
COMMENT

CHEVRON CORP. V. BERLINGER AND THE FUTURE OF THE JOURNALISTS' PRIVILEGE FOR DOCUMENTARY FILMMAKERS

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INTRODUCTION

The documentary film *Crude*, directed by award-winning filmmaker Joseph Berlinger,¹ tells the story of a class action lawsuit brought by thousands of Ecuadorians against the oil company Chevron, alleging that the company's systematic contamination of a portion of the Amazon jungle increased the rates of cancer, leukemia, birth defects, and other health problems for the indigenous people of the region.² Berlinger and his crew spent three years filming but captured only a small portion of the ongoing fight between the Ecuadorians and Chevron.³ By the time Berlinger's cameras arrived, the legal battle was already a dozen years old, and a title screen at the end of *Crude* predicts that the litigation could last another decade.⁴ The film premiered at the 2009 Sundance Film Festival⁵ and went on to earn dozens of nominations and awards from film festival juries and critics' organizations around the world.⁶

In 2010, Chevron and, separately, two of Chevron's lawyers who were facing criminal charges in Ecuador for falsifying documents,⁷

¹ Berlinger is best known for two other legal documentaries, *BROTHER'S KEEPER* (American Playhouse Theatrical Films 1992) and his trilogy of films about the "West Memphis Three," beginning with *PARADISE LOST: THE CHILD MURDERS AT ROBIN HOOD HILLS* (HBO 1996), which brought national attention to, and contributed to the release of, three men who had been imprisoned for eighteen years. Campbell Robertson, *Rare Deal Frees 3 in '93 Arkansas Child Killings*, N.Y. TIMES, Aug. 20, 2011, at A1. Berlinger has won, among other prizes, two Emmys, a Peabody, and the Audience Award at the Sundance Film Festival, as well as awards from the Directors Guild of America, the New York Film Critics Circle, the National Board of Review, and the Independent Spirit Awards. About Joe Berlinger, BERLINGER + SINOFSKY, <http://www.berlinger-sinofsky.com/#/berlinger/about> (last visited Dec. 15, 2011).

² See *CRUDE: THE REAL PRICE OF OIL* (Third Eye Motion Picture Co. 2009); *Synopsis*, *CRUDE: PRODUCTION NOTES* (2009), available at <http://crudethemovie.com/blog/wp-content/uploads/2009/08/CRUDE-Press-Kit-081909.pdf> (providing a brief overview of the case against Chevron and the making of the film that documents it). Other groups of Ecuadorians have brought different lawsuits alleging similar charges, including suits against the claimed polluter Texaco prior to its acquisition by its successor in interest Chevron. See *infra* Part II.

³ *Synopsis*, *CRUDE: PRODUCTION NOTES*, *supra* note 2.

⁴ *CRUDE*, *supra* note 2; see also *Historical Timeline of Events*, *CRUDE: PRODUCTION NOTES*, *supra* note 2 (noting that the first class action suit was filed in 1993 and that principal photography for the film began in 2005).

⁵ *About the Production*, *CRUDE: PRODUCTION NOTES*, *supra* note 2.

⁶ For a list of *Crude's* awards, nominations, and festival screenings, see *Awards & Festivals*, *CRUDE: A JOE BERLINGER FILM*, <http://www.crudethemovie.com/awards-and-festivals> (last visited Dec. 15, 2011).

⁷ Hereinafter I will refer to Chevron and the lawyers facing criminal charges collectively as "Chevron."

moved to subpoena nearly six-hundred hours of raw footage, or “outtakes,” that Berlinger did not include in the completed film.⁸ Chevron sought to prove that the plaintiffs’ lawyers exerted improper influence over judges and experts involved in the proceedings in Ecuador through ex parte communications, and it argued that Berlinger’s footage contained evidence of this misconduct.⁹ Berlinger attempted to quash the subpoenas on the ground that he was protected by the journalists’ privilege.¹⁰

The district court ordered Berlinger to turn over all of his outtakes¹¹—the largest mandate to turn over outtakes ever ordered by a U.S. court.¹² In doing so, the court revealed its misunderstanding of outtakes and how they should be treated under the existing journalists’ privilege doctrine. The Second Circuit’s standard for obtaining nonconfidential material from journalists, set forth in *Gonzales v. NBC*, requires petitioners to prove that the material sought is “of likely relevance to a significant issue in the case” and “not reasonably obtainable from other available sources.”¹³ The district court in the *Berlinger* litigation, after assuming that this qualified privilege applies to independent documentary filmmakers, narrowed the protection of journalistic work product by collapsing the two-pronged *Gonzales* test into

⁸ *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 285, 287 (S.D.N.Y. 2010). The motion was filed pursuant to 28 U.S.C. § 1782, seeking discovery for use in a proceeding in a foreign tribunal. 709 F. Supp. 2d at 289-90.

⁹ *Id.* at 295-96.

¹⁰ *Id.* at 285, 293. While the Second Circuit does recognize a qualified privilege for journalists, it has repeatedly declined to explain whether this privilege is derived from the First Amendment or from federal common law. *See* *United States v. Treacy*, 639 F.3d 32, 43 (2d Cir. 2011) (noting that the court had “previously declined to resolve [the issue] absent any Congressional retrenchment of the privilege” and again “declin[ing] to wade into these constitutional waters”).

¹¹ *In re* *Chevron*, 709 F. Supp. 2d at 299.

¹² *See* Brief for ABC, Inc. et al. as Amici Curiae Supporting Respondents-Appellants at 1-2, *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011) (Nos. 10-1918, 10-1966), 2010 WL 2648173, at *1-2 (“The District Court’s order granted an application by . . . Chevron . . . to subpoena what appears to be the largest amount of film outtakes in American history”); Norman Lear, *Was Oil Named ‘Crude’ Because of the Way Oil Companies Do Business?*, HUFFINGTON POST (June 8, 2010, 2:44 PM), http://www.huffingtonpost.com/norman-lear/was-oil-named-crude-becau_b_604741.html (describing the district court’s order as “the largest turnover of a reporter’s work product in American history”). Compare the six-hundred hours of Berlinger’s footage with the few hours, at most, of interview footage ordered discoverable in *United States v. LaRouche Campaign*, 841 F.2d 1176, 1177 (1st Cir. 1988), and *United States v. Smith*, 135 F.3d 963, 966 (5th Cir. 1998), as well as the footage of the short traffic stop ordered discoverable in *Gonzales v. NBC*, 194 F.3d 29, 31 (2d Cir. 1999).

¹³ 194 F.3d at 36.

a general standard of “likely relevance” for outtakes, and lowered the bar for what constitutes relevance.¹⁴ The Second Circuit narrowed¹⁵ but nonetheless affirmed the order.¹⁶ The Second Circuit further ruled that because Berlinger appeared to be subject to the influence of his filmmaking subjects, he lacked the editorial independence necessary to qualify for the journalists’ privilege.¹⁷

This Comment argues that the courts’ improper assumptions about outtakes and documentary filmmaking led to an inappropriate weakening of the journalists’ privilege as applied to nonfiction filmmakers and other noninstitutional media entities. While journalistic work product should not be protected in all cases, the courts’ imprecise application of the relevant standard treats documentarians like second-class journalists. This imprecision also endangers the future production of independent, investigative documentaries, which warrant protection for the same reasons that courts embrace a qualified privilege for other kinds of journalism.

Part I traces the evolution of the journalists’ privilege in the Second Circuit. Part II discusses the opinions in the *Berlinger* litigation. Part III argues that the Second Circuit’s new “independence” test will result in courts discriminating against journalists not on account of their output but because of their motivations and associations. Part IV then considers several ways in which filmmakers might approach projects in this new legal landscape to better protect their footage and their subjects. Such approaches include signing agreements with subjects, offering subjects final cut approval, destroying unreleased footage after the film has been released, and altering filming techniques.

Under the Second Circuit’s weakened protections, filmmakers will not find any effective legal means of preventing discovery of their footage, short of altering their filmmaking practices or destroying unused footage—methods that impose their own costs and may affect the quantity and quality of documentaries that explore the justice system in action. The best way to meet the needs of the justice system while minimizing the impact on the production of documentaries is to apply the existing journalists’ privilege doctrine properly. Once courts recognize and correct common misunderstandings about outtakes and video evidence, documentary filmmakers can be treated the

¹⁴ See *In re Chevron*, 709 F. Supp. 2d at 295-98; see also *infra* Section II.A.

¹⁵ See *infra* notes 133-34 and accompanying text.

¹⁶ *Chevron Corp. v. Berlinger*, 629 F.3d 297, 311 (2d Cir. 2011).

¹⁷ *Id.* at 308.

same as other newsgatherers who serve the vital role of investigating and disseminating valuable information to the public.

I. FROM *BRANZBURG* TO *BERLINGER*

Today, thirty-seven states and the District of Columbia have shield laws that grant journalists either an absolute or qualified privilege concerning confidential sources; roughly two-thirds of these laws also protect journalists' work product, such as outtakes.¹⁸ Twelve other states recognize either a constitutional or a common law privilege for reporters, at least in civil cases.¹⁹ Most federal courts recognize that under a federal common law privilege, journalists need not disclose confidential sources.²⁰ But the Fifth and Seventh Circuits have rejected extending the privilege to nonconfidential journalistic work product,²¹ and the Sixth Circuit rejects any type of federal journalists' privi-

¹⁸ See *Shield Laws and Protection of Sources by State*, REPORTERS COMMITTEE FOR FREEDOM PRESS, <http://www.rcfp.org/privilege/shieldmap.html> (last visited Dec. 15, 2011); see also Anthony L. Fargo & Paul McAdoo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist's Privilege Problem*, 33 WM. MITCHELL L. REV. 1347, 1355-57 (2007) (surveying state privilege statutes and noting that about two-thirds of the laws protect journalists' work product); RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317, 384-85 & n.263 (2009) (listing state shield statutes). New York's shield law, typical of other states, provides for "[a]bsolute protection for confidential news" and "qualified protection" for nonconfidential news. N.Y. CIV. RIGHTS LAW § 79-h(b)-(c) (McKinney 2010). Those seeking nonconfidential information from journalists must show that the news is (1) "highly material and relevant," (2) "critical or necessary to the maintenance of a party's claim, defense or proof of an issue thereto material," and (3) "not obtainable from any alternative source." *Id.* § 79-h(c). The act defines a professional journalist as "one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, *filming*, taping or photographing of news intended for . . . dissemination to the public" via a professional medium or agency. *Id.* § 79-h(a)(6) (emphasis added).

¹⁹ See *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1164 (D.C. Cir. 2006) (Tatel, J., concurring) (stating that forty-nine states and the District of Columbia recognize some form of the journalists' privilege).

²⁰ See Fargo & McAdoo, *supra* note 18, at 1359-62 (summarizing federal privilege law); Michael Fitzsimmons, Casenote, *Defending the Informers: The Media's Right to Protect Non-Confidential Source Information Following United States v. Smith*, 6 VILL. SPORTS & ENT. L.J. 295, 305 n.55 (1999) (listing and categorizing circuit court decisions on the journalists' privilege).

²¹ See *United States v. Smith*, 135 F.3d 963, 969-71 (5th Cir. 1998) (finding "little support in either the plurality or the concurring opinions of *Branzburg*" for a reporter's privilege to nonconfidential journalistic work product); *McKevitt v. Pallasch*, 339 F.3d 530, 532-34 (7th Cir. 2003) (explaining that when a journalist tries to protect nonconfidential information, the court should not focus on privilege and instead "should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances").

lege.²² In addition, the Department of Justice has adopted its own guidelines limiting the circumstances in which prosecutors should subpoena journalists, regardless of the jurisdiction or controlling law.²³ Any proper discussion of the journalists' privilege, however, must begin with the Supreme Court's decision in *Branzburg*.

A. *Branzburg v. Hayes*

In the landmark 1972 Supreme Court case *Branzburg v. Hayes*, the Court declined to hold that reporters could avoid testifying before state or federal grand juries by invoking the First Amendment.²⁴ However, Justice White, writing for four other Justices,²⁵ noted that the First Amendment might protect journalists who were the subject of bad-faith investigations or harassment by government officials for reasons unrelated to law enforcement.²⁶

Justice Powell, who joined Justice White's opinion, wrote separately to "emphasize . . . the limited nature of the Court's holding."²⁷ He also noted that a reporter is entitled to a First Amendment remedy if

²² *Storer Commc'ns, Inc. v. Giovan (In re Grand Jury Proceedings)*, 810 F.2d 580, 583-86 (6th Cir. 1987) (holding that the "balancing of interests" that occurs in journalists' privilege cases "should not then be elevated . . . to the status of a first amendment constitutional privilege").

²³ The guidelines direct prosecutors, prior to seeking a subpoena in a criminal case or a civil case of substantial importance, to take steps such as making reasonable attempts to obtain the information from other sources, entering into negotiations with the media, and establishing through use of nonmedia sources reasonable grounds for the belief that the information sought is essential. 28 C.F.R. § 50.10 (2011).

²⁴ 408 U.S. 665, 691-92 (1972). The Court considered the consolidated appeals of three journalists who witnessed criminal or potentially criminal activity and who were asked by prosecutors to reveal sources or information that the reporters had agreed to keep confidential. *Id.* at 667-79; see also David A. Anderson, *Confidential Sources Reconsidered*, 61 FLA. L. REV. 883, 891-99 (2009) (arguing that the facts of *Branzburg* did not present the case for constitutional protection in the best light and detailing the "meliorations" and "unraveling" of the decision over the years); Fitzsimmons, *supra* note 20, at 300-05 (describing the *Branzburg* opinions in detail).

²⁵ *Branzburg*, 408 U.S. at 665. Even though the Court's opinion represented the views of five Justices, some commentators refer to *Branzburg* as a "plurality" decision or its equivalent due to Justice Powell's enigmatic concurrence, which purported to endorse the majority but also espoused a case-by-case analysis. See, e.g., Rodney A. Smolla, *The First Amendment, Journalists, and Sources: A Curious Study in "Reverse Federalism,"* 29 CARDOZO L. REV. 1423, 1424-28 (2008) (highlighting the ambiguities of the Powell concurrence and how media advocates "exploited" them until courts began to "second guess" the plurality reading of the case in the 1990s); Fitzsimmons, *supra* note 20, at 301 (stating outright that the opinion is a "plurality").

²⁶ *Branzburg*, 408 U.S. at 707-08.

²⁷ *Id.* at 709 (Powell, J., concurring).

he is subject to the harassment of bad-faith investigations, or if the information he is asked to reveal bears “only a remote and tenuous relationship to the subject of the investigation, or if . . . his testimony implicates confidential source relationships without a legitimate need of law enforcement.”²⁸ Powell insisted that courts should balance the need for a free press against the general obligation to provide testimony in criminal cases on a case-by-case basis.²⁹

Following *Branzburg*, many commentators and courts accepted the argument that, by grouping Justice Powell with the four dissenting Justices who endorsed constitutional protections for journalists, a majority of the Justices had endorsed a limited journalists’ privilege grounded in the First Amendment.³⁰ As a result, in general, the scope of the journalists’ privilege expanded after *Branzburg*.³¹ In *McKevitt v. Pallasch*, Judge Posner criticized this reading and the court decisions that embraced it.³² He noted that Justice Powell concurred not only in the judgment but also in Justice White’s opinion, which rendered it a legitimate majority opinion.³³ But as states adopted their own shield laws for journalists and the Department of Justice issued its own subpoena guidelines, *Branzburg* gradually became less of an interpretive problem for the courts.³⁴

B. *Second Circuit Jurisprudence Following Branzburg*

Following *Branzburg*, the Second Circuit expanded protection for journalists, primarily to avoid the chilling effect that would follow if prosecutors were able to use journalists as “an investigative arm of the

²⁸ *Id.* at 710.

²⁹ *Id.*

³⁰ See Anderson, *supra* note 24, at 894 (discussing this grouping of opinions and Judge Posner’s criticism of it in *McKevitt v. Pallasch*); Recent Case, *Lee v. Department of Justice*, 119 HARV. L. REV. 1923, 1924 & n.6 (2006) (noting the grouping and listing cases advancing this argument).

³¹ See Recent Case, *Lee v. Department of Justice*, *supra* note 30, at 1923-24 (“In the years following [*Branzburg*] most circuits . . . creat[ed] heightened newsgathering protections for the press by construing Justice Powell’s concurrence in *Branzburg* as allowing qualified journalist privileges.”).

³² 339 F.3d 530, 532 (7th Cir. 2003) (criticizing other cases that either “essentially ignore *Branzburg*” or “audaciously declare that *Branzburg* actually created a reporter’s privilege”).

³³ See *id.* at 531-32.

³⁴ See Anderson, *supra* note 24, at 892-93 (noting that a “major showdown over confidential sources” was averted due to, among other things, the Department of Justice’s adoption of subpoena guidelines and the increasing number of states adopting shield laws).

government.”³⁵ The Second Circuit’s first major post-*Branzburg* case concerned Alfred Balk, a journalist and journalism professor who refused to identify a source for a *Saturday Evening Post* article he wrote about racially discriminatory real estate practices in Chicago.³⁶ The civil rights class action plaintiffs sought the identity of Balk’s source as evidence of discriminatory practices known as “blockbusting.”³⁷ Balk, who had promised his source anonymity, argued that the First Amendment granted him a privilege against testifying, and the district court, deciding the case prior to *Branzburg*, ruled that Balk could not be compelled to reveal the identity of his source.³⁸ Judge Bonsal of the Southern District of New York concluded that the plaintiffs had shown neither “that all other available sources [had] been exhausted” nor that disclosure was “essential to the protection of the public interest.”³⁹

The Second Circuit, ruling after *Branzburg*, affirmed the district court’s decision in holding that the First Amendment protects journalists from revealing confidential sources if “the public interest in non-disclosure of a journalist’s confidential sources outweighs the public and private interest in compelled testimony.”⁴⁰ The court concluded that no “compelling concern” here outweighed the First Amendment interest in maintaining confidentiality.⁴¹ In its discussion of this interest, the court stated that “[c]ompelled disclosure of confidential sources unquestionably threatens a journalist’s ability to secure information that is made available to him only on a confidential basis” and that the deterrent effect of a contrary ruling would “threaten[] freedom of the press and the public’s need to be informed,” particularly in the context of investigative reporting.⁴² The Second Circuit easily distinguished *Branzburg* as being limited to the disclosure of

³⁵ *Branzburg*, 408 U.S. at 709 (Powell, J., concurring) (internal quotation marks omitted).

³⁶ *Baker v. F & F Inv.*, 470 F.2d 778, 780-81 (2d Cir. 1972).

³⁷ *Id.* Blockbusting is an umbrella term for a number of practices designed to manipulate real estate prices in order to affect the racial, ethnic, or religious composition of a neighborhood. See *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 214 (N.D. Ill. 1969) (defining “blockbusting” as “stimulat[ing] and prey[ing] on racial bigotry and fear by initiating and encouraging rumors that negroes were about to move into a given area, that all non-negroes would leave, and that the market values of properties would descend to ‘panic prices’”).

³⁸ *Baker v. F & F Inv.*, 339 F. Supp. 942, 945 (S.D.N.Y. 1972).

³⁹ *Id.*

⁴⁰ *Baker*, 470 F.2d at 783.

⁴¹ *Id.* at 785.

⁴² *Id.* at 782.

confidential sources before grand juries investigating criminal activity, and declined to apply it in a civil case.⁴³

In *von Bulow v. von Bulow*, the Second Circuit continued to expand the privilege by broadening the class of individuals who could invoke its protection and stating explicitly that the privilege extended to nonconfidential information.⁴⁴ In *von Bulow*, Andrea Reynolds, a friend of Martha von Bulow, attempted to invoke the journalists' privilege to prevent disclosure of an unpublished manuscript of a book she was writing about the civil litigation between Martha and Claus von Bulow.⁴⁵ The Second Circuit concluded that anyone, regardless of whether she was a member of the "institutionalized press," could invoke the journalists' privilege as long as she, "at the inception of the newsgathering process," intended to disseminate to the public the information obtained from her sources.⁴⁶ The court stated that prior experience as a journalist was not required; rather, the inquiry should focus on whether Reynolds was "involved in activities traditionally associated with the gathering and dissemination of news."⁴⁷ Nor did the court limit the privilege to those working in a particular medium, such as newspapers or magazines, because "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."⁴⁸ By focusing exclusively on whether the information gatherer's intent was to disseminate her work to the public, the Second Circuit expressly stated for the first time that the privilege protected both confidential and nonconfidential information.⁴⁹

⁴³ See *id.* at 784 ("Branzburg . . . is only of tangential relevance to this case.").

⁴⁴ See 811 F.2d 136, 142 (2d Cir. 1987) ("[T]he relationship between the journalist and his source may be confidential or nonconfidential for the purposes of the privilege.").

⁴⁵ *Id.* at 138. The civil dispute between the von Bulows alleged that Claus put Martha into a permanent comatose state "by injecting her surreptitiously with insulin and other drugs." *Id.* at 139.

⁴⁶ *Id.* at 142, 144.

⁴⁷ *Id.* at 142.

⁴⁸ *Id.* at 144 (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)). The federal privacy law, designed to protect First Amendment activities, forbids government actors from searching or seizing journalistic work product and, like *von Bulow*, defines the privilege broadly. See 42 U.S.C. § 2000aa(a) (2006). The statute covers "any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." *Id.*

⁴⁹ 811 F.2d at 142. The court noted that other federal courts had reached the same conclusion and quoted the Middle District of Florida for the proposition that with regard to materials developed by a reporter in preparation for an article, the "nonconfidentiality of [a] source was utterly irrelevant to [the] chilling effect on [the] flow of

The court nonetheless declined to extend the privilege to Reynolds on the ground that she did not have the requisite intent to disseminate the information to the public when she undertook her book project.⁵⁰ The court found that other impulses had motivated Reynolds to gather information about the von Bulows, including her desire to bolster the credibility of the von Bulow children in support of the underlying litigation as well as her desire to secure her own peace of mind.⁵¹ The court noted that only on “rare occasions” had “persons who are not journalists in the traditional sense of that term” successfully invoked the journalists’ privilege.⁵² But the court’s permissive test was a signal that “lecturers, political pollsters, novelists, academic researchers, and dramatists,” among others, deserved the same protection as a veteran reporter for the *New York Times*.⁵³ The ruling affirmed the importance of nontraditional journalists gathering information for the public’s benefit.

In *United States v. Cutler*, the Second Circuit, confronting a criminal defendant seeking outtakes from a television interview, set a high standard for compelling disclosure.⁵⁴ The case involved a subpoena for outtakes of a television interview with an attorney facing criminal contempt charges, which the reporters and television station sought to quash.⁵⁵ The court recited the “well settled” proposition that in order “to protect the important interests of reporters and the public in preserving the confidentiality of journalists’ sources,” disclosure of journalistic work product may be compelled in civil cases “only upon a

information to press and public.” *Id.* at 143 (quoting *Loadholtz v. Fields*, 389 F. Supp. 1299, 1300, 1303 (M.D. Fla. 1975)) (internal quotation marks omitted).

⁵⁰ *See id.* at 145-46 (“[O]ur central inquiry as to whether Reynolds is entitled to claim a journalist’s privilege must be answered in the negative.”).

⁵¹ *Id.* at 139.

⁵² *Id.* at 143. For example, in 1977, the Tenth Circuit confronted the case of Arthur Hirsch, a freelance reporter and film student who, as a nonparty witness, tried to invoke the journalists’ privilege to avoid revealing confidential sources. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 434 (10th Cir. 1977). The court held that Hirsch—who had formed a production company with a UCLA professor and a fellow film student in order to make a documentary film about the death of Karen Silkwood—could invoke the privilege to protect research he had done in anticipation of making the film. *Id.* at 435-37. The court reasoned that Hirsch spent “considerable time and effort in obtaining facts . . . in preparation of [making] the film. It strikes us as somewhat anomalous that the appellee would argue that he is not a genuine reporter entitled to the privilege.” *Id.* at 436-37.

⁵³ *Von Bulow*, 811 F.2d at 144-45 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972)).

⁵⁴ 6 F.3d 67, 68, 71, 75 (2d Cir. 1993).

⁵⁵ *Id.* at 69-70.

clear and specific showing that the information is: *highly material* and relevant, *necessary or critical* to the maintenance of the claim, and *not obtainable* from other available sources.⁵⁶ The court ordered the television station to turn over the outtakes on the ground that the footage was “clearly relevant,” necessary to defend against a criminal charge and, other than the attorney’s own testimony, “probably the *only* significant proof regarding his assertedly criminal behavior.”⁵⁷

The years following *Cutler* represented the high-water mark of the journalists’ privilege in civil cases in the Second Circuit.⁵⁸ Although the Second Circuit had not expressly ruled that journalists—as defined under the expansive *von Bulow* formulation—were entitled to a strong privilege for confidential information and a qualified privilege for nonconfidential information, district courts in the Second Circuit assumed as much throughout the 1980s and 1990s.⁵⁹ However, beginning in 1999 with *Gonzales v. NBC*, the Second Circuit started to contract the privilege in civil cases.⁶⁰

The *Gonzales* case centered on hidden camera footage recorded by *Dateline NBC*, a news magazine show, for a program about law enforcement abuses, namely unwarranted traffic stops of out-of-state or minority drivers in Louisiana.⁶¹ An undercover NBC reporter rigged a car with hidden cameras, set his car on cruise control below the speed limit, and obeyed all traffic laws.⁶² The reporter was stopped by Louisiana Deputy Sheriff Darrell Pierce, and some footage of the stop was aired on NBC.⁶³ In a separate incident, Plaintiffs Albert and Mary Gonzales were stopped by Deputy Pierce and, after filing a civil rights action against Deputy Pierce for stopping them on the basis of their

⁵⁶ *Id.* at 71 (emphasis added) (quoting *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983)).

⁵⁷ *Id.* at 73.

⁵⁸ The Second Circuit later observed that *Cutler* itself was a retreat from the high-water mark of *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983), which had “set too *high* a bar for overcoming the privilege in criminal cases.” *United States v. Treacy*, 639 F.3d 32, 43 (2d Cir. 2011). In *Treacy*, the Second Circuit held that “the showing required to overcome the journalist’s privilege [for nonconfidential information] is the same in a criminal case as it is in a civil case—namely, the showing required by *Gonzales*.” *Id.*

⁵⁹ See *Gonzales v. NBC*, 194 F.3d 29, 34 & n.4 (2d Cir. 1999) (citing fourteen district court opinions that assumed and enforced the privilege for nonconfidential material).

⁶⁰ 194 F.3d 29.

⁶¹ *Id.* at 31.

⁶² *Id.*

⁶³ *Id.*

Hispanic origin, sought access to NBC's outtakes of the Deputy Pierce traffic stop filmed for *Dateline*.⁶⁴

Reviewing the district court's motion to compel disclosure, the Second Circuit explicitly held that in a civil case nonconfidential information is protected by a qualified privilege.⁶⁵ In isolation, such a holding would have strengthened the journalists' privilege in the Second Circuit. But the court further ruled that the privilege could be overcome upon a lesser showing than would be necessary to obtain confidential information.⁶⁶ This holding was curious. The court described at length the "broader concerns" implicated by the journalists' privilege, including the "pivotal function of reporters to collect information for public dissemination"⁶⁷ and the "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters."⁶⁸

The court concluded that these concerns "are relevant regardless whether the information sought from the press is confidential."⁶⁹ It posited that widespread exposure of press files would burden the press, increase costs for the media, deter sources from speaking to the press or increase their insistence on confidentiality, encourage journalists to dispose of files containing potentially valuable information, and lend to the press the appearance of being an investigative arm of the judicial system.⁷⁰ Yet the court then proceeded to require a lesser showing in order to gain access to nonconfidential information.⁷¹ The

⁶⁴ *Id.* at 30-31.

⁶⁵ *See id.* at 30 (reaffirming the existence of a "qualified privilege for nonconfidential press information").

⁶⁶ *Id.* The case came to the Second Circuit on an unusual posture. Originally, the district court held that a qualified privilege existed for nonconfidential information, but the requirements for overcoming the privilege had not been met. *Id.* The Second Circuit affirmed on the ground that no qualified privilege existed for nonconfidential information. *Id.* But after a motion for a rehearing by NBC, the Second Circuit "reconsidered [its] opinion" and explicitly reaffirmed the existence of a qualified privilege for nonconfidential information. *Id.*

⁶⁷ *Id.* at 35 (quoting *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8 (2d Cir. 1982)).

⁶⁸ *Id.* at 35 (quoting *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 35-36. For an in-depth discussion of *Gonzales* and, in particular, the curiosity of requiring a lesser showing for nonconfidential information, see generally Anthony L. Fargo, *Reconsidering the Federal Journalist's Privilege for Non-Confidential Information: Gonzales v. NBC*, 19 CARDOZO ARTS & ENT. L.J. 355 (2001). Fargo points out that the Third and Ninth Circuits also agree "in principle" with the Second Circuit that the

court merely stated that “where the protection of confidential sources is not involved, the nature of the press interest protected by the privilege is narrower.”⁷² For nonconfidential information, a civil litigant is entitled to discovery upon a showing that the materials are “of likely relevance to a significant issue in the case” and “not reasonably obtainable from other available sources.”⁷³ The court focused on the circumstances surrounding the conveyance of information, rather than the effect disclosure would have on the press, and concluded that if information was not communicated in confidence, journalists should not be able to shield it from court proceedings so easily.⁷⁴

Applying its newly minted test to the facts, the court held that the Gonzaleses were entitled to the outtakes.⁷⁵ The footage was “clearly relevant to a significant issue in the case”: whether Deputy Pierce engaged in a pattern of stopping vehicles without probable cause.⁷⁶ The court also found that the information contained in the outtakes was not available from other sources “because they can provide unimpeachably objective evidence of Deputy Pierce’s conduct.”⁷⁷ A deposition, the court noted, would not be an adequate substitute for the information that could be obtained from the videotapes.⁷⁸

The *Gonzales* court got a couple of things right and one thing wrong about outtakes. First, it recognized that the information contained within the outtakes was conceptually separate from the physical videotapes possessed by NBC. The court spoke of “the evidence *in* the tapes” and the fact that “the outtakes *contain* information that is not reasonably obtainable from other available sources.”⁷⁹ Second, in deciding whether the information contained within the outtakes was available from other sources, the court considered at least one other source that might be available.⁸⁰ It did not, however, discuss what other efforts the Gonzaleses made, or could have made, to find evidence of

privilege for nonconfidential information is weaker than that for confidential material. *Id.* at 387.

⁷² *Gonzales*, 194 F.3d at 36.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 32, 36 (emphasis added). For a discussion of how this distinction was blurred in the district court’s opinion in the *Berlinger* case, see *infra* Section III.D.

⁸⁰ See *Gonzales*, 194 F.3d at 36 (considering the adequacy of a deposition as another available source for the information).

Deputy Pierce's conduct. The court ultimately rejected the adequacy of a deposition as a substitute for the outtakes.⁸¹

But the court revealed its misunderstanding of video and other photographic evidence by describing outtakes as providing "unimpeachably objective evidence."⁸² Section III.D of this Comment discusses in detail the fallacy of treating video footage as unquestionably objective evidence, but it is sufficient to note at this juncture that a wealth of film scholars, legal commentators, and documentary filmmakers reject the notion that video and photographs have objective meaning independent of context.⁸³ This suggests that visual evidence should be treated as substantive evidence, rather than as a special class of demonstrative proof. This seemingly small misstep laid the groundwork for further mistakes by the *Berlinger* court.

II. *CHEVRON CORP. V. BERLINGER*

In 1964, Texaco began drilling for oil in the Amazon rainforest of eastern Ecuador.⁸⁴ There, the company built and operated oil fields and a trans-Ecuadorian pipeline for more than a quarter century.⁸⁵ In 1976, the government of Ecuador, through its state-owned oil company, Petroecuador, became the majority stakeholder in the oil consortium that had been formed to conduct the oil operations in the country and that was owned in part and operated by Texaco.⁸⁶ Petroecuador

⁸¹ *Id.*

⁸² *Id.*

⁸³ See Jessica Silbey, *Evidence Verité and the Law of Film*, 31 *CARDOZO L. REV.* 1257, 1297 (2010) [hereinafter Silbey, *Evidence Verité*] ("Photographs . . . should be admitted as substantive evidence . . . and analyzed for their assertive message, rather than considered demonstrative aids or real evidence."); Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 *U. MICH. J.L. REFORM* 493, 496-99, 519-20 (2004) [hereinafter Silbey, *Judges as Film Critics*] (criticizing the judicial approach to filmic evidence that treats film as if it were an "unimpeachable eyewitness," and arguing that judges miscategorize film as demonstrative evidence, rather than substantive and assertive in nature); Alison Lynn Tuley, Note, *Outtakes, Hidden Cameras, and the First Amendment: A Reporter's Privilege*, 38 *WM & MARY L. REV.* 1817, 1832 (1997) (arguing that judges view video evidence as a category of its own, making it more likely that outtakes will be treated differently than other journalistic work product); see also Errol Morris, *Liar, Liar, Pants on Fire*, *N.Y. TIMES OPINIONATOR BLOG* (July 10, 2007, 2:14 PM), <http://opinionator.blogs.nytimes.com/2007/07/10/pictures-are-supposed-to-be-worth-a-thousand-words> (criticizing the common belief that photographs reveal "an objective piece of reality" and arguing that photographs only contain truth in context "with respect to statements we make about them or the questions we might ask of them").

⁸⁴ *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 285 (S.D.N.Y. 2010).

⁸⁵ *Id.*

⁸⁶ *Id.*

assumed operational control in 1990 and purchased all of Texaco's Ecuadorean assets in 1992.⁸⁷ The next year, 30,000 Ecuadoreans filed a federal class action lawsuit in the Southern District of New York against Texaco, alleging that the company had dumped billions of gallons of oil and inadequately treated toxic waste into the Amazon basin, destroying its natural habitats and biodiversity and harming the indigenous community.⁸⁸ One of the tribes most affected by the oil production was the Cofán nation. By 2006, of the 15,000 tribe members who once lived on their ancestral land between the Pisurie and Aguarico Rivers, only a few hundred remained, many suffering from cancer, birth defects, or other diseases stemming from, at least in part, a lack of clean drinking water.⁸⁹ The case was dismissed in 2001 on grounds of *forum non conveniens*.⁹⁰ Chevron inherited Texaco's liabilities when it merged with Texaco in 2001, and, in 2003, a new group of Ecuadorians, including some of the plaintiffs from the previous action, brought suit under Ecuadorian law against Chevron in Lago Agrio, Ecuador.⁹¹ Throughout the litigation, Chevron contended that there was no evidence of an increase in cancer rate, no evidence that cancer was linked to the oil production, and no evidence that any environmental harm was caused by Texaco, as opposed to Petroecuador.⁹²

Steven Donziger, an American attorney and one of the lead counsel for the plaintiffs in the Lago Agrio litigation, sought to raise awareness of the case and put public and media pressure on Chevron by inviting journalists, filmmakers, and celebrity activists to report on or publicize the environmental devastation in Ecuador.⁹³ In 2005,

⁸⁷ Press Release, Chevron Corp., Ecuador Lawsuit Report Has Fabricated Evidence, Tainted by Political Pressure (Sept. 15, 2008), available at <http://investor.chevron.com/phoenix.zhtml?c=130102&p=irol-newsArticle&ID=1197255>.

⁸⁸ *Aguinda v. Texaco, Inc.*, No. 93-7527, 1994 WL 142006, at *1 (S.D.N.Y. Apr. 11, 1994).

⁸⁹ See CRUDE, *supra* note 2; see also Juan Forero, 'Gringo Chief' Helps Craft an Indian Community's Success Story, WASH. POST, June 21, 2010, at A10 (estimating the current population of the tribe in Ecuador at 1200); *Programa Selva Amazonica Ecuatoriana, SELVA VIDA SIN FRONTERAS*, <http://www.selvavidasinfronteras.org/contenidos.php?menu=39&idiom=2> (last visited Dec. 15, 2011) (estimating the current population at 700, down from 15,000 in the 1960s).

⁹⁰ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001).

⁹¹ See *In re Chevron*, 709 F. Supp. 2d at 286 (discussing the procedural history of the Lago Agrio litigation); see also CRUDE, *supra* note 2.

⁹² CRUDE, *supra* note 2.

⁹³ See *In re Chevron*, 709 F. Supp. 2d at 287 (noting that Donziger approached Berlinger to make a film about the litigation); see also CRUDE, *supra* note 2 (depicting Donziger's efforts to pitch an article to *Vanity Fair*, orchestrate press conferences in the

Donziger met Berlinger, who eventually agreed to embark on a long-term documentary project about the litigation and the underlying ecological disaster.⁹⁴ Berlinger and his crew shot more than six-hundred hours of footage over the next three years,⁹⁵ during which they enjoyed “extraordinary access”⁹⁶ to the plaintiffs’ lawyers. The final version of *Crude* focuses on the evidentiary phase of the trial and includes: interviews with Ecuadoreans affected by the oil production, scenes of plaintiffs’ lawyers strategizing about the litigation, interviews with Chevron lawyers and spokespeople, scenes of judicial inspections of the oil pits created by Texaco, and footage of an independent court-appointed expert as he prepared a nonbinding global damage assessment to quantify the damage attributable to Texaco.⁹⁷ The film concludes with the expert completing his report for the judge, in which he finds Texaco responsible for up to \$27 billion in damages.⁹⁸

A. *The District Court Orders Discovery*

Chevron filed an application for subpoenas in the Southern District of New York, seeking the outtakes of *Crude* to provide evidence of misconduct on the part of the plaintiffs’ lawyers during the underlying Lago Agrio litigation.⁹⁹ Chevron argued that the footage was “highly likely to be directly relevant” to the Lago Agrio litigation.¹⁰⁰ Berlinger argued in response that his footage was protected by the journalists’ privilege.¹⁰¹ Judge Kaplan, writing for the court, first determined that under 28 U.S.C. § 1782 the district court had the authority to issue an order to compel discovery of the evidence for use in a foreign pro-

United States, and introduce Trudie Styler, environmental activist and wife of the musician Sting, to the people of Ecuador).

⁹⁴ See *In re Chevron*, 709 F. Supp. 2d at 287 (describing the meeting as Donziger “solicit[ing]” Berlinger “to tell his clients’ story”). The court’s description of the meeting as a solicitation is potentially misleading, however, because it suggests that Donziger financed, or offered to finance, the documentary, which he did not. See *infra* notes 154-55 and accompanying text.

⁹⁵ See *In re Chevron*, 709 F. Supp. 2d at 287.

⁹⁶ *Synopsis*, CRUDE: PRODUCTION NOTES, *supra* note 2.

⁹⁷ See CRUDE, *supra* note 2.

⁹⁸ See *id.*

⁹⁹ *In re Chevron*, 709 F. Supp. 2d at 289-90.

¹⁰⁰ *Id.* at 290.

¹⁰¹ *Id.* at 293.

ceeding.¹⁰² The court then turned to whether the journalists' privilege prevented the application of § 1782 in this case.¹⁰³

First, the court noted that the Second Circuit had not addressed the issue of whether the journalists' privilege extended to documentary filmmakers.¹⁰⁴ The court did note, however, that under *von Bulow* an individual "involved in activities traditionally associated with the gathering and dissemination of news" may still assert the qualified privilege even if he is not a "member of the institutionalized press."¹⁰⁵ Applying the *von Bulow* test, the court assumed that because Berlinger gathered information about a "newsworthy event" and "disseminated his film to the public," the qualified privilege applied to Berlinger's outtakes.¹⁰⁶

The court then had to categorize the outtakes as confidential or nonconfidential to determine which of the two tests applied: the higher *Cutler* standard or the lower *Gonzales* standard.¹⁰⁷ Berlinger argued that the outtakes were confidential because he had "entered into agreements" with some sources that he would not use "certain footage" of them "without first obtaining their express authorization," and because he had developed relationships of trust with other sources, who had an explicit or implicit understanding that the footage not used in the final product "would remain confidential."¹⁰⁸ However, the court was not persuaded. In rejecting Berlinger's arguments, it faulted the filmmaker for failing to identify which individual subjects or which, if any, outtakes were covered by alleged confidentiality agreements, since footage that was not subject to such agreements could not possibly be considered confidential.¹⁰⁹

Key to the court's analysis was the finding that Berlinger's subjects could not have had any expectation of confidentiality in any particular footage because the standard release form signed by subjects granted

¹⁰² *Id.* at 290-93. The court first determined that Chevron's request met the statutory requirements of § 1782. *Id.* at 291; see also 28 U.S.C. § 1782 (2006). The court then looked to the discretionary factors set forth by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). *In re Chevron*, 709 F. Supp. 2d at 291-93. The court concluded that "petitioners have satisfied the *Intel* discretionary factors." *Id.* at 293.

¹⁰³ *In re Chevron*, 709 F. Supp. 2d at 293.

¹⁰⁴ *Id.* at 294.

¹⁰⁵ *Id.* (quoting *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (emphasis omitted).

¹⁰⁹ *Id.* at 294-95.

the filmmaker “*carte blanche*” to use any of the footage in the released film.¹¹⁰ The court reasoned that subjects appeared on camera for the purpose of having their images and words disseminated “in whatever film Berlinger decided to create.”¹¹¹ Because “Berlinger alone retained control of the content of the film,” the court determined that the film’s subjects could not have had a reasonable expectation of confidentiality.¹¹² Because the court found the outtakes to be nonconfidential, they were subject to the less stringent *Gonzales* test.¹¹³ But the court left the door cracked open for future filmmakers by noting that, although Berlinger did not present persuasive evidence of confidentiality agreements, the court would have considered affidavits or other evidence to determine whether the filmmaker had met his burden.¹¹⁴

To assess the “likely relevance” prong of the *Gonzales* test, the court considered three scenes from *Crude* that Chevron argued were “concrete evidence” that the outtakes contained “more than likely relevant” footage of other improper conduct by the plaintiffs’ lawyers.¹¹⁵ First, the court considered a scene in which plaintiffs’ counsel allegedly participated in a “supposedly neutral” focus group conducted by an expert contributing to the global damages assessment report—a scene which was removed from the DVD version of the film at the request of the plaintiffs’ lawyers after Berlinger showed the film to lawyers representing both sides.¹¹⁶ The court stated that this conduct was “suggestive of an awareness of questionable activity” and supportive of Chevron’s argument that other “outtakes are relevant to significant issues in the Lago Agrio Litigation.”¹¹⁷ A second scene showed plaintiffs’ counsel

¹¹⁰ *Id.*

¹¹¹ *Id.* at 295.

¹¹² *Id.*

¹¹³ *Id.* (citing *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999)).

¹¹⁴ *Id.* at 295 n.69. For one example of a filmmaker-subject relationship that likely would qualify as confidential, see *EXIT THROUGH THE GIFT SHOP* (Paranoid Pictures Film Co. Ltd. 2010), which depicts the street artist Banksy without showing his face and having digitally altered his voice. The filmmaker’s raw footage, which might include shots of Banksy’s face and unaltered voice, would likely qualify for confidential protection under the district court’s test.

¹¹⁵ *In re Chevron*, 709 F. Supp. 2d at 295-96.

¹¹⁶ *Id.* at 296; see also Declaration of Joseph A. Berlinger ¶ 33, *In re Chevron*, 709 F. Supp. 2d 293 (No. 19-0111), available at <http://www.crudethemovie.com/blog/wp-content/uploads/2009/08/Berlinger-II.pdf> (describing how Berlinger gave both sides an opportunity to review the film for accuracy before the theatrical release).

¹¹⁷ 709 F. Supp. 2d at 296-97. Berlinger contends that the footage did not depict one of the neutral focus groups and that he edited the scene for narrative clarity, rather than any attempt to conceal behavior by the plaintiffs’ counsel. Declaration of Joseph A. Berlinger *supra* note 116, ¶ 32 (“The reason I edited Dr. Beristain from the

requesting that a judge block an order to investigate a laboratory used by the plaintiffs to test soil and water samples.¹¹⁸ A third scene depicted *ex parte* interactions between plaintiffs' lawyers and government officials, and Chevron argued the outtakes likely depicted other attempts to "curry favor" with the Government of Ecuador.¹¹⁹ Berlinger responded by claiming that Chevron's assumptions about the outtakes were "entirely speculative" and that Chevron failed to particularize a specific portion of the footage it believed was relevant.¹²⁰

The court disagreed with Berlinger, deciding that the outtakes were likely relevant.¹²¹ For example, "[a]ny interaction between plaintiffs' counsel and a supposedly neutral expert in the Lago Agrio Litigation" would be relevant to proving or disproving the expert's independence and reliability.¹²² The court explained that the inclusion of excerpts of these interactions in the film "amply supports an inference that the outtakes contain additional relevant material," and noted that the "extraordinary access" granted to Berlinger supported the assumption that Berlinger's outtakes were relevant to showing whether the plaintiffs' lawyers improperly influenced witnesses and government officials.¹²³ Finally, the court completely rejected Berlinger's particularity argument: "[T]here is no uncertainty as to the type of evidence petitioners seek. . . . [Chevron] cannot reasonably be expected to identify with particularity the outtakes that they seek where knowledge of their content lies exclusively with Berlinger."¹²⁴

Turning to the second prong of the *Gonzales* test, the court framed the issue as "whether there is sufficient ground to believe that the footage petitioners seek would not reasonably be obtainable elsewhere."¹²⁵ Berlinger argued first that the footage was "cumulative or duplicative

Cofan meeting scene was not to 'conceal' any improper conduct by plaintiffs' counsel, but to prevent the scene from being misconstrued and taken out of context, just as Chevron is attempting to do here.").

¹¹⁸ 709 F. Supp. 2d at 296. However, prior to this scene in the film, Donziger explains that it was improper for Chevron to seek the order in the first place. CRUDE, *supra* note 2. Chevron's lawyer and other news media were present during the discussion with the judge. *Id.*

¹¹⁹ 709 F. Supp. 2d at 296.

¹²⁰ *Id.* at 296-97.

¹²¹ *Id.* at 297-98.

¹²² *Id.* at 297.

¹²³ *Id.* The court did not explain what relevance mere access to the film's subjects and the plaintiffs' lawyers had to proving that the outtakes would be relevant to the litigation.

¹²⁴ *Id.* at 297.

¹²⁵ *Id.* at 298.

of the decades-worth of scientific reports and analyses performed by Chevron”—an argument the court summarily rejected.¹²⁶ Berlinger next argued that Chevron had failed to meet its burden to exhaust other potential sources for the evidence, noting that Chevron often had its own videographers present when Berlinger was filming.¹²⁷ Without addressing whether Chevron’s own footage should narrow the scope of the subpoena, the court recited the *Gonzales* language that outtakes were “‘unimpeachably objective’ evidence of any misconduct.”¹²⁸ Moreover, because Berlinger was “in sole possession of the *Crude* outtakes,” they could not be obtained from other sources.¹²⁹ The court also noted that depositions were not adequate substitutes for outtake evidence and ordered Berlinger to turn over all of his outtakes.¹³⁰

By grounding its analysis in the characterization of Berlinger’s raw footage as “‘unimpeachably objective’ evidence,”¹³¹ the court effectively awarded special evidentiary status to outtakes.¹³² By the court’s logic, outtakes need only be sufficiently relevant to the underlying claims in order to pass the second prong of the *Gonzales* test, rendering moot the availability of the information from other sources. Thus, the district court’s opinion seems to collapse the two-pronged *Gonzales* test into a single inquiry: whether the outtakes are likely relevant, a standard that the district court and, ultimately, the Second Circuit both weakened. Although purportedly extending the *Gonzales* standard to documentary filmmakers, the district court actually diluted the test and pegged documentary filmmakers as second-class journalists, subject to different standards because their footage is classified as unimpeachably objective.

B. *The Second Circuit Affirms*

Immediately after hearing oral arguments in July 2010, the Second Circuit affirmed but narrowed the district court’s order by specifying that Berlinger only needed to turn over footage depicting certain individuals. The Second Circuit’s order compelled Berlinger to

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* (quoting *Gonzales v. NBC*, 194 F.3d 29, 36 (2d Cir. 1999)).

¹²⁹ *Id.*

¹³⁰ *Id.* at 298-99.

¹³¹ *Id.* at 298 (quoting *Gonzales*, 194 F.3d at 36).

¹³² See Tuley, *supra* note 83, at 1832 (arguing that “judges implicitly consider video evidence to be in a category all its own,” making it “more likely that outtakes will receive different treatment”).

turn over “all footage that does not appear in publicly released versions of *Crude* showing: (a) counsel for the plaintiffs in the case of *Maria Aguinda y Otros v. Chevron Corp.*; (b) private or court-appointed experts in that proceeding; or (c) current or former officials of the Government of Ecuador.”¹³³ The Second Circuit mandated that Chevron use the footage “solely for litigation, arbitration or submission to official bodies” and that Chevron reimburse Berlinger’s “reasonable expenses” of sorting and duplicating the footage.¹³⁴

Six months after oral argument, the Second Circuit issued its full opinion “affirm[ing] in full the district court’s ruling.”¹³⁵ Without disturbing any of the district court’s reasoning, Judge Leval, who also authored the Second Circuit’s opinion in *Gonzales*,¹³⁶ shifted the court’s focus from confidentiality to Berlinger’s status as a journalist.¹³⁷ The court concluded that Berlinger, due to his close relationship with the plaintiffs’ lawyers, failed to prove that he undertook the documentary project “with independence,” and thus he was only entitled to a weak journalists’ privilege, if any privilege at all.¹³⁸ The court explained that under Second Circuit precedent, the purpose of the journalists’ privilege is primarily to “protect[] . . . the public’s interest in being in-

¹³³ *Chevron Corp. v. Berlinger*, Nos. 10-1918, 10-1966 (2d Cir. July 15, 2010) (order).

¹³⁴ *Id.* Berlinger complied with the subpoena, and in later legal proceedings Chevron quickly convinced the court to issue additional subpoenas based on “extraordinarily revealing” outtakes, compelling Donziger to submit to depositions conducted by Chevron lawyers. *In re Application of Chevron Corp.*, 749 F. Supp. 2d 135, 137, 141 (S.D.N.Y. 2010); *see also* Barbara Leonard, *Lawyer Must Comply with Chevron Subpoena*, COURT-HOUSE NEWS SERVICE (Oct. 21, 2010, 11:49 AM), <http://www.courthousenews.com/2010/10/21/31264.htm>. In subsequent proceedings, the court noted that the outtakes contained “substantial evidence” that Donziger and others had ex parte contacts with the Ecuadorian court to obtain appointment of the “supposedly neutral and impartial” expert responsible for preparing the damages report, “secretly” worked with the expert prior to his appointment, and “wrote some or all of the expert’s final report” submitted to the court. *In re Application of Chevron Corp.*, 749 F. Supp. 2d at 138-39. The outtakes showed Donziger stating that the Ecuadorian court was corrupt and the plaintiffs could “prevail only by pressuring and intimidating the courts.” *In re Application of Chevron Corp.*, 749 F. Supp. 2d 141, 147 (S.D.N.Y. 2010). For more discussion of the content of the outtakes and the subsequent legal proceedings, *see* Patrick Radden Keefe, *Reversal of Fortune*, NEW YORKER, Jan. 9, 2012, at 38, 45-49.

¹³⁵ *Chevron Corp. v. Berlinger*, 629 F.3d 297, 311 (2d Cir. 2011).

¹³⁶ *Gonzales v. NBC*, 194 F.3d 29, 30 (2d Cir. 1999).

¹³⁷ *See Berlinger*, 629 F.3d at 300 (concluding that “Berlinger failed to carry his burden of showing that he collected information for the purpose of *independent* reporting and commentary”).

¹³⁸ *Id.* at 309-10. The court declined to answer the question of “whether the consequence of the failure of the claimant of the privilege to establish independence means it has a weaker privilege or no privilege at all.” *Id.* at 309.

formed by ‘a vigorous, aggressive *and independent* press.’”¹³⁹ Thus, to qualify for the privilege, “the person must have acted in the role . . . identified in *Baker, von Bulow*, and *Gonzales* as that favored by the public interest that motivates the privilege—the role of the *independent* press.”¹⁴⁰ Further emphasizing the importance of independence, the court stated:

Those who do not retain independence as to what they will publish but are subservient to the objectives of others who have a stake in what will be published have either a weaker privilege or none at all. . . . An undertaking to publish matter in order to promote the interests of another, regardless of justification, does not serve the same public interest, regardless of whether the resultant work may prove to be one of high quality.¹⁴¹

Because Berlinger was “solicited” by Donziger to make the film, and because Berlinger removed one scene from the final version of the film at the request of the plaintiffs’ lawyers, the Second Circuit concluded that the district court reasonably denied Berlinger’s claim of privilege.¹⁴²

Dismissing Berlinger’s argument that Chevron failed to prove the relevance of the outtakes it sought, the Second Circuit concluded that the *Gonzales* test does not apply to journalists who do not demonstrate independence.¹⁴³ The Second Circuit then concisely rejected Berlinger’s claim of confidentiality. In light of the expansive release signed by Berlinger’s subjects and without any significant evidence offered to the contrary, the district court was entitled to conclude that Berlinger had not met his burden as to confidentiality.¹⁴⁴ The Second Circuit likewise made short work of Berlinger’s argument that the district court’s order was overbroad.¹⁴⁵ The court reasoned that the district court had “greater discretion to order production of privileged material” based on the finding that Berlinger lacked independence, and it also faulted Berlinger for not providing the district court “with any proposal for distinguishing between relevant and assertedly non-relevant material.”¹⁴⁶ The district court, according to the Second Cir-

¹³⁹ *Id.* at 307 (quoting *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987)).

¹⁴⁰ *Id.* at 307. The individual seeking the privilege has the burden of proving independence. *Id.* at 309.

¹⁴¹ *Id.* at 308.

¹⁴² *Id.*

¹⁴³ *Id.* at 309.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 310.

¹⁴⁶ *Id.*

cuit, "is not obligated to undertake this burden without help from the party requesting the limitation."¹⁴⁷

III. ON INDEPENDENCE AND OUTTAKES

The Second Circuit failed to take advantage of the opportunity to correct the district court's errors, and, by focusing on Berlinger's lack of "independence," misunderstood the nature of journalism and documentary film production. The introduction of the independence requirement and its application to Berlinger were misguided and may potentially bar the use of the journalists' privilege by those outside the institutional media, particularly documentary filmmakers. Even for filmmakers who can meet the independence standard, the Second Circuit weakened the *Gonzales* test's relevancy requirement and effectively eliminated the important inquiry into alternative sources for obtaining the information. Finally, the courts overstated the objectivity of outtakes, which will likely result in their underprotection, branding filmmakers as a disfavored and disadvantaged class of journalists.

A. *Factual Confusion About Independence, Journalism, and Filmmaking*

The first problem with the Second Circuit's opinion was that it invented an independence requirement for the journalists' privilege that was not relied upon in the district court's opinion or found in other cases. "Although the [district] court did not explicitly state a finding that Berlinger failed to show his independence," the Second Circuit wrote, its findings that Donziger both asked Berlinger to make the film and successfully requested that a scene be removed from the DVD version "essentially assert that conclusion."¹⁴⁸ One reason, perhaps, that the district court did not explicitly comment on Berlinger's independence was that such a requirement had never before been part of the Second Circuit's analysis. Moreover, the district court explicitly found Berlinger to be independent. The district court's entire analysis in rejecting Berlinger's confidentiality claim was premised on the findings that "Berlinger *alone* retained control of the content of the film and determined what footage would be made public"¹⁴⁹ and that his subjects signed release forms granting Berlinger "*carte blanche*"

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 308.

¹⁴⁹ *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 295 (S.D.N.Y. 2010) (emphasis added).

to include or exclude footage as he saw fit.¹⁵⁰ Had the district court actually concluded that Berlinger lacked editorial independence, as the Second Circuit suggested, the court would have needed other justifications to prove Berlinger's sources did not have an expectation of confidentiality.¹⁵¹

Furthermore, while the district court mentioned Donziger's role in initiating the documentary project, it did not find that Donziger or others exerted enough editorial influence over Berlinger to negate Berlinger's independence. Rather, the district court emphasized Donziger's role only to support the inference that the outtakes likely contained relevant evidence of improper conduct by the plaintiffs' lawyers.¹⁵² The court mentioned the scene deleted from the final version only to support the conclusion "that the outtakes are relevant to significant issues in the Lago Agrio Litigation."¹⁵³ If one scene in the outtakes was known to be relevant, the court reasoned, then others likely were too. But the district court never ruled that that Donziger compelled Berlinger to excise the deleted scene. The Second Circuit—without citing reliable evidence that Berlinger in fact lacked independence—could not plausibly adopt the district court's opinion "in full" and still reach the conclusion it did.

The Second Circuit's ruling implicitly set too high a bar for non-institutional media to prove editorial and financial independence. By repeatedly stating that the film had been "commissioned" or "solicited,"¹⁵⁴ the court glossed over the fact that Donziger did not hire Berlinger to make the film, nor did he fund the project.¹⁵⁵ As *Crude* documented, Donziger was eager to gain publicity for his case, and he

¹⁵⁰ *Id.* at 294-95.

¹⁵¹ For a discussion of what the court might have accepted to prove confidentiality, see *infra* Sections IV.A-B.

¹⁵² 709 F. Supp. 2d at 297.

¹⁵³ *Id.*

¹⁵⁴ *Chevron Corp. v. Berlinger*, 629 F.3d 297, 300, 302, 304-05, 308-09 (2d Cir. 2011).

¹⁵⁵ In a filmmaking magazine cited by the district court, Berlinger recounted that in his initial meeting with Donziger, he told Donziger that his observational style of filmmaking, which presents all sides of an argument and allows the audience to reach its own conclusions, opposes that of "the standard environmental and human rights advocacy" filmmaker. The magazine is no longer available online but the article is reprinted in the *Crude* production notes. See "Crude Realities," by Joe Berlinger, CRUDE: PRODUCTION NOTES, *supra* note 2. Berlinger stated that Donziger "was interested in my kind of storytelling, even if it meant he could not control the outcome or the message." *Id.* The Second Circuit mentioned Berlinger's testimony to this effect and labeled it "self-serving." *Berlinger*, 629 F.3d at 308 n.5. However, Berlinger's article was published in 2009, prior to Chevron's petition. See Declaration of Joseph A. Berlinger, *supra* note 116, ¶ 25.

succeeded in convincing a *Vanity Fair* reporter to write a feature about the case and in recruiting Sting and Trudie Styler to champion the environmental cause of the Cofán nation.¹⁵⁶ But the fact that Donziger brought the subject to Berlinger's attention does not mean that Berlinger lacked independence. The court's fixation on the origin of the idea for the film reveals ignorance of a common journalistic practice for both traditional journalists and prominent documentary filmmakers.¹⁵⁷ It is not unusual for subjects or those associated with them to bring ideas for films to well-known filmmakers without demanding or obtaining any editorial control, particularly for observational documentaries.¹⁵⁸ Because the Second Circuit took this common practice as evidence of Berlinger's lack of independence—and presumably would not find a similar lack of independence if, for instance, a whistleblower brought a story idea to a member of the institutional media¹⁵⁹—the court created a scheme that treats filmmakers like Berlinger as second-class journalists.

¹⁵⁶ See CRUDE, *supra* note 2.

¹⁵⁷ Subjects or their representatives bring stories to members of the institutional media all the time, and the Second Circuit has never before questioned the independence of those journalists based on where their story ideas originated. Consider, for example, public relations professionals who actively seek media coverage for their clients, or whistleblowers who pitch stories to journalists.

¹⁵⁸ See, e.g., Interview with D.A. Pennebaker, Documentary Filmmaker, in New Haven, Conn. (Sept. 3, 2003) (stating that the ideas for his films come to him almost exclusively from other people who approach him with topics and that thinking up ideas without the help of others is “a waste of time”); Interview with Ricki Stern & Annie Sundberg, Documentary Filmmakers, in New York, N.Y. (Apr. 23, 2007) (explaining that the idea for the legal documentary *The Trials of Darryl Hunt* came from a suggestion by an investigator working on the case for the defendant); see also Keith Phipps, *Albert Maysles: Attamont Revisited*, A.V. CLUB (Oct. 18, 2000), <http://www.avclub.com/articles/albert-maysles.13682> (explaining that filmmakers Albert and Davis Maysles got the idea for the film *Gimme Shelter* from another filmmaker associated with the Rollins Stones); RICH EISEN, *TOTAL ACCESS: A JOURNEY TO THE CENTER OF THE NFL UNIVERSE* 215-16 (2007) (quoting an interview with filmmaker Steve Sabol, who said sportscaster Howard Cosell approached him and said, “You should make a film about me!” And that’s what we did.”).

¹⁵⁹ It is common for individuals and partisan organizations to pitch stories to traditional journalists, a practice which the Second Circuit presumably would not find destructive of editorial independence if the journalist were employed, for example, by the *New York Times*. Nearly every activist organization with a website has a section for press releases that are distributed to journalists in hopes of placing stories on the subject. See, e.g., *Press Releases*, AMAZON WATCH, <http://amazonwatch.org/news/press-releases> (last visited Dec. 15, 2011) (publicizing various environmental causes, and hence story ideas, to journalists). Yet the distribution of press releases does not mean that any resulting articles are automatically considered the product of the activist’s editorial control. Furthermore, beat reporters for institutional media companies operate within a “culture in which journalists implicitly provide positive coverage in exchange

The Second Circuit opinion also faulted Berlinger for removing a scene at the request of plaintiffs' counsel.¹⁶⁰ But the court, without explanation, dismissed Berlinger's contention that he had an editorial justification for removing the scene and that he rejected other proposed changes, both of which indicate that he maintained editorial control.¹⁶¹ As the Center for Social Media recently concluded in its report on the ethics of documentary filmmaking, it is common for filmmakers to give subjects the opportunity to review a cut of the film and make suggestions, without sacrificing their editorial independence.¹⁶² The study also noted that films can benefit from the input of the subjects, just as films benefit from the opinions of producers or other advisors who evaluate rough cuts.¹⁶³ One example provided in

for tidbits of news." Dana Milbank, *Rotten to the Press Corps*, WASH. POST, Mar. 2, 2011, at A15; see also Jack Shafer, *Back Scratching, Washington Style*, SLATE (Mar. 2, 2011, 6:16 PM), <http://www.slate.com/id/2287089> (describing how journalists will negotiate with sources, perhaps implicitly, to provide positive coverage to ensure an ongoing relationship with a source). Presumably, courts would not question the independence of professional reporters who engage in such pervasive "back scratching." However the *Berlinger* decision does raise the question of whether baldly partisan news outlets, such as the *New York Post* or Fox News, could meet the independence requirement.

¹⁶⁰ See *Berlinger*, 629 F.3d at 308 (affirming the district court's conclusion that the journalists' privilege did not apply to Berlinger in large part because of the lack of independence supposedly evidenced by the deletion of the scene).

¹⁶¹ See *id.* at 304 (noting that Berlinger rejected other changes proposed by the Lago Agrio plaintiffs); see also *supra* note 117 (recounting that Berlinger maintained that he removed the scene for narrative clarity).

¹⁶² See PATRICIA AUFDERHEIDE ET AL., CTR. FOR SOC. MEDIA, HONEST TRUTHS: DOCUMENTARY FILMMAKERS ON ETHICAL CHALLENGES IN THEIR WORK 10-12 (2009), available at http://www.centerforsocialmedia.org/sites/default/files/Honest_Truths_-_Documentary_Filmmakers_on_Ethical_Challenges_in_Their_Work.pdf (noting that while filmmakers often try to accommodate their subjects' requests to remove footage if the filmmakers do not deem the footage to be essential to the story, most filmmakers obtain releases reserving for themselves ultimate editorial control). This is particularly true of observational documentaries, as opposed to investigative documentaries that are composed largely of formal sit-down interviews. Filmmakers who spend great lengths of time following subjects as they conduct their daily lives often form close relationships with the subjects, and some believe that their subjects deserve the courtesy of reviewing the cut prior to distribution. See *id.* (describing several filmmakers' decisions to remove or change scenes at the request of their subjects); see also Heidi Ewing & Rachel Grady, *Directors Uncut: Notes on One Team's Process*, DOCUMENTARY, Fall 2011, at 22, 26 ("When our docs are nearly finished, we screen the work for [our subjects]. This private viewing is not an invitation for editorial changes but a respectful gesture that fosters a frank discussion about the decisions we made in the edit. Here, grievances can be aired and any factual errors remedied before the film flies out of our hands and into the world at large."); CINEMANIA (Wellspring Media 2002) (ending the documentary film with a scene of the film's subjects, itinerate movie-goers, watching a near-final cut of the film about themselves and reacting to their depictions).

¹⁶³ See AUFDERHEIDE ET AL., *supra* note 162, at 11.

the study was that of filmmaker Ross Kauffman, director of the Academy Award-winning *Born into Brothels*,¹⁶⁴ who removed a “coda” from one of his films because the subjects maintained that the scene did not “ring true” to who they were.¹⁶⁵ Kauffman agreed and removed the coda from the film, remarking, “They were much happier, I was much happier, and the film was better because of it.”¹⁶⁶ In other words, Kauffman was simply persuaded by his subjects’ argument; his decision to remove the scene was in no way compelled by his subjects’ editorial control of the film.

The *Berlinger* decision discourages filmmakers from accepting advice from subjects, even if making the changes would improve the film’s clarity or accuracy.¹⁶⁷ The presumption that accepting subjects’ advice suggests a lack of independence raises unique ethical questions for documentary filmmakers. Filmmakers often form close, trust-based relationships with subjects during the intense and intimate film-

¹⁶⁴ Ross Kauffman, IMDB, <http://www.imdb.com/name/nm1502104> (last visited Dec. 15, 2011).

¹⁶⁵ AUFDERHEIDE ET AL., *supra* note 162, at 11. A coda is a short scene that appears after the closing credits of a film.

¹⁶⁶ *Id.*

¹⁶⁷ Removing a scene is similar to the common journalistic practice of correcting or contextualizing a quotation after sending the quotation to the source for review, which, again, would be unlikely to destroy independence in the eyes of the court if practiced by a member of the institutional press. Journalists working on tight deadlines often do not have the luxury of permitting sources to review quotations for inaccuracies. However, when time permits, the practice is allowed and is not uncommon. *See, e.g., Handbook of Journalism: Independence*, REUTERS, <http://handbook.reuters.com/index.php/independence> (last updated Sept. 21, 2009) (allowing reporters to verify quotes and information with sources, but warning against being unduly influenced by subjects). Many organizations do not expressly allow subjects to review an article prior to publication, although they recognize that pieces are often created in a spirit of collaboration. *See Guidance: Access Agreements and Indemnity Forms*, BBC, <http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidance-access-agreements-summary> (last updated Oct. 2010) (noting that collaboration between journalists and subjects often happens in practice, but that formal legal agreements that could compromise editorial integrity should be avoided). The Society of Professional Journalists’ Code of Ethics directs journalists to “act independently” of any obligation or interest “other than the public’s right to know.” *See Code of Ethics*, SOC’Y OF PROF. JOURNALISTS, <http://www.spj.org/pdf/ethicscode.pdf> (last visited Dec. 15, 2011). But the Code cannot be taken to mean that filmmakers are prohibited from excising any scene that is included in a rough cut of a film. Although the district court was suspicious of Berlinger’s motivation for removing the scene, Berlinger also had a plausible editorial explanation—narrative clarity—for cutting the scene. *See supra* note 117. It is also worth noting that the deleted scene is still included in the version of the film available for streaming on Netflix, and thus was not entirely removed from public viewing. *See Crude*, NETFLIX, <http://www.netflix.com/Movie/Crude/70112742> (last visited Dec. 15, 2011) (allowing Netflix subscribers to watch this version of *Crude* instantly).

ing process, and believe that subjects have a right to review the film prior to distribution because the subjects are the ones who must live with the consequences that result from the public dissemination of the intimate details of their lives.¹⁶⁸ Filmmaker Gordon Quinn,¹⁶⁹ who requires his subjects to sign releases acknowledging that they will not have any legal control over the final cut, nonetheless tells subjects: “We will show [you] the film before it is finished. I want you to sign the release, but we will really listen to you. But ultimately it has to be our decision.”¹⁷⁰ Quinn’s statement recognizes that the documentary film medium, due to its immediacy and vivid depictions of reality, carries with it special ethical obligations. Quinn’s solution is to reserve his legal rights to editorial control but remain sympathetic to the opinions and feelings of his subjects until those opinions and feelings begin to interfere with his editorial convictions. The fact that a filmmaker faces different ethical obligations than print journalists should not make him any less able to invoke the journalists’ privilege than are “lecturers, political pollsters, novelists, academic researchers, and dramatists,” all of whom qualify for protection under *von Bulow*.¹⁷¹

In *Berlinger*, the Second Circuit focused on the different ethical obligations and professional practices of filmmakers and traditional institutional journalists to derive an independence requirement that disadvantages filmmakers more than other journalists. The application of the independence requirement in *Berlinger* discounts the value of the contributions documentarians make to the public debate, and, in the name of respecting the underlying principles of the journalists’ privilege, frustrates the purposes of the privilege itself. A better ap-

¹⁶⁸ See AUFDERHEIDE ET AL., *supra* note 162, at 10-11. In many ways, a documentary film, particularly an observational film, represents a more intimate and often more revealing portrait than a print media profile because the film depicts actual images and sounds of the subject. Some documentarians believe that this heightened intimacy triggers ethical considerations not present in the print journalist–subject relationship. See, e.g., Interview by John Ellis with Roger Graef, Documentary Filmmaker, in Phila., Pa. (Feb. 25, 2011) (discussing how Graef pulled a documentary from BBC prior to broadcast because of objections by the family of a child depicted in the film, based not on legal but ethical considerations).

¹⁶⁹ Gordon Quinn is the artistic director and co-founder of Kartemquin Films. Gordon Quinn, KARTEMQUIN FILMS, <http://kartemquin.com/about/gordon-quinn> (last visited Dec. 15, 2011). Kartemquin is a Chicago-based production company known for its award-winning documentaries *Hoop Dreams*, *The Interrupters*, *At the Death House Door*, and *Stevie*. Films, KARTEMQUIN FILMS <http://www.kartemquin.com/films> (last visited Dec. 15, 2011).

¹⁷⁰ AUFDERHEIDE ET AL., *supra* note 162, at 10.

¹⁷¹ *Von Bulow v. von Bulow*, 811 F.2d 136, 144-45 (2d Cir. 1987) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972)).

proach would be for courts to accept how technology has altered the practice of journalism and construct a test that does not discriminate against new technological forms. A film detailing the environmental impact of decades of oil production deserves as much protection as an article on the same subject, and courts should not justify interfering with the journalistic function of documentary filmmakers on the basis of differing best practices and ethical considerations.

B. *Fishing for Precedent*

The language of the Second Circuit's decision in *Berlinger* belied the scarcity of precedent for the new independence requirement and severed the word "independent" from its accepted meaning in the context of the press. Applying the *von Bulow* test, the district court had "assume[d]" that the privilege applied to Berlinger as a filmmaker because he investigated a newsworthy event with the intent to disseminate his film to the public.¹⁷² But the Second Circuit read *von Bulow* to contain an additional requirement: "[W]e spoke of the interest being protected as the public's interest in being informed by 'a vigorous, aggressive and independent press.'"¹⁷³ Although independence was never central to the holding in *von Bulow*, nor cited as a required element by subsequent circuits adopting or referencing the test,¹⁷⁴ in *Berlinger* the Second Circuit implied *von Bulow* held independence as an essential element of the test for the journalists' privilege. When discussing *Gonzales*, the court admitted that independence was not a factor in that case but, without citing textual support, similarly asserted that "our discussion assumed that the press entity was acting with independence."¹⁷⁵ In fact, *Gonzales* itself summarized *von Bulow* without reference to independence: "In *von Bulow v. von Bulow* we stated that

¹⁷² *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 294 (S.D.N.Y. 2010).

¹⁷³ *Chevron Corp. v. Berlinger*, 629 F.3d 297, 307 (2d Cir. 2011) (quoting *von Bulow*, 811 F.2d at 144).

¹⁷⁴ *See, e.g., Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) (describing the *von Bulow* test as inquiring whether the claimant seeking protection "intended 'at the inception of the newsgathering process' to use the fruits of his research 'to disseminate information to the public'" (quoting *von Bulow*, 811 F.2d at 144)); *Titan Sports, Inc. v. Turner Broad. Sys., Inc. (In re Madden)*, 151 F.3d 125, 129-30 (3d Cir. 1998) (adopting the *von Bulow* test without mention of an independence requirement and remarking that a person may invoke the privilege if his or her purpose is "gathering news for publication"); *Shoen v. Shoen*, 5 F.3d 1289, 1293-94 (9th Cir. 1993) (adopting the *von Bulow* test in the case of an investigative book author without mention of independence and stating that "[w]hat makes journalism journalism is . . . its content").

¹⁷⁵ *Berlinger*, 629 F.3d at 309.

so long as an entity gathers information with ‘intent to disseminate to the public,’ it may avail itself of the journalists’ privilege”¹⁷⁶

The Second Circuit’s only authority for its new concept of “independence” was a snippet of a single sentence from its 1992 decision in *Baker v. F & F Investment*, later quoted in *Gonzales*¹⁷⁷ and *von Bulow*,¹⁷⁸ which described the justification for the creation of journalist shield laws in New York and Illinois.¹⁷⁹ Those laws, the *Baker* court wrote, “reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment.”¹⁸⁰ When courts and commentators discuss the “independence” of the press, they overwhelmingly use the term in reference to freedom from government control or obstruction of journalism by some other authority with censorship power—not to describe a journalist’s freedom from influence by a subject.¹⁸¹ In *New York Times Co. v. Sullivan*, cited by

¹⁷⁶ *Gonzales v. NBC*, 194 F.3d 29, 34 (2d Cir. 1999) (citation omitted) (quoting *von Bulow*, 811 F.2d at 143).

¹⁷⁷ 194 F.3d at 33.

¹⁷⁸ 811 F.2d at 144.

¹⁷⁹ *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972).

¹⁸⁰ *Id.* Interestingly, New York’s own shield law defines a “professional journalist” without any reference to independence from subjects: a professional journalist is “one who . . . is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency . . . or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public.” N.Y. CIV. RIGHTS LAW § 79-h(a) (6) (McKinney 2010).

¹⁸¹ See, e.g., *United Steelworkers v. Sadlowski*, 457 U.S. 102, 129 n.4 (1982) (White, J., dissenting) (recounting one of the respondent’s arguments that “[t]here is no such thing as a free and *independent press* within the union” when the incumbent officers governing the organization also control the union newspaper (emphasis added)); *Branzburg v. Hayes*, 408 U.S. 665, 727-28 (1972) (Stewart, J., dissenting) (reciting past governmental attempts to regulate the press and concluding “there is obviously a continuing need for an *independent press*” to, among other things, expose corruption and keep the public informed (emphasis added)); *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 602 (1953) (“By interpreting to the citizen the policies of his government and vigilantly scrutinizing the official conduct of those who administer the state, an *independent press* stimulates free discussion and focuses public opinion on issues and officials as a potent check on arbitrary action or abuse.” (emphasis added)); *United States v. Sanders*, 211 F.3d 711, 720 (2d Cir. 2000) (asserting that a judicial order to reveal a confidential source sought by the prosecutor would threaten the public interest in an *independent press*); *Herbert v. Lando*, 568 F.2d 974, 988 (2d Cir. 1977) (“To the extent that the *independent exercise* of editorial functions is threatened by *governmental action*, the very foundations of the architectural masterpiece that is our form of government are shaken” (emphasis added)), *rev’d on other grounds*, 441 U.S. 153 (1979); *Sikelianos v. City of New York*, No. 05-7673, 2008 WL 2465120, at *1 (S.D.N.Y.

Baker, the Supreme Court, discussing the press and freedom of speech expressed concern about the government “placing . . . a handicap upon the freedoms of expression,”¹⁸² and praised the “unfettered interchange of ideas”¹⁸³ and “free political discussion” as “essential to the security of the Republic.”¹⁸⁴ These notions of encouraging a marketplace of ideas and facilitating self-governance with a well-informed public—two oft-cited theoretical justifications for the freedoms of speech and the press¹⁸⁵—thus inform the *Baker* court’s use of the word “independent” and underscore the misreading by the Second Circuit in *Berlinger*.¹⁸⁶

The Second Circuit did not explain how courts should assess independence, but the court offered “an illustrative example.”¹⁸⁷ Imagine, the court instructed, two individuals, Smith and Jones, both inves-

June 18, 2008) (stating that granting “unfettered access to ‘sift through [journalists’] files’ . . . would undermine the public’s perception of the press as an *independent institution* and foster the view that it is ‘an investigative arm of the judicial system, the *government*, or private parties’” (emphasis added) (quoting *Gonzales*, 194 F.3d at 36)); *Ofoosu v. McElroy*, 933 F. Supp. 237, 240 n.2 (S.D.N.Y. 1995) (“[T]he opposition press remains *vigorous* and *unrestrained by the government* . . .” (emphasis added) (internal quotation marks omitted)); *United Food & Commercial Workers Local 919 v. Ottaway Newspapers, Inc.*, No. 90-0592, 1991 WL 328466, at *3 (D. Conn. Nov. 12, 1991) (noting that the “function of the press . . . has never been conceived as anything but a private enterprise, free and *independent of government control and supervision*” (emphasis added)).

A number of other judicial voices concur that independence of the press refers to the media’s relationship *with the government*. See David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 232-34 (describing the historical practice of official licensing of the press and concluding that such a practice precluded the possibility of an independent press); Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 634 (1975) (discussing the origins of the First Amendment and asserting the “primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches”).

¹⁸² 376 U.S. 254, 266 (1964).

¹⁸³ *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

¹⁸⁴ *Id.* (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

¹⁸⁵ See GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 8-15, 493-95 (3d ed. 2008) (collecting various scholars’ justifications for the freedoms of speech and the press, including several noting the democracy-reinforcing effect of the free exchange of ideas and the dangers inherent in government manipulation of information disseminated to the public).

¹⁸⁶ Rather than speaking of independence, perhaps a more textually sound approach for the Second Circuit would be to conclude that, because *Berlinger* was subject to influences by his sources, he was not engaged in activities “traditionally associated with the gathering and dissemination of news.” *Von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987). The court then could have stated that objectivity, rather than independence, was a prerequisite for claiming protection. For a discussion of why even this argument would be descriptively questionable, see *supra* note 159 and *infra* note 198.

¹⁸⁷ *Chevron Corp. v. Berlinger*, 629 F.3d 297, 308 (2d Cir. 2011).

tigating and writing about a public official.¹⁸⁸ Smith is entitled to stronger protections if she undertakes the project “to discover whatever she can through her investigations and to write a book that reflects whatever her investigations may show.”¹⁸⁹ Jones, by contrast, has been “hired or commissioned to write a book extolling [the public official’s] virtues and rebutting his critics,” and promoting “a particular point of view regardless of what her investigations may reveal.”¹⁹⁰ The court concluded that Jones is entitled to little or no protection.¹⁹¹ The court’s hypothetical suggests that even if Smith and Jones engaged in identical research techniques and produced identical books, Jones would receive less protection merely due to the source of her paycheck or her mindset while writing the book. The court provided no explanation why a person’s employer, mindset, or professional associations should be relevant to determining the applicability or strength of the journalists’ privilege, which was designed to safeguard the free flow of information from sources to news gatherers to the public.

The implication of the hypothetical is not encouraging for journalists outside of the institutional media. The court seemed to conclude that Berlinger was a Jones rather than a Smith, when in fact there was no evidence at all that Berlinger was hired to advocate a particular point of view or that he was subject to the editorial control of Donziger or others.¹⁹² If the Second Circuit’s test was designed to weaken or eliminate the privilege for filmmakers who were commissioned by subjects to present a biased film and who ceded editorial control to those subjects, then the court was fashioning a solution to a problem that, in Berlinger’s case, did not exist.¹⁹³

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² I submit that the Jones-type character is capable of producing an objective work of journalism even if she has a particular agenda in mind during her investigation. At the very least, the hypothetical should recognize a third character, representing a middle ground. Such a character can set out to create a film or article at the suggestion of a subject and incorporate the subject’s ideas without sacrificing editorial objectivity.

¹⁹³ The court’s independence requirement seems tailored to much more baldly partisan filmmaking than that practiced by Berlinger. Perhaps in writing the opinion, Judge Leval was more concerned about political films such as *Hillary: The Movie*, which was the subject of *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), or—although it would not be created until the 2012 presidential Republican primary—*When Mitt Romney Came to Town*, a 28-minute “documentary-style attack film” made by a “Republican operative” and broadcast in South Carolina using funds from a “[Newt] Gingrich super PAC.” See David Carr, *Hollywood Techniques at Play in Politics*, N.Y. TIMES, Jan. 16, 2012, at B1. Focusing more explicitly on the funding sources for

Furthermore, the court placed the burden of proving independence on the person claiming the privilege.¹⁹⁴ If Berlinger was unable to pass the independence test, it is unclear how many other documentarians would be able to meet this burden. The Second Circuit's decision implies that complete financial independence,¹⁹⁵ signed releases by subjects waiving rights to editorial control,¹⁹⁶ and declarations that the filmmaker rejected editorial suggestions by the subject are all insufficient to prove independence.¹⁹⁷ Likewise, independence cannot be inferred by the inclusion of material that shows the subject in an unfavorable light.¹⁹⁸ Presumably, a documentary filmmaker who develops an idea for a film without any suggestion from her subjects, and who denies those subjects the opportunity to review or comment on the film prior to release, would pass the *Berlinger* test.¹⁹⁹ But denying the privilege to filmmakers on the basis of where an idea originated or upon whose final cut advice the filmmaker accepts uncouples the test from the core purpose that the privilege was designed to protect—the unfettered flow of newsworthy information to the public.

Other courts have declined to probe into an individual's motivation for gathering information beyond what *von Bulow* requires. These courts recognize that assessing the origins and motivations of a journalistic work is perilous, as is distinguishing between scrupulous journalism and advocacy. For example, one California appellate court

films, however, might be a better, if imperfect, way to distinguish paid propaganda from films like *Crude*.

¹⁹⁴ *Berlinger*, 629 F.3d at 309.

¹⁹⁵ There was never any assertion that Donziger or the other plaintiffs' lawyers bankrolled Berlinger's film.

¹⁹⁶ See *In re Application of Chevron Corp.*, 709 F. Supp. 2d. 283, 294-95 (S.D.N.Y. 2010) (describing the release forms Berlinger had his subjects sign).

¹⁹⁷ See Declaration of Joseph A. Berlinger, *supra* note 116, ¶ 33 (testifying that Berlinger rejected all but one editorial suggestion made by the plaintiffs' lawyers).

¹⁹⁸ See *id.* ¶ 32 (arguing that including scenes depicting Donziger's "questionable conduct" is evidence of Berlinger's commitment "to creating an unbiased" portrait "of the people and events surrounding the Lago Argio Litigation"); see also *CRUDE*, *supra* note 2 (depicting questionable interactions between Donziger and a judge and other government officials); *supra* notes 117-18 and accompanying text.

¹⁹⁹ *Berlinger's* independence test might even disqualify institutionalized journalists. A journalist using leaked information from a confidential source might be said to lack independence if the journalist knows that the publication of such information will serve the source's personal or political goals. A reporter for Fox News, for instance, also might be denied the privilege if she fashions a piece to serve the objectives of a conservative politician featured in a television report. The court did not define objectivity for these purposes, nor did it explain how to characterize the interests of subjects and journalists.

stated as much in a case about website operators who posted information about forthcoming Apple products:

We decline the implicit invitation to embroil ourselves in questions of what constitutes “legitimate journalis[m].” The shield law is intended to protect the gathering and dissemination of *news*, and that is what petitioners did here. We can think of no workable test or principle that would distinguish “legitimate” from “illegitimate” news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace.²⁰⁰

C. *Overbroad Orders and Weakening the Relevance Requirement*

Perhaps just as critical for documentary filmmakers, the Second Circuit failed to correct the flaws in the district court’s reasoning and left intact assertions and findings that may lead future courts astray when considering outtakes. By treating outtakes differently from other evidence, the district court misapplied the *Gonzales* test and thereby weakened the journalists’ privilege for documentary filmmakers. The Second Circuit made this misstep in spite of the fact that the district court assumed that the qualified privilege applied.

First, the order to turn over all six-hundred hours of outtakes was overbroad on its face. The district court found that “[a]ny interaction” between the lawyers and experts, implicitly including interactions with members of the judiciary or other government agents, “would be relevant.”²⁰¹ But the court did not limit the subpoena to footage depicting interactions between the lawyers and relevant officials, nor did it limit the subpoena to footage containing the lawyers whose behavior Chevron sought to discredit.²⁰² Chevron made no showing and the court provided no explanation in ruling that footage of other individuals (for example, members of the Cofán nation) would be “likely relevant” to proving anything regarding the conduct of the plaintiffs’ lawyers.²⁰³ Thus, the district court’s order lowered the relevancy standard under *Gonzales*.

²⁰⁰ O’Grady v. Superior Court, 44 Cal. Rptr. 3d 72, 97 (Ct. App. 2006) (alteration in original).

²⁰¹ *In re Chevron*, 709 F. Supp. 2d at 297.

²⁰² *See id.* at 299 (ordering that Berlinger turn over “the raw footage” of *Crude*).

²⁰³ *See supra* text accompanying notes 115-23 (tracing the district court’s application of the “likely relevant” standard to scenes in *Crude*).

In a minor victory for Berlinger, the Second Circuit temporarily narrowed the order by limiting discovery to footage that depicted certain key individuals.²⁰⁴ Because the Second Circuit did not limit its order to footage of the interactions of the lawyers with the experts or other officials, or to footage of those individuals describing or strategizing about their interactions, the order still netted about eighty-five percent of Berlinger's footage, approximately five-hundred hours.²⁰⁵ The Second Circuit, transforming *Gonzales*, sanctioned the use of a lower standard of relevance for outtakes, because the order captured *any* footage of *any* of the listed individuals, including footage with no possible relevance to the issue of improper conduct on the part of the plaintiffs' lawyers.²⁰⁶ For instance, any footage of Donziger coaching a member of the Cofán nation in preparation for a press conference was discoverable under the Second Circuit's order. Acknowledging that its order would compel discovery of irrelevant material, the Second Circuit turned a *Gonzales* mandate into an aspiration: "While in general it is *desirable* for a district court to tailor a production order to material likely to be relevant, the district court *lacked any reliable means of doing so*."²⁰⁷ In other words, because Chevron could not articulate the specific behavior of which they sought evidence, they were rewarded with access to all of the footage.²⁰⁸ This reasoning severely lowered, if not completely obliterated, the bar for relevance under

²⁰⁴ See *Chevron Corp. v. Berlinger*, Nos. 10-1918, 10-1966 (2d Cir. July 15, 2010) (order) (narrowing the required disclosure to footage involving counsel, experts, or government officials).

²⁰⁵ Telephone Interview with Joseph Berlinger, Documentary Filmmaker (Nov. 12, 2010).

²⁰⁶ The Second Circuit claimed that the *Gonzales* test did not apply to Berlinger. See *Chevron Corp. v. Berlinger*, 629 F.3d 297, 309 (2d Cir. 2011) (distinguishing *Gonzales* on the ground that independence was not an issue in that case). But by affirming the district court's opinion "in full," *id.* at 311, the court arguably validated the district court's analysis of the test. It is unclear what precedential effect *Chevron v. Berlinger* will have on *Gonzales*.

²⁰⁷ *Id.* at 310 (emphasis added).

²⁰⁸ The Second Circuit order reflected a lack of understanding about the technology of film outtakes too. And in reality the scope of the Second Circuit's order was not even as loosely tailored as it seemed. Berlinger had just two-and-a-half weeks to turn over the footage, not even enough time to review the six-hundred hours of footage to pull out the relevant five-hundred hours. Telephone Interview with Joseph Berlinger, *supra* note 205. As a result, Berlinger "threw in the towel" and turned over more footage than necessary, including irrelevant footage, in order to comply with the deadline set in the order. *Id.* A more narrowly tailored order likely would have required even more time to comply. As a policy matter, the time-consuming nature of reviewing and duplicating footage should be taken into account when fashioning discovery order deadlines.

Gonzales and created an incentive for parties to phrase discovery requests broadly.²⁰⁹ *Gonzales* itself warned that litigants should not be allowed “to sift through press files in search of information supporting their claims,” because such disclosure “would burden the press with heavy costs of subpoena compliance,” impair its ability to perform its duties, and bestow upon it the appearance of being “an investigative arm of the judicial system.”²¹⁰ At best, the scenes in the final cut of *Crude* indicate the *possible* relevance of outtakes, a showing that would have been insufficient to compel discovery in the past.

Next, the district court ruled that Chevron had met its burden to show that the evidence in the outtakes was not available from other sources because Berlinger had been granted “almost unprecedented access” to the plaintiffs’ attorneys and “[t]he raw footage he compiled would be ‘unimpeachably objective’ evidence of any misconduct on the part of the plaintiffs’ counsel, expert witnesses, or the [Govern-

²⁰⁹ In all other previous cases, outtakes were much more clearly relevant to known events or material already in the record. For instance, in *United States v. Cutler*, a criminal case, outtakes of an interview with a lawyer were deemed directly relevant because the underlying suit concerned whether the lawyer violated an order not to discuss certain topics with the media; so the process of filming was potentially the crime itself. 6 F.3d 67, 73-74 (2d Cir. 1993). In *Gonzales v. NBC*, petitioners sought footage to contextualize an event known to have taken place—the traffic stop of the NBC reporter—as evidence of a pattern of behavior by the defendant police officer. 194 F.3d 29, 30-31, 36-37 (2d Cir. 1999).

Even the First Circuit case of *United States v. LaRouche Campaign*, which granted perhaps the most speculative discovery of outtakes of any federal court, was directly relevant to testimony already given in court. 841 F.2d 1176, 1179 (1st Cir. 1988). This appeal arose out of a “pretrial ruling enforcing a subpoena of a third-party witness in connection with a pending criminal prosecution” of Lyndon LaRouche, a presidential candidate in 1984. *Id.* at 1177. The district court ordered NBC to submit outtakes of an interview with Forrest Lee Fick, a consultant to the LaRouche campaign. *Id.* The interview allegedly included statements that contradicted testimony Fick gave in the trial of Roy Frankhauser, another consultant to the campaign. *Id.* Frankhauser was convicted of obstruction of justice relating to his efforts to prevent a grand jury from gathering evidence on mail and wire fraud counts. *Id.* On appeal, the First Circuit held that outtakes from a 100-minute television interview with Fick, a key witness in LaRouche’s pending criminal case, of which only one minute aired, “likely covered a wide range of subject matter” and might show bias or reveal statements inconsistent with his previous trial testimony. *Id.* at 1177, 1179-80. Chevron, by contrast, was not looking to establish a general practice or pattern by the lawyers, nor to impeach testimony already in the record of a companion case, but rather was looking for evidence of specific improper conduct uncorroborated by other evidence. This fact is particularly confounding because of the ample evidence that Chevron obtained through other § 1782 motions alleging misconduct by the lawyers. See *infra* notes 214-15 and accompanying text.

²¹⁰ *Gonzales*, 194 F.3d at 35.

ment of Ecuador].”²¹¹ While the district court’s description of Berlinger’s access was accurate, such access alone does not indicate that no other evidence of wrongdoing was available.²¹² The Second Circuit explicitly made this observation in 1996: “[I]t cannot be said that pertinent material is not obtainable elsewhere just because it is included in some out-takes.”²¹³

Chevron’s § 1782 actions in other jurisdictions make the unavailability claim even less plausible. Although Berlinger did not raise and the district court did not consider these other motions, Chevron brought § 1782 actions in more than a dozen U.S. jurisdictions to obtain evidence of misconduct by plaintiffs’ lawyers, and each motion yielded at least some discovery.²¹⁴ Chevron’s efforts, beginning in 2009, uncovered thousands of documents that would establish a prima facie case that Donziger and others associated with the plaintiffs “ghostwrote” the Lago Agrio damages report.²¹⁵ Had Chevron adduced some of this independent evidence suggesting specific behavior by the plaintiffs’ attorneys during Berlinger’s filming, the district court could have soundly concluded that the footage was “likely relevant” to Chevron’s defense, but it also might have concluded that evidence of the lawyers’ misconduct was available from these other sources. In light of this evidence, the district court appears to have guessed correctly that the outtakes contained evidence of misconduct. But, by allowing Chevron to subpoena Berlinger’s footage without having to first produce any of the evidence, the court baited the hooks for future fishing expeditions the likes of which courts have decried.²¹⁶

²¹¹ *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 298 (S.D.N.Y. 2010).

²¹² For instance, the court ignored Berlinger’s claim that Chevron’s attorneys often had their own cameras capturing the same events witnessed by Berlinger and his crew—a potential alternate source of evidence. *Id.*

²¹³ *Krase v. Graco Children Prods., Inc.* (*In re* Application to Quash Subpoenas to NBC), 79 F.3d 346, 353 (2d Cir. 1996).

²¹⁴ *See* *Chevron Corp. v. Donziger*, 783 F. Supp. 2d 713, 717 (S.D.N.Y. 2011) (referring to Chevron’s § 1782 proceedings throughout the country).

²¹⁵ *In re* Application of Chevron Corp., Nos. 10-0208, 10-0209, 2010 WL 5173279, at *9 (E.D. Pa. Dec. 20, 2010), *rev’d on other grounds*, 650 F.3d 276 (3d Cir. 2011); *see also* Roger Parloff, *Evidence of Fraud Mounts in Ecuadorian Suit Against Chevron*, CNN MONEY (Sept. 13, 2010, 10:43 AM), http://money.cnn.com/2010/09/13/news/international/chevron_ecuador_litigation.fortune/index.htm (discussing the breadth of documents available to Chevron and testimony on the issue of misconduct by the lawyers).

²¹⁶ *See, e.g., United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc.*, 600 F. Supp. 667, 669, 671 (S.D.N.Y. 1985) (suggesting that “such a request to compel disclosure of media files for this sort of fishing expedition should not lightly be granted” and that a motion “at most based on a hypothesis or ‘hunch,’ lacking a logical basis” is “insufficient” to show relevance).

Chevron's actual showing in this case should have failed either the "likely relevant" prong or the unavailability prong of the *Gonzales* test.²¹⁷

What remains of the *Gonzales* test, then, is one basic inquiry: whether the outtakes are "likely relevant" to the proceeding. In the realm of documentary filmmaking, the court effectively abandoned any meaningful inquiry into alternate sources of evidence prior to compelling discovery of journalistic work product and also lowered the standard for relevance by granting such a broad order. Protection for nonconfidential information, at least for documentary filmmakers, has been dealt a serious blow by the *Berlinger* cases.

D. *Impeachable Outtakes*

The district court opinion further reveals a lack of conceptual clarity about the nature of outtakes which, if uncorrected, could lead future courts to treat outtakes differently from other types of evidence without adequate justification. Using language that posits outtakes as "unimpeachably objective" encourages judges and jurors to place undeserved trust in photographic evidence, which will lead to its underprotection. Courts that embrace this exceptionalism of outtakes almost always compel discovery.²¹⁸ But if courts better understood the filmmaking process and the influence that the act of filming has on subjects and conducted a more searching analysis of what outtakes do or do not contain, they would conclude that outtakes should be treated with as critical an eye as any other kind of evidence. Although it is tempting to view outtakes as an unbiased record of events, outtakes are in fact far more subjective and incomplete than courts recognize.

The district court's language in the *Berlinger* case occasionally failed to distinguish the physical film, videotape, or digital file (the "outtakes") from the information contained within the outtakes. The district court framed one issue as "whether there is sufficient ground to

²¹⁷ See *Gonzales v. NBC*, 194 F.3d 29, 36 (2d Cir. 1999).

²¹⁸ See Tuley, *supra* note 83, at 1825-32 (arguing that this view of outtakes leads to less stringent applications of discovery standards and makes it more likely that outtakes will receive different treatment as compared to other evidence); see also *United States v. LaRouche Campaign*, 841 F.2d 1176, 1180 (1st Cir. 1988) (finding that a subpoena for outtakes was appropriate, in part because "[n]o other source (by definition) [was] available"); *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980) (describing outtakes as "[b]y their very nature . . . not obtainable from any other source" because "[t]hey are unique bits of evidence that are frozen at a particular place and time"); *United States v. Sanusi*, 813 F. Supp. 149, 159-60 (E.D.N.Y. 1992) (describing outtakes as demonstrating "with extraordinary clarity" behavior by government agents).

believe that the *footage* petitioners seek would not reasonably be obtainable elsewhere,²¹⁹ while the proper inquiry should have been whether the *information contained within the outtakes* was obtainable elsewhere. Even when the district court properly distinguished outtakes from their content, the court conflated the outtakes with the underlying allegations that petitioners sought to prove: “Petitioners cannot reasonably be expected to identify with particularity the *outtakes* that they seek where knowledge of *their content* lies exclusively with Berlinger.”²²⁰ The court’s statement here seems to suggest that Chevron could not articulate what conduct it sought to prove without knowing what the outtakes depicted. This confusion—which posits outtakes as unique evidence either inseparable from their content or from the underlying allegations of wrongdoing—leaves a textual trail that could lead future courts to apply the *Gonzales* test improperly and thus carelessly underprotect outtakes.

To be sure, film and video footage enjoys a nexus to reality that distinguishes them from other kinds of evidence and “differing treatment based on the intrinsic nature of the medium is not necessarily offensive.”²²¹ But the *way* the Second Circuit has distinguished outtakes from other kinds of evidence—describing footage as “unimpeachably objective evidence”²²²—represents a simplistic and problematic view of the video medium and encourages courts to hold outtakes to a different standard than other kinds of evidence. This unquestioned belief in the objectivity of video evidence may lead judges and jurors to erroneous conclusions.

While it is tempting to view photographs and video as objective evidence—indeed, photographic records do document exactly what was in front of the camera at the time of recording—it is nonetheless intuitive to treat outtake evidence critically, rather than as “unimpeachably objective.” One common criticism of observational documentary filmmaking—of which Berlinger is, to a degree, a practitioner—is that the premise that filmmakers can observe what is being recorded without influencing the events and the subjects of the camera’s gaze is a fallacy. This observational impact should cause us to question the very

²¹⁹ *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 298 (S.D.N.Y. 2010) (emphasis added).

²²⁰ *Id.* at 297 (emphasis added).

²²¹ Tuley, *supra* note 83, at 1833.

²²² *Gonzales* 194 F.3d at 36.

truth of what the films purport to capture.²²³ In 1985, the Southern District of New York warned that the evidentiary value of statements depends on the context in which they are made:

[H]abitudes of saloons and guests at talk shows are usually not placed under oath, and in both cases temptations are great for exaggeration and for the speaker placing himself in the most favorable light. The resulting information in each case is likely to be of little or no evidentiary value in court.²²⁴

Courts should treat documentary footage—particularly outtakes—with the same skepticism. During the production of any documentary, filmmakers inevitably will find a subject altering his behavior for the benefit of the camera,²²⁵ perhaps making contrived statements to appear how he wishes to be viewed or self-consciously attempting to portray himself in the most favorable light. It is the job of the filmmaker, during the editing process, to recognize which moments seem genuine and minimize the use of those that seem contrived for the camera in the final film.²²⁶ If the judgment of the filmmaker is to be trusted, there may be more reason to doubt the authenticity of statements and behavior in outtakes than those in the final cut of the film.²²⁷

Another widely accepted truism about documentary filmmaking is that the editing process introduces manipulation and bias in the film's

²²³ See, e.g., WILLIAM ROTHMAN, *Alfred Guzzetti's Family Portrait Sitzings* ("We cannot take for granted the authenticity of what is in the frame, because our means of access to it may be deeply implicated in its appearance."), in *THE "I" OF THE CAMERA: ESSAYS IN FILM CRITICISM, HISTORY, AND AESTHETICS* 304, 305 (2d ed. 2004).

²²⁴ *United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc.*, 600 F. Supp. 667, 671 (S.D.N.Y. 1985).

²²⁵ See BARRY HAMPE, *MAKING DOCUMENTARY FILMS AND REALITY VIDEOS* 41-42 (1997) (observing that since "[w]e expect people to act differently in different situations . . . it is not surprising if people alter their behavior in front of a documentary crew and camera," but because "[m]ost people just aren't very good actors[,] . . . if they start out playing a role, they'll soon fall back on their normal pattern of behavior" (emphasis omitted)).

²²⁶ See, e.g., *id.* at 296 (recommending that filmmakers discard footage "in which someone was mugging at the camera" as well as other footage that implies something untrue or unfair); Interview by John Ellis with Roger Graef, *supra* note 168 (discussing the practice of stopping filming or editing out moments when subjects directly address or "mug" for the camera).

²²⁷ Filmmakers may choose to discard footage for any number of reasons, including if a subject is acting for the benefit of the camera, if the footage gives the wrong impression without proper context, or if the outtakes needlessly confuse the simplified narrative that the filmmaker constructs while editing hundreds of hours of footage down to a final cut. Filmmakers who hold themselves to certain journalistic and filmmaking standards of professional behavior and ethics, by behaving in accordance with documentary norms, stand to be harmed the most by the *Berlinger* rulings.

presentation of reality.²²⁸ But the same could be said of the mental “editing” process that occurs when the filmmaker initially chooses when, where, and what to record. Just as a film presents only a portion of the captured footage, outtakes capture only a portion of real events—the portion the camera recorded—and courts must be careful not to assume too much about what has and has not been recorded. The real-time nature of documentary film production ensures that filmmakers will miss capturing some key moments or statements. Outtakes may include a statement without capturing the subject’s caveat about what he intended to say or a damaging assertion without the subject’s later recantation. Outtakes may not fully represent the context of certain statements, thus failing to alert uncritical viewers that, for example, a statement was made in jest. The very phrase “unimpeachably objective evidence” discourages viewers from thinking critically about what outtakes do and do not show and invites a lower level of scrutiny than is applied to other testimonial evidence. Filmmakers should have the opportunity to raise these issues, and judges should be open to the idea that outtakes are less reliable than they may initially appear.

Professor Jessica Silbey has argued forcefully that photographs and other visual documentary evidence should be subject to the critical analysis applied to all other evidence.²²⁹ Drawing from film theory and semiotics,²³⁰ Silbey and others generally conclude that the audience “provide[s] the photograph’s meaning; its significance does not originate from the photograph’s referentiality but from what we currently use it for in our world.”²³¹ Those who recognize the limitations of photographic evidence do not claim that photographs are inherently unreliable, but they do acknowledge that photographs and video evidence can “attract false beliefs” and “make us think we know more

²²⁸ See, e.g., Barry Keith Grant, *Truth or Dare: Theoretical and Ethical Considerations*, FILM REFERENCE, <http://www.filmreference.com/encyclopedia/Criticism-Ideology/Documentary-TRUTH-OR-DARE-THEORETICAL-AND-ETHICAL-CONSIDERATIONS.html> (last visited Dec. 15, 2011) (“[T]he nature of the film medium ensures that the hand of the maker must always work over the raw material on the editing table.”).

²²⁹ See Silbey, *Evidence Verité*, *supra* note 83, at 1297-98 (suggesting changes aimed at “minimizing the potential for unconscious or less-than-deliberative responses to . . . films”); see also Silbey, *Judges as Film Critics*, *supra* note 83, at 519 (criticizing judges for describing film “as if it were an unimpeachable eyewitness”).

²³⁰ See generally Silbey, *Evidence Verité*, *supra* note 83, at 1262-72, 1298 (summarizing the intellectual contributions of Roland Barthes, Stanley Fish, William Mitchell, Errol Morris, Lennart Nilsson, Susan Sontag, John Tagg, and others on the questions of what photographs do, say, and “want”).

²³¹ *Id.* at 1296.

than we really know.”²³² Errol Morris, a noted documentary filmmaker who has written essays on this topic for the *New York Times*, argues that “[p]hotographic evidence—like all evidence—needs to be seen in context. It needs to be evaluated. If seeing itself is belief-laden, then there is no seeing independent of believing, and the ‘truism’ has to be reversed. Believing is seeing and not the other way around.”²³³

Treating outtakes as a unique class of evidence tends to favor disclosure because judges will instinctively want to admit evidence that they believe is conclusive as to the issue at hand. But in reality, outtakes are less objective than many judges believe. If journalistic work product is worth protecting in order to maintain a vigorous and independent press, then it should be worth protecting for filmmakers and other journalists alike. Cavalier enforcement of subpoenas for outtakes jeopardizes society’s important goal of maintaining a free press.

IV. CONSEQUENCES FOR FILMMAKERS

What is the significance of a weakened privilege for outtakes? Berlinger and other interested parties argued to the Second Circuit that upholding the district court’s order would have a chilling effect on Berlinger’s ability to find subjects willing to appear in documentaries.²³⁴ Concern about a chilling effect impeding the free flow of information to the public has been part of the conversation about the journalists’ privilege from its inception, and courts continue to raise and debate this issue in privilege cases.²³⁵ Unsurprisingly, filmmakers

²³² Errol Morris, *Will the Real Hooded Man Please Stand Up*, N.Y. TIMES OPINIONATOR BLOG (Aug. 15, 2007, 6:13 PM), <http://opinionator.blogs.nytimes.com/2007/08/15/will-the-real-hooded-man-please-stand-up>. See generally ERROL MORRIS, BELIEVING IS SEEING: OBSERVATIONS ON THE MYSTERIES OF PHOTOGRAPHY 75-95 (2011) (revisiting and expanding on the questions explored in his articles).

²³³ Morris, *supra* note 232; see also HAMPE, *supra* note 225, at 30 (responding to the claim that “the camera doesn’t lie” as “nonsense” and noting that “only the mind of the viewer, making inferences from these shadows and color patterns, . . . gives [footage] meaning”).

²³⁴ See Brief and Special Appendix for Respondents-Appellants Joseph A. Berlinger et al. at 22-23, 35, *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011) (Nos. 10-1918, 10-1966) (arguing that requiring Berlinger to produce outtakes would have “a chilling effect on his ability—and the ability of other journalists—to develop relationships with sources and to make documentaries reporting on important and newsworthy topics”); see also Brief of Int’l Documentary Ass’n et al. as Amici Curiae in Support of Appellants at 14-17, *Berlinger*, 629 F.3d 297 (Nos. 10-1918, 10-1966) (“If subjects fear that their outtakes may be taken out of context and used against them by their adversaries in litigation, they will be less willing to participate.”).

²³⁵ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972) (discussing the concern that “the flow of news will be diminished by compelling reporters” to testify before

and journalists have also voiced this concern in reaction to the *Berlinger* litigation.²³⁶

Some courts and commentators are skeptical of the chilling effect.²³⁷ Indeed, one scholar, Randall Eliason, argues that because journalism flourished for many years prior to the invention of the journalists' privilege, a privilege is not necessary to safeguard the free flow of information.²³⁸ Eliason maintains that because sources who disclose sensitive information face many potential risks, a chilling effect could only be present when a source, who is otherwise willing to accept those risks, is deterred exclusively by the possibility of his or her in-

grand juries); *Lee v. Dep't of Justice*, 428 F.3d 299, 301-02 (D.C. Cir. 2005) (Tatel, J., dissenting from the denial of rehearing en banc) (arguing that the private interest of the party seeking disclosure "pales in comparison to the public's interest in avoiding the chilling of disclosures" that can result when journalists are forced to disclose confidential information); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) ("We discern a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled."); *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972) ("Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information The deterrence effect [of] such disclosure . . . threatens freedom of the press and the public's need to be informed."); *Ayala v. Ayers*, 668 F. Supp. 2d 1248, 1251 (S.D. Cal. 2009) (limiting a motion to compel discovery of a manuscript for an investigative book "in deference to the goals of protecting the free flow of information and protecting the privacy of editorial processes").

²³⁶ See Dave Itzkoff, *Michael Moore Says Judge's Ruling Could Have 'Chilling Effect' on Documentaries*, N.Y. TIMES ARTSBEAT BLOG (May 7, 2010, 9:06 AM), <http://www.artsbeat.blogs.nytimes.com/2010/05/07/michael-moore-says-judges-ruling-could-have-chilling-effect-on-documentaries> (quoting filmmaker Michael Moore as arguing that because of the ruling's chilling effect, "the next whistledblower at the next corporation is going to think twice about showing [a filmmaker] some documents if that information has to be turned over to the corporation that they're working for"); Amy Reiter, *Documentary Filmmakers Rally Around CRUDE Director*, SUNFILTERED (May 20, 2010), <http://www.sundancechannel.com/sunfiltered/2010/05/documentary-filmmakers-rally-around-crude-director> (quoting filmmakers who argue that the district court's ruling "surely will have a crippling effect on the work of investigative journalists everywhere").

²³⁷ See, e.g., *Wolf v. United States (In re Grand Jury Subpoena)*, 201 F. App'x 430, 433 (9th Cir. 2006) (noting that the "chilling effect" argument was ultimately rejected by the Supreme Court, which stated that the lack of a "constitutional protection for press informants" has "not been a serious obstacle to either the development or retention of confidential news sources by the press" (quoting *Branzburg*, 408 U.S. at 699)). See generally Jones, *supra* note 18, at 363-74 (presenting empirical data that fills the noted gap in the debate about whether the existence of a privilege makes any difference in journalistic practices).

²³⁸ See Randall D. Eliason, *Leakers, Bloggers and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 417-19 (2006) (distinguishing a potential journalist's privilege from those privileges already recognized by the law in that the former does not have the same "common law pedigree" and does not so closely tie to "notions of personal liberty and privacy").

formation being revealed during litigation.²³⁹ By contrast, another scholar, David Anderson, argues:

Where a reporter's privilege exists, it seems to work not so much by providing firm assurance that the law will not permit the particular confidence to be breached, but by leading sources to believe that reporters will refuse to disclose and that anyone seeking to force them to disclose will at least face some legal impediments.²⁴⁰

Even if a privilege is not absolute, it is one of the tools that journalists can use to persuade sources to speak. Berlinger, for one, has used his successful track record of quashing subpoenas for his outtakes to convince new potential film subjects to agree to participate.²⁴¹ He specifically discussed this history with Donziger when the two considered making *Crude*.²⁴² Now, Berlinger admits, "I can no longer look at a subject square in the eye and say if you give me access, I can protect the footage."²⁴³

In recent years, individuals and organizations have gathered some empirical support to prove the impact of subpoenas on the media and the newsgathering process. Studies by scholars and the Reporters Committee for Freedom of the Press, as well as congressional testimony, show that both the frequency of media subpoenas is increasing and the effect is detrimental to the newsgathering process.²⁴⁴ Evi-

²³⁹ See *id.* at 422-23 (arguing that such a possibility is so "remote" in regards to both the probability of disclosure and the time that would pass between initial publication and subsequent revelation of the source that it is unlikely to have a deterrent effect). The risks a source in a leak case can face include: the journalist deliberately or inadvertently not honoring the promise of confidentiality; a source's employer discovering the source's identity through an internal investigation that may involve conducting interviews under oath; and a source's identity being uncovered to outside parties through e-mails or telephone records other than those possessed by the journalist. *Id.* at 423-25.

²⁴⁰ Anderson, *supra* note 24, at 907. For a lengthy list of articles arguing both sides of the debate about the necessity of the journalists' privilege, see Jones, *supra* note 18, at 321 n.14, 324 nn.18 & 21.

²⁴¹ Telephone Interview with Joseph Berlinger, *supra* note 205. In 1994, Berlinger successfully fought two state court subpoenas to produce his *Paradise Lost* outtakes. Declaration of Joseph A. Berlinger, *supra* note 116, ¶¶ 23-24.

²⁴² Telephone Interview with Joseph Berlinger, *supra* note 205.

²⁴³ *Id.*

²⁴⁴ See generally Jones, *supra* note 18, at 353-98 (analyzing qualitative and quantitative survey data and concluding that a legal environment favoring media subpoenas imposes enough burdens on the media and the public to warrant a federal shield law). As of 2009, "[m]ore than a quarter of media organizations spen[t] more time and resources responding to subpoenas than they did five years [prior]." *Id.* at 354; see also RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 626-66 (2008) (analyzing empirical data

dence “suggests strongly that the recent wave of losing cases has led to something of a nationwide chill,” that organizations fear the financial and institutional burdens of challenging subpoenas, and that attorneys are now “more willing to subpoena the press.”²⁴⁵ Studies also show that, apart from the traditional chilling effect, the increase in subpoenas has resulted in self-censorship or changes to the newsgathering process that are potentially detrimental to the public.²⁴⁶ One survey found a “clear trend” that media organizations, which would otherwise prefer to archive material, now systematically destroy notes and outtakes soon after the publication or broadcast of stories.²⁴⁷ The consequence of such destruction is a lack of long-term records on people and topics, which makes it more difficult for journalists to make connections between current events and past research.²⁴⁸ With newsroom budgets declining and resources diverted to defend against an increasing number of subpoenas, media organizations have less financial and institutional resources to dedicate to investigative reporting.²⁴⁹ Subpoenas, then, appear to have a negative impact on the overall newsgathering process.²⁵⁰

from a 2007 survey about media subpoena requests). In the 1990s, the vast majority of media subpoenas, ninety-five to ninety-seven percent, were for nonconfidential information, according to four national studies by the Reporters Committee for Freedom of the Press. See Fargo, *supra* note 71, at 356.

²⁴⁵ Jones, *supra* note 18, at 393-94; see also Belinda Baldwin, *The Death of Objectivity?*, DOCUMENTARY, Fall 2010, at 34, 35 (“I was at my darkest hour,’ [Berlinger] recalls [after losing his privilege objection for the *Crude* outtakes], ‘questioning whether I had the financial and emotional resources to fight”).

²⁴⁶ See Jones, *supra* note 18, at 369 (noting that the specific examples included in survey responses, as well as the general tone of responses, “suggest that the issuance of subpoenas is negatively impacting relationships with potential confidential sources in a variety of ways, ranging from the overt to the subtle”).

²⁴⁷ See *id.* at 364-65 (noting that several media organizations reported rarely retaining journalist notes “for more than a few days after publication”); see also *infra* Section IV.C (discussing the consequences of destroying outtakes).

²⁴⁸ See Jones, *supra* note 18, at 365 (“The quick destruction of notes, footage and other materials might impede investigative journalism by making it more difficult for a newsroom to keep helpful long-term records on potentially ongoing stories or to report on a pattern of corruption or abuse that became evident only after earlier notes or footage were destroyed.”).

²⁴⁹ See *id.* at 330, 356, 361-63 (noting that rising legal pressures and the recent economic downturn have put an enormous strain on resource-strapped media organizations); see also Jones, *supra* note 244, at 648 (discussing how subpoenas and the risk of court-ordered disclosure can affect newsroom assignments); Chelsea Ide & Kanupriya Vashisht, *Today's Investigative Reporters Lack Resources*, AZCENTRAL (May 28, 2006, 3:30 AM), <http://www.azcentral.com/specials/special01/0528bolles-stateofreporting.html> (concluding, based on the results of an academic study about investigative reporting units in newspapers, that fewer investigative teams exist today than in the past due to

These empirical studies will not end the debates over the need for a privilege or how journalism would function without it. But Berlinger himself says that the litigation over his outtakes already has changed the way he plans to approach the filmmaking process in order to better protect his footage (and thus, his sources), to prevent himself from facing this kind of litigation again, and to convince subjects to participate in documentary projects.²⁵¹ Filmmakers who continue to tackle sensitive subjects will need to take steps to minimize the risks to themselves and their subjects. However, many of the methods filmmakers have considered employing are unlikely to provide the protection they seek.

the nontrivial resources they require, and pointing to “campaign[s] targeted at attacking the journalist who engages in investigative reporting” as an obstacle to institutional investigative teams (internal quotation marks omitted)). As traditional media dedicate fewer resources to long-form, in-depth investigative reporting, years-long documentary investigations by filmmakers like Berlinger become even more valuable to the public. Cf. Mary Walton, *Investigative Shortfall*, AM. JOURNALISM REV., Fall 2010, at 19 (noting in particular the decline of investigative teams at traditional news organizations).

²⁵⁰ This raises a corollary question: to what extent should courts worry about the chilling effect in the context of documentaries? The *Berlinger* litigation will only curb documentary production to the extent that filmmakers or their subjects are aware of the outcome of the case and are unwilling to participate in future documentary projects because of it. Lawyers, of course, are the individuals most likely to be aware of the case and its implications, and thus the chilling effect will arguably be most pronounced for filmmakers trying to make documentaries about the legal system. Berlinger has expressed doubt over whether he will ever make another movie about a lawsuit. See Dave Itzkoff, *Filmmakers Take Dual Roles in Quest for Truth*, N.Y. TIMES, Jan. 8, 2012, at AR9.

While the benefits of a free press in general are widely accepted, the importance of law-genre documentary films deserves reiteration. Compare *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (describing an “untrammelled press” as having shed “more light on the public and business affairs of the nation than any other instrumentality of publicity,” and noting that an “informed public opinion is the most potent of all restraints upon misgovernment”), with Regina Austin, *The Next “New Wave”: Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809, 817-21 (2006) (arguing that law-genre documentaries “provide critical perspectives on the law, particularly as it is actually lived with and experienced,” put legal disputes in context in a powerful way, and bring to life social and political realities that underlie legal disputes), and Charles Musser, *Film Truth, Documentary, and the Law: Justice at the Margins*, 30 U.S.F. L. REV. 963, 984 (1996) (praising law-genre documentaries for forcing the public to reflect on the American justice system).

²⁵¹ See Telephone Interview with Joseph Berlinger, *supra* note 205 (discussing anticipated changes in his filmmaking).

A. Confidentiality Options

One change Berlinger intends to make is to execute confidentiality agreements with his subjects, promising to keep confidential any material *not* released to the public in the final cut of the film or released on the DVD—in other words, promising to keep outtakes confidential.²⁵² Assuming Berlinger can prove editorial and financial independence, he believes that this evidence of a confidential relationship would qualify his footage for the higher judicial test of *Cutler* and other cases, which requires petitioners to prove that outtakes are “highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.”²⁵³

In effect, Berlinger’s proposal would require courts to recognize a new category of confidentiality. His subjects would not be considered traditional confidential sources because their identities would be revealed in any footage used in the released film. Nor would the outtake footage be considered confidential information in the traditional sense because, at the time of filming, the subjects did not communicate the information to Berlinger in confidence. Subjects would not know which statements or recorded moments would be included in the film, and thus, what would be subject to the agreement. What Berlinger proposes is a new kind of confidentiality, which I will refer to as a “confidentiality option” because it bears a similarity to a stock option: it is exercisable by the filmmaker, with confidentiality vesting when the footage is left out of the final cut.

Unfortunately, there is ample reason to doubt that courts would endorse such confidentiality options. In the *Berlinger* litigation, the district court noted that all of Berlinger’s subjects in *Crude* “appeared on camera for the very purpose of having their images and words shown publicly,” and because Berlinger retained absolute control over the editing of the film, the subjects “could not possibly have [had] any understanding of confidentiality.”²⁵⁴ Other courts agree that information must be conveyed and received in confidence to be protected.

²⁵² *Id.*; see also *Politics of Culture: Joe Berlinger’s ‘Crude’ vs Chevron*, KCRW (June 8, 2010), http://www.kcrw.com/etc/programs/pc/pc100608joe_berlingers_crude (interviewing Berlinger and discussing his plans to employ formal confidentiality agreements in his future documentary projects). Berlinger would also need to execute confidentiality agreements with everyone who has access to raw footage, including producers, editors, sound technicians, cameramen, and assistants, in order to prove a true confidential relationship existed.

²⁵³ *United States v. Cutler*, 6 F.3d 67, 71 (2d Cir. 1993).

²⁵⁴ *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 295 (S.D.N.Y. 2010).

In *United States v. Smith*, the Fifth Circuit found confidentiality to be “absent” because an interview subject who spoke on camera with television reporters “wanted [the interview] aired when he gave it” and had “no expectation . . . that any of the information he provided was to be kept in confidence.”²⁵⁵ California appellate courts, which recognize the tort of breach of confidence in the commercial context, define a confidential idea as one which “is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others.”²⁵⁶ The Southern District of New York, in *Cohen v. City of New York*, held that volunteers who videotaped arrests of protesters in connection with the Republican National Convention in 2004 expected to release footage depicting the arrests to defend protesters, and thus could not claim that unpublished outtakes were confidential.²⁵⁷ The court shut the door on the idea that filmmakers could disseminate some footage but expect to keep the rest confidential: “Though [the volunteers] may have anticipated that they could disclose [their footage] selectively, disseminating what would be helpful to their cause and retaining the balance, this assumption was legally unwarranted.”²⁵⁸

²⁵⁵ 135 F.3d 963, 970, 972 (5th Cir. 1998).

²⁵⁶ *Balboa Ins. Co. v. Trans Global Equities*, 267 Cal. Rptr. 787, 797 n.20 (Ct. App. 1990) (quoting *Faris v. Enberg*, 158 Cal. Rptr. 704, 712 (Ct. App. 1979)) (internal quotation marks omitted).

²⁵⁷ 255 F.R.D. 110, 114, 121 (S.D.N.Y. 2008).

²⁵⁸ *Id.* at 121. Nonjudicial sources also militate against recognizing this new kind of conditional confidentiality. Wigmore’s treatise on evidence describes four conditions that must be present before a confidential privilege exists: (1) the communications must originate in confidence, (2) confidentiality must be essential to the relationship between the parties, (3) the relationship must be one that the community believes ought to be fostered, and (4) the costs of disclosure must outweigh the benefits. 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2285, at 527 (John T. McNaughton ed., Little, Brown & Co. 1961); see also Fargo, *supra* note 71, at 361-62 (offering Wigmore’s view on confidentiality as an illustration of a “long legal history of distrust toward testimonial and evidentiary privileges in general”). Even if filmmakers using a confidentiality option could prove elements (3) and (4), they will not be able to argue that the communications “originate in confidence,” because the confidentiality expressly attaches only after the filmmaker decides the footage will not be used in the film.

Additionally, courts might choose to characterize confidentiality options as “contracts of silence” designed to suppress discovery of potential evidence, and therefore find the agreements void. See RESTATEMENT (FIRST) OF CONTRACTS § 554 (1932) (stating that contracts to suppress evidence are illegal and unenforceable); see also *Papago Tribal Util. Auth. v. Fed. Energy Regulatory Comm’n*, 723 F.2d 950, 954 (D.C. Cir. 1983) (stating that a contract suppressing evidence is void); 7 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 15:8, at 169 (Richard A. Lord ed., 4th ed. 2010) (“The better rule is that all bargains tending to stifle criminal prosecution,

In sum, then, it does not appear that use of confidentiality options would alter the outcome in future outtake cases: once a filmmaker's subjects freely give him the ability to use their statements or show their conduct, confidentiality is destroyed.

B. *Final Cut Approval*

Filmmakers will find it difficult to satisfy the Second Circuit's independence requirement while also qualifying for the heightened level of protection that accompanies confidentiality. Consider the practice of filmmakers granting final cut approval to subjects. On the one hand, giving subjects veto power over what footage is used strengthens a filmmaker's claim to a confidential relationship with the subject, because the filmmaker must keep all footage private until obtaining the subject's consent. At the same time, veto agreements would tend to show a filmmaker's lack of editorial independence, prohibiting the filmmaker from qualifying for the journalists' privilege in the first place.

Granting approval rights to subjects is an impractical, undesirable, and ethically questionable solution for most documentary filmmakers. The administrative burden of obtaining approval from every subject who appears in a film—or even from only the most important subjects—could be enormous, if not insurmountable. Subjects might withhold consent for any number of reasons, from disliking their physical appearance in a certain shot to rethinking the propriety of a statement they had made in front of the camera. Thus, granting approval rights could lead to censorship of the film by its own subjects,

whether by suppressing investigation of crime or by deterring citizens from their public duty of assisting in the detection or punishment of crime, are void as against public policy.”). For a detailed discussion of contracts of silence, see Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261 (1998). Garfield notes that while some contracts of silence are enforced in the commercial context, rarely are they upheld outside of the context of trade secrets. *Id.* at 304-05, 312-13. Garfield also recommends that courts decline to enforce contracts of silence when there is an overriding public interest in the dissemination of the suppressed speech. *Id.* at 314-15.

Finally, courts might dismiss confidentiality options simply as a formal ploy by filmmakers seeking to obtain more deference from the courts, rather than a substantive agreement that alters the filmmaker-subject relationship. *Cf.* *Branzburg v. Hayes*, 408 U.S. 665, 682 n.21 (1972) (“No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice.” (quoting WIGMORE *supra*, § 2286, at 528)); *Cohen*, 255 F.R.D. at 120 (“[T]he duty to provide evidence ‘has long been considered to be almost absolute.’” (quoting *Klay v. All Defendants*, 425 F.3d 977, 986 (11th Cir. 2005))).

rendering documentaries less reliable, less objective, and less valuable to the public.

Granting subjects approval rights might even block films from being broadcast and released or prevent filmmakers from pursuing their projects altogether. Filmmakers often must obtain “errors and omissions insurance” before showing or distributing their films, and this insurance requires filmmakers to secure signed releases from subjects ceding complete editorial control.²⁵⁹ Filmmakers and distributors typically require these releases in order to preempt legal disputes when a film is released or to ensure creative control over the final product.²⁶⁰

Because it is so difficult to meet the Second Circuit’s independence requirement and since granting approval rights to subjects is not a workable solution, independent filmmakers will find it nearly impossible to claim their footage is confidential and protected under the heightened *Cutler* standard. Instead, even if documentarians can demonstrate their editorial independence, the only protection they will receive is likely the weakened standard of *Gonzales*, under which outtakes are particularly vulnerable to discovery.

C. Destruction of Outtakes

To avoid disclosure in future litigation, print and television journalists now systematically destroy notes and outtakes after stories are published.²⁶¹ Documentarians, following the *Berlinger* decision, suggested that they, too, may destroy outtakes after their films are completed to avoid the expense and aggravation of responding to subpoenas and the potential legal harm that could befall their subjects.²⁶² But the destruction of footage carries significant costs for filmmakers, litigants, and the public, and a legal doctrine that encourages the wide-

²⁵⁹ See AUFDERHEIDE ET AL., *supra* note 162, at 10. Errors and omissions insurance indemnifies producers against claims such as libel, invasion of privacy, defamation, and copyright infringement. See Winnie Wong, *E&O to the Rescue!*, INT’L DOCUMENTARY ASS’N (Feb. 2006), <http://www.documentary.org/content/eo-rescue-0> (describing “E&O” insurance and how filmmakers can obtain it).

²⁶⁰ See Wong, *supra* note 259.

²⁶¹ See Jones, *supra* note 18, at 364-65 & nn.186-87 (reporting a “clear trend” in newsrooms of destroying “materials used in the newsgathering process” within days after publication and listing survey responses detailing different destruction policies).

²⁶² See Itzkoff, *supra* note 236 (quoting documentary filmmaker Michael Moore who claims that after *Berlinger* filmmakers might have to start getting rid of their extra footage to avoid subpoenas); Telephone Interview with Joseph Berlinger, *supra* note 205 (describing the destruction of outtakes as “sadly . . . prudent”); *Politics of Culture*, *supra* note 252 (suggesting in an interview that Berlinger will destroy outtakes).

spread destruction of unused footage does not offer countervailing benefits. At a minimum, subpoena rules should be crafted and enforced to legitimize the subpoena process in journalists' minds so as to discourage them from destroying footage to protect subjects.

Filmmakers and producers who destroy outtakes stand to lose a revenue source because outtakes can be licensed to future content producers.²⁶³ Some filmmakers also use their own outtake footage in later projects. Berlinger himself has directed three films about a murder trial in Arkansas—the *Paradise Lost* films.²⁶⁴ Each of the sequels contains footage that Berlinger shot during production of the first film but did not include in that film.²⁶⁵ The destruction of outtakes makes it more difficult to produce such longitudinal studies or new reports about people or events covered in the past.²⁶⁶

Documentary footage, including outtakes, is also immensely valuable to the public and historians.²⁶⁷ Testifying before a panel of the

²⁶³ See, e.g., Press Release, Getty Images, Getty Images Offers New Editorial Footage Collection with Sky News (May 20, 2010), available at http://company.gettyimages.com/article_display.cfm?article_id=221 (announcing that Getty's documentary footage archive of more than 50,000 hours is available for licensing and distribution); *Documentary*, SCREEN VENTURES, <http://www.screenventures.com/Documentary.htm> (last visited Dec. 15, 2011) (offering footage from various documentary projects for licensing); *Explore Our Archives*, MACNEIL/LEHRER PRODUCTIONS, <http://home.macneil-lehrer.com/explore-our-archives> (last visited Dec. 15, 2011) (offering stock documentary footage for licensing); HBO ARCHIVES, <http://www.hboarchives.com> (last visited Dec. 15, 2011) (making sports, entertainment, nature, and historical footage available for licensing). Use of outtake footage in later documentary films is common. See, e.g., NO DIRECTION HOME: BOB DYLAN (Spitfire Pictures 2005) (incorporating unreleased outtake footage of Bob Dylan shot by D.A. Pennebaker in the 1960s in Martin Scorsese's 2005 film about Dylan); *Bob Dylan: About the Film*, PBS (June 28, 2006), <http://www.pbs.org/wnet/americanmasters/episodes/bob-dylan/about-the-film/574> (noting the film's use of Pennebaker's outtakes).

²⁶⁴ See *PARADISE LOST: THE CHILD MURDERS AT ROBIN HOOD HILLS* (HBO 1996) (covering a triple-homicide trial); *PARADISE LOST 2: REVELATIONS* (HBO 2000) (following up on the trial and investigating new evidence and ambiguities); *PARADISE LOST 3: PURGATORY* (HBO 2012) (documenting the efforts to obtain a new trial and the defendants' subsequent release from prison after they entered *Alford* pleas, which allowed them to plead guilty while maintaining their innocence).

²⁶⁵ See Telephone Interview with Joseph Berlinger, *supra* note 205 (describing subsequent use of footage not used in the original film).

²⁶⁶ See Jones, *supra* note 18, at 365 (discussing how destruction of notes and footage "in the name of avoiding . . . legal battles" increases the difficulty of reporting ongoing stories or presenting corruption or abuse that is evident only after original footage and notes are destroyed).

²⁶⁷ See *Film Preservation Study: Washington, D.C. Public Hearing, February 1993*, LIBR. CONGRESS, <http://www.loc.gov/film/hrng93dc.html> (last visited Dec. 15, 2011) (including testimony before the National Film Preservation Board as to the historical and educational value of outtakes and efforts to preserve them).

National Film Preservation Board in 1993 about the state of American film preservation, distinguished documentary filmmaker Frederick Wiseman asserted that outtakes may be of particular interest in future centuries by those attempting “to reconstruct, know and understand the way we live now.”²⁶⁸ Some institutions preserve documentary outtakes specifically for their historical value. For example, the Schomburg Center for Research in Black Culture, part of the New York Public Library system, has preserved four million feet of unedited documentary footage.²⁶⁹ Marie Nesthus, the principal librarian of the Donnell Media Center of the New York Public Library, urged the Board to focus on preserving “[u]nreleased titles and raw footage” because, when viewed by future generations, the footage “will provide greater insights into the people and events of the past” and “will be that upon which future generations of documentary filmmakers will rely for their productions.”²⁷⁰

Destroying outtakes also might unintentionally and undesirably eliminate evidence that filmmakers actually want to disclose in court proceedings. Filmmakers often voluntarily turn over outtakes when they feel that discovery will not threaten vulnerable parties or breach an ethical duty.²⁷¹ In 2004, for instance, a murder suspect was exonerated when a lawyer found him in the background of outtakes for an episode of the HBO comedy series *Curb Your Enthusiasm* shot live at a baseball game at Dodger Stadium.²⁷² In another famous example, Academy Award-winning documentary filmmaker Errol Morris, director of *The Thin Blue Line*, which revealed a miscarriage of justice and ultimately contributed to the exoneration of a man on death row,

²⁶⁸ *Id.* (statement of Frederick Wiseman, Independent Filmmaker).

²⁶⁹ *Id.* (statement of Marie Nesthus, Principal Librarian, Donnell Media Center, New York Public Library).

²⁷⁰ *Id.*

²⁷¹ *See, e.g.*, Baldwin, *supra* note 245, at 34 (describing a case in which the filmmakers “were happy that [their] film could speak for” a subject killed after filming had ended so as to “give her a voice in the trial”); E-mail from Joey Allen, Vice President of Prod., Pangolin Pictures to author (Oct. 18, 2010, 3:18 PM) (on file with author) (describing Pangolin Pictures’ willing compliance with prosecution and defense subpoenas for outtakes from *Jacked*, a documentary series about the Newark Police Department’s auto-theft unit).

²⁷² *See* Jeffrey Toobin, *Face in the Crowd*, NEW YORKER, June 7, 2004, at 34, 34-36. Although the project was not conceived as a documentary, the footage shot at the baseball stadium was effectively documentary footage of the crowd.

handed over outtakes to the courts to prove the subject's innocence.²⁷³ These circumstances suggest another category of people—defendants and victims—that would be harmed by the destruction of outtakes.

What journalists and filmmakers object to 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.”²⁷⁴ The Reporters Committee for Freedom of the Press survey found that journalists most dislike subpoenas by “lazy” or “aggressive” attorneys seeking seemingly cumulative evidence, or “fishing expeditions” that “indiscriminately ask[] for large amounts of material” and require “a complete waste of manpower and materials” to ensure compliance.²⁷⁵ Berlinger himself has implied that he would not have appealed the district court's order if Chevron had not been granted access to his “entire files.”²⁷⁶

Outtakes offer value both to filmmakers and the public—as sources of revenue, building blocks of future projects, historical documentation, and evidence to be used in litigation—and the journalists' privilege should be constructed to protect journalistic work product well enough that reporters and filmmakers do not feel compelled to destroy outtakes preemptively on a widespread basis. This cannot be done unless courts require meaningful demonstrations of both relevancy and the unavailability of evidence from other sources before they grant subpoenas for outtakes.

D. *Alteration of Filmmaking Practices*

Along the lines of destroying outtakes, Berlinger acknowledges that he will be more careful in the future about what he records in the

²⁷³ See Musser, *supra* note 250, at 963, 976 (reporting that Morris provided the court with full transcripts of the interview outtakes to prove that Morris's editing of the footage for the film was not unfairly manipulative).

²⁷⁴ Jones, *supra* note 18, at 381 (quoting Vince Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 261 (1971)).

²⁷⁵ *Id.* at 381-83.

²⁷⁶ *Court Orders Documentary Filmmaker to Hand Ecuador Footage to Chevron*, DEMOCRACY NOW! (May 10, 2010), http://www.democracynow.org/2010/5/10/court_orders_documentary_filmmaker_to_hand (stating Berlinger's belief that the journalists' privilege should only be pierced for specific, relevant material, which was not what was done in the order).

first place.²⁷⁷ He will be more judicious in turning off the cameras when subjects are, for instance, making off-color jokes unlikely to be relevant to the film.²⁷⁸ Such an approach likely will come at little cost to Berlinger; perhaps he will miss recording some material that he otherwise would have wanted to capture. But the approach is unlikely to eliminate outtakes of all material that subjects and filmmakers, if they had their choice, would want to keep out of the hands of opposing parties. Part of the excitement and draw of documentary filmmaking is following stories that are yet unwritten, and filmmakers never know what will unfold in front of their cameras. So even if filmmakers are conservative with the number of hours they capture on tape, they will still amass material that they would want to protect.

Filmmakers also will need to have upfront discussions about the discoverability of the outtakes with subjects, particularly when the film concerns, or is likely to lead to, litigation. Lacking other legal protections, filmmakers have an ethical duty when embarking upon a project to be open with subjects about the possible legal consequences of amassing video documentation.²⁷⁹

Filmmakers may also choose to document more formally their reasons for accepting or rejecting subjects' suggestions to avoid appearing subservient to their subjects. Such evidence could help filmmakers meet the *Berlinger* independence test; however, courts may view the documentation as self-serving.²⁸⁰

In short, while filmmakers may be more judicious about filming or may destroy some footage upon release of their films, there are no simple ways for filmmakers to erect legal barriers around the footage they choose to keep. In the wake of the *Berlinger* decisions, outtakes are particularly vulnerable. While documentarians will still produce films on topics of importance to the public, litigants should feel emboldened by the new precedent, which misunderstands these filmmakers' work.

²⁷⁷ Telephone Interview with Joseph Berlinger, *supra* note 205; see also Itzkoff, *supra* note 250 (stating that Berlinger "now tells his crew members not to roll their cameras unless they're shooting something formally intended for a film").

²⁷⁸ Telephone Interview with Joseph Berlinger, *supra* note 205.

²⁷⁹ Cf. AUFDERHEIDE ET AL., *supra* note 162, at 6-8 (discussing the professional obligation by filmmakers to "do no harm" to their subjects).

²⁸⁰ See, e.g., *Chevron Corp. v. Berlinger*, 629 F.3d 297, 308 n.5 (2d Cir. 2011) (describing Berlinger's written account of his first meeting with Donziger as "self-serving").

CONCLUSION

Recent decisions in the Southern District of New York and the Second Circuit have revealed unfounded and potentially misleading assumptions about the nature of outtakes, documentary filmmaking, and journalism in general. Courts have acknowledged that noninstitutional journalists and filmmakers serve the valuable role of gathering and disseminating information to the public that the journalists' privilege is intended to protect. And yet in spite of this acknowledgement, these decisions are just the most recent in a line of cases that have dramatically weakened the privilege for those individuals. The media has responded to this gradual weakening of the journalists' privilege and the corresponding increase in subpoenas by destroying notes and other journalistic work product. If courts continue to allow widespread discovery of journalistic work product on speculative grounds, then the media will respond with even more draconian measures that destroy materials of historical, journalistic, and evidentiary importance.

Courts should instead require a meaningful showing of both relevance and unavailability of other evidentiary sources and should require narrowly tailored discovery requests, if only to legitimize the subpoena process in journalists' minds and prevent them from taking matters into their own hands. Courts should also abstain from describing outtakes as unique evidence that is "unimpeachably objective," which tends to lead to the underprotection of outtakes as compared to other kinds of journalistic work product. And courts should stop shaping doctrine that invites judges to distinguish between legitimate and illegitimate forms of journalism, a task that could restrict the court's flexibility as new forms of journalism emerge. A workable, flexible framework already exists: *von Bulow* defines who may invoke the privilege, and *Cutler* and *Gonzales* delineate how to adequately protect work product. Courts should enforce these limits.

There are steps the documentary film community should take to facilitate this transformation. Aside from the study of ethics by the Center for Social Media, there is no authoritative source of best practices or code of accepted professional conduct for documentarians. Organizations like the Center for Social Media and the International Documentary Association should harness their resources to produce reports that discuss common practices and ethical considerations and demonstrate the compatibility of these practices with editorial independence.