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REFUSAL TO TESTIFY: AN EMPIRICAL STUDY OF NEWSMAN'S PRIVILEGE CASES

By

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ABSTRACT

REFUSAL TO TESTIFY: AN EMPIRICAL STUDY OF NEWSMAN'S PRIVILEGE CASES

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Factors of significance in newsman's privilege cases were determined using a content analysis of 331 cases from 1969 through 1988. Four hypotheses were tested. First, it was found that print journalists were treated most favorably by the courts in newsman's privilege cases. Second, newsmen involved in libel suits were required to testify in newsman's privilege cases as often as those subpoenaed in criminal proceedings. Third, work on a business story resulted in the greatest number of subpoenas for newsmen's testimony in civil cases. Fourth, newsmen subpoenaed to testify in grand jury proceedings were required to testify much more frequently than those subpoenaed by the defense in criminal proceedings. It was also determined that a qualified newsman's privilege is being recognized in an increasing number of cases as the years pass.

Dedicated to

GREGORY THOMAS MASTERS

for our friendship

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CHAPTER I

INTRODUCTION

Background

The law has traditionally held that "the public has a right to every man's evidence."[1] Society is best served by requiring every individual to testify to relevant facts to resolve issues being investigated or litigated.[2] The Sixth Amendment guarantee of compulsory process for the accused in criminal trials provides an example of society's adherence to the tradition of no evidentiary privileges.[3] Nevertheless, communications between certain persons are recognized as privileged by the courts: husband and wife, physician and patient, and clergy and penitent.[4]

Many newsmen believe that confidential communications between sources and themselves should also be privileged. They claim that recognition of a privilege to protect the identity of sources and the content of unpublished written, recorded, and photographed material is necessary to ensure the flow of vital information to the public. Otherwise, the possibility of forced disclosure of sources and release of materials will result in a "chill" on the newsgathering process. The "chill" occurs when sources who would give information to journalists refuse to do so because their identity or particular information may not remain confidential. The "chill" also occurs when newsmen do not publish what they otherwise might because they fear reprisals in the form of subpoenas.[5]

Members of the press therefore argue that for the public to receive vital information, newsmen must be able to act without fear that they will be called into court and compelled to testify. Yet many journalists are subpoenaed and many courts refuse to recognize an unqualified privilege not to testify. The options for journalists are either to break their promise of confidentiality to the source or to go to jail and pay a fine.[6]

Purpose

The purpose of this research is to determine the significance of several factors that may have an effect on the outcome of newsman's privilege cases: the type of employment the subpoenaed individual pursues, the type of media organization for which the individual works, the subject of the story that resulted in the subpoena, and the type of material, if any, that was subpoenaed. The factors considered here have not been studied by other researchers. Emphasis in the literature has been placed on discussions of the appropriate bases for a newsman's privilege, analyses of statutes, and summaries of surveys of newsmen and media organizations on the use of confidential sources.

Also, until 1969, very few reported cases dealt with the issue of newsman's privilege. Only in the last twenty years have newsmen and media organizations repeatedly been summoned to appear in court and refused to do so. The body of cases available for this type of analysis was not sufficiently large. Now, sixteen years have passed since *Branzburg v. Hayes*[7] and well-defined attitudes about the newsman's privilege have evolved in many state and federal courts. Cataloging the cases will allow a correlation between specific factors and decisions in newsman's privilege cases. Also, trends in the use of particular bases for court decisions in newsman's privilege cases will become obvious.

Also included in this study are some factors that have been considered by other researchers: the court's jurisdiction, whether the case is civil or criminal, the reason the subpoena was issued, whether the media is a party to the case, whether the evidence sought is a source, information, or both, and what the legal bases are for the newsman's privilege claim and for the court's decision.

This study will provide a significant contribution to mass communication law literature because it will clarify the factors of importance to journalists when they are involved in a newsman's privilege case. It will provide a basis for strategy for newsmen and their managers when contemplating the use of a confidential source in a story or when negotiating with attorneys before a subpoena is issued.[8] The study will also provide guidelines for attorneys who defend newsmen and media organizations faced with subpoenas.

Hypotheses

This study is only the second to undertake the task of cataloging reporter privilege cases.[9] It is designed to have greater breadth and depth than the previous study. The researcher therefore anticipated that much information of interest to members of the media and the bar would be gathered. Although the hypotheses listed below are designed to answer some pertinent questions and to provide a direction for the research, they indicate only part of the information to be gathered and analyzed. The extent of the information is discussed more fully in Chapter IV.

1. Print journalists employed by newspapers are required to testify in fewer cases than any other category of journalist.

Historically, print journalists working for newspapers and newspaper organizations have received greater protection by legislatures and the courts than other types of journalists. For example, legislatures that have enacted

shield laws have always afforded some protection for newspaper reporters, while other types of journalists, including other print journalists, may not be protected at all.[10]

Courts have also afforded greater protection and greater freedom to print journalists than to other types of journalists. Although print journalists have access to virtually all types of judicial proceedings,[11] photographers and cameramen do not.[12] Also, courts have treated newspaper organizations more favorably than broadcast organizations by ruling that the content of broadcast media may be regulated more closely than the content of print media.[13]

It is therefore instructive to determine if print journalists working for newspapers are favored when the issue of newsman's privilege arises in a court case.

2. Journalists and media organizations involved in libel suits are required to disclose sources and information as often as those subpoenaed in criminal proceedings.

Mehra found that reporters involved in civil cases to which they are a party are required to testify almost as often as in criminal cases.[14] Of 33 civil cases in which the media was a party, testimony was required in 17 cases, or 52 percent.[15] Of 22 civil cases in which the media was not a party, testimony was required in seven cases, or 32 percent.[16] Of 58 criminal cases not involving grand jury proceedings, testimony was required in 34 cases, or 59 percent.[17]

Thus, the recommendations of many legal and media scholars, who suggest that disclosure should be required in civil cases only under exceptional circumstances, appear to be going unheeded by the courts when the media is a first party.[18] Many courts appear to believe that under the current standards for libel, either "actual malice" or "negligence" is very hard for a plaintiff to prove

without disclosure of the source of a reporter's information.[19] Journalists should be warned that if they are to prevail in a libel suit, courts may demand that they have carefully verified information received from confidential sources and that they have nonconfidential sources available to verify information that may be libelous.

3. Stories about government or politics result in the greatest number of subpoenas for testimony by members of the media in civil cases.

Blasi analyzed the distribution of reporters' reliance on confidential sources according to reporting beat. Not surprisingly, he discovered that government reporters relied more heavily on confidential sources than did reporters on any other beat.[20] In an update of Blasi's study, Osborn found that when the individuals he surveyed used confidential or background information, 58 percent of the stories involved government or politics.[21] In contrast to other groups with which there may not be an explicit agreement about what is on and off the record, politicians and government bureaucrats tend to be much more explicit.[22] If the number of subpoenas issued in civil cases reflects the heavy use of confidential sources in stories about government and politics, it may indicate the need for greater care and persistence on the part of journalists assigned to this beat.

4. Subpoenas by the defense in criminal proceedings result in a requirement for testimony as often as in grand jury proceedings.

Subsequent to *Branzburg v. Hayes*,[23] a view developed that despite the requirement for disclosure of sources and information in grand jury proceedings, the law was not clear for other types of criminal proceedings.[24] However, Mehra found that it was immaterial whether a reporter was required to testify in a grand jury proceeding or in a criminal trial. Testimony was required in 56

percent of grand jury proceedings and in 59 percent of criminal trials.[25] Because Mehra did not further subdivide the criminal trial category into subpoenas by the defense and prosecution, it is not known whether the source of the subpoena affects the requirement for testimony. Obviously, the Court in *Branzburg v. Hayes* indicated that testimony may be required in grand jury proceedings, and the guarantees of the Sixth Amendment to a defendant in a criminal proceeding present a formidable challenge to those seeking a newsman's privilege based on the First Amendment.[26]

The effect of the source of a subpoena during criminal proceedings is of great interest to those who frequently cover crime news and may find themselves subpoenaed for this reason.

Endnotes

[1]United States v. Bryan, 339 U.S. 325, 331 (1950).

[2]8 J. Wigmore, *Evidence in Trials & Common Law* §2190, at 65 (McNaughton Rev. 1961).

[3]*See* U.S. Const. amend. VI, which states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

[4]Wigmore suggested four conditions that should exist before a communication is deemed privileged: 1) The communications are confided with the prior agreement that they will not be disclosed; 2) Confidentiality must be necessary to maintain a satisfactory relationship between the parties; 3) The public must support a privilege for the relationship; and 4) The possible injury to the relationship that would result from disclosure of confidential communications must outweigh the public benefit achieved by disclosing the information. J. Wigmore, *supra* note 2, §2285, at 527.

Wigmore was not in favor of creating a testimonial privilege for journalists (or any other extension of testimonial privileges available at common law) because he felt it had not been demonstrated "that the occasional disclosure, in judicial proceedings, of the communication sought to be kept secret would be injurious to the general exercise of the occupation, or that all the conditions exist which justify a general privilege." J. Wigmore, *supra* note 2, §2286, at 532.

[5]*See, e.g.*, Schrag, *The Sacramento Bee Censors Itself*, 67 The Quill 26 (March 1979). The article concerns a story that the *Sacramento Bee* chose not to print for fear the reporter might be required to divulge the identity of sources to whom he had promised confidentiality.

[6]Newsmen usually prefer to accept imprisonment or a fine rather than reveal their confidential sources. *See*, e.g., Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229, 276 (1971) (68.4% of survey respondents said they would "be willing to go to jail to protect important source relationships") [hereinafter cited as Blasi, *The Newsman's Privilege*]; Murasky, *The Journalists's Privilege: Branzburg and Its Aftermath*, 52 Tex. L. Rev. 829, 858 n. 94 (1974) (one commentator found that of more than 100 reported and unreported cases studied, in only four had journalists eventually disclosed their confidential sources); Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 Calif. L. Rev. 1198, 1203 n. 24 (1970) (citing *In re* Wayne, 4 Hawaii 475 (U.S.D.C. 1914), as the only reported case in which a reporter revealed his source) [hereinafter cited as Comment, *The Newsman's Privilege*].

[7]408 U.S. 665 (1972).

[8]Frequently, attorneys negotiate with the media about the information requested before a subpoena is issued. For example, the Attorney General's Guidelines for the issuance of subpoenas to the press provided that the Justice Department, before requesting a subpoena, will weigh its harm to First Amendment rights

against the benefit to the fair administration of justice; will make reasonable attempts to obtain the information from persons other than journalists; and will negotiate with the press. United States Department of Justice, Memorandum No. 692: Guidelines for Subpoenas to the News Media (September 2, 1970).

Blasi reported that in a qualitative survey and personal interviews with reporters he found that "almost all subpoenas are preceded by informal discussions with the reporter, and as often as not his full cooperation is secured or an accommodation is reached at this earlier stage." Blasi, *supra* note 6, at 260 and n. 147.

[9]The first such study was reported in Mehra, *Newsmen's Privilege: An Empirical Study*, 58 Journalism Quarterly 560 (1987).

[10]See Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 Mo. L. Rev. 1, 30 n. 158-163 (1986). Monk reported that of the 26 states that have shield laws, all protect newspapers, all but one include radio and television stations, and all but three include periodicals, but only about half include wire service or press associations, and less than half include other media.

The shield laws of Alabama and Kentucky appear to exclude periodicals. Ala. Code §12-21-142 (1975) provides: "No person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity, shall be compelled to disclose in any legal proceeding or trial . . . "

Ky. Rev. Stat. Ann. §421.100 (1972) provides: "No person shall be compelled to disclose . . . the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

[11]*See* Press Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 510 (1984) (presumption of open public proceeding in criminal trials embodied in First Amendment applies to *voir dire* examination); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (right of public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments).

[12]*See* Chandler v. Florida, 449 U.S. 560 (1981). The U.S. Supreme Court ruled that although there is no constitutional problem with regulated access for cameras in the courtroom of those states that choose to allow them, there is no right of camera access in states that forbid it or in federal courts.

[13]*See* Miami Herald v. Tornillo, 418 U.S. 241 (1974). The Supreme Court held that a Florida statute granting political candidates a right to equal space to reply to attacks on his newspaper by a newspaper violated the First Amendment. *But see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Court upheld the fairness doctrine and personal attack rules as consistent with the First Amendment, allowing the FCC to determine if broadcast media were serving the public by presenting representative community views on controversial public issues.

[14]*See supra*, note 9, at 565.

[15]*Id.* at 564.

[16]*Id.*

[17]*Id.*

[18]*See, e.g.*, Monk, *supra* note 10, at 37-42; Eckhardt & McKey, *Reporter's Privilege: An Update*, 12 Conn. L. Rev. 435, 457-59 (1980).

[19]In New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court ruled that public officials must prove the falsity of publications and "actual malice", i.e. knowledge of falsity or reckless disregard of whether or not the information is false. In Gertz v. Welch, 418 U.S. 323 (1974), the Court ruled that public figures must also meet the "actual malice" standard, but that a heightened state interest permits a lower standard of recovery for private figures, as long as falsity and negligence are demonstrated.

For example, the court in Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974) found that it would be difficult for the plaintiff to prove "actual malice" without knowing the identity of the defendant's source since Hume's information about the circumstances of observations was so imprecise that Carey could not know where to begin his search. *See infra* Chapter II, note 67 and accompanying text.

[20]Blasi, *supra* note 6, at 251-52.

[21]Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Columbia Human Rights L. Rev. 57, 79 (1985).

[22]Blasi, *supra* note 6, at 243.

[23]408 U.S. 665 (1972).

[24]Mehra, *supra* note 9, at 565.

[25]*Id.*

[26]Blasi, *supra* note 6, at 258. "Preventing the conviction of an innocent man is generally recognized as the paramount value in our system of criminal justice."

See, e.g., Alaska Stat. §09.25.160 (1983) (court may deny privilege if withholding of testimony would "result in a miscarriage of justice or the denial of a fair trial.").

Monk, *supra* note 10, at 44 and n. 235, noted that "the rights to fair trial and compulsory process have been held to require a reporter to divulge confidential sources and information, at least in circumstances where the defendant makes an adequate showing of relevance and inability to feasibly obtain the information elsewhere."

CHAPTER II

HISTORY OF JOURNALISTS' PRIVILEGE

From the Founding of the Republic to *Branzburg v. Hayes*

Few courts in the United States heard cases involving a claim of journalist's privilege prior to the late 1960's. The first case involving a reporter's confidential source did not surface until 1848.[1] It proved to be an inauspicious beginning for the press: the District of Columbia Circuit denied a New York *Herald* reporter's writ of habeas corpus for relief from a U.S. Senate contempt conviction.[2]

Later, James W. Simonton, a Washington correspondent for the New York *Daily Times*, was cited for contempt when he refused to disclose his confidential sources to the United States House of Representatives.[3] The *Times* published charges that bribes were being taken by House members for votes on certain land grant measures. Simonton was called to testify before a House committee investigating the charges. Without testimony from Simonton, the committee concluded that the charges were essentially true and the House recommended expulsion of four members.[4] Simonton was convicted of contempt of Congress and placed in custody of the sergeant-at-arms for the remainder of the session.[5]

Thirty years later the press' lack of success continued when the Supreme Court of Georgia decided a newspaper publisher was a competent witness and could not refuse to reveal the identity of the author of a libelous article.[6] The

court took the interesting tack of stating that if the publisher refused to reveal the author's name, he would be considered the author himself.[7] Also, he could be punished for contempt of court as would any other witness refusing to testify.[8]

In 1894, various newspapers charged that the "sugar trust" interest had bribed senators to vote for favorable amendments to the Wilson-Gorman Tariff Bill pending in the U.S. Senate.[9] A senate committee was convened to investigate the charges and two reporters, Elisha Edwards of the Philadelphia *Press* and John Edwards of the New York *Mail and Express*, were called to testify. They refused to tell the committee who their sources of information for the newspaper articles were. The reluctant witnesses then became the responsibility of the District Attorney for the District of Columbia. The Supreme Court of the District of Columbia struck their objection to testifying and demanded the reporters disclose their information.[10] Judge Cole apparently regarded the power to force reporters to divulge information as a "great barrier against libelous publication" and once stricken down, a great temptation to "use the public press as a means of disseminating scandal" arises.[11]

In 1897, California became the next jurisdiction to refuse to recognize a confidential source privilege for journalists. In *Ex parte* Lawrence,[12] the editor and publisher of a newspaper that had charged members of the state senate with accepting bribes refused to reveal the source of their information. The appellate court affirmed the Senate's contempt citation. In *People v. Durrant*,[13] the prosecution in a murder case asked the defendant if he had told a newspaper reporter of a certain event. The court summarily rejected the argument raised by the defense counsel that the statement, if made, was privileged.

In 1901, an Ohio court held that in any action for libel, a question as to who furnished the information is both material and competent.[14] The court concluded that a communication made to a newspaper reporter and subsequently published is not privileged.

Garland v. Torre[15] was the first case in which the issue of First Amendment protection of confidential news sources was raised. Judy Garland sued the Columbia Broadcasting System for breach of contract and for defamation. The libel action resulted from statements that were published in Marie Torre's gossip column in the New York *Herald Tribune*. Garland sought the name of the CBS "network executive" who allegedly made the statements. At a deposition hearing, Torre refused to divulge the identity of her source, and when she subsequently disobeyed a federal district court order to reveal the name, she was found in contempt of court.

On appeal to the Second Circuit Court of Appeals, the defense contended that to compel a newspaper reporter to disclose a source violated the freedom of the press guaranteed by the First Amendment and that the public interest is served by an unrestricted flow of information, which can best be provided if confidential news sources are protected. Mr. Justice Stewart, who was sitting as Circuit Justice at the time, accepted that disclosure of newsmen's confidential sources might result in an abridgment of press freedom.[16] However, he noted that the First Amendment is not absolute and that the fair administration of justice underlies the requirement of witnesses to testify.[17] Stewart held that where the identity of the source went to the "heart of the claim" there was no constitutional right not to testify.[18] The U.S. Supreme Court denied *certiorari* and Torre spent ten days in jail.

From 1911 to 1969, only 17 reported cases arose in which journalists claimed a confidentiality privilege.[19] Several authors have suggested reasons for the limited number of cases.[20] One author speculated that newsmen failed to demand hearings because penalties for not testifying were seldom harsh. Also, the government wanted to maintain a good working relationship with the press and prosecutors often worked out compromises when they sought information. Smaller and less powerful news organizations were frequently willing to cooperate.

By the late 1960's, however, the government was issuing an unprecedented number of subpoenas to journalists.[21] The onslaught of subpoenas has been attributed to the increase in the number of counterculture social and political groups during these years. A large number of journalists in Chicago, New York, Los Angeles, and San Francisco--the four metropolitan areas most closely associated with student radical activities--were subpoenaed. Investigative reporting became more prevalent and government officials believed that the press was informed about the activities of a wide range of dissident groups.[22]

The media were deeply disturbed by the sudden surge of subpoenas, claiming that they were being forced to assist the government in investigating crime.[23] Cooperating would limit their ability to gather news because sources would no longer offer information. Journalists founded The Reporters Committee for Freedom of the Press at Georgetown University in 1970, partially as a reaction to the increase in subpoenas. To solve the problem, they wanted state legislatures to enact shield laws to provide statutory protection for journalists unwilling to testify, and courts to recognize a newsman's privilege to provide judicial protection against forced disclosure of unpublished information.[24]

Legislatures and courts did react, perhaps as a result of Justice White's invitation in *Branzburg v. Hayes.*[25] At the time the decision in *Branzburg* was handed down by the United States Supreme Court, seventeen states had shield laws.[26] Since that time, legislatures in nine more states have enacted shield laws.[27] In most jurisdictions, courts have also recognized some type of qualified privilege for newsmen, based on their interpretation of *Branzburg v. Hayes.*[28]

Branzburg v. Hayes

Branzburg v. Hayes[29] remains the only case in which the U.S. Supreme Court has considered a newsmen's privilege. *Branzburg* was actually a consolidation of four cases: *Branzburg v. Meigs,*[30] *Branzburg v. Pound,*[31] *Caldwell v. United States,*[32] and *In re Pappas.*[33]

The first two cases involved judgments of the Kentucky Court of Appeals regarding Branzburg, a staff reporter for the *Louisville Courier-Journal.* Branzburg wrote two articles that described drug use in Kentucky.[34] After publication of each of the articles, grand juries were convened to investigate illegal drug activity and summoned Branzburg.[35] However, he refused to reveal the identities of the individuals he had seen using or manufacturing drugs, based on the Kentucky reporters' privilege statute,[36] Sections 1, 2, and 8 of the Kentucky Constitution,[37] and the First Amendment of the United States Constitution.[38] The Kentucky Court of Appeals, however, rejected his arguments based on the First Amendment and the Kentucky Constitution. It construed the Kentucky reporters' privilege statute as allowing a newsman the privilege of refusing to reveal the identity of an informant, but held that the statute did not permit a newsman to refuse to testify about individuals and events he had personally observed.[39] Branzburg sought review of both judgments by the U.S. Supreme Court.[40]

In *Pappas*, a television newsman-photographer had been assigned to report on civil disorders involving the Black Panthers in New Bedford, Massachusetts on July 30, 1970.[41] He was allowed to enter and remain inside Panther headquarters during an expected police raid provided that he would not report anything he saw or heard while inside.[42] Pappas stayed inside headquarters for three hours but no raid occurred. He therefore issued no report.

When Pappas was later summoned before a grand jury investigating the New Bedford disorders, he refused to answer questions about his visit to Panthers headquarters. A second summons was then served on Pappas, which he moved to quash on First Amendment grounds. The motion was denied by the trial judge and the denial was upheld by the Massachusetts Supreme Judicial Court. The court cited the serious civil disorders and the need for a grand jury investigation "to discover and indict those responsible for criminal acts."[43] The court observed that recognition of testimonial privileges was the exception in Massachusetts and that "[t]he obligation of newsmen . . . is that of every citizen . . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries."[44]

United States v. Caldwell involved a New York *Times* reporter assigned to cover the Black Panther party and other black militant groups in San Francisco.[45] A federal grand jury investigating a number of possible violations of criminal statutes subpoenaed Caldwell. Caldwell and the New York *Times* moved to quash because Caldwell would have had to appear in secret before the grand jury, which could have destroyed his working relationship with the Black Panther Party.[46] Although the federal district court and the Ninth Circuit Court of Appeals were willing to permit Caldwell to refuse to identify his sources, they

were not willing to grant him an absolute right to refuse to appear before the grand jury.

Caldwell appealed the contempt order and the Court of Appeals reversed.[47] The Court of Appeals viewed the issue as whether Caldwell was required to appear before the grand jury, rather than the scope of interrogation permissible. The court determined that the First Amendment provided a qualified testimonial privilege to newsmen, stating that requiring Caldwell to testify would affect his unique relationship with members of the Black Panther Party and cause him to censor his writings in an effort to avoid being subpoenaed. The court held that Caldwell could refuse to appear before the grand jury because of the potential impact of his appearance on the flow of news to the public.[48]

The Supreme Court split 4-1-4 in its decision on these cases. Justice White delivered the opinion of the Court.[49] Justice Powell concurred separately,[50] and Justices Douglas, Stewart, Brennan, and Marshall dissented.[51] Justice White framed the issue narrowly: "The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment."[52] The Court held that it does not.

The Court acknowledged that the press might sometimes need to promise to keep informants' identities or particular information confidential to effectively gather the news. News gathering qualifies for First Amendment protection, the Court agreed: "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."[53] However, the Court noted that at common law, courts consistently refused to recognize a privilege allowing newsmen to refuse to reveal confidential information to a grand jury regardless of the burdens placed

on the news gathering function.[54] The Court held that the public interest in law enforcement outweighed the burden on news gathering that results from requiring reporters to testify before grand juries.[53] Although both anecdotal and empirical data in the form of affidavits and briefs *amici curiae* were before the Court, they did not find that the evidence demonstrated the flow of news would be significantly constricted by affirming the testimonial obligations of newsmen.[54] The Court declined to administer a confidential newsman's privilege.[55] However, the Court noted that Congress and state legislatures could fashion their own standards with regard to a testimonial privilege for newsmen. Also, state courts were free to interpret their own constitutions so as to recognize a qualified or absolute newsman's privilege.[56]

Justice Powell issued a brief concurring opinion that is the key to understanding *Branzburg v. Hayes*.[57] Justice Powell stated 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 safeguarding their sources."[58] It therefore appears that Justice Powell at least accepts a qualified right of newsmen not to testify. However, he made it quite clear that newsmen must appear before the grand jury: "The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him."[59] It can be said, then, that the only issue decided by *Branzburg* is whether or not newsmen must appear before grand juries: they must. But it is quite clear that Justice Powell did not believe they must testify under all circumstances. To the contrary, he indicated that if a newsman believes the information he has is not relevant to the subject of the investigation, or if the demand for information is frivolous, he may move to quash the subpoena. Justice Powell suggested that a balance be

struck between freedom of the press and the obligation of citizens to give relevant testimony with respect to criminal conduct. However, he did not indicate how such a balance was to be achieved, stating only that the test proposed by Justice Stewart placed a heavy burden of proof on the State and would defeat a fair balancing on the merits of a particular case.

Justice Stewart's test was adopted by three of the dissenters in Branzburg. The test had the following provisions:

> [T]he government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[60]

The test was virtually identical to one proposed by Professor Alexander Bickel of Yale Law School in an *amicus* brief.[61] Justice Stewart accused the majority of inviting "state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government."[62] He based his qualified privilege "on the constitutional guarantee of a full flow of information to the public."[63] Stewart reasoned that the right to gather news is a corollary of the right to publish guaranteed by the First Amendment.

Justice Douglas alone advocated an absolute privilege for newsmen.[64] His absolute view of the guarantees of the First Amendment precluded any requirement that a newsman appear before a grand jury unless the newsman himself was involved in a crime. Justice Douglas noted that if the newsman was involved in a crime, the Fifth Amendment would provide immunity. He found the majority's decision offensive to "the wide-open and robust

dissemination of ideas and counterthought that a free press both fosters and protects and which is essential to the success of intelligent self-government."[65]

Thus, despite the outcome of *Branzburg v. Hayes*, five of the nine justices did recognize a constitutionally-based testimonial privilege for newsmen. Justice Stewart correctly assessed that Justice Powell's "enigmatic concurring opinion"[66] might allow flexibility in *Branzburg*'s interpretation. Without Justice Powell's brief opinion, lower courts view of *Branzburg v. Hayes* might have been radically different.

The Aftermath

After *Branzburg*, court decisions by the U.S. Court of Appeals in three circuits established precedents that have been followed in federal and state courts. These three cases--*Baker v. F&F Investment*,[67] *Carey v. Hume*,[68] and *Silkwood v. Kerr-McGee Corp.*[69]--are frequently cited as illustrations of how to balance the interests of the media and litigants in court cases.

Baker v. F&F Investment

Alfred Balk had written an article on blockbusting in Chicago for the *Saturday Evening Post*, which described tactics used by some real estate firms to provoke panic selling of homes by white owners when a black family moved into the neighborhood. The real estate firms bought homes at low prices from white owners and sold them at much higher prices to black owners. Baker, representing himself and other black buyers, sued F&F, seeking damages as alleged victims of racial discrimination. Baker wanted to compel Balk, who was then an editor of the Columbia Journalism Review and living in New York, to identify the sources interviewed for the article. The federal district court in New York refused to compel Balk to reveal his sources because Baker had not shown he had exhausted alternative sources for the article. The Circuit Court of

Appeals upheld the lower court's decision, adding that Balk's information did not go to the "heart of the claim" advanced by Baker.[70] The court distinguished *Baker* from *Branzburg*, holding that a journalist's interest in freedom of the press carries more weight in a civil action than in a criminal proceeding.[71]

Carey v. Hume

Carey v. Hume was also a civil action but the journalist was a libel defendant. Jack Anderson wrote a column alleging that Carey, a lawyer for the United Mine Workers, had taken a box of union records from the union office and then reported them as stolen. The column was based on information given to one of Anderson's reporters by a confidential source. To win the libel suit Carey had to prove "actual malice," which he said he could not do without knowing the identity of Anderson's sources.[72] The federal district court agreed and ordered Anderson to reveal the confidential source.

On appeal, the District of Columbia Circuit Court affirmed. The court used the balancing test given by Justice Powell and found that the information Carey wanted went to the "heart of the claim."[73] Although the court recognized the existence of a qualified privilege, it held that the journalists' interest would have to yield.

Silkwood v. Kerr-McGee Corp.

Arthur Hirsch was an independent film maker who investigated the mysterious death of Karen Silkwood. Silkwood was an employee at a Kerr-McGee plant that processed plutonium. She was killed in a one-car accident while on her way to discuss plant conditions with a New York *Times* reporter. Her estate sued Kerr-McGee, alleging violation of Silkwood's civil rights by conspiring to prevent her from organizing a labor union and from filing official complaints over safety conditions, and by contaminating her with radiation.

Kerr-McGee sought to question Hirsch about his sources and about confidential information that he had not used in his documentary. Hirsch moved to quash the subpoena but the federal district court ruled that he was not a journalist and therefore could not use the privilege. On appeal, the Tenth Circuit Court of Appeals ruled that the privilege was not limited to newspaper reporters. The case was remanded to the district court with directions to apply Justice Stewart's three-part test in determining whether to compel Hirsch to testify.[74]

In re Farber

One of the most widely publicized post-*Branzburg* cases was *In re Farber*.[75] New York *Times* reporter Myron Farber began investigating a series of thirteen unexplained deaths at a New Jersey hospital in 1975. The investigation led to the indictment of Dr. Mario Jascalevich.[76] During his trial the defendant subpoenaed documents and materials in the New York *Times*' possession resulting from Farber's investigation. A motion to quash the subpoena was denied and the trial judge ordered that the materials be produced for *in camera* inspection. The Supreme Court denied a stay of the order.[77] Farber and the *Times* refused to comply with the order and were fined $1,000 and $100,000, respectively, for criminal contempt. Civil penalties were also imposed in the form of an indefinite prison term for Farber and a $5,000 per day fine for the *Times*.[78]

On appeal, the New Jersey Supreme Court affirmed all orders below. The majority addressed four issues: 1) whether Farber and the *Times* were protected by a First Amendment privilege; 2) whether the New Jersey shield law afforded the privilege claimed by Farber and the *Times*; 3) whether the Sixth Amendment of the U.S. Constitution or the comparable article in the New Jersey

Constitution required compliance with the subpoena; and 4) whether special procedural requirements existed under the New Jersey shield law.

On the first issue, the New Jersey Supreme Court found that *Branzburg* was applicable to criminal proceedings as well as grand jury proceedings and therefore Farber and the *Times* had no privilege under the First Amendment.[79] However, the court also stated that disclosure of information cannot be compelled when it is "patently irrelevant" or when disclosure is not "manifestly compelling" to the party seeking disclosure.[80] This sounds very much like two of the three parts of Justice Stewart's proposed test in *Branzburg*.

On the second and third issues, the court held that while the shield law was applicable, the guarantees of compulsory process nevertheless required disclosure.[81]

On the last issue, the court held that the legislation required a preliminary hearing before a reporter could be compelled to submit materials to a trial judge for *in camera* inspection.[82] At the hearing the person seeking to compel disclosure must prove that there is "a reasonable probability or likelihood that the information sought by the subpoena was material and relevant to his defense, that it could not be secured from any less intrusive source, and that the defendant had a legitimate need to see and otherwise use it."[83]

Despite the media's concern over the unfavorable ruling in *Farber*, the procedural requirement espoused by the court was very similar to the three-part test proposed by Justice Stewart in *Branzburg*.

Other Aspects

Newsroom Searches

Zurcher v. Stanford Daily[84] afforded another look at the Supreme Court's attitude towards special privileges for the media. On April 11, 1971, the student newspaper at Stanford University published photographs of an antiwar demonstration in which policemen were attacked by unknown persons. The police obtained a warrant to search the newspaper's offices for further photographic evidence, but the search was not productive.[85]

The Stanford Daily filed suit in federal court alleging that the search violated the First, Fourth, and Fourteenth Amendments.[86] The district court held that when a search is directed at an innocent third party, it is rarely permissible.[87] The Ninth Circuit upheld the district court's ruling.[88]

The Supreme Court reversed the decision in a five to three ruling, with the majority holding that searches of newspapers require no special procedures.[89] Justice White again delivered the opinion of the Court and stated that the traditional requirements of probable cause and reasonableness when issuing a warrant offered sufficient protection against any harm to First Amendment rights.[90] The majority was unconvinced that sources would disappear or that reporters would limit their news gathering because they might be subject to searches.[91]

In his dissent, Justice Stewart argued that newsroom searches violate the press clause of the First Amendment.[92] He found it self evident that allowing law enforcement officers to search a newsroom jeopardizes confidential information that may be held there.[93]

Widespread criticism of the decision in *Zurcher* led Congress to enact the Privacy Protection Act of 1980.[94] The intent of the Act was to "lessen greatly the threat that *Stanford Daily* poses to the vigorous exercise of First Amendment rights."[95] It made obtaining a warrant to search the property of an

innocent third party engaged in news dissemination much more difficult to acquire and generally required officials to request or subpoena documents before attempting to obtain a search warrant.[96]

The Journalist's State of Mind

Herbert v. Lando[97] proved to be a source of concern for those who felt it allowed liberal discovery rules to prevail, perhaps extending these rules to libel suits that involved the use of confidential sources. Herbert, a retired army officer, sued CBS Inc., Atlantic Monthly, and individual defendants, claiming that he had been portrayed as a liar. Lando was the producer of the broadcast and author of the Atlantic Monthly article. As a public figure, Herbert had to meet the actual malice standard.[98] During discovery, Herbert asked Lando about his thoughts and conversations with codefendant Mike Wallace about material included in the two publications.[99] Lando refused to answer on the grounds that the editorial process was privileged under the First Amendment.[100] The district court granted Herbert's motion to compel discovery but the Second Circuit reversed on appeal. Chief Judge Kaufman held that Lando's thoughts and conversations were protected and inquiries into these processes would chill the media and violate the First Amendment.[101]

The Supreme Court held that Lando had no constitutional grounds for refusing to answer and reversed the Second Circuit decision.[102] The Court held that the content of journalists' thoughts and conversations may provide the only direct evidence available to the plaintiff attempting to prove actual malice.[103] The majority felt that First Amendment interests would not be seriously threatened by compelling journalists to reveal the content of their thoughts and conversations. The Court suggested that compelling disclosure of journalists' thoughts would be likely to contribute to the suppression of false information,

but not information that could be verified.[104] Furthermore, the Court did not believe that journalists would limit their conversations because of the possibility of later disclosure since these help to eliminate error.[105] Thus, the Court concluded that the interpretation of the First Amendment should not be modified to include an evidentiary privilege for the editorial process.

Endnotes

[1]The first case dealing with newsman's privilege has often been mistakenly cited as one involving James Simonton, *infra* Chapter II, note 3. However, this error was found and reported in Gordon, *Protection of News Sources: The History and Legal Status of the Newsman's Privilege*, 1970 (University of Wisconsin, unpublished dissertation).

[2]*Ex parte* Nugent, 18 F. Cas. 471 (D.C. 1848).

[3]Cong. Globe, 34th Cong. 3d Sess. 274-75, 411-12 (1857).

[4]H.R. Rep. No. 243, 34th Cong., 3d Sess. 169-179 (1857).

[5]Cong. Globe, 34th Cong., 3d Sess. 411-412, 426 (1857).

[6]Pledger v. State, 77 G. 242, 3 S.E. 320 (1887).

[7]*Id.* at 248.

[8]*Id.*

[9]D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 Harv. J. on Legis. 307, 313 (1969).

[10]Chapman v. United States, 5 App. D.C. 122, 123-125 (1895).

[11]Sen. Misc. Doc. 279 at 856.

[12]116 Cal. 179, 48 P. 75 (1897).

[13]116 Cal. 298, 48 P. 124 (1897).

[14]Clinton v. Commercial Tribune Co., 11 Ohio Dec. 603 (1901).

[15]259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

[16]*Id.* at 548.

[17]*See supra* Chapter I, notes 1-4 and accompanying text.

[18]259 F.2d at 550.

[19]Garland v. Torre, 259 F.2d 545 (2nd Cir. 1958), *cert. denied*, 358 U.S. 910 (1958); *In re* Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964); Deltec, Inc. v. Dunn and Bradstreet, Inc., 187 F. Supp. 788 (N.D. Ohio 1960); Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); *In re* Howard, 136 Cal. App.2d 816, 289 P.2d 537 (3d Dist. 1955); Clein v. State, 52 So.2d 117 (Fla. 1950); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); *In re* Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961); *In re* Wayne, 4 Hawaii 475 (U.S.D.C. 1914); Beecroft v. Point Pleasant Print and Pub. Co., 82 N.J. Super. 269, 197 A.2d 416 (1964); Brogan v. Passaic Daily

News, 22 N.J. 139, 123 A.2d 473 (1956); State v. Donovan, 129 N.J.L. 478, 30 A.2d 1011 (1943); *In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (1913); People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936); State v. Buchanan, 250 Or. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968); In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

[20]*See* Comment, *The Newsman's Privilege*, *supra* Chapter I, note 6, at 1200, n.9.

[21]*See* Note, *The Case for a Federal Shield Law*, 24 U.C.L.A. L. Rev. 160, 162-164 (1976); Osborn, *supra* Chapter I, note 21, at 59-60, n. 12.

[22]*Id.*

[23]*See* Osborn, *supra* Chapter I, note 21, at 60, n. 14.

[24]Matthews, *Journalism's Full Court Press*, Wash. Journalism Rev., Mar. 1982 at 40.

[25]Branzburg v. Hayes, 408 U.S. 665, 706 (1972): "There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute."

[26]*Id.* at 689, n. 27.

[27]The nine shield laws enacted after *Branzburg* are Del. Code Ann. tit. 10, §§4320-4326 (1974); Ill. Ann. Stat. ch. 110, para. 8-901--8-909 (Smith-Hurd 1983 & Supp. 1987); Minn. Stat. Ann. §§595.021--.025 (West Supp. 1988); Neb. Rev. Stat. §§20-1-901--903 (1987); N.D. Cent. Code §31-01-06.2 (1976); Okla. Stat. Ann. tit. 12, §2506 (1980); Or. Rev. Stat. §§44.510-.540 (1984); R.I. Gen. Laws §§9-19.1-1 to -3 (1985); Tenn. Code Ann. §24-1-208 (1980).

[28]*See* Monk, *supra* Chapter I, note 10, at n. 115. Monk stated that 14 of the 24 states without a shield law had some form of qualified privilege. In 9 of the 26 states with a shield law, courts have recognized a qualified First Amendment privilege. Also, most federal circuit courts that have addressed the issue have recognized a qualified newsman's privilege.

[29]408 U.S. 665 (1972).

[30]Unreported case.

[31]461 S.W.2d 345 (Ky. 1970).

[32]434 F.2d 1081 (9th Cir. 1970).

[33]358 Mass. 604, 266 N.E. 2d 697 (1971).

[34]Branzburg v. Hayes, 408 U.S. 665, at 667, 669 (1972). The articles were run November 15, 1969 and January 10, 1971.

[35]*Id.* at 667-70.

[36]Ky. Rev. Stat. Ann. §421.100 (1972) provides: "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

[37]Ky. Const. §§1, 2, and 8.

[38]U.S. Const. Amend. 1.

[39]408 U.S. 665, at 669.

[40]*Id.* at 671.

[41]*Id.* at 672. *See* Murasky, *supra* Chapter I, note 6, at 835-36. Murasky states that the Panthers agreed to allow Pappas inside their headquarters because they felt the press often gave only the official side of stories. They were expecting a police raid and wanted Pappas to cover the story from the inside.

[42]408 U.S. at 672.

[43]358 Mass. 604, 607, 266 N.E. 2d 297, 299 (1971).

[44]358 Mass. 604, 612, 266 N.E.2d 297, 303 (1971).

[45]408 U.S. 665, 675.

[46]*Id.* at 676.

[47]*Id.* at 685.

[48]*Id.* at 691.

[49]408 U.S. 665, 667.

[50]*Id.* at 709-710.

[51]*Id.* at 711-25 (Douglas J., dissenting); *id.* at 725-52 (Stewart, Brennan, & Marshall, JJ., dissenting).

[52]*Id.* at 667.

[53]*Id.* at 681.

[54]*Id.* at 685.

[53]*Id.* at 691.

[54]*Id.* at 693.

[55]*Id.* at 703.

[56]*Id.* at 706.

[57]*Id.* at 709-710.

[58]*Id.* at 709.

[59]*Id.* at 710.

[60]*Id.* at 743 (Stewart, Brennan & Marshall, JJ., dissenting).

[61]Brief for The New York Times Co., National Broadcasting Co., Columbia Broadcasting System, Inc., American Broadcasting Co., Chicago Sun-Times, Chicago Daily News, Associated Press Managing Editors Ass'n, Associated Press Broadcasters' Ass'n and Association of American Publishers, Inc. as *Amici Curiae* at 29, Branzburg v. Hayes, 408 U.S. 665 (1972).

[62]408 U.S. at 725.

[63]*Id.* at 726 n.2 (Stewart J., dissenting).

[64]*Id.* at 712 (Douglas J., dissenting).

[65]*Id.* at 721.

[66]*Id.* at 725 (Stewart J., dissenting).

[67]470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

[68]492 F.2d 631 (D.C. Cir.), *cert. denied*, 417 U.S. 938 (1974).

[69]563 F.2d 433 (10th Cir. 1977).

[70]470 F.2d 778, 784 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

[71]*Id.*

[72]492 F.2d 631, 637 (D.C. Cir.), *cert. denied*, 417 U.S. 938 (1974).

[73]*Id.* at 636.

[74]563 F.2d 433, 438 (10th Cir. 1977).

[75]78 N.J. 250, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978).

[76]*Id.* at 264, 394 A.2d at 332.

[77]*See* New York Times v. Jascalevich, 439 U.S. 1301 (1978) (Justice White); New York Times v. Jascalevich, 439 U.S. 1304 (1978)(Justice Marshall).

[78]*In re Farber*, 78 N.J. at 264, 394 A.2d at 332.

[79]*Id.* at 268, 394 A.2d at 334.

[80]*Id.* at 267, 394 A.2d at 334.

[81]*Id.* at 270-274, 394 A.2d at 335-37.

[82]*Id.* at 276, 394 A.2d at 338.

[83]*Id.* at 276-77, 394 A.2d at 338.

[84]436 U.S. 547 (1978).

[85]*Id.* at 551.

[86]353 F.Supp. 124 (N.D. Cal. 1972).

[87]*Id.* at 135.

[88]550 F.2d 464 (9th Cir. 1977).

[89]436 U.S. 547, 567-68.

[90]*Id.* at 565.

[91]*Id.* at 566.

[92]*Id.* at 570-583 (Stewart, J., dissenting).

[93]*Id.* at 573 (Stewart, J., dissenting).

[94]Pub. L. No. 96-440, 94 Stat. 1879 (1980).

[95]S. Rep. No. 874, 96th Con., 2d Sess. 4-5, reprinted in 1980 U.S. Code Cong. & Ad. News 3950, 3951.

[96]Pub. L. No. 96-440 at §101, 94 Stat. 1879-80. For a more detailed analysis of the Act, *see* Note, *The Privacy Protection Act of 1980: Curbing Unrestricted Third-Party Searches in the Wake of* Zurcher v. Stanford Daily, 14 U. Mich. J. L. Ref. 519 (1981); Note, *Legislative Response to* Zurcher v. Stanford Daily, 9 Pepperdine L. Rev. 131 (1981).

[97]441 U.S. 153 (1979).

[98]*See supra* Chapter I, note 19.

[99]Herbert v. Lando, 568 F.2d 974, 983 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

[100]The Court noted: "The opinions below did not state, and respondents do not explain, precisely when the editorial process begins and when it ends. Moreover, although we are told respondent Lando was willing to testify as to what he 'knew' and what he had 'learned' from his interviews, as opposed to what he 'believed,' it is not at all clear why the suggested editorial privilege would not cover knowledge as well as belief about the veracity of published reports."

[101]568 F.2d at 984.

[102]441 U.S. 153 (1979).

[103]*Id.* at 170.

[104]*Id.* at 172-73.

[105]*Id.* at 173-74.

CHAPTER III

REVIEW OF LITERATURE

Legislatures in 26 states have enacted shield laws that offer various degrees of protection to a newsman who refuses to reveal a confidential source.[1] In addition, ten of the twelve federal Circuit Courts of Appeal recognize a newsman's privilege based on the First Amendment or on federal common law.[2] The Seventh Circuit Court of Appeals has not heard a newsman's privilege case, although the United States District Court for the Northern District of Illinois has recognized a privilege.[3] Only the Sixth Circuit Court of Appeals does not appear to be willing to recognize an evidentiary privilege for newsmen.[4]

While legislatures and courts were addressing the newsman's privilege issue, media and legal scholars were also developing their views. The literature encompasses overviews of the newsman's privilege issue, examinations of cases, discussions of bases for the privilege, analyses of statutes, summaries of surveys of newsmen and media organizations on the use of confidential sources, and empirical studies of newsman's privilege cases.

Before *Branzburg v. Hayes*

Prior to *Branzburg v. Hayes*, many authors urged adoption of some type of testimonial privilege for journalists. Although there were some earlier articles,[5] the large number of subpoenas issued in the late sixties and early seventies[6] and the publicity surrounding the cases that would later be heard by

the U.S. Supreme Court in *Branzburg v. Hayes*[7] prompted many authors to propose solutions to the problem in those years.

D'Alemberte focused on the proper weight to be given to the public interests involved when considering newsman's privilege--societal interests in both the revelation of facts and the maintenance of confidential sources.[8] He noted that advocating a constitutional basis for newsman's privilege was a recent development and the rationales given for not divulging confidential sources or information in the first half of the twentieth century were quite different: 1) the codes of ethics of news organizations forbid revelation of sources or information; 2) loss of livelihood might result from disclosure; 3) newsmen might be forced to disobey employer's regulations; 4) disclosure might result in a limit on the flow of information from news sources to the press; 5) newsmen might be forced to incriminate themselves; and 6) the information sought was irrelevant to the proceedings.[9] D'Alemberte argued for a statutory resolution of the problem and, after surveying the statutes in existence and examining the problems in drafting a newsmen's privilege statute, he proposed two model statutes.

Not satisfied that the shield laws then in existence provided adequate protection for newsmen, Guest and Stanzler argued for a constitutional basis for newsman's privilege.[10] They attacked Wigmore's rationale for rejecting newsman's privilege at common law, stating that newsman's privilege did meet all four criteria, and contended that lack of cases in which a common law right has been recognized should not decide whether the constitutional basis is accepted.[11] The authors argued that news gathering qualifies for protection as a First Amendment activity and maintained that the proper test is a balancing of the interests involved, case by case. However, they believed that the scales should be tipped to favor newsmen: "Courts should start with the presumption

that there is a constitutional privilege and make an exception only if the free flow of news will not be seriously impaired and the interest in more effective judicial administration will not be enhanced sufficiently by enforcing the exception."[12] Guest and Stanzler also made one of the first attempts to obtain data on the importance of information from confidential sources in news stories to determine the effect of denying newsman's privilege on the flow of news. The survey was unsophisticated: they asked editors of 37 daily newspapers throughout the United States how many articles per year were based on information from confidential sources.[13] They found that newspapers run a large number of stories based on material from confidential sources although this varies widely between newspapers.[14]

Sherwood agreed that most pre-*Branzburg* privilege cases were not correctly decided.[15] She stated that constitutional claims for the privilege were not properly evaluated by the courts in *Torre*[16] and *Goodfader*[17] because 1) they failed to balance the interests and weigh the circumstances in each particular case; 2) they weighed the interest in compelling testimony high and the press freedom interest low; 3) interests of private litigants should normally be considered subordinate to those of the press; and, 4) in the absence of a clear and present danger to judicial proceedings, the press' First Amendment claims should not be overridden.[18] She concluded that neither court had a strong conviction that news gathering is constitutionally protected. The author then suggested a constitutional basis for the newsman's privilege and analyzed the scope and extent of the privilege that should be available in various circumstances. Against government subpoenas, the author suggested that there must be an overriding state interest before encroachment on First Amendment rights is allowed;[19] against subpoenas by criminal defendants, she suggested a

balance be struck between Sixth and First Amendment rights;[20] and in relation to private litigation, she recommended that newsman's privilege give way when actual malice or highly unreasonable conduct is shown.[21] Sherwood concluded by calling for the Supreme Court to resolve the confusion in the courts and in the state and federal government.

In a brief article, Nelson presented a journalist's perspective on newsman's privilege before *Branzburg*.[22] He agreed that the social and political turmoil of the late 1960's and early 1970's was a major cause of the increase in the number of newsmen subpoenaed. He also advocated a constitutional basis for the privilege and analyzed several cases, including those that would later be heard in *Branzburg*, which relied on constitutional protection for the privilege.[23] The author concluded that if the Ninth Circuit Court of Appeals decision in *Caldwell v. United States*[24] were upheld by the Supreme Court, newsmen would use the reasoning to seek First Amendment support for a right of access in a variety of circumstances.[25]

Post-*Branzburg*--The Early Years

Scholars were critical of the U.S. Supreme Court decision in *Branzburg v. Hayes*,[26] but most soon realized that lower courts were interpreting the decision narrowly. Bases for a qualified newsman's privilege were proposed, including a common law basis and a federal shield law.

Murasky provided a thorough analysis of the Supreme Court's decision in *Branzburg*, its implications, and its impact on the lower courts.[27] She also discussed the "chilling effect" of compulsory disclosure on the press and the evidence of the effect that was ignored by the Supreme Court in *Branzburg*.[28] Murasky evaluated the state's countervailing interest in apprehending and punishing criminals and determined that the appropriate analysis by the

Supreme Court would have been whether the means being used to achieve that end unduly impaired the exercise of First Amendment rights. An analysis of the impact of *Branzburg* on criminal and civil litigation in the lower courts led the author to the conclusion that these courts were showing a greater willingness than they had prior to *Branzburg* to uphold a privilege on First Amendment grounds after consideration of the content of the information, the circumstances in which it was obtained, and the circumstances in which disclosure was sought.[29]

In another article that discussed several early post-*Branzburg* cases, Goodale suggested that the solution to the problem was to let it be resolved "on a case-by-case basis so that, in effect, a common law of subpoenas may develop."[30] He first presented an extensive analysis of *Branzburg v. Hayes* and decided that the case granted newsmen a qualified privilege. as five of the nine justices would not require testimony in every instance. He then evaluated lower court rulings in newsman's privilege cases and noted that, in the majority of cases, a qualified privilege has been recognized. He concluded that when the Supreme Court next hears a newsman's privilege case, the justices will be able to rely on the common law to uphold a qualified privilege.[31]

Eckhardt and McKey discussed reporter privilege cases from *Branzburg v. Hayes* through the late 1970's.[32] They examined reporter's privilege in various contexts, including criminal investigations, criminal trials, interference with the criminal process such as disclosure of secret grand jury proceedings, and civil cases. They found somewhat contradictory developments and attempted to reconcile the holdings in *Zurcher v. Stanford Daily*,[33] *In re Farber*,[34] and *Herbert v. Lando*,[35] with the developments in post-*Branzburg* newsman's privilege cases. They noted that *Farber* may not have been a bad blow to the development of

newsman's privilege because the procedural requirements agreed upon by the court are very similar to those in Justice Stewart's three-part test in his dissent in *Branzburg*.[36] The Supreme Court's concern over the abuse of discretion during civil discovery in *Herbert v. Lando* led Eckhardt and McKey to assume that lower level trial courts will give procedural arguments substantial weight.[37] However, they found *Zurcher* a difficult case to understand because 1) the Court was willing to ignore judicial and scholarly authority since *Branzburg*; 2) search warrants are generally considered to be more threatening than other attempts to compel newsmen to disclose information; 3) the Court rejected procedures which might have proved less restrictive of First Amendment rights; and 4) no representative of First Amendment rights is consulted prior to issuance of a search warrant.[38] Eckhardt and McKey concluded that the views of a majority of the Supreme Court are in sharp contrast to those of the lower federal and state courts, the state legislatures that have passed shield legislation, most commentators, and the media. However, they anticipated an accumulation of judicial precedent favoring newsman's privilege and believed that the vast weight of judicial and scholarly opinion would ultimately prevail.

Similarly, Killenberg also found reason to hope for recognition of newsman's privilege.[39] He analyzed several post-*Branzburg* cases and found recognition of newsman's privilege as a qualified First Amendment right, although state and federal court decisions were inconsistent. He also considered the Supreme Court's decision in *Zurcher* a serious threat to confidential sources and information, and stated that journalists certainly preferred the subpoena to the search warrant because it allows a refusal to comply.[40] He concluded that the Powell concurring opinion allowed *Branzburg* a flexibility that proved to be

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less destructive to newsman's privilege than advocates of a free press originally expected.

The failure of newsmen to gain a shield against subpoenas through the common law, state statutes, and constitutional law prompted one author to suggest a federal shield law as the solution.[41] Neubauer summarized the history of newsman's privilege and noted that while the radical activity which prompted the rash of subpoenas in the late 1960's and early 1970's had subsided, the issuance of subpoenas had not.[42] He then reviewed the bases for assertion of the privilege, including common law, the Fifth Amendment, state statutes, and the First Amendment. Neubauer concluded that the combination of a constitutional and federal statutory privilege would provide the best protection of newsmen's confidential relationships. However, he warned that the major problem with a federal statute, as with state statutes, is that courts are likely to interpret it quite narrowly.[43] Therefore, he suggested solutions to the problems likely to occur when drafting such a statute: who qualifies for the privilege, what is protected and to what extend, and what constitutes a waiver of the privilege.

Status of Confidential Privilege in Libel Suits

Although much research has involved the issue of newsman's privilege in the context of criminal proceedings, it also arises frequently in civil actions, particularly in libel suits. Plaintiffs may find it difficult to prove "actual malice" if they cannot determine the identity of a newsman's source. Libel suits are obviously of great interest to the media because of their direct involvement.

Watkins discussed the question of compelled disclosure in libel actions subsequent to *Branzburg v. Hayes*.[44] He reviewed two decision by U.S. Courts of Appeal: *Cervantes v. Times Inc.*[45] and *Carey v. Hume*.[46] In *Cervantes*, the mayor of St. Louis sued *Time* because of an allegedly libelous article accusing him of

ties with organized crime. The Eighth Circuit determined that the extensive documentation and uncontroverted accuracy of the bulk of the article, coupled with evidence of a comprehensive investigation, made it unlikely that Cervantes could establish malice.[47] Thus, the court did not require disclosure of *Time*'s confidential sources.

In *Carey*, an attorney for the United Mine Workers sued Britt Hume, an associate of syndicated columnist Jack Anderson, because of an article accusing Carey of removing financial records from United Mine Workers headquarters while the government was investigating the union.[48] Attempting to meet the actual malice standard, Carey demanded that Hume be required to disclose the source of his information. The Court of Appeals for the District of Columbia found that the information sought by Carey did go to the "heart of the claim," and it would be difficult for him to prove actual malice without knowing the identity of Hume's source.[49] Watkins used these cases to design a general rule for source disclosure in libel actions: "[N]ewsmen should not be subject to compulsory disclosure of confidential sources unless the plaintiff in a libel suit is able to show with convincing clarity that such disclosure would provide significantly different evidence that "goes to the heart" of his libel claim."[50] The standard provides for disclosure when it would lead to persuasive evidence of actual malice or when there is no other method for proving malice. Watkins suggested that other factors might also be taken into consideration in this balancing approach, including the established ethical principle of journalism that confidential sources should not be revealed.[51]

Lindberg developed another approach to source disclosure in libel suits in light of the danger to First Amendment interests.[52] She claimed that the public's interest in receiving a wide range of information dictates a need for a

privilege against compelled disclosure in libel cases. Only when the plaintiff can present a *prima facie* case of actionable falsity and the defendants cannot prove due care should the courts then consider whether the need for disclosure is essential to the plaintiff's case. The author found *Herbert v. Lando*[53] inapplicable to the question of confidential source disclosure because it addressed news processing and not news gathering. Furthermore, *Lando* involved disclosure of journalists' thoughts and conversations only, not disclosure of confidential sources and information. The author concluded that the ultimate aim of a theory governing source disclosure in libel suits should be to neutralize the impact of the confidential source issue on libel litigation. Thus, when courts deny plaintiffs access to sources' identities, defendants should not be allowed to use these sources as proof of due care.[54] But this should also not allow a court to instruct the jury that no source existed, thus punishing the defendant.

Post-*Branzburg*--A Decade Later

Ten years after *Branzburg v. Hayes*, it became obvious that lower courts were being very careful when interpreting *Branzburg*. Justice Stewart's proposed three-part test appeared to prevail in lower court decisions. Thus, *Branzburg*'s effect was not as restrictive as critics first thought it would be.

In a more recent note on newsman's privilege, Newman reported on post-*Branzburg* developments in grand jury and other criminal proceedings, including the *Farber* case.[55] Newman concluded that lower courts were proving sensitive to First Amendment values by confining *Branzburg* to the facts of the case. He also reviewed *Zurcher v. Stanford Daily*[56] and suggested that the Supreme Court majority opinion was consistent with *Branzburg* and indicated a neutral application of First Amendment principles.[57] The author cautioned that

abuse of confidential sources and information by some journalists might make it more difficult to convince the judiciary of a need for newsman's privilege.[58]

Simon used the "absolute" Nebraska shield law as a basis for comparison of the freedom from disclosure in other states.[59] He reviewed newsman's privilege cases heard in the federal circuit courts of appeal and concluded that a qualified newsman's privilege has been adopted by almost every circuit.[60] He noted that courts' interpretation of several "absolute" shield laws could lead newsmen to assume that they should consistently rely on a First Amendment based privilege when called into court. Simon then addressed the conflicts between federal and state courts on the question of newsman's privilege and found that such a conflict could prove very difficult to resolve. He concluded by determining when disclosure would be required even under the "absolute" Nebraska shield law and noted that any countervailing constitutional right may overcome the law.[61]

Monk provided the most current review of newsman's privilege cases and statutes.[62] He first discussed Wigmore's four criteria for granting a testimonial privilege,[63] and concluded that although the newsman's privilege meets the criteria, stronger protection is afforded by a privilege based on the First Amendment. Agreeing with Simon's analysis, Monk stated that the constitutional origins of newsman's privilege call for it to be absolute except when confronting a countervailing constitutional right. He conceded, however, that no absolute privilege is likely to be recognized in the near future.[64] The author examined the history of newsmen's privilege as well as the provisions of the various state newsmen's privilege statutes. He concluded that most of the current shield laws are subject to interpretations by the judiciary that could result in insufficient protection for newsmen. Monk favored an absolute privilege based on the First

Amendment, to be recognized except in those instances in which there is a countervailing constitutional right at stake.

Empirical Data on the Use of Confidential Sources

Justice White deplored the lack of adequate empirical evidence supporting the "chilling" effect in his opinion in *Branzburg v. Hayes*.[65] However, without a survey of the sources themselves to confirm or deny that the lack of a newsman's privilege deters them from providing information in confidence, a survey of reporters would seem to be the next best thing. Several individuals have attempted this type of survey.

Blasi conducted an extensive survey of the use of confidential sources and information by newsmen.[66] Because he found that most legal decisions are based on premises that are formulated in an unsystematic and impressionistic manner, he "sought to achieve as comprehensive and systematic an understanding of the dispute [press subpoena controversy] as time and resources would permit."[67] Therefore, he conducted three projects: 1) personal interviews with 47 reporters and editors in New York City, Washington, D.C., Chicago, Detroit, Los Angeles, San Francisco, and Denver; 2) a mail survey, designed to provide qualitative rather than quantitative information, of 67 reporters who were believed to be especially familiar with the subpoena problem; and 3) a quantitative survey sent to reporters and editors of newspapers, news magazines, national and local television stations, radio stations, and the underground press. For the quantitative survey, 1470 questionnaires were sent and 975 were returned, for a response rate of 66.3 percent.[68] Blasi used the personal interviews and qualitative survey to put the information from the quantitative survey in perspective. Some of his more interesting conclusions were 1) the threat of subpoenas makes investigative reporting more difficult, but does not necessarily

cause sources to "dry up"; 2) frequently, understandings of confidentiality in reporter-source relationships are implicit rather than explicit; 3) reporters feel that they should resolve conflicting obligations to sources and to society and thus show both a high level of willingness to testify voluntarily and to go to jail if necessary to protect a source; 4) newsmen believe protection of the source's identity is more important than protection of confidential information; and 5) newsmen object most strenuously to press subpoenas when they feel the circumstances do not warrant the subpoena and they have no relevant information to contribute.

Osborn supplied an update on the empirical evidence gathered by Blasi in support of a newsman's privilege.[69] He surveyed reporters nominated for Pulitzer Prizes in 1980. Surveys were distributed to 366 reporters and 110 were returned, for a response rate of 30.1 percent.[70] Osborn explained that the response rate was deceptively low because many of the surveys were never received by the intended reporters and contended that the uniformity of the responses should offset concerns about the response rate. The surveys asked about the frequency, purpose, and subject of stories in which confidential information was used. Also asked was how the reporter would react or has reacted in various scenarios involving the newsman's privilege issue.[71] Osborn concluded that reporters continued to rely heavily on confidential sources for information and that court decisions were not resulting in increased demands for disclosure. He found, however, that newsmen believed sources continued to divulge information only because of newsmen's willingness to face incarceration rather than violate the confidentiality of a source.

Empirical Data on Newsmen's Privilege Cases

Only one study has involved the cataloging of newsman's privilege cases. Most authors' conclusions about lower court decisions have been based on their impressions of the cases they have read. While this is probably adequate for determining the direction the courts are taking, it may not be adequate for determining the strength of that direction.

Mehra analyzed 129 cases for the years 1977 through 1980 in which newsmen were subpoenaed. The cases were reported in Media Law Reporter and News Media and the Law.[72] His purpose was to determine if a pattern existed in court decisions that could form the basis for solid guidelines for journalists. He found earlier studies inadequate because conclusions were drawn without an actual cataloguing of cases and most were done in the immediate aftermath of *Branzburg* when courts were still interpreting the Supreme Court's meaning. Mehra followed the following procedure when coding cases: 1) cases were divided into two categories, federal and state; 2) cases were then further divided into civil and criminal cases; 3) criminal cases were divided into those for grand jury proceedings and those for criminal trials; 4) civil cases were categorized according to whether or not the media was a party; and, 5) information for cases under each heading was recorded, including a) state of origin, b) court's decision whether or not to reveal, c) basis for decision, whether shield law, balancing test, no explanation, or technical. Then cases were followed up to the appellate level and categorized according to whether a) the lower court's verdict was upheld, b) the lower court's verdict was reversed, c) reviewal of the case was denied, or d) no appeal was made.[73]

He concluded that litigants subpoena reporters more often in state courts than in federal courts, but federal courts uphold subpoenas less often than state

courts.[74] He also noted that newsmen are more protected in civil cases than in criminal cases, particularly in those in which they are not a party. In criminal cases, Mehra found it irrelevant whether the testimony was required in a grand jury proceeding or a trial. This negates the conclusion that *Branzburg* provided the answer for grand jury proceedings but not for other proceedings in criminal cases.[75] Mehra suggested a more thorough study would help evolve concrete guidelines on which newsmen could rely.

Endnotes

[1]*See supra* Chapter II, notes 26-27 and accompanying text.

[2]United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Bruno & Stillman v. Globe Newspaper, 633 F.2d 583 (1st Cir. 1980); United States v. Criden, 633 F.2d 346 (3d Cir. 1980); Miller v. Transamerican Press, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980); United States v. Steelhammer, 561 F.2d 539 (4th Cir. 1977); Silkwood v. Kerr-McGee, 563 F.2d 433 (10th Cir. 1977); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); Baker v. F&F Investment., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

[3]Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F. Supp. 1197 (N.D. Ill. 1978).

[4]Storer Communications v. Giovan, 13 Med. L. Rptr. (BNA) 2049 (6th Cir. Feb. 6, 1987).

[5]*See* Desmond, *The Newsman's Privilege Bill*, 13 Albany L. Rev. 1 (1949); Gallup, *Further Consideration of a Privilege for Newsmen*, 14 Albany L. Rev. 16 (1950); Garter, *The Journalist, his Informant, and Testimonial Privilege*, 35 N.Y.U. L. Rev. 1111 (1960); Semeta, *Journalist's Testimonial Privilege*, 9 Cleve.-Mar. L. Rev. 311 (1960); Comment, *Confidentiality of News Sources Under the First Amendment*, 11 Stan. L. Rev. 541 (1959); Note and Comment, *Privileged Communications--News Media--A "Shield Statute" for Oregon?* 46 Ore. L. Rev. 99 (1966); Note, *The Journalist and his Confidential Source: Should a Testimonial Privilege Be Allowed?* 35 Neb. L. Rev. 562 (1956); Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 Va. L. Rev. 61 (1950).

[6]*See supra* Chapter II, n. 21 and accompanying text.

[7]408 U.S. 665 (1972). *See supra* Chapter II, n.29 and accompanying text.

[8]D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 Harv. J. on Legis. 307 (1969).

[9]*Id.* at 315.

[10]Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing their Sources*, 64 Nw. U. L. Rev. 18 (1969).

[11]*Id.* at 26-27.

[12]*Id.* at 56.

[13]*Id.* at 57-61.

[14]*Id.*

[15]Comment, *The Newsman's Privilege,* supra. Chapter I, note 6.

[16]Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958).

[17]In re Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961).

[18]Comment, *The Newsman's Privilege, supra* Chapter I, note 6, at 1216-20.

[19]*Id.* at 1236-45.

[20]Id. at 1245-47.

[21]*Id.* at 1247-48.

[22]Nelson, *The Newsman's Privilege Against Disclosure of Confidential Sources and Information,* 24 Vanderbilt L. Rev. 667 (1971).

[23]Id. at 671-76.

[24]434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

[25]*See* Nelson, *supra* note 22, at 680. The circumstances included access to government records and meetings and to records of industry, labor, and privately owned hospitals. Of course, the decision of the Ninth Circuit in Caldwell was not upheld.

[26]408 U.S. 665 (1972).

[27]Murasky, *supra* Chapter I, note 6.

[28]*Id.* at 851.

[29]*Id.* at 916-17.

[30]Goodale, Branzburg v. Hayes *and the Developing Qualified Privilege for Newsmen,* 26 Hastings L.J. 709 (1975).

[31]*Id.* at 743.

[32]Eckhardt & McKey, *supra* Chapter I, note 18.

[33]436 U.S. 547 (1978). *See supra* Chapter II, note 79 and accompanying text.

[34]78 N.J. 250, 394 A.2d 330, *cert. denied,* 439 U.S. 997 (1978). *See supra* note 69 and accompanying text.

[35]441 U.S. 153 (1979). *See supra* note 92 and accompanying text.

[36]Eckhardt & McKey, *supra* Chapter I, note 18, at 451-455.

[37]*Id.* at 460-63.

[38]*Id.* at 446-47.

[39]Killenberg, Branzburg *Revisited: The Struggle to Define Newsman's Privilege Goes On*, 55 Journalism Quarterly 703 (1978) [hereinafter cited as Killenberg, *Branzburg Revisited*].

[40]*Id.* at 710.

[41]Note, *The Newsman's Privilege After* Branzburg: *The Case For a Federal Shield Law*, 24 U.C.L.A. L. Rev. 160 (1976) [hereinafter cited as Note, *The Newsman's Privilege After Branzburg*].

[42]*Id.* at 164.

[43]*Id.* at 188.

[44]Watkins, *The Status of Confidential Privilege for Newsmen in Civil Libel Actions*, 52 Journalism Quarterly 505 (1975).

[45]464 F.2d 986 (8th Cir. 1972).

[46]492 F.2d 631 (D.C. Cir. 1974).

[47]464 F.2d 986, 992-94 (8th Cir. 1972).

[48]492 F.2d 631, 632 (D.C. Cir. 1974).

[49]*Id.* at 632.

[50]Watkins, *supra* note 40, at 512.

[51]*Id.* at 514.

[52]Note, *Source Protection in Libel Suits After* Herbert v. Lando, 81 Columbia L. Rev. 338 (1981) [hereinafter cited as Note, *Source Protection in Libel Suits*].

[53]441 U.S. 153 (1979).

[54]*Source Protection in Libel Suits*, *supra* note 48, at 364.

[55]Note, *Qualified Privilege for Journalists*--Branzburg v. Hayes: *A Decade Later*, 61 Det. J. Urban Law 463 (1984) [hereinafter cited as Note, *Qualified Privilege for Journalists*].

[56]436 U.S. 547 (1978).

[57]*Qualified Privilege for Journalists*, *supra* note 51, at 482-485.

[58]*Id.* at 485-86.

[59]Simon, *Reporter Privilege: Can Nebraska Pass a Shield Law to Bind the Whole World?*, 61 Nebraska L. Rev. 446 (1982).

[60]*Id.* at 457-469.

[61]*Id.* at 497.

[62]Monk, *supra* Chapter I, note 10.

[63]*Id.* at 2-3.

[64]*Id.* at 17.

[65]408 U.S. 665, 693-94 (1972). Justice White wrote, "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. It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees."

[66]Blasi, *supra* Chapter I, note 6.

[67]*Id.* at 235.

[68]*Id.* at 236-239.

[69]Osborn, *supra* Chapter I, note 21.

[70]*Id.* at 69.

[71]*Id.* at 70.

[72]Mehra, *supra* Chapter I, note 9.

[73]*Id.* at 563.

[74]*Id.* at 564.

[75]*Id.* at 565.

CHAPTER IV

METHOD

Research Sample

To determine the factors significant to decisions in newsman's privilege cases, it was necessary to examine the case law itself. To adequately describe the interrelationship between factors and the inclination of the courts when deciding newsman's privilege cases, a content analysis was chosen as the research method. Berelson provided a classical definition of content analysis: "Content analysis is a research technique for the objective, systematic, and quantitative description of the manifest content of communication."[1] Content analysis of newsman's privilege cases should prove to be an effective method for gathering the data necessary to test the hypotheses presented in Chapter I.

To analyze newsman's privilege cases, it was first necessary to identify them. Initially, the West Publishing Company's *American Digest System* was used. Ideally, this method would have enabled all newsman's privilege cases reported in the various units of the *National Reporter System* to be identified.[2] However, identifying pertinent cases with the digests proved to be a tedious method. Another source with an extensive listing of newsman's privilege cases was located.[3] One other source used to locate newsman's privilege cases was the *Media Law Reporter*, which reported many state newsman's privilege cases not

published elsewhere.[4] Ultimately, more than three hundred newsman's privilege cases were identified as having been reported during the period under study.

The time period chosen for the study was 1969 through the present. As noted previously, few newsman's privilege cases were reported prior to 1969.[5] The time period included the release of the opinion in the landmark Supreme Court case of *Branzburg v. Hayes,* allowing an examination of its effect on court decisions that followed. Other Supreme Court decisions that had an effect on the development of the newsman's privilege were *Zurcher v. Stanford Daily*,[6] released in 1978, and *Herbert v. Lando*,[7] released in 1979. The decisions of federal circuit courts in *Baker v. F&F Investment* (1972),[8] *Carey v. Hume* (1974),[9] and *Silkwood v. Kerr-McGee* (1977)[10] had a substantial impact on federal court decisions. During the time period, both federal and state courts analyzed constitutional, statutory, common law, and public policy claims for recognizing a newsman's privilege and many established precedents in their jurisdictions.

The unit of analysis for this study was the court case. All court cases previously identified that met the following criterion were included: an individual or media organization requested to testify or produce materials in a legal proceeding must have asserted a privilege not to do so.[11] Consolidated cases were considered to be one case only.[12] Because many newsman's privilege cases have been appealed, only the decision of the court at the highest level of appeal was examined. Cases that were remanded with no evident decision were not pursued back to the lower courts to determine the final decision because many of the lower court decisions would not have been reported. Thus, the cases were included as decided by the highest court of appeal.

Coding Categories

One coder working with a pretested instrument conducted the coding. Each case was coded according to 23 coding categories. The categories, in the order they appeared on the coding sheet, were court jurisdiction; federal circuit; state; year; type of proceeding, whether criminal or civil; reason for a subpoena in a criminal proceeding; reason for a subpoena in a grand jury proceeding; reason for a subpoena by the defense; media status in a civil proceeding; type of civil proceeding with media a party; type of civil proceeding with media a non-party; type of evidence sought; type of material sought; type of party subpoenaed; employment type of subpoenaed individual; non-management employment type; management employment type; media organization type; primary subject of material that resulted in a subpoena; basis for the newsman's privilege claim; whether or not the court recognized a newsman's privilege; the basis for the court's decision; and the court's decision (see Appendix I).

Obviously, no case required use of all the categories. The court jurisdiction, federal circuit, state, year, and type of proceeding were self-evident. The reason the subpoena in a criminal proceeding was issued was usually specified in the court's opinion, as was the reason for a subpoena in a grand jury proceeding. The reason for a subpoena by a criminal defendant was frequently not mentioned. The status of the media in a civil proceeding was apparent, and if the media were a party to the lawsuit, the type of proceeding was also easily discerned. However, if the media were a non-party in a civil suit, it was sometimes difficult to determine the type of proceeding. Even if not specified in the court's opinion, a proceeding involving two parties in a state court was presumed to involve a state cause of action.

The only choices available for the type of evidence sought from a subpoena were the source, information, or both. However, a request for certain information seemed contrived to reveal the source. For example, some subpoenas did not require the name of the source, but did request information on the source's employment, location, means of obtaining information, or means of contacting the newsman.[13] Frequently the court's opinion did not specify what evidence was sought, or stated in such a generic fashion that information was sought that the coder became convinced the coding definition of information was not the same as the court's definition. Nevertheless, the manifest content of the court's opinion was used, along with strict adherence to the coding definitions. If material was actually subpoenaed, the specific type was usually better defined.

The type of party subpoenaed and their type of employment or business was usually specified in the court's opinion. The primary subject of the material that resulted in the subpoena was frequently not specified. In cases where the subject was government officials involved in crime, the subject was considered to be crime.[14]

The basis for the newsman's privilege claim was easy to discern if specified in the court's opinion. It was also fairly easy to determine whether or not the court recognized a qualified or absolute newsman's privilege because most opinions were clear on this point. However, it was frequently difficult to determine the court's basis for recognizing or not recognizing the privilege. A citation to *Branzburg v. Hayes* was considered a First Amendment basis for the privilege. Also difficult was discerning between a First Amendment and federal common law basis for recognition of the newsman's privilege. If the First Amendment was mentioned, it was chosen as the basis; if federal circuit cases were cited, federal common law was considered the basis; if both appeared, the

First Amendment was considered the basis.[15] Finally, the court's decision posed no problem for coding.

The coding categories were chosen to collect the information necessary to test the hypotheses. However, much additional information was included on the coding sheet to satisfy the researcher's curiosity: federal circuit, state, year, type of evidence, type of material, basis for newsman's privilege claim, whether the court recognized a privilege, and the basis for recognizing the privilege. This additional information should provide the basis for further understanding of the newsman's privilege issue. Also, because content analyses of court cases are not conducted frequently, expanding the categories allowed the efficacy of using this method of analyzing court cases to be examined more fully.

Reliability

Reliability in content analysis refers to consistency of classification. Repeated measures with the same instrument by different coders on a given sample of data should yield similar results. Opportunities for enhancing reliability are generally limited to improving coders or category definitions. Therefore, category definitions and coding procedures should be reviewed before the analysis begins. Also, categories must be precisely defined, so that coding becomes more of a clerical task rather than a judgmental one.

Pretesting of the coding sheet and definitions was done by two coders. Five cases were randomly selected to be coded. The initial effort resulted in an 86.3% agreement across all categories between the coders. Several categories in need of refinement were apparent, including the following: the definition of "witness" to a crime, the types of civil proceedings available, the types of employment available, the bases for the newsman's privilege claim, and the bases for a decision. These categories were altered to increase precision.

Five more randomly selected cases were chosen for coding. The second effort resulted in a 96.2% agreement between the coders, for a final agreement of 91.2% (see Table 1). The agreement figure was arrived at by dividing the total number of agreed-upon responses by the total number of responses.

Table 1--Intercoder Reliability

Coding Category	Coding Agreement	Coding Disagreement	Agreement Percentage
Court jurisdiction	10	0	100.0
Federal circuit	6	0	100.0
State	4	0	100.0
Year	10	0	100.0
Proceeding type	10	0	100.0
Subpoena reason	6	0	100.0
Grand jury reason	2	0	100.0
Defense reason	4	0	100.0
Media status	4	0	100.0
Proceeding w/media	1	0	100.0
Proceeding w/o media	3	0	100.0
Evidence type	9	1	90.0
Material type	13	3	81.3
Party subpoenaed	9	1	90.0
Employment type	8	1	88.9
Non-management type	7	1	87.5
Management type	1	0	100.0
Media type	10	1	90.9
Subject type	9	1	90.0
Basis for claim	15	3	83.3
Privilege recognition	10	0	100.0
Basis for recognition	15	5	75.0
Decision	10	0	100.0
Total	176	17	91.2

The worst agreement was achieved for the basis for newsman's privilege claim, basis for recognizing or not recognizing the privilege, and evidence type. However, these were categories included by the researcher to verify information found in the literature, and not central to testing of the hypotheses. The researcher was satisfied with the category and overall intercoder reliability achieved during the pretest.

Similarly, the intracoder reliability was tested during the actual study. After 150 cases had been coded, five were chosen at random to be recoded. The resulting agreement was 94.3%. After a total of 300 cases had been coded, five cases were again randomly selected to be recoded. Agreement on the second recoding was 89.9%, for a total intracoder agreement of 92.0% (see Table 2). Again, the worst agreement was achieved in those categories not central to the research.

Table 2--Intracoder Reliability

Coding Category	Coding Agreement	Coding Disagreement	Agreement Percentage
Court jurisdiction	10	0	100.0
Federal circuit	5	0	100.0
State	5	0	100.0
Year	10	0	100.0
Proceeding type	10	0	100.0
Subpoena reason	5	0	100.0
Grand jury reason	2	0	100.0
Defense reason	3	0	100.0
Media status	5	0	100.0
Proceeding w/media	2	0	100.0
Proceeding w/o media	3	0	100.0
Evidence type	9	1	90.0
Material type	12	3	80.0
Party subpoenaed	9	1	90.0
Employment type	9	1	90.0
Non-management type	8	1	88.9
Management type	1	0	100.0
Media type	11	1	91.7
Subject type	9	1	90.0
Basis for claim	14	2	87.5
Privilege recognition	10	0	100.0
Basis for recognition	11	3	78.6
Decision	10	0	100.0
Total	173	14	92.0

Validity

Validity is generally defined as the extent to which a coding instrument measures that which it is intended to measure.[16] Holsti identified four types of

validity which must be considered in research involving content analysis--content validity, predictive validity, concurrent validity, and construct validity.[17]

Content validity refers to the informed judgment of the researcher as to whether the results are plausible and consistent with other information about the phenomenon under study.[18] Although this judgment is made at the end of the study, it must be an ongoing process during the study. For this study, the content seemed consistent with the impressions of legal and media scholars regarding the impact of *Branzburg v. Hayes*, the use of Justice Stewart's proposed three-part test, and the accepted bases for the newsman's privilege.

Predictive validity refers to the ability of an instrument to predict events for which evidence is not presently available.[19] For this study, the entire body of case law involving newsman's privilege for the time period was studied. However, results of the research could be used to predict the outcome of future newsman's privilege cases.

The type of legal system used in the United States allows this possibility. The American legal system is based on the common law tradition, which originated and evolved in England. Common law consists of those principles and rules of law for which the authority is not based on the will of the legislature.[20] In the early history of English law, the custom developed of considering the decisions of the courts as precedents. Thus, the doctrine of *stare decisis* developed, which has been described as follows:

> [T]hat when [a] court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same.[21]

Obviously the role of statutes in the law cannot be ignored. When studying the issue of newsman's privilege, one must consider the will of the

legislature in the 26 states that have now enacted some form of newsman's privilege statute.[22] However, interpretation of these statutes has still been left to state courts, and sometimes federal courts, to decide.[23] As there is no federal shield law, the federal courts have decided the scope of any federal common law newsman's privilege available in each of the twelve federal circuits.

Thus, the results acquired using the coding instrument to analyze past cases should provide a reliable indicator of how cases will be decided in the future. Trend in recognition of the privilege and in bases used for claiming newsman's privilege and for deciding cases should indicate the direction the courts are taking when confronted with these issues. Nevertheless, the method of analysis chosen was experimental and the usefulness of the results in predicting future events can only be determined at a point in the future.

The experimental nature of the research method also affect the concurrent validity. Concurrent validity refers to the determination of whether research findings are consistent with information other than that upon which the research is based.[24] Naturally, the external criterion with which the findings are compared must also be a valid measure of the phenomenon being studied. Mehra's study of newsman's privilege cases provided such a reference point for some of the factors under study.[25] For example, initial identification of cases showed 105 (33%) in federal courts and 215 (67%) in state courts for the time period under study. Mehra's study included only 129 cases that occurred between 1977 and 1980.[26] However, the breakdown of federal and state cases was similar: 47 (36%) were federal court cases and 82 (64%) were state court cases.[27] Unfortunately, although there is much qualitative literature available on the issue of newsman's privilege, no quantitative research comparable to this

study has been undertaken except for Mehra's work. Thus, no comparison with other data to determine consistency is possible.

Construct validity refers to the consistency of the measures used in the study with other measures.[28] Some comparisons with measures used in Mehra's study were possible, including type of proceeding and jurisdiction of the court. Because content analysis of court cases is rare, some of the measures had not previously been used. However, the types of measures used were similar to those used in other content analyses. For example, the subject matter category was similar to that used by Mott to identify trends in newspaper content.[29]

Data Analysis

When coding was completed, data from the coding sheets were entered into a personal computer file formatted for use with the program Statistical Package for the Social Sciences (SPSS)(see Appendix VI). A tabulation of the frequencies with which the various choices occurred for each category was then run. Frequencies were also run for some categories while controlling for the effects of other categories.

The first hypothesis--print journalists employed by newspapers are required to testify in fewer cases than other categories of journalists--was addressed by considering the media organization the independent variable, the decision the dependent variable, and controlling for the type of employment.

The second hypothesis--journalists and media organizations involved in libel suits are required to disclose sources and information as often as those involved in criminal proceedings--required an analysis using two different independent variables. Both the proceeding type and the civil proceeding with media were considered independent variables. The dependent variable was the

decision. To obtain more information, the data were also run controlling for the type of journalist and media organization.

The third hypothesis was simple to address. The hypothesis--stories about government and politics result in the greatest number of subpoenas for testimony by members of the media in civil cases--required only one independent and one dependent variable. The independent variable was the subject type and the dependent variable was the proceeding type, which included civil cases.

The fourth hypothesis--subpoenas by the defense in criminal proceedings result in a requirement for testimony as often as in grand jury proceedings--again required only one independent and one dependent variable. The independent variable was the reason for a subpoena in a criminal proceeding and the dependent variable was the decision. To expand on the available information, cross-tabulations were also run using the reason for a subpoena by a grand jury and by the defense as the independent variables and the decision as the dependent variable.

The research conducted was basically descriptive. The data were collected to enable various factors of significance in newsman's privilege cases to be represented empirically. Because the research involved a census of every newsman's privilege case reported during a particular time period, it was possible to use descriptive statistics. Almost all the data were measured at the nominal level, the one exception being the year in which the case was reported. To understand how two variables were related, contingency tables were used. The data entered into the cells were the joint occurrences of single values on each of two variables. Occasionally it was necessary to develop contingency tables that controlled for other variables.

Endnotes

[1]B. Berelson, *Content Analysis in Communication Research* 18 (1952).

[2]Cases included are all federal court cases and state supreme and intermediate appellate courts.

[3]Goodale & Moodhe, *Reporter's Privilege Cases*, in 2 Communications Law 1985 (Practicing Law Institute).

[4]When contacted, the Bureau of National Affairs, which publishes *Media Law Reporter*, claimed that not all newsman's privilege cases are published in *Media Law Reporter*. However, perusal of the cases that are published led this researcher to believe that the coverage is fairly complete.

[5]*See supra* Chapter II, note 19 and accompanying text. Only 17 cases were reported from 1911 to 1969; more than 300 cases were reported from 1969 to the present.

[6]*See supra* Chapter II, n.79 and accompanying text.

[7]*See supra* Chapter II, n.92 and accompanying text.

[8]*See supra* Chapter II, n.66 and accompanying text.

[9]*See supra* Chapter II, n.67 and accompanying text.

[10]*See supra* Chapter II, n.68 and accompanying text.

[11]The newsman's privilege issue has arisen in other contexts. For example, two cases from Indiana involved criminal defendants who had confessed to a newsman. The defendants then attempted to invoke the Indiana shield law to prevent the newsman from testifying against them. *See* Lipps v. State, 254 Ind. 141, 258 N.E.2d 622 (1970); Hestand v. State, 257 Ind. 191, 273 N.E.2d 282 (1971). These cases were not included in the study.

[12]For example, *Branzburg v. Hayes* was a consolidation of four cases but was considered one case for research purposes. *See supra* Chapter II, n. 30-33 and accompanying text.

[13]Some states protect the identity of confidential sources but not the confidential information they impart.

[14]Perhaps this definition seems inappropriate--Watergate becomes a simple crime story. However, the researcher felt that the instigation that forced Woodward and Bernstein to delve deeper into the events surrounding Watergate was that a crime had been committed.

[15]*See* Clampitt v. Thurston County, 9 Med. L. Rptr. (BNA) 1206 (Wash. Sup. Ct. 1983). The court noted that while some federal courts have viewed the newsman's privilege as one of federal common law, most have viewed it as a product of the First Amendment. Even those cases labeling the privilege a

matter of common law have recognized that it is bounded "by an awareness of First Amendment values." Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 598 (1st Cir. 1980).

[16]O. Holsti, *Content Analysis for the Social Sciences and Humanities* 142 (1969).

[17]*Id.* at 136, 142-143.

[18]*Id.* at 143.

[19]*Id.* at 144.

[20]*Black's Law Dictionary* 250-251 (5th ed. 1979).

[21]Moore v. City of Albany, 98 N.Y. 396, 410 (1885).

[22]*See supra* Chapter II, n. 26-27.

[23]*See* Simon, *supra* Chapter III, n. 56.

[24]*Id.*

[25]*See supra* Chapter III, n.69 and accompanying text.

[26]*Id.* at 563.

[27]*Id.* at 564.

[28]*See supra*, note 16, at 148.

[29]*Id.* at 104.

CHAPTER V

FINDINGS

The content analysis of the newsman's privilege cases from 1969 through mid-1988 included 331 cases. Of the cases, one was a United States Supreme Court case, 108 or 32.6% were federal court cases, and 222 or 67.1% were state court cases (see Table 3). Table 3 shows the distribution of decisions across the various court jurisdictions.[1]

The distribution of newsman's privilege cases across states is shown in Table 4. Cases from Florida represented the largest number, with 57 cases for 25.6% of the total state cases. A large number of cases coded were from New York, with 35 cases, or 15.7% of the total. California cases were also well represented, with 14 cases, or 6.3% of the total. Although Florida, New York, and California have a high concentration of media organizations, the distribution may indicate the inclusion of a large number of cases from these states in *Media Law Reporter*.

The large number of cases from Florida prompted comparisons between variable frequencies for the states including and excluding Florida. Including Florida, the percentages of state supreme court, state appellate court, and state lower court cases were 23.0%, 28.4%, and 48.6%, respectively. Excluding Florida, the percentages of state supreme court, state appellate court, and state lower court cases were 29.5%, 31.3%, and 39.2%, respectively.

Table 3--Distribution of Decisions by Jurisdiction of Court

	Decision					
Jurisdiction	1	2	3	4	5	Total
U.S. Sup. Ct.	0	1	0	0	0	1
	0.0	100.0	0.0	0.0	0.0	0.3
U.S. Cir. Ct.	12	10	3	2	2	29
	41.4	34.5	10.3	6.9	6.9	8.8
U.S. Dist. Ct.	51	11	17	0	0	79
	64.6	13.9	21.5	0.0	0.0	23.9
State Sup. Ct.	23	16	2	8	2	51
	45.1	31.4	3.9	15.7	3.9	15.4
State App. Ct.	26	18	11	6	2	63
	41.3	28.6	17.5	9.5	3.2	19.0
State Low. Ct.	80	19	9	0	0	108
	74.1	17.6	8.3	0.0	0.0	32.6
Total	192	75	42	16	6	331
	58.0	22.7	12.7	4.8	1.8	

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table 4--Distribution of Cases by State

State	No. of Cases	% of Cases
Alabama	1	0.4
Alaska	3	1.3
Arizona	2	0.9
Arkansas	1	0.4
California	14	6.3
Colorado	2	0.9
Connecticut	4	1.8
Delaware	2	0.9
Florida	57	25.6
Georgia	2	0.9
Idaho	4	1.8
Illinois	5	2.2
Indiana	7	3.1
Iowa	3	1.3
Kansas	1	0.4
Kentucky	1	0.4
Louisiana	4	1.8
Maine	1	0.4
Maryland	6	2.7
Massachusetts	3	1.3
Michigan	2	0.9
Minnesota	1	0.4
Missouri	1	0.4
Montana	2	0.9
New Hampshire	4	1.8
New Jersey	9	4.0
New Mexico	1	0.4
New York	35	15.7
North Carolina	6	2.7
North Dakota	2	0.9
Ohio	9	4.0
Oklahoma	1	0.4
Oregon	3	1.3
Pennsylvania	2	0.9
Tennessee	4	1.8
Texas	5	2.2
Vermont	3	1.3
Virginia	1	0.4
Washington	5	2.2
Wisconsin	4	1.8
Total	223	

Including Florida, the percentage of civil cases in which the media were first parties was approximately 9% lower than when excluding Florida. The percentage of libel cases decreased by approximately 8% when Florida was included. The frequencies of most other variables varied no more than 5% when Florida was included.

However, the basis for decision varied considerably with the inclusion of Florida with the state cases. Florida does not have a newsman's privilege statute, but does have a strong common law tradition of recognizing a newsman's privilege. With the inclusion of Florida, decisions based on a newsman's privilege statute decreased from 42.3% to 28.2%. Decisions based on state common law increased from 5.6% to 17.0% with the inclusion of Florida. Other bases for decisions showed little variation when Florida was included.

The percentage of favorable decisions in state courts increased from 49.4% to 57.8% with the inclusion of Florida. Because of the tradition of common law recognition of a newsman's privilege in Florida, most cases in that state are decided favorably for the press. Other bases for decisions showed little variation with the inclusion of Florida.

The distribution of newsman's privilege cases across the time period of the study may also reflect the use of *Media Law Reporter* as a source of cases for the research. Table 5 shows the distribution of cases for the years of the study. Only 20.4% of the cases coded for the study were decided between 1969 and 1978, while 13.0% of the cases were decided in 1982 alone. *Media Law Reporter* was not published until 1977. Twelve newsman's privilege cases were reported in 3 Media Law Reporter, which contained cases published from September 9, 1977 through July 25, 1978. Twenty-four newsman's privilege cases were reported in 13 Media Law Reporter, which contained cases published

Table 5--Distribution of Cases by Year

Year	No. of Cases	% of Cases
1969	0	0.0
1970	1	0.3
1971	1	0.3
1972	7	2.1
1973	9	2.7
1974	4	1.2
1975	7	2.1
1976	12	3.6
1977	6	1.8
1978	21	6.3
1979	27	8.2
1980	23	6.9
1981	20	6.0
1982	43	13.0
1983	27	8.2
1984	31	9.4
1985	38	11.5
1986	24	7.3
1987	22	6.6
1988	8	2.4
Total	331	

from August 5, 1986 through May 26, 1987.

Of the cases coded, 147 or 44.4% were criminal cases and 184 or 55.6% were civil cases. Table 6 shows the distribution of decisions for criminal and civil cases. The percentages of favorable decisions in criminal and civil cases was 60.7% and 63.3%, respectively. However, a larger percentage of criminal cases resulted in unfavorable decisions for the press--29.3% of criminal cases versus 20.1% of civil cases. A larger percentage of civil cases resulted in split decisions--16.6% of civil cases versus 10.0% of criminal cases.[2]

Table 7 shows the distribution of reasons for subpoenas versus favorable and unfavorable decisions. In criminal proceedings, media were subpoenaed most often by the defense. Seventy-six cases, or 60.3% of cases listed in Table 7 resulting from criminal proceedings, involved a subpoena by the defense. Grand jury proceedings followed defense subpoenas in frequency, with 23 cases or 18.3% of cases listed in Table 7 resulting from criminal proceedings.

Table AIII-1 shows the distribution of decisions in cases involving a defense subpoena versus the reason given for the defense subpoena. Of those cases that specified the reason for a defense subpoena, the need for impeaching evidence was the justification most often given. Impeaching evidence was defined in the operational definitions as evidence that will contradict a prosecution witness's testimony. However, in 39 cases or 44.8% of the total, the reason for a defense subpoena was either other than those listed or not specified. Thus, no information was available for this variable in a large number of cases.

Table AIII-2 shows the distribution of reasons for subpoenas in grand jury proceedings versus the decisions in the resulting newsman privilege cases. For cases resulting from grand jury proceedings, subpoenas were issued in 22

Table 6--Distribution of Decisions by Case Type

	Decision			
Case Type	Favorable to Media	Unfavorable to Media	Split	Total
Criminal	85 60.7	41 29.3	14 10.0	140 45.3
Civil	107 63.3	34 20.1	28 16.6	169 54.7
Total	192 62.1	75 24.3	42 13.6	309

Table 7--Distribution of Favorable and Unfavorable Decisions in Criminal Cases by Reason for Subpoena

	Decision		
Reason for Subpoena	Favorable to Media	Unfavorable to Media	Total
Grand Jury Subpoena	9 39.1	14 60.9	23 18.3
Defense Subpoena	64 84.2	12 15.8	76 60.3
Prosecution Subpoena	5 38.5	8 61.5	13 10.3
Violation of Grand Jury Secrecy	2 50.0	2 50.0	4 3.2
Other	5 50.0	5 50.0	10 7.9
Total	85 67.5	41 32.5	126

cases, or 78.6% of the total, because it was believed the newsman had evidence of criminal activity. Of five cases in which the newsman witnessed a crime, only one was decided favorably for the media. However, in those cases in which the newsman had other evidence of criminal activity, seven of 22, or 31.8%, were decided in the media's favor. The percentage of unfavorable decisions was also lower for the newsman who had evidence of criminal activity but who had not actually witnessed a crime.

In civil actions, the media were first parties in 74, or 40.2%, of the cases and a third party in 110, or 59.8%, of the cases. Table AIII-3 shows the distribution of decisions for civil cases. When the media were a first party, the decision was favorable in 34 or 50.7% of the cases and unfavorable in 18 or 26.9% of the cases. When the media were a third party, the decision was favorable in 73 or 71.6% of the cases and unfavorable in 16 or 15.7% of the cases. There were nearly as many split decisions as unfavorable decisions regardless of the media's status in a civil suit.

Table 8 shows the distribution of decisions in libel, privacy, and other civil suits in which the media were a first party. Fifty-eight or 82.8% of the cases were libel suits. The decision was favorable to the media in 28 or 48.3% of the libel cases. Split decisions were almost as numerous as unfavorable decisions, with 14 or 24.1%, and 16 or 27.6% of the total, respectively. When combined, decisions in these categories outnumbered favorable decisions.

Table AIII-4 summarizes the distribution of decisions in civil suits in which the media were a third party. The majority of these cases involved a state cause of action--69 cases or 61.6%. Results in third party civil cases were quite favorable to the media, with the media prevailing in 73 cases or 65.2%.

Table 8--Distribution of Decisions by Reason for Civil Suit with Media a First Party

Reason for Civil Suit	Decision: Favorable to Media	Unfavorable to Media	Split	Total
Libel	28 48.3	16 27.6	14 24.1	58 82.8
Privacy	1 33.3	2 66.7	0 0.0	3 4.3
Other	6 66.7	2 22.2	1 11.1	9 12.9
Total	35 50.0	20 28.6	15 21.4	70

Table AIII-5 indicates that information was the evidence type most frequently requested in a subpoena. In those cases where the subpoena requested identification of the source of information, the decisions were slightly more favorable to the press than in those cases where information alone was requested. Of 76 cases in which the source was requested, 48 or 63.2% were decided favorably to the media. Of 179 cases in which information was requested, 102 or 57.0% were decided favorably for the media. The percentages of decisions unfavorable to the media were also similar, with 22.4% of cases involving the source and 25.7% of cases involving information decided unfavorably for the media. When source and information were both requested, favorable decisions occurred in 23 or 43.4% of the cases. However, when combined the number of unfavorable and split decisions equalled the number of favorable decisions.

Table AIII-6 shows the distribution between the type of material subpoenaed, if any, and the decision. In 146 cases, or 44.1% of the 331 total cases, no material was subpoenaed. The media prevailed in 91 or 62.3% of these cases. In 107 of the listed cases, or 32.3% of the 331 total cases, written documentation was subpoenaed. Seventy-two or 67.3% of these cases were decided favorably for the media. The percentage of favorable decisions declined when the material subpoenaed could contain direct evidence of a wrong. Thus, the media prevailed in only 56.5% of the cases in which photographs were subpoenaed, 48.8% of the cases in which videotape was subpoenaed, and 48.6% of the cases in which audiotape was subpoenaed.

Table AIII-7 indicates that non-management employees were involved in more newsman's privilege cases than management employees. Of 307 subpoenaed employees, 256 or 83.4% were non-management and 51, or 16.6%,

were management employees. Subpoenaed print journalists represented 191 or 74.6% of non-management employees subpoenaed and 62.2% of all employees subpoenaed. Of management employees, editors and publishers were most often parties in newsman's privilege cases, with 37.3% and 23.5% of the total, respectively.

Newspapers and their employees were parties in far more newsman's privilege cases than any other media type. Table AIII-8 shows that of 343 subpoenaed organizations, 218 or 63.6% were newspapers. Television stations and networks were next in frequency, with 63 subpoenas or 18.4% of the total.

Table 9 shows that the subject material that most often resulted in a subpoena was crime, with 135 cases or 40.8% of the total subpoenas. Business stories followed with 54 cases or 16.3% of the total, and stories about government resulted in 50 cases or 15.1% of the total.

Table AIII-9a shows the distribution of decisions in criminal cases by type of non-management employment. Except for radio broadcasters, who were involved in only two cases, print journalists were treated most favorably by the courts. Of 93 cases, print journalists prevailed in 61 or 65.6% of the cases. Television journalists received favorable decisions in eight of 14 cases, or 57.1%.

Similarly, Table AIII-9b shows that print journalists were treated most favorably in civil cases. In 66 of 98 cases, or 67.3%, print journalists were granted a favorable decision. However, the number of split decisions in civil cases almost equalled the number of unfavorable decisions. Radio broadcasters were only involved in three civil cases, and received favorable decisions in two cases, or 66.7%. Photojournalists and television journalists each had favorable decisions in half of the civil suits in which they were involved.

Table 9--Distribution of Case Types by Subject Material That Resulted in Subpoena*

Subject	Case Type Criminal	Civil	Total
Government	9 6.1	41 22.3	50 15.1
Politics	2 1.4	6 3.3	8 2.4
Business	2 1.4	52 28.3	54 16.3
Accident	2 1.4	15 8.2	17 5.1
Crime	116 78.9	19 10.3	135 40.8
Social Injustice	0 0.0	3 1.6	3 0.9
Environment	0 0.0	3 1.6	3 0.9
Other	16 10.9	45 24.5	61 18.4
Total	147 44.4	184 55.6	331

*Percentages listed are column percentages, not row percentages.

Table AIII-10a summarizes the distribution of decisions in criminal cases by type of management employment. Editors were the managers most often involved in criminal cases. Nine of 17 cases, or 52.9%, involved newspaper or magazine editors. Only three of the criminal cases involving editors, or 33.3%, were decided in their favor.

Table AIII-10b indicates that managers were subpoenaed in twice as many civil cases as criminal cases. Publishers and editors were involved in 21 of the 34 cases, or 61.8%. However, publishers fared much better, with seven or 63.6% of their cases being decided in their favor. Editors prevailed in only four cases or 40.0%. The combined number of unfavorable and split decisions equalled the number of favorable decisions for editors.

Table AIII-11a summarizes the distribution of decisions in criminal cases for media organizations. Newspaper and magazine organizations prevailed in almost two-thirds of the criminal cases in which they were involved. News and wire services also received favorable treatment from the courts. Television stations and networks were not treated as well. The combined number of unfavorable and split decisions almost equalled the number of favorable decisions. Thus, of 30 criminal cases involving television stations or networks, 14 or 46.7% were decided favorably for the media, and 13 or 43.3% resulted in unfavorable or split decisions.

Table AIII-11b summarizes the decisions in civil cases by type of media organization. Again, newspaper and magazines received favorable decisions in almost two-thirds of the cases in which they were involved. The number of split decisions for newspapers almost equalled the number of unfavorable decisions, and for magazines they were equal. Of the five cases in which radio stations or networks were involved, favorable decisions were received in three cases or

60.0%. However, television stations and networks were also treated unfavorably by the courts in civil cases. Television stations and networks prevailed in only 13 of 33 cases, or 39.4%. The combined number of unfavorable and split decisions was 17, or 51.5%, much higher than the number of favorable decisions.

Table 10a summarizes the distribution of decisions in newsman's privilege cases resulting from libel suits by type of non-management employment. Print journalists prevailed in 14 cases or 46.7%. However, 16 cases or 53.3% resulted in unfavorable or split decisions. Overall, non-management employees received favorable decisions in 16 cases or 45.7%, and 19 unfavorable or split decisions, or 54.3%.

Table 10b summarizes the distribution of decisions in libel cases by type of management employment. Publishers prevailed in three of five cases, or 60.0%. Editors received a favorable decision in only one of three cases, or 33.3%.

Table 10c indicates that media organizations received favorable decisions in 28 of 58 libel cases, or 48.3%. However, 30 cases or 51.7% resulted in unfavorable or split decisions. Television stations fared almost as well as newspapers in the percentage of favorable decisions received.

Table 11a indicates that print journalists employed by magazines prevailed in more newsman's privilege cases that did those employed by newspapers. Overall, print journalists received favorable decisions in 128 of 186 cases, or 68.8%.

Table 11b shows the distribution of favorable and unfavorable decisions in newsman's privilege cases involving photojournalists. Photojournalists received an equal number of favorable and unfavorable decisions, and prevailed in only 4 of 8, or 50.0%, of their cases.

Table 10a--Distribution of Decisions in Libel Cases Versus Type of Non-Management Employment

Type of Non-Mgt. Employment	Decision: Favorable to Media	Unfavorable to Media	Split	Total
Print Journalist	14 46.7	9 30.0	7 23.3	30 85.7
Radio Broadcaster	1 50.0	1 50.0	0 0.0	2 5.7
Television Journalist	1 33.3	0 0.0	2 66.7	3 8.6
Total	16 45.7	10 28.6	9 25.7	35

Table 10b--Distribution of Decisions in Libel Cases Versus Type of Management Employment

Type of Management Employment	Decision: Favorable to Media	Unfavorable to Media	Split	Total
Owner	1 100.0	0 0.0	0 0.0	1 10.0
Publisher	3 60.0	1 20.0	1 20.0	5 50.0
Editor	1 33.3	1 33.3	1 33.3	3 30.0
Producer	0 0.0	0 0.0	1 100.0	1 10.0
Total	5 50.0	2 20.0	3 30.0	10

Table 10c--Distribution of Decisions in Libel Cases Versus Type of Media Organization

Type of Media Organization	Decision: Favorable to Media	Unfavorable to Media	Split	Total
Newspaper	15 45.5	9 27.3	9 27.3	33 56.9
Magazine	7 63.6	3 27.3	1 9.1	11 19.0
Radio Station or Network	1 50.0	1 50.0	0 0.0	2 3.4
TV Station or Network	5 41.7	3 25.0	4 33.3	12 20.7
Total	28 48.3	16 27.6	14 24.1	58

Table 11a--Distribution of Decisions by Type of Media Organization in Cases Involving Print Journalists

Type of Media Organization	Decision: Favorable to Media	Unfavorable to Media	Split	Total
Newspaper	113	35	17	165
	68.5	21.2	10.3	88.7
Magazine	14	3	2	19
	73.7	15.8	10.5	10.2
News or Wire Service	1	0	0	1
	100.0	0.0	0.0	0.5
Other	0	1	0	1
	0.0	100.0	0.0	0.5
Total	128	39	19	186
	68.8	21.0	10.2	

Table 11b--Distribution of Decisions by Type of Media Organization in Cases Involving Photojournalists

	Decision			
Type of Media Organization	Favorable to Media	Unfavorable to Media	Split	Total
Newspaper	4 57.1	3 42.9	0 0.0	7 87.5
News or Wire Service	0 0.0	1 100.0	0 0.0	1 12.5
Total	4 50.0	4 50.0	0 0.0	8

Table 11c indicates that broadcast journalists employed by radio stations or networks received favorable decisions in four of five, or 80.0%, of their cases. Broadcast journalists employed by television stations prevailed in only 14 of 24, or 58.3%, of their cases.

Table 12a indicates that publishers prevailed in eight of 12 cases, or 66.7%. Newspaper publishers fared even better--they received favorable decisions in five of seven cases, or 71.4%.

In contrast, Table 12b shows that editors received favorable decisions in only seven of 14 cases, or 50.0%. Newspaper editors fared particularly badly--they received favorable decisions in only three of nine cases, or 33.3%.

Table 12c indicates that managers for television stations also fared poorly in newsman's privilege cases. Television managers prevailed in only one of five cases, or 20.0%, and received three split decisions, or 60.0% of their cases.

Table 11c--Distribution of Decisions by Type of Media Organization in Cases Involving Broadcast Journalists

Type of Media Organization	Decision: Favorable to Media	Unfavorable to Media	Split	Total
Radio Station or Network	4 80.0	1 20.0	0 0.0	5 17.2
TV Station	14 58.3	3 12.5	7 29.2	24 82.8
Total	18 62.1	4 13.8	7 24.1	29

Table 12a--Distribution of Favorable and Unfavorable Decisions by Type of Media Organization in Cases Involving Publishers

Type of Media Organization	Decision: Favorable to Media	Decision: Unfavorable to Media	Total
Newspaper	5 71.4	2 28.6	7 58.3
Magazine	1 50.0	1 50.0	2 16.7
News or Wire Service	0 0.0	1 100.0	1 8.3
Other	2 100.0	0 0.0	2 16.7
Total	8 66.7	4 33.3	12

Table 12b--Distribution of Favorable and Unfavorable Decisions by Type of Media Organization in Cases Involving Editors

Type of Media Organization	Decision: Favorable to Media	Decision: Unfavorable to Media	Total
Newspaper	3 33.3	6 66.7	9 64.3
Magazine	3 75.0	1 25.0	4 28.6
Other	1 100.0	0 0.0	1 7.1
Total	7 50.0	7 50.0	14

Table 12c--Distribution of Favorable and Unfavorable Decisions by Type of Media Organization in Cases Involving Television Managers

	Decision			
Type of Media Organization	Favorable to Media	Unfavorable to Media	Split	Total
Television	1 20.0	1 20.0	3 60.0	5 100.0
Total	1 20.0	1 20.0	3 60.0	5 100.0

Endnotes

[1]All tables list the numbers for each cell, with the row percentages beneath them. Row sums and percentages of the total are given at the right of the tables; column sums and percentages of the total are given at the bottom of the table.

[2]For purposes of this research, a split decision refers to a decision that required partial disclosure of the information sought from a newsman. Split decisions occur frequently in libel suits, when a newsman is not required to reveal confidential information but may not use the information as part of his defense. Also, in criminal proceedings, a judge may require *in camera* review of information prior to determining if the information must be disclosed.

CHAPTER VI

ANALYSIS

The research was designed to test four hypotheses and to provide other information relevant to the issue of newsman's privilege. The analysis provides a discussion of the significance of the results.

Hypotheses

1. Print journalists employed by newspapers are required to testify in fewer cases than any other category of journalist.

In general the hypothesis was supported. Print journalists employed by newspapers were required to testify in fewer cases than almost any other category of journalist. Only print journalists working for magazines and wire services and radio broadcast journalists fared better in the courts; however, they were involved in only 19, one, and five cases, respectively. Print journalists were involved in 165 cases.

Table 11 summarizes data relevant to the first hypothesis. Table 11a indicates that 73.7% of print journalists working for magazines received favorable decisions, while 68.5% of print journalists working for newspapers received favorable decisions. The one case involving a print journalist working for a news or wire service was decided in the media's favor. Overall, 68.8% of cases involving print journalists were decided favorably for the media.

Table 11b indicates that photojournalists prevailed in only 50.0% of the

cases in which they were involved. Photojournalists working for newspapers fared only slightly better, with 57.1% of their cases being decided in the media's favor.

Table 11c shows that the treatment of broadcast journalists depended on the type of organization for which the journalist works. While radio broadcast journalists prevailed in 80.0% of their cases, only 58.3% of the cases in which television broadcast journalists were involved were decided favorably for the media. Overall, broadcast journalists prevailed in 62.1% of their cases.

Although it may seem appropriate to conclude that print journalists receive favorable treatment from the courts, regardless of the type of media organization for which they work, this distinction is misleading. A more apt distinction can be made, based on whether the type of information the newsman normally gathers can be expected to be received in confidence. Information received in confidence has received much more protection in the legislatures and the courts than information in the public forum.

The distinction between material received under a "cloak of confidentiality" or material obtained in the public forum often depends on whether the material is visual or non-visual. Thus, print journalists are more likely to obtain confidential information than some other types of journalists. In particular, photojournalists and television broadcast journalists often obtain information in the public forum, which does not require a promise not to disclose confidential sources and materials. Furthermore, the taking of photographs and videotape[1] and the making of audiotape requires personal observation of events.

The distribution of decisions based on the type of material subpoenaed is summarized in Table AIII-6. When no material was subpoenaed, or when written documents or transcripts were subpoenaed, more than 60% of the cases

resulted in favorable decisions. However, the percentage of favorable decisions for cases in which photographs, videotape, or audiotape were subpoenaed was less than 60%.

Additional research or an extensive search of the qualitative literature would be required to determine if non-print journalists are indeed discriminated in court decisions and in statutes. The lower percentage of favorable decisions in cases in which photographs, videotape, and audiotape were subpoenaed probably resulted from the lack of an agreement of confidentiality in these cases. As confidentiality was not a coding category, the extent to which this factor affected the outcome of cases cannot be determined. However, a number of court decisions and statutes refer to confidentiality. For example, in *CBS, Inc. v. Campbell*, the Missouri Court of Appeals held that neither the state nor federal constitution protected a television station's "outtakes", when there were no claims of confidential sources involved in providing the video and audio to a grand jury.[2]

In *Ex parte Grothe*, the Texas Court of Criminal Appeals held that a photographer did not have a First Amendment privilege to refuse to produce photographs of an alleged criminal offense that occurred in a public place.[3] The court said, "[W]e fail to see a hypothetical case wherein a weighing process would result in suppression of highly relevant personal observation of public criminal activity."[4]

Neither of the cases cited above was heard in a state with a shield law to protect subpoenaed newsmen. However, some state shield laws do not exempt a newsman from testifying when he personally observed an event. For example, Delaware's shield law states:

> "Source" means a person from whom a reporter obtained information by means of written or spoken communication or the

> transfer of physical objects, but does not include a person from whom a reporter obtained information by means of personal observation unaccompanied by any other form of communication...[5]

Rhode Island's shield law protects only confidential information:

> [N]o person shall be required . . . to reveal confidential association, to disclose any confidential information or to disclose the source of any confidential information . . . [6]

Thus, the shield laws themselves in some states may work against photojournalists and television broadcast journalists when they are subpoenaed to testify.

The New York shield law would not seem to require disclosure of nonconfidential material. No reference to protection only of material acquired under a "cloak of confidentiality" is made.[7] Nevertheless, the New York courts interpret the shield law to protect only confidential sources and material.

The court in *People v. Korkala* noted that the legislature had amended the New York shield law in 1981 and had not created an "absolute privilege" against disclosure.[8] Prior to the 1981 amendments, there was no doubt that "for a communication or its source to be shielded from disclosure it must be shown that the information was imparted to the newsman under a cloak of confidentiality upon an understanding, either express or implied, that either the information or its sources or both, would not be revealed."[9]

Thus, in *People v. Korkala*, the appeals court held that television "outtakes" of interviews with the defendants must be produced for *in camera* inspection to determine whether the "outtakes" were necessary to the prosecution's case. Similarly, in *O'Neill v. Oakgrove Construction*, the appeals court held that a newspaper organization must produce photographs of an accident scene for *in camera* inspection, to determine if they depicted relevant evidence not shown in police photographs already available.[10]

A number of legislatures and courts do not recognize a privilege for material not received in confidence: precisely the type of material that a photojournalist or television broadcast journalists is most likely to gather. If no promise of confidentiality is involved, courts in many jurisdictions find that First Amendment interests are not harmed by requiring disclosure. The "chill" on the news gathering process usually refers to sources who elect not to give information to newsmen because they fear their identity or particular information may not remain confidential. But when non-confidential material is involved, the "chill" refers to newsmen who do not cover certain stories because they fear they will be subpoenaed. The "chill" for non-confidential material is self-imposed, in contrast to the "chill" for confidential material. Courts see no need to engage in a lengthy balancing test to determine need, relevance, and lack of alternative sources for non-confidential material. Instead, courts require testimony from newsmen who have non-confidential material relevant to the case at bar.

2. Journalists and media organizations involved in libel suits are required to disclose sources and information as often as those subpoenaed in criminal proceedings.

The hypothesis is supported by the data: a requirement for disclosure occurs only slightly less often in a newsman's privilege case resulting from a libel suit than in a case arising from criminal proceedings. The percentage of unfavorable decisions was 27.6% in cases resulting from libel suits (Table 8); and 29.3% in cases resulting from criminal proceedings (Table 6).

Although the percentage of unfavorable decisions is similar in libel suits and criminal proceedings, the percentage of favorable decisions is not. Newsmen receive a lower percentage of favorable decisions in privilege cases arising from

libel suits than in cases resulting from criminal proceedings. The percentage of favorable decisions was 48.3% in cases arising from libel suits (Table 8); and 60.7% in cases arising from criminal proceedings (Table 6). The difference lies in the percentage of split decisions: 24.1% in privilege cases resulting from libel suits (Table 8); and 10.0% in cases resulting from criminal proceedings.

Split decisions appear to be the judiciary's answer to media parties that use the newsman's privilege simultaneously as a "shield" and a "sword". The court in *Greenberg v. CBS* explained how the defendants' refusal to disclose sources stymied the plaintiff:

> Their refusal to disclose has deprived the plaintiff of access to valuable and material evidence on a critical element of the plaintiff's cause of action. In short, defendants rely on undisclosed sources and information for verification and offer this verification as "proof" of their responsibility. Thus they have put in issue the very privilege upon which they rely. They are using the "Shield Law" affirmatively as a sword to prevent challenge by the plaintiff.[11]

Public officials who are plaintiffs in libel suits must prove the falsity of publications and "actual malice", which is defined as knowledge of falsity or reckless disregard of whether or not the information was false.[12] Public figures must also meet the "actual malice" standard,[13] but private figures usually need only show falsity and negligence to impose liability.[14]

Because of the heavy burden of proof imposed on public officials and public figures, many courts find it unreasonable for newsmen to prevent plaintiffs in libel suits from obtaining the evidence necessary to meet the burden. In *Downing v. Monitor Publishing Company*, the New Hampshire Supreme Court expanded on the necessity for disclosure:

> One way to show reckless publication is to show that "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262 (1968). Another is to show that there was in fact no informant and that the publication

> was therefore baseless. If a defendant is unable or unwilling to name its informant, it may be inferred that there was none. If there was in fact an informant, a plaintiff would be unable to show that there "were obvious reasons to doubt" his veracity if he is unable to determine who the informant was.[15]

Courts realize that to enforce an order for disclosure, they must rely on their contempt power. However, newsmen often refuse to obey an order for disclosure, deciding instead to go to jail. Courts are aware that using the contempt power does not aid the libel plaintiff in proving his case:

> We come to the question of enforcement of the court's order. Of course, the trial court is free to exercise its contempt power to enforce its order. We are aware, however, that most media personnel have refused to obey court orders to disclose, electing to go to jail instead. Confining newsmen to jail in no way aids the plaintiff in proving his case. Although we do not say that the contempt power should not be exercised, we do say that something more is required to protect the rights of a libel plaintiff.[16]

Therefore, courts often issue split decisions in newsman's privilege cases resulting from libel suits. Generally, these split decisions do not require the media party to reveal the identity of a confidential source. In some cases, however, there was a presumption of no source at trial if the media defendant refused to reveal a source during discovery. In *Downing v. Monitor Publishing Company*, the New Hampshire Supreme Court decided to enforce its order as follows:

> [W]e hold that when a defendant in a libel action, brought by a plaintiff who is required to prove actual malice under *New York Times*, refuses to declare his sources of information upon a valid order of the court, there shall arise a presumption that the defendant had no source. This presumption may be removed by a disclosure of the sources a reasonable time before trial.[17]

Another approach was used by the court in *Greenberg v. CBS*. The libel defendants were allowed to state that a source existed, but were not allowed to rely on the source as evidence of due care. The court addressed the problem as follows:

> At trial, if the defendants opt to rely on their statutory privilege, they should be precluded from any use of those sources and information as proof of verification or evidence of responsibility.[18]

Eight states have avoided the dilemma of source disclosure in libel suits by incorporating specific provisions in their newsman's privilege statutes.[19] In four of the states, the newsman's privilege is automatically eliminated if the media party asserts a defense based on information from a confidential source.[20] Another state eliminates the privilege if an article is written "in bad faith [or] with malice."[21] In a fifth state, if the defense is based on information from a confidential source, the burden of proof is shifted to the defendant.[22] In the two remaining states, the libel plaintiff must first demonstrate sufficient need for the information before the privilege is eliminated.[23]

In most states with specific provisions for libel in the newsman's privilege statutes, the courts have yet to address the issue of source disclosure in a libel suit. However, in *Saxton v. Arkansas Gazette*, the Arkansas Supreme Court affirmed a trial court ruling that the plaintiff in a libel suit had not made a reasonable effort to determine the informant's identity or to show publication with malice, bad faith, or reckless disregard for the truth.[24] The Oklahoma Supreme Court held in *Taylor v. Miskovsky* that the plaintiff had not shown that a newsman's articles were relevant to a significant issue in his defamation lawsuit.[25] In *Munson v. Gaylord Broadcasting*, the Louisiana Court of Appeals reversed a lower court decision, stating that the order for disclosure was not justified because the libel plaintiff had not shown the newsman's information would be relevant to his case and because, as a private figure, the plaintiff did not have to prove "actual malice".[26]

In states with newsman's privilege statutes without specific provisions for defamation actions, the courts usually give precedence to the First Amendment interests expressed in the statutes. For example, in *Mazzella v. Philadelphia Newspapers, Inc.*, the federal district court refused to compel disclosure of the identity of a source, in accordance with the Pennsylvania shield law. The court said:

> In the absence of any constitutional right to a cause of action sounding in defamation, an individual's interest in vindicating this interest recognized by State law is clearly not as great as the public's interest in discovering crimes against the State held insufficient to warrant piercing the reporter's shield in *Taylor.* Since the legislature has chosen not to incorporate an exception for libel cases in the statute as it clearly could have, . . . it would be highly inappropriate for this court to undertake the task.[27]

The court makes an interesting point about the relative importance of the newsman's privilege statute and an individual's right to his good name. A libel suit is, after all, a state cause of action. As there is no federal shield law, newsman's privilege statutes are state laws. Few states' constitutions unquestionably provide recourse for damage to reputation; only one state's constitution provides newsmen freedom from contempt citations for failure to reveal a confidential source. However, in most jurisdictions, the newsman's privilege is grounded in the First Amendment, while the tort of defamation implies a restriction on First Amendment rights. Because of the federal constitutional basis for the newsman's privilege recognized by many courts,[28] a test for admitting evidence and existence of a source in defamation actions should be interpreted by the judiciary to favor the media party.

However, the libel plaintiff should not be precluded from proving his case because a newsman will not reveal his source. A newsman who does not have a non-confidential source to verify confidential information should not be allowed

to benefit from his lack of thoroughness. Thus, the approach taken by the court in *Greenberg v. CBS* is appropriate: allow libel defendants to state that a source existed, but do not allow reliance on the source as evidence of responsibility. The jury can then determine the proper weight to give testimony from each party.

3. Stories about government or politics result in the greatest number of subpoenas for testimony by members of the media in civil cases.

The hypothesis must be rejected. Work on a business story resulted in the greatest number of subpoenas for testimony by media witnesses in civil cases. The number of subpoenas in civil cases arising from work on both government and politics stories combined was slightly less.

Table 9 shows that media witnesses were subpoenaed in 28.3% of civil cases involving newsman's privilege because of work on a business story. In 25.6% of civil cases involving newsman's privilege, media witnesses were subpoenaed because of work on a story about government or politics.

Osborn found that, when surveyed, newsmen indicated that when they used confidential information, 57.8% of the stories involved government or politics.[29] Only 11.9% of the stories involved business or consumer issues.[30] If this is true, a large number of subpoenas for testimony by newsmen in civil cases resulted from a small number of stories using confidential sources and information.

Table AIII-12a and -12b provide a partial explanation for the number of media witnesses subpoenaed in civil cases because of work on business stories or government and politics stories. Of 54 civil cases in which newsmen were subpoenaed because of work on a business story, 21 or 38.9% were libel suits. Of 48 civil cases in which newsmen were subpoenaed because of work on a story

about government or politics, 22 or 45.8% were libel suits. Table AIII-12a provides an additional piece of information about the 64 newsman's privilege cases arising from libel suits. Of the 64 cases, 22 or 34.4% resulted from stories about government or politics and 21 or 32.8% resulted from stories about business.

The high proportion of libel suits resulting from business stories may be the result of businessmen's lack of experience in dealing with the media. While government officials and politicians, and to a lesser extent, government employees, are accustomed to dealing with the media, most businessmen are not. Government officials and politicians expect to be in the public eye, but most businessmen tend to avoid public exposure. When businessmen become the focus of public attention, they may overreact if that attention is less than favorable.[31] Also, one effect of the Republican administration during the 1980's may be an increased focus on business by media organizations.

In civil cases in which the media is a third party, the ease with which an attorney can obtain information may affect the number of subpoenas issued to newsmen. Although obtaining information from government agencies may be difficult, an attorney is still dealing with an organization with requirements for public disclosure of much information. Businesses, on the other hand, are usually private and prefer to keep information about their operations from the public. Thus, an attorney may have little recourse but to subpoena a newsman who may be privy to information about a civil case.

The media have fared well in newsman's privilege cases resulting from civil suits in which they were a third party. Table AIII-3 indicates that the media received favorable decisions in 71.6% of these cases. However, courts are much stricter with newsmen who refuse to reveal confidential sources and

information when involved in a libel suit.[32] Table 8 indicates that the media received favorable decisions in only 48.3% of libel suits. Newsmen should be aware of the need to verify information received from confidential sources in stories about government and politics and about business. In particular, newsmen should have non-confidential sources available to verify information that may be defamatory.

4. Subpoenas by the defense in criminal proceedings result in a requirement for testimony as often as those in grand jury proceedings.

The hypothesis must be rejected. Newsmen subpoenaed in grand jury proceedings are required to testify much more frequently than newsmen subpoenaed by the defense in criminal proceedings. Newsmen subpoenaed by the prosecution or in cases involving a violation of grand jury secrecy also were required to testify more often than those subpoenaed by the defense.

Table 7 indicates that newsmen subpoenaed by the defense were required to testify in only 15.8% of those cases, compared to 60.9% of grand jury proceedings, 61.5% of cases in which the newsman was subpoenaed by the prosecution, and 50.0% of cases involving a violation of grand jury secrecy. Newsmen received favorable decisions in 84.2% of cases in which they were subpoenaed by the defense, compared to 39.1% of cases in which they were subpoenaed by a grand jury.

Initially it appears that Justice Stewart's concern about state and federal authorities attempting to annex the press as "an investigative arm of government" was well-founded.[33] Certainly the Sixth Amendment guarantee of compulsory process for criminal defendants has not resulted in a requirement for testimony by media witnesses. On the other hand, the Supreme Court's decision in *Branzburg v. Hayes* has resulted in a requirement for testimony by media

witnesses when subpoenaed to testify in grand jury proceedings or by the prosecution.

Shortly after the U.S. Supreme Court's decision in *Branzburg v. Hayes*, a case similar to *Branzburg v. Pound*[34] came before the Maryland Court of Special Appeals.[35] Responding to the newsman's claim that the constitutional guarantees of free press and free speech were violated by compelling disclosure, the court stated:

> The appellant contends that where, as here, a newsman is engaged in preparation of a series of articles dealing with illicit use of drugs by young people, and where sources of information may only be ascertained through observation of those who might become sources while engaged in illegal drug practices, it violates the free press and free speech guarantee of the federal and Maryland constitutions to compel a reporter to disclose the identity of a source, some of whose activities he has described in a newspaper article but whose identity he has fully protected. That no such violation of the federal constitutional guarantees exists in such circumstances has now been made clear by the Supreme Court of the United States in *Branzburg v. Hayes* . . .[36]

Most courts dealing with the question of whether a newsman must testify when subpoenaed by a grand jury have responded in the affirmative.[37] They follow Justice White's lead in *Branzburg v. Hayes*:

> On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.[38]

Because *Branzburg v. Hayes* was a Supreme Court decision, other courts feel compelled to follow the narrow holding, that newsmen must appear to testify before grand juries, at the very least. However, in other contexts, courts are applying Justice Stewart's three-part test to determine when newsmen must testify.

Subpoenas by state and federal authorities have been limited. In the 20 years covered by the study, only 28 subpoenas for media witnesses were issued in grand jury proceedings, compared to 87 subpoenas issued by criminal defendants. Prosecutors subpoenaed 17 media witnesses. Only five newsmen were subpoenaed to testify about violations of grand jury secrecy.

Little difference was noted between decisions in state and federal courts in criminal proceedings. In 64 state cases involving defense subpoenas, 75.0% were decided in the media's favor and 14.1% were not. In 23 federal cases involving defense subpoenas, 69.6% of the decisions were favorable for the media and 13.0% were unfavorable. In 20 state cases resulting from grand jury subpoenas, 36.8% were decided in favor of the media and 47.4% were decided unfavorably for the media. The media were less successful in federal court cases resulting from grand jury subpoenas. In eight cases, only 25.0% were decided favorably for the media, 50.0% were decided unfavorably, and 25.0% were split decisions. Of the 34 newsman's privilege cases arising from federal court criminal proceedings, only 10 or 29.4% involved subpoenas by government authorities. Of the 113 newsman's privilege cases arising from state court criminal proceedings, 39 or 34.5% involved subpoenas by government authorities.

A number of reasons may account for the scarcity of newsman's privilege cases resulting from subpoenas by government authorities. Newsmen may not be pursuing investigative reporting to the extent they did during the 1960's and 1970's. Instead, they may be relying on governmental investigative agencies for information on criminal activity. If this is true, little information not available elsewhere would be obtained by subpoenaing newsmen.

Perhaps the part of Justice Stewart's test requiring proof of no alternative sources has caused government agencies to conduct more exhaustive

investigations before asking for newsmen's help. Also, the Attorney General's guidelines may be working as intended to decrease the number of subpoenas issued to newsmen.[39] The guidelines state that subpoenas are to be served on journalists only as a last resort, and then only with the attorney general's approval.

In several of the early privilege cases, newsmen were subpoenaed to appear before grand juries because they had witnessed individuals making or using drugs.[40] The news stories in the cases dealt with marijuana use. Today, drug stories do not focus on the use of marijuana: the drug is cocaine or "crack". While marijuana use may have been accepted by a large segment of society, cocaine use certainly is not. Illegal drug manufacturing and sales is big business today, and those involved are unlikely to invite a journalist to report on their activities. Newsmen will probably not be receiving confidential information from crack dealers.

Early privilege cases frequently involved confidences from counter-culture groups. Both Caldwell and Pappas were concerned about their relationships with dissident groups in *Branzburg v. Hayes.*[41] In the early 1970's, the Vietnam War was an ongoing source of dissension among millions of Americans. The civil rights movement, which had erupted during the 1960's, remained an important focus of news stories. Now, the Vietnam War is over and many of the dissident groups have disbanded or been absorbed into the mainstream. Developing delicate relationships with underground groups to insure that their stories are communicated to the public is no longer a concern newsmen frequently face.

Recent newsman's privilege cases resulting from subpoenas by government authorities have usually involved serious crimes other than drug use or sales.[42]

If no alternative source for the information exists, newsmen can be expected to be forced to testify if called before a grand jury or subpoenaed by the prosecution. Newsmen can take comfort in knowing that subpoenas by government authorities have been rare.

Recognition of the Newsman's Privilege in the Courts

The newsman's privilege was recognized in 268 or 81.0% of the 331 cases coded. In only 17 or 5.1% of the cases was the privilege rejected and 46 or 13.9% of the cases did not specify whether or not the privilege was recognized.

Of course, recognition of the newsman's privilege does not necessarily mean a result favorable for the media. Table AIII-15 shows that only 170, or 67.2%, of the 253 cases in which the newsman's privilege was recognized resulted in favorable decisions for the media. The media received an unfavorable decision in 47 or 18.6% of the cases in which the newsman's privilege was recognized. Therefore, courts that recognized the newsman's privilege found reasons for deciding the case unfavorably for the media in certain circumstances. Courts may have applied Justice Stewart's three-part test and found that the newsman's testimony was still required. Obviously, almost all courts have regarded the newsman's privilege as qualified, not absolute.

Table AIII-14 summarizes data for recognition of the newsman's privilege in the courts for 1969 through 1988. One trend is fairly obvious from viewing the table: courts are recognizing the newsman's privilege in a higher percentage of cases as the years pass. In 1972, the year of the decision in *Branzburg v. Hayes*, the newsman's privilege was specifically recognized in only three of seven cases, or 42.9%. In 1987, the newsman's privilege was recognized in 21 of 22 cases, or 95.5%.

The percentage of cases in which the newsman's privilege was recognized

would probably be even higher if cases in which recognition was not specified were included. Table AIII-15 shows that 22, or 56.4%, of the 39 cases in which recognition was not specified resulted in favorable decisions for the media. Although some opinions do not explicitly state that a newsman's privilege was recognized, the assumption can safely be made in most cases decided favorably for the media.

Not surprisingly, in the 17 cases in which the newsman's privilege was not recognized, the media received no favorable decisions. Sixteen or 94.1% of the cases resulted in unfavorable decisions for the media and one or 5.9% resulted in a split decision.

Bases for Claims and Decisions

Newsmen used a variety of bases for claiming the privilege not to disclose sources and information in the cases studied. Judges addressed similar bases when deciding newsman's privilege cases. The coding sheet allowed as many as three bases for claiming the privilege and three bases for deciding the case. Most newsmen used no more than three bases for claiming the privilege and most judges referred to no more than three bases for deciding the privilege. The bases were analyzed as though each stood alone, although often more than one basis for claiming the privilege or for making the decision was used in a case.

Table AIII-16 shows the distribution of bases for claiming the newsman's privilege for the study years. In the 331 cases, 462 bases for claiming the privilege were coded. In 110 of the 331 cases, or 33.2%, no basis for claiming the newsman's privilege was specified.

The First Amendment was the basis for the newsman's privilege most often claimed. In 331 cases, the First Amendment was used 175 times, or in 52.9% of the cases. The statutory basis for claiming the newsman's privilege

appeared second in frequency, with 103 cases or 31.1%. The state constitutional basis was also used often. Fifty-nine of the 331 cases, or 17.8%, referred to a state constitutional basis for the claim.

The decision resulting from the use of each basis for the newsman's privilege claim was of particular interest. However, the highest percentage of decisions favorable to the media was received when the basis for the claim was not specified in the court's opinion.

The second highest percentage of decisions favorable to the media occurred when state common law was used as the basis for the newsman's privilege claim. Florida is the only state with a strong tradition of recognizing a common law basis for the newsman's privilege.[43] When state cases alone were analyzed, decisions based on state common law increased from 5.6% to 17.0% with the inclusion of Florida. Thus, use of state common law as the basis for claiming the newsman's privilege in any other state would probably not result in a favorable decision as often as it might appear.

The federal common law basis for the newsman's privilege claim resulted in favorable decisions in three of five cases, or 60.0%. Ten of the twelve federal circuits recognize a newsman's privilege based on the First Amendment or on federal common law.[44] Table 3 indicates that only 41.4% of cases that reach the U.S. Circuit Courts were decided favorably for the media, but 64.6% of the U.S. District Court cases resulted in decisions in the media's favor.

Cases in which the statutory basis for the newsman's privilege was claimed resulted in favorable decisions in 51 of 98 cases, or 52.0%. Apparently, the existence of a shield law in the forum state does not dictate a favorable decision for the newsman subpoenaed to testify. The percentage of favorable decisions in cases where newsmen claimed protection under the state shield law

was less than the overall percentage of 58.0% of favorable decisions.

Most state constitutions contain a section with a content similar to that of the First Amendment. However, claiming a newsman's privilege based on the provisions of the federal or state constitutions did not result in favorable decisions in the courts. Federal and state constitutional bases resulted in 49.1% and 47.4% favorable decisions, respectively. Obviously, standing alone, a newsman's privilege claim with a constitutional basis will not insure a decision favorable to the media.

Table AIII-18 summarizes the distribution of bases for decisions for the study years. Again, three bases for the court's decision were allowed, resulting in 475 decision bases in 331 cases. In only 44 of the 331 cases, or 13.3%, was the basis for the decision not specified.

The basis for decision cited most frequently was the First Amendment. In 180 cases, or 54.4% of the 331 cases, the First Amendment was cited as one of the bases for the decision. Second in frequency was the statutory basis for deciding the case, with 100 cases or 30.2% of the 331 cases. Next was federal common law with 49 cases, or 14.8%. Opinions cited state common law as the basis for decision in 52 cases, or 15.7%, and a state constitution in 43 cases, or 13.0%, of the 331 cases.

The distribution of decisions for the various decision bases is summarized in Table AIII-20. The state common law basis for decision resulted in the highest percentage of favorable decisions. Of 47 cases in which the state common law basis for decision was used, 42 or 89.4% were decided favorably for the media. However, because Florida is the only state with a strong common law tradition of recognizing the newsman's privilege, most cases in this category were probably heard in Florida.

Federal and state constitutional bases for the decision resulted in 63.2 and 72.5% favorable decisions, respectively. Courts using a constitutional basis for their decision apparently accepted a privilege grounded in the constitutional guarantees of a free press. To determine the strength of that privilege, most courts applied Justice Stewart's three-part balancing test.

When the court's decision was based on a newsman's privilege statute, favorable decisions resulted in 52 of 97 cases, or 53.6%. Newsmen should be aware that although newsman's privilege statutes offer some protection to newsmen refusing to disclose sources or information, the extent of the protection depends heavily on the language of the statute and the courts' interpretation of the statute.[45]

Of the 47 cases in which federal common law was a basis for decision, 27 or 57.4% were decided favorably for the media. Although ten of twelve federal circuits recognize a newsman's privilege, it is certainly not an absolute privilege. Again, newsmen should be aware that most federal courts apply Justice Stewart's three-part test,[46] but often use of the test results in a requirement for disclosure.

Recommendation

When subpoenaed, newsmen can expect courts to recognize a privilege for them not to disclose confidential sources and information. The basis for recognition of that privilege will vary from court to court. However, newsmen should always rely on a constitutional basis for the privilege, as well as any other bases that may be available. Courts using a constitutional basis for their decision in a newsman privilege case often reach a decision favorable for the media. Constitutional bases will override other statutory, common law, or public policy considerations.

At the federal level, a common law tradition of recognizing a newsman's privilege grounded in the First Amendment has developed. Most circuits use Justice Stewart's three-part test to determine when a newsman must testify. However, courts still use the narrow holding of *Branzburg v. Hayes* to refuse newsmen a privilege from disclosure when they are subpoenaed by grand juries, the prosecution, or in cases involving violation of grand jury secrecy.

Courts should recognize a privilege for newsmen not to reveal confidential sources and information based on the First Amendment. The values that underlie the free press clause of the First Amendment are inherent to the functioning of a democracy. The right to disseminate information implies a concurrent right to gather information. Without a privilege to gather news from confidential as well as non-confidential sources, without fear of required revelation of sources in all but the most essential of circumstances, First Amendment rights are unnecessarily restricted. Policy that limits the flow of information to the public should be allowed only when an overriding competing interest of constitutional magnitude exists.

The newsman's privilege should serve the purpose of expanding the information available to the public from sources that would otherwise not provide information. Non-confidential sources and information should not be protected. Although subpoenas to testify about or produce non-confidential information may be inconvenient for newsmen, such subpoenas do not interfere with the central purpose of the privilege. While the privilege belongs to the newsman alone, it is not intended for his benefit, but rather for the good of the public.

The "chill" that occurs when newsmen are forced to reveal confidential sources and information causes potential informants to withdraw. The "chill"

that occurs when newsmen are compelled to reveal non-confidential sources and information is self-imposed. Newsmen may be engaging in protected First Amendment activities, but they have no monopoly on First Amendment rights. When they procure information that does not require confidentiality, they should have no more right to protect that information than do ordinary citizens. Otherwise, the potential for abuse of the privilege becomes too great.[47]

Courts have adopted Justice Stewart's three-part test to determine when newsmen should be forced to testify. The test should continue to be used to determine when newsmen should be compelled to reveal confidential sources and information. However, courts should be more consistent in their application of the test. Each of the three parts of the test should be strictly construed. "Need" for a newsman's testimony should indicate that the outcome of the case hinges upon the information the newsman can provide. "Relevance" should refer to testimony that is directly related to the material issue in the case. And "lack of alternative sources" should require proof that other possible sources for the information have been exhausted.

A privilege grounded in the First Amendment and implemented by the courts using a rigid application of Justice Stewart's three-part test provides the best protection for newsmen. The free speech guarantees of state constitutions should be used to strengthen the privilege in the states. Courts should interpret state shield laws to amplify the privilege, not to restrict it.

Suggestions for Further Research

The following are suggestions for further work on the newsman's privilege issue:

1) Much evidence exists to support a difference in the treatment of confidential and non-confidential material. However, the confidentiality of the source or

information subpoenaed was not coded for in this study. Knowing how courts treat confidential and non-confidential material differently could resulted in a savings of time, effort, and money when material is subpoenaed.

2) Courts' implementation of Justice Stewart's three-part test should be analyzed. Cases using the test should be coded to determine if one of the three parts--need, relevance, and alternative sources--is a deciding factor in decisions. Also, it would be informative to learn how protection for newsmen changes when the test is applied in various types of criminal and civil cases.

3) A content analysis of state shield laws should be made. The statutes should be coded for various factors, including the class of individuals protected, the type of material protected, and under what circumstances the privilege can be revoked. Then, all cases for those states with shield laws should be analyzed to determine how courts have interpreted the statutes. Analyzing state shield laws and cases would provide newsmen guidance when lobbying for revision of existing shield laws, when writing new laws, and when subpoenaed.

Endnotes

[1]In almost 45% of cases in which audiotape was subpoenaed, videotape was also requested. Table AIII-6 indicates that the distribution of decisions for these two types of materials is similar. Thus, they are treated together for purposes of this analysis.

[2]645 S.W.2d 30, 33 (Mo. Ct. App. 1982).

[3]687 S.W.2d 736 (Tex. Crim. App. 1984), *cert. denied*, 106 S.C. 308 (1985).

[4]*Id.* at 739.

[5]Del. Code Ann. tit. 10 §4320(5).

[6]R.I. Gen. Laws §9-19.1-1.

[7]N.Y. Civ. Rights Law §79-h (McKinney 1976 & Supp. 1988) states, in part: "Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, 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, by which he is professionally employed or otherwise associated in a news gathering capacity.

[8]99 A.D.2d 161, 472 N.Y.S.2d 310 (App. Div. 1984).

[9]99 A.D.2d 161, 163, 472 N.Y.S.2d 310, 312 (App. Div. 1984).

[10]505 N.Y.S.2d 477 (N.Y.A.D. 1986).

[11]69 A.D.2d 693, 702, 419 N.Y.S.2d 988, 997 (1979).

[12]New York Times v. Sullivan, 376 U.S. 254 (1964).

[13]Gertz v. Welch, 418 U.S. 323 (1974).

[14]Gertz v. Welch, 418 U.S. 323 (1974).

[15]120 N.H. 383, 386, 415 A.2d 683, 686 (1980).

[16]*Id.*

[17]*Id.*

[18]69 A.D.2d 693, 702, 419 N.Y.S.2d 988, 997 (1979).

[19]*See* Monk, *supra* Chapter I, note 10, at 38.

[20]*See* Okla. Stat. Ann. tit. 12, §2506(B)(1980); Or. Rev. Stat. §44.530(3)(1983); R.I. Gen. Laws §9-19.1-3(b)(1985); Tenn. Code Ann. §24-1-208(b)(1980).

[21]Ark. Stat. Ann. §16-85-510 (1987).

[22]*See* La. Rev. Stat. Ann. §45:1454 (West 1982): "If the privilege granted herein is claimed and if, in a suit for damages for defamation, a legal defense of good faith has been asserted by a reporter or by a news media with respect to an issue upon which the reporter alleges to have obtained information from a confidential source, the burden of proof shall be on the reporter or news media to sustain this defense."

[23]*See* Privileges and Immunities--Reporters (Public Act 84-398), ch. 110, para. 8-903, 1985 Ill. Laws 437, amending Ill. Ann. Stat. §8-903 (Smith-Hurd 1984); Minn. Stat. Ann. §595.025 (1), (2) (West Supp. 1988).

[24]264 Ark. 133, 569 S.W.2d 115 (1978).

[25]640 P.2d 959 (Okla. 1981).

[26]13 Med. L. Rptr. (BNA) 1618 (La. Ct. App. July 7, 1986).

[27]479 F.Supp. 523, 528-529 (E.D.N.Y. 1979). The law that must be followed by the lower courts within a jurisdiction is contained in the applicable constitutions, legislation, and decisions of the highest court of the jurisdiction. At the federal level, this includes the U.S. Constitution, the Acts of Congress, and the decisions of the U.S. Supreme Court. The decisions of the Circuit Courts of Appeal must be followed by lower courts within each circuit. At the state level, the law includes the state constitution, the enactments of the state legislature, and the written decisions of the highest court of appeal. Federal law takes precedence over state law. Thus in *Branzburg v. Hayes*, Justice White left state legislatures free, *within First Amendment limits* [emphasis added], to determine the proper statutory response to the newsman's privilege issue in their respective states. Justice White also noted: [W]e are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." 408 U.S. 665, 706 (1972).

[28]*See infra* at 107.

[29]*See* Osborn, *supra* Chapter I, note 21, at 79.

[30]*Id.*

[31]As *The Associated Press Stylebook and Libel Manual* states:

> Companies are naturally sensitive to news stories that reflect on their business prospects and practices. There have been many

> such news stories in the field of environmental and consumer protection. The issues are complicated, and the legal aspects not always clear. Formal charges and allegations should be reported precisely and fairly. *The Associated Press Stylebook and Libel Manual* at 274.

[32]*See supra* Chapter VI, at 94-96.

[33]*See supra* Chapter II, note 62 and accompanying text.

[34]*See supra* Chapter II, note 34 and accompanying text.

[35]Lightman v. State, 15 Md. App. 713, 294 A.2d 149 (Ct. Spec. App. 1972), *aff'd per curiam*, 266 Md. 550, 295 A.2d 212, *cert. denied*, 411 U.S. 951 (1973).

[36]*Id.* at 15 Md. App. 721, 294 A.2d 157.

[37]Lewis v. United States, 517 F.2d 236, 238 (9th Cir. 1975); WBAL-TV Division, The Hearst Corporation v. Maryland, 300 Md. 233, 235-237, 477 A.2d 776, 778-780 (1984); Tofani v. State, 297 Md. 165, 171-175, 465 A.2d 413, 419-423 (Ct. App. 1983); Knight-Ridder Broadcasting, Inc. v. Greenberg, 511 N.E.2d 1116, 1121 (1987); Andrews v. Andreoli, 92 Misc.2d 410, 414, 400 N.Y.S.2d 942, 946 (Sup. Ct. Onondaga Co. 1977).

[38]408 U.S. 665, 690.

[39]*See supra*, Chapter I, note 8.

[40]Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970); Lightman v. State, 15 Md. App. 713, 294 A.2d 149 (Ct. Spec. App. 1972), *aff'd per curiam*, 266 Md. 550, 295 A.2d 212, *cert. denied*, 411 U.S. 951 (1973); State v. Buchanan, 436 P.2d 729 (Ore. 1968).

[41]*See supra* Chapter II, at 15-16.

[42]Knight-Ridder Broadcasting, Inc. v. Greenberg, 511 N.E.2d 1116, 1121 (1987)(homicide); WBAL-TV Division, The Hearst Corp. v. Maryland, 300 Md. 233, 477 A.2d 776 (1984)(homicide); Tofani v. State, 297 Md. 165, 465 A.2d 413 (Ct. App. 1983)(sexual assault).

[43]*See supra* Chapter V, at 63-66.

[44]*See supra* Chapter III, note 2 and accompanying text. Generally, federal courts used the three-part test proposed by Justice Stewart to determine when newsmen will be compelled to testify.

[45]*See supra* Chapter VI, at 91-92.

[46]*See* United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir.), *reh. denied*, 628 F.2d 932 (1980), *cert. denied*, 450 U.S. 1041 (1981); Zerrilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st

Cir. 1980); United States v. Criden, 633 F.2d 349 (3d. Cir. 1980), *cert. denied sub nom.*, Schaffer v. United States, 449 U.S. 1113 (1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Baker v. F&F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Gulliver's Periodicals, Ltd., v. Chas. Levy Circulating Co., 455 F. Supp. 1197 (N.D. Ill. 1978).

[47]*See In re* Avila, 206 N.J. Super. 61, 501 A.2d 1018 (Super. Ct. App. Div. 1985). Avila was the publisher, owner, and advertising salesman of the Spanish-language weekly newspaper, *Avance*, in Union City, New Jersey. When subpoenaed to testify before a grand jury about his friends' organized crime activities, he refused to respond to questions. Avila invoked the state shield law and First Amendment of the U.S. Constitution. The grand jury eventually relented, realizing that the almost absolute New Jersey shield law afforded Avila powerful protection. According to Avila, his social life was as much a part of his journalistic endeavors as feature stories he wrote or political positions he took in editorials. Avila said: "They all have one purpose: to obtain information, ideas and sources in order to prepare and disseminate news and opinion. Naturally, while all of the information I obtain is not always printed, my activities are designed to insure that I have the widest possible network of contact--both confidential and non-confidential--in the community so I can 'keep my ear to the ground.'" Quoted in Garneau, *Is the Shield Law vulnerable to abuse?*, Editor & Publisher, October 11, 1986.

APPENDIX I

CODING SHEET

Appendix I contains the coding sheet used to code cases for this study.

CODING SHEET

1. Case Designation: _____

_____

2. Jurisdiction of Court: _____

1 = U.S. Supreme Court
2 = U.S. Circuit Court of Appeals
3 = U.S. District Court
4 = State Supreme Court
5 = State Court of Appeals
6 = State Lower Court
7 = Other; specify: _____

If 2 or 3 go to question 3.
If 4, 5, or 6 go to question 4.
If 1 or 7 go to question 5.

3. Specify the federal circuit in which the proceeding occurred: _____

4. Specify the state in which the proceeding occurred: _____

5. Year: _____

6. Type of proceeding in which issue of newsmen or media privilege first arose: _____

1 = criminal
2 = civil

If 1 go to question 5.
If 2 go to question 8.

7. Reason for issue of subpoena: _____

0 = not specified
1 = grand jury proceeding
2 = subpoena by defense
3 = subpoena by prosecution
4 = violation of grand jury secrecy
5 = other; specify: _____

If 1 go to question 8.
If 2 go to question 9.
If 3, 4, or 5 go to question 13.

8. Reason for subpoena in grand jury proceeding: _____

0 = not specified
1 = witness to a crime
2 = other evidence of a crime
3 = accused of a crime

Go to question 13.

9. Reason for subpoena by defense: _____

0 = not specified
1 = exculpatory evidence
2 = impeaching evidence
3 = evidence of prejudicial trial or pretrial publicity
4 = prosecutorial or investigative misconduct
5 = sixth amendment right
6 = other; specify: _____

Go to question 13.

10. Status of media in civil proceeding: _____

1 = first party
2 = third party

If 1 go to question 11.
If 2 go to question 12.

11. Type of proceeding (media a party): _____
_____

0 = not specified
1 = libel
2 = privacy
3 = other; specify: _____

Go to question 13.

12. Type of proceeding (media not a party): _____

0 = not specified
1 = government proceeding
2 = federal cause of action
3 = state cause of action
4 = other; specify:

13. Type of evidence sought from subpoena: _____

0 = not specified
1 = source
2 = information
3 = source and information

14. Type of material(s) subpoenaed: _____

0 = none _____
1 = notes relating to written material _____
2 = unpublished photographs, negatives, proof sheets _____
3 = audio tape recordings
4 = video tape recordings
5 = transcript of radio or television broadcast
6 = finished work product
7 = not specified
8 = other; specify: _____

15. Type of party subpoenaed: _____

0 = not specified
1 = individual(s)
2 = media organization
3 = both individual(s) and media organization

If 0 go to question 20.
If 1 go to question 16.
If 2 go to question 19.
If 3 go to question 16.

16. Type of employment of subpoenaed individual(s): _____

    0 = not specified _____
    1 = non-management
    2 = management

17. Type of non-management employment of subpoenaed individual(s): _____

    _____
    0 = not specified
    1 = print journalist _____
    2 = photojournalist
    3 = radio broadcast journalist
    4 = television broadcast journalist
    5 = television cameraman
    6 = custodian of photographic records
    7 = author
    8 = free-lance journalist
    9 = other; specify:_____

18. Type of management employment of subpoenaed individual(s): _____

    _____
    0 = not specified
    1 = owner
    2 = publisher
    3 = newspaper or magazine editor
    4 = television news director
    5 = radio news director
    6 = radio program producer
    7 = television program producer
    8 = other; specify: _____

19. Type of media organization: _____

    _____
    0 = not specified
    1 = newspaper
    2 = magazine or publishing company
    3 = radio station or network
    4 = television station or network
    5 = news or wire service
    6 = news or feature syndicate
    7 = cable or community antenna television
    8 = other; specify: _____

20. Primary focus of material(s) that resulted in subpoena: _____

0 = not specified
1 = government
2 = politics
3 = business/consumers
4 = accident (vehicular, fire, etc.)
5 = crime
6 = social injustice (discrimination)
7 = environment
8 = other; specify: _____

21. Basis for reporter privilege claim: _____

0 = not specified _____
1 = first amendment _____
2 = fifth amendment
3 = state constitutional
4 = state common law
5 = statutory
6 = federal common law
7 = other; specify: _____

22. Did the court recognize a qualified or absolute reporter privilege? _____

0 = not specified
1 = yes
2 = no

23. What was the basis for recognizing or not recognizing a reporter privilege? _____

_____

0 = not specified _____
1 = first amendment
2 = fifth amendment
3 = state constitutional
4 = state common law
5 = statutory
6 = federal common law
7 = other; specify: _____

24. Decision: _____

1 = favorable to press
2 = unfavorable to press
3 = split decision
4 = remanded
5 = other; specify:_____

APPENDIX II

OPERATIONAL DEFINITIONS

Appendix II contains the operational definitions used for coding in this study.

OPERATIONAL DEFINITIONS

1. Case Designation--citation of the case as it would appear in *A Uniform System of Citation* (14th edition).

2. Jurisdiction of the court--the limits or territory within which a court has the authority to interpret and apply the law, usually obvious by looking at the case designation.

Federal:

1. U.S. Supreme Court

2. U.S. Circuit Court of Appeals

3. U.S. District Court

State:

4. Supreme Court

5. Court of Appeals

6. Lower Court

7. Other--if a court other than those listed above rendered the decision, specify the jurisdiction of that court.

3. Specify the federal circuit in which the proceeding occurred--the federal circuit in which the proceeding was heard (one of eleven).

4. Specify the state in which the proceeding occurred--the state in which the proceeding was heard (one of fifty).

5. Year--date of decision of highest court of appeal.

6. Type of proceeding in which issue of newsmen or media privilege first arose--either criminal or civil. If the type of proceeding is unclear, choose "not specified."

0. not specified

1. criminal--relating to the prosecution of one accused of committing a crime.

2. civil--relating to private rights and to remedies sought by action or suit distinct from criminal proceedings.

For purposes of this coding sheet, subpoena will refer to any demand for appearance of media witnesses and for production of materials held by them or media organizations, whether or not the opinion refers to these demands as subpoenas.

7. Reason for issue of subpoena--reason for subpoena at criminal proceeding. If it is unclear why the subpoena was issued, choose "not specified."

0. not specified.

1. grand jury proceeding--proceeding by a jury whose responsibility it is to decide whether probable cause exists to warrant the trial of an accused for a crime.

2. subpoena by defense--subpoena by defense during trial or pretrial proceedings.

3. subpoena by prosecution--subpoena by prosecution during pretrial and/or trial proceedings.

4. violation of grand jury secrecy--subpoena because of publication of details of grand jury proceeding.

5. other--if the reason for issue of subpoena is not one of those listed above, specify the reason.

8. Reason for subpoena in grand jury proceeding--reason for subpoena at grand jury proceeding. If it is unclear why the subpoena was issued, choose "not specified".

0. not specified.

1. witness to a crime--a proceeding in which information is sought from an individual who may have witnessed criminal activity.

2. other evidence of a crime--a proceeding in which information is sought from an individual who may have evidence of criminal activity but did not witness criminal activity.

3. accused of a crime--the media individual or organization is accused of a criminal offense.

9. Reason for subpoena by defense--reason media was requested to appear or produce materials by defense. If it is unclear why the subpoena was issued, choose "not specified".

0. not specified.

1. exculpatory evidence--subpoena to obtain evidence relevant to the defendant's innocence.

2. impeaching evidence--subpoena to obtain evidence which will contradict a prosecution witness's testimony.

3. evidence of prejudicial trial or pretrial publicity--subpoena to obtain evidence of prejudicial trial or pretrial publicity in the defendant's case.

4. prosecutorial or investigative misconduct--subpoena to obtain evidence of improper behavior or investigative techniques used by the prosecution or investigative officers.

5. sixth amendment right--subpoena issued without reference to specific evidence but based on the sixth amendment right to compulsory process.

6. other--if the subpoena was issued for a reason other than those listed above, specify the reason.

10. Status of media in civil proceeding--whether or not media is a party in a civil case.

1. first party--subpoena issued in a civil action in which a media organization or employee is a party.

2. third party--subpoena of individual in a civil action in which neither a media organization or employee is a party.

11. Type of proceeding (media a party)--type of civil action in which media is a first party and newsmen or media privilege issue first arose. If it is unclear what type of civil action this is, choose "not specified".

0. not specified.

1. libel--action in which the individual or media organization is accused of publishing false, defamatory material.

2. privacy--action in which the individual or media organization is accused of invading an individual's privacy.

3. other--if the type of civil action to which the media is a party is other than those listed above, specify the type of civil action.

12. Type of proceeding (media not a party)--type of civil action in which media is not a party and newsmen or media privilege issue first arose. If it is unclear what type of civil action this is, choose "not specified".

0. not specified.

1. government proceeding--civil action in which one party is a federal, state, or local government or regulatory agency.

2. federal cause of action--civil action involving a federal issue, i.e. civil rights or antitrust, in which the government is not a party.

3. state cause of action--civil action involving a state issue, whether in state or federal court, in which the government is not a party.

4. other--if the type of civil action to which the media is not a party is other than those listed above, specify the type of civil action.

13. Type of evidence sought from subpoena--whether the type of evidence sought is the source of information, the information itself, or both. If it is unclear what type of evidence was sought from the subpoenaed individual, choose "not specified".

0. not specified.

1. source--only the identity of the individual who supplied information is sought.

2. information--only information supplied by the confidential source is sought.

3. source and information--both 1 and 2 are sought.

14. Type of material(s) subpoenaed--work product created by newsman or media organizational which is object of a subpoena. If the court opinion indicates that a particular type of material was subpoenaed, it should be selected here. If it is unclear what type of material was subpoenaed, choose "not specified." If no material was subpoenaed, choose "none." If the type of material subpoenaed is other than those listed, specify the type of material. If more than one type of material was subpoenaed, more than one answer is possible.

0. none.

1. notes relating to written material--interview and other notes, documents, records, forms, etc.

2. unpublished photographs, negatives, proof sheets..

3. audio tape recordings.

4. video tape recordings.

5. transcript of radio or television broadcast.

6. finished work product only.

7. not specified.

8. other.

15. Type of party subpoenaed--whether the party subpoenaed is an individual, a media organization, or both. If it is unclear what type of party was subpoenaed, choose "not specified."

0. not specified.

1. individual(s).

2. media organization.

3. both individual(s) and media organization.

16. Type of employment of subpoenaed individual(s)--whether or not the subpoenaed individual(s) was employed in a management capacity. If the court opinion indicates the type of employment, it should be selected here. If it is unclear whether the subpoenaed individual was employed in a management or non-management capacity, choose "not specified." If more than one individual was subpoenaed, more than one answer is possible.

0. none--subpoena was not issued for individual, but rather for media organization.

1. not specified.

2. non-management--the subpoenaed individual is employed in one of the occupations listed in operational definition 16.

3. management--the subpoenaed individual is employed in one of the occupations listed in operational definition 17.

17. Type of non-management employment of subpoenaed individual(s)--occupation individual was pursuing at the time knowledge or material which is object of subpoena was acquired. If the court opinion indicates the type of employment of the subpoenaed individual, it should be selected here. If the type of employment of the subpoenaed individual is unclear, choose "not specified." If the type of non-management employment of the subpoenaed individual is other than those listed, specify the type. If more than one individual was subpoenaed, more than one answer is possible.

0. not specified.

1. print journalist.

2. photojournalist.

3. radio broadcast journalist.

4. television broadcast journalist.

5. television cameraman.

6. custodian of photographic records.

7. author.

8. free-lance journalist.

9. other.

18. Type of management employment of subpoenaed individual(s)--occupation individual was pursuing at the time knowledge or material which is object of subpoena was acquired. If the court opinion indicates the type of employment of the subpoenaed individual, it should be selected here. If the type of employment of the subpoenaed individual is unclear, choose "not specified." If the type of management employment of the subpoenaed individual is other than those listed, specify the type. If more than one individual was subpoenaed, more than one answer is possible.

0. not specified.

1. owner.

2. publisher.

3. newspaper or magazine editor.

4. television news director.

5. radio news director.

6. other.

19. Type of media organization--type of organization a) for which subpoenaed individual(s) works; or b) to which subpoenaed individual supplied information; or c) which was recipient of subpoena. If the court opinion indicates the type of media organization, it should be selected here. If the type of media organization is unclear, choose "not specified". If the type of media organization is other than those listed, specify the type.

0. not specified.

1. newspaper.

2. magazine or publishing house.

3. radio station.

4. television station.

5. news or wire service.

6. news or feature syndicate.

7. cable or community antenna television.

8. other.

20. Primary focus of material(s) that resulted in subpoena--the subject of the material the subpoenaed individual was working on when the source or information which resulted in the subpoena was acquired. If the court opinion indicates the subject of the subpoenaed material, it should be selected here. If it is unclear what the subject of the material was, choose "not specified." If the subject of the subpoenaed material is other than those listed, specify the subject.

0. not specified.

1. government.

2. politics.

3. business/consumers.

4. accident (vehicular, fire, etc.).

5. crime.

6. social injustice.

7. environment.

8. other.

21. Basis for reporter privilege claim--basis for individual's refusal to honor subpoena. If the court opinion indicates the basis for the reporter privilege claim, it should be selected here. If it is unclear on what basis the reporter privilege claim is made, choose "not specified." If the basis for the reporter privilege claim is other than those listed, specify the basis for the claim. More than one answer is possible.

0. not specified.

1. first amendment--claim based on first amendment protection of news gathering.

2. fifth amendment--claim based on fifth amendment guarantees against self-incrimination.

3. state constitutional--claim based on provisions of constitution in state of occurrence or trial.

4. state common law--claim based on cases in state of occurrence or trial.

5. statutory--claim based on statute in state of occurrence or trial.

6. federal common law--based on cases decided in federal courts.

7. other.

22. Did the court recognize a qualified or absolute reporter privilege?--Whether or not the court accepted the existence of a reporter privilege. If it is unclear whether or not the court has recognized a privilege choose "not specified".

0. not specified.

1. yes.

2. no.

23. Basis for decision--basis for court's decision as to whether an individual must honor subpoena. If the court opinion indicates the basis for the court's decision, it should be selected here. If it is unclear on what basis the court's decision was made, choose "not specified." If the basis for the court's decision is other than those listed, specify the basis for the decision. The definitions are the same as in 21 above. More than one answer is possible.

0. not specified.

1. first amendment.

2. fifth amendment.

3. state constitutional.

4. state common law.

5. statutory.

6. federal common law.

7. other.

24. Decision--outcome of case at highest level of appeal.

1. favorable to media litigant--individual not require to testify as to confidential source or information.

2. unfavorable to media litigant--individual required to testify as to confidential source or information or "suffer the consequences" of failure to obey the court.

3. split decision--partial disclosure of information sought from individual is required, i.e. when in camera review of information is required by judge prior to disclosure, or when reporter not required to reveal confidential source but may not use source as part of defense in lawsuit.

4. remanded--case remanded to lower court; final decision not made by higher court.

5. other--issue of reporter privilege not addressed or otherwise unable to determine decision of court.

APPENDIX III

SUPPLEMENTAL TABLES

Appendix III contains tables supplemental to those that appear in the text.

Table AIII-1--Distribution of Decisions by Reason for Defense Subpoena in Criminal Case

Reason for Defense Subpoena	Decision 1	2	3	4	5	Total
Exculpatory Evidence	7 58.3	4 33.3	1 8.3	0 0.0	0 0.0	12 13.8
Impeaching Evidence	14 63.6	4 18.2	3 13.6	1 4.5	0 0.0	22 25.3
Prejudicial Publicity	2 100.0	0 0.0	0 0.0	0 0.0	0 0.0	2 2.3
Prosecutorial Misconduct	9 75.0	2 16.7	0 0.0	1 8.3	0 0.0	12 13.8
Other	32 82.1	2 5.1	2 5.1	2 5.1	1 2.6	39 44.8
Total	64 73.6	12 13.8	6 6.9	4 4.6	1 1.1	87

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-2--Distribution of Decisions by Reason for Grand Jury Subpoena

Reason for Grand Jury Subpoena	Decision 1	2	3	4	5	Total
Witness to a Crime	1 20.0	3 60.0	1 20.0	0 0.0	0 0.0	5 17.9
Other Evidence of a Crime	7 31.8	11 50.0	3 13.6	1 4.5	0 0.0	22 78.6
Accused of a Crime	0 0.0	1 100.0	0 0.0	0 0.0	0 0.0	1 3.6
Total	8 28.6	15 53.6	4 14.3	1 3.6	0 0.0	28

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-3--Distribution of Decisions by Type of Media Involvement in Civil Case

	Decision			
Media Involvement	Favorable to Media	Unfavorable to Media	Split	Total
First Party	34 50.7	18 26.9	15 22.4	67 39.6
Third Party	73 71.6	16 15.7	13 12.7	102 60.4
Total	107 63.3	34 20.1	28 16.6	169

Table AIII-4--Distribution of Decisions by Reason for Civil Suit with Media a Third Party

Reason for Grand Jury Subpoena	Decision 1	2	3	4	5	Total
Government Proceeding	8 80.0	0 0.0	0 0.0	0 0.0	2 20.0	10 8.9
Federal Cause of Action	16 57.1	6 21.4	4 14.3	1 3.6	1 3.6	28 25.0
State Cause of Action	44 63.8	12 17.4	9 13.0	4 5.8	0 0.0	69 61.6
Other	5 100.0	0 0.0	0 0.0	0 0.0	0 0.0	5 4.5
Total	73 65.2	18 16.1	13 11.6	5 4.5	3 2.7	112

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-5--Distribution of Decisions by Type of Evidence Sought in Subpoena

Type of Evidence	Decision 1	2	3	4	5	Total
Source	48	17	7	3	1	76
	63.2	22.4	9.2	3.9	1.3	23.0
Information	102	46	21	7	3	179
	57.0	25.7	11.7	3.9	1.7	54.1
Source and Information	23	11	12	6	1	53
	43.4	20.8	22.6	11.3	1.9	16.0
Not Specified	19	1	2	0	1	23
	82.6	4.3	8.7	0.0	4.3	6.9
Total	192	75	42	16	6	331
	58.0	22.7	12.7	4.8	1.8	

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-6--Distribution of Decisions by Type of Material Subpoenaed

Type of Material Subpoenaed	Decision: Favorable to Media	Unfavorable to Media	Split	Total
None	91	40	15	146
	62.3	27.4	10.3	37.8
Written Notes	72	17	18	107
	67.3	15.9	16.8	27.7
Photographs	13	6	4	23
	56.5	26.1	17.4	6.0
Audiotape	17	7	11	35
	48.6	20.0	31.4	9.1
Videotape	21	10	12	43
	48.8	23.3	27.9	11.1
Transcript	8	0	5	13
	61.5	0.0	38.5	3.4
Finished Work Product	1	1	1	3
	33.3	33.3	33.3	0.8
Other	8	6	2	16
	50.0	37.5	12.5	4.1
Total	231	87	68	386
	59.8	22.5	17.6	

Table AIII-7--Distribution of Subpoenas by Employment Type

Non-Management

Employment Type	Number of Subpoenas	Percent of Subpoenas
Print journalist	191	74.6
Photojournalist	10	3.9
Radio broadcaster	5	2.0
Television broadcaster	25	9.8
Television cameraman	1	0.4
Records custodian	9	3.5
Author	5	2.0
Freelance journalist	5	2.0
Other	5	2.0
Total	256	

Management

Employment Type	Number of Subpoenas	Percent of Subpoenas
Owner	4	7.8
Publisher	12	23.5
Editor	19	37.3
TV news director	3	5.9
TV program producer	3	5.9
Other	10	19.6
Total	51	

Table AIII-8--Distribution of Subpoenas by Type of Media Organization

Media Organization Type	Number of Subpoenas	Percent of Subpoenas
Newspaper	218	63.6
Magazine	32	9.3
Radio	9	2.6
Television	63	18.4
Wire service	4	1.2
Other	17	5.0
Total	343	

Table AIII-9a--Distribution of Decisions in Criminal Cases by Type of Non-Management Employment

Type of Non-Management Employment	Decision 1	2	3	4	5	Total
Print Journalist	61 65.6	22 23.7	7 7.5	3 3.2	0 0.0	93 75.6
Photo Journalist	2 50.0	2 50.0	0 0.0	0 0.0	0 0.0	4 3.3
Radio Broadcaster	2 100.0	0 0.0	0 0.0	0 0.0	0 0.0	2 1.6
Television Journalist	8 57.1	3 21.4	2 14.3	0 0.0	1 7.1	14 11.4
Records Custodian	1 20.0	2 40.0	1 20.0	1 20.0	0 0.0	5 4.1
Author	2 50.0	2 50.0	0 0.0	0 0.0	0 0.0	4 3.3
Freelance Journalist	0 0.0	1 100.0	0 0.0	0 0.0	0 0.0	1 0.8
Total	76 61.8	32 26.0	10 8.1	4 3.3	1 0.8	123

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-9b--Distribution of Decisions in Civil Cases by Type of Non-Management Employment

Type of Non-Management Employment	Decision 1	2	3	4	5	Total
Print Journalist	66 67.3	17 17.3	13 13.3	2 2.0	0 0.0	98 76.6
Photo Journalist	3 50.0	1 16.7	0 0.0	2 33.3	0 0.0	6 4.7
Radio Broadcaster	2 66.7	1 33.3	0 0.0	0 0.0	0 0.0	3 2.3
Television Journalist	6 50.0	0 0.0	5 41.7	0 0.0	1 8.3	12 9.4
Records Custodian	1 25.0	1 25.0	1 25.0	0 0.0	1 25.0	4 3.1
Author	0 0.0	0 0.0	0 0.0	1 100.0	0 0.0	1 0.8
Freelance Journalist	1 25.0	3 75.0	0 0.0	0 0.0	0 0.0	4 3.1
Total	79 61.7	23 18.0	19 14.8	5 3.9	2 1.6	128

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-10a--Distribution of Decisions in Criminal Cases by Type of Management Employment

Type of Management Employment	Decision 1	2	3	4	5	Total
Owner	1	1	0	0	0	2
	50.0	50.0	0.0	0.0	0.0	11.8
Publisher	1	0	0	0	0	1
	100.0	0.0	0.0	0.0	0.0	5.9
Newspaper or	3	4	2	0	0	9
Mag. Editor	33.3	44.4	22.2	0.0	0.0	52.9
TV Director	0	0	1	0	0	1
or Producer	0.0	0.0	100.0	0.0	0.0	5.9
Other	1	3	0	0	0	4
	25.0	75.0	0.0	0.0	0.0	23.5
Total	6	8	3	0	0	17
	35.3	47.1	17.6	0.0	0.0	

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-10b--Distribution of Decisions in Civil Cases by Type of Management Employment

Type of Management Employment	Decision					
	1	2	3	4	5	Total
Owner	1	1	0	0	0	2
	50.0	50.0	0.0	0.0	0.0	5.9
Publisher	7	3	1	0	0	11
	63.6	27.3	9.1	0.0	0.0	32.4
Newspaper or Mag. Editor	4	3	1	0	2	10
	40.0	30.0	10.0	0.0	20.0	29.4
TV Director or Producer	1	1	2	1	0	5
	20.0	20.0	40.0	20.0	0.0	14.7
Other	3	2	1	0	0	6
	50.0	33.3	16.7	0.0	0.0	17.6
Total	16	10	5	1	2	34
	47.1	29.4	14.7	2.9	5.9	

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-11a--Distribution of Decisions in Criminal Cases by Type of Media Organization

Type of Media Organization	Decision 1	2	3	4	5	Total
Newspaper	60	25	6	4	0	95
	63.2	26.3	6.3	4.2	0.0	62.5
Magazine or Pub. Co.	7	3	1	0	0	11
	63.6	27.3	9.1	0.0	0.0	7.2
Radio Station or Network	2	2	0	0	0	4
	50.0	50.0	0.0	0.0	0.0	2.6
TV Station or Network	14	6	7	2	1	30
	46.7	20.0	23.3	6.7	3.3	19.7
News or Wire Service	2	1	0	0	0	3
	66.7	33.3	0.0	0.0	0.0	2.0
Other	3	5	1	0	0	9
	33.3	55.5	11.1	0.0	0.0	5.9
Total	88	42	15	6	1	152
	57.9	27.6	9.9	3.9	0.7	

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-11b--Distribution of Decisions in Civil Cases by Type of Media Organization

Type of Media Organization	Decision					
	1	2	3	4	5	Total
Newspaper	76	21	17	6	3	123
	61.8	17.1	13.8	4.9	2.4	64.4
Magazine or Pub. Co.	14	3	3	1	0	21
	66.7	14.3	14.3	4.8	0.0	11.0
Radio Station or Network	3	1	1	0	0	5
	60.0	20.0	20.0	0.0	0.0	2.6
TV Station or Network	13	7	10	1	2	33
	39.4	21.2	30.3	3.0	6.1	17.3
News or Wire Service	0	1	0	0	0	1
	0.0	100.0	0.0	0.0	0.0	0.5
Other	3	2	1	2	0	8
	37.5	25.0	12.5	25.0	0.0	4.2
Total	109	35	32	10	5	191
	57.1	18.3	16.8	5.2	2.6	

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-12a--Distribution of Civil Case Types by Subject Matter that Led to Subpoena with Media a First Party

Subject Matter	Type of Civil Case: Libel	Privacy	Other	Total
Not Specified	8 100.0	0 0.0	0 0.0	8 10.3
Government	18 90.0	1 5.0	1 5.0	20 25.6
Politics	4 100.0	0 0.0	0 0.0	4 5.1
Business	21 80.8	1 3.8	4 15.4	26 33.3
Crime	12 80.0	2 13.3	1 6.7	15 19.2
Other	1 20.0	1 20.0	3 60.0	5 6.4
Total	64 82.1	5 6.4	9 11.5	78

Table AIII-12b--Distribution of Civil Case Types by Subject Matter that Led to Subpoena with Media a Third Party

Subject Matter	Type of Civil Case: Not Specified	Gov't Proc.	Federal Cause	State Cause	Total
Not Specified	2 10.0	1 5.0	0 0.0	17 85.0	20 17.9
Government	0 0.0	5 23.8	10 47.6	6 28.6	21 18.8
Politics	0 0.0	0 0.0	2 66.7	1 33.3	3 2.7
Business	3 10.7	2 7.1	7 25.0	16 57.1	28 25.0
Accident	0 0.0	0 0.0	0 0.0	15 100.0	15 13.4
Crime	0 0.0	1 16.7	2 33.3	3 50.0	6 5.4
Social Injustice	0 0.0	0 0.0	3 100.0	0 0.0	3 2.7
Environment	0 0.0	0 0.0	1 33.3	2 66.7	3 2.7
Other	0 0.0	1 7.7	3 23.1	9 69.2	13 11.6
Total	5 4.5	10 8.9	28 25.0	69 61.6	112

Table AIII-13a--Distribution of Decisions by Type of Case With No Material Subpoenaed

Case Type	Decision 1	2	3	4	5	Total
Criminal	39	21	2	2	1	65
	60.0	32.3	3.1	3.1	1.5	42.8
Civil	52	19	12	2	2	87
	59.8	21.8	13.8	2.3	2.3	57.2
Total	91	40	14	4	3	152
	59.9	26.3	9.2	2.6	2.0	

Table AIII-13b--Distribution of Decisions by Type of Case With Written Documentation Subpoenaed

Case Type	Decision 1	2	3	4	5	Total
Criminal	31	8	6	3	0	48
	64.6	16.7	12.5	6.3	0.0	41.7
Civil	41	9	12	5	0	67
	61.2	13.4	17.9	7.5	0.0	58.3
Total	72	17	18	8	0	115
	62.6	14.8	15.7	7.0	0.0	

Table AIII-13c--Distribution of Decisions by Type of Case With Photographs Subpoenaed

Case Type	Decision 1	2	3	4	5	Total
Criminal	5	3	0	0	0	8
	62.5	37.5	0.0	0.0	0.0	30.8
Civil	8	3	4	2	1	18
	44.4	16.7	22.2	11.1	5.6	69.2
Total	13	6	4	2	1	26
	50.0	23.1	15.4	7.7	3.8	

Table AIII-13d--Distribution of Decisions by Type of Case With Audiotape Subpoenaed

Case Type	Decision 1	2	3	4	5	Total
Criminal	9	6	6	3	0	24
	37.5	25.0	25.0	12.5	0.0	61.5
Civil	8	1	5	0	1	15
	53.3	6.7	33.3	0.0	6.7	38.5
Total	17	7	11	3	1	39
	43.6	17.9	28.2	7.7	2.6	

Table AIII-13e--Distribution of Decisions by Type of Case With Videotape Subpoenaed

Case Type	Decision 1	2	3	4	5	Total
Criminal	11	4	6	2	0	23
	47.8	17.4	26.1	8.7	0.0	47.9
Civil	10	6	6	1	2	25
	40.0	24.0	24.0	4.0	8.0	52.1
Total	21	10	12	3	2	48
	43.8	20.8	25.0	6.3	4.2	

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-14--Recognition of Newsman's Privilege by the Courts by Year

Year	Privilege Recognized: Not Specified	Yes	No	Total
1969	0 0.0	0 0.0	0 0.0	0 0.0
1970	1 100.0	0 0.0	0 0.0	1 0.3
1971	0 0.0	1 100.0	0 0.0	1 0.3
1972	3 42.9	3 42.9	1 14.3	7 2.1
1973	2 22.2	6 66.7	1 11.1	9 2.7
1974	1 25.0	3 75.0	0 0.0	4 1.2
1975	1 14.3	5 71.4	1 14.3	7 2.1
1976	2 16.7	9 75.0	1 8.3	12 3.6
1977	1 16.7	4 66.7	1 16.7	6 1.8
1978	1 4.8	17 81.0	3 14.3	21 6.3
1979	7 25.9	20 74.1	0 0.0	27 8.2
1980	7 30.4	15 65.2	1 4.3	23 6.9
1981	1 5.0	17 85.0	2 10.0	20 6.0
1982	5 11.6	34 79.1	4 9.3	43 13.0

Table AIII-14 (cont'd.).

Year	Not Specified	Yes	No	Total
1983	2	25	0	27
	7.4	92.6	0.0	8.2
1984	3	28	0	31
	9.7	90.3	0.0	9.4
1985	6	31	1	38
	15.8	81.6	2.6	11.5
1986	2	22	0	24
	8.3	91.7	0.0	7.3
1987	0	21	1	22
	0.0	95.5	4.5	6.7
1988	1	7	0	8
	12.5	87.5	0.0	2.4
Total	46	268	17	331
	13.9	81.0	5.1	

Table AIII-15--Distribution of Decisions by Recognition of Newsman's Privilege

Privilege Recognition	Decision: Favorable to Media	Unfavorable to Media	Split	Total
Not Specified	22 56.4	12 30.8	5 12.8	39 12.6
Yes	170 67.2	47 18.6	36 14.2	253 81.9
No	0 0.0	16 94.1	1 5.9	17 5.5
Total	192 62.1	75 24.3	42 13.6	309

Table AIII-16--Bases Claimed for Newsman's Privilege by Year

Year	Basis for Newsman's Privilege Claim								
	0	1	2	3	4	5	6	7	Total
1969	0	0	0	0	0	0	0	0	0
	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1970	0	1	0	1	0	1	0	0	3
	0.0	33.3	0.0	33.3	0.0	33.3	0.0	0.0	0.6
1971	0	1	0	0	0	0	0	0	1
	0.0	100.0	0.0	0.0	0.0	0.0	0.0	0.0	0.2
1972	1	6	1	2	0	4	0	0	14
	7.1	42.9	7.1	14.3	0.0	28.6	0.0	0.0	3.0
1973	1	7	0	1	0	3	0	0	12
	8.3	58.3	0.0	8.3	0.0	25.0	0.0	0.0	2.6
1974	0	4	0	0	0	1	0	0	5
	0.0	80.0	0.0	0.0	0.0	20.0	0.0	0.0	1.1
1975	2	4	0	2	0	4	0	0	12
	16.7	33.3	0.0	16.7	0.0	33.3	0.0	0.0	2.6
1976	3	8	0	4	0	5	0	0	20
	15.0	40.0	0.0	20.0	0.0	25.0	0.0	0.0	4.3
1977	2	4	0	1	0	2	0	1	10
	20.0	40.0	0.0	10.0	0.0	20.0	0.0	10.0	2.2
1978	6	11	0	5	0	5	1	2	30
	20.0	36.7	0.0	16.7	0.0	16.7	3.3	6.7	6.5
1979	9	13	0	4	0	12	0	0	38
	23.7	34.2	0.0	10.5	0.0	31.6	0.0	0.0	8.2
1980	9	10	0	3	0	3	0	2	27
	33.3	37.0	0.0	11.1	0.0	11.1	0.0	7.4	5.8
1981	6	12	0	3	0	5	1	0	27
	22.2	44.4	0.0	11.1	0.0	18.5	3.7	0.0	5.8
1982	13	25	0	8	0	9	0	1	56
	23.2	44.6	0.0	14.3	0.0	16.1	0.0	1.8	12.1
1983	9	14	1	1	2	8	0	1	36
	25.0	38.9	2.8	2.8	5.6	22.2	0.0	2.8	7.8

Table AIII-16 (cont'd.).

Year	0	1	2	3	4	5	6	7	Total
1984	11	13	1	6	2	11	1	0	45
	24.4	28.9	2.2	13.3	4.4	24.4	2.2	0.0	9.7
1985	18	15	0	5	2	7	1	0	48
	37.5	31.3	0.0	10.4	4.2	14.6	2.1	0.0	10.4
1986	7	14	0	6	0	9	0	0	36
	19.4	38.9	0.0	16.7	0.0	25.0	0.0	0.0	7.8
1987	10	10	0	2	0	5	1	1	29
	34.5	34.5	0.0	6.9	0.0	17.2	3.4	3.4	6.3
1988	3	3	0	3	0	4	0	0	13
	23.1	23.1	0.0	23.1	0.0	30.8	0.0	0.0	2.8
Total	110	175	3	57	6	98	5	8	462
	23.8	37.9	0.6	12.3	1.3	21.2	1.1	1.7	

0=not specified
1=First Amendment
2=Fifth Amendment
3=state constitutional
4=state common law
5=statutory
6=federal common law
7=other

Table AIII-17--Distribution of Decisions by Basis for Newsman's Privilege Claim

Basis for Claim	Decision 1	2	3	4	5	Total
Not Specified	78 70.9	15 13.6	11 10.0	3 2.7	3 2.7	110 23.8
First Amendment	86 49.1	50 28.6	26 14.9	10 5.7	3 1.7	175 37.9
Fifth Amendment	1 33.3	1 33.3	1 33.3	0 0.0	0 0.0	3 0.6
State Constitution	27 47.4	20 35.1	5 8.8	5 8.8	0 0.0	57 12.3
State Common Law	4 66.7	0 0.0	0 0.0	2 33.3	0 0.0	6 1.3
Statutory	51 52.0	29 29.6	14 14.3	4 4.1	0 0.0	98 21.2
Federal Common Law	3 60.0	1 20.0	1 20.0	0 0.0	0 0.0	5 1.1
Other	5 62.5	2 25.0	0 0.0	1 12.5	0 0.0	8 1.7
Total	255 55.2	118 25.5	58 12.6	25 5.4	6 1.3	462

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-18--Bases for Court Decisions by Year

Year	Basis for Court's Decision 0	1	2	3	4	5	6	7	Total
1969	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0
1970	0 100.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	1 0.2
1971	0 0.0	1 100.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	1 0.2
1972	3 42.9	3 42.9	0 0.0	0 0.0	0 0.0	1 14.3	0 0.0	0 0.0	7 1.5
1973	2 18.2	3 27.3	0 0.0	0 0.0	1 9.1	5 45.5	0 0.0	0 0.0	11 2.3
1974	1 25.0	3 75.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	4 0.8
1975	1 11.1	5 55.5	0 0.0	0 0.0	0 0.0	2 22.2	1 11.1	0 0.0	9 1.9
1976	2 13.3	7 46.7	0 0.0	1 6.7	1 6.7	4 26.7	0 0.0	0 0.0	15 3.2
1977	1 12.5	2 25.0	0 0.0	1 12.5	0 0.0	2 25.0	2 25.0	0 0.0	8 1.7
1978	0 0.0	14 41.2	0 0.0	5 14.7	3 8.8	7 20.6	5 14.7	0 0.0	34 7.2
1979	7 17.5	12 30.0	0 0.0	4 10.0	3 7.5	9 22.5	5 12.5	0 0.0	40 8.4
1980	6 20.0	11 36.7	0 0.0	3 10.0	3 10.0	4 13.3	2 6.7	1 3.3	30 6.3
1981	1 3.0	14 42.4	0 0.0	3 9.1	1 3.0	6 18.2	8 24.2	0 0.0	33 7.0
1982	5 8.3	23 38.3	0 0.0	5 8.3	10 16.7	10 16.7	6 10.0	1 16.7	60 12.7
1983	1 2.3	17 39.5	1 2.3	5 11.6	7 11.6	8 18.6	4 9.3	0 0.0	43 9.1

Table AIII-18 (cont'd.).

Year	0	1	2	3	4	5	6	7	Total
1984	4	11	1	4	5	13	3	1	42
	9.5	26.2	2.4	9.5	11.9	31.0	7.1	2.4	8.9
1985	6	22	0	4	3	10	7	1	53
	14.0	41.5	0.0	7.6	5.7	18.9	13.2	1.9	11.2
1986	2	14	0	4	5	8	2	0	35
	5.7	40.0	0.0	11.4	14.3	22.9	5.7	0.0	7.4
1987	0	13	0	3	9	6	4	0	35
	0.0	37.1	0.0	8.6	25.7	17.1	11.4	0.0	7.4
1988	1	5	0	1	1	5	0	0	13
	7.7	38.5	0.0	7.7	7.7	38.5	0.0	0.0	2.7
Total	44	180	2	43	52	100	49	4	474
	9.3	38.0	0.4	9.1	11.0	21.1	10.3	0.8	

0=not specified
1=First Amendment
2=Fifth Amendment
3=state constitutional
4=state common law
5=statutory
6=federal common law
7=other

Table AIII-19a--Distribution of Decisions in Criminal Cases by Year

	Decision					
Year	1	2	3	4	5	Total
1969	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0
1970	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0
1971	0 0.0	1 100.0	0 0.0	0 0.0	0 0.0	1 0.7
1972	0 0.0	4 80.0	1 20.0	0 0.0	0 0.0	5 3.4
1973	1 25.0	1 25.0	2 50.0	0 0.0	0 0.0	4 2.7
1974	1 33.3	1 33.3	0 0.0	0 0.0	1 33.3	3 2.0
1975	3 75.0	1 25.0	0 0.0	0 0.0	0 0.0	4 2.7
1976	3 50.0	2 33.3	1 16.7	0 0.0	0 0.0	6 4.1
1977	0 0.0	2 100.0	0 0.0	0 0.0	0 0.0	2 1.4
1978	2 22.2	4 44.4	2 22.2	1 11.1	0 0.0	9 6.1
1979	11 78.6	2 14.3	1 7.1	0 0.0	0 0.0	14 9.5
1980	4 44.4	3 33.3	2 22.2	0 0.0	0 0.0	9 6.1
1981	4 50.0	2 25.0	0 0.0	2 25.0	0 0.0	8 5.4
1982	8 53.3	5 33.3	2 13.3	0 0.0	0 0.0	15 10.2
1983	7 77.8	2 22.2	0 0.0	0 0.0	0 0.0	9 6.1

Table AIII-19a (cont'd.).

Year	1	2	3	4	5	Total
1984	8	3	2	1	0	14
	57.1	21.4	14.3	7.1	0.0	9.5
1985	17	2	0	1	0	20
	85.0	10.0	0.0	5.0	0.0	13.6
1986	5	2	0	0	0	7
	71.4	28.6	0.0	0.0	0.0	4.8
1987	7	2	0	0	0	9
	77.8	22.2	0.0	0.0	0.0	6.1
1988	4	2	1	1	0	8
	50.0	25.0	12.5	12.5	0.0	5.4
Total	85	41	14	6	1	147
	57.8	27.9	9.5	4.1	0.7	

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-19b--Distribution of Decisions in Civil Cases by Year

	Decision					
Year	1	2	3	4	5	Total
1969	0	0	0	0	0	0
	0.0	0.0	0.0	0.0	0.0	0.0
1970	0	1	0	0	0	1
	0.0	100.0	0.0	0.0	0.0	0.5
1971	0	0	0	0	0	0
	0.0	0.0	0.0	0.0	0.0	0.0
1972	2	0	0	0	0	2
	100.0	0.0	0.0	0.0	0.0	1.1
1973	3	1	0	0	1	5
	60.0	20.0	0.0	0.0	20.0	2.7
1974	0	1	0	0	0	1
	0.0	100.0	0.0	0.0	0.0	0.5
1975	2	0	0	0	1	3
	66.7	0.0	0.0	0.0	33.3	1.6
1976	5	0	1	0	0	6
	83.3	0.0	16.7	0.0	0.0	3.3
1977	1	2	0	1	0	4
	25.0	50.0	0.0	25.0	0.0	2.2
1978	10	1	1	0	0	12
	83.3	8.3	8.3	0.0	0.0	6.5
1979	8	3	2	0	0	13
	61.5	23.1	15.4	0.0	0.0	7.1
1980	5	4	2	3	0	14
	35.7	28.6	14.3	21.4	0.0	7.6
1981	8	2	2	0	0	12
	66.7	16.7	16.7	0.0	0.0	6.5
1982	17	7	1	2	1	28
	60.7	25.0	3.6	7.1	3.6	15.2
1983	12	4	1	0	1	18
	66.7	22.2	5.6	0.0	5.6	9.8

Table AIII-19b (cont'd.).

Year	1	2	3	4	5	Total
1984	11	2	3	1	0	17
	64.7	11.8	17.6	5.9	0.0	9.2
1985	5	3	9	1	0	18
	27.8	16.7	50.0	5.6	0.0	9.8
1986	9	2	4	1	1	17
	52.9	11.8	23.5	5.9	5.9	9.2
1987	9	1	2	1	0	13
	69.2	7.7	15.4	7.7	0.0	7.1
1988	0	0	0	0	0	0
	0.0	0.0	0.0	0.0	0.0	0.0
Total	107	34	28	10	5	184
	58.2	18.5	15.2	5.4	2.7	

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-19c--Distribution of Decisions by Year

	Decision					
Year	1	2	3	4	5	Total
1969	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0	0 0.0
1970	0 0.0	1 100.0	0 0.0	0 0.0	0 0.0	1 0.3
1971	0 0.0	1 100.0	0 0.0	0 0.0	0 0.0	1 0.3
1972	2 28.6	4 57.1	1 14.3	0 0.0	0 0.0	7 2.1
1973	4 44.4	2 22.2	2 22.2	0 0.0	1 11.1	9 2.7
1974	1 25.0	2 50.0	0 0.0	0 0.0	1 25.0	4 1.2
1975	5 71.4	1 14.3	0 0.0	0 0.0	1 14.3	7 2.1
1976	8 66.7	2 16.7	2 16.7	0 0.0	0 0.0	12 3.6
1977	1 16.7	4 66.7	0 0.0	1 16.7	0 0.0	6 1.8
1978	12 57.1	5 23.8	3 14.3	1 4.8	0 0.0	21 6.3
1979	19 70.4	5 18.5	3 11.1	0 0.0	0 0.0	27 8.2
1980	9 39.1	7 30.4	4 17.4	3 13.0	0 0.0	23 6.9
1981	12 60.0	4 20.0	2 10.0	2 10.0	0 0.0	20 6.0
1982	25 58.1	12 27.9	3 7.0	2 4.7	1 2.3	43 13.0
1983	19 70.4	6 22.2	1 3.7	0 0.0	1 3.7	27 8.2

Table AIII-19c (cont'd.).

Year	1	2	3	4	5	Total
1984	19	5	5	2	0	31
	61.3	16.1	16.1	6.5	0.0	9.4
1985	22	5	9	2	0	38
	57.9	13.2	23.7	5.3	0.0	11.5
1986	14	4	4	1	1	24
	58.3	16.7	16.7	4.2	4.2	7.3
1987	16	3	2	1	0	22
	72.7	13.6	9.1	4.5	0.0	6.6
1988	4	2	1	1	0	8
	50.0	25.0	12.5	12.5	0.0	2.4
Total	192	75	42	16	6	331
	58.0	22.7	12.7	4.8	1.8	

1=favorable to media
2=unfavorable to media
3=split decision
4=remanded
5=other

Table AIII-20--Distribution of Decisions by Basis for Decision

Basis for Decision	Decision: Favorable to Media	Unfavorable to Media	Split	Total
Not Specified	22 59.5	10 27.0	5 13.5	37 8.4
First Amendment	108 63.2	38 22.2	25 14.6	171 38.8
Fifth Amendment	1 50.0	1 50.0	0 0.0	2 0.5
State Constitution	29 72.5	6 15.0	5 12.5	40 9.1
State Common Law	42 89.4	3 6.4	2 4.3	47 10.7
Statutory	52 53.6	27 27.8	18 18.6	97 22.0
Federal Common Law	27 57.4	13 27.7	7 14.9	47 10.7
Total	281 63.7	98 22.2	62 14.1	441

APPENDIX IV

LIST OF CASES

Appendix IV lists all cases coded for the study and the number of the case used in the data list.

U. S. Supreme Court

Circuit Courts of Appeal

D. C. Circuit

First Circuit

United States v. Doe, 460 F.2d 328 (1st Cir. 1972), *cert. denied*, 411 U.S. 909 (1973). 116

Second Circuit

von Bulow by Auersperg v. von Bulow, 811 F.2d 136 (2nd Cir. 1987). 070

United States ex rel. Vuitton v. Karen Bags, Inc., 600 F.Supp. 667 (S.D.N.Y. 1985). 298

United States v. Winans, 11 Med. L. Rptr. (BNA) 1279 (S.D.N.Y. Jan. 2, 1985). 212

In re Grand Jury Subpoena, 583 F.Supp. 991 (E.D.N.Y. 1984). 074

Millicom v. Giallanza, 10 Med. L. Rptr. (BNA) 1591 (S.D.N.Y. Apr. 19, 1984). 209

Sharon v. Time, Inc., 599 F.Supp. 538 (S.D.N.Y. 1984). 320

United States v. Burke, 7 Med. L. Rptr. 2019 (E.D.N.Y. Sept. 22, 1981), *aff'd*, 700 F.2d 70 (2d. Cir), *cert. denied*, 104 S.Ct. 72 (1983). 129

Westmoreland v. CBS, 9 Med. L. Rptr. (BNA) 1521 (S.D.N.Y. Apr. 21, 1983). 188

In re Ziegler, 9 Med. L. Rptr. (BNA) 1013 (W.D.N.Y. Nov. 2, 1982). 213

McGraw Hill v. Arizona, 680 F.2d 5 (2nd Cir.), *cert. denied*, 459 U.S. 909 (1982). 113

SEC v. Hirsch, 8 Med. L. Rptr. (BNA) 2421 (S.D.N.Y. Oct. 25, 1982). 153

Solargen Electric Motor Car Corp. v. American Motors Corp., 506 F.Supp. 546 (N.D.N.Y. 1981). 300

In re Consumers Union, 495 F.Supp. 582 (S.D.N.Y. 1980). 296

Montezuma Realty Corp. v. Occidental Petroleum Corp., 494 F. Supp. 780 (S.D.N.Y. 1980). 124

Tenth Circuit

Eleventh Circuit

State Courts

Delaware

Florida

Hawaii

No cases.

Idaho

Illinois

Indiana

Minnesota

Aerial Burials, Inc. v. Minneapolis Star and Tribune Co., 8 Med. L. Rptr. (BNA) 1653 (Minn. Dist. Ct. Apr. 15, 1982). 164

Mississippi

No cases.

Missouri

CBS, Inc. v. Campbell, 645 S.W.2d 30 (Mo. Ct. App. 1982). 061

Montana

Sible v. Lee Enters., 13 Med. L. Rptr. (BNA) 1738 (Mont. Sup. Ct. Nov. 25, 1986). 260

In re Investigative File, 4 Med. L. Rptr. (BNA) 1865 (Mont. Dist. Ct. Oct. 2, 1978). 332

Nebraska

No cases.

Nevada

Newburn v. Howard Hughes Medical Institute, 95 Nev. 368, 594 P.2d 1146 (1979). 050

New Hampshire

State v. Siel, 122 N.H. 254, 444 A.2d 499 (1982). 137

Downing v. Monitor Publishing Co., 120 N.H. 383, 415 A.2d 683 (1980). 047

Opinion of the Justices, 117 N.H. 386, 373 A.2d 644 (1977). 017

New Jersey

In re Schumann, 15 Med. L. Rptr. (BNA) 1113 (N.J. Super. Ct. Feb. 9, 1988). 280

In re Avila, 206 N.J. Super. 61, 501 A.2d 1018 (Super. Ct. App. Div. 1985). 310

South Carolina

No cases.

South Dakota

No cases.

Tennessee

Tennessee v. Hendricks, 14 Med. L. Rptr. (BNA) 2369 (Tenn. Cir. Ct. Jan. 21, 1988). 267

Tennessee ex rel. Gerbitz v. Curriden, 14 Med. L. Rptr. (BNA) 1797 (Tenn. Sup. Ct. Oct. 5, 1987). 278

Benson v. McConkey, 11 Med. L. Rptr. (BNA) 1711 (Tenn. Ct. App. Mar. 11, 1985). 231

Austin v. Memphis Publ. Co., 655 S.W.2d 146 (Tenn. 1983). 090

Texas

Channel Two Television v. Dickerson, 13 Med. L. Rptr. (BNA) 2133 (Tex. Ct. App. Feb. 12, 1987). 262

Suede Originals v. Aetna Casualty, 8 Med. L. Rptr. (BNA) 2565 (Tex. Dist. Ct. Nov. 19, 1982). 170

In re Grand Jury Subpoena, 5 Med. L. Rptr. (BNA) 1153 (Tex. Dist. Ct. May 24, 1979). 186

Dallas Oil and Gas, Inc. v. Mouer, 533 S.W.2d 70 (Tex. Civ. App. 1976). 096

Ex parte Grothe, 687 S.W.2d 736 (Tex. Crim. App. 1984), *cert. denied*, 106 S.C. 308 (1985). 088

Utah

No cases.

Vermont

Vermont v. Blais, 6 Med. L. Rptr. (BNA) 1537 (Vt. Dist. Ct. July 7, 1980). 146

APPENDIX V

STATE SHIELD LAWS

Appendix V provides the statute containing the newsman's shield law for each state.

Alabama--Ala. Code §12-21-142 (1975).

Alaska--Alaska Stat. §§9.25.150-.220 (1962).

Arizona--Ariz. Rev. Stat. Ann. §12-2237 (1982); Ariz. Rev. Stat. Ann. §12-2214 (1982 & Supp. 1987).

Arkansas--Ark. Stat. Ann. §16-85-510 (1987).

California--Cal. Evid. Code §1070 (1966 & Supp. 1988); Cal. Const. Art. 1, §2.

Colorado--none.

Connecticut--none.

Delaware--Del. Code Ann. tit. 10, §§4320-4326 (1974).

Florida--none.

Georgia--none.

Hawaii--none.

Idaho--none.

Illinois--Ill. Ann. Stat. ch. 110, para. 8-901--8-909 (Smith-Hurd 1983 & Supp. 1987).

Indiana--Ind. Code Ann. §34-3-5-1 (Burns 1986).

Iowa--none.

Kansas--none.

Kentucky--Ky. Rev. Stat. Ann. §421.100 (Michie/Bobbs-Merrill 1972).

Louisiana--La. Rev. Stat. Ann. §§45:1451-1454 (West 1982); La. Rev. Stat. Ann. §§45:1455-1458 (West Supp. 1988).

Maine--none.

Maryland--Md. Cts. & Jud. Proc. Code Ann. 112 (1984 & Supp. 1987).

Massachusetts--none.

Michigan--Mich. Comp. Laws Ann. §767.5a (West 1982 & Supp. 1987).

Minnesota--Minn. Stat. Ann. §§595.021--.025 (West Supp. 1988).

Mississippi--none.

Missouri--none.

Montana--Mont. Code Ann. §§26-1-901--903 (1987).

Nebraska--Neb. Rev. Stat. §§20-144--147 (1983).

Nevada--Nev. Rev. Stat. §49.275 (1985).

New Hampshire--none.

New Jersey--N.J. Stat. Ann. §2A:84A-21, -21a, -21.1 to -21.9 (West 1976 & Supp. 1987).

New Mexico--N.M. Stat. Ann. §38-6-7 (1978 & Supp. 1986) replaced by N.M. R. Evid. 11-514.

New York--N.Y. Civ. Rights Law §79-h (McKinney 1976 & Supp. 1988).

North Carolina--none.

North Dakota--N.D. Cent. Code §31-01-06.2 (1976).

Ohio--Ohio Rev. Code Ann. §§2739.04 & 2739.12 (Anderson 1981).

Oklahoma--Okla. Stat. Ann. tit. 12, §2506 (1980).

Oregon--Or. Rev. Stat. §§44.510-.540 (1984).

Pennsylvania--42 Pa. Cons. Stat. Ann. §5942 (Purdon 1982).

Rhode Island--R.I. Gen. Laws §§9-19.1-1 to -3 (1985).

South Carolina--none.

South Dakota--none.

Tennessee--Tenn. Code Ann. §24-1-208 (1980).

Texas--none.

Utah--none.

Vermont--none.

Virginia--none.

Washington--none.

West Virginia--none.

Wisconsin--none.

Wyoming--none.

APPENDIX VI

DATA LIST

Appendix VI lists the personal computer file formatted for use with the program Statistical Package for the Social Sciences (SPSS).

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Data List/case 1-3 juris 4 fedcirc 5-6 state 7-8 year 9-10 casetype 11 subreas 12
gireas 13 defreas 14 medstat 15 medciv1 16 medciv2 17 nonciv1 18 nonciv2 19
evidtype 20 submat1 21 submat2 22 submat3 23 submat4 24 partype 25
emptype1 26 emptype2 27 nmgtype1 28-29 nmgtype2 30-31 nmgtype3 32-33
mgtype1 34 mgtype2 35 mgtype3 36 medorg1 37 medorg2 38 matsub1 39 clbase1
40 clbase2 41 clbase3 42 privrec 43 decbas1 44 decbas2 45 decbas3 46 decision
47.
Variable Labels case "Case Number"
/juris "Jurisdiction of Court"
/fedcirc "Federal Circuit"
/state "State"
/year "Year"
/casetype "Type of case in which issue of newsmen or media privilege arose"
/subreas "Reason for subpoena in criminal proceeding"
/gireas "Reason for subpoena in grand jury proceeding"
/defreas "Reason for subpoena by defense"
/medstat "Status of media in civil action"
/medciv1 "Type of action media a party"
/medciv2 "Type of action media a party"
/nonciv1 "Type of action media not a party"
/nonciv2 "Type of action media not a party"
/evidtype "Type of evidence sought from subpoena"
/submat1 "Type of material subpoenaed"
/submat2 "Type of material subpoenaed"
/submat3 "Type of material subpoenaed"
/submat4 "Type of material subpoenaed"
/partype "Type of party subpoenaed"
/emptype1 "Type of employment of subpoenaed individual"
/emptype2 "Type of employment of subpoenaed individual"
/nmgtype1 "Type of non-management employment"
/nmgtype2 "Type of non-management employment"
/nmgtype3 "Type of non-management employment"
/mgtype1 "Type of management employment"
/mgtype2 "Type of management employment"
/mgtype3 "Type of management employment"
/medorg1 "Type of media organization"
/medorg2 "Type of media organization"
/matsub1 "Subject material which resulted in subpoena"
/clbase1 "Basis for reporter privilege claim"
/clbase2 "Basis for reporter privilege claim"
/clbase3 "Basis for reporter privilege claim"
/recog "Recognition of privilege"
/decbas1 "Basis for decision"
/decbas2 "Basis for decision"
/decbas3 "Basis for decision"
/decision "Decision".
Value labels juris 1'U.S. Supreme Court' 2'U.S.Circuit Court of Appeals'
3'U.S. District Court' 4'State Supreme Court' 5'State Court of Appeals'
6'State Lower Court' 7'Other'/fedcirc 1'First' 2'Second' 3'Third' 4'Fourth' 5'Fifth'
6'Sixth' 7'Seventh' 8'Eighth' 9'Ninth' 10'Tenth' 11'Eleventh' 12'D.C.'/state
1'Alabama' 2'Alaska' 3'Arizona' 4'Arkansas' 5'California' 6'Colorado' 7'Connecticut'
8'Delaware' 9'Florida' 10'Georgia' 11'Hawaii' 12'Idaho' 13'Illinois' 14'Indiana'
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15'Iowa' 16'Kansas' 17'Kentucky' 18'Louisiana' 19'Maine' 20'Maryland'
21'Massachusetts' 22'Michigan' 23'Minnesota' 24'Mississippi' 25'Missouri'
26'Montana' 27'Nebraska' 28'Nevada' 29'New Hampshire' 30'New Jersey' 31'New
Mexico' 32'New York' 33'North Carolina' 34'North Dakota' 35'Ohio' 36'Oklahoma'
37'Oregon' 38'Vermont' 39'Pennsylvania' 40'Rhode Island' 41'South Carolina'
42'South Dakota' 43'Tennessee' 44'Texas' 45'Utah' 46'Virginia' 47'Washington'
48'West Virginia' 49'Wisconsin' 50'Wyoming'/
casetype 0'not specified' 1'criminal' 2'civil'/
subreas 0 'not specified' 1'grand jury proceeding' 2'subpoena by defense'
3'subpoena by prosecution' 4'violation of grand jury secrecy' 5'other'/
gjreas 0'not specified' 1'witness to a crime' 2'other evidence of a crime'
3'accused of a crime'/defreas 0'not specified' 1'exculpatory evidence'
2'impeaching evidence' 3'evidence of prejudicial trial or pretrial publicity'
4'prosecutorial or investigative misconduct' 5'Sixth Amendment right' 6'other'/
medstat 0'not specified' 1'first party' 2'third party'/medciv1 0'not specified'
1'libel' 2'privacy' 3'other'/medciv2 0'not specified' 1'libel' 2'privacy'
3'other'/nonciv1 0'not specified' 1'government proceeding'
2'federal cause of action' 3'state cause of action' 4'other'/nonciv2
0'not specified' 1'government proceeding' 2'federal cause of action'
3'state cause of action'/evidtype 0'not specified' 1'source' 2'information'
3'source and information'/submat1 0'none' 1'notes for written material'
2'unpublished photographs' 3'audiotape outtakes' 4'videotape outtakes'
5'transcript of broadcast' 6'finished work product' 7'not specified' 8'other'/
submat2 0'none' 1'notes for written material' 2'unpublished photographs'
3'audiotape outtakes' 4'videotape outtakes' 5'transcript of broadcast'
6'finished work product' 7'not specified' 8'other'/
submat3 0'none' 1'notes for written material' 2'unpublished photographs'
3'audiotape outtakes' 4'videotape outtakes' 5'transcript of broadcast'
6'finished work product' 7'not specified' 8'other'/
submat4 0'none' 1'notes for written material' 2'unpublished photographs'
3'audiotape outtakes' 4'videotape outtakes' 5'transcript of broadcast'
6'finished work product' 7'not specified' 8'other'/
partype 0'not specified' 1'individual(s)' 2'media organization'
3'both individual(s) and media organization'/emptype1 0'not specified'
1'non-management' 2'management'/emptype2 0'not specified' 1'non- management'
2'management'/nmgtype1 0'not specified' 1'print journalist' 2'photojournalist'
3'radio broadcast journalist' 4'television broadcast journalist'
5'television cameraman' 6'records custodian' 7'author' 8'freelance journalist'
9'other'/
nmgtype2 0'not specified' 1'print journalist' 2'photojournalist'
3'radio broadcast journalist' 4'television broadcast journalist'
5'television cameraman' 6'records custodian' 7'author' 8'freelance journalist'
9'other'/
nmgtype3 0'not specified' 1'print journalist' 2'photojournalist'
3'radio broadcast journalist' 4'television broadcast journalist'
5'television cameraman' 6'records custodian' 7'author' 8'freelance journalist'
9'other'/
mgtype1 0'not specified' 1'owner' 2'publisher'
3'newspaper or magazine editor' 4'television news director'
5'radio news director' 6'radio program producer' 7'television program producer'
8'other'/mgtype2 0'not specified' 1'owner' 2'publisher'
3'newspaper or magazine editor' 4'television news director'

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5'radio news director' 6'radio program producer' 7'television program producer'
8'other'/mgtype3 0'not specified' 1'owner' 2'publisher'
3'newspaper or magazine editor' 4'television news director'
5'radio news director' 6'radio program producer' 7'television program producer'
8'other'/medorg1 0'not specified' 1'newspaper' 2'magazine or publishing co.'
3'radio station or network' 4'television station or network'
5'news or wire service' 6'news or feature syndicate'
7'cable or community antenna television' 8'other'/
medorg2 0'not specified' 1'newspaper' 2'magazine or publishing co.'
3'radio station or network' 4'television station or network'
5'news or wire service' 6'news or feature syndicate'
7'cable or community antenna television' 8'other'/matsub1 0'not specified'
1'government' 2'politics' 3'business-consumers' 4'accident'
5'crime' 6'social injustice' 7'environment' 8'other'/
clbase1 0'not specified'
1'First Amendment' 2'Fifth Amendment' 3'state constitutional'
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