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Vince Blasi

University of Michigan Law School

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THE NEWSMAN'S PRIVILEGE: AN EMPIRICAL STUDY

Vince Blasi*

I. THE PROBLEM

A legal issue can smolder for years until suddenly the winds of a larger controversy fan it into flame. Such has been the case with the question whether information received in confidence by journalists is entitled to a legal privilege against compulsory process.

Although dating back at least to the days of Benjamin Franklin's apprenticeship in the newspaper business,¹ the press subpoena problem remained until very recently a matter of only occasional and local significance.² Approximately two years ago, however, subpoenas

* Associate Professor of Law, University of Michigan. B.A. 1964, Northwestern University; J.D. 1967, University of Chicago.—Ed.

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1. One of the Pieces in our News-Paper, on some political Point which I have now forgotten, gave Offence to the Assembly. He was taken up, censur'd and imprison'd for a Month by the Speaker's Warrant, I suppose because he would not discover his Author. I too was taken up and examin'd before the Council; but tho' I did not give them any Satisfaction, they contented themselves with admonishing me, and dismiss'd me; considering me perhaps as an Apprentice who was bound to keep his Master's Secrets.

THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 69 (Yale Univ. Press 1964).

2. The problem attracted some attention in the 1950's in two much-publicized courtroom clashes. In *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), libel plaintiff Judy Garland tried to obtain the name of the unidentified "CBS network executive" who was quoted in a Marie Torre gossip column as having said that Miss Garland had lost a performing contract on account of her girth. When Miss Torre refused to divulge her source, she was held in contempt. The Second Circuit in affirming the contempt citation held that even if there is some first amendment limitation on press subpoenas, a reporter must identify her source when the information "[goes] to the heart of" the plaintiff's claim. 259 F.2d at 550. The other dispute arose when, during a challenge by convicted atomic spy Ethel Rosenberg to the conditions of her incarceration, New York Post columnist Leonard Lyons refused to divulge his source for a statement that Mrs. Rosenberg could still avoid the death penalty if she would turn state's evidence. *Rosenberg v. Carroll In re Lyons*, 99 F. Supp. 629 (S.D.N.Y. 1951). The judge rejected Lyons' contention that communications to a journalist are privileged, but ruled that in this case the source need not be divulged because the statement was not relevant to the eighth amendment claim under consideration. 99 F. Supp. at 629-30.

Two cases in the 1960's also briefly focused public attention on the problem. In *In re Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964), the star first baseman for the San Francisco Giants sought to discover the sources for allegedly defamatory statements about him in a magazine article. The applicable California newsman's privilege statute expressly covered only journalists employed by newspapers, wire services, press associations, and radio and television stations. Since the statute was in derogation of the common law, the court held it should not be construed to extend a privilege to magazine writers. 233 F. Supp. at 473.

began to issue against reporters in such numbers and circumstances as to generate consternation in virtually all quarters of the journalism profession and a questioning by many reporters of the Government's motives. Then the Attorney General quickly issued a set of conciliatory guidelines,³ the volume of subpoenas subsided to a less alarming level, and everyone dug in for a long legal siege.

Today, the statutory, common-law, and constitutional aspects of the long-dormant problem are being re-examined by many legislators,⁴ judges,⁵ and academicians.⁶ The Supreme Court is scheduled to address the constitutional question some time this term.⁷ I propose to enter this fray. In this article, I will report the results of an empirical survey that I have undertaken. In subsequent articles,⁸ I will analyze the eighteen state statutes that grant newsmen a privilege, consider whether protection for the reporter-news source relationship is compelled by existing common-law principles, and address the question whether a newsman's privilege is properly to be inferred from the free-press clause of the Federal Constitution. Before

In *State v. Buchanan*, 250 Ore. 244, 248-50, 436 P.2d 729, 731, *cert. denied*, 392 U.S. 905 (1968), a student newspaper editor used fictional names in reporting an interview with seven marijuana smokers. A grand jury, rejecting the editor's claim of a first amendment privilege, demanded the real names. She then accepted a contempt citation, which was affirmed by the Oregon supreme court, and paid a \$300 fine.

For other cases prior to the recent spate, see Annot., 7 A.L.R. 3d 591 (1966).

3. See note 212 *infra*.

4. One of the best of the recent articles on the problem was written by a state legislator. See D'Alemberte, *Journalists under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307 (1969).

5. See, e.g., *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971); *In re Pappas*, — Mass. —, 266 N.E.2d 297, *cert. granted*, 402 U.S. 942 (1971); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. Ct. App.), *cert. granted*, 402 U.S. 942 (1971); *State v. Knops*, 49 Wis. 2d 647, 183 N.W.2d 93 (1971); *People v. Dohrn*, Crim. No. 69-3803 (Cir. Ct. Cook County, Ill., May 20, 1970); *People v. Rios* (Super. Ct. San Francisco County, Cal., July 15, 1970).

6. For a remarkably thoughtful and thorough discussion of the press subpoena problem, see Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970). Other recent commentary includes: Nelson, *The Newsmen's Privilege Against Disclosure of Confidential Sources and Information*, 24 VAND. L. REV. 667 (1971); Comment, *The Newsmen's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970); Comment, *Constitutional Protection for the Newsmen's Work Product*, 6 HARV. CIV. LIB.—CIV. RIGHTS L. REV. 119 (1970); Comment, *The Newsmen's Privilege: Protection of Confidential Associations and Private Communications*, 4 U. MICH. J. L. REF. 85 (1970); Comment, *Newsmen's Immunity Needs a Shot in the Arm*, 11 SANTA CLARA LAW. 56 (1970); Note, *The Right of the Press To Gather Information*, 71 COLUM. L. REV. 838 (1971); Recent Case, 84 HARV. L. REV. 1536 (1971).

7. The issue will come before the Court in *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971); *In re Pappas*, — Mass. —, 266 N.E.2d 297, *cert. granted*, 402 U.S. 942 (1971); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. Ct. App.), *cert. granted*, 402 U.S. 942 (1971).

8. The second article will discuss the common-law and statutory dimensions of the press-subpoena controversy. The third article will consider the constitutional question.

proceeding, however, it may be helpful to sketch briefly some of the dimensions of the controversy.

The three cases on the Court's docket all concern one variant of the press subpoena problem: a grand jury's effort to acquire from a reporter information about possible law violations committed by his news sources. While this is currently the most common posture in which the issue presents itself, one must take cognizance of many other manifestations of the controversy before deciding what general principles, let alone detailed standards, ought to govern press subpoena disputes. Congressional committees, such as the panel that was looking into the CBS documentary *The Selling of the Pentagon*,⁹ may wish to subpoena newsmen to scrutinize the accuracy and balance of certain reporting efforts. Criminal defendants have an explicit sixth amendment right to compel the attendance of witnesses in their favor; this right may at times conflict with the reporter's interest in honoring confidences with sources, such as police officers or prosecutors, who may have given the reporter information that would be helpful to the defense.¹⁰ On occasion, information in the hands of newsmen might enable the police to prevent future crimes or to apprehend fugitive felons.¹¹ Some journalistic endeavors border on criminal activity, such as participation in acts of demonstrative vandalism¹² or receiving stolen documents.¹³ As of the Supreme Court's recent decision in *Rosenbloom v. Metro-*

9. See N.Y. Times, June 25, 1971, at 71, col. 1.

10. In *People v. Dohrn*, Crim. No. 69-3808 (Cir. Ct. Cook County, Ill., May 20, 1970), this sixth amendment right was held in the particular circumstances of the case to be superseded by the newsman's first amendment right to a privilege. See also *People v. Rios*, No. 75129 (Super. Ct. San Francisco County, Cal., July 15, 1970).

11. This was the consideration put forth by the majority in *State v. Knops*, 49 Wis. 2d 647, 659, 183 N.W.2d 93, 99 (1971). The case concerned an attempt by a grand jury to secure the testimony of the editor of an underground newspaper which, after a bombing at the University of Wisconsin resulting in the death of one student, ran a story entitled "The Bombers Tell Why and What Next—Exclusive to Kaleidoscope." The editor refused to testify, first asserting his fifth amendment right against self-incrimination. The grand jury then granted him immunity, but he still declined to answer questions and was cited for contempt. 49 Wis. 2d at 650, 183 N.W.2d at 94. On appeal, the Wisconsin supreme court interpreted the first amendment to grant all journalists, including those of the underground press, a qualified privilege to protect sources. The court held, however, over one dissent, that in the particular circumstances of the case the incremental law enforcement gains to be realized by compelling Knops to testify outweighed the first amendment interest in newsgathering. 49 Wis. 2d at 658-59, 183 N.W.2d at 99. Knops spent several months in jail, and to this date has refused to answer the grand jury's questions. The bombing remains unsolved.

12. One night Michigan's celebrated "billboard bandits" invited two reporters along to cover one of their periodic efforts to improve the environment. A group of local residents surprised the group, and the newsmen were held for complicity in the crime. The charges were eventually dropped. See, e.g., *Detroit Free Press*, April 20, 1971, at 1-A, col. 7.

13. See *New York Times v. United States*, 403 U.S. 713 (1971); *Liberty Lobby v. Pearson*, 390 F.2d 489 (D.C. Cir. 1968); *Dodd v. Pearson*, 279 F. Supp. 101 (D.D.C. 1968).

media, Inc.,¹⁴ virtually all libel plaintiffs must carry the burden of proving with clear and convincing evidence that the defendant acted with reckless disregard for the truth, a well-nigh impossible task if the defendant is allowed to hide behind anonymous sources. These and other situations raise considerations that are not present in the cases that are currently before the Court, and that may call for a quite different reconciliation of the conflicting interests.

In addition to keeping in mind a number of factual variants, one should also view the problem from the broader perspective of evidence law. While constitutional doctrine has relied rather heavily on rules that exclude trustworthy evidence in the name of social values other than the search for truth,¹⁵ evidence scholars have criticized this strategy.¹⁶ Partly, this criticism is a result of the fact that these scholars tend to center their professional attention on, and consequently attach very high priority to, the quality of the fact-finding process.¹⁷ Equally important, however, is their scepticism over whether exclusionary rules and privileges come even close to achieving the behavioral effects that are usually invoked to justify the evidentiary costs.¹⁸ Have police officers been more respectful of the privacy of suspects as a result of *Mapp v. Ohio*?¹⁹ Has a husband ever confided in his wife because of the husband-wife privilege? One cannot, it would seem, resolve the press subpoena controversy by mindlessly looking to "progressive" legal thought because, as with the cases concerning the privacy tort²⁰ and trial publicity,²¹ the "progressive" trends are on a collision course.

14. 403 U.S. 29 (1971).

15. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

16. See, e.g., 8 J. WIGMORE, EVIDENCE § 2184a n.1, at 31 (McNaughton rev. 1961). Happily for his peace of mind, Wigmore did not live to see *Mapp* and *Miranda*. He was deeply upset by their progenitors, however; his scathing parable of Titus and Flavius makes the current law-and-order literature seem tame by comparison:

Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.

Id. See also J. MACUIRE, EVIDENCE OF GUILT, § 5.02, at 176-79 (1959).

17. See, e.g., C. MCCORMICK, EVIDENCE § 81, at 165, § 90, at 179-80 (1954); 8 J. WIGMORE, *supra* note 16, § 2192, at 70-74.

18. See, e.g., C. MCCORMICK, *supra* note 17, §§ 90-91, at 179, 181-82, § 108, at 222; Morgan, Foreword to MODEL CODE OF EVIDENCE at 22-31 (1942).

19. 367 U.S. 643 (1961). See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

20. *Time, Inc. v. Hill*, 385 U.S. 374 (1962) (expanding first amendment principles held to limit expansion of the privacy tort).

21. E.g., *Estes v. Texas*, 381 U.S. 532 (1965) (expanding notions of due process for

The subpoena controversy ought also to be viewed in the context of developing free speech theory. Having spent more than a century in largely hortatory limbo,²² the first amendment has had a surprisingly brief career—just over fifty years—as a meaningful legal concept.²³ And in that relatively short span of time, judicial and academic analysis has concentrated on the problems of advocacy and political belief.²⁴ Only recently have the courts made serious efforts to formulate free speech principles to govern disputes over emotive imagery,²⁵ falsehood,²⁶ and competing demands for the use of public and quasi-public land.²⁷ The press subpoena controversy, the dispute over the publishing of the Pentagon Papers,²⁸ and a recent landmark court of appeals decision recognizing a first amendment right to buy network time for political advertisements²⁹ all suggest that free speech analysis in the future may be increasingly concerned with the flow of information—with questions of access to sources of information³⁰

the accused held to supersede the news media's first amendment interest in televising trials).

22. See, e.g., T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 35-60 (1967), and authorities cited therein. See also *Fox v. Washington*, 236 U.S. 273 (1915); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1910); *Patterson v. Colorado*, 205 U.S. 454 (1903).

23. Apparently, the earliest judicial decision to give any meaningful protection to speech was Judge Learned Hand's district court holding in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd. on other grounds*, 246 F. 24 (2d Cir. 1917). Justice Holmes' clear-and-present-danger test appeared two years later, *Schenck v. United States*, 249 U.S. 47 (1919), but it was not until *Near v. Minnesota*, 283 U.S. 697 (1931), that the Court reversed a state court judgment explicitly on first amendment grounds. Cf. *Fiske v. Kansas*, 274 U.S. 380 (1927). The first Supreme Court decision to strike down an act of Congress as repugnant to the first amendment came only six years ago. *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

24. See, e.g., the cases and articles compiled in W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 724-894 (3d ed. 1970).

25. E.g., *Cohen v. California*, 403 U.S. 15 (1971); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen.*, 383 U.S. 413 (1966).

26. E.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

27. E.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Adderly v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

28. *New York Times v. United States*, 403 U.S. 713 (1971).

29. *Business Executives' Move for Vietnam Peace v. FCC*, 40 U.S.L.W. 2082 (D.C. Cir. Aug. 3, 1971).

30. See, e.g., *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959); *Kovach v. Maddux*, 238 F. Supp. 835 (M.D. Tenn. 1965); *Los Angeles Free Press v. City of Los Angeles*, 9 Cal. App. 3d 448, 88 Cal. Rptr. 605 (1970); *New York Post Corp. v. Moses*, 23 Misc. 2d 826, 204 N.Y.S.2d 44 (Sup. Ct. 1960).

and to the channels of mass communication.³¹ The press subpoena cases will challenge the Court either to fit this burgeoning set of issues into an existing conceptual framework or to devise new first amendment standards for resolving these information-flow disputes.

Modern developments in the journalism profession comprise still another background against which the subpoena issue should be examined. As the broadcast media have gradually assumed predominance in the provision of hot news, the print media have turned increasingly to in-depth, interpretive reporting.³² This latter variety of news coverage depends heavily on "not for attribution" quotes, "off the record" background sessions, leads, and continuing relationships with sources.³³ The spectacular growth of the underground press has ushered in other important trends in the profession, including what might be termed "participant-observer" reporting, an approach that is particularly implicated in the subpoena controversy. Perhaps the most significant recent development in American journalism, however, is the pronounced disillusionment that many reporters have come to experience with regard to the nation's political leadership.³⁴ This feeling is not traceable solely to President Nixon's treatment of the press. Indeed, the disillusionment traces back to the Kennedy Administration's more subtle manipulation of the media and to the credibility gap of the Johnson years. Nor is the attitude limited to the young reporters whose naive idealism has been punctured. The "old pros," men who have covered the tough beats, who have "seen it all," and who used to cooperate willingly with law enforcement officials and investigatory bodies, now say they

31. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Chicago Joint Bd., Amal. Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970).

32. See C. MACDOUGALL, *INTERPRETATIVE REPORTING* 13-18 (5th ed. 1966). This trend was confirmed in several personal interviews. E.g., interviews with: Jack Mabley of *Chicago Today*, Aug. 6, 1971, Chicago; William Jones of the *Chicago Tribune*, Aug. 6, 1971, Chicago; Jim Hoge, Editor of the *Chicago Sun-Times*, Aug. 6, 1971, Chicago; Ray Brennan of the *Chicago Sun-Times*, Aug. 6, 1971, Chicago; Steve Roberts of the *N.Y. Times*, Aug. 9, 1971, Los Angeles; Peter Goldman, Senior Editor of *NEWSWEEK*, July 8, 1971, New York; Theo Wilson of the *N.Y. Daily News*, May 13, 1971, New York; Jerry Tallmer of the *N.Y. Post*, May 14, 1971, New York. Some critics of the press contend, however, that this trend is not as rapid or as extensive as it should be. See, e.g., J. HOHENBURG, *THE NEWS MEDIA: A JOURNALIST LOOKS AT HIS PROFESSION* 34-35 (1968); Ways, *What's Wrong with News? It Isn't Enough*, *FORTUNE*, Oct. 1969, at 110.

33. This point was made repeatedly in the interviews cited in note 32 *supra*.

34. This feeling of disillusionment is apparently very widespread. The attitude was conveyed in a particularly poignant fashion in interviews with: Sander Vanocur of Public Broadcasting Service, July 8, 1971, New York; Jim Hoge, *supra* note 32; Joseph Lelyveld of the *N.Y. Times*, May 14, 1971, New York; Jerry Tallmer, *supra* note 32; Hal Bruno, News Editor of *NEWSWEEK*, May 13, 1971, New York; Wallace Turner of the *N.Y. Times*, Aug. 10-11, 1971, San Francisco.

are so alienated that they feel no obligation to assist the processes of government.³⁵ The press subpoena controversy is in the courts today largely because the sensitivity to each other's needs that used to characterize government-press relations is now virtually nonexistent.

II. FINDINGS AND IMPRESSIONS

One component of every legal decision—whether it be the decision to draft or to vote for a statute, to crystallize a common-law concept, or to interpret a statute or a constitution in one way rather than another—is a set of factual premises. Many, if not most, of the empirical premises that guide legal decision-making are initially formulated by a most unsystematic and impressionistic process. What is worse, these premises are seldom tested in operation. Indeed, probably the greatest single shortcoming of American law as a decision-making process is its failure to institute any sort of systematic auditing procedure. At a time when other disciplines are experiencing a virtual knowledge explosion, legal decision-makers and pundits continue to rely almost exclusively on “the lessons of experience” and intuitive “insights.”

In preparation for examining the statutory, common-law, and constitutional dimensions of the press subpoena controversy, I have sought to achieve as comprehensive and systematic an understanding of the empirical aspects of the dispute as time and resources would permit. I present my empirical findings and impressions separately, before proceeding to incorporate them in an analysis of the legal questions, for two reasons. First, I hope to help readers who are unwilling to accept my empirical premises to know the exact points on which we disagree and the reasons for our disagreement. Too often discourse on legal issues is plagued by a failure to separate the empirical and normative dimensions of the inquiry and a concomitant failure to subject empirical premises to a rigorous standard of justification. Second, there may be some readers who may find my empirical conclusions persuasive but who cannot accept the legal conclusions that I draw therefrom. In presenting my empirical findings separately, I hope to aid these readers in formulating their own conclusions on the legal questions.

A. *Research Methods*

My conclusions are a composite derived essentially from three separate but interrelated empirical projects. First, I conducted

35. Interviews with: Hal Bruno, *supra* note 34; Jerry Tallmer, *supra* note 32; Ray Brennan, *supra* note 32.

personal interviews with 47 reporters and editors in New York City, Washington, D.C., Chicago, Detroit, Los Angeles, San Francisco, and Denver. Most of the interviews lasted about one hour, although some lasted much longer and a few were shorter. The subjects were chosen impressionistically on the basis of their expressed willingness to cooperate, their achievements in the profession, the kind of reporting or editing they do, their importance in terms of the number of readers or viewers they reach, and their familiarity with the subpoena problem. Frequently one interviewee would recommend other newsmen with whom I should try to speak, and I pursued these leads whenever possible. I followed no set pattern in the interviews, but rather I tried to explore the nuances and details of whatever aspects of the problem the interviewee seemed most interested in and informed about. On some occasions I studied questionnaire responses that the interviewee had given to a qualitative survey that I had conducted and then in the personal interview I pressed for reasons, sometimes in a cross-examining manner. I also used these personal interviews to explore hypotheses that were forming in my mind, including some that were developing as a result of responses to a quantitative survey of newsmen I was conducting at the same time. Throughout this interviewing phase of the empirical study, my goal was depth rather than breadth; I sought to gain a "feel" for some of the empirical aspects of the problem that could not be reduced to quantitative measures.

Second, Dean Richard Baker of the Columbia Graduate School of Journalism and I conducted a mail questionnaire survey of 67 reporters whom we expected, on the basis of direct information we had or the kind of reporting they do, to be especially familiar with the subpoena problem. The questionnaire was designed to elicit "qualitative" rather than "quantitative" information. We invited the respondents to tell about their subpoena experiences and to express their opinions about the controversy in their own words.

Third, Dean Baker and I conducted a quantitative survey. The questionnaire sought responses that could be coded and tabulated and thus it necessarily failed to measure some of the possibly important subtleties and nuances in the experiences and opinions of the newsmen surveyed. Rather than choosing a smaller, random sample from which one might generalize about a larger population, we decided to measure the responses of a large nonrandom population with no intention of generalizing statistically beyond the population. Two major considerations influenced this decision. First, for legal purposes the most important population need not be so large

(e.g., all voters, all journalists, all blacks) that it can be measured only by random sampling techniques. The more appropriate population, in fact, may be of a size capable of being completely surveyed. If, for example, only 100 highly specialized reporters were at all affected by the subpoena threat, the quantitative information one might obtain from surveying this relatively small population completely might be more valuable than the information that might result from studying the entire journalism profession by means of a random sample. Second, even if the latter course were desirable, we were sceptical whether we could devise a sample that would qualify as "random," as careful social scientists use the term, and that would permit valid generalizations about a population larger than that surveyed. For one thing, definitional complications are not insignificant in this age of stringers, free-lancers, and the underground press. More important, because of the dearth of previous survey research on the subpoena problem,³⁶ we could not—as political pollsters do—know with confidence what variables to control for in selecting the sample. Thus, the sample was not intended to be random. It was, however, chosen with care and with an eye to achieving the quantitative measures that would be most relevant to the analysis of the legal questions.

In deciding upon the population to be surveyed, we adopted two selection principles. We sought, first, to include reporters from a wide range of media, and, second, to include primarily those reporters who reach a comparatively large number of readers, viewers, or listeners. In surveying the daily press, we limited our population to the 208 newspapers with a minimum circulation of 50,000. We sent each of these newspapers one questionnaire for every 50,000 persons in its circulation, as reported in the 1971 Editor and Publisher Yearbook. We chose the recipients of the questionnaire by selecting a recent edition of the paper; beginning with page one and proceeding until the paper's quota was reached, we sent a questionnaire to each journalist (including wire service reporters) who had a domestic by-line, photo credit, or column in the paper that day. For the weekly news magazines, we decided because of definitional hazards to limit the survey to *Newsweek*, *Time* and *United States News and World Report*. We sent a questionnaire to every

36. The only previous survey is reported in Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 57-61 (1969). The authors asked 37 daily newspaper editors, apparently selected on an impressionistic basis, the following question: "Excluding one- or two-sentence gossip items, on the average how many stories based on information received in confidence are published in your paper each year? Very rough estimate." *Id.* at 61.

domestic correspondent employed by these three magazines. The underground press posed more of a problem: we anticipated a sparse response and we wanted a large enough population to enable us to draw some comparisons with reporters from the establishment media. We sent one questionnaire each to the editors of 95 underground newspapers, which we selected impressionistically on the basis of reputation for importance and geographic dispersity³⁷ from a larger list supplied by the Liberation News Service. For the national television networks, we were able to obtain personnel lists from two of the three networks, the National Broadcasting Company (NBC) and the American Broadcasting Company (ABC), and we chose newsmen randomly from these lists. For local television, we sent questionnaires to all the news directors from the 21 leading market areas whose names were listed in the 1971 Broadcasting Yearbook. For radio we followed the same pattern: all news directors listed from the 21 leading market areas. Finally, we included free-lance journalists and those who write for magazines other than the three major newsweeklies by taking every other name from the membership list of the Magazine Writers Association.

Altogether, 1,470 questionnaires were sent out with a cover letter that stressed the importance of objectivity and made no mention of the pending subpoena litigation. Two follow-up letters were sent to those who did not return the questionnaire on the first round. A total of 975 questionnaires (66.3%) were eventually returned. The distribution by type of medium was: daily press, 528 (53.2%); newsweekly, 132 (13.3%); underground press, 47 (4.7%); network television, 51 (5.1%); local television and radio, 130 (13.1%); free-lance and other magazine, 103 (10.4%). The distribution by years of experience as a full-time reporter was: less than one year, 36 (4.2%); 1-5 years, 206 (23.9%); 6-10 years, 197 (22.9%); 11-20 years, 224 (26.0%); more than 20 years, 199 (23.1%). Each respondent was asked to specify the state in which he does most of his work; 46 states and the District of Columbia were represented in the returned questionnaires.³⁸ One hundred and forty-eight (16.8%) of the respondents

37. This selection was done by Arthur Felson, our research associate, who is more familiar with the underground press than are Dean Baker and I.

38. The breakdown by state was: Alabama 8; Alaska 0; Arizona 8; Arkansas 0; California 88; Colorado 1; Connecticut 10; Delaware 2; District of Columbia 106; Florida 29; Georgia 11; Hawaii 0; Idaho 13; Illinois 55; Indiana 21; Iowa 7; Kansas 4; Kentucky 9; Louisiana 8; Maine 3; Maryland 7; Massachusetts 37; Michigan 39; Minnesota 18; Mississippi 10; Missouri 20; Montana 1; Nebraska 5; Nevada 2; New Hampshire 4; New Jersey 23; New Mexico 4; New York 165; North Carolina 16; North Dakota 1; Ohio 35; Oklahoma 16; Oregon 4; Pennsylvania 39; Rhode Island 1; South Carolina 3; South Dakota 1; Tennessee 10; Texas 37; Utah 2; Vermont 1; Virginia 5; Washington 28; West Virginia 2; Wisconsin 14; Wyoming 0.

considered themselves very well qualified to answer the questionnaire; 198 (22.5%) fairly well qualified; 240 (27.3%) somewhat qualified; and 293 (33.3%) considered themselves not well qualified.

This population of respondents, having been consciously selected by me in the first place and then having been self-selected by those who chose to fill out the questionnaire, is necessarily "biased" in some directions. The claim can fairly be made, nonetheless, that this population represents one extremely important segment of the journalism profession, and that the average consumer of news receives a significant portion of his daily and weekly fare from the newsmen who comprise this survey.

Finally, I wish to emphasize the point that the quantitative survey is only one of several sources on which my ultimate empirical conclusions are based. Quantitative information can be extremely valuable—but only if it is used with care. It must be remembered that a questionnaire measures only one kind of response, at one level of consciousness, and after only a limited amount of thought by the respondent. The way a person checks off blanks on a questionnaire tells something about his experiences and judgments, but it does not necessarily tell how he would respond to a question in a personal interview, let alone how he would react in a real-life situation, particularly a crisis. Relying on the personal interviews and the separate qualitative survey, I have tried to place the quantitative information in perspective.

B. *The Nature of Reporter-Source Relationships*

Confidential relationships between reporters and sources vary greatly, but a few patterns can be discerned.

Most people find exciting the prospect of press coverage of their activities, their information, or their ideas, and they cooperate with reporters as completely as they can. This generalization is less true for politicians on the make, cautious bureaucrats, and severely disaffected members of the society, but even these potential news sources seem to display at worst an approach-avoidance attitude. In fact, a great deal of information comes to newsmen unsolicited. Some top-flight investigative reporters, for example, say that they get as many important leads from unsolicited letters and phone calls as they do from their own digging after information.³⁹ Newsmen who specialize in daily coverage of minority groups receive many more unsolic-

39. *E.g.*, interviews with: William Jones, *supra* note 32; Bill Farr, formerly of the Los Angeles Herald Examiner, Oct. 9, 1971, Los Angeles.

ited tips than they can possibly follow up.⁴⁰ Reporting of radical activities, on the other hand, appears to rely less on unsolicited information.⁴¹

When reporters are seeking to establish contact with particular sources, elaborate rituals of introduction are seldom necessary except with political and entertainment celebrities.⁴² Personal recommendations and name-dropping come in handy on occasion, but these devices seem to be relied upon much less than one might suppose. Blacks tend to be suspicious of white reporters and radicals tend to distrust the establishment press, but reporters with the basic personal credential of blackness or a counterculture life style seem to need little else to establish preliminary contact with these sources.⁴³ There are, of course, exceptional situations. On such occasions, newsmen will resort to any number of devices to get information from sources: for example, securing a personal recommendation from another reporter who has won the trust of the source;⁴⁴ giving the source detailed assurances of confidentiality, sometimes to the extent of promising to go to jail if necessary;⁴⁵ paying the source⁴⁶—one instance of a \$5,000 payoff was related to me in an interview;⁴⁷ offering to trade information with the source;⁴⁸ or offering not to print information that might be damaging to the source in return for other information or leads. For the most part, however, the acquisition of sources is more a function of personality than of any special techniques or contacts.⁴⁹

Getting an interview is one thing; gaining an accurate and comprehensive understanding of a person, a group, or a news event is quite another matter. It is in this latter pursuit that some reporters succeed and many fail.⁵⁰ Personal recommendations, inside informa-

40. Interviews with: Steve Duncan of the N.Y. Daily News, May 13, 1971, New York; Meremeil Rodriguez of the N.Y. Daily News, May 13, 1971, New York.

41. Interview with John Kifner of the N.Y. Times, Aug. 13, 1971, Boulder, Colorado.

42. Interviews with: Karston Prager of TIME, Aug. 10, 1971, San Francisco; Wallace Turner, *supra* note 34; Earl Caldwell of the N.Y. Times, Aug. 12, 1971, San Francisco; Judy Kinnard of the N.Y. Times, Aug. 9, 1971, Los Angeles.

43. *Id.*

44. Interviews with: Steve Duncan, *supra* note 40; Earl Caldwell, *supra* note 42.

45. Interview with David Burnham of the N.Y. Times, May 14, 1971, New York.

46. Interviews with: Tom Powers of the Chicago Tribune, Aug. 6, 1971, Chicago; William Jones, *supra* note 32.

47. Interview with Tom Powers, *supra* note 46.

48. Interviews with: Jack Mabley, *supra* note 32; William Jones, *supra* note 32, Helen Moad of CBS, July 8, 1971, New York.

49. Interviews with: Wallace Turner, *supra* note 34; Karston Prager, *supra* note 42.

50. Wallace Turner, chief of the N.Y. Times San Francisco bureau, made the point to me most dramatically. He gave me a lengthy feature story that he had written on the Black Panthers before Earl Caldwell joined the bureau to specialize in Panther

tion, and mutual acquaintances can be very important in getting a source to relax and to speak expansively, or in persuading a group to allow its operations to be observed in an unstructured fashion.⁵¹ But even more important for these purposes is the reporter's ability to inspire in his sources a feeling of confidence that he will understand the information he receives and will report it accurately.⁵² In covering some of the polarized elements in society—radicals, minority groups, police—it is virtually impossible for the reporter to establish this feeling of confidence unless the source is convinced that the reporter is actually "on his side."⁵³ This attitude, characterized by the slogan "if you are not for me, you are against me," is prevalent today among many news sources. And other sources who do not put the matter in such either/or terms demand at a minimum that the reporter maintain an independence and an autonomy that may require him to avoid any involvement whatsoever with "the other side."⁵⁴

In maintaining this posture, reporters and editors face a dilemma. It is important for the reporter to identify with the source in order to reduce the feelings of self-consciousness that most sources experience when speaking with the press. Unless this self-consciousness is overcome, the newsmen, unable to report accurately and perceptively on daily routines, may be reduced to reporting a series of "pseudo-events."⁵⁵ But identifying with sources also creates substantial risks. Reporters can get caught up in a gossip syndrome as a result of which they become more concerned with getting the inside story for themselves than with getting as much of the story as possible across to the reader.⁵⁶ Many editors and reporters feel that reporters

coverage. The story, which included an in-depth interview with Eldridge Cleaver, seemed to present a rather detailed and insightful analysis of the Panthers. "It's not worth a damn," Turner told me after I had read the story. He noted that he had to print essentially what the Panther leaders told him, that he was not able to get to the rank-and-file members of the party or to observe the Panthers' daily routine. In short, he could not verify the information that was given him, and his analysis of trends and tensions was of necessity based almost exclusively on what the leaders told him. Interview, *supra* note 34.

51. Interviews with: Earl Caldwell, *supra* note 42; Steve Duncan, *supra* note 40.

52. Interviews with: John Kifner, *supra* note 41; Ron Einstoss of the Los Angeles Times, Aug. 9, 1971, Los Angeles; Earl Caldwell, *supra* note 42; Steve Roberts, *supra* note 32.

53. Interviews with: Earl Caldwell, *supra* note 42; Diane Camper of NEWSWEEK, Aug. 12, 1971, San Francisco; John Kifner, *supra* note 41.

54. Interviews with: William Cook of NEWSWEEK, Aug. 12, 1971, San Francisco; Steve Roberts, *supra* note 32; Karston Prager, *supra* note 42; John Kifner, *supra* note 41.

55. The term is Daniel Boorstin's. See generally THE IMAGE (1960).

56. Interviews with: Joseph Lelyveld, *supra* note 34; David Burnham, *supra* note 45; Theo Wilson, *supra* note 32; Jerry Tallmer, *supra* note 32.

could get a great deal more information on the record if they pressed their sources more aggressively and were less concerned about really being on the "inside."⁵⁷ Regular confidential sources can also co-opt a reporter, particularly when the reporter's career is interrelated with the source's career.⁵⁸ The danger of co-optation is probably greatest in reporting on politicians, but it is not unknown in covering radicals and minority groups.⁵⁹

Reporters cope with this dilemma in different ways. Every newsman whom I questioned on the point said that he consciously strives to keep his role as a reporter clearly defined. According to these journalists, it is important for sources to realize that although a newsman's sympathies may lie with his sources, his primary responsibility is to his readers. This role definition sometimes takes the form of a reluctance on the part of the reporter to offer information or advice to sources,⁶⁰ although it is not uncommon for newsmen to counsel inexperienced sources on public relations tactics such as the timing of press releases⁶¹ and investigative reporters sometimes plot strategy with bureaucrats who have decided to "blow the whistle."⁶² Another example of the sensitivity to role is the fact that some reporters who have distinguished themselves in acquiring sources in radical movements say they would not put themselves in a position to learn certain highly sensitive pieces of information that could not be related to readers.⁶³ On the other hand, reporters will sometimes take it upon themselves to look after an inexperienced source's best interests even when such concern might conflict with the reporter's professional endeavors. It is not unheard of for a newsman, particularly one who identifies strongly with his sources, to advise a source that he probably would not want his name to be used.⁶⁴ In writing their stories reporters will sometimes omit details that they believe would unduly

57. Interviews with: Jason McManus of TIME, July 7, 1971, New York; Ronald Kriss of TIME, July 7, 1971, New York; Joseph Lelyveld, *supra* note 34.

58. Interviews with: Sander Vanocur, *supra* note 34; David Burnham, *supra* note 45. This phenomenon is also described in G. TALESE, THE KINGDOM AND THE POWER 234 (Bantam ed. 1970).

59. Interview with Steve Roberts, *supra* note 32.

60. Interviews with: Meremeil Rodriguez, *supra* note 40; John Kifner, *supra* note 41.

61. Interview with John Kifner, *supra* note 41.

62. Interview with William Jones, *supra* note 32.

63. Interviews with: J. Anthony Lukas of the N.Y. Times, July 8, 1971, New York; Earl Caldwell, *supra* note 42; John Kifner, *supra* note 41.

64. Interviews with: Elisabeth Coleman of NEWSWEEK, Aug. 12, 1971, San Francisco; Diane Camper, *supra* note 53.

harm a source even though the source himself, out of recklessness or naïveté, might not mind if the information were printed.⁶⁵

No matter how these problems of role definition are resolved, "confidentiality" in these relationships often takes the form of an unspoken trust that the reporter will treat the information with care and will know what to use and what not to use. Frequently there is not an explicit agreement about what is on and off the record.⁶⁶ In fact, radical and militant sources are most often concerned not with keeping sensitive information out of stories, but rather with making sure that the information is presented in its proper context and in enough detail so that a distorted or oversimplified impression is not conveyed.⁶⁷

With relatively sophisticated sources such as politicians and government bureaucrats, on the other hand, the confidentiality tends to be more explicit.⁶⁸ On his own initiative the source may preface a remark with "You can't use this, but . . ." or "You can quote this, but don't attribute it." Or the reporter may cajole a reticent source by volunteering to keep information off the record. A common technique is for a reporter to put the source at ease by initiating an interview on an off-the-record basis and then to press at the conclusion of the interview, or even days later, for permission to use the material.⁶⁹ Correspondents for newsweeklies in particular find themselves engaged in this renegotiation after the New York writers and editors decide how they want the story to run.⁷⁰ Frequently sources who offer material off the record can subsequently be persuaded to allow the information to be printed as long as it is not attributed to them.

In a few situations confidentiality will take still another form: the identity of the source will remain unknown even to the reporter. Some investigative reporters have gotten big stories from unsolicited,

65. Interview with Peter Goldman, *supra* note 32.

66. Interviews with: J. Anthony Lukas, *supra* note 63; John Kifner, *supra* note 41; Earl Caldwell, *supra* note 42; Ron Einstoss, *supra* note 52.

67. Interviews with: Earl Caldwell, *supra* note 42; John Kifner, *supra* note 41.

68. Interview with Floyd Kalber of NBC, Aug. 6, 1971, Chicago. As radicals and militants become more experienced and sophisticated in dealing with the press, they tend to demand more explicit understandings concerning the details of confidentiality. One reporter attributes this phenomenon partly to role playing in emulation of the "Washington syndrome." Interview with Martin Kasindorf of NEWSWEEK, Aug. 9, 1971, Los Angeles.

69. Interviews with: Martin Kasindorf, *supra* note 68; Karston Prager, *supra* note 42.

70. *Id.*

anonymous sources.⁷¹ The mystery man may, for example, leave revealing documents in a bus station locker, or he may phone regularly at an appointed hour. Newsmen are very reluctant to use these sources in the absence of independent verification of their information, but the phenomenon of the totally anonymous source is not unknown.

For most confidential relationships, even those in which the terms are carefully negotiated, the reporter's secrecy obligation does not preclude him from sharing the information with his editors and fellow reporters.⁷² There are some instances in which the reporter will feel bound to keep the information to himself, but they are rare. A very important use of confidential information is in persuading editors to run the story.⁷³ Only with his most trusted reporters will an editor have sufficient faith in the accuracy and balance of a story when he knows he is being kept partly in the dark. Although the rules are not followed to the letter, correspondents for *Newsweek* and *Time* are required to include in the files they submit to New York all the information they get off the record and the identities of all their sources for not-for-attribution quotes.⁷⁴ Material obtained in confidence is also shared among competitors; a common practice, especially in trial reporting, is for reporters from different newspapers to pool their confidential information.⁷⁵

Sources may "dry up" for any number of reasons. The most common cause is the source's disillusionment with the way the reporter is writing his stories.⁷⁶ Although few sources expect stories to be written from their own point of view, perceptions are so determined by values that a reporter's composite assessment of what happened will often be considered by the source to be outside the range within which reasonable men might differ. And, of course, some stories *are* badly botched in ways that can be damaging to the source.

This sensitivity on the part of sources can have some interesting effects on the competition for stories. Reporters for the newsweeklies sometimes are able to placate angry sources by placing all the blame

71. Interviews with: Jack Mabley, *supra* note 32; William Jones, *supra* note 32; Bill Farr, *supra* note 39.

72. Interviews with: Theo Wilson, *supra* note 32; Jack Mabley, *supra* note 32; Hal Bruno, *supra* note 34.

73. David Burnham, the New York Times reporter who did the exposé last year on graft in the New York Police Department, told me that his editors were reluctant to run the story until he brought some of his police sources to the Times building for a lengthy, off-the-record conference with the editors. Interview, *supra* note 45.

74. Interviews with: Hal Bruno, *supra* note 34; Jason McManus, *supra* note 57.

75. Interview with Theo Wilson, *supra* note 32.

76. Interviews with: John Kifner, *supra* note 41; Steve Roberts, *supra* note 32; Earl Caldwell, *supra* note 42; Hal Bruno, *supra* note 34.

on the writers and editors in New York,⁷⁷ an excuse that is not available to newspaper reporters with by-lines. Earl Caldwell of the *New York Times* says that in covering the Black Panthers in the Bay Area he has an easier time than do reporters from the *San Francisco Chronicle* because the Panthers do not regularly read the *Times*.⁷⁸ A reporter for an establishment newspaper once appeared at an SDS convention with a scrapbook of his sympathetic stories on radical groups and found this to be a remarkably effective device for acquiring sources.⁷⁹

Given the phenomenon of value-laden perceptions and the long-term value of some sources, there can be a great deal of pressure on a reporter to write favorably about regular sources. When coupled with the tendency of reporters to identify with their sources, there exists the possibility that fairness as well as neutrality may be sacrificed. All newsmen are aware of this danger, and most fight very hard to resist it.⁸⁰ Few reporters will admit to tempering stories or omitting even marginal information that might greatly annoy a source. One editor told me that he thinks he has probably erred too often on the side of running the story and risking the source.⁸¹

There appears to be one other common pattern in source relationships. Threats by sources to cut the reporter off are made far more frequently than they are carried out.⁸² Particularly for those local and national media that are important to the source's endeavors, disenchantment with the reporter has a way of subsiding after a short period of time. Some reporters attribute this high source-return rate to something more than the need for publicity. They say that most sources will quietly acknowledge the "inherent fairness" of a critical story, even while they go through the motions of ranting and raving.⁸³ If the reporter is cut off, it is frequently only temporary. More often than not, the prodigal son returns.

C. *The Uses of Confidential Sources*

Confidential news sources are useful to reporters in a number of ways. Traditionally, the most significant use has been for not-for-

77. Interviews with: Jason McManus, *supra* note 57; Karston Prager, *supra* note 42.

78. Interview, *supra* note 42.

79. The reporter was Jack Nelson of the Los Angeles Times. The incident was related to me by John Kifner. Interview, *supra* note 41.

80. Interviews with: Meremeil Rodriques, *supra* note 40; Steve Roberts, *supra* note 32.

81. Interview with Hal Bruno, *supra* note 34.

82. Interviews with: Steve Roberts, *supra* note 32; Martin Kasindorf, *supra* note 68.

83. *Id.*

attribution quotations, which convey information or opinions to the reader that presumably would not be available for public consumption if the source had to be identified. Other uses are less obvious but, according to some respected newsmen, even more important for quality reporting. Information received in confidence is regularly used to verify printable items received from other sources on the record.⁸⁴ Off-the-record information is also important in deciding what emphasis to give certain printable facts in writing up a story;⁸⁵ in determining what stories to cover with what commitment of resources;⁸⁶ in persuading editors to run a particular story or to give it a certain prominence;⁸⁷ and in assessing for the reader the significance of recent developments and the alternatives and probabilities for the future.⁸⁸ Confidential information is also helpful to journalists in eliciting on-the-record information from other sources. Confidential tips often lead reporters to these other sources;⁸⁹ newsmen sometimes get reluctant sources to talk either by establishing a rapport by means of name-dropping or fact-dropping, or else by convincing the source that the cat is already out of the bag ("I have learned X, can you verify it?" or "When will X be announced?").⁹⁰ On the other hand, most editorial writers and columnists appear to rely very little, if at all, on information that comes from confidential sources.⁹¹

The extent of reliance on confidential sources cannot be quantified with any degree of precision, but the survey results provide a rough indication. Tables I and II show the estimates given by the respondents as to what percentage of their stories depend on confidential sources. By assigning to each response the midpoint within the range designated,⁹² one can approximate from these data that the

84. Interviews with: Earl Caldwell, *supra* note 42; Wallace Turner, *supra* note 34; John Kifner, *supra* note 41; Ron Einstoss, *supra* note 52; Edwin Bolwell of TIME, July 7, 1971, New York; Frank Maier of NEWSWEEK, Aug. 6, 1971, Chicago.

85. Interviews with: Joseph Lelyveld, *supra* note 34; Earl Caldwell, *supra* note 42; John Kifner, *supra* note 41.

86. Interviews with: Ronald Kriss, *supra* note 57; Hal Bruno, *supra* note 34; Steve Duncan, *supra* note 40; Tom Powers, *supra* note 46.

87. Interviews with: David Burnham, *supra* note 45; Theo Wilson, *supra* note 32.

88. Interviews with: Hal Bruno, *supra* note 34; Earl Caldwell, *supra* note 42; Peter Goldman, *supra* note 32; Wallace Turner, *supra* note 34.

89. Interviews with: Meremeil Rodriquez, *supra* note 40; William Jones, *supra* note 32; Tom Powers, *supra* note 46; Steve Duncan, *supra* note 40.

90. Interviews with: Sander Vanocur, *supra* note 34; Helen Moad, *supra* note 48; Ronald Kriss, *supra* note 57; Edwin Bolwell, *supra* note 84.

91. Interviews with: Leonard Lyons of the N.Y. Post, May 13, 1971, New York; Jack Mabley, *supra* note 32.

92. Thus, all respondents who checked 0-5% are assigned the figure 2.5%, all who

TABLE I

"Approximately what percentage of your stories depend (either for direct quotation or information, or for leads or background) on explicit or implied understandings of confidentiality with sources who have helped you on at least two different occasions?"

Percentage of stories	Responses	
	Number	(Per Cent)
0-5%	256	(26.3%)
6-10%	178	(18.3%)
11-25%	188	(19.3%)
26-50%	134	(13.7%)
51-75%	73	(7.5%)
76-100%	49	(5.0%)
No answer	97	(9.9%)
	975	

TABLE II

"Approximately what percentage of your stories depend (either for direct quotation or information, or for leads or background) on explicit or implied understandings of confidentiality with sources who have never helped you on a story before?"

Percentage of stories	Responses	
	Number	(Per Cent)
0-5%	426	(43.7%)
6-10%	211	(21.6%)
11-25%	131	(13.4%)
26-50%	66	(6.8%)
51-75%	30	(3.0%)
76-100%	14	(1.4%)
No answer	97	(9.9%)
	975	

average newsman in the population surveyed relies on "regular" confidential sources in 22.2% of his stories and on first-time confidential sources in 12.2% of his stories. One can approximate further that, depending on the overlap—*i.e.*, the extent to which the first-time source stories are the same stories that involve regular sources—the average member of the population relies on one or the other kind of confidential source in anywhere from 22.2% to 34.4% of his stories. One should not, however, draw any conclusion from these data regarding the relative importance of regular and first-time sources. Many reporters whom I interviewed said that while more of their stories depend on regular sources, their most important stories tend to come from first-time sources and that such stories often require the use of many different sources.⁹³

checked 6-10% are assigned 8%, all who checked 11-25% are assigned 18%, and so on. The percentages are then averaged. See H. BLALOCK, *SOCIAL STATISTICS* 50-55 (1960).

93. Interviews with: William Jones, *supra* note 32; Jack Mabley, *supra* note 32; Tom Powers, *supra* note 46.

Using the same midpoint calculation,⁹⁴ Table III shows the distribution of reliance on confidential sources according to years of experience as a full-time reporter. The heavier reliance on regular

TABLE III
EXPERIENCE: RELIANCE ON CONFIDENTIAL SOURCES

Years of experience as a full-time reporter	Number of respondents ⁹⁵	Percentage of stories that depend on "regular" confidential sources	Percentage of stories that depend on first-time confidential sources
Less than 1	34	13.3	12.7
1-5	206	18.4	11.2
6-10	196	21.6	11.1
11-20	222	24.7	13.9
More than 20	193	25.8	11.6

confidential sources that appears to characterize the more experienced reporters⁹⁶ might suggest that the acquisition of regular sources takes both time and a certain skill that comes from experience. The heavier reliance can also be explained in part by the fact that regular sources are more important in regular beats and reporters tend to specialize more as they become more experienced. On the basis of the personal interviews I conducted, however, I am persuaded that a third explanation is probably the most important: younger reporters believe that there has been far too much reliance in the past on regular sources, off-the-record briefings, and blind quotes.⁹⁷ It is easy for a reporter to be "taken in" by his sources—"taken in" anywhere from believing and printing lies, to tempering stories so as to avoid alienating a valuable source, to perceiving events much as the source does. Many of the young newsmen I interviewed,⁹⁸ and some of the more experienced reporters as well,⁹⁹ are now deeply suspicious of all confidential information. They say, for example, that sources are more

94. See note 92 *supra*.

95. Some respondents failed to answer one or more of the three questions included in this Table. Only those respondents who answered all three questions are represented. The total is thus less than the 975 who returned the questionnaire.

96. Not only do the reporters who might be considered "experienced" rely more on regular sources than do reporters who might be considered "inexperienced," but also even relatively experienced reporters tend to rely more on such sources the more years of experience they have.

97. Interviews with: Steve Roberts, *supra* note 32; Joseph Lelyveld, *supra* note 34; David Burnham, *supra* note 45; Jason McManus, *supra* note 57.

98. *Id.*

99. Interviews with: Sander Vanocur, *supra* note 34; Ray Brennan, *supra* note 32; Wallace Turner, *supra* note 34; Edwin Bolwell, *supra* note 84.

willing to lie in off-the-record or not-for-attribution statements because their lies will not be exposed via the news media to those who know differently.¹⁰⁰ I. F. Stone, who makes a point of not accepting off-the-record information, was repeatedly cited as the model for this more suspicious group of journalists. Of course, the need to rely on confidential sources depends on several factors, including deadline pressures, the type of beat, and the type of news medium. But there is a sound basis for the generalization that the younger reporters—who incidentally, are considered by virtually everyone in the profession to be, on the whole, far superior to any previous generation of journalists¹⁰¹—tend to rely less on regular confidential sources. As Table III suggests, however, this disdain among younger reporters for confidential-source relationships seems not to carry over to first-time sources, who are generally less experienced and are considered to be less manipulative.¹⁰²

Some news media rely more than others on confidential sources. Table IV presents a breakdown of source reliance in these terms. The

TABLE IV
SOURCE RELIANCE: MEDIUM

Type of news medium	Number of respondents ¹⁰³	Percentage of stories that depend on "regular" confidential sources	Percentage of stories that depend on first-time confidential sources
Daily newspapers	455	22.6	11.6
Underground newspapers	35	23.7	15.9
National network television	48	25.4	12.0
Local radio and television	119	13.4	6.7
Wire services	49	18.3	6.1
Newsweeklies	124	32.9	17.6
Other magazines and free-lance	97	18.5	18.0

most interesting statistic here, the heavy reliance by newsweeklies on regular confidential sources,¹⁰⁴ is all the more striking when it is

100. *Id.*

101. Without exception, the journalists whom I interviewed, both old and young, expressed the opinion that the standards of the profession are improving at a rapid rate because of the influx of a vastly more talented and committed generation of new reporters. *E.g.*, interviews with: Sander Vanocur, *supra* note 34; Ray Brennan, *supra* note 32; Jack Mabley, *supra* note 32; Jason McManus, *supra* note 57.

102. Interviews with: Steve Roberts, *supra* note 32; Elisabeth Coleman, *supra* note 64; Karston Prager, *supra* note 42; Diane Camper, *supra* note 53.

103. The figures include only those respondents who answered all three questions. See note 95 *supra*.

104. We studied subpopulations based on experience, type of medium, and type

considered that the newsweekly correspondents tend not to cover regular beats.¹⁰⁵ In interviews with newsweekly editors and reporters, the reason most often cited for this dependence on regular confidential sources is the importance of such sources for the kind of interpretive journalism that characterizes the newsweeklies.¹⁰⁶ Another reason is that the newsweeklies' tripartite division of labor—reporter, writer, editor—necessitates the systematic filing of confidential information if writers and editors in New York are to bring to their work the same "feel" for the situation that a newspaper reporter who is on the street has when writing up his stories.¹⁰⁷ Some newsweekly editors, however, admit that there is probably too much reliance on confidential information, particularly on blind quotes.¹⁰⁸

Another datum that seems to stand out from Table IV is the infrequent reliance on confidential sources by the local broadcast media.¹⁰⁹ Again, this quantitative measure is consistent with the impressions I formed from the personal interviews.¹¹⁰ For "hot," "hard" news, the importance of confidential sources lies not so much in getting information that can be passed on to the public as in assessing the accuracy and importance of information that is received from nonconfidential sources. Local television and radio stations have such small staffs (with virtually no regular beats) and are under such deadline pressures that this assessment is carried out only in a most unsystematic fashion.¹¹¹ Table IV also indicates that wire-service reporters rely relatively little on confidential sources. I did not personally interview any wire-service reporters, but my distinct impression is that they too work under such deadline pressure that they have little opportunity to engage in the kinds of verification efforts for which confidential sources are so important. According to Table IV, free-lancers, who presumably spend more than the average

of beat, and no single group relies on regular confidential sources as much as does the group consisting of all newsweekly correspondents.

105. Interviews with: Frank Maier, *supra* note 84; Elisabeth Coleman, *supra* note 64; Karston Prager, *supra* note 42.

106. Interviews with: Hal Bruno, *supra* note 34; Peter Goldman, *supra* note 32; Jason McManus, *supra* note 57.

107. Interviews with: Karston Prager, *supra* note 42; Hal Bruno, *supra* note 34; Peter Goldman, *supra* note 32.

108. Interviews with: Jason McManus, *supra* note 57; Ronald Kriss, *supra* note 57.

109. Compare this with the higher-than-average reliance on confidential sources by the national networks, which have larger and more specialized staffs and tend to produce more features, documentaries, and other types of in-depth news reports.

110. Interviews with: Floyd Kalber, *supra* note 68; Joe Young of WXYZ Detroit, Sept. 24, 1971, Detroit.

111. Interviews with: Joe Young, *supra* note 110; Lowell Newton of WXYZ Detroit, Sept. 24, 1971, Detroit.

amount of time on verification, rely less than do most reporters on regular confidential sources but more than any other category of reporters on first-time sources. If one attributes the low reliance on regular sources to the disparate subject matter of their stories, the responses of the free-lancers would seem likewise to support the hypothesis that reliance on confidential sources is closely linked to the verification function.

Table V shows the distribution of source reliance according to

TABLE V
SOURCE RELIANCE: BEAT

Type of beat ¹¹²	Number of Respondents ¹¹³	Percentage of stories that depend on "regular" confidential sources ¹¹⁴	Percentage of stories that depend on first-time confidential sources ¹¹⁴
General assignment	390	17.4	12.1
Features	293	18.8	12.3
Police	138	22.6	11.5
Investigative	240	26.2	14.4
Trials	138	23.3	12.3
Government	316	28.5	13.3
Financial	106	25.0	12.9
Radical and militant groups	163	24.0	14.0
Minority groups	189	21.9	13.2
Sports	75	14.9	8.7
Youth and education	181	18.5	11.5

type of reporting beat. The heavy dependence of government reporters on regular confidential sources is a well-known and often-

112. These categories are somewhat diluted because many reporters "specialize" in more than one kind of reporting and we asked the respondents to check as many of the categories as were appropriate. However, it was not feasible, given our desire for a short, uncomplicated questionnaire, to have each reporter who checked more than one category subdivide his answers on the rest of the questionnaire according to the type of reporting assignments for which the answers were appropriate. Thus, it is theoretically possible, for example, for a reporter to have checked "government," "trials," and "financial," to have estimated that 26-50% of his stories are based on regular confidential sources, and never to have used confidential sources in his financial reporting. If this were true, his 26-50% would nonetheless be included in the average for financial reporters as well as government and trial reporters. If a particular type of reporting assignment tends not to require confidential sources, however, reporters who have such assignments frequently enough to have checked that category will have their percentages of over-all source reliance reduced. Thus, the figures in Table V, though diluted, should reflect the *direction* of differences in source reliance for various beats though not the *extent*.

113. The figures include only those respondents who answered all three questions. See note 95 *supra*. The total is greater than the number of respondents who returned the questionnaire because the categories are not mutually exclusive.

114. The percentage is arrived at by using the midpoint calculation described in note 92 *supra*.

criticized phenomenon.¹¹⁵ Probably for no other type of beat is the danger of being "taken in" by sources so great.¹¹⁶ The more interesting indication in these data is that investigative reporters rely more heavily than do most newsmen on confidential sources, both "regular" and first-time.¹¹⁷ This reliance is important because there is an unmistakable trend in American journalism, particularly among daily newspapers, toward more investigative reporting.¹¹⁸ Several reasons are given for this development. First, the broadcast media have so captured the market for hot news that the print media have turned to a different news product, only to be followed in turn by the broadcast media seeking hegemony in that market as well.¹¹⁹ Second, reporters who embarked upon their careers in the 1960's (some of whom are now becoming editors) tend to view their function as that of reforming society as well as describing it.¹²⁰ There have, of course, always been committed, idealistic journalists, but never before in such numbers. Third, investigative reporting requires unique skills, and the journalism profession has in the past ten years attracted persons who are far more able and better trained than ever before.¹²¹ This is attributable to many factors, including the growth and improvement of the journalism schools, the increase in salaries, and the rebellion among talented college graduates against the corporate lifestyle.¹²² Fourth, newspaper readers as a class have become much better educated, partly because of mass education and partly because of the disproportionate loss of the less educated readers to television. This better educated readership appears to want a more in-depth, reform-oriented news coverage.¹²³ Whatever the exact constellation of causes, newspapers are devoting a great deal more effort to investigative reporting, and that fact is significant if, as Table V suggests,

115. See, e.g., Gwertzman, *Nixon is Brought into Dispute on Background Briefings of Press*, N.Y. Times, Dec. 17, 1971, at 26, col. 4; Lawrence, *The Backgrounder for Propaganda*, N.Y. Times, Dec. 22, 1971, at 35, col. 2.

116. See G. TALESE, *supra* note 58, at 234.

117. Although the source-reliance figures for investigative reporters are not dramatically greater than the average figures for the entire population—4% more for regular sources and 2.2% for first-time sources—it should be remembered that these figures will tend to understate the difference because of the dilution phenomenon discussed in note 112 *supra*.

118. Interviews with: Jack Mabley, *supra* note 32; Ray Brennan, *supra* note 32; Tom Powers, *supra* note 46; William Jones, *supra* note 32; Bill Farr, *supra* note 39.

119. Interviews with: Jim Hoge, *supra* note 32; William Jones, *supra* note 32.

120. Interviews with: Theo Wilson, *supra* note 32; Ray Brennan, *supra* note 32; William Jones, *supra* note 32; Jack Mabley, *supra* note 32.

121. Interviews with: Jack Mabley, *supra* note 32; William Jones, *supra* note 32; Ray Brennan, *supra* note 32; Jim Hoge, *supra* note 32.

122. *Id.*

123. *Id.*

this type of news coverage depends more than others on confidential relationships with news sources.

Another interesting result of the breakdown according to type of beat is that reporters covering radical and militant groups do not seem to rely on confidential sources a great deal more than do reporters with other assignments, and reporters covering minority groups rely on such sources even less than does the average reporter in the population surveyed. A possible explanation for this statistical result is that while first-rate coverage of radicals and minority groups might require many confidential sources, the over-all quality of this type of reporting is poor, and so the *average* reliance on sources on these beats is no greater than on other kinds of beats where confidential sources are not so vital to good stories.¹²⁴ The source-reliance percentages do increase somewhat if the field is limited to those reporters who answered "yes" to the survey question, "Have you ever been entrusted with confidential information from a group or person commonly labeled as "radical," "militant," "extreme" or "dissident" (e.g. Black Panthers, SDS, Ku Klux Klan)?" Among the 124 radical militant reporters in this category, the regular source figure is 26.3% and the first-time source figure is 16.5%. Among the 127 reporters in this category who have minority group beats, the regular-source figure is 22.7% and the first-time source figure is 15.1%. To understand fully the place of the confidential source on these specialized beats, however, we should have survey information spanning a longer period of time. Several of the persons I interviewed confirmed my suggestion that radical-militant and minority group coverage has gone through a succession of stages, with close relationships with sources being possible and helpful at some stages and virtually nonexistent at others.¹²⁵

D. Press Cooperation with Law Enforcement

For years people have been going to jail on the basis of evidence originally acquired by newsmen. Police reporters have always had a friendly rivalry with law enforcement officials to see who could solve a case first.¹²⁶ Investigative reporters are often eager to help a

124. Another possible explanation for the small disparity between radical-militant reporters and others is the dilution factor discussed in note 112 *supra*.

125. Interviews with: Earl Caldwell, *supra* note 42; Karston Prager, *supra* note 42; Diane Camper, *supra* note 53; Don Holt of NEWSWEEK, Aug. 6, 1971, Chicago; John Kifner, *supra* note 41.

126. Interviews with: Hal Bruno, *supra* note 34; Jerry Tallmer, *supra* note 32; Jack Mabley, *supra* note 32. This point was also made in several of the essay responses to our qualitative survey.

grand jury follow up their exposés.¹²⁷ In fact, for many newsmen the opportunity to serve as the lead-off witness in a publicized official probe is considered a mark of distinction, the next best thing to a Pulitzer Prize. Moreover, this phenomenon of cooperation with law enforcement has not been limited to reporters on specialized beats who rely on police sources. During the early 1960's in the South, reporters frequently gave information to FBI agents concerning violations of civil rights.¹²⁸ Several newsmen voluntarily testified in lawsuits seeking reparation for the allegedly lawless behavior of certain police officers during the 1968 Democratic National Convention.¹²⁹ In most of these situations, of course, the newsmen were violating no explicit confidences in contributing the information they learned to law enforcement endeavors. On the other hand, much of the information that eventually wound up in the hands of the fact-finding tribunals was obtained by reporters in loosely defined contexts not unlike some of the reporter-source relationships that are the subject of the subpoena controversy.

There can be no doubt that, quite apart from any fears about losing sources, reporters today are far more reluctant to cooperate with law enforcement officials. There are several reasons for this change of attitude.¹³⁰ First, most newsmen share a general disillusionment with the process of government as a result of the Viet Nam war, the collapse of the civil rights and poverty efforts, and the various government attempts to suppress dissent. Second, the journalism profession feels a special sense of indignity at the way it has been manipulated by the past three presidential administrations; Sander Vanocur put it to me most poignantly: "I have served as a conduit for lies."¹³¹ Third, the special hostility that has grown up between the Nixon Administration and the press has generated a spirit of non-cooperation that carries over even to local government institutions. Fourth, the beatings that newsmen received at the hands of the Chicago police during the 1968 Democratic National Convention have left a legacy of hate throughout the journalism profession. Fifth, and in some ways most important, the technique adopted by some police departments of having their undercover agents pose as reporters has so embittered newsmen that things may never be the same even

127. Interview with Jack Mabley, *supra* note 32.

128. Interview with William Cook, *supra* note 54.

129. This fact came to light in the qualitative survey responses.

130. Interviews with: Jerry Tallmer, *supra* note 32; Jim Hoge, *supra* note 32; Theo Wilson, *supra* note 32; Steve Roberts, *supra* note 32; Don Holt, *supra* note 125; Hal Bruno, *supra* note 34.

131. Interview, *supra* note 34.

though most police departments quickly abandoned the practice and offered apologies to the press. The increased use of the subpoena power by law enforcement officials, while in many ways a result of the reduction in voluntary press cooperation, has only exacerbated the situation.

Nevertheless, despite this marked change of attitude on the part of reporters, and despite the fact that today cooperation with the government is more likely than in previous reporting eras to endanger source relationships, there still exists among virtually all reporters a strong sense of civic responsibility.¹³² The essential change is that newsmen are now more inclined to judge for themselves when the civic need for their information outweighs their own professional need to respect confidences.

We attempted to measure the extent to which the press would cooperate with law enforcement even if reporters had an absolute privilege against testimonial compulsion. In pretesting our questionnaire, we listed many different categories of requests for information and asked the reporters to check those with which they would cooperate. So many respondents replied that their answers would depend on the precise circumstances that we decided for the final survey to posit a single, fairly detailed hypothetical situation and to measure the reporters' responses to a number of different requests for information growing out of that situation. The respondents were asked to consider the following hypothetical situation:

You have a continuing source relationship with a group of political radicals. They have given you much information in confidence and this has enabled you to write several byline stories describing and assessing in general terms the activities and moods of the group. During the course of this relationship, you are present at a closed meeting with ten of these radicals at which the group vigorously debates whether to bomb a number of targets, including the local police station. The consensus is against such bombing, but two members of the group argue very heatedly in favor of bombing and are deeply upset when the others refuse to go along. These two then threaten to act on their own. The discussion then turns to another topic. Two weeks later the local police station is in fact bombed. One officer is killed by the blast and two others are seriously injured.

We then asked a number of specific questions. Table VI reports the answers from the entire population and from the more limited popu-

132. Several reporters whom I interviewed expressed a deep concern about their conflicting ethical obligations to society and to sources. Interviews with: Frank Maier, *supra* note 84; James Wechsler of the N.Y. Post, May 14, 1971, New York; Karston Prager, *supra* note 42; J. Anthony Lukas, *supra* note 63; Jack Mabley, *supra* note 32; Wallace Turner, *supra* note 34.

TABLE VI
WILLINGNESS TO DISCLOSE INFORMATION VOLUNTARILY

Question: "In these circumstances, would you on your own initiative volunteer the information you learned at the meeting right after the meeting (i.e., before a bombing took place)?"

<i>Responses:</i>	<i>Yes</i>	<i>No</i>	<i>No answer</i>
All reporters (975)	255 (26.2%)	541 (55.5%)	179 (18.3%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	77 (21.2%)	253 (69.5%)	34 (9.3%)

Question: "Would you volunteer the information on your own initiative to law enforcement authorities after the bombing (but before you were contacted by the police or subpoenaed by a grand jury)?"

<i>Responses:</i>	<i>Yes</i>	<i>No</i>	<i>No answer</i>
All reporters (975)	367 (37.6%)	351 (36.0%)	257 (26.4%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	131 (36.0%)	178 (48.9%)	55 (15.1%)

Question: "Assume that you were subpoenaed by a grand jury investigating the bombing but that an absolute legal privilege were established so that you could not be compelled to answer questions against your will. Would you voluntarily answer if the grand jury asked you whether this group of radicals had ever discussed the possibility of bombing the police station?"

<i>Responses:</i>	<i>Yes</i>	<i>No</i>	<i>No answer</i>
All reporters (975)	444 (45.5%)	351 (36.0%)	180 (18.5%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	143 (39.3%)	185 (50.8%)	36 (9.9%)

Question: "If the grand jury asked you to name the members of the group who had advocated bombing?"

<i>Responses:</i>	<i>Yes</i>	<i>No</i>	<i>No answer</i>
All reporters (975)	360 (36.9%)	430 (44.1%)	185 (19.0%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	123 (33.8%)	205 (56.3%)	36 (9.9%)

Question: "Assume that one of the members of the group who had argued vigorously against the bombing was indicted for the crime and that you believed, on the basis of the meeting, that it is highly unlikely that this particular member was the bomber. Would you on your own initiative volunteer this information to the prosecutor?"

<i>Responses:</i>	<i>Yes</i>	<i>No</i>	<i>No answer</i>
All reporters (975)	585 (60.0%)	216 (22.2%)	174 (17.8%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	217 (59.6%)	113 (31.0%)	34 (9.3%)

Question: "If this member's defense lawyer subpoenaed you at the trial would you testify about the meeting you had witnessed (including giving the names of those who did advocate bombing) even if you were protected by an absolute privilege so that you couldn't be compelled to testify?"

<i>Responses:</i>	<i>Yes</i>	<i>No</i>	<i>No answer</i>
All reporters (975)	421 (43.2%)	355 (36.4%)	199 (20.4%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	148 (40.7%)	174 (47.8%)	42 (11.5%)

lation of those reporters who answered "yes" to the question, "Have you ever been entrusted with confidential information from a group or person commonly labeled as "radical," "militant," "extreme" or "dissident" (e.g. Black Panthers, SDS, Ku Klux Klan)?"

It is interesting that so many of the reporters who returned the questionnaire were unwilling to answer this particular set of questions, and also that a higher percentage of the reporters who have had confidential dissident sources were willing to respond.¹³³ These phenomena would seem to substantiate a strong impression I formed in the personal interviews: most reporters simply do not know how they would react in these troubling situations that involve conflicting obligations to society and to sources. Virtually everyone agrees that there are difficult ethical questions in this area—many newsmen raised the issue with me on their own initiative¹³⁴—but nothing like a professional consensus has yet emerged. Those newsmen who have received information that might give rise to these conflicting obligations have, not surprisingly, given more thought to the subject. Nonetheless, it is likely that of all our survey data, the responses to this set of inquiries should be given the least weight because the respondents could only guess at how they would react if the situation were to arise in real life.

In each of the six sets of circumstances, those reporters who have received confidential information from dissident sources indicated less willingness to volunteer information than the total population of reporters. We anticipated this pattern for the first four situations posited (those in which sources could only be harmed by the reporter's cooperation); but we were somewhat surprised to learn that the reporters who have had dissident sources would be slightly less willing than the average reporter in our sample to provide information that might serve to exculpate rather than to convict.

We were particularly interested in the relationship between the willingness to cooperate in the prosecution of a case and the willingness to help a defendant. Of 338 respondents¹³⁵ who said they would *not* volunteer information about the radicals' meeting to law enforce-

133. For the entire population, 20.1% of the questions were left unanswered; for the more limited population of reporters with confidential dissident sources, 10.9% of the questions were not answered.

134. See note 132 *supra*.

135. Although 351 respondents said they would not volunteer the information before being subpoenaed, 13 of these did not answer the question whether they would volunteer the information if they thought the prosecutor had the wrong man. Throughout this report on the survey results, cross-tabulations include only those respondents who answered all the questions that are being cross-tabulated, so that the total will always be slightly less than the number who answered each individual question.

ment officials after the bombing but before being subpoenaed, 148 (43.8%) said they *would* volunteer information to the prosecutor if they thought he had the wrong man. Also, of 410 respondents who said they would not name names before a grand jury, 80 (19.5%) said they *would* identify the members of the group who had advocated bombing if asked to do so by the defense lawyer at the trial of a member of the group who had argued against bombing. The willingness to cooperate indicated in these data is less selective than we had expected, given the fact that preventing the conviction of an innocent man is generally recognized as the paramount value in our system of criminal justice. My personal interviews also impressed me with the strongly felt belief among reporters and editors that they must be consistent in these matters.¹³⁶ Some newspapers have even formulated internal policies prohibiting their reporters from voluntarily cooperating in certain circumstances so that the position of the newspaper will appear to be consistent should it subsequently find it necessary to contest a subpoena.¹³⁷ The prevalent attitude of newsmen can be described as a rather vehement belief that they—not the courts—should decide when cooperation with fact-finding tribunals is appropriate, but that the profession must make these decisions with an even more scrupulous regard for consistency, and the *appearance* of consistency,¹³⁸ than would be observed by judges.

We also sought to gain some understanding of where reporters “draw the line” with regard to voluntary cooperation. Of the respondents who would, even if they had an absolute privilege, tell the grand jury whether the radicals had ever discussed bombing the police station, 83.3% would also volunteer their information after the bombing without waiting to be subpoenaed. However, only 46.2% of those who would testify before the grand jury would volunteer the information before a bombing actually took place.

136. Interviews with: J. Anthony Lukas, *supra* note 63; Wallace Turner, *supra* note 34; Frank Maier, *supra* note 84; William Jones, *supra* note 32; Jack Mabley, *supra* note 32.

137. William Jones (interview *supra* note 32) told me that the Chicago Tribune has a policy of directing its reporters to refuse to answer “fishing expedition” subpoenas even if no sources would be jeopardized, simply to maintain this consistent posture. I discussed this consistency point with several executives, editors, and reporters of the New York Times, and they were so concerned about it that they were unwilling to accept many tenable distinctions that would rationalize a refusal to respond in one situation and a willingness to respond in another. Group interview with Harding Bancroft, James Goodale, Gene Roberts, J. Anthony Lukas, Paul Montgomery, Katherine Darrow, Lesley Oelsner, and Charlayne Hunter, Sept. 27, 1970, New York.

138. See note 137 *supra*.

Finally, given all the trends and comparisons that have been discussed in this section, it is important to emphasize that the basic phenomenon revealed by the data and the personal interviews is one of press cooperation with the process of official fact-finding. Perhaps the most significant statistic in all these data is that almost half of the journalists surveyed say they would, even if favored with an absolute privilege, give testimony before a grand jury that could well result in life imprisonment or worse for sources with whom they enjoyed a close, professionally rewarding relationship.

E. *The Uses and Effects of Press Subpoenas*

Although currently the focus of the controversy is on grand jury investigations into radical activities,¹³⁹ the use of press subpoenas is by no means limited to that context. The reported cases tell of subpoenas served on newsmen by legislative committees,¹⁴⁰ criminal defendants,¹⁴¹ and litigants in civil cases,¹⁴² as well as grand juries. One commentator estimates that more press subpoenas come from criminal defendants than from any other source.¹⁴³ The subject mat-

139. *E.g.*, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971); *In re Miller*, Misc. No. 154 (D. Ariz. Aug. 26, 1971); *In re Grand Jury Witnesses*, 322 F. Supp. 573 (N.D. Cal. 1970); *State v. Knops*, 49 Wis. 2d 647, 183 N.W.2d 93 (1971); *In re Pappas*, — Mass. —, 266 N.E.2d 297, *cert. granted*, 402 U.S. 942 (1971).

140. *E.g.*, *Ex parte Lawrence*, 116 Cal. 298, 4 P. 124 (1897). Recently, the House Interstate and Foreign Relations Committee served a subpoena on the Columbia Broadcasting System in conjunction with an investigation of the network's documentary, *The Selling of the Pentagon*. See N.Y. Times, April 9, 1971, at 1, col. 1; *id.*, June 25, 1971, at 71, col. 1 & at 83, col. 2.

141. *E.g.*, *People v. Dohrn*, Crim. No. 69-3808 (Cir. Ct. Cook County, Ill., May 20, 1970); *People v. Rios*, No. 75129 (Super. Ct. San Francisco County, Cal., July 15, 1970).

142. *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *In re Goodfader*, 45 Hawaii 317, 367 P.2d 472 (1961).

143. Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198, 1203 n.21 (1970) ("Newspaper counsel and editors are unanimous in stating that defense subpoenas are probably more numerous than governmental ones."). This is not, however, the picture that emerged from our various empirical studies. The newsmen I interviewed personally had much more experience with government subpoenas than with subpoenas from defense attorneys. The newsmen in our qualitative survey (see pt. II. A. *supra*) reported that in the past year they received a total of 12 subpoenas from the prosecution and 8 from the defense, and 46 informal requests for information from the prosecution and 29 from the defense. Since the subjects for my interviewing and for our qualitative survey were all chosen on an impressionistic basis (as were, presumably, the subjects for the *California Law Review's* interviewing), one should be cautious about drawing any quantitative conclusions from any of these sources. We decided not to devote any of the limited space on our quantitative questionnaire to this particular inquiry. An amicus brief filed with the Supreme Court by several media

ter of press subpoenas also covers a wide spectrum, ranging from allegedly criminal behavior¹⁴⁴ to the most frivolous show business gossip.¹⁴⁵ Some of the brief descriptions from our qualitative survey give an indication of the variety of reporting efforts that have, at one time or another, been the subject of subpoenas and informal requests for information: "illegal gambling"; "the Julius and Ethel Rosenberg case"; "disbarment of an attorney"; "conflict of interest involving speaker of state house of representatives"; "interviews with Lieutenant Calley"; "information on a Soviet diplomat after I had lunch with him"; "Mafia investigation"; "zoning irregularities"; "taxpayer's suit to fire Angela Davis [from her UCLA professorship]"; "charity frauds." Press subpoenas are, in addition, commonly issued pursuant to motions by criminal defendants seeking a continuance or a change of venue on the basis of allegedly prejudicial trial publicity.¹⁴⁶

In order to gain some appreciation of the incidence of press subpoenas, we asked in our quantitative survey, "Have you ever been served with a subpoena in conjunction with your reporting?" One hundred eighty (18.5%) of the respondents said "yes," 689 (70.7%) said "no," and 106 (10.9%) did not answer the question. We then asked, "If so, did you eventually turn over all the information requested in the subpoena?" We instructed the respondents to "[c]heck 'yes' even if you unsuccessfully challenged the subpoena." Of the 155 reporters for whom the question was applicable and who responded, 83 (53.5%) checked "yes" and 72 (46.5%) checked "no." These data should be read, however, in conjunction with a phenomenon that came to light in the qualitative survey and personal interviews: almost all subpoenas are preceded by informal discussions with the reporter, and as often as not his full cooperation is secured or an accommodation is reached at this earlier stage.¹⁴⁷ Thus, the number of reporters who have at some time, under some measure of compulsion, turned over all the information requested by a fact-finding tribunal is no doubt significantly larger than the 83 who said they

organizations in *Caldwell* contains an appendix that lists all "[s]ubpoenas served upon National Broadcasting Company, Inc. and Columbia Broadcasting System, Inc. and wholly owned stations from 1969 through July 1971." Of these, 53 were issued on behalf of the government and 44 on behalf of criminal defendants. Amicus Curiae Brief, Appendix, *Caldwell v. United States*, No. 70-57 (U.S., Oct. Term 1971).

144. *E.g.*, *State v. Knops*, 49 Wis. 2d 647, 183 N.W.2d 93 (1971); *People v. Dohrn*, No. 69-3808 (Cir. Ct. Cook County, Ill., May 20, 1970).

145. *E.g.*, *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

146. Several of the respondents to our qualitative survey mentioned this context.

147. Interviews with: William Jones, *supra* note 32; Jack Mabley, *supra* note 32; Earl Caldwell, *supra* note 42.

have been subpoenaed and eventually told all. In the qualitative survey, we also learned of instances in which subpoena plans were abandoned after newsmen made it clear that they were adamant in their refusal to reveal what they knew. Thus, the number of reporters in the survey population who have successfully resisted demands for some of the information they have learned on their beats is doubtless greater than the 72 shown in the quantitative data.

What infuriates many newsmen is not so much the principle of press subpoenas, nor even the increased volume in recent years, but rather the frequency with which subpoenas are issued in what reporters view as unnecessary circumstances. The reporters I interviewed, particularly those who have built their careers around in-depth coverage of radicals, say that the Government vastly overestimates the quantity and quality of the information that is given to the press.¹⁴⁸ Why, these reporters ask, should their source relationships be put in jeopardy when they really can contribute nothing new to the factual inquiry? A frequently voiced complaint is that newsmen are sometimes, as in the Spock¹⁴⁹ and Chicago Seven¹⁵⁰ trials, forced to the witness stand to give cumulative evidence that is already a matter of public record. There are other situations, some newsmen believe, in which the Government subpoenas reporters to avoid blowing the cover on its own agents who have infiltrated dissident movements.¹⁵¹ The comments from the qualitative survey give some indication of the depth of sentiment on these points. We asked the respondents to what they primarily attributed the recent spate of subpoenas: "It's just an easy way to get information and the freedom of the press be damned." "Laziness, inept investigative procedures and a disrespect for the press and a misunderstanding of its role." "The hungry investigator has to have something to show for his efforts and often will bite for crumbs." "Pure politics. When I do a story about 'criminal activity'—based on interviews with the 'criminals' themselves—it embarrasses law enforcement types. So they subpoena me. Invariably my testimony would be insufficient to justify indictments of my sources." "Police sometimes are too lazy or not well enough trained to build up their own cases." "Embarrassment and paranoia. Law enforcement officers do not like me to

148. Interviews with: Earl Caldwell, *supra* note 42; John Kifner, *supra* note 41; J. Anthony Lukas, *supra* note 63.

149. Interview with Sid Zion, formerly of the N.Y. Times and SCANLON's, Sept. 27, 1970, New York.

150. Interview with J. Anthony Lukas, *supra* note 63.

151. Interviews with: Wallace Turner, *supra* note 34; Earl Caldwell, *supra* note 42; Steve Roberts, *supra* note 32.

publicize things they did not know or did not want anyone to know they knew." "Resentment that a good reporter is as good and, in many cases, a better investigator than many enforcement people."

Although most reporters attribute the frequent issuance of "unnecessary" subpoenas to prosecutorial laziness or to misconceptions concerning how much information the press has, a substantial number of newsmen believe that subpoenas are used in some instances as a conscious device to drive a wedge between reporters and their radical sources. In our qualitative survey we suggested this as a possibility,¹⁵² and 15 of the 67 reporters who answered said that they felt that this desire to destroy source relationships was the primary reason for the increase in press subpoenas.¹⁵³

It is clear that the recent use of press subpoenas has generated among newsmen a great deal of resentment, recrimination, and suspicion toward the Government. It has also generated widespread fears among reporters that their sources will "dry up." The case of Anthony Ripley, now the Rocky Mountain correspondent for the *New York Times*, is cited as the paradigm.¹⁵⁴ Ripley, then based in the *Times* Detroit bureau, was assigned to cover an SDS national convention in East Lansing, Michigan. Establishment reporters were admitted to the meeting hall only upon payment of a \$25 "press fee" and a promise not to quote directly any of the proceedings on the floor of the convention. Ripley paid his fee and sat through three days of convention rhetoric. On the last day of the convention, Bernardine Dohrn, one of the aspirants to office in the organization,

152. Our question read: "Recently, law enforcement authorities have been subpoenaing newsmen with much greater frequency than in the past. Do you attribute this primarily to: (1) a conscious government effort to impair source relationships in order to reduce the coverage given certain groups; (2) a greater need for help from the media, due to the difficulty of penetrating certain alienated groups by normal investigative methods; (3) a greater need for help from the media due to the overburdening of law enforcement resources; (4) other."

153. Some comments: "One television executive was told by a U.S. Attorney that if you didn't film this sort of stuff you wouldn't be having this problem." "An effort to intimidate groups they view as radical or militant." "To discredit these groups and their ideologies." "A conscious effort to influence and slant news coverage to its own advantage." "An attempt to break down the authenticity of an otherwise credible authority (newsmen)." "There is a deliberate effort, a pervasive willingness if not a conspiracy to hail reporters before government agencies at all levels to reduce effectiveness or to disarm or defuse reporters, who are threats." "In Chicago, police, U.S. and state prosecutors have developed a view of newsmen (newspapers as a result) ranging from controlled dislike to outright hatred. I view the increasing pressure on newsmen to produce information as a kind of emotional outlet within legal justification. I don't believe the process is anything so conspiratorial or calculated—except in rare cases—as an attempt to block newsmen from contacting radical sources."

154. The incident was recounted to me in a personal interview with Mr. Ripley on Aug. 13, 1971, in Denver. See also DeZutter, *Why SDS Banned Press at Coliseum*, *CHI. JOURNALISM REV.*, July 1969, at 11-12.

described herself as a "revolutionary Communist." Feeling no ethical obligation to abide by the convention's restrictions on press coverage, Ripley violated the conditions and reported Miss Dohrn's self-description. The *Times* buried the story in the back of a thick Sunday edition, and Ripley never heard a word about his breach of faith from any SDS sources.

Several months later, however, Ripley was subpoenaed to testify before the House Committee on Un-American Activities, which was conducting a probe into radical activities. After consulting with some *Times* editors and fellow reporters, Ripley decided not to contest the subpoena, primarily because he felt no fears about violating confidences since the sum total of everything he knew about the SDS, its convention, and any of its members was already a matter of public record in his published stories. Ripley appeared before the Committee, told the representatives that his stories constituted everything he knew, and explained in very general terms the radical philosophy as he understood it from reading the newspapers. He was at the witness table for no more than twenty minutes. A few days later, Ripley received an irate phone call from Allen Young, of the Liberation News Service, who bitterly criticized Ripley for "giving legitimacy to HUAC." Several months later, Ripley was covering a street disturbance in Ann Arbor, Michigan, when a radical source he was interviewing was yanked away from him by a fellow radical and was told, "That's the fink who testified before HUAC." The source immediately terminated the interview, telling Ripley, "I just don't want to talk to you."

At the SDS national convention the following year, a resolution was passed denouncing Anthony Ripley: "Mr. Ripley, by cooperating with this committee, and the New York Times, by authorizing his appearance there, have taken the side of the nation's most notorious witch-hunters. A reporter and a newspaper dedicated to the concept of 'objectivity' have plainly illustrated once again what 'objectivity' means in fact."¹⁵⁵ The SDS membership then debated whether to demand from all establishment reporters seeking to cover the convention an affidavit promising not to "do a Ripley," and finally decided to bar all establishment reporters from the convention hall.¹⁵⁶

These incidents were personally very upsetting to Ripley, but they did not significantly interfere with his reporting career. He never had a network of radical sources to lose; his assignments in

155. Quoted in DeZutter, *supra* note 154, at 11-12.

156. DeZutter, *supra* note 154, at 12.

East Lansing and Ann Arbor were solely a function of his being stationed in the *Times* Detroit bureau. He subsequently was able to do a superb investigative story on the shoot-out in Cleveland between police and black militants.¹⁵⁷ John Kifner, a *Times* reporter who *does* specialize in movement coverage and does have many radical sources, had the Ripley incident mentioned to him on several occasions but Kifner thinks he lost no stories because of it.¹⁵⁸

Anthony Ripley's case is thus not, as it is sometimes cited to be,¹⁵⁹ an example of a subpoena causing an intolerable interference with news flow. The incident is illustrative, however, of a very important aspect of the press subpoena controversy in its contemporary form. The primary concern of reporters is not that they will lose their sources by being made to turn over highly sensitive and secret information—newsmen almost never are privy to such information.¹⁶⁰ Rather, the worry is that their mere cooperation with fact-finding tribunals will alienate sources who demand to know of reporters "whose side are you on?"¹⁶¹ To these sources it may make no difference that the newsman's "cooperation" with the tribunal is involuntary, perfunctory, and unhelpful. It is the principle that counts.

In fact, one of the ironies of the situation is that the press subpoena issue, and the larger government-press controversy of which it is a part, has in some respects *improved* relationships between reporters and radical sources by placing the press in a position of opposition to the Government. Earl Caldwell reports that the Black Panthers now trust him much more than they did before he contested his grand jury subpoena; the incident gave Caldwell a concrete opportunity to prove his credibility.¹⁶² John Kifner also says that the subpoena issue has created a unity of interest that has made his white radical sources somewhat less hostile toward, and distrustful of, the establishment press.¹⁶³ This phenomenon was reported, in addition, in the responses to our qualitative survey. We asked those reporters who had been subpoenaed, many of whom successfully re-

157. N.Y. Times, Sept. 2, 1968, at 1, col. 1.

158. Interview, *supra* note 41.

159. See, e.g., Brief for Respondent at 27 n.30, *Caldwell v. United States*, No. 70-57 (U.S., Oct. Term 1971).

160. Interviews with: Earl Caldwell, *supra* note 42; John Kifner, *supra* note 41; Wallace Turner, *supra* note 34; Steve Roberts, *supra* note 32; J. Anthony Lukas, *supra* note 63.

161. See text accompanying notes 53-54 *supra*.

162. Interview, *supra* note 42.

163. Interview, *supra* note 41.

sisted the subpoena or accepted contempt sentences, whether the incident had affected their relationships with sources. Although several of these newsmen found some of their source relationships to have been impaired, others reported a net gain: "My contacts with the New Left and various freak-radical street people groups 'improved.' They had tolerated my presence on the basis of my pledge that I would neither testify for nor against them regardless of any risk (i.e. contempt). The incident [in which the reporter, by making it clear that he would accept a contempt citation, convinced the U.S. Attorney to withdraw a subpoena] simply made them believers. I have been able, for example, to report 'trashings' from inside." "They like me more—or disliked me less." "In both instances, relationships with both prosecuting and defense attorneys improved." A somewhat different way in which a subpoena can actually help a reporter acquire sources was suggested to me in an interview with Bill Farr, a former investigative reporter who is currently the subject of a widely publicized subpoena dispute in California.¹⁶⁴ Farr speculates that the publicity he has received in accepting a contempt sentence rather than revealing his source should increase the number of unsolicited tips and leads he gets simply because people who have a story to tell will have heard of him.¹⁶⁵

It would be a mistake, however, to conclude from these observations that press subpoenas are an over-all boon to reporting. From my interviewing and from our qualitative survey it appears that the subpoena spate of the past two years has interfered with reporting efforts in a variety of ways. The most significant effects that subpoenas have on newsgathering are of a highly personal, and relatively unmeasurable, nature. One is the professionally incapacitating worry and hassle to which the reporter is subjected.¹⁶⁶ During the period that a subpoena dispute is being litigated, the reporter is ordinarily not able to cover his beat with full effectiveness. This is not so much because his sources will not talk to him but because his time is not free. He has court commitments. He must consult with his lawyer. He becomes a news source in his own right and must, ironically, fend off his colleagues. Perhaps most important, unless he has an unusual emotional constitution he must spend much of his time worrying and agonizing and re-examining his ethical position. If he loses in litigation and chooses not to break the confidence, he may

164. *In re Farr*, Crim. No. A253-156 (Super. Ct. L.A. County, Cal., 1971).

165. Interview, *supra* note 39.

166. Interviews with: Earl Caldwell, *supra* note 42; William Farr, *supra* note 39; Hal Bruno, *supra* note 34; Anthony Ripley, *supra* note 154.

spend a term in jail, a time commitment that can yield an exclusive on prison conditions but not many other stories.

A second way in which press subpoenas may interfere with reporting efforts concerns the intangible quality of source relationships. As suggested above,¹⁶⁷ good reporting frequently depends on sources who will relax and speak in a spontaneous, expansive, and candid fashion. Some reporters say that the subpoena possibility can puncture this cooperative atmosphere—even when the source is persuaded, in a rational sense, that he really has nothing to fear.¹⁶⁸ According to these reporters, the irrational doubt can introduce into the relationship a self-consciousness and guardedness that may preclude the possibility of in-depth, interpretive coverage. For radical and militant sources, the subpoena threat can engender this self-consciousness not only because of the fear that confidential information will be disclosed but also simply because the subpoena issue redirects attention to the question of the reporter's—and his editor's and publisher's—loyalties.¹⁶⁹

Because this claimed effect is subtle and intangible, it is difficult to verify its existence or to assess its importance. Reporters are themselves unsure whether sources who do not explicitly refuse to cooperate are nonetheless holding back. In our qualitative survey, we asked those reporters who had been subpoenaed whether the incident affected their source relationships.¹⁷⁰ While some of the responses told of measurable damage,¹⁷¹ others evinced amorphous feelings that things were not quite right: "Found a different temperament with defense source after the request—not necessarily more difficult to deal with source, but suspect answers to questions asked subsequent to incident were more guarded than answers prior to the incident." "Rather than specifics, it has been more of a general reserve rather than openness." "[C]hiefly in the form of people not contacting me to volunteer information, as before, rather than refusing information when questioned." "This is hard to say—generally, I think, members of radical groups won't tell reporters much because they feel *somehow* it'll be used against them; they usually don't give good reasons, though, for refusing to talk."

The task of evaluating this inherently unmeasurable qualitative

167. See text accompanying notes 51-52 *supra*.

168. Interviews with: Don Holt, *supra* note 125; Earl Caldwell, *supra* note 42; Hal Bruno, *supra* note 34.

169. See text accompanying notes 53-54 *supra*.

170. As detailed above (see text accompanying notes 162-65 *supra*), some newsmen reported a net gain in source relationships.

171. See text following note 182 *infra*.

dimension of the "drying up" phenomenon is complicated by an additional factor. Frequently reporters who correctly sense a reserve on the part of a source may be unsure whether the subpoena threat is a primary, or even partial, cause. The drying up of sources can result from any number of factors other than the fear of subpoenas: for example, the source's dissatisfaction with the way stories are being written by the reporter, or his newspaper, or even other reporters on other papers;¹⁷² tactical decisions by groups or personalities to "lower their profile" temporarily;¹⁷³ expiration of the source's initial enchantment with media coverage;¹⁷⁴ or the source's desire to exercise more control over press coverage, if only as a mark of sophistication.¹⁷⁵ Most of the reporters with radical beats whom I interviewed said that the tides of source cooperation ebb and flow for reasons that transcend the subpoena threat.¹⁷⁶ And for most of these situations in which the causes of noncooperation are unclear it is virtually impossible to isolate the discrete impact of the subpoena threat, particularly since reporters try in dealing with sources to avoid any mention of the subject for fear of generating irrational fears that would not otherwise be operative.¹⁷⁷

When the source is aware of the subpoena threat and conveys his doubts to the reporter, the impact of press subpoenas on the news-gathering process can be ascertained with a greater degree of reliability. One tangible ramification of the subpoena controversy is that some sources will no longer allow reporters to tape-record interviews. Several of the respondents in our qualitative survey mentioned this as the most immediate manifestation of source inhibitions. Earl Caldwell says that he used to have "open tape" sessions with the Black Panthers in which he would just let the tape recorder run for several hours to capture the daily routine at Panther headquarters. Now, says Caldwell, both he and the Panthers are unwilling to do this—precisely because of the subpoena threat.¹⁷⁸

172. See text accompanying notes 76-79 *supra*. John Kifner recently found it very difficult to get a counterculture life style story in Colorado because of some previous insensitive stories by reporters from other newspapers. Interview, *supra* note 41.

173. Interviews with: Steve Duncan, *supra* note 40; Steve Roberts, *supra* note 32; John Kifner, *supra* note 41; Karston Prager, *supra* note 42; Peter Goldman, *supra* note 32; Don Holt, *supra* note 125.

174. Interviews with: John Kifner, *supra* note 41; Steve Roberts, *supra* note 32; Karston Prager, *supra* note 42.

175. Interview with Martin Kasindorf, *supra* note 68.

176. Interviews with: John Kifner, *supra* note 41; Martin Kasindorf, *supra* note 68; Joseph Lelyveld, *supra* note 34; Steve Roberts, *supra* note 32.

177. Interview with Peter Goldman, *supra* note 32.

178. Interview, *supra* note 42.

Another measurable way in which the subpoena fear hampers some reporting is by greatly increasing the time it takes to get a story. With cajoling and elaborate promises it is often possible to quiet a source's subpoena anxieties, but these techniques take time. Sometimes, for example, a source will delay an interview until he has "checked out" the reporter through the grapevine.¹⁷⁹ Sources are now less willing to receive a newsman on the basis of a recommendation from another reporter whom the source trusts.¹⁸⁰ John Kifner, who probably has as extensive and as long-standing a network of "movement" sources as anyone, says that recently it took him six weeks to do a story on the Berrigans that should have been a two-day assignment.¹⁸¹ This time factor is particularly important in light of the belief expressed to me in several interviews that the key to first-rate reporting, especially in covering dissident movements and life styles, is to check a story with as many different sources as possible rather than to rely on only a few sources, however well placed they may be.¹⁸²

Finally, there is the ultimate form of impairment of press coverage: a firm refusal by the source to grant an interview or to give the reporter certain information because of the fear of a subpoena. We asked the reporters in our qualitative survey if they had ever experienced this kind of rejection. Several respondents cited specific instances in which they lost whole stories or valuable information because of the subpoena threat. For example: "[T]he incident [being subpoenaed] and subsequent publicity cost me several good sources on the fringe of the underworld. The loss was measurable." "In a recent investigation of court corruption in Chicago, several persons with first-hand knowledge of fixes in civil personal injury cases refused to talk in specifics despite assurances that I would not testify as to my sources." "Three instances come to mind quickly—a story that I did on draft dodgers in Canada, a story on black panther demonstrations at Yale, and a story involving an anti-war demonstration in Washington." "Once, in covering a bank failure, a teller who was worried that any information he would give me would eventually expose him refused to come through at the last moment, even though he really wanted to make the information public. The information itself could not be traced to him. He was fearful though that

179. Interview with Karston Prager, *supra* note 42.

180. Interview with Earl Caldwell, *supra* note 42.

181. Interview, *supra* note 41.

182. Interviews with: Steve Roberts, *supra* note 32; Earl Caldwell, *supra* note 42; Wallace Turner, *supra* note 34.

I would be forced to identify him in court as my news source." "Story involving draft resisters in federal prison, who refused to relate certain allegedly illegal practices."

Among news items of contemporary importance, coverage of fugitives and others who have "gone underground" appears to suffer greatly because of the subpoena threat. One of the respondents to the qualitative survey did a story on fugitives and reports that "[s]everal people voiced concern that I might be forced to testify about their whereabouts." He continues, "Can't be sure, tho I think several people I approached on the above mentioned fugitive piece backed out for that reason." John Kifner says that he feels fairly confident that if it were not for the subpoena danger he could get some very significant stories on several radicals who are currently working underground.¹⁸³

The qualitative survey responses suggest some reasons why certain sources will decline to give a reporter information even though he promises to go to jail to protect the confidence. After actually serving time for refusing to testify in response to a subpoena, one respondent said, "Definitely found my relationship with sources *impaired* afterwards—for at least 2 reasons: (a) sources with criminal information were reluctant to see and give me information because they assumed that I was under constant surveillance, (b) sources with criminal information who were also friends or acquaintances simply did not want to see me go to jail again for withholding information, which they knew I would if subpoenaed again." Some other comments: "In reporting on drug use in a local park, young people openly expressed a fear that reporters were arms of the police and—whether the reporter was willing or not—police had access to his information by subpoena." "Particularly since the Caldwell case, the radicals that I often interview are concerned that being honest with me could be dangerous. They worry that even if I don't at that moment intend to cooperate with the police, future pressure might develop."

One potential "future pressure" that makes sources reluctant to cooperate even with reporters whom they trust is a decision by media executives, especially those fearful of losing valuable broadcast licenses, not to support a reporter who wishes to resist a subpoena.¹⁸⁴ Anxieties of this sort were felt two years ago when some important

183. Interview, *supra* note 41.

184. Interviews with: Helen Moad, *supra* note 48; William Cook, *supra* note 54; Karston Prager, *supra* note 42.

organizations, including the *New York Times*¹⁸⁵ and *Newsweek*,¹⁸⁶ initially displayed some uncertainty regarding their stance on the subpoena issue and others, including CBS¹⁸⁷ and *Time*,¹⁸⁸ handed over confidential information to law enforcement authorities as a result of some bureaucratic failures of communication. Some of the responses to the qualitative survey indicate, moreover, that source fears about a "publisher's sell-out" are not without basis: "My newspaper has a continuing relationship with the FBI." "[P]otos taken at demonstrations of various types have been provided to the FBI at the agency's request." "Oftentimes, carbons of news stories [containing unedited material] were given out." As a result of the crystallization of the issue and angry protests from reporters, many media organizations have revised their practices and taken a strong stand against subpoenas. However, the incident portrayed in the movie *Medium Cool*, in which a reporter's notes and tapes are without his knowledge turned over to the police, cannot be dismissed as a figment of the Hollywood imagination.

It appears from this evidence that the practice of subpoenaing reporters has, in several instances, had a significant detrimental effect on the quality of news coverage. Under some interpretations of common-law principles and of the free-press clause of the first amendment, this empirical finding would be sufficient to compel the recognition of a privilege for newsmen. Other interpretations, however, will place more emphasis on the frequency, extensiveness, and continuity of the detrimental effect. Several aspects of our quantitative study were directed to these questions.

We asked the respondents, "In the last eighteen months, has your coverage of any story been adversely affected by the possibility that you might be subpoenaed?" Because the causes of noncooperation by sources are frequently unclear,¹⁸⁹ and also because we were afraid that some reporters would resolve ambiguities in favor of a "yes" response, we offered three choices: "yes," "no," "I'm not sure." Of the 887 newsmen who answered the question, 71 (8.0%) said "yes," 97 (10.9%) said "I'm not sure," and 719 (81.1%) said "no." Table

185. Interviews with: J. Anthony Lukas, *supra* note 63; Steve Roberts, *supra* note 32; Wallace Turner, *supra* note 34; John Kifner, *supra* note 41.

186. Interview with William Cook, *supra* note 54.

187. Interview with Helen Moad, *supra* note 48. The "outtakes" (unused portions of video tape) from an interview with Eldridge Cleaver were given to federal law enforcement authorities through a bureaucratic mishap. The reporter who conducted the interview, Mike Wallace, received strong rebukes from the Panthers. *Id.*

188. Interview with Jason McManus, *supra* note 57.

189. See text accompanying notes 172-77 *supra*.

TABLE VII
ADVERSE EFFECT: TYPE OF BEAT

Type of beat	Number of responses	Yes	I'm not sure	No
General assignment	390	36 (9.2%)	47 (12.1%)	307 (78.7%)
Features	294	29 (9.9%)	37 (12.6%)	228 (77.6%)
Police	139	16 (11.5%)	26 (18.7%)	97 (69.8%)
Investigative	242	31 (12.8%)	35 (14.5%)	176 (72.7%)
Trials	138	24 (17.4%)	27 (19.6%)	87 (63.0%)
Government	320	29 (9.1%)	39 (12.2%)	252 (78.8%)
Financial	106	9 (8.5%)	12 (11.3%)	85 (80.2%)
Radical and militant groups	163	25 (15.3%)	31 (19.0%)	107 (65.6%)
Minority groups	191	25 (13.1%)	28 (14.7%)	138 (72.3%)
Sports	75	9 (12.0%)	13 (17.3%)	53 (70.7%)
Youth and education	183	21 (11.5%)	21 (11.5%)	141 (77.0%)
Other	259	19 (7.3%)	30 (11.6%)	210 (81.1%)

VII shows the breakdown of responses according to type of beat. One must be extremely cautious in drawing conclusions from these data¹⁹⁰ but, generally speaking, they are consistent with an impression I gained during the personal interviews: within the broad range of situations for which future legal proceedings are a possible contingency, the impact of the subpoena threat is primarily a function not of the subject matter of the story so much as the approach of the reporter. Newsmen who pay little attention to verification and interpretation and who rely heavily on a limited number of regular sources tend to be relatively unaffected by the subpoena threat, even when they are covering radical and militant activities. The reporters most hindered by the possibility of being subpoenaed are those who seek a composite picture, who check and cross-check their information with numerous sources (particularly sources who are not officially designated "spokesmen," and who are relatively inexperienced and cautious about dealing with the press), and who keep extensive files and tapes for future verification reference and for trend stories. Because of deadline pressures, budgetary constraints, and endemic laziness, there are not very many newsmen who operate in this latter fashion. Those who do tend to be concen-

190. Since the respondents were permitted to check as many of these categories as were appropriate, and since a "yes" response would register in each of the categories checked, the responses to the adverse-effect question of those who checked several type-of-beat categories weigh disproportionately in this Table. This phenomenon appears to explain the fact that all but one of the categories show a higher "yes" response percentage than was recorded for the population as a whole. Also, since a "yes" response based on an adverse effect concerning a radical-militant story would also show up in the other categories that the respondent checked, the data shown in Table VII should be read only to suggest the *direction* not the *extent* of the comparisons indicated. In retrospect, we probably should have asked the respondents to check only the type of beat that most characterizes the kind of reporting they do.

trated in a few news organizations but tend not to be concentrated on any particular beats.

This explanation is substantiated somewhat by the breakdown according to type of news medium. Table VIII gives these data.

TABLE VIII
ADVERSE EFFECT: TYPE OF MEDIUM

Type of medium	Number of responses	Yes	I'm not sure	No
Daily press	456	34 (7.7%)	43 (9.4%)	379 (83.1%)
Wire service	50	2 (4.0%)	6 (12.0%)	42 (84.0%)
Underground press	35	5 (14.3%)	7 (20.0%)	23 (65.7%)
Network television	49	4 (8.2%)	9 (18.4%)	36 (73.5%)
Local radio and television	121	7 (5.8%)	17 (14.0%)	97 (80.2%)
Newsweekly	127	14 (11.0%)	18 (14.2%)	95 (74.8%)
Other magazines and free-lance	98	7 (7.1%)	9 (9.2%)	82 (83.7%)

Newsweekly correspondents—who generally work under less deadline pressure than other reporters, compile fairly extensive files using many different sources, and engage in an interpretive style of reporting—feel more adversely affected by the subpoena threat than do most other journalists. Likewise, local-broadcast and wire-service journalists, who appear to devote less effort to verification and interpretation, indicate that the subpoena threat has had little impact on their reporting.¹⁹¹ However, the disparity in the figures, while suggestive, is not great enough to justify any firm conclusion that the effect of the subpoena threat is significantly related to the depth of news coverage.

Similarly, such a relationship is suggested, but by no means confirmed, by comparing the estimates of adverse effects among reporters with different levels of experience. In my personal interviewing I found an unmistakable consensus on the point that the younger, less experienced reporters tend to be more talented, more probing, more thorough, and more interested in verification, as well as more committed to social causes.¹⁹² And as one might expect, these report-

191. The comparatively high incidence of adverse effect claimed by reporters for underground publications is probably not explicable in terms of their greater efforts at verification, but the high incidence is not surprising in light of other factors: the underground press' emphasis on movement news; its greater access to sensitive information; the likelihood that law enforcement authorities are less solicitous of its journalistic needs; and its more limited resources for contesting subpoenas, either in court or in the forum of public opinion.

192. See notes 101 & 121 *supra* and accompanying text.

ers tend to feel the effect of the subpoena threat more than do their older, more experienced colleagues. Of the 437 reporters in our survey who have had 10 years of experience or less, 41 (9.4%) said their ability to cover a story had been adversely affected in the past 18 months because of the subpoena threat, 53 (12.1%) answered "I'm not sure," and 343 (78.5%) reported no adverse effect. In comparison, among the 421 respondents with 11 or more years of experience as a full-time reporter, the figures were: "yes," 23 (5.5%); "not sure," 44 (10.5%); "no," 354 (84.1%). Again, these disparities are suggestive but not conclusive, particularly since they might be traceable in part to other variables, such as type of beat and type of medium.

Two other cross-tabulations reveal a slightly more pronounced concentration of impact from the subpoena threat. If one limits the population to the 364 respondents who answered "yes" to the question, "Have you ever been entrusted with confidential information from a group or person commonly labeled as "radical," "militant," "extreme," or "dissident" (e.g. Black Panthers, SDS, Ku Klux Klan)?", the indications of adverse effects resulting from the subpoena possibility increase. Forty-four of these respondents (12.1%) answered "yes" to our question whether their ability to cover a story had been adversely affected in the past 18 months, another 55 (15.1%) said "I'm not sure," and 265 (72.8%) said "no." We also decided to divide the figures in terms of the respondents' own judgments of how well qualified they were to respond to the questionnaire. We asked each reporter to rate himself: "On the basis of my experiences with the subpoena threat and the type of reporting I do, I consider myself, in comparison with other reporters, very well qualified, fairly well qualified, somewhat qualified, not well qualified to respond to this questionnaire." Table IX shows this breakdown.

TABLE IX
ADVERSE EFFECT: HOW WELL QUALIFIED

How well qualified	Number of responses	Yes	I'm not sure	No
Very well qualified	147	24 (16.3%)	16 (10.9%)	107 (72.8%)
Fairly well qualified	198	20 (10.1%)	29 (14.6%)	149 (75.3%)
Somewhat qualified	239	18 (7.5%)	30 (12.6%)	191 (79.9%)
Not well qualified	268	6 (2.2%)	18 (6.7%)	244 (91.0%)

These markedly higher figures (almost 27.2% answering either "yes" or "not sure") for those who have been entrusted with confidential information from dissident groups and those who consider

themselves very well qualified would seem to support the suggestion from the personal interviews and the qualitative survey that the subpoena threat really hinders only a certain subpopulation of reporters. For this subpopulation, which appears to be characterized as much by reporting techniques as by type of beat, the subpoena possibility unmistakably has caused *some* losses of stories, and parts of stories, and opportunities for verification. Whether this "some" is "enough" to justify a newsman's privilege is a legal rather than empirical question.

F. *The Impact of a Privilege*

Simply because the practice of subpoenaing reporters appears to have an adverse effect on the newsgathering process, it does not follow that the arguments for a common-law, statutory, or constitutional newsman's privilege are necessarily persuasive. The counter-arguments based on the evidentiary gains of press subpoenas may be forceful. Or it may be that no legal privilege would be able to allay the often intangible, sometimes irrational fears that haunt sources. Many of our empirical efforts were devoted to finding out whether a privilege would make much of a difference and, if so, how it would do so.

First, we asked, "If the confidentiality of reporter-source relationships were protected by a legal privilege, would your reporting be helped in any of the following respects?" We then listed four possibilities and asked the respondents to check as many as were appropriate. Table X shows the responses to the four suggestions, both from the total population and from the more limited population of those reporters who answered either "yes" or "not sure" to the question whether their ability to cover a story in the previous 18 months had been adversely affected by the subpoena possibility. These figures seem to support an impression that I formed from the personal interviews and from some of the statements in response to the qualitative survey: reporters commonly make promises of confidentiality and sources commonly refuse to believe the promises, often because they fear that the reporter's editors and publishers will force him to cooperate with official requests for information. Several reporters told me that the court of appeals' ruling in *Caldwell v. United States*¹⁹³ that Caldwell was not required to appear before the grand jury has helped them substantially in their deal-

193. 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971).

TABLE X

"If the confidentiality of reporter-source relationships were protected by a legal privilege, would your reporting be helped in any of the following respects?
(Check as many as are appropriate)."

	Total population (975)	Respondents adversely affected or not sure (168)
"Legal protection would enable me to give sources a firmer promise of confidentiality than I can give them at present."	386 (39.6%)	97 (57.7%)
"Legal protection would make sources more willing to believe my current promises of confidentiality."	429 (44.0%)	111 (66.1%)
"Legal protection would make sources more willing to talk in situations in which I do not make explicit promises of confidentiality."	278 (28.5%)	69 (41.1%)
"Legal protection would eliminate my own inhibitions due to the subpoena threat in pursuing certain stories and publishing certain material."	173 (17.7%)	58 (34.5%)

ings with sources in just the way suggested by these data. When sources are hesitant to trust the reporter or fearful about the future pressures to which he may be subjected, a mention of the *Caldwell* ruling can lend to his promises of confidentiality the extra credibility that is necessary to get the sources to talk.¹⁹⁴

More problematical, on the other hand, is the impact of the less-publicized privileges that have been established for newsmen by statute in 18 states.¹⁹⁵ The lack of awareness of these statutes is remarkable. We asked the respondents, "Does the state in which you do most of your work have a 'shield law' which protects the confidentiality of source relationships in certain circumstances?" Of the 421 respondents in our survey who listed one of the shield law states as the state in which they do most of their work, only 149 (35.4%) were able to say with certainty that their state has a statutory priv-

194. Interviews with: John Kifner, *supra* note 41; Ray Brennan, *supra* note 32; Karston Prager, *supra* note 42.

195. ALA. CODE tit. 7, § 370 (1960); ALASKA COMP. LAWS ANN. §§ 09.25.150 to .220 (Supp. 1970); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West 1966); ILL. LEGIS. H. BILL 1756, 1971 General Assembly; IND. STAT. ANN. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1962); LA. REV. STAT. tit. 45, §§ 1451-53 (Supp. 1970); MD. ANN. CODE art. 35, § 2 (1971); MICH. COMP. LAWS ANN. § 767.5a (1968); MONT. REV. CODES ANN. tit. 93, §§ 601-1 to 601-2 (1964); NEV. REV. STAT. § 48.087 (1969); N.J. STAT. ANN. § 2A:84A-21 (Supp. 1971); N.M. STAT. ANN. § 20-1-12.1 (1970); N.Y. CIVIL RIGHTS LAW § 79-h (McKinney Supp. 1970); OHIO REV. CODE ANN. § 2739.12 (1953); PA. STAT. ANN. tit. 28, § 330 (Supp. 1971).

ilege for newsmen; 211 (50.1%) said, "I'm not certain," and 61 (14.5%) were under the mistaken impression that their state has no shield law.

In determining whether there ought to be a newsman's privilege, one must consider not only the newsgathering gains to be had thereby, but also the evidentiary losses. From the personal interviews and the qualitative survey responses, I formed the distinct impression that newsmen seldom possess information that might be considered vital to the fact-finding endeavors of legal tribunals. The most important exception to this generalization is the story on victimless or politically oriented crimes for which the reporter may be permitted to be an eyewitness and will thus know the identities of the principals. Whatever value one may attach to the successful prosecution of such offenses and to unhindered fact-finding in any of the other situations for which newsmen may have relevant evidence, one must be careful to consider only the *incremental* evidentiary costs that the recognition of a newsman's privilege would entail. I have already discussed our findings concerning the level of voluntary cooperation that would exist even if journalists were favored with an absolute privilege.¹⁹⁶ Another consideration is the level of non-cooperation that exists even when newsmen have no privilege and must therefore pay for their recalcitrance with fines and jail sentences. It is the middle range—the situations in which newsmen would not volunteer the information but would eventually turn it over under subpoena in the absence of a privilege—that constitutes the evidentiary stake that is at issue.

We asked our respondents, "Generally speaking, would you be willing to go to jail in order to protect important source relationships which you believed ought to be privileged but which were not under the existing law if you were advised by your lawyer that the sentence would probably be 30 days but might be as much as 6 months?" Of our 975 respondents, 667 (68.4%) said "yes," 140 (14.4%) said "no," and 168 (17.2%) did not answer the question. Among the 364 respondents who had been entrusted with confidential information from dissident sources, the willingness to go to jail to protect confidences was even greater: 297 (81.6%) said "yes," 40 (11.0%) said "no," and 27 (7.4%) did not answer the question. These figures should be somewhat discounted, however, for at least two reasons. First, it is much easier to talk about going to jail than it is to face up

196. See pt. II. D. *supra*.

to that prospect when it is a reality. In personal interviews some reporters admitted to me that their promises to sources to go to jail if necessary to protect confidences are premised on the firm belief that it will never come to that and that, even if it did, the sentence would be minimal.¹⁹⁷ Second, one of the reporters whom I interviewed confessed that his willingness to go to jail is somewhat influenced by the fact that the constitutional question is in doubt and the journalism community is consciously taking a strong stand on the issue. If the courts were to rule firmly against the press, he says that his judgment on the difficult ethical question would be affected and the tactical incentives for martyrdom would be removed. My guess is that this newsman, who must be cited here on a not-for-attribution basis, is atypical only in his candor. Nevertheless, many journalists have actually accepted contempt citations rather than breach their confidences with sources,¹⁹⁸ and the asserted willingness to go to jail—even if discounted—is impressive.

The news-flow gains and evidentiary losses that would result from a newsman's privilege will vary depending on whether the privilege is absolute or qualified and, if the privilege is qualified, what precise scheme of qualification is selected. Most of the statutory privileges protect only the identity of confidential sources and not the contents of confidential communications.¹⁹⁹ Some of the recent subpoena disputes, however, have involved requests for the contents of communications from known sources.²⁰⁰ We were interested to know which category of information our respondents thought was most important to protect. We asked:

The confidentiality of source relationships embraces two broad categories of information: 1) the *identity* of sources; and 2) the *contents* of communications. Proposals for a newsman's privilege vary with respect to which of these two categories is given the more complete protection. While you may favor absolute protection for both, if you had to pick one category of information for the more complete protection which would you choose?

197. Interviews with: David Burnham, *supra* note 45; Jack Mabley, *supra* note 32; Joseph Lelyveld, *supra* note 34.

198. Mark Knops of the Madison Kaleidoscope, for example, spent several months in jail after he refused to breach a source confidence. See *State v. Knops*, 49 Wis. 2d 647, 183 N.W.2d 93 (1971).

199. Compare N.Y. CIVIL RIGHTS LAW § 79-h (McKinney Supp. 1970), with OHIO REV. CODE ANN. § 2739.12 (1953).

200. *E.g.*, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971); *In re Grand Jury Witnesses*, 322 F. Supp. 573 (N.D. Cal. 1970).

Of the 820 reporters who answered this question,²⁰¹ 746 (91.0%) said "the identity of confidential sources," and 74 (9.0%) said "the contents of confidential communications." The 339 reporters in our survey who have been entrusted with confidential information from dissident sources²⁰² were only slightly less inclined to consider protection for identity to be more important than protection for contents: 306 of these respondents (90.3%) checked "identity" and 33 (9.7%) checked "contents." Most of the persons whom I personally interviewed confirmed this preference.²⁰³ Several of these newsmen, however, considered the question a Hobson's choice. They stressed the point that both categories are important and that, if a newsman's privilege is to be qualified, the exceptions should be constructed along lines other than this dichotomy between identity and contents.²⁰⁴

In pretesting our quantitative survey, we found that many respondents were reluctant even to talk about a qualified privilege because they believed that they should have an absolute protection against subpoenas. We sought to learn from these reporters, however, not their opinions on the over-all value question, but rather their judgments on some of the empirical components of the larger value question. Therefore, we asked the respondents to rate, from the standpoint of newsgathering, four qualified privileges that seemed, although vastly different in structure, to be comparable in terms of orientation toward the competing newsgathering and evidentiary interests. To avoid a possible bias caused by the order in which the choices appeared, we scrambled them so that each choice appeared in each of the four positions on 25% of the questionnaires. Table XI shows the results.

Had it not been for what I learned during the personal interviews, these results would have surprised me. Writing about the press subpoena controversy at the outset of this study, I suggested that any newsman's privilege "should be qualified in such a way that the exceptions are known to newsmen and sources at the moment of contact."²⁰⁴ That way, I thought, reporters could give their sources

201. Actually 364 respondents had been so entrusted, but only 339 of these answered our question about which category of information needs the stronger protection.

202. *E.g.*, interviews with: Jerry Tallmer, *supra* note 32; Hal Bruno, *supra* note 34; Joseph Lelyveld, *supra* note 34.

203. *Id.* Also, interviews with: Jason McManus, *supra* note 57; Peter Goldman, *supra* note 32.

204. Blasi, *Press Subpoenas: Privilege in Time of Violence*, THE NATION, Dec. 21, 1970, at 656.

TABLE XI

"Solely in terms of your ability to acquire and maintain source relationships (*i.e.*, quite apart from your judgment regarding overall fairness considering both sides of the issue), rank the following forms of a qualified privilege from 1 to 4, using 1 to indicate the most desirable and 4 to indicate the least desirable form of privilege."

	Phrasing of privilege	Number of respondents who ranked the privilege most desirable (#1)	Number of respondents who ranked the privilege second most desirable (#2)	Number of respondents who ranked the privilege third most desirable (#3)	Number of respondents who ranked the privilege least desirable (#4)	Average ranking among all respondents	Average ranking among the respondents who have been entrusted with confidential information from dissident sources	Average ranking among respondents who have been adversely affected by the subpoena threat in the last eighteen months
279	No protection when a crime of physical violence has been committed, there is reason to believe that the newsman has important information, and all non-press sources of the information have been exhausted; information obtained by the newsman protected by a privilege in all other circumstances.	340 (47.5%)	196 (27.4%)	127 (17.7%)	53 (7.4%)	1.85	1.85	2.02
	No protection when the judge determines that the information is needed to prevent a "miscarriage of justice;" information obtained by the newsman protected by a privilege in all other circumstances.	272 (38.0%)	169 (23.6%)	157 (21.9%)	118 (16.5%)	2.17	2.12	2.00
	No protection against subpoenas issued by courts pertaining to pending civil and criminal litigation; complete protection against all subpoenas issued by grand juries, legislative committees, and other investigatory bodies.	54 (7.6%)	199 (27.9%)	234 (31.8%)	227 (32.8%)	2.89	2.94	2.96
	No protection for information pertaining to planned future violations of the law, the whereabouts of fugitives, eye witness testimony, verification of published or broadcast stories, and information understood to be "on the record;" all other information protected by a legal privilege.	64 (8.8%)	152 (20.9%)	188 (25.9%)	322 (44.4%)	3.06	3.08	2.91

unequivocal assurances of legal protection for all information not covered by the defined exceptions to the privilege. If, on the other hand, protection depended on contingencies such as the availability of nonpress sources and the importance of the information to the particular fact-finding endeavor, I surmised that sources would be deterred from speaking because they could be given only contingent promises of legal protection. The quantitative-survey results and the opinions expressed to me during the personal interviews,²⁰⁵ however, point to precisely the opposite conclusion. If predictability at the point of reporter-source contact were the controlling consideration, the fourth choice presented in Table XI should have been favored. In fact, this choice was rated, on the average, to be the least desirable form of qualified privilege. I also would have thought, before the personal interviews, that newsmen would prefer a phrasing of the privilege that minimized the discretion of the judge and provided, instead, for a relatively mechanistic legal standard that would not lend itself to judicial manipulation in response to public passions. The third choice listed in Table XI offered one such mechanistic legal standard, but this choice too was strongly disfavored by the reporters in our survey.

Our respondents' distinct preference for the first and second choices is explicable in the light of some of the observations made to me in the personal interviews. As detailed above,²⁰⁶ many reporters emphasize the point that they seldom have information of genuine evidentiary value. If the reporter's testimonial obligation were limited to those few instances in which he really does have important information that is not available through nonpress sources, and if some provision were made to protect confidences in stories about victimless crimes, the contingency of press involvement with official fact-finding would be so remote as to have only a negligible impact on the flow of news. Again, the press' deep resentment of "unnecessary" subpoenas seems to be reflected in the data.

Daniel Feldman, an attorney who has represented the *Chicago Daily News* and *Sun-Times* in numerous subpoena disputes, suggested to me a practical reason why the first choice listed in Table XI might be most effective in preventing unnecessary subpoena

205. *E.g.*, interviews with: Wallace Turner, *supra* note 34; Peter Goldman, *supra* note 32; Don Holt, *supra* note 125; Jim Hoge, *supra* note 32; John Kifner, *supra* note 41.

206. See text accompanying notes 63 & 160 *supra*.

requests.²⁰⁷ With a mechanistic rule, he observed, there is nothing left to litigate or, by extension, to negotiate—there is no legal restraint on unnecessary subpoenas that can be fit under one of the defined exceptions to the privilege. But with a flexible standard that demands a set of particularistic findings before a subpoena can issue, there is some disincentive to subpoena requests that are motivated by laziness. If prosecutors and defense lawyers face the prospect of having to justify their subpoena requests with some documentation, they are likely to make those requests only when they perceive a genuine need. Wallace Turner, who as San Francisco bureau chief of the *New York Times* has been deeply involved with the *Caldwell* case, suggested to me this same rationale, articulated in more cosmic terms: "Accountability is what makes social institutions work."²⁰⁸

One further consideration, which may also explain the preference for a flexible privilege, was mentioned to me repeatedly in the personal interviews. What really matters, in the judgment of many newsmen, is the basic recognition in principle of a newsman's privilege; the precise wording is not so important.²⁰⁹ The *Caldwell* decision, for example, has had a remarkable effect in "clearing the air,"²¹⁰ despite the fact that the court's holding was sharply qualified.²¹¹ The exception-riddled guidelines that were handed down by the Attorney General²¹² in the aftermath of the furor over the Cald-

207. Interview, Nov. 17, 1970, Chicago.

208. Interview, *supra* note 34.

209. Interviews with: Peter Goldman, *supra* note 32; Hal Bruno, *supra* note 34; Don Holt, *supra* note 125; Wallace Turner, *supra* note 34; John Kifner, *supra* note 41.

210. Interviews with: Ray Brennan, *supra* note 32; John Kifner, *supra* note 41; Frank Maier, *supra* note 34; Jim Hoge, *supra* note 32; Karston Prager, *supra* note 42; Hal Bruno, *supra* note 34.

211. [T]he rule of this case is a narrow one. It is not every news source that is as sensitive as the Black Panther Party has been shown to be respecting the performance of the "establishment" press or the extent to which that performance is open to view. It is not every reporter who so uniquely enjoys the trust and confidence of his sensitive news source.
434 F.2d at 1090.

212. The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice.

The Department of Justice does not consider the press "an investigative arm of the government." Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.

It is the policy of the Department to insist that negotiations with the press be attempted in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the grand jury with the interests of the news media.

In these negotiations, where the nature of the investigation permits, the gov-

well subpoena have also had surprisingly salutary effect.²¹³ In dealing with sources, newsmen say that they try to avoid any mention of the subpoena contingency;²¹⁴ when the subject is raised, they discuss legal and extra-legal resistance in terms of broad commitments, not legal nuances.²¹⁵

On the other hand, this relative unconcern with the details of a newsman's privilege was not reflected in the quantitative survey. We asked, "Would the qualified privilege which you have ranked #1 adequately protect you in your relationships with your sources, or is a stronger privilege needed?" Although a majority of the 773 reporters who answered this question (475-61.4%) said "#1 is adequate," it seems significant that 298 (38.6%) of the respondents said

ernment should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the news media.

If negotiations fail, no Justice Department official should request, or make any arrangements for, a subpoena to the press without the express authorization of the Attorney General.

If a subpoena is obtained under such circumstances without this authorization, the department will—as a matter of course—move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization.

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

A. There should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources. The Department does not approve of utilizing the press as a spring board for investigations.

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

C. The government should have unsuccessfully attempted to obtain the information from alternative non-press sources.

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

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

F. Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassments on the grounds that their photographs will become available to the government.

G. In any event, subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

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

ATTORNEY GENERAL'S GUIDELINES FOR SUBPOENAS TO NEWS MEDIA, in 7 CRIM. L. REP. 2461 (Sept. 2, 1970).

213. Interviews with: Hal Bruno, *supra* note 34; Wallace Turner, *supra* note 34.

214. Interviews with: Peter Goldman, *supra* note 32; John Kifner, *supra* note 41.

215. Interview with John Kifner, *supra* note 41.

"a stronger privilege is needed." Moreover, a majority (167-50.3%) of the 332 reporters who have been entrusted with confidential information from dissident groups expressed the belief that a stronger privilege is needed. Part of this response probably can be attributed to the fact that it is difficult in any context to answer "no" to the question, "Do you want more?" Nonetheless, I was surprised by the number of reporters in the quantitative survey who were willing to say that the best of the qualified privileges offered them on the questionnaire was not enough.

My contrary impression from the personal interviews that newsmen are generally willing to accept a qualified privilege may be closely intertwined with a parallel impression that emerged with compelling clarity. Nothing, in the opinion of every reporter with whom I discussed the matter, would be more damaging to source relationships than a Supreme Court reversal of the Ninth Circuit's *Caldwell* holding.²¹⁶ Several newsmen told me that initially they were extremely worried by the subpoena spate of two years ago but that now their anxieties have greatly subsided as a result of the strong stand taken by the journalism profession and the tentative victories in court.²¹⁷ However, a Supreme Court declaration that the first amendment is in no wise abridged by the practice of subpoenaing reporters would, these newsmen assert, set off a wave of anxiety among sources.²¹⁸ The publicity and imprimatur that would accompany such a Court holding would, in the opinion of these reporters, create an atmosphere even more uncongenial to source relationships than that which existed two years ago, when the constitutional question remained in doubt.²¹⁹ Many newsmen told me that they would be happy to accede to more qualifications and exceptions in the wording of a privilege if the probability were thereby increased that the Supreme Court would recognize the basic principle of a newsman's privilege.²²⁰ These estimates of the impact of a reversal in *Caldwell* are pure speculation, and only as such should

216. Interviews with: Frank Maier, *supra* note 84; Don Holt, *supra* note 125; John Kifner, *supra* note 41; Elisabeth Coleman, *supra* note 64; Ray Brennan, *supra* note 32; Jim Hoge, *supra* note 32; Karston Prager, *supra* note 42; William Cook, *supra* note 54; Wallace Turner, *supra* note 34.

217. Interviews with: Karston Prager, *supra* note 42; William Cook, *supra* note 54; J. Anthony Lukas, *supra* note 63; Peter Goldman, *supra* note 32.

218. Interviews with: Frank Maier, *supra* note 84; Don Holt, *supra* note 125; John Kifner, *supra* note 41; Karston Praeger, *supra* note 42; Jim Hoge, *supra* note 32.

219. *Id.*

220. Interviews with: Hal Bruno, *supra* note 34; Wallace Turner, *supra* note 34; John Kifner, *supra* note 41; Peter Goldman, *supra* note 32.

they be accorded weight in one's empirical analysis. But if these widely and strongly held opinions of reporters are to be given any credence, the press subpoena controversy should be resolved with careful consideration devoted to the symbolic aspects of any decision.

III. CONCLUSION

The results of a wide-ranging empirical study of the sort that I have undertaken cannot be telescoped into a tidy conclusion. Nevertheless, it may be useful for me to identify those findings and impressions that I regard as the most important and the most interesting. They are as follows: (1) good reporters use confidential source relationships mainly for the assessment and verification opportunities that such relationships afford rather than for the purpose of gaining access to highly sensitive information of a newsworthy character; (2) the adverse impact of the subpoena threat has been primarily in "poisoning the atmosphere" so as to make insightful, interpretive reporting more difficult rather than in causing sources to "dry up" completely; (3) understandings of confidentiality in reporter-source relationships are frequently unstated and imprecise; (4) press subpoenas damage source relationships primarily by compromising the reporter's independent or compatriot status in the eyes of sources rather than by forcing the revelation of sensitive information; (5) only one segment of the journalism profession, characterized by certain reporting traits (emphasis on interpretation and verification) more than type of beat, has been adversely affected by the subpoena threat; (6) reporters feel very strongly that any resolution of their conflicting ethical obligations to sources and to society should be a matter for personal rather than judicial determination, and in consonance with this belief these reporters evince a high level of asserted willingness to testify voluntarily and also a very high level of asserted willingness to go to jail if necessary to honor what they perceive to be their obligation of confidentiality; (7) newsmen prefer a flexible ad hoc qualified privilege to an inflexible per se qualified privilege; (8) newsmen regard protection for the *identity* of anonymous sources as more important than protection for the *contents* of confidential information given by known sources; (9) newsmen object most of all to the frequency with which press subpoenas have been issued in what these reporters regard as unnecessary circumstances when they have no important information to contribute; and (10) newsmen fear that an outright rejection by the Supreme Court of any sort of newsman's privilege would "poison the atmosphere" considerably and thus they regard the symbolic aspect of the current constitutional litigation to be of the utmost importance.