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Reporter Privilege: Can Nebraska Pass a Shield Law to Bind the Whole World?

Todd F. Simon
National Law Center, George Washington University

By Todd F. Simon*

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I. INTRODUCTION

Practicing journalists in Nebraska go to sleep at night with the comfort of knowing that confidential sources and confidential information are safe and secure from disclosure—thanks to what may be the strongest and most comprehensive reporter's shield law in the United States.[1] The privilege not to disclose is absolute

* University Teaching Fellow and Masters of Law (LL.M.) candidate, The National Law Center, George Washington University; B.S. 1974, University of Nebraska at Omaha; J.D. 1980 Boston College. Former Assistant Professor of Journalism, Department of Communication, University of Nebraska at Omaha. The author was formerly a reporter, photographer and editor with the Sun Newspapers of Omaha.

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1. Nebraska Free Flow of Information Act, NEB. REV. STAT. §§ 20-144 to -147 (1977). The statute provides:

> **(d) Free Flow of Information Act**
>
> 20-144 The Legislature finds:
>
> (1) That the policy of the State of Nebraska is to insure the free flow of news and other information to the public, and that those who gather, write, or edit information for the public or disseminate information to the public may perform these vital functions only in a free and unfettered atmosphere;
>
> (2) That such persons shall not be inhibited, directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be fully informed;
>
> (3) That compelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest and inhibits the free flow of information to the public;
>
> (4) That there is an urgent need to provide effective measures to halt and prevent this inhibition;
>
> (5) That the obstruction of the free flow of information through any medium of communication to the public affects interstate commerce; and
>
> (6) That [this act] is necessary to insure the free flow of information and to implement the first and fourteenth amendments and

on its face, and its coverage is as broad as the number of judicial and legislative proceedings one might imagine.

The Nebraska Free Flow of Information Act, enacted in 1973, was the Unicameral's response to the United States Supreme Court's invitation to states in *Branzburg v. Hayes*[2] to experiment with granting some type of evidentiary privilege to journalists.[3] In

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Article I, section 8, of the United States Constitution, and the Nebraska Constitution.

20-145 As used in [this act,] unless the context otherwise requires:

(1) Federal or state proceedings shall include any proceeding or investigation before or by any federal or state judicial, legislative, executive, or administrative body;

(2) Medium of communication shall include, but is not limited to, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system;

(3) Information shall include any written, audio, oral or pictorial news or other material;

(4) Published or broadcast information shall mean any information disseminated to the public by the person from whom disclosure is sought;

(5) Unpublished or nonbroadcast information shall include information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and shall include, but not be limited to, all notes, outtakes, photographs, film, tapes, or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published or broadcast information based upon or related to such material has been disseminated;

(6) Processing shall include compiling, storing, transferring, handling, and editing of information; and

(7) Person shall mean any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any state or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

20-146 No person engaged in procuring, gathering, writing, editing or disseminating news or other information to the public shall be required to disclose in any federal or state proceeding:

(1) The source of any published or unpublished, broadcast or nonbroadcast information obtained in the gathering, receiving, or processing of information for any medium of communication to the public, or

(2) Any unpublished or nonbroadcast information obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public.

20-147 [This act] shall be known and may be cited as the Free Flow of Information Act.

See Schroeder, *An Analysis of the Nebraska Privilege Statute (Free Flow of Information Act)*, 7 CREIGHTON L. REV. 329 (1973). Only a handful of state statutes are written in such absolute terms. J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 420 n.23 (1979).

2. 408 U.S. 665 (1972).

3. *Id.* at 706. "There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards . . . ."

Branzburg, the Court specifically narrowed its holding to the issue of a privilege to not testify before a grand jury, stating: "The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the first amendment. We hold that it does not."[4] The Court was not persuaded by arguments that failure to create a first amendment privilege would "chill" the newsgathering process. As in many other areas of communications law,[5] the Court expressly left open the question of what, if any, protection is available to newspeople when called to testify in a trial or legal proceeding other than a grand jury. Issues outside the grand jury context were commended to the state legislatures and lower state and federal courts.[6] As will be seen, legislatures and courts throughout the country took the Court's advice quite literally.

The Nebraska legislature accepted the arguments which were rejected by the Supreme Court and clearly spelled them out in the legislative purpose of the statute.[7] Most significantly, the legislature tied the protections created by the statute to both the federal and state constitutions.[8]

In phrasing Nebraska's statute in absolute terms, the legislature was apparently aware of difficulties that "absolute" statutes have met in a number of other states. Some state courts have read state privilege statutes narrowly, asserting that any privilege is in derogation of the common law precept that all people are required to testify.[9] Other state courts have found that the shield law must yield when it collides sufficiently with a "fundamental" right, such

4. *Id.* at 667.

5. Examples of issues in the communication area where the Supreme Court has deferred to the states include: Chandler v. Florida, 449 U.S. 560 (1981) (states are free to set own rules for broadcast coverage of trials; broadcasting by itself does not offend sixth amendment fair trial rights); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (states are free, within first amendment limits, to set their own standards of proof in libel suits); Miller v. California, 413 U.S. 15 (1973) (states free to set their own obscenity standards within first amendment limits).

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

7. NEB. REV. STAT. § 20-144(1)-(6) (1979). For the text of the legislature's findings, see *supra* note 1.

8. *See* NEB. REV. STAT. § 20-144(6) (1979).

9. *See, e.g.*, Lightman v. State, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973); In re Farber, 78 N.J. 259, 394 A.2d 330 (1978). 8 WIGMORE, EVIDENCE § 2286 (McNaughton rev. ed. 1961) (§ 2286 is most often cited for this position). The low esteem with which the privilege was first met is exemplified by the summary treatment of the privilege in MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 77 at 159 n.44 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK'S].

as the right to a fair trial[10] or the right to maintain one's good reputation.[11] The Nebraska statute, in contrast to the vagueness of similar statutes,[12] is explicit and covers a broader range of persons and information than a majority of other state shield statutes.[13] It is one of a handful of state shield laws that are absolute on their faces.[14] Of those statutes that appear absolute, only Pennsylvania's statute has been determined to be absolute in fact, and that determination may now be open to question.[15] Surprisingly, the Nebraska shield law has not generated a single reported case, and there is no evidence that the statute has been construed by the Nebraska Supreme Court in an unrelated case. The only attempts to require disclosure of confidential sources since the statute was passed in 1973 resulted in almost summary refusal by trial court judges to override the protections clearly given in the statute

10. State v. Sandstrom, 224 Kan. 293, 580 P.2d 1310 (1978) (state has an interest in "fair" prosecutions under criminal statutes); In re Farber, 78 N.J. 259, 394 A.2d 330 (1978); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429 (1974); Zelenka v. State, 83 Wis. 2d 601, 266 N.W.2d 279 (1978) (fair trial rights must be balanced with free press rights).

11. Rancho La Costa v. Penthouse, 165 Cal. Rptr. 347, 106 Cal. App. 3d 646 (1980) (libel); Greenberg v. CBS, Inc., 69 A.D.2d 693, 419 N.Y.S.2d 988 (1979) (libel); Taylor v. Miskovsky, 7 Media L. Rep. (BNA) 2408 (Okla. 1981) (shield falls if disclosure inescapably necessary); Downing v. Monitor Publishing Co., 120 N.H. 393, 415 A.2d 683 (1980) (shield recognized as a constitutional matter, although not applicable in a libel case).

12. The variety of coverages in the different states' shield laws is a source of continuing frustration to those who are in favor of a confidential source privilege. *See, e.g.*, J. BARRON & C. DIENES, *supra* note 1, at 419; J. GORA, THE RIGHTS OF REPORTERS 49-62 (1974); H. NELSON & D. TEETER, LAW OF MASS COMMUNICATIONS 372 (4th ed. 1982).

13. The majority of statutes limit protection to persons who are either employed as journalists or who have contracts to perform reportorial work. *See, e.g.*, New York v. LeGrand, 67 A.D.2d 446, 415 N.Y.S.2d 252 (1979) (non-fiction book author not a journalist under state shield law); Application of Dack, 101 Misc. 2d 490, 421 N.Y.S.2d 775 (N.Y. Sup. Ct. 1979). The statutes are collected at note 118 *infra*.

14. KY. REV. STAT. ANN. § 421.100 (Baldwin 1969) (limited in Branzburg v. Pound, 461 S.W.2d 345 (Ky. Ct. App. 1971)); MD. CTS. & JUD. PROC. ANN. § 9-112 (1980); PA. STAT. ANN. tit. 28 § 330 (Purdon Cum. Supp. 1979) (confirmed absolute in In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963)).

15. In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963). The United States Court of Appeals for the Third Circuit, which embraces Pennsylvania, has been active in the privilege issue on the federal level; its rulings may have an effect on Pennsylvania law. *See infra*, note 162 and accompanying text. Pennsylvania itself may be reconsidering its position in *Taylor*. *See*, Curran v. Philadelphia Newspapers, — Pa. —, 439 A.2d 652 (1981) (court employed constitutional rather than statutory analysis of source disclosure issue).

Maressa v. New Jersey Monthly, 89 N.J. 176, 445 A.2d 376 (1982), decided while this article was in preparation, holds that New Jersey's "absolute" shield law is absolute in the absence of a countervailing right of constitutional stature. *See infra* note 135 and accompanying text.

itself.[16] The absence of cases may perhaps be attributed to the strong shield afforded journalists, to the caution of Nebraska journalists when considering the use of confidential sources,[17] or to a combination of the two. Thus Nebraska has been spared the type of melodramatic confrontations between the press and the judiciary that have occurred in other states when disclosure of confidential sources is at issue.[18]

In view of the absence of cases and the broad legislative intent, the Nebraska shield law may be considered a gauge of the extent of freedom from disclosure that journalists enjoy in the nation as a whole. This Article examines the extent of that freedom. If being absolute on its face were sufficient, an examination of the Ne-

16. *Judge Refuses to Make Reporter Give Sources*, Omaha World-Herald, April 1, 1981, at 2, col. 1; *Trial Set for Nightspot's Policy*, Omaha World-Herald, April 1, 1982, at 28, col. 1. In the first instance, a World-Herald reporter was the subject of a request by a criminal defendant for disclosure of confidential sources in Douglas County District Court. Judge John E. Clark, after a facial inspection of the Nebraska Shield Law, denied the request. The second story arose from a report in the Sun Newspapers of Omaha that dealt with admission of minors to a popular local lounge. Suspecting that the reporter had observed illegal behavior, the Omaha city prosecutor sought to compel testimony from the reporter in the context of an action for an injunction by the lounge owner. Douglas County District Court Judge James Buckley, expressing "reluctance about the need for a reporter's testimony because of the provisions of the Nebraska Shield Law," apparently convinced the city to drop its request. There was no appeal in the first case. Appeal seemed unlikely in the second case.

17. Three of Nebraska's highest circulation newspapers, for example, have strict standards for allowing the use of anonymous or confidential sources in news articles. Howe, *Your Newspaper*, Omaha World-Herald, Nov. 2, 1980, at 2, col. 1 (anonymous sources used only when there is no other way to obtain story, and story is of paramount public interest). The Sun Newspapers of Omaha has no written policy, but reporters "know they will have a hard time using it (anonymity) in any case." The Sun applies criteria essentially the same as that of the Omaha World-Herald. Interview with Thomas Giitter, Managing Editor, Sun Newspapers of Omaha (March 22, 1982). The Lincoln Star and Journal has a similar unwritten, but strictly enforced, policy. Telephone interview with Gary Seacrest, Vice President, Journal-Star Company (March 23, 1982). The news industry is aware of the unusually high risks involved in promising confidentiality. It is often true that potential sources operate from selfish rather than altruistic reasons. The use of anonymous sources also often affects a reporter's credibility. *See* H. NELSON & D. TEETER, *supra* note 12 at 382; H. SCHULTE, REPORTING PUBLIC AFFAIRS 406 (1981); T. SIMON, COMMUNICATION LAW SUPPLEMENT 28 (1981).

18. Not infrequently, judges see a refusal to testify as an affront to the authority of the court. Petitioner's Opening Brief at 11, Marks v. Vehlow, No. 13938 (Idaho 1981). The usual punishment used to compel testimony is a contempt citation, either in the form of a fine or jailing. *See* Annot. 99 A.L.R.3d 37, 49-52 (1980). A recent trend unsettling journalists is a judicially-created presumption in libel suits that refusal to identify sources means that no sources exist. *See* DeRoburt v. Gannett, 507 F. Supp. 880 (D. Hawaii 1981).

braska statute would be unnecessary. However, developments in other parts of the country preclude the assumption that the privilege will automatically apply when a reporter is called to testify.[19] To determine whether the Nebraska statute may bind the whole world it is necessary to first review the philosophical and practical foundations for the creation of the privilege and then examine the privilege as it has been construed in a variety of situations.

II. ARGUMENTS FOR AND AGAINST CREATING THE PRIVILEGE

The arguments for creating an evidentiary privilege that protects the newsgathering process have been outlined at length elsewhere.[20] The notion that journalists should not be required to disclose confidential sources of information has existed for a long time, but only recently have the arguments been developed in a legal as well as reportorial context.

One aspect of the privilege issue that must be noted is that journalists have been promising sources anonymity, as a matter of normal newsgathering procedure, since the founding of the republic.[21] Journalists argue that granting confidentiality is essential to their newsgathering duties. Numerous codes of the profession maintain that the journalist's promise of anonymity is a sacred vow.[22] Many reporters believe that forcing disclosure of sources would "chill" the newsgathering process. Maryland was the first state to recognize the chill, passing a shield law in 1896.[23] The press also at various times has argued that it is entitled to a common law privilege protecting confidential sources.[24]

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19. *See infra* sections III, IV, and V.
20. Note, *The Constitutional Argument for Newsmen Concealing Their Sources*, 80 YALE L.J. 317 (1970); Comment, *Branzburg Revisited: The Continuing Search for a Testimonial Privilege for Newsmen*, 11 TULSA L.J. 258 (1975); Comment, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 U.C.L.A. L. REV. 160 (1976).
21. Gordon, *The Confidences Newsmen Must Keep*, 10 COLUM. JOURNALISM REV. 15, 17 (1971).
22. The Code of Ethics of the Society of Professional Journalists § III, 5, *reprinted in* B. WESTLEY, NEWS EDITING 385 (3d ed. 1980); Ethical Principles of the American Society of Newspaper Editors, Article VI, *reprinted in* J. HULTENG, PLAYING IT STRAIGHT 51, 64 (1981). "If the stakes are high enough, the risks must be taken. But they should never be taken lightly." *Id.* at 65.
23. 1896 MD. LAWS 249. The statute is discussed in W. FRANCOIS, MASS MEDIA LAW AND REGULATION 405 (3d ed. 1982).
24. Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) (analyzes the claim of a common law confidential source privilege in the context of the Federal Rules of Evidence). *See also* Senear v. Daily Journal-American, 97 Wash. 2d 148, 641 P.2d 1180 (1982) (privilege recognized both on common law and constitutional grounds).

The first modern twist in the privilege argument was the contention by the press that confidential sources were, or should be, protected by the first amendment. The press urged adoption of a first amendment interpretation which would view the press as agents of the public, *i.e.*, the disseminator of information required under the Constitution to ensure enlightened citizen participation in our democracy.[25] In the 1958 case of *Garland v. Torre*,[26] the Second Circuit, in an opinion by then Circuit Judge Potter Stewart, recognized a qualified confidentiality privilege under the first amendment. The idea that the press acts as an agent of the public has received explicit approval by and recognition from the Supreme Court in recent years.[27]

A second modern argument regarding the privilege is that the first amendment confers a special status on the press. In other words, the institutional press has rights that individual citizens do not. It is argued that the special status is needed for the press to fulfill its role as agent of the public. Although no court has explicity held that the press enjoys a special status, a number of cases have noted with approval the special functions of the press.[28] The 1974 case of *Miami Herald v. Tornillo*[29] has been interpreted by some as creating a special status for the press.[30]

At the heart of the privilege issue is the practical use of confidential sources by journalists. The worrisome "chill," now elevated to constitutional status within the profession, takes the form of sources "drying up." In other words, people who would channel news to journalists if they were able to rely on confidentiality will

25. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974). The first amendment position is supported in Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, and Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977). The position is critiqued in Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position"*, 28 HASTINGS L.J. 761 (1977), and Barron, *The Rise and Fall of a Doctrine of Editorial Privilege: Reflections on Herbert v. Lando*, 47 GEO. WASH. L. REV. 1002 (1979). The Supreme Court has strengthened press privilege claims by recognizing a right to receive information. The press contends that the right to receive information on the part of the public requires a right to obtain it on the part of the press. Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Stanley v. Georgia, 394 U.S. 557, 564 (1969).

26. 259 F.2d 545 (2d Cir. 1958).

27. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980).

28. *Id.* (access to criminal trials); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (access to public facilities); New York Times v. Sullivan, 376 U.S. 254 (1964) (libel standards).

29. 418 U.S. 241 (1974).

30. Muir v. Alabama Educational Television Comm'n, 656 F.2d 1012 (5th Cir. 1981); Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1977).

refuse to channel news if their names or the information imparted become public knowledge. There is considerable evidence that journalists make extensive use of confidential sources nationwide,[31] but there is little evidence that occasional forced disclosure dries up sources.[32] Journalists are fond of comparing the reporter's privilege to other common law or statutory privileges. The essential similarity among the privileges is the assertion that they are needed to foster a relationship in which the benefits to society override the possible loss of testimony.[33] It is likely that comparisons to the professional privileges, notably the attorney-client privilege, are also motivated by journalists' increased concern over being part of a profession.[34] A reporter's privilege is yet another mark of a special status in this sense.

Arguments against creating the privilege center on the traditional precept that the law is entitled to every person's testimony.[35] Normally, only a clearly stated constitutional or statutory policy of privilege upsets the presumption that no one is privileged.[36] This approach leaves room for the states, or even Con-

31. Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969).

32. This was noted by the Supreme Court in Branzburg v. Hayes, 408 U.S. 665, 693-94 (1972). One veteran investigative reporter suggests that reporters should use confidential sources primarily as a means of getting additional information from sources of record. Mollenhoff, *You'd Better Know What You're Getting Into*, QUILL, March 1979, at 27.

33. MCCORMICK'S, *supra* note 9, at §§ 72, 77.

34. *Id.* at §§ 87, 88, 98, 99; Singletary, *Commentary: Are Journalists "Professionals"?*, 3 NEWSPAPER RESEARCH J. 75 (1982) (review of sociological research on what factors constitute professionalism; author concludes that journalists do not meet the standard criteria). The privileges most often compared are the lawyer-client and physician-patient privileges. All three require establishing a "confidential" relationship. Often the relationship is explicitly based on confidentiality. MCCORMICK'S, *supra* note 9, at §§ 88, 99. A major difference is that the two traditional privileges are usually said to belong to the client or patient, *id.* at §§ 92, 102, while the reporter's privilege is normally thought to belong to the reporter. *See* Comment, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 U.C.L.A. L. REV. 160, 168 (1976); New York v. LeGrand, 67 A.D.2d 446, 415 N.Y.S.2d 252 (1979).

35. Branzburg v. Hayes, 408 U.S. 665, 682 (1972); *see supra* note 9.

36. In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court in considering an analogous claim of executive privilege not to disclose materials sought by subpoena ordered disclosure. Although the privilege sought was rooted in the Constitution (a proposition tacitly accepted in *Branzburg* concerning a reporter's privilege), the Court found that President Nixon's general claim could not take precedence over a "demonstrated, specific need for evidence in a pending *criminal* trial." *Id.* at 711, 713 (emphasis added). Later, in Nixon v. Administrator of Gen. Servs. Admin., 433 U.S. 425 (1977), the Court upheld a subsequent statute that granted "privileged" status to some of the very same materials.

gress, to adopt formal shield statutes.

The second argument against the privilege, often voiced by journalists themselves, is that the privilege must be uniform, national in scope, and absolute if it is to work. Absent those characteristics, many feel the privilege would be of little value.[37]

A third argument against the privilege is that it resembles licensing—a first amendment evil so frightful that many journalists are willing to forego a privilege to avoid it.[38] Even if the privilege does not amount to licensing, it presents the tricky question of who is a journalist for purposes of a reporter's shield law.[39]

Finally, it has been argued that there is an analytic difference

37. Comment, *supra* note 34, at 186.

38. Henderson, *Reporting Licensing*, Freedom of Information Center Report No. 440 (June 1981).

39. There has been no reported case in which an ordinary citizen was denied protection of the shield because he was not a recognized member of the press; such a situation could create an interesting equal protection claim.

The question of coverage has been addressed on purely statutory terms. If a statute does not explicitly protect a certain individual because that person is outside the class of persons protected, the courts have reasoned that the classification comports with public policy and is enforceable. In Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964), the state shield law protected newspapers but not magazines, and the delineation was upheld. The New York Supreme Court upheld that state's distinction between professional journalists and newscasters, who qualify for protection, and independent book authors, who do not. In re Haden-Guest, 5 Media L. Rep. (BNA) 2361 (N.Y. Sup. Ct. 1980). There is no court case that considers possible equal protection issues concerning the confidential source or information privilege. However, the question was addressed by the Oregon Attorney General in In re Attorney General, 5 Media L. Rep. 1238 (BNA) (1979). The Attorney General's opinion assumed that the creation of a special class consisting of journalists did not offend equal protection standards, and was justified on the basis of minimum rationality. In first amendment equal protection cases, however, the Supreme Court has demanded that the state show a compelling state interest, Police Department of Chicago v. Mosely, 408 U.S. 92 (1972), and if the issue were raised it would likely be on the argument that a shield statute conferred greater free expression rights on one class of citizens than on others. The notion of first amendment equal protection as a separate category of equal protection analysis is well established, J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 675 (1978). The Supreme Court has shown increasing interest in equalizing free expression rights. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). The *Bellotti* case stressed that a state could not establish rules limiting expression by corporations absent a compelling interest, which was not shown. Chief Justice Burger, who provided the crucial fifth vote, wrote a separate concurrence to stress what he saw as dangers in giving privileges to media corporations but not to other corporations. *Id.* at 795. An appeal anticipated from Burnett v. National Enquirer, 7 Media L. Rep. (BNA) 1321 (Cal. Super. Ct. 1981), concerns an equal protection claim in a libel context because California law distinguishes between newspapers and magazines when determining liability in libel cases. The trial court depended upon Werner v. Southern Cal. Newspapers, 35 Cal. 2d 121, 206 P.2d 952 (1950) for determining that no discrimination

between a privilege for reporters and the traditional privileges. The traditional privileges are meant to protect a professional or private relationship between two individuals; the privilege itself belongs to each.[40] In contrast, several courts have held that the confidential source privilege belongs to the reporter alone.[41] A reporter, therefore, may freely choose to break the promise of confidentiality that has been given, while an attorney or physician may not.[42] This result appears to reflect the "agent of the public" approach to first amendment questions.[43] Since the privilege exists for the purpose of protecting newsgathering, and the reporter is the agent of the public in disseminating news, it is argued that the rights of the public as reflected in the reporter are paramount;[44] hence, rights of sources do not exist or are negligible. The confidential source privilege presents a stark contrast to the traditional privileges. In the traditional privilege analysis, the relationship fostered by the privilege is believed to serve a private rather than

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had occurred. The *Werner* case, however, predates almost all the Supreme Court first amendment equal protection cases.

Reporters' concerns over licensing in the past have primarily been concerned with obtaining credentials such as press passes that provide special access to newsworthy people and places. Access by license has become an issue in litigation only recently, but its frequency is increasing. Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977), held that the Secret Service must establish neutral guidelines when deciding who will obtain White House press passes. A more recent case, Cable News Network v. ABC, 518 F. Supp. 1238 (N.D. Ga. 1981), held that the White House must establish non-discriminatory rules for allowing access to broadcasters. The press is troubled by occasional cases such as Los Angeles Free Press, Inc. v. City of Los Angeles, 9 Cal. App. 3d 448, 88 Cal. Rptr. 605 (1970), *cert. denied*, 401 U.S. 982 (1971), where a city disallowed press passes for an alternative newspaper because it was not like most other newspapers. For a general discussion of reporter licensing issues see, Henderson, *supra* note 38.

40. *See supra* note 34.
41. *See supra* note 34. The United States Court of Appeals for the Third Circuit went to great lengths to emphasize the "personal to the reporter" nature of the privilege in United States v. Criden, 633 F.2d 346 (3d Cir. 1980).
42. McCORMICK'S, *supra* note 9, at §§ 88, 99.
43. In Anderson v. Nixon, 444 F. Supp. 1195 (D.D.C. 1978), for example, a reporter's claim of privilege in a case where he was the plaintiff seeking civil damages was not recognized, primarily because the journalist was pursuing his own interests, not acting as an agent of the public. The agent of the public theory was accepted by the court in Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975), and is adopted explicitly in NEB. REV. STAT. § 20-144(2) (1979).
44. The paramount public interest in protecting confidential information, and thereby the free flow of information to the public, was explicitly recognized in Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981). The Nebraska shield law makes no mention of the rights of sources. It can be inferred that the legislature meant for the public interest to be met through journalists alone. It may also be inferred that the privilege conferred is personal to the reporter. *See* United States v. Criden, 633 F.2d 346 (3d Cir. 1980).

public good—frank discussion between attorney and client—which is superior to any rights society may have to the information. The reporters' privilege, however, creates a two-party relationship that is asserted to be for the good of society itself. Society fosters the confidential relationship not to protect the interaction of sources and reporters, but to ensure a freer flow of information to the public. Paradoxically, it is argued that it is necessary to restrict the flow of some information (identities of anonymous sources) to protect the flow of other information.[45] However, it may be assumed that the privilege serves the public both in the press and in the courtroom. Thus the type of protection sought in the confidential source privilege differs markedly from that in the traditional privileges. This difference has moved one newspaper defendant in a disclosure case to argue that it is not really a privilege in the usual sense at all.[46]

The issue of creating a confidential source privilege involves questions of both judicial interpretation and public policy. The public has a surprisingly high awareness of how and why reporters use confidential sources and strongly appears to support the creation of such a privilege.[47] That policy preference is reflected in the statutes of a majority of states.[48] At the same time the public was being convinced of the appropriateness of the privilege, the courts, both state and federal, were considering the question from the per-

45. Branzburg v. Hayes, 408 U.S. 665, 693 (1972). This, of course, is the rationale for the traditional privileges as well. *See* MCCORMICK'S, *supra* note 9, at §§ 88, 99. The key difference in the confidential source context is that the ultimate beneficiary—the news-consuming public—is not a party to the confidentiality agreement.

46. Petitioner's Opening Brief at 24, Marks v. Vehlow, No. 13938 (Idaho 1981): "The 'privilege' label is inappropriate and misleading. Instead, the issue of whether a newsperson can be compelled to reveal confidential sources and other information . . . involves a *weighing* of the competing interests . . . to determine which interest must yield in a particular case."

47. In a survey of 1,000 citizens, forty-seven percent felt a reporter should not be required to disclose sources even if a criminal might go free, while only thirty-six percent supported disclosure in such a case. PUBLIC AGENDA FOUNDATION, THE SPEAKER AND THE LISTENER: A PUBLIC PERSPECTIVE ON FREEDOM OF EXPRESSION, Technical Appendix, Table 32 (1980). It is safe to assume a higher approval rate in cases without a criminal issue. Journalists are still attempting to assess the negative impact of publicity concerning the Janet Cooke incident. Cooke, a reporter for the Washington Post, was awarded a 1981 Pulitzer Prize for "Jimmy's World," the story of an eight-year-old heroin addict, based on anonymous sources. It was later disclosed that Cooke had created the sources and had also created Jimmy. Mollenhoff, *A Lack of Clear Standards for Sound Corroboration*, Bulletin of the American Society of Newspaper Editors, 34 (May-June 1981), is one of the more reasoned responses to the Janet Cooke affair.

48. *See infra* notes 118-21 and accompanying text.

spective of their traditional role as protectors of freedom of the press.[49]

III. FEDERAL CONSTITUTIONAL BASIS FOR SOURCE CONFIDENTIALITY

The battle to create a confidential source privilege has mainly been played out on a constitutional stage. The press is convinced that nothing less than a privilege rooted in the federal Constitution will provide the needed protection.[50] A clearly stated privilege based on the Constitution would avoid the complexities of varied state statutes under the supremacy clause.[51] The Nebraska statute recognizes the press's constitutional argument by noting that the law "implements" the first amendment.[52] The question is not that simple, however, since the bulk of first amendment interpretation in this area has been by the federal judiciary.

Today there is unquestionably a federal constitutional privilege for journalists to refuse to reveal confidential sources.[53] It is a

49. An excellent example of a case where the court showed particular concern for its protective role is Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977), *cert. denied*, 465 U.S. 905 (1978). For a general discussion of the role of the judiciary as primary protector of expression rights, see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 11-14 (1970).

50. Huffman, Kelley & Trauth, *Newsperson's Privilege: Its Present Constitutional Status*, 1981 NEWSPAPER RESEARCH J. 42, 48: "Each succeeding case at the Circuit Court level has been more liberal in granting journalists' claims to a testimonial privilege. If this line of reasoning continues in the federal courts, it would obviate the need for action by Congress in enacting a federal 'shield law,' . . . ."; Guest & Stanzler, *supra* note 31.

51. U.S. CONST. art. VI, cl. 2. The effect of the supremacy clause has received little attention in the cases and scholarship in the reporter privilege area. It is generally clear that the Supreme Court may review a state court decision when there is a federal question. *See* C. WRIGHT, FEDERAL COURTS § 107 (3d ed. 1976). It is unclear what effect a federal constitutional ruling by a circuit court has on states within the circuit. On appeal, cases in federal court often present a dazzling mixture of state and federal questions. *See infra* note 159 and accompanying text.

52. NEB. REV. STAT. § 20-144(6) (1979).

53. Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981);Bruno & Stillman v. Globe Newspaper, 633 F.2d 583 (1st Cir. 1980) (qualified privilege applied in diversity libel case); United States v. Criden, 633 F.2d 346 (3d Cir. 1980) (privilege applied based on federal common law and constitutional philosophy); Miller v. Transamerican Press, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980) (privilege applies in diversity libel case); United States v. Steelhammer, 561 F.2d 539 (4th Cir. 1977) (nature of protection available uncertain); Silkwood v. Kerr-McGee, 563 F.2d 433 (10th Cir. 1977); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); Baker v. F&F Inv., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (qualified privilege applied to non-party reporter in civil case); United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982). Each of the cases is based to some extent on the *Branzburg* decision.

qualified privilege, however, and may be understood only by looking at the privilege in the context of several types of cases.

The only Supreme Court case on the question is *Branzburg v. Hayes*.[54] In that case, the Court considered the narrow question of the obligation of reporters to respond to grand jury subpoenas as other citizens do.[55] The Court held that reporters have the same obligation to respond as do ordinary citizens.[56] It is crucial when considering *Branzburg* to remember that the Court was weighing the function of grand juries against the function of the press. Thus two institutions, each with constitutionally protected functions,[57] were pitted against one another.

The *Branzburg* case generated separate opinions which are worthy of note. Justice Powell wrote a separate concurring opinion that stressed the rights of the press to resist subpoenas that were issued only to harass the press or that were excessively burdensome. Justice Powell appeared to accept the argument for a qualified privilege, but simply did not see the facts to support application of the privilege in *Branzburg*.[58] Many judges and commentators have read Justice Powell's opinion as suggesting that an actual majority of the court recognized a qualified privilege.[59]

Justice Stewart dissented in *Branzburg*,[60] amplifying the opinion he earlier expressed in *Garland v. Torre*.[61] In *Torre*, Justice Stewart found that the reporter's qualified privilege was overridden because the information sought went to the "heart of the claim," which simply meant that the availability of the information would make the difference between winning or losing the case.[62] In *Branzburg*, Justice Stewart proposed a three-part test to be used when the government sought to compel disclosure from a reporter. He stated:

> [I] would hold that the government must (1) show that there is probable

54. 408 U.S. 665 (1972).
55. *Id.* at 667.
56. *Id.* at 682.
57. Grand juries are provided for in the fifth amendment of the United States Constitution, which provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend V.
58. 408 U.S. at 709-10.
59. Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Bruno & Stillman v. Globe Newspaper, 633 F.2d 583, 665 (1st Cir. 1980); Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980); Baker v. F&F Inv., 470 F.2d 778 (2d Cir. 1972). *See generally* J. BARRON & C. DIENES, *supra* note 1, at 435.
60. 408 U.S. at 725-52.
61. 259 F.2d 545 (2d Cir. 1958).
62. *Id.* at 549; New Hampshire v. Siel, — N.H. —, 444 A.2d 499, 503 (1982) (information sought by criminal defendant must be likely to affect the verdict).

> cause to believe that the newsman has information which 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.[63]

The trio of tests—relevance, alternative means, compelling interest—have become the basis for decisions in many of the cases that followed *Branzburg*.[64] The relevance requirement is simply a recognition that even the laws of evidence prevent a wholly irrelevant inquiry; thus it breaks no new ground. The alternative means requirement bears a remarkable similarity to the Court's approaches in the prejudicial publicity and open courtroom cases.[65] It stands for the elementary first amendment principle that protected speech or press activity may be restrained only as a last resort.[66] The most ambiguous part of the test is that of compelling interest. It is not clear if the compelling interest is the same as that the Court requires when it would allow a court to issue a gag order,[67]

63. 408 U.S. at 743.

64. Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); United States v. Criden, 633 F.2d 346 (3d Cir. 1980); Bruno & Stillman v. Globe Newspaper, 633 F.2d 583 (1st Cir. 1980); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973); Baker v. F&F Inv., 470 F.2d 778 (2d Cir. 1972); United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982); Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429 (1974).

65. In cases where free press rights and fair trial rights are both at issue, the Supreme Court has consistently held that trial courts must exhaust all alternatives before taking any direct actions restricting the press. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (courtroom may be closed to press only after alternatives exhausted on evidence of compelling interest); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (court may issue gag order on press only in face of clear and present danger to a fair trial for defendant).

66. The Burger Court has often used a clear and present danger type of analysis in press cases. The Court's current understanding of clear and present danger is found in Brandenburg v. Ohio, 395 U.S. 444 (1969), where the Court held that the state could not act to restrain speech until there was a palpable immediate likelihood of violence. The interest that may on occasion override first amendment activity in such a case is the interest in preventing domestic chaos. *See generally* T. EMERSON, *supra* note 49, at 325, 461-62. Justice Powell's concurring opinion in *Branzburg* may imply application of such a test. 408 U.S. at 709-10 (Powell, J., concurring).

67. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). The notion of compelling interest as it is discussed and applied in reporter privilege issues seems to be closely related to the compelling interest tests applied when government allegedly infringes on the exercise of what are considered "fundamental" rights. *See generally* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classification*, 62 GEO. L.J. 1071 (1974). The difference is that in a typical equal protection case the court is determining the validity of legislative classifications against constitutional rights, while in the privilege area the courts, especially federal courts, are balancing competing constitutional rights. *See infra* note 186 and accompanying text.

close its doors,[68] or allow the government to issue a prior restraint on publication;[69] but some similarity may be presumed. As will be discussed, the requirement of compelling interest is, in essence, a refinement of Justice Stewart's "heart of the claim" approach.[70] All three parts of the test must be met. Once met, they prove something quite like a clear and present danger. The danger is that a compelling interest may be defeated. It is clear because it is relevant. It is present because all alternative means have been exhausted.[71] In the *Branzburg* case itself, the compelling interest was society's interest in effective law enforcement, as expressed through the fifth amendment.

Reporters are less likely to be called to testify before grand juries than they are to be called to testify during a trial or during pretrial proceedings. The majority in *Branzburg* deliberately avoided considering the question of privilege in these situations, apparently content to let the lower courts outline the solution. The bulk of the reported cases in the lower courts has been in the trial context, and the best known of those cases involved criminal trials.

In re Farber[72] is the most famous of the criminal cases in which a reporter was called to testify. Reporter Myron Farber of the *New York Times* became a cause célèbre when he refused to reveal the sources of information for stories that eventually led to a murder prosecution. Farber relied primarily on the first amendment but also relied on the New Jersey shield law, which was absolute on its face. The New Jersey Supreme Court read *Branzburg* as refusing to create even a qualified privilege,[73] but it did not rest its decision on that interpretation. Rather, the key factor was that the defendant seeking the disclosure was attempting to assure his sixth amendment right to a fair trial. The court found that the fair trial right was sufficiently compelling to override the state shield law on the ground that the statute must bow before a constitutional com-

68. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).

69. New York Times v. United States, 403 U.S. 713 (1971) (prior restraint on publication disallowed; apparently only clear and present danger to national security would justify such a restraint).

70. The "heart" in heart of the claim has never been given substantive definition. Justice Stewart's dissent in Branzburg v. Hayes equates "compelling and overriding interest" with heart of the claim, but neither defines nor gives examples of what constitutes a compelling interest. 408 U.S. at 743 n.33.

71. In Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), danger of an unfair trial due to publicity only becomes a *present* danger because the exhaustion of alternative means makes it so. *Accord*, In re Pulitzer Publishing, 635 F.2d 676 (8th Cir. 1980) (closure of voir dire by trial judge reversed because of factors not considered before closure order; closure invalid absent written record by trial judge showing exhaustion of alternatives).

72. 78 N.J. 259, 394 A.2d 330 (1978).

73. *Id.* at 266, 394 A.2d at 333.

mand. The fair trial right was also found to be sufficiently compelling to override first amendment interests. A clear conclusion from *Farber* is that the right to a fair trial—a specific constitutional right that works in the favor of an individual—meets Justice Stewart's compelling interest test.[74]

In *United States v. Criden*,[75] the Third Circuit applied reasoning very similar to that used in *Farber*. However, the Third Circuit had already accepted the qualified reporter's privilege as a matter of federal common law in *Riley v. City of Chester*,[76] adopting essentially the same three-part test as proposed by Justice Stewart. In *Criden*, the court found that the three-part test was met and grounded its order requiring the reporter to testify on the fifth and sixth amendments.

A rule has developed in criminal cases in which a reporter is called to testify that the reporter cannot be compelled to reveal sources until it has been shown that the reporter's information is *essential* to a fair trial. At that point, the criminal defendant's due process rights to a fair trial take precedence.[77] Although it is usually the criminal defendants who seek disclosure of sources in pursuit of a fair trial, on occasion state prosecutors seek disclosure to aid in either bringing or prosecuting actions. Generally, the courts have been amenable to press claims that they should not be made agents of law enforcement agencies.[78] In extreme cases, however, the courts have required disclosure of confidential sources to aid in solving or punishing crimes.[79] The compelling need here is not

74. The New Jersey Supreme Court appears to base its decision on what it read as a refusal to create a testimonial privilege in *Branzburg*. The court's extensive sixth amendment analysis, however, indicates it was uncertain of its reading of *Branzburg*. Rather, it appears that the court found the fair trial safeguards to be an interest as compelling as the constitutional function of the grand jury was in *Branzburg*.

75. 633 F.2d 346 (3d Cir. 1980).

76. 612 F.2d 708 (3d Cir. 1979).

77. Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429 (1974).

78. In the wake of what journalists felt was an overzealous use of subpoenas by the Justice Department, the Attorney General in 1970 issued guidelines regulating issuance of subpoenas for law enforcement purposes. *See* 28 C.F.R. § 50.10 (1977). An example of a case where the court declined to "enlist" reporters in law enforcement is United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982) (federal officials seeking disclosure foreclosed on the basis of constitutional privilege and 28 C.F.R. § 50.10 (1977)). The Justice Department guidelines were developed in response to complaints from the press that the government, through the use of subpoenas, was attempting to make newspeople partners in law enforcement. W. FRANCOIS, *supra* note 23, at 400-02.

79. In re Corsetti, 7 Media L. Rep. (BNA) 1084 (Mass. Super. Ct. 1981) (reporter had written article in which confidential source confessed to murder); Massachusetts v. McDonald, 6 Media L. Rep. (BNA) 2230 (Mass. Super. Ct. 1980) (confidential source was eyewitness to a murder and was only eyewitness known to exist); State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971) (privilege

grounded on any specific constitutional right. Rather, it is grounded on the basic right of society to maintain and protect itself and its citizens.[80]

The press privilege to protect sources has received its strongest interpretation in civil cases where a reporter is called upon as a third party witness. In the majority of civil cases, a purely private dispute is being settled, and few matters of constitutional right or compelling need in the *Farber* sense will be at issue. In *Baker v. F&F Investment*,[81] the Second Circuit relied explicitly on the argument that a reporter should not be called to aid in a private dispute. In *Baker*, a group of plaintiffs had brought a civil action alleging denial of civil rights due to racial discrimination by the defendant. Alfred Balk, a journalist, had written articles on the events that led to the lawsuit, relying extensively on anonymous sources. The plaintiffs filed a motion to compel discovery of Balk's sources. In considering the motion to compel discovery, the Second Circuit in *Baker* limited the holding of *Branzburg v. Hayes*[82] to its grand jury context and at the same time erected a nearly absolute privilege for non-party reporters in civil cases.[83] In addition, the court distinguished *Garland v. Torre*,[84] where the reporter was the defendant.[85] *Torre* had some effect upon the court, however, because Judge Kaufman wrote that the three-part test had been satisfied in *Torre*, while the test was not satisfied in *Baker*.[86]

Baker may be contrasted with the case of *Riley v. City of Chester*.[87] Although the Third Circuit reached an identical result, it employed a different analysis. In *Riley*, the court noted Pennsylvania's strong public policy favoring confidentiality as expressed in the state shield law,[88] but reached its result by applying federal common law rather than conflicts or constitutional analy-

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overridden where confidential source was member of group that had bombed a state university building, killing an employee). An argument that the compelling interest is the safeguarding against domestic chaos might be made. *See* discussion at *supra* note 69.

80. Such an argument was accepted by the court to justify restraint of a publication on security grounds in United States v. The Progressive, 467 F. Supp. 990 (W.D. Wis. 1979). This aspect of first amendment analysis is often explained under the notion that the amendment did not create a suicide pact. The "suicide pact" analysis is perhaps given its best demonstration by Justice Jackson dissenting in Terminiello v. Chicago, 337 U.S. 1 (1949).
81. 470 F.2d 778 (2d Cir. 1972).
82. 408 U.S. 665 (1972).
83. 470 F.2d at 784-85.
84. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). *See supra* note 26 and accompanying text.
85. 470 F.2d at 784.
86. *Id.* at 783-84.
87. 612 F.2d 708 (3d Cir. 1979).
88. *Id.* at 715.

sis.[89] The court upheld confidentiality despite the fact that the plaintiff in *Riley* was seeking to vindicate a constitutional right to participate in a public election.[90] In *Baker*, the court had found no compelling interest to justify disclosure; in *Riley*, the court saw a compelling interest but held that it was not ripe.[91] The *Baker* court found that the proffered proof was inadequate to meet the three-part test, while the *Riley* court found that more proof of lack of alternatives was needed. Although using federal common law rather than the Constitution as the source of the privilege applied, the *Riley* opinion relied upon the same three-part test analysis. Together, these two cases have set the parameters for decisions on confidential source issues in federal courts by the use of either a constitutional or evidentiary approach. The approach chosen, despite the applicability of the same three-part test, may make a difference in the possible result.[92]

The *Baker* case, perhaps because it was decided earliest, has been quite influential among other federal courts when the same type of issue has been presented.[93] Although these courts have created qualified rather than absolute privileges, there is no reported case in which a purely civil claim provided the type of compelling interest that would justify disclosure of confidential sources in the sense that Justice Stewart intended; apparently a constitutional claim is essential.[94]

The first amendment-based privilege has fared less well in the paradigm newsgathering case, a libel trial. Nonetheless, the First, Fifth, Eighth, and District of Columbia Circuit Courts of Appeal

89. *Id.*

90. *Id.* at 716. "[P]laintiff must demonstrate why his interest in civil litigation, although brought to vindicate his significant constitutional right to participate . . . in a public election, is dependent upon the information sought." *Id.*

91. The difference in the rationales is critical. Judge Kaufman in *Baker* simply found that a private civil action could not be the kind of interest that compels disclosure. In *Riley v. City of Chester*, even a right of constitutional status was subordinate to the privilege claim when the person seeking disclosure had failed to meet the three-part test burden of proof, and there was nothing akin to a clear and present danger. 612 F.2d at 717-18.

92. *See infra* notes 159-206 and accompanying text.

93. *Baker* has become the analytical basis for many courts when faced with a request for disclosure against a non-party reporter in a civil case. *See generally* J. BARRON & C. DIENES, *supra* note 1, at 452-58; *infra* notes 159-206.

94. Justice Stewart did not precisely define the compelling need he envisioned in the final part of his three-part test. Branzburg v. Hayes, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting). However, it seems reasonable to assume that his understanding of compelling need or interest is congruent with the Court's pronouncements about compelling interest in other first amendment contexts. *See supra* notes 65-67 and accompanying text.

have all recognized a qualified reporter's privilege in the context of a libel case.[95]

In the First Circuit case, *Bruno & Stillman v. Globe Publishing*,[96] the district court had refused the privilege claim in a diversity jurisdiction libel suit. In *Bruno*, a company that manufactured boats brought a libel action against the Boston Globe, contending that a series of articles had resulted in loss of business and reputation. Creating a privilege that follows the three-part test, the court of appeals reversed and remanded the case to the district court for a determination of whether the test was met.

The Fifth Circuit, in *Miller v. Transamerican Press*,[97] recognized a qualified privilege with the same contours. In *Miller*, a Teamsters Union official brought a libel suit against a trucking industry magazine for an article that alleged misuse of union funds. The court found that the three-part test was met and stated: "The only way Miller can establish malice and prove his case is to show that Transamerican knew the story was false or that it was reckless to rely on the information. In order to do that, he must know the informant's identity."[98] The court found that the relevance and alternative means requirements were met. The necessity of the plaintiff obtaining the identity of the source in order to show evidence of actual malice[99] became the compelling interest in *Miller*, just as the "heart of the claim" had in *Torre*.[100]

The District of Columbia Circuit extensively analyzed the relationship between discovery of sources and proof of actual malice in

95. Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Bruno & Stillman v. Globe Newspaper, 633 F.2d 583 (1st Cir. 1980); Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972).

96. 633 F.2d 583 (1st Cir. 1980).

97. 621 F.2d 721 (5th Cir. 1980).

98. *Id.* at 726.

99. In New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court established that public figures must prove actual malice, which is defined as publishing known falsehood, or publication with a reckless disregard for truth or falsity. A public figure must produce at least some evidence tending to show actual malice to survive a summary judgment motion. Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966). If the plaintiff is precluded from showing actual malice on the basis of a confidential source privilege, the plaintiff will simply be unable to maintain the claim. *See* Maressa v. New Jersey Monthly, 89 N.J. 176, 445 A.2d 376 (1982) (New Jersey shield statute prevents discovery of information from newspersons tending to prove or disprove actual malice in a civil libel action brought by a state senator). The Supreme Court rejected an analogous claim of "editorial privilege" covering pre-publication meetings and discussions in Herbert v. Lando, 441 U.S. 153 (1979), when a public figure plaintiff sought discovery of editorial conferences in a libel case. The defendants did not raise a direct claim of source confidentiality, however.

100. *See supra* note 26 and accompanying text.

Zerilli v. Smith.[101] In *Zerilli*, two plaintiffs who had been accused in print of organized crime activity brought a privacy lawsuit against the federal government, alleging that the government had "leaked" the contents of wiretap tapes to news reporters. The plaintiffs sought to compel discovery of the sources used for various news articles. Although the suit was "serious," the court demanded that plaintiffs continue looking for alternative sources.[102]

The Eighth Circuit, in *Cervantes v. Time, Inc.*,[103] addressed the same question in the context of a media defendant's motion for summary judgment. In *Cervantes*, a former mayor of St. Louis, Missouri, filed a libel action against *Life* magazine for an article that accused him of having organized crime connections.

The courts in *Miller*, *Zerilli*, and *Cervantes* were all concerned with the need of a public figure libel plaintiff to show the actual malice required in a libel case. They deemed it unfair to enforce an absolute privilege which would essentially close off the plaintiff's chance of maintaining the action. However, the same complaint might be made in a civil case where a journalist is a third party—that the information sought is essential to the bringing of an action. There are indications that, although the information goes to the heart of the claim, disclosure would not be required in such a case.[104]

It may be wiser, when considering the libel cases, to look at the underlying compelling state interest in disclosure. Although libel is considered a creature of state statutory or common law,[105] libel has largely been "constitutionalized." While no court has so held, it may be wiser to consider the protection of reputation, rather than the cause of action itself, as the compelling state interest in libel actions in which disclosure is sought. As discussed earlier,[106] the courts have tended to grant requests to override the qualified confidential source privilege only in those instances where a specific, constitutionally based right is in jeopardy. The *Miller*, *Zerilli*, *Bruno*, and *Cervantes* cases may have silently held that reputation is a right of constitutional status.[107] The federal courts have previ-

101. 656 F.2d 705 (D.C. Cir. 1981).
102. *Id.* at 713-14.
103. 464 F.2d 986 (8th Cir. 1972).
104. Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975) (distinction between confidential and non-confidential material "utterly irrelevant to the chilling effect that the enforcement of these subpoenas would have on the flow of information to the press and to the public"); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973).
105. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
106. *See supra* notes 65-69 and accompanying text.
107. In Miller v. Transamerican Press, 621 F.2d 721, 726 (5th Cir. 1980), the court stated, "Miller's case is more akin to *Garland* and *Carey* than it is to

ously recognized that some aspects of the right to privacy may be constitutionally protected.[108] The existence of a right to protect one's reputation through the libel laws is a given of American jurisprudence. Unlike other actions that hamper the press,[109] libel has

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Cervantes. Miller challenges every statement . . . . [L]ike the defendants in *Carey* and *Garland*, Transamerican's *only* source for the allegedly libelous comments is the informant." (emphasis added). *See* Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Bruno & Stillman v. Globe Newspaper, 633 F.2d 583 (1st Cir. 1980); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972). Although none of these courts explicitly held that vindication of reputation unjustly lost was a right of constitutional magnitude, it is reasonable to assume that each court considered the right highly important, if not fundamental. The *Zerilli* court stated, "Thus in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished." Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981). The Supreme Court has addressed the interest in vindication of reputation, finding the interest is "a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Reputation protection has also been seen as a matter primarily left to the states. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

Although libel has historically been thought to be outside the protections of the first amendment because falsehood played no major part in the dissemination of ideas and information, the Court made libel burdens of proof a matter of constitutional law in New York Times v. Sullivan, 376 U.S. 254 (1964). The Court, however, avoided the substantive question of determining the constitutional status of the respective rights at issue by simply reading falsehood out of the first amendment. *Id.* at 270. *Cf.*, Roth v. United States, 354 U.S. 476 (1957) (the Court had earlier read obscenity out of the constitution). In both libel and obscenity, the questions were returned to the states with slight constitutional modifications.

The question of whether reputation is a right of constitutional magnitude that may override a confidential source privilege was raised directly in Maressa v. New Jersey Monthly, 89 N.J. 176, 445 A.2d 376 (1982). Holding that libel is solely a matter of state statutory law, the court held that the privilege statute took precedence. Id. at —, 445 A.2d at 384. Significantly, the court made no decision on either reputation or privilege upon constitutional grounds.

108. Zacchini v. Scripps-Howard, 433 U.S. 562 (1977) (state statute creating action for "appropriation" invasion of privacy does not offend first amendment); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (implying that some embarrassing private facts, if published, may be actionable on a constitutional basis); Time, Inc. v. Hill, 385 U.S. 374 (1967) (privacy plaintiff who is a public figure and claims he was portrayed in false light must meet actual malice standard); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (recognizing constitutional privacy right of freedom of individuals from intrusion by news people). The Supreme Court has recognized many other rights under the rubric of privacy and "fundamental right." *See infra* note 110. It is clear that, in a number of cases, the courts have recognized personal privacy in the form of protection of personal information from publication as a right that can override first amendment concerns in appropriate circumstances.

109. Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (press sought specific protection under first amendment from general search warrant requirements);

never been challenged by the press on first amendment grounds. It is safe to assume that it is the type of right that is considered "fundamental" in the sense defined by the Supreme Court.[110]

A case now on appeal before the Idaho Supreme Court, *Marks v. Vehlow*,[111] poses the conflict between a reporter's right to refuse disclosure based upon the first amendment and a parent's "fundamental" right[112] to the benefits of parenthood. In *Marks*, the father

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Hannegan v. Esquire, 327 U.S. 146 (1946) (discriminatory administration of postal regulations which disfavors a magazine on basis of content violates the first amendment); Grosjean v. American Press, 297 U.S. 233 (1936) (state tax on newspaper advertising that discriminates on basis of content against specific newspapers violates first amendment); Near v. Minnesota, 283 U.S. 697 (1931) (prior restraint on publication based on "scandal sheet" nature of newspaper violates first amendment). Only Justices Black and Douglas in the last fifty years consistently adhered to the absolutist position that the first amendment bars all libel actions. New York Times v. Sullivan, 376 U.S. 254, 293 (1964) (Douglas, J., concurring). Although it is not clear that the news industry is satisfied with the qualified privilege to comment on public figures and on issues of public concern created in the cases that intervened from *Sullivan* to Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), there is evidence that the qualified protection is in fact serving its purpose of avoiding frivolous libel suits while encouraging robust debate. *See*, Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795.

110. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (claim that state statute banning sale of contraceptives violated due process). In Roe v. Wade, 410 U.S. 133 (1973) (right to abortion), the Court stated: "Where certain 'fundamental' rights are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155 (citations omitted). The bulk of cases that have recognized privacy rights or other fundamental rights have focused on interests that are intensely personal. Boddie v. Connecticut, 401 U.S. 371 (1971) (access to state divorce proceedings); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (schoolchildren's right to engage in peaceful protest); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry person of own choice); NAACP v. Alabama, 377 U.S. 288 (1964) (right of association); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parents' right to direct the upbringing of children). It is hard to imagine that the right to vindicate one's reputation is less important than the rights vindicated under privacy or fundamental rights arguments. This interpretation is supported by the Court's determination in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), that private individuals are entitled to greater reputational concern under the first amendment than are public individuals. The Court clearly has linked the reputation concern with the more well known constitutionally established fundamental privacy concern.

111. Marks v. Vehlow, No. 13938 (Idaho, filed Feb. 12, 1981).

112. This right is believed to stem from the Court's decisions in Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923). It was recently applied in Stanley v. Illinois, 405 U.S. 645 (1972), to overturn a state statute creating an irrebuttable presumption that an unmarried father is unfit to have custody of his own minor children. The clash was avoided in *Marks*, Petitioner's Opening Brief at 14, but bears remarkable similarities to the libel cases discussed at note 107 *supra*. If forced disclosure of the re-

had been granted custody of a minor child pursuant to a valid custody and divorce decree issued in Nebraska. The mother wrongfully retained the child in Idaho following a visitation period. The *Idaho Statesman* published a series of articles on the dispute. The reporter, Ellen Marks, had interviewed the mother while the child was present. The interview was arranged through third parties who had requested anonymity. When called before the judge in the father's action to enforce his custody decree, Marks refused to disclose either her sources or the location of the child at the time of the interview. The stage was set for a direct conflict between the constitutional rights of a parent entitled to custody and the constitutional rights of the press. The conflict was mooted, however, when the father regained custody by self-help. Instead, *Marks* became a clash between the rights of the press and the authority of the court. Although the court was initially motivated by concern for the rights of the child and father, one of the major issues on appeal became the court's contempt authority.

After refusing to disclose information, Marks was imprisoned for a short time and fined a total of $36,000. The Idaho Supreme Court had previously emphatically rejected an asserted reporter's privilege,[113] so the attorneys for Marks and the newspaper recharacterized the privilege as a first amendment right,[114] comparable to the doctrine against prior restraints on publication.

The *Marks* case, and others like it, pose a great difficulty for the courts. Although the reporter is a third party in such a situation, the rights asserted are fundamental; indeed, that alone may be sufficient to constitute a compelling interest. Unlike the civil rights violation claimed in *Baker*, which could be redressed in money damages, there is no redress for loss of custody of a child—except to restore custody. The same argument could be made for a number of other rights that have been held to be fundamental.[115] Of course, the relevance and alternative source portions of the

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porter's confidential source was the *only way* that a parent could regain custody of a minor child whose custody had been granted by a proper court, the issue would pit a first amendment right against a fundamental right. If the usual three-part test was applied and met by the father, disclosure would likely result, as it did in Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980).

113. Caldero v. Tribune Publishing Co., 98 Idaho 294, 562 P.2d 791, *cert. denied*, 434 U.S. 930 (1977).

114. Petitioner's Opening Brief at 36, Marks v. Vehlow, No. 13938 (Idaho 1981).

115. In an analogous area, the courts have rather consistently held that rights which are fundamental and difficult to assess in concrete or monetary terms may be vindicated by resort to a declaratory judgment action when infringed by government. Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Younger v. Harris, 401 U.S. 37 (1971). There is simply no remedy in our jurisprudence for

three-part test must be met before the issue of compelling interest comes into play.

In summary, the first amendment basis of the confidential source privilege has been accepted and adopted as law in almost every federal circuit, including the new Eleventh Circuit which retained the precedents of the Fifth Circuit from which it split.[116] In the process of creating a qualified first amendment privilege, the circuit courts have found that the *Branzburg* case did not rule out a privilege; in fact, it created one.[117] The fact that the federal courts now follow some variation of the privilege—normally Justice Stewart's variation—poses some basic questions about the continuing vitality of the state shield laws. These questions are discussed more fully in part VI, which analyzes the Nebraska shield law in relation to national developments concerning the confidential source privilege.

IV. REPORTER PRIVILEGE IN THE STATES

The state courts and legislatures have taken seriously the Supreme Court's recommendation to look into shield laws on their own. Virtually every state has considered passing such a statute. Twenty-six states have shield statutes,[118] while eight others have

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the person denied a right to marry as he wishes, or denied a right to vote. The courts are only able to assure that infringement does not occur again.

In first amendment cases, the remedying of denial of a right is enhanced by the courts' use of "accelerated review" of a case to assure that free expression rights are infringed upon for the least possible period of time. The Pentagon Papers case, largely because it concerned a direct restraint on the freedom to publish, was decided in less than two weeks. New York Times v. United States, 403 U.S. 713 (1971).

116. The new Eleventh Circuit, sitting en banc, recognized as binding precedent the law in the Fifth Circuit as of September 30, 1981. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981). The Eleventh Circuit was created as a result of dividing the Fifth Circuit. Fifth Circuit Court of Appeals Reorganization Act of 1980, §§ 1, 9, 28 U.S.C.A. § 1 (West Supp. 1980).

117. *See supra* note 53 and accompanying text. In Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981), the court stated: "We indicated that a qualified reporter's privilege under the First Amendment should be readily available in civil cases. An approach similar to that described by Justice Powell in *Branzburg* was adopted . . . . Every other circuit that has considered the question has also ruled that a privilege should be readily available in civil cases . . . ."

118. ALA. CODE tit. 12 § 12-21-142 (1975); ALASKA STAT. §§ 09.25.150-09.25.220 (1973); ARIZ. REV. STAT. § 12-2237 (Supp. 1977); ARK. STAT. ANN. § 43-917 (1977); CAL. EVID. CODE § 1070 (West 1978); DEL. CODE ANN. tit. 10, § 4320-26 (Michie 1974); ILL. ANN. STAT. ch. 51, § 111-119 (Smith-Hurd Supp. 1978); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1977); KY. REV. STAT. ANN. § 421.100 (Baldwin 1969); LA. REV. STAT. ANN. §§ 45.1451-.1454 (West Supp. 1978); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1974); MICH. STAT. ANN. § 28.945(1) (Callaghan 1972); MINN. STAT. ANN. §§ 595.021-595.025 (West Supp. 1978); MONT. REV. CODES ANN. tit. 26, § 26-1-1005 (1979); NEB. REV. STAT. §§ 20-144-148 (1979); NEV. REV.

created a shield under the common law or as a matter of constitutional interpretation.[119] A handful of states have steadfastly refused to create a shield either by legislation or court decision.[120] The shields created by the states are as varied as the states themselves. Some are written in absolute terms, like Nebraska's.[121] Others are qualified in coverage; for example, they may cover the source of information but not shield the information itself.[122] In other states, the shield laws discriminate between regular working members of the traditional news media and freelancers.[123] Still others discriminate among mediums, granting more shield to newspaper writers than to magazine writers, for example.[124] It can be asserted that the Nebraska statute avoids those problems since it explicitly covers both sources and information.[125] The question of who is covered is apparently considered a matter of intent.[126]

STAT. tit. 4, § 49-275 (1975); N.J. STAT. ANN. §§ 2A:84a-21a (West Supp. 1979); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1975); N.Y. CIVIL RIGHTS LAW § 79h (McKinney 1976); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. § 2739.12 (Page 1954), § 2739.04 (Page Supp. 1977); OKLA. STAT. ANN. tit. 12, §§ 385.1-.3 (West Supp. 1978); OR. REV. STAT. §§ 44.510-.540 (1977); PA. STAT. ANN. tit. 28, § 330 (Purdon Supp. 1979); R.I. GEN. LAWS § 9-19.1-1.1-3 (Supp. 1977); TENN. CODE ANN. §§ 24-113-115 (Supp. 1977).

119. Morgan v. State, 337 So. 2d 951 (Fla. 1976); Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977); Opinion of the Justices, 117 N.H. 386, 373 A.2d 644 (1977); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429 (1974); State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974); Senear v. Daily Journal-American, 97 Wash. 2d 148, 641 P.2d 1180 (1982); Zelenka v. Wisconsin, 83 Wis. 2d 601, 266 N.W.2d 279 (1978); CAL. CONST. art. 1, § 2.

120. *See, e.g.*, Caldero v. Tribune Publishing Co., 98 Idaho 294, 562 P.2d 791 (1977); In re Roche, 1980 Mass. Adv. Sh. 2203, 411 N.E.2d 466 (1980). A bill has been introduced in the Massachusetts legislature that would create a privilege against source disclosures only. News Notes, Media L. Rep. (BNA), March 30, 1982.

121. *See supra* note 14.

122. Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971); Lightman v. State, 266 Md. 550, 295 A.2d 212 (1972); People v. DuPree, 88 Misc. 2d 791, 388 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1976). The New York legislature recently amended that state's shield law to cover information itself. N.Y. CIV. RIGHTS LAW § 79h, as amended, L 1981, ch. 468 §§ 1-3 (West Supp. 1981-1982). The amended law was upheld to prevent forced disclosure of a reporter's notes for an unpublished story in New York v. Iannaccone, — Misc. 2d —, 447 N.Y.S.2d 996 (N.Y. Sup. Ct. 1982).

123. In re Haden-Guest, 5 Media L. Rep. (BNA) 2361 (N.Y. Sup. Ct. 1980). The New York statute, typical of many, provided a shield for those regularly employed as journalists or contracted with as a journalist. N.Y. CIV. RIGHTS LAW § 79h (McKinney 1976). *See* MONT. REV. CODES ANN. §§ 26-1-901 to -903 (1979); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. § 2739.12 (1979).

124. Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964); In re Haden-Guest, 5 Media L. Rep. (BNA) 2361 (N.Y. Sup. Ct. 1980); *contra* Silkwood v. Kerr-McGee, 563 F.2d 433 (10th Cir. 1977).

125. NEB. REV. STAT. § 20-146(1), (2) (1979).

126. NEB. REV. STAT. § 20-146 (1979). The statutory provision refers to the act of

The Supreme Court's suggestion in *Branzburg* was based on the notion that a state may grant individuals or groups rights and privileges greater than are provided by the federal Constitution,[127] as long as those enlarged rights do not directly conflict with the federal Constitution. Closely tied to this reasoning is the tradition that each state is allowed to develop its own rules of evidence.

Of greatest concern to Nebraska journalists is the treatment of other states' "absolute" shield laws by the courts. Only Pennsylvania's shield law has been given the absolute construction intended on its face when challenged in the courts. Two cases are most illustrative. The first case, *In re Taylor*,[128] involved a 1963 attempt to force a reporter to disclose sources in a libel proceeding. The Pennsylvania Supreme Court gave the state shield law the broadest reading possible, holding that the shield was to be construed *in favor* of the newsperson.[129] The court envisioned no possible exceptions under the statute. It is open to question whether *Taylor* survives the Supreme Court's *Branzburg* decision.

A second case, *Mazzella v. Philadelphia Newspapers, Inc.*,[130] was a libel case brought in federal district court in New York on diversity jurisdiction. The court, concluding that Pennsylvania had the most interest and closest contacts with the actions that led to the lawsuit, applied the Pennsylvania shield law to a plaintiff's request to compel discovery of confidential sources. The court felt that *Herbert v. Lando*,[131] which had refused to create an "editorial process" privilege to protect pre-publication deliberation from discovery in a libel case, did not apply to the case. Although redressing libel is a fundamental concern, the court said that states were free to offer or not offer redress. Thus if the state shield law had the effect of closing off an action for libel, it was a matter for

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newsgathering for dissemination of information *to the public*. Whether or not the material is being gathered and prepared for private purposes or for public information—in other words, intent—is the key to providing protection under the shield law. The section carefully avoids references to the traditional media, instead referring to *any medium* of communication. This would preclude selective application as in In re Haden-Guest, 5 Media L. Rep. (BNA) 2361 (N.Y. Sup. Ct. 1980), or Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964).

127. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (state may provide greater rights to public speakers than required by the first amendment); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (states are free within specific constitutional limits to determine own libel standards); Miller v. California, 413 U.S. 15 (1973) (states free to set own obscenity standards within first amendment limits, presumptively including elimination of all obscenity prosecutions).

128. 412 Pa. 32, 193 A.2d 181 (1963).

129. *Id.* at 40, 193 A.2d at 185.

130. 479 F. Supp. 523 (E.D.N.Y. 1979).

131. 441 U.S. 53 (1979).

the state.[132] The court concluded that: "[T]he Pennsylvania shield law is almost impenetrable."[133]

Other states' courts have been less deferential to the reporter. The New Jersey Supreme Court in *Farber*, as previously noted,[134] limited that state's absolute shield law to allow disclosure when the refusal to disclose jeopardized a criminal defendant's sixth amendment right to a fair trial. In 1981, the New Jersey Superior Court in *Resorts International v. NMJ Associates (Resorts I)* [135] limited the shield law's application in libel suits brought by plaintiffs who are public figures. The court held that while the three-part test must still be met,[136] a defense of truth against a libel claim operated to "waive" the protection of the shield law.

The rule announced by the superior court was rejected on appeal to the New Jersey Supreme Court.[137] The supreme court expressly rejected the lower court's waiver analysis in this case. Under the companion case of *Maressa v. New Jersey Monthly*,[138] neither cooperation in pretrial discovery nor assertion by defendants of the defense of truth sufficed to warrant a waiver finding.[139] In *Maressa*, the supreme court held that the privilege under the New Jersey statute—which protects not only sources but information itself—was absolute in the absence of a showing that a constitutional right would be jeopardized by failure to disclose sources. The underlying waiver analysis of *Resorts I*, however, was only explicitly disavowed as applied under the shield law in that particular case.[140]

The superior court's finding of waiver in *Resorts I* rested on questionable grounds. Although the superior court relied on an earlier case, *Brogan v. Passaic Daily News*,[141] in finding a waiver, the reporter in *Brogan* had in fact taken the stand. In *Resorts*, the disclosure issue arose on a discovery motion. There was no indication in *Resorts I* of the type of behavior normally associated with

132. 479 F. Supp. at 528: The court recognized that reputation is a "basic concern," but "solely a matter of State law." If reputation is a fundamental right rather than a mere statutory remedy, the balancing in *Mazzella* was performed with a thumb on the scales.

133. *Id.* at 529.

134. *See supra* note 73 and accompanying text.

135. 180 N.J. Super. 459, 435 A.2d 572 (1981) (Resorts I).

136. *Id.* at 468, 435 A.2d at 579.

137. Resorts Int'l, Inc. v. NMJ Assocs., 89 N.J. 212, 445 A.2d 395 (1982) (Resorts II).

138. 89 N.J. 176, 445 A.2d 376 (1982).

139. *Id.* at —, 445 A.2d at 386; Resorts Int'l, Inc. v. NMJ Assocs., 89 N.J. 212, —, 445 A.2d 395, 397 (1982).

140. *Id.*; Maressa v. New Jersey Monthly, 89 N.J. 176, —, 445 A.2d 376, 385-86 (1982).

141. 22 N.J. 139, 123 A.2d 473 (1956).

waivers,[142] and there is certainly nothing "voluntary" about being called into court to defend one's actions. *Resorts I* might better be considered a compelling interest case; since the court found the three-part test satisfied, it may be assumed that the interest in vindicating reputation provided the compelling interest.[143]

Maressa's attorneys took the *Resorts I* opinion as a springboard to argue that reputation was indeed a right of constitutional magnitude. The court pointedly found that interest in reputation was an interest protected, if at all, only by state statutes.[144] In effect, then, Maressa was precluded from proving the existence of actual malice on the part of the defendant reporters except by inference. The supreme court found that if libel plaintiffs were prevented by the shield law from maintaining libel actions, it would be a matter for the legislature to remedy.[145] The supreme court, therefore, urged the superior court to look favorably on a motion for summary judgment filed by the defendants.[146] The results in *Maressa* and *Resorts II* are in direct conflict with decisions in several other state and federal court cases presenting the same issues.[147] Under *Maressa*, the three-part test is irrelevant in the absence of clashing constitutional rights. *Maressa* also emphasized that the relevant inquiry is the statutory source of the claim, rather than the heart of the claim.

Another significant limitation on shield laws is the tendency of the courts to strictly construe them against the press because a confidential source privilege is in derogation of the common law.[148]

142. "The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." BLACK'S LAW DICTIONARY 1751 (rev. 4th ed. 1968). The rule announced in Resorts Int'l v. New Jersey Monthly, 180 N.J. Super. 459, 435 A.2d 572 (1981) (Resorts I), apparently assumes that a reporter who prints an allegedly libelous article satisfies either the voluntary or inference requirement for a waiver, although there certainly is nothing voluntary about being a defendant in a libel suit. The fundamental rights analysis discussed at note 107, *supra* would avoid the necessity for so drastic a plaintiff's remedy as waiver. The approach would also solve the problems with a "constructive" waiver such as in Downing v. Monitor Publishing Co., 120 N.H. 383, 415 A.2d 683 (1980), where the court held that refusal to disclose a source in a public figure plaintiff libel action warranted a presumption that no source existed. In both cases, the courts seem to recognize the strength of the claim of libel plaintiffs, but offer no analysis of the nature of those rights. This is especially peculiar in light of New Hampshire's constitutionally based privilege. *See supra* note 119.

143. So viewed, *Resorts I* opened the question of whether reputation is a "fundamental right" when asserted by either individuals or corporations. *See supra* notes 107-10 and accompanying text.

144. 89 N.J. 176, —, 445 A.2d 376, 384.

145. *Id.* at —, 445 A.2d at 385.

146. *Id.* at —, 445 A.2d at 387.

147. *See supra* notes 107, 119.

148. *See supra* note 9 and accompanying text.

Such strict reviews lead some in journalism to believe that courts will attempt to find any "loophole" to prevent application of shields.[149]

Shield laws have been declared ineffective to protect either the names of persons or the descriptions of activities when those persons or activities are actually witnessed by a reporter.[150] Although such a result dismays reporters, it is consonant with traditional notions of privileges,[151] which usually protect *communications* between two parties. Mere observation, no matter how informative, cannot be considered the equivalent of face-to-face communication. The reporter is instead being asked to describe action rather than convey information. Our traditional notions of privilege imply something of a closed communication system.[152] A reporter might argue that the shield law applies when conduct is observed pursuant to a commitment of confidentiality entered into by two parties—the reporter and the source. The information obtained by observation could then be considered an extension of a valid pledge of confidentiality.[153]

149. H. NELSON & D. TEETER, *supra* note 12, at 373; Denniston, *The Press: Protecting Sources*, QUILL, July/August 1981, at 10-11. A standard evidence rule, often applied in privilege analysis, holds that any statute in derogation of the common law should be strictly construed by the courts. In re Farber, 78 N.J. 259, 394 A.2d 330 (1978).

150. *See supra* note 119.

151. MCCORMICK'S, *supra* note 9, at §§ 91, 101 (discussing lawyer-client and physician-patient privileges). The understanding of the parties must be one of confidentiality, although this may be inferred from the facts. Most importantly, there are apparently no cases in these areas comparable to the situation where a reporter simply observes something. Whereas doctors or lawyers enter confidential relationships on a narrow professional basis, a reporter, as the eyes and ears of the public, is acting as a reporter simply by observing matters in a general way. Still, the idea that the information must have been gained from a confidential relationship is a common prerequisite to claiming these statutory privileges. *Id.*

152. A case that discusses the importance of a closed, private and confidential relationship to the creation of an evidentiary privilege is In re Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970), where the California Supreme Court reinforced the reasoning supporting a privilege between a psychiatrist and a patient. New York courts strictly applied the requirement of confidentiality in reporter privilege cases and later the New York legislature amended its shield statute to protect information that is *not* obtained in a confidential relationship. The provision was upheld by a court in New York v. Iannaccone, — Misc. 2d —, 447 N.Y.S.2d 996, (N.Y. Sup. Ct. 1982). At issue were notes prepared by a reporter for a story that had not yet been published. The protection is analogous to that provided in the Nebraska shield law through intent. *See infra* note 221 and accompanying text.

153. This is apparently the position taken by the reporter in Marks v. Vehlow, No. 13938 (Idaho filed Feb. 12, 1981), where the court sought the *location* of the child whose custody was at stake. Marks declined because of a confidentiality agreement entered into with persons who set up the secret interview at

Cases where the privilege has been granted only to one type of journalist are rare,[154] and these exceptions seem firmly based on the language of the underlying statute. There are no reported cases in which a court limited a state shield law to specific media or to specific journalists when the law clearly covered the general activity of newsgathering.[155]

In a number of cases, state courts have taken the "heart of the claim" notion perhaps too seriously. Without first examining the source of the claim, these courts have found that evidence showing that confidential information goes to the heart of a claim is sufficient to overcome a shield.[156] In these cases, it is the right to pursue a claim that is critical, whether the suit is over one's right to a fair trial or over construction of a garage. In order to overcome the privilege, the claim must at the least enjoy the same legal status as the shield.[157]

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which Marks saw the child. Similar questions concerning the numbers of people who may be included in a confidential relationship have arisen in the lawyer-client and physician-patient areas. Generally, the privilege is extended to cover such people as paralegal assistants and medical assistants. MCCORMICK'S, *supra* note 9, at § 107.

154. Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964); In re Haden-Guest, 5 Media L. Rep. (BNA) 2361 (N.Y. Sup. Ct. 1980).

155. There are, of course, cases where other benefits normally granted to journalists generally have been denied to one specific journalist or publication as a result of the content of the material produced by the journalist or contained in the magazine. *See supra* note 39 and accompanying text. The term "newsgathering," however, may be critical. Most state laws protect "newsgathering" explicitly. GORA, *supra* note 12, at 48.

156. Garland v. Torre, 259 F.2d 545 (2d Cir. 1958) (identity of source necessary for pursuit of libel claim); Appeal of Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961) (information obtained by reporter critical to plaintiff's civil action against city officials); Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977) (individual's interest in upholding personal reputation a compelling interest sufficient to override constitutional privilege); Downing v. Monitor Publishing Co., 120 N.H. 383, 415 A.2d 683 (1980) (refusal to disclose source by reporter in libel action where identity of source is critical to libel action warrants presumption that no source exists); State v. Buchanan, 250 Ore. 244, 436 P.2d 726, *cert. denied*, 392 U.S. 905 (1968) (college newspaper editor observed illegal drug transactions; information obtained went to heart of prosecutor's criminal claim). Although not finding a sufficient interest to justify requiring disclosure in a criminal case, the court in United States v. Homer, 411 F. Supp. 972 (W.D. Pa. 1976), noted that it would grant a request to compel disclosure if the information sought went to the heart of the claim. The reporter in this case relied explicitly on Pennsylvania's very strong shield law. *See supra* note 128 and accompanying text. The court rejected the opportunity to decide if the state shield law would apply in a federal criminal proceeding. There is much reason, however, to doubt that the state shield would apply in such a case. *See generally infra* note 222 and accompanying text.

157. The difficulty with such cases arises from their concern for the maintenance of any claim. The bulk of privilege cases focus on specific types of strongly-supportable claims. The cases discussed at note 156, *supra*, do not concern

There are no reported state cases where a journalist tried to rely on the privilege while bringing a suit as a plaintiff. Such a case would be an appropriate occasion for a full waiver analysis. Certainly, choosing to become a plaintiff satisfies any notions of a voluntary and knowing waiver.[158]

A major concern of journalists is that a state shield law is created at the behest of the legislature and may just as easily be repealed by it. Although there is no indication that any state legislature has repealed its reporter shield laws, the possibility helps explain why reporters called into court to testify on confidential matters argue for a first amendment-based privilege. Such a privilege, journalists believe, would at least be uniform. It would also accord with the standards of a profession that operates under identical codes of ethics at the national, state, and local levels.

A final concern of journalists is the law which will apply in a lawsuit involving confidential sources. A reporter in Omaha who is called to testify in a federal district court in Minnesota at a lawsuit brought by a resident of Florida, has reason to doubt whether the Nebraska shield law will apply. The question is further muddied if the reporter is asked about a story based in part on a confidential long-distance telephone call to Idaho.

V. CONFLICTS OF LAW, FEDERALISM, AND SUPREMACY

The reporter mentioned in the above scenario has reason to worry, since even the courts cannot easily answer the question of when a given state's shield law will apply. The first stop for analysis is the body of federal court decisions. The *Mazzella*, *Baker*, and *Riley* courts reached the same ultimate conclusion[159]—but by different routes. *Baker* and *Riley* should be considered together. In

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claims of constitutional or analogous status. If the privilege to protect sources is assumed to be constitutionally-based, it is an axiomatic rule of statutory construction that the claim which purports to override it must be of equal stature. Similarly, if the shield law provides evidence of a particularly strong presumption in favor of the reporter—as Nebraska's does—the shield law will be first among equals in statutory analysis.

158. In Anderson v. Nixon, 444 F. Supp. 1195 (D.D.C. 1978), columnist Jack Anderson brought an action for damages against Richard Nixon and other Watergate participants for conspiracy to violate Anderson's constitutional rights. The defendants wanted the names of sources Anderson had used in his column, but Anderson refused to provide the names. Anderson's case was dismissed. Judge Gessell purported to apply a balancing approach but ultimately appeared to be swayed by the fact that Anderson was seeking redress in his role as a private citizen rather than as a news gatherer. Anderson "waived" the protections of the privilege precisely because he was not seeking them as a member of the class intended to be protected by the privilege.

159. Each court found that a qualified reporter's privilege is to be found in the first amendment. *See supra* notes 53, 76-92, 130-33 and accompanying text.

each case, a private plaintiff brought a civil action to vindicate alleged violations of civil and constitutional rights. Both suits involved federal claims. In *Baker*, Judge Kaufman found a qualified first amendment privilege.[160] Although he looked to both the Illinois and New York reporter privilege statutes for guidance, Judge Kaufman eventually relied upon *Branzburg* and *Torre* for his decision,[161] focusing on the constitutional role of the press in society. In contrast, in *Riley*, Judge Sloviter fashioned a federal common law privilege and, as in *Baker*, adopted the three-part test. Judge Sloviter found the Third Circuit's version of the privilege implicit in the Federal Rules of Evidence[162] and in the legislative history of the rules.[163] Since the suit was filed under a federal statute, however, the court was "required to interpret federal common law insofar as it applies to the claimed privilege of a reporter."[164] The difference in approach between the two circuits has major implications. By basing the confidential source privilege upon the Constitution, the Second Circuit in *Baker* presumptively made the privilege binding upon *all* courts, both state and federal, in that circuit.[165] In contrast, the federal common law privilege in *Riley*

160. Baker v. F&F Inv., 470 F.2d 778, 783 (2d Cir. 1972).

161. 470 F.2d at 784-85. Judge Kaufman's analysis follows the traditional approach of first amendment jurisprudence. *See supra* discussion at notes 65-66. In other words, he sees the attempt to use courts to restrain reporters (by making confidential relationships uncertain) as simply another form of governmental restraint, subject to typical first amendment analysis.

162. 612 F.2d at 713. Perhaps the most important aspect of Judge Sloviter's analysis is that she approached the privilege issue entirely as an evidentiary problem. Despite some discussion of the constitutional developments in this area, she was more convinced that the first amendment considerations, as reflected in the Federal Rules of Evidence, sufficed to create the federal common law privilege. The Washington Supreme Court in Senear v. Daily Journal-American, — Wash. 2d —, 641 P.2d 1180 (1982) was impressed by the Third Circuit's common law privilege analysis, using it in part to create a state reporter privilege.

163. 612 F.2d at 714.

164. *Id.*

165. The question of how much authority the federal circuit courts of appeals have to dictate constitutional law is actually rather uncertain. As a practical matter, however, states are likely to find circuit court decisions compelling when discussing the confidential source privilege. It is apparently simpler to remove an action from state court to federal court when a first amendment question is at issue. *See* C. WRIGHT, *supra* note 51, at §§ 17, 23, 39, 48, 52. A recent case that demonstrates this concept and also analyzes the applicable doctrine, is Davis v. Passman, 442 U.S. 228 (1979). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 716 (1978). On a practical level, diversity cases with a confidential source problem pose a significant risk of conflicting outcomes despite the fact that the rules are supposedly identical in either event. State courts may simply find it preferable to follow the circuit courts rather than risk seeing a state shield law lose its effect in federal court. *See infra* note 174-81 and accompanying text.

applies only to federal courts in the Third Circuit, and then only when the case is based on federal question jurisdiction.[166]

The case of *Mazzella v. Philadelphia Newspapers, Inc.*[167] illustrates the effects of *Riley*. In *Mazzella*, a New York plaintiff sued a Pennsylvania newspaper. Diversity of citizenship brought the action within the jurisdiction of a federal district court in New York. Since the underlying action, libel, was solely a state claim, the court used a typical conflicts of laws analysis in determining to apply the Pennsylvania shield law.[168] The court decided, using the same Federal Rule of Evidence as the Third Circuit in *Riley*, that it was bound to apply a state privilege law in a diversity case.[169] Thus under the *Riley* case, the *Mazzella* court had no choice but to apply the state law. *Mazzella*, however, was brought in New York in the Second Circuit. Surely the Second Circuit's holdings on an issue of federal constitutional law—even if it applies to evidence—takes precedence, in fact supremacy, over a state law covering the identical question in a diversity action.[170]

The question of when a state-created privilege should apply is not as straightforward as the decisions in *Riley* and *Mazzella* imply, however.[171] To apply a federal common law analysis when a reporter acted in reliance on a state shield law frustrates the understanding of the parties to a confidentiality agreement, and more importantly, possibly eliminates the major purpose of any law, which is to guide future conduct. As noted,[172] federal common law

166. R. LEFLAR, AMERICAN CONFLICTS LAW § 66, at 130-33 (3d ed. 1977). *Accord*, United Liquor Co. v. Gard, 88 F.R.D. 123 (D. Ariz. 1980) (purely federal case calls for application of a purely federal privilege analysis); Richards of Rockford, Inc. v. Pacific Gas and Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976) (unless a claimed privilege rises to a federal constitutional level, a federal court must use state privilege; court held that academic freedom privilege reached constitutional level). A case with potential import for the Nebraska shield law is Blackledge v. Martin K. Eby Constr. Co., 542 F.2d 474 (8th Cir. 1976), where a Nebraska state privilege was held to be applicable in a civil action based on diversity of citizenship.

167. 479 F. Supp. 523 (E.D.N.Y. 1979).

168. *Id.* at 526-27.

169. *Id.* at 527.

170. Federal courts have often been called upon to interpret state law in diversity of citizenship actions. R. LEFLAR, *supra* note 166, at §§ 64-65. In the reporter privilege area, where the federal courts have announced an evidentiary rule on constitutional grounds, any conflict with a state shield law will likely result in a victory for the federal rule. Generally, federal courts in these cases have not engaged in the substance/procedure inquiry often resorted to in diversity cases. Baker v. F&F Inv., 470 F.2d 778, 781 (2d Cir. 1972); Mazzella v. Philadelphia Newspapers, 479 F. Supp. 523, 526 (E.D.N.Y. 1979).

171. *See generally* Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956); Nacht, *Privileges in the Federal Courts: The Two Faces of Rule 501*, 1978 ANN. SURVEY AM. L. 493.

172. *See supra* note 87-89 and accompanying text.

has been interpreted to create a right limited to withholding sources. Using typical privilege interpretation, however, the privilege might as easily be denied.[173]

The exact language of Federal Rule of Evidence 501 may be consulted for an alternative approach. This rule provides: "However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law."[174] Since a motion to compel disclosure is almost always a proceeding separate from the action that spawned it,[175] and involves a narrow question of whether the reporter enjoys the protection of the privilege, state law arguably should supply the rule of decision. Such an approach, however, plunges the federal courts into the complex issues of choice of law in diversity cases[176] and of public policy in purely federal cases.[177] No cases explicitly treat the issue of what law applies when a confidential source/reporter relationship crosses state lines. If state law applies, the privilege law of the forum state apparently will apply.[178] This approach, however, ignores the element of reliance by a reporter.

In determining whether to apply state law, federal courts should consider whether a shield law is procedural or substantive. In general, under the *Erie* doctrine,[179] federal courts in diversity of citizenship cases will apply their own procedure, but will apply state law to substantive issues. In *Mazzella*, the Pennsylvania shield law was presumed to be substantive, while in *Riley* it was presumed to be procedural and, therefore, fit for federal common law analysis. *Baker*, on the other hand, created a constitutionally based privilege and thus made the privilege a substantive matter, at least for federal purposes. The majority of federal cases simply do not deal with the issue; usually state law is examined for gui-

173. *See supra* note 156; United States v. Schoenheinz, 548 F.2d 1389 (9th Cir. 1977) (refusal to recognize and apply a "stenographer" privilege provided by state law in a federal proceeding; the privilege was viewed as a procedural matter, hence federal law took precedence).

174. FED. R. EVID. 501.

175. This is assumed by many to stem from Justice Powell's concurring opinion in Branzburg v. Hayes, 408 U.S. at 709. A separate proceeding has been held in virtually every case discussed here.

176. *See* Mazzella v. Philadelphia Newspapers, 479 F. Supp. 523, 527 (E.D.N.Y. 1979).

177. *See* Baker v. F&F Inv., 470 F.2d 778, 784 (2d Cir. 1972); United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982).

178. Samuelson v. Susen, 576 F.2d 546 (3d Cir. 1978); Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964).

179. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *See generally* C. WRIGHT, *supra* note 51, at §§ 58, 59.

dance rather than for a rule of decision.[180] Ironically, while the Supreme Court has urged the states to experiment in the area of the confidential source privilege, the federal courts have recognized few state prerogatives. Rather, they have preferred to address the constitutional issue, despite the well-known prescription that courts of appeal should not decide constitutional issues when there are alternative grounds for decision.[181]

The choice of law issue has not arisen in the state courts for the obvious reason that an action involving multi-state parties and multi-state events may be readily brought in federal court;[182] the cases examined here indicate a preference for federal jurisdiction where diversity exists. When a state's shield law is the subject of a suit brought in a state court, the courts tend to examine the statute itself without recourse to federal court opinions in this area.[183] Many states with or without shield laws regard *Branzburg* as the only pertinent federal precedent.[184] States without shield laws, however, often look to the federal decisions for guidance, and many cases have rendered decisions in light of the federal courts' test under a qualified constitutional privilege.[185] Thus state court opinions rendered under the influence of federal cases reflect the notion that those states were bound by the first amendment analysis of the federal cases. Logically, the next question is the extent to which federal precedents bind a state court in a state with a shield law. There is little explicit discussion of this question in

180. In Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), for example, a libel action was brought on the basis of diversity of citizenship. Arguably, the laws of California, Texas, Virginia, and the District of Columbia were involved. The court looked to state law for guidance, but grounded its holding squarely on the first amendment. *See* Baker v. F&F Inv., 470 F.2d 778, 782 (2d Cir. 1972). *Contra*, Samuelson v. Susen, 576 F.2d 546 (3d Cir. 1978).

181. *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979) (espousing policy of "abstention" when alternative ground for decision is available). The lack of abstention in reporter privilege cases may be an indication that the circuit courts do not consider state shield laws appropriate alternative grounds for decision. *See* Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975) (no attempt to ascertain state law in civil case).

182. 28 U.S.C. §§ 1331-32, 1441, 1446, 2201, 2283 (1976).

183. Typically, the courts look either to their own state laws, In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963), or look to Supreme Court opinions for guidance, Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791 (1977).

184. *See* Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791 (1977); Dow Jones & Co. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973); In re Farber, 78 N.J. 259, 394 A.2d 330 (1978).

185. *See, e.g.*, Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977); Zelenka v. State, 83 Wis. 2d 601, 266 N.W.2d 279 (1978). Both *Winegard* and *Zelenka* involved court interpretation without the aid of shield laws, but indicate that constitutional analysis would override shield law if applicable. *See also* In re Farber, 78 N.J. 259, 394 A.2d 330 (1978) (shield law falls in light of federal constitutional policy).

state cases.[186]

The potential confusion of the conflicts and federalism questions is evident in the facts of *In re Consumers Union*.[187] The plaintiff brought a personal injury action in a Kansas federal court based on diversity of citizenship. The plaintiff served a subpoena duces tecum seeking information about certain tested products from a non-party magazine publisher. The publisher challenged the subpoena in a New York federal court, relying upon the first amendment for protection rather than any state shields. The court applied a purely federal analysis, based on *Garland v. Torre*,[188] to quash the subpoena. The court did not address the substance/procedure question, but appears to have considered the hearing as involving a procedural issue.[189] *Consumers Union* was decided a year after *Mazzella*, and although the two courts were in the Second Circuit, the analysis was markedly different.

One can only speculate how a state court would approach a conflict of laws issue in the reporter privilege area. Generally, however, the choice of law rules[190] are suspended when the case involves a question of unusually strong state public policy.[191] Numerous cases indicate that states with shield laws consider the shield law to be an expression of just such a policy,[192] and it is safe to assume that states which have made the privilege a matter of constitutional doctrine will find their privilege equally strong if not stronger.[193] Some of the state courts that have refused to create a reporter's privilege have phrased their opinions in language that suggests *not having* a privilege is an unusually strong public policy

186. *See supra* discussion at notes 165, 173. Although state cases have not considered this point to any extent, the state courts should consider doing so. It is clear that federal law will usually be applied in diversity actions despite the availability of a state shield law. *See* Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964) (choice of law analysis); *see* also note 166 and accompanying text *supra*.

187. 495 F. Supp. 582 (S.D.N.Y. 1980).

188. 259 F.2d 545 (2d Cir. 1958).

189. 495 F. Supp. at 587.

190. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971).

191. R. LEFLAR, *supra* note 166, at §§ 90, 92: "The idea that the forum's own law is the best in the world is not uncommon among judges." Los Angeles Memorial Coliseum Comm'n v. National Football League, 519 F. Supp 581 (C.D. Cal. 1981).

192. Saxton v. Arkansas Gazette Co., 569 S.W.2d 115 (Ark. 1978); Shindler v. State, 166 Ind. App. 258, 335 N.E.2d 638 (Ind. Ct. App. 1975); Bilney v. Evening Star Newspaper Co., 43 Md. App. 560, 406 A.2d 652 (Md. Ct. Spec. App. 1979); Solargen Elec. Motor Car Corp. v. American Motors Corp., 506 F. Supp. 546 (N.D.N.Y. 1981) (interpreting state law); In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963); State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974) (shield created by court).

193. *See supra* note 119.

of their state.[194] In a few states lacking a shield, statutory or judicial, courts have found that the absence of a shield justifies the conclusion that a reporter has no sources when a reporter refuses to disclose sources in a libel action.[195] This is a harsh remedy, certainly reflecting a strong public policy in favor of traditional discovery and evidence law.[196]

The above discussion of conflicts, federalism, and supremacy may lead to the conclusion that the only certainty is uncertainty. Federal and state court systems have used separate analyses. The emphasis in federal cases has been on first amendment considerations, while the emphasis in state courts has centered on statutory analysis. Understandably, the journalist's attention has centered on results. The profession cheers when a privilege claim is recognized and upheld, and is less kind when the privilege is not applied.[197] Perhaps most important, from the viewpoint of the law's role in ordering behavior, there is often a major difference between how journalists, judges and lawyers interpret privilege cases.[198] One journalist concluded that some form of shield exists in every state,[199] a conclusion that surely must surprise judges and lawyers

194. *See, e.g.*, Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791 (1978); Dow Jones & Co. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973).

195. DeRoburt v. Gannett Co., 507 F. Supp. 880 (D. Hawaii 1981); Downing v. Moniter Publishing, 120 N.H. 393, 415 A.2d 683 (1980).

196. *See* discussion at *supra* note 9. Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) was a diversity of citizenship libel case. It offered an opportunity to analyze the respective interests of Massachusetts, which has staunchly refused to create a reporter's privilege, *see supra* note 120, and New Hampshire, which has a privilege created by the judiciary. Opinion of the Justices, 117 N.H. 386, 373 A.2d 644 (1977). By ordering the case back for rehearing in light of the Stewart three-part test, however, the First Circuit explicitly disapproved of the "no source" rule announced in Downing v. Monitor Publishing Co., 120 N.H. 383, 415 A.2d 683 (1980). The First Circuit avoided a choice of law problem by applying federal law—despite the fact that competing state laws were involved.

197. *See Confidentiality: The Court Continues to Steer Clear*, NEWS MEDIA & THE LAW, Feb./March 1982, at 24 [hereinafter cited as *Confidentiality*]; Denniston, *supra* note 149, at 10; Huffman, Kelley & Trauth, *supra* note 50, at 42. The press takes an equally dim view of failures to receive what they believe is proper treatment from the courts in other areas. *See*, Denniston, *Cameras in the Courtroom 1982*, QUILL, March 1982, at 22.

198. *Reporter Must Yield Source Despite Shield*, NEWS MEDIA & THE LAW, Feb./March 1982, at 26. In discussing Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), the article said the Fifth Circuit held that, "Despite the California shield law, a reporter must divulge his source for a story that prompted a libel suit by a public figure . . . ." The *Miller* court actually based its holding squarely on federal privilege law. 621 F.2d at 726. Huffman, Kelley & Trauth, *supra* note 50, at 47, wrongly praise the *Miller* case for upholding a reporter's qualified privilege.

199. Denniston, *supra* note 149. The article in fact urges journalists to rely upon state law rather than the first amendment.

in many states. There is also an enmity between the bench and the press, made apparent in the tone of privilege articles in journalism publications and the language used by some journalists to describe the issue.[200] The press and bench have in fact been historic adversaries, particularly in free press-fair trial cases,[201] and some of the emotional fallout from other issues has apparently made its way into the privilege issue. Unlike questions of gag orders, closed hearings, or broadcast limitations, journalists (and perhaps judges too) do not readily recognize the privilege issue as a variation on the free press-fair trial controversy. This has led to bitter exchanges, where both judge and reporter perceive a threat to their rights.[202] At least one commentator has called for what amounts to a ceasefire between reporters and judges.[203]

It is doubtful that mere reflection can resolve the conflicts. Journalists are trained in the ethics of their profession,[204] including anonymity for sources,[205] just as surely as a law student is

200. *See* Marks, *The Price Came High*, APME NEWS, August 1981 at 4: "Being a reporter is not against the law. Why, then, am I being treated like Bugs Moran? . . . Ironically, I think Vehlow (the judge) and I were alike in our insistence on upholding our principles. But our convictions clashed." Denniston, *Sandra O'Connor to be Tested Early and Often*, QUILL, Oct. 1981 at 15: "Some anxiety is beginning to show in the nation's newsrooms as the Supreme Court starts a new term without one of the press' best friends, Justice Potter Stewart . . . . Her (O'Connor's) political instincts are just about the only hope the press has that she won't add to its continuing woe at the court." *See* Anderson & Murdock, *Effects of Communication Law Decisions on Daily Newspaper Editors*, 1981 JOURNALISM Q. 525. A number of observers have called for a truce in the invective. *See* Goodwin, *Press-Court Relations: Can They Be Improved?*, 7 HASTINGS CONST. L.Q. 633 (1980); Friendly, *Judges and Journalists: Whose End of the Boat is Sinking?*, 65 JUDICATURE 389 (1982); Friendly, *Order in the Court—Freedom in the Newsroom*, 20 JUDGES J. 14 (1981).

201. *See generally*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

202. *See* Petitioner's Opening Brief, at 10, 11, Marks v. Vehlow, No. 13938 (Idaho 1981); Brief of Respondent, at 2, 3, Marks v. Vehlow, No. 13938 (Idaho 1981). The reporter is posing a first amendment right of nondisclosure against a judge's traditional right to enforce the powers of her courtroom through contempt citations. *See* also, Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971).

203. Friendly, *Judges and Journalists: Whose End of the Boat is Sinking?*, 65 JUDICATURE 389, 390: "But those who run courtrooms and newsrooms should never forget that they are both guardians and beneficiaries of the Constitution and particularly the provisions of the Bill of Rights." (arguing that judges and journalists have more, rather than less, in common).

204. The Association for Education in Journalism (AEJ) has no formal ethics requirement for the curriculum of a school approved for professional accreditation. Most schools, however, include material on ethics in classes on communication law or advanced reporting. J. HULTENG, PLAYING IT STRAIGHT (1981), published by the American Society of Newspaper Editors, is a good summary of journalism ethical standards, both as taught and practiced.

205. *Id.* at 64; H. SCHULTE, REPORTING PUBLIC AFFAIRS 406-07 (1981); P. WILLIAMS,

taught to respect client confidences.[206] Both professions treat confidences as sacred. To the journalist, protecting sources is both a matter of principle and simple good business; if reporters are routinely forced or volunteer to reveal sources, they will undoubtedly have fewer sources. Similarly, an attorney who reveals confidences regarding clients will soon lose credibility and, eventually, clients.

The one institution in a position to settle the issue of the confidential source privilege, the Supreme Court, has refused to take a privilege case for ten years.[207] This refusal bolsters the belief that the Court was serious when it called for experimentation in *Branzburg*.[208] In 1980, Justice Brennan, acting as circuit justice in *In re Roche*,[209] stayed a contempt order against a reporter in Massachusetts. Justice Brennan applied the traditional criteria for issuing such a stay: a "reasonable probability" that four justices would vote to grant certiorari; a fair prospect that the Court would conclude that the lower court was in error; irreparable harm to the person seeking the stay; and, whether the "balance of equities" favored granting the stay.[210] Justice Brennan decided that the key question was that of a fair prospect of reversal. He found that the party seeking forced disclosure had not exhausted alternative sources. The opinion, although by only one justice, may be read as an indication that Justice Brennan believes a majority of the Court now accepts at least a qualified privilege.

Whatever privilege Justice Brennan feels may be accepted by the Supreme Court is clearly affected by the context of the case. In *In re Roche* a reporter was called to provide disclosure of sources in a civil setting. During August 1982 in *In re Corsetti*, Brennan, again sitting as circuit justice, refused to issue a stay on the sen-

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INVESTIGATIVE REPORTING AND EDITING 64 (1978); B. WESTLEY, NEWS EDITING 234 (3d ed. 1980); W. FRANCOIS, MASS MEDIA LAW AND REGULATION 404 (3d ed. 1981). Nearly all journalism texts surveyed by the author include a section dealing with treatment of confidential sources reminding journalism students that promises of confidentiality are sacred. The very emphasis on the subject may induce what reporters call the "Deep Throat" syndrome, where using anonymous sources may appear more romantic than dangerous. *See supra* note 47 and accompanying text.

206. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1979).

207. *Confidentiality, supra* note 197, at 24. Another institution capable of settling the issue on at least the federal level is Congress, which was also invited to fashion its own standards in Branzburg v. Hayes, 408 U.S. 664, 706 (1972). H.R. 6230, 97th Cong., 2d Sess. (1982), introduced by Rep. Bill Green of New York, is the latest of many bills introduced to create a privilege at the federal level. Green's bill, like those of Nebraska and New Jersey, would protect both sources of information and information itself.

208. *See supra* notes 3-8 and accompanying text.

209. 448 U.S. 1312 (Brennan, Circuit Justice, 1980).

210. *Id.* at 1314.

tence of a reporter for the *Boston Herald-American* who had promised anonymity to a news source.[211] Significantly, the source, who was later a defendant in a criminal trial arising from facts covered in the reporter's story, had admitted to the reporter that he was involved in a murder.[212] The action by Justice Brennan serves to finalize the Massachusetts Superior Court's earlier decision in *In re Corsetti*.[213] Together, Justice Brennan's decisions in *Roche* and *Corsetti* indicate that he believes the Court is prepared to accept a privilege along the lines followed by the lower federal courts.[214] The refusal to issue a stay in *Corsetti* is in line with decisions noting the public interest in preventing domestic chaos as an exception to the privilege.[215]

The *Roche* and *Corsetti* cases, however, are weak hooks on which to hang a journalist's hopes for certainty. The journalist must consider the "alternative sources" of law in statutes and in the federal circuits to ascertain the rules that apply. To determine the protection a journalist may expect in Nebraska, or other states with an absolute shield law, the shield law must be assessed in context.

VI. TO BIND THE WHOLE WORLD?

The Nebraska shield law, as noted earlier,[216] is comprehensive and absolute. The legislative purposes expressly set forth in the statute make it clear that the legislature was serious about keeping the news industry "unfettered."[217] The law was not a hasty response to the *Branzburg* invitation. Rather, it was adopted after careful reflection on developments throughout the country.[218] The legislature was in fact urged to modify the statute to allow only a qualified privilege; then-Governor J.J. Exon felt that the statute should not be allowed to cover most criminal actions, and also believed that the application of the privilege was best left to the discretion of trial judges.[219] Supreme Court Chief Justice Norman Krivosha, then an assistant to Exon, advanced the governor's argu-

211. In re Corsetti, 51 U.S.L.W. 3149 (U.S. Sept. 1, 1982); *Corsetti loses appeal, remains in jail*, Boston Globe, Sept. 2, 1982, at 1, col. 2.
212. *Corsetti's back in jail*, Boston Globe, Sept. 1, 1982, at 1, col. 2.
213. 7 Media L. Rep. (BNA) 1084 (Mass. Super. Ct. 1981).
214. *See supra* notes 53, 87-104 and accompanying text.
215. *See supra* notes 79-80 and accompanying text.
216. *See supra* note 1 and accompanying text.
217. *See supra* note 1.
218. *Nebraska Free Flow of Information Act: Hearing on L.B. 380 Before the Committee on the Judiciary*, Nebraska Legislature, 83rd Leg., 1st Sess. 1973.
219. *Amended Nebraska Free Flow of Information Act: Hearing on L.B. 575 Before the Committee on the Judiciary*, Nebraska Legislature, 83rd Leg., 1st Sess. 1973.

ments to the legislature. Debates on the statute were extensive. The legislators were very much aware, however, of "loopholes" so readily found in shield laws in other states. All attempts to modify the absolute shield were defeated. The effectiveness of the shield, however, remains a subject of speculation as there have been only two attempts to challenge the law in court[220] and both challenges were dropped in pre-trial hearings.

The most prominent feature of the Nebraska law is its protection of all newsgathering and dissemination activity.[221] The act applies to all "persons" engaged in these first amendment activities, so long as they intend to disseminate the news obtained. Unlike a statute which specifically delineates persons covered, such as including reporters or filmmakers but excluding biographers, the Nebraska law makes no exceptions, and it may be assumed that the courts will not readily limit the scope of the statute. Where courts have found exceptions as to which persons are covered, the exceptions are often suggested by the statute itself.[222]

There are two possible objections to the breadth of protection

220. *See supra* note 16. Neither of the two Nebraska cases actually mounted a challenge to the shield law since no appeal was taken in either case. The judges involved seemed to treat the shield both as a privilege and as a formal rule of evidentiary exclusion.

221. NEB. REV. STAT. § 20-146 (1979) provides:

> No person engaged in procuring, gathering, writing, editing or disseminating news or other information to the public shall be required to disclose in any federal or state proceeding:
>
> (1) The source of any published or unpublished, broadcast or nonbroadcast information obtained in the gathering, receiving, or processing of information for any medium of communication to the public, or
>
> (2) Any unpublished or nonbroadcast information obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public.

222. *See supra* notes 122-23 and accompanying text. There apparently is no case where a court limited the application of a state shield law when no limitation was clear from the text of the statute. Federal courts, however, have limited shield laws in a variety of cases, but on federal grounds rather than on an interpretation of the shield laws. Los Angeles Memorial Coliseum Comm'n v. National Football League, 519 F. Supp. 581 (C.D. Cal. 1981) (finding state shield essentially same as federal law, but relying on federal precedents); In re Consumers Union, 495 F. Supp. 582 (S.D.N.Y. 1978). For an example of a case where a state court relied on federal analysis rather than analysis of its own shield law, see Curran v. Philadelphia Newspapers, Inc., — Pa. —, 439 A.2d 652 (1981) (possibly a supremacy-based decision). *See supra* note 165 and accompanying text.

There is some authority for expanding the scope of a shield statute beyond its plain meaning. See Silkwood v. Kerr-McGee, 563 F.2d 433 (10th Cir. 1977), where the court found that a freelance documentary filmmaker was covered by Oklahoma's shield law, although the law did not directly apply to filmmakers.

provided by the Nebraska statute. Since the statute applies to certain types of conduct rather than specific classes of persons, it may be impermissibly broad or vague, or both.[223] Since anyone who *intends* to engage in the activities protected is covered, the analysis by a court would necessarily focus on intent—a difficult element to prove in any type of case,[224] and one explicitly rejected by the Supreme Court in first amendment cases. If the courts, however understandably, limited coverage to persons with the same type of credentials as a newsperson, the statute might conceivably be challenged on equal protection grounds. The only relevant authority on this issue is an opinion by the Oregon Attorney General,[225] asserting that the reasons for creating a special class under a shield law provide plentiful evidence of a government interest sufficient to withstand an equal protection challenge. His analysis, however, does not discuss why source protection is a matter of state interest.[226] Normally, an equal protection challenge in the first amendment area is analyzed with "strict scrutiny."[227] It is doubtful that a limited interpretation of the statute as suggested above would survive strict scrutiny.[228] The result might easily be

223. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

224. To provide a distinction between protected expression and unprotected activity in such criminal areas as conspiracy, solicitation, or attempts to commit crimes, Professor Emerson suggests that mere intent is insufficient and vague. He would limit intent to a finding that a defendant helped plan the commission of a crime or in some way became closely tied to the illegal action that resulted. T. EMERSON, *supra* note 49, at 401-412 (1970). The analogous intent under the Nebraska shield law, would be the intent to "commit" newsgathering for dissemination to the public. NEB. REV. STAT. § 20-146 (1977); *Amended Nebraska Free Flow of Information Act: Hearing on L.B. 575 Before the Committee on the Judiciary*, Nebraska Legislature, 83rd Leg., 1st Sess., p. 1.

225. In re Attorney General, 5 Media L. Rep. (BNA) 1238 (1979).

226. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (state distinction between police officers on basis of age satisfied rational basis test for equal protection challenge). If the challenge were that the shield law grants more free expression rights to some than to others, a much greater state interest might be required. *See supra* note 39 and accompanying text.

227. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (city ordinance banning motion pictures displaying mere nudity at drive-in theaters not supported by compelling state interest); Police Dep't of Chicago v. Mosely, 408 U.S. 92 (1972) (state statute distinguishing between labor picketing and other picketing not supported by overriding state interest). *See generally* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

228. The overriding state interest in the Nebraska shield law is "to insure the free flow of news and other information to the public." NEB. REV. STAT. § 20-144 (1977). The statute, however, must be closely drafted to accomplish the purpose intended in order to avoid equal protection or vagueness challenges, and

that the statute is too broad as written, but too narrow if limited.

Ascertaining what materials are to be covered by the statute poses problems of equal uncertainty. The shield applies to:

> (1) The source of any published or unpublished, broadcast or nonbroadcast information obtained in the gathering, receiving, or processing of information for any medium of communication to the public, or
> (2) Any unpublished or nonbroadcast information obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public.[229]

The statute seeks not only to protect the identity of sources, but also the secrecy of a journalist's "work product". It operates in a manner similar to a rule protecting the work product of attorneys[230] or a statute protecting trade secrets.[231] The breadth of the protection is in reaction to cases where newspaper reporters were called on to reveal notes used in preparing stories,[232] or where television reporters were subpoenaed to produce unused film or "outtakes."[233] Information is given a very broad definition in the statute: "Information shall include any written, audio, oral or pictorial news or other material."[234] This definition presumably is meant to protect "oral" information received through direct obser-

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classifications in the statute must be almost inescapably tied to effectuation of the purpose. "In a sense, every governmental restriction on expression based on content which does not involve a complete ban on expression raises problems of equal protection. Whenever government undertakes to pick and choose . . . among forms of communication, it introduces discrimination demanding justification." J. BARRON & C. DIENES, *supra* note 1, at 136. The Nebraska shield law by its very terms discriminates in two ways. It favors some types of communicators over others and also favors certain types of communication over other types of communication. NEB. REV. STAT. § 20-146 (1977).

229. NEB. REV. STAT. § 20-146 (1977).

230. *See generally* MCCORMICK'S, *supra* note 9, at § 96. The burden of proof required to force disclosure of an attorney's work product, however, is slighter than the burden required for disclosure in most reporter's privilege cases. This is because the attorney-client privilege is purely statutory, while the journalist's confidential source privilege is a mix of statutory and constitutional law. *See supra* note 166 and accompanying text. On occasion, a court will look to constitutional precepts despite the fact that the state shield law at issue is sufficient. *See, e.g.*, People v. Monroe, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (N.Y. Sup. Ct. 1975) (court invoked both first amendment and free press clause of state constitution despite existence of state shield law).

231. CAL. EVID. CODE § 1060 (Deering 1965).

232. *See, e.g.*, Cape Publications, Inc. v. Bridges, 387 So. 2d 436 (Fla. Dist. Ct. App. 1980) (newspaper required to provide "any and all" notes, memoranda, rough drafts, photographs, negatives, and prints in invasion of privacy action); People v. Zagarino, 97 Misc. 2d 181, 411 N.Y.S.2d 494 (N.Y. Sup. Ct. 1978) (reporter required to provide notes and memoranda sought by criminal defendant).

233. *See, e.g.*, United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980) (television network's qualified privilege against forced production in court of "outtakes" not used in news broadcast must be overridden if material is needed to effectuate a criminal defendant's fair trial rights).

234. NEB. REV. STAT. § 20-145(3) (1977).

vation. It is not clear whether the cases requiring reporter testimony concerning what reporters have observed (and heard) will apply to this section. The strength of the section must be doubted, however, for two reasons. First, the statute does not differentiate between expression and action, the primary analytic tool in first amendment cases.[235] Courts might easily decide that the news-gathering involved when a reporter attends a particular meeting is more action than expression. It is not clear where the line between the two is drawn.[236] Second, the coverage of information may also be too broad or vague. It should be clear that a telephone interview conducted pursuant to a confidentiality agreement will be covered. However, the law might also be invoked by a reporter who wishes to avoid testifying about an automobile accident he witnessed by chance. For that matter, perhaps anyone with the requisite intent might invoke the statute. In addition, it must be assumed that the legislature did not intend to protect information or material which is illegal or integrally tied to an illegality.[237]

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235. Generally speaking, government may not restrict purely expressive activities, but may restrict "action" which is incidental to expression. *See supra* notes 66-67; Cohen v. California, 403 U.S. 15 (1971) (vulgar word worn on back of jacket in a public place is not "action" subject to government regulation consistent with the first amendment); United States v. O'Brien, 391 U.S. 367 (1968) (prosecution for burning draft card; although burning card is expressive, the action of burning itself may be subject to government regulation).

236. The key question will be whether or not a reporter observed something pursuant to an express confidentiality agreement with a source. In some states, the burden of proof is on the reporter to show that the information was received with an understanding of confidentiality. *See, e.g.*, WBAI-FM v. Proskin, 42 A.D.2d 5, 344 N.Y.S.2d 393 (1973). Express confidentiality is one assertion made by the reporter in Marks v. Vehlow, No. 13938 (Idaho filed Feb. 12, 1981). Intent under NEB. REV. STAT. § 20-146 (1977) would appear to be satisfied if an event was observed only after a reporter had entered into an express confidentiality agreement. The same argument was of little aid to a reporter under the Kentucky statute in Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971), interpreting KY. REV. STAT. ANN. § 421.100 (Baldwin 1969), which is written in absolute terms.

237. *See* Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971) (reporter was an eyewitness to illegal drug transactions). An even stronger argument for disclosure may exist where a reporter is an eyewitness to murder, or is the only person who can identify an eyewitness. Massachusetts v. McDonald, 6 Media L. Rep. (BNA) 2230 (Mass. Super. Ct. 1980) (no matter what the scope of the reporter's privilege, it is overcome by compelling state interest in public safety and law enforcement). Together, *Pound* and *McDonald* suggest two rules for disclosure under a compelling state interest standard. In *Pound*, the reporter, by observing illegal transactions but not reporting the transactions to the police, was much like an accessory after the fact inasmuch as he willfully concealed the commission of a crime. While the analogy to being an accessory is also present in *McDonald*, the court found support in the interest of society to be free from domestic chaos as well. *Accord* State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971).

The issue of whether the identity of a source may be forced into the open depends heavily on where a lawsuit is brought and on the type of claim being made. The Nebraska shield law purports to protect reporters "in any federal or state proceeding."[238] "Federal or state proceedings . . . include any proceeding or investigation before or by any federal or state judicial, legislative, executive, or administrative body."[239] If the shield is not meant to bind the whole world, it at least aspires to bind the entire United States.

One type of proceeding, however, may be readily excepted. The *Branzburg v. Hayes*[240] decision forecloses the availability of an absolute privilege for a reporter called before a grand jury. To the extent that the shield law conflicts with *Branzburg*, the shield law must yield.[241]

The term "any proceeding" in the Nebraska shield law is the most suspect portion of the law. As discussed earlier, the scope of the reporter privilege has depended on where and how the privilege was claimed. Normally, any court construing the Nebraska shield law would look for an interpretation by the Nebraska Supreme Court.[242] However, that court has never interpreted the shield, nor has any federal court construed the shield in a diversity case.

Since Nebraska is within the Eighth Circuit, opinions of the Eighth Circuit Court of Appeals may be useful in determining the scope of the reporter privilege in Nebraska under the Nebraska shield law. The Eighth Circuit has considered the reporter privilege in only one case, *Cervantes v. Time, Inc.*[243] Although *Cervantes* is frequently cited as having created a qualified rule of confidential source privilege,[244] the case was decided on narrower grounds.

Cervantes, the mayor of St. Louis, sued *Life* magazine for libel. During pretrial discovery, he sought to obtain the identities of sources used in preparing the article. Although the case was brought in Missouri, Cervantes sought the confidential source information upon a motion and affidavit that was to be heard in New York. The mayor's motion for discovery coincided with the defendant's motion for summary judgment. Following the principles

238. NEB. REV. STAT. § 20-146 (1977).
239. NEB. REV. STAT. § 20-145(1) (1977).
240. 408 U.S. 665, 667 (1972).
241. *Id.*; In re Farber, 78 N.J. 259, 266, 394 A.2d 330, 333, *cert. denied*, 439 U.S. 997 (1978).
242. *See* City of Mesquite v. Aladdin's Castle, Inc., 102 S. Ct. 1070 (1982); Mullaney v. Wilbur, 421 U.S. 684 (1975). The principle also applies to state courts making conflicts of laws decisions, R. LEFLAR, *supra* note 166, at § 74.
243. 464 F.2d 986 (8th Cir. 1972).
244. Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980).

for deciding a motion for summary judgment, the court found that Cervantes' evidence, viewed in the most favorable light, was insufficient to withstand the motion. Futhermore, Cervantes did not provide evidence that the identity of sources would help him overcome the motion.[245] The defendant, however, provided evidence that the sources had been independently corroborated. This fact seemed to weigh heavily with the court.[246]

Although the court considered the potential conflicts problems and engaged in a lengthy discussion of both Missouri and New York law,[247] deciding the conflicts issue was not considered essential. The court assumed that Missouri law, which called for application of the law of the state where the evidence was to be heard, would apply. Missouri had no applicable shield. Although the court rested its decision on purely procedural grounds, it presented a balancing test to be applied in similar libel cases in the future. The court stated:

> Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine these sources, whether they be anonymous or known. For only then can it be said that no genuine issue remains to be tried.[248]

Couched in terms of procedure, the test is remarkably similar to the "heart of the claim" test in *Garland v. Torre*,[249] and to the tests adopted in libel cases by other circuits.[250] The *Cervantes* court, however, refused to characterize its holding as a rule of constitutional law. It instead used the Federal Rules of Civil Procedure, as modified by the *New York Times Co. v. Sullivan*[251] accomodation of interests in libel suits filed by public figures. *Cervantes* was, therefore, a case concerned with burdens of proof and sufficiency of evidence rather than pure privilege.

Since *Cervantes* does not explicitly create a constitutional rule of privilege, it cannot bind Nebraska state courts on the question. Any state court deciding a privilege claim, however, should carefully note the similarities between the Eighth Circuit's result and reasoning and that of other circuits which have decided the same issue on constitutional grounds. The results elsewhere appear to support upholding the absolute nature of the Nebraska shield law when it is at issue in civil cases in state courts. The validity of the

245. 464 F.2d at 992.
246. *Id.* at 991.
247. *Id.* at 989.
248. *Id.* at 994.
249. 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).
250. *See supra* note 53 and accompanying text.
251. 376 U.S. 254 (1964).

shield in federal civil cases brought under diversity jurisdiction, however, is less certain. Federal district courts in the Eighth Circuit are bound by the procedural interpretation in *Cervantes*, and if the issue goes to the heart of a libel claim, presumably they must override the Nebraska shield. A similar result would likely occur in non-libel civil suits where a "fundamental" interest is at stake.[252] In civil suits where no fundamental right is involved, it may be assumed that the Nebraska shield law will be held to be as absolute as intended. Such a result conforms to the decisions in both state and federal courts in other parts of the country.

Criminal cases pose great problems for the Nebraska shield law. Based on federal circuit court and other state court precedent, it must be assumed that the shield will be limited to the extent that it conflicts with the fair trial guarantees of either the federal or state constitutions.[253] This is the direct teaching not only of *In re Farber*,[254] but also of the Supreme Court's refusal to hear Farber's appeal. Justice Brennan believed the Court was ready to hear an appeal in an investigative body case in *In re Roche*,[255] but both Justices Marshall and White found no such readiness in the *Farber* case.[256] The reason is that *Farber* was

252. *See* discussion of fundamental rights at *supra* note 110. A recent case supporting the position that a confidential source privilege, whether grounded in state law or constitutional precept, may be overridden where a "fundamental" right is threatened is Trautman v. Dallas School Dist. 8 MEDIA L. REP. (BNA) 1088 (N.D. Tex. 1982) (court ordered disclosure of sources in a suit where a former school district employee was asserting a denial of the constitutional right to due process relating to termination of employment). *Contra*, Maressa v. New Jersey Monthly, 89 N.J. 176, 445 A.2d 376 (1982).

253. U.S. CONST. amend. VI; NEB. CONST. art. 1, §§ 1, 3, 11. Like most state constitutions, the Nebraska Constitution's provisions for fair trial and due process essentially track the provisions of of the federal constitution.

254. 78 N.J. 259, 394 A.2d 330 (1978).

255. 448 U.S. 1312 (1980) (Brennan, Circuit Justice). In *Roche*, a reporter was called to testify concerning confidential sources used in reporting for a special news report by a Boston television station on alleged unethical behavior by a state court judge. The Massachusetts Commission on Judicial Conduct ordered disclosure of the reporter's sources; the order was upheld by the Massachusetts Supreme Judicial Court. Justice Brennan issued a stay of the state court's contempt order against Roche. In so doing, Brennan found that there was a probability that at least four Justices would vote to grant certiorari, and that there was a reasonable prospect that the lower court would be reversed. *Id.* at 1314. It is not certain, but the opinion appears to indicate that Justice Brennan believes a majority of the Court is ready to uphold the qualified first amendment confidential source privilege that has been recognized in the circuit courts. *Id.* at 1316. It may also be significant, however, that the disclosure order was originally issued by a non-judicial body. Disclosure orders issued by administrative and other quasi-judicial bodies have been reversed in some instances. *See, e.g.*, Connecticut Bd. of Labor Relations v. Fagin, 33 Conn. Supp. 204, 370 A.2d 1095 (1976).

256. New York Times Co. v. Jascalevich, 439 U.S. 1317 (White, Circuit Justice) *de-*

more analogous to *Branzburg v. Hayes*,[257] which also mentioned the state interest in law enforcement, while *Roche* was similar to civil cases such as *Baker v. F&F Investment*.[258] Justice Brennan's decision to not issue a stay in *In re Corsetti*[259] is consistent with this distinction. Because *Corsetti* was a criminal case where the anonymous source admitted observing a crime, *Corsetti* is much closer to *Farber* than to *Roche*.[260]

The Eighth Circuit Court of Appeals and the Nebraska Supreme Court have not heard cases on the privilege issue in a criminal context. In an analogous context, however, the Eighth Circuit has held that first amendment rights may be overridden by sixth amendment fair trial rights. In a 1980 case, *In re Pulitzer Publishing*,[261] the Eighth Circuit interpreted Supreme Court cases addressing when trials may be closed to the press or public.[262] Although the court recognized a newly created qualified first amendment privilege to attend trials, it also noted that the right to attend could be extinguished (always in the least restrictive fashion) when sixth amendment rights were jeopardized.[263] *Pulitzer*, then, strengthens the notion that a specific personal right will have priority over a more general right when both rights have a constitutional basis.[264] The federal district court for Minnesota reached

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nying stay to sub nom. In re Farber, 78 N.J. 259, 394 A.2d 330 (1978); New York Times Co. v. Jascalevich, 439 U.S. 1331 (1978) (Marshall, Circuit Justice) *denying stay to sub nom.* In re Farber, 78 N.J. 259, 394 A.2d 330 (1978). The difference between granting and not granting a stay in the *Farber* proceedings and *Roche* may well be the nature of the underlying action. The New Jersey Supreme Court noted the similarities between Branzburg v. Hayes, 408 U.S. 665 (1971), and the *Farber* proceedings in In re Farber, 78 N.J. 259, 394 A.2d 330 (1978). In re Roche, on the other hand, involved what remained a purely civil matter, although the charges against the judge could have resulted in criminal charges at a later time. In re Roche, 448 U.S. 1312, 1316 (1980) (Brennan, Circuit Justice). The Commission on Judicial Conduct and the accused judge also had not apparently made an attempt to satisfy the three-part test. *Id.*

257. 408 U.S. 665, 696 (1972).

258. 470 F.2d 778 (2d Cir. 1972); *see* analysis of *Baker* at *supra* notes 81-95 and accompanying text.

259. In re Corsetti, 51 U.S.L.W. 3149 (U.S. Sept. 1, 1982); *see supra* note 211.

260. 448 U.S. 1312 (Brennan, Circuit Justice, 1980); *see supra* notes 209-13 and accompanying text.

261. 635 F.2d 676 (8th Cir. 1980).

262. *Id.* at 678. The cases interpreted were Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) and Gannett v. DePasquale, 443 U.S. 368 (1979).

263. 635 F.2d at 678.

264. This is the essential reasoning in support of limited exceptions to the confidential source privilege in libel actions, Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), and in criminal actions, United States v. Criden, 633 F.2d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), when the right to maintain one's reputation or the right to a fair trial can only be upheld by requiring disclosure of confidential information.

a similar decision in a case involving the "fundamental" right of personal privacy.[265] In *Richmond Newspapers Inc. v. Virginia*,[266] the Supreme Court held that only an "overriding interest" on the part of the state would justify closing a criminal or civil trial that is presumptively open to the public.[267] The test, although rather uncertain, adopts the hallmarks of the clear and present danger analysis that highlight Justice Stewart's confidential source test in *Branzburg v. Hayes*.[268] The overriding interest justifying restrictions on press freedoms in either the open trial or confidential source context has most often been the endangering of fair trial rights.

Since the federal cases concerning the source privilege in criminal cases have relied on a constitutional analysis rather than on the rules of evidence and procedure, it seems fair to assume that Nebraska courts will be obliged to follow the federal clear and present danger analysis in state criminal cases. On occasion, the balancing of interests required in such an approach will result in forced disclosure (or a contempt citation) for the reporter.[269]

Previous discussion shows that it is likely the Nebraska shield law will be given an absolute interpretation in a civil case where the reporter is a non-party. If a fundamental right is at issue, however, it is possible that the shield law would be limited so as to not conflict with the right.[270] *Baker* and similar cases offer strong support for assuming the validity of the Nebraska shield in most civil contexts.

Similarly, the shield law should be found absolute when applied to other types of proceedings. There is some authority to the effect that only a body with constitutional authority to adduce testimony (normally a court) has the authority to compel disclosure

265. In re Application of KSTP Television, 504 F. Supp. 360 (D. Minn. 1980) (journalists moved for release of copies of videotapes introduced as evidence in a rape trial that showed victim nude, bound, and gagged; court ruled that strong common law right of public and press to inspect and copy material introduced at trial was overridden by victim's stronger, fundamental right of personal privacy).

266. 448 U.S. 555 (1980).

267. 448 U.S. at 581.

268. 408 U.S. 665, at 727, 743 (1971) (Stewart, J., dissenting). The analogy to the clear and present danger doctrine is discussed more fully at *supra* note 66 and accompanying text.

269. *See, e.g.*, United States v. Cutherbertson, 630 F.2d 139 (3d Cir. 1980); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975); New Hampshire v. Siel, — N.H. —, 444 A.2d 499 (1982); In re Farber, 78 N.J. 259, 394 A.2d 330 (1978).

270. *See supra* note 110 and accompanying text. Absoluteness was the express intent of the legislature at the time of passage. Comment, *An Analysis of the Nebraska Privilege Statute (Free Flow of Information Act)*, 7 CREIGHTON L. REV. 329, 344 (1973).

of sources from a reporter.[271] Since the Nebraska shield law expresses state policy, and is also meant to implement the first amendment, it may be assumed that the legislature intended to provide protection as full as the amendment itself may provide. One typical protection is that a first amendment right may not be infringed upon without due process of law.[272] Normally, only judicial process constitutes due process in the first amendment area.[273] Informal proceedings, such as legislative investigations simply do not meet the due process requirements. The shield law would also appear to be absolute in administrative hearings and proceedings.

The final type of proceeding that may arise under the Nebraska shield law is one in which the reporter is a plaintiff in a civil case.[274] *Anderson v. Nixon*[275] stands for the proposition that the privilege is waived when used by a reporter for purely personal reasons—a reporter may not use confidential information for personal gain without exposing the sources of that information to normal tests of credibility. The reasoning of the *Anderson* case appears to be sound waiver analysis in almost any jurisdiction. In Nebraska, an additional limitation on the shield law might therefore be engrafted. Since the application of the shield law depends

271. Connecticut State Bd. of Labor Relations v. Fagin, 33 Conn. Supp. 204, 370 A.2d 1095 (1976). There is a hint of the same reasoning in In re Roche, 448 U.S. 1312 (1980) (Brennan, Circuit Justice).

272. Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975). *See generally* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970). Since journalists claim that a privilege is needed both as a matter of first amendment doctrine and also for the practical reason that protecting confidential relationships between reporters and sources is necessary for the proper practice of the profession of journalism, an enterprising reporter in a disclosure action might wish to make the additional claim that forced disclosure of sources would amount to a denial of the right to practice one's profession, which is itself a denial of liberty in constitutional law. *See* Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (schoolteacher may not be dismissed for exercising first amendment rights); Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978) (female sports reporter denied right to practice her profession when she was barred from entering professional baseball club locker room to which only male reporters were granted access).

273. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965) (state may not ban movie as obscene without prompt judicial determination of fact of obscenity); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (order by trial judge prohibiting news media from contact with any and all parties involved in judicial proceeding violates the right of the press to gather news); Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973) (state statute that provides for registration and approval of reporters prior to allowing reporters access to state legislature activities violates first amendment).

274. For purposes of this Article, it is assumed that no Nebraska reporter will be a defendant in a criminal case.

275. 444 F. Supp. 1195 (D.D.C. 1978).

strongly on a reporter having the proper intent, it is but a small step to determine that a reporter seeking personal advantage by using the privilege is not behaving with the requisite intent, which is solely to inform the public.[276] A private lawsuit by a reporter simply has nothing to do with the traditional ideas about free dissemination of news and ideas. It is not within the legislative purpose that motivated the shield law's passage; it does not meet the intent anticipated by the statute, and it should not be protected under the act.

The Nebraska shield law, although absolute on its face, is nonetheless capable of offering only a qualified privilege. The weight of authority throughout the United States is that no shield law may offer stronger protection than that offered by the first amendment itself. Since a first amendment qualified privilege has been recognized but overridden in federal cases by other rights such as the right to a fair trial or the right to maintain one's reputation, it must be assumed that the Nebraska shield law may go no further. Protection for sources and information is most limited in libel and criminal cases. In all other judicial proceedings, or other types of proceedings, the privilege will be absolute as intended unless a right of comparable constitutional stature is posed against the privilege. The privilege is then subject to the rule that conflicting constitutional rights will be balanced.

The strength of the Nebraska shield law may also be suspect in the event that it is construed in a case before the courts of another state. The existence or non-existence of the privilege to protect confidential sources is normally a matter of strong public policy. It is safe to assume that a number of states might give no effect whatsoever to the Nebraska law.[277]

Nebraska journalists are in the same boat as their colleagues throughout the United States. In the past ten years, the courts have been willing to create a qualified reporter's privilege in a variety of cases. Courts construing state shield laws have been willing

276. In a civil case where the journalist is the plaintiff, the "intent" to benefit the public, NEB. REV. STAT. § 20-146 (1977), if a concern at all, is likely to be peripheral. The plaintiff journalist is seeking personal redress, not redress on behalf of the public. *See supra* note 158 and accompanying text.

277. Idaho, for example, has rather strongly emphasized its rejection of the notion of confidential source privilege. Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791 (1977) (basing its holding on Branzburg v. Hayes, 408 U.S. 665 (1972)). Nebraska's privilege, in a state where no shield law has been passed, or where the courts have not recognized a constitutional or common law shield, might be limited both as a result of state policy and of constitutional interpretation. Even states that have recognized a privilege may grant the Nebraska shield law recognition only as a qualified rather than absolute privilege. *See, e.g.*, Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977).

to uphold qualified but not absolute privileges. Although there is clearly no absolute shield anywhere in the United States, journalists should not take exception to the occasional case where disclosure is required. Those cases are rare. The three-part test adopted in most jurisdictions is a difficult burden for parties seeking disclosure to meet.[278] The presumption under the test is always that the reporter is entitled to the shield;[279] the burden is on the party seeking disclosure to overcome the presumption. In the 1970s, there was much discussion of a possible national shield law. A number of proposed bills were introduced in Congress,[280] but none has been adopted. Even a nationwide, federal shield law would be subject to constitutional limitations. In *Riley v. City of Chester*,[281] the Third Circuit found that a confidential source privilege flows from the new Federal Rules of Evidence, but at the same time held that the privilege created was subject to constitutional limitations.[282] An express act of Congress would fare no better.

278. In virtually every case analyzed where disclosure was not required, the party moving for disclosure failed to meet one or more parts of the three-part test urged by Justice Stewart in *Branzburg v. Hayes*. *See* cases collected at *supra* note 64. The performance of courts in the reporter privilege context has generally matched the requirements under traditional first amendment analysis—in other words, no action has been taken against the press unless it is shown to be inescapably necessary. This has been true despite the fact that meeting the evidentiary burdens of the three-part test may entail costs both in terms of money and time. Such expense is considered a necessary condition to help assure the fullest first amendment protection. *See*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (trial courtroom may not be closed absent consideration of alternative methods of assuring fair trial that do not impinge on first amendment rights of press and public); Nebraska Press Ass'n v. Stuart, 423 U.S. 1319 (1975) (trial judge may not issue gag orders upon press unless or until it is demonstrated that gag order is the only method of assuring fair trial to criminal defendant; the incidental costs of seeking alternatives to gag orders are considered necessary to protect first amendment interests). The similarity between judicial caution in closing off judicial proceedings to the press, and caution in ordering disclosure of sources is not coincidental. It is firmly in line with established first amendment doctrine. *See*, United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982) ("chilling effect" analysis employed to prevent compulsory production of materials from journalist in criminal action upon request by prosecutor).

279. Branzburg v. Hayes, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting) (when reporter files a motion to quash a request for forced disclosure of sources or information, the burden of proof shifts to the party seeking disclosure, who must prove that the information sought is relevant, that no alternative means of obtaining the information exist, and that the party seeking disclosure has a compelling and overriding interest in the information).

280. H. NELSON & D. TEETER, *supra* note 12, at 378. A model privilege statute offered by the American Newspaper Publishers Association became the basis for much of the language in the Nebraska shield law. *An Analysis of the Nebraska Privilege Statute*, *supra* note 1, at 354.

281. 612 F.2d 708 (3d Cir. 1979).

282. *Id.* at 715.

Throughout this Article, it has been assumed that the ultimate purpose of the law concerning the confidential source privilege is to provide guidance for the future behavior of both journalists and judges. The law today has sufficiently developed for those rules to be easily understood and followed by all those involved. Rather than to complain about being denied an absolute privilege, journalists should become familiar with the rare exceptions to privilege as they have done with exceptions in the area of libel. For judges, the task is a bit more complex. Scores of courts have found multiple reasons for creating or upholding privileges that are substantially identical. They must now find a way of agreeing on rationale. Justice Brennan feels a qualified privilege has a fighting chance in the Supreme Court. Perhaps developments should concentrate on constitutional analysis.

That the Nebraska shield law is not absolute should not dismay Nebraska journalists. Confidential sources have not dragged them into the courts so far. That, perhaps, is a reflection of the strength of the shield law, but perhaps more rightly reflects justifiable caution.