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Comment

Piercing The Shield: Reporter Privilege in Minnesota Following *State v. Turner*

*Nancy V. Mate**

On October 11, 1995, a St. Paul Pioneer Press photographer accompanied two city police officers on their night rounds, hoping to get pictures to illustrate the newspaper's special series on local crime.¹ One of the pictures the photographer took that night appeared later on the front page of the newspaper.² Others, the ones not selected for publication, ended up nine months later as the basis of a state supreme court decision that significantly altered the fundamental relationship that had existed for the past quarter of a century between the media and the courts in the state of Minnesota.

The events that occurred that autumn night during the police ride-along appeared routine. The officers arrested a man for possession of what they believed was crack cocaine and later charged him with a violation of the Controlled Substance Law.³ The man's defense attorney contested the arrest at a preliminary hearing, claiming his client's Fourth Amendment rights were violated because the officers lacked probable cause to stop his client.⁴ When the attorney discovered that a newspaper photographer had been present at the time of the arrest, he subpoenaed the photographer to appear at the hearing and produce all photographs, both published and unpublished, taken at the scene of the arrest.⁵ The subpoena was later broadened to include all notes and photographs gathered by the newspaper for the entire series that might relate to the

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1. See *State v. Turner*, 550 N.W.2d 622, 624 (Minn. 1996).
2. See ST. PAUL PIONEER PRESS, Oct. 15, 1995, at 1.
3. See *Turner*, 550 N.W.2d at 624.
4. See *id.*
5. See *id.* at 624-25.

particular officers involved in the arrest.⁶ The newspaper responded by filing a motion to quash, based on reporter privilege under the First Amendment, the state constitution, and the Minnesota Shield Law.⁷

At issue was the conflict between the court's right to the best evidence and a reporter's qualified privilege to ensure the free flow of information to the public and freedom of the press. Whether courts should recognize a constitutional basis for reporter privilege has been the focus of much debate throughout the country over the past quarter century since the U.S. Supreme Court's decision in *Branzburg v. Hayes*,⁸ which held that a reporter could be compelled to testify before a grand jury conducting a criminal investigation. The Minnesota Free Flow of Information Act,⁹ often called the Minnesota Shield Law, was passed by the legislature shortly after the *Branzburg* decision and provided limited statutory protection to the press.¹⁰ But in 1996, *State v. Turner* changed the rules for reporters in Minnesota.

For over twenty years, Minnesota's Shield Law had been regarded as one of the most liberal in the country,¹¹ protecting the press from forced disclosure of confidential information and unpublished, nonconfidential material, such as notes, unused photographs and video, documents and early drafts of stories, in the absence of a threshold showing. The *Turner* court held, however, that the Shield Law provides only very narrow protection for reporters.¹² Furthermore, the court declined to find any greater protection for the press under the First Amendment or the state constitution.¹³ In this abrupt about-face, Minnesota became one of the states with the least protection for the press on either statutory or constitutional grounds.¹⁴

6. See *id.* at 625.

7. See *id.*

8. 408 U.S. 665 (1972).

9. MINN. STAT. §§ 595.021-595.025 (1996).

10. See *infra* note 167 (providing text of law).

11. Interviews with Mark Anfinson, Esq., attorney for The Minnesota Newspaper Association, in Minneapolis, Minn. (Oct. 10, 1997); Lucy Dalglish, Esq., Dorsey & Whitney, former President of the Minnesota Chapter of the Society of Professional Journalists (Oct. 23, 1997); Paul Hannah, Esq., attorney for *St. Paul Pioneer Press*, KTCA Television, KSTP Television, WCCO Television (March 6, 1998) [hereinafter *Interviews*].

12. See *Turner*, 550 N.W.2d at 624.

13. See *id.*

14. See *Interviews*, *supra* note 11 (Mark Anfinson, Lucy Dalglish, Paul

This decision has dramatically broadened the opportunities for both the government and defense attorneys to have access to reporter information and work product.¹⁵ While the immediate impact of *Turner* is unclear, the holding engenders criticism and concern from those who believe the lack of protection will interfere with the free flow of information to the public.[†]

This Comment critically examines the *State v. Turner* decision and its impact on reporter privilege under both the state Shield Law and the First Amendment. Part I traces the development of reporter privilege and the policy considerations be-

Hannah).

15. Hennepin County Attorney Mike Freeman has said he now considers that an "ethical prosecutor has an obligation" to seek nonconfidential media material and testimony from the media. See Michael O. Freeman, *Was Justice Served by Minnesota Daily Actions?*, ST. PAUL PIONEER PRESS, Feb. 6, 1996, at 7A.

† Since this Comment was written, the Minnesota Legislature amended the state Shield Law, incorporating some of the changes recommended *infra* Part III. The amended statute now specifically provides a qualified privilege for reporters who wish to protect unpublished sources and information whether or not the information was obtained in confidence. Parties wishing to compel disclosure must meet the following conditions by clear and convincing evidence:

(1) that there is probable cause to believe that the specific information sought (i) is clearly relevant to a gross misdemeanor or felony, or (ii) is clearly relevant to a misdemeanor so long as the information would not tend to identify the source of the information or the means through which it was obtained, (2) that the information cannot be obtained by any alternative means or remedies less destructive of first amendment rights, and (3) that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice.

MINN. STAT. §§ 595.024 (1998). How effective these changes will be at protecting reporter work product while allowing the shield to be pierced to avoid injustice awaits the outcome of new challenges in the courts.

The statutory change does not, of course, alter the constitutional interpretation of the *Turner* court, as discussed *infra* Part III.A. It also does not address the standards advocated in this paper for in camera review. See Part III.A.4. These issues will continue to arise in Minnesota as well as other states as courts seek to weigh the competing constitutional considerations that arise in a rapidly changing media environment. As this Comment suggests, questions of what constitutes an undue burden on newsgathering need to account for changes away from a focus merely on protecting confidential sources. The increased reliance on media subpoenas by prosecutors and defense attorneys, as well as their vastly enlarged scope, pose additional burdens, such as an intrusion on the editorial process and a loss of perceived neutrality. But the inquiry is not limited to that. As technological changes, such as the Internet, alter traditional definitions of what constitutes a "reporter," or a "publisher," and provide new jurisdictional dilemmas that expand the boundaries of geography and traditional media delivery systems, the debate will become even more complex.

hind the protection. Part II outlines the holding and reasoning of the *Turner* decision. Part III compares the constitutional analysis of *Turner* with other courts' opinions, and examines the statutory interpretation of the Minnesota Shield Law. This Comment argues that *State v. Turner* was wrongly decided, based both on policy considerations and on statutory interpretation. It concludes with a proposal for changes in the Shield Law that would restore greater protection for reporters, while still allowing disclosure when needed to prevent injustice.

I. PROTECTIONS OF THE MEDIA AND THE REPORTER'S PRIVILEGE

A. THE ROLE OF THE MEDIA IN THE UNITED STATES

The framers of the U.S. Constitution held a fundamental conviction that open and free communication was essential to the successful workings of a democracy.¹⁶ Since the electorate was to be responsible for making decisions about the workings of government, voters needed to be informed of the issues and the positions of their representatives, and to participate in discussions about these choices. "A popular Government without popular information, or the means of acquiring it,' wrote James Madison, 'is but a prologue to a Farce or a Tragedy. . . Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.'"¹⁷ As important as town meetings were in colonial days, they were not sufficient to communicate information and ideas between the colonies. The press and other printed treatises filled this void.¹⁸

16. See *Whitney v. California*, 274 U.S. 357, 375-76 (1927) ("Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government."). The First Amendment in the Bill of Rights was designed to protect the freedom of speech, religion, assembly, and the press. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press."). The role of speech in effective democratic governance is but one of the purposes for the First Amendment attributed to the founding fathers. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 785-89 (2d ed. 1988).

17. Sam J. Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 234 (1974) (quoting 9 WRITING OF JAMES MADISON 103 (Hunt ed., 1910) (letter to W.T. Barry, Aug. 4, 1822)).

18. A free press was a means of ensuring free speech. See *id.* ("[T]he first amendment unquestionably contemplates the press as an informational link between the people and their government."); see also *Riley v. City of Chester*,

As the country grew in size and complexity, the role of the press became even more crucial. The words of the Supreme Court in 1931 seem prophetic when considered as they apply today:

[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities.¹⁹

While the press still informs the public about numerous aspects of our daily life, it continues to bear the responsibility of uncovering and reporting governmental corruption and abuse so that an informed public may shape, control, or correct the problems as it chooses.²⁰

B. THE DEVELOPMENT OF PROTECTION FOR THE PRESS

The role of the press as a watchdog of government gave rise to the concern that reporters needed special protections. Historically, the constitutional concerns regarding freedom of the press focused on prior restraint and censorship.²¹ But other types of interference with the press's ability to publish have been scrutinized for their constitutional implications.²² "Undue restraints" on the press can include intrusion into the editorial process, interference in press neutrality, and placing costly and time-consuming requirements that rise to a level of burdensomeness.²³

Early conflicts between the press and government often took the form of threats to jail reporters who refused to name confidential sources in stories critical of the government.²⁴ Confidential sources became important not only in reporting on the government, but also in other stories of public concern where a source feared public exposure.²⁵ Reporters were reluctant to reveal their confidential sources due to concern about a "chilling effect" on future stories that might not get reported if sources no longer trusted reporters' assurances of confidentiality.²⁶ Generally, the courts allowed no testimonial exception for reporters,²⁷ though some commentators note the impact was

612 F.2d 708, 714 (3d Cir. 1979) ("The role of 'an untrammelled press as a vital source of public information', was one of the primary bases for its First Amendment protection.") (citation omitted).

19. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 719-20 (1931).

lessened when courts declined to vigorously enforce their own orders to jail reporters.²⁸

Some states responded to the jailing of reporters by passing laws that excused journalists from compelled disclosure of confidential information in certain circumstances. Maryland became the first state to pass a shield law in 1896, giving limited testimonial privilege to members of the press.²⁹ In response to several well-publicized jailings of reporters who refused to reveal their sources,³⁰ ten other states³¹ adopted shield laws be-

20. As the Supreme Court has noted, the First Amendment served to avoid governmental suppression of its own embarrassing or illegal activities. See *New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) ("The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. . . . [T]he First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be.")

21. See *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958) ("Freedom of the press within the historic meaning of the First Amendment meant primarily freedom from previous restraints upon publication and freedom from censorship.")

22. See *id.* ("[I]n the domain of indispensable First Amendment liberties, it is essential 'not to limit the protection of the right to any particular way of abridging it.' . . . [A]bridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.") (citations omitted).

23. See *infra* Part III.A.2 (discussing restraints on newsgathering).

24. Benjamin Franklin's brother, for example, narrowly escaped being jailed by the state assembly for such an incident. See Vincent Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 229 n.1 (1971) (citing BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 69 (1964)). During the Depression the controversy again surfaced over reporters protecting confidential sources for stories of political corruption and labor unrest. See 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5426, at 715 (1980).

25. Fear of talking publicly with a reporter can arise for a variety of reasons, for example, fear of losing a job, threats to one's family and self, ostracism by fellow-employees, and fear of self-incrimination.

26. See Blasi, *supra* note 24, at 262-64.

27. See 23 WRIGHT & GRAHAM, *supra* note 24, § 5426, at 716 & n.22.

28. See *id.* at 717.

29. The legislation was prompted by the jailing of a *Baltimore Sun* reporter who refused to reveal how he obtained accurate information on the proceedings of a grand jury. See C. THOMAS DIENES ET AL., *NEWSGATHERING AND THE LAW* § 14-1, at 603 (1997).

30. See Duane D. Morse & John W. Zucker, *The Journalist's Privilege, in TESTIMONIAL PRIVILEGES* 407, 424 (Scott N. Stone & Ronald S. Liebman eds., 1983).

31. Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Montana, New Jersey, Ohio, and Pennsylvania.

tween 1933 and 1941 that provided some form of protection to reporters against compelled disclosure.

In 1958, a federal court first recognized a qualified constitutional protection for reporters.³² In a libel case brought by Judy Garland, a newspaper reporter refused to disclose her source, claiming protection under the First Amendment for freedom of the press.³³ The court concluded that the circumstances in this case required disclosure and refused to extend constitutional protection.³⁴ Nevertheless, the court recognized that the First Amendment guaranteed some unspecified level of protection to the press from the burdens of compulsory disclosure.³⁵

This case was significant not only for recognizing a qualified constitutional protection for the press, but also for the early articulation of a balancing test for weighing the competing constitutional values.³⁶ Compelled disclosure would not be justified where the information was of "doubtful relevance or materiality."³⁷ Also, the party seeking disclosure must have first made efforts to get the information from other sources.³⁸

In 1970, the Ninth Circuit in *Caldwell v. United States*³⁹ became the first federal circuit court to extend explicit constitutional protection to the press. Noting there was particular necessity for a free press during times of civil unrest, the court recognized the need for reporters to maintain confidentiality in order to report on unknown and unpopular movements.⁴⁰ This

32. See *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958), cert. denied, 358 U.S. 910.

33. See *id.* at 547.

34. See *id.* at 550-51.

35. See *id.* at 548 ("[W]e accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information entail an abridgment of press freedom by imposing some limitation upon the availability of news. . . . 'Abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.'" (citations omitted)).

36. See *id.* "[F]reedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom." *Id.*

37. *Id.* at 549-50. In the case at hand, the Court found that the reporter's information "went to the heart of the plaintiff's claim." *Id.* at 550. As such, it compelled disclosure.

38. See *id.* at 551.

39. 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

40. See *id.* at 1084-85 ("The need for an untrammelled press takes on special urgency in times of widespread protest and dissent. In such times the

protection, however, was short lived. The Supreme Court reversed the *Caldwell* decision in the seminal case involving reporter protection, *Branzburg v. Hayes*.⁴¹

The *Branzburg* decision combined four cases in which reporters, each who had promised confidentiality to sources in return for information and access, were subpoenaed by grand juries to disclose that information.⁴² The reporters refused to testify, claiming reporter privilege under the First Amendment.⁴³ While acknowledging the importance of First Amendment protection for the press,⁴⁴ Justice White's plurality held that journalists did not have an absolute constitutional privilege to refuse to testify before a grand jury.⁴⁵ Moreover, the government was not required to demonstrate a compelling need in order to require journalists to reveal confidential sources and information if called by a grand jury.⁴⁶ The Court found that the public interest in law enforcement and effective grand jury proceedings outweighed the "uncertain, burden on news gathering" when journalists are compelled to disclose confidential information before a grand jury.⁴⁷

First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy.").

41. 408 U.S. 665 (1972).

42. *See id.* at 667-79.

43. The *Caldwell* case arose out of the investigations of a reporter for *The New York Times*, working in California, who was assigned to cover activities of the Black Panther Party and other black militant organizations. A federal grand jury subpoenaed him to appear to testify and produce all "[n]otes and tape recordings of interviews covering the period from January 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization and the activities of said organization." *Id.* at 675-76 n.12. A second case involved a Massachusetts television reporter who had been allowed to attend a meeting of the Black Panthers on the condition that he not report on anything he saw or heard unless an anticipated police raid occurred. *See id.* at 672. The other two cases arose from the stories of Paul Branzburg, a Kentucky reporter, who wrote an account of two young people he had observed manufacturing hashish from marijuana, and an article about the use of drugs in Frankfort, Kentucky. Branzburg had interviewed several dozen drug users over a period of two weeks to develop his story. *See id.* at 667-69.

44. *See id.* at 681 ("We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.").

45. *See id.* at 708-09.

46. *See id.* at 708.

47. *Id.* at 690-91.

In a frequently quoted concurring opinion, Justice Powell noted the limited nature of the Court's opinion, suggesting the existence of a qualified reporter privilege under different fact scenarios.⁴⁸ He noted that the grand jury's investigation must be conducted "in good faith," the information sought must fill a "legitimate need of law enforcement," and not have a "remote and tenuous" connection to the investigation.⁴⁹ He asserted that privilege claims should be determined on a case-by-case basis, balancing conflicting interests and utilizing traditional methods of adjudication.⁵⁰

Despite finding no absolute reporter privilege against compelled testimony before a grand jury in *Branzburg*, the opinions of both Justices White and Powell acknowledged constitutional rights of the press not only in safeguarding sources, but in the more general endeavor of "news gathering."⁵¹ By 1972, therefore, there was a recognition of some degree of reporter privilege for confidential sources and other activities necessary to the newsgathering process.

C. THE AFTERMATH OF *BRANZBURG*

1. Changes in Scope of Reporter Privilege

Although the *Branzburg* holding applied only to reporters who were subpoenaed before a grand jury because they may have witnessed a crime,⁵² many thought the decision would be broadly interpreted to cover other judicial fora and other fact scenarios.⁵³ Their fears arose out of the dramatic changes that had developed during the preceding decade that altered the focus of reporter protection. In response to the tumultuous activities of the sixties, the number of subpoenas to media organizations had increased dramatically as the government sought to discover and prosecute illegal activities of radical groups.⁵⁴ The

48. *See id.* at 709 (Powell, J., concurring).

49. *Id.* at 710.

50. *See id.*

51. *Id.* at 681, 707; *see also id.* at 709 (Powell, J., concurring) ("The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.").

52. *See id.* at 708-09.

53. *See Ervin, supra* note 17, at 240.

54. Senator Sam Ervin provides a particularly fascinating, contemporaneous recounting of the historic forces operating throughout the country in the sixties that fundamentally altered the relationship between the press and

scope of subpoenas had also broadened from disclosure of confidential sources to broadly written subpoenas for the production of all notes, tapes, draft scripts, and documents used in the preparation of reports, regardless of whether the information had been published or broadcast.⁵⁵ Instead of subpoenas issued for specific evidence in specific crimes, the government also began using information gathered by the media to uncover possible illegal activities.⁵⁶ Finally, the number and nature of governmental agencies seeking reporter information also increased.⁵⁷

the government. See Ervin, *supra* note 17, at 243-50. Reporters, trying to cover the activism of that decade, including radical groups advocating violence, found themselves subject to a rash of subpoenas as the government sought to uncover illegal activity. From 1969 to mid-1971, NBC and CBS and their wholly owned affiliates were served with a total of 121 subpoenas, mostly involving network coverage of militant and anti-war groups, demonstrations and campus disturbances. See *id.* at 245. The *New York Times* was served with twenty-one subpoenas in three years, contrasted with five total in the preceding four years. See *id.* As the press relentlessly published information on the war in Vietnam that was contrary to official government reports, the rift widened. Evidence emerged of deliberate attempts by the government to suppress information, and reporters began to recognize they were being manipulated as conduits of inaccurate government reports. There was a dramatic increase in classification of documents and a resurgence of an aggressive investigative journalism that contributed to the hostility. Conflicts between the press and the police also increased during the sixties, culminating in the gassing and beating of reporters and photographers during the 1968 Democratic National Convention. Use of police as undercover informants posing as reporters exacerbated the conflict. Vice President Agnew's regular attacks on the press ("nattering nabobs of negativism") both reflected the tension and contributed to it. See *id.* at 248-49. Some journalists characterized these changes as fundamentally altering the relationship between the press and the prosecutor. In testifying before Congress in 1973, the editor of the *Los Angeles Times* explained the change in the nature of the relationship between government and the press:

We always had an understanding . . . with prosecutors [that] there were certain things they couldn't ask of us. They couldn't bring us into court, they couldn't make us serve as an agent of the court, and they couldn't get hold of our material. When they made feeble efforts to do so—that is all they were in those days—we told them they were not going to do it and that was the end of it.

Newsmen's Privilege: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 292 (1973), quoted in Ervin, *supra* note 17, at 243.

55. See Ervin, *supra* note 17, at 244-45.

56. See Branzburg, 408 U.S. at 747-49 & nn.38-39 (Stewart, J., dissenting) (discussing absence of factual showing of commission of crime in Caldwell grand jury proceeding).

57. In addition to the Justice Department, agencies included, for example, all levels of courts, boards of education, and state boards of personnel review. See Letter from William Ware, Chairman of The Freedom of Information Committee, to Sen. Sam Ervin (Oct. 6, 1971), quoted in Ervin, *supra* note 17,

The media perceived these changes as potentially interfering with their access to information and their ability to publish.⁵⁸ Finding little support in *Branzburg* for constitutionally based reporter privilege, attention turned to guaranteeing statutory protection at both the federal and state level.

2. Statutory Protection

Efforts to secure statutory protection from Congress proved unsuccessful. Prior to *Branzburg*, Senator Thomas McIntyre of New Hampshire, reacting to what he described as "the recent wave of broad and sweeping subpoenas which have issued from the Justice Department," had introduced legislation to create a testimonial privilege for newsmen.⁵⁹ Following the U.S. Supreme Court's decision in *Branzburg*, many other bills were introduced in Congress, but, like the McIntyre legislation, none was passed.⁶⁰ Several factors likely contributed to the demise of the congressional legislative effort, including the divided support of the press itself,⁶¹ and the newly self-imposed restraint on the part of the government in issuing subpoenas.⁶² The perceived need for federal legislation also declined as federal courts began to reinterpret *Branzburg* as recognizing a qualified reporter privilege.⁶³

at 246.

58. The changes created new instances of "undue restraint" on the media due to the loss of perceived neutrality, increased governmental intrusion in the editorial process, and increased burden of time and money arising from the tremendous increase in quantity and scope of subpoenas, raising questions of actual interference with the reporters' ability to cover the news.

59. S. 3552, 91st Cong., 2d Sess. (1970); see also Ervin, *supra* note 17, at 251.

60. See Morse & Zucker, *supra* note 30, at 422 & n.85.

61. Some members of the press opposed any government regulation as contrary to the very freedom they were trying to protect. See DIENES ET AL., *supra* note 29, at 604 n.19. Others opposed being bound by a rigid statute or wanted an absolute privilege. See Ervin, *supra* note 17, at 242-43.

62. In response to the escalating number of subpoenas, Attorney General John Mitchell had issued federal guidelines for the Justice Department prior to *Branzburg*, which required his personal authorization for all departmental subpoenas served on the media. See John N. Mitchell, *Free Press and Fair Trial: The Subpoena Controversy*, 59 ILL. B.J. 282, 292 (1970). The current version appears at 28 C.F.R. § 50.10. Limitations imposed by the guidelines required that members of the Justice Department make "all reasonable attempts" to obtain information first from nonmedia sources, that they ensure the information sought was considered 'essential' to the investigation, and that they narrowly tailor the scope of any subpoenas. See *id.*

63. See *infra* note 68 and accompanying text.

Meanwhile, several states, including Minnesota, responded to *Branzburg* by creating their own shield laws. Prior to *Branzburg*, seventeen states had enacted specific statutes designed to provide some degree of press privilege.⁶⁴ Today, a total of twenty-nine states plus the District of Columbia have shield laws, offering varying levels of protection.⁶⁵ Most states provide a qualified privilege, with disclosure compelled when competing interests prevail.⁶⁶

3. Constitutional Protection

Following *Branzburg*, courts have looked to both state constitutions and the First Amendment as possible sources of reporter protection.⁶⁷ While the U.S. Supreme Court has yet to revisit reporter privilege, nine out of the ten circuits that have addressed the issue have interpreted *Branzburg* as recognizing a qualified First Amendment privilege for journalists to resist compelled disclosure.⁶⁸ By 1977, the Tenth Circuit had de-

64. See *Branzburg*, 408 U.S. at 691 n.27 (Alabama, Alaska, Arizona, Arkansas, California, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, and Pennsylvania).

65. In addition to the states with statutes at the time of *Branzburg*, these include Colorado, Delaware, District of Columbia, Georgia, Illinois, Minnesota, Nebraska, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, and Tennessee. Many states that have not enacted specific shield statutes have recognized either a common law or state constitutional privilege, so that nearly all states provide some form of reporter's privilege. See DONALD M. GILLMOR ET AL., *MASS COMMUNICATION LAW* 344 (6th ed. 1998) (Connecticut, Florida, Idaho, Iowa, Kansas, Maine, Massachusetts, New Hampshire, North Carolina, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin).

66. See DIENES ET AL., *supra* note 29, at 683.

67. See Morse & Zucker, *supra* note 30, at 412 ("[S]ome state courts fashioned a privilege comparable to the First Amendment's by interpreting state constitutional provisions or building on common law concepts to protect journalists' information and materials.")

68. See *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *La Rouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), *cert. denied*, 479 U.S. 818; *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983), *cert. denied*, 464 U.S. 816; *Zerilli v. Smith*, 656 F.2d 705, 711 n.39 (D.C. Cir. 1981) ("The Supreme Court explicitly acknowledged the existence of First Amendment protection for news gathering in *Branzburg v. Hayes*."); *Miller v. Transamerican Press, Inc.* 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) ("In *Branzburg v. Hayes*, the Court acknowledged the existence of First Amendment protection for 'newsgathering.'"); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977); *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th

clared that "the present privilege is no longer in doubt."⁶⁹ The only circuit to decline to interpret *Branzburg* as recognizing any First Amendment reporter privilege refused to protect a reporter from compelled testimony before a grand jury.⁷⁰ Nonetheless, the court approved a balancing of interests between freedom of the press and the duty to testify.⁷¹

The scope of the privilege has varied widely within the circuits recognizing a limited privilege. Protection of confidential sources has been most commonly recognized,⁷² but not always upheld under the particular circumstances of the case.⁷³ The privilege has also been interpreted to limit forced disclosure of nonconfidential, unpublished information, such as reporter notes, tape outtakes and draft scripts.⁷⁴ For example, the Second Circuit refused to enforce a subpoena that sought production of both published and unpublished documents and tapes in a criminal case where the defendant failed to meet the

Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) ("It is clear that *Branzburg* recognizes some First Amendment protection of news sources."); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 & n.9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). The Seventh and Eleventh Circuits have yet to decide the question.

69. *Silkwood*, 563 F.2d at 437.

70. *See In re Grand Jury Proceedings*, 810 F.2d at 585. "Justice Powell's opinion certainly does not warrant the rewriting of the majority opinion to grant a first amendment testimonial privilege to news reporters." *Id.*

71. *See id.* at 584-86. The court distinguished between a constitutionally required balancing test and one that met the balancing standard set by *Branzburg*. *See id.*

72. *See Zerilli*, 656 F.2d at 712 (noting the "preferred position of the First Amendment" when protecting confidential sources in a civil case); *Riley*, 612 F.2d at 715 ("[J]ournalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources."); *Silkwood*, 563 F.2d at 437 ("[*Branzburg*] recogniz[es] a privilege which protects information given in confidence to a reporter."); *Baker v. F&F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) ("Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information.")

73. *See Miller*, 621 F.2d at 725 (finding the privilege must yield in a libel suit where the press is a party); *Farr*, 522 F.2d at 469 (finding due process guarantee to a fair trial in a criminal case outweighs reporter privilege).

74. *See Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) ("[W]e hold that the journalist's privilege applies to a journalist's resource materials even in the absence of confidentiality."); *United States v. La Rouche*, 841 F.2d 1176, 1182 (1st Cir. 1988) (finding routine, compelled disclosure of unpublished, nonconfidential information to be a "lurking and subtle threat," but finding defendant's interests in case to outweigh First Amendment issues after applying balancing test); *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1981).

threshold balancing test.⁷⁵ The court required a "clear and specific showing" that the information is "highly material and relevant, necessary or critical to the . . . claim, and not obtainable from other available sources."⁷⁶

The standard articulated by the Second Circuit is similar to factors considered by most other federal courts in defining the boundaries of the qualified privilege.⁷⁷ Courts may vary the required degree of relevancy,⁷⁸ the standard used for exhausting alternative sources,⁷⁹ or how critical the information must be to the central issues of the case,⁸⁰ but nonetheless consistently apply some version of a balancing test to weigh the competing interests.

4. Reporter Privilege in Minnesota Before *State v. Turner*

In response to the *Branzburg* decision, Minnesota passed the Free Flow of Information Act.⁸¹ Early treatment by the district courts provided fairly broad protection to reporters, applying a balancing test for both confidential and nonconfidential materials and ordering disclosure only if there was a showing the party had met the threshold requirements.⁸² As recently as

75. See *Burke*, 700 F.2d at 78.

76. *Id.* at 77. The court applied this standard of protection both for confidential information and unpublished reporter work product.

77. The elements appeared in both the *Garland* opinion, see *supra* note 32, and in Justice Stewart's dissent in *Branzburg*, see 408 U.S. at 743.

78. See *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) (compelled disclosure of nonconfidential information must be "clearly relevant to an important issue in the case" with a showing of actual, not potential relevance); *In re Petroleum Products*, 680 F.2d 5, 7 (2d Cir. 1982) ("[D]isclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant.").

79. See *Zerilli v. Smith*, 656 F.2d 705, 713-14 (D.C. Cir. 1981) (noting that efforts to find alternative sources must be "very substantial"); *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980) (finding defendant met burden of establishing that information not available from another, unprivileged source).

80. See *Garland v. Torre*, 259 F.2d 545, 550 (2d Cir. 1958) (noting the information sought "went to the heart of the plaintiff's claim"); *In re Application (Krase v. Graco)* 79 F.3d 346, 351 (2d Cir. 1996) (finding that the information must be so critical to maintenance of the case that the case "virtually rises or falls with the admission or exclusion of the proffered evidence" (quoting *United States v. Marcos*, No. 87 CR 598, 1990 WL 74521, at *3 (S.D.N.Y. June 1, 1990))).

81. Minnesota Free Flow of Information Act, MINN. STAT. §§ 595.021-595.025 (1996). See *infra* note 167 for the text of the key provisions.

82. See *McNeilus v. Corporate Report*, No. CO-91-120 1993 WL 542394 (Minn. Dist. Ct. Sept. 16, 1993) (unpublished order); *United States v. Ford*,

1994, the district court in *State v. Ross*⁸³ interpreted the Minnesota Shield Law to protect reporters from compelled production of all notes, recordings and files in a criminal case where the defendant had failed to make the requisite showing to overcome the privilege.⁸⁴ In reaching this holding, the court recognized the press's concerns about burdensomeness and about being perceived as an arm of the state in a criminal investigation.⁸⁵

There was a sudden shift in interpretation of the Shield Law in 1994, when in *Heaslip v. Freeman*,⁸⁶ the Minnesota Court of Appeals limited reporter privilege to protection of confidential sources and information.⁸⁷ *Heaslip* read section 595.023⁸⁸ as providing protection from disclosing unpublished information "which would tend to identify the person or means through which the information was obtained."⁸⁹ This reading conflicted with an earlier Court of Appeals decision⁹⁰ and most of the district court cases that interpreted the statute to protect

Crim. No. 4-92-112 (D. Minn. 1992) (unpublished order); *State v. Guevara*, No. K7-92-1032 (Minn. Dist. Ct. Sept. 24, 1992) (unpublished order); *Jackson v. State*, No. 796844 (Minn. Dist. Ct. April 4, 1983) (unpublished order); *Aerial Burials v. Minneapolis Star & Tribune*, 8 Media L. Rep. 1653 (BNA) (Minn. Dist. Ct. 1982) (finding that the Shield Law protected both confidential and non-confidential materials, published and unpublished information); see also *State v. Astleford*, 323 N.W.2d 733 (Minn. 1982) (finding insufficient showing of relevance and materiality in pretrial certified question in a criminal case to compel testimony of television reporter); *State v. Brenner*, 488 N.W. 2d 339 (Minn. Ct. App. 1992). *But cf. In re The Investigation of the Assault, Arson Riot and Other Crimes on 5/7/92 in North Minneapolis* (Minn. Dist. Ct. June 23, 1992) (unpublished order) (finding no reporter privilege under Shield Law for nonbroadcast videotape of crime scene absent confidential sources and given overriding interest in criminal prosecution of case). During the first twenty years of the Shield Law, reporters relied on broad district court precedent to prevent enforcement of subpoenas. See *Interviews*, *supra* note 11. A literal interpretation of § 595.024 would create an absolute privilege in misdemeanor and civil cases, but courts have nonetheless applied a balancing test. See, e.g., *Aerial Burials*, 8 Media L. Rep. at 1653. Whether similar applications are likely to continue is beyond the scope of this paper.

83. No. KO-94-70, 1994 WL 750593 (Minn. Dist. Ct. Oct. 11, 1994).

84. See *id.* at *2.

85. See *id.* at *1-2.

86. 511 N.W.2d 21, 24 (Minn. Ct. App. 1994), *pet. for review denied*, (Feb. 24, 1994 Minn. 1994).

87. See *id.* at 21.

88. See *infra* note 167 (quoting the provision).

89. *Heaslip*, 511 N.W.2d at 23.

90. See *State v. Brenner*, 488 N.W. 2d 339, 341 (Minn. Ct. App. 1992) (applying balancing test in criminal case requesting unpublished reporter notes and finding in camera review appropriate response to criminal defendant's Sixth Amendment interests).

both confidential and nonconfidential materials.⁹¹ While the *Heaslip* court implied it might have reached a different decision had a constitutional privilege been asserted,⁹² no such defense had been raised by the parties.⁹³

II. STATE V. TURNER

The Minnesota Supreme Court addressed the issue of reporter privilege for the first time since the Supreme Court's *Branzburg* decision in *State v. Turner*.⁹⁴ The case also marked the first application by the court of the state's Shield Law to nonconfidential information. The court found that there was no qualified constitutional privilege for reporters, and that the protection provided by Minnesota's Shield Law was limited to confidential sources and information.⁹⁵

Turner first addressed the issue of compelled reporter testimony. The court interpreted *Branzburg* as holding that no qualified reporter privilege existed,⁹⁶ and that reporters are required to testify before a grand jury like other citizens.⁹⁷ In doing so, the court relied on a noted commentator's assessment that no reporter privilege existed at common law⁹⁸ and Justice White's *Branzburg* opinion.⁹⁹ The *Turner* court noted that other courts had interpreted *Branzburg* differently, finding a

91. The relevant text of § 595.023 was interpreted as preventing disclosure of unpublished information and "notes, memoranda, recording tapes, [and] film or other reportorial data which would tend to identify the person or means through which the information was obtained." MINN. STAT. § 595.023 (emphasis added). See *infra* note 167 for the full text of the provision.

92. See *Heaslip*, 511 N.W.2d at 24.

93. See *id.* Two subsequent appellate decisions also applied a narrow interpretation of the Shield Law. See *infra* note 112.

94. 550 N.W.2d 622 (Minn. 1996).

95. See *id.* at 630-31.

96. See *id.* at 627 ("The Court . . . refused to establish a qualified reporter's privilege.").

97. See *id.* The *Turner* court read *Branzburg* as rejecting the argument that compelled testimony might interfere with the free flow of information because there was no evidence this would happen. See *id.* Most relevant to the court was the reasoning that the public interest in criminal prosecutions outweighed any possible interest in the chilling effect on future confidential informants. See *id.*

98. See *id.* (citing 23 WRIGHT & GRAHAM, *supra* note 24, § 5426, at 716 n.22).

99. See *id.*

reporter privilege under different circumstances, but the court considered these interpretations to be "strained."¹⁰⁰

Applying *Branzburg* to the facts in *Turner*, the court found no constitutional privilege that protected the newspaper photographer from being compelled to testify at the omnibus hearing.¹⁰¹ Since it is unclear what the photographer had seen and heard during the arrest, the court reasoned he could be compelled to testify as an eyewitness to a crime.¹⁰² Noting that a reporter cannot escape his obligation to testify simply because he observed a crime while acting in his professional capacity,¹⁰³ the court asserted that its opinion was in line with the majority of courts since *Branzburg*, which have found no constitutional protection for reporters who have been an eyewitness to a crime.¹⁰⁴

The *Turner* court did not directly analyze a constitutional privilege regarding unpublished, nonconfidential information, like the unpublished photographs in this case, but referred approvingly to an appellate court decision¹⁰⁵ that declined to apply a qualified privilege for unpublished, nonconfidential photographs.¹⁰⁶ *Turner* also followed the result of the appellate court in its order for in camera review of the unpublished information,¹⁰⁷ proposing that this review would mitigate any "concerns of overburdening the news media."¹⁰⁸ As authority, the court cited a U.S. Supreme Court case involving a defendant accused of rape who sought access to a state agency's confidential file.¹⁰⁹ The U.S. Supreme Court ordered in camera review after the defendant had made a sufficient showing of materiality and significance to the outcome of the case.¹¹⁰

100. *Id.*

101. *See id.* at 628.

102. *See Turner*, 550 N.W.2d at 628.

103. *See id.* (citing *State v. Knutson (Knutson I)*, 523 N.W.2d 909, 913 (Minn. Ct. App. 1994), *pet. for review denied*, (Minn. Jan. 13, 1995)).

104. *See id.* The court also found no broader protection for reporters under the state constitution. *See id.*

105. *See State v. Knutson (Knutson II)*, 539 N.W. 2d 254, 257 (Minn. Ct. App. 1996).

106. *See Turner*, 550 N.W.2d at 628.

107. *See id.* at 629 (citing *Knutson II*, 539 N.W.2d at 258).

108. *Id.*

109. *See id.* (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987)).

110. *See Ritchie*, 480 U.S. at 58. The *Turner* court, 550 N.W.2d at 629, cited additional cases involving access to confidential government or medical records: *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (finding defendant's request for in camera review of mental health records was properly

Finally, the *Turner* court limited application of the Shield Law to the protection of reporter's confidential sources and information. While the statute had previously been interpreted by lower state courts to include protection from compelled disclosure of nonconfidential and unpublished information,¹¹¹ *Turner* adopted the recent *Heaslip* court's interpretation, finding that the broader application was not supported by the text, history, or purpose of the Act.¹¹² The court noted that the Minnesota Shield Law was passed in order to provide additional protection to reporters against subpoenas, but asserted that similar laws in other states had not been applied to nonconfidential and unpublished information, nor to eyewitness testimony in most cases.¹¹³ Finally, once again agreeing with *Heaslip* and *Knutson*, the *Turner* court declared that the Shield Law had "clearly" been aimed at protecting confidential relationships and so did not implicate the subpoenas in the *Turner* case.¹¹⁴ The Shield Law, the court concluded, provided no special protection for either the photographer's testimony or the unpublished photographs since neither involved confidential material.¹¹⁵

III. IMPLICATIONS OF THE LOSS OF REPORTER PRIVILEGE AND REBUILDING THE SHIELD

State v. Turner undermines important constitutional protections for the press in Minnesota, protections that are widely

denied by district court due to defendant's failure to show how records could be relevant to his defense); *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987) (ordering in camera review of welfare department records); *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn. 1984) (finding privilege not to disclose past medical records must sometimes give way to defendant's right to confront his accusers, but in camera review by court did not reveal any relevant information). The court did not, however, cite cases covering reporter privilege.

111. See *supra* Part I.C.4 (discussing early court interpretation of the Minnesota Shield Law).

112. See *Turner*, 550 N.W.2d at 630; see also *Heaslip v. Freeman*, 511 N.W.2d 21, 23 (Minn. Ct. App. 1994). Two subsequent appellate opinions applied a similar interpretation. See *Knutson I*, 523 N.W.2d 909, 912 (Minn. Ct. App. 1994) (finding Minnesota Shield Law does not apply to compelled eyewitness testimony of *Minnesota Daily* reporter if confidential source not identified); *Knutson II*, 539 N.W.2d 254, 257 (Minn. Ct. App. 1996) (finding that Shield Law did not protect unpublished photographs if no confidential source disclosed). *Heaslip* was decided solely under the state Shield Law, while *Knutson I* and *II* also considered First Amendment privileges.

113. See *Turner*, 550 N.W.2d at 631 (citing 23 WRIGHT & GRAHAM, *supra* note 24, at 775).

114. See *id.*

115. See *id.*

recognized by federal courts around the country, including those in Minnesota.¹¹⁶ The decision also restricts protection under Minnesota's Shield Law, leaving the media susceptible to broad and routine subpoenas that threaten to interfere with their newsgathering activities. The solution suggested by *Turner* of in camera inspection of unpublished, nonconfidential information provides an inadequate remedy. To encourage a free and vigorous press in the state, the Minnesota legislature should amend the Shield Law to ensure broader protection for the media, while protecting defendants' interests in access to the best evidence.

A. FIRST AMENDMENT PROTECTION

1. The *Turner* Court Misinterpreted U.S. Supreme Court Precedent Regarding a Qualified Reporter Privilege

In the overwhelming majority of federal circuits, journalists are afforded special protection under the First Amendment's guarantee of freedom of the press.¹¹⁷ Only one circuit has interpreted *Branzburg* as precluding a constitutional reporter privilege, and that opinion involved a grand jury proceeding, as did *Branzburg*.¹¹⁸ The *Turner* court also declined to interpret *Branzburg* as suggesting a qualified privilege, characterizing other courts' reliance on Justice Powell's concurrence as "strained interpretations."¹¹⁹

Such a dismissive approach to the other appellate decisions is unwarranted. Certainly, the U.S. Supreme Court has held that reporters cannot refuse to testify before a grand jury by relying on reporter privilege,¹²⁰ but both Justice White's plurality opinion and Justice Powell's concurrence provide support for the interpretation that a qualified reporter privilege exists in other circumstances.¹²¹ Writing for the Court, Justice White suggested that a qualified privilege may be invoked as "news gathering is not without its First Amendment protections,"¹²² and that "without some protection for seeking out the news,

116. See *supra* note 68; see also *J.J.C. v. Fridell*, 165 F.R.D. 513, 513 (D. Minn. 1995).

117. See *supra* note 68.

118. See *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987).

119. *Turner*, 550 N.W.2d at 627.

120. See *Branzburg*, 408 U.S. at 708.

121. See *supra* notes 44-51 and accompanying text.

122. *Branzburg*, 408 U.S. at 707.

freedom of the press could be eviscerated.¹²³ The Court also made clear it was not endorsing an indiscriminate disclosure of sources merely upon request,¹²⁴ indicating the existence of a threshold requirement.

Justice Powell's critical concurrence stressed the limited nature of the Court's opinion, specifically rejecting compelled testimony having "only a remote and tenuous relationship" to the investigation.¹²⁵ He also suggested a threshold need requirement, offering the court's protection if disclosure did not serve a legitimate law enforcement need.¹²⁶ Most compelling, however, was his assertion of the need for a balancing test on a case-by-case basis to weigh competing constitutional interests.¹²⁷

This reading of *Branzburg* has support in the Attorney General Guidelines, which set forth procedures for federal law enforcement to issue subpoenas for the media.¹²⁸ The Guidelines' statement of purpose recognizes the threat that compelled disclosure can inhibit a free press, and the regulations establish threshold requirements that must be met.¹²⁹ While limited in applicability to the Justice Department, the Guidelines are a strong indication of First Amendment protections afforded the press for newsgathering.

The *Turner* court's dismissal of a reporter privilege misreads, therefore, the U.S. Supreme Court's opinion in *Branzburg* and the protections it provides the press, as demonstrated by interpretations of the federal courts over the past twenty-five years.

123. *Id.* at 681.

124. *See id.* at 682; *see also* *Silkwood v. Kerr-McGee*, 563 F.2d 433, 437 (10th Cir. 1977).

125. *See id.* at 710.

126. *See id.*

127. *See id.*

128. *See supra* note 62 (discussing the Guidelines)

129. *See* 28 C.F.R. § 50.10.

[F]reedom of the press can be no broader than the freedom of reporters to investigate and report the news, [so that] the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function.

Id.

2. The *Turner* Court Improperly Ignored the Negative Impact on Newsgathering When No Qualified Privilege Exists

Turner erred in failing to distinguish between subpoenas served on reporters in their capacity as citizens and as members of the press.¹³⁰ Reporter privilege is not a personal one provided to the journalist; it extends to the reporter from the job of gathering information for the public.¹³¹ The issue is whether there is a burden on newsgathering activities when broad disclosure requests are only limited when confidential information is involved. A qualified reporter privilege is needed to protect newsgathering, not to confer journalists with a special status of immunity.¹³²

Courts recognizing a qualified reporter privilege have utilized a balancing test to weigh the burden on newsgathering against the evidentiary interest in disclosure on a case-by-case basis, requiring as a minimum that the requested information be highly relevant, critical to the maintenance of the claim, and not available from other sources.¹³³ The *Turner* court erred by declining to apply such a balancing test to the unpublished photographs and rejecting the need to make any preliminary showing of relevance to compel a reporter's testimony.¹³⁴

In contrast, other courts have recognized the special dangers presented by routine disclosures of nonconfidential infor-

130. See *Turner*, 550 N.W.2d at 629 ("The inconvenience suffered by reporters and news photographers . . . is no more compelling than the inconvenience suffered by any other citizen who must disrupt his or her daily activities . . .").

131. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 85 (1975) ("These rights, while lodged in the reporter and his publisher, in reality reflect an underlying interest of the public. . . . The issue is the public's right to know. That right is the reporter's by virtue of the proxy which the freedom of the press clause in the First Amendment gives to the press in behalf of the public." (citation omitted)).

132. The overwhelming majority of subpoenas of media organizations today occur where the media is a third party. The media was a party in only 3.7% of all subpoenas reported in a 1993 survey. See *THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1993*, at 4-5 (1995). Journalists are more frequent targets of subpoenas due to the nature of their job. They regularly gather information involving crime, accidents, disasters and malfeasance, which makes them knowledgeable about events that result in litigation. Furthermore, since reporters routinely disclose the fact they have this information, they are more vulnerable to disclosure requests from a wide variety of self-interested parties

133. See *supra* Part I.C.3 (discussing the balancing test).

134. See *Turner*, 550 N.W.2d at 628.

mation. As the First Circuit commented, "We discern a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled."¹³⁵ Failure to require a balancing test encourages routine and widespread use of subpoenas by litigants seeking easy access to information, pictures, and reports gathered by journalists in the course of their work. Readily available subpoenas in turn impose restraints on newsgathering. If courts do not apply a balancing test or rigorously review subpoena requests, the practice of "subjecting the press to discovery as a nonparty will be widespread."¹³⁶ Enlarging the use and scope of subpoenas has several negative impacts on newsgathering.

a. Loss of Perceived Neutrality: When courts and prosecutors have unlimited access to reporter notes containing background information, or documents and private papers acquired in an investigation, the public begins to see the media as merely a conduit or tool of government instead of a neutral party. This undermines public support of a neutral press and restricts access to information. Of particular concern is the negative impact on a journalists' ability to develop trust relationships with groups that are disaffected and distrustful of the government, stories that are especially difficult to cover in the mainstream press.¹³⁷ As the Ninth Circuit has noted, it is

135. *United States v. LaRouche*, 841 F.2d 1176, 1182 (1st Cir. 1988); *see also Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993); *O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 526 (N.Y. 1988) ("The autonomy of the press would be jeopardized if resort to its resource materials, by litigants seeking to utilize the newsgathering efforts of journalists for their private purposes, were routinely permitted.").

136. *O'Neill*, 71 N.Y.2d at 526.

137. Earl Caldwell, the *New York Times* reporter who covered the activities of the Black Panthers in the sixties, and who was one of the reporters ordered to testify before a grand jury in the *Branzburg* decision, had spent months gaining the confidence of the members of that organization. This trust allowed him access to information that enabled him to report with a unique level of depth and understanding. Caldwell was called before a grand jury so that government investigators could question him on all unpublished information he had acquired during the course of his work as a reporter. *See Branzburg v. Hayes*, 408 U.S. 665, 747-50 & nn.38-41 (1972) (Stewart, J., dissenting). In an affidavit filed with the District Court, Caldwell stated:

I began covering and writing articles about the Black Panthers almost from the time of their inception, and I myself found that in those first months . . . they were very brief and reluctant to discuss any substantive matter with me. However, as they realized I could be trusted and my sole purpose was to collect my information and

their neutral status that often allows the media access to meetings, even without a pledge of confidentiality, where government officials would not be allowed.¹³⁸ If the press is seen as a routine investigative arm of the courts, future stories will be compromised when sources are reticent to trust reporters with sensitive information and leads.¹³⁹

b. Intrusion in Editorial Process: The use of broadly inclusive subpoenas also has a chilling effect on the press itself. Turning over unpublished notes, outlines, draft scripts, and outtakes subjects the press to a review of its editorial decisions by the courts and other public officials.¹⁴⁰ The prospect of governmental review of editorial decisions may well inhibit news-gathering and writing activities and “substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege.”¹⁴¹ Governmental interference with the press was one of the abuses feared by those who drafted the First Amendment,¹⁴² and there is concern that routine government access to unpublished information will interfere with the role of the media as the watchdog of government.¹⁴³

c. Burden on Time and Resources: The growth in quantity and breadth of subpoenas also puts an increasing strain on the time and resources of reporters and editors, and thus interferes

present it objectively in the newspaper and that I had no other motive, I found that not only were the party leaders available for in-depth interviews but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do. During the time that I have been covering the party, I have noticed other newspapermen representing legitimate organizations in the news media being turned away because they were not known and trusted by the party leadership.

Id. at 749 n.41.

138. See *Shoen*, 5 F.3d at 1295 (citing *Morse & Zucker*, *supra* note 30, at 474).

139. See *id.*

140. See *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (“[T]he compelled production of a reporter’s [unpublished and nonconfidential] resource materials can constitute a significant intrusion into the newsgathering and editorial processes . . .”); see also *J.J.C. v. Fridell*, 165 F.R.D. 513, 515 (D. Minn. 1995) (“Federal courts are motivated to cultivate a reporter’s privilege to prevent judicial intrusion into the editorial process, and to ensure the free flow of information to the public.”).

141. *Cuthbertson*, 630 F.2d at 147.

142. See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (“The press was protected so that it could bare the secrets of government and inform the people.”).

143. See *supra* note 20; see also *Cuthbertson*, 630 F.2d at 147.

with their ability to investigate and report stories. Time spent retrieving materials for subpoenas and time spent in court detracts from time spent on reporting. This is a particularly critical issue for smaller media organizations that may only have one or two reporters. While reporters should face these burdens when defending the stories they publish, the increase in third party litigation and the need to produce and explain material that has *not* been published increases the burden substantially.

The increased burden encourages changes in industry practices that interfere with the quality of reportorial information provided to the public. Reporters may have a disincentive to compile and retain information. As with attorney work product,¹⁴⁴ fear of public disclosure of notes compiled while preparing a report may discourage journalists from producing written material altogether, which is likely to adversely affect the accuracy of their reporting. These fears also lead to procedures for routine destruction of materials, hampering future reporting and eliminating information that might be essential to future court proceedings.¹⁴⁵ Even more alarmingly, journalists actually have an incentive to prepare reports that rely on confidential sources and information since the courts afford these materials greater protection, even though this practice runs counter to the best journalistic standards of minimizing the use of confidential sources.¹⁴⁶

Furthermore, the burden on time and resources makes it less likely that journalists will attempt risky and lengthy investigations, particularly when costly litigation to protect information is probable. Media organizations, already under increased pressures to maintain profitable margins, are less likely to risk the investment of time and expense to investigate "difficult"

144. Cf. *Hickman v. Taylor*, 329 U.S. 495 (1947).

145. See *United States v. LaRouche*, 841 F.2d 1176, 1182 (1st Cir. 1988) ("To the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment.")

146. The use of both confidential and anonymous sources is widely regarded by the mainstream press as substantially less desirable than sources willing to publicly acknowledge their statements. They are considered generally less reliable, and provide the news consumer with less information to evaluate the validity of the sources' statements. See JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM* 185 (The Sigma Delta Chi Found. & The Soc'y of Prof'l Journalists 1993).

stories, despite the potential public interest. As a result, the public will receive more stories directly from government officials with less investigative filtering by reporters, and more noncontroversial reports on such topics as entertainment and consumer issues.

3. The *Turner* Court's Failure to Find a Qualified Privilege Creates an Erroneous Hierarchy of Constitutional Rights in Criminal Cases

In *Branzburg*, Justice Powell pointed to the need for balancing the rights of a criminal defendant with the rights of a free press.¹⁴⁷ *Turner* declined to apply any balancing test regarding reporter testimony, asserting only that a reporter is not excused from testifying as an eyewitness, presumably to protect the rights of the criminal defendant.¹⁴⁸ By failing to weigh competing constitutional concerns, however, the court elevated rights existing under the Sixth Amendment over those of the First Amendment.

As the Third Circuit noted in *United States v. Cuthbertson*,¹⁴⁹ the framers of the constitution did not contemplate a constitutional system where one right was inherently preferred over another. The *Cuthbertson* court noted,

"The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. . . . [I]f the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do."¹⁵⁰

The application of a balancing test permits the court to weigh the criminal defendant's interests against the impact on the media.¹⁵¹ When no balancing test is applied, the criminal

147. See *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972); see also *Baker v. F&F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972).

148. See *Turner*, 550 N.W.2d at 628.

149. *United States v. Cuthbertson*, 630 F.2d. 139 (3d Cir. 1980).

150. *Id.* at 147 (quoting *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 561 (1976)).

151. See *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) ("We see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence. To be sure, a criminal defendant has more at stake than a civil litigant and the evidentiary needs of a criminal defendant may weigh more heavily in the balance."); *Cuthbertson*, 630 F.2d at 147 ("[T]he interests of the press that form the foun-

defendant's Sixth Amendment interests are given inherent preference over the press's First Amendment protections. This inherent preference constitutes an impermissible rewriting of the Constitution.

The *Turner* court's failure to apply a balancing test erroneously placed all criminal defendant's Sixth Amendment rights over the public's interest in First Amendment rights of a free press regardless of the relevancy, materiality, or significance of the information to the essential elements of a particular case. This denigration of the First Amendment concerns about impediments to newsgathering could be avoided by applying the balancing test adopted by the majority of federal courts to recognize a reporter's qualified privilege.

4. The *Turner* Court's Remedy of In Camera Review of Unpublished, Nonconfidential Documents Provides Insufficient Protection

After finding no constitutional reporter privilege for eyewitness testimony, the *Turner* court limited its analysis of unpublished material by noting that some protection is needed and ordered in camera inspection as a remedy.¹⁵² Requiring in camera review of unpublished, nonconfidential information before any threshold has been met is an inadequate remedy for protecting the press and is seemingly without authority. The court's decision erroneously deferred any possible application of a balancing test until after all the requested materials have been assembled and turned over to the courts. In the event that in camera review is required, it should only be ordered after the requesting party has shown the requisite relevance, need and effort to obtain the information from alternative sources.

Turner adopted the *Knutson II*¹⁵³ court's remedy of in camera review as an appropriate means of balancing the need for disclosure and the needs of a free press.¹⁵⁴ The cases cited by

dition for the privilege . . . [do] not change because a case is civil or criminal. . . . [R]ather than affecting the existence of the qualified privilege, we think that these rights are important factors that must be considered.").

152. See *Turner*, 550 N.W.2d at 629 ("We recognize . . . that some courts have required a threshold showing of relevance, need and unavailability before a reporter will be forced to disclose nontestimonial, unpublished information. . . . [I]n camera review by the district court is an appropriate means of balancing the defendant's need for evidence . . . against the public's interest in a free and independent press.").

153. 539 N.W.2d 254 (Minn. Ct. App. 1995).

154. See *Turner*, 550 N.W.2d at 629.

Knutson II, however, do not support in camera review as a substitute for meeting a threshold requirement. Two out of the three opinions relied on in *Knutson II* did not, in fact, order in camera review.¹⁵⁵ They referred to this practice as a possibility, but only after a threshold requirement had been met.¹⁵⁶ The third court did order a partial in camera review, but only after applying a rigorous balancing test, with the added provision that the material not be released, even if found relevant, until after witnesses had testified in court and the material was found necessary for possible impeachment.¹⁵⁷ Neither *Turner* nor *Knutson II* imposed similar constraints.

The *Turner* court also relied on *Pennsylvania v. Ritchie*,¹⁵⁸ a U.S. Supreme Court case, and several Minnesota cases¹⁵⁹ as authority for in camera review. None of the cases cited, however, involved reporter privilege. Instead, the requests involved confidential medical and psychiatric records of victims¹⁶⁰ and governmental investigative and social service records.¹⁶¹ First Amendment cases require a different analysis than cases involving victim privacy. Privacy and confidentiality may be elements of a claim for reporter privilege, but constitutional considerations of the negative impact on newsgathering are also implicated with media subpoenas. Moreover, even the *Ritchie* decision pointedly required a threshold showing of materiality and need before ordering in camera review of confidential government records.¹⁶²

155. See *Burke*, 700 F.2d at 78; *Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583, 599 (1st Cir. 1980).

156. See *Burke*, 700 F.2d at 78 n.9 (finding the trial court did not commit error by refusing to order in camera review, but noting it did not preclude such a procedure if the information were sufficiently relevant and central to the case); *Bruno*, 633 F.2d at 597-98 (noting the court has several options in determining whether or not to compel disclosure, depending on its assessment of the risk to newsgathering and need in the case).

157. See *United States v. Cuthbertson*, 630 F.2d. 139, 148 (3d Cir. 1980).

158. 480 U.S. 39 (1987).

159. See *State v. Hummel*, 483 N.W.2d 68 (Minn. 1992); *State v. Paradee*, 403 N.W.2d 640 (Minn. 1987); *State v. Kutchara*, 350 N.W.2d 924 (Minn. 1984); see also *supra* note 110.

160. See *Hummel*, 483 N.W.2d at 71; *Kutchara*, 350 N.W.2d at 926.

161. See *Ritchie*, 480 U.S. at 42-43; *Paradee*, 403 N.W.2d at 640.

162. See *Ritchie*, 480 U.S. at 58 n.15 ("He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense." (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982))).

Ordering in camera review before any threshold showing is also contrary to the policy considerations behind the First Amendment's protection of the press. It applies the balancing test at the wrong time and is not a substitute for the obligation of the moving party to first show relevance, need, and effort to find alternative sources.¹⁶³ Because no threshold showing is required, the court will automatically review all documents subject to the subpoena. As the facts in *Turner* show, a defendant can subpoena both personnel and documents from a media organization despite no showing of relevance, let alone compelling need or alternative sources. Review by the court of both confidential information and unpublished reporter work product is review by an arm of the government. This has a negative impact on the perceived neutrality of the press, and has a chilling effect on both sources and journalists who fear government intrusion in the editorial process. In contrast, requiring a threshold test *before* an order for in camera review avoids many of the undue negative impacts on the press discussed above.¹⁶⁴

Requiring in camera review before applying a balancing test creates an additional problem for the courts. First, they are given little guidance in determining what to disclose when the moving party has not provided specific reasons why it considers the material relevant and necessary to their claim.¹⁶⁵ Furthermore, since in camera review is an *ex parte* proceeding, the press is afforded no opportunity to demonstrate how particular disclosure decisions may impose burdens on newsgathering activities. As a result, the court has limited information to assist it in applying a balancing test during in camera review. The *Turner* court's holding that unpublished information must be submitted to the court for in camera review before any

163. See *New York Times v. Jascaveich*, 439 U.S. 1331, 1335 (1978) (Marshall, J., in chambers) ("Given the likelihood that forced disclosure even for in camera review will inhibit the reporter's and newspaper's exercise of First Amendment rights . . . some threshold showing of materiality, relevance, and necessity should be required.").

164. See *supra* Part III.A.2.

165. See Brief for Respondent at 5, *State v. Turner*, 550 N.W.2d 622 (Minn. 1996) (No.C5-95-2668) (quoting Judge Donald Gross at the pretrial hearing on November 17, 1995: "It is not clear to me how the testimony of the reporter/photographer would be relevant or fit into a probable cause hearing with respect to photographs. It is not clear to me how these would be relevant. And if I have to conduct an in camera inspection, you are not giving me any indication of what I should be looking for.").

threshold requirement is met, therefore, is without legal support and is unwise as a matter of public policy.

B. THE MINNESOTA SHIELD LAW

The *Turner* court relied on the Minnesota Court of Appeals decision in *Heaslip v. Freeman*¹⁶⁶ to apply a narrow textual interpretation to the Minnesota Free Flow of Information Act.¹⁶⁷ *Turner* and *Heaslip's* conclusion that the Act is limited to the protection of confidential sources and information reverses an earlier Court of Appeals reading of the statute,¹⁶⁸ as well as a line of district court cases that found the statute covered non-confidential information and sources.¹⁶⁹ These previous cases established a level of expectation on the part of the media, defense attorneys, and the government that permitted disclosure under particular circumstances, but required a certain threshold showing before disclosure was compelled. The *Turner* court erred in departing from this long-standing line of analysis.

As a matter of textual analysis, the *Heaslip* opinion relied predominantly on what it admitted was a "finely tuned"¹⁷⁰ grammatical reading of section 595.023. *Heaslip* focused on

166. 511 N.W.2d 21 (Minn. Ct. App. 1994).

167. See *Turner*, 550 N.W.2d at 630 (construing MINN. STAT. §§ 595.021-595.025 (1996)). Two provisions are key for this discussion:

§595.022. Public Policy. In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. To this end, the freedom of press requires protection of the confidential relationship between the news gatherer and the source of information. The purpose of sections 595.021 to 595.025 is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its sources.

§595.023. Disclosure prohibited. No person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public shall be required by any court, grand jury, agency, department or branch of the state, or any of its political subdivisions or other public body, or by either house of the legislature or any committee, officer, member, or employee thereof, to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information procured by the person in the course of work or any of the person's notes, memoranda, recording tapes, film or other reportorial data which would tend to identify the person or means through which the information was obtained.

168. See *State v. Brenner*, 488 N.W.2d 339, 341 (Minn. Ct. App. 1992).

169. See *supra* note 82 and accompanying text.

170. *Heaslip v. Freeman*, 511 N.W.2d 21, 23 (Minn. Ct. App. 1994).

the absence of a comma, parallel infinitive construction, and what it found to be the overall focus of the Act, to conclude that the statute protects only confidential sources and information. This reading, however, ignores the clearly worded purpose clause, which states that the broad, overall goal of the statute is "to protect the public interest and the free flow of information."¹⁷¹ Section 595.022 specifically states that "the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information."¹⁷² The separate treatment of these elements of newsgathering, in light of the broad purpose of the statute, helps clarify the ambiguous meaning of section 595.023. A narrow reading of section 595.023 is structurally inconsistent with section 595.022, thus violating the "whole act rule."¹⁷³ If the legislature had intended to limit the statute to protection of confidential sources, the term "unpublished information" in the purpose clause would be meaningless, contrary to the presumption that every word or phrase has significance.¹⁷⁴ In addition, a narrow reading makes the inclusion of "unpublished information" in section 595.023 redundant, since the clause which follows, listing notes, memoranda and reportorial data, covers whatever might be considered as "unpublished information." Considering the statute as a whole, a textual analysis supports a broad reading to protect the public's interest in the free flow of information.

The *Turner* court's conclusion that the Free Flow of Information Act was passed by the legislature with the limited purpose of protecting confidential sources¹⁷⁵ fails to take account of other indications that the legislature contemplated a broader purpose. Contemporaneous newspaper coverage of the bill indicated an intent to protect both confidential sources and un-

171. § 595.022.

172. *Id.* (emphasis added).

173. "When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)); see also MINN. STAT. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions.").

174. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 369 n.14 (1986) (refusing to interpret a statute in a manner that renders a phrase superfluous).

175. See *Turner*, 550 N.W.2d at 631.

published information.¹⁷⁶ John Finnegan, former executive editor of the St. Paul Pioneer Press, and one of the chief proponents of the Minnesota Shield Law, spoke publicly and forcefully against the government's demands for reporters' unpublished information in addition to compelled disclosure of confidential sources.¹⁷⁷ Another media professional who actively campaigned for the passage of the Shield Law, recalls specifically aiming the statute to cover both confidential and nonconfidential information.¹⁷⁸ These signs argue against the hasty conclusion of a limited legislative purpose.

The likelihood that the movement in Minnesota was motivated by a broader intent to protect newsgathering in general is supported by similar discussions at the time around the country. Across the nation, the overarching consideration was to protect the newsgathering process, with particular consideration given to the compelled disclosure of confidential sources as one aspect of that process.¹⁷⁹ In *Branzburg*, Justice White wrote about freedom of the press in terms of "news gathering,"¹⁸⁰ while Justice Powell separately noted the need for protection both of confidentiality and other newsgathering practices.¹⁸¹ Furthermore, one of the earliest circuit court decisions following *Branzburg*, found a broad constitutional privilege, which included unpublished information whether or not it was confidential.¹⁸² This court found that compelled dis-

176. See MINNEAPOLIS STAR, Feb. 28, 1973, at 5A ("[The proposed bill] would prohibit state courts or governmental agencies from requiring reporters to disclose confidential sources or unpublished information unless... four conditions are met." (emphasis added)).

177. See ST. PAUL PIONEER PRESS & DISPATCH, Sept. 22, 1992, at 5 (describing various proposed state shield laws and testimony regarding proposed federal statute). Finnegan was a vocal leader both nationally, as the chair of the Freedom of Information Committee of the Associated Press Managing Editors Association, and locally in the efforts by the Joint Media Committee to pass the Minnesota Shield Law.

178. "We thought we had it right," ruefully recalls Don Gillmor, Silha Professor of Media Ethics and Law, University of Minnesota, reacting to the *Healslip/Turner* interpretation of the statute. Interview with Don Gillmor in Minneapolis, Minn. (Oct. 16, 1997).

179. See Morse & Zucker, *supra* note 30, at 473.

180. *Branzburg*, 408 U.S. at 707 ("[N]ews gathering is not without its First Amendment protections.")

181. See *id.* at 709 (Powell, J. concurring) ("The Court does not hold that newsmen . . . are without constitutional rights with respect to the gathering of news or in safeguarding their sources.")

182. See *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980). The court stated:

closure of nonconfidential information threatened the free flow of information, much like confidential sources.¹⁸³ Protecting confidential sources was not the sole concern of the courts and media reformers at the time the Minnesota Shield Law was enacted.

Furthermore, several of the shield laws adopted in other states in the wake of *Branzburg* included broad protection for both published and unpublished information.¹⁸⁴ In fact, only one state clearly limited coverage to confidential sources and information.¹⁸⁵ Most states did not distinguish between confidential and nonconfidential information, but provided for broad protection against compelled disclosure.¹⁸⁶ At least one state supreme court declined to read the word "confidential" into that state's generally-worded statute, finding that the legislature intended to provide broad protection to reporters in reaction to the *Branzburg* decision.¹⁸⁷ The *Turner* court's as-

We do not think that the privilege can be limited solely to protection of sources. The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege.

Id. (citation omitted).

183. *See id.*

184. Nine states passed shield laws in the next few years following the *Branzburg* decision. They were Delaware, Illinois, Minnesota, Nebraska, North Dakota, Oklahoma, Oregon, Rhode Island, and Tennessee.

185. *See* R.I. STAT. § 9-19.1-2 (1997) ("[N]o person shall be required . . . to reveal confidential association, to disclose any confidential information, or to disclose the source of any confidential information received or obtained by him . . . in his . . . capacity as a reporter, editor, commentator, journalist, writer, correspondent, newsphotographer . . .").

186. *See, e.g.,* NEB. STAT. § 20-144 (1991) ("[Newspersons] shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be fully informed. . . . [C]ompelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest and inhibits the free flow of information to the public."); TENN. CODE ANN. § 24-1-208 (1980) ("A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press . . . shall not be required . . . to disclose . . . any information or the source of any information procured for publication or broadcast." (emphasis added)). For similar statutes, see N.D. CENT. CODE § 31-01-06.2 (1996); OKLA. STAT. ANN. Tit. 12 § 2506B (West 1993); OR. REV. STAT. § 44.520 (1988).

187. *See Austin v. Memphis Publishing Co.*, 655 S.W.2d 146 (Tenn. 1983) (upholding state statutory protection for nonconfidential information in wrongful death case where newspaper was a third party).

sertion that the statute was directed only at confidential sources is, therefore, subject to dispute.

The *Turner* court, in short, erred in adopting the *Heaslip* court's narrow interpretation of the Minnesota Shield Law and overturning more than two decades of lower court precedent that extended protection to published and unpublished information, confidential and nonconfidential material. By relying on a "finely tuned" textual interpretation, the Court also failed to adequately consider the broad purpose of the statute, drafted in response to the heightened concerns of the late sixties over governmental intrusions on a free press.

C. RESTORING THE SHIELD

To restore protection for newsgathering in Minnesota, the legislature should follow the path taken by at least three other states that strengthened their shield laws in response to interpretations by their courts that narrowed protection for the press.¹⁸⁸ The state should amend the Free Flow of Information Act to expand reporter privilege to specifically include protection for nonconfidential information. It must establish a threshold requirement that is set high enough to prevent frivolous, irrelevant, and nonessential subpoenas, while leaving enough flexibility for the court to weigh competing, compelling interests.

The Minnesota Joint Media Committee,¹⁸⁹ working with legislators in both the House and Senate, have proposed changing section 525.023¹⁹⁰ so that newsmen would not be

188. New York and New Jersey have strengthened their shield laws, while California passed an amendment to the state constitution. See Morse & Zucker, *supra* note 30 at 427; DIENES ET AL., *supra* note 29, at 650 n.17, 651.

189. The Minnesota Joint Media Committee, organized in 1973, is composed of groups and individuals representing media interests on First Amendment and media access issues. Its membership includes the Minnesota Newspaper Association, the Society of Professional Journalists, the Minnesota Broadcasters Association, the Neighborhood Press Association, the Silha Center for the Study of Media Ethics and Law, the Associated Press, as well as individual media organizations.

190. § 595.023 would read:

No person who is . . . engaged in the gathering . . . or publishing of information . . . for . . . publication to the public shall be required . . . to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information . . . or any of the person's notes, memoranda, recording tapes, film or other reportorial data whether or not it would tend to identify the person . . . through which the information was obtained.

required to disclose either confidential or nonconfidential information.¹⁹¹ This proposed change would enable the courts in Minnesota to more closely follow standards that reflect the position reached by the majority of federal courts and would afford protection to competing constitutional rights.

In addition, the legislature should establish guidelines with a threshold standard for when in camera review can be compelled, and a process by which the parties may be heard within that procedure. New Jersey has such a provision in its Shield Law, which requires a showing by a preponderance of the evidence *before* in camera review is ordered, that the information is relevant, material, necessary, and unavailable from a less intrusive source.¹⁹² This provision can serve as a useful model for Minnesota because it reduces intrusion on newsgathering by requiring a balancing test before disclosure is compelled. That process should eliminate frivolous and non-essential subpoenas and reduce governmental intrusion in the editorial process. It will also assist the court in its review, both by focusing on items of relevance and by permitting the press to set forth its First Amendment concerns on particular items under review.

CONCLUSION

As a result of the *Turner* decision, reporter information in Minnesota is provided only narrow protection against compelled disclosure in a wide variety of both civil and criminal cases. This decision dramatically changes the previous protections afforded reporters in Minnesota under both constitutional and statutory interpretations, is out of step with the great majority of federal courts, and poses a serious threat to a vigorous, responsible, and independent press. By limiting the "shield" to confidential information and sources, and declining to require a threshold showing of relevance, materiality and need, the decision leaves the press vulnerable to a significant increase in the number and scope of subpoenas, which, in turn, threatens to impede the media's newsgathering and reporting capabilities.

The Minnesota Shield Law, enacted in 1973 to ensure the "free flow of information," should be amended to expand re-

191. See S. 1480, 80th Leg., (Minn. 1998); H.R. 1668, 80th Leg., (Minn. 1998). The proposed bill also includes some clarifying language to § 595.024 regarding the threshold requirement for disclosure.

192. See N.J. STAT. ANN. § 2A:84A-21.4 (West 1994).

porter privilege to specifically include nonconfidential information which would be protected against compelled disclosure absent the threshold showing required for confidential material. Guidelines should also be established to regulate in camera review of reportorial information, both confidential and nonconfidential. The goal of the proposed changes to the Minnesota Shield Law is not to immunize the press, nor to preclude its cooperation when other compelling interests prevail, nor to bestow on them a special status that is personal to the individual reporter. Rather, the goal is to ensure that the legal system does not impose impediments on the newsgathering process that will interfere with the aggressive, vigorous, and responsible reporting that enables us to be informed participants in this democracy.

The impact of restraints on the press are not always apparent to the public. As an institution, the media has garnered many critics who condemn its errors and its excesses. Much of this criticism is merited. But unless the public is willing to recognize the changing nature of the forces that are impeding the newsgathering process, and provide appropriate protection from frivolous, irrelevant, or nonessential subpoenas, those who remain in the responsible press will spend less of their time on the street and more time in court.

