SHIELD LAWS ON TRIAL: STATE COURT INTERPRETATION OF THE JOURNALIST'S STATUTORY PRIVILEGE

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I. INTRODUCTION

Twenty-five years ago, the legal and journalistic professions were grappling with the issue of a privilege to protect newsgatherers from the threat of subpoenas. Historically, journalists have used confidential sources and information to facilitate newsgathering.[1] Because of their proximity to news events and information, however, journalists frequently have been called on for testimony, documents, notes, film and tape.[2]

Despite the journalists' failure to win a blanket privilege from the U.S. Supreme Court or a national protective statute from the U.S. Congress more than two decades ago, they have not been forgotten. A majority (twenty-nine) of the state legislatures in this country enacted laws—many of them over the last two decades—to protect journalists from having to answer every subpoena. The statutes, called shield laws, can sometimes excuse journalists from the responsibility of testifying or producing materials they may have obtained in confidence.

Have these laws been effective in serving their original purposes of protecting the newsgathering process and the free flow of information? Have the state courts interpreting these laws ruled consistently with the legislative desires? Are some categories of subpoenas more protected than others? This paper will explore these questions in the context of appellate court opinions of the states that have shield laws. It will analyze the relative strength of the shields by reviewing how they have been interpreted by the courts. The researchers hope that the study will shed some light on whether journalism and the newsgathering function in particular is being well served by statutory and judicial intervention.

II. BACKGROUND

Branzburg v. Hayes[3] is the seminal 1972 case in which the U.S. Supreme Court

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1. Byron St. Dizier, *Reporters' Use of Confidential Sources, 1974 and 1984: A Comparative Study*, 6 NEWSPAPER RES. J. 44-50 (1985).

2. AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1989, A SURVEY BY THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (1991); AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA 1991, A SURVEY BY THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (1993).

3. Branzburg v. Hayes, 408 U.S. 665 (1972).

addressed the journalist's testimonial privilege. That ruling was a consolidation of four separate cases in which reporters had been subpoenaed to identify their sources of information or disclose other confidences. Specifically, two of the cases resulted from stories written by Paul Branzburg, a reporter for the *Louisville Courier-Journal.* In one of those cases, Branzburg was asked to identify two young people he observed synthesizing hashish from marijuana.[4] The second case resulted from a subpoena that required Branzburg's testimony about the sale and use of drugs after he reported interviewing several dozen drug users.[5] In the third subpoena case, Paul Pappas, a reporter for a Massachusetts television station, was called before a grand jury to tell what he had seen and heard when he spent several hours at a Black Panthers headquarters.[6] The fourth case involved Earl Caldwell, a reporter for *The New York Times,* who was called before a grand jury investigating the activities of the Black Panthers in Oakland, California.[7] In a plurality opinion, Justice Byron White wrote that journalists, like other citizens, must reveal personal knowledge of criminal activities when asked by the grand jury.[8] In so doing, the Court rejected the reporters' argument that the burden placed on the newsgathering process by compelling them to testify required the Court to acknowledge a First Amendment privilege for their testimony.[9]

Justice Lewis Powell, in a concurring opinion, limited the Court's ruling to grand jury investigations that are conducted "in good faith."[10] He noted that law enforcement's needs for the journalists' testimony may properly be challenged in a motion to quash the subpoena. Therefore, he suggested that courts make a case by case determination, with the claim of the journalists' privilege being "judged on its facts by the striking of a proper balance between freedom of the press and the obligations of all citizens to give relevant testimony with respect to criminal conduct."[11]

Justice Potter Stewart, writing in dissent, favored a qualified privilege for journalists faced with subpoenas. Before a journalist can be compelled to testify in a criminal proceeding, he argued, the prosecution must: (1) show probable cause to believe the journalist 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.[12]

Since *Branzburg*, the Supreme Court has not commented further on the constitutional validity of a privilege protecting journalists' confidential sources.[13] The ruling left open the possibility for state courts to construe "their own constitutions so as to recognize a newsman's privilege, either qualified or absolute."[14]

The first state privilege statute was enacted by Maryland in 1896.[15] By the time *Branzburg* found its way to the Supreme Court, another sixteen states had joined

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4. *Id.* at 667.
5. *Id.* at 669.
6. *Id.* at 672.
7. *Id.* at 675.
8. *Id.* at 690-91.
9. *Id.* at 692.
10. *Id.* at 710 (Powell, J., concurring).
11. *Id.* at 710.
12. *Id.* at 743 (Stewart, J., dissenting).
13. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Herbert v. Lando, 441 U.S. 153 (1979).
14. *Id.* at 706.
15. *See* Lightman v. State, 294 A.2d 149, 152 n.2 (1972).

Maryland in passing a shield law.[16] Today, twenty-nine states have these protective statutes on the books offering varying degrees and categories of security to journalists who become the targets of subpoenas.[17] Fifteen of the remaining twenty-one states without shields have state court protections for journalists.[18]

The primary reason for enacting shield laws is rarely stated in the laws themselves. However, the fact that all of these provisions are aimed at sparing news reporters' testimony in whole or in part is clear evidence that such laws were intended to assist the efforts of the press. In addition, the tools of the journalist's profession that the legislatures singled out for protection—confidential sources and information—strongly indicate the legislature's willingness to protect newsgathering.

A review of the legislative rationales that appear in statutes reveals that the primary interest of the legislators was protecting journalists from forced disclosure. The language of the Illinois shield law, for example, says "[n]o court may compel any person to disclose the source of any information obtained by a reporter," except as provided for in the act.[19] While the act does not constitute a wholesale ban on ever calling reporters to testify, it does make clear the legislature's intent to protect reporters from disclosing their sources.[20] A federal appellate court comparing Illinois' statute with New York's statute on reporter's privilege found that both laws "reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment."[21]

Similarly, the Minnesota statute declares a privilege for the news media to protect confidential sources and unpublished information. This is to protect the "public interest" and the "free flow of information."[22] Nebraska's shield law has a comparable protective measure, but it goes on to state that those who gather news "shall not be inhibited directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit or disseminate news or other information vigorously so that the public may be fully informed."[23] Thus, some legislators determined as a policy matter that the gathering and disseminating of news was more important than the disclosure of confidential sources and information at least in some circumstances.[24]

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16. *Branzburg*, 408 U.S. at 689 n.27.

17. ALA. CODE § 12-21-142 (1994); ALASKA STAT. § 09.25.310 (Michie 1994); ARIZ. REV. STAT. ANN. § 12-2237 (West 1994); ARK. CODE ANN. § 16-85-510 (Michie 1994); CAL. EVID. CODE § 1070 (Deering 1995); COLO. REV. STAT. § 13-90-119 (1994); DEL. CODE ANN. tit. 10, § 4320 (1994); GA. CODE ANN. § 24-9-30 (1995); 735 ILL. COMP. STAT. ANN. 5/8-901 (West 1995); IND. CODE ANN. § 34-3-5-1 (Michie 1994); KY. REV. STAT. ANN. § 421.100 (Michie 1994); LA. REV. STAT. ANN. § 45.1451 (West 1995); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (1994); MINN. STAT. § 595.021 (1994); MONT. CODE ANN. § 26-1-901 (1994); NEB. REV. STAT. § 20-144 (1994); NEV. REV. STAT. ANN. § 49.275 (Michie 1993); N.J. STAT. ANN. tit. 2A, ch. 84A, 21a (1993); N.M. STAT. ANN. § 11-513 (Michie 1994); N.Y. CIV. RIGHTS LAW § 79-h (Consol. 1994); N.D. CENT. CODE § 31-01-06.2 (1993); OHIO REV. CODE ANN. § 2739.04 (Anderson 1994); OKLA. STAT. tit. 12, § 2506 (1995); OR. REV. STAT. § 44.510 (1994); 42 PA. CONS. STAT. § 5942 (1994); R.I. GEN. LAWS § 9-19, 1-2 (1994); S.C. CODE ANN. § 19-11-100 (Law. Co-op 1993); TENN. CODE ANN. § 24-1-208 (1994).

18. The fifteen states are Connecticut, Florida, Idaho, Iowa, Kansas, Maine, Massachusetts, Missouri, New Hampshire, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin.

19. ILL. COMP. STAT. ANN. Ch.735, § 5/8-901 (West 1995).

20. *See generally* People v. Palacio, 607 N.E.2d 1375 (Ill. App. Ct. 1993).

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

22. MINN. STAT. § 595.022 (1994).

23. NEB. REV. STAT. § 20-144 (1994).

24. Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law*, Branzburg v. Hayes,

Although a few states have shield laws that provide journalists an absolute privilege, most states have a qualified privilege, which sets forth the circumstances and conditions under which newsgatherers will be allowed to keep sources and information confidential. Examples of the absolute privilege can be found in Alabama[25] and Pennsylvania.[26] Both state statutes essentially protect journalists from being compelled to disclose their sources of information in any proceeding. The qualified privilege, on the other hand, varies from state to state, but most of the statutes require a First Amendment balancing test to determine whether the privilege applies to a given situation.[27]

Now that a majority of states have shields in a post-*Branzburg* journalistic environment, the question arises: how are those protections faring in court when they are asserted by journalists and challenged by others? This study was conducted to determine the answer to that question and to find out which subpoena categories get more or less protection as a result of judicial interpretation of the shield laws.

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and Recent Statutory Developments, 25 ARIZ. L. REV. 815 (1984).

One study of press privilege conducted a few years after *Branzburg* found that some shield laws were not having the desired policy effects. The study found that statutory protection remained little more than a "paper shield" because various courts had interpreted these laws narrowly to deny reporters' claims of privilege. Shield laws in at least two states, California and New Mexico, were attacked in state courts on constitutional grounds. George M. Killenberg, Branzburg *Revisited: The Struggle to Define Newsman's Privilege Goes On*, 55 JOURNALISM Q. 456 (1978).

These cases, according to another study, may continue to be the exception rather than the rule. Qualified shield statutes are more likely to avoid this kind of confrontation because judicial power and integrity remain unimpaired when conditions are attached to the laws, but absolute privilege shields raise serious separation of power concerns because they restrict or abridge the court's contempt authority. Louis A. Day, *Shield Laws and the Separation of Powers Doctrine*, 2 COMM. L. part 4, 15 (1980).

25. ALA. CODE § 12-21-142 (1994) states:

> No person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a newsgathering capacity, shall be compelled to disclose in any legal proceeding or trial, before any court or before a grand jury of any court, before the presiding officer of any tribunal or his agent or agents or before any committee of the Legislature or elsewhere the sources of any information procured or obtained by him and published in the newspaper, broadcast by any broadcasting station, or televised by any television station on which he is engaged, connected with or employed.

26. 42 PA. CONS. STAT. § 5942 (1994) states in pertinent part:

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

27. An example of a qualified privilege statute can be found in South Carolina. It provides in pertinent part that a person involved in newsgathering:

> may not be compelled to disclose any information or document or produce any item obtained or prepared in the gathering or dissemination of news *unless* the party seeking to compel the production or testimony establishes by clear and convincing evidence that this privilege has been knowingly waived or that the testimony or production sought:
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> (1) is material and relevant to the controversy for which the testimony or production is sought;
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> (2) cannot be reasonably obtained by alternative means; and
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> (3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document or item.

S.C. CODE ANN. § 19-11-100(B) (Law Co-op 1993) (emphasis added).

III. METHODOLOGY

The study commenced with a series of computerized database searches for all of the state appellate court rulings interpreting shield laws. Only cases decided after the 1972 *Branzburg* decision through 1993 were retrieved for review and analysis. The analysis did not include trial court rulings because of the unavailability of a reliable means for including all of them. State trial court judges seldom write analytical opinions on the disposition of subpoenas, and the results of court rulings at that level often go unreported.

By contrast, appellate courts have the forums for resolving journalists' challenges based on shield laws. They typically issue opinions explaining their decisions that carry greater precedential value as "controlling authority." As such, they are the final arbiters of the rights and protections of journalists in both shield-law and common-law privilege states.

The searches yielded 88 cases in the period studied. The appellate court opinions from those cases were individually reviewed, categorized and quantified. Of the cases studied, the researchers identified 97 separate claims for analysis. Because some courts issued rulings that crossed categorical lines, those claims were recorded separately to maintain their distinctions. The categories included: testimony about a confidential source; testimony about confidential information; testimony about non-confidential information or about events the journalist may have witnessed; documents, which includes notes, film, tape, photographs, letters and other memoranda; multi-item requests for "all" or "any and all" of the above named items; and claims of privilege that were not specified.[28] Further, the cases were classified according to whether they resulted in a favorable or unfavorable outcome for journalists. "Other" claims of the privilege were neither favorable nor unfavorable but were decided on non-privilege grounds.

IV. FINDINGS AND DISCUSSION

A. Subpoenas Seeking Testimony for Identification of a Confidential Source

Subpoenas seeking testimony for identification of a confidential source get the strongest protection in states with shield laws. Of the twenty-seven claims discussed in this category of cases, the media succeeded in quashing subpoenas or overturning contempt orders in nineteen claims—seventy percent.[29] Courts are more likely to recognize the privilege in states with absolute laws. Thirteen states[30] have what one judge described as the "ultimate in news media protection." That is, the press has a "seemingly unassailable privilege not to disclose the source of any information obtained in the course of employment."[31] Generally, these decisions rest on the reasoning that the courts have an obligation to carry out the clear objective and intent of the state legislatures.

In New Jersey, for example, the state legislature twice amended its shield law to

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28. *See infra* Table 1.

29. *Id.*

30. Those thirteen states are Alabama, Arizona, California, Delaware, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Oregon and Pennsylvania.

31. Jamerson v. Anderson Newspapers, 469 N.E.2d 1243, 1248 (Ind. Ct. App. 1984).

"preserve a far-reaching newsperson's privilege in this state."[32] The amendments left no doubt that the legislature intended to provide comprehensive protection of all aspects of news gathering and dissemination. The court stated that "[a]bsent any countervailing constitutional right, the newsperson's statutory privilege not to disclose confidential information is absolute."[33]

New Jersey's shield law protects a person connected with or employed by the news media who is gathering, compiling, editing or disseminating news "in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere."[34] New Jersey's list of protected proceedings is extensive, but similar to lists compiled in states such as Alabama, Arizona and Maryland.

Meanwhile, states with qualified shield laws may look to whether information is available elsewhere, balancing the public's need to know against the statutory and First Amendment rights of the reporter. Tennessee[35] and Illinois[36] are examples of states that use a three-part test similar to the one suggested by Justice Stewart's dissent in *Branzburg v. Hayes*. These tests require courts to consider the importance of and the need for the information.

The Illinois Supreme Court said it could not agree with the circuit court that all other available sources of information had been exhausted in a case where a newspaper reporter refused to reveal a source.[37] The reporter published information from a controversial closed juvenile court proceeding. The court ruled the reporter could not be compelled to disclose the name of the source who released the transcript of the proceeding. "We think it clear that the statute requires more than a showing of inconvenience to the investigator before a reporter can be compelled to disclose his sources."[38]

Courts in states with absolute laws are more likely to quash subpoenas in libel cases than are courts in states with qualified laws. Courts in Pennsylvania[39] and New Jersey[40] have upheld the media's right to keep source identification secret, even though the news organization was a defendant in a libel action. Although a New Jersey libel plaintiff claimed he could not go forward in his suit without discovery of sources, the New Jersey Supreme Court found the constitutional protection for freedom of speech outweighed the plaintiff's right to bring a libel action.[41] Despite the burden on some libel plaintiffs, the court said the First Amendment right to gather news and publish was more important than the right to bring a libel action.[42]

In a similar case, an Ohio appeals court said the shield privilege is absolute in civil litigation and upheld the denial of discovery of sources where a funeral home

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32. Maressa v. New Jersey Monthly, 445 A.2d 376, 382 (N.J. 1982).
33. *Id.*
34. N.J. STAT. ANN. § 2A:84A-21 (West 1992).
35. TENN. CODE ANN. § 24-1-208(c)(2)(A-C) (1994).
36. ILL. COMP. STAT. ANN. ch.735, § 5/8-906 (Michie 1995).
37. *In re* Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act, 472 N.E.2d 450 (Ill. 1984).
38. *Id.*
39. Sprague v. Walter, 543 A.2d 1078 (Pa. 1988); Hatchard v. Westinghouse Broadcasting Co., 504 A.2d 211 (Pa. 1986).
40. *Maressa*, 445 A.2d 376 (N.J. 1982).
41. *Id.* at 387.
42. *Id.*

director sued a television station for libel.[43]

In Indiana, a libel plaintiff argued that the court should presume that a defendant who refuses to reveal sources has no sources so that both sides are even in the discovery process. The Indiana Court of Appeals decided that this presumption, however, would "emasculate the protection afforded by the shield law," noting the law says that no inference may be drawn from the invocation of privilege.[44]

Some qualified shield laws specifically exempt use of the law in a libel case. Minnesota,[45] Oklahoma,[46] Oregon,[47] Rhode Island[48] and Tennessee[49] simply do not allow the press to use the shield law in a libel or slander action where it is the defendant.

B. Subpoenas Seeking Testimony for Confidential Information

Litigants have been more successful when seeking testimony about confidential information rather than testimony about confidential sources from journalists. The study found that the media lost on more than half the claims involving testimony about confidential information—five out of nine.[50]

In Maryland, a court of appeals stated that the shield law protects confidential sources, but not confidential information.[51] Reporter Loretta Tofani had already published names of sources in her article about rape in the county jail, thus the court ruled she could not claim the news reporters' privilege when a grand jury questioned her about the incidents.[52]

In 1978, the New Jersey Supreme Court ordered *New York Times* reporter Myron Farber to disclose confidential information in a criminal trial.[53] The court said the newsperson's privilege conflicted with a criminal defendant's constitutional right to compel attendance of witnesses and production of evidence.[54] Following that decision, the legislature amended the shield law to give newspersons increased protection and to establish stringent prerequisites for judicial enforcement of a subpoena.[55]

New Jersey courts have gone further than any other state court by stating that the newsperson's privilege even protects the editorial process of newsgathering. As noted by Supreme Court Justice Pashman in 1982, "[d]iscovery of editorial processes is especially threatening to newspersons because it inhibits the exchange of ideas that is crucial to the functioning of a free and vigorous press."[56]

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43. House of Wheat v. Wright, slip opinion (Ohio Ct. App. 1985).
44. *Jamerson*, 469 N.E.2d at 1250.
45. MINN. STAT. § 595.021 (1994).
46. OKLA. STAT. tit. 12, § 2506 (1995).
47. OR. REV. STAT. § 44.510-5.30 (1994).
48. R.I. GEN. LAWS § 9-19, 1-2 (1994) (repealed 1956).
49. TENN. CODE ANN. § 24-1-208 (1994).
50. *See infra* Table 1.
51. Tofani v. State, 465 A.2d 413, 418 (Md. Ct. Spec. App. 1983).
52. *Id.*
53. *In re* Farber, 78 N.J. 259 (1978) *cert. den. sub nom.*, New York Times Co. v. New Jersey, 439 U.S. 997 (1978).
54. *Id.*
55. State v. Boiardo, 416 A.2d 793 (N.J. 1980).
56. *Maressa*, 445 A.2d at 383.

C. Subpoenas Seeking Testimony for Non-confidential and Eyewitness Information

Should reporters or photographers be required to testify about events they observe? Courts have reached very different conclusions in different states. In fifty-four percent of the claims (seven out of thirteen) courts ordered news persons to testify about non-confidential information or about events reporters witnessed.[57]

New Jersey, Georgia, Illinois, Ohio and Tennessee appear to offer more protection than courts in New York and California. In New Jersey, a prosecutor subpoenaed three photographers who shot aerial photographs of a fire from a helicopter and directed the press to bring "any and all photographs and negatives."[58] When the photographers claimed the shield law protection, the state argued that the shield law did not apply because the photographers were eyewitnesses to "an act involving property damage."[59]

The New Jersey Shield Act, although broader than most state shields, does not protect a reporter who is an eyewitness to, or participant in, any act involving physical violence or property damage."[60] However, the New Jersey Supreme Court chose to narrowly construe the exception to cover only cases in which the reporter witnessed human participation in a crime or accident.[61] The court stated:

> If reporters sent to cover a fire were to lose their Shield Law protection because they have witnessed the consequences of an act involving property damage, there would remain no reasonable grounds on which press photographers would not be considered eyewitnesses as they arrive on the scene to gather news after a crime or accident has occurred . . . . If we were to allow the State to obtain press photographs in cases such as this one, simply because its own photographs were unsatisfactory, there would be little to prevent the State from continually and increasingly calling on press resources in its investigations.[62]

The court noted that burdens resulting from frequent prosecution subpoenas could severely interfere with the newsgathering activities of many newspapers.

States that protect the names of confidential sources, but do not protect other information, are more likely to require testimony of a reporter who observes an event. In *Lightman v. State*, a Maryland appellate court upheld the civil contempt of a reporter who observed illegal drug use in a shop in Ocean City.[63] The reporter refused to describe the shopkeeper or the shop's location to a grand jury, citing the state's shield law.[64] The appeals court said the reporter did not identify himself as a reporter to the shopkeeper and thus could not claim the newsperson's privilege. In Maryland, the newsperson's privilege belongs to a journalist who can protect an informant; however in *Lightman*, the reporter, himself, was the source since he observed the illegal activity. Consequently, the Court of Special Appeals held that the reporter was not protect-

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57. *See infra* Table 1.
58. *Woodhaven Lumber and Mill Work. State v. Asbury Park Press*, 589 A.2d 135 (N.J. Super. 1991).
59. *Id.* at 136.
60. N.J. STAT. ANN. § 2A:84A-21a(h) (West 1992).
61. *Asbury Park Press*, 589 A.2d at 143.
62. *Id.*
63. Lightman v. State, 294 A.2d 149. (Md. Ct. Spec. App. 1972).
64. *Id.*

ed by the newsperson's privilege.[65]

Despite the inclusion of the California shield law in that state's constitution, reporters have no immunity from testifying about events they witnessed. In *Delaney v. Superior Court*, a reporter and a photographer for *The Los Angeles Times* were accompanying members of a Long Beach police task force on patrol.[66] The officers stopped Sean Patrick Delaney in a shopping mall when they saw a suspicious plastic bag protruding from his pocket. The officers claimed Delaney consented to a search of his jacket, which turned up a set of brass knuckles. Delaney was charged with possessing the knuckles. He sought to suppress the weapon by claiming the search was not consensual, and he subpoenaed the two reporters to testify in his behalf.

The California Supreme Court found that Delaney was entitled to the journalists' testimony for several reasons: the observations of the search and arrest were not made in confidence or were sensitive; there was no suggestion that the testimony would impinge on their future newsgathering ability; their testimony would likely determine the outcome of the case; and most surprising, the criminal defendants "need not always show the lack of an alternative source for a newsperson's unpublished information."[67]

Reporters who witness an event are likely to be compelled to provide information to prosecutors or courts, because they may not be covered by narrow shield laws. While Maryland and California courts have required testimony, New Jersey has provided some protection to the media.

D. Subpoenas for Documents, Film, Tape, Photographs and Memoranda

The media prevailed in fifty percent of the claims in the documents category—nineteen out of thirty-eight.[68] When the media lost, courts often said shield laws did not apply.

In Michigan, an appeals court upheld an order for a newspaper to produce unpublished non-confidential photographs of a fire scene. The court said that the Michigan shield law protects the identities of informants and unpublished information or communication between a journalist and an informant. It declined to extend the privilege to non-confidential materials in a civil case.[69] In a similar case, Kentucky required a newsperson to provide copies of notes requested in a libel case against a newspaper, once the names of confidential informants were removed.[70]

Broadcasters were treated differently than print reporters in Michigan because of the wording in the state shield law. In 1986, in *In re Stone*, a Michigan appeals court upheld the contempt citation of a television news reporter for failure to surrender confidential videotapes and notes to a grand jury for investigation of a state trooper's death.[71] The court held that a plain reading of the state's shield law indicated the law was intended to protect the print media, rather than the broadcaster. Following the *Stone* ruling, the Michigan state legislature amended the state shield law to include broadcasters.[72]

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65. *Id.* at 157.
66. Delaney v. Superior Court, 789 P.2d 934 (Cal. 1990).
67. *Id.* at 953.
68. *See infra* Table 1.
69. Marketos v. American Employers Ins. Co., 185 Mich. App. 179 (Mich. Ct. App. 1990).
70. Lexington Herald-Leader v. Beard, 690 S.W.2d 374 (Ky. 1984).
71. In re Stone, 397 N.W.2d 244, (Mich. Ct. App. 1986).
72. MICH. COMP. LAWS ANN. § 767(5)a (West 1992).

In deciding when to compel production of notes or video, courts may consider whether the case is civil or criminal. In Pennsylvania, an appellate court prohibited plaintiffs in a libel action from compelling a reporter to produce filmed outtakes, notes and other documentary material.[73] A Michigan appellate court said its shield law protected confidential pricing information requested from a technical writer in a civil case.[74] However, the Michigan law in question specifically allowed courts to compel disclosure of confidential information in a criminal case involving a life sentence if the information sought is essential and other available sources have been exhausted.[75]

In an Indiana civil case, a defendant in an auto accident subpoenaed newspaper photos of the accident and a trial court ordered their production.[76] The Indiana Court of Appeals reversed and remanded, directing a lower court to determine if the requested photos were clearly material and highly relevant, and if there was a compelling need for them in a third party case not involving the newspaper.[77] The court said that

> [t]he job of the newspaper is to gather as much information as it possibly can with respect to all facets of activity of interest and importance to readers . . . . [T]o make the press in effect, the investigative arm of every civil litigant . . . inevitably will constrict the flow of information to the press, and ultimately to us all.[78]

However, a subpoena for a photographer's pictures in a criminal case was upheld by a Delaware court that purported to follow the *Branzburg* ruling. The court deferred to the authority of the state attorney to investigate the crime.

New Jersey stands out as one of the few states that protects documents in a criminal case. For example, in *State v. Boiardo*,[79] the New Jersey Supreme Court overturned an order in a murder trial requiring a reporter to produce a letter written by a government witness. The witness, a former accomplice of the defendants, sent two letters to a reporter thanking her for her honest reporting and expressing dissatisfaction with his government deal. The court held that the letters were not necessary, given the "plethora of information substantially similar to that contained in the letters."[80] Consequently, the court held that the defendant had not demonstrated the lack of less intrusive sources of similar information.[81]

With the exception of New Jersey, most states require production of documents, photographs and outtakes in criminal cases. Nevertheless, courts are more likely to protect the news media from discovery in civil cases.

E. Other Issues

1. Waiver

A waiver usually occurs when the privilege holder voluntarily discloses the infor-

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73. Hatchard v. Westinghouse Broad. Co., 504 A.2d 211 (Pa. Super. Ct. 1986).
74. King v. Photo Marketing Assoc. Int'l., 327 N.W.2d 515 (Mich. Ct. App. 1982).
75. MICH. COMP. LAWS ANN. § 767(5)a (West 1992).
76. *Id.*
77. Stearns v. Zulka, 489 N.E.2d 146 (Ind. Ct. App. 1986).
78. *Id.* at 151 (quoting Suede Originals v. Aetna Casualty, 8 Media L. Reptr. (BNA) 2565, 2566 (Tex. App. 1982)).
79. *Boiardo*, 416 A.2d 793.
80. *Id.* at 796.
81. *Id.*

mation or makes some other revelations that effectively eliminates the application or exercise of the privilege. In a Montana case, the court found a waiver of the statutory privilege ended protection for a reporter's notes because he took the witness stand and testified.[82] A concurring justice found part of the court's decision contrary to the legislative intent of the shield law, which was to encourage a free and dynamic press. He said that the reporter's notes should not be subjected to disclosure because the notes were not voluntarily offered or referred to by the reporter.[83] Another waiver of the privilege occurred in a Nevada case in which the reporter revealed conversations and memoranda he had access to in connection with Howard Hughes' estate. The court said the privilege had been waived by voluntary disclosure.[84]

By contrast, New Jersey has changed its position on waiver as the legislature has strengthened its shield law. The state could not compel *New Jersey Herald* reporter Evan Schuman to testify about a murder defendant's confession just because the reporter published information about the confession. The reporter's privilege was not waived simply because he published information about the confession.[85] The court further held that "[o]ther fundamental public policies underlying New Jersey's strong Shield Law support the conclusion that (reporter) Schuman should not be compelled to testify . . . . The public perception conveyed by compelling Schuman to testify will hinder the free flow of information from newspapers to the public."[86]

2. New Theory: Special Witness Doctrine

After finding that the state shield law did not apply in a difficult case, an appeals court in Illinois created a special protection privilege for reporters in 1993. The court concluded that a defense attorney frivolously subpoenaed James Dey, a *Champaign News Gazette* columnist, because the attorney did not like what the writer said about the defendant, a man convicted of aggravated arson and home invasion. Dey reported that the prosecutor said in closing arguments that the defendant was "shot once too few times."[87] Although the judge ruled the argument improper and instructed the jury to disregard it, the prosecutor told Dey he was not sure the comment was wrong. The prosecutor allegedly told Dey afterward, "This (defendant) is a mean, evil man."[88]

The defense subpoenaed Dey, saying it planned to show that the prosecutor planned the slip and the defendant should get a new trial. But the defendant's attorney also told the trial court judge he did not like the columnist writing about legal arguments in on-going cases. On appeal, the Illinois appellate court said the trial court erred in ordering Dey to testify, because the subpoena had both a harassing and disrupting effect on Dey. The appeals court found an implicit threat that if the reporter speaks or writes something unfavorable about the attorney's client or case, the attorney will find some ground to force the reporter to testify.[89]

The appeals court said the state shield law does not apply in this situation, because Dey was not required to reveal a source. However, the court held that Dey

82. Sible v. Lee Enter., 729 P.2d 1271, 1275 (Mont. 1986).
83. *Id.* at 1275-76. (Hunt, J., concurring).
84. Newburn v. Howard Hughes Med. Inst., 594 P.2d 1146 (Nev. 1979).
85. In re Schuman, 552 A.2d. 602 (N.J. 1989).
86. *Id.* at 609.
87. People v. Palacio, 607 N.E.2d 1375, 1387 (Ill. App. Ct. 1993).
88. *Id.*
89. *Id.* at 1389.

should be protected under a special witness doctrine that protects prosecutors and judges from subpoenas used to harass them. The special witness doctrine should extend to reporters. Additionally, the party who subpoenas a reporter should specifically state the testimony the party expects to elicit and why it is necessary to the case. In this case, the judge should have just asked Dey if he could stipulate to the accuracy of his column and not have required his testimony.[90]

3. Separation of Powers

The news privilege under shield laws also has been challenged on a separation of power argument, which questions the legislative branch's authority to make judicial rules.

In *Ammerman v. Hubbard Broadcasting*, the Supreme Court of New Mexico invalidated the legislature's shield law because lawmakers had exceeded their power to enact laws.[91] *Ammerman* involved five consolidated cases in which the plaintiffs sought recovery for slanderous broadcasts. The plaintiffs requested the station's confidential informants and all information obtained from informants, including documents and tapes.[92] The court ruled that the privilege created by the legislature was essentially a rule of evidence, and the legislature lacks the power to prescribe rules of evidence and procedure. The court stated, "[t]his constitutional power is vested exclusively in this court, and statutes purporting to regulate practice and procedure in the courts cannot be binding . . . ."[93] Since then, the New Mexico Supreme Court has added a provision to the state Rules of Court to replace the invalidated shield law.[94]

In California, the Court of Appeals in *Rosato v. Superior Court*[95] upheld contempt citations against four *Fresno Bee* reporters who obtained a sealed court transcript and refused to reveal its source. The court concluded that application of the shield law "to immunize petitioner from contempt would unconstitutionally interfere with the power and the duty of the court."[96] Commentator Louis Day noted that absolute shield laws, such as California's, raise serious separation of powers questions, while qualified privilege statutes are more likely to avoid this kind of confrontation.[97]

V. CONCLUSION

The effectiveness of shield laws varies tremendously from state to state, both because of the difference in shield law language and in how state courts interpret them. Courts are most likely to protect source names in states that have absolute privilege statutes. Judges are more likely to protect the names of sources and possibly confidential information rather than eyewitness and non-confidential information. Courts in Indiana and New Jersey have extended the privilege by looking to the intentions of the legislature and the public policy behind shield laws. At the other extreme is New Mexico, where the supreme court voided a shield law, then wrote its own judicial rule. A California court also has raised concerns about the legislature interfering with the

90. *Id.* at 1389-90.
91. 551 P.2d 1354 (N.M. 1976).
92. *Id.*
93. *Id.* at 1359.
94. N.M. STAT. EVIDENCE RULE 11-514. (1991).
95. 51 Cal. App. 3d 190 (1975).
96. *Id.* at 222.
97. Day, *supra* note 24, at 1.

power of the judiciary. Courts in some states, such as Maryland, Kentucky and Rhode Island, have interpreted shield laws narrowly.

Based on an analysis of the claims, courts are slightly more willing to protect notes, video and other documents from discovery than they are to protect non-confidential information or a reporter who is an eyewitness. Testimony and production of documents in criminal cases get less protection from the courts, particularly where a criminal defendant requests information. Judges are less likely to compel production in civil cases, especially where the news organization is not a defendant.

Finally, it is possible that a strong shield law may result in fewer cases going to court, because an absolute privilege from the legislature sends a strong message to the courts. Alabama and Pennsylvania are considered to have strong, absolute laws. Pennsylvania has only two appellate court cases, both resulting in favorable outcomes for the journalists; Alabama had no reported cases.

There are many reasons why the disparity in state protections exist. For a simple explanation, one can look to the absence of a federal shield law. The state courts and legislatures thus cannot look to federal law for guidance. Although several efforts were made in Congress to enact a shield law, they were never successful. The result is an array of state statutes designed to shield the press from unnecessary subpoenas. Some states crafted shield laws in absolute terms, which provide sufficient protection to journalists, their work product and the free flow of information (from news source to the news media). Other states, which have adopted a qualified privilege, limit disclosure from journalists to instances in which the source or information in a proceeding is relevant, necessary and unavailable through other means. The effect is that the citizens who live in a state with a weak press privilege would not experience a flow of information from news media and sources that is as free as citizens who reside in a state with a broader privilege.

The *Branzburg* case, while settling the privilege question for journalists who are called to testify before grand juries, gave few clues on how privilege would be handled in other contexts. The lack of a clear standard left a great deal of latitude for state legislatures to act and courts to interpret. In fact, the number and variety of the contexts in which news-related subpoenas arise only serves to further complicate the press privilege picture. Not only must courts and legislatures contend with a variety of proceedings in which the privilege arises, but they must assess the value of exempting the press from the legal duty everyone has to bring forth evidence in a number of different contexts, including confidential-source identification, other confidential information, notes, tapes, documents, non-confidential information and testimony of a journalist's observations.

The remaining question is an interesting one for policy debate: what would be the effects of encroaching on the rights on either side? The disparities noted between the states obviously lead to a lack of uniformity in treatment of practicing journalists in this country regarding the press privilege issue. Journalists who have only weak protections face the possibility of being used for convenience and becoming agents of criminal and civil court litigants. On the other hand, absolute privilege statutes, while giving broad protections to the concerns of a free press and a free flow of information, take a swipe at the rights of the subpoenaing party. As such, they offer no relief to persons who are falsely accused or wrongfully sued and have few places to turn for evidence that would aid their exoneration.

Cases that raise these constitutional conflicts are few. (Only eighty-eight appel-

late court cases were identified in this study.) Also, as this study has shown, despite the presence of a state statute, each case must be decided on its own merits. Thus, the criminal defendant or the civil litigant who fails to get a court to enforce a subpoena against a journalist would be inflicting no harm on future parties that are similarly situated. The converse, however, could bring irreparable consequences for journalists. This is because journalists who feel their confidential sources and work product were vulnerable to subpoena attack, could turn away from activities that could lead to subpoenas.

When the press is deterred in this manner, there is the potential of a lasting chilling effect on press freedom. Thus, the barriers to a free press are raised in three areas. First, the press could lose its aggressive stance and halt all attempts at using confidential sources or information. Second, whistle-blowers and other potential news sources could be left without any legal protection from discovery. Third, any policies that breach the journalist's confidential relationship with sources impedes the free flow of information to the public.

This study has shown that absolute shield laws are not really required for courts and society to recognize the importance of confidential sources to journalists. The qualified privilege serves this purpose well by enabling a judicial balance between the interests of the journalists and the subpoenaing party. The differences in "favorable" versus "unfavorable" outcomes of subpoena challenges ranged between thirty-three and fifty percent, a balance that makes it difficult to conclude that those categories (Confidential Information, Non-confidential Information, Eyewitnessed Events, Documents, Records and Multi-Item "Catchall" Requests) were decidedly in one camp or the other.

Draftsmanship of the state shield laws also can have a role in how the privilege is used and protected. It may help to have clearly stated in the statute the purposes of the legislation. Only a few states—Illinois, Minnesota and Nebraska—really give a strong indication of the policy reasons behind enactment. Surely, judges interpreting state shield laws may look into the states' legislative histories and seek out transcripts of debates and hearings from the state houses. However, conventional interpretative analysis requires jurists to review the plain language and construction of the statute first before reviewing it on any other basis. If the initial review answers the legal question before the court, then no further review is necessary. A strongly worded statement of purpose in the statute would indicate to judges which direction they should lean when there are close calls and what the relative values are that should be considered in balancing the competing interests.

Table 1

CATEGORIES OF STATUTORY-BASED PRIVILEGE

Category	Favorable Claims	Unfavorable Claims	Other Claims	Totals	Percent Favorable
Testimony to Identify a Confidential Source	19	7	1	27	70%
Testimony About Information that is Confidential	3	5	1	9	33%
Testimony About Non-Confidential Information and Eyewitnessed Events	6	7	0	13	46%
Documents - includes notes, tapes, film, photographs and memoranda	19	18	1	38	50%
Multi-Item (Catchall) Requests	4	3	2	9	44%
Not Specified (based on privilege in general)	1	0	0	1	100%
Totals	52	40	5	97	54%