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# ***Knight-Ridder Broadcasting v. Greenberg:*** **Is the Judiciary Making Policy?**

## I. Introduction

The struggle to establish a privilege to protect both journalistic<sup>1</sup> sources and information from compulsory disclosure represents the conflict between the well-established tenet that every competent person should testify<sup>2</sup> and the constitutional concern for the free flow of information to the public.<sup>3</sup> The battle has been arduous, but through the machinery of the state legislatures, journalists have been advancing their cause. The majority of states have enacted shield laws<sup>4</sup> protecting newsmen from compulsory process to reveal their sources and the information they obtain in their quest for news. But the battle is not yet won. The controversy wages on between the judiciary and journalists as to whether these statutes extend their protection not merely to confidential, but to nonconfidential sources and information, as well.

Recently, the New York Court of Appeals had the opportunity to construe the New York Shield Law<sup>5</sup> as one which affords an absolute privilege against the mandatory disclosure of both

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1. For this Note, terms such as "journalist," "reporter," or "newsperson" will apply to

one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and re-searching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

N.Y. CIV. RIGHTS LAW § 79-h(a)(6) (McKinney 1976 & Supp. 1988).

2. 8 J. WIGMORE, EVIDENCE § 2192, at 65 (3d ed. 1940).

3. See *infra* notes 20-22 and accompanying text.

4. Statutes that grant newsmen the privilege to refuse to disclose sources and information are commonly referred to as "shield laws." See, e.g., *In re Farber*, 78 N.J. 259, 269 n.2, 394 A.2d 330, 335 n.2, cert. denied, 439 U.S. 997 (1978). See *infra* note 64 for a list of state shield laws.

5. N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1988).

confidential and nonconfidential information obtained in the news gathering process. In *Knight-Ridder Broadcasting v. Greenberg*,<sup>6</sup> a 4-3 majority declined to do so. Instead, the court construed the statute narrowly, holding that the protection of the Shield Law does not extend to information obtained from nonconfidential sources.<sup>7</sup> The court also found that no first amendment protection existed for a television news reporter's videotaped interview that contained information pertinent to a grand jury's investigation.<sup>8</sup>

The decision limits the protection offered by the Shield Law, instead of allowing New York to join those states which provide absolute protection to newsmen through a strong shield law.<sup>9</sup> Furthermore, the decision may have far-reaching effects.<sup>10</sup> Prior to *Knight-Ridder*, a large number of subpoenas duces tecum issued to newsmen in New York had been quashed under the Shield Law.<sup>11</sup> This decision, however, imposes a narrow construction and, therefore, a broader range of information<sup>12</sup> can now be found to lie outside the statutory protection.

Part II of this Note examines the scope of the newsman's privilege under the Constitution and at common law. Particular attention is paid to the Supreme Court decision in *Branzburg v. Hayes*<sup>13</sup> and the applicability of its three-prong test of rele-

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6. 70 N.Y.2d 151, 511 N.E.2d 1116, 518 N.Y.S.2d 595 (1987).

7. *Id.* at 153, 511 N.E.2d at 1117, 518 N.Y.S.2d at 596.

8. *Id.* at 160, 511 N.E.2d at 1121, 518 N.Y.S.2d at 600.

9. N.Y. Times, Jul. 8, 1987, at B4, col. 3 (citing Jane Kirtley, Executive Director of the Reporters Committee for Freedom of the Press). According to the article those states affording an absolute privilege are: California, Montana, Nebraska, Nevada, New Jersey, and Oregon. Whether the absolute privilege was granted by constitution, statute, or judicial interpretation was not discussed.

10. Subpoenas hamper the effectiveness of the journalist, both personally and professionally. The reporter cannot devote full time to reporting because he has court commitments and consultations with lawyers. The reporter is also handicapped by "professionally incapacitating worry and hassle" because now he becomes a news source and must "ironically, fend off his colleagues." Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 265 (1971).

11. N.Y. Times, Jul. 8, 1987, at B4, cols. 3-4. The percentage was higher than the nationwide average due to uncertainty about what the Shield Law actually protected.

12. *Id.* at B4, cols. 1-2. The concern is that this kind of information will include reporters' "notes, outtakes, photographs and other materials routinely used by journalists." *Id.*

13. 408 U.S. 665 (1972).

vancy, availability, and compelling interest<sup>14</sup> to the instant case. Part II also examines other state statutes, focusing on those states that specifically insert confidentiality into the language of the statute, contain no qualification, incorporate the *Branzburg* test, or afford an absolute privilege. Part II concludes with an analysis of the evolution of the New York Shield Law. The facts of *Knight-Ridder*, the lower court proceedings and Judge Bellocosa's dissent are discussed in Part III. Part IV analyzes the position of the judiciary in finding a requirement of confidentiality where none formally existed.<sup>15</sup> Part V concludes that there is a need for a strong shield law and calls upon the legislature to clearly define the limits of the New York Shield Law.

## II. Background

### A. Scope of the Journalist's Privilege

#### 1. Constitutional Foundation

##### a. First Amendment

The cornerstone of the newsman's argument for a right to the protection of his communication and sources derives from the first amendment.<sup>16</sup> The Supreme Court has interpreted this first amendment freedom of the press as a "right basic to the existence of a democratic society."<sup>17</sup> Accordingly, a first amendment protection has also been interpreted to encompass a right

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14. *Id.* at 713 n.1 (Douglas, J., dissenting).

15. N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney Supp. 1988) states in pertinent part: "[N]o professional journalist or newscaster . . . employed or otherwise associated with any newspaper, magazine, news agency, . . . shall be adjudged in contempt . . . 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 . . ." (emphasis added).

16. U.S. CONST. amend. I. The first amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." The protection of the first amendment extends not only to the legislature, but also to executive and judiciary proceedings, and to state governments through the due process clause of the fourteenth amendment. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See also *Watkins v. United States*, 354 U.S. 178, 187-88 (1957) (concerning the constitutional limits of federal legislative inquiry); *Sweezy v. New Hampshire*, 354 U.S. 234, 254-55 (1957) (concerning the constitutional limits of state legislative inquiry).

17. Note *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 327. See also *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Id.* at 250.

to publish without prior governmental consent;<sup>18</sup> immunity from restraint of publication thereby encouraging circulation;<sup>19</sup> and a right to distribute,<sup>20</sup> as well as receive,<sup>21</sup> printed material without state restrictions that would unconstitutionally impair the exchange of information.

It follows then that the first amendment carries with it an implicit right to gather news — a right envisioned by the framers of the Bill of Rights<sup>22</sup> — that is basic to the idea of freedom of the press.<sup>23</sup> The underlying theory that news gathering is protected by the first amendment rests upon the public's first amendment right to uninhibited access to information and ideas.<sup>24</sup> Therefore, newsmen argue that being subject to subpoena to disclose their sources would limit the information they would be able to obtain, thereby denying "not only their freedom to publish, but also the public's right to receive news."<sup>25</sup> A basic tenet of the first amendment is to encourage the free flow of ideas by preventing governmental interference. Accordingly, first amendment protection should prevent the government from using the "media as its own private investigative force."<sup>26</sup>

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18. *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

19. *Grosjean*, 297 U.S. at 250. "[A]n untrammelled press [is] a vital source of public information . . . and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Id.*

20. *See, e.g., Marsh v. Alabama*, 326 U.S. 501 (1946) (a state cannot impose criminal punishment on a person for distributing religious literature on a sidewalk of a company-owned town); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (ordinance prohibiting door-to-door distribution of handbills declared unconstitutional).

21. *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (statute requiring Postmaster General to detain certain unsealed foreign mailings and deliver only on addressee's request held to unconstitutionally limit first amendment rights).

22. 6 WRITINGS OF JAMES MADISON 398 (Hunt ed. 1906). "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." *Id.*

23. Note, *supra* note 17, at 328: "The right to gather material for publication has never been explicitly recognized by the Supreme Court. However, the Court . . . has implicitly acknowledged the existence of a general right to gather information." *Id.*

24. For an in-depth discussion of the access doctrine, which is beyond the scope of this Note, see Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

25. Comment, *The Newsmen's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 UCLA L. REV. 160, 170 (1976).

26. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1, 15 (1986).

Indeed, this first amendment theory has been tested in the courts, initially in *Garland v. Torre*.<sup>27</sup> Judy Garland had brought the suit, contending that statements made in a column written by a New York Herald Tribune columnist, Marie Torre, were defamatory. The statements were allegedly attributed to an anonymous CBS executive, and several attempts to uncover the identity of the executive were thwarted. Torre refused to disclose the identity of her source on the grounds that this disclosure would ultimately limit the availability of news both to the reporter and to the public, and would deny her freedom of the press.<sup>28</sup> Justice Potter Stewart, then a judge on the Second Circuit Court of Appeals, acknowledged that disclosure of confidential sources could infringe upon freedom of the press by limiting the availability of news.<sup>29</sup> The court asserted, however, that freedom of the press is not absolute and must be balanced against the duty to testify.<sup>30</sup> In *Torre*, the relevance of the material in question went to the "heart of the plaintiff's claim" and, therefore, the duty to testify was of overriding importance.<sup>31</sup>

Following the *Torre* decision, several cases recognized a qualified first amendment privilege, but a majority of those courts refused to extend such a privilege to newsmen.<sup>32</sup> *Torre* was a precursor to the balancing test that would subsequently

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27. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

28. *Id.* at 547-48.

29. *Id.*

30. Justice Stewart partially agreed with this interpretation of the first amendment: [C]ompulsory disclosure of a journalist's confidential sources of information may entail an abridgement of press freedom by imposing some limitation upon the availability of news.

... But freedom of the press ... is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness ... justifies some impairment of this First Amendment freedom.

*Id.*

31. *Id.* at 550.

32. *See, e.g.*, *State v. Knops*, 49 Wis. 2d 647, 183 N.W.2d 93 (1971) (where newspaper editor received information under a cloak of confidentiality, court held there is a constitutional privilege not to disclose unless overridden by the public's compelling need to know); *State v. Buchanan*, 250 Or. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968) (where student editor refused to disclose the identity of her source, court held no constitutional protection compels recognition of a privilege to withhold evidence); *In re Taylor*, 412 Pa. 32, 41, 193 A.2d 181, 185 (1963) (the court took judicial notice that "important information, tips and leads will dry up and the public will often be deprived of the knowledge . . .").

become the constitutional standard.<sup>33</sup> Under the first amendment, a newsman will not be compelled to disclose confidential information unless balancing shows that the overriding national interest is greater than the need to protect a confidential relationship.

### b. *Fifth Amendment*

The fifth amendment protection against self-incrimination has been propounded as another theory for the protection against source or information disclosure.<sup>34</sup> This protection against self-incrimination is invoked where a newsman's refusal to testify could subject him to a charge of misprision,<sup>35</sup> or to a charge of obstruction of justice for aiding criminals by withholding information. Where there is no danger that the newsman will

33. The seminal case, *Branzburg v. Hayes*, 408 U.S. 665 (1972), held, in effect, that the newsman has a privilege under the first amendment not to disclose confidential sources or information to a grand jury until an overriding or compelling interest in this testimony is established. *Id.* at 708.

34. See, e.g., *Burdick v. United States*, 236 U.S. 79 (1915). *Burdick*, the city editor of the New York Tribune, appeared before the grand jury and refused to answer questions regarding his sources of information for an article on customs fraud, on the grounds that the answers might be self-incriminating. Although a presidential pardon was obtained by the United States Attorney seeking to compel this testimony, the newsman continued his refusal to answer on the same grounds. The Supreme Court held that *Burdick* could refuse the pardon and that *Burdick's* fifth amendment claim did not imply a confession, but rather that his testimony might tend to incriminate him and, therefore, qualified for the fifth amendment protection. *Id.* at 93-95. See also *Curtin v. United States*, 236 U.S. 96 (1915) (reporter who wrote article at issue in *Burdick* was also granted fifth amendment protection).

35. Misprision is "[a] word used to describe an offense which does not possess a specific name . . . and . . . denotes . . . a contempt against the . . . government . . ." BLACK'S LAW DICTIONARY 902 (5th ed. 1979).

Misprision of felony is

[t]he offense of concealing a felony committed by another, but without such previous concert with or subsequent assistance to the felon as would make the party concealing an accessory before or after the fact.

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in . . . authority . . . is guilty of the federal crime of misprision of felony.

*Id.* at 902-03 (citations omitted).

In noting this potential liability, the Supreme Court stated, "[h]istorically, the common law recognized a duty to raise the 'hue and cry' and report felonies to the authorities. Misprision of a felony . . . was often said to be a common-law crime." *Branzburg*, 408 U.S. at 696 (footnote omitted).

be implicated as having committed a crime, however, newsmen have been denied fifth amendment protection.<sup>36</sup> This protection will also be denied when the reporter refuses to disclose enough information for the court to make a determination as to whether the fifth amendment is properly invoked.<sup>37</sup> Because proceedings do not always involve criminal cases, fifth amendment protection is virtually useless in protecting newsmen from the mandatory disclosure of sources or information in civil litigation.<sup>38</sup>

## 2. *Judicial Interpretation*

The first reported privilege case in the United States dates back to 1848, when John Nugent, a news reporter with the New York Herald, refused to reveal his source in response to a subpoena by the United States Senate.<sup>39</sup> At that time, the Senate was in secret session debating a treaty to end the Mexican-American War. Nugent obtained copies of confidential documents, including a secret draft of the treaty, which he sent to his editor.<sup>40</sup> The reporter was imprisoned for contempt of Congress.<sup>41</sup> It is unclear whether Nugent ever revealed his source — but it is very clear that the controversy over the newsman's privilege had begun.

### a. *Rejection of a Common-Law Privilege*

At common law, for a privilege against disclosure of communications to be granted, four basic requirements had to be satisfied:

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36. *Ex parte Holliway*, 272 Mo. 108, 199 S.W. 412 (1917) (protection against self-incrimination can only be used where the tendency to incriminate actually exists; not to merely escape answering).

37. *See, e.g., Elwell v. United States*, 275 F. 775 (7th Cir. 1921), *cert. denied*, 257 U.S. 647 (1921) (court decides from the circumstances of the case and the nature of the evidence the witness will present whether fifth amendment protection applies; not for the witness' discretion).

38. The fifth amendment states in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

39. *Ex parte Nugent*, 18 F. Cas. 471 (D.C. Cir. 1848).

40. *See Comment, supra* note 25, at 161.

41. 18 F. Cas. at 483.



- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.<sup>42</sup>

Because it was normally impossible to meet all of these criteria, no common-law privilege was available for the protection of a journalist's sources and information.<sup>43</sup> The courts, having addressed the issue of whether a common-law privilege protecting the disclosure of sources or information extended to journalists, decided that it did not. Reporters also tried to establish a common-law privilege predicated on potential injury to the journalist's career,<sup>44</sup> but courts have uniformly rejected this approach.<sup>45</sup>

*People ex rel. Mooney v. Sheriff of New York County*<sup>46</sup> is most often cited as the leading case rejecting a common-law

42. 8 J. WIGMORE, EVIDENCE § 2285, at 531 (3d ed. 1940) (emphasis in original).

43. *Id.* at § 2286, at 533-34. "Accordingly, a confidential communication . . . to a . . . journalist . . . is not privileged from disclosure." *Id.*

44. See Note, *Beach v. Shanley: An Expansive Interpretation of New York's "Shield Law,"* 49 ALB. L. REV. 748 (1985). See also *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911). In *Plunkett*, a reporter was subpoenaed to testify as to information received from a police officer. The reporter refused, claiming he would be subjected to ridicule, contempt and would lose his job as a result. *Id.* at 81, 70 S.E. at 785. The court held these arguments to be without merit and found no privilege to protect the reporter from revealing the information. *Id.*

45. See, e.g., *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951) (prevailing rule is that a newspaper correspondent must answer pertinent questions and disclose the sources of his information unless the communication derives from a confidential relationship); *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957) (reporter has no privilege protecting the disclosure of his source of information in the absence of a statute); *Ex parte Lawrence*, 116 Cal. 298, 48 P. 124 (1897) (editor and reporter held in contempt for failing to reveal sources relevant and pertinent to a state senate investigation); *Joslyn v. People*, 67 Colo. 297, 184 P. 375 (1919) (owner of newspaper may not refuse to testify or claim privilege because he considers the matter inquired about his private, confidential and personal business).

46. 269 N.Y. 291, 199 N.E. 415 (1936). A reporter was subpoenaed after making allegations that gambling and lottery racketeering activities continued despite grand jury investigations. The reporter refused to give names and addresses of persons mentioned in the article. *Id.* at 293, 199 N.E. at 415.

privilege.<sup>47</sup> In *Mooney*, the New York Court of Appeals held that a reporter, subpoenaed by a grand jury, could not refuse to testify regarding statements made to him on a claim that these communications were privileged. Again, the court overlooked the claim of possible harm to the journalist's career in denying the privilege. The underlying rationale for the court's steadfast adherence to a refusal to grant the privilege is the evidentiary principle that every person should testify.<sup>48</sup>

#### b. *Branzburg v. Hayes*

In their quest for a common-law privilege, newsmen at first sought to protect only the identity of their sources. But with greater reliance on off-the-record information in the preparation of news stories, journalists have endeavored to include confidential *information* in the scope of the privilege they are trying to establish.<sup>49</sup> This assertion has been grounded in the first amendment right of the public to be informed, and on the practical fear that the supply of information from informants will dry up.<sup>50</sup> Nevertheless, with the Supreme Court's decision in *Branzburg v. Hayes*,<sup>51</sup> the existence of a common-law privilege

47. See Comment, *supra*, note 25, at 166 n.34.

48. *Mooney*, 269 N.Y. at 295, 199 N.E. at 416. "The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege." *Id.* See also 8 J. WIGMORE, *supra* note 42, § 2192 at 64 ("[T]he public . . . has a right to every man's evidence.").

49. See *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

50.

The relationship [between a reporter and his source] depends upon trust and confidence . . . [and] depends in turn on actual knowledge of how news and information imparted have been handled . . . .

This reassurance disappears when the reporter is called to testify behind closed doors. . . . [This] necessarily introduces uncertainty in the minds of those who fear a betrayal of their confidences.

*Caldwell*, 434 F.2d at 1088.

51. 408 U.S. 665 (1972). This decision represents a consolidation of: *Caldwell v. United States*, 434 F.2d 1081 (first amendment provides a qualified testimonial privilege to newsmen, and absent compelling reasons for requiring his testimony, he was held privileged to withhold it); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1971) (statute construed as not affording newsmen privilege not to testify about events he had observed personally); and *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971) (there is no constitutional newsmen's privilege, either qualified or absolute, to refuse to testify before a court or grand jury).

was emphatically denied.

The *Branzburg* Court rejected a first amendment testimonial privilege for newsmen and held that a grand jury may require a reporter to breach a promise of confidentiality to a source if the grand jury is investigating a crime the source is alleged to have witnessed.<sup>52</sup> The Court acknowledged the legitimate concern of reporters regarding the likely impact of a lack of testimonial privilege on the flow of news,<sup>53</sup> but found that the government's compelling interest in pursuing and prosecuting criminals took precedence. First amendment protection did encompass news gathering, but it was counterbalanced by the compelling relevancy of the information to a grand jury investigation.<sup>54</sup> Asserting that at common law "courts consistently refuse to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand

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Petitioners *Branzburg* and *Pappas*, and respondent *Caldwell* asserted that in order to gather news

it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both . . . and that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure.

408 U.S. at 679-80.

52. *Id.* at 692. Justice White, in his majority opinion, stated:

[W]e cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

*Id.*

53. *Id.* at 693. "The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational . . ." *Id.*

54. *Id.* at 700.

[T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification."

*Id.* (quoting *Bates v. Little Rock*, 361 U.S. 516, 525 (1960)).

jury,"<sup>55</sup> the Court could find no basis to override the "public interest in law enforcement and in ensuring effective grand jury proceedings" in favor of the "consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to . . . a valid grand jury investigation or criminal trial."<sup>56</sup>

In his concurrence, Justice Powell emphasized that the decision was limited to situations where a newsman is called before a grand jury and when the issue is the newsman's right to a confidential relationship.<sup>57</sup> The newsman could still resort to the courts "where legitimate First Amendment interests require protection,"<sup>58</sup> and in each case, the court should strike a "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."<sup>59</sup>

Justice Stewart, in a dissent joined by Justices Brennan and Marshall, found that the right to gather news implicitly encompasses "a right to a confidential relationship between a reporter and his source."<sup>60</sup> In arguing that the Court should adopt a qualified privilege for journalists faced with subpoenas, Justice Stewart also articulated a three-pronged test for determining when the privilege should be denied:

the 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.<sup>61</sup>

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55. *Id.* at 685.

56. *Id.* at 690.

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

58. *Id.* at 710. Justice Powell delineated a broad scope for newsmen to have access to the courts to assert their first amendment privilege.

[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

*Id.* (Powell, J., concurring).

59. *Id.*

60. *Id.* at 728 (Stewart, J., dissenting).

61. *Id.* at 743 (citation omitted).

In the absence of such a qualified privilege, Justice Stewart voiced his apprehension that the flow of news to the public would be curtailed.<sup>62</sup>

Although *Branzburg* is the ultimate death knell to the creation of a common-law privilege for newsmen and their confidential relationships, the Court did not preclude a state from granting an absolute privilege under its own state shield law.<sup>63</sup>

## B. General Evolution of State Shield Laws

A majority of states<sup>64</sup> have adopted some form of shield law that explicitly delineates who holds the privilege and the types of media protected.<sup>65</sup> However, the scope of the protection provided under these statutes varies.<sup>66</sup>

62. *Id.* at 736. "[W]e cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished." *Id.*

63. *Branzburg*, 408 U.S. at 706.

64. ALA. CODE § 12-21-142 (1986); ALASKA STAT. §§ 09.25.150 to 09.25.220 (1987); ARIZ. REV. STAT. ANN. § 12-2237 (1982); ARK. STAT. ANN. § 16-85-510 (1987); CAL. EVID. CODE § 1070 (West Supp. 1988) and CAL. CONST. art. I, § 2(b); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1975); ILL. ANN. STAT. ch. 110, para. 8-901 to 8-909 § 8-907-90 (Smith-Hurd 1984 & Supp. 1987); IND. CODE ANN. § 34-3-5-1 (Burns 1986); KY. REV. STAT. ANN. § 421.100 (Bobbs-Merrill 1972); LA. REV. STAT. §§ 45:1451 to 45:1454 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (Supp. 1987); MICH. COMP. LAWS ANN. § 767.5a (West 1982); MINN. STAT. ANN. §§ 595.021 to 595.025 (West Supp. 1988); MONT. REV. CODE ANN. §§ 26-1-901 to 26-1-903 (1983); NEB. REV. STAT. §§ 20-144 to 20-147 (1983); NEV. REV. STAT. § 49.275 (1985); N.J. STAT. ANN. §§ 2A:84A-21 to 2A:84A-21.13 (West Supp. 1987); N.M. STAT. ANN. § 38-6-7 (1984); N.M.R. EVID. 514 (eff. Nov. 1, 1982); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1988); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Page 1981); OKLA. STAT. tit. 12, § 2506 (1980); OR. REV. STAT. §§ 44.510 to 44.540 (1987); 42 PA. CONS. STAT. ANN. § 4942 (Purdon, 1982); R.I. GEN. LAWS § 9-19.1-1 to 9-19.1-3 (1985); TENN. CODE ANN. § 24-1-208 (1980).

65. For an in-depth analysis of the language of the statutes, see Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 Mo. L. REV. 1, 26-34 (1986). See, e.g., ALA. CODE § 12-21-142 (1986), which states in pertinent part:

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 . . . 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.

*Id.*

66. In some states that have no shield law, a qualified privilege has been adopted through the state or federal courts. See, e.g., *Altomose Const. v. Building & Const. Trades Council*, 443 F. Supp. 489 (E.D. Pa. 1977) (no absolute privilege protects news-

### 1. Statutes Having No Confidentiality Requirements

Some statutes protect the source's identity, but not the information conveyed, based on the rationale that nondisseminated information should not be protected.<sup>67</sup> Even though these statutes protect only sources, some courts have construed these laws to imply a qualified privilege against disclosure of information.<sup>68</sup> In Arizona, the legislature enacted additional legislation that appears to broaden the original statute's coverage to include information, as well as the source, within its pro-

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men; the asserted claim to privilege should be judged on an ad hoc basis since first amendment interests usually outweigh the public's interest in civil proceedings). *See also In re Roche*, 411 N.E.2d 466 (Mass. 1980) (first amendment does not grant reporter privilege not to testify if the information sought is relevant, and not otherwise available).

Other states have incorporated an absolute privilege into the constitution. *See, e.g., Wright v. Kiss*, 108 Idaho 418, 700 P.2d 40 (1985) (interpreting U.S. CONST. amend. I and IDAHO CONST. art. I, § 9 to provide a qualified privilege to newsmen, and applies a balancing test similar to the one used in *Branzburg*). California amended its constitution, CAL. CONST. art. I, § 2, to make the shield law a constitutional provision in order to curb the antishield decisions. *Monk, Evidentiary Privilege for Journalists' Sources, supra* note 65, at 46-47.

67. *See* ALA. CODE § 12-21-142 (1986) and *supra* note 65; ALASKA STAT. § 09.25.150 (1983) ("[N]o . . . reporter may be compelled to disclose the source of information"); ARIZ. REV. STAT. ANN. § 12-2237 (1982) ("the source of information"); ARK. STAT. ANN. § 16-85-510 (1977) ("the source of information used"); ILL. ANN. STAT. § 8-901 (Smith-Hurd Supp. 1987) ("source of information"); IND. CODE ANN. § 34-3-5-1 (Burns 1986) ("the source of any information procured"); KY. REV. STAT. ANN. § 421.100 (Bobbs-Merrill 1972) ("the source of any information procured"); LA. REV. STAT. ANN. § 45:1452 (West 1982) ("the identity of any informant or any source of information obtained"); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (Supp. 1987) ("the source of any news or information . . . obtained"); OHIO REV. CODE ANN. § 2739.04, 2739.12 (Page 1981) ("any information procured"); 42 PA. CONS. STAT. ANN. § 5942(a) (Purdon 1982) ("the source of any information procured"). These statutes have also been interpreted by courts as protecting only the source. *See, e.g., Williams v. American Broadcasting Cos.*, 96 F.R.D. 658, 665 (W.D. Ark. 1983) ("statute, by its own terms, applies only so as to protect 'the source'"); *Dumez v. Houma Mun. Fire & Police Civil Serv. Bd.*, 341 So.2d 1206, 1208 (La. 1976), *cert. denied*, 344 So.2d 667 (La. 1977) (shield law grants a privilege from disclosing the source of the information not against disclosing the information itself).

68. *See, e.g., Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 279 (3d Cir. 1980) (Pennsylvania shield law held to protect outtakes even though the identity of the source was known); *Illinois v. Johnson*, 11 Media L. Rep. (BNA) 1101 (Ill. Cir. Ct. Cook County Oct. 22, 1984) (there is a qualified protection for disclosure of information under the Illinois Shield Law). The courts, however, are not consistent in their interpretation. In *Gutierrez v. Shafer*, 9 Media L. Rep. (BNA) 1054, 1055 (Ill. Cir. Ct. Cook County Aug. 18, 1982), the court found a qualified privilege against disclosing information, based on the first amendment. The court acknowledged that a different result could arise under the shield law, which only protects against the disclosure of the source.

tection.<sup>69</sup>

Other statutes specifically protect both the source and the information.<sup>70</sup> Michigan's statute is the most expansive in providing that "communications between reporters of newspapers or other publications and their informants are hereby declared to be privileged and confidential."<sup>71</sup> With few exceptions, these shield laws have no requirement of confidentiality on their face.<sup>72</sup>

## 2. Statutes Specifically Requiring Confidentiality

Traditionally, the law of privilege covers only communications in situations where a confidential relationship exists.<sup>73</sup> Yet of the twenty-six states with shield laws,<sup>74</sup> only three expressly require confidentiality as a prerequisite to the news media's privileges.<sup>75</sup> While the public policy of Minnesota's shield law

69. See Monk, *supra* at 51 n.268. The point is made that the ARIZ. REV. STAT. ANN. § 12-2237 (1982), which protects only the "source of information" appears to broaden its scope when read in conjunction with ARIZ. STAT. ANN. § 12-2214(A) (Supp. 1987), entitled "Requirements for subpoena of media witnesses." This provision requires that six criteria be satisfied if the subpoena is to have effect. These requirements include a showing that the information: is unavailable from other sources, including an identification of which sources were investigated; the information is relevant and material to the person's cause of action; and that there is no intent to interfere with news gathering processes. *Id.*

70. See CAL. EVID. CODE § 1070 (West Supp. 1988); MICH. COMP. LAWS ANN. § 767.5a (West 1982); MINN. STAT. ANN. §§ 595.021 to 595.025 (West Supp. 1988); MONT. REV. CODE ANN. §§ 26-1-901 to 26-1-903 (1983); NEB. REV. STAT. §§ 20-144 to 20-147 (1983); N.J. STAT. ANN. §§ 2A:84A-21 to 2A:84A-21.13 (West Supp. 1987); N.M. STAT. ANN. § 38-6-7 (1984); N.D. CENT. CODE § 31-01-06.2 (1976); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1986 & Supp. 1988); OKLA. STAT. tit. 12, § 2506 (1980); OR. REV. STAT. § 44.520 (1987); R.I. GEN. LAWS § 9-19.1-2 (1985); TENN. CODE ANN. § 24-1-208 (1980).

71. MICH. COMP. LAWS ANN. § 767.5a (West 1982). The statute does not require a confidential relationship to exist. The statute deems the communication to be confidential.

72. See, e.g., MINN. STAT. ANN. § 595.022 (West Supp. 1988): "[T]he freedom of press requires protection of the confidential relationship between the news gatherer and the source of information." Again, the statute does not seem to require a confidential relationship, but instead deems one to be created. This language is ambiguous, as was noted by the state trial court in *Aerial Burials v. Minneapolis Star & Tribune*, 8 Media L. Rep. (BNA) 1653-54 (Minn. Dist. Ct. 4th Dist. Apr. 15, 1982), where the statute was interpreted to encompass "unpublished information regardless of whether the source is known or will be identified if such information is revealed." *Id.* See also *infra* note 75.

73. See J. WIGMORE, *supra* note 42, § 2285 at 531. "The communications must originate in a confidence that they will not be disclosed . . ." (emphasis in original).

74. See *supra* note 64.

75. See DEL. CODE ANN. tit. 10, § 4322 (1975); N.M.R. EVID. 514 (eff. Nov. 1, 1982);

indicates that its purpose "is to ensure and perpetuate . . . the confidential relationship between the news media and its sources,"<sup>76</sup> an explicit or implied understanding of confidentiality is not a prerequisite to invoking the statute's protection. In comparison, Delaware requires a statement, under oath, that "an express or implied understanding" of confidentiality existed originally between the reporter and his source.<sup>77</sup> However, no such understanding is required for nonadjudicative procedures in that state.<sup>78</sup> Rhode Island places great emphasis on the confidential relationship by designating a "confidential association"<sup>79</sup> or "confidential information"<sup>80</sup> as within the scope of the statute's protection. Confidentiality is a prerequisite to invoking the privilege in all proceedings.<sup>81</sup> The statute further reinforces the confidentiality requirement by providing for the waiver of the privilege when the information obtained is made public.<sup>82</sup>

### 3. *Statutes Incorporating the Branzburg Test*

Many of the state legislatures specifically qualified the broad language of their statutes by including provisions that adopt either the *Branzburg* test<sup>83</sup> or some modification.<sup>84</sup> The

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R.I. GEN. LAWS § 9-19.1-2 (1985).

76. MINN. STAT. ANN. § 595.022 (West Supp. 1988).

77. DEL. CODE ANN. tit. 10, § 4322 (1975):

A reporter is privileged in an adjudicative proceeding to decline to testify concerning the source or content of information . . . if he states under oath that the disclosure of the information would violate an express or implied understanding with the source under which the information was originally obtained or would substantially hinder the reporter in the maintenance of existing source relationships or the development of new source relationships.

*Id.*

78. *Id.* § 4321.

79. R.I. GEN. LAWS § 9-19.1-2 (1985). "[N]o person shall be required . . . to reveal a confidential association, to disclose any confidential information or to disclose the source of any confidential information received . . . ." *Id.*

80. *Id.*

81. *Id.* But cf. N.M.R. EVID. 514 (eff. Nov. 1, 1982). Confidentiality is only a prerequisite for privilege in judicial proceedings.

82. R.I. GEN. LAWS § 9-19.1-3(a) (1985). "The privilege conferred by § 9-19.1-2 shall not apply to any information which has at any time been published, broadcast, or otherwise made public by the person claiming the privilege." *Id.*

83. See *supra* note 61 and accompanying text.

84. See, e.g., ARIZ. REV. STAT. ANN. § 12-2214(A)(2), (4) (Supp. 1985); DEL. CODE ANN. tit. 10, § 4323 (1975); MINN. STAT. ANN. § 595.024 (West Supp. 1988); N.J. STAT.



three-pronged test for denial of the privilege requires a showing of relevancy to a probable violation of law, unavailability from alternative sources, and a compelling and overriding interest in the information.<sup>85</sup> The test or its modification is generally applied when the subpoenaing party seeks to discover material that the newsman claims is protected by privilege. It is then up to the discretion of the judge to determine whether the party seeking the information has met its burden by making the requisite showing.<sup>86</sup>

a. *Total Incorporation of the Three-Pronged Test*

Tennessee, which employs the full *Branzburg* test, requires a showing by clear and convincing evidence.<sup>87</sup> Delaware limits the application of the three-pronged test to adjudicative proceedings.<sup>88</sup> Its statute, however, provides an unqualified privilege to protect the reporter from testifying as to his source, and only a qualified privilege as to the content.<sup>89</sup> Under the Delaware statute, the judge determines whether the "public interest in having the reporter's testimony outweighs the public interest in keeping the information confidential."<sup>90</sup> In making this determination, the judge examines such factors as the relevance of the

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ANN. § 2A:84A-21.3 (West Supp. 1987); OKLA. STAT. tit. 12, § 2506(B)(2) (1980); R.I. GEN. LAWS § 9-19.1-3 (1985); TENN. CODE ANN. § 24-1-208 (1980).

85. See *supra* note 61 and accompanying text.

86. TENN. CODE ANN. § 24-1-208 (1980).

The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that:

(A) There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law;

(B) The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and

(C) The person has demonstrated a compelling and overriding public interest of the people of the state of Tennessee in the information.

*Id.*

87. *Id.*

88. DEL. CODE ANN. tit. 10, § 4322 (1974). There is an unqualified privilege in nonadjudicative proceedings.

89. *Id.* § 4323. "The privilege . . . shall not prevent a reporter from being required in an adjudicative proceeding to testify concerning the content, but not the source, of the information that he obtained . . . ." *Id.*

90. *Id.*

information, the efforts made by the seeking party to obtain the information from alternative sources, and the possible effect disclosure will have on "the future flow of information to the public."<sup>91</sup>

Minnesota also requires that the party seeking production demonstrate, by clear and convincing evidence, that "(1) . . . the source has information clearly relevant to a specific violation of the law . . . (2) . . . the information cannot be obtained by any alternative means . . . less destructive of first amendment rights, and (3) . . . there is a compelling and overriding interest requiring the disclosure . . . where the disclosure is necessary to prevent injustice."<sup>92</sup> The Minnesota statute does not distinguish the sources from the information itself. Both are subject to a qualified privilege.

The New Jersey Legislature, recognizing the need to provide newspeople with a broad privilege against disclosure that could be balanced against a defendant's sixth amendment rights, amended its original shield law. Under the new law,<sup>93</sup> the claim for a newsperson's privilege could be overcome by a showing by a preponderance of the evidence that:

there is a reasonable probability that the subpoenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source.<sup>94</sup>

In addition to the elements of the *Branzburg* test, the statute incorporates a balancing test of the interests served by compulsory process against those served by protecting the newsperson's source and information.

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91. *Id.*

92. MINN. STAT. ANN. § 595.024 (West Supp. 1988).

93. N.J. STAT. ANN. §§ 2A:84A-21 to 2A:84A-21-13 (West Supp. 1987).

94. *Id.* § 2A:84A-21.3(b).

b. *Partial Inclusion of the Branzburg Elements*

Oklahoma employs a modification of the *Branzburg* test.<sup>95</sup> The party seeking the identity of the source or the information must establish by clear and convincing evidence the relevancy of the material to a significant issue in the proceeding and his use of "due diligence" to find alternative sources.<sup>96</sup> Rhode Island also employs a modified two-part test.<sup>97</sup> Its statute provides for a lesser standard, that of "substantial evidence," which requires the person seeking the information or its source to establish the relevancy of the information to the prosecution of a specific felony or "to prevent a threat to human life," as well as its unavailability from other witnesses.<sup>98</sup> Arizona employs a similar test in requiring the seeking party to provide affidavits attesting to the relevance of the information to the action and the exhaustion of alternative sources.<sup>99</sup> Satisfaction of this test by the seeking party may require the reporter to disclose the identity of his source or the information obtained in the news gathering process.

4. *Statutes Granting an Absolute Privilege*

A minority of states have granted an absolute privilege in their statutes. There is no qualifying language as to confidentiality, nor a test as to when disclosure of either reporters' sources or information is required. The Nevada Shield Law provides:

No reporter . . . of any newspaper . . . radio or television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation . . . .<sup>100</sup>

The statute provides for this privilege to be accorded in such proceedings as grand jury investigations, legislative or commit-

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95. OKLA. STAT. tit. 12, § 2506(B)(2) (1980).

96. *Id.*

97. R.I. GEN. LAWS § 9-19.1-3 (2)(c) (1985).

98. *Id.*

99. ARIZ. REV. STAT. § 12-2214(A)(2), (4) (Supp. 1987).

100. NEV. REV. STAT. § 49.275 (1985).

tee hearings, or department, agency, or commission proceedings.<sup>101</sup>

While the language of the Delaware statute is broad, it is more ambiguous in its application than is the language of the Nevada statute. Under the terms of the Delaware statute, nonadjudicative proceedings confer an absolute privilege upon newsmen against mandatory disclosure of information or of the identity of sources.<sup>102</sup> However, the ambiguity lies in the definition of "nonadjudicative proceedings." It is not clear whether or not Delaware characterizes the grand jury proceeding as adjudicative. Only if grand juries are treated as nonadjudicative proceedings would there truly be an absolute privilege.

### C. *The Evolution of the New York Shield Law*

#### 1. *Legislative History*

In 1949, the New York Legislature investigated the possibility of enacting a law granting a privilege to newsmen,<sup>103</sup> but it was not until 1970 that the New York Shield Law was finally adopted.<sup>104</sup> Earlier, the legislature recognized that although there was no common-law privilege for newsmen, it could be created statutorily. However, at that time, the legislature was not willing to join the minority of states<sup>105</sup> that offered such protection to newspeople:

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101. *Id.* The language of the statute is very specific and far-reaching:

1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.
2. Before the legislature or any committee thereof.
3. Before any department, agency or commission of the state.
4. Before any local governing body or committee thereof, or any officer of a local government.

*Id.*

102. See *supra* note 91 and accompanying text.

103. *The Journalist's Privilege to Withhold the Source of His News*, 1949 N.Y. LAW REV. COMM. REP. 33, 49 [hereinafter *The Journalist's Privilege*]. New bills were introduced in 1936, 1938, 1939, 1946, 1947, and 1948, but none became law. In 1946, two bills passed the Senate, but were defeated in the Assembly committees. *Id.* Interest in enacting a shield law seemed to escalate each time a new case arose holding reporters in contempt. *Id.* at 49-50.

104. Act of May 12, 1970, ch. 615, 1970 N.Y. Laws 1357-58 (codified as amended at N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1988)).

105. From 1896 until the time of the commission's report in 1949, eleven states had adopted a privilege for newsmen. See *The Journalist's Privilege*, *supra* note 103, at 35.

The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. The granting of a privilege from such disclosure constitutes an exception to the general rule. . . . [T]he existence of the privilege from disclosure . . . works a hardship. The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege.<sup>106</sup>

The sponsor of the 1970 "Freedom of Information Bill for Newsmen" stated that the purpose of the bill was to protect the news media from being forced by investigative bodies to reveal "the sources of their information on material which they have broadcast or published."<sup>107</sup> The impetus behind the bill was the attempts by the Justice Department to serve large newspapers and television networks with subpoenas and the recognition that the news media needed legislative protection.<sup>108</sup>

In approving the Shield Law, Governor Nelson A. Rockefeller asserted that New York, "as the Nation's principal center of news gathering and dissemination,"<sup>109</sup> would now have a strong statute protecting both the newsman's first amendment rights and the public's right to a free flow of news.<sup>110</sup> The broad-reaching protection afforded by the law prevented a newsman from being charged with contempt for the failure or refusal to disclose

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106. *Id.* at 49 (quoting *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936)). For a discussion of *Mooney*, see *supra* text accompanying notes 46-48.

107. Memorandum of Assemblyman Betros, *reprinted in* 1970 N.Y. LEGIS. ANN. 33.

108. *Id.*

The recent practices of the Justice Department have brought to everyone's attention the fact that the news media could be subjected to unwarranted "fishing" expeditions wherein investigators for these bodies could hope to learn from reporters, their notes, their research and conversations, facts and other material which could be later used in criminal prosecutions. The professional newspaperman frequently possesses [a] mass of notes and information which he has derived from various sources, some reliable and some not reliable from which he has gleaned his news stories. Frequently, a reporter has information in his files or a news service possesses information which because of its dubious nature is not used for actual publication. Without any protective legislation these sources of information could be investigated by agencies under the threat of citing the newspaperman for contempt for failure to disclose his files.

*Id.*

109. Governor's Memorandum on Approval of ch. 615, N.Y. Laws (May 12, 1970), *reprinted in* 1970 N.Y. LEGIS. ANN. 508 [hereinafter Governor's Memorandum].

110. *Id.*

his sources or information gathered.<sup>111</sup> The Governor noted that the result of not protecting the newsman from contempt charges for failing to disclose under subpoena would be a significant reduction in the newsman's "ability to gather vital information."<sup>112</sup>

As noted below, the New York Legislature later amended the Shield Law on two separate occasions, in response to narrow statutory interpretations by the judiciary.<sup>113</sup> The judiciary disregarded the purpose and reasoning underlying the legislature's enactment of the act by consistently holding that nonconfidential information and personal observation were not privileged,<sup>114</sup> or that the privilege was waived by the publication of the story or of the source's identity.<sup>115</sup> The legislature responded in 1975 by strengthening the statute with a provision which gave the news media immunity from being held in contempt for refusing to disclose sources of information to a grand jury.<sup>116</sup> This provision was necessary because at that time, legal authorities thought that the New York Shield Law provided inadequate protection for news media personnel in grand jury investigations.<sup>117</sup>

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111. *Id.*

The bill protects journalists and newscasters from charges of contempt in any proceeding brought under State law for refusing or failing to disclose information or sources of information obtained in the course of gathering news for publication.

The types of information that need not be disclosed by newsmen are written, oral and pictorial information and communications concerning local, national or world-wide events or any other matter of public concern or public interest or affecting the public welfare.

*Id.*

112. *Id.* Governor Rockefeller relied on statements of prominent reporters to the effect that their ability to gather news would be diminished, fifteen other states that had enacted statutes granting a testimonial privilege to newsmen, and case law. *Id.* However, his reliance on *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), was ill-founded since that case was later reversed in *Branzburg*.

113. See *infra* notes 116-126 and accompanying text.

114. See *infra* notes 127-148 and accompanying text.

115. See *infra* note 132 and accompanying text.

116. Act of June 24, 1975, ch. 316, § 1, 1975 N.Y. Laws 435 (codified as amended at N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney 1976)) which states in pertinent part: "[N]or shall a grand jury seek to have a journalist or newscaster held in contempt by a court, legislature or other body having contempt powers." *Id.*

117. Memorandum of Assemblyman Kremer, reprinted in 1975 N.Y. LEGIS. ANN. 38, 39. "The so-called 'shield law' adopted in 1970 gave news media personnel immunity from contempt when appearing before a court the legislature or any other body possess-

In 1981, in light of the judiciary's persistent disregard of the legislature's intent, the legislature again amended the statute to "correct loopholes and fill gaps in the existing statute . . . ."<sup>118</sup> This amendment was considered necessary after the New Jersey Supreme Court decision in *In re Farber*,<sup>119</sup> affirming the contempt conviction of a reporter. The amendment strengthened the statute by including "all persons professionally engaged in a journalistic capacity,"<sup>120</sup> thereby broadening the scope of the statute's protection,<sup>121</sup> and excluding evidence obtained in violation of the statute as incompetent.<sup>122</sup> The amendment also prohibited the imposition of fines or imprisonment against a newsman who properly invoked the privilege.<sup>123</sup> The legislature

ing contempt powers. Grand juries who do not possess contempt powers have successfully sought in many states to have media employees held in contempt." *Id.* at 39.

118. Memorandum of Assemblyman Sanders, reprinted in 1981 N.Y. LEGIS. ANN. 257 [hereinafter cited as Sanders Memorandum]. "The bill guarantees absolute coverage for persons professionally engaged in a news gathering capacity, and grants the journalist sole determination as to when that protection may be waived. The original intent of the Legislature in 1970 is to be reinforced, and strengthened." *Id.*

119. 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978). Myron Farber, a New York Times reporter, compiled notes and material while investigating a murder defendant's case. The defendant sought to obtain these notes. New Jersey's highest court held that the Shield Law must yield to the defendant's sixth amendment right to confront adverse witnesses. *Id.* at 274, 394 A.2d at 337. During these proceedings, Farber spent a total of forty days in jail and the New York Times paid \$286,000 in contempt penalties. N.Y.L.J., June 5, 1980, at 1, col. 2.

120. Sanders Memorandum, *supra* note 118 at 257.

121. Act of May 12, 1970, ch. 615, 1970 N.Y. Laws 1357-58. The term "professional journalist" was expanded as a result of amendments in 1981 to include

one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and re-searching of news intended for dissemination to the public; such persons shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

Act of July 7, 1981, ch. 468, § 1, 1981 N.Y. Laws 944 (codified as amended at N.Y. CIV. RIGHTS LAW § 79-h(a)(6) (McKinney Supp. 1988)).

122. Act of July 7, 1981, ch. 468, § 3, 1981 N.Y. Laws 945 (codified as amended at N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney Supp. 1988)): "Any information obtained in violation of the provisions of this section shall be inadmissible in any action or proceeding or hearing before any agency."

123. Act of July 7, 1981, ch. 468, § 3, 1981 N.Y. Laws 945 (codified as amended at N.Y. CIV. RIGHTS LAW § 79-h(d) (McKinney Supp. 1988)): "No fine or imprisonment may be imposed against a person for any refusal to disclose information privileged by the

further strengthened the contempt provision by declaring that the privilege encompassed materials that were highly relevant to a governmental investigation, even if the newsman had not solicited the disclosure.<sup>124</sup>

Thus, the 1981 amendment expanded the scope of protection to include a broad spectrum of news media personnel and strengthened the protection against contempt charges by including relevant material in the privilege. The legislature intentionally did not qualify its protection with elements of the *Branzburg* test, as did the New Jersey Legislature in response to the *Farber* decision.<sup>125</sup> Assemblyman Steven Sanders, the sponsor of the 1981 amendment, used the most absolute language in framing the amendment, instead of following the "laundry list" approach which could inadvertently omit a specific item from the protection of the statute. Therefore, in drafting the amendment, he specifically did not include a provision that would speak strictly to nonconfidential information.<sup>126</sup>

## 2. Judicial Interpretation

### a. Prior to the 1981 Amendment

After the 1970 enactment, the judiciary found a variety of reasons to pierce the New York Shield Law. In *Wolf v. People*,<sup>127</sup> two limitations were placed on the broad language of the

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provisions of this section."

124. Act of July 7, 1981, ch. 468, § 2, 1981 N.Y. Laws 945 (codified as amended at N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney Supp. 1988)).

Exemption of professional journalists and newscasters from contempt. . . . [N]otwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to him.

*Id.*

125. See *supra* note 119 and accompanying text.

126. Telephone interview with Stephen Kaufman, Special Assistant to Assemblyman Sanders (Feb. 6, 1988).

127. 69 Misc. 2d 256, 329 N.Y.S.2d 291 (Sup. Ct. N.Y. County), *aff'd*, 39 A.D.2d 864, 333 N.Y.S.2d 299 (1st Dep't 1972). In *Wolf*, a newspaper published an article regarding a prison riot, allegedly written by a prisoner who was indicted for kidnapping, coercion, and other crimes committed during the riot. The newspaper was served with a subpoena duces tecum to produce the original manuscript of the article for use by the district attorney in the prosecution of the prisoner. The article did not purport to be anonymous,



statute. Initially, the trial court read a requirement of confidentiality into the Shield Law.<sup>128</sup> It found that to raise a successful claim of privilege, one had to show that the information or its source was obtained in the process of gathering news for publication and that there was either an express or implied understanding that there would be no disclosure of the source or information.<sup>129</sup> Thus, *Wolf* firmly established the "cloak of confidentiality" as a prerequisite to invoking the protection of the Shield Law.<sup>130</sup>

The *Wolf* decision further limited the Shield Law by holding that "[p]ublication of the article constituted a voluntary disclosure."<sup>131</sup> Accordingly, publication waived the privilege, whether all or part of the information or the identity of the source was revealed.<sup>132</sup>

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and the published article was found not to be confidential within the meaning of section 79-h of the N.Y. Civil Rights Law. The newspaper's motion to quash was denied. *Id.* at 261-62, 329 N.Y.S.2d at 297.

128. *Id.* at 261, 329 N.Y.S.2d at 296. The trial court cited the broad language of the statute and indicated that one statement qualified another. "[T]he phrase 'for refusing or failing to disclose any news or the source of such news coming into his possession' is qualified by the phrase 'in the course of gathering or obtaining news for publication' etc." *Id.* As to the information upon which news stories were based, the court then concluded it was only "the private information or the undisclosed source which is to be protected. Implicit in the section is the element of confidentiality." *Id.* However, we are not enlightened as to where exactly this requirement of confidentiality arises.

129. *Id.*

130. *But cf.* *People v. Marahan*, 81 Misc. 2d 637, 368 N.Y.S.2d 685 (Sup. Ct. Kings County 1975). The court held that a reporter could not be questioned concerning the source of his information and could refuse to testify on the basis of section 79-h of the N.Y. Civil Rights Law. In *Davis v. Davis*, 88 Misc. 2d 1, 386 N.Y.S.2d 992 (Family Ct. Rensselaer County 1976), a subpoena was quashed where the actual source of letters published in a newspaper column was not revealed or made public by the letter writer, on the grounds that the information was entitled to be deemed to be under a cloak of confidentiality. These were the only two cases prior to the 1981 amendments that did not require a cloak of confidentiality.

131. 69 Misc. 2d at 261, 329 N.Y.S.2d at 297. "The representations by the Village Voice that the article in question was authored by Ricardo de Leon constitute a waiver of any possible protection afforded by the statute." *Id.*

132. The appellate court affirmed, finding neither a first amendment protection nor a protection under section 79-h of the N. Y. Civil Rights Law. "[T]he information sought by the subpoena has been published and the source revealed. The statute therefore, cannot be used as a shield to protect that which has already been exposed to view." *Wolf*, 39 A.D.2d at 864, 333 N.Y.S.2d at 301.

See also *People v. Zagarino*, 97 Misc. 2d 181, 411 N.Y.S.2d 494 (Sup. Ct. Kings County 1978) (news reporter's notes and memoranda not protected where she obtained information about the defendant from an undercover police officer whose identity would

In *WBAI-FM v. Proskin*,<sup>133</sup> the court again limited the scope of the Shield Law's protection, and strengthened the confidentiality requirement, by holding that nonconfidential information did not enjoy any privilege under the Shield Law. *WBAI-FM* involved a radio announcer who read the contents of a letter containing a bomb threat on the air.<sup>134</sup> The announcer had been given the location of the letter by an anonymous caller.<sup>135</sup> The announcer later released the contents of the letter to all interested news agencies.<sup>136</sup> The radio station was served with a subpoena duces tecum requesting the production of the letter for a grand jury investigation.<sup>137</sup> *WBAI-FM* instituted a proceeding to quash the subpoena, claiming privilege under the New York Shield Law.<sup>138</sup> The trial court found that the letter was outside the scope of the privilege since it was not a confidential communication.<sup>139</sup> The trial court further held that the failure to comply with the subpoena would result in contempt proceedings.<sup>140</sup> The appellate division affirmed the lower court finding that the author had exhibited his unwillingness to establish a confidential relationship because his identity remained anonymous, and he had left the letter in a public place.<sup>141</sup> The

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be revealed and dissolve any confidential relationship that existed); *Andrews v. Andreoli*, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. Onondaga County 1977) (confidentiality waived where newsman's sources spoke to prosecution staff members or spoke to newsman in public places without explicitly or implicitly establishing a confidential relationship); *People v. Dupree*, 88 Misc. 2d 791, 388 N.Y.S.2d 1000 (Sup. Ct. N.Y. County 1976) (publication of certain photographs taken at the scene of a homicide waived the protection of the statute thereby requiring the disclosure of all such photographs taken).

133. 42 A.D.2d 5, 344 N.Y.S.2d 393 (3d Dep't 1973).

134. *In re WBAI-FM*, 68 Misc. 2d 355, 326 N.Y.S.2d 434 (Albany County Ct. 1971).

135. *Id.*

136. *Id.*

137. *Id.* at 357, 326 N.Y.S.2d at 436.

138. *Id.* at 356, 326 N.Y.S.2d at 435.

139. *Id.* at 357, 326 N.Y.S.2d at 436-37. The court held that the letter was not acquired through the efforts of the "news media to obtain information" and limited the nature of the protection of section 79-h of the N.Y. Civil Rights Law given to the press as being "subservient to the furtherance of public policy requiring investigation of crime and prosecution therefor, at least where the information received is not the result of affirmative questioning of persons by a news media agency acting as such." *Id.*

140. *Id.* at 358, 326 N.Y.S.2d at 437.

141. *WBAI-FM*, 42 A.D.2d at 7, 344 N.Y.S.2d at 394-95. In his dissent, Judge Cooke argued that the letter was obtained through a confidential relationship that was impliedly established because: (1) the newsman had never revealed the identity of the caller; (2) the letter had no identifiable signature; and (3) the nature of the communica-

appellate court found that without the cloak of confidentiality there could be no protection under the statute.<sup>142</sup>

In addition to the judicial limitations placed on the statute for confidentiality and publication, personal observation was also found not to be protected under the law by the court in *People v. Dan*.<sup>143</sup> In *Dan*, two journalists were subpoenaed to testify as to criminal activity they had witnessed while inside Attica prison during the prisoner riot. The journalists refused to comply since they were at Attica in their "capacity as news-gatherer[s] and not as an arm of the government."<sup>144</sup> The court held that the Shield Law did not exempt newsmen from their duty to testify before a grand jury as to their personal observations of events or identities of persons.<sup>145</sup> However, the court did hold that the newsmen need not divulge the identity of an informant from whom they had obtained their information.<sup>146</sup> Subsequently, one of the journalists moved to quash a subpoena, issued as a result of his grand jury testimony, requiring him to testify at trial.<sup>147</sup> The court denied the motion on the grounds that the information "(1) is material to the prosecution of this case; and (2) was not obtained as a result of a confidential source; and (3) was published . . . ."<sup>148</sup>

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tion of the letter demonstrated a request for confidentiality. These elements established an understanding of confidentiality which permits the communication to be shielded. *Id.* at 9-10, 344 N.Y.S.2d at 397 (Cooke, J., dissenting).

142. *WBAI-FM*, 42 A.D.2d at 6, 344 N.Y.S.2d at 394. The court cited Governor Rockefeller's intent in approving the Shield Law to protect information that reporters have acquired in confidence. Historically, privileges were usually found only where confidential relationships existed and are an exception to the general rule of the duty of all citizens to testify to an authorized governmental body; therefore, they should be strictly construed. *Id.* at 7, 344 N.Y.S.2d at 394.

143. 41 A.D.2d 687, 342 N.Y.S.2d 731 (4th Dep't), *appeal dismissed*, 32 N.Y.2d 764, 298 N.E.2d 118, 344 N.Y.S.2d 955, *appeal denied*, 32 N.Y.2d 613, 300 N.E.2d 745, 347 N.Y.S.2d 1025 (1973).

144. *Dan v. Simonetti*, 80 Misc. 2d 399, 400, 363 N.Y.S.2d 493, 495 (Sup. Ct. Erie County 1975) (a subsequent proceeding discussing the facts of *People v. Dan*).

145. *Dan*, 41 A.D.2d at 688, 342 N.Y.S.2d at 733.

146. *Id.*

147. *Dan*, 80 Misc. 2d at 400, 363 N.Y.S.2d at 495.

148. *Id.* at 403, 363 N.Y.S.2d at 498. The court found that no confidential relationship had been established since the person giving the information had not requested that his identity remain anonymous. Had a confidential relationship been established, the privilege would have been waived by publication when the reporter gave a statement to the district attorney, the grand jury, and for a report published by Bantam Books, Inc. These statements were also made at a negotiating table in the prison and therefore could

In *People v. Le Grand*,<sup>149</sup> yet another restriction was placed upon the scope of the Shield Law. An author of a book about an alleged member of a crime family sought to invoke the statute's protection to quash a subpoena requiring the production of notes and tapes of interviews with a family "intimate."<sup>150</sup> The court held that the legislative design of the statute protected only "professional journalists" and "newscasters,"<sup>151</sup> not authors.

b. *Post-1981 Decisions Requiring Confidentiality*

The legislature responded in 1981 by amending the statute again,<sup>152</sup> and the judiciary now focused on the issue of whether the new amendment had resolved the cloak of confidentiality controversy. Many trial courts continued to hold that confidentiality was a requirement of the statute.<sup>153</sup> In *Hennigan v. Buffalo Courier Express Co.*,<sup>154</sup> a police officer who had been erroneously identified in a series of articles as a participant in the brutal beating of a city employee brought suit for defamation against the newspaper and certain of its employees.<sup>155</sup> The plaintiff submitted a series of interrogatories, and defendants answered several, while moving to strike others.<sup>156</sup> The appellate division affirmed the lower court's holding that those interrogatories were properly stricken when a confidential relationship existed, but held that the lower court had erred in striking an interrogatory pertaining to nonconfidential information.<sup>157</sup>

In *People v. Bova*,<sup>158</sup> the court found that although the 1981 amendment included unsolicited information within the stat-

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be heard by bystanders. *Id.* at 401-03, 363 N.Y.S.2d at 496-98.

149. 67 A.D.2d 446, 415 N.Y.S.2d 252 (2d Dep't 1979).

150. *Id.* at 449, 415 N.Y.S.2d at 254.

151. *Id.* at 451, 415 N.Y.S.2d at 255. Statutes "should not by judicial fiat and strained interpretation be deemed to encompass those engaged in a different field of writing and research." *Id.*

152. See *supra* notes 121-124 and accompanying text.

153. See *infra* notes 154-166 and accompanying text.

154. 85 A.D.2d 924, 446 N.Y.S.2d 767 (4th Dep't 1981).

155. *Id.* at 924, 446 N.Y.S.2d at 768.

156. *Id.*

157. *Id.* at 924-25, 446 N.Y.S.2d at 768. At no point did the appellate court acknowledge or analyze the effect of the 1981 amendments on the statute.

158. 118 Misc. 2d 14, 460 N.Y.S.2d 230 (Sup. Ct. Kings County 1983).

ute's protection, the amendment did not eliminate the cloak of confidentiality requirement.<sup>159</sup> Accordingly, in *People v. Korkala*,<sup>160</sup> CBS moved to quash a subpoena duces tecum for the production of a reporter's video and audio tapes, and unpublished outtakes, of interviews with a defendant in a pending criminal prosecution. CBS claimed that an absolute privilege was afforded by the 1981 amendment to the Shield Law.<sup>161</sup> The court again found that confidentiality was still a criterion for the statute's protection because "the very provision contained in the initial version of the bill that would have eliminated the 'cloak of confidentiality' requirement for invoking the Shield Law was deleted from the version finally passed."<sup>162</sup> Therefore, the subpoena was upheld because the information was not imparted through a confidential relationship.<sup>163</sup>

The issue appeared again, in *In re Pennzoil Co.*,<sup>164</sup> where a nonparty witness, a magazine reporter, tried to quash a subpoena seeking his deposition regarding an article he had published.<sup>165</sup> The court again found that the privilege against

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159. In *Bova*, notes pertaining to an interview with a witness to a murder were subpoenaed by the defendant. The New York Times Company and the reporter moved to quash the subpoena asserting a protection from disclosure under New York's Shield Law (N.Y. CIV. RIGHTS LAW § 79-h, as amended); and on a first amendment claim of a reporter's privilege against disclosure. The court held that the Shield Law did "not provide a basis for quashing the subpoenas. . . . Petitioners . . . failed to adequately assert that . . . the interview was conducted under the requisite 'cloak of confidentiality.'" *Id.* at 19, 460 N.Y.S.2d at 233. However, the court did quash the subpoena under the first amendment. *Id.* at 22, 460 N.Y.S.2d at 235.

160. 99 A.D.2d 161, 472 N.Y.S.2d 310 (1st Dep't 1984).

161. *Id.* at 162, 472 N.Y.S.2d at 311.

162. *Id.* at 165-66, 472 N.Y.S.2d at 313. The court acknowledged that the deletion itself did not conclusively establish the legislative intent, but was a significant indicia when "divining legislative intent." *Id.* at 166, 472 N.Y.S.2d at 313. The court also relied on the continued judicial policy of interpreting the statute as requiring an implicit or explicit understanding of a confidential relationship. *Id.*

163. *Id.* at 165, 472 N.Y.S.2d at 313. The court held that no confidential relationship existed because there was a clear expectation that both the material and source would be broadcast on "60 Minutes" and that "[u]nder the settled pre-1981 interpretation of section 79-h, no privilege shields the unbroadcast material, these 'outtakes', from production." *Id.* On the basis of the deletion of the provisions that would eliminate the confidentiality requirement that the judiciary had previously read into the statute, the court determined that the requirement still existed. *Id.* at 165-66, 472 N.Y.S.2d at 313.

164. 108 A.D.2d 666, 485 N.Y.S.2d 533 (1st Dep't 1985).

165. This case is focused around a controversy in which Pennzoil alleged that Texaco, Inc., had induced Getty Oil Company to breach an agreement pursuant to which Pennzoil Inc., would control three-sevenths of Getty. The nonparty witness, Peter Nulty,

mandatory disclosure could only be raised where there is a cloak of confidentiality. Even with the existence of a confidential relationship, however, the privilege would be waived by publication.<sup>166</sup>

c. *Post-1981 Decisions Not Requiring Confidentiality*

Other trial courts have held that the cloak of confidentiality requirement had been negated by the 1981 amendments. In *People v. Iannaccone*,<sup>167</sup> an investigative reporter moved to quash a subpoena for the production of the tape, or transcript of the tape, obtained while preparing an article, as yet unpublished, about a murder case. The court considered this to be a case of first impression to determine the scope of the privilege afforded by the newly amended Shield Law.<sup>168</sup> It found that "ordering the reporter . . . to produce any notes compiled by her concerning interviews with any witnesses or participants . . . would be in direct contravention of her statutory rights under the Shield Law. . . . [T]he statute protects her from divulging not only the identity of her source, but also against the compulsory disclosure of any notes."<sup>169</sup> The court based its conclusion on the legisla-

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a reporter for Fortune magazine, had interviewed Getty's chairman and had published a quote from this interview in his article. Pennzoil sought to question Nulty as to the actual words Petersen employed. *Id.* at 666, 485 N.Y.S.2d at 535.

166. *Id.* at 667, 485 N.Y.S.2d at 535. The court relied on *People v. Korkala*, 99 A.D.2d 161, 472 N.Y.S.2d 310 (1st Dep't 1984), in finding that a confidential relationship had to exist. The *Korkala* court acknowledged that a qualified privilege exists under the first amendment upon the satisfaction of the three-prong test of relevancy, necessity, and availability. 99 A.D.2d at 167, 472 N.Y.S.2d at 314. However, in *Pennzoil*, the court stated that this three-prong test was unnecessary since the material was already published and therefore, the privilege was waived. 108 A.D.2d at 667, 485 N.Y.S.2d at 535.

167. 112 Misc. 2d 1057, 447 N.Y.S.2d 996 (Sup. Ct. N.Y. County 1982), *See also In re Consumers Union*, 7 Media L. Rep. (BNA) 2038 (S.D.N.Y. 1981), in which a federal district court quashed a subpoena in a products liability case demanding the production of unpublished material regarding automobile evaluation and employee testimony. The court found that the public policy of the state was to discourage mandated disclosure of sources or information, whether published or unpublished. *But cf. Westmoreland v. CBS*, 97 F.R.D. 703 (S.D.N.Y. 1983) (in which a United States district court held that an internal memorandum prepared in the investigation of a libel action was not news gathering as defined by the statute, and therefore beyond the scope of its protection).

168. *Iannaccone*, 112 Misc. 2d at 1058, 447 N.Y.S.2d at 997.

169. *Id.* at 1059, 447 N.Y.S.2d at 997. The court gives the Shield Law a very broad interpretation.

The clear language of the New York Shield Law indicates that the Legislature

ture's response to prior decisions of the courts which demonstrated that the judiciary was "disinclined to follow the letter or even spirit of the existing law."<sup>170</sup> The court concluded that both confidential and nonconfidential information were now within the scope of the Shield Law's protection.<sup>171</sup> Subsequently, in *Lawless v. Clay*,<sup>172</sup> the court found that the confidentiality requirement had been eliminated and construed the Shield Law to be absolute.<sup>173</sup>

Relying on the language in the statute that newsmen may refuse to disclose "any news or the source of any such news"<sup>174</sup> obtained in the news gathering process, the New York Supreme Court, in *Wilkins v. Kalla*,<sup>175</sup> held that "the statute makes clear that its protection extends not only to confidential sources, but

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intended to prevent a defendant from conducting a "fishing expedition" into the work product of a reporter, regardless of the relevancy of any material in the reporter's possession. The reporter's information and source of such information are privileged regardless of its relevancy.

*Id.* at 1060, 447 N.Y.S.2d at 998.

170. *Id.* at 1061, 447 N.Y.S.2d at 998 (quoting Memorandum of Steven Sanders). The court focused on the change in the legal climate. A reporter who was held in contempt and fined (along with the New York Times) for failing to comply with a court order to produce documents concerning a murder suspect (*In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978)) was pardoned and portions of the fines were remitted; concomitantly, the New Jersey Shield Law was amended. N.J. STAT. ANN. §§ 2A:84A-21.1 to 2A:84A-21.8 (West Supp. 1987). The court also recognized that freedom of the press is not absolute and set criteria where the shield law protection applies "where an investigative reporter compiled information both confidential and nonconfidential, and where there has been no publication or disclosure of any of the information compiled, and where the defense subpoena duces tecum is a broad and general request . . . the Shield Law mandates that the subpoena duces tecum be quashed." *Iannaccone*, 112 Misc. 2d at 1063, 447 N.Y.S.2d at 1000.

171. "Although the Legislature, in amending section 79-h of the Civil Rights Law, has again refrained from including explicit language with regard to confidentiality . . . the Shield Law, as amended, protects both the confidential and nonconfidential information . . ." *Id.* at 1062, 447 N.Y.S.2d at 999.

172. 9 Media L. Rep. (BNA) 1223 (N.Y. Sup. Ct. 1982).

173. *Id.* In *Lawless*, the plaintiff alleged that a Syracuse newspaper printed erroneous information obtained from a police blotter indicating that the defendant had been arrested for committing a crime. The plaintiff made a motion to depose the newspaper to show that it was a common practice of the newspaper to utilize the police blotter to obtain information for its articles. The court denied the plaintiff's motion on the grounds that the Shield Law was absolute, and therefore, provided protection from disclosure of both confidential and nonconfidential sources. *Id.*

174. N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney Supp. 1988).

175. 118 Misc. 2d 34, 459 N.Y.S.2d 985 (Sup. Ct. N.Y. County 1983).

also to all unpublished information.”<sup>176</sup> Subpoenaed outtakes, notes, and other nonbroadcast materials compiled for the television news program “60 Minutes” were held nondiscoverable because they fell within the purview of the New York Shield Law.<sup>177</sup> The court held that the intent of the 1981 amendment was to insure a “broad and pervasive protection” to the news media in all phases of gathering and disseminating news.<sup>178</sup>

#### d. Recent Decisions

Recent decisions indicate a liberal approach toward the interpretation of the language of the New York Shield Law. The New York Court of Appeals addressed the Shield Law in a civil case, *Oak Beach Inn v. Babylon Beacon*,<sup>179</sup> and in the context of a criminal proceeding in *Beach v. Shanley*,<sup>180</sup> on the same day. In *Oak Beach Inn*, the appellate division had held that not only did the Shield Law protect newsmen from contempt proceedings upon failure to disclose subpoenaed information and sources, but that it would be unduly restrictive if those same newsmen were then subject to large monetary judgments in civil proceedings.<sup>181</sup> The court of appeals, in affirming the appellate decision,

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176. *Id.* at 36, 459 N.Y.S.2d at 987. The court acknowledged that any doubt as to the absolute privilege afforded by the New York Shield Law was laid to rest by the 1981 amendment. *Id.*

177. *Id.* at 35, 459 N.Y.S.2d at 986. The plaintiff, a former cotton mill worker, alleged that he contracted “brown lung disease” due to the negligence and malfeasance of his defendant employers. The defendants alleged that they were entitled to the information compiled for a report, broadcast February 4, 1979, entitled, “Brown Lung.” *Id.* at 34-35, 459 N.Y.S.2d at 986. “It is clear that the subpoenas in question seek to exploit certain professional journalists as unwilling investigators and seriously interfere with and undermine their ability to gather news.” *Id.* at 35, 459 N.Y.S.2d at 986.

178. *Id.* at 37, 459 N.Y.S.2d at 987. See also *CBA Elecs. v. Ellenberg*, 10 Media L. Rep. (BNA) 1095 (N.Y. Civ. Ct. 1983) (the Shield Law affords absolute protection against the disclosure of confidential and nonconfidential information where the plaintiff subpoenaed testimony of a reporter to disclose whether or not the defendant had made reference to the plaintiff during an interview).

179. 92 A.D.2d 102, 459 N.Y.S.2d 819 (2d Dep’t 1983), *aff’d*, 62 N.Y.2d 158, 464 N.E.2d 967, 476 N.Y.S.2d 269 (1984), *cert. denied*, 469 U.S. 1158 (1985).

180. 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984).

181. 92 A.D.2d at 104, 459 N.Y.S.2d at 820. It should be noted that while the court of appeals affirmed the lower court decision, Judge Wachtler expressly stated that he affirmed the decision on different grounds: “The consequences of nondisclosure imposed pursuant to the CPLR should not create new obstacles to newsgathering or undermine the strong legislative policy expressed in the Shield Law.” *Oak Beach Inn*, 62 N.Y.2d at



held that holding defendant newspaper in contempt for failing to identify a letter writer so that suit could commence was prohibited by the Shield Law.<sup>182</sup>

In *Beach v. Shanley*,<sup>183</sup> a reporter for a television station in Schenectady had expressly agreed to protect the identity of an informant who had given the reporter information regarding the contents of sealed grand jury reports.<sup>184</sup> The reporter was served with a subpoena duces tecum to appear before a grand jury investigating the sources of the leaked information. The reporter moved to quash, claiming the protection of New York's Shield Law.<sup>185</sup> The county court granted the motion to quash,<sup>186</sup> but the appellate division reversed on the grounds that it impaired the grand jury's power to investigate public officers.<sup>187</sup> The court of appeals reversed, granting the motion to quash.<sup>188</sup> In an opinion by Chief Judge Cooke, the Shield Law was given its most expansive construction. The majority held that reporters who refuse to divulge their news sources are protected, notwithstanding that the information concerns criminal activity or that the revelation to the reporter itself might be a criminal act.<sup>189</sup> The high-

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166, 464 N.E.2d at 971, 476 N.Y.S.2d at 273.

182. *Oak Beach Inn*, 62 N.Y.2d at 168, 464 N.E.2d at 972, 476 N.Y.S.2d at 274. A restaurant owner brought a libel action against a local newspaper for publishing an anonymous letter. The newspaper refused to disclose the identity of the letter writer at the plaintiff's demand, claiming privilege under the Shield Law. *Id.* at 162-63, 464 N.E.2d at 968, 476 N.Y.S.2d at 270.

183. 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765.

184. The reports were compiled in connection with allegations against a lieutenant and captain involved in retaining or selling guns. Two of the reports were sealed and recommended the removal of two public officials. The station broadcast that the sheriff was one of the officials to be removed. *Id.* at 246, 465 N.E.2d at 306, 476 N.Y.S.2d at 767.

185. *Id.* at 247, 465 N.E.2d at 306-07, 476 N.Y.S.2d at 767-68.

186. *In re Grand Jury Investigation*, 118 Misc. 2d 195, 460 N.Y.S.2d 227 (Rensselaer County Ct. 1983), *rev'd sub nom.*, *Beach v. Shanley*, 94 A.D.2d 542, 466 N.Y.S.2d 725 (3d Dep't 1983), *rev'd*, 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984).

187. *Beach*, 94 A.D.2d 542, 466 N.Y.S.2d 725 (3d Dep't 1983), *rev'd*, 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984).

188. *Beach*, 62 N.Y.2d at 254, 465 N.E.2d at 311, 476 N.Y.S.2d at 772.

189. *Id.* at 251, 465 N.E.2d at 310, 476 N.Y.S.2d at 771. "[A] subpoena requiring a television reporter to appear before a grand jury investigating the unauthorized disclosure of another grand jury's report should be quashed." *Id.* at 246, 465 N.E.2d at 306, 476 N.Y.S.2d at 767. However, the court noted that while the Shield Law creates an evidentiary privilege and a protection against contempt orders, it does not authorize the quashing of grand jury subpoenas. *Id.* at 247, 465 N.E.2d at 307, 476 N.Y.S.2d at 768.

est court also concluded that reporters enjoy a broad privilege under the New York Shield Law due to the lack of "any qualifying language."<sup>190</sup> *Beach* had the effect of making New York's Shield Law one of the strongest in the nation.<sup>191</sup> However, the *Beach* court failed to address the "cloak of confidentiality" or "waiver by publication" exceptions formerly read into the Shield Law by the judiciary, thereby leaving the door open to retreat from its more expansive approach to the question of newsmen's privilege.

### III. *Knight-Ridder Broadcasting v. Greenberg*

#### A. *The Facts*

In February 1966, portions of an interview with Mr. Donald Bent were televised in an evening broadcast by WTEN-TV, the Knight-Ridder television station in Albany, New York.<sup>192</sup> At that time, Mr. Bent's wife had been missing for several days. The interview was conducted by a reporter with the support of a back-up news team. Approximately one minute of the interview was broadcast, and the remaining portions were never made public.<sup>193</sup>

After Mrs. Bent was found dead in the trunk of an automobile, Donald Bent became a suspect in the district attorney's grand jury investigation into the death of Bent's wife.<sup>194</sup> A subpoena duces tecum was served on WTEN demanding "all videotapes regarding" the station's interview with Donald Bent.<sup>195</sup> In response to the subpoena, WTEN produced the videotape of the newscast, a written introduction to the broadcast that had been

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Each case is fact sensitive. For an in-depth discussion of *Beach*, see Note, *Beach v. Shanley: An Expansive Interpretation of New York's "Shield Law,"* 49 ALB. L. REV. 748 (1985).

190. *Beach*, 2 N.Y.2d at 251, 465 N.E.2d at 310, 476 N.Y.S.2d at 771.

191. See Nat'l L.J., May 28, 1984, at 6, col. 1 ("[T]he New York law, considered one of the broadest, became even stronger with the [holding in *Beach*]"). See also Note, *supra* note 189, at 778 n.192 (quoting Floyd Abrams, a first amendment expert): "[T]he *Beach* court interpreted the shield law in the 'broadest and most-protective fashion.' N.Y.L.J., May 11, 1984, at 4, col. 1."

192. *Knight-Ridder Broadcasting Co. v. Greenberg*, 70 N.Y.2d 151, 511 N.E.2d 1116, 518 N.Y.S.2d 595 (1987).

193. *Id.* at 153-54, 511 N.E.2d at 1117, 518 N.Y.S.2d at 596.

194. *Id.*

195. *Id.* at 154, 511 N.E.2d at 1117, 518 N.Y.S.2d at 596.

read on the air from the studio, as well as other information pertinent to the broadcast.<sup>196</sup> WTEN refused, however, to produce either the nonbroadcast portions of the interview or the reporter's notes obtained in preparation for the report. While no preconditions had been established for the interview, WTEN alleged that a promise of confidentiality covered portions of the interview.<sup>197</sup> Knight-Ridder moved to quash the subpoena duces tecum, asserting that the New York Shield Law<sup>198</sup> and the first amendment protected this material from disclosure.<sup>199</sup>

### B. Lower Court Decisions

The supreme court for Albany County granted the motion to quash solely on statutory grounds that this material was protected.<sup>200</sup> The appellate division reversed on the grounds that the Shield Law only provides a privilege for information obtained under a cloak of confidentiality.<sup>201</sup> Noting the first department's decision in *People v. Korkala*,<sup>202</sup> which took the position that the 1981 amendment to the Shield Law did not eliminate the confidentiality requirement, the third department found "absolutely no language in the 1981 amendment that persuades us otherwise . . . ."<sup>203</sup> The court found significant the legislature's deletion of the provision in the final version of the bill that would have "unquestionably abolished such requirement,"<sup>204</sup> and the lack of any "clear manifestation" in the legislative history of the 1981 amendment to eliminate the confidentiality requirement.<sup>205</sup> The appellate division also found no merit to the first amendment claim since the qualified first

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196. *Id.*

197. *Knight-Ridder Broadcasting Co. v. Greenberg*, 119 A.D.2d 68, 69, 505 N.Y.S.2d 368, 369 (3d Dep't 1986). It is also pertinent to note that at the time of this decision, it was still not ascertained if any portion of the interview was conducted under a cloak of confidentiality. *Knight-Ridder*, 70 N.Y.2d at 154, 511 N.E.2d at 1117, 518 N.Y.S.2d at 596.

198. N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1986 & Supp. 1988).

199. *Knight-Ridder*, 70 N.Y.2d at 154, 511 N.E.2d at 1117, 518 N.Y.S.2d at 596.

200. *Knight-Ridder*, 119 A.D.2d at 70, 505 N.Y.S.2d at 370.

201. *Id.* at 72, 505 N.Y.S.2d at 371.

202. *Id.* at 71, 505 N.Y.S.2d at 370.

203. *Id.*

204. *Id.* at 71, 505 N.Y.S.2d at 370-71.

205. *Id.* at 71, 505 N.Y.S.2d at 371.

amendment privilege did not extend to taped material which was relevant and necessary to the grand jury investigation, and was unavailable from other sources.<sup>206</sup> The order was reversed, and the matter was remitted to the supreme court for an *in camera* determination of which portions of the outtakes were confidential.<sup>207</sup>

The court of appeals subsequently dismissed an appeal taken as of right.<sup>208</sup> The appellate division then granted leave to appeal to the highest court on a certified question.<sup>209</sup> After the third department's decision, but before the appeal was taken, Donald Bent was indicted, thereby mooting this question. Nevertheless, the case was preserved as an exception to the mootness doctrine.<sup>210</sup>

### C. *Opinion of the New York Court of Appeals*

#### 1. *The Majority*

Judge Alexander, writing for the majority, concluded that the cloak of confidentiality requirement still exists. He based this conclusion on the "unanimous appellate authority in this State"<sup>211</sup> and "unsuccessful attempts in the Legislature to amend a statute following our interpretation of the statute as evidence that our interpretation correctly reflected the intent of the Legislature."<sup>212</sup> The majority specifically stated that the legislature's rejection of an explicit provision regarding nonconfidential sources inexorably indicated that the legislature did not intend to create an absolute privilege under the Shield Law.<sup>213</sup>

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206. *Id.* at 72, 505 N.Y.S.2d at 371.

207. *Id.*

208. *Knight-Ridder Broadcasting Co. v. Greenberg*, 68 N.Y.2d 997, 503 N.E.2d 125, 510 N.Y.S.2d 1028 (1986).

209. *Knight-Ridder Broadcasting Co. v. Greenberg*, 126 A.D.2d 834, 510 N.Y.S.2d 491 (3d Dep't 1987). The certified question to be reviewed by the court of appeals was "[d]id this court err in reversing the Supreme Court's order and remitting the matter to the Supreme Court for an in-camera inspection of the taped interview with Donald Bent to determine what portions, if any, of such interview, were conducted confidentially?" *Id.* at 835, 510 N.Y.S.2d at 491.

210. *Knight-Ridder*, 70 N.Y.2d at 154 n.2, 511 N.E.2d at 1117 n.2, 518 N.Y.S.2d at 596 n.2.

211. *Id.* at 156, 511 N.E.2d at 1118, 518 N.Y.S.2d at 597.

212. *Id.* at 157, 511 N.E.2d at 1119, 518 N.Y.S.2d at 598.

213. *Id.* at 159, 511 N.E.2d at 1120, 518 N.Y.S.2d at 599.

The court also cited the opinion of the attorney general that the scope of the statute "did not protect journalists when the requested information was not confidential."<sup>214</sup> While the court acknowledged that the attorney general's opinion was neither binding on the court nor dispositive of the legislative intent, it could not be dismissed lightly, "for nothing else in the Governor's Bill Jacket concerning the 1981 amendments discusses the confidentiality requirement."<sup>215</sup> The majority concluded that because the legislature failed to adopt an amendment specifically addressed to confidentiality concerns, as the sponsor had recommended, the "long-standing interpretation of the Shield Law should not be judicially abrogated."<sup>216</sup>

The majority also dismissed the first amendment claim of privilege on the grounds that the qualified privilege does not protect the taped interview since it contained information relevant and necessary to the grand jury, and it was unavailable from other sources.<sup>217</sup>

## 2. *The Dissent*

In a particularly strong dissent, Judge Bellacosa, joined by Chief Judge Wachtler and Judge Kaye, found the majority to "functionally enact their own amendment to the core provision of the Shield Law" under the disguise of "interpretation," "judicial construction," and "legislative intent."<sup>218</sup> The dissent stated that the majority had substituted the word "some" for "any," thereby affording protection to "some news" rather than "any news" as was enacted into law by the legislature and approved by the governor.<sup>219</sup> Judge Bellacosa found it to be particularly ironic that while the judiciary asserted that it should not substitute its own intent for that of the legislature, that was exactly

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214. *Id.* at 158, 511 N.E.2d at 1120, 518 N.Y.S.2d at 598 (citing Memorandum of Attorney General, July 8, 1981, Governor's Bill Jacket L. 1981, ch. 468).

215. *Id.* at 158-59, 511 N.E.2d at 1120, 518 N.Y.S.2d at 599.

216. *Id.* at 159, 511 N.E.2d at 1120, 518 N.Y.S.2d at 599. The majority distinguished its recent decisions in *Beach* and *Oak Beach Inn* as not being inconsistent with the confidentiality requirement because this was not an issue in either case. *Id.* at 160 n.6, 511 N.E.2d at 1121 n.6, 518 N.Y.S.2d at 600 n.6.

217. *Id.* at 160, 511 N.E.2d at 1121, 518 N.Y.S.2d at 600.

218. *Id.* at 161, 511 N.E.2d at 1121, 518 N.Y.S.2d at 600 (Bellacosa, J., dissenting).

219. *Id.* at 161, 511 N.E.2d at 1121, 518 N.Y.S.2d at 600-01.

what the majority accomplished by imposing a confidentiality requirement where none clearly exists.<sup>220</sup> The judiciary “chills [the privilege] by inserting its own confidentiality clause into an unqualified statute.”<sup>221</sup>

The dissent also asserted that the majority violated a threshold rule of statutory construction by ignoring the plain language of the statute in proceeding directly to a discussion of the legislative history.<sup>222</sup> In addition, the dissent faulted the majority for giving such “significant impact” to the attorney general’s 1981 opinion which was written after the bill became law by “an official who ha[d] absolutely nothing to do with the enactment process or the interpretative process.”<sup>223</sup>

The dissent also accused the majority of bootstrapping because of its reference to a “‘well-settled rule of confidentiality.’”<sup>224</sup> The dissent pointed out that this issue had been the focal point of hot debate in the legislature and vigorous litigation in the courts by the media for the past seventeen years, as well as the reason for the sharp division in the court’s 4-3 vote.<sup>225</sup> From the dissent’s point of view, the majority also overlooked the fact that the court of appeals had never addressed this issue of confidentiality before the 1981 amendment, and this could have been a factor in the legislature’s failure to address the “judicial artifact of confidentiality.”<sup>226</sup>

The dissent then turned to the majority’s treatment of the most recent court of appeals decisions, which had exhibited a more expansive approach to interpreting the Shield Law, in both criminal and civil contexts. In *Beach v. Shanley*,<sup>227</sup> the majority relied on the unqualified language of the statute and the spirit behind its enactment to quash a subpoena — despite the fact that a grand jury investigation could be thwarted, or a criminal act could have been committed by divulging the information.<sup>228</sup>

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220. *Id.* at 166, 511 N.E.2d at 1125, 518 N.Y.S.2d at 604.

221. *Id.* at 161, 511 N.E.2d at 1122, 518 N.Y.S.2d at 601.

222. *Id.* at 167, 511 N.E.2d at 1125, 518 N.Y.S.2d at 604.

223. *Id.*

224. *Id.* at 167, 511 N.E.2d at 1125, 518 N.Y.S.2d at 604-05.

225. *Id.* at 167, 511 N.E.2d at 1125-26, 518 N.Y.S.2d at 605.

226. *Id.* at 167, 511 N.E.2d at 1126, 518 N.Y.S.2d at 605.

227. 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984).

228. See *supra* notes 180-191 and accompanying text.

Contemporaneously, in *Oak Beach Inn v. Babylon Beacon*,<sup>229</sup> an unqualified privilege was recognized for journalists in a civil proceeding.<sup>230</sup> The dissent was astonished by the majority's apparently cavalier treatment of *its own words* and of *stare decisis* in asserting that these cases "are of no consequence,"<sup>231</sup> since confidentiality was not an issue. The majority then "relegated [these cases] to a denigrating endpiece footnote in the majority opinion."<sup>232</sup>

Accordingly, Judge Bellacosa implied that the judiciary is making newspersons into investigative arms of the government. The statutory language, the legislative intent exhibited in its history, and recent precedents all buttress the argument that the subpoena should have been quashed under the absolute protection of the New York Shield Law.<sup>233</sup>

#### IV. Analysis

The broad language of the New York Shield Law<sup>234</sup> enables the judiciary, through its interpretative process, to have a crea-

229. 62 N.Y.2d 158, 464 N.E.2d 967, 476 N.Y.S.2d 269 (1984).

230. See *supra* notes 179-182 and accompanying text.

231. *Knight-Ridder*, 70 N.Y.2d at 167, 511 N.E.2d at 1126, 518 N.Y.S.2d at 605 (Bellacosa, J., dissenting).

232. *Id.* See also *supra* note 216. The majority explained this away by stating "what was said is not evidence of what was decided, unless it relates directly to the question presented for decision." *Id.* at 160 n.6, 511 N.E.2d at 1121 n.6, 518 N.Y.S.2d at 600 n.6 (quoting *People ex rel Metro. St. Ry. v. State Bd. of Tax Comm'rs*, 174 N.Y. 417, 447, 67 N.E. 69, 77 (1903)).

233. *Id.* at 161, 168, 511 N.E.2d at 1122, 1126, 518 N.Y.S.2d at 601, 605 (Bellacosa, J., dissenting).

234. N.Y. CIV. RIGHTS LAW § 79-h(b), (c), (d) (McKinney 1976 & Supp. 1988):

(b) Exemption of professional journalists and newscasters from contempt. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court, the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination

tive role in establishing the policy related to the law. Yet, the role of the judiciary is to apply the "plain meaning" of the statute, not to modify the statute under the pretense of interpretation.<sup>235</sup> Judicial analysis ought to begin with the "four corners" of the statute — if there is no ambiguity in the text, it should be enforced as written.<sup>236</sup>

### A. *Language of the Statute*

There is no ambiguity on the face of the New York statute, nor are there qualifications written into its terms.<sup>237</sup> The absolute privilege afforded by the language of the statute is not modified by requiring the seeking party to show relevancy, nonavailability of alternative sources, or a compelling or overriding interest. The court is not instructed, upon a requisite showing, to use its discretion to require the production of the identity of the source or the information.<sup>238</sup> To the contrary, the statute specifies that "information obtained in violation of the provisions" is incompetent.<sup>239</sup>

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of news to the public, by which he is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to him.

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

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

*Id.*

235.

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.

*Caminetti v. United States*, 242 U.S. 470, 485 (1917).

236. W.P. STATSKY, *LEGISLATIVE ANALYSIS AND DRAFTING* 75 (2d ed. 1984).

237. *See supra* note 234.

238. *See supra* note 234. Neither the *Branzburg* test nor a modification is written into the statute. *But cf.* ARIZ. REV. STAT. ANN. § 12-2214(A)(2), (4) (Supp. 1985); DEL. CODE ANN. tit. 10, § 4323 (1975); MINN. STAT. ANN. § 595.024 (West Supp. 1988); N.J. STAT. ANN. § 2A:84A-21.3 (West Supp. 1987); OKLA. STAT. tit. 12, § 2506(B)(2) (1980); R.I. GEN. LAWS § 9-19.1-3 (1985); TENN. CODE ANN. § 24-1-208 (1980). *See supra* notes 84-86 and accompanying text.

239. N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney Supp. 1988).



There is no provision in the New York statute that waives the privilege upon publication of either the identity of the source or of the contents of the information.<sup>240</sup> Those state legislatures that intended to waive the privilege upon disclosure of the identity of the source, the information, or both, expressly stated these qualifications in the terms of the statute.<sup>241</sup> Similarly, there is no requirement set forth in the language of the New York statute that requires a confidential relationship to exist either through an explicit or implicit understanding.<sup>242</sup> However, three states expressly include a requirement of confidentiality when such was the intention of the legislature.<sup>243</sup>

### B. *Legislative Intent*

There was no ambiguity as to the intent of the sponsors of the New York Shield Law. The letter and spirit of the original shield law were well expressed by Governor Rockefeller when he described New York as being

the only state that clearly protects the public's right to know and the First Amendment rights of all legitimate newspapermen, reporters and television and radio broadcasters.

....

A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news.<sup>244</sup>

The Governor also reiterated that the statute, as approved, provided a "stronger safeguard of the free channels of news communication" by protecting newsmen from compulsory disclosure of their sources and the information they obtained in the news gathering process.<sup>245</sup> Governor Rockefeller also emphatically noted that this statute provided greater protection than most other existing legislation.<sup>246</sup> Clearly, the reasoning behind the original enactment of the statute displays a "firm conviction" to

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240. See *supra* note 234.

241. See, e.g., *supra* note 82 and accompanying text.

242. See *supra* note 234.

243. See *supra* note 76 and accompanying text.

244. Governor's Memorandum, reprinted in 1970 N.Y. LEGIS. ANN. 508.

245. *Id.*

246. *Id.*

protect news media personnel from forcibly having to disclose "any information, material, or sources."<sup>247</sup> Nowhere in the legislative history is the privilege qualified either by conditions imposed on the seeking party or a cloak of confidentiality.<sup>248</sup>

The subsequent amendments to the New York Shield Law were the legislature's responses to the judiciary's interpretation of the statute, and had as their purpose the clarification of the Shield Law against prior misconstruction.<sup>249</sup> The sponsor of the 1981 amendment posited that the amendment was the definitive statement that the legislature will not allow

the courts . . . [to] arrogate to themselves the power to pierce the absolute privilege of confidentiality for journalists so intended by the Legislature . . . . It is in the interests of society as a whole that the Legislature mandate absolutely and without qualification the protection of journalists from being compelled to produce information or reveal sources.<sup>250</sup>

Assemblyman Sanders believed that the interest of society in maintaining an "independent free press" outweighed the inconvenience occasioned by the failure of the press to disclose information in its possession, even when there is a compelling interest in having the information revealed.<sup>251</sup>

### C. *Judicial Error*

It is well established that courts should look to the particular statutory language and apply its most obvious and natural meaning.<sup>252</sup> Lower courts in New York have incorrectly read

247. *Knight-Ridder Broadcasting Co. v. Greenberg*, 70 N.Y.2d 151, 163, 511 N.E.2d 1116, 1123, 518 N.Y.S.2d 595, 602 (1986) (Bellacosa, J., dissenting).

248. *Id.*

249. See *supra* notes 116-124 and accompanying text.

250. Sanders Memorandum, *supra* note 118, at 257-58. The legislative intent did not require the reporter to explicitly establish a confidential relationship with his source; the absolute privilege deemed one to exist. See also MINN. STAT. ANN. § 595.022 (West Supp. 1988); see *supra* note 72 and accompanying text.

251. Sanders Memorandum, *supra* note 118, at 258.

252. See, e.g., *Monarch Elec. Contr. Corp. v. Roberts*, 70 N.Y.2d 91, 97, 510 N.E.2d 795, 798, 517 N.Y.S.2d 711, 714 (1987) (where statute is unambiguous, its plain meaning must be applied); *Capital Newspapers v. Whalen*, 69 N.Y.2d 246, 251, 505 N.E.2d 932, 935, 513 N.Y.S.2d 367, 370 (1987) ("It is fundamental that in interpreting a statute, a court should look first to the particular words in question . . . ."); *Price v. Price*, 69 N.Y.2d 8, 15, 503 N.E.2d 684, 688, 511 N.Y.S.2d 219, 223 (1986) ("[I]f there is nothing to

confidentiality into a statute that contains no qualification on its face.<sup>253</sup> In *People v. Korkala*,<sup>254</sup> the appellate division held that no "absolute privilege" was created by the 1981 amendment.<sup>255</sup> The *Korkala* court did not rely on the language of the Shield Law,<sup>256</sup> but instead relied on the prior decisional law that "such privilege may be invoked only after there has been established an express or implied agreement of confidentiality."<sup>257</sup> The *Korkala* court then addressed the legislative intent behind the 1981 amendment and held that the cloak of confidentiality requirement was not dispensed with because the specific provision that would have eliminated confidentiality as a requirement was deleted from the final version of the bill.<sup>258</sup> The appellate division, having denied an absolute privilege under the Shield Law, proceeded to uphold the mandatory production of outtakes for *in camera* inspection on the basis that the qualified privilege of the first amendment would apply only if the three elements of the *Branzburg* test could not be satisfied.<sup>259</sup>

The majority in *Knight-Ridder* based its construction on the failure of the legislature to change the law in the face of the narrow judicial construction. The appellate division had reasoned that the 1981 amendments did not eliminate the judicially imposed cloak of confidentiality because the legislature did not specifically incorporate a provision that would expressly abolish that requirement.<sup>260</sup> While the third department recognized the

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indicate a contrary intent, terms of general import will ordinarily be given their full significance without limitation.").

253. See *supra* notes 127-130, 133, 139-142, and accompanying text.

254. 99 A.D.2d 161, 472 N.Y.S.2d 310 (1st Dep't 1984). For facts of *Korkala*, see *supra* notes 162-163.

255. *Korkala*, 99 A.D.2d at 165, 472 N.Y.S.2d at 313.

256. N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1988).

257. *Korkala*, 99 A.D.2d at 166, 472 N.Y.S.2d at 313 (relying on *Hennigan v. Buffalo Courier Express Co.*, 85 A.D.2d 924, 446 N.Y.S.2d 767 (4th Dep't 1981), and *Oak Beach Inn Corp. v. Babylon Beacon*, 92 A.D.2d 102, 459 N.Y.S.2d 819 (2d Dep't 1983)).

258. *Id.* at 165-66, 472 N.Y.S.2d at 313. "Although such deletion does not conclusively establish the intent of the legislature, . . . such rejection of a specific statutory provision is a significant consideration when divining legislative intent." *Id.* at 166, 472 N.Y.S.2d at 313.

259. *Id.* at 167-68, 472 N.Y.S.2d at 314. The appellate division could not apply the three-prong *Branzburg* test on the basis of the New York Shield Law since it is not written into the statute. See *supra* note 234. Therefore, *Korkala* had to be decided as a first amendment issue.

260. See *supra* notes 203-205 and accompanying text.

broad language of the recent New York Court of Appeals decision in *Beach v. Shanley*,<sup>261</sup> which stated that "the Shield Law provides a broad protection to journalists without any qualifying language,"<sup>262</sup> the appellate court in *Knight-Ridder* refused to "apply such broad language . . . to abolish the confidentiality requirement that has long been read into the statute by the courts of this State. Such action is more appropriately left to the Legislature."<sup>263</sup> But the legislature's omission of a provision which expressly stated that nonconfidential information should be protected should not be used as the basis for construing the statute as requiring confidentiality; "such deletion does not conclusively establish the intent of the legislature . . . and while preenactment statements properly may be taken into consideration . . . [those statements] are by no means conclusive."<sup>264</sup>

Relying on this omission as a failure of the legislature to speak to the confidentiality requirement is a misinterpretation of legislative history. The wording of the provision was changed because of the desire of its sponsor to propose an absolute law. There was no rejection of any version of the bill by either committee or by the legislature. Neither the legislature, nor any committee turned down any proposal regarding the Shield Law. At no time was there any action of the legislature from which to read legislative intent. The bill memorandum by Assemblyman Sanders, the sponsor, never changed, and accordingly, most supporting memoranda discussed the *absoluteness* of the provision.<sup>265</sup> Even the court of appeals decision asserts that the public policy of the legislature should not be circumscribed by the judiciary's view of what that policy should be.<sup>266</sup> But, according to the dissent,

[t]he majority's holding produces a classic irony. New York State's judiciary, which should be the bastion of protection of this right afforded by the elected representatives of the people of this

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261. 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984).

262. *Id.* at 251, 465 N.E.2d at 310, 476 N.Y.S.2d at 771.

263. *Knight-Ridder Broadcasting v. Greenberg*, 119 A.D.2d 68, 72, 505 N.Y.S.2d 368, 371 (3d Dep't 1986).

264. *Korkala*, 99 A.D.2d at 166, 472 N.Y.S.2d at 313.

265. Telephone interview with Stephen Kaufman, Special Assistant to Assemblyman Sanders (Feb. 8, 1988). See also Sanders Memorandum, *supra* note 116.

266. *Knight-Ridder*, 70 N.Y.2d at 158, 511 N.E.2d at 1119, 518 N.Y.S.2d at 598.

State, instead chills that right by inserting its own confidentiality clause into an unqualified statute. Their holding may be reduced to this syllogism: (1) the lower courts put confidentiality into the statute; (2) the judiciary then says that the Legislature did not take it out; and (3) the judiciary finally declares that the Legislature put it in in the first place.<sup>267</sup>

However, it is evident that the purpose of the legislature was to enact an absolute law.

According to the Bellacosa dissent, the majority has substituted the word "some" for "any," thereby enabling the judiciary to read a qualification into the statute.<sup>268</sup> The word "any" in the statute implies no limitations. Other states construe their statutes without limits on the word "any." In *Grand Forks Herald v. District Court*,<sup>269</sup> the North Dakota Supreme Court found its shield law to be unambiguous and not limited to the disclosure of confidential sources by the words "'any information or the source of any information' obtained by a news gatherer."<sup>270</sup> Imposition of a requirement of confidentiality would be contrary to the intent and wording of the statute.<sup>271</sup> "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."<sup>272</sup> The New York Shield Law, written in similar terms, refers to "any news or the source of any news."<sup>273</sup> It is unlimited and unqualified on its face.

The majority in *Knight-Ridder* also dismissed the first amendment claim on the basis of the *Branzburg* test, finding that the taped interview contained relevant information necessary to a grand jury investigation that was unavailable from other sources.<sup>274</sup> The *Branzburg* decision, however, did not pre-

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267. *Id.* at 161, 511 N.E.2d at 1122, 518 N.Y.S.2d at 601 (Bellacosa, J., dissenting).

268. *Id.* at 161, 511 N.E.2d at 1121, 518 N.Y.S.2d at 600-01.

269. 322 N.W.2d 850 (N.D. 1982).

270. *Id.* at 854 (citing N.D. CENT. CODE § 31-01-06.2 (1976)).

271. *Id.* at 854.

272. *Id.* See also *Austin v. Memphis Pub. Co.*, 655 S.W.2d 146, 150 (Tenn. 1983).

The Tennessee Supreme Court overturned an appellate decision which construed the Shield Law as limiting the phrase "'any information or the source of any information procured for publication or broadcast'" only to circumstances of confidentiality. *Id.* (citing TENN. CODE ANN. § 24-1-208 (1980)).

273. See *supra* note 234.

274. 70 N.Y.2d at 160, 511 N.E.2d at 1121, 518 N.Y.S.2d at 600.

clude a state from enacting its own shield law, nor its courts from deciding its cases on the basis of the state law.<sup>275</sup> The New York Court of Appeals could have quashed the subpoena under section 79-h of the New York Civil Rights Law.

The judiciary has retreated from a trend of recognizing a more expansive approach to the privilege afforded under the statute. The trial courts began this trend between the enactment of the 1981 amendment and the court of appeals decision in *Beach* in 1984, determining that the legislature "never did encumber the plain protections afforded by the statute even in its original enactment."<sup>276</sup> With the *Knight-Ridder* decision, however, the majority has curtailed this more expansive approach. The majority has, in effect, reversed its decision in *Beach*, where the court relied on the plain meaning of the statute and the legislative intent behind the original enactment and subsequent amendments, to hold that "the Shield Law provides a broad protection to journalists without any qualifying language."<sup>277</sup>

## V. Conclusion

The New York Shield Law was intended to be an unambiguous and strong law. Had the legislature wanted to impose limitations on the scope of the journalists' privilege, it could have expressly added qualifications in the language of the statute, as did its counterparts in other states that require either confidentiality or a formulation of the *Branzburg* test.<sup>278</sup> The intent of

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275. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

276. *Knight-Ridder*, 70 N.Y.2d at 165, 511 N.E.2d at 1124, 518 N.Y.S.2d at 603 (Bellacosa, J., dissenting). See, e.g., *People v. Iannacone*, 112 Misc. 2d 1057, 447 N.Y.S.2d 996 (Sup. Ct. N.Y. County 1982) (reporter's motion to quash subpoena for his notes for forthcoming article granted even though interviews were conducted without promise of confidentiality); *Wilkins v. Kalla*, 118 Misc. 2d 34, 459 N.Y.S.2d 985 (Sup. Ct. N.Y. County 1983) (outtakes, notes, and other nonbroadcast materials held absolutely privileged under the broad and pervasive protection of the Shield Law); *CBA Elecs. v. Ellenberg*, 10 Media L. Rep. (BNA) 1095 (N.Y. Civ. Ct. Dec. 9, 1983) (Shield Law provides absolute protection against disclosure for both confidential and nonconfidential information). But cf. *Hennigan v. Buffalo Courier Express Co.*, 85 A.D.2d 924, 446 N.Y.S.2d 767 (4th Dep't 1981) and *People v. Korkala*, 99 A.D.2d 161, 472 N.Y.S.2d 310 (1st Dep't 1984) (appellate division continued to require confidentiality in order to claim the privilege). For a discussion of *Hennigan*, see *supra* notes 154-167 and accompanying text. For a discussion of *Korkala*, see *supra* notes 160-163 and accompanying text.

277. *Beach*, 62 N.Y.2d at 251, 465 N.E.2d at 310, 476 N.Y.S.2d at 771.

278. See *supra* notes 75, 83-99, and accompanying text.

the legislature is clear. "[T]he Nation's principal center of news gathering and dissemination"<sup>279</sup> requires a strong statute that grants its privilege without qualifications. This is what the New York Legislature has given us.

But the judiciary, based on a negative implication, has continued to read a cloak of confidentiality into the privilege.<sup>280</sup> The rules of statutory construction are clear. The statute must be read in light of its plain meaning, before the judiciary attempts to divine legislative intent.<sup>281</sup> Where there is no ambiguity, the statute is to be enforced as written.<sup>282</sup> The legislature has attempted to correct judicial misinterpretation by two prior amendments, each intended to strengthen the Shield Law.<sup>283</sup> Nevertheless, the New York Court of Appeals has failed to follow the lead of the state's lower courts toward a broad interpretation of New York Civil Rights Law section 79-h.<sup>284</sup>

New York, a stronghold of the news media, needs a strong shield law. Perhaps it is time for the legislature to defuse the controversy that has raged over this statute since the time of its enactment. The legislature has only to include a confidentiality requirement or a *Branzburg* test to qualify the privilege in criminal proceedings. It seems, however, that the legislature's persistence in not including these elements should lead the judiciary to the conclusion that the New York Shield Law, by design, grants an absolute privilege. Since the judiciary has not reached this conclusion, it is now time for the legislature to state unequivocally that the privilege extends to both confidential and nonconfidential information. To fail to do so is to abandon the legislature's obligation to safeguard the unfettered rights of a free press.<sup>285</sup>

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279. Governor's Memorandum, *supra* note 109, at 508.

280. See *supra* notes 152-166 and accompanying text.

281. See *supra* note 235.

282. See *supra* note 236.

283. See *supra* notes 116-124 and accompanying text.

284. See *supra* notes 167, 172, 175, and accompanying text.

285. Assemblyman Steven Sanders is currently sponsoring an amendment to the New York Shield Law which will definitively include nonconfidential information within the protection of the statute. In his supporting statement, Assemblyman Sanders avowed that the bill would "reinforce New York's commitment to safeguarding the free channels

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of news communication” and in effect would reverse the *Knight-Ridder* decision. GOVERNOR’S PROGRAM BILL 139 (1988). The proposed language is very specific. Journalists and newscasters would be protected from contempt proceedings “for failing to disclose any news, *whether or not obtained under agreement of confidentiality . . .*” GOVERNOR’S PROGRAM BILL 139 to amend N.Y. CIV. RIGHTS LAW § 79-h(b) (emphasis in original).