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A RE-EXAMINATION OF THE LIBERTY OF PRESS AND MEDIA SHIELD LAWS AFTER *KNIGHT- RIDDER BROADCASTING, INC. V. GREENBERG*

It has been fifteen years since the Supreme Court handed down the landmark decision in *Branzburg v. Hayes*,¹ refusing to establish a testimonial privilege for the press² under the first amendment to the United States Constitution.³ Yet, the press has not been without privilege.⁴ In the years since *Branzburg*, lower courts have wrestled with the language of Justice Powell's concurrence⁵ which suggested that a qualified constitutional privilege for the press might be upheld under certain circumstances,⁶ or have distinguished *Branzburg*, to find such a privilege.⁷ Moreover, for almost a century state legislatures have sought to protect the press and its confidential sources and information through the enactment of privilege statutes, commonly known as shield laws.⁸ Nevertheless, the wisdom of a testimonial privilege for the press remains a controversial issue.⁹

Recently, the New York Court of Appeals addressed the issue in a decision construing the New York State Shield Law.¹⁰ This article will explain, in broad terms, the propriety of the court of ap-

¹ 408 U.S. 665 (1972).

² See *Branzburg*, 408 U.S. at 690. For a discussion of the *Branzburg* case see *infra* notes 41-43 and accompanying text.

³ U.S. CONST. amend. I. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press" *Id.*

⁴ See *infra* notes 42, 69 and accompanying text.

⁵ *Branzburg*, 408 U.S. at 709-10.

⁶ See *id.* at 709. See *infra* note 42 and accompanying text.

⁷ See *infra* notes 42, 69 and accompanying text.

⁸ See *infra* note 44 and accompanying text.

⁹ See generally M. VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS (1979); C. WHALEN, YOUR RIGHT TO KNOW (1973); *Bills to Protect Newsmen from Compulsory Disclosure*, AM. ENTER. INST. (1971); *Newsmen's Privilege Legislation*, AM. ENTER. INST. (1973).

¹⁰ See *infra* note 14 and accompanying text.

Media Shield Laws

peals decision through a critical re-examination of both the qualified privilege enjoyed by the press under the first amendment, and the proper scope of state shield laws.

I. KNIGHT-RIDDER BROADCASTING, INC. V. GREENBERG

In 1970, New York amended its Civil Rights Law to include a shield law provision, Section 79-h.¹¹ Twice amended since enactment,¹² New York's Shield Law has been construed as affording

¹¹ N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1987). The New York Shield Law provides in pertinent part:

(a)(8) "News" shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

(b) Exemption of professional journalists and newscasters from contempt. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court, the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which he is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to him.

(c) Any information obtained in violation of the provisions of this section shall be inadmissible in any action or proceeding or hearing before any agency.

(d) No fine or imprisonment may be imposed against a person for any refusal to disclose information privileged by the provisions of this section.

(e) The privilege contained within this section shall apply to supervisory or employer third person or organization having authority over the person described in this section.

N.Y. CIV. RIGHTS LAW § 79-h(a)(8)-(e) (McKinney Supp. 1987).

¹² See N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976). The statute was amended in 1975 to include "nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers." *Id.* The 1981 amendment, *inter alia*, broadened the scope of professional journalists to whom the statute applied to include those involved in "the processing and researching of news intended for dissemination to the public," and to those who may be "regular employee[s] or . . . otherwise professionally affiliated . . ." *Id.* (McKinney Supp. 1987). Other significant provisions

the media an extremely broad protection.¹³ However, in *Knight-Ridder Broadcasting, Inc. v. Greenberg*,¹⁴ the New York Court of Appeals constrained the scope of the New York statute.¹⁵

In *Knight-Ridder*, an Albany television station was served with a grand jury subpoena *duces tecum*.¹⁶ The subpoena demanded out-takes and other materials in the station's possession relating to an interview conducted with a man who, subsequent to the interview, became a murder suspect in the investigation of his wife's death.¹⁷ The station refused to comply with the subpoena,¹⁸ claiming both shield law protection and exemption from disclosure under the first amendment.¹⁹ Both claims, however, were rejected.²⁰ In a four to three decision, the court of appeals settled the rule that New York's Shield Law could not be invoked to prevent the disclosure of information proffered to a newsgatherer unless it had been offered in confidence.²¹ The station had been unable to

of the amendment afforded protection to information whether it "is or is not highly relevant to a particular inquiry of government" and made immaterial whether the information was or "was not solicited by the journalist or newscaster . . ." *Id.* Finally, the 1981 amendment provided that information obtained in violation of the statute "be inadmissible in any action or proceeding" and that "no fine or imprisonment may be imposed . . . for any refusal to disclose information privileged" by the statute. *Id.*

¹³ See *Beach v. Shanley*, 62 N.Y.2d 241, 251, 465 N.E.2d 304, 310, 476 N.Y.S.2d 765, 771 (1984) (New York shield law affords journalists broad protection); see also *Oak Beach Inn v. Babylon Beacon*, 62 N.Y.2d 158, 165, 464 N.E.2d 967, 970, 476 N.Y.S.2d 269, 272 (1984) (amendments to New York's shield law have clarified and broadened the statute), *cert. denied*, 469 U.S. 1158 (1985); Note, *Beach v. Shanley: An Expansive Interpretation of New York's "Shield Law"*, 49 ALB. L. REV. 748, 779 (1985) (language of New York shield law suggests it should be broadly applied).

¹⁴ 70 N.Y.2d 151, 511 N.E.2d 1116, 518 N.Y.S.2d 595 (1987).

¹⁵ See *infra* note 21 and accompanying text.

¹⁶ See C. McCORMICK, *McCORMICK ON EVIDENCE* (E. Cleary 3d ed. 1984). The subpoena *duces tecum* is a writ, issued by a court, which demands that one in possession of documents or other physical evidence attend trial and bring such evidence as required by the subpoena. *Id.* § 3, at 5.

¹⁷ *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 70 N.Y.2d 151, 153-54, 511 N.E.2d 1116, 1117, 518 N.Y.S.2d 595, 596 (1987). A news reporter for WTEN-TV obtained a taped interview with Donald Bent in connection with his wife who had been missing for several days; only one minute of the entire interview became part of an actual newscast. *Id.* Mrs. Bent was eventually found dead in the trunk of an automobile. *Id.*

¹⁸ *Id.* at 154, 511 N.E.2d at 1117, 518 N.Y.S.2d at 596. WTEN-TV released only that one minute of the interview actually broadcast, a written introduction read from the studio, and a list of "supers" which had appeared during the newscast. *Id.*

¹⁹ *Id.*

²⁰ See *id.* at 153, 160, 511 N.E.2d at 1117, 1121, 518 N.Y.S.2d at 596, 600.

²¹ See *id.* at 153, 511 N.E.2d at 1117, 518 N.Y.S.2d at 596. The court held that: "The issue . . . is whether the Shield Law . . . extends its protection to nonconfidential sources or

Media Shield Laws

make such a showing.²² Additionally, the court was unpersuaded that the materials sought were protected under a qualified first amendment privilege for the press.²³

It is submitted that the court of appeals gave proper effect to the purpose of the New York Shield Law and wisely rejected the station's claim to a constitutional privilege under the first amendment. It is further submitted, however, that the opinions of both the majority and the dissent relied excessively upon statutory interpretation. It is suggested that the court should have employed a more balanced analysis rooted in constitutional and statutory policy considerations vis-a-vis the competing interests at stake.

II. THE FIRST AMENDMENT PRIVILEGE

A. Background

The key relationship at stake in the press privilege debate has been that of the newsman and his source or informant.²⁴ Histori-

information We hold that it does not." *Id.*

²² *Id.* at 154, 511 N.E.2d at 1117, 518 N.Y.S.2d at 596 (at the time of appeal it was unclear whether any portion of the interview had been conducted in confidence).

²³ *Id.* at 160, 511 N.E.2d at 1121, 518 N.Y.S.2d at 600. The court found that the materials sought were not protected by the first amendment since the interview contained "relevant information necessary to the Grand Jury investigation [which was] unavailable from other sources" *Id.*

Constitutionally, a newsman's privilege is especially problematic when it conflicts with the rights of criminal defendants to confront the witnesses against them. *See, e.g., In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978). In this much celebrated case, New York Times reporter Myron Farber refused to comply with a defendant's subpoena *duces tecum*. *Id.* at 263, 394 A.2d at 332. The court held that a defendant asserting his legitimate sixth amendment right created an obligation "at least as compelling as the duty to appear before a grand jury," and that the first amendment did not provide newsmen with a privilege to refuse to appear before a grand jury. *Id.* at 268-69, 394 A.2d at 334. The *Farber* court pointed up that the relevant section of the New Jersey Constitution was identical to the confrontation clause of the sixth amendment. *Id.* at 273-74, 394 A.2d at 337. *See also Lewis, Rights and Responsibilities of the Newsman*, in *RIGHTS AND RESPONSIBILITIES* 231, 238-39 (1980).

²⁴ *Cf. Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 397-98, 153 Cal. Rptr. 608, 613 (1979). Courts have protected the media's editorial processes as well, holding that the "statutory privilege . . . encompasses all information acquired by the newsman in the course of his professional activities . . ." *Id.* *See also In re Taylor*, 412 Pa. 32, 40, 193 A.2d 181, 184 (1963) ("The common and approved meaning or usage of the words 'source of information' includes documents . . ."). *But cf. Bartlett v. Superior Court*, 150 Ariz. 178, 184, 722 P.2d 346, 352 (Ariz. Ct. App. 1986) (video tape not protected); *Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 377-78 (Ky. 1984) (the statute "grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself." (quoting *Branzburg v. Pound*, 461 S.W.2d 345, 347 (Ky.

cally, privileges have been rooted in the belief that it is better to foster certain key relationships than to expedite the fact-finding process.²⁵ Yet the common law, with few exceptions,²⁶ has not conferred upon the press a testimonial privilege,²⁷ adhering to the settled rule "that the public . . . has a right to every man's evidence."²⁸

1971))).

²⁵ See C. McCORMICK, *supra* note 16, § 75, at 180. The two privileges established at common law were those of husband-wife and attorney-client. *Id.* The husband-wife privilege had as its foundation the general rule that spouses and other interested parties were disqualified from testifying for one another. *Id.* § 78, at 188. The movement for a marital privilege separate from the rule for disqualification did not actually exist until the nineteenth century; its premise being that to compel the disclosure of private communications between a husband and wife would be harmful to society. *Id.* at 189. It is generally held that the attorney-client privilege was born of the barrister's oath of honor as early as the time of Elizabeth. *Id.* § 87, at 204. Its rationale is that the ends of justice are best served when a client is able to make full and complete disclosure to his attorney. *Id.* at 204-05. Of those privileges enacted by statute the most common are clergy-penitent and physician-patient. *Id.* § 76.2, at 184. See generally W. RICHARDSON, RICHARDSON ON EVIDENCE § 410, at 403-04 (J. Prince 10th ed. 1973); 8 J. WIGMORE, EVIDENCE §§ 2290, 2232-33 (3d ed. 1940).

Dean Wigmore, in an effort to codify the criteria for cases in which the conferring of privileges should be granted, set forth the following four preconditions:

- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and
- (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. § 2285, at 531.

²⁶ See *Riley v. City of Chester*, 612 F.2d 708, 715-16 (3d Cir. 1979) (journalists have federal common law privilege against compulsory disclosure of sources absent a "demonstrated, specific need for evidence" (quoting *United States v. Nixon*, 418 U.S. 683 (1974))); *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975) (in federal question cases federal law is controlling on the issue of privileges).

²⁷ See *infra* note 47 and accompanying text. See *Ex parte Nugent*, 18 F. Cas. 471 (D.C. Cir. 1848) (No. 10,375). As early as 1858 a news reporter was cited for contempt and jailed by order of the United States Senate for refusing to reveal the source of his information. *Id.* at 471-72. John Nugent, a reporter for the New York Herald, had obtained copies of amendments, made by the United States Senate, to a treaty between the United States and Mexico. *Id.* Nugent had published copies of the amendments in the Herald. *Id.* See also Comment, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 UCLA L. REV. 160, 161 (1976) (Nugent began battle for newsman's privilege).

²⁸ 8 J. WIGMORE, *supra* note 25, § 2192, at 64. Dean Wigmore contended that "[n]o pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice." *Id.* § 2286, at 532. See *Branzburg v. Hayes*, 408 U.S. 665, 690 n.29 (1972). The creation of new testimonial privileges has not been favored as it "obstructs the search for truth." *Id.* But see 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 501[03], at 501-30 (1986) (courts may develop "new privileges, on a case by case basis.").

Media Shield Laws

B. *The Rise of a Qualified Privilege*

The first case to address the possibility of a press privilege rooted in the first amendment was decided in 1958. In *Garland v. Torre*,²⁹ celebrity Judy Garland sought to compel Marie Torre to disclose the confidential source of defamatory accusations made about her in Torre's newspaper column.³⁰ Torre refused to disclose her source and was cited for contempt by the district court.³¹ On appeal to the Second Circuit, the contempt citation was affirmed.³² The opinion is generally cited as foreshadowing a doctrine whereby upon a proper balancing of competing interests the press might be accorded a constitutional privilege to withhold its sources in judicial proceedings.³³ It is submitted that, fundamen-

²⁹ 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). See *Branzburg v. Hayes*, 408 U.S. 655 (1972). Writing of the *Garland* case, the *Branzburg* Court stated that "[i]n 1958, a news gatherer asserted for the first time that the First Amendment exempted confidential information from public disclosure . . ." *Id.* at 685-86. See Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, 21-22 (1969); Morse & Zuker, *The Journalists' Privilege*, in TESTIMONIAL PRIVILEGES § 8.04, at 413 (S. Stone & R. Liebman ed. 1983); Comment, *The Newsmen's Qualified Privilege: An Analytical Approach*, 16 CAL. W.L. REV. 331, 335 (1980); Comment, *supra* note 27, at 170.

³⁰ *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). In her column, Torre claimed that the source of her information was a CBS network executive. *Id.* at 547. CBS denied it had made the "alleged false and defamatory statements . . ." *Id.* Torre, in testimony, confirmed that the statements were made to her by an executive at CBS, but refused to reveal his identity. *Id.*

³¹ *Id.* Torre was sentenced to ten days in jail for criminal contempt but was released upon her own recognizance. *Id.* at n.2. See Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 816, 820 (1983). "While common law judges have expressly rejected the privilege . . . [they] were not at all tough in their treatment of journalists who refused to disclose sources." *Id.*

³² See *Garland*, 259 F.2d at 550-51. The court found that "the Constitution conferred no right to refuse an answer." *Id.*

³³ See Morse & Zuker, *supra* note 29, § 8.04, at 413. "The [*Garland*] court's emphasis that the information . . . was relevant, material, and went to the heart of the matter suggested that other kinds of information would not be discoverable. The groundwork for the privilege had been laid." *Id.* at 414. See also O'Neil, *Shield Laws: Partial Solution to a Pervasive Problem*, 20 N.Y.L.F. 515, 527 (1975) (constitutional principle was presented and way paved for the future); Comment, *supra* note 29, at 335 (journalists' first amendment privilege depends upon the outcome of balancing test); *cf.* Guest & Stanzler, *supra* note 29, at 37-39 (*Torre* decision less concrete with regard to a constitutional journalist's privilege).

See *Garland*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). The *Garland* decision accepted, with a mitigating footnote, the "hypothesis that compulsory disclosure of confidential sources . . . may entail an abridgement of press freedom." *Id.* at 548. Yet, the decision noted as well that members of the media did not possess a right of access to news by virtue of their "professional status," greater than that possessed by others. *Id.* at 548 n.4 (citing *United Press Ass'ns v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954); *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958)).

tally, *Garland* enunciated a balanced view of the first amendment rightly in accord with proper constitutional aims. Freedom of the press is primarily freedom from previous restraints; it is not an absolute.³⁴

For more than a decade after *Garland*, claims of a first amendment press privilege were unsuccessful,³⁵ and it was not until

Judicial recognition of the balancing test has also seized upon *Garland* as an influential decision. See, e.g., *Baker v. F & F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972) (holding in *Garland* is carefully circumscribed), *cert. denied*, 411 U.S. 966 (1973); *Caldwell v. United States*, 434 F.2d 1081, 1090-91 (9th Cir. 1970) (Jameson, J., concurring), *rev'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972); see also *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978). In addressing a reporter's claim of privilege by balancing the competing interests:

[A] court should consider: the nature of the case at bar; the relevance and materiality of the information sought to be adduced; whether the information sought goes to the heart of, is crucial to, the claims made by the discovering party and the issues framed by the pleadings; and the availability of the information from other sources.

Id. at 1202-03.

³⁴ See *Garland*, 259 F.2d at 548. Although acknowledging the importance of liberty for the press, Justice Stewart refused to enunciate a first amendment theory under which the press would be an elevated interest:

Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.

Id. See also *supra* note 28 and accompanying text.

³⁵ See *In re Goodfader*, 45 Haw. 317, 367 P.2d 472 (1961). In *Goodfader*, a reporter had attended a meeting of a city civil service commission on a confidential tip that the commission was going to call for the ouster of one of its members. *Id.* at 319, 367 P.2d at 475. At a trial in connection with the commission's actions the reporter was deposed and stated that he had been informed a week and a half prior to the incident that the ouster was imminent. *Id.* On cross-examination the reporter refused to reveal his source, claiming a first amendment privilege. *Id.* at 319-21, 367 P.2d at 475-76. The reporter contended that implicit in the freedom to print news was the freedom to gather it, and that being forced to divulge his source constituted a restraint on gathering, and thus an impairment of his first amendment rights. *Id.* at 327, 367 P.2d at 479. In rejecting the claim, the court acknowledged that compulsory disclosure may disadvantage a reporter, yet it found no authority under which such disadvantage was deemed a violation of the constitutional right to gather news. *Id.* at 327-28, 367 P.2d at 479. The court conceded that disclosure may impair press freedom, but concluded that the impairment was not of sufficient weight as to warrant the granting of privilege. *Id.* at 329, 367 P.2d at 480 (citing *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958)). See also *State v. Buchanan*, 250 Or. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968). In *Buchanan*, the Supreme Court of Oregon rejected a school newspaper reporter's claim to a first amendment privilege. *Id.* at 245-48, 436 P.2d at 729-31. The reporter had promised anonymity to seven subjects whom she interviewed regarding their use of marijuana. *Id.* at 246, 436 P.2d at 730. The article attracted considerable attention upon publication, including that of the district attorney. *Id.* at 246-47, 436 P.2d at 730. In rejecting the reporter's first amendment claim the court focused on three factors which fundamentally impair the logic of a press privilege based on the first amendment: First, the court stated that "news gatherers have no constitutional

Media Shield Laws

1970, in *Caldwell v. United States*,³⁶ that such a privilege was successfully invoked. In *Caldwell*, the Ninth Circuit upheld a first amendment press privilege to quash a grand jury subpoena. *Caldwell* held that, in order to defeat a journalist's qualified testimonial privilege under the first amendment, the government would be required to establish both an overriding and compelling need for confidential information sought, as well as its lack of an alternative source for obtaining such information.³⁷ Thus, *Caldwell* brought to fruition the balancing test and first amendment privilege first suggested in *Garland*.³⁸

Consolidated with three other cases,³⁹ *Caldwell* was reversed in *Branzburg v. Hayes*,⁴⁰ the benchmark 1972 Supreme Court deci-

right to information which is not accessible to the public generally." *Id.* at 248, 436 P.2d at 731. Secondly, the court surmised that freedom of the press belonged to the public, and that it was "not the private preserve of those who possess the implements of publishing." *Id.* at 249, 436 P.2d at 731. Finally, the court presciently touched on the concern voiced by Justice White in *Branzburg* when it stressed the practical deficiencies of a constitutional privilege based upon "class". *Id.* The court reasoned that "a special privilege to a special class of 'news gatherers' necessarily draws after it an invitation to the government to define the membership of that class." *Id.* *But see* *Adams v. Associated Press*, 46 F.R.D. 439 (S.D. Tex. 1969), *cert. dismissed*, 402 U.S. 901 (1971) (the court recognized the existence of a first amendment shield, but compelled disclosure as the source's identity went to the "heart of the claim").

³⁶ *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972). Earl Caldwell was a news journalist employed by The New York Times. *Id.* at 1082. His work focused primarily on the activities of the Black Panther Party, a minority group militant organization. *Id.* He was subpoenaed by a grand jury investigating possible criminal activity of the Black Panthers in violation of federal law. *Id.* Caldwell acknowledged that over time he had "won the confidence and trust of party leaders." *Id.* at 1084.

³⁷ *See Caldwell*, 434 F.2d at 1089. In balancing the competing interests, the court held that "the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation . . ." *Id.* However, the court tempered this against the idea that if the government could demonstrate a compelling need for the information the privilege would be lost. *Id.* The "alternative source" component of the balancing test flows from the fact that the journalist contended that his appearance before the grand jury was unnecessary insofar as he had already made public the information sought. *Id.* Concurring, Judge Jameson wondered whether journalists ought to be required to comply but under protective order, thus enabling the government to establish its compelling and overriding need after a witness has appeared. *Id.* at 1092 (Jameson, J., concurring).

³⁸ *See supra* note 33 and accompanying text.

³⁹ *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971), *aff'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970), *aff'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972); *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971), *aff'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

⁴⁰ 408 U.S. 665 (1972).

sion on press privilege. *Branzburg* held that a journalist had no first amendment right to refuse to comply with a state or federal grand jury subpoena.⁴¹ However, Justice Powell's concurrence, which forged the decision, has often been cited⁴² as leaving open the possibility for a first amendment privilege for the press which might be upheld absent the particular circumstances which accompanied the cases consolidated in *Branzburg*.⁴³

III. THE SHIELD LAW ALTERNATIVE

In 1896 Maryland became the first state to grant a statutory testimonial privilege to reporters.⁴⁴ The privilege was designed to

⁴¹ See *id.* at 690. Justice White, writing for the majority, stated: "We are asked to create another [constitutional privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." *Id.* (White, J., joined by Burger, C.J., Blackmun & Rehnquist, J.J.). See also *id.* at 708 (if there is no first amendment privilege for newsmen, then they have no privilege to refuse to appear before a grand jury). Justice Powell wrote a concurrence and Justices Douglas and Stewart wrote dissents. Justices Brennan and Marshall joined in Stewart's dissent. *Id.* at 709, 711, 725.

⁴² *Id.* at 709. Justice Powell, in his concurrence, stressed the "limited nature of the Court's holding", stating that: "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safe-guarding their sources." *Id.* For characteristic readings and effective usage of Powell's concurrence see *Baker v. F & F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972) (situation might require that the duty to testify yield to first amendment values), *cert. denied*, 411 U.S. 966 (1973); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 83 (E.D.N.Y. 1975). See also Comment, *supra* note 27, at 171-72 (majority laid the foundation for recognition of qualified first amendment privilege, although it held that privilege did not apply in cases before it). *But cf.* Marcus, *supra* note 31, at 829-31 (Powell's concurrence is both strange and confusing); Morse & Zuker, *supra* note 29, § 8.05 at 419 (Powell's "enigmatic" concurring opinion).

⁴³ *Branzburg v. Hayes*, 408 U.S. 665 (1972). Each of the cases consolidated for review in *Branzburg* involved issuance of grand jury subpoenas in furtherance of investigations into criminal activity; activity not only about which news had been published, but activity actually witnessed by the newsmen involved. *Id.* at 667-79.

⁴⁴ See *Lightman v. State*, 15 Md. App. 713, 294 A.2d 149, *aff'd per curiam*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973). The original Maryland statute first appeared in Chapter 249 of the Acts of 1896. *Id.* at 294 A.2d at 153 n.3. As the statute did not protect those engaged in "radio or television news broadcasting" the Maryland legislature later provided such protection in Chapter 614 of the Acts of 1949. *Id.* See *Tofani v. State*, 297 Md. 165, 465 A.2d 413 (1983). The impetus behind enactment of Maryland's first shield law was an incident which occurred in 1896. *Id.* at 169, 465 A.2d at 415. A reporter for the *Baltimore Sun* printed an article containing confidential information which was concurrently before a Baltimore City grand jury investigating official corruption. *Id.* The article suggested that certain officials had been bribed by the owners of illegal gambling establishments. *Id.* The grand jury, suspecting a leak, summoned the reporter and demanded that he disclose the source of his information. *Id.* The reporter refused and was jailed for five days- the remaining duration of the grand jury's term. *Id.* The Maryland General Assembly enacted the shield law in response to lobbying efforts by the city's Jour-

Media Shield Laws

protect reporters from compulsory disclosure of their sources in judicial and legislative proceedings.⁴⁶ Today, such shield laws have been enacted in over half of the states,⁴⁶ reflecting a legislative intent to expand the limited protection afforded the media under common law and constitutional doctrine.⁴⁷ Although diverse in

nalists' Club; the club had been distressed both by the jailing of the reporter and at the prospect of journalists having to reveal their confidential sources. *Id.* See also Bortz & Bortz, "Pressing" Out The Wrinkles In Maryland's Shield Law For Journalists, 8 U. BALT. L. REV. 461, 461 (1979) (Maryland's statute was the nation's first shield law).

⁴⁶ See Bortz & Bortz, *supra* note 44, at 462 n.10. The original Maryland Shield Law read:

No person engaged in, connected with or employed on a newspaper or journal shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper on and in which he is engaged, connected with or employed.

Id. The current version of Maryland's shield law is included in the Maryland Code of Courts and Judicial Proceedings. MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1984). The drafting of shield law statutes is diverse with respect to the designated proceedings in which they may be invoked; however, their coverage is generally broad. See, e.g., ALA. CODE § 12-21-142 (1986). The journalist is protected "in any legal proceeding or trial, before any court or before a grand jury of any court, before the presiding officer of any tribunal or his agent or agents or before any committee of the legislature or elsewhere . . ." *Id.* MONT. CODE ANN. § 26-1-902 (1987). The journalist "may not be adjudged in contempt by a judicial, legislative, administrative, or any other body having the power to issue subpoenas . . ." *Id.*

In accord with the design of its original law, Maryland's present-day shield law protects only the source of information rather than the information itself. See Morse & Zuker, *supra* note 29, § 8.08, at 425 n.107.

⁴⁶ ALA. CODE § 12-21-142 (1975); ALASKA STAT. § 09.25.150-220 (1983); ARIZ. REV. STAT. ANN. § 12-2237 (1982); ARK. STAT. ANN. § 43-917 (1977); CAL. EVID. CODE § 1070 (West Supp. 1987); DEL. CODE ANN. tit. 10, §§ 4320-26 (1974); ILL. ANN. STAT. ch. 110 paras. 8-901 to -909 (Smith-Hurd 1984 & Supp. 1987-1988); IND. CODE ANN. § 34-3-5-1 (West 1983); KY. REV. STAT. ANN. § 421.100 (Michie/Bobbs-Merrill 1972); LA. REV. STAT. ANN. §§ 45:1451-1454 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1984); MICH. STAT. ANN. § 28.945(1) (Callaghan 1985); MINN. STAT. ANN. §§ 595.021-.025 (West Supp. 1986-1987); MONT. CODE ANN. §§ 26-1-901 to -903 (1987); NEB. REV. STAT. §§ 20-144 to -147 (1983); NEV. REV. STAT. § 49.275 (1986); N.J. STAT. ANN. §§ 2A:84A-21 to -21.9 (West Supp. 1987-1988); N.M. STAT. ANN. § 38-6-7 (Supp. 1987); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1987); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. §§ 2739.04-.12 (Page 1981); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. §§ 44.510-.540 (1981); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1982); R.I. GEN. LAWS §§ 9-19.1-1 to .3 (1985); TENN. CODE ANN. § 24-1-208 (1980).

⁴⁷ See *Ex parte Lawrence*, 116 Cal. 298, 300, 48 P. 124, 125 (1897) ("It cannot be successfully contended, and has not been seriously argued, that the witnesses were justified in refusing to give these names upon the ground that the communication was privileged."); *Plunkett v. Hamilton*, 136 Ga. 72, 82, 70 S.E. 781, 785 (1911) (newspaper reporter cannot claim privilege of confidentiality); *In re Grunrow*, 84 N.J.L. 235, 236, 85 A. 1011, 1012 (1913) (the reporter "pleaded a privilege which finds no countenance in the law. Such an immunity . . . would be far-reaching in its effect and detrimental to the due administration of law."); *People ex rel. Mooney v. Sheriff of New York County*, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936) ("[t]he tendency is not to extend the classes to whom the privilege

their protective coverage,⁴⁸ shield laws are generally recognized as balancing the interest which a democratic society has in the free flow of news and information with its interest in the evidentiary process necessary to the administration of justice.⁴⁹ Thus, it is not surprising that serious debate has attended both the passage⁵⁰ and

from disclosure is granted, but to restrict that privilege."); *Clein v. State*, 52 So. 2d 117, 120 (Fla. 1950) ("Members of the journalistic profession do not enjoy the privilege of confidential communication, as between themselves and their informants . . .").

It was not until 1970 that the judiciary was receptive to a privilege for the press based upon the first amendment. *See supra* note 37 and accompanying text. *See also* *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980) (television network partially protected by first amendment privilege against subpoena requesting outtakes and other materials pertaining to criminal investigation); *cert. denied*, 449 U.S. 1126 (1981). *See generally* Beaver, *The Newsmen's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 OR. L. REV. 243 (1968); Guest & Stanzler, *supra* note 29, at 18; Morse & Zucker, *supra* note 29. §§ 8.01-.06 at 408.

⁴⁸ *See* Marcus, *supra* note 31, at 859-67 (overview of varied characteristics of state shield laws); Morse & Zucker, *supra* note 29, § 8.08, at 425 (construction of shield laws can vary significantly); *see generally* Note & Comment, *Privileged Communications- News Media- A "Shield Statute" for Oregon?*, 46 OR. L. REV. 99 (1966) (comparative analysis of model shield law for Oregon proposed by state newspaper association).

⁴⁹ *See* Note & Comment, *supra* note 48, at 107. One commentator succinctly summarized the balancing issue as follows: "[T]he decision whether to enact a shield statute is ultimately made by resolving two competing values, *viz.*, (1) efficient and effective administration of the search for truth, and (2) maximizing the amount of information available to the public." *Id.* Legislatures enact shield laws when they determine the public interest in information outweighs the need for full disclosure. *See* *Maressa v. New Jersey Monthly*, 89 N.J. 176, 184, 445 A.2d 376, 380 ("The Legislature enacts such privileges 'because in the particular area concerned, they are regarded as serving a more important public interest than the need for full disclosure.'" (quoting *State v. Briley*, 53 N.J. 498, 506, 251 A.2d 442, 446 (1969))), *cert. denied*, 459 U.S. 907 (1982).

The Nebraska Legislature weighed these interests when it drafted the state's *Free Flow of Information Act*. NEB. REV. STAT. § 20-144 (1983). It commences with six short paragraphs which set forth a legislative finding on the need to encourage the free flow of news. *Id.* However, shield laws will give way when a defendant's constitutional rights are in jeopardy. *See In re McAuley*, 63 Ohio App. 2d 5, 20, 408 N.E.2d 697, 708 (1979) ("Inasmuch as the shield law was in conflict with the Sixth Amendment . . . the court concluded that in the interests of justice and under the present facts, the shield law must yield.").

⁵⁰ *See* Bortz & Bortz, *supra* note 44, at 462. Dean Wigmore was greatly dismayed at the enactment of the Maryland shield law, calling it "as detestable in substance as it is crude in form," noting that "for more than three centuries, it has been recognized as a fundamental maxim that the public is entitled to every man's evidence." *Id.* Wigmore wrongly predicted that the Maryland statute would "remain unique." *Id.* *See also* 8 J. WIGMORE, *supra* note 25, § 2286, at 533-34 (confidential communication to journalist not privileged). Maryland remained alone in affording protection to journalists for thirty-seven years until 1933, when New Jersey enacted a similar statute. *See* Note, *The Right of a Newsmen to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 61 n.1 (1950).

New York first considered, but failed to pass, a shield statute in 1949. *See* Guest & Stanzler, *supra* note 29, at 21 n.14. *See also* New York Law Revision Commission Report and Study Relating to Problems Involved in Conferring Upon Newspapermen a Privilege Which Would Legally Protect Them from Divulging Sources of Information Given to

Media Shield Laws

subsequent judicial administration of state shield laws.⁶¹

A. Comparison and Overview

The legislatures of the majority of states providing shield law protection have included in their statutes some form of equivocating language by which the press is accountable under certain circumstances.⁶² In fact, as many as eleven states provide that shield law protection may be overcome upon specified findings, usually ascertained upon a balancing test.⁶³ Generally, the privilege is

Them: *The Journalist's Privilege to Withhold the Source of His News*, [1949] N.Y. LAW REV. COMM'N REP. 33 (thorough examination of relative benefits and detriments attending such a privilege).

⁶¹ See generally Note, *supra* note 13, at 748 (approving of broad judicial construction of state shield law); see also Comment, *Branzburg v. Hayes: A Need for Statutory Protection of News Sources*, 61 KY. L.J. 551, 557-58 (1973) (discussion of varied judicial applications of state shield laws); Comment, *Journalist's Privilege: In re Farber and the New Jersey Shield Law*, 32 RUTGERS L. REV. 545, 573 (1979) (state shield law should be redrafted and strengthened in view of judicial hostility to newsmen's assertion of privilege).

Some commentators have questioned the underlying wisdom of shield law legislation. See Bortz & Bortz, *supra* note 44, at 462. See also Note, *Constitutional Law- Freedom of the Press-Right of News Media Personnel to Refuse to Disclose Confidential Sources of Information*, 61 MICH. L. REV. 184, 191 (1962) ("extensions of first amendment freedoms for purely economic advantage is 'dangerous and unwise'"). Other commentators have questioned the design of particular statutes. See Note, *Newsjournalist's Privilege and the New York State Shield Law: A Proposal*, 43 ALB. L. REV. 918, 927 (1979) ("New York's shield law is too limited in scope and uncertain in application."); Note, *The Newsgatherer's Shield-Why Waste Space in the California Constitution?*, 15 SW. U.L. REV. 527, 538 (1985) (California shield law is textually ambiguous; does not create privilege but merely provides immunity from contempt).

⁶² See *infra* note 53 and accompanying text.

⁶³ See ALASKA STAT. § 09.25.160(b)(1)(2) (1983) (balancing test may revoke privilege if failure to disclose shown to cause miscarriage of justice, denial of fair trial or is contrary to public interest); ARK. STAT. ANN. § 43-917 (1977) (no privilege if shown material "was written, published or broadcast in bad faith, with malice and not in the interest of public welfare."); DEL. CODE ANN. tit. 10, § 4323(a) (1974) (privilege may be lost in balancing public interest against relevance of information sought, alternative sources, and effect disclosure would have on flow of news); ILL. ANN. STAT. ch. 110, para. 8-903, -904, -907 (Smith-Hurd 1984 & Supp. 1987-1988) (balancing test may allow granting petition to revoke privilege; petition must state specific public interest harmed if information is not disclosed); LA. REV. STAT. ANN. § 45-1453 (West 1982) (privilege revoked if disclosure is essential to public interest); MINN. STAT. ANN. § 595.024 Subd. 2(1), (2), (3) (West Supp. 1986-1987) (exception to privilege if disclosure is necessary to prevent injustice; in balancing must be shown that information is relevant to violation of law and unavailable from other sources); N.M. STAT. ANN. § 38-6-7(A) (Supp. 1987) (privilege not available if "essential to prevent injustice."); N.D. CENT. CODE § 31-01-06.2 (1976) (no privilege if failure to disclose will cause miscarriage of justice); OKLA. STAT. ANN. tit. 12 § 2506(B)(2) (West 1980) (privilege may be lost if disclosure shown to be relevant to issue in the action and not available from alternative source); R.I. GEN. LAWS § 9-19.1-3(c) (1985) (no privilege if information necessary to felony prosecution or to prevent threat to human life); TENN. CODE ANN. § 24-1-208(c)(1)

overcome if it is found that failure to disclose the information sought would either lead to an unjust result or be harmful to the public interest.⁵⁴ Moreover, recognizing that libel plaintiffs may suffer at the hands of broad shield law coverage,⁵⁵ six states have incorporated provisions to restrict their statutes accordingly.⁵⁶ Such libel provisions range from shifting the burden of proof to the party invoking the privilege,⁵⁷ to complete revocation when a defense is based upon privileged information or sources.⁵⁸ In accord with the common law doctrine on privileges, as many as seven shield laws have either been expressly drafted⁵⁹ or judicially interpreted to allow for waiver upon the prior disclosure of privileged information.⁶⁰ Finally, the judiciary of two states have required that invocation of shield law protection be subject to a balancing test.⁶¹

(1980) (three-part balancing test requires showing that public interest requires disclosure).

⁵⁴ See *supra* note 53.

⁵⁵ See, e.g., *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 780 F.2d 349, 349 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2927 (1986). See also *Maressa v. New Jersey Monthly*, 89 N.J. 176, 202-03, 445 A.2d 376, 390 (Schreiber, J., dissenting) (majority's rigid interpretation of state shield law in effect eliminates "cause of action for defamation" where public figure is involved), *cert. denied*, 459 U.S. 907 (1982); *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346, 349 (Pa. 1987) (Supreme Court of Pennsylvania noted that excessive shield law protection may make it impossible for defamation plaintiff to prove his case).

⁵⁶ See ILL. ANN. STAT. ch. 110 para. 8-903(b) (Smith-Hurd Supp. 1987-1988) (plaintiff may apply for order revoking privilege in libel cases); LA. REV. STAT. ANN. § 45-1454 (West 1982) (in defamation action burden of proof is on reporter if he claims privilege); MINN. STAT. ANN. § 595.025 (West Supp. 1986-1987) (privilege unavailable where plaintiff can show disclosure will lead to evidence of actual malice); OKLA. STAT. ANN. tit. 12, § 2506(B)(2) (West 1980) (no privilege in defamation action when defense is based on content or source of privileged information); R.I. GEN. LAWS § 919.1-3(b)(1) (1985) (no privilege when defamation defense based on source of privileged information); TENN. CODE ANN. § 24-1-208(b) (1980) (same); cf. ARK. STAT. ANN. § 43-917 (1977) (privilege unavailable if material published with malice).

⁵⁷ LA. REV. STAT. ANN. § 1454 (West 1982).

⁵⁸ R.I. GEN. LAWS § 9-19.1-3(b)(1) (1985).

⁵⁹ MONT. CODE ANN. § 26-1-903(2) (1987) (newsman's voluntary offer of information to grand jury or other official body waives privilege); N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1987-88) (New Jersey shield law may be waived pursuant to Rule 37); R.I. GEN. LAWS § 9-19.1-3(a) (1985) (privilege does not apply to information already made public).

⁶⁰ See *Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 375 n.1 (Ky. 1984); *Tofani v. State*, 297 Md. 165, 173, 465 A.2d 413, 417 (1983); *Newburn v. Howard Hughes Medical Inst.*, 95 Nev. 368, 371-72, 594 P.2d 1146, 1148-49 (1979); *State v. Geis*, 2 Ohio App. 3d 258, 262, 441 N.E.2d 803, 809 (1981) (privilege waived only to extent of information disclosed).

⁶¹ See *Lexington Herald-Leader Co.*, 690 S.W.2d at 379 (Supreme Court of Kentucky subscribed to balancing test notwithstanding state shield law); *In re McAuley*, 63 Ohio App. 2d

Media Shield Laws

B. Confidentiality and Shield Laws

With the exception of Rhode Island,⁶² no state shield law expressly requires confidentiality.⁶³ Moreover, no statute whatsoever expressly protects sources and information that are nonconfidential.⁶⁴ Several states have judicially construed their shield laws as applicable both to confidential and nonconfidential information,⁶⁵ while three states, now including New York, confine the privilege to sources and information acquired in confidence.⁶⁶ A review of existing case law from jurisdictions that have yet to rule directly on the issue reveals an ostensible understanding of press privilege as applicable to sources and information obtained in confidence.⁶⁷

5, 22, 408 N.E.2d 697, 709 (1979) (newsperson's privilege is qualified and subject to balancing test; "state shield laws do not provide an absolute right . . .").

⁶² See R.I. GEN. LAWS § 9-19.1-2 (1985).

⁶³ See *supra* note 46 (of twenty-six statutes, Rhode Island has the only statute which expressly refers to confidential information in conferring the privilege). However, a requirement of confidentiality may be strongly inferred from policy statements included in certain statutes. See, e.g., ILL. ANN. STAT. ch. 110, para. 8-907 (Smith-Hurd Supp. 1987) (libel provision weighs public interest in disclosure against newsman's confidential source). See also MINN. STAT. ANN. § 595.022 (West Supp. 1986-1987) (public policy rationale is to protect confidential relationship); cf. DEL. CODE ANN. tit. 10, § 4322 (1974) (privilege designed to protect "an express or implied understanding").

⁶⁴ See *supra* note 46 (no statute on its face covers nonconfidential sources and information).

⁶⁵ See *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 397, 153 Cal. Rptr. 608, 613 (1979) (applies to all information acquired by a newsman); *Tofani v. State*, 297 Md. 165, 174 n.2, 465 A.2d 413, 418 n.2 (1983) (confidentiality not a prerequisite); *Grand Forks Herald v. District Court*, 322 N.W.2d 850, 854 (N.D. 1982) (privilege not limited to confidential sources); *Austin v. Memphis Publishing Co.*, 655 S.W.2d 146, 149-50 (Tenn. 1983) (court finds legislature considered but rejected requirement of confidentiality). *But cf. Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa. 1987) (state Supreme Court reverses lower court decision which held nonconfidential media outtakes privileged under state's shield law).

⁶⁶ See *supra* note 21 and accompanying text. See also *Newburn v. Howard Hughes Medical Inst.*, 95 Nev. 368, 372, 594 P.2d 1146, 1149 (1979); R.I. GEN. LAWS § 9-19.1-2 (1985).

⁶⁷ See *Bartlett v. Superior Court*, 150 Ariz. 178, 183, 722 P.2d 346, 351 (Ariz. Ct. App. 1986) (Arizona court construes statute as protecting against disclosure of "confidential sources"); *Subpoena Duces Tecum to Stearns v. Zulka*, 489 N.E.2d 146, 149 (Ind. Ct. App. 3d Dist. 1986) (in dictum, court stated that shield law provides "absolute privilege against revealing confidential sources . . ."); *In re Burns*, 484 So. 2d 658, 659 (La. 1986) (shield law protects identity of "confidential source of information" as well as information which might lead to his identity); *Sible v. Lee Enters., Inc.*, 729 P.2d 1271, 1276 (Mont. 1986) (Hunt, J., concurring) (shield law protects "disclosure of sources and confidential information" (citing MONT. CODE ANN. § 26-1-902 (Media Confidentiality Act))), *cert. denied*, 107 S. Ct. 3242 (1987); *Resorts Int'l, Inc. v. NJM Assocs.*, 89 N.J. 212, 215, 445 A.2d 395, 396 (shield law protects "sources, editorial processes and other confidential information . . ."), *cert. denied*, 459 U.S. 907 (1982); *In re McAuley*, 63 Ohio App. 2d 5, 22, 408 N.E.2d 697,

IV. ANALYSIS

A. *The Case Against a First Amendment Privilege*

In *Knight-Ridder*, the court of appeals cited Justice Powell's concurrence in *Branzburg* as the criterion by which it weighed and rejected the petitioner's claim to a qualified constitutional privilege.⁶⁸ By so doing, the court of appeals lent credence to the premise implicit in Powell's concurrence that courts may find within the first amendment a qualified evidentiary privilege for the press.⁶⁹ It is submitted that reliance upon Justice Powell's concurrence is misplaced. It is suggested that the better view is that of the *Branzburg* plurality: that the press has no testimonial privilege, qualified or unqualified, under the first amendment.

Testimonial privileges were established at common law.⁷⁰ Additional privileges have been established both judicially and by statutory enactment.⁷¹ Arguably, privileges created in this manner are

709 (1979) (shield law does "not provide an absolute right not to provide the name of a confidential informant."); *Taylor v. Miskovsky*, 640 P.2d 959, 961-62 (Okla. 1981) (court's rationale framed in language of confidentiality).

The commentators clearly manifest an understanding that the debate is *a priori* about confidential sources and information. See *Beaver*, *supra* note 47, at 245; *Guest & Stanzler*, *supra* note 29, at 18; *Marcus*, *supra* note 31, at 815; *O'Neil*, *supra* note 33, at 515; *Comment*, *supra* note 29, at 331; *Note & Comment*, *supra* note 48, at 101. See also *Comment*, *Newsman's Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy*, 49 *TUL. L. REV.* 417, 418 n.7 (1975) (American Newspaper Guild Code of Newsmen's Ethics specifically refers to *confidential* sources and information.).

⁶⁸ See *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 70 N.Y.2d 151, 160, 511 N.E.2d 1116, 1121, 518 N.Y.S.2d 595, 600 (1987) (the information sought was both relevant and unavailable from alternative sources (citing *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972))).

⁶⁹ See *supra* note 42 and accompanying text. An alternative tactic used by courts to find a first amendment privilege has been to distinguish *Branzburg*. See *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977) ("The actual problem in that case was whether a reporter was free to avoid altogether a grand jury subpoena." (distinguishing *Branzburg v. Hayes*, 408 U.S. 665 (1972))); *Baker v. F & F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972) ("*Branzburg v. Hayes* . . . involving as it did . . . a grand jury investigating criminal activities, is only of tangential relevance to this case."), *cert. denied*, 411 U.S. 966 (1973); see also *Loadholtz v. Fields*, 389 F. Supp. 1299, 1301 (M.D. Fla. 1975); *State v. St. Peter*, 132 Vt. 266, 269, 315 A.2d 254, 255 (1974).

Notwithstanding *Branzburg*, more recent decisions have indicated a willingness to grant a first amendment journalist's privilege in the realm of criminal cases. See *United States v. Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

⁷⁰ See *supra* note 25.

⁷¹ See *C. McCORMICK*, *supra* note 16, § 76.2, at 180-81. Legislatures are better suited to the task of evaluating the need for new privileges because they have no immediate interest,

Media Shield Laws

subject to repeal. It is submitted that a constitutional press privilege, whether qualified or unqualified, would be a privilege above all others⁷³ and unrepealable. Its effect would be to usurp the legitimate right of states and state courts to prescribe their own evidentiary rules.⁷³ Proponents of the privilege have often framed their arguments in the language of "news gathering;" a special right reserved to the press under the constitution, threatened by the compulsory disclosure of confidential sources.⁷⁴ Yet, no privilege ought rest upon professional standing⁷⁵ when it is rooted in a

as does the judiciary, in the effects of privileges vis-a-vis the litigation process. *Id. Cf. C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE* (2d ed. 1987). The federal courts observe privileges in accord with the common law as interpreted by the courts of the United States. *Id.* § 9.2, at 384. Additionally, the Federal Rules of Evidence permit the judicial development of privileges. *Id.* at 385. However, in diversity cases in which a civil action involves a state law claim or defense, privileges are governed by state law. *Id.* at 384-85. The Advisory Committee's Note to section 501 of the Federal Rules of Evidence indicates that federal courts are to address the issue of privilege "in the light of reason and experience." (quoting the Advisory Committee on Rules of Criminal Procedure). *See FED. R. EVID.* 501.

⁷³ *Cf. Knight-Ridder Broadcasting, Inc. v. Greenberg*, 70 N.Y.2d 151, 163, 511 N.E.2d 1116, 1123, 518 N.Y.S.2d 595, 602 (1987) (Bellacosa, J., dissenting). The *Knight-Ridder* dissent argued that, indeed, New York's press privilege statute was unique insofar as it was contained in the New York Civil Rights Law and was a "statutory enactment of the State and the Federal constitutional protections of a free press." *Id.* (Bellacosa, J., dissenting). The dissent pointed out that certain other privilege statutes are contained in New York's evidence code. *Id.*

⁷⁴ *Cf. Chambers v. Mississippi*, 410 U.S. 284, 308 (1973) (Rehnquist, J., dissenting). "I would have considerable difficulty in subscribing to the Court's further constitutionalization of the intricacies of the common law of evidence." *Id.* (Rehnquist, J., dissenting). The constitutionalization of any evidentiary rule necessarily weakens the integrity of a federalist system. *Cf. California v. Green*, 399 U.S. 149, 171 (1970) (Burger, C.J., concurring) (state sovereignty must be respected when states enact rules of evidence in the area of criminal justice).

See Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 309, 551 P.2d 1354, 1356 (1976) ("There can be no real question about rules of privilege being rules of evidence . . ."). The Supreme Court of New Mexico struck down its state's shield law as violative of a state constitutional provision prohibiting the legislature from creating rules of practice and procedure by statute. *Id.* at 312, 551 P.2d at 1358.

⁷⁵ *See Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) ("We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news."); *Sigma Delta Chi v. Speaker*, 270 Md. 1, 310 A.2d 156 (1973) (journalism fraternity and news reporter contend prohibition against tape recording in legislative chambers violates first amendment right to gather news); *State v. Buchanan*, 250 Or. 244, 247, 436 P.2d 729, 730 (reporter contends that freedom of the press implies the freedom to gather news), *cert. denied*, 392 U.S. 905 (1968).

⁷⁶ *See Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws."); *Buchanan*, 250 Or. at 248-49, 436 P.2d 729 at 731 ("[I]t would be difficult to rationalize . . . special constitutional rights for those possessing credentials as newsgatherers . . ."), *cert. denied*, 392 U.S.

right of access to information which, in any coherent first amendment scheme, must apply equally to all citizens.⁷⁶ Furthermore, freedom of the press should not confer an unqualified exemption from the fundamental duty to account for that which is published.⁷⁷

Oliver Wendell Holmes wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."⁷⁸ Today, this market is saturated by modern me-

905 (1968); *see also* Beaver, *supra* note 47, at 249 (a right of access for special class is discriminatory); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.19, at 886 (3d ed. 1986) [hereinafter CONSTITUTIONAL LAW]. "The Court thus far has refused to draw any constitutional distinction between speech and the press, or the 'institutional press,' or the 'organized media,' in part, perhaps, because there is no principled way of doing so." *Id.* Cf. Associated Press v. United States, 326 U.S. 1, 20 (1945) (freedom to publish is not confined to a special class of professionals); Lovell v. Griffin, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.").

⁷⁶ *See Branzburg*, 408 U.S. at 684-85 (press has no elevated right of access); *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883, 884-85 (3d Cir. 1958) (no right of access to information not available to the public (quoting Judge Fuld in *United Press Ass'ns v. Valente*, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954))); *cf. Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) ("The right to speak and to publish does not carry with it the unrestrained right to gather information.").

⁷⁷ *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). "It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the constitution, does not confer an absolute right to speak or publish without responsibility . . ." *Id.* *See also* 4 W. BLACKSTONE, COMMENTARIES 151-52 (1966) (as stated by Blackstone, if a man "publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity."), *quoted in* *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931).

See THE WRITINGS OF THOMAS PAINE vol. IV, app. J, at 475 (M. Conway ed. 1969). In 1806 Thomas Paine wrote, in response to the remarks of Jefferson, that "nothing is more common with printers . . . than the continual reply of Liberty of the Press, as if because they are printers they have more privileges than other people." *Id.* Paine took exception to Jefferson's remark, made while Jefferson was Minister at Paris, that "the licentiousness of the press produces the same effect as the restraint of the press . . ." *Id.* Paine contended that liberty of the press was properly traced to the abolition of official censorship; "in England, called *Imprimeur* . . . [A]nd as works could then be published without first obtaining the permission of the government office, the press was . . . said to be free." *Id.* Paine had been in France and observed there the "terrible effects of personal libels shielded under the liberty of press." *Id.* at n.1.

For authority that Jefferson understood liberty of the press to be qualified see W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 81-86 (1976). Moreover, although under the influence of Oliver Wendell Holmes and Zachariah Chafee, Jr., the notion came to be accepted that the Framers had abolished the law of seditious libel by adoption of the first amendment, there is evidence to the contrary. *See id.* at 83 (citing L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960)); *see also* CONSTITUTIONAL LAW, *supra* note 75, § 16.5, at 833.

⁷⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Media Shield Laws

dia.⁷⁹ But, without accountability there can be no “test”. It is suggested that the discerning of truth within the market necessarily implies the duty to account for what is written. Privilege—as exemption from accountability based upon status—denudes the first amendment of its proper role in a democratic scheme.⁸⁰ In *Branzburg*, Justice White recognized the problematic nature of constitutional “categories” and declined “to embark the judiciary on a long and difficult journey to such an uncertain destination.”⁸¹ It is suggested that whatever need there is for a press privilege, it is properly fulfilled and measured by the legislature.

B. *The Proper Scope of Shield Laws*

In *Knight-Ridder*, the issue was whether the New York Shield Law covered nonconfidential information.⁸² In New York, dating as far back as 1828, the vast majority of privilege statutes have not contained express references to confidentiality,⁸³ yet have been construed to require it.⁸⁴ It is submitted that the *Knight-Ridder*

⁷⁹ See *Broadcasting-Cablecasting Yearbook* 1987, at A2. There are currently 1,285 VHF, UHF and non-commercial stations operating in the United States. *Id.* See also *Statistical Abstract of the United States* 1987, at 536. There are currently 9,144 newspapers in the United States, including dailies, weeklies and semi-weeklies. *Id.*

⁸⁰ Cf. *State v. Buchanan*, 250 Or. 244, 249, 436 P.2d 729, 731 (such a privilege would be “destructive of the very freedom that is sought to be preserved . . .”), *cert. denied*, 392 U.S. 905 (1968).

⁸¹ *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972). Justice White recognized that applying a constitutional privilege for the media would be difficult to administer as it would require the court to determine which media entities were entitled to the privilege. *Id.* at 704. Furthermore, having to decide each case on an “ad hoc” basis would not serve the media’s interest in securing their sources of information. *Id.* at 702, n.37.

⁸² See *supra* note 21 and accompanying text.

⁸³ See Brief for Respondent at 7-11, 28, *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 70 N.Y.2d 151, 511 N.E.2d 1116, 518 N.Y.S.2d 595 (1987) (No. 86-2643). In 1828, New York was the first state to establish a statutory physician-patient privilege (citing W. RICHARDSON, *RICHARDSON ON EVIDENCE* § 426, at 419 (J. Prince 10th ed. 1973)). The statute did not expressly state its application to confidential communications. *Id.* at 7. Thereafter, most privilege statutes in New York were uniform in failing to make reference to confidentiality. *Id.* at 28. Cf. N.Y. CIV. PRAC. L. & R. §§ 4503-05, 08 (McKinney Supp. 1987). Statutory privileges for the attorney, physician, dentist and nurse, clergy, and social worker all make reference to confidentiality. *Id.*

⁸⁴ See Brief for Respondent at 10, *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 70 N.Y.2d 151, 511 N.E.2d 1116, 518 N.Y.S.2d 595 (1987) (No. 86-2643) (citing *Bauman v. Steingester*, 213 N.Y. 328, 333, 107 N.E. 578, 579 (1915) (confidentiality interpreted to be a requirement of physician-patient and attorney-client privilege in the 1876 Code of Remedial Justice)).

court ruled in accordance with this practice and properly interpreted the shield law's legislative history.⁸⁵ Furthermore, it is suggested that the proper scope of shield law protection has clearly not been, and should not be, absolute or unqualified, but should be constrained to the protection of sources and information acquired in confidence. Moreover, existing empirical data gauging the harmful effects of compulsory disclosure on the flow of news and information is highly tenuous.⁸⁶ It is urged that shield laws

⁸⁵ See Governor's Memorandum, (N.Y.A. 5478-B, 193rd Sess.), reprinted in [1970] N.Y. LEGIS. ANN. 508. The Governor's memorandum reads in pertinent part: "[S]ources of information have been cut off because of recent attempts by the Federal Government to require the disclosure of information obtained by reporters in confidence." (emphasis added). *Id.* See Ch. 615 [1970] N.Y. Laws (Governor's Bill Jacket). The Bill Jacket contains a letter written by Oxie Reichler—editor emeritus of the Yonkers Herald Statesman, formerly president of the New York State Society of Newspaper Editors—in support of proposed federal shield law legislation. *Id.* It refers consistently to *confidential* sources (emphasis added). *Id.* See Ch. 316 [1975] N.Y. Laws (Governor's Bill Jacket) (Budget Report on Bills, No.4(b) states in support of shield law 1975 amendment that "representatives of the press [will] not have to divulge their *confidential sources* . . ." (emphasis added)). See also N.Y.S. 3553, N.Y.A. 4547 204 Sess. (1981). The original study bill draft for the 1981 amendment to the shield law would have affirmatively removed any requirement of confidentiality. *Id.* But see N.Y.S. 3553B, N.Y.A. 4547, 204 Sess. (1981). That provision, as well as many others which would have broadened the scope of the shield law, did not survive the legislative process and was not contained in the amendment finally signed into law. *Id.*

All four New York Appellate Divisions have construed the shield law as applicable to confidential sources and information. See *In re Pennzoil Co.*, 108 App. Div. 2d 666, 485 N.Y.S.2d 533 (1st Dep't 1985); *Hennigan v. Buffalo Courier Express Co.*, 85 App. Div. 2d 924, 446 N.Y.S.2d 767 (4th Dep't 1981); *People v. Le Grand*, 67 App. Div. 2d 446, 415 N.Y.S.2d 252 (2d Dep't 1979); *WBAI-FM v. Proskin*, 42 App. Div. 2d 5, 344 N.Y.S.2d 393 (3d Dep't 1973).

⁸⁶ *Branzburg*, 408 U.S. at 694-95 n.32. The court in *Branzburg* found that: "Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative." (citing survey included in *Guest & Stanzler*, *supra* note 29, at 57-61). *Id.* Cf. *Guest & Stanzler*, *supra* note 29, at 43. In view of their survey, the authors themselves write: "[N]ewspapers do run a large number of stories based on material from informants." *Id.* However, notwithstanding their survey, the authors are primarily in accord with Justice White in *Branzburg* when attempting to draw conclusions regarding the effects of compulsory disclosure: "We simply cannot measure the effect on informants." *Id.* at 44. In writing of the pressures imposed upon newsmen, and a possible "chilling effect" due to sanctions which may be imposed upon them for refusing compulsory disclosure, the authors surmise: "Nevertheless, the present effect on newsmen probably is not great." *Id.* at 46.

See Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 246-51 (1971). In attempting to reveal the media's reliance upon confidential sources through the use of numerical and percentage tables, the author commences his analysis with the caveat that "[t]he extent of reliance on confidential sources cannot be quantified with any degree of precision . . ." (emphasis added). *Id.* at 246. See *Branzburg*, 408 U.S. at 694 n.33 (Court cites study conducted by professor Blasi on press subpoenas indicating only 8% of 975 reporters surveyed could "say with some certainty that [they] . . . had been adversely affected

Media Shield Laws

should be drafted not only to apply expressly to confidential sources and information, but also to include provisions under which the privilege may be overcome under appropriate circumstances. Such construction would properly recognize the element of balanced accountability which the New York Shield Law presently lacks.

V. REMAINING QUESTIONS

It is contended by some that the privilege of the press is unlike any other; it neither exists for, nor resides with, the utterer—it belongs solely to the journalist.⁸⁷ Yet, if the proposed purpose of shield laws is to facilitate the flow of news by ensuring anonymity and safety for sources,⁸⁸ of what inducement can it be to those sources when they find that their privilege to remain anonymous rests not with them but with their media contact, who may, of his own choice, reveal their identities? It is suggested that it is questionable whether a privilege, so explained, exists for the legiti-

by the threat of subpoena" (citing Blasi, *Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press* 6-12)); see also Beaver, *supra* note 47, at 251-52 (effects of divulging sources extremely difficult to measure); cf. Comment, *The Newsmen's Privilege After Branzburg v. Hayes: Whither Now?*, 64 J. CRIM. L. & CRIMINOLOGY 218, 231 (1973) (contention by opponents of press privilege that the "paucity" of cases generated by the debate indicates that the effects of disclosure are negligible is unwarranted). Indeed, a review of the annotated statutes of the twenty-six states with shield laws reveals that, but for a few choice "media" jurisdictions, shield laws are marginally litigated at best. See *supra* note 46.

⁸⁷ See *Branzburg*, 408 U.S. at 695. The Court stated that the "privilege claimed is that of the reporter, not the informant . . ." *Id.* See also *Hestand v. State*, 257 Ind. 191, 192-93, 273 N.E.2d 282, 283 (1971) ("creates a right personal to the reporter . . . which only he can invoke."); *Lipps v. State*, 254 Ind. 141, 146, 258 N.E. 2d 622, 626 (1970) (same); *State v. Boiardo*, 83 N.J. 350, 361, 416 A.2d 793, 798 (1980) (privilege is that of the newsperson and not the source); C. McCORMICK, *supra* note 16, § 76.2, at 185 (privilege belongs solely to journalist).

⁸⁸ See, e.g., Guest & Stanzler, *supra* note 29, at 45 n.138. It has proved difficult to logically explain the newsmen's privilege: as stated by Guest & Stanzler, the purpose "is not to protect the source, although that is a secondary effect, but to promote the flow of news." *Id.* Cf. *Hestand*, 257 Ind. at 192-93, 273 N.E.2d at 283. A defendant who confessed his guilt to a newsmen could not prevent the newsmen from testifying; the privilege belonged to the journalist, not the defendant. *Id.* See also *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). The court stated that the newsmen's privilege belonged to the newsmen and that the right to waive it could be exercised only by him— not by potential witnesses. *Id.*

It has been contended that shield laws change the flow of news marginally, if at all, because informants are unaware of such statutes. See Beaver, *supra* note 47, at 251-52.

mate aims of news gathering or to facilitate an exemption from accountability.

The years following *Branzburg* brought a growth of investigative journalism such has not been previously seen.⁸⁹ Of late, the wisdom of reliance upon confidential sources has been called into question.⁹⁰ It has been suggested that reliance upon confidential sources "is more the sort of thing reporters try to do than sources;"⁹¹ the contention being that, although it may facilitate news gathering, it leads as well to lazy journalism and inaccuracy.⁹² Recent libel cases of prominence⁹³ have revealed, through the required disclosure of outtakes, the sometimes embarrassing and highly questionable tactics⁹⁴ used by the press in obtaining

⁸⁹ See Leslie, *The Anonymous Source: Second Thoughts on "Deep Throat,"* WASH. JOURNALISM REV., Sept. 1986, at 33, 34 (after Watergate "a generation of investigative reporters modeled themselves after Woodward and Bernstein . . ."); cf. Kraft, *The Imperial Media*, COMMENTARY, May 1981, at 36, 41. Since Watergate "there has been no holding us." *Id.* at 41. Newsmen assume that "behind every story there is a secret, and that every secret is a dirty secret." *Id.*

⁹⁰ See Leslie, *supra* note 89, at 34. Reliance upon anonymous sources has been excessive and "the public was growing more skeptical . . ." (quoting David Lipman, managing editor, St. Louis Post-Dispatch). *Id.* See also Clark, *Spies and Whispers: A Tour Through Casey's CIA* (Book Review), BUS. WEEK, Oct. 19, 1987, at 12. The recent publication of *Veil* by Bob Woodward has caused "a storm of controversy" over the author's "veracity, ethics [and] judgment . . ." *Id.* In *Veil*, Woodward accuses the late CIA Director of planning a car bombing which cost eighty lives. *Id.* at 14. The book is based on 250 anonymous sources and the author's alleged interviews with the late director, including interviews during his recovery from brain surgery. *Id.* at 12-14.

⁹¹ See Leslie, *supra* note 89, at 34 (quoting Walter Mears, Executive Editor of the Associated Press).

⁹² *Id.* at 35. Cf. Beaver, *supra* note 47, at 256 (shield law exemption to account for unattributed sources encourages journalistic excess); Note, *Constitutional Law—Freedom of the Press—Right of News Media Personnel to Refuse to Disclose Confidential Sources of Information*, 61 MICH. L. REV. 184, 190 (1962) (journalistic claims of privilege used to avoid responsibility for failure to comply with compulsory disclosure). *But cf.* Comment, *supra* note 86, at 231 (shield laws might lead to "greater journalistic excellence . . ."); Comment, *The Protection of Confidential News Sources: Enhancing the Utility of Ohio's Shield Law*, 42 OHIO ST. L.J. 1039, 1059 (1981) (anonymous informants facilitate reporting of controversial issues).

⁹³ See, e.g., *Tavoulaareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987); *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984); *Westmoreland v. CBS, Inc.*, 97 F.R.D. 703 (S.D.N.Y. 1983). See also Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 797, 797 n.1 (figures for several prominent multi-million dollar libel judgments indicate initial judgements are often substantially reduced).

⁹⁴ See *Tavoulaareas v. Piro*, 817 F.2d 762, 829-38 (D.C. Cir. 1987) (MacKinnon, J., dissenting). The dissent outlines the pressure placed upon staff reporters by Washington Post metropolitan editor Bob Woodward to obtain what Woodward termed "'holy shit' stories—presumably stories so startling that they cause the reader to exclaim in this fashion." *Id.* at 834 (MacKinnon, J., dissenting). As well, Judge MacKinnon pointed up that the investigative reporter assigned to the Tavoulaareas story evidenced a willingness to break the law in

Media Shield Laws

their stories. Such outtakes are those which the media would have shield laws protect.⁹⁵

Wigmore feared the unwarranted expansion of statutory privileges arising from the tendency of professional interests to lobby legislators.⁹⁶ It may be suggested that the press has an economic interest in its privilege⁹⁷ as well as an interest in its role as the

order to obtain the story he wanted. *Id.* (MacKinnon, J., dissenting). See also *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984). In *Sharon*, the court found that there was sufficient evidence of actual malice on the part of Time to go to the jury. *Id.* at 584. Moreover, the court admonished Time that it could avoid such litigation if it inquired properly into the sources of its stories. *Id.* at 588. See Bedell & Kowet, *Anatomy of a Smear: How CBS Broke the Rules and Got Gen. Westmoreland*, TV GUIDE, May 29, 1982, at 3. The two month investigation by TV Guide into the editorial methods utilized by CBS in putting together its "documentary" on General Westmoreland entitled *The Uncounted Enemy: A Vietnam Deception*, revealed, among other things that: CBS began the project convinced of Westmoreland's guilt and ignored evidence to the contrary. *Id.* at 4. CBS allowed witnesses sympathetic to the thesis of its "documentary" the opportunity to re-do their "interviews" so that they would be more persuasive in view of other interviews already on film. *Id.* The targets of its "documentary", however, were accorded no such opportunity nor were they permitted to know, before being interviewed, of what they had been accused. *Id.* See also *Westmoreland v. CBS*, 97 F.R.D. 703, 704 (S.D.N.Y. 1983) (citing TV GUIDE, May 29, 1982).

See Denniston, *Settling Lawsuits in Print*, WASH. JOURNALISM REV., Jan.-Feb. 1987, at 16. Denniston, a reporter for the Baltimore Sun, writes on a seminar given at Yale Law School by Federal Judge Pierre N. Leval, of the Southern District of New York. *Id.* Leval presided over the *Westmoreland* case. *Id.* Judge Leval noted the embarrassing editorial practices of Time magazine and the Washington Post which came to light during defamation actions brought against them by Ariel Sharon and Mobil president, William Tavoulaareas, respectively. *Id.* Judge Leval believes "the press might be willing to give up its 'actual malice' protection to prevent its internal processes from being revealed." *Id.*

⁹⁵ *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984). In *Sharon*, Time sought to invoke the New York shield law. *Id.* at 582. The court, however, found Time's assertion of shield law protection particularly disturbing and noted that "shield laws may serve sound interests in governing the relationship between the courts and the press, but they serve no sound purpose if used as an excuse for the press to fail to keep its own shops in order." *Id.* at 588. See also *Westmoreland v. CBS, Inc.*, 97 F.R.D. 703, 706-07 (S.D.N.Y. 1983). In *Westmoreland*, CBS claimed that an internal company report evaluating its making of a documentary concerning General William Westmoreland was protected from disclosure by the New York shield law as "generated 'in the course of gathering or obtaining news for publication.'" (construing N.Y. CIV. RIGHTS LAW § 79-h); *Id.* at 707. Judge Leval rejected the claim. *Id.*

The press evinces less concern for first amendment protections and privileges when government officials are required to relinquish their confidential materials. See Kraft, *supra*, note 89, at 46. Kraft points up the hypocrisy of The New York Times' opposition to the decision requiring the Times' reporter, Myron Farber, to turn over his investigative materials, but on the other hand its enlightened understanding of the balancing of constitutional interests involved when it came to the Supreme Court's ordering Richard Nixon to turn over his tapes. *Id.*

⁹⁶ See WIGMORE, *supra* note 25, § 2286, at 537 (most attempts to legislate new privileges are due to efforts of organized occupational groups acting in their own self-interest).

⁹⁷ See Leslie, *supra* note 89, at 34 (newspapers can be "put at a terrible competitive dis-

"fourth estate"—protecting the polity from governmental deceit.⁹⁸ However, a recent media survey raised doubt that that same polity would cede to the press privileges beyond, or even commensurate with, those they already enjoy.⁹⁹

CONCLUSION

The conferring of privileges becomes difficult because their invocation usually entails the abridgement of some concomitant or coequal right. Under constitutional analysis, it is doubtful that we should accept such abridgement imposed on the basis of profession or status. By statute, a press privilege is properly conferred, but questions of accountability remain.

advantage because of . . . scrupulousness." (quoting Allan M. Siegal, News Editor, The New York Times)); see also Beaver, *supra* note 47, at 249 (not only do media serve public interest, but are "private businesses, quite validly conducted for economic gain"); Note, *supra* note 92, at 188 (same); see generally Felder, *When Headlines are Bought*, BARRISTER 14 (Fall 1980) (overview of problems attending media practice of purchasing sensational stories).

Media institutions readily seek protection of their economic interests through the courts. See *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (because press is a business it is not exempt from general business laws); *Teleprompter Corp. v. CBS*, 415 U.S. 394, 396 (1974) (plaintiff seeking recovery for copyright infringement).

⁹⁸ See CONSTITUTIONAL LAW, *supra* note 75, § 16.6, at 835-36; Coleman, *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243, 244 (1984). It is generally theorized that "the press would serve as a nongovernmental 'fourth branch' of government, a check against the abuse of power . . ." *Id.* See also Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 10-11 (press frequently described as "fourth estate").

Proponents of Shield Law legislation have indicated their belief that an unfettered press is an aid to criminal justice. See C. WHALEN, *supra* note 9, at 137-38. *But cf. Newsman's Privilege Legislation*, *supra* note 9, at 29 ("[R]eporters rarely have information as to specific crimes or guilt or innocence . . ." (quoting William Cahn, District Attorney, Nassau County, New York)).

For a discussion of the detriment to the administration of justice caused by grand juries and prosecutors leaking information to the press in confidence, see Dershowitz, *When Prosecutors Violate Confidentiality*, N.Y. Times, Oct. 12, 1987, at A19, col. 1.

⁹⁹ See Denniston, *The Public Grades the Press*, WASH. JOURNALISM REV., March 1986, at 46. A Gallup poll found that 89% of those surveyed believed that the press should be accountable in libel actions, and that freedom of the press should not encompass the right to say anything regardless of accuracy. *Id.* Contrary to existing libel law, 75% of those surveyed said that private parties and public officials should have an equal opportunity to prevail in libel actions against the press. *Id.*

See THE FEDERALIST NO. 84, at 580 (A. Hamilton) (J. Cooke ed. 1968). Alexander Hamilton, on freedom of the press, wrote that "whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government." *Id.*

Media Shield Laws

In *Knight-Ridder*, the dissent stressed the need for an absolute and unqualified media privilege, but the proposal was based more on rhetoric than substance. The ability to precisely measure the effects of compulsory disclosure on news gathering remains questionable. Therefore, states must enact shield law legislation with a view to the media's vital role in informing the public, but equally mindful of its enormous influence. It is only with such an awareness that an appropriate privilege for the press may ultimately be achieved.

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