# FOUND AND LOST: RECLAIMING THE PRESS PRIVILEGE FOR NONCONFIDENTIAL INFORMATION

*David McCraw**

## INTRODUCTION

For nearly thirty years, New York State has recognized a qualified right of journalists to withhold nonconfidential but unpublished editorial materials in the face of subpoenas from investigators and litigants.[1] But two recent appellate decisions have raised questions about the vitality of that protection: both criminal cases, both involving murders, both involving jailhouse interviews, and neither on its face the kind of case in which one would expect to find courts making important decisions shaping the future of press law in New York.[2]

The first case involves "Ramona Moore[, who] was last seen on July 31, 2012, when she vanished from her residence in the Bronx."[3] Nearly two years later, her landlord, Nasean Bonie, was charged with her murder.[4] On December 15, 2014, as Mr. Bonie sat in a New York City jail, he was interviewed on camera by a local television crew for nearly thirty minutes.[5] He denied killing Ms. Moore.[6] A few weeks later, News 12, *The Bronx*, aired some sixty seconds of the interview as part of a show entitled "Burden of Proof."[7]

The second case involves the infamous murder of "Baby Hope," a death that had once captured the attention of New Yorkers.[8] In

* David McCraw is vice president and assistant general counsel at the New York Times Company and was counsel to reporter Frances Robles in the *Juarez* case. He thanks Ian MacDougall, the 2016-2017 First Amendment Fellow at the *Times*, for his valuable input to this article.

1 *See, e.g.*, N.Y. CIV. RIGHTS LAW § 79-h(a)(8), (c) (McKinney 2017).

2 *See* People v. Juarez, 39 N.Y.S.3d 155, 156 (App. Div. 2016); People v. Bonie, 35 N.Y.S.3d 53, 53–54 (App. Div. 2016).

3 *Bonie*, 35 N.Y.S.3d at 54.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *See* People v. Juarez, 39 N.Y.S.3d 155, 156 (App. Div. 2016).

July 1991, police discovered near the Henry Hudson Parkway the body of a four-year-old girl.[9] The anonymous victim, who had been sexually assaulted and suffocated, came to be known as "Baby Hope."[10] Her murder, dramatically reported by New York's tabloids, remained unsolved for more than two decades.[11] Then, in 2013, police came upon new leads and learned that the girl's name was Anjélica Castillo.[12] A short time later, Conrado Juarez, one of Anjélica's cousins, was charged with murder.[13] As Juarez remained in jail on Rikers Island, he was visited by *New York Times* reporter Frances Robles and sat down for an interview in which he denied killing the little girl.[14] Ms. Robles's story appeared in the paper a short time later.[15]

In 2016, the two cases became the latest battlegrounds in the fight over the scope and strength of New York State's "Shield Law."[16] Skirmishes between prosecutors and reporters over anonymous sources have been in the public spotlight since the U.S. Supreme Court's 1972 decision in *Branzburg v. Hayes*,[17] in which the Court refused to quash three subpoenas on reporters who declined to identify sources during grand jury investigations.[18] But *Bonie* and *Juarez* were different. They involved the Shield Law's separate protection, under subdivision (c), for nonconfidential material collected by journalists but not used in their stories or broadcast reports.[19] The Shield Law contains an absolute privilege for confidential information, but sets out a three-prong qualified privilege for unpublished nonconfidential information.[20] Several years ago, the Court of Appeals candidly admitted: "[T]here are uncertainties concerning the application of the outer reaches of our statute, particularly the scope of the qualified privilege for

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *See* Frances Robles, *Suspect Recalls the Short Life of 'Baby Hope,'* N.Y. TIMES (Oct. 17, 2013), http://www.nytimes.com/2013/10/18/nyregion/suspect-recalls-the-short-life-of-baby-hope.html.

[13] *See Juarez*, 39 N.Y.S.3d at 156.

[14] *Id.*

[15] *See* Robles, *supra* note 12.

[16] *Juarez*, 39 N.Y.S.3d at 156–57 (citing N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2017)); People v. Bonie, 35 N.Y.S.3d 53, 54–56 (App. Div. 2016) (citing CIV. RIGHTS LAW § 79-h).

[17] Branzburg v. Hayes, 408 U.S. 665, 668 (1972).

[18] *See id.* at 667–73, 709.

[19] CIV. RIGHTS LAW § 79-h(c); *see, e.g.*, *Juarez*, 39 N.Y.S.3d at 156–57; *Bonie*, 35 N.Y.S.3d at 56.

[20] CIV. RIGHTS LAW § 79-h(b), (c).

nonconfidential news."[21]

In light of that uncertainty, it was not surprising that the same appellate court would come to different results in cases that had basic similarities. In *Bonie*, the First Department ordered News 12 to turn over its unaired footage from the jailhouse interview.[22] In *Juarez*, the First Department veered the other way, quashing the subpoena served on the reporter.[23]

Yet, in neither *Bonie* nor *Juarez* did the appellate division delve deeply into the language of the statutory privilege or grapple with the policy and philosophy that underlie the Shield Law's protection for unpublished materials.[24] It was a lost opportunity in an area that the Court of Appeals acknowledges is lacking in clear precedent.[25] More than that, both decisions continue a judicial trend of diluting the applicable standard and, by doing so, eroding the intended protection of the press.

To be sure, for courts accustomed to dealing with privileges that grow out of confidential relationships—attorney-client, physician-patient, cleric-parishioner, reporter-source—subdivision (c) is a strange legal cousin. Why do reporters need a privilege to cover information that was given to them with the expectation and understanding that it could be published or aired? What public good is advanced by such a privilege? Where should the courts draw the outer boundaries of the privilege, which by the very terms of subdivision (c) is qualified?

While subdivision (c) resides in the long shadow of the much more prominent Shield Law provision protecting confidential sources, it is an essential bulwark of press freedom. Arguably, it is a more consequential provision for work-a-day journalism because it applies to virtually every news report that appears in a newspaper, on television or radio, or on a news website in New York.[26] Yet, neither *Bonie* nor *Juarez* provides the sort of jurisprudential foundation that is needed to assure that press freedom receives the protection afforded by the Shield Law. If anything, by moving away from strict application of the formal three-part test contained in the Shield Law and relying on an amorphous determination of whether the evidence is "necessary," the courts make it more likely that

[21] *In re* Holmes v. Winter, 3 N.E.3d 694, 704 (N.Y. 2013).
[22] *Bonie*, 35 N.Y.S.3d at 56.
[23] *Juarez*, 39 N.Y.S.3d at 156–57.
[24] *See, e.g.*, *Juarez*, 39 N.Y.S.3d at 156–57; *Bonie*, 35 N.Y.S.3d at 55–56.
[25] *See, e.g.*, *In re Holmes*, 3 N.E.3d at 704.
[26] *See* N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 2017).

subpoenas from investigators and litigants will interfere with the legitimate and important news gathering activities of New York journalists. Now that leave to appeal has been granted in *Juarez*, these issues may again be front and center for the New York courts.[27]

## I. THE HISTORY OF THE REPORTER'S PRIVILEGE IN NEW YORK

The privilege for unpublished information is ultimately rooted in the legal battles over the privilege to protect confidential sources.[28] New York's original Shield Law was passed in 1970.[29] It made no mention of unpublished nonconfidential information and instead addressed solely the confidential source privilege, now embodied in subdivision (a), which provides an absolute privilege to journalist's confidential sources and information.[30] That privilege became a focal point of national attention two years later when three confidential sources cases made their way to the U.S. Supreme Court: *Branzburg v. Hayes*, *In re Pappas*,[31] and *United States v. Caldwell*.[32] At issue in each was whether the First Amendment embodied a constitutional privilege that would permit journalists to avoid having to disclose the identities of confidential sources.[33]

Advocates for the press saw the trilogy of cases as providing the Supreme Court with an opportunity to carry forward its groundbreaking jurisprudence expanding First Amendment protections.[34] In 1964, the Court had revolutionized libel law in *New York Times v. Sullivan*,[35] establishing that public officials could not prevail in libel actions without showing that the publisher had acted with reckless disregard for the truth.[36] Three years later, in *Curtis Publishing Co. v Butts*[37] and *Associated Press v. Walker*,[38]

[27] *See* People v. Juarez, 80 N.E.3d 401 (2017).

[28] *See, e.g.*, Knight-Ridder Broad. Co. v. Greenberg, 511 N.E.2d 1116, 1117, 1118 (N.Y. 1987).

[29] *Id.* at 1120.

[30] *See* REPS. COMMITTEE FOR FREEDOM OF THE PRESS, REPORTER'S PRIVILEGE: NEW YORK (2010), https://www.rcfp.org/rcfp/orders/docs/privilege/NY.pdf.

[31] *In re* Pappas, 402 U.S. 942, 942 (1971); *see In re* Pappas, 266 N.E.2d 297, 298 (Mass. 1971).

[32] United States v. Caldwell, 402 U.S. 942, 942 (1971); *see* Caldwell v. United States, 434 F.2d 1081, 1082, 1083 (9th Cir. 1970).

[33] *Branzburg*, 408 U.S. at 667, 693; *Caldwell*, 434 F.2d at 1082; *In re Pappas*, 266 N.E.2d at 298.

[34] *See, e.g.*, David Abramowicz, Note, *Calculating the Public Interest in Protecting Journalists' Confidential Sources,* 108 COLUM. L. REV. 1949, 1954–56 (2008).

[35] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[36] *Id.* at 279–80, 283.

[37] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

the Court expanded the *Sullivan* rule to public figures.[39] In 1971, in the Pentagon Papers decision, the Court refused to permit the government to enjoin the publication of classified information in a decision that left little doubt that prior restraints would rarely be tolerated, if at all.[40]

In the *Branzburg* cases, the press stopped short of advocating for an absolute privilege to protect the identities of sources.[41] Instead, the journalists argued for a qualified constitutional privilege under which a subpoena seeking confidential sources would be quashed unless it was shown that the need for the information was compelling and no alternative sources were available.[42] By a 5-4 vote, the Court declined to adopt a constitutional "reporter's privilege" of any sort.[43] The Court's decision was, as the dissenters said, "enigmatic," thanks to a concurrence by Justice Powell that stressed that reporters subpoenaed to testify "are without constitutional rights" and that "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[44] Indeed, in the aftermath of *Branzburg*, various federal courts found that there was a qualified First Amendment privilege.[45] Some federal courts found a privilege applicable to unpublished information, although the U.S. Court of Appeals for the Second Circuit declined to say whether it was acting under the First Amendment or as a matter of federal common law.[46] In recent years, many federal courts have turned hostile to the idea that *Branzburg* created a constitutional privilege in respect to grand jury subpoenas, most notably in the U.S. Court of Appeals for the Fourth Circuit's decision involving *New York Times* journalist James Risen.[47] Its scope is more in doubt than ever.

But whatever the proper interpretation of *Branzburg*, that decision laid out the competing interests that would come to

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[38] *See* Associated Press v. Walker, 389 U.S. 28 (1967).

[39] *See Curtis Publ'g Co.*, 388 U.S. at 155; *Associated Press*, 389 U.S. at 28 (citing *Curtis Publ'g Co.*, 388 U.S. at 155).

[40] *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

[41] *See* Branzburg v. Hayes, 408 U.S. 665, 680 (1972).

[42] *See id.*

[43] *See id.* at 702, 708–09.

[44] *See id.* at 709–10 (Powell, J., concurring); *id.* at 725 (Stewart, J., dissenting).

[45] *See, e.g.*, Zerilli v. Smith, 656 F.2d 705, 707 (D.C. Cir. 1981); Miller v. Transamerican Press, 621 F.2d 721, 725 (5th Cir. 1980).

[46] *See, e.g.*, Gonzales v. NBC, 194 F.3d 29, 35 & n.6 (2d Cir. 1998).

[47] *See, e.g.*, United States v. Sterling, 724 F.3d 482, 498, 499 (4th Cir. 2013).

illuminate the debate over the subdivision (c) privilege: the long-held principle that every citizen has an obligation to provide evidence balanced against the recognition that the right to publish will often be rendered hollow without some protection for news gathering.[48]

The issue of protecting unpublished information made its way to the Court of Appeals in 1987 in *Knight-Ridder Broad. Co. v. Greenberg*.[49] *Greenberg* involved the reporting of an Albany television station on the disappearance of a local woman.[50] As the hunt for the woman unfolded, WTEN-TV interviewed her husband, Donald Bent.[51] The station then aired a minute of the interview.[52] Later, Mrs. Bent was found dead in the trunk of a car and investigators' suspicions turned to her husband.[53] The District Attorney subpoenaed the tape of the WTEN interview.[54]

Knight-Ridder, the owner of WTEN, moved to quash the subpoena on the basis of the Shield Law.[55] The Shield Law by its terms covered only confidential sources and information, but state Supreme Court, Albany County, had found the law broad enough to reach unpublished information, even if the information was not given to reporters under a promise of confidentiality.[56] The appellate division reversed, and the Court of Appeals affirmed that decision.[57] "Because the statute . . . does not extend its protection to nonconfidential sources or information obtained in the course of gathering or obtaining news for publication, the appellate division correctly declined to quash the subpoena."[58] That ruling followed from a series of appellate division decisions that had similarly found that nonconfidential information did not fall within the purview of the Shield Law.[59]

The Shield Law was subsequently amended in 1981, but still provided no protection for nonconfidential information.[60] The *Greenberg* court pointed out that the protection of nonconfidential

[48] *See* N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 2017).
[49] *See* Knight-Ridder Broad. Co. v. Greenberg, 511 N.E.2d 1116, 1117 (N.Y. 1987).
[50] *See id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *See id.*
[57] *Id.*
[58] *Id.* at 1118.
[59] *See id.*
[60] *See id.*

information had been part of the legislative debate surrounding the 1981 amendments and the proposal had been rejected.[61] In passing, the court sidestepped the issue of whether there was a privilege for nonconfidential information in the federal Constitution.[62] It held that even if such a qualified constitutional privilege existed, it was overcome by the prosecutors' need for the tape.[63] Any similar claim under the New York State Constitution had not been preserved for review by the Court of Appeals.[64]

The state Constitution became the centerpiece of the debate over the privilege one year later in *O'Neill v. Oakgrove Constr., Inc.*[65] The plaintiff in *O'Neill* was injured in a car accident on a road that was under construction.[66] A photographer from a local newspaper arrived on the scene and took fifty-eight photographs, one of which was published the next day.[67] The plaintiff subpoenaed the photographs as part of an effort to show that the defendant road construction company had created a safety hazard.[68]

The Court of Appeals found that journalists enjoyed a qualified privilege protecting unpublished information even when it was not obtained under a promise of confidentiality, under Article I, section 8 of the state Constitution.[69] The court noted that some federal courts after *Branzburg* found a First Amendment privilege and the court embraced those decisions, but ultimately turned to the state Constitution as an independent source for protection of the press.[70] A three-part test, adopted largely from federal decisions going back to the *Branzburg* dissent, emerged.[71] The litigant seeking access to unpublished information needed to show that the material was: "(1) highly material, (2) critical to the litigant's claim, and (3) not otherwise available."[72]

Significantly, the Court of Appeals broadly laid out the policy underpinnings of the privilege. "The ability of the press freely to collect and edit news, unhampered by repeated demands for its

[61] *See id*. at 1118, 1120.
[62] *See id*. at 1121.
[63] *See id*. (citing Branzburg v. Hayes, 408 U.S. 665, 710 (1972)).
[64] *Knight-Ridder Broad. Co.*, 511 N.E.2d at 1121 (citing People v. Lancaster, 503 N.E.2d 990, 996 (N.Y. 1986)).
[65] O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 277–78 (N.Y. 1988).
[66] *Id*. at 278.
[67] *Id*.
[68] *See id*.
[69] *See id*. at 280.
[70] *See id*. (citing Branzburg v. Hayes, 408 U.S. 665, 706 (1972)).
[71] *See id*.
[72] *Id*. at 279.

resource materials, requires more protection than that afforded [by the CPLR]."[73] The court continued: "The practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of newsgathering activity, would be particularly inimical to the vigor of a free press."[74]

All of that exalted language about press freedom was coming in a case that involved nothing more than photographs from a car wreck.[75] It would have been easy to frame the issue as having de minimis impact on core journalism. *O'Neill* was not about disclosures of political scandal, government corruption, or even a high-profile murder investigation, as was the case in *Greenberg*.[76] In reality, the burden on the newspaper and the photographer could hardly have been slighter. They were being asked to do nothing more than turn over images that had been shot with every intention to publish them and that were unlikely to have any value—journalistic or financial—beyond telling the story of a single car accident.[77] But the court was willing to use those slender facts to stand up basic principles about press freedom, and the message to the courts was indisputably that they should not let decisions about press subpoenas turn into an exercise in judicial assessment of the value of a given piece of journalism.

Two years later, the legislature amended the Shield Law.[78] For the first time, it protected nonconfidential unpublished information.[79] The language of the new subdivision (c) actually went beyond the terms of the constitutional privilege laid out in *O'Neill* in specifying that litigants had to make a "clear and specific showing" that the information sought "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source."[80] That provision applies to "any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news."[81] "News," in turn, is currently defined in the statute as "written, oral, pictorial photographic, or electronically recorded information or

[73] *Id.*

[74] *Id.*

[75] *See id.* at 278.

[76] *See id.*; Knight-Ridder Broad. Co. v. Greenberg, 511 N.E.2d 1116, 1117 (N.Y. 1987).

[77] *See O'Neill*, 523 N.E.2d at 278.

[78] *See* Qualified Protection for Nonconfidential News, L 1990, ch. 33, § 2 (codified as amended at N.Y. CIV. RIGHTS § 79-h (McKinney 1990)).

[79] *See id.*

[80] *Id.*

[81] *Id.*

communication concerning local, national, or worldwide events or other matters of public concern or public interest or affecting the public welfare."[82]

## II. *PEOPLE V. COMBEST* AND ITS AFTERMATH

Only once since *O'Neill* and the amending of the Shield Law has the Court of Appeals returned to the issue of nonpublished information, in *People v. Combest*.[83] It was a decision based on a singular set of facts and one that has come to raise doubts about the strength and scope of subdivision (c)'s protection.[84] The Court of Appeals itself recognized as much when in 2013, in a confidential source case, it declared that "there are uncertainties concerning the application of the outer reaches of our statute, particularly the scope of the qualified privilege for nonconfidential news," citing specifically to *Combest*.[85] The citation is understandable: *Combest* involved facts far removed from those typically found in a privilege case, and it is not clear how far the court intended it to reach.[86]

In *Combest*, a film crew was invited by police to film the interrogation of defendant Combest, a seventeen-year-old Brooklyn resident who was ultimately charged with murder.[87] The film crew's tape became the sole record of much of the interrogation because the police did not make their own recording, except for a videotaped confession.[88] Prior to trial, the defense issued a subpoena to the film company, Hybrid Films, Inc. ("Hybrid"), for the recording, arguing that the footage would help prove that Combest's confession was involuntary and would support his claim that he had acted in self-defense.[89] Hybrid moved to quash, but the trial court ordered the footage produced.[90] The next day, Hybrid won a stay from the appellate division.[91] The appellate division directed the trial court to keep possession of the film and to decide the subdivision (c) issue if it arose during trial.[92]

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[82] *See* N.Y. CIV. RIGHTS LAW § 79-h(a)(8) (McKinney 2017).
[83] People v. Combest, 828 N.E.2d 583, 586–87 (N.Y. 2005).
[84] *See, e.g.*, *In re* Holmes v. Winter, 3 N.E.3d 694, 704 (N.Y. 2013).
[85] *See id.* (citing *Combest*, 828 N.E.2d at 586–87).
[86] *See In re* Holmes, 3 N.E.3d at 704 (citing *Combest*, 828 N.E.2d at 586–87).
[87] *See Combest*, 828 N.E.2d at 584.
[88] *Id.* at 584–85.
[89] *See id.* at 585, 587.
[90] *Id.* at 585.
[91] *Id.*
[92] *See id.*

At trial, the defense again sought access to the footage but the trial court ruled this time that the defendant had failed to carry his burden under subdivision (c).[93] Combest was convicted of manslaughter.[94] On appeal, the appellate division affirmed the conviction and held that the trial court had properly granted Hybrid's motion to quash during trial.[95]

The Court of Appeals reversed and ordered a new trial.[96] "Defendant was entitled to present evidence, if he could, that he had been coerced into making a statement," the court held.[97] A jury's assessment of whether a statement was voluntary may involve "more than an analysis of the words spoken to and by him," the court said.[98] "Here, only the tapes could establish those intangibles that might properly be considered."[99] The court went on to say that while *in camera* review was not always required, it "would have been the better practice" in Combest's case.[100]

There is little question that the unique facts in *Combest* were critical to the court's reasoning. Rarely will reporters have access to any nonpublic governmental venue like the police interrogation room.[101] Typically, the reporting at question involves, as was true in *Juarez* and *Bonie*, private interactions between reporters and newsmakers.[102] *Combest* was strikingly different. While declining to say whether an agency relationship had been formed between the police and the documentary film company, the court concluded that "the police may not immunize themselves from their obligation to provide defendants with copies of their own taped statements simply by letting a news organization—invited into the room by the police—operate the cameras."[103]

In assessing materiality for purposes of the Shield Law, the court observed that a "defendant's own statements *to police* are highly material and relevant to a criminal prosecution."[104] The court referred to a provision of New York's criminal procedure law that

[93] *See id.*
[94] *Id.*
[95] *Id.* at 585–86.
[96] *Id.* at 586.
[97] *Id.* at 588.
[98] *Id.* at 589.
[99] *Id.*
[100] *Id.* at 589 n.4.
[101] *See id.* at 584.
[102] People v. Juarez, 39 N.Y.S.3d 155, 156 (App. Div. 2016); People v. Bonie, 35 N.Y.S.3d 53, 53 (App. Div. 2016).
[103] *Combest*, 828 N.E.2d at 589.
[104] *Id.* at 587 (emphasis added).

requires the police to turn over to defendants the statements that they made to police.[105] It followed for the court that if Hybrid had the only copy of the recording, the recording should be produced to the defense.[106] Whether that criminal procedure law provision should apply to a third party with a legitimate claim for privilege is a good question, but once the court invoked the law, it was an easy path to the conclusion that the defendant had met his burden for overcoming the Shield Law privilege as a matter of law—without actually discussing or analyzing the requirements for "highly material and relevant" and "critical [and] necessary."[107] The court found there to be no alternate source because the film was the "only depiction[]" of the questioning.[108]

*Combest* stands as the most important decision rendered on subdivision (c).[109] Yet, it is apparent that the court approached the case as being about the dubious practices of law enforcement officers in conducting interrogations rather than the Shield Law itself.[110] The court explicitly "note[d its] . . . concern with the troubling practice of the police partnering with the media to make a television show depicting custodial interrogations."[111] The court wrote: "Defendant correctly contends that the police here allowed the film company to perform what was in fact a police function—the memorialization of an otherwise private interrogation and admission."[112] The court included a lengthy footnote that catalogs:

> [The] increasing number of jurisdictions . . . now mandating that police questioning of arrestees be recorded, and that a resolution calling for all law enforcement agencies to videotape in their entirety the custodial interrogations of crime suspects has recently been adopted by the New York State and American Bar Associations.[113]

Rather, it was the single-judge dissent more than the majority opinion that approached the case for what it actually was: a Shield Law decision. Judge Smith, the dissenter, expressed doubts about

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[105] *See id.* (citing N.Y. CRIM. PROC. LAW § 240.20(1) (McKinney 2017)).

[106] *See Combest*, 828 N.E.2d at 587–88.

[107] *Id.* at 588–89.

[108] *See id.* at 587–88.

[109] *See, e.g.*, Albert V. Messina, Jr., *Recent Case: Shield Law—The Qualified Privilege of Newscasters & Journalists in Non-Confidential News—Court of Appeals of New York*—People v. Combest*, 828 N.E.2d 583 (N.Y. 2005),* 22 TOURO L. REV. 353, 353–54 (2006) (discussing the erosion of the "critical or necessary" standard in the *Combest* decision).

[110] *See Combest*, 828 N.E.2d at 589.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 589 n.5.

how the court analyzed the case under subdivision (c)'s balancing test. He pointed out that there were open questions about what "critical or necessary" means and how courts should address that prong.[114] Perhaps, Judge Smith reasoned, the tape actually showed Combest being treated well.[115] Would that sort of tape really be critical or necessary to Combest's claims of coercion?[116] He went on to criticize the majority for relying on "what the defendant *contended* that the tapes would show," and found nothing in the Shield Law that allowed a party's contention about subpoenaed material to carry the day.[117] On that basis, he supported *in camera* review although he had his doubts about whether the tapes would meet the requirements of subdivision (c) even if they were exactly as Combest claimed because they did not seem probative of coercion or self-defense.[118]

In the end, what is most concerning about *Combest* is that the court took the opportunity to raise doubts about the import of subdivision (c) to the working press.[119] The court wrote:

> In a criminal case, defendant's interest in nonconfidential material weighs heavy. Of course, in *any* case, the interest in refusing to share nonconfidential information is significantly lower than when confidential material is at issue. When confidential material is at issue, the media may have real reason to fear that their ability to find sources willing to provide information will soon evaporate if their guarantees of confidentiality will not be honored.[120]

That assessment plainly misconstrues a key element of the subdivision (c) analysis. A criminal defendant may have an interest in nonconfidential material that is quite trivial or unrelated to any issue that is truly in dispute.[121] The mere fact that the subpoena comes in a criminal case or comes from the defense does not excuse the defendant from showing by "clear and specific" evidence that the information sought is "*highly* material and relevant."[122] Further, while it is indisputable that the Shield Law sets up a higher test for

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[114] *See id.* at 591 (Smith, J., dissenting).
[115] *See id.*
[116] *See id.*
[117] *Id.*
[118] *See id.*
[119] *See id.* at 586–87 (majority opinion).
[120] *Id.* at 586.
[121] *See, e.g.*, *id.* (discussing defendant's argument that in criminal cases, the defense should be entitled to material that does not meet statutory requirements).
[122] *See* N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 2017) (emphasis added).

confidential than for nonconfidential information, the same policy concerns undergird both parts of the Shield Law.[123] Take, for instance, defendants who give jailhouse interviews and help the news media report on how the accused are being treated by the courts, by the prosecution, and by their own defense lawyers.[124] They are less likely to speak if they have reason to believe that the next time that they will see the reporter is in court as a witness for the prosecution.[125] Whether that is a bigger or lesser restraint on newsgathering than the chilling effect that is found when prosecutors seek to unmask confidential sources is beside the point.[126] The same policy issue is present and should illuminate the courts' decisions.[127]

In the eleven-year period between *Combest* and the First Department's decisions in *Juarez* and *Bonie*, appellate division courts have shown a willingness to quash subpoenas served on journalists but have seemingly moved away from the formalistic three-prong statutory test and embraced what could be viewed as a functionalist test focusing on whether the litigant has shown a convincing need for the materials. Given C*ombest*'s superficial treatment of the "critical or necessary" prong, as highlighted in Judge Smith's dissent, that judicial tendency is understandable if regrettable. There were three relevant opinions in that period.

In *People v. Royster*,[128] the defendant sought to subpoena a newspaper reporter's notes, which he believed would demonstrate that detectives in his case had questioned his mental condition.[129] The court affirmed the trial court's order to quash the subpoena.[130] Although the court paid passing attention to relevance, in the end it found that the defendant had other ways to get before the jury the fact that the detectives had called him a "madman."[131]

In *Perito v. Finklestein*,[132] a defendant was accused of selling

[123] *See, e.g.*, Messina, *supra* note 109, at 371–73 (discussing burdens and the balancing of confidential and nonconfidential material).

[124] *See, e.g.*, Saxbe v. Wash. Post Co., 417 U.S. 843, 847 (1974).

[125] *See* Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL'Y 241, 246 (2002); *see also In re* Paul, 513 S.E.2d 219, 221 (Ga. 1999) (discussing the flow of information to a reporter regarding an investigation).

[126] *See* Fargo, *supra* note 125, at 272.

[127] *See id.*

[128] People v. Royster, 842 N.Y.S.2d 12 (App. Div. 2007).

[129] *Id.* at 14.

[130] *See id.*

[131] *Id.*

[132] *In re* Perito v. Finklestein, 856 N.Y.S.2d 677 (App. Div. 2008).

counterfeit medicine.[133] He sought notes from the author's interviews with law enforcement.[134] The defendant said he needed the notes for impeachment purposes but the Second Department declined to enforce the subpoena, finding that the defense had other means of impeaching the police testimony.[135]

Finally, in *Gilson v. Coburn*,[136] the widow of a man killed in a flying accident sought notes from a reporter who had earlier written about taking part in a similar flight.[137] The First Department affirmed the trial court's order to quash.[138] Once again, the court found that there were other ways to obtain information about the flights.[139]

All of those decisions paid attention to the journalistic interests at stake, but they each can be read as looking at subdivision (c) as merely requiring something a little beyond relevance. They, like *Combest*, stand in contrast to earlier decisions that had looked at subdivision (c) as requiring that a claim or defense "virtually rises or falls" on a journalist's evidence.[140]

## III. *BONIE* AND *JUAREZ*

*Bonie* and *Juarez* came to opposite conclusions about whether a subpoena should be quashed,[141] but they fit into the pattern of other post-*Combest* cases by largely reducing the subdivision (c) analysis to a single free-form test focused on the parties' perceived need for the evidence.[142] In each case, prosecutors sought the journalists' evidence as a way to shed light on an earlier statement made by the defendant.[143] In *Bonie*, the television station had done a video interview at the jailhouse with the defendant, who was charged with killing his tenant.[144] Investigators had previously questioned him, and he had told them that "he had argued with [the tenant] . . .

[133] *Id.* at 678.
[134] *Id.*
[135] *Id.*
[136] *See In re* Gilson v. Coburn, 964 N.Y.S.2d 149 (App. Div. 2013).
[137] *Id.* at 150.
[138] *Id.*
[139] *Id.*
[140] *See, e.g.*, *In re* Nat'l Broad. Co., 79 F.3d 346, 351 (2d Cir. 1996) (citations omitted); Flynn v. NYP Holdings, 652 N.Y.S.2d 833, 835 (App. Div. 1997) (citation omitted); discussion *infra* Section IV.
[141] *Compare* People v. Juarez, 39 N.Y.S.3d 155, 156–57 (App. Div. 2016), *with* People v. Bonie, 35 N.Y.S.3d 53, 56 (App. Div. 2016).
[142] *See, e.g.*, *Juarez*, 39 N.Y.S.3d at 156–57; *Bonie*, 35 N.Y.S.3d at 56.
[143] *See Juarez*, 39 N.Y.S.3d at 156; *Bonie*, 35 N.Y.S.3d at 54.
[144] *See Bonie*, 35 N.Y.S.3d at 54.

and made derogatory comments about her lifestyle."[145] In the interview with the journalist, however, Bonie said that there were no personal issues between them and that they had never quarreled.[146] Those statements were not broadcast, but the news report referenced them.[147] Prosecutors sought the outtakes of the interview to show that he had made contradictory statements.[148]

In affirming the enforcement of the subpoena, the *Bonie* court cited the three-prong standard from subdivision (c) but veered far from the "virtually rises or falls" analysis that had been employed in earlier cases.[149] Instead, the court acknowledged that the statements being sought "might seem benign."[150] Nonetheless, the court found that this was a circumstantial murder case and "evidence which, standing alone, might appear innocuous can be deemed critical when viewed in combination with other circumstantial evidence."[151] This is a "mosaic theory" in which the disputed evidence gets weighed not on its merits but on whether, in combination with other evidence, it becomes compelling proof.[152] That approach has no obvious limiting principle. The presentation of proof is always an exercise in combining, and the mosaic theory could allow insignificant press evidence to be admitted, even when it plays only a minor role, depending on how it combined with other evidence.

The *Bonie* court made short work of the fact that jailhouse employees had witnessed the interview and could testify as to what was said.[153] Recollections "do not have the same evidentiary effect as would the video recording," the court noted.[154] If that is the proper rendering of the "alternative source" test, it means that the third prong of subdivision (c) is written out of the law in a case involving video outtakes.

As it turned out, while *Bonie* was pending before the appellate division, the criminal trial went forward without the outtakes and Bonie was convicted.[155] That outcome stunningly undermines the

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[145] *Id.*
[146] *See id.*
[147] *See id.*
[148] *See id.*
[149] *See id.* at 55.
[150] *Id.* at 55–56.
[151] *Id.* at 55 (citing People v. Mercereau, 875 N.Y.S.2d 857, 859 (Sup. Ct. 2009)).
[152] *See* Christina E. Wells, CIA v. Sims*: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 846 (2006).
[153] *Bonie*, 35 N.Y.S.3d at 56.
[154] *Id.*
[155] *See* Aidan McLaughlin, *Ex-Bronx Superintendent Convicted of Manslaughter for 2012*

prosecution's claim of necessity.[156]

*Juarez*, decided a few months later, also involved a video.[157] This time, though, the police had the videotape and the reporter did not.[158] In his videotaped confession to police, Juarez admitted killing Baby Hope and recounted various details about his interaction with the little girl and her family as well as facts about his own life.[159] In his later interview in prison with reporter Frances Robles, he said he had not killed the little girl.[160] He again recounted various details about his life and his connection to Baby Hope.[161] The People sought Robles's testimony on the theory that Juarez had said many of the same things to Robles as he had said to police.[162] In the People's view, that suggested that both statements were voluntary.[163]

The People first moved to compel reporter Robles's testimony for a pre-trial suppression hearing.[164] The subpoena on its face sought only testimony about what had been published, as published information is not covered by the Shield Law.[165] The People subsequently sought the reporter's notes as well.[166] However, with or without the notes, the Shield Law is implicated, even when only authentication of the story is sought, because of the anticipated cross-examination.[167] Defendants will want to probe the circumstances of the interview, whether notes were taken, and whether other statements were made by the defendant but not recorded in the story—all, by definition, unpublished information.[168]

*Death*, N.Y. DAILY NEWS (July 25, 2016), http://www.nydailynews.com/mew-york/nyc-crime/bronx-superintendent-convicted-manslaughter-2012-killing-article-1.2725641.

[156] *Bonie*, 35 N.Y.S.3d at 56.

[157] People v. Juarez, 39 N.Y.S.3d 155, 156 (App. Div. 2016).

[158] *See id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *See* People v. Juarez, No. 4467/2013, SCID No. 3022/15, slip op. at 1 (N.Y. Sup. Ct. Aug. 4, 2016).

[163] James C. McKinley Jr., *Judge Says Reporter for* New York Times *Must Testify at 'Baby Hope' Trial*, N.Y. TIMES (Aug. 4, 2016), https://www.nytimes.com/2016/08/05/nyregion/frances-robles-baby-hope-trial.html?_r=0.

[164] *Juarez*, 39 N.Y.S.3d at 156.

[165] *Juarez*, slip op. at 2.

[166] *Id.*

[167] *See* United States v. Treacy, 639 F.3d 32, 43–44 (2d Cir. 2011); *see also* Baker v. Goldman Sachs & Co., 669 F.3d 105, 110–11 (2d Cir. 2012) (discussing the Shield Law and compelling testimony and cross-examination); *In re* Morgan Keegan & Co. Inc. v. Eavis, 955 N.Y.S.2d 715, 718 (Sup. Ct. 2012) (noting what is protected under the Shield Law); People v. Santiago, No. 348/06, 2007 N.Y. Misc. LEXIS 7757, at *7–8 (Sup. Ct. Oct. 4, 2007) (discussing the standard necessary to compel testimony from a reporter).

[168] *See* People v. Juarez, No. 4467/2013, SCID No. 3022/15, slip op. at 2 (N.Y. Sup. Ct. Aug.

In advance of the suppression hearing, the trial court applied subdivision (c)'s three-part test and found that the People had failed to carry their burden.[169] It quashed the subpoena.[170] The suppression hearing proceeded, and the court ruled that Juarez's confession was voluntary and could come in.[171]

It was at that point that the trial court did a dramatic pivot. Under the law, the defendant gets a second bite of the apple and can argue to the jury at trial that the confession was involuntary.[172] The People again moved to compel Ms. Robles's testimony, employing the same theory as before.[173] This time, the trial judge reversed course, agreed with the People, and ordered her testimony.[174]

It was a puzzling decision. The legal test for the voluntariness of a confession is the same at trial as it is in a suppression hearing.[175] Ms. Robles was not required to testify.[176] Only one thing had changed in the intervening time: the appellate division had decided *Bonie*, and the court found that decision influential despite the fact that a subdivision (c) determination is highly fact-dependent and the key facts in *Bonie* were different.[177]

In October 2016, the appellate division in *Juarez* reversed the trial court and quashed the subpoena.[178] It found that the police videotape, when shown in court, was sufficient evidence for the jury to consider whether the confession was voluntary.[179] Little attention was paid in the decision to the three-prong analysis set out in the statute.[180] Instead, the court distinguished *Juarez* from *Bonie* by noting that the statements by Bonie to the reporter contradicted his earlier statement to investigators.[181] Why that fact would be dispositive is not explained.[182] Indeed, Juarez, in speaking

4, 2016).

[169] *See id.*

[170] *See id.* at 1.

[171] *See id.*

[172] People v. Huntley, 204 N.E.2d 179, 183 (N.Y. 1965).

[173] Petition and Affirmation Requesting Production of Material Witness, ¶¶ 12, 15, People v. Juarez (Dec. 10, 2015) (No. 4667/2013).

[174] Certificate Adjudging Frances Robles to be a Material Witness Pursuant to C.P.L. § 640.10, ¶ 6, People v. Juarez (Dec. 11, 2015) (No. 4667/2013).

[175] *See Huntley*, 204 N.E.2d at 183.

[176] *See Juarez*, 39 N.Y.S.3d at 156–57.

[177] *See id.* at 156 (citing People v. Bonie, 35 N.Y.S.3d 53, 55–56 (App. Div. 2016)).

[178] *See Juarez*, 39 N.Y.S.3d at 156.

[179] *See id.*

[180] *See id.* at 156–57.

[181] *See id.* at 156.

[182] *See id.* at 156–57.

to the *Times* reporter and denying guilt, contradicted what he said to the police.[183] And the *Juarez* court—which had four of the same judges from *Bonie*—took pains to proclaim the importance of press freedom, finding that quashing the subpoena was in keeping with "the consistent tradition in this state of providing the broadest possible protection to the sensitive role of gathering and disseminating news of public events."[184]

In the end, despite their different outcomes, the cases are not that dissimilar in their analytical approach: each largely eschews a step-by-step analysis of the statutory three prongs and instead does a free-form analysis of whether the evidence is necessary, albeit with a mosaic theory in *Bonie*.[185]

## IV. PRESERVING SUBDIVISION (C)

The Court of Appeals has acknowledged that the contours of the subdivision (c) privilege are unclear.[186] And Judge Smith's dissent in *Combest* highlights that the second prong of the subdivision (c) analysis—focusing on whether the evidence is "critical or necessary"—remains amorphous, permitting a court to rely on its own sense of the equities presented by the underlying case.[187] It is striking as well that the state appellate decisions have largely moved away from a formalistic, step-by-step application of the three-prong test—a marked contrast to the practices of the federal courts in the Second Circuit, where discussion of each prong is common.[188]

Reinvigorating the subdivision (c) privilege begins with acknowledging the importance of the privilege in the protection of the free press in New York—a point that was lost on the *Combest* court, which saw the privilege as a distant and diminished cousin of

[183] McKinley, *supra* note 163.

[184] *Juarez*, 39 N.Y.S.3d at 156 (quoting O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 281 (N.Y. 1988)).

[185] *See Juarez*, 39 N.Y.S.3d at 156–57; *Bonie*, 35 N.Y.S.3d at 55–56; People v. Combest, 828 N.E.2d 583, 588–89 (N.Y. 2005). They are similar, too, in their embrace of video evidence. The prosecutors in *Juarez* had the video—no need for anything further. *See Juarez*, 39 N.Y.S.3d at 156–57. The prosecutors in *Bonie* did not have the video—it must be produced. *See Bonie*, 35 N.Y.S.3d at 55–56. *Combest* fell into the same pattern: the defendant wanted the video evidence, the journalists had it, and the privilege was set aside. *Combest*, 828 N.E.2d at 584. It might be tempting to say that possession of the videotape is the dispositive fact in all three cases.

[186] *See, e.g.*, *In re* Holmes, 3 N.E.3d 694, 704 (N.Y. 2013).

[187] *See Combest*, 828 N.E.2d at 591 (Smith, J., dissenting).

[188] *See, e.g.*, *O'Neill*, 523 N.E.2d at 281 (N.Y. 1988); United States v. Marcos, No. SSSS 87 Cr. 598(JFK), 1990 U.S. Dist. LEXIS 6541, at *8–9, 11, 13 (S.D.N.Y. May 31, 1990).

the privilege applied to confidential information.[189] The sustaining rationale for the privilege for nonconfidential editorial materials was well framed by the Second Circuit in *Gonzales v. NBC*, which analyzed a similar privilege under federal law.[190] The reporter's privilege, both for confidential and nonconfidential material, grew out of the "paramount public interest in the maintenance of a vigorous, aggressive[,] and independent press capable of participating in robust, unfettered debate over controversial matters."[191] But special considerations played into the protection of nonconfidential information collected by journalists:

> These broader concerns, we believe, are relevant regardless whether the information sought from the press is confidential. If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties—particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas. And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.[192]

All of those policy concerns are pertinent, but one in particular deserves to be underscored. Journalists inevitably end up at events that will foster litigation and investigations: crime scenes, accidents, protests, and natural disasters.[193] They report on subjects that may not require confidential sources but nonetheless

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[189] *See Combest*, 828 N.E.2d at 586 (majority opinion).

[190] Gonzales v. NBC, 186 F.3d 102, 108–09 (2d Cir. 1998).

[191] *Id.* at 106 (quoting Baker v. F & F Inv., 470 F.2d 778, 782 (2d Cir. 1972)).

[192] *Gonzales*, 186 F.3d at 108.

[193] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 684–85 (1972); Faraone v. City of New York, No. 13cv9074(DLC), 2016 U.S. Dist. LEXIS 36316, at *1 (S.D.N.Y. Mar. 21, 2016); *O'Neill*, 523 N.E.2d at 278.

involve in-depth reporting about topics familiar to the litigious: abuses at nursing homes, corporate financial malfeasance, customer complaints about businesses, political favoritism, police misconduct, and products or services that underperform or cause harm.[194] From the public's viewpoint, journalists are right where they should be: on the scene or talking to the persons most directly affected.[195] From the litigator's viewpoint, too, they appear ideal: independent and credible witnesses with real knowledge about the subject of a lawsuit or investigation.[196] But, as Judge Bellacosa wrote in his *O'Neill* concurrence: "Journalists should be spending their time in newsrooms, not in courtrooms as participants in the litigation process."[197]

When journalists are called into a lawsuit to provide evidence about unpublished information, two negative consequences follow. First, the editorial autonomy of publishers and broadcasters is breached.[198] Journalism is, by its very nature, an exercise in deciding what to include, what to leave out, how to frame the facts, what sources have credibility, and what sources do not.[199] Courts have repeatedly observed that the independence of editors to make those editorial judgments free of judicial intrusion is a sustaining First Amendment value.[200] Many litigants will take exception with

[194] *See, e.g.*, Michael Corkery & Jessica Silver-Greenberg, *Pivotal Nursing Home Suit Raises a Simple Question: Who Signed the Contract?*, N.Y. TIMES (Feb. 21, 2016), https://www.nytimes.com/2016/02/22/business/dealbook/pivotal-nursing-home-suit-raises-a-simple-question-who-signed-the-contract.html; Peter Eavis, *Judge's Ruling Against 2 Banks Finds Misconduct in '08 Crash*, N.Y. TIMES (May 11, 2015), https://www.nytimes.com/2015/05/12/business/dealbook/nomura-found-liable-in-us-mortgage-suit-tied-to-financial-crisis.html; Constance Gustke, *A Bad Review is Forever: How to Counter Online Complaints*, N.Y. TIMES (Dec. 9, 2015), https://www.nytimes.com/2015/12/10/business/smallbusiness/small-business-counter-bad-reviews.html; Campbell Robertson, *New Orleans Settles Katrina-Era Police Brutality Cases for $13.3 Million*, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/2016/12/19/us/new-orleans-police-brutality-katrina.html?_r=0; Catherine Saint Louis, *Why a Chemical Banned from Soap is Still in Your Toothpaste*, N.Y. TIMES (Sept. 7, 2016), https://www.nytimes.com/2016/09/07/well/live/why-your-toothpaste-has-triclosan.html; Jacques Steinberg, *On the Press Bus, Some Questions Over Favoritism*, N.Y. TIMES (Mar. 1, 2008), http://www.nytimes.com/2008/03/01/us/politics/01press.html.

[195] *See, e.g.*, *Statement of Journalistic Ethics*, DAILY PRESS, http://www.dailypress.com/dp-contests-htmlstory.html (last visited Feb. 21, 2017).

[196] *See, e.g.*, Nina Bernstein, *Should War Reporters Testify, too? A Recent Court Decision Helps Clarify the Issue but Does Not End the Debate*, N.Y. TIMES (Dec. 14, 2002), http://www.nytimes.com/2002/12/14/arts/should-war-reporters-testify-too-recent-court-decision-helps-clarify-issue-but.html.

[197] *O'Neill*, 523 N.E.2d at 283 (Bellacosa, J., concurring).

[198] *See* United States v. Marcos, No. SSSS 87 Cr. 598(JFK), 1990 U.S. Dist. LEXIS 6541, at *7–8 (S.D.N.Y. May 31, 1990).

[199] *See* Miami Herald Publ'g Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 258 (1974).

[200] *Id.*; *see also* Huggins v. Moore, 726 N.E.2d 456, 460 (N.Y. 1999) (discussing the

how the press covers their actions.[201] The ability of litigants to use the state power of the courts to obtain unpublished information is easily transformed into an improper attempt to impeach editorial judgments and critique internal publishing deliberations.[202] Accountability is an important democratic value, but we also realize that certain processes—jury deliberations, consultations among appellate judges, and strategy sessions between clients and attorneys—are best walled off, save for some exceptional circumstances.[203] Editorial deliberations fall within that protected class.[204]

Second is the likely chilling effect that would result if journalists were routinely converted into legal witnesses. If litigants could freely obtain journalists' notes, recordings, and testimony, people would quickly come to know that every journalist who conducts an interview must be viewed with suspicion as a potential witness in the future.[205] Reporters are able to get access to those newsmakers and witnesses, in part, because they are perceived as independent actors whose role in our system is to deliver valuable information to the public.[206] When interviewees must worry that someday those same reporters will be testifying against them in court, candor is chilled, stories go unreported, and the public that depends on vigorous news coverage is the worse for it.[207]

Both the Court of Appeals in *O'Neill* and the legislature in amending the Shield Law in 1990 understood these concerns and attempted to put into place protections that while not absolute, would widely shield nonconfidential information from litigants' subpoena.[208] Subdivision (c) may be described as a balancing test, but it is in reality an "imbalancing" test.[209] The legislature put its thumb on the scale, favoring the press over litigants and investigators. The specific terms are important. The subpoenaing

discretion provided to editorial decisions in defamation cases).

[201] *See, e.g.*, *Huggins*, 726 N.E.2d at 458.

[202] Giuffre v. Maxwell, No. 15 Civ. 7433, 2016 U.S. Dist. LEXIS 161541, at *11–12 (S.D.N.Y. Sept. 1, 2016).

[203] *See* People v. Rivera, 933 N.E.2d 183, 185–86 (N.Y. 2010); Tribune Co. v. Purcigliotti, No. 93 Civ. 7222(LAP/THK), 1997 U.S. Dist. LEXIS 228, at *20–21 (S.D.N.Y. Jan. 10, 1997).

[204] *See Miami Herald Publ'g Co.*, 418 U.S. at 258.

[205] *See* O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 279 (N.Y. 1988).

[206] *See id.* at 283 (Bellacosa, J., concurring).

[207] *See* Gonzales v. NBC, 186 F.3d 102, 108 (2d Cir. 1998).

[208] *See O'Neill*, 523 N.E.2d at 283 (Bellacosa, J., concurring); *see also id.* at 279, 281 (majority opinion) (discussing the ability of the press to gather information under a Shield Law); *see generally* N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 2017) (protecting journalists and newscasters).

[209] *See, e.g.*, *O'Neill*, 523 N.E.2d at 279, 281.

party must show—clearly and convincingly—that the material: "(i) is *highly* material and relevant; (ii) is *critical or necessary* to the maintenance of a party's claim, defense or proof of an issue material thereto; *and* (iii) is not obtainable from *any* alternative source."[210] The legislature's express purpose in passing the Shield Law was "to avoid 'problematic incursions into the integrity of the editorial process.'"[211] The privilege is not merely a statutory evidence rule, but the embodiment of a constitutional right as recognized in *O'Neill*.[212]

The New York courts have tended to devalue that Constitution-based protection of the free press in two ways in recent decisions. First, the courts appear to be moving away from doing a meaningful formalistic analysis of each prong of the subdivision (c) test.[213] Indisputably, there is overlap between materiality and relevance in prong one and criticality and necessity in prong two, and both of the initial prongs are tied to prong three's "alternative source" requirement.[214] But the exercise of forcing a party to make a showing on each prong, by its very nature, adds a layer of protection for the press right. For instance, prong one's materiality and relevance requirement is often given scant attention by the courts, yet there is precedent for seeing it as requiring courts to consider the admissibility of the evidence sought—an inquiry not typically subsumed in a review of relevance.[215] Only if the court demands adherence to the formal three-step analysis can those types of arguments be explored and developed.

Second, the recent appellate decisions have diminished the "critical or necessary" analysis of prong two.[216] The meaning of the phrase is not self-obvious.[217] At one end of the spectrum, the term "necessity" can stand for nothing more than a lack of alternative means for getting relevant evidence into the record, or at the other end, it can mean that the evidence will be a "but for" cause of

[210] CIV. RIGHTS LAW § 79-h(c) (emphasis added).

[211] *See In re* Grand Jury Subpoenas Served on NBC, 683 N.Y.S.2d 708, 711 (Sup. Ct. 1998) (citation omitted); *see also* United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) ("The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes.").

[212] *See O'Neill*, 523 N.E.2d at 281.

[213] *See, e.g.*, Guice-Mills v. Forbes, 819 N.Y.S.2d 432, 435–36 (Sup. Ct. 2006).

[214] *See* CIV. RIGHTS LAW § 79-h(c).

[215] *See, e.g.,* Mandal v. City of New York, No. 02 Civ. 1234, 2004 U.S. Dist. LEXIS 21209, at *10–11 (S.D.N.Y. Oct. 20, 2004) (quoting Gonzalez v. NBC, 186 F.3d 102, 109 (2d Cir. 1998)) (interpreting the federal version of prong one and citing relevant cases).

[216] *See, e.g.,* People v. Juarez, 39 N.Y.S.3d 155, 156–57 (App. Div. 2016) (quoting CIV. RIGHTS LAW § 79-h(c)).

[217] *See In re Nat'l Broad. Co.*, 79 F.3d 346, 351 (2d Cir. 1996).

winning or losing.[218] The early decisions decided in the immediate aftermath of *O'Neill* and the 1990 Shield Law amendment understood that prong two was intended to set a high standard: specifically, that a claim, defense, or issue "virtually rises or falls with the admission or exclusion" of the material sought by subpoena.[219]

The standard originated in a 1990 opinion written by Judge Keenan of the Southern District of New York.[220] Given "the serious import of the phrase 'necessary or critical,'" he wrote, "the Court believes the appropriate inquiry to be whether the Government's claim virtually rises or falls with the admission or exclusion of the proffered evidence."[221] In the *Marcos* decision, Judge Keenan laid out the policy concerns animating the standard: "The underpinning of this concern lies in the recognition that effective gathering of newsworthy information in great measure relies upon the reporter's ability to secure the trust of news sources. Many doors will be closed to reporters who are viewed as investigative resources of litigants."[222] Further, the court understood that "the press' independence in its 'selection and choice of material for publication'" would be eroded without a vigorous privilege for nonconfidential material.[223]

The Second Circuit adopted Judge Keenan's standard in 1996.[224] The circuit relied on *Marcos* and a subsequent decision by Judge Keenan, as well as a case from state Supreme Court, St. Lawrence County, *Doe v. Cummings*.[225] The "virtually rises or falls" went on to be adopted by a variety of state courts.[226] It has also persisted

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[218] *Compare Juarez*, 39 N.Y.S.3d at 156 (quoting People v. Bonie, 35 N.Y.S.3d 53, 55–56 (App. Div. 2016)), *with Gonzalez*, 186 F.3d at 105.

[219] *See* Baker v. Goldman Sachs & Co., 669 F.3d 105, 108 (2d Cir. 2012) (quoting *In re Nat'l Broad. Co.*, 79 F.3d at 351); Baez v. JetBlue Airways, No. 09 CV 596(ENV/RML), 2012 U.S. Dist. LEXIS 161246, at *2 (E.D.N.Y. Nov. 9, 2012); *In re* Nat. Gas Commodities Litig., 235 F.R.D. 241, 244 (S.D.N.Y. 2006); Flynn v. NYP Holdings, 652 N.Y.S.2d 833, 835 (App. Div. 1997); *In re* Subpoena Duces Tecum to Evans, 950 N.Y.S.2d 608, 608 (Sup. Ct. 2012); *see also In re* Perito v. Finklestein, 856 N.Y.S.2d 677, 687 (App. Div. 2008) ("[A] petitioner cannot merely show that it would be useful, but rather[,] that the defense could not be presented without it.").

[220] United States v. Marcos, No. SSSS 87 Cr. 598(JFK), 1990 U.S. Dist. LEXIS 6541, at *11 (S.D.N.Y. May 31, 1990).

[221] *Id.*

[222] *Id.* at *7.

[223] *Id.* (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973)).

[224] *See In re Nat'l Broad. Co.*, 79 F.3d at 351.

[225] Doe v. Cummings, No. 91-346, 1994 WL 315640, at *1 (N.Y. Sup. Ct. Jan. 18, 1994).

[226] *See, e.g.*, Flynn v. NYP Holdings, 652 N.Y.S.2d 833, 835 (App. Div. 1997); *In re* Subpoena Duces Tecum to Evans, 950 N.Y.S.2d 608, 608 (Sup. Ct. 2012); Subpoena Duces

within the federal courts.[227]

Neither *Combest* nor the appellate division decisions decided after *Combest* either embraced or rejected the "rises or falls" conception.[228] It was raised in *Bonie* at the trial court, which questioned the formulation and pointed out that the Court of Appeals had never adopted it.[229] But the appellate division in *Bonie* said nothing about it.[230]

A free-form analysis focused on a court's general sense of "necessity" will inevitably under-protect the press interest that the state Constitution and the Shield Law are intended to safeguard. Too easily, in the absence of an articulated standard, the necessity analysis becomes little more than asking whether the evidence would have an appreciable effect on the decider of fact.[231] The outtakes at issue in *Bonie* were undoubtedly useful to the prosecution[232] but it is difficult to see how the privilege would have been set aside under the "virtually rises or falls" standard. The court instead latched on to the mosaic theory, suggesting that courts need only consider whether the journalist's evidence might combine with other evidence to become a necessary or critical piece of a litigant's case.[233] That is far removed from requiring parties to show that their case turns specifically on admission of the journalist's evidence. Similar concerns about the necessity of the evidence in *Combest* are laid out in Judge Smith's dissent.[234]

Taken to an extreme, the *Bonie* approach becomes indistinguishable from the normal threshold for production of evidence under CPLR 3101: "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action."[235] That standard was specifically rejected by *O'Neill* as

Tecum ABC v. Crea, 735 N.Y.S. 2d 919, 922 (Sup. Ct. 2001); *In re* Grand Jury Subpoenas Served on NBC, 683 N.Y.S.2d 708, 712 (Sup. Ct. 1998).

[227] *See, e.g.*, Baker v. Goldman Sachs & Co., 669 F.3d 105, 108 (2d Cir. 2012); Baez v. JetBlue Airways, No. 09 CV 596(ENV/RML), 2012 U.S. Dist. LEXIS 161246, at *4–5 (E.D.N.Y. Nov. 9, 2012); *In re* Nat. Gas Commodities Litig., 235 F.R.D. 241, 244 (S.D.N.Y. 2006).

[228] *See* People v. Combest, 828 N.E.2d 583, 588–89 (N.Y. 2005); People v. Juarez, 39 N.Y.S.3d 155, 156–57 (App. Div. 2016); *In re* Perito v. Finklestein, 856 N.Y.S.2d 677, 678 (App. Div. 2008).

[229] *See In re* Bonie, No. 1431/2014, 2015 N.Y. Misc. LEXIS 4741, at *15–16 (Sup. Ct. Dec. 7, 2015), *affirmed in part and modified in part by* 35 N.Y.S.3d 53.

[230] *See* People v. Bonie, 35 N.Y.S.3d 53, 56 (App. Div. 2016).

[231] *See In re Bonie*, 2015 N.Y. Misc. LEXIS 4741, at *15–16.

[232] *See, e.g.*, *id.* at *10–11.

[233] *See id.* at *15–16.

[234] *See* People v. Combest, 828 N.E.2d 583, 590–91 (N.Y. 2005) (Smith, J., dissenting).

[235] N.Y. C.P.L.R. 3101(a) (McKinney 2017).

failing to adequately protect the press.[236] Only with a higher articulated threshold for criticality and necessity can the protection intended by the Shield Law and *O'Neill* be consistently realized.

## CONCLUSION

Many elements of the subdivision (c) privilege deserve the attention of New York's appellate courts. There has been too little consideration of the "alternate source" requirement of prong three. Can the court take into account the relative credibility of the alternate source? Why is live testimony by non-journalists who were present at the time of the filming not an alternate source to video outtakes, as was the case in *Combest* and *Bonie*?[237] Similarly, *Combest*'s easy embrace of *in camera* review seems at odds with the procedures employed when other privileges are addressed in the New York courts.[238] And much remains to be explored by the proper meaning of "materiality" in prong one. But nothing is more central to revitalizing subdivision (c) than setting an appropriately high standard for the "critical or necessary" prong and having courts recommit themselves to the formal three-prong analysis set out in the Shield Law.

[236] *See* O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 279 (N.Y. 1988).
[237] *Combest*, 828 N.E.2d at 585; *In re Bonie*, 2015 N.Y. Misc. LEXIS 4741, at *6.
[238] *See In re Bonie*, 2015 N.Y. Misc. LEXIS 4741, at *1.