no privilege exists in a grand jury investigation) *cert. denied*, 392 U.S. 905 (1968). A few courts did recognize the privilege's existence but refused to uphold it in the circumstances involved. *See, e.g., In re* Grand Jury Witnesses, 322 F. Supp. 573, 576-78 (N.D. Cal. 1970) (dicta) (privilege may exist when grand jury has no overriding interest in confidential information); State v. Knops, 49 Wis.2d 647, 658-59, 183 N.W.2d 93, 99 (1971) (although a reporter may have a limited privilege, grand jury's need for information prevails where privilege impedes administration of criminal justice).

Since *Branzburg*, some courts have refused to recognize the existence of *any* first amendment privilege in a civil or criminal setting. *See, e.g.*, Dow Jones & Co. v. Superior Court, 364 Mass. 317, 320-21, 303 N.E.2d 847, 849 (1973); *In re* Farber, 78 N.J. 259, 268-69, 394 A.2d 330, 334, *cert. denied*, 439 U.S. 997 (1978).

However, the trend has been toward recognizing a limited journalist's privilege which courts will uphold when evidence withheld by the journalist is not essential to the proper disposition of the case. *See generally* Annot., 99 A.L.R. 3d 37, 53-71 (1980). In the federal courts "journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources." Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979). In many cases, the privilege has not withstood the balancing test, and the court has compelled the journalist to reveal confidential sources. *See* United States v. Liddy, 478 F.2d 586, 587-88 (D.C. Cir. 1972). In the context of grand jury proceedings, courts frequently have overridden journalists' constitutional privilege claims to compel the production of evidence for the prosecution. *See, e.g.*, People *ex rel.* Fischer v. Dan, 41 A.D.2d 687, 688, 342 N.Y.S.2d 731, 733 (privilege claim does not cover personal observations of newsperson at prison riot), *appeal dismissed*, 32 N.Y.2d 764, 344 N.Y.S.2d 955 (1973); Petition of McGowan, 298 A.2d 339, 341 (Del. Super. Ct. 1972), *rev'd on other grounds, sub nom. In re* McGowen, 303 A.2d 645 (Del. 1973) (photographer denied first amendment privilege against grand jury subpoena of photographs depicting campus demonstration); *In re* Bridge, 120 N.J. Super. 460, 468, 295 A.2d 3,

reasons. First, the utilitarian justification fails because the benefit society obtains from the just disposition of litigation, which may require a reporter to disclose his confidential sources, is perceived as greater than the loss to society of information which such disclosures will indirectly cause.[31] Second, the privilege is inconsistent with the strong egalitarian strain in the first amendment because it permits the government to grant a special right not available to members of the general public.[32]

These two objections to a journalist's privilege merged in *Branzburg v. Hayes*[33] to provide the United States Supreme Court with a dual basis for refusing to recognize a journalist's privilege. The *Branzburg* decision encompassed four separate instances in which grand juries subpoenaed newspaper or television journalists to testify about alleged crimes which they had observed or about which they had reported.[34] In all four cases, the re-

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6-7 (1972) (reporter denied any first amendment privilege against grand jury questions regarding unpublished information).

However, some courts have upheld the privilege in criminal proceedings, allowing the journalist to decline to disclose his or her sources where disclosure is not essential to the case. *See, e.g.*, Brown v. Commonwealth, 214 Va. 755, 757, 204 S.E.2d 429, 431 (where evidence is not material to a defendant's case, the journalist's first amendment privilege to withhold confidential sources will prevail because sixth amendment rights are not at stake) *cert. denied*, 419 U.S. 966 (1974); State v. St. Peter, 132 Vt. 266, 271, 315 A.2d 254, 256 (1974) (same). In civil cases, the journalist's privilege has also been upheld against a litigant's demand for evidence when the evidence was either available elsewhere or not material to the case. *E.g.*, Democratic National Committee v. McCord, 356 F. Supp. 1394 (D.D.C. 1973); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975).

31. *See* In re Goodfader's Appeal, 45 Hawaii 317, 329, 367 P.2d 472, 480 (1961) (the privilege claim "may not be considered of a degree sufficient to outweigh the necessity to maintain the court's fundamental authority to compel the attendance of witnesses and to exact their testimony.")

32. *See* State v. Buchanan, 250 Or. 244, 250, 346 P.2d 729, 732 (it is dangerous for the government to extend the journalist's privilege to "the employee of a 'respectable' newspaper" while denying it to others), *cert. denied*, 392 U.S. 905 (1968); Dworkin, *The Rights of Myron Farber*, *supra* note 2, at 34. ("Reporters, columnists, newscasters, authors, and novelists, of course, have the same right of free expression as other citizens, in spite of the great power of the press . . . . But newsmen do not, as a matter of principle, have any greater right of free speech than anyone else"). *See generally* Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); R. DWORKIN, TAKING RIGHTS SERIOUSLY 273-74 (1978) (rights derive from a fundamental concept of equality); J. RAWLS, A THEORY OF JUSTICE 60-61 (1971) (rights such as freedom of speech are guaranteed because they derive from the basic equality which all citizens share in a democratic society).

33. 408 U.S. 665 (1972).

34. The four cases were: Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970) (Kentucky statute granting reporters immunity from disclosing their sources of information does not apply to reporter who observed the illegal manufacture of hashish), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972); Branzburg v. Meigs, 508 S.W.2d 748 (Ky. 1970), (reporter must honor subpoena regarding his report of illegal drug use) *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972); Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970) (where grand jury interrogation would jeopardize the public's right to be informed, a journalist who reports on activities of the Black Panther Party need not submit to questioning absent a compelling need for attendance) *rev'd sub nom.* Branzburg v. Hayes, 408 U.S.

porters refused to testify in criminal proceedings on the ground that the first amendment offered them a limited privilege to withhold confidential news sources and information obtained in the course of newsgathering when nondisclosure would not interfere with the administration of criminal justice.[35] Although journalist's privilege claims had not fared well in the past,[36] these journalists hoped to persuade the court that it should apply first amendment principles previously articulated in the associational privacy cases[37] to their claim. The court explored the jurisprudential roots of those principles in four separate opinions, but it failed to find a judicially definable journalist's privilege in the constitution.

Justice White, writing for the majority,[38] based his refusal to recognize a first amendment journalist's privilege on two arguments. Initially he argued that the first amendment does not offer the press any special protection not available to other citizens. Finding that "neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence,"[39] Justice White declared that "[t]he publisher of a newspaper has no special immunity from the application of general laws"[40] and that the press does not have "a constitutional right of special access to information not available to the public generally."[41] He found it not surprising that "newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation."[42] Since he did not believe that the first amendment afforded ordinary citizens any right to protect confidential information from compulsory disclosure pursuant to the subpoena power, Justice White thought it antithetical to the principles of equality underlying the amendment to grant the press any such protection.

Justice White's second argument concerned his skepticism about the value of the journalist's privilege when weighed against the need for criminal law enforcement. He felt it was "unclear how often and to what extent

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665 (1972); *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), (television reporter forced to reveal sources for story on the Black Panthers) *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

35. Branzburg, 408 U.S. at 679-81.

36. *See, e.g.,* Garland v. Torre, 259 F.2d 545, 550 (2d Cir.), (first amendment does not confer a privilege upon a journalist not to reveal identity of a source where the identity is sought in good faith and goes to the heart of the plaintiff's claim) *cert. denied,* 358 U.S. 910 (1958).

37. *See infra* text accompanying notes 88 to 106.

38. The *Branzburg* majority included Justice White, Chief Justice Burger, and Justices Blackmun, Powell and Rehnquist. Justice Powell also wrote a concurring opinion. Justice Stewart wrote a dissenting opinion in which Justices Brennan and Marshall joined. Justice Douglas wrote a separate dissenting opinion.

39. Branzburg, 408 U.S. at 682.

40. *Id.* at 683, *quoting* Associated Press v. N.L.R.B., 301 U.S. 103, 132-33 (1937).

41. *Id.* at 684.

42. *Id.* at 685.

informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury."[43] On the other hand, he wrote, grand jury investigation of crime "implements a fundamental governmental role of securing the safety of the person and property of the citizen, and . . . calling reporters to give testimony in the manner and for the reasons that other citizens are called 'bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.' "[44] He stated:

> [W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.[45]

The Court refused to recognize a right to withhold confidential sources in the context of a criminal proceeding, whether that right is asserted by a reporter or by anyone else. The importance of grand jury investigations of criminal activity consequently outweighed the public need for the free flow of information.

Justice White preferred to leave to the state courts and legislatures the question of whether a journalist's privilege might ever be justified. He refused to "embroil" the judiciary in administering the privilege because it is a very complex task to determine whether a "proper predicate" has been laid to compel a reporter to testify.[46] Furthermore, the courts should not become "inextricably involved in differentiating between the value of enforcing different criminal laws."[47] Instead, Justice White found that other institutions were better qualified to determine how far a first amendment based journalist's privilege might extend without interfering with the state's compelling interest in criminal law enforcement.

Justice Powell, in a concurring opinion, was somewhat more generous to the press. He concluded that a journalist might have a limited privilege not to testify if a subpoena were not given in good faith or if a journalist were called upon to give confidential information only remotely relevant to the judicial proceeding. Justice Powell advocated allowing the courts some discretion in balancing the needs of the press against the needs of the criminal justice system and in exempting a journalist from testifying when confidentiality is warranted by the facts.[48]

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43. *Id.* at 693.
44. *Id.* at 700, *quoting* Bates v. City of Little Rock, 361 U.S. 516, 525 (1960).
45. *Id.* at 695.
46. *Id.* at 706.
47. *Id.* at 705-06.
48. *Id.* at 709-10 (Powell, J., concurring). In a footnote, Justice Powell criticized the balancing test adopted by Justice Stewart in his dissent. He felt it "would . . . defeat . . . a fair balancing" by heavily subordinating "the essential societal interest in the detection and prosecution of crime." *Id.* at 710. Although some courts have read Justice Powell's

Justices Stewart, Brennan and Marshall, who all dissented, concluded that a constitutional protection derives from the "broad societal interest in a full and free flow of information to the public."[49] After noting that "the right to publish is central to the First Amendment and basic to the existence of constitutional democracy," Justice Stewart argued that a failure to recognize a constitutional protection for its "corollary," the right to gather news, would empty the amendment of meaning by drying up the flow of information necessary to a robust political debate.[50]

Justice Stewart inferred from the first amendment a protection of a reporter's interest in a confidential relationship with his source from a number of factual observations about the nature of newsgathering. He observed that reporters regularly depend upon informants for their news, and that informants will not divulge information in many circumstances without a grant of confidentiality. Therefore, an "unbridled subpoena power" without any protection for confidential relationships would dry up sources and deter reporters from gathering and publishing information.[51] This, in turn, would reduce the flow of information into the public domain.

Justice Stewart proposed a tripartite test for determining when a journalist must submit to judicial process. First, the state would be required to show that there is "probable cause" to believe that a journalist has information "clearly relevant to a specific probable violation of law." Second, the state would have to show that the information could not be obtained through "alternative means less destructive of first amendment rights." Finally, the government would be asked to demonstrate "compelling and overriding interest in the information."[52] Justice Stewart believed that a limited, judicially administered journalist's privilege would fairly balance the needs of both the press and the criminal justice system.

Like the plurality, Justice Stewart accepted the traditional justification for the journalist's privilege. He saw it essentially as a special accommodation made by society to reporters so that they could increase the flow of information into the political and public arena. Although Justice Stewart gave greater weight than the majority to the societal interest in the free flow of information, he shared the majority's belief that a balancing of competing interest to maximize societal welfare should define the scope of the privilege.

Justice Douglas presented a justification grounded in a different tradition of first amendment jurisprudence than Justice Stewart's. He empha-

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concurrence as not "in any way disagreeing with what is said by Justice White," *see, e.g., In re* Farber, 78 N.J. at 268-69, 394 A.2d at 334, other courts have favored Justice Powell's comments, finding in them the basis for a limited journalist's privilege. *See, e.g.,* State v. St. Peter, 132 Vt. 266, 269-70, 315 A.2d 254, 255 (1974), and cases cited in note 30, *supra.*

49. Branzburg, 408 U.S. at 725 (Stewart, J., dissenting).

50. *Id.* at 727 (Stewart, J., dissenting).

51. *Id.* at 728 (Stewart, J., dissenting).

52. *Id.* at 743 (Stewart, J., dissenting).

sized the right of each individual to shape and express political views without interference from the state.[53] In discussing petitioner Caldwell's appeal, Justice Douglas said:

> [T]he people, the ultimate governors, must have absolute freedom of, and therefore privacy of, their individual opinions and beliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs. In this regard, Caldwell's status as a reporter is less relevant than is his status as a student who affirmatively pursued empirical research to enlarge his own intellectual viewpoint.[54]

Justice Douglas reasoned that subpoenaing Caldwell to testify before a grand jury would require him to expose his political beliefs before a governmental body, since his "entire experience was shaped by his intellectual viewpoint."[55] He pointed out that "[u]nlike the random bystander, those who affirmatively set out to test a hypothesis . . . have no tidy means of segregating subjective opinion from objective facts."[56]

To justify the journalist's privilege Justice Douglas drew heavily upon the notion that the first amendment protects the expressive rights of speakers, rather than the theory that it protects a societal interest in information flow. For Justice Douglas, Caldwell's professional status as a journalist did not grant him any special favors from the government which were not available to all. This suggests that the first amendment should shield not only the confidential notes and sources of a journalist, but also those of any author or researcher, from disclosure in a legal proceeding. Justice Douglas' opinion contains the seeds of an egalitarian rights-based view of the privilege which does not depend for its validity upon utilitarian interest balancing.[57]

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53. *Id.* at 714-15 (Douglas, J., dissenting). Justice Douglas agreed with the rationale advocated by Justice Stewart. *See id.* at 721-24. In addition, Justice Douglas rejected the "timid, watered-down, emasculated versions of the First Amendment" advocated by the litigants in favor of an absolute journalist's privilege. *Id.* at 713. Unless a reporter were directly implicated in a crime, Douglas would not compel him to testify, and when he was directly implicated, the reporter would be able to assert his privilege against self-incrimination. Accordingly, compelling a reporter to divulge his confidential sources could, in Justice Douglas' mind, serve no compelling state interest. *Id.* at 712. Justice Douglas feared that any limited privilege would "be twisted and relaxed so as to provide virtually no protection at all." *Id.* at 720.

54. *Id.* at 714-15 (Douglas, J., dissenting).

55. *Id.* at 720 (Douglas, J., dissenting).

56. *Id.* This was particularly true of Caldwell who was himself black and whose reporting dealt with the politically sensitive subject of the Black Panther Party.

57. Justice Douglas argued that, "since all of the balancing was done by those who wrote the Bill of Rights," the government could not limit free speech rights by weighing them against other societal values to arrive at a utilitarian maximum of aggregate welfare. *Id.* at 713.

IV

THE NEWSGATHER'S PRIVILEGE AND ITS JUSTIFICATION

Most advocates of the journalist's privilege have traditionally emphasized the utilitarian benefits of testimonial privileges to society in general and the benefit of increased information flow as a central function of the first amendment in particular. However, a different, nonutilitarian theory suggests that an information gatherer's privilege can play a role in protecting the individual from intrusions upon fundamental interests by society and the state. This nonutilitarian privilege continues to exist even when its breach would make society incrementally better off, and it is consistent with notions of egalitarianism inherent in the first amendment. A nonutilitarian rights theory provides a strong basis for a first amendment based testimonial privilege which protects individuals who engage in research, investigation and information gathering.

Before discussing the nonutilitarian rationale for this specific privilege it is necessary to lay out the nonutilitarian rationale advanced for testimonial privileges in general. It will then be necessary to see if first amendment jurisprudence contains an analogous justification for the information gatherer's privilege.

A. Testimonial Privileges as Protectors of Privacy

Most discussions of testimonial privileges emphasize the privilege's role in protecting some socially beneficial relationship or otherwise enhancing aggregate welfare. An alternative approach, often neglected by many scholars, emphasizes that testimonial privileges enhance individual autonomy by protecting privacy.[58] This view places individual autonomy at the apex of societal priorities. To protect this autonomy, society recognizes that persons have "rights to which all are entitled equally, by virtue of their status as persons."[59] The state may override these rights "only in order to insure equal protection of the same rights in others," and not "for the purpose of maximizing the happiness or welfare of all."[60] This system of equal liberties allows each person "to define and pursue his values free from undesired impingement by others."[61]

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58. *See, e.g.*, Black, *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 48-50 (marital and physician-patient privileges not only promote those relationships for the good of society, but also protect important privacy interests); Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Federal Rules of Evidence*, 62 GEO. L.J. 61, 86 (1973) (testimonial privileges are important protectors of individual privacy).

59. Fried, *Privacy*, 77 YALE L.J. 475, 478 (1968).

60. *Id.*

61. *Id.* at 479.

Privacy is an essential attribute of autonomy because it allows individuals to define their personal identities and relationships with others by exercising control over information about themselves.[62] The fact that the state is shut out of large parts of an individual's life is testimony of liberal democracy's recognition of the primacy of individual welfare over collective goals.[63] Privacy in a liberal democracy allows individuals to develop personal lifestyles and beliefs which they may then implement in free association with others.[64]

Testimonial privileges protect individual privacy by allowing the individual to choose the amount of privileged information which she wishes to disclose before an investigatory body.[65] Privacy cannot always prevail over the state's interest in disclosure since this would render meaningless the individual's duty to testify[66] and would jeopardize the litigation process. However, testimonial privileges exist in part because the individual's interest in privacy often outweighs society's interest in efficient adjudication.[67]

The weight of the privacy interest involved in any given case depends upon the harm which would result to the individual from disclosure. While most disclosures in a courtroom will not harm a witness, some aspects of a person's life are too personal or too incriminating to permit compulsory disclosure. The marital privilege, the physician-patient privilege, and the fifth amendment privilege against self-incrimination all protect such interests.[68] Testimonial privileges protect these overriding privacy interests by providing the individual a right of non-disclosure even though protection might frustrate the achievement of societal goals through the litigation process.

This nonutilitarian, rights-based rationale provides an important justification for testimonial privileges generally. The remaining question is whether first amendment jurisprudence can provide a nonutilitarian, rights-based rationale for an information gatherer's privilege.

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62. *Id.* at 482. Privacy is an essential attribute of autonomy for a number of reasons. It allows an individual to form relationships and to develop individuality free of public disclosure and ridicule and grants a safe channel for the release of emotion. In addition, a person is allowed to develop personal views to full maturity before disclosure. Finally, it permits one to control contacts with others and to develop different relationships based on differing levels of intimacy. Krattenmaker, *supra* note 58, at 85-94.

63. *See* A. Westin, PRIVACY AND FREEDOM 24 (1967).

64. *Id.* at 24-25.

65. Krattenmaker, *supra* note 58, at 89-90.

66. *See supra* text accompanying note 21.

67. *Cf.* Black, *supra* note 58, at 51 (testimonial privileges should be broadened because many privacy interests are more important than the societal interest in efficient litigation).

68. On marital and physician-patient privileges, *see id.* at 48-51. As to the fifth amendment privilege against self-incrimination, *see* Schmerber v. California, 384 U.S. 757, 760-63 (1966) (the privilege against self-incrimination protects the individual's privacy interest in not being compelled to admit his or her own guilt by compelling the state to obtain evidence through its own labors).

B. A First Amendment-Information Gatherer's Privilege as a Protector of Freedom of Expression

As traditional advocates of the journalist's privilege point out, the first amendment "prohibit[s] government from limiting the stock of information from which the members of the public may draw."[69] It plays a "structural role . . . in securing and fostering our republican system of self government"[70] by insuring that public debate is "uninhibited, robust, and wide open," as well as informed.[71] However, the first amendment plays another vital role: protection of freedom of expression for the sake of the individual. The individual's right of free expression has two aspects. It "is justified first of all as the right of an individual purely in his capacity as an individual."[72] This justification begins with the "accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being," and recognizes that the starting point of self-realization is the development of the mind.[73] In developing his own mind and personality, every individual "has the right to form his own beliefs and opinions" and to "express those beliefs and opinions."[74] Freedom of expression is essential to protect freedom of belief, since "expression is an integral part of the development of ideas, of mental exploration and of affirmation of self."[75] Justice Marshall summed up this aspect of the individual's right to free expression when he said:

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and to affront the individual's worth and dignity. Such restraint may be 'the greatest displeasure

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69. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

70. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

71. *Id.* (Brennan, J., concurring) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). This utilitarian, structurally-oriented emphasis on the societal interest in information flow permeates first amendment jurisprudence. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 32 (1978) (information gathering is protected "not for the private benefit of . . . the 'press' but to insure that the citizens are fully informed regarding matters of public interest and importance"); Bellotti, 435 U.S. 765, 777 (1978) (because the value of information to the public does not depend upon the status of the speaker, the first amendment protects corporate as well as individual speech); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 95 (1977) (societal interest in free flow of commercial information protects commercial speech); Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 765 (1976) (same).

72. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

73. *Id.*

74. *Id.*

75. *Id.*

> and indignity to a free and knowing spirit that can be put upon him.'[76]

The second part of this right derives from "the role of the individual in his capacity as a member of society."[77] Although the individual is necessarily subject to the control of the community and the state, "[s]ociety and the state are not ends in themselves; they exist to serve the individual," and "every individual is entitled to equal opportunity to share in common decisions which affect him."[78] As one noted commentator has pointed out,

> From these concepts there follows the right of the individual to access to knowledge; to shape his own views; to communicate his needs, preferences and judgments; in short, to participate in formulating the aims and achievements of his society and his state. To cut off his search for truth, or his expression of it, is thus to elevate society and the state to a despotic command and to reduce the individual to the arbitrary control of others. The individual, in short, owes an obligation to cooperate with his fellow man, but that responsibility carries with it the right to freedom in expressing himself.[79]

Because freedom of belief and expression are fundamental rights of an autonomous individual, the nonutilitarian tradition of first amendment jurisprudence holds that the state cannot abridge them even though their exercise might cause a reduction in aggregate social welfare.[80] This nonutilitarian view of the first amendment is also fundamentally egalitarian. The individual's entitlement to equal concern and respect and an equal role in societal decision making grants her the same right of free speech which every other person has.[81] It is out of respect for this equality that courts have refused to allow use of the first amendment as a basis for granting special prerogatives, such as the traditional journalist's privilege, to some but not to others.[82]

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76. Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring), (quoting J. MILTON, AEROPAGITICA 21 (Everyman's ed. 1927) (citations omitted)). *See also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (free speech is indispensable to the development of free men's and women's faculties).

77. Emerson, *supra* note 72, at 880.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See id. See also,* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 32, at 273-74.

82. This equality is not necessarily inconsistent with the view that the societal interest in information flow might justify the creation of a first amendment testimonial privilege available only to journalists. Courts will not, however, create such an inequality, lest the precedent generated provide the rationale for governmental abridgement of the equal rights of some in the interest of social welfare. This reluctance to allow the societal interest in information flow to justify inequalities grounded in the first amendment appears in many of the Supreme Court's decisions. *See, e.g.,* Pell v. Procunier, 417 U.S. 817, 833-34 (1974) (the

It is axiomatic that the government may not prohibit or regulate the expression of ideas on the basis of content.[83] The first amendment was "designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . "[84] In invalidating a compulsory flag salute statute, the Court said in *West Virginia State Board of Education v. Barnette*[85] that:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[86]

No approach other than the total prohibition of censorship of ideas "would comport with the premise of individual dignity and choice upon which our political system rests."[87]

Just as the government cannot directly abridge freedom of thought and expression, it cannot do so indirectly. This principle has arisen in a number of areas to give life to several rights correlative to freedom of speech. One such right is privacy of association, which the first amendment has protected for over twenty years. The first case to so hold was *NAACP v. Alabama.*[88] In that case, an Alabama law required all foreign corporations to meet the requirements of a qualifying statute before doing business in the state.[89] When the NAACP failed to comply, the state attorney general filed a bill in equity and moved to compel the association to produce full membership lists

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first amendment does not require that the government grant the press special access to information not available to the public generally); Gannett Co. v. De Pasquale, 443 U.S. 368, 397-98 (1979) (Powell, J., concurring) (any constitutional guarantee of media access to pre-trial or trial proceedings grounded in the first amendment applies equally to the press and to the public); Houchins, 438 U.S. 1, 16 (1978) (opinion of Burger, C.J.) (unless the political branches of government decree otherwise, the media have no special right of access to a county jail not accorded to members of the general public).

83. *See, e.g.,* Spence v. Washington, 418 U.S. 405, 411-15 (1974) ("prosecution for the expression of an idea through activity" is prohibited by the first amendment, unless the state has a valid, countervailing interest); Cohen v. California, 403 U.S. 15, 26 (1971) (since the form an idea takes often is as determinative of its content as the message to be conveyed, the first amendment protects the right of an individual to choose the form which his speech will take); Stromberg v. California, 283 U.S. 359, 369-70 (1931) (statute which prohibits the display of a red flag as an expression of opposition to organized government violates first amendment protection of free political expression). Of course, these decisions did not merely further the autonomy values protected by the first amendment. *See infra* text accompanying notes 119 to 123. However, the Court, by protecting the other values at stake, also protected the speakers' interest in personal autonomy.

84. Cohen, 403 U.S. at 24.

85. 319 U.S. 624 (1943).

86. *Id.* at 642.

87. Cohen, 403 U.S. at 24 (citing Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring)).

88. 357 U.S. 449 (1958).

89. *Id.* at 453.

to aid the state in preparing its case.[90] Because it feared vigilante persecution of its members, the NAACP refused to comply with the court's production order and was subsequently adjudged in contempt and fined.[91] The Supreme Court declared that "freedom of association . . . is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[92] The Constitution protects the "inviolability of privacy in group association" because, in many circumstances, free cultural and political association can occur only where state-compelled disclosure is forbidden unless substantially related to the furtherance of a constitutionally permissible end.[93] The court concluded that the compelled disclosure of membership lists by the NAACP in this case did not have a sufficiently essential bearing on Alabama's legitimate interest in corporate regulation.[94]

In *Shelton v. Tucker*,[95] the Supreme Court used overbreadth analysis[96] to strike down a state law which infringed the associational privacy of schoolteachers. Overbreadth analysis was justified on the ground that states may not pursue legitimate ends by means which indiscriminately and unnecessarily stifle the associational privacy protected by the first amendment.[97]

In *Gibson v. Florida Legislative Investigation Committee*,[98] the Supreme Court applied these principles to curtail the investigative power of a legislative body. In that case, the president of the Florida NAACP refused

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90. *Id.*
91. *Id.* at 451.
92. *Id.* at 460.
93. *Id.* at 460-64.
94. *Id.* at 464. *See also* Bates v. City of Little Rock, 361 U.S. 516, 525 (1960) (to justify an abridgement of associational rights, laws compelling disclosure must be "reasonably related" to a legitimate and substantial governmental purpose).
95. 364 U.S. 479 (1960).
96. *Id.* at 488. The Supreme Court uses overbreadth analysis to invalidate laws which "sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964). In Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), the Court summarized the overbreadth approach:

> Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. . . .In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activity may be inhibited by the overly broad reach of the statute. *Id.* at 634 (citations omitted).

The Warren Court resorted to overbreadth analysis frequently. Although the Burger Court has reduced the scope of the doctrine by requiring a showing of "substantial" overbreadth when impermissible legislation affects conduct rather than speech, Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973), overbreadth analysis is still useful for protecting first amendment freedoms.
97. 364 U.S. at 488.
98. 372 U.S. 539 (1963).

to turn over a list of his organization's members to a committee of the Florida legislature which was investigating suspected Communist activities. The committee brought him before a state court, where he was held in contempt and fined.[99] The Supreme Court ruled that, absent a "substantial relation between the information sought" in the investigation and an "overriding and compelling state interest," a state legislature cannot abridge privacy of association by requiring the disclosure of the membership lists of political organizations.[100] The state of Florida made no such showing here.[101]

In his concurring opinion in *Gibson*, Justice Douglas explained the relationship between privacy and freedom of association. Noting that "[j]oining a group is often as vital to freedom of expression as utterance itself,"[102] Justice Douglas analogized the harassment of the NAACP in *Gibson* to the situation faced by a newspaper publisher who, if confronted by "the harassment of hearings, investigations, reports, and subpoenas," might decline to inquire into issues of personal concern and to publish what he thought.[103] Justice Douglas saw the need for a "pervasive right of privacy against government intrusion"[104] in order to protect "the sancity of thought and belief."[105] He concluded that Florida's interest in security could not justify its broad investigation of the NAACP, since: "[T]he State and Federal Governments, by force of the First Amendment, are barred from investigating any person's faith or ideology by summoning him or by summoning officers or members of his society, church or club."[106]

The privacy of association cases rest in part on the fundamental principle that, because the government lacks authority to regulate political belief, it also lacks authority to investigate those beliefs. Furthermore, the govern-

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99. *Id.* at 543.
100. *Id.* at 546.
101. *Id.* at 554-55.
102. *Id.* at 565 (Douglas, J., concurring).
103. *Id.* at 567 (Douglas, J., concurring).
104. *Id.* at 569 (Douglas, J., concurring).
105. *Id.* at 570 (Douglas, J., concurring) (quoting Public Utilities Comm'n v. Pollack, 343 U.S. 451, 467-68 (1952) (Douglas, J., dissenting)). Justice Douglas firmly believed that: "[T]he views a citizen entertains, the beliefs he harbors, the utterances he makes, the ideology he embraces and the people he associates with are no concern of government." *Id.* at 570.
106. *Id.* at 573 (Douglas, J., concurring). Justice Douglas also developed this theme in his concurring opinion in Russell v. United States, 369 U.S. 749 (1962). In voting to overturn the convictions of six persons held in contempt of Congress for refusing to testify about Communist influence in the press, Justice Douglas said:

> The theory of our Free Society is that . . . in a community where men's minds are free, all shades of opinion must be immune from governmental inquiry lest we end with regimentation. . . . Since the editorials written and the news printed and the policies advocated by the press are none of the Government's business, I see no justification for the Government investigating the capacities, leanings, ideology, qualifications, prejudices or politics of those who collect or write the news." *Id.* at 776-77.

ment cannot harass a person for holding political beliefs under the pretext of investigating his associational ties. In short, the government cannot use its investigative powers as a prelude to direct regulation of belief and expression or as an indirect tool to deter those forms of belief and expression which it finds undesirable.

The important link between freedom of belief and privacy of thought has also emerged in fourth amendment search and seizure cases. In *Stanford v. Texas*,[107] local law enforcement officials searched a private library for evidence of the owner's connections with and activities in the Communist Party.[108] Although the officers did not find the evidence they sought, they did cart away about 300 books "by such diverse writers as Karl Marx, Jean Paul Sartre, Theodore Draper, Fidel Castro, Earl Browder, Pope John XXIII, and Mr. Justice Hugo L. Black."[109] The Supreme Court declared this broad use of the state's investigatory power to be unconstitutional. The court recognized that the struggle which gave rise to the concepts embodied in the fourth amendment "is largely a history of struggle between the Crown and the press," in which printers and publishers opposed the government's use of "roving commissions to search where they pleased in order to suppress and destroy the literature of dissent."[110] It declared that the Bill of Rights, "fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression,"[111] was established to protect "conscience and human dignity and freedom of expression."[112] The court declared the broad, discretionary search in this case to be constitutionally impermissible: [T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain."[113] *Stanford* rests on a recognition of the fact that a person's books

107. 379 U.S. 476 (1965).
108. *Id.* at 477-78.
109. *Id.* at 479-80.
110. *Id.* at 482.
111. *Id.* at 484 (quoting Marcus v. Search Warrant, 367 U.S. 717, 729 (1961)).
112. *Id.* at 485 (quoting Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting)). *See also* United States v. Marti, 421 F.2d 1263, 1268 (2d Cir. 1970) (in obscenity case, warrant must be sufficiently precise to avoid seizure of materials protected by the first amendment).
113. *Id.* at 485. In Zurcher v. Stanford Daily, 436 U.S. 547 (1978), the Palo Alto Police Department obtained a warrant to search the offices of a student newspaper whose staff the police believed had photographed an assault upon nine police officers by student demonstrators. *Id.* at 550-51. The newspaper sued, alleging that the fourth and first amendments required that, in the absence of probable cause to believe that evidence will be destroyed, the courts should require the police to obtain subpoenas before gaining access to evidence in the possession of the press or other nonculpable third parties. *Id.* at 552.

The Supreme Court rejected the claims, but did indicate that judges should "apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search." *Id.* at 565. As Justice Powell pointed out in his concurring opinion, courts should issue warrants only after they properly weight the "independent

often are the tools with which she formulates her beliefs. Since the government cannot regulate beliefs directly, it cannot use the warrant power to attack political belief and expression indirectly.[114]

The principle articulated by the assocational privacy case and *Stanford* applies by analogy to governmental efforts to subpoena and interrogate individuals in order to further law enforcement and criminal justice. Information gathering involves important first amendment autonomy values. When an individual actively seeks out information with which to verify or reformulate his beliefs, he necessarily establishes ties with the sources of that information, which disclosure might disrupt. If so, disclosure will cut off the individual's access to information, depriving him of the raw materials of creative thought. Furthermore, as Justice Douglas pointed out in *Branzburg*,[115] an individual hauled before a court to testify about his confidential notes or sources must, through the very act of revelation, disclose his political beliefs, since they are what gave rise to his activities and contacts in the first place. An individual in this position loses his ability to express his beliefs when and how he sees fit.[116]

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values protected by the First Amendment." *Id.* at 570 (Powell, J., concurring). *See also* Heller v. New York, 413 U.S. 483, 489 (1973) (in issuing a warrant to search an establishment for obscene materials, a court should take particular care to insure that the materials in fact are obscene); Marcus v. Search Warrant, 367 U.S. 717, 732 (1961) (same).

As in *Branzburg*, the Court in *Zurcher* focused upon the contribution of the press to societal information flow and the likely impact which use of a warrant would have upon that flow in assessing the *Stanford Daily's* first amendment claims. In light of *Branzburg*, it is not surprising that the court found the impact of searching a news office upon information flow to be negligible and easily outweighed by the societal interest in law enforcement. *See* Zurcher, 436 U.S. 547, 566 (1978).

114. Herbert v. Lando, 441 U.S. 153 (1979), is consistent with this thesis. In that case, the Supreme Court rejected the claim that editors of a newspaper have an absolute constitutional privilege not to disclose their editorial decision making processes to libel plaintiffs attempting to establish claims under the malice standards of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and its progeny. Herbert, 441 U.S. 153, 158, 170-71. Nevertheless, a limited privilege does exist. As the court stated:

> [T]he editorial discussions or exchanges (do) have . . . constitutional protection from casual inquiry. There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed. *Id.* at 174.

This limitation protects not only "the important public interest in a free flow of news and commentary," *id.* at 179-80 (Powell, J., concurring), but is also consistent with the view that the first amendment provides a right of privacy for the editorial process which need not yield except to more fundamental rights, such as that of a libel plaintiff to have her injuries redressed.

115. *See supra* text accompanying notes 53-56.

116. *See* Krattenmaker, *supra* note 58 at 86. ("What makes privacy . . . a valuable right is the fact that it is voluntary and that it includes a secured ability to control by oneself how much information about oneself is disseminated and the scope and circumstances of its communication.") Krattenmaker points out that privacy also enhances the quality of information flowing to the public by allowing individuals to develop and improve their views before disclosing them. *Id.* at 90.

Compulsory disclosure may dry up the information upon which political thought depends, or it may simply expose that thought prematurely to the glare of adverse publicity. In either case, unrestrained governmental inquiry into political beliefs in the guise of criminal investigation deters individuals from expressing or believing the things which government finds objectionable. The individual loses her ability to think freely, and, unlike those not subject to investigation, loses her right, as a member of society, to formulate and express her views as to how she should be governed. The failure to accord an individual a first amendment information gatherer's privilege, which recognizes her right to seek out information and formulate her views in private, deprives her of an essential attribute of humanity—the right of free thought.

A nonutilitarian first amendment information gatherer's privilege would have a number of characteristics. Like the traditional journalist's privilege, it would apply only to those who actively seek out information, and not to passive bystanders who happen to observe an event. Passive observers are not in the process of actively attempting to verify or formulate their beliefs. The passive observer, unlike the active information seeker, would not be deterred from developing and expressing beliefs if forced to disclose what he observed.

Unlike the traditional journalist's privilege, the nonutilitarian information gatherer's privilege would be available to all information gatherers, regardless of their professional status, since the privilege exists to protect the right of free thought and expression held by all. The privilege would be available regardless of whether the data obtained through its use were published, conveyed orally to others, or kept secret, because the privilege protects individual thought processes and not the flow of information to the public.[117] This theory for the information gatherer's privilege suffers neither from the weakness of a utilitarian rationale nor from any fundamental inconsistency with the egalitarianism inherent in the first amendment.

V.

THE INSTITUTIONAL ROLES OF THE COURTS, LEGISLATURES AND EXECUTIVES IN IMPLEMENTING A RIGHTS-BASED INFORMATION GATHERER'S PRIVILEGE

In spite of arguments advanced by Justice Douglas and others, the Supreme Court has not emphasized the rights-based view of first amendment jurisprudence, and no court has been willing to recognize a rights-based information gatherer's privilege. This note will explore the institutional reasons for this reluctance and suggest a statutory scheme for the privilege's enactment.

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117. It is for this reason that the state cannot limit freedom of expression simply to increase aggregate welfare by giving preference to an interest which outweighs the value of information flow to the public. *See supra* text accompanying notes 72-80.

A. Institutional Restraints Upon the Courts

The Supreme Court's failure to recognize an information gatherer's privilege probably stems from the fact that since the Warren era, the Court has been more concerned with the protection of first amendment freedoms as a means of improving the democratic process than as a means of protecting individual autonomy and dignity.[118] In addition, due to the nature of criminal law enforcement, the Supreme Court has preferred to give other institutions the task of defining the precise boundaries of the state's compelling interest in this area.

Judicial treatment of the journalist's privilege as a mechanism to insure public access to information, rather than as a protection for individual rights, reflects the Supreme Court's view of its institutional role since the Warren era. Some commentators have recognized that the federal judiciary in America is isolated from the democratic process by which popular government articulates and implements the fundamental values which the people read into the Constitution,[119] and that appointed judges can never interpret the Constitution without reading their own values into it.[120] As a result, these scholars have suggested that the Warren Court employed judicial review as a tool for broadening access to the processes of representative government rather than for enforcing particular substantive values.[121] Under this analysis, courts do not enforce constitutional rights primarily in order to enhance the dignity and autonomy of the individual. They leave that task to the legislature.[122] Rather, courts review legislation strictly and enforce rights scrupulously when necessary to maximize the effectiveness of the representative process. In this way, courts render their role consistent with democratic theory while leaving to the legislature the primary responsibility for respecting and protecting individual rights.[123]

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118. *See supra* text accompanying notes 33-52.

119. *E.g.*, J. ELY, DEMOCRACY AND DISTRUST 4-5 (1980).

120. While some constitutional provisions are quite specific, others "are difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it." *Id.* at 14.

121. *Id.* at 74-75.

122. *See, e.g.*, Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893) (in many cases the legislature first interprets a constitutional provision, and its judgment is ordinarily entitled to great respect from the courts).

123. The Supreme Court first established for itself the task of policing the representative process in United States v. Carolene Products Co., 304 U.S. 144 (1938). In the famous *Carolene Products* footnote, the court said:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . .

When determining whether to recognize the existence of a constitutional privilege for journalists and information gatherers, the courts are not likely, therefore, to rely on the rights-based arguments of Justice Douglas and other advocates of the nonutilitarian strain of first amendment jurisprudence. As might be expected, courts prefer to couch their justification for a journalist's privilege in terms which refer to the crucial role which the first amendment plays in enhancing representative government. As *Le Grand*, *Branzburg* and other cases dealing with the journalist's privilege suggest, courts will enforce the privilege because it contributes to the effectiveness of the representative process by increasing information flow to the public.[124]

A second barrier to judicial recognition of a rights-based information gatherer's privilege is the judiciary's reluctance to interfere with the process of legislative and executive determination of when the state interest in criminal law enforcement is sufficiently compelling to justify limiting first amendment rights. This barrier derives from the inherent limitations on first amendment rights themselves. However broad those rights might be, they cannot interfere with the state's obligation to protect all rights and interests through the maintenance of public order.[125] The first amendment must yield to the state's compelling interest in criminal law enforcement. The legislature, through the enactment of substantive law, and the prosecutor, through exercise of discretion in the enforcement of the statutes, determine the scope of this interest. In its role as enactor of the criminal code, the legislature balances interests of varying kind and weight when defining the law's content.[126] Through the political process, all elements of society can, in theory, participate in the weighing of these competing values. This pro-

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> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. *Id.* at 152-53, n.4 (citations omitted).

In future decisions the Court relied upon this note in outlining its institutional role as protector of the integrity of the political process. *See* ELY, *supra* note 119, at 76-77.

124. *See supra* text accompanying notes 4-57. For a discussion of the representation-reinforcing justification for strict judicial scrutiny of legislation which abridges first amendment rights of free speech and press see ELY, *supra* note 119, at 105-16.

125. *Cf.* RAWLS, *supra* note 32, at 212-13 (notions of individual rights based on a social contract theory require that liberty of conscience be limited only when necessary to insure that the public order, upon which all rights and interests depend, is enforced).

126. The requirement of *mens rea* provides an excellent example of how this balancing process operates in the development of substantive criminal law. The criminal law protects the public interest in order through the imposition of sanctions to deter or reform those who would violate the rights or policies which the law seeks to protect. Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1105 (1952). Although punishment of the morally nonculpable might serve the utilitarian end of deterrence, H. HART, PUNISHMENT AND RESPONSIBILITY 19 (1968), respect for human dignity requires that, in most cases, only those persons who are morally at fault should be punished for their acts. The legislatures must balance these and other values in defining the elements of any given criminal offense.

cess works reasonably well to produce just results as long as it operates within due process constraints.[127]

Given the uncertain nature of the process of defining the content of criminal laws, courts are not in a position to weigh the value of various criminal laws against constitutional values. Although homicide laws are essential to maintain social order, the enforcement of parking regulations on busy streets also contributes to public safety. The courts will not distinguish between the two. Moreover, the courts cannot assess the importance which any single prosecution might have in the deterrence of criminal behavior. Through enactment of statutory privileges and other restrictions on the police power, the legislature can assist in making these distinctions. However, statutory classifications are broad and cannot reflect the subtle interest-balancing which must occur. For example, laws which no longer reflect public morality no longer merit enforcement. Nor is it possible to prosecute all crimes committed. Given the limited public resources dedicated to law enforcement, the state must necessarily concentrate on those crimes which constitute the greatest threat to public safety and on prosecution which will most effectively deter illegal conduct. The task of weighing these factors must ultimately rest with the prosecutor who, of necessity, has been given considerable discretion.[128]

The prosecutor, like the legislator or judge, is sworn to uphold the Constitution. As an officer in charge of law enforcement, the prosecutor should weigh the relative importance of various criminal laws and the value of criminal prosecution against the competing constitutional values which a given prosecution would abridge. Therefore, a prosecutor should consider the information gatherer's privilege in determining prosecution strategy. When the defendant can be prosecuted without violating the privilege, the prosecutor should do so. When the defendant cannot be prosecuted without compelling disclosure of privilege notes or sources, the prosecutor should assess the need for the prosecution. If the prosecution is not needed to enforce the law in question, or if the law protects interests less compelling than the privacy interest of the information gatherer witness, the prosecutor should decline to prosecute. However, if the prosecution of the defendant is essential to protect a substantial interest in public safety or order which outweighs the privacy interest of the witness, the prosecutor should pursue prosecution of the defendant. Since the state's interest in such cases is sufficiently compelling, the information gatherer's constitutionally protected privilege should not preclude prosecution.

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127. *Cf.* RAWLS, *supra* note 32, at 201 (the legislative process is a system of quasi-pure procedural justice, in which a number of outcomes are within certain limits, equally just).

128. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533 (1970).

The state's decision that prosecution is necessary to further its compelling interest in law enforcement triggers the defendant's sixth amendment[129] and due process rights.[130] The constitution protects the defendant's right to have the state produce all available material evidence germane to his defense.[131]

In the area of due process, the Supreme Court has defined as material any evidence which "could . . . in any reasonable likelihood have affected the judgment of the jury."[132] This standard also applies in the sixth amendment area.[133] Evidence is material if it is *likely* to affect the determination of guilt or innocence.[134] No single rule can encompass this standard of materiality. Judges must weigh the importance of the issue to which the evidence relates, the extent to which the issue is in dispute, the number of other witnesses who have testified on the issue, and the credibility of the

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129. The sixth amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI.

130. The fifth amendment provides in pertinent part: "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The fourteenth amendment provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Sixth amendment and due process rights, in theory, require the breaching of a testimonial privilege only after the state decides as a matter of policy that the prosecution serves interests more fundamental than those served by the privilege. *In re* Farber, 78 N.J. 259, 394 A.2d 331, *cert. denied*, 439 U.S. 997 (1978), the New Jersey Supreme Court declared the state's statutory journalist's privilege to be an unconstitutional abridgement of the criminal defendant's sixth amendment rights. *Id.* at 272-74, 394 A.2d at 336-37. However, as commentators have pointed out, the court had the alternative, equally acceptable from a constitutional perspective, of dismissing the case or declaring a mistrial, thereby protecting the defendant's rights and the integrity of the testimonial privilege. *See, e.g.*, Hill, *Testimonial Privileges and Fair Trial*, 80 COLUM. L. REV. 1173, 1174-75 (1980) (when a defendant must be given relief from the prejudicial operation of a journalist's privilege, the court may dismiss the case against him or strike the testimony of the un-cross-examined adverse witness); Comment, *The Fallacy of* Farber*: Failure to Recognize The Constitutional Newsman's Privilege in Criminal Cases*, 70 J. CRIM. L. & CRIMINOLOGY 299, 335 (1979) (when the journalist's privilege and sixth amendment rights conflict, the appropriate remedy is striking of unconfronted adverse testimony or dismissal of the prosecution); Comment, *The First Amendment Newsman's Privilege: From* Branzburg *to* Farber, 10 SETON HALL L. REV. 333, 368 (1979) (same).

131. Availability is constitutionally defined. In the context of the confrontation clause, the Court has stated that a witness is constitutionally unavailable for purposes of confrontation if the state makes a "good faith effort" to produce him for cross-examination and cannot do so. *See* Barber v. Page, 390 U.S. 719, 724-25 (1968). Commentators have suggested that this general standard of availability also applies in the area of compulsory process to define the effort the state must make to produce witnesses on behalf of the defendant. *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 595 (1978).

132. Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959) (ellipses in original)).

133. *See* Westen, *Compulsory Process II*, 74 MICH. L. REV. 191, 221-23 (1975).

134. *See id.* at 217-22 for a discussion of the development of a standard of materiality applicable in the area of compulsory process.

excluded evidence in relation to the evidence already presented.[135] A court can only approach these problems on a case by case basis.

The Supreme Court has suggested on several occasions that testimonial privileges cannot prevent the production of otherwise available, material evidence for the defendant.[136] For example, in *Davis v. Alaska*,[137] the Supreme Court held that a privilege statute which denies a defendant the opportunity to cross-examine a key prosecution witness violates his confrontation rights. In *Davis*, the defendant wished to use a confidential juvenile record to show that the witness was on probation and had testified out of fear of police suspicion or because of police threats to revoke probation. The lower court had allowed the confidentiality statute to stand, suggesting that the state of Alaska had no obligation in this case to choose between the state's interest in protecting juvenile offender anonymity and the defendant's right to meaningful confrontation with adverse witnesses.[138] The Supreme Court reversed the defendant's conviction. The Court determined that access to the probation record was crucial to the defendant's theory of bias[139] and concluded that the defendant's right of confrontation was "paramount" to the state's interest in protecting the juvenile offender through nondisclosure of the probation record.[140] In sum, the state could not, "consistent with the right of confrontation," require the defendant "to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records."[141]

Although some courts have limited the *Davis* principle to cases in which the defendant seeks evidence to permit adequate cross-examination in order to establish bias,[142] others have recognized that any testimonial privilege which prevents a defendant from introducing material evidence on his own behalf abridges his sixth amendment and due process rights.[143] A state

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135. *Id.* at 225-26.

136. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 711-13 (1974) (executive privilege must yield to trial court's need for material evidence in a criminal prosecution); Davis v. Alaska, 415 U.S. 308, 320 (1974) (where cross-examination of juvenile who is key prosecution witness may provide evidence of bias helpful for defense, state statute keeping juvenile probation records confidential must yield to defendant's right to confront adverse witnesses); Roviaro v. United States, 353 U.S. 53, 60-61 (1957) (where anonymous government informer is key prosecution witness, the state must either reveal the witness' identity so the defendant may confront him, or it must forego the prosecution).

137. 415 U.S. 308 (1974).

138. *Id.* at 314.

139. *Id.* at 317-18.

140. *Id.* at 319.

141. *Id.* at 320.

142. *See, e.g.*, State v. Farrow, 116 N.H. 731, 733, 366 A.2d 1177, 1179 (1976).

143. *See, e.g.*, Salazar v. State, 559 P.2d 66, 78-79 (Alaska 1976) (defendant's constitutional right to cross-examine a key prosecution witness outweighs a marital privilege claim; State v. Roma, 140 N.J. Super. 582, 592, 357 A.2d 45, 51 (Super. Ct. Law Div.), *aff'd on reargument*, 143 N.J. Super. 504, 363 A.2d 923 (Super. Ct. Law Div. 1976) (defendant's right to cross-examine a key prosecution witness outweighs a marriage counselor's privilege claim); People v. Price, 100 Misc.2d 372, 387-88, 419 N.Y.S.2d 415, 426 (1979) (statute

must decide, when it creates a testimonial privilege, whether it wishes to limit the privilege's application so that criminal defendants can introduce material evidence through cross-examination and compulsory process. If it chooses not to limit the testimonial privilege, then the sixth amendment requires the prosecution to strike the portion of its case to which the information relates, or if the information is indispensible to rebuttal or to an affirmative defense, to forego the prosecution.[144] The state must make the choice even if the privilege safeguards fundamental constitutionally protected values.[145] In deciding whether to limit the application of the information gatherer's privilege, a state must decide whether its interest in criminal law enforcement is ever sufficiently compelling to require limitation of the privilege in order to allow either the prosecution or the defense to obtain evidence necessary to the just disposition of criminal litigation.

The foregoing analysis clarifies the institutional significance of *Branzburg*. The Supreme Court believes that the legislature and the prosecution, working in cooperation, are in the best position to decide when the state's interest in enforcing the criminal law is sufficiently compelling to limit a first amendment testimonial privilege. The courts leave the task of defining the privilege's scope to the political branches rather than create inflexible general rules which might impermissibly limit the state's ability to enforce its criminal laws.[146]

In view of the judiciary's limited institutional role, the legislature must take the initiative in protecting the constitutional right at stake.[147] The

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protecting confidentiality of probation intake records must yield when defendant seeks evidence determinative of guilt or innocence). The case law dealing with rape shield legislation comports with this view. These statutes are constitutional only because evidence of a woman's prior sexual conduct is usually irrelevant to the question of whether the defendant raped her. Therefore, exclusion of such evidence violates no constitutional rights of the defendant. State v. Green, 260 S.E.2d 257, 260-64 (W. Va. 1979) and cases cited therein.

144. *See* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 173-77 (1974) (certain privileges cannot be modified to accommodate compulsory process without defeating their purpose).

145. United States v. Nixon, 418 U.S. 683, 711-13 (1974) (constitutionally-mandated executive privilege must yield to need for evidence in a criminal trial).

146. *See supra* text accompanying notes 57-58.

147. The notion that a legislature should, as a coequal branch of government, participate in the protection of constitutional rights and the enforcement of constitutional duties is not new. For broad discussion of the legislative role in protecting these rights, *see generally*, Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Thayer *supra* note 121. *See* Edelstein & LoBue, *Journalist's Privilege and the Criminal Defendant*, 47 FORDHAM L. REV. 913, 921-28 (1979), in which the authors argue that the judicial reluctance to recognize the existence of the traditional journalist's privilege is rooted in the institutional inability of the judiciary to assess the need for and administer such a privilege, and that the legislature should therefore take the initiative in enforcing this constitutional requirement.

As Justice White pointed out in *Branzburg*, state courts can respond to the Supreme Court's unwillingness to create a journalist's privilege "in their own way" by "construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." *Branzburg*, 408 U.S. at 706. Furthermore, like the Supreme Court, these courts may

remaining question is what kind of statutory enactment can protect every individual's right to research and gather information free of arbitrary government interference and, at the same time, protect the state's interest in criminal law enforcement?

B. The Information Gatherer's Privilege: A Legislative Proposal

Any statutory information gatherer's privilege must successfully weigh the competing interests and rights at stake: the witness' first amendment right to privacy of association and thought, the state's interest in criminal law enforcement, and, once the prosecution has shown the state's interest to be compelling, the defendant's sixth amendment and due process rights. The state has discretion in allocating institutional responsibility.[148] The proposal discussed herein provides a minimum level of constitutional protection for information gatherers.

The analysis already presented suggests the outlines of a statute which would represent a legislative understanding of the requirements of the first amendment. Unlike the judiciary, which limits its strict scrutiny to those cases in which violation of the first amendment endangers the functioning of the representative process,[149] the legislature can and should recognize that

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perceive their power as resting on a tradition grounded in the need to protect the rights of autonomous individuals rather than merely to protect the societal interest in an informed citizenry. They therefore might provide judicial enforcement for a rights-based privilege. Indeed, some commentators believe that the state courts should have the power to enforce federal constitutional rights such as free speech to their full extent when institutional limitations prevent the Supreme Court from doing so. *See generally*, Sager, *supra*, at 1242-1263 (discussion of the stated thesis).

148. If the legislature concludes that no interest in criminal law enforcement is sufficiently compelling to limit the information gatherer's privilege, it can enact an absolute privilege applicable to all information gatherers. For example, to protect authors and journalists, the revisions to the New York shield law extend the privilege to anyone "employed or otherwise associated with any . . . professional medium of communicating news or information to the public" and prohibits courts from holding these persons in comtempt for refusing to disclose confidential information gathered in the course of information gathering, "notwithstanding that the material or identity of a source of such material or related material . . . is or is not highly relevant to a particular inquiry of government . . . ." 1981 N.Y. LAWS Ch. 468 § 2, *amending* N.Y. CIV. RIGHTS LAW § 79h (McKinney 1976 & Supp. 1981-1982).

Alternatively, the legislature might require a showing in court that the state's interest in criminal law enforcement outweighs the first amendment rights at stake. Though its statute is applicable only to professional journalists, the state of New Jersey has adopted this approach since the *Farber* decision. *See* N.J. STAT. ANN. § 2a:84A-21.3 (West Supp. 1981-1982).

149. *See supra* text accompanying notes 125-30. Thirteen states provide an absolute testimonial privilege for professional journalists. *See*: ALA. CODE § 12-21-142 (1975); ARIZ. REV. STAT. ANN. § 12-2237 (West 1956); CAL. EVID. CODE § 1070 (West Supp. 1981); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1980); KY. REV. STAT. § 421.100 (1970); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1980); MICH. COMP. LAWS ANN. § 767.5a (West 1968); MONT. CODE ANN. § 26-1-901 to 903 (1981); NEB. REV. STAT. §§ 20-144 to -147 (1977); NEV. REV. STAT. § 49.275 (1979); N.Y. CIV. RIGHTS LAW § 79h (McKinney 1976 & Supp. 1981-

the first amendment protects the privacy interests of all citizens. Unlike the existing journalist's privilege statutes,[150] a comprehensive information gatherer's privilege should protect the confidential notes and sources of all individuals engaged in information gathering, regardless of professional status.[151] However, such a statute should provide only a qualified privilege. Since the first amendment was never intended to interfere with the state's compelling interest in criminal law enforcement,[152] the statute should declare than an information gatherer's notes and sources will remain confidential only if they are not essential to the just disposition of litigation.

When a potential conflict arises, the court might administer the privilege as follows. Initially, the individual called to testify must establish that he may assert the privilege. He must demonstrate that he is an information gatherer by showing that, at the time he obtained the evidence sought, he was engaged in gathering information either for publication or for his personal use.[153] Then he must prove that application of the privilege in this case would further such purposes. He may do this by showing that he actively sought the information out. He must further show that he received it pursuant to an agreement to keep the information or its source confidential. Alternatively, if the information or source is not confidential he must demonstrate that disclosure to the court would substantially and detrimentally interfere with his ability to formulate and express his ideas by prematurely exposing them to public scrutiny. If the witness fails to meet this burden, the inquiry should stop and the court should order the evidence produced.

If the witness does establish his entitlement to the privilege, the court must next ascertain the interests of the defendant. The defendant is entitled to the production of the evidence if it is helpful to him and there is a

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1982); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Page 1954 & Supp. 1981); 42 PA. CONS. STAT. ANN. § 5942 (Purdon Supp. 1981-1982). An additional thirteen states provide a limited privilege to professional journalists. *See* ALASKA STAT. §§ 09.25.150 to .220 (1973); ARK. STAT. ANN. § 43-917 (1964); DEL. CODE ANN. tit. 10, §§ 4320-26 (1974); ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1981-1982) (Act of Sept. 23, 1971, P.A. 77-1623, §§ 1-9); LA. REV. STAT. ANN. §§ 45:1451-54 (West Supp. 1982); MINN. STAT. ANN. §§ 595.021-.024 (West Supp. 1981); N.J. STAT. ANN. §§ 2A:84A-21 to -21.13 (West Supp. 1981-1982); N.M. STAT. ANN. § 38-6-7 (Supp. 1981); N.D. CENT. CODE § 31-01-06.2 (1976); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. §§ 44.510-.540 (1979); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (Supp. 1981); TENN. CODE ANN. § 24-1-208 (1980).

151. No state currently provides protection for the non-journalist, except New York, which protects professional authors.

152. *See supra* text accompanying note 125-26.

153. While the use of privileged information for publication is generally considered essential for the assertion of the traditional journalist's privilege, publication is not relevant to the purposes of the information gatherer's privilege advocated here: protection of freedom of belief and inquiry.

reasonable likelihood that, when considered in light of other evidence, it will affect the outcome of the case.[154] If the privileged evidence does not meet this standard of materiality, the defendant's sixth amendment rights do not come into play, and the case may go forward without requiring production of the privileged evidence.[155] If the defendant does make the proper showing, his sixth amendment and due process rights will receive protection either through production of the evidence, dismissal of the prosecution or another appropriate remedy. At this point, too, the prosecution's interest becomes synonymous with the defendant's, since, in order to continue the prosecution, the evidence must be produced. Although the prosecutor may have the case dismissed if he wishes, he might prefer to allow it to continue in the hope that the jury will reach a guilty verdict in spite of the new evidence. Therefore, once the defendant shows that the evidence is material, the focus of the court's inquiry should shift to the prosecution.

In order to justify overriding the privilege, the prosecutor must demonstrate that the state has made "a good faith effort"[156] to produce the evidence sought or substantially similar evidence from alternative, unprivileged sources. This is the constitutional standard for availability in the confrontation and compulsory process contexts, and it should govern in the context of the information gatherer's alternate privilege to define availability from sources. This burden to make a good faith effort to seek out evidence on behalf of the defendant neither overtaxes the state's resources[157] nor unfairly prejudices the interests of the witness and defendant. Moreover, this burden forces the prosecution to demonstrate a substantial relation between the state's legitimate objective of enforcing the criminal law in a manner consistent with the defendant's constitutional rights and the means it seeks to employ.[158] If the prosecution fails to meet this burden, the privilege should remain intact, and the court should require the state to

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154. The prosecution should have to meet the same standards of materiality discussed here in relation to the defendant when it seeks to override a privilege claim asserted by a witness either before the grand jury or in trial, since the witness' interest in nondisclosure is of the same weight in both instances.

155. *See* State v. Boiardo, 83 N.J. 350, 359-60, 416 A.2d 793, 798 (1980). Defendant in *Boiardo* failed to demonstrate a need for the evidence withheld by failing to show that the information was not available from less intrusive sources. *Id.*

156. *Cf.* Barber v. Page, 390 U.S. 719, 724-25 (1968) (a witness is not "unavailable" for confrontation unless authorities have made a good faith effort to obtain his presence at trial). The standard set by *Barber* in the confrontation clause area is, by analogy, applicable to the compulsory process clause. *See* Westen, *supra* note 131, at 588-89.

157. That the "good faith effort" standard does not overtax the resources of the state is especially true in light of the standards dilution in Ohio v. Roberts, 448 U.S. 56, 75-76 (1980). The Court in *Roberts* excused the prosecution's failure to search for an "unavailable" witness where it appeared that such efforts would prove fruitless, in spite of the Court's admonition in *Barber* that "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." Barber, 390 U.S. at 724.

158. This is the standard laid down in the associational privacy cases. *See, e.g., Gibson*, 372 U.S at 546 (1963).

produce the evidence from alternative sources. If the state has made a good faith effort and is still unable to produce the evidence, the court should override the privilege and require the witness to produce the evidence. Production of the evidence at this time is an appropriate exercise of judicial deference to the prosecutor.

The next step is to determine whether the state's interest is sufficiently compelling to require limitation of the privilege. This can be accomplished only by weighing the need for the particular criminal prosecution against the value of the privilege, a task which the legislature is institutionally capable of doing only to a limited extent,[159] and, as *Branzburg* suggests, a task the courts are unwilling to assume for institutional reasons.[160] The only arm of government in a position to decide which laws outweigh the first amendment right protected by the information gatherer's privilege, and which prosecutions are necessary to enforce these laws, is the prosecution.

To minimize unnecessary disclosure of privileged information, the court should use an *in camera* review proceeding. Once the witness asserts her claim to the privilege, the court should hold a due process hearing at which the witness can demonstrate her entitlement[161] and the defendant can make a preliminary showing of materiality.[162] The judge should then hold an *in camera* hearing in the presence of the representatives of the prosecution, the defendant, and the witness.[163] At this hearing, the judge should examine the privileged material and compel the disclosure only of that evidence which is essential to the disposition of the case, returning the rest to its original privileged status.[164] This statutory framework should provide

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159. *See supra* text accompanying note 128.

160. *See supra* text accompanying notes 125-28. *See also* Westen, *Reflections on Alfred Hill's "Testimonial Privilege and Fair Trial,"* 14 U. MICH. J.L. REF. 371, 382-83 (1981) (courts are unwilling to dismiss cases over prosecutor's objections even though prosecutors have greater experience and autonomy in weighing criminal law enforcement against competing values than courts).

161. *In re* Farber, 78 N.J. at 274-76, 394 A.2d at 337-38.

162. *See id.* at 276-77, 394 A.2d at 338.

163. The defendant should have access to the hearing so that, on appeal, she can argue that the evidence is material. The witness should be able to make further showings that disclosure would substantially injure her interests. The prosecutor should have the opportunity either to show that the trial can continue without the evidence because it is not material, or that the evidence is material and unavailable from alternative sources and therefore should be produced at trial. *See* Note, Defendant v. Witness: *Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 977-78 (1978).

164. The sixth amendment requires not merely the production of evidence which is itself material, but also the production of evidence necessary to allow the jury to place the material evidence in its proper context. *See* United States v. Cuthbertson, 511 F. Supp. 375, 379-80 (D.N.J.), *rev'd on other grounds*, 651 F.2d 189 (3d Cir. 1981). When dealing with this problem, a court must exercise its discretion with great care in order to minimize unnecessary disclosure. The *in camera* procedure should be used cautiously, since it has a number of disadvantages. First, the hearing is itself a breach of the privilege and threatens the first amendment values involved. *See, e.g., In re* Farber, 78 N.J. at 288, 394 A.2d at 344-45

the minimum protection necessary for the first amendment interest of the professional and nonprofessional information gatherer, while meeting the criminal justice system's need for material evidence.

VI

CONCLUSION

For sound substantive and institutional reasons, the courts have given the traditional journalist's privilege a less than enthusiastic reception. However, since society's utilitarian interest in increased information flow seldom outweighs the compelling state interest in criminal law enforcement, the courts' fixation on a utilitarian balance has left important first amendment privacy rights without protection. Moreover, the availability of the privilege only to professional journalists runs contrary to the egalitarianism inherent in the first amendment. The refusal of the courts to endorse the non-utilitarian justification suggested by Justice Douglas in *Branzburg* leaves to the legislatures the task of protecting every person's first amendment right to keep confidential the sources and information she uses in formulating and publishing her views. This note has sketched out one such legislative proposal.

GERALD R. LAMPTON

(Pashman, J., dissenting); State v. Boiardo, 82 N.J. 446, 467-69, 414 A.2d 14, 25-26 (decision affirmed after further *in camera* inspection), *aff'd*, 83 N.J. 350, 416 A.2d 793 (1980). Second, the hearing threatens public access to the trial, which the first and sixth amendments guarantee "absent an overriding interest articulated in findings" of the court. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (Opinion of Burger, C.J.). Because judicial decisions should be made in public, and because the outcome of a trial often depends upon the admissibility of evidence, an *in camera* hearing to decide these issues often strikes at the heart of the public trial guarantee. Third, the procedure is often unnecessary, since courts can use circumstantial evidence in some cases to determine the materiality of privileged information. *See* Boiardo, 83 N.J. at 359, 416 A.2d at 797.