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Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism

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MEDIA SUBPOENAS: IMPACT, PERCEPTION, AND LEGAL PROTECTION IN THE CHANGING WORLD OF AMERICAN JOURNALISM

RonNell Andersen Jones¹

Abstract: Forty years ago, at a time when the media were experiencing enormous professional change and a surge of subpoena activity, First Amendment scholar Vincent Blasi investigated the perceptions of members of the press and the impact of subpoenas within American newsrooms in a study that quickly came to be regarded as a watershed in media law. That empirical information is now a full generation old, and American journalism faces a new critical moment. The traditional press once again finds itself facing a surge of subpoenas and once again finds itself at a time of intense change—albeit on a different trajectory—as readership and public reputation plummet. As the dialogue on this complicated topic once again reaches full volume, intensified by a series of hotly contested federal reporter’s privilege bills, the question of the appropriate legal rule is again inextricably intertwined with the question of the real-world impact of subpoenas on the operations of the media. This “law-in-action” Article aims to offer the legislators and policymakers of today what Blasi offered them four decades ago. It reports the results of a large-scale empirical study, presenting both quantitative and qualitative assessments of the effects that subpoenas have on daily newspapers and local television news operations, and re-explores the questions of changing legal climate and media awareness of legal protection. The Article concludes that media subpoenas have a substantial impact on newsgathering, warranting federal legislative attention. But it also concludes that the traditional press is ill-informed of the contours of its own legal protection, which may compound the difficulties the media experience in this area.

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INTRODUCTION

Nearly forty years ago, journalists in the United States faced both an unprecedented transformation of the media profession and a critical change in the legal climate for reporters. With the blossoming of a new brand of investigative, public-interest reporting that would culminate in the legendary Watergate stories,² members of the traditional press

2. See Carl Bernstein & Bob Woodward, *Bug Suspect Got Campaign Funds*, WASH. POST, Aug. 1, 1972, at A1; Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, WASH. POST, Oct. 10, 1972, at A1; Carl Bernstein & Bob Woodward, *Mitchell Controlled Secret GOP Fund*, WASH. POST, Sept. 29, 1972, at A1; Alfred E. Lewis, *5 Held in Plot to Bug Democrats' Office Here*, WASH. POST, June 18, 1972, at A1; Bob Woodward & Carl Bernstein, *GOP Security Aide Among Five Arrested in Bugging Affair*, WASH. POST, June 19, 1972, at A1; see also Anthea J. Jeffery, *Free Speech and Press: An Absolute Right?*, 8 HUM. RTS. Q. 197, 198 (1986) ("The importance of such investigative journalism has been demonstrated beyond all doubt by the

enjoyed record-high public opinion and a skyrocketing reputational status that led some judges and scholars to suggest that daily newspapers and television news operations should be revered as a fourth branch of government,³ critical to the nation's security and well-being and protected as a check on the other three branches. At the same time, the media's changing structure and increasing profile had created legal complications. Subpoenas against reporters—a problem that historically had been “a matter of only occasional and local significance”⁴—began to occur with much greater regularity, “in such numbers and circumstances as to generate consternation in virtually all quarters of the journalism profession.”⁵ These changed circumstances led to proposed changes in law, and both the judicial and the legislative branches found themselves intensely focused on the possible need for a reporter's privilege.

Noting the dual trends of a rapidly changing industry⁶ and a stark uptick in the issuance of subpoenas⁷—and recognizing that the ensuing legal debate demanded an assessment of the real-world impact of subpoenas on these new “modern”⁸ newsrooms—First Amendment scholar Vincent Blasi sought to investigate these effects. His empirical study, which included qualitative and quantitative measures of journalists' perceptions of the impact of subpoenas on newsgathering,⁹ along with data describing their perceptions of their own legal protections, is widely regarded as a landmark in media law.¹⁰ It helped to

Watergate scandal . . .”).

3. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521 (1977); Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1974–75).

4. Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 229 (1971) [hereinafter Blasi].

5. *Id.* at 230.

6. *Id.* at 233–35.

7. *Id.* at 229–30.

8. *Id.* at 234.

9. *Id.* at 235–39.

10. Charles Allen Wright, 23 FED. PRAC. & PROC., EVIDENCE § 5426 at 720 n.45 (1980) (the “best attempt to assess the empirical underpinnings of the claim of privilege”); Michael Dicke, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1563 n.53 (1989) (the “seminal study on the relationship between reporters and their confidential sources”); Willard L. Eckhardt, Jr. & Arthur Duncan McKey, *Caldero v. Tribune Publishing Co.: Substantive and Remedial Aspects of First Amendment Protection for a Reporter's Confidential Sources*, 14 IDAHO L. REV. 21, 58 n.240 (1977–78) (“noteworthy”); Peri Z. Hansen, “According to an Unnamed Official”: *Reconsidering the Consequences of Confidential Source Agreements when Promises Are Broken by the Press*, 20

inform the legislative debates on proposed shield laws and to shape the contours of the courts' analyses of reporter's privilege in the years immediately following the study.¹¹

Today, American journalism faces a new critical moment, with some unmistakable parallels to the events that triggered Blasi's watershed study a generation ago. The traditional press once again finds itself at a time of intense change—albeit on a different trajectory—as the Internet robs it of readership and viewership and as the public reputation of the mainstream media slides downward. And, after an intervening period of relative calm on the legal front, a new string of high-profile subpoena cases has resurrected the debate over the propriety of a reporter's privilege.¹² As was the case four decades ago, the dialogue on this complicated topic is once again at full volume, intensified by a series of hotly contested bills proposing a federal shield law for reporters. Once again, the question of the appropriate legal remedy is inextricably intertwined with the question of the real-world impact of subpoenas on the operations of the media.

This Article aims to contribute much-needed updated insights on the perceptions of members of the media and on the impact of subpoenas within modern American newsrooms—which operate in a professional and legal climate that is radically different than the one that Blasi explored in the last neutral, academic study of the question. Using data gathered in a large-scale, nationwide study of the frequency and impact of media subpoenas,¹³ the Article presents both quantitative and qualitative assessments of the effects that subpoenas have on daily newspapers and network-affiliated local television news operations, and

PEPP. L. REV. 115, 165 (1992) (the “seminal study on the relationship between reporters and confidential informants”); Kurt Hirsch, Note, *Throwing the Book at Revelations: First Amendment Implications and Enforcing Reporters' Promises*, 18 N.Y.U. REV. L. & SOC. CHANGE 161, 209 (1990/1991) (“[t]he leading study on the use of confidential sources”); Brian A. Morrison, *Recent Developments*, 51 WASH. L. REV. 1005, 1022 (1975–76) (“exhaustive”).

11. See, e.g., *Newsmen's Privilege: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 93d Cong. 136–44 (1973) (statement of Vincent Blasi, Professor of Law, University of Michigan School of Law); *Newsmen's Privilege: Hearings on H.R. 717 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 93d Cong. 127–45 (1973); see also *Branzburg v. Hayes*, 408 U.S. 665, 731 (1972) (Stewart, J., dissenting) (citing Blasi's empirical work).

12. See *infra* text accompanying notes 87–92.

13. The subpoena frequency data are reported separately. See Ronnell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585 (2008) [hereinafter Jones, *Avalanche or Undue Alarm*].

re-explores the questions of the changing legal climate for the press and journalists' awareness of their own legal protection, a generation after Blasi made the same important inquiries.

Part I of the Article provides an overview of the issue and describes the motivation for the empirical study, demonstrating the ways in which a collection of factors—including very recent changes in the circumstances of the traditional press, a recent wave of highly publicized cases in which reporters were found in contempt, an overall increase in subpoena frequency nationwide, and a burst of federal legislative shield law proposals—all make the need for data on subpoena impact and perception as great or greater than it was at the time of Blasi's report. Part II describes the current study's methodology and the ways in which it mirrors and departs from Blasi's earlier work. Part III shares the study's results. The Article then offers final, overarching conclusions. The data suggest that while the circumstances of the press are radically different today than they were at the time of the initial study, the perceived impacts of subpoenas on newsrooms and the process of newsgathering are the same, if not intensified. Newsroom leaders' awareness of their current legal protections is no better than it was a generation ago, and this lack of awareness may serve to heighten the difficulties they experience in this area.

I. THE NEED FOR THE STUDY

Subpoenas served to members of the mainstream press have gotten a great deal of attention in recent years, both among the general public and as a component of a heightened legal discussion over the need for a reporter's privilege. Gallons of ink have been spilled discussing the pros and cons of various forms of the privilege.¹⁴ Members of Congress have

14. See, e.g., Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need for Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97 (2002) (exploring the limits and contours of the journalist's privilege and its application to non-traditional journalists); Steven D. Clymer, *Censoring and Prosecuting the Press—An Assessment of Reporter's Shield Legislation*, 57 AM. U. L. REV. 1203, 1218–24 (2008) (arguing against any type of federal reporter's privilege); Lucy A. Dalglish & Casey Murray, *Déjà Vu All Over Again: How a Generation of Gains in Federal Reporter's Privilege Law is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13 (2006) (asserting that the country has “reached another breaking point for the idea of the reporter's privilege”); Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385 (2006–07) (asserting that neither the presence nor the absence of federal shield laws will affect the willingness of sources to come forward or the ultimate

consequences faced by journalists who refuse to testify); Randall D. Eliason, *The Problems with the Reporter's Privilege*, 57 AM. U. L. REV. 1341, 1342 (2008) (arguing that the claims made in support of a reporter's privilege are unfounded and that the privilege itself is "a flawed, unnecessary piece of legislation that will not accomplish its goals."); Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 126 (2003-04) (proposing a legislative remedy for the current problems that exist due to numerous "state and federal rules and rulings regarding forced disclosure."); Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35 (2006) (examining and assessing the likely effects of recent shield law proposals with additional suggestions for improvement); Eric M. Freedman, *Reconstructing Journalists' Privilege*, 29 CARDOZO L. REV. 1381 (2008) (favoring an absolute privilege for reporters); Michelle C. Gabriel, *Plugging Leaks: The Necessity of Distinguishing Whistleblowers and Wrongdoers in the Free Flow of Information Act*, 40 LOY. U. CHI. L.J. 531, 535 (2009) (discussing the Free Flow of Information Act (FFIA) and a possible exception "to protect victims of malicious leaks."); Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795-2005*, 43 SAN DIEGO L. REV. 425, 432 (2006) ("[R]ecommends how the legal principles currently regulating journalists' confidentiality can be adjusted slightly to accommodate the contributions of political leaks to governance"); Jane E. Kirtley, *Will the Demise of the Reporter's Privilege Mean the End of Investigative Reporting, and Should Judges Care If it Does?*, 32 OHIO N.U. L. REV. 519 (2006); William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1461 (2008) (asserting that "courts should vigorously protect" the press in publishing confidential information); William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635 (2005-06) (arguing that, as the Supreme Court is unlikely to overrule *Branzburg*, 408 U.S. 665, legislatures need to step in and create journalist privileges); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 520 (2006-07) (arguing that, with few exceptions, a qualified reporter's privilege should be available "to anyone disseminating information to the public who is called to testify" in court); Rodney A. Smolla, *The First Amendment, Journalists, and Sources: A Curious Study in "Reverse Federalism"*, 29 CARDOZO L. REV. 1423, 1430 (2008) ("The delicate balance between the compelling interest in protecting our national security and the preservations of civil liberty that rests at the very heart of the American identity . . . is best preserved by granting . . . qualified protection for promises of confidentiality extended in the process of newsgathering."); Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 39 (2005-06) ("A strong and effective journalist-source privilege is essential to a robust and independent press and to a well-functioning democratic society."); James Thomas Tucker & Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 AM. U. L. REV. 1291, 1294 (2008) (arguing that the FFIA "strikes the right balance between the free flow of information and other competing interests"); Keith Werhan, *Rethinking Freedom of the Press After 9/11*, 82 TUL. L. REV. 1561 (2008) (arguing for a qualified reporter's privilege that would subject press subpoenas to a form of strict scrutiny); David Abramowicz, Note, *Calculating the Public Interest in Protecting Journalists' Confidential Sources*, 108 COLUM. L. REV. 1949 (2007-08) (arguing that courts should adopt a procedural analysis, focusing on a journalist's use of information, when calculating the "newsgathering interest" in protecting the confidentiality of any source); Paul Brewer, Note, *The Fourth Estate and the Quest for a Double Edged Shield: Why a Federal Reporters' Shield Law Would Violate the First Amendment*, 36 U. MEM. L. REV. 1073 (2005-06) (arguing that the FFIA would actually violate the First Amendment by limiting the class of people who qualify as "press"); Sean W. Kelly, Note, *Black and White and Read All Over: Press Protection After Branzburg*, 57 DUKE L.J. 199, 203 (2007-08) (arguing that the *Branzburg* opinion is often misinterpreted, and actually "mandates both judicial and

debated the need for a federal shield law for reporters,¹⁵ judges have questioned the propriety of recognizing a privilege rooted in the First Amendment,¹⁶ and academics have discussed the usefulness of protecting journalists from subpoenas.¹⁷ With all this discussion, however, there has not been any current, neutral empirical data on the intersection between the law and the affected community—the

prosecutorial discretion when compelling journalists to testify”); Josi Kennon, Note, *When Rights Collide: An Examination of the Reporter’s Privilege, Grand Jury Leaks, and the Sixth Amendment Rights of the Criminal Defendant*, 17 S. CAL. INTERDISC. L.J. 543 (2007–08) (arguing that the Sixth Amendment right to an impartial jury should trump a reporter’s privilege in any grand jury leak situation); Leila Wombacher Knox, Note, *The Reporter’s Privilege: The Necessity of A Federal Shield Law Thirty Years After Branzburg*, 28 HASTINGS COMM. & ENT. L.J. 125 (2005–06) (urging the passage of a federal shield law); Anne M. Macrander, Note, *Bloggers as Newsmen: Expanding the Testimonial Privilege*, 88 B.U.L. REV. 1075 (2008) (arguing for a federal shield law protecting all “journalists,” even non-traditional “newsmen” like bloggers); Peter Meyer, Note, *BALCO, the Steroids Scandal, and What the Already Fragile Secrecy of Federal Grand Juries Means to the Debate over a Potential Federal Media Shield Law*, 83 IND. L. J. 1671 (2008) (explaining how a federal media shield law could violate the Fifth Amendment); Scott Neinas, Comment, *A Skinny Shield is Better: Why Congress Should Propose a Federal Reporters’ Shield Statute that Narrowly Defines Journalists*, 40 U. TOL. L. REV. 225 (2008) (asserting that the best solution to the inconsistency of federal court rulings on reporter’s privilege is a federal statute); Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist’s Privilege*, 154 U. PA. L. REV. 201, 203 (2005–06) (maintaining that the need to protect confidentiality of sources is of utmost importance and as such journalists should have a privilege “grounded in the common law and derived from the First Amendment”); Jaime M. Porter, Note, *Not Just “Every Man”: Revisiting the Journalist’s Privilege Against Compelled Disclosure of Confidential Sources*, 82 IND. L.J. 549 (2007) (asserting that a federal shield law is the only way to adequately protect First Amendment values); Michael D. Saperstein, Jr., Comment, *Federal Shield Law: Protecting Free Speech or Endangering the Nation?*, 14 COMMLAW CONSPECTUS 543 (2005–06) (exploring the necessity, helpfulness, and benefit of a federal shield law); Leslie Siegel, Note, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469, 469 (2006) (concluding “that the most direct and efficient way to protect journalists from compelled disclosure of sources and information is through federal legislation”); Leita Walker, Comment, *Saving the Shield with Silkwood: A Compromise to Protect Journalists, Their Sources, and the Public*, 53 U. KAN. L. REV. 1215 (2004–05) (arguing that a Tenth Circuit case offers an effective solution to the ongoing reporter’s privilege debate).

15. See, e.g., *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. (2007); *Reporter’s Privilege Legislation: Preserving Effective Federal Law Enforcement: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006); *Reporters’ Privilege Legislation: Issues and Implications: Hearing on Reporter’s Shield Legislation Before S. Comm. on the Judiciary*, 109th Cong. (2005); *Reporter’s Privilege Legislation: An Additional Investigation of Issues and Implications: Hearing Before S. Comm. on the Judiciary*, 109th Cong. (2005).

16. See, e.g., *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

17. See *supra* note 14.

perceptions of newsroom leaders as to their own legal climate and as to the impact of subpoenas on the newsgathering process.¹⁸ Thus, while we know that media subpoenas are occurring and we sense that the legal climate for journalists is under the microscope in a way that it has not been in many years, much of the decision-making by Congress and the courts is occurring in the absence of any neutral, scholarly assessment of how the operations of the media are impacted by the presence or absence of a privilege.

Professor Blasi recognized nearly identical conditions forty years ago. Noting the “dearth of previous survey research on the subpoena problem,”¹⁹ he set out to “achieve as comprehensive and systematic an understanding of the empirical aspects of the dispute as time and resources would permit.”²⁰ In taking this tack, Blasi was significantly ahead of his time, both in his eagerness to employ empirical tools in legal scholarship²¹ and in his recognition of the need for scholars to examine the law as it is perceived and experienced by the affected parties.²²

18. In the years since Blasi’s study, researchers from within the media industry have released some data on aspects of these questions. One attempted empirical update of Blasi’s work was conducted in 1985 by John Osborn while he was interning at the Reporter’s Committee for Freedom of the Press. See John E. Osborn, *The Reporter’s Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57 (1985). Scholars have noted that the utility of even this updated, industry-focused study is limited “because the research is somewhat stale” and significant factual changes have occurred since its publication. James Thomas Tucker & Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 AM. U. L. REV. 1291, 1323 (2008). Another article setting forth some empirical results was sponsored more recently by the Media Law Resource Center. See Steven D. Zansberg, *The Empirical Case: Proving the Need for the Privilege*, 2 MEDIA LAW RESOURCE CENTER BULL. 145, 148 (2004). It appears that no neutral academic study has been conducted since Blasi published his work in 1971.

19. Blasi, *supra* note 4, at 237.

20. *Id.* at 235.

21. See, e.g., Mark Suchman, *Empirical Legal Studies: Sociology of Law, or Something ELS Entirely?*, 13 AMICI 1, 1 (2006) (discussing the empirical legal studies movement and noting that it “dates only to the mid-1990s at the earliest”); see also Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741 (2004); Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L. J. 141 (2006); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984) (describing the early debate over the virtues of empirical techniques and investigation in legal scholarship).

22. Blasi, *supra* note 4, at 235 (“One component of every legal decision . . . is a set of factual premises. Many, if not most, of the empirical premises that guide legal decision-making are initially formulated by a most unsystematic and impressionistic process. What is worse, these premises are

Blasi's approach to the study of reporter's privilege law was very much a "law in action"²³ approach—examining the role of law not only as it exists in the abstract in legislation and court cases but as it is actually applied in society. Law-in-action scholars routinely begin analyses with observations about the behavior of institutions and "work backwards" toward the legal philosophies that guide—or should guide—the jurisprudence of the courts or the legislative determinations of Congress.²⁴

Whatever the virtues of this approach as an overarching jurisprudential model, it has clear value in contributing to the narrow and somewhat unique legal debate over the appropriateness of a statutory reporter's privilege.²⁵ Indeed, at the very center of many discussions on the topic of media subpoenas is the question of whether the existence of a privilege makes any difference at all.²⁶ The ordinary and age-old rule applicable to the issuance of subpoenas is a simple and mandatory one:

seldom tested in operation. Indeed, probably the greatest single shortcoming of American law as a decision-making process is its failure to institute any sort of systematic auditing procedure. At a time when other disciplines are experiencing a virtual knowledge explosion, legal decision-makers and pundits continue to rely almost exclusively on 'the lessons of experience' and intuitive 'insights.'").

23. The apparent origin of this now widely used term is Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). See also Richard Delgado, *Legal Scholarship: Insiders, Outsiders, Editors*, 63 U. COLO. L. REV. 717, 717 (1992) ("[T]he Law in Action school of legal scholarship . . . sprang up at Wisconsin in the middle years of the century and continues today . . . Law in Action focuses on how legal institutions and rules operate in practice in the real world. Law in Action is more interested in law's impact than in its coherence, beauty, or whatever virtues it may have 'on the books.'").

24. See Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365, 366–68 (tracing methods of examining the law in action in legal scholarship).

25. See Douglas E. Lee, *Do Not Pass Go, Do not Collect \$200: The Reporter's Privilege Today*, 29 U. ARK. LITTLE ROCK L. REV. 77, 98 (2006) ("[W]hat occurs in the newsroom is vital to understanding how to protect the free flow of information.").

26. Compare *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972) ("[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen.") with *id.* at 721–22 (Douglas, J., dissenting) ("Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens. . . . If [a journalist] can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended.") and *id.* at 728 (Stewart, J., dissenting) ("[A]n unbridled subpoena power—the absence of a constitutional right protecting, in any way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.").

the courts are entitled to “every man’s evidence.”²⁷ If the core purpose for granting journalists an exception to this ordinary rule is that in the absence of this exception they will be unable to fulfill a public-serving function of producing important news stories,²⁸ the veracity of that factual assumption becomes key to any dialogue about the direction that the law should take. Thus, the question of whether the existence of the privilege would actually assist the media in providing news stories that serve the public good has been a main source of dispute in public discussions²⁹ and in recent legislative debates over proposed federal shield laws.³⁰

27. See *id.* at 688 (noting “the longstanding principle that ‘the public . . . has a right to every man’s evidence,’ except for those persons protected by a constitutional, common-law, or statutory privilege”); see also *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); 8 Wigmore, *Evidence* § 2370 (McNaughton ed. 1961).

28. See, e.g., Editorial, *A Shield for the Public*, N.Y. TIMES, Sept. 20, 2007, at A22 (“For freedom of the press to be more than a promise and for the public to be kept informed about the doings of its government, especially the doings that the government does not want known, reporters must be able to pursue the news wherever it takes them.”); *Toward a Federal Shield Law*, N.Y. TIMES, May 3, 2007, at A22 (“[T]he real benefit for society is that it protects sources, allowing whistle-blowers or other insiders to expose wrongdoing in government and the private sector. The information they provide is vital to the public’s ability to know what government and business are doing and to make informed judgments.”).

29. Compare Editorial, *Our View on Protecting Confidential Sources: Presidential Contenders Back Your Right to Know*, USA TODAY, Apr. 17, 2008, <http://blogs.usatoday.com/oped/2008/04/our-view-on-pro.html?loc=interstitialskip> (referencing the “number of stories that go untold, or scandals that remain hidden, because of the chilling effect that occurs when prosecutors and judges force reporters to choose between selling out confidential sources and going to jail, or going bankrupt”) and Theodore B. Olson, Editorial, *A Much-Needed Shield for Reporters*, WASH. POST, June 29, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/28/AR2006062801983.html> (“Journalists reporting on high-profile legal or political controversies cannot function effectively without offering some measure of confidentiality to their sources.”) with Michael B. Mukasey, Editorial, *Opposing View: No Need for a Shield*, USA TODAY, Apr. 17, 2008, <http://blogs.usatoday.com/oped/2008/04/opposing-view-n.html> (arguing that the evidence demonstrates there is no chilling effect and that “a federal shield law is [not] necessary to ensure the ‘free flow of information’”).

30. Compare *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 13 (2007) (statement of Rep. Mike Pence) (“Compelling reporters to testify, and in particular, compelling them to reveal the identity of their confidential sources is a detriment to the public interest. Without the promise of confidentiality, many important conduits of information about our government will be shut down.”) and *Reporters’ Privilege Legislation: Preserving Effective Federal Law Enforcement: Hearing on S. 2831 Before the S. Comm. on the Judiciary*, 109th Cong. 14 (2006) (statement of Theodore Olson, Attorney) (“One of the most vital functions of our free and independent press is to function as a watchdog on behalf of the people—working to uncover stories that would otherwise go untold.”) with *id.* at 3 (statement of Paul J. McNulty, Deputy Att’y Gen., Department of Justice) (arguing that in the absence of a federal shield law, “the media has not missed a beat,” and has “continued to use confidential sources and to

Many have accurately noted the difficulty of producing perfectly clear evidence on the relationship between the privilege and newsgathering—particularly in proving the negative assertion that there are news stories not being produced because the absence of a reporter’s privilege precludes them.³¹ Arguably, this difficulty could be a major roadblock to a court conducting a constitutional analysis of the problem. Such a court, when trying to determine whether the privilege is mandated by First Amendment press freedoms, might demand a tight fit between the benefit of the privilege and the flow of information produced, because the court faces the tasks of interpreting a given constitutional protection and analyzing whether that protection is implicated by the particular fact pattern. However, legislators determining whether to enact a particular statutory scheme face a very different sort of task. They have to assess in a more practical way what societal or policy benefits might result from their proposed legislation and consider how organizations that at least traditionally have served some public function perceive their legal climate and the impact of that climate upon that public function. Blasi rightly observed that, whatever limitations exist on the discovery of pure truth on the issue of the link between newsgathering and privilege, an on-the-ground inquiry into journalists’ views of their own legal climate and the perceived impact of the privilege within the journalism community is an invaluable aid to those who would craft the law that governs that community’s behavior.³² Developing a clear empirical picture of the situation, from the position of those who would be affected by any new legal development, is vital to any legislative inquiry.

This study therefore offers today’s legislators what Blasi’s study

engage in robust reporting on issues of extraordinary importance to our communities and Nation”) and *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 54 (2007) (prepared statement of Randall Eliason) (“The primary rationale for a reporter’s privilege is that, in the absence of a privilege, confidential sources will not speak to the press for fear of having their identities revealed. I submit there is little or no evidence that this chilling effect exists, and thus little reason to believe that any real benefits would flow from the passage of a privilege law.”).

31. See, e.g., Lee, *supra* note 25, at 97 (noting that there are “logical inconsistencies” in the chilling effect argument because much of the important reporting cited as evidence of the important investigative work that journalists do was “performed in a legal and journalistic environment without a clear reporter’s privilege”); Mukasey, *supra* note 29, (“[I]n the 36 years since the Supreme Court ruled that reporters—like their fellow citizens—have no First Amendment privilege to resist grand jury subpoenas, we have seen an explosion of news and information available to the public on every conceivable topic . . .”).

32. Blasi, *supra* note 4, at 235.

offered those of four decades ago. It presents both quantitative and qualitative assessments of the effects that subpoenas have on the mainstream press, and empirically re-explores the questions of changing legal climate and awareness of legal protection within American newsrooms, which once again find themselves at a time of immense professional transformation and a period of renewed emphasis on legal climate.

Updating Blasi's data in a way that enlightens lawmaking and that offers a law-in-action analysis of the relationship between members of the traditional media and their legal climate is essential for at least three reasons, which echo the reasons that motivated Blasi's initial work: (1) first, major recent changes in the profession of journalism and the public reputation of the mainstream media have changed the relevant landscape; (2) second, the nation has experienced a wave of high-profile media subpoena cases and an overall increase in subpoena numbers; and (3) third, the legal dialogue in this country has demonstrated a renewed interest in the appropriateness of providing a reporter's privilege.

A. *Changes in the Profession and in the Public Reputation of the Media*

1. *Modern Developments in the Traditional Press*

Blasi wrote that “[m]odern developments in the journalism profession” form a “background against which the subpoena issue should be examined.”³³ Although the developments that are changing the character of the profession today are every bit as stark as the developments that Blasi recognized, they are, on the whole, negative rather than positive developments for the traditional press.

The media that Blasi studied were in many respects in their heyday. On the eve of such major journalistic accomplishments as the Watergate coverage, investigative reporting was surging, and with it the reputation of the media. Blasi noted an “unmistakable trend in American journalism, particularly among daily newspapers, toward more investigative reporting.”³⁴ He described an increased public reliance on newspapers and television reporting and an increase in investigative techniques and important investigative stories, and he portrayed an

33. *Id.* at 234.

34. *Id.* at 252.

increasingly adversarial, “checking” relationship between media and the government, as journalists who “used to cooperate willingly with law enforcement officials and investigatory bodies [began to] say they . . . [felt] no obligation to assist the processes of government.”³⁵ Arguably, today’s trends suggest the opposite—a pointed decrease in investigative reporting³⁶ and a press riddled with allegations that it is “in the pocket” of government, reporting only that which is provided to it by the government for dissemination.³⁷ Likewise, the press finds itself subject to criticism that coverage has shifted to more entertainment-style or partisan-style news and less investigative journalism or public-serving news on governmental affairs.³⁸

35. *Id.* at 234–35.

36. *See, e.g.*, Steve Outing, *Investigative Journalism: Will it Survive?*, EDITOR & PUBLISHER, Nov. 16, 2005, http://www.editorandpublisher.com/eandp/columns/stopthepresses_display.jsp?vnu_content_id=1001523690 (noting the decline of investigative reporting by newspapers and the reduction of investigative teams, and quoting a Pulitzer Prize judge as marking a “worrisome trend” that “as the newspaper industry’s fortunes declined, good investigative entries” for that prize became limited to only a handful of major publications); Christine Russell, *The Survival of Investigative Journalism*, COLUM. JOURNALISM REV., Mar. 24, 2008, http://www.cjr.org/the_observatory/the_survival_of_investigative.php; *Shining a Light*, On the Media, NATL. PUBLIC RADIO, Aug. 15, 2008, <http://www.onthemedial.org/transcripts/2008/08/15/01> (discussing the “illustrious past and perilous future of investigative reporting” and the fate of investigative stories “in an era of layoffs and slashed newsrooms budgets”); David Simon, *In Baltimore, No One Left to Press the Police*, WASH. POST, Mar. 1, 2009, at B1 (describing the sharp decline in newspapers seeking public documents and endeavoring to uncover corruption).

37. *See, e.g.*, Ellen P. Goodman, *A Comment on Professor Magarian’s Substantive Media Regulation in Three Dimensions*, 76 GEO. WASH. L. REV. 897, 897 (2008) (“[T]he failure of leading media organizations to reveal errors in the justifications for the Iraq War exposed concerns that the media have systematically silenced dissenting and marginal voices.”); Richard Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists’ Confidentiality*, 43 SAN DIEGO. L. REV. 425, 430 (2006) (describing ways in which “officials use the media to govern”). Indeed, in the decades since Blasi’s study, scholars have questioned the basic assumption that the media provides a check on government. *See* Cass Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 902 (1986) (dismissing as inaccurate the assertion that the media and the government are “locked in combat”).

38. *See The Future of Journalism: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (2009) (statement of Steve Coll, Former Managing Editor, Wash. Post) (unpublished hearing, on file with Author) (“The institutions that . . . have nurtured this accidental era of large-scale, well-resourced professional journalism at every level of American governance are now contracting at a remarkable rate of speed. For example, according to a recent report by the Pew Center’s Project for Excellence in Journalism, the number of newspapers accredited to cover Congress has fallen by two-thirds since the 1980s. Newspaper chains and television networks have closed or drastically reduced staff in their Washington bureaus. There have been similar reductions in overseas bureaus and in the numbers of professional foreign correspondents reporting independently on the countries

Compounding this time of criticism is the recent economic downturn, which has affected traditional media organizations particularly severely. Slashed budgets at newspapers and television newsrooms have intensified these problems.³⁹ Reporters who once had solid budgets for

where the United States is making or considering large, risky investments of blood and treasure. At the state and local level, the picture is, if anything, even worse; newspapers have dramatically reduced their coverage of state capitals, school boards, utility regulators, medical licensing boards, city councils and other institutions whose decisions shape the lives and welfare of every citizen.”); Goodman, *supra* note 37, at 907 (“Many believe that American media are overly commercial, partisan, trivial, and concentrated. Despite the proliferation of media outlets in recent years, critics decry what they see as either a monolithic sameness or a polarizing partisanship in mainstream media.”); Brian Lehrer, *A Million Little Murrows: New Media and New Politics*, 17 *MEDIA L. & POL’Y* 1, 13 (2008) (arguing that media companies have “transform[ed] broadcast journalism increasingly into infotainment. As a result, Americans approach media less as citizens and more as mere consumers”); Lili Levi, *Reclaiming the First Amendment: Constitutional Theories of Media Reform: In Search of Regulatory Equilibrium*, 35 *HOFSTRA L. REV.* 1321, 1326, 1329 (2007) (arguing that the press has tended “timorously to produce entertainment rather than serve its watchdog role,” that “[o]verworked journalists will likely be satisfied by relying on government news releases” and that because “the kind of investigative journalism that a watchdog profile requires is both labor- and cost-intensive,” it is often the first victim of budget cuts); Howard Kurtz, *Politico Tries to Mix Steak and Sizzle*, *WASH. POST*, Apr. 13, 2009, at C1 (quoting Michael Scherer, “[T]he news is increasingly reduced to its most elemental form, a series of instantaneous, always new, constantly updated, transient and often superfluous information bites, which preferably jolt emotional reactions.”); *see also* W. LANCE BENNETT ET AL., *WHEN THE PRESS FAILS: POLITICAL POWER AND THE NEWS MEDIA FROM IRAQ TO KATRINA* 4 (2007) (“[G]overnment deregulation and the rise of huge media conglomerates have relegated news to the same bottom-line demands as entertainment content—meaning fewer resources for investigative journalism, more infotainment and soft features, and a play-it-safe mentality favoring authorized content over more challenging fare.”); LEONARD DOWNIE, JR. & ROBERT G. KAISER, *THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL* 7, 9–10 (2002) (“Most newspapers have shrunk their reporting staffs, along with the space they devote to news, to increase their owners’ profits. Most owners and publishers have forced their editors to focus more on the bottom line than on good journalism. Papers have tried to attract readers and advertisers with the light features and stories that please advertisers—shopping is a favorite—and by de-emphasizing serious reporting on business, government, the country and the world.”).

39. *See* Megan Tady, *Washington Reporters’ Mass Exodus*, *IN THESE TIMES*, Feb. 2, 2009, http://www.inthesetimes.com/article/4201/washington_reporters_mass_exodus/ (“If there were ever a time for a strong and sharp-toothed press corps to hound our lawmakers in Washington, it would be now. . . . It’s startling, then to discover the dwindling number of journalists on the beat. Rather than an increase of journalists schlepping their laptops to Washington, there’s been a mass exodus [as] [n]ewspapers across the country have gouged their staffs in order to stave off unhappy Wall Street investors and prop up their profit margins.”); *see also* *The Future of Journalism: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (2009) (statement of Sen. John F. Kerry, Chair, Subcomm. on Communications, Technology, and the Internet) (unpublished hearing, on file with Author) (“In 2008, newspaper stock prices fell an astounding 83 percent. The New York Times bought The Boston Globe for \$1.1 billion in 1993, but the value of all of The Times stock today is less than \$800 million now. And this past weekend, the oracle of Omaha himself Warren Buffett

investigative journalism now see their organizations struggling even to stay afloat, as many media companies are forced to implement severe cutbacks and lay-offs,⁴⁰ and, even more alarmingly, declare bankruptcy and shut down newspapers with long histories in major American cities.⁴¹ While Blasi's media were surging in public importance and public demand, the daily newspapers and television news operations of today are seeing their readership and viewership rapidly shrinking. Many

gave newspapers a vote of no confidence when he said that he wouldn't invest in newspapers at any price. These are stark numbers that the newspapers face. The numbers for broadcast journalism are not much better.”).

40. See, e.g., L. Brent Bozell III, Opinion, *Government Has No Business Bailing Out Newspapers the People Don't Want*, U.S. NEWS AND WORLD REPORT, May 4, 2009; *Courant Cutting About 100 Jobs Declining Ad Revenue*, HARTFORD COURANT, Feb. 26, 2009, at A16; Etan Horowitz, *Big Stories, Bigger Financial Woes*, ORLANDO SENTINEL, Jan. 12, 2009, at 22; Howard Kurtz, *Post Buyouts Come with an Emotional Cost*, WASH. POST, May 26, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/25/AR2008052502761.html>; Richard Pérez-Peña, *Times Will Cut Sections to Lower Costs*, N.Y. TIMES, Apr. 17, 2009, at C7; Phil Rosenthal, *Chicago Tribune Cuts 53 Workers; Parent Company Seeks Approval to Pay Bonuses, Severance*, CHI. TRIB., Apr. 23, 2009, <http://archives.chicagotribune.com/2009/apr/23/business/chi-thu-tribune-0423apr23>; Martin Zimmerman, *Newspapers: Times to Lay Off 300, Consolidate Sections: As Ad Revenue Drops, Stand-Alone California Pages will Merge into Main News, Meaning Fewer Press Runs*, L.A. TIMES, Jan. 31, 2009, at C1; see also *The Future of Journalism: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (2009) (statement of James Moroney, Publisher and CEO, The Dallas Morning News) (unpublished hearing, on file with Author) (“Virtually all publishers in every market—large and small—have been forced to lay off journalists, and take other drastic cost-saving measures. Industry-wide, nearly 9,000 newspaper employees already have lost their jobs in the first four months of this year.”).

41. See Dan Barry, *In Seattle, A Symbol of What Was Lost*, N.Y. TIMES, Mar. 17, 2009, at A18 (describing the legacy of the *Seattle Post-Intelligencer* as word came of its shutdown); Richard Pérez-Peña, *As Cities Go From Two Papers to One, Talk of Zero*, N.Y. TIMES, Mar. 12, 2009, at A1, available at <http://www.nytimes.com/2009/03/12/business/media/12papers.html> (noting the demise of the *Seattle Post-Intelligencer* and other major daily newspapers); *The 10 Most Endangered Newspapers in America*, TIME, Mar. 9, 2009, <http://www.time.com/time/business/article/0,8599,1883785,00.html> (noting that the newspaper industry has very recently “entered a new period of decline,” with the parent of the newspapers in Philadelphia declaring bankruptcy, the closure of the *Rocky Mountain News* and the *Seattle Post-Intelligencer*, and serious hits to the *San Francisco Chronicle*); see also *The Future of Journalism: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (2009) (statement of Sen. John F. Kerry, Chair, Subcomm. on Communications, Technology, and the Internet) (unpublished hearing, on file with Author) (“The 150-year-old Rocky Mountain News ceased publishing altogether this year. The 146-year-old Seattle Post-Intelligencer and the 100-year-old Christian Science Monitor shifted completely to The Web. And the Detroit Free Press cut home delivery to only three days. It took a week of negotiations before a tentative deal between The New York Times Company and the Boston Newspaper Guild could be reached to prevent The Boston Globe from shutting its doors.”).

now are forecasting the “death” of newspapers.⁴² Circulation has plummeted⁴³ and, as studies confirm for the first time in history that the internet has replaced other traditional forms of media as the primary source of news and information for most Americans,⁴⁴ both newspapers

42. Indeed, a series of websites have now emerged that are dedicated to monitoring this ultimate demise: *See, e.g.*, Paul Gillin, Newspaper Death Watch, <http://www.newspaperdeathwatch.com/about/> (last visited Aug. 27, 2009) (a blog “chronicling the decline of newspapers and the rebirth of journalism”); Erica Smith, Paper Cuts, <http://graphicdesignr.net/papercuts/> (last visited Aug. 27, 2009) (charting the decline of newspaper jobs); *see also* ASNE votes to drop ‘Newspapers’ from its name, ASNE, Apr. 6, 2009, <http://www.asne.org/index.cfm?ID=7320>; Benjamin L. Cardin, Opinion, *With No Newspapers, as Thomas Jefferson Knew, Democracy Suffers*, U.S. NEWS AND WORLD REPORT, May 4, 2009, <http://www.usnews.com/articles/opinion/2009/05/04/with-no-newspapers-as-thomas-jefferson-knew-democracy-suffers.html>; Marc Dunkelman, Opinion, *Death of Newspapers Could Kill Communities, Civic Values Too*, U.S. NEWS AND WORLD REPORT, May 5, 2009, <http://www.usnews.com/articles/opinion/2009/05/05/death-of-newspapers-could-kill-communities-civic-values-too.html>; Lauren Kornreich, *Kerry: Newspapers an ‘Endangered Species’*, CNNPOLITICS.COM, May 6, 2009, <http://politicalticker.blogs.cnn.com/2009/05/06/kerry-newspapers-an-endangered-species/>.

43. Between 2003 and 2007 the *Los Angeles Times* and *Boston Globe* lost about 20% of their daily circulation, the *Atlanta Journal Constitution* lost 17%, and the *Washington Post* lost 13%. Overall, the Project for Excellence in Journalism reports that the newspaper industry has lost about 8% of its daily circulation since 2001. *See* Project for Excellence in Journalism, *The State of the News Media 2008: An Annual Report on American Journalism* (Mar. 17, 2008), <http://www.stateofthenewsmedia.com/2008/>; *see also* *The Future of Journalism: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (2009) (statement of Sen. John F. Kerry, Chair, Subcomm. on Communications, Technology, and the Internet) (unpublished hearing, on file with author) (“The latest circulation figures released just last week show that the largest metro newspapers are continuing to lose daily and Sunday readers—a long time trend. . . . In the sixth-month period ending March 31, major metro dailies in great cities like Boston, San Francisco, Houston, Miami and Atlanta all saw double-digit percentage decreases in daily circulation.”); *The Future of Journalism: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (2009) (statement of John D. Rockefeller, IV) (unpublished hearing, on file with author) (“During roughly the last six months, daily newspaper circulation has declined 7 percent. During roughly the past year, media companies have cut a heartbreaking 41,000 jobs. The inevitable result is less reporting, less news, and less coverage of our communities and interests at home and abroad.”); Tim Arango, *Fall in Newspaper Sales Accelerates to Pass 7%*, N.Y. TIMES, Apr. 28, 2009, at B3.

44. *See* Pew Research Center for the People & the Press, *Internet Overtakes Newspapers As News Outlet*, PEW RESEARCH CENTER PUBLICATIONS, Dec. 23, 2008, <http://pewresearch.org/pubs/1066/internet-overtakes-newspapers-as-news-source> (noting that for the first time in a Pew survey, more people say they rely mostly on the internet for news than on newspapers); Project for Excellence in Journalism, *The State of the News Media 2008: An Annual Report on American Journalism* (Mar. 17, 2008), <http://www.stateofthenewsmedia.com/2008/> (describing the rising number of citizen journalists providing online content and the increase in number of people going online for news on a regular basis); *see also* *The Future of Journalism: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (2009) (statement of John D. Rockefeller, IV)

and television stations are feeling the hit.⁴⁵ This exodus away from the traditional press has left the mainstream media struggling to support coverage of the news they once produced.⁴⁶

(unpublished hearing, on file with Author) (“The future of journalism is digital. We are fast migrating from a world where news is cranked out daily over a regional printing press to one where news is distributed digitally over the infinite networks of the Internet.”).

45. See Project for Excellence in Journalism, *The State of the News Media 2008* (Mar. 17, 2008), <http://www.stateofthenewsmedia.com/2008/> (“Eight in 10 Americans 17 and older now say the Internet is a critical source of information—up from 66% in 2006,” and “more Americans identified the Internet as a more important source of information than television (68%), radio (63%) and newspapers (63%)”); PEW Research Center for the People & the Press, *Newspapers Face a Challenging Calculus*, PEW RESEARCH CENTER PUBLICATIONS, Feb. 26, 2009, <http://pewresearch.org/pubs/1133/decline-print-newspapers-increased-online-news> (“The trend is unmistakable: Fewer Americans are reading print newspapers as more turn to the internet for their news.”); Chris V. Thangham, *Research: More People Getting News Online Than From Newspapers*, DIGITAL JOURNAL, Dec. 26, 2008, <http://www.digitaljournal.com/article/264000> (noting that although television still dominates as the main news source, that status is threatened by the internet as younger news consumers move online and that “[a]mong adults under 30, the Internet already ties TV as the primary source for news for 59 percent of the population,” a number that appears to be increasing substantially over time); see also *The Future of Journalism: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (2009) (statement of Sen. John F. Kerry, Chair, Subcomm. on Communications, Technology, and the Internet) (unpublished hearing, on file with Author) (“Most experts believe that what we are seeing happen in newspapers is just the beginning. Soon, perhaps in a matter of a few years, some predict that television and radio will experience what newspapers are experiencing now.”).

46. See *The Future of Journalism: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (2009) (statement of Steve Coll, Former Managing Editor, Wash. Post) (unpublished hearing, on file with Author) (“[A]t present, the rate of destruction of professional journalism, by which I refer to the independent reporting on government, corporations, and international affairs produced mainly by newspapers during the last four decades, is far outpacing the ability of new institutions to reproduce what is being lost. This independent reporting, complex investigations using public records, the identification and vetting of whistleblowers, the tracking of legislative debates, and lobbying at the local, state, and national level; and independent, transparent witness reports of important events here and overseas, has played a very important role in shaping American governance and foreign policy since the 1960s—at least. [Its] sudden diminishment seems, to me, an urgent matter of public interest.”); *The Future of Journalism: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (2009) (statement of David Simon, Author, TV Producer, and Former Newspaper Journalist) (unpublished hearing, on file with Author) (“High-end journalism is dying in America and unless a new economic model is achieved, it will not be reborn on the web or anywhere else. The Internet is a marvelous tool and clearly it is the informational delivery system of our future, but thus far it does not deliver much first-generation reporting. Instead, it leeches that reporting from mainstream news publications, whereupon aggregating websites and bloggers contribute little more than repetition, commentary and froth. Meanwhile, readers acquire news from the aggregators and abandon its point of origin—namely the newspapers themselves.”); Horowitz, *supra* note 40, at 22 (“Traditional media companies also are still trying to adapt to the changing

2. *Declining Public Perception*

Accompanying these radical changes in the way journalists do business is another set of significant changes facing modern American journalists, which likewise set them drastically apart from the traditional media of Blasi's day. The media have fallen from public favor since the glory days that Blasi studied, and public respect for the industry is plummeting. These trends are significant, given the ways in which public opinion and legal climate may be bound up in each other, with negative public perceptions feeding hostility in the legal system and vice versa.

In recent years, the public's perception of the news media has declined dramatically. Television and pop culture images are "full of unethical, invasive and sleazy journalists,"⁴⁷ whereas a generation ago, members of the news media were portrayed, quite literally, as superheroes—trustworthy defenders of the public interest.⁴⁸ In the 1970s, CBS anchor Walter Cronkite was described by 73% of Americans as "the most trusted figure in American public life."⁴⁹ When

habits of consumers, who increasingly are turning to the internet as their primary source of news."); Richard Pérez-Peña, *As Cities Go From Two Papers to One, Talk of Zero*, N.Y. TIMES, Mar. 12, 2009, <http://www.nytimes.com/2009/03/12/business/media/12papers.html> (suggesting that the move to online reliance for news "may presage an era of news organizations that are smaller, weaker and less able to fulfill their traditional function as the nation's watchdog"); Richard Pérez-Peña, *Newspaper Ad Revenue Could Fall as Much as 30%*, N.Y. TIMES, Apr. 15, 2009, at B3 (noting that the decline is expected to push many publishers closer to bankruptcy); Martin Zimmerman, *Newspapers: Times to Lay Off 300, Consolidate Sections: As Ad Revenue Drops, Stand-Alone California Pages will Merge into Main News, Meaning Fewer Press Runs*, L.A. TIMES, Jan. 31, 2009, at C1 (noting "the flight of advertisers to online media outlets").

47. Jonathan Hiskes, *Paulson: First Amendment at Core of Who We Are*, INDIANA UNIVERSITY: SCHOOL OF JOURNALISM, Nov. 8, 2007, <http://journalism.indiana.edu/news/paulson-first-amendment-at-core-of-who-we-are> (reporting *USA Today* editor Ken Paulson's comments about the slipping reputation of journalists as evidenced in pop culture references).

48. *Id.* (pointing out that "Superman's alter ego was earnest reporter Clark Kent," "Spiderman's alter ego was news photographer Peter Parker" and the "Green Hornet's alter ego was crusading editor Britt Reid"); see also David Dinsmore, *Journalists' Days as the 'Good Guys' Past*, APME ONLINE GAZETTE, Oct. 4, 2007, <http://apme.typepad.com/apme/2007/10/journalists-day.html> (Ken Paulson referencing Clark Kent and Humphrey Bogart of *Deadline U.S.A.*); *National Public Radio Broadcast* (Aug. 20, 2004) (media attorney Floyd Abrams noting that "Journalists are much less respected by the public and the judiciary" and that "the notion of the journalist as a romantic hero, Robert Redford, for example, has faded away, and there really has been a growing hostility to the press, which I think is reflected in some of these [recent losing court] decisions.").

49. DAVID A. YALOF & KENNETH DAUTRICH, *THE FIRST AMENDMENT AND THE MEDIA IN THE COURT OF PUBLIC OPINION* 10 (2002).

the Watergate scandal hit, the press received the majority of the credit for revealing the extent of the government corruption.⁵⁰ It also was the press that shed light on the war in Vietnam, “expos[ing] patterns of deception by high-level officials.”⁵¹ At that time, the majority of Americans gave journalists the benefit of the doubt;⁵² however, over the course of the last decade in particular, the public perception of the press has drastically changed, with 49% of Americans today saying they have little or no confidence in the press.⁵³

A comparison of statistics from surveys and polls done in the 1970s and 1980s with those of the last two decades confirms that the public’s confidence in the news media is waning. In 2004, Gallup reported that the media’s credibility had reached its lowest point in three decades.⁵⁴ That poll found that just 44% of Americans had confidence in the media’s ability to report news stories fairly and accurately.⁵⁵ Gallup noted that this result was “particularly striking because this figure had previously been very stable—fluctuating only between 51% and 55% from 1997–2003.”⁵⁶ This result also stands in stark contrast to the results obtained in the 1970s, during which time between 68% and 72% of Americans said they had confidence in the news media.⁵⁷ During the last decade, other studies have similarly found confidence rates hovering around 50%, well below the public’s level of confidence at the time of Blasi’s study.⁵⁸ The decline in the public’s respect for the media is also

50. *Id.*

51. *Id.*

52. *Id.* at 11.

53. Pew Research Center for the People & the Press, March 2007 Political Survey (Mar. 21–25, 2007), <http://people-press.org/reports/questionnaires/317.pdf>.

54. Mark Gillespie, *Media Credibility Reaches Lowest Point in Three Decades: CBS News Incident Latest in Long History of Media Mistakes*, GALLUP, Sept. 23, 2004, <http://www.gallup.com/poll/13132/Media-Credibility-Reaches-Lowest-Point-Three-Decades.aspx> [hereinafter Gillespie, *Media Credibility*].

55. *Id.* (9% said “a great deal” and 35% said “a fair amount.”).

56. *Id.*

57. *Id.*

58. See NBC News/Wall Street Journal, July 2006 Poll (July 21–24, 2006), <http://online.wsj.com/public/resources/documents/poll20060726.pdf> (July 2006: 8% very positive about the job of the news media; 23% somewhat positive); Pew Research Center for the People & the Press, April 2006 News Interest Poll (Apr. 7–16, 2006), <http://people-press.org/reports/questionnaires/275.pdf> (Apr. 2006: 8% very favorable opinion of media; 40% mostly favorable); Pew Research Center for the People & the Press, *America’s Place in the World* Poll (Oct. 12–14, 2005), <http://people-press.org/reports/print.php3?PageID=1012> (Oct. 2005: 11% very favorable opinion of media; 41%

illustrated in polls that address the perceived bias of news reporters.⁵⁹

Structural changes in news organizations may account for some of the recent criticism of the media.⁶⁰ The public no longer is limited to newspapers, radio, and a handful of television stations for the latest on current events; instead, there seems to be an endless number of “news” sources with varying degrees of quality, including cable channels, blogs, and other websites on the Internet.⁶¹ This substantial increase in news sources changes the way the public views the media, and currently the average citizen is less likely to feel a connection with those reporting the news than in times past.⁶² Additionally, the increase in news organizations requires each news program and newspaper to fight for a limited number of stories, racing to get that story to the public first.⁶³

mostly favorable); Pollingreport.com, Journalism: ABC News/Washington Post Poll (May 18–22, 2005), <http://www.pollingreport.com/media.htm> (11% great confidence in media; 47% fair amount); Gillespie, *Media Credibility*, *supra* note 54, (Sept. 5–8, 2002: 10% great deal of confidence in media; 44% fair amount); Harvard University Institute of Politics, Fall 2002 Youth Survey: A National Survey of College Undergraduates (Oct. 18–27, 2002), http://www.iop.harvard.edu/var/ezp_site/storage/fckeditor/file/2002_topline.pdf (Oct. 2002: 12% trust the media to do the right thing all or most of the time; 61% some of the time); Pollingreport.com, Journalism: Brookings Institution Poll, (May 30, 2002), <http://www.pollingreport.com/media.htm> (May 2002: 14% very favorable opinion of news media; 45% somewhat favorable); NBC News/Wall Street Journal, July 2006 Poll (Sept. 1998), <http://online.wsj.com/public/resources/documents/poll20060726.pdf> (Sept. 1998: 9% very positive about the job of the news media; 18% somewhat positive).

59. See First Amendment Center, ‘07 Survey Shows Americans’ Views Mixed on Basic Freedoms (Sept. 24, 2007), <http://www.firstamendmentcenter.org/news.aspx?id=19031> (60% of Americans disagree with the statement that the press tries to report the news without bias) [hereinafter ‘07 Survey Shows]; Harris Interactive, News Reporting is Perceived as Biased, Though Less Agreement on Whether it is Liberal or Conservative Bias (June 30, 2006), http://www.harrisinteractive.com/harris_poll/index.asp?PID=679 (Over 60% of Americans surveyed agree that there is bias in the reporting of the news); Pew Research Center for the People & the Press, Mid-October 2004 Political Survey, (Oct. 24, 2004), <http://people-press.org/reports/print.php3?PageID=902> (90% of Americans feel that the news media let their own political preferences influence the way they report the news); Gillespie, *Media Credibility*, *supra* note 54 (63% of Americans feel the news media is either too liberal or too conservative); Pew Research Center for the People & the Press, Feb. 1999 News Interest Poll (Feb. 25, 1999), <http://people-press.org/reports/print.php3?PageID=330> (56% of Americans believe the news media are politically biased in their reporting).

60. YALOF & DAUTRICH, *supra* note 49, at 11.

61. *Id.*

62. *See id.*

63. *See id.* (“[L]arger press organizations must fight for their piece of an ever-shrinking pie of revenue from consumers who enjoy numerous low-cost or even free news alternatives.”); *see also* David L. Geary, *The Decline of Media Credibility and its Impact on Public Relations*, 50 PUB. REL. Q. 9, 10 (Fall 2005) (quoting a TV news producer as saying, “The need to compete for ratings results in an obsession with non-news, frivolity and entertainment”); Marianne M. Jennings, *Where*

Any mistakes made in the race to publish are more likely to be brought to the attention of the public by the countless competitors.⁶⁴

Although these changes in technology naturally have had a negative impact on the way the public views the news media, the behavior and actions of some prominent journalists in recent years certainly have not helped the cause. Numerous well-publicized scandals involving highly respected news organizations have further damaged the reputation of journalists.⁶⁵ Embarrassing episodes ranging from the rigged explosions on NBC's Dateline⁶⁶ to retracted reports on CNN⁶⁷ and CBS⁶⁸ shook the television news world. Newspapers likewise were plagued with a series of well-known incidents in which journalists from the New York Times and USA Today fabricated stories, plagiarized the works of competitors,

Are Our Minds and What Are We Thinking? Virtue Ethics for a "Perfidious" Media, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 637, 675 (2005) ("And the desire for a good story, in the face of competition from all varieties of new and old media, is a powerful—and sometimes blinding—incentive."). This race to get the story published first has led the public to believe that news media are covering stories just to sell papers, not because they think the stories are newsworthy. See American Society of News Editors, Examining Our Credibility: Perspectives of the Public and the Press (Aug. 1999), http://www.asne.org/kiosk/reports/99reports/1999examiningourcredibility/p5-6_findings.html.

64. YALOF & DAUTRICH, *supra* note 49, at 11.

65. See Geary, *supra* note 63, at 9–10 (enumerating the numerous scandals involving such news organizations as Newsweek, CBS News, New York Times, and ABC News).

66. The Dateline report alleged that trucks produced by General Motors were unsafe due to side-saddle gas tanks that exploded upon impact. Shortly after the piece aired, NBC News admitted that the test trucks used in the segment had been rigged with "sparking devices" that would produce a more dramatic explosion for the viewers. Jennings, *supra* note 63, at 647; see also Bill Carter & Jacques Steinberg, *CBS Quiet About Fallout, But Precedent is Ominous*, N.Y. TIMES, Sept. 21, 2004, at A24 [hereinafter *CBS Quiet*].

67. CNN was forced to retract a report that claimed U.S. soldiers in Vietnam secretly used nerve gas on American defectors. See Editorial, *The CNN-Time Retraction*, N.Y. TIMES, July 3, 1998, at A20. Pulitzer Prize-winning journalist Peter Arnett claimed that he had no part in developing the piece despite the fact that his name was featured on the report. See Jennings, *supra* note 63, at 658. It was suggested that CNN and Time were too focused on the headline and as a result cut corners in verifying their story. See Editorial, *The CNN-Time Retraction*, N.Y. TIMES, July 3, 1998, at A20.

68. CBS aired a segment based on unsubstantiated evidence in an attempt to be the first to report on questions about President Bush's prior service in the Texas Air National Guard in the 1970s. See Jacques Steinberg & Bill Carter, *CBS Dismisses 4 Over Broadcast on Bush Service*, N.Y. TIMES, Jan. 11, 2005, at A1 ("[I]n a dash to beat its competitors . . . the [CBS] news report was approved by inattentive executives; was delivered by an overworked anchor, Dan Rather; and did not undergo even the most rudimentary fact-checking."); see also Jim Rutenberg & Kate Zernike, *CBS Apologizes for Report on Bush Guard Service*, N.Y. TIMES, Sept. 21, 2004, at A1; *CBS Quiet supra* note 66, at A24.

or failed sufficiently to verify their sources.⁶⁹ Each of these cases has negatively affected the public's perception of the ethics of journalists and reduced its confidence that the news media will provide accurate and fair accounts of stories.⁷⁰ Although these episodes quite clearly represent an extraordinarily small percentage of the behavior of the institutional press, they appear to have significantly fueled the negative perceptions held by the public. As one scholar noted, "For a lot of the casual public, it's one more piece of evidence against an institution they feel they can't trust."⁷¹ Indeed, polls undertaken during the last decade indicate Americans feel that journalists care more about headlines and prizes than accurately reporting the news,⁷² and suggest that journalists themselves are troubled by the path that the news media have taken in recent years.⁷³

69. See Staff, *Correcting the Record; Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, at N1, 24 [hereinafter Staff, *Correcting the Record*] (describing former N.Y. Times staff reporter Jayson Blair, who fabricated stories, used photographs to describe locations that he never visited, and pulled passages from other newspapers such as the Washington Post in 36 of 73 articles, including those on the D.C. sniper); Jacques Steinberg, *USA Today Finds Top Writer Lied*, N.Y. TIMES, Mar. 20, 2004, at A1 (USA Today foreign correspondent Jack Kelley "fabricated substantial portions of at least eight major articles in the last 10 years, including one that earned him a finalist nomination for a Pulitzer Prize in 2002."); see also Howard Kurtz, *USA Today Calls Work by Star Reporter Fake; Paper Details Evidence of Fabrication*, WASH. POST, Mar. 20, 2004, at A01; Blake Morrison et al., *Kelley Issues Apology; More Fabricated Stories Discovered*, USA TODAY, Apr. 22, 2004, at 10A.

70. See Staff, *Correcting the Record*, *supra* note 69, at 24 (quoting a woman, to whom Jayson Blair had falsely attributed a quote, as saying "The New York Times. You would expect more out of that").

71. Steinberg, *supra* note 68, at A11.

72. '07 Survey Shows, *supra* note 59 (2007: 62% of Americans believe falsifying or making up of stories in the American news media is widespread); Darren K. Carlson, *Nurses Remain at Top of Honesty and Ethics Poll*, GALLUP, Nov. 27, 2000, <http://www.gallup.com/poll/2287/Nurses-Remain-Top-Honesty-Ethics-Poll.aspx> (30% of Americans think newspaper and TV reporters have low or very low honesty and ethical standards; 53% and 47%, respectively, think they have average ethical standards); Mark Gillespie, *Public Remains Skeptical of News Media: Majority of Americans Believe News Organizations Often Get Facts Wrong*, GALLUP, May 30, 2003, <http://www.gallup.com/poll/8518/Public-Remains-Skeptical-News-Media.aspx> (62% of Americans think news organizations' stories and reports are often inaccurate; only 34% said stories were often inaccurate in 1985); Pew Center for the People & the Press, February 1999 News Interest Poll (Feb. 25, 1999), <http://people-press.org/reports/print.php3?PageID=330> (August 1998: 33% of Americans thought news organizations got facts straight; March 1995: 74% thought that in covering the personal and ethical behavior of public figures, news organizations were driving the controversy rather than just reporting the news).

73. See David Carlson, *Journalism Industry Must Return to Principles*, 94 QUILL 3, 3 (Jan./Feb. 2006) ("Journalism is about seeking truth and reporting it. But our industry has strayed somewhat from these principles . . . [it] has become about profits and ratings. Too often it has become about

As public perception of the media erodes and the investigative functions once performed by the mainstream media are increasingly abandoned, an exploration of the relationship between media behavior and the strength of the reporter's privilege becomes all the more salient.

B. A Wave of High-Profile Subpoena Cases and an Overall Increase in the Number of Subpoenas

Blasi noted that “a legal issue can smolder for years until suddenly the winds of a larger controversy fan it into flame.”⁷⁴ Debate on the question of reporter's privilege certainly has supported this observation. Only twice in history has the question of whether to protect the media from service of subpoenas been fanned into a full conflagration: the period in which Blasi conducted his study, and the period in which the current study was conducted. And in both instances, the flame was fueled by nearly identical larger controversies, in the form of (1) a set of major media-subpoena cases that garnered widespread public attention and (2) an uptick in the overall number of subpoenas received by members of the press.

When Blasi launched his investigation of the impact of and perceptions about media subpoenas, he did so on the heels of a spate of very high-profile cases in which members of the press were subpoenaed to reveal confidential information and declined to do so.⁷⁵ Three of those cases—involving reporters who in separate incidents had been subpoenaed to testify before grand juries about drug dealing in Kentucky⁷⁶ and the activities of the Black Panthers in Massachusetts and California⁷⁷—would be consolidated and decided by the United States

political agendas and ax grinding, about entertainment disguised as news, about ‘spin’ and saber-rattling.”); Steinberg, *supra* note 68, at A11 (citing a USA Today correspondent criticizing editors for not taking responsibility for making it possible for journalists to fabricate and plagiarize numerous stories); Peter Johnson, *Media Weigh in on ‘Journalistic Fraud,’* USA TODAY, May 12, 2003, at 3D (“*New Yorker* media writer Ken Auletta said that although the *Times* ‘nailed [Jayson] Blair as a liar, cheat and plagiarizer,’ it failed to detail mistakes by *Times* editors . . .”).

74. Blasi, *supra* note 4, at 229.

75. *Id.* at 230 n.5 (citing *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971); *In re Pappas*, 266 N.E.2d 297, *cert. granted*, 402 U.S. 942 (1971); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. Ct. App.), *cert. granted*, 402 U.S. 942 (1971); *State v. Knops*, 183 N.W.2d 93 (Wis. 1971); *People v. Dohrn*, Crim. No. 69–3803 (Cir. Ct. Cook County, 1U., May 20, 1970); *People v. Rios* (Super. Ct. San Francisco County, Cal., July 15, 1970)).

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

77. *Id.* at 672–79 (describing *In re Pappas*, 402 U.S. 942 (1971) and *United States v. Caldwell*,

Supreme Court the year after Blasi's article was published. This opinion, *Branzburg v. Hayes*,⁷⁸ would mark the only time that the Court has spoken directly to the question of the constitutional necessity of a reporter's privilege.⁷⁹

In anticipation of the Supreme Court's decision, Blasi emphasized that the widespread publicity surrounding the recent wave of major cases had generated a great deal of discussion and debate among and between journalists and their sources, and that reporters anticipated that the even higher-profile decision expected from the Supreme Court would likewise greatly impact the working relationships that they had developed.⁸⁰

Beyond these high-profile cases, Blasi noted that there had been an overall "increased volume"⁸¹ of subpoenas to the media, which warranted a closer examination of the interrelationships between the law of reporter's privilege and the behaviors and perceptions of the traditional press.⁸² His study, which made a brief investigation into both the frequency of subpoenas related to newsgathering and the newsrooms' responses to subpoenas that were received,⁸³ confirmed that

402 U.S. 942 (1971)).

78. 408 U.S. 665 (1972). The Court in *Branzburg* held, 5–4, that the First Amendment did not mandate a constitutional reporter's privilege—although a narrowing concurrence from Justice Powell arguably limited the case to its specific facts. For greater discussion of the case, see *infra* text accompanying notes 103–107.

79. Recently, the Court has been asked to chime in on another batch of high-profile cases but has denied certiorari. See *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1187 (2006); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005).

80. Compare Blasi, *supra* note 4, at 274–75 (reporting that the court of appeals' ruling in *Caldwell* that the reporter was not required to appear before the grand jury was helpful to reporters, who would mention the ruling to hesitant sources) with *id.* at 283 (reporting that some respondents feared that a high-profile reversal of *Caldwell* by the Supreme Court would "set off a wave of anxiety among sources"; "The publicity and imprimatur that would accompany such a Court holding would, in the opinion of these reporters, create an atmosphere even more uncongenial to source relationships than that which existed two years ago, when the constitutional question remained in doubt.").

81. *Id.* at 261.

82. *Id.* at 229–30 (noting that "the press subpoena problem remained until very recently a matter of only occasional and local significance," but that, within the last two years, "subpoenas began to issue against reporters in such numbers and circumstances as to generate consternation in virtually all quarters of the journalism profession").

83. *Id.* at 260. In light of significant modern legislative disputes over the frequency of media subpoenas, the current study investigated the questions of the incidence of such subpoenas and newsroom responses to them in significantly greater depth than did Blasi's study. See Jones, *Avalanche or Undue Alarm*, *supra* note 13.

reporters were receiving subpoenas in a wide array of circumstances, from a wide variety of sources,⁸⁴ and on a wide range of substantive matters.⁸⁵

Both of the companion trends observed by Blasi—a spurt of widely publicized subpoena cases and an overall uptick in subpoena numbers—have occurred again in very recent years.

Beginning in approximately 2002, journalism in the United States faced a wave of high-profile subpoena cases unmatched by any other time in history except perhaps the era that prompted Blasi's study. Media subpoenas, and the losing arguments made in resistance to them, dominated major newspaper and news magazine headlines in a way that had not been seen for at least three decades.⁸⁶ In a series of cases, subpoenaed reporters asserted a privilege, lost their arguments, and then either relented and testified or were jailed for contempt. Among the highest profile journalists affected by this surge were Rhode Island television reporter Jim Taricani,⁸⁷ convicted of criminal contempt and

84. Blasi, *supra* note 4, at 259 (“Although currently the focus of the controversy is on grand jury investigations into radical activities, the use of press subpoenas is by no means limited to that context. The reported cases tell of subpoenas served on newsmen by legislative committees, criminal defendants, and litigants in civil cases, as well as grand juries.”) (footnotes omitted).

85. *Id.* at 259–60 (“The subject matter of press subpoenas also covers a wide spectrum, ranging from allegedly criminal behavior to the most frivolous show business gossip.”) (footnotes omitted); *see also id.* at 260 (listing examples of reporting efforts that had been the subject of subpoenas and requests for information).

86. Indeed, when a freelance book author was jailed in 2001 for refusing to identify confidential sources for a book she was writing about a Houston murder, the Reporters Committee for Freedom of the Press noted that the story “made national news for being the first time in 30 years that a journalist had spent any significant amount of time behind bars for refusing to comply with a subpoena.” THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001, at 3 (Lucy A. Dalglish, et al. eds., 2003), <http://www.rcfp.org/agents/agents.pdf> [hereinafter 2001 Report on Media Subpoenas]; *see also id.* at 1 (“We at the Reporters Committee for Freedom of the Press know if we waited long enough for a horror story to make the case for a strong reporter’s privilege, we’d get a doozy.”).

87. *See In re Special Proceedings*, 291 F. Supp. 2d 44, 47 (D.R.I. 2003) (granting the special prosecutor’s motion to compel Taricani to reveal the source of the videotape); *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (affirming the district court’s civil contempt order against Taricani for refusing to obey the order compelling disclosure of the source); Pam Belluck, *TV Reporter Facing Jail Says Source Rejected Plea*, N.Y. TIMES, Dec. 7, 2004, at A18 (reporting Taricani’s claim that his requests to his source to come forward were repeatedly refused); Pam Belluck, *Reporter Granted Release from Sentence*, N.Y. TIMES, April 7, 2005, at A21 (noting Taricani’s early release from his original six-month sentence); Mike Stanton & W. Zachary Malinowski, *Bevilacqua Gets 18 Months for Leaking Tape*, PROVIDENCE J., Sept. 10, 2005, at A1, available at http://www.projo.com/news/content/projo_20050910_joeb10.d06a857.html.

sentenced to house arrest for refusing to reveal the name of the person who gave him an F.B.I. videotape; members of the national media subpoenaed in separate Privacy Act⁸⁸ suits brought against the government by a nuclear scientist falsely accused of espionage⁸⁹ and by a germ-weapons expert who was named a “person of interest” in a series of anthrax-laced mailings;⁹⁰ two San Francisco Chronicle reporters who were ordered jailed for their refusal to tell a grand jury the identity of an individual who leaked the secret testimony of several professional athletes for a story on a steroids scandal;⁹¹ and the television and

88. Federal Privacy Act of 1974, 5 U.S.C. § 552a (2000).

89. See *Lee v. Dep't of Justice*, 287 F. Supp. 2d 15, 16 (D.D.C. 2003) (ordering the journalists to appear for depositions, to truthfully answer questions as to the identity of any government officer who provided information to them directly about Dr. Wen Ho Lee, and to produce all records provided to them by any government officer), *aff'd in part and vacated in part*, 413 F.3d 53 (D.C. Cir. 2005); *Lee v. Dep't of Justice*, 327 F. Supp. 2d 26, 27–28 (D.D.C. 2004) (finding the journalists in civil contempt and imposing a fine on each of \$500 per day until compliance, but staying the imposition of the fines pending appeal), *aff'd in part and vacated in part*, 413 F.3d 53 (D.C. Cir. 2005); *Lee v. Dep't of Justice*, 428 F.3d 299, 300 (D.C. Cir. 2005) (denying appellant-journalists' petition for rehearing); *Lee v. Dep't of Justice*, 413 F.3d 53, 55, 60–61 (D.C. Cir. 2005) (vacating the contempt order as to one journalist and upholding as to the remaining journalists), *cert. denied*, 547 U.S. 1187 (2006); Paul Farhi, *U.S., Media Settle With Wen Ho Lee: News Organizations Pay to Keep Sources Secret*, WASH. POST, June 3, 2006, at A1 (reporting that the federal government and five media organizations agreed to pay Lee a total of \$1.6 million to settle the lawsuit).

90. See *Hatfill v. Gonzales*, 505 F. Supp. 2d 33 (D.D.C. 2007) (granting Hatfill's motion to compel further testimony from the individual journalists and granting the motion to quash the subpoenas of the five media organizations); *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104 (D.D.C. 2005) (granting in part and denying in part the defendants' motion to dismiss action brought by Steven Hatfill); Ken Paulson, Editorial, *The Real Cost of Fining a Reporter*, USA TODAY, Mar. 12, 2008, at 11A (describing the drastic fines ordered against journalist Toni Locy for her refusal to reveal the law enforcement sources of her articles during the anthrax-letters situation); Eric Schmitt, *Scientist Denies Being Involved in Anthrax Plot*, N.Y. TIMES, Aug. 12, 2002, at A1 (reporting Hatfill's vehement denial of any involvement in the anthrax attacks); Samantha Fredrickson, *Locy Appeal Dismissed, Contempt Order Vacated*, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Nov. 17, 2008, <http://www.rcfp.org/newsitems/index.php?i=7137> (reporting that, even after urging by Locy to decide the case and thereby determine the issue of reporter's privilege, the D.C. Court of Appeals dismissed both the appeal and the underlying contempt order).

91. See *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006) (denying the reporters' motion to quash the subpoenas based on a reporter's privilege); Bob Egelko, *Lawyer Admits Leaking BALCO Testimony: He Agrees to Plead Guilty; Prosecutors Say They'll Drop Bid to Jail Chronicle Reporters*, S.F. CHRON., Feb. 15, 2007, at A1 (reporting attorney Troy Ellerman's admission of leaking the transcripts and his agreement to enter a guilty plea for his involvement); Bob Egelko, *The BALCO Case: Lawyer Who Leaked Athletes' Testimony Seeks Less Prison Time*, S.F. CHRON., June 7, 2007, at B2 (noting Ellerman's request to a federal judge for a reduction in sentence from twenty-four to fifteen months); Paul Elias, *BALCO Attorney Gets 2 ½ Years: Judge Scoffs at Ellerman's Plea for Lighter Sentence*, CHI. TRIB., July 13, 2007, at 4 (reporting Ellerman's ultimate sentencing of two-and-a-half-years).

newspaper reporters subpoenaed in connection with the Valerie Plame leak investigation.⁹² In a parallel to Blasi's time, the onslaught of publicity received by these reporters' battles—and ultimate losses—brought the issue of reporter's privilege to the forefront and made it an issue of wider discussion among the general public.

Likewise, it does appear that the frequency of media subpoenas nationwide is on the increase and that the media once again are operating in an environment in which the volume of subpoenas is swelling.⁹³ Results from the author's Media Subpoena Survey that are reported in greater detail elsewhere⁹⁴ confirm that subpoenas to the mainstream media are now being issued with some regularity,⁹⁵ that they are not limited to the media organizations or the substantive issues involved in the high-profile recent cases,⁹⁶ and that, in at least some categories—most notably federal subpoenas and subpoenas requesting information obtained under a promise of confidentiality—they are on the increase.⁹⁷ As was the case forty years ago, subpoenas are being issued by a wide

92. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005) (affirming lower court's holding that found the appellants in civil contempt); *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 27 (D.D.C. 2004) (denying the journalists' motion to quash the grand jury subpoenas); *In re Grand Jury Subpoena*, Matthew Cooper, No. 04-3112, 04-3113, 2004 WL 1900566 (D.C. App. Aug. 25, 2004) (order granting dismissal); *In re Special Counsel Investigation*, 346 F. Supp. 2d 54, 55 (D.D.C. 2004) (denying an additional motion to quash a grand jury subpoena); *Cooper v. U.S.* 545 U.S. 1150 (2005) (cert denied); *In re Special Counsel Investigation*, 374 F. Supp. 2d 238 (D.D.C. 2005) (allowing the journalists to remain on bail and staying the court's order requiring the payment of fines until additional orders could be issued); David Johnson & Douglas Jehl, *Times Reporter Free from Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1 (noting Judith Miller's release from jail after receipt of a waiver from her confidential source, allowing her to testify); Neil A. Lewis, *The Libby Verdict; Libby, Ex-Cheney Aide, Guilty of Lying in C.I.A. Leak Case*, N.Y. TIMES, Mar. 7, 2007, at A1 (reporting I. Lewis Libby's conviction on four felony counts); Adam Liptak, *Time Inc. to Yield Files on Sources, Relenting to U.S.*, N.Y. TIMES, July 1, 2005, at A1 (reporting Time magazine's decision to turn over the requested sources, as well as Judith Miller's continuing refusal to do so); Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1 (reporting Judith Miller's imprisonment for continued refusals to reveal confidential sources).

93. See, e.g., *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 32 (2007) (testimony of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP) (media attorney testifying before Congress that "an unprecedented number of subpoenas seeking the names of confidential sources have been issued by Federal courts in a remarkably short period of time").

94. Jones, *Avalanche or Undue Alarm*, *supra* note 13.

95. *Id.* at 626–27.

96. *Id.* at 638–40, 642.

97. *Id.* at 638, 642–44.

variety of sources on a broad assortment of substantive matters.⁹⁸

All told, as was the case at the time Blasi launched his study, subpoenas are being issued in “such numbers and circumstances as to generate consternation in virtually all quarters of the journalism profession.”⁹⁹ Both the spurt of high-profile cases and the overall increase in the incidence of media subpoenas call for a new investigation of the interrelationships between reporter’s privilege and the media’s perceptions and behaviors.

C. *An Increased Focus on the Law of Reporter’s Privilege*

Finally, Blasi wrote at a time of intense focus on the development of reporter’s privilege law—a unique moment in media-law history in which “the statutory, common-law, and constitutional aspects of the long-dormant problem [were] being re-examined by many legislators, judges, and academicians.”¹⁰⁰ The topic of media subpoenas was occupying the courts with an intensity never before seen. The United States Court of Appeals for the Ninth Circuit had just upheld a reporter’s privilege in *Caldwell v. United States*,¹⁰¹ and the developing legal doctrine in that case and others formed the framework for much of Blasi’s questioning of his study subjects,¹⁰² who were individually working through the current and future consequences of the courts’ approaches to the privilege question. When the Supreme Court heard *Caldwell* and its companion cases in *Branzburg v. Hayes*¹⁰³ the following Term, a plurality rejected the argument that a reporter’s privilege was constitutionally mandated by the First Amendment.¹⁰⁴ But

98. *Id.* at 639–40, 656–60.

99. Blasi, *supra* note 4, at 229. *Cf.* Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 608–12 (describing extensive recent Congressional testimony from media executives, journalists, and media attorneys commenting on the “recent surge in the number of subpoenas,” the “increase in the severity of contempt penalties,” a “deluge of subpoenas” reaching “epidemic proportions” and an “unprecedented attack” on reporters with the use of federal subpoenas).

100. Blasi, *supra* note 4, at 230 (footnotes omitted).

101. 434 F.2d 1081 (9th Cir. 1970).

102. *See* Blasi, *supra* note 4, at 230, 269, 274, 275, 281, 283.

103. 408 U.S. 665 (1972).

104. *Id.* at 682 (“Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.”).

a concurring opinion from Justice Powell,¹⁰⁵ suggesting that the privilege would sometimes be warranted on a case-by-case basis, would significantly soften the blow dealt to the press by the plurality and would lead lower courts to limit *Branzburg* to its very facts in the coming three decades¹⁰⁶ and to find a qualified privilege in a wide variety of instances.¹⁰⁷

In anticipation of and in reaction to the Supreme Court's *Branzburg* decision, Congress also entered the fray with great gusto in Blasi's era with a rash of federal shield law proposals.¹⁰⁸ Indeed, more than seventy bills proposing either an absolute or a qualified privilege permitting reporters to refuse to respond to subpoenas in certain circumstances were introduced in just the year following *Branzburg*.¹⁰⁹ As legislative and judicial debate swirled around him, Blasi correctly predicted that a key component of each of these inquiries into potential alterations to the legal protection of journalists would be a complex assessment of the real-world consequences that new protections—or the absence of

105. *Id.* at 709–10 (Powell, J., concurring) (emphasizing that “[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources,” and “the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection”).

106. See Kristina Spinneweber, Comment, *Branzburg, Who? The Existence of a Reporter's Privilege in Federal Courts*, 44 DUQ. L. REV. 317, 330 (2006) (“*Branzburg* has been effectively limited to the grand jury setting.”).

107. See Lucy A. Dalglish & Casey Murray, *Déjà Vu All Over Again: How a Generation of Gains in Federal Reporter's Privilege Law Is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13, 19 (2006) (“[F]or thirty-two years, many subpoenaed reporters and their lawyers convinced courts all over the country that Justice Powell's concurrence represented the true majority view” that *Branzburg* was limited to the grand jury setting, and that a qualified privilege existed in most other circumstances.).

108. See, e.g., H.R. 16527, 92d Cong. (1972); S. 3925, 92d Cong. (1972); S. 3932, 92d Cong. (1972); S. 3786, 92d Cong. (1972); S. 1311, 92d Cong. (1971); S. 3552, 91st Cong. (1970); H.R. 16704, 91st Cong. (1970); H.R. 16328, 91st Cong. (1970). See also Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 Harv. J. ON LEGIS. 233, 260–63 (1974) (describing the flurry of reporter's privilege bills in the early 1970s from the perspective of a senator who sponsored some of the legislation).

109. See *A Short History of Attempts to Pass a Federal Shield Law*, NEWS MEDIA & THE LAW., at 9 (Fall 2004) (“At least six bills [were] introduced quickly [after *Branzburg*], and 65 would be introduced in the next year.”); see also MAURICE VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS 148 (1979) (listing congressional sessions before 1975 in which federal shield-law bills were introduced); Wendy N. Davis, *The Squeeze on the Press: More Courts Are Forcing Reporters to Testify as Judges Reconsider Media Privilege*, A.B.A. J., Mar. 2005, at 23 (quoting the executive director of the Reporters Committee for Freedom of the Press as saying that ninety-nine bills were introduced between 1973 and 1978).

protection—would have for American newsrooms.¹¹⁰

Without question, the last few years have greatly paralleled this final aspect of Blasi's time period, with the legislative and judicial focus on reporter's privilege suddenly and fervently renewed and the question of the necessity and scope of the privilege again examined closely by judges, legislators, and academics. After an intervening three-decade period of relative calm—in which federal circuit courts gave a media-generous reading to *Branzburg*¹¹¹ and a very large number of states enacted reporter shield laws,¹¹² or came to recognize a reporter's privilege as a matter of state constitutional or common law¹¹³—the legal tide appears to have begun to turn against the press, and the vigorous debate among courts, Congress, and scholars has been resurrected.

Within the courts, the high-profile media losses described above¹¹⁴ were viewed by some as signaling this retreat from a media-generous approach to subpoena privilege. These cases were compounded by an especially high-profile federal appellate decision that many viewed as “chang[ing] the landscape”¹¹⁵ on the reporter's privilege question. In *McKevitt v. Pallasch*,¹¹⁶ influential Judge Richard Posner held that a subpoena for material not obtained under a promise of confidentiality could not raise First Amendment issues,¹¹⁷ questioned the value of

110. Blasi, *supra* note 4, at 230–35.

111. *See, e.g.*, *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *LaRouche v. Nat'l Broad. Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Zerilli v. Smith*, 656 F.2d 705, 710–11 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595–99 (1st Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *Farr v. Pitchess*, 522 F.2d 464, 467–68 (9th Cir. 1975); *Baker v. F & F Inv.*, 470 F.2d 778, 779–80 (2d Cir. 1972); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992–93 (8th Cir. 1972).

112. *See infra* text accompanying notes 262–265 (discussing state shield laws).

113. *See, e.g.*, *State v. Sandstrom*, 581 P.2d 812, 814–15 (Kan. 1978) (applying *Branzburg* and opinions from various other state courts); *State ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650, 653–60 (Mo. Ct. App. 1997) (relying on various state and federal cases, including *Branzburg*); *State v. St. Peter*, 315 A.2d 254, 256 (Vt. 1974) (citing *Branzburg*); *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va. 1974) (same); *In re Contempt of Wright*, 700 P.2d 40, 45 (Idaho 1985) (finding a privilege rooted in state constitution); *Winegard v. Oxberger*, 258 N.W.2d 847, 852 (Iowa 1977) (same); *Opinion of the Justices*, 373 A.2d 644, 647 (N.H. 1977) (same); *Zelenka v. State*, 266 N.W.2d 279, 286–87 (Wis. 1978) (same).

114. *See supra* text accompanying notes 87–92.

115. Davis, *supra* note 109, at 23.

116. 339 F.3d 530 (7th Cir. 2003).

117. *See id.* at 533 (“When the information in the reporter's possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on

recognizing any reporter's privilege at all,¹¹⁸ and flatly rejected the journalist-friendly readings of *Branzburg* that had been adopted by courts across the country.¹¹⁹ Scholars and media commentators agreed that the decision marked a stark departure from the approach that courts had taken to reporter's privilege in the years since Blasi's study, and argued that it may well indicate that court-created privileges will continue to erode.¹²⁰

As was true in Blasi's era, a changing dialogue within the courts has spurred a changing dialogue within the legislature. Beginning in late 2004,¹²¹ and in response to the high-profile modern media subpoena cases and the signals from courts that protection for journalists may be waning, a second wave of federal shield law proposals was introduced in

the question of compelled disclosure.”).

118. *See id.* (questioning the need for “special criteria merely because the possessor of the documents or other evidence sought is a journalist,” and arguing that “rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas”).

119. *See id.* at 532 (“Some of the cases that recognize the privilege . . . essentially ignore *Branzburg*, [while others] treat the ‘majority’ opinion in *Branzburg* as actually just a plurality opinion [and] some audaciously declare that *Branzburg* actually created a reporter’s privilege.”).

120. *See, e.g.,* Dalglish & Murray, *supra* note 107, at 37, 39 (arguing that *McKevitt* “drastically changed the formulations” and launched “the perfect storm that devastated the federal reporter’s privilege” and asserting that that “the media has lost much of the ground it gained since *Branzburg*,” and that “[a]ny suggestion that a First Amendment argument has been developing over the past thirty years in the federal courts has been collapsing”); Jane E. Kirtley, *Will the Demise of the Reporter’s Privilege Mean the End of Investigative Reporting, and Should Judges Care If it Does?*, 32 OHIO N.U. L. REV. 519 at 520 (2006) (citing *McKevitt* as part of a trend of judges “question[ing] whether any kind of constitutional or federal common law privilege exists” and “rejecting the suggestion that the public interest would actually be enhanced by granting rights to the press not enjoyed by the public”); Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 555 (2007) (citing *McKevitt* and noting that “[i]n the last few years, the minority view that Powell’s concurring opinion is largely irrelevant has been gaining ground”); Michael D. Saperstein, Jr., *Federal Shield Law: Protecting Free Speech or Endangering the Nation?*, 14 COMMLAW CONSPECTUS 543, 559 (2006) (noting that *McKevitt* “opened a floodgate of litigation in federal courts with a rising tide of holding journalists in contempt”); Leslie Siegel, Note, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L. J. 469, 473 (2006) (citing *McKevitt* for the proposition that “the recent trend has been toward utilizing [*Branzburg*] to refuse to recognize a reporter privilege”).

121. S. 3020, 108th Cong. (2004) was introduced by Senator Christopher Dodd. Titled the Free Speech Protection Act of 2004, it would have provided reporters with an absolute privilege against disclosing sources, whether or not those sources had been promised confidentiality, and would have given a qualified privilege to reporters subpoenaed for notes, documents, photographs, and other information obtained in the course of newsgathering. *Id.* at § 4.

Congress. In the last five years, both Democrats and Republicans have sponsored bills in the House¹²² and the Senate¹²³ proposing a federal reporter's privilege. In late 2007, a federal shield law cleared one of the houses of Congress for the first time in history, as The Free Flow of Information Act, H.R. 2102, passed the House of Representatives by a vote of 398–21. Offering broad protection to confidential sources and more limited protection in cases of reporters with general information,¹²⁴ the bill applied to all those who engaged in journalism “for a substantial portion of the person’s livelihood or for substantial financial gain.”¹²⁵ A narrower version of the bill, which instead covered only material obtained under a promise of confidentiality, was voted out of the Senate Judiciary Committee 15–2 the same month.¹²⁶ Senate leaders tried to bring that bill to a vote in the full Senate the next July, but a motion to end debate and go to a vote fell short of the sixty votes needed.¹²⁷ Nevertheless, the renewed momentum on Capitol Hill pushed onward, and bipartisan efforts reemerged in 2009 with the introduction of new bills in both the House and the Senate.¹²⁸ This most recent House bill—identical to the bill that was successful in 2007—again passed the House, by unanimous vote, in March 2009.¹²⁹ As this Article went to

122. Representative Mike Pence (R-Ind.) sponsored the Free Flow of Information Act, H.R. 581, 109th Cong. (2005), and reintroduced it later that year as H.R. 3323, 109th Cong. (2005). Pence went on to co-sponsor, with Rep. Rick Boucher (D-Va.), H.R. 2102, 110th Cong. (2007).

123. Senator Dodd (D-Conn.) reintroduced his bill as S. 369, 109th Cong. (2005) (referred to the Committee on the Judiciary). Senator Richard Lugar (R-Ind.) introduced the Free Flow of Information Act, S. 340, 109th Cong. (2005), and it was reintroduced as S. 1419, 109th Cong. (2005). The following year, Lugar introduced S. 2831, 109th Cong. (2006).

124. H.R. 2102, 110th Cong. (2007) at §§ 2(a)(2), 2(a)(3).

125. *Id.* at § 4(2).

126. S. 2035, 110th Cong. (2007); 254 CONG. REC. S7595 (daily ed. July 29, 2008) (statement of Sen. Leahy); The Associated Press & Editor & Publisher Staff, *Senate Committee Backs Shield Law by 15-2 Vote*, EDITOR & PUBLISHER, Oct. 4, 2007, http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1003652937.

127. See Walter Pincus, *Vote on Journalist Shield Stalled*, WASH. POST, July 31, 2008, at A17.

128. Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009), was sponsored by Reps. Rick Boucher (D-Va.), Mike Pence (R-Ind.), John Conyers (D-Mich.), and Bob Goodlatte (R-Va.). Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009), was introduced by Senators Arlen Specter (R-Pa.), Charles Schumer (D-N.Y.), Richard Lugar (R-Ind.), and Lindsey Graham (R-S.C.).

129. See *House Unanimously Passes Shield Law*, BROADCASTING & CABLE (Mar. 31, 2009), http://www.broadcastingcable.com/article/191081-House_Unanimously_Passes_Shield_Law.php (“The bill defines a covered journalist as someone who gains a substantial financial interest or earns the majority of their livelihood from their journalistic pursuits.”); Samantha Frederickson, *House*

press, media advocacy organizations, buoyed by President Obama's apparent support for a privilege,¹³⁰ continued to push for passage of the federal shield-law bill in the Senate.

In sum, if Blasi was accurate in his assessment that significant legal development and significant industry development demand an empirical analysis of the interaction between reporter's privilege law and the newsroom populations affected by that body of law, the area is as ripe for study today as it was when Blasi conducted his study a generation ago. Legislators considering proposals in this arena need data on the ways in which the law operates "on the ground" in order to make policy judgments and draw legal conclusions that accurately reflect the impact of the law on the affected body.

II. STUDY METHODOLOGY

Blasi's study of the impact of media subpoenas and the perceptions of journalists on the topic set out to "achieve as comprehensive and systematic an understanding of the empirical aspects of the dispute as time and resources would permit."¹³¹ Although differing somewhat in approach, the present empirical study had an identical goal. Specifically, the study aimed to offer, as Blasi's did, both quantitative and qualitative measurements of the following: (1) the frequency of subpoenas against the media, and any increase in that frequency in the wake of the spate of high-profile losing cases;¹³² (2) the impact, if any, that receipt of a subpoena has on a newsroom; (3) newsroom leaders' perceptions of their own legal climate and changes to that climate in the wake of the spate of losing cases; and (4) the extent to which members of the media are aware of their current legal protections in the realm of reporter's privilege.

Blasi's study included a quantitative survey, distributed to 1470 journalists from daily newspapers, local television news operations, and

Passes Federal Shield Bill, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Mar. 31, 2009), <http://www.rcfp.org/newsitems/index.php?i=10682> ("The law will provide a qualified privilege for journalists with exceptions for national security, the prevention of death or bodily harm, or information that is deemed essential in a criminal case or critical in a civil suit.").

130. Judson Berger, *Media Groups Have High Hopes for 'Shield Law'*, FOX News, Feb. 12, 2009, www.foxnews.com/politics/2009/02/12/media-groups-high-hopes-shield-law/.

131. Blasi, *supra* note 4, at 235.

132. Frequency data is discussed in Jones, *Avalanche or Undue Alarm*, *supra* note 13.

weekly newsmagazines,¹³³ which aimed to measure certain aspects of subpoena frequency and impact. It also included qualitative components, including personal interviews with investigative reporters and editors and questionnaires that posed open-ended questions seeking qualitative information about the subpoena situation and “invit[ing] the respondents to tell about their subpoena experiences and to express their opinions about the controversy in their own words.”¹³⁴

Like Blasi’s study, the current study canvassed the opinions of the mainstream press at daily newspapers and in local television newsrooms and sought responses to both quantitative questions (in the form of numerical answers and closed-option multiple choice responses) and qualitative inquiries (in the form of open-ended questions designed to provide the opportunity for storytelling that gives context to the quantitative data).¹³⁵

The survey in the present study was sent to the editor of every U.S. daily newspaper, regardless of circulation or geographic location,¹³⁶ and to the news director of every U.S. television news station affiliated with ABC, NBC, CBS, or FOX.¹³⁷ This target population differed slightly from Blasi’s population in its scope and reach,¹³⁸ and the current study placed its focus on newsroom leaders rather than individual journalists. Both of these alterations were made in order to align the target population with the population that had been studied in an industry survey five years earlier, thus making possible the analysis of numerical trends.¹³⁹ A total of 1997 invitations to participate in the survey were

133. Blasi reported that 975 of the surveys were returned. Blasi, *supra* note 4, at 238.

134. *Id.* at 236.

135. Survey instrument is available online and on file with the author. RonNell Andersen Jones, 2007 Media Subpoena Survey Instrument (2007) (on file with author), available at http://www.law.byu.edu/Law_School/Faculty_Profile?241 and http://www.law.washington.edu/wlr/issues/v084/docs/v084i03_2007MediaSubpoenaSurveyInstrument.pdf [hereinafter Jones, *Survey*].

136. As listed in EDITOR & PUBLISHER INT’L YEARBOOK (2006).

137. As listed in R.R. BOWKER, BROADCASTING & CABLE YEARBOOK (2006).

138. The daily newspapers involved in Blasi’s survey had a minimum circulation of 50,000 and the television stations surveyed were only from leading market areas. Blasi, *supra* note 4, at 237–38. The present survey included all daily newspapers and all network-affiliated television newsrooms, in an effort to identify and compare the different impacts of subpoenas served at larger and smaller organizations. Blasi also surveyed weekly newsmagazines, which were excluded from the present study.

139. See Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 620–24; 2001 Report on Media Subpoenas, *supra* note 86.

sent, by both U.S. Mail and email, in late March and early April 2007.¹⁴⁰

Respondents were given the option of completing the survey by U.S. Mail, by email, by telephone, or by logging onto the project's website. Respondents were asked to report numerical data for a single calendar year, 2006, and to compare the legal climate of 2007 with the legal climate of five years earlier, before the spate of high-profile losing subpoena cases.¹⁴¹ Seven hundred sixty-one surveys were completed,¹⁴² making the final response rate 38%, with a greater than 50% response rate among the 100 largest newspapers by circulation¹⁴³ and among the twenty-five largest television stations by market area.¹⁴⁴ Three hundred forty-six responses were received through the website, 196 by U.S. Mail, 121 by email, and 98 by telephone. Of the 1411 newspapers that were provided with surveys, 511 responded, for a newspaper response rate of 36.2%. Of the 586 television stations that were provided with surveys, 250 responded, for a television response rate of 42.7%. Television station responses represented 32.9% of the total surveys received; newspaper responses represented 67.1%.¹⁴⁵ Respondents included stations from all Nielsen television market-size categories and newspapers from all Editor & Publisher newspaper-circulation categories, and the proportion of the respondents found in each market-size and circulation category was roughly representative of the proportion of organizations from those categories found in the total population. *Figure 1*. Responses were received from the District of Columbia and from every state except Delaware.

Participants in the study were asked a series of questions about the number and type of subpoenas received by the organization in the

140. The initial invitations to participate in the survey were timed to correspond with the annual conventions of the American Society of Newspaper Editors and the Radio Television News Directors Associations, at which the study was announced by the author.

141. See Jones, *Survey*, *supra* note 135.

142. Blasi reported on his respondents by name. Because of developments in federal law regarding the treatment of subjects of studies conducted at universities receiving federal funding, the respondents in the present study were promised confidentiality in the reporting of data, with general demographic and organizational-size data gathered only for analytical purposes.

143. Responses were received from six of the largest ten newspapers by circulation and fifty-nine of the top 100.

144. Nielsen Station Index (Nielsen Media Research, Inc. 2007).

145. By comparison, the 2001 Reporters Committee study received responses from 319 news outlets, for a response rate of 14%. 2001 Report on Media Subpoenas, *supra* note 86, at 5. Eighty-two of the responses were from television broadcasters and 237 were from newspapers. *Id.*

preceding calendar year.¹⁴⁶ Mirroring Blasi's work, respondents also were asked if they perceived an increase in subpoenas and, if so, to what they primarily attributed that increase.¹⁴⁷ The survey also asked multiple-choice questions designed to assess the time and resources spent responding to subpoenas, editor and news director perceptions of the impact of the recent high-profile cases, and changes in legal climate "compared to five years ago."¹⁴⁸

Commentary boxes throughout the survey provided participants space for elaboration or clarification of answers other than those that the multiple-choice options provided.¹⁴⁹ Respondents answered two yes-or-no questions about whether the threat or use of subpoenas against their organization affected its policy on confidential sources and whether the threat or use of subpoenas against their news organization affected its policy on retention of notes, drafts, or other unpublished/unbroadcast material.¹⁵⁰ They were given open-ended space in which to provide details and anecdotes on these matters.¹⁵¹ They also were asked to "describe generally" the time and resources that are expended on subpoenas and were encouraged to provide examples and details.¹⁵² "Comments, anecdotes [and] other relevant information" on the subpoena situation were collected from participants willing to share them.¹⁵³

Finally, again borrowing directly from Blasi, respondents were also asked to answer "Yes," "No," or "Don't Know" to two questions testing their awareness of current legal protections: "Does the state in which your reporters do most of their work have a shield law that protects the confidentiality of source relationships in certain circumstances?" and "Does the state in which your reporters do most of their work recognize some form of reporters' privilege as a matter of state constitutional law or court decision?"¹⁵⁴

146. See Jones, *Survey*, *supra* note 135.

147. *Id.*, at 1-2; see Blasi, *supra* note 4, at 261.

148. See Jones, *Survey*, *supra* note 135.

149. *Id.*

150. *Id.* at 7.

151. *Id.*

152. *Id.*

153. *Id.* at 8.

154. *Id.*

Survey-response data were analyzed using STATA/IC 10.0 statistical software, in which quantitative responses were tabulated and percentages were calculated. In an effort to predict responses for the total population (all newsroom leaders at daily newspapers and network television affiliates in the country), results were analyzed in STATA using a standard mechanism for countering non-response bias.¹⁵⁵ Except where specified otherwise, results reported in this article are responses that have been analyzed in this way, giving a picture of the experiences and perceptions of *all* newsroom leaders in the nation, not only those who participated in the study.

Altogether, the data conveyed respondents' reported beliefs about changes in legal climate, allowed for a comparison of the beliefs of those who received subpoenas with those who did not, and gave important insights into the way in which the subpoena situation operates in the daily lives of newsroom leaders. In addition, open-ended questions that welcomed narrative from survey participants gave a deeper account of the effect that subpoenas do—and do not—have on newsroom practices, policies and operations. Together, these quantitative and qualitative measures also provided a chance to see the depth of overall newsroom leader perceptions—including perceptions about the impact of the recent wave of cases, awareness of currently existing legal protections, and, of critical importance, perceptions about the less easily measurable impact of subpoenas on the newsgathering process.

III. STUDY RESULTS

The qualitative and quantitative data in the present study combine to give a better picture of the complex relationship between the media and the law of reporter's privilege than previously has been available, and to offer useful updates to the data provided by Blasi a generation ago. The data can be divided into three broad categories: (1) data describing the

155. A logistical regression was performed using a set of factors known about all media organizations in the population: (1) form of media (newspaper or television broadcaster); (2) state in which the organization is located; (3) circulation or market size; (4) the existence of a state shield statute; and (5) whether or not the organization responded to the survey. Based on these factors, responses were weighted by the inverse of the probability of response, so as to minimize non-response bias and make results more generalizable to the total population. Datasets are available for public review online and on file with the author. RonNeil Andersen Jones, 2007 Media Subpoena Survey Public Dataset (2007) on file with author and *available at* http://www.law.byu.edu/Law_School/Faculty_Profile?241.

impact of subpoenas on newsgathering; (2) data describing media perceptions of the current legal climate; and (3) data describing journalists' awareness of their own legal protection.¹⁵⁶

A. *Impact of Subpoenas on Newsgathering*

The open-ended textual responses from survey respondents, coupled with answers to quantitative empirical questions that were designed to address the effect of subpoenas on the newsgathering process, indicate a variety of ways in which a subpoena served in a newsroom can be disruptive to a news operation. Newsroom leaders report that the cost of these subpoenas—in time, money, newsgathering, and independence—remains great and, indeed, that it is increasing with time. These impacts are greatest when subpoenas result in protracted legal battles, but also are felt when subpoenas are withdrawn or when the news organization fully complies. As was true of Blasi's data forty years ago, "it appears from this evidence that the practice of subpoenaing reporters has, in several instances, had a significant detrimental effect on the quality of news coverage."¹⁵⁷

1. *Impact on Newsroom Time*

One significant cost to news organizations is time spent responding to subpoenas—whether complying or challenging. *Figure 2*. While a majority of news organizations spend the same amount of time and resources responding to subpoenas as they did five years ago,¹⁵⁸ those who report a change in the expenditure of time and resources report an increase. More than a quarter of media organizations spend more time and resources responding to subpoenas than they did five years ago. Fewer than 8% spend less time.

With limited exceptions, the percentage of newspapers and television stations reporting an increase in expenditure of time and resources goes

156. The responses cited in this article have been excerpted from the larger dataset for easier access. RonNeil Andersen Jones, Sample Respondent Commentary from Survey Database, 2007 Media Subpoena Survey (2007), http://www.law.byu.edu/Law_School/Faculty_Profile?241 and http://www.law.washington.edu/wlr/issues/v084/docs/v084i03_SampleRespondentCommentary.pdf.

157. See Blasi, *supra* note 4, at 270.

158. A total of 65.7% of weighted responses answered "about the same"; 20.6% said "somewhat greater"; 6.3% said "significantly greater"; 4.3% said "somewhat less"; 3.1% said "significantly less."

up as the size of organization increases.¹⁵⁹ *Figures 3a and 3b.* These data may be particularly important if, as both common understanding and some research suggests,¹⁶⁰ the largest media organizations produce the lion's share of investigative stories. Consistent with the disproportionately large flow of subpoenas to television stations,¹⁶¹ more than twice as many television news directors as newspaper editors report that their expenditures of time and resources have increased.¹⁶² *Figure 4.* However, newspaper editors at the largest newspapers in the country experience these increases in as great or greater degrees than broadcasters.¹⁶³

Interestingly, newsroom leaders from states with state shield laws report increases in expenditures of time and resources that are nearly identical to the increases reported by newsrooms without shield laws. *Figure 5.* Respondents from shield-law states volunteer one possible explanation for this phenomenon. In answers to open-ended, interview-style questions, editors and news directors in states with shield laws report that they spend a good deal of time educating subpoenaing

159. By way of comparison, 17.1% of broadcasters in markets of fewer than 100,000 households reported an increase in time and resources expended on subpoenas; 53.3% of broadcasters in markets of greater than 1 million households reported an increase.

160. See Richard Pérez-Peña, *As Cities Go From Two Papers to One, Talk of Zero*, N.Y. TIMES, Mar. 12, 2009, <http://www.nytimes.com/2009/03/12/business/media/12papers.html> (quoting a former editor and publisher noting that major metropolitan newspapers do “the bulk of the serious reporting”); Public Broadcasting Service, *The NewsHour with Jim Lehrer: Investigative Reporting Hard Hit by Media Cutbacks* (Apr. 20, 2009) (television broadcast), available at http://www.pbs.org/newshour/bb/media/jan-june09/reporting_04-20.html.

161. See Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 628–30.

162. Just over 45% of broadcasters report that, compared to five years ago, “the amount of time and resources that my colleagues and I spend responding to subpoenas” is greater (32.0% report “somewhat greater” and 13.1% report “significantly greater”). Among newspaper editors, only 18.7% report that the amount is greater (15.5% report “somewhat greater”; 3.2% report “significantly greater”). Newspaper editors are significantly more likely to report that the time and resources spent are about the same as five years ago (74.8% of newspapers, compared to 45.4% of television stations). These data reflect the fact that subpoenas occur with significantly reduced frequency among smaller newspapers, which do not now nor have ever spent time or resources on the matter. See Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 631.

163. Weighting for nonresponses, 42.9% of newspapers with a circulation over 500,000 spend more time and resources on subpoenas than they did five years ago; 53.8% of those with circulations between 250,000 and 500,000 spend more time and resources. Conversely, within the smallest two circulation categories, only 13.1% and 11.0% of editors, respectively, spend more time and resources. Just over 80% of editors at these smallest newspapers reported that the time spent is “about the same,” and in the survey comment section, many noted that this answer was because the organization had never received subpoenas. *Figure 3a.*

attorneys on the existence of the state shield law or dealing with subpoenas that ultimately are quashed under the shield.¹⁶⁴ The lack of uniformity of protection from subpoenas on a state and a federal level may be diminishing the prophylactic effectiveness of state shield laws.

Additional commentary from the qualitative interview-style portions of the survey suggests that a challenge to a subpoena—particularly in a forum that does not have a shield law—can consume enormous amounts of editor, news director, and reporter time.¹⁶⁵ But it also appears that even *compliance* with a subpoena creates a time burden that distracts from newsgathering. News organizations of all sizes report that one immeasurable but strongly felt cost of subpoenas is the diversion they create from the time-sensitive business of news.¹⁶⁶ Many respondents noted that even when the total time spent on a subpoena is minimal, the cost of distraction from the daily news is significant. Television news directors, especially at smaller stations, report that the sheer bulk of subpoenas received makes for regular disruptions, even if no legal challenge is raised. “I have six ‘ordinary’ subpoenas on my desk right now,” one wrote. “We won’t be fighting them, and we might not even be able to comply with them because we recycle our field tapes. But we can’t ignore them. And that is time I won’t be spending on the news.” Another wrote: “For one case, I can spend four or five hours waiting for calls, taking calls, missing daily editorial meetings so that I wouldn’t miss important calls from attorneys. It is increasingly frustrating.”

Actual time reported spent on “routine” subpoenas with which newsrooms complied varied radically, from a few hours or less¹⁶⁷ to

164. “All were withdrawn after I talked to the issuing party and told him or her that [this state] has a shield law—which most don’t know.”; “[This state’s attorneys] are not well versed in the law and send subpoenas that are forbidden by state statute. You still have to defend against these, even though they will get thrown out by a judge.” For additional analysis of compliance rates and quash rates of organizations with and without shield laws, see Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 662.

165. Illustrative examples of actual responses: “In the few cases over the years in which reporters were subpoenaed in an effort to make them reveal confidential sources, the amount of time and money spent to defend them was enormous.”; “It takes over our operation when we have to fight one of these. Our reporters are involved, our editors are involved, and our management is involved. We turn our focus to this and find it eating up so much time that would otherwise be spent on the news.”

166. “The real cost isn’t dollars. It’s the time and aggravation that a shield law should be stronger so that we can go about the business of gathering the news.”

167. “It takes all of 10–15 minutes to satisfy most of these requests for dubs.”; “It takes us about 30 minutes to dub video that has been aired and comply with the average subpoena.”; “about half an

much greater amounts of time.¹⁶⁸ The overall tenor of the reports strongly suggests that television broadcasters often have a routinized system of searching for and dubbing recently aired material in response to a subpoena, taking between a half-hour and two hours of time. Particularly at larger television outlets, only a small amount of this time might be spent by a news director or other news employee. But many broadcasters also report that more complicated subpoenas—seeking larger amounts of material or material that is particularly old—can increase the time expenditure sharply.¹⁶⁹ And many newspaper editors

hour to make a dub and prepare it for mailing”; “About two hours of staff time per request”; “We spend about two hours on most subpoenas.”; “A couple of hours of work”; “Probably spent two hours”; “Three people for a few hours”; “took a few hours to straighten out”; “probably two hours the reporter spent with a lawyer”; “2–3 hours”; “I spent a few hours complying”; “routine ones are 2–3 hours”; “The average length of time spent was approximately three hours.”; “one to five hours per subpoena”; “several hours”; “four hours average per subpoena for searching, dubbing, etc.”; “I estimate a total of five hours of a lawyer’s time to prepare the reporter to testify and accompany him to the hearing.”; “1–5 hours”; “On average, we spend anywhere from four to eight hours dealing with each subpoena.”; “half-dozen-plus hours spent conferring with attorney”; “It probably takes in the neighborhood of six man[-]hours to comply with the most basic subpoena—from consulting with legal counsel, to locating the file video, to transcribing it into the desired format.”

168. “Generally speaking, it takes one person 2 hours of research and 3 hours of tracking down archived video, along with 2 hours of editing.”; “About 8 hours. We had to search for notes and photos, and consulted with attorney.”; “The equivalent of one day worth of internal meetings with the newspaper’s top three executives”; “8 to 10 hours each subpoena, doing research searches and copying of story and photo archives”; “Each one required about 11 hours worth of research.”; “five hours each, three people”; “On average, the typical subpoena consumes 10 hours of time.”; “On the average, about three hours of a senior editor’s time, about three hours of staff time, and five to 10 hours of our general counsel’s time.”; “Typically, it consumes a good part of a day of the two top editors’ time.”; “Probably a total of 12 hours’ time on our one subpoena”; “A routine subpoena takes about two days—managing editor’s time and library staff time for research.”; “The average subpoena takes two days to compile. Searching archives, viewing tapes, conversations with legal department, tape dubbing and administrative paperwork are the norm. The process can involve three or more people.”; “I would estimate at least 20 hours.”; “Routine stuff takes about four people, including a lawyer, librarian, editor(s) and clerk, a total of 20 hours to handle.”; “Each one takes 5 to 25 hours staff time on average.”; “I would guess each takes up a combined 20 to 40 hours of editors’, reporters’ and attorneys’ time.”; “About 20 hours of staff time”; “about 30 hours of my time; a few hours of attorney time”; “probably 30-40 hours”; “A ‘simple’ subpoena fight can take 40-plus hours of attorney and staff time and cost thousands.”; “50 hours, conferring with attorneys and making dubs of on-air stories”; “Three reporters, lawyer, editor all reviewed the case. With court time, most likely a total of 60 hours” “A week’s worth of working time”; “I would estimate a total of two weeks’ worth of working time, all told, to compile everything for one subpoena.”; “Dozens of hours involving two reporters and one editor. Hours consulting with legal counsel and corporate counsel”; “100 hours”; “Each one took two full days at least to process; a total of one person’s 160 hours plus lawyers’ and editors’ time.”

169. By way of example, one newspaper editor told of a subpoena that consumed “nearly two full weeks of staff time.” Another editor told of a subpoena seeking “all material” related to a

who offered comments on the process suggested that there is no routine procedure in place for handling subpoenas, unless the process is handled by a corporate parent; instead, editors are required to dedicate time to investigating the individual matter and consulting with legal counsel.

Survey responses highlight important differences between the impact that a subpoena has on a small versus a large organization. The differences cut in two directions. On the one hand, the recent wave of high-profile cases overwhelmingly involves large-circulation newspapers and the biggest television news operations in the country. Respondents in these categories—some of whom, presumably, faced major litigation that accompanied this wave and shared these experiences in the survey—reported staggering legal bills and major institutional commitments to the subpoena issue that were not required even a half-decade ago. In particular, most editors of the nation's largest newspapers state with certainty that resources are flowing to the problem in exponentially greater amounts. Thus, if the inquiry is whether the subpoena blitz is having an impact on investigative journalism, there is at least some evidence that those organizations that traditionally have performed much of the major investigative work on stories of national import are taking a particularly heavy hit. On the other hand, although larger organizations are receiving many more subpoenas,¹⁷⁰ they nonetheless appear to have smaller amounts of editor or news director time diverted from newsgathering to subpoena-handling, because they have in place teams of attorneys,¹⁷¹ librarians,¹⁷² or other staffers who routinely handle subpoena requests. (Other, smaller news outlets with strongly centralized corporate operations also report that their subpoena

particularly high-profile crime wave, on which the news director worked every day for “several months.”

170. See Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 631.

171. “I don’t know how much time. Our lawyer handles the majority of the work.”; “Most subpoenas are handled in a routine manner. We have an attorney who does our subpoena work.”; “We generally let our attorney spend all the time. We occasionally spent 10 to 15 minutes in discussion with him.”; “Aside from a 5-minute discussion with the attorney, it is not an issue.” “The bulk of the time on this is spent by our attorneys.”; “minimal time spent”; “It was just a few hours by our library staff pulling some articles.”; “All matters are turned over to attorneys, with little to no discussion within the newsroom.”; “The subpoenas were given to our lawyers.”; “We fight them all by referring them to our First Amendment counsel.”; “Mostly involves in-house counsel.”

172. “Our librarian . . . receives routine attorney inquiries and subpoenas.”; “My assistant prepares dubs of broadcast material.”

burden is greatly alleviated¹⁷³—although not entirely eliminated¹⁷⁴—by this structure.)

Conversely, it appears that smaller organizations, although not reporting as significant an increase in subpoena activity or impact in recent years, nonetheless are feeling vulnerable and altering the way they do business in the wake of the spate of high-profile cases—or, more specifically, in the wake of the firestorm of publicity that accompanied them. Mid- and small-sized media organizations that do face subpoenas report that the imposition on daily news operations can be quite significant. Ironically, it appears that the existence of a reporter’s privilege that can be easily invoked to avoid responding to subpoenas may be most critically important for the protection of small news organizations that rarely receive them, because they lack the resources necessary to battle subpoenas and thus experience the greatest impact on news operations.¹⁷⁵ Dedicating editor time to a search for material¹⁷⁶ or losing even one reporter during subpoena compliance¹⁷⁷ can be crippling to some. To cite one extreme example, the editor of a newspaper with a daily circulation of just over 1,000—believed by the editor to be the smallest daily newspaper in the country—reported in the study that the paper’s lone reporter received a subpoena to testify in a local state court, leaving no one to cover the proceeding itself, which was “one of the

173. “More nuisances than actual problems; we send on to our corporate attorney”; “Our parent company has attorneys that handle our subpoenas. They negotiate with the lawyers who issued the subpoenas and instruct us what to provide.”; “Corporate legal counsel handles all correspondence.”; “We rely upon counsel at our corporate headquarters; we spend time on conference calls with the lawyers, but we are able to deflect most of these inquiries to the legal team.”

174. Newsroom leaders in both of these camps note that subpoenas will always require some time commitment from news personnel. If the organization is fighting the subpoena, news personnel face what one respondent called the “drain of time and energy to bring the legal counsel up to speed on the coverage.” When organizations comply with subpoenas, editors or news directors are called upon to complete notarized questionnaires or affidavits of authenticity to accompany subpoenaed material, and the news gatherer may be required to identify the material from the witness stand.

175. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5426, at 752 (1980) (noting the disproportionate impact of subpoenas on smaller outlets).

176. “A judge issued a subpoena for back issues and gave us two hours to produce several-year-old issues. And of course it was the busiest day of the week.”; “The one subpoena that we received took two weeks of editor time to handle.”

177. A sampling of comments: “Reporter was required to wait at the courthouse during business hours for a couple of days during the case but was never put on the stand.”; “In this case, the reporter didn’t know anything or have information of value, but she had to go to the court and testify as such.”; “Our reporter did not come to work in the office for two days.”

biggest stories to hit town in a long while.” Another small newspaper editor in a state with a shield law told of a court that would not quash subpoenas unless the reporter got on the stand and invoked the statutory privilege in person. “[O]ur reporter had to travel three hours to the courthouse, get on the stand and seek the privilege, and then travel three hours back,” the editor reported. “We did this twice for two separate co-defendants in a criminal matter about which we had written just a little crime blurb of a story. We were without our police-and-courts reporter for all that time.” A news director of a small television station told how, after the station’s crew was on the scene of a nearby explosion before any law enforcement personnel, the raw video was subpoenaed many times, “tying up most of the manpower of our very small staff.” Some news directors at smaller stations commented with envy at the resources of larger organizations: “Stations like ours typically have small, very busy staffs and don’t have a good mechanism for dealing with dub requests from the public. Subpoenas can be a huge distraction from the daily task of gathering and presenting the news.”

Although the effect of these time commitments and distractions are incredibly difficult to quantify,¹⁷⁸ a large number of respondents did opine that the increase in time spent dealing with subpoenas is not merely a cost in and of itself, but also has led to a decrease in good reporting. A great percentage of newsroom leaders appear to believe that with resources dwindling—and with the likelihood that they will continue to do so—their peers in the industry are making the calculation that the kind of meaningful investigative work that was done in Blasi’s day no longer is financially feasible, in light of the very real and ever-increasing subpoena risk. Many respondents confessed to having made this calculation themselves, and called this phenomenon new. “News organizations now are worried about being nibbled to death in depositions and spending all of their time dealing with subpoenas rather than with the work of newsgathering,” one newsroom leader wrote, echoing a sentiment expressed by many others. “So they have now just decided to go for the low-hanging fruit rather than continue with good, investigative journalism. I hear people in the business say all the time now that they just can’t do it anymore, because they can’t afford to have

178. Steven D. Zansberg, *The Empirical Case: Proving the Need for the Privilege*, 2 MEDIA LAW RESOURCE CENTER BULL. 145, 147–48 (2004), http://www.medialaw.org/Content/NavigationMenu/Publications1/MLRC_Bulletin/Bulletin_Archive/2004-2WhitePaper.pdf.

that kind of time spent on subpoenas.” Another respondent confirmed: “Where we once might have had the luxury of doing some real digging for important stories, the trade-off today is too great. I don’t have the staff to do that kind of work, and especially can’t risk tying up somebody’s time in a prolonged subpoena battle.”

2. *Monetary Impact*

A companion issue to the question of expenditure of time by press organizations is the question of expenditure of money. (Indeed, those organizations reporting that they received subpoenas but that the expenditure of time was not significant almost uniformly did so because the organization for which they worked made a monetary expenditure to fund internal staff or external attorneys to handle incoming subpoenas.) This inquiry is all the more critical as media companies take an especially hard hit in the current financial crisis, implementing severe cutbacks and facing the very real threat of shutdowns and bankruptcy.¹⁷⁹ The qualitative reports from the survey on this issue often are expressed in the superlative, even for single subpoena episodes—“considerable legal expense,” “large attorney bills,” “significant legal costs,” “immeasurable financial resources.” One large newspaper reported dedicating two in-house attorneys to work full-time advising reporters and editors on a single subpoena case. Newsroom leaders at smaller news organizations told of spending ten thousand dollars to have a reporter removed from a witness list or thousands of dollars to handle a “simple motion to quash” in a state with a shield law.¹⁸⁰ In four reported

179. See, e.g., *Courant Cutting About 100 Jobs - Declining Ad Revenue*, *supra* note 40, at A16; Horowitz, *supra* note 40, at 22; Howard Kurtz, *Lack of Vision to Blame for Newspaper Woes*, WASH. POST, May 11, 2009, at C01; Howard Kurtz, *Post Buyouts Come with an Emotional Cost*, WASH. POST, May 26, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/25/AR2008052502761.html>; David Phelps, *Star Tribune Files for Chapter 11 Bankruptcy*, STAR TRIB., Jan. 16, 2009, available at <http://www.startribune.com/business/37685134.html?page=1&c=y>; Richard Pérez-Peña, *As Cities Go From Two Papers to One, Talk of Zero*, N.Y. TIMES, Mar. 12, 2009, <http://www.nytimes.com/2009/03/12/business/media/12papers.html>; David Roeder, *Sun-Times Media Group Files for Bankruptcy*, CHI. SUN-TIMES, Mar. 31, 2009, available at <http://www.suntimes.com/business/1503942,sun-times-media-group-bankruptcy-033109.article>; Martin Zimmerman, *Times to Lay Off 300, Consolidate Sections: As Ad Revenue Drops, Stand-Alone California Pages will Merge into Main News, Meaning Fewer Press Runs*, L.A. TIMES, Jan. 31, 2009, at C1.

180. “Just the process of replying and the back and forth between attorneys cost us thousands of dollars in legal fees.”; “One thousand dollars for a simple motion to quash”; “We racked up more than \$10,000 in legal bills from local counsel handling subpoenas (this is in addition to the ‘free’

instances in the single calendar year assessed in the study, newsrooms faced sanctions from a court for refusing to comply with a subpoena. The largest of these was for \$10,000 a day.¹⁸¹ Fines of substantially larger amounts were levied against individual journalists in the period immediately following data collection for this study.¹⁸² These financial hits—especially if required by courts to be borne by the individual journalists—presumably would create an even greater deterrent to high-profile reporting that might trigger a subpoena, because even those journalists who might be willing to go to jail on the principle of keeping a commitment of confidentiality simply could not weather a more directed financial consequence.¹⁸³

Many newsroom leaders are convinced that the cost of fighting subpoenas, in dollars and cents, translates to a more fundamental cost in loss of integrity for the institution of the press. The editor of one mid-sized newspaper, summarizing the position taken by a number of respondents, argued that “[y]ou can’t overestimate what the cost to our business is of these things. Most of the papers of our size, I think, seek to have every subpoena quashed and really fight for this, but I’ll hear editors from smaller and weekly papers in our area say, ‘I just handed it over. What else could I do? I don’t have ten or fifteen thousand dollars to fight these.’ But when we do that, we really lose our independence and become the agents of government.” Smaller organizations participating in the current study confirmed this position. The smallest two newspaper circulation categories and the smallest two broadcaster market sizes have by far the highest overall compliance rates within their respective mediums.¹⁸⁴ Indeed, when only federal subpoenas are

time from corporate counsel).”

181. The respondent reports that an appellate court found that the issuing trial court judge had exceeded his authority in issuing a sanction of this size.

182. *See, e.g.*, Ken Paulson, *The Real Cost of Fining a Reporter*, USA TODAY, Mar. 12, 2008, at 11A (reporting that USA Today reporter Toni Locy was ordered to pay fines of up to \$500 a day for a week, then \$1,000 a day for a week and then \$5,000 a day for a week).

183. *See id.* (noting that the district court ordered the reporter to pay the fines herself, with no assistance from the newspaper or parent company).

184. Weighted to account for nonresponses, the data indicate that 59.4% of all subpoenas received by newspapers with circulations under 10,000 were complied with fully, without opposition. So were 44.4% of all subpoenas received by newspapers with circulations between 10,000 and 25,000. The smallest two broadcast market areas—under 100,000 households and between 100,000 and 250,000 households—had overall compliance rates of 93.9% and 94.1%, respectively. For more information on compliance rates, see Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 661–66.

considered, both the very smallest newspapers and the very smallest television stations complied fully, without opposing the subpoena, 100% of the time. In commentary throughout the qualitative and interview-style portions of the survey, many smaller organizations indicated that they complied with subpoenas they might otherwise have contested because they could not afford the legal challenge. “We’re a smaller paper and our bill, in the end, was close to \$50,000,” reported one editor of his subpoena litigation. “That is a huge amount when you consider, by way of comparison, that our full newsroom operating budget for the year is less than a million dollars.” “Our policy is that we do not guarantee confidentiality,” another small newspaper’s editor reported. “We say that we will try to provide it, unless ordered by a court to ‘fess up.’ There might be a circumstance in which we would refuse to comply with a court order, but we are a small company and could not afford a protracted legal action.”

In comments directed at explaining perceived increases in the frequency of subpoenas, some newsroom leaders explicitly attributed the rise in frequency to cost, describing how media organizations that are increasingly strapped for cash now take a harder look at whether the legal costs of challenging a subpoena are worth it.¹⁸⁵ “Retaining a lawyer to fight a subpoena is expensive, and many news outlets are under increasing financial pressures,” wrote one. “I think prosecutors know that, and figure they have deeper pockets than privately owned news outlets.” Some newsroom leaders even suspect that legal costs are being used against them tactically or vindictively. For example, one editor told of a local businessman who “dragged out the subpoena process and deliberately ran up our costs” after the newspaper had revealed corruption in some of his dealings. Another newsroom leader, in a state with a “solid shield law” commented that a local prosecutor still pursues subpoenas, “hoping to make the newspaper bleed a few dollars.”

3. *Impact on Journalistic Practices*

Finally, survey respondents report a variety of ways in which newsroom practices themselves are being impacted by the receipt or threat of subpoenas—effects that Blasi rightly suggested are both among

185. Examples of relevant responses when asked “to what do you attribute this increase [in subpoenas in the last five years]?”: “Media organizations are worried about finances and take a hard look at any legal costs.”; “Smaller papers cannot absorb the costs of contempt citations.”

the most difficult to quantify and potentially the most troublesome, because they represent the clearest link between the absence of legal protection against subpoenas and harm to the purported public-serving actions of the press.

a. Impact on Material-Retention Policies

One impact on newsgathering is seen in the effect that subpoenas have on material-retention practices at newspapers and television stations. News outlets that might otherwise prefer to archive notes, emails, audiotapes, and unaired video footage report that they instead are opting to destroy such materials in fairly short order, so as not to have them on hand for a potential future subpoena.¹⁸⁶ Organizations describing ways in which the “threat or use of subpoenas against [the news] organization [has] affected [a] policy on retention of notes, drafts, or other unpublished/unbroadcast material” did not show complete uniformity of practice. But at both newspapers¹⁸⁷ and television news

186. 16.2% of all organizations answered that the receipt or threat of subpoenas had an effect on retention practices. Comments made by many respondents who answered “no” to the question indicated that they, too, had altered their retention practices to avoid having materials available for subpoena, but that they did so prior to 2006 or prior to 2001, and believed the question to be inquiring only about changes in policy within that five-year period, which was the focus of many of the other survey inquiries.

187. “We toss our notes after completion of story.”; “We do not retain notes as we have in the past.”; “We changed our practice to require reporters to destroy notes within two weeks of publication. We delete all unused photographs.”; “We save fewer notes and fewer photographs.”; “We now keep notes for only 30 days.”; “We do not keep reporter notes or photos from breaking news situations that were not published.”; “Reporters told to throw away notes in 2-3 weeks; previously was a few months”; “Our policy is for reporters to destroy notes within one week of publication of their story. We also destroy all unpublished photos from news events that might trigger subpoenas, such as from crime scenes and accident scenes.”; “We have encouraged reporters to destroy notes periodically.”; “We don’t archive unpublished news photos.”; “We required destruction of all notes within 30 days of publication or decision not to publish.”; “Reporters throw out notes as soon as they are no longer useful to the story.”; “We are more rigorous about reminding reporters to act consistently in the destruction of notes, and to do so more frequently.”; “I don’t keep notes beyond stories/corrections because the threat is there.”; “Our policy is to destroy notes, electronic and written, after 90 days maximum.”; “We encourage reporters not to take notes on computers, so they are not preserved, and have them dispose of them after a period of time.”; “We encourage reporters not to keep notes past publication—destroy once the story is about two weeks old.”; “Keeping notes from all stories merely invites lawyers to go on fishing expeditions through our records. Might as well get rid of them.”; “We keep no notes. Reporters are told to destroy them immediately after they use them, so that if we are subpoenaed, we can look them in the eye and say we don’t have it. We still worry about subpoenas of what is on our computer hard drives.”; “We continue to educate young reporters to dispose of notes after publication of a story.”; “We encourage reporters to not keep notes. Published story should stand as record of notes.”; “Reporters

operations,¹⁸⁸ the clear trend appears to be to consistently destroy materials used in the newsgathering process. “We recently lost a motion to quash and are in the process of changing our policy so notes are not retained beyond story publication,” wrote one newspaper editor. Broadcasters reported similarly: “We don’t keep outtakes beyond 24 hours.” Echoing the practice of many, another newsroom leader commented, “We do not keep notes for more than a few days after publication. Then, if someone asks for them, the answer is that they do not exist.”

The quick destruction of notes, footage and other materials might impede investigative journalism by making it more difficult for a newsroom to keep helpful long-term records on potentially ongoing stories or to report on a pattern of corruption or abuse that became evident only after earlier notes or footage were destroyed. Nevertheless, in the name of avoiding the legal battles, it appears that newsrooms now routinely destroy these materials right away.

have been instructed to destroy old notes after a story has run and not to have superfluous material in notebooks.”; “Notes are the property of the newspaper. They are turned in monthly. We keep for one year unless other notice.”; “We suggest reporters destroy notes after six months.”; “Email is now covered under the two-week notebook destruction policy.”; “We are less likely to retain notes and other material. Some reporters have been known to make electronic copies of notes and drafts and take them home on memory sticks so our news organization won’t have custody of the material. Also, we suggest that any sensitive material that is sent electronically be copied to our legal team, both to keep the lawyers posted on our activities and to protect material from disclosure under the attorney-client privilege.”

188. “Our organization does not maintain raw, unedited materials or notes.”; “We recycle our raw video 72 hours after a story airs.”; “We no longer keep notes or unbroadcast material longer than one week.”; “We do not archive unbroadcast material.”; “We have disposed of notes quickly, as well as extra tapes.”; “We do not keep raw videotape longer than a week.”; “We no longer keep raw video or notes beyond one day.”; “Video cards are rotated on a weekly basis, keeping raw material for only one week.”; “We aggressively recycle our ‘field’ tapes within 24 hours.”; “We do not keep raw video or reporter notes.”; “We tape over raw video almost immediately.”; “We don’t keep a tape for very long, and a strong factor in that is to be rid of the tape in the event of a subpoena.”; “I now require reporters to destroy their notes and all raw footage is immediately recorded over.”; “We are much more attentive to recycling raw tape and not saving notes.”; “We have shortened the length of time we retain raw video.”; “We keep general assignment video for only one week.”; “We do not keep raw field tapes for over one week.”; “We only save tape for about 10 days and then erase it, before it could be requested. This started as a money-saving effort long ago when we reused the tape, but when our attorneys heard about it, they said to keep doing it for legal reasons.”; “We promptly recycle unused footage.”; “We reuse tape because it is economical to do it, but a byproduct is that old footage isn’t available for long.”; “We do not keep notes. Field tapes are recycled after one week.”; “We do not save raw video for more than 48 hours.”

b. *Impact on News Coverage*

A second, more direct impact that subpoenas have on the news process arises when a subpoenaed reporter is unable to continue his or her reporting on a story because of real or perceived involvement in the case. Blasi noted the difficulty presented by this situation, when “the reporter is ordinarily not able to cover his beat with full effectiveness.”¹⁸⁹ He emphasized the awkwardness of a reporter “becom[ing] a news source in his own right.”¹⁹⁰ “[U]nless he has an unusual emotional constitution,” Blasi wrote, “he must spend much of his time worrying and agonizing and re-examining his ethical position.”¹⁹¹

This situation appears to be on the rise in recent years. In 2001, the Reporters Committee for Freedom of the Press polled the same population as was studied in the current survey and asked “Were any reporters at your organization removed from a story as a result of the threat or use of subpoenas?”¹⁹² Four responded in the affirmative, all specifying that the removal was at the organization’s own discretion and not ordered by a court.¹⁹³ The identical question was posed five years later in the present study. Actual respondents provided more than eight times as many affirmative responses. In thirty-five reported instances in 2006, reporters were removed from a story because of a subpoena. In thirty-one instances, a reporter was removed as a result of the media organization’s own editorial decision,¹⁹⁴ and in four instances it occurred as a result of a judge’s separation order, forbidding a reporter-witness to be in the courtroom.

When asked to provide details about the reported instances, newsroom leaders told of having to assign less-experienced reporters—or no reporters at all—to cover the ongoing story, because the subpoena

189. Blasi, *supra* note 4, at 265.

190. *Id.*

191. *Id.*

192. The Reporters Committee for Freedom of the Press, Subpoena Survey (2001), at 3, <http://www.rcfp.org/agents/survey2001.pdf>.

193. 2001 Report on Media Subpoenas, *supra* note 86, at 10.

194. A total of twenty-four organizations reported voluntarily removing reporters from stories. Fifteen were from states with shield laws; nine were from states without shield laws. Nineteen were newspapers, representing all newspaper circulation categories; five were broadcasters, all at mid-sized stations.

had made the reporter a part of the story itself. One respondent suggested that a subpoena was issued “purely to get the reporter off the story” after the party perceived the reporter’s coverage as unflattering. Several told of reporters who were removed from stories on their regular beats to avoid the appearance of a conflict of interest.

c. Impact on Availability and Use of Confidential Sources

A third realm in which subpoenas impact newsgathering focuses on the relationship between the receipt of subpoenas and the use of confidential sources. This aspect of the subpoena problem has been the subject of significant speculation and debate,¹⁹⁵ and, as was noted by Blasi¹⁹⁶ and many others in the wake of his research,¹⁹⁷ it is exceptionally difficult to draw clear conclusions on this relationship. Nevertheless, the perceptions and experiences of newsroom leaders on these issues that were captured in the present study offer some useful and timely insights on the interplay between law and newsgathering. They highlight some significant ways in which the nuances of this interplay have changed since Blasi’s day, and these data may prove useful in advancing the modern debate on this inquiry.

Newsroom leaders overwhelmingly perceive that media subpoenas are increasing in frequency and also report that the use of confidential sources is decreasing in frequency. Just over 64% of newsroom leaders believe that media subpoenas are on the rise, compared to five years ago. *Figure 6*. Data from these same leaders indicate that in 35.4% of American newsrooms, the use of confidential sources has decreased in the last five years; in 15.1% of newsrooms, the use is “significantly less.”¹⁹⁸ *Figure 7*.¹⁹⁹ However, few are drawing a neat correlation

195. See *supra* text accompanying notes 25–32.

196. Blasi, *supra* note 4, at 266.

197. See Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates*, 24 CARDOZO ARTS & ENT. L.J. 385, 418 (2006) (“No one can say for certain whether any significant number of confidential sources will be deterred from coming forward in the absence of a privilege.”); David Kohler, *Self Help, the Media, and the First Amendment*, 35 HOFSTRA L. REV. 1263, 1295 (2007) (“[I]t may be difficult, or impossible, empirically to demonstrate how much information will be lost by the failure to provide adequate protection to the reporter/source relationship . . .”).

198. In the open narratives, some respondents indicated that had the question covered a larger timeframe and instead asked for a comparison between current practices and those of ten years ago, they would have answered that the change was significant. It appears that, among at least some news organizations, the shift away from reliance on confidential sources preceded the wave of high-profile subpoena cases.

between these two trends. Instead, the story that newsroom leaders are telling about reliance on confidential sources and legal developments regarding reporter's privilege is significantly more nuanced.

i. Availability of Sources

On the one hand, many respondents reported a link between coverage of the recent high-profile subpoena cases and leering on the part of potential sources to speak on condition of confidentiality. Their narratives in many respects mirrored those reported by Blasi, who described how the issuance of subpoenas was “‘poisoning the atmosphere’ so as to make insightful, interpretive reporting more difficult,” even if it is not likely to cause sources to “dry up completely.”²⁰⁰ Respondents in the current study described a changing tenor in the relationships with potential news sources and indicated that some sources are openly discussing with them their sense of the shifting views of the courts. The quantitative data support these narratives. Nearly one-third of newsroom leaders believe that sources are either somewhat or much less willing to speak on condition of confidentiality with reporters at their organization than they were five years ago. By contrast, only 7.7% believe that sources are more willing to speak on condition of confidentiality. *Figure 12*. Newsroom leaders at both newspapers and television stations share this belief that sources are less willing to speak on this condition, and, in general, this belief is held more strongly by larger organizations than by smaller ones. *Figure 13* and *Figures 14a* and *14b*. Blasi's interviewees a generation ago told him that high-profile legal victories for reporters who had refused to name confidential sources had an observable positive impact on the willingness of their sources to share information in confidence.²⁰¹ In contrast, respondents from the current study have detected reluctance on the part of sources, which either the respondents or the sources themselves attribute to recent high-profile losses in the courts.

199. For details on the reduction in use of confidential sources by organizational size, see *Figures 8a* and *8b*. For details on the reduction in use of confidential sources by medium, see *Figure 9*. For a comparison of the reduction in use of confidential sources by those newsrooms that recently received subpoenas and those that did not, see *Figure 10*. For a comparison of the reduction in use of confidential sources by organizations in states with and without shield laws, see *Figure 11*.

200. Blasi, *supra* note 4, at 284.

201. *Id.* at 274–75.

A number of newsroom leaders at large-circulation newspapers reported a discernable shift in source relationships in the wake of the spurt of cases, with more individuals disinclined to speak on condition of confidentiality, even for general background information. But the impact does not appear to be limited to the large national news organizations. For example, one respondent from a Rhode Island news organization reported that sources have referred to that state's *Taricani* case²⁰² when declining to provide confidential information: "[Taricani] went to jail, and sources see that. More and more, people are not willing to put themselves in that boat. Sources say, 'Even if you promise me, I will be found out. Even if you promise us confidentiality, you'll be forced to tell. Maybe I shouldn't talk.'" These concerns parallel many that were reported by investigative reporters in Blasi's study, who emphasized that relationships of trust with sources were damaged by those sources' perceptions of the legal pressures faced by the journalists.²⁰³ The same appears to be the case today. Indeed, two respondents in the current study reported that they experienced, during the year that was the focus of the study, what Blasi called "the ultimate form of impairment of press coverage: a firm refusal by the source to grant an interview or to give the reporter certain information because of the fear of a subpoena."²⁰⁴ One claimed that during that year, a reporter at his organization lost a longtime source on these grounds; the other referenced a major investigative story that was not run because of a perceived subpoena threat. These specific examples, coupled with the overall tone of response, suggest that the issuance of subpoenas is negatively impacting relationships with potential confidential sources in a variety of ways, ranging from the overt to the subtle.

202. *See supra* note 87.

203. *See, e.g.,* Blasi, *supra* note 4, at 266 ("[G]ood reporting frequently depends on sources who will relax and speak in a spontaneous, expansive, and candid fashion. Some reporters say that the subpoena possibility can puncture this cooperative atmosphere—even when the source is persuaded, in a rational sense, that he really has nothing to fear."); *id.* at 269 ("Particularly since the Caldwell case, the radicals that I often interview are concerned that being honest with me could be dangerous. They worry that even if I don't at that moment intend to cooperate with the police, future pressure might develop."); *id.* at 268-69 ("He was fearful though that I would be forced to identify him in court as my news source."); *id.* at 274 (noting that "reporters commonly make promises of confidentiality and sources commonly refuse to believe the promises, often because they fear that the reporter's editors and publishers will force him to cooperate with official requests for information").

204. Blasi, *supra* note 4, at 268.

ii. News Organizations' Policy Changes

On the other hand, although both the congruence with Blasi's findings and the connection between newsgathering and legal policy appear to be strong on this "poisoning the atmosphere" front, the results of the study are more complicated when respondents were asked to focus more specifically on their *own* behaviors and motivations. Respondents were asked to specify changes to their own newsroom "polic[ies] or practice[s] on the use of confidential sources." As demonstrated in *Figure 15*,²⁰⁵ almost one-third of organizations have altered their internal policies in the last five years to permit fewer uses of such sources,²⁰⁶ while only 2.0% of organizations permit more uses of such sources than five years ago, and no organizations at all have a policy or practice that permits "many more" uses of confidential sources than five years ago.²⁰⁷

To be sure, some of the motivations for these changes in policy are legal in nature. *Figure 18*. Newsroom leaders who reported a change in practice or policy on confidential sources were given a list of predetermined factors and asked to identify which, if any, of those factors contributed to their policy change and which, if any, was the "most significant" reason for the change in policy or practice. They also were given the opportunity to volunteer their own narrative explanation of the motivation for the change. Some data do suggest that legal

205. Again, the data asked only about changes in policy that had occurred in the preceding five years. Respondent commentary indicated that if the relevant time frame had been ten years, the percentages of newsrooms reporting significant policy changes would have been even greater, because a number of corporate "clamp downs" on confidential source usage occurred within that time period but not within the time period queried in the present study.

206. As depicted in *Figure 16*, newspapers report somewhat more changes in policy than broadcasters: 32.4% of newspapers permit either fewer or far fewer confidential sources than five years ago; 26.5% of television stations permit either fewer or far fewer.

207. Both the reduction in the use of confidential sources and the changes in policy on such sources are greater the larger the newspaper is. As illustrated in *Figure 17a*, smaller newspapers much more frequently report that their policies on confidential sources are "unchanged" in comparison to five years ago (this is true of greater than half of the papers in the smallest five circulation categories), while greater than half of the newspapers in the largest two circulation categories have altered their policies to permit fewer or far fewer confidential sources. Likewise, greater than 70% of editors of newspapers with circulations between 250,000 and 500,000 and circulations of 500,000 or more report that their actual use of confidential sources is somewhat less or significantly less compared with five years ago. *Figure 8a*. But no similar patterns are seen among television newsrooms. *Figure 8b*. Indeed, as demonstrated by *Figure 17b*, the smallest television newsrooms appear to be altering their policies to permit fewer confidential sources in greater percentages than the very largest stations are.

concerns and changing legal norms are impacting policy changes on questions of confidential sources. More than one-fourth of newsroom leaders chose “advice of legal counsel” as being among the factors motivating change in policy, and the receipt of at least one subpoena by the organization itself was among the reasons for 13.9% of newsrooms making a change. “News coverage of reporter’s privilege cases that were lost by reporters at other organizations” was among the reasons for the change of policy at just over 30% of newsrooms making a change, and 14.7% went on to list this as the most significant motivating factor.

Interestingly, however, the tight link between the state of legal rules and the use of confidential sources that Blasi suggested in his study is not evidenced in the modern data. Some respondents cited requests from management or reporters²⁰⁸ and changes in the attitudes of major sources²⁰⁹ as factors motivating change in policy. And when a separate question asked whether “the threat or use of subpoenas against your news organization affected your policy on the use of confidential sources,” only twenty-nine newspapers and twenty broadcasters answered in the affirmative. Generalized to the wider population, the statistically extrapolated data suggest that the threat or use of subpoenas affects the confidential-source policy at only an estimated 6.1% of news organizations in the country.

Perhaps even more surprising, a solid majority of respondents who reported a change in policy or practice on confidential sources opted to utilize the open narrative option and described motivating factors that were tied more closely to journalism-industry norms than to the legal environment. This “other” option was selected more than any predetermined answer choice, and nearly all of those who exercised this option went on to list the non-legal explanation as the “most significant” factor motivating their newsrooms’ changes of policy. The textual commentary from this portion of the study suggests these reasons are overwhelmingly rooted in changing industry norms about journalistic integrity and reputation with the media-consuming public. Study participants referenced a desire for greater transparency in reporting in order to increase credibility in the eyes of readers and viewers,

208. “Request from management” was a reason for change in 36.5% of newsrooms and the most significant reason in 20.1%. “Request from reporters” was a reason for change in 9.9% of newsrooms and the most significant reason in 4.8%.

209. A total of 18.5% of newsrooms listed this as being among the reasons for a change in policy; 6.2% list it as the most significant reason.

indicating that their recent change in policy on the use of confidential sources “has much more to do with trust of the media and its sources” than with any fear of or reaction to subpoenas. Citing a new reader skepticism—both as to the accuracy of reports involving confidential sources and as to the motives of those who decline to go on the record—respondents referenced changes in newsroom leadership and corporate policy or the adoption of company-wide ethical codes designed to meet these concerns.

Many respondents noted a different set of high-profile cases than those involved in the spurt of reporter’s privilege losses—cases involving reporter fabrication of sources or quotes²¹⁰—and suggested that these cases heightened newsroom concerns about reputation among the public and spurred industry discussions about the risks of over-reliance on confidential sources. “The readers simply will not tolerate it anymore,” one said. “These decisions are driven by journalistic fairness,” another noted. “We are no longer willing to give people the chance to take shots at each other anonymously, so we use confidential sources only when truly necessary.” Summarized one respondent: “It is a journalistic reason, not a legal one.”

Apparently driven primarily (although not exclusively) by these motivations, today’s newsroom leaders emphasized that the use of a confidential source should be rare, with many calling it an option only of last resort, after significant consultation between editors and reporters and the exhaustion of all reasonable efforts to get the source on the record. Even then, they reported, policy often dictates that the reporter give the reader or viewer a full explanation for the decision not to name the source. In light of these responses, it appears to be even truer today than in Blasi’s day that “good reporters use confidential source relationships mainly for the assessment and verification opportunities that such relationships afford rather than for the purpose of gaining access to highly sensitive information of a newsworthy character.”²¹¹ That said, respondents were no less adamant than the respondents a generation ago as to the importance of being protected if and when they opt to utilize such sources. Thus, while as a general matter, the use of confidential sources is in sharp decline in comparison to Blasi’s time,²¹²

210. *See supra* text accompanying notes 65–73.

211. Blasi, *supra* note 4, at 284.

212. *Id.* at 246–47 (acknowledging that that “the extent of reliance” on confidential sources

and newsroom policies forbid such use in significantly wider circumstances than in Blasi's time,²¹³ the desire on the part of newsroom leaders to preserve the freedom to use these sources remains fervent. As was true a generation ago, journalists are "inclined to judge for themselves when the civic need for their information outweighs their own professional need to respect confidences."²¹⁴

d. Impact on Neutrality

A final impact that respondents report that subpoenas have on newsgathering is one that might be labeled a matter of principle for those gathering the news. Respondents overwhelmingly noted concern for the neutrality of media organizations—both real and perceived—and spoke of the threat of becoming "agents of discovery" or "arms of government investigative teams" when they believe that the press should be viewed as differently situated from other targets of discovery in order to maintain its position as a voice independent from government. "The biggest cost," commented one respondent, "is the psychological cost to our reporting staff—the uneasy sense that they may have to testify can't be measured, but does real harm to our operation." Several told of particularly new reporters for whom the psychological impact was especially severe.²¹⁵ Some expressed concern that the increase in subpoenas against the media struck at core democratic values: "[I]t indicates a general disrespect in the bar for the key element of independence that is so essential for the functioning of our free press." Many offered comments that spoke of the battle to preserve the "integrity" or "independence" of the press.

These sentiments, which were pervasively held by survey participants, in many ways reflect the core concerns expressed a generation ago to Blasi, who reported that his respondents "[felt] very

"cannot be quantified with any degree of precision," but concluding that a large number of reporters in the study relied on them).

213. To cite just one example, Blasi discussed the practice of a "mystery man" leaving "revealing documents in a bus station locker, or [phoning] regularly at an appointed hour." *Id.* at 244. Responses and commentary from the present study on the extreme limits that have been placed on confidential sources indicate that practices of that sort would not occur with any frequency today.

214. *Id.* at 255.

215. The psychological impact on reporters was likewise recognized by Blasi, who reported an "incapacitating worry and hassle" that accompanied the receipt of a subpoena by a member of the press. Blasi, *supra* note 4, at 265.

strongly that any resolution of their conflicting ethical obligations to sources and to society should be a matter for personal rather than judicial determination.”²¹⁶ Blasi noted that “[t]he most significant effects that subpoenas have on newsgathering are of a highly personal, and relatively unmeasurable, nature,”²¹⁷ and that to the outside world, “it may make no difference that the newsman’s ‘cooperation’ with the tribunal is involuntary, perfunctory, and unhelpful,”²¹⁸ because the perception of having become an instrument of the government is the sticking point. This clearly remains true today. The self-perception of the newsroom leaders who participated in the current study revolves around a deeply held belief that the intermingling of the interests of the government (and, to a lesser extent, the interests of private litigants) with the operations of the press can irreparably damage the media’s reputation as a neutral presenter of balanced, useful information to the public.

If—as the qualitative data strongly suggest—the receipt of subpoenas by the traditional media is causing an interruption of the news process as a practical matter, this is worth noting, regardless of the number of subpoenas issued. If significant amounts of time that could be spent on journalism are instead being spent dealing with subpoenas, or if participation in discovery is preventing objective or thorough news coverage for a wide variety of reasons, as appears to be the case, the issue may be worth addressing legislatively, even if the numbers of subpoenas issued against the press over time proved stagnant.

B. *Perceptions of Legal Climate*

1. *Perceptions of Recent Legal Developments*

Blasi’s investigation of the legal climate of the last generation’s media included an exploration of reactions to that era’s “subpoena blitz”²¹⁹ and, importantly, an insider’s look at media perceptions of that legal activity, including a question inquiring “[in]to what they primarily attributed the recent spate of subpoenas.”²²⁰ The current study shared

216. *Id.* at 284.

217. *Id.* at 265.

218. *Id.* at 264.

219. Wright, *supra* note 10.

220. Blasi, *supra* note 4, at 261.

those objectives. The data on this front suggest that the forecast from the vantage point of traditional newsrooms is rather bleak. Both quantitative and qualitative data signal a deep discouragement on the part of editors and news directors, who are concerned that both public opinion and the legal tide have turned against them and that these movements are precluding them from meeting their public-serving aims. Newsroom leaders in the United States overwhelmingly perceive that, in the last five years, courts have become less protective of the media, prosecutors and civil litigants have become more willing to subpoena the press, and the frequency with which subpoenas are issued to news organizations has increased. *Figures 19–22.*

Almost 70% of newsroom leaders believe courts' attitudes toward news organizations and subpoenas are less protective of the media than they were five years ago. Nearly 30% believe courts are "much less" protective.²²¹ Nearly 60% of newsroom leaders believe prosecutors are more willing to subpoena the press than they were five years ago,²²² and approximately 64% believe the same²²³ about civil litigants.²²⁴ Nearly two-thirds of newsroom leaders believe that the frequency with which subpoenas are issued to news organizations in the United States has

221. 40.1% believe that courts are "somewhat less protective of the media"; 28.9% believe that courts are "much less protective of the media"; 28.3% believe that courts' attitudes are "about the same"; 2.4% believe that courts are "somewhat more protective of the media"; 0.3% believe that courts are "much more protective of the media."

222. 48.2% believe prosecutors are "somewhat more willing"; 34.9% believe their willingness is "about the same"; 11.5% believe "significantly more willing"; 4.8% believe "somewhat less willing"; 0.5% believe "significantly less willing."

223. Newsroom leaders appear to perceive that the change in civil litigants' willingness to subpoena the press is greater than the change in prosecutors' willingness. 47.8% believe civil litigants are "somewhat more willing"; 33.5% believe "about the same"; 16.1% believe "significantly more willing"; 2.2% believe "somewhat less willing"; 0.4% believe "significantly less willing."

224. Broadcasters and newspaper editors share similar beliefs about the increased willingness of both prosecutors and civil litigants to subpoena the press. 55.8% of television news directors believe prosecutors are more willing to subpoena the press than they were five years ago (40.2% believe "somewhat more willing"; 15.6% believe "significantly more willing"). 61.5% of newspaper editors believe prosecutors are more willing (51.7% believe "somewhat more willing"; 9.8% believe "significantly more willing"). As to civil litigants, 65.1% of television news directors believe there is greater willingness to subpoena the press compared to five years ago (44.6% believe "somewhat more willing"; 20.5% believe "significantly more willing"). 63.4% of newspaper editors believe civil litigants are more willing (49.2% believe "somewhat more willing"; 14.2% believe "significantly more willing").

increased compared to five years ago.²²⁵ Nearly 14% believe this frequency is “significantly greater.”

When asked to specify the reasons for this increased frequency of media subpoena activity, respondents in the current study offered some reasons that mirrored the attitudes of journalists in Blasi’s era and others that are unique to the changing world of modern American journalism. *Figure 23.*

The most notable difference in the two groups is seen in the current respondents’ attribution of subpoena activity to a declining public image of the press. Although they largely believe this decline to be undeserved, newsroom leaders are keenly aware of the faltering reputation of the traditional media, and perceive a connection between this faltering reputation and the willingness of attorneys to issue subpoenas to their newsrooms. More than 60% of all editors and news directors believe that “increased public distrust of the media” is among the reasons for the increase in subpoenas. In volunteered commentary, many noted the link between their waning public support and their waning legal protection. Often referring to a “lack of respect” for the press, respondents commented that an industry that is not respected is unlikely to be protected by courts, defended by legislators, or left alone by subpoenaing attorneys.²²⁶

A second set of reasons that respondents see for the increase in subpoena activity are related to the national political climate. Nearly as many respondents attributed the increased frequency, at least in part, to “national political change,” as attributed it to distrust of the media.²²⁷ Many who volunteered commentary on the issue suggested that politics have influenced changes in the courts,²²⁸ and that increased government aggressiveness post-9/11²²⁹ has weakened the overall protection of the

225. 51.1% believe the frequency is “somewhat greater”; 31.1% believe the frequency is “about the same”; 13.0% believe the frequency is “significantly greater”; 4.0% believe the frequency is “somewhat less”; 0.8% believe the frequency is “significantly less.” Empirical data on subpoena frequency indicate that those who perceive an overall increase in subpoena activity are likely correct in their perceptions. See Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 626–30.

226. For details on this data by medium, see *Figures 24a* and *24b*.

227. See *Figure 23*.

228. “Courts have continually chipped away at the concept of limited reporters’ privilege under common law”; “Courts are issuing subpoenas more quickly that are overly broad, with short return times”; “Recent court decisions”; “Judiciary climate change”; “A weakening of newspapers’ legal rights in courts.”

229. “Homeland security laws; Government becoming more aggressive after 9/11”; “The

press in ways that bleed over into the subpoena situation. Some respondents simply believe that subpoenas to the press are on the increase because lawsuits on the whole are on the increase.²³⁰ To a significantly lesser degree, respondents acknowledged the media's own possible role in the subpoena increase, attributing the recent change in frequency to a "decreased willingness of media organizations to challenge subpoenas."²³¹

Overwhelmingly, though, newsroom leaders attribute the recent increase in subpoena activity to a change in legal climate brought about by the recent spate of high-profile, losing cases. Fully three-quarters of newsroom leaders consider this to be among the reasons for the increase, and they consider it to be the "most significant reason for the increase in frequency" of subpoenas in greater percentages than any other reason.²³² Cross-analysis of subpoena-frequency data and newsroom leader-perception data demonstrates that both the view that subpoena frequency has increased and the view that the increase is a result of this wave of cases are shared by those whose organizations received one or more subpoenas and those whose organizations received none. Indeed, a greater percentage of those newsroom leaders who received no subpoenas in the calendar year that was the focus of the study believe that the rash of high-profile cases was one of the causes of the perceived increase in subpoenas.²³³ This suggests that, within at least some media

government has become a bully after 9/11 and with its secrecy tactics it has the press in a fetal position."; "The government and other organizations now feel threatened by the media and use their power against it."; "The war on terror"; "Does the government remember the freedom of the press? Frustrating." Two respondents reported receiving subpoenas that required them not to reveal the subpoena's existence or the existence of the investigation with which it was related.

230. "More lawsuits and frivolous lawsuits"; "The increasingly litigious society"; "More and more lawsuits filed every day"; "Increased litigation brings with it increased subpoenas."; "Lawsuits on the increase"; "The society in which we live is more sue-happy. More lawsuits are being filed, wanting video of products, car accidents, information on stories we have run"; "Increase in the number of court cases and an increase in the number of ambulance-chasing attorneys."

231. Altogether, 33.5% believe this is among the reasons for the subpoena increase. *See Figure 23.*

232. Weighted totals suggest that 75.6% of all newsroom leaders would list "Change in climate brought about by recent, high-profile cases in which reporters asserting a reporter's privilege were forced to testify or jailed" as among the reasons for the increase, and that 37.3% would list it as the "most significant reason for the increase in frequency" of subpoenas. This is the greatest percentage listed for any reason. *Figure 23.*

233. 83.1% of newsroom leaders whose organizations received no subpoenas believe that the increase in subpoenas was caused, at least in part, by a change in climate brought about by high-publicity cases in which reporters were forced to testify or jailed. 69.3% of newsroom leaders whose

organizations, the perceptions of change may be overshadowing the reality of change, and editors and news directors may be feeling spooked by high-publicity losses that did not impact them directly.

Newsroom leaders in states with shield laws perceive the negative impact of these cases on legal climate in greater percentages than non-shield-law states,²³⁴ perhaps because the heavily federal nature of the high-profile cases leaves those members of the press who once felt relative ease feeling insecure about the scope of their protection.

Interestingly, although the number of subpoenas they are facing is significantly greater,²³⁵ television news directors' beliefs about the impact of the spate of high-profile cases are not as strong as those of their counterparts at newspapers. Nearly three-quarters of newspaper editors believe that courts' attitudes toward news organizations and subpoenas are less protective of the media, while 57.3% of television news directors have this belief.²³⁶ A greater percentage of newspaper editors believe that subpoena frequency has increased,²³⁷ and a significantly greater percentage of newspaper editors think the wave of high-profile, losing cases is the reason for the increase. While 83% of newspaper editors attribute an increase in frequency to this wave, only 56% of television news directors make this connection.²³⁸ One

organizations received one or more subpoenas in the studied year believed this. (When asked to list the "most important" reason for the increase in frequency, a slightly larger percentage of those receiving no subpoenas listed the wave of cases—39.5%, compared with 35.4% of those who did receive subpoenas.)

234. Weighted to account for non-responses, 80.2% of responses from shield-law states believe the increased frequency was a result of a change in climate brought about by the high-publicity cases in which reporters were forced to testify or jailed. 64.4% of responses from non-shield-law states believe that this is a reason for the increased frequency. For further comparisons of responses from states with and without shield laws, see Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 652–56.

235. *Id.* at 628–30.

236. 30.7% of newspaper editors believe courts are "much less protective," compared to five years ago; 43.4% believe they are "somewhat less protective." Among broadcasters, 24.8% believe courts are "much less protective"; 32.5% believe they are "somewhat less protective." 24.1% percent of newspaper editors believe courts' attitudes are "about the same"; 38.0% of broadcasters believe this.

237. Asked to compare the frequency with which subpoenas are issued to news organizations in the United States to the situation five years ago, 66.9% of newspaper editors answer that the frequency is greater (55.6% believe "somewhat greater"; 11.3% believe "significantly greater"). 57.8% of television news directors asked the same question believe that the frequency is greater (40.8% believe "somewhat greater"; 17.0% believe "significantly greater").

238. Newsroom leaders from both media forms cite "a change in climate brought about by recent

explanation for this may be that because the reporters involved in that wave of cases were primarily newspaper journalists, newspaper editors are more likely to feel the effects of that wave and attribute recent change to the after-effects of it. Another explanation may be that because television news operations have long dealt with a greater number of subpoenas and have in place systems for handling the large number of “routine” subpoenas, high-profile cases that suggest a change in climate are less alarming to them than they are to newspapers, which once avoided subpoenas and now have greater fears about new impositions for which they are not institutionally prepared.

Likewise, perhaps because they experience subpoenas in such greater volume than smaller publications, larger newspapers perceive legal change and the consequences of it with greater intensity than do smaller newspapers. *Figure 25a*. Ninety-two percent of editors at newspapers with circulations between 250,000 to 500,000 and 100% of those at newspapers with circulations of 500,000 or greater perceive that courts are less protective. More than 70% of editors at the very largest papers believe that courts are “*much less protective*”—a sentiment expressed by significantly smaller percentages of small-newspaper editors.²³⁹ Larger broadcast organizations also perceive legal change with greater intensity than smaller ones, although it is only the very smallest broadcast organizations that report they are not feeling the shift in courts’ attitudes.²⁴⁰ Again, if the larger media organizations are responsible for more of the investigatory journalism that the privilege is designed to protect, the intensity of perception at these organizations may be particularly worthy of note.

When focusing on the risk of their own organization receiving a subpoena, newsroom leaders again perceive an increase in the last five

high-publicity cases in which reporters asserting a reporter’s privilege were forced to testify or jailed” as a cause of the subpoena increase more than any other cause, but newspaper editors hold this view with greater intensity. 40.5% of the newspaper editors who reported an increased frequency believe this is the “most significant reason” for that increase; 28.9% of television news editors who reported an increased frequency believe this is the most significant reason.

239. 28.6% of editors at newspapers with circulations under 10,000 believe courts are “much less” protective than five years ago; 23.6% of editors at newspapers with circulations between 10,000 and 25,000 believe this.

240. Only 22.2% of news directors at stations in market areas of fewer than 100,000 households report that courts’ attitudes are somewhat less protective. A larger percentage—27.0%—report that they are “somewhat more protective.” These percentages are in stark contrast to the perceptions of news directors at stations in market areas with more than 100,000 households. *Figure 25b*.

years, although many report feeling greater concern for the industry as a whole than for their own newspaper or television station. Asked to assess the risk of their own organization receiving a subpoena, as compared to five years ago, 48.4% of all newsroom leaders say that risk has increased—an only slightly greater percentage than the 45.8% who believe their own organization’s risk is “about the same” as it was five years ago.²⁴¹ *Figure 26*. Television news directors perceive an increased risk in slightly larger percentages than newspaper editors do²⁴²—and, except for the very smallest stations, which perceive significantly less risk,²⁴³ broadcasters perceive this risk in roughly the same degree across size categories. Among newspapers, size has a much greater correlation to perceived increase in subpoena risk. *Figures 28a* and *28b*. Just over 70% of newspaper editors in the largest circulation category²⁴⁴ believe their organization’s subpoena risk has increased in the last five years, with 42.9% believing they face a “significantly greater risk.” Editors in the next two largest categories also report an increased risk in greater percentages than the total population.²⁴⁵ *Figure 28a*. These trends track the groups reporting the highest numbers of subpoenas received in the numerical data.²⁴⁶

There is wide variation by state in newsroom leaders’ perceptions of change in legal climate. *Figures 29–30*. Newsroom leaders in Massachusetts, Rhode Island, and Tennessee have the strongest perceptions of courts’ declining protectiveness toward the media; those in District of Columbia, West Virginia, and Nebraska have the weakest. Newsroom leaders in Alaska, Nevada, and Rhode Island perceive the greatest increases in frequency of subpoenas; those in Vermont, Idaho, and Connecticut perceive the least.

241. 38.3% believe “somewhat greater”; 10.1% believe “significantly greater”; 5.1% believe “somewhat less”; “0.7% believe “significantly less.”

242. 51.7% of news directors believe that, compared to five years ago, the risk of their own organization receiving a subpoena is greater (37.5% believe “somewhat greater”; 14.2% believe “significantly greater”). 47% of newspaper editors believe the risk is greater (38.7% believe “somewhat greater”; 8.3% believe “significantly greater”). *Figure 27*.

243. Only 10.4% of news directors in market areas of fewer than 100,000 households report that the risk is either significantly or somewhat greater.

244. Newspapers in this category had a daily circulation of greater than 500,000.

245. 58.4% of editors at papers with circulation between 250,000 and 500,000 believe their own organization’s risk of receiving a subpoena has increased in the last five years; 61.2% of editors at papers with circulation between 100,000 and 250,000 have this belief.

246. Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 631–37.

2. *Perceptions That Subpoenas Are Overbroad or Unnecessary*

One of the most striking parallels between the responses to the present survey and those reported by Blasi is found in the perceptions held by newsroom leaders that subpoenas are issued in overreaching ways and that attorneys use media subpoenas as substitutes for their own investigative work in a case.

Blasi's respondents emphasized to him that "they seldom have information of genuine evidentiary value,"²⁴⁷ and he concluded that "newsmen object most of all to the frequency with which press subpoenas have been issued in what these reporters regard as unnecessary circumstances when they have no important information to contribute."²⁴⁸ He wrote that "the press' deep resentment of 'unnecessary' subpoenas seems to be reflected in the data,"²⁴⁹ noting that "[w]hat infuriates many newsmen is not so much the principle of press subpoenas, nor even the increased volume in recent years, but rather the frequency with which subpoenas are issued in what reporters view as unnecessary circumstances."²⁵⁰ Respondents told of being forced to the stand "to give cumulative evidence that is already a matter of public record,"²⁵¹ and reported deep indignation toward what they perceived as "lazy" attorneys. Indeed, when Blasi asked the respondents to what they primarily attributed the recent spate of subpoenas, they overwhelmingly responded with answers like the following: "It's just an easy way to get information and the freedom of the press be damned"; "Laziness, inept investigative procedures and a disrespect for the press and a misunderstanding of its role"; "The hungry investigator has to have something to show for his efforts and often will bite for crumbs."²⁵²

The newsroom leaders surveyed in the current study, although entirely unprompted, wholeheartedly asserted this same sentiment.

247. Blasi, *supra* note 4, at 280 ("If the reporter's testimonial obligation were limited to those few instances in which he really does have important information that is not available through nonpress sources, and if some provision were made to protect confidences in stories about victimless crimes, the contingency of press involvement with official fact-finding would be so remote as to have only a negligible impact on the flow of news.")

248. *Id.* at 284.

249. *Id.* at 280.

250. *Id.* at 261.

251. *Id.*

252. *Id.*; *see also id.* at 262 (noting that "[m]ost reporters attribute the frequent issuance of 'unnecessary' subpoenas to prosecutorial laziness").

When given a set of multiple-choice answers to a question asking for the reason for the recent increase in subpoenas, nearly one-fifth opted to answer “other,” and provide an individual narrative explanation. The strong majority of those pointed the finger at increasingly “lazy” or increasingly “aggressive” attorneys²⁵³ who now “subpoena the media first rather than trying to get information readily available elsewhere.” A number of respondents indicated that they routinely are subpoenaed for material available at a public library. Indeed, one respondent indicated that when the story that is sought in a subpoena is not readily available in the newspaper’s own archives, the editor himself goes to the library to find it. The editor saw himself as having little choice but to do so, given his media company’s limited budget for challenging subpoenas, but also found it deeply offensive that he would be made to “do the footwork of the attorneys” at a time when his own business was struggling to stay afloat. Another respondent reported a subpoena received during the survey period that asked the news organization to supply public documents that the newsroom itself had requested through the Freedom of Information Act and other public-records laws.

Likewise, many newsroom leaders report that a major difference they have perceived in the last five years involves the breadth of materials sought by increasingly emboldened attorneys. The term “fishing expedition” was widely used by respondents to describe subpoenas that they perceive as being significantly more sweeping in scope than

253. “Local attorneys seemed to believe that our TV station was the public library, and would subpoena anything and everything.”; “Gathering the information that is requested could be done by an employee of the attorney at the public library, but it runs into about 2 hours of work on each if all goes well.”; “High-priced attorneys have become lazier and greedier. They expect their clients to pay for research that they now subpoena the media for, as opposed to doing the legwork themselves.”; “Lazy attorneys hoping to gather information easily”; “Lazy lawyers who want journalists to handle investigations of accidents”; “Laziness or ignorance by some attorneys seeking quick and easy information”; “Lawyers who want what amounts to free research by issuing a subpoena rather than going to the library or paying the paper a research fee for commonly available reporting, such as car wrecks or some other type of civil lawsuit”; “More and better investigating by reporters than by police officers themselves”; “Prosecutors who want to bolster their cases at the expense of news organizations, particularly as it relates to video and photos”; “Attorneys see us as an arm of their organization. Aggressive reporting brings with it a higher profile in the community. Therefore, attorneys recognize the TV station as a place to get video or sourcing for their clients.”; “Use of the media as an investigative tool, letting news personnel do the legwork for the legal system”; “District Attorney’s offices rely on the use of video of chases and other crimes to prosecute their cases because it is easy.”; “Law firms don’t do the homework and often request material we don’t hold.”

subpoenas have been in the past,²⁵⁴ indiscriminately asking for large amounts of material from the newspaper or television news operation. Echoing a concern of many, one respondent told of regularly receiving subpoenas that ask for “all materials relevant to a particular client,” sometimes even asking that such materials be preserved for “anticipated future legal action” that never comes to pass—a task that the respondent called “a complete waste of manpower and materials.”

Respondents similarly noted the relationship between subpoena frequency and an apparently increased willingness of attorneys to battle news media objections to subpoenas,²⁵⁵ with many anecdotally linking this newfound boldness to the losses that the press experienced in the spate of high-profile contempt cases. One newspaper editor responded:

In the past, if there was a subpoena, we'd just call the city attorney and say we didn't think it was a good idea and tell them we had a privilege, and they'd be persuaded, or they'd say, 'Oh well, I thought I'd give it a try,' and then back down. It doesn't play out that way anymore. I think lawyers see reporters being successfully subpoenaed in cases across the country and it just encourages more.

Another wrote: “There is an increased willingness of attorneys to attempt to use reporters as investigative tools or witnesses, and a growing willingness by the courts to allow this.” Respondents appear to believe that the media's lack of popularity in the courts,²⁵⁶ coupled with

254. “Courts allow broad ‘fishing’ subpoenas in civil cases.”; “Subpoenas now seem to seek an expansive amount—a broad range of raw tape. In the end, the attorneys are on big fishing expeditions.”; “If an attorney takes on a civil case (such as a car accident), he may subpoena my station for all material that aired, over any length of time, regarding that accident, just to ‘fish’ for evidence for the client. My feelings on this matter would be different if they KNEW we had material that may help their clients and confined their subpoena to that matter only.”; “Particularly aggravating to me are plaintiff lawyers who go on ‘fishing expeditions’ by asking for all manner of reporting notes, etc.”; “There is a tendency by more attorneys these days to attempt to collect whatever news material they can, looking for any type of information they feel may help their client. I find most of my subpoenas are fishing expeditions by lawyers working on accident and criminal cases, checking to see what material we have.”

255. “More aggressive attorneys”; “We seem to hear more rumblings from prosecutors [and] cops that would indicate they are more willing to take us on over matters that previously would have been non-issues.”

256. “I believe there is a trend among attorneys to substitute unpublished reporting for their own research. Because courts have shown less respect for newsgathering, attorneys are emboldened to try to extract more information from us through the courts.”

a lack of popularity among the public,²⁵⁷ has resulted in the greater number of subpoenas being issued. Some respondents suggested that the high level of publicity accompanying the wave of losing cases brought about a pattern of compliance, and that this pattern is itself the cause of a continued increase and has encouraged the “fishing.” “The media has complied too willingly,” one respondent wrote, “and now private and public lawyers carefully monitor the media for leads, sources, and investigative material.”

C. *Awareness-of-Legal-Protection Data*

Recognizing that an additional, critical piece of the puzzle in assessing the relationship between the media and their legal climate is a measurement of the awareness that members of the press have of their already-existing legal protections, Blasi designed his study to examine the extent to which his respondents knew about state statutes that already afforded them at least a qualified privilege at the time that the study was conducted.²⁵⁸ Although acknowledging that these eighteen state statutes were, at the time, “less-publicized,” Blasi was nonetheless troubled to discover widespread misinformation among journalists as to these state “shield laws.”²⁵⁹

Of the respondents in Blasi’s study who listed one of the shield-law states as the state in which they did most of their work, only 35% “were able to say with certainty that their state has a statutory privilege for newsmen.”²⁶⁰ Fully half answered that they were uncertain, and 14% were “under the mistaken impression that their state ha[d] no shield law.”²⁶¹

As of the time that data for the present study were collected, most states recognized some form of reporters’ privilege as a statutory, constitutional or common-law matter. Maryland enacted the first state reporter shield law statute in 1896,²⁶² and by the time of the survey,

257. “Prosecutors are emboldened because of our lack of popularity. The media is not held in as high of regard anymore.”; “The media has behaved irresponsibly.”

258. Blasi, *supra* note 4, at 275.

259. *Id.*

260. *Id.* at 275–76.

261. *Id.*

262. MD. CODE ANN., CTS. & JUD. PROC. § 9–112 (2008) (first enacted as Ch. 249 [1896] Laws of Md. 437).

thirty-two states²⁶³ and the District of Columbia provided a reporter's privilege legislatively.

These statutes differ greatly with respect to coverage and degree of protection,²⁶⁴ but all provide at least a qualified privilege against responding to some subpoenas and offer this privilege to at least mainstream journalists like those surveyed in the present study.²⁶⁵ In at least a dozen other states, state appellate courts have clearly recognized at least a qualified privilege through their interpretations of the First Amendment, relevant provisions of their own state constitutions, or common law.²⁶⁶ Arguably, a similar protection has been recognized by

263. ALA. CODE § 12-21-142 (2008); ALASKA STAT. §§ 09.25.300–.390 (2008); ARIZ. REV. STAT. § 12-2237 (2008); ARK. CODE ANN. § 16-85-510 (2008); CAL. EVID. CODE § 1070 (2008); COLO. REV. STAT. § 13-90-119 (2008); CONN. GEN. STAT. § 52-146t (2008); DEL. CODE ANN. Tit. 10, § 4320–26 (2008); D.C. CODE §§ 16-4701–4704 (2008); FLA. STAT. § 90.5015 (2007); GA. CODE ANN. § 24-9-30 (2007); 735 ILL. COMP. STAT. 5/8-901 (2008); IND. CODE §§ 34-46-4-1, 34-46-4-2 (2008); KY. REV. STAT. ANN. § 421.100 (2008); LA. REV. STAT. ANN. §§ 45:1451–1459 (2008); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2008); MICH. COMP. LAWS §§ 767.5a, 767A.6 (2008); MINN. STAT. §§ 595.021–.025 (2008); MONT. CODE ANN. § 26-1-902 (2007); NEB. REV. STAT. §§ 20-144–147 (2007); NEV. REV. STAT. § 49.275 (2008); N.J. STAT. ANN. § 2A:84A-21 (2007); N.M. STAT. § 38-6-7 (2008); N.Y. CIV. RIGHTS LAW § 79-h (2008); N.C. GEN. STAT. § 8-53.11 (2008); N.D. CENT. CODE § 31-01-06.2 (2007); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (2008); OKLA. STAT. tit. 12, § 2506 (2008); OR. REV. STAT. §§ 44.510–.540 (2007); 42 PA. CONS. STAT. § 5942 (2008); R.I. GEN. LAWS § 9-19-1 (2008); S.C. CODE ANN. § 19-11-100 (2007); TENN. CODE ANN. § 24-1-208 (2007). Washington State enacted the nation's 34th shield law during the time of the study. WASH. REV. CODE § 5.68.010 (2008). It was signed into law on April 28, 2007, but it did not become effective until July 22, 2007. Because the law was not in effect at the time the Washington respondents participated in the study, it was counted as a non-shield-law state for purposes of analysis.

264. For example, only eleven states—Alabama, Arizona, California, Indiana, Kentucky, Montana, Nebraska, Nevada, Ohio, Oregon, and Pennsylvania—and the District of Columbia, provide an absolute privilege for confidential sources, while the others are qualified in some way. See Privilege Compendium Front Page, The Reporters Committee for Freedom of the Press, <http://rcfp.org/privilege/> (last visited Aug. 27, 2009) [hereinafter Privilege Compendium].

265. See *supra* note 262.

266. See, e.g., IDAHO CONST. art. 1, § 9 (*In re* Contempt of Wright, 700 P.2d 40 (Idaho 1985) (applying constitutional provision)); IOWA CONST. art. 1, § 7 (*Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977) (applying constitutional provision)); *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978) (acknowledging the privilege in response to *Branzburg* but refusing to apply it here); *In re Letellier*, 578 A.2d 722 (Me. 1990) (recognizing the privilege based on First Amendment grounds (noting that the state constitution affords no greater privilege, through *Branzburg*, but refusing to apply it here)); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991) (recognizing no constitutional or statutory privilege, but recognizing a balancing test for a common law privilege); *State ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650, 655 (Mo. Ct. App. 1997) (recognizing a qualified privilege based on a balancing test, which rests on First Amendment grounds and distinguishing between criminal and civil cases, giving a broader privilege to civil cases); N.H. CONST. pt. 1, art. 22 (*Opinion of the Justices*, 373 A.2d 644 (N.H. 1977) (applying the constitutional

lower courts in most other states that do not have statutory shield laws,²⁶⁷ but at least two states—Hawaii and Wyoming—plainly recognized neither a legislative nor a court-created privilege at the time of the study.²⁶⁸

As Blasi appreciated, there is great value in having respondents self-report whether the state in which their reporters do most of their work has a shield law and whether state constitutional or common law provides a privilege. The answers to these questions, when compared to actual data on state-based legal protections, provide useful insight into newsroom leaders' general awareness of current legal protections. Survey results on this issue highlight the importance of a basic legal education among the "point people" in newsrooms. Particularly at this critical moment in which media organizations are pushing strongly for greater legal protections in the form of a federal statute, it is worth noting that a not-small percentage of newsroom leaders are unaware of or not taking full advantage of the legal protections they already have. The results of the current study are as troubling, if not more so, than the results reported by Blasi.²⁶⁹

provision)); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780 (S.D. 1995) (adopting a five-factor qualified privilege based on California case law); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974) (finding a qualified privilege); *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974) (finding a First Amendment privilege where the information held by the reporter is not material to the defense); W. VA. CONST. art. 3, § 7 (*State ex rel. Hudok v. Henry*, 389 S.E.2d 188 (W. Va. 1989) (case applying the constitutional provision)); WIS. CONST. art. 1, § 3 (*Zelenka v. State*, 266 N.W.2d 279 (Wis. 1978) (case applying the constitutional provision)). After data collection concluded, the State of Utah enacted a rule of evidence protecting News Reporters. UT. R. REV. RULE 509 (2008). The new rule protects "confidential source information," "confidential unpublished news information" and "other unpublished news information." *Id.* §§ (a)–(d). Because this happened after the conclusion of data collection, Utah was considered under the data as a state without a shield law.

267. See generally *Privilege Compendium*, *supra* note 264.

268. *In re Goodfader*, 367 P.2d 472 (Haw. 1961) (a pre-*Branzburg* case refusing to recognize a privilege); Fargo, *supra* note 14, at 47 (noting that no state appellate courts have addressed the issue). Hawaii has since enacted a state shield law. See Matthew Pollack, *Hawaii Governor Signs Shield Law*, The Reporters Committee for Freedom of the Press, July 7, 2008, <http://www.rcfp.org/newsitems/index.php?i=6845>.

269. Indeed, the lack of awareness of legal protections in the present study may be even more striking than the misinformation found by Blasi, given the fact that shield laws are now significantly more prevalent and the fact that the respondents to this study were not reporters, as was the case in Blasi's study, but editors and news directors—top newsroom leaders who presumably bear primary responsibility for ensuring the education of news teams and the handling of subpoenas.

1. *Awareness of Shield Laws*

The data indicate that just over 20% of newsroom leaders in the country “don’t know” whether the state in which the organization’s reporters do most of their work “has a shield law that protects the confidentiality of source relationships in certain circumstances.”²⁷⁰ The percentage of “don’t know” responses from newsroom leaders in states that do have shield laws is almost as high as the percentage from states that do not,²⁷¹ and is nearly as great among those newsrooms that received one or more subpoenas in the year of the survey as it is among the total population.²⁷²

Moreover, a staggering 59.5% of newsroom leaders in non-shield-law states mistakenly believe that they *do* have a state shield law that they do not have,²⁷³ and 16.8% of those in shield-law states mistakenly believe that they *do not* have a shield law when that protection does, in fact, exist.²⁷⁴ The frequency of these misperceptions is lower among respondents who report that they received one or more subpoenas in the survey year²⁷⁵—perhaps because those newsroom leaders who were mistaken about the extent of their legal protections became aware of them in the course of handling the subpoenas they received. Nevertheless, 16.3% of shield-law-state newsroom leaders who received subpoenas in the survey year did not know whether they have a shield law.

270. Broadcasters answered “don’t know” in slightly larger percentages than newspaper respondents. Seventy of the 415 answering newspaper respondents (16.9%) answered “don’t know” to the question. Forty-six of the 198 answering broadcaster respondents (23.2%) answered “don’t know.”

271. Weighted to overcome non-response bias, 20.1% of all newsroom leaders from shield-law states “don’t know,” while 21.9% of newsroom leaders from non-shield-law states “don’t know.”

272. At 16.3% of newsrooms that received one or more subpoenas in 2006, the newsroom leader does not know if the state in which the organization’s reporters work has a shield law.

273. Only 18.6% of all newsroom leaders in non-shield-law states can correctly identify that their state does not have a shield law.

274. 63.1% of all newsroom leaders in shield-law states can correctly identify that their state does have a shield law.

275. Sixty-three percent of non-shield-law-state respondents who reported receiving one or more subpoenas in 2006 correctly identify the nonexistence of a shield law; 19.1% incorrectly believe that their state does have a shield law. 70.4% of shield-law-state respondents who reported receiving one or more subpoenas in 2006 correctly identify the existence of that shield law; 13.9% incorrectly believe that their state does not have such a law. Shield-law-state newspapers were better able to correctly identify than were shield-law-state broadcasters (75.3% vs. 65.1%).

Perhaps because they experience subpoenas with significantly greater frequency,²⁷⁶ television news editors are somewhat more likely to be able to correctly identify that they operate with the protection of a state shield law than are their counterparts at newspapers.²⁷⁷ They also are slightly more likely to be able to correctly identify when they do *not* have such a law in their states—although newsroom leaders at both broadcast and print operations only infrequently recognize this absence of protection.²⁷⁸

It appears that organizational size has a direct bearing on a newsroom leader's awareness of the existence of a shield law in his or her state. *Figures 31a* and *31b*. Newspaper editors in states with shield laws become progressively more able to correctly identify that a shield law is in place as the size of their newspapers increases—with only 47% of editors at the very smallest newspapers²⁷⁹ correctly identifying that they have a shield law and 90 and 100%, respectively, of newspaper editors in the 250,000 to 500,000 and greater-than-500,000 circulation categories correctly identifying that their states have shield laws. Although less pronounced, this same correlation exists among broadcaster size categories, with news directors in the very smallest market size²⁸⁰ correctly identifying the existence of a shield law 54.5% of the time and those in the very largest²⁸¹ identifying it 86.4% of the time.²⁸² These results are not surprising, as the data suggest that small organizations—for which a significantly larger percent of newsroom leaders either do not know or are wrong about the existence of a shield law—are also the organizations that receive subpoenas only rarely.²⁸³ However, in light of the fact that these organizations also appear to

276. See Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 628–30.

277. 66.7% of shield-law-state television news directors correctly answer “yes” when asked if they have a shield law; 61.7% of newspaper editors answer correctly.

278. 20.9% of broadcasters in non-shield-law states can correctly identify that their state does not have a shield law, while 27.8% don't know, and 51.3% mistakenly believe that they do have a shield law. By comparison, 17.7% of broadcasters in non-shield-law states can correctly identify that their state does not have a shield law, while 19.3% don't know and 63.0% mistakenly believe that they do have a shield law.

279. Circulation under 10,000.

280. Fewer than 100,000 households.

281. Greater than 1 million households.

282. In states that do *not* have shield laws, awareness of the absence of legislative protection does not correlate to organizational size.

283. See Jones, *Avalanche or Undue Alarm*, *supra* note 13, at 631–37.

experience the greatest negative impact on newsgathering when a subpoena is served,²⁸⁴ an increased effort to educate their newsroom leaders on existing legal protections almost certainly would prove worthwhile.

When the shield-law awareness data are analyzed by state, it is also clear that an increase in legal education efforts is more crucial in some states than others. *Figure 32*. In a dozen states,²⁸⁵ fewer than half of all newsroom leaders can correctly answer whether their state has a shield law; seven of those states²⁸⁶ are states that do in fact have shield laws. Alaska has the greatest percentage of newsroom leaders who “don’t know”—62.2%—and South Carolina and New Mexico newsroom leaders are the least likely to be aware of their existing shield laws (approximately 35% in each state answer correctly.) California newsroom leaders are the most likely to be aware of their shield law (91.3%), followed closely by those in Tennessee (86.3%).

2. *Awareness of Reporter’s Privilege Protection Other Than Statutory Shield Laws*

In the years following Blasi’s study, a large number of states began to recognize some form of reporter’s privilege through common law or constitutional doctrine.²⁸⁷ A separate survey question was added to the present study asking respondents whether the state in which their reporters do most of their work “recognize[s] some form of reporters’ privilege as a matter of state constitutional law or court decision.”²⁸⁸ Because the aim of the data collection on this point was to track awareness of clearly identifiable legal protections, analysis of this question was limited to responses received from twelve states in which state courts at an appellate level have definitively recognized the privilege,²⁸⁹ as well as responses received from the two states that

284. *See supra* text accompanying notes 175–177.

285. Alaska, Illinois, Iowa, Maine, Michigan, New Mexico, North Carolina, North Dakota, South Carolina, South Dakota, West Virginia, and Wisconsin.

286. Alaska (37.8% can correctly identify that a shield law is on the books); Illinois (46.3%); Michigan (45.8%); North Carolina (38.5%); North Dakota (40.8%); New Mexico (35.7%); South Carolina (35.4%).

287. *See supra* text accompanying note 113.

288. Jones, *Survey, supra* note 135, at 8.

289. Idaho, Iowa, Kansas, Maine, Massachusetts, Missouri, New Hampshire, South Dakota, Vermont, Virginia, West Virginia, and Wisconsin. *See* IDAHO CONST. art. 1, § 9 (*In re* Contempt of

definitely did not recognize any such protection.²⁹⁰ While some states with legislative shield laws also have case law that recognizes some non-legislative form of privilege,²⁹¹ it was assumed that statutory protection is primary in those states, and awareness of that case law was not tracked.

Newsroom leaders who have a judicially recognized privilege are less likely to be aware of that privilege than are newsroom leaders who have a statutory shield law. Overall, 28% of newsroom leaders in the twelve analyzed states that judicially recognize a reporter's privilege "don't know" if such a privilege exists, and 23.6% wrongly believe that such a privilege does not exist, meaning that fewer than half of all newsroom leaders in these states are accurately informed of their legal protections. Newsroom leaders within these states who actually received subpoenas during the survey year were no more aware of their legal protection than the general population.²⁹² Newspaper editors in these states are

Wright, 700 P.2d 40 (Idaho 1985) (applying constitutional provision)); IOWA CONST. art. 1, § 7 (Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977) (applying constitutional provision)); State v. Sandstrom, 581 P.2d 812 (Kan. 1978) *cert. denied* 440 U.S. 929 (1979) (acknowledging the privilege in response to *Branzburg* but refusing to apply it here); *In re Letellier*, 578 A.2d 722 (Me. 1990) (recognizing the privilege based on First Amendment grounds (noting that the state constitution affords no greater privilege, through *Branzburg*, but refusing to apply it here)); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991) (recognizing no constitutional or statutory privilege, but recognizing a balancing test for a common law privilege); State *ex rel.* Classic III Inc. v. Ely, 954 S.W.2d 650, 655 (Mo. Ct. App. 1997) (recognizing a qualified privilege based on a balancing test, which rests on First Amendment grounds and distinguishing between criminal and civil cases, giving a broader privilege to civil cases); N.H. CONST. pt. 1, art. 22 (Opinion of the Justices, 373 A.2d 644 (N.H. 1977) (applying the constitutional provision)); Hopewell v. Midcontinent Broad. Corp., 538 N.W.2d 780 (S.D. 1995) (adopting a five-factor qualified privilege based on California case law); State v. St. Peter, 315 A.2d 254 (Vt. 1974) (finding a qualified privilege); Brown v. Commonwealth, 204 S.E.2d 429 (Va. 1974) (finding a First Amendment privilege where the information held by the reporter is not material to the defense); W. VA. CONST. art. 3, § 7 (State *ex rel.* Hudok v. Henry, 389 S.E.2d 188 (W. Va. 1989) (case applying the constitutional provision)); WIS. CONST. art. 1, § 3 (Zelenka v. State, 266 N.W.2d 279 (Wis. 1978) (case applying the constitutional provision)).

290. Hawaii and Wyoming. *In re Goodfader*, 367 P.2d 472 (Haw. 1961) (a pre-*Branzburg* case refusing to recognize a privilege); Fargo, *supra* note 4, at 47 (noting that no state appellate courts have addressed the issue). Hawaii has since enacted a state shield law. See Pollack, *supra* note 268.

291. See, e.g., Delaware, Georgia, Maryland, Michigan, Minnesota, New Mexico, and New York. DEL. CODE ANN. tit. 10, § 4320-26 (2008); GA. CODE ANN. § 24-9-30 (2007); MICH. COMP. LAWS §§ 767.5a, 767A.6 (2008); MINN. STAT. §§ 595.021-.025 (2008); N.M. STAT. § 38-6-7 (2008); N.Y. CIV. RIGHTS LAW § 79-h (2008).

292. 47.6% of respondents in states with judicially recognized privileges and who received one or more subpoenas in 2006 correctly identified that the state has such a privilege; 27.1% incorrectly believed they had no such privilege; 25.3% "don't know."

significantly more likely to be aware of a case law-based privilege than are television news directors.²⁹³ In the states that clearly did not have any privilege, 31.8% of newsroom leaders incorrectly believed that a privilege existed and 8.4% did not know.²⁹⁴

3. *Other Misinformation About Reporter's Privilege Protections*

Responses to other questions on the survey and anecdotal evidence from open-ended queries also might suggest that some members of the media, especially at smaller organizations, are misinformed about their legal protection. For example, more than one-third of the actual respondents who reported that courts had either quashed or modified their subpoenas on the basis of a shield law were affiliated with news organizations in states that do not have a shield law,²⁹⁵ suggesting that newsroom leaders whose subpoenas have been quashed may be uninformed or misinformed as to the legal basis for that decision.

Anecdotal evidence suggests that at least a subset of editors and news directors falsely believe in a sweeping First Amendment protection that precludes any legal action at all against the press; others believe that “the law” creates an absolute privilege against responding to subpoenas in all instances and that the judges who penalized reporters in recent high-profile cases were simply unaware of this law. Other respondents—even some whose answers to the quantitative questions suggested that they very strongly felt that the subpoena problem was on the increase—gave comments that manifested a lack of awareness of major legal developments affecting the press. “If my state has a shield law, it is so rarely invoked that I don’t ever remember reading about it,” wrote a

293. 53.7% of newspaper editors in these states can correctly identify the existence of a privilege; 37.0% of television news directors can do so. Newspaper editors “don’t know” 24.1% of the time and are incorrect 22.2% of the time. Television news directors “don’t know” 36.5% of the time and are incorrect 26.5% of the time.

294. The number of responses from these states was too small to accurately assess any trends among media or organizational size.

295. It is possible, of course, that the litigation in these instances occurred in other states that had shield laws. However, given the primarily local character of the news coverage at all but the very largest news organizations, it seems more probable that subpoenas would arise in the organization’s own state courts. Assuming the subpoena was issued in conjunction with state court proceedings in the state in which the news organization was housed, at least one newsroom leader from ten states that had no shield law on the books in 2006—Iowa, Kansas, Massachusetts, Missouri, New Hampshire, Texas, Utah, Vermont, Virginia, and West Virginia—wrongly believed that subpoenas that they received were resolved in 2006 on the basis of a shield law.

news director from a state in which the shield law has been routinely invoked. “I tell our reporters that we can print whatever we want and no one can subpoena us,” one editor of a small newspaper commented. “The Supreme Court has made this very clear. We are free to do what we want, and they can’t stop us.”²⁹⁶

Finally, some newsroom leaders demonstrated confusion about the legal consequences of a subpoena when answering a question about the impact that the threat of subpoenas has on internal material-retention policies.²⁹⁷ While a majority of those who said that they had altered their policies in response to the threat of subpoenas described how they had enacted policies for routinely destroying or recycling notes and video so that these materials would not be available if subpoenaed,²⁹⁸ a number of respondents—perhaps counter-intuitively, and contrary to widespread industry advice²⁹⁹—reported that they go out of their way to *retain* materials that might be the subject of litigation.³⁰⁰

All told, the survey suggests that the industry as a whole might do well to redouble efforts to educate news outlets of all sizes on both the legal protections that exist and the policies and practices that might best serve the organizations’ goals in times of legal uncertainty. Likewise, if new legislation is enacted, it should be coupled with educational campaigns within the media industry to ensure that the breadth and limitations of protection are understood by those who might invoke the privilege.

296. Such a view is contrary to the clear holding of *Branzburg* (see *supra* Part I.C), and inconsistent with even the most generous reading of that precedent, under which the press never enjoyed an absolute privilege. See *supra* text accompanying notes 111–113.

297. See discussion at Part III.A.3.a., *supra*.

298. *Id.*

299. See, e.g., Jessica Meyers, *Fighting Like Tigers*, AM. JOURNALISM REV., June–July 2006 at 58–59 (At a 2006 conference called “The End of Confidentiality? Journalists, Sources and Consequences,” top media attorney Lee Levine suggested that news organizations purge emails regularly and enact policies establishing that the notes are the reporter’s and do not belong to the news organization. He also recommended that reporters keep their notes only as long as there is an “ongoing journalistic need for them,” and discard them thereafter.).

300. “Must always prepare for the eventual lawsuit”; “All newscasts are now recorded on DVD and kept indefinitely”; “We caution reporters/editors not to discard notes, etc.”; “Increased urging reporters to save their notes, based on cases in the past”; “We’ve always kept everything forever. We have drawers full of old notes.”

CONCLUSIONS

In addition to the extensive findings described above, four overarching conclusions should be noted.

First, if the law-in-action question that Congress needs to answer is whether the existence of a federal shield law for reporters would have value to the newsgathering operations of the targeted population—and therefore to the general public that receives the news that this population produces—the answer appears to be yes. The breadth and depth of the qualitative and the quantitative data demonstrate that both the threat and the reality of subpoenas alter behaviors in newsrooms of all sizes. Although the data suggest that the mere existence of a shield law does not spare newsrooms from all costs associated with subpoenas, a shield law can go a substantial distance in alleviating newsroom concerns. Moreover, a clearly worded, easily invoked shield law would go a long way toward protecting newsrooms from subpoena-induced interference with newsgathering, particularly if coupled with an education campaign that informed both attorneys and journalists of the protection's contours. Without question, members of the media are keenly aware that their legal climate is changing for the worse and believe that the wave of recent cases has emboldened subpoenaing attorneys and discouraged potential sources. Even if other social forces—like the general decline in public respect for the media—have contributed to the willingness of attorneys to issue subpoenas to members of the media, a well-publicized federal reporter's shield would send a more unified message on the question of media subpoenas and cause at least some attorneys to rethink their views of media susceptibility to them.

The strength of respondents' perceptions that subpoenas are on the increase, that attorneys are more willing to subpoena them, and that their subpoena risk is up, combined with perceived consequences of these trends, suggests strongly that the recent wave of losing cases has led to something of a nationwide chill. Indeed, the overwhelming sentiment expressed by survey respondents is fear. They fear that their already struggling businesses will not have the financial or institutional wherewithal to challenge subpoenas—particularly if the chances of prevailing are slim—and that the inevitable result is a very practical limitation on the watchdog function that most newsroom leaders still see as a vitally important aspect of their work. Subpoenas are only one piece of this complicated puzzle, but the survey results suggest they are a critical one, largely because the recent surge of losing cases seems to

have steeled attorneys and made them more willing to subpoena the press, while spurring a wave of terror in journalism that is leading even those who have not been subpoenaed to limit their news coverage. Nearly all of the participants operated in a state with some form of reporter's privilege, suggesting that the absence of clarity as to federal protection is the source of much of this concern. Closing the circle with a federal legislative shield could be expected to have ramifications outside the realm of federal courts. It might well change the tenor of the legal environment and have the larger societal effect of eliminating some of the costs to newsgathering that are now experienced by those who have state-level protection that does not provide fully effective prophylaxis because of the perceptions of acceptability that are fostered by the absence of federal protection. It also almost certainly would have a direct impact on the working journalists who cannot now know, at the time that they engage in newsgathering, whether a future subpoena related to that newsgathering might be issued in state court, where they ordinarily are protected, or in federal court, where they increasingly are not.

Notably, the behaviors and perceptions reported above call into question some recent assertions that compelled disclosure has no impact on the newsgathering activity of the press if the disclosure is of material for which confidentiality was not promised. The impacts described above—on newsroom time, on already-limited newsroom budgets, on material-retention policies, and on story coverage—are not exclusive to subpoenas seeking confidential material, and respondents reported that each of these impacts creates disruptions to the newsgathering enterprise. Of course, the media do not have a corner on the market when it comes to the impositions that accompany the receipt of a subpoena. Ordinary citizens and business entities who receive subpoenas also experience expenditures of time, money, resources and psychological stress. But the data gathered in this study strongly suggest that the media—both in their own self-perception and as a practical matter borne out by the experiences shared in the survey—are differently situated from other subpoena recipients, because subpoenas served upon them bleed into larger-scale social ramifications and because these media recipients can be made agents of discovery in ways that ordinary citizens cannot.

This is true in at least three ways supported by the study's data: (1) First, the widespread reports of unnecessary and overbroad subpoenas strongly suggest that newsrooms are being made instruments for the

collection of publicly available material in ways that other subpoena recipients are not. The newsgathering function of the press necessarily means that newsrooms are repositories of information gathered from a wide variety of other sources. It appears that attorneys are increasingly seeking to take advantage of this gathering, and that a media subpoena is becoming a subpoena of first resort rather than a subpoena of last resort. As attorneys see the declining reputation of the press and the lessening of the social and legal stigma against serving a journalist a subpoena, it is increasingly easy for them to seek from the traditional press material that is readily available elsewhere. Journalists perceive that they are essentially being punished for doing the public-serving role that is expected of them, and they report that the recent flurry of subpoenas is discouraging this public-serving behavior. (2) Second, unlike most other subpoena recipients, journalists sometimes commit to keep confidential the information that is provided to them—and do so for reasons that may promote the public good. It happens that newsrooms are cutting back on their reliance on confidential sources for reasons separate and apart from the subpoena trends. But newsroom leaders nevertheless report that the willingness of sources to speak on condition of confidentiality is waning and believe that the atmosphere for this form of newsgathering is being poisoned by the subpoena threat. (3) Finally, and relatedly, newsrooms differ from other subpoena recipients in their institutional commitment to neutrality and in our societal preference for the maintenance of that neutrality. Some of the most overwhelming commentary in the study expresses grave concern from all corners of the journalism world over the perceived loss of this neutrality that occurs when media subpoenas become routine.

A second overarching conclusion that should be noted is that today, unlike in Blasi's time, we see a significant gap between the public's perception of the media and the media's perception of itself. Newsroom leaders' responses in this study demonstrate that the media continues to think of itself as public-serving, differently situated than other subjects of subpoenas, and worthy of significant constitutional, common-law, and statutory protection—all while public perception of its trustworthiness and public value deteriorate. Even more notable is the fact that the media appear prone to imagining themselves more protected than they are, as evidenced by some boastful but erroneous commentary on the question of constitutional protection for the press and by the significant tendency to overestimate the existence and extent of protection provided by state shield laws. The consequences of the growing gap between the media's

view of itself and the view that ordinary citizens, lawmakers, and judges have of the media could be significant and wide-ranging. It certainly remains true that there “exists among virtually all reporters a strong sense of civic responsibility,”³⁰¹ but the media would do well to intensify efforts to educate journalists about the contours of their legal protection and to educate the public about the value of a free and independent press. Indeed, it is likely that the difficulties that newsroom leaders see as springing from the uptick of media subpoenas are compounded by misinformation on both of these fronts.

Third, a note about the complexity of determining causation in a changing legal climate: The convergence of a decreasing public regard for journalists, a decreasing protection from the courts, and an increasing number of subpoenas demonstrates the multifarious ways in which societal changes breed legal changes and vice versa. Given this confluence, the erosion of the media’s reputation among the American public is as significant an ongoing trend as the trends demonstrating an increase in subpoena activity and a decrease in court protection. A law-in-action approach demands a recognition of the relationship between and among public opinion, the leanings of the courts, the actions of legislatures, and the behaviors of subpoenaing attorneys vis-à-vis the press. The members of the press surveyed here are overwhelmingly convinced that the uptick in subpoenas they are now facing is the result of the recent string of high-profile cases. Even if it can be said with surety that legal protection of the media has waned (which some case law does suggest) and that subpoena frequency has increased (which the numerical data appear to support), it is extraordinarily difficult to say whether the string of high-profile cases is the *cause* of that increase or simply a symptom of the same disease of declining public reputation.

Likewise, it is exceptionally difficult to know for certain the causal direction between the decrease in investigative reporting and the waning legal protection for reporters. Certainly it could be argued that journalists who are doing less of the work of democracy and are acting less and less like a check on government are accordingly less worthy than were their public-serving predecessors of a privilege that excuses them from the subpoena power that binds nearly all other citizens. But through the lens of the survey and interview data collected here, the causal trend works in the other direction: It is, at least in part, *because*

301. Blasi, *supra* note 4, at 255.

once-reliable subpoena protection has waned that investigative reporting has diminished, as industry and economic realities lead newsroom leaders to make the calculation that they simply cannot afford the risk of the protracted legal costs that are significantly more likely to arise out of that style of reporting than out of other forms. Legislators might demand more of a showing of public service before granting special protection to the press. However, the participants of the study suggest that practical constraints will require that the opposite occur—that reporting of this sort will be encouraged only when it is protected by Congress, such that there is something approaching uniformity of protection on a state and a federal level and the environment feels like one in which it is safe to engage in this enterprise.

Finally, given the almost universal recognition that the media are at a new defining moment, the clear next step for scholars and legislators is to think carefully about how old legal frameworks need to be reconsidered as the traditional media revolutionize into something new or entirely disappear. One benefit to providing a reporter's privilege by legislation rather than as a matter of constitutional doctrine is that statutory protections are more easily changed to account for new circumstances and changing societal impacts. While the hyperbolic forecast is for the total "death" of traditional media, it may be more likely that instead of ceasing to exist they will morph into something new and different. It may be that traditional media will keep their traditional roles but execute them in different delivery mechanisms, or that hybrid entities will spring up that more fully perform the public-serving, investigative watchdog role that the mainstream media traditionally have performed.³⁰² In either event, legislation will need to

302. See, e.g., *Shining a Light*, On the Media, NATL. PUBLIC RADIO, Aug. 15, 2008, available at <http://www.onthemedial.org/transcripts/2008/08/15/01> ("ProPublica has become a sanctuary for orphaned investigative reporters"); Claire Cain Miller & Brad Stone, *News Without Newspapers*, N.Y. TIMES, Apr. 13, 2009, at B1 ("A number of Web start-up companies are creating so-called hyperlocal news sites that let people zoom in on what is happening closest to them, often without involving traditional journalists."); David Bauder, *Huffington Post Launches Investigative Journalism Venture*, THE HUFFINGTON POST, Mar. 29, 2009, http://www.huffingtonpost.com/2009/03/29/huffington-post-launches-_0_n_180498.html (reporting that The Huffington Post, along with The Atlantic Philanthropies and other donors, have plans to launch an investigative journalism team with an initial budget of \$1.75 million); see also The Center for Public Integrity, <http://www.publicintegrity.org/> (last visited Aug. 27, 2009); ProPublica, <http://www.propublica.org/> (last visited Aug. 27, 2009); Public Broadcasting Service, *The NewsHour with Jim Lehrer: Investigative Reporting Hard Hit by Media Cutbacks* (Apr. 20, 2009) (television broadcast), available at http://www.pbs.org/newshour/bb/media/jan-june09/reporting_04-20.html.

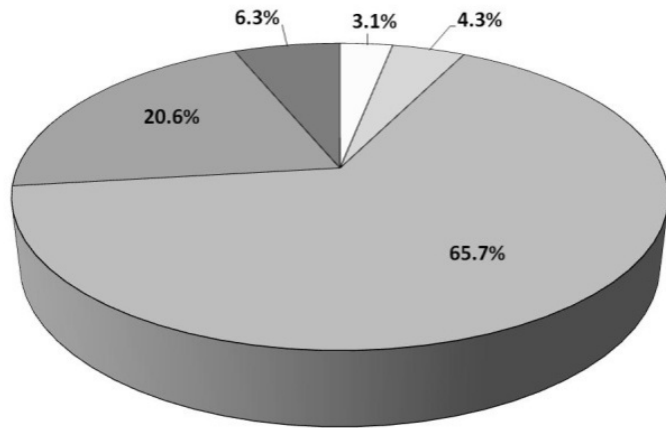
grow and develop over time as the law-in-action view of life in the trenches of investigative journalism grows and develops.³⁰³ For the moment, however, the study's data suggest that a federal shield law that protects at least the traditional press would provide an important foundation for fostering public-serving reportage and would alleviate some of the negative impact that the current increase in media subpoenas has had on newsgathering at the very institutions that pioneered the investigative reporting that supports, nourishes, and sustains our democratic tradition.

303. See Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515 (2007).

APPENDIX OF FIGURES

Media by Category	Proportion of Respondent Group	Proportion of General Population
Broadcast Market Size under 100,000 Households	7.2%	9.0%
Broadcast Market Size 100,000 - 250,000 Households	28.8%	24.9%
Broadcast Market Size 250,000 - 500,000 Households	29.6%	27.5%
Broadcast Market Size 500,000 - 1,000,000 Households	18.4%	20.1%
Broadcast Market Size > 1,000,000 Households	16.0%	18.4%
Newspaper Circulation under 10,000	34.2%	43.2%
Newspaper Circulation 10,000 - 25,000	27.8%	28.4%
Newspaper Circulation 25,000 - 50,000	15.7%	13.6%
Newspaper Circulation 50,000 - 100,000	10.2%	7.5%
Newspaper Circulation 100,000 - 250,000	8.0%	4.7%
Newspaper Circulation 250,000 - 500,000	2.7%	1.7%
Newspaper Circulation > 500,000	1.4%	0.8%

Figure 1 Summary of survey participants and general population



significantly less
 somewhat less
 about the same
 somewhat greater
 significantly greater

Figure 2 Time and resources spent responding to subpoenas, compared to five years ago

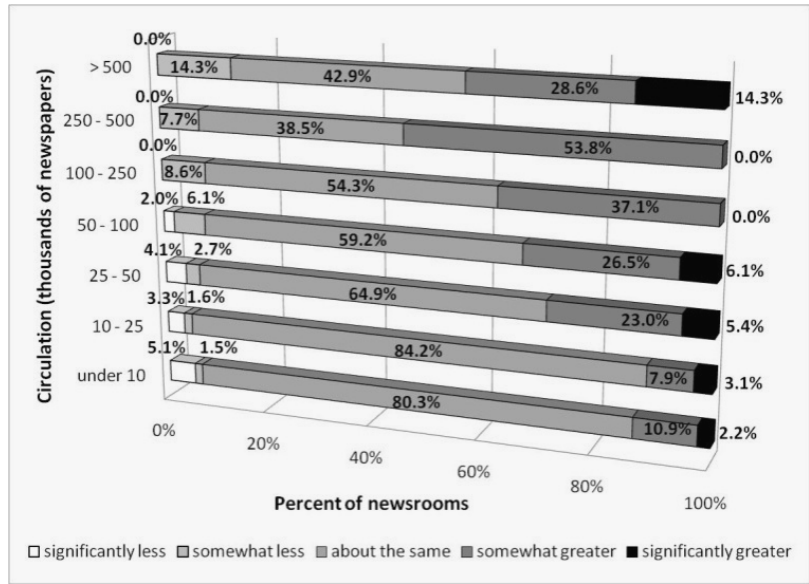


Figure 3a Time and resources spent responding to subpoenas, compared to five years ago, by newspaper circulation

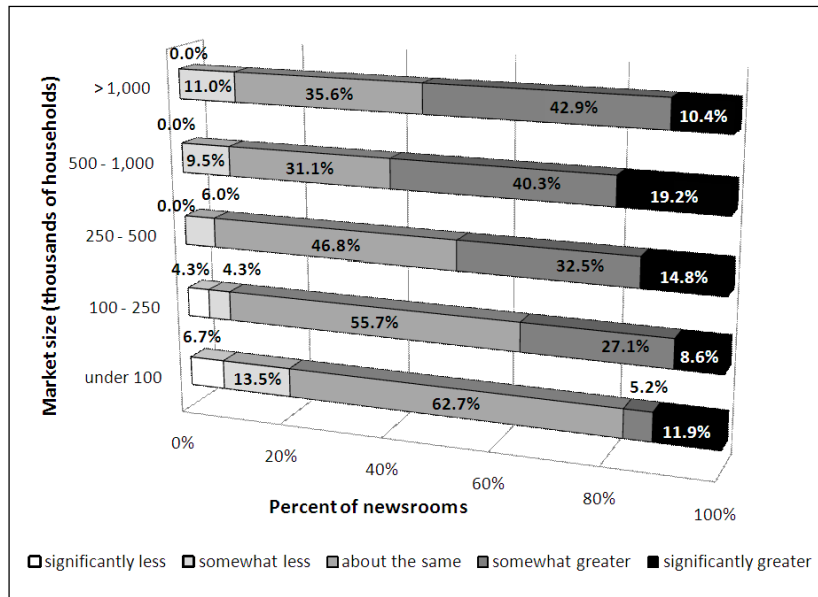


Figure 3b Time and resources spent responding to subpoenas, compared to five years ago, by broadcast market size

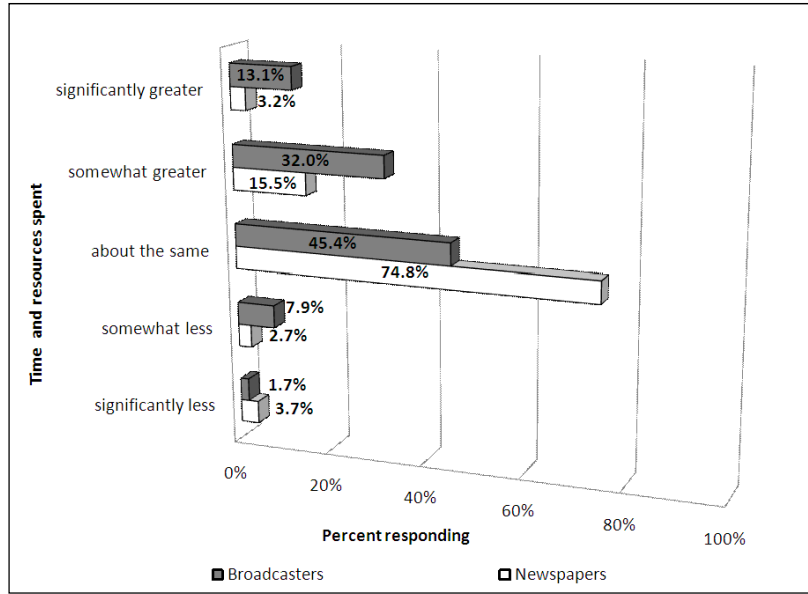


Figure 4 Time and resources spent responding to subpoenas, compared to five years ago, by medium

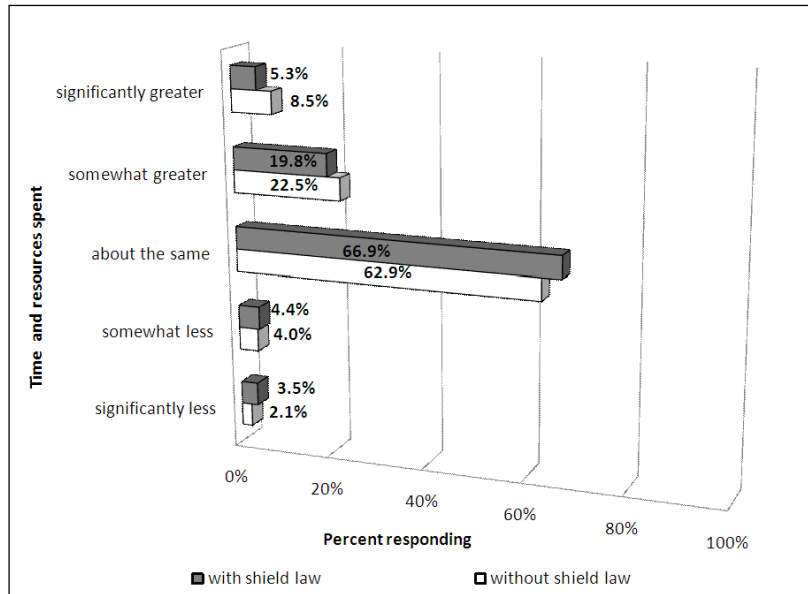


Figure 5 Time and resources spent responding to subpoenas, compared to five years ago, by existence of shield law

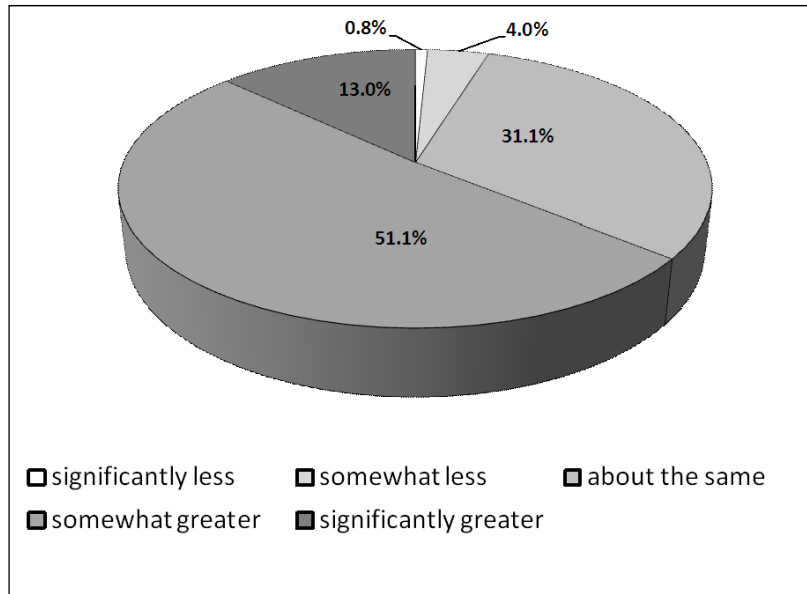


Figure 6 Perceived frequency of subpoenas, compared to five years ago

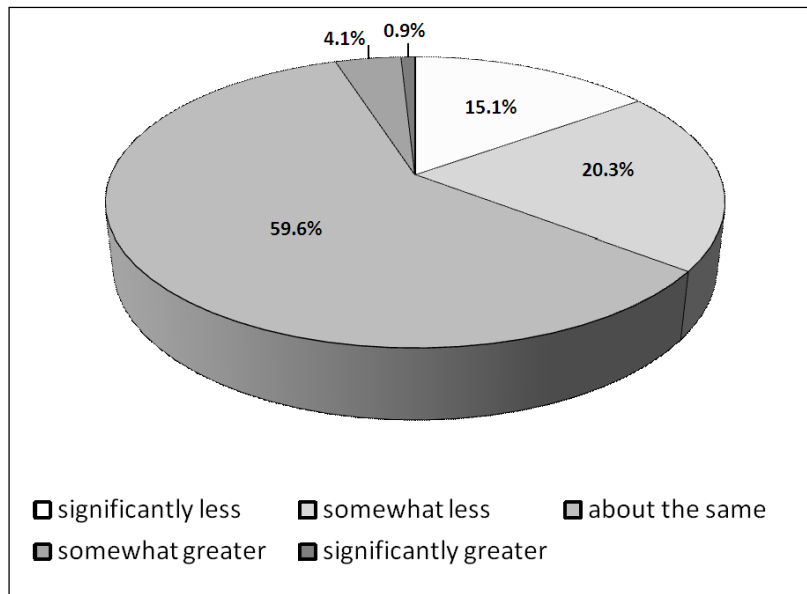


Figure 7 Use of confidential sources, compared to five years ago

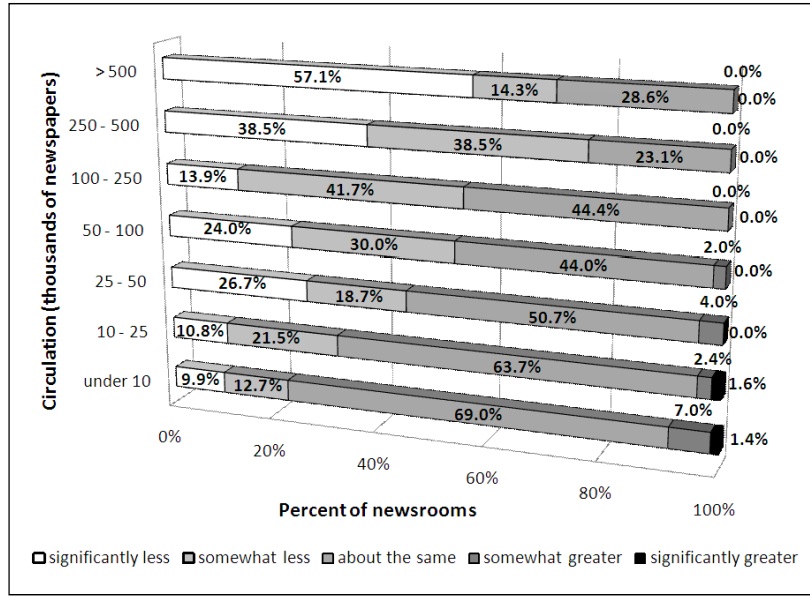


Figure 8a Use of confidential sources, compared to five years ago, by newspaper circulation

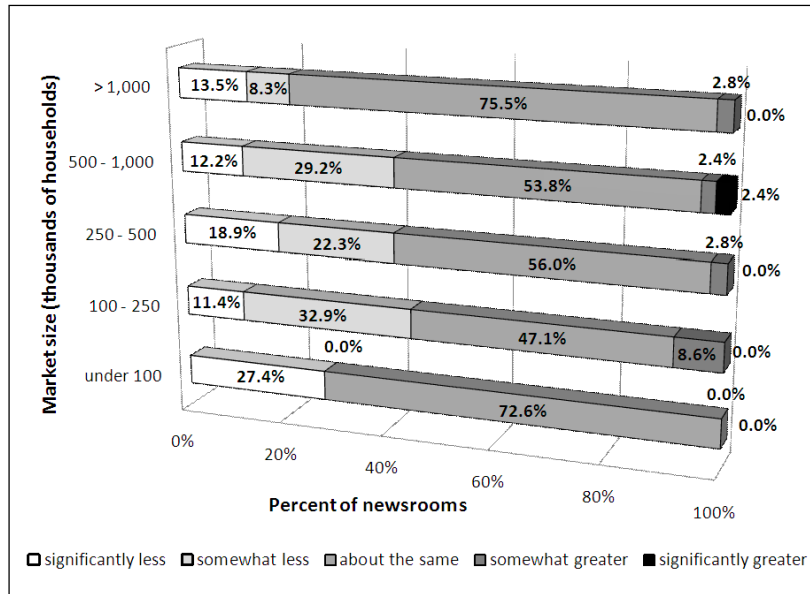


Figure 8b Use of confidential sources, compared to five years ago, by broadcast market size

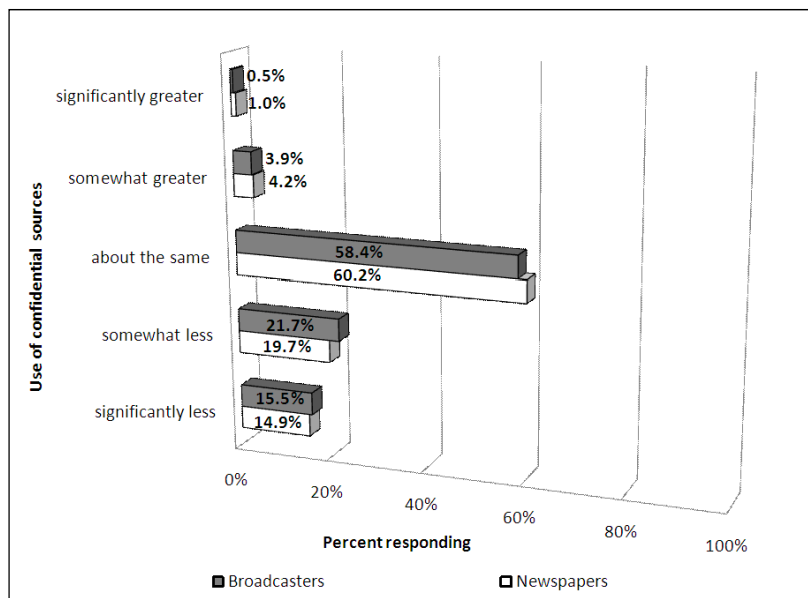


Figure 9 Use of confidential sources, compared to five years ago, by medium

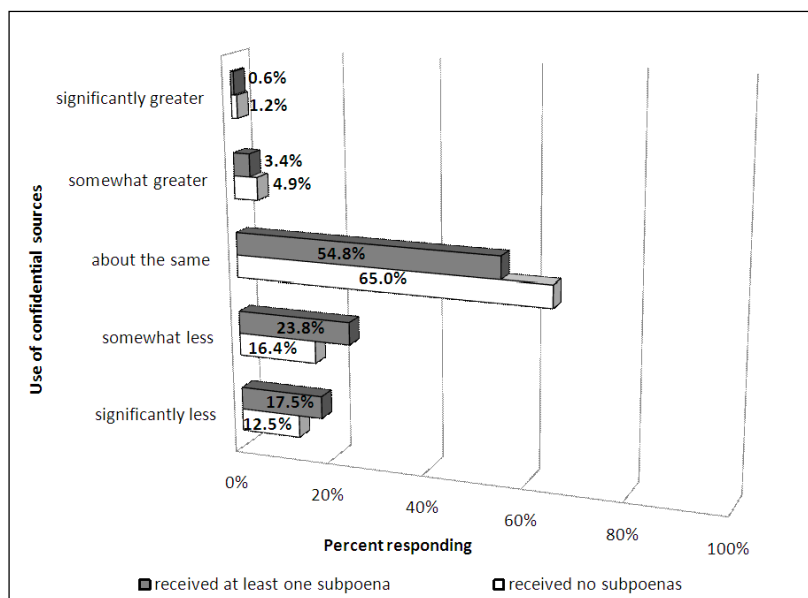


Figure 10 Use of confidential sources, compared to five years ago, by newsrooms that did or did not receive subpoenas

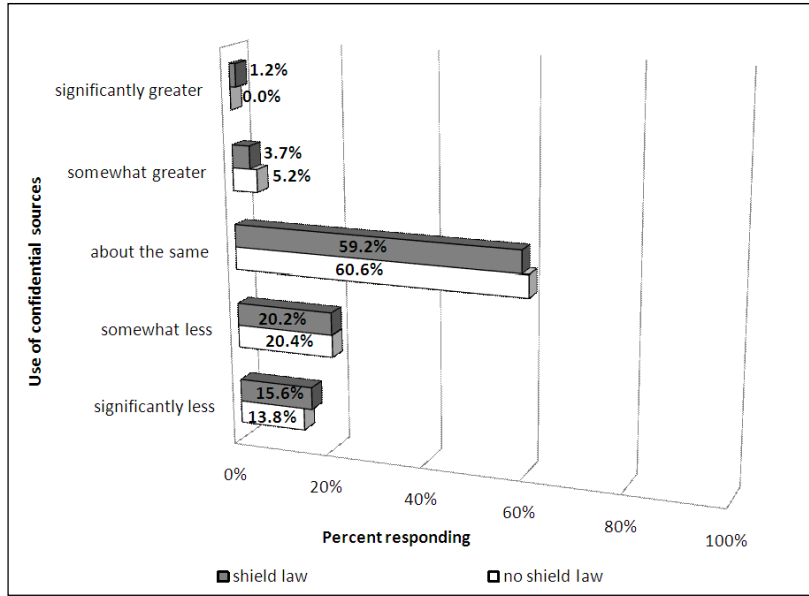


Figure 11 Use of confidential sources, compared to five years ago, by shield law

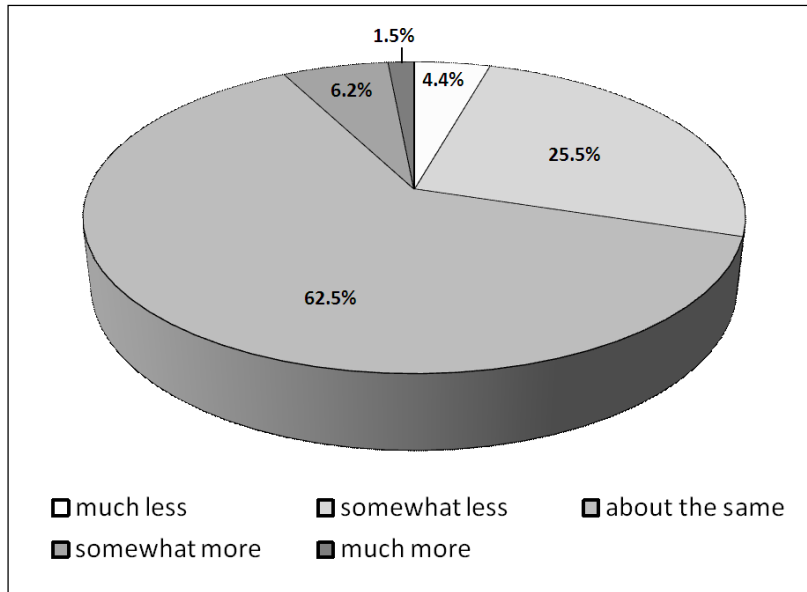


Figure 12 Willingness of sources to speak on condition of confidentiality, compared to five years ago

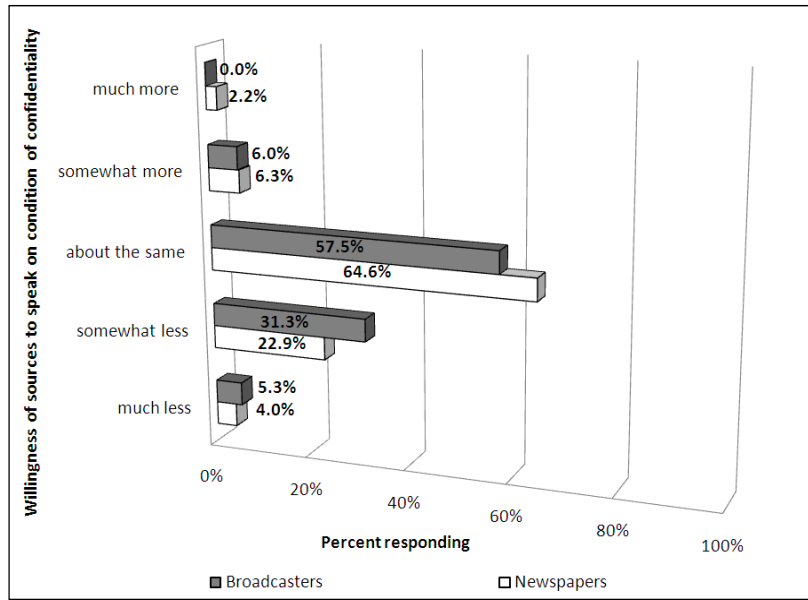


Figure 13 Willingness of sources to speak on condition of confidentiality, compared to five years ago, by medium

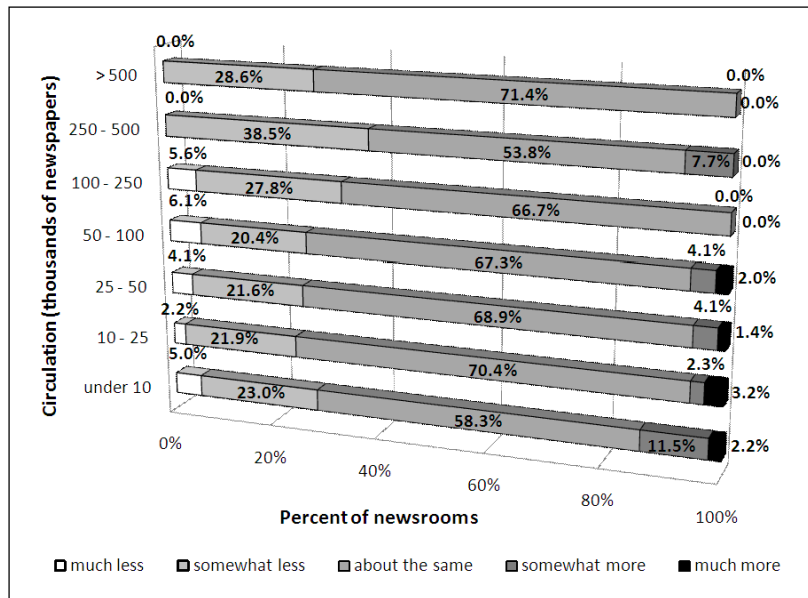


Figure 14a Willingness of sources to speak on condition of confidentiality, compared to five years ago, by newspaper size

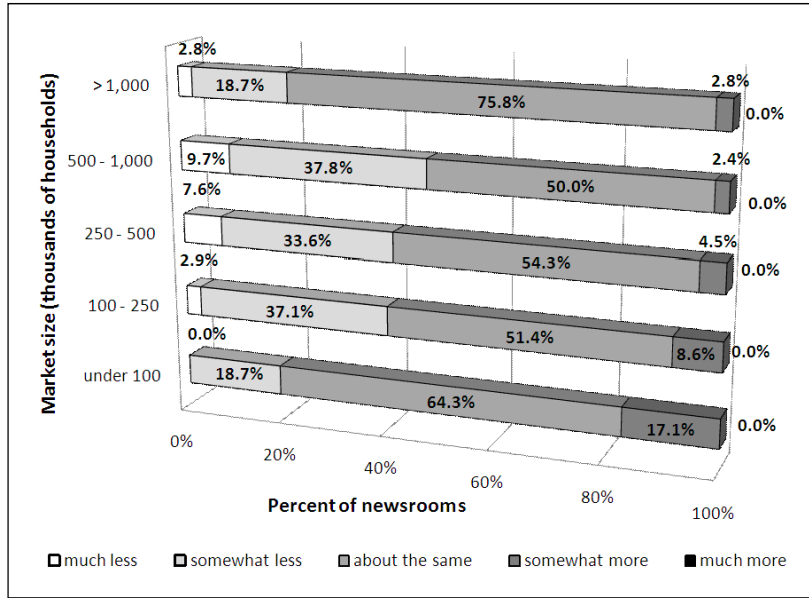


Figure 14b Willingness of sources to speak on condition of confidentiality, compared to five years ago, by broadcast size

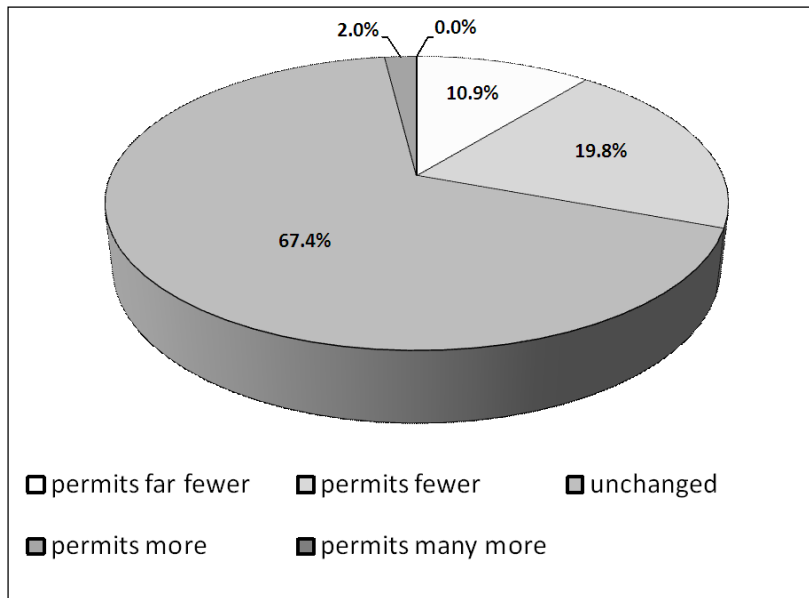


Figure 15 Change in policy or practice on use of confidential sources, compared to five years ago

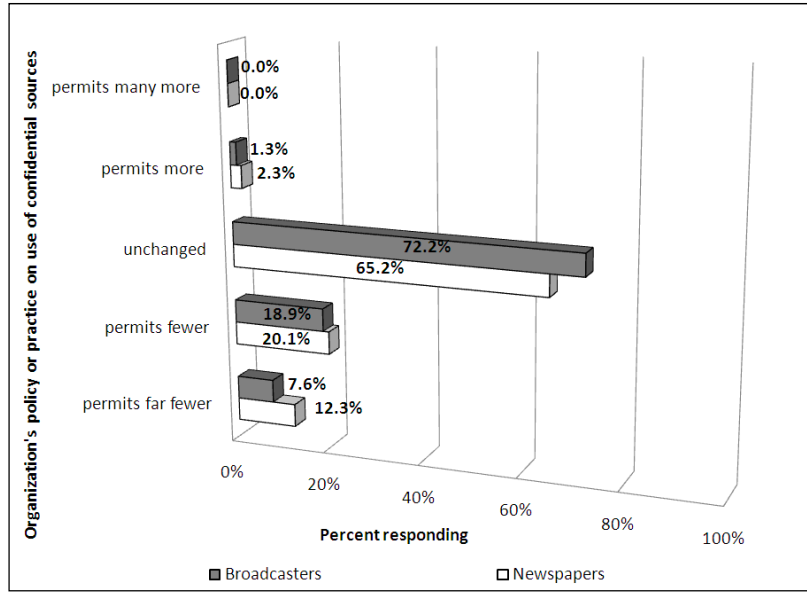


Figure 16 Change in policy or practice on use of confidential sources, compared to five years ago, by medium

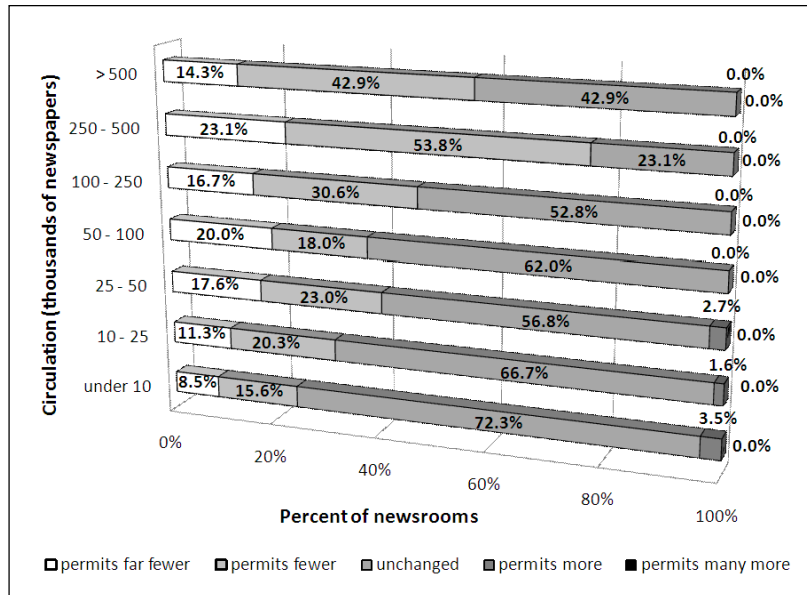


Figure 17a Change in policy or practice on use of confidential sources, compared to five years ago, by newspaper size

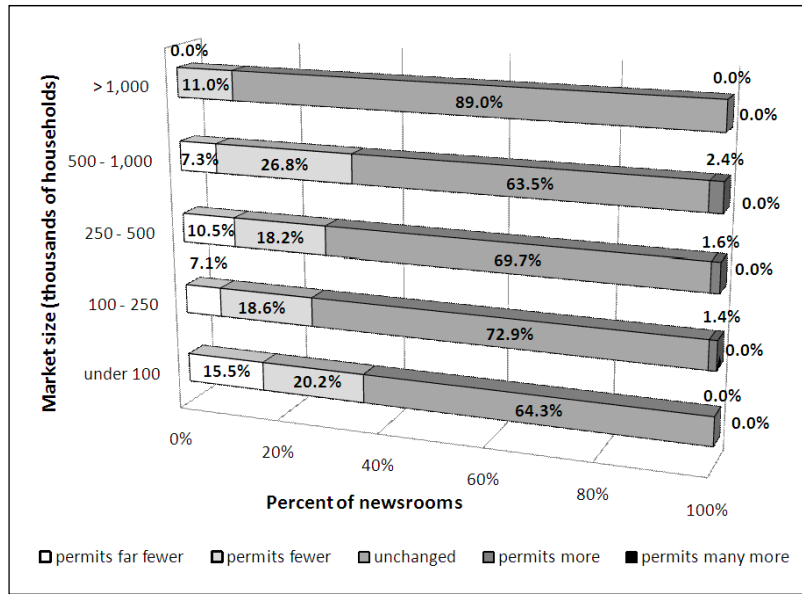


Figure 17b Change in policy or practice on use of confidential sources, compared to five years ago, by broadcaster size

Reasons for Change of Policy	Among the Reasons for Change of Policy	Most Significant Reason for Change of Policy
A request from management	36.5%	20.1%
A request from reporters	9.9%	4.8%
The receipt of one or more subpoenas by the organization	13.9%	5.3%
News coverage of reporters' privilege cases that were lost by reporters at other organizations	30.2%	14.7%
Changes in the attitudes of major sources	18.5%	6.2%
Advice of legal counsel	27.8%	17.1%
Other	38.0%	31.8%

Figure 18 Reasons for change in policy or practice on use of confidential sources

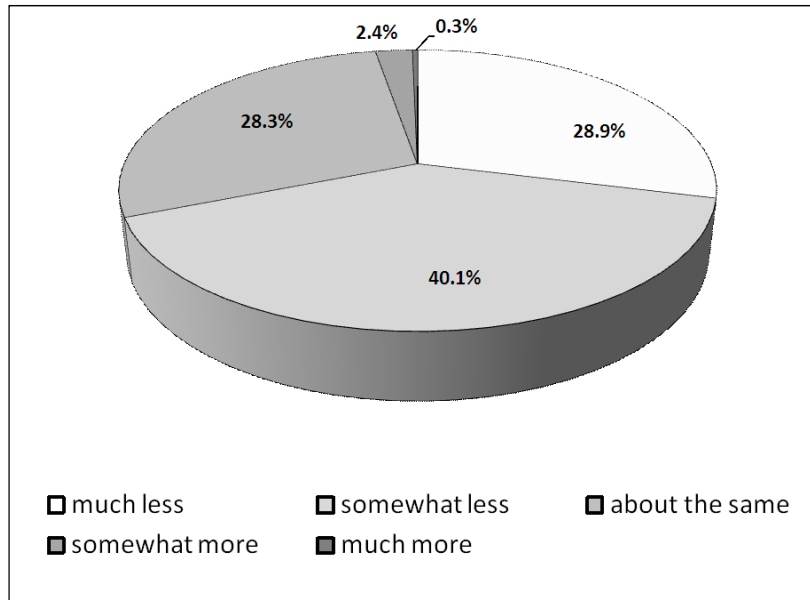


Figure 19 Perceived protection from courts, compared to five years ago

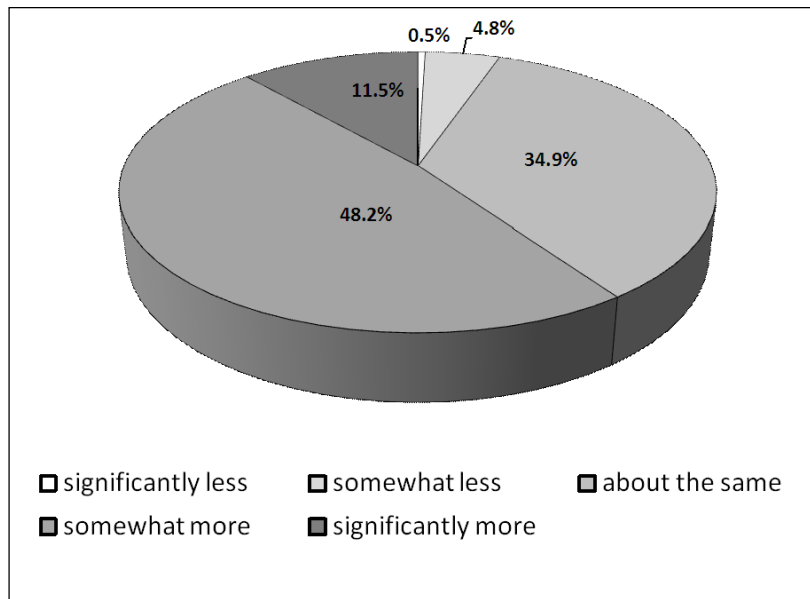


Figure 20 Perceived willingness of prosecutors to issue subpoenas, compared to five years ago

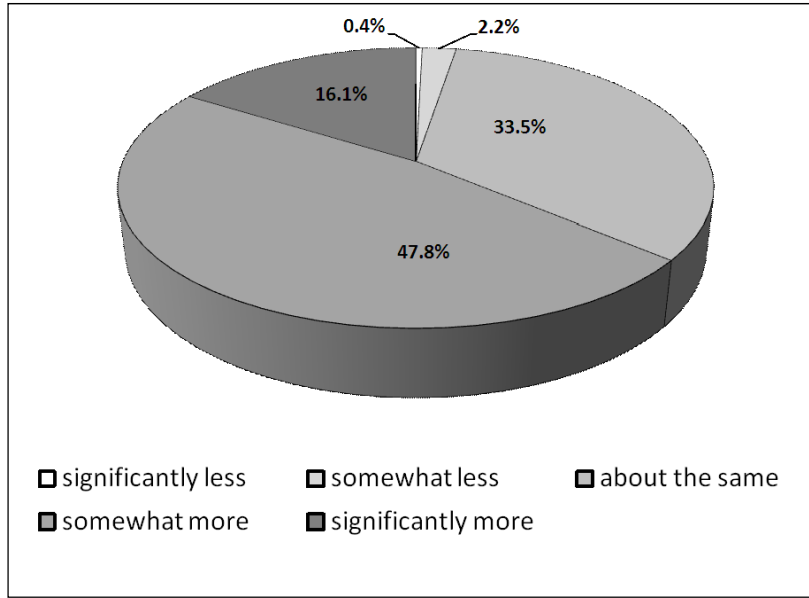


Figure 21 Perceived willingness of civil litigants to issue subpoenas, compared to five years ago

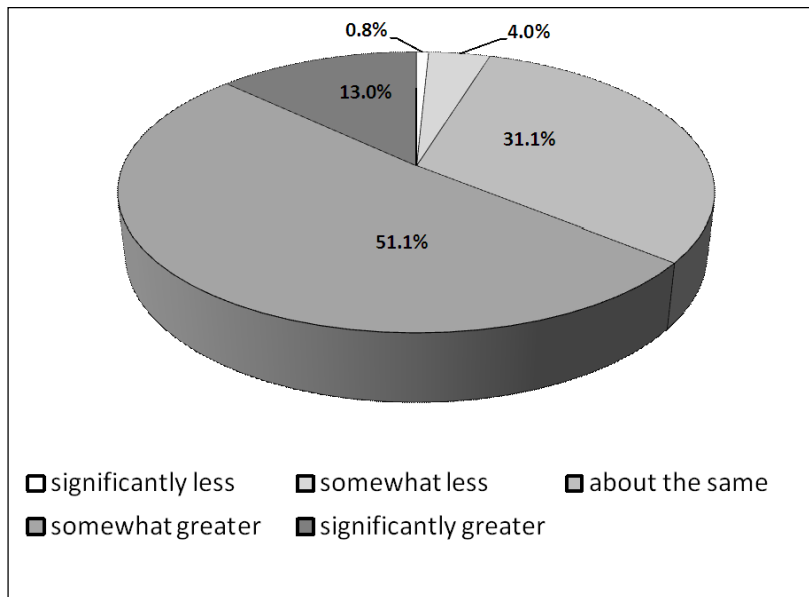


Figure 22 Perceived frequency of subpoenas, compared to five years ago

Reasons for Increase in Frequency	Among the Reasons for Increase in Frequency	Most Significant Reason for Increase in Frequency
Change in climate brought about by recent, high-publicity cases in which reporters asserting a reporter's privilege were forced to testify or jailed	75.6%	37.3%
Increased public distrust of the media	60.9%	16.7%
National political change	57.2%	24.8%
Decreased willingness of media organizations to challenge subpoenas	33.5%	10.3%
Other	16.3%	11.0%

Figure 23 Reasons given for recent increase in subpoena activity

Reasons for Increase in Frequency	Among the Reasons for Increase in Frequency	Most Significant Reason for Increase in Frequency
Change in climate brought about by recent, high-publicity cases in which reporters asserting a reporter's privilege were forced to testify or jailed	83.0%	40.4%
Increased public distrust of the media	68.1%	17.0%
National political change	64.1%	28.7%
Decreased willingness of media organizations to challenge subpoenas	29.9%	6.4%
Other	11.3%	7.6%

Figure 24a Reasons given by newspaper editors for recent increase in subpoena activity

Reasons for Increase in Frequency	Among the Reasons for Increase in Frequency	Most Significant Reason for Increase in Frequency
Change in climate brought about by recent, high-publicity cases in which reporters asserting a reporter's privilege were forced to testify or jailed	56.0%	28.9%
Increased public distrust of the media	42.0%	15.8%
National political change	38.8%	14.1%
Decreased willingness of media organizations to challenge subpoenas	43.1%	21.0%
Other	29.7%	20.1%

Figure 24b Reasons given by broadcast news directors for recent increase in subpoena activity

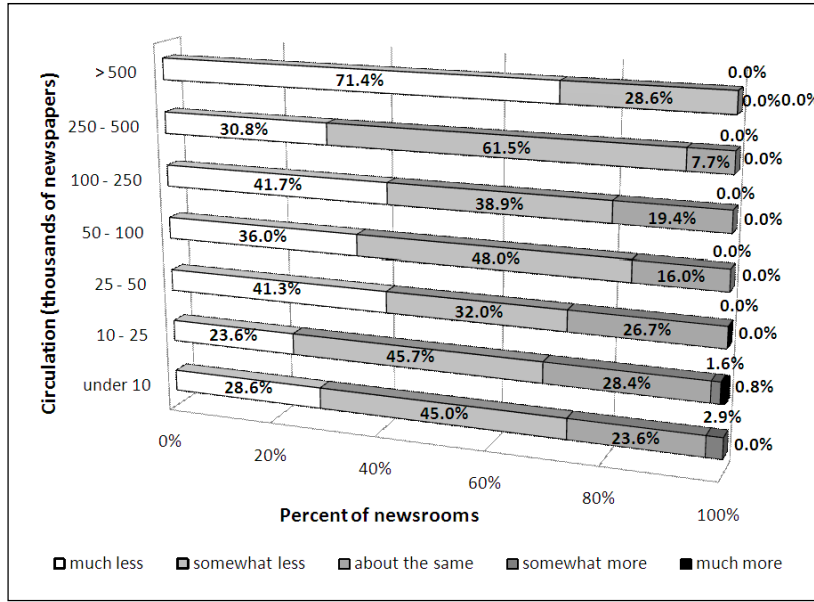


Figure 25a Perceived protection from courts, compared to five years ago, by newspaper size

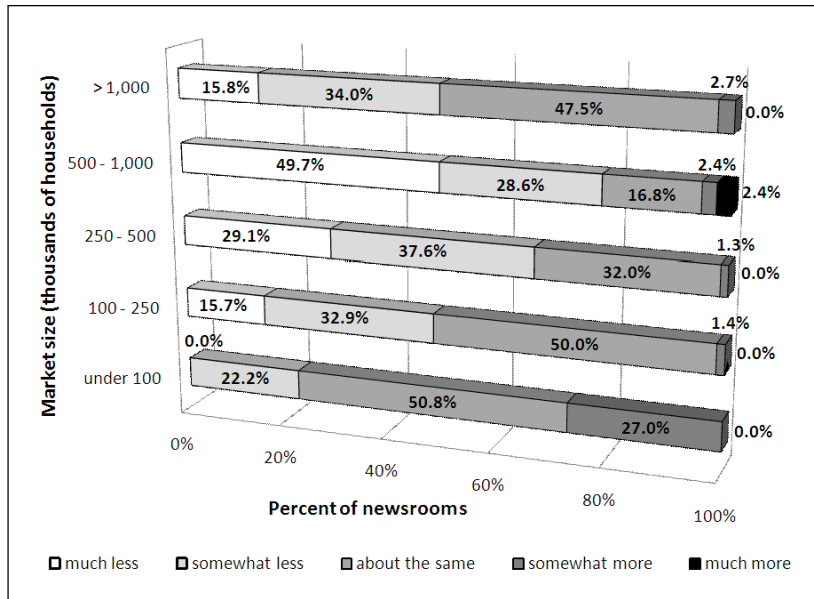


Figure 25b Perceived protection from courts, compared to five years ago, by broadcast size

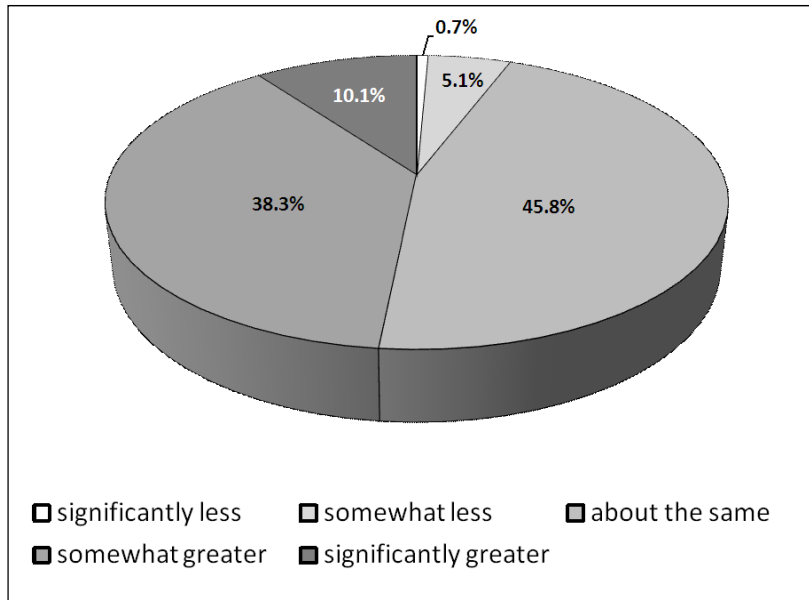


Figure 26 Perceived subpoena risk, compared to five years ago

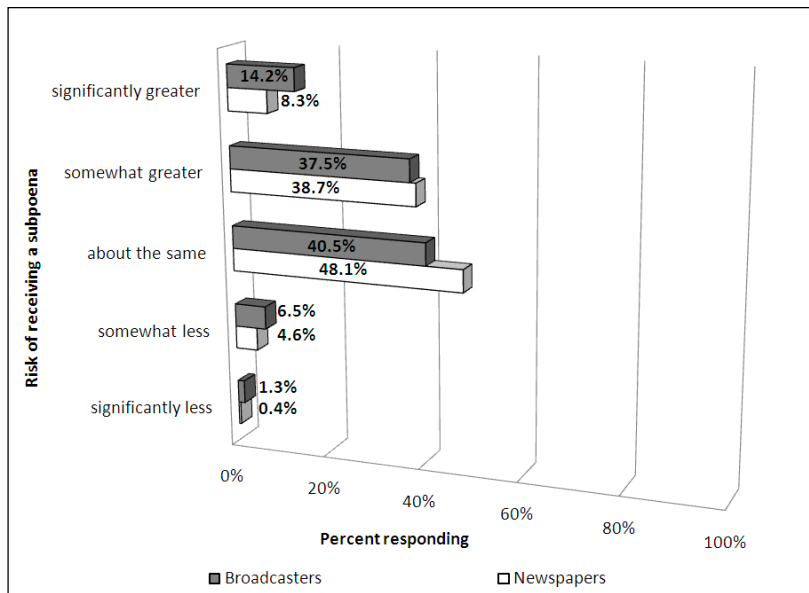


Figure 27 Perceived subpoena risk, compared to five years ago, by medium

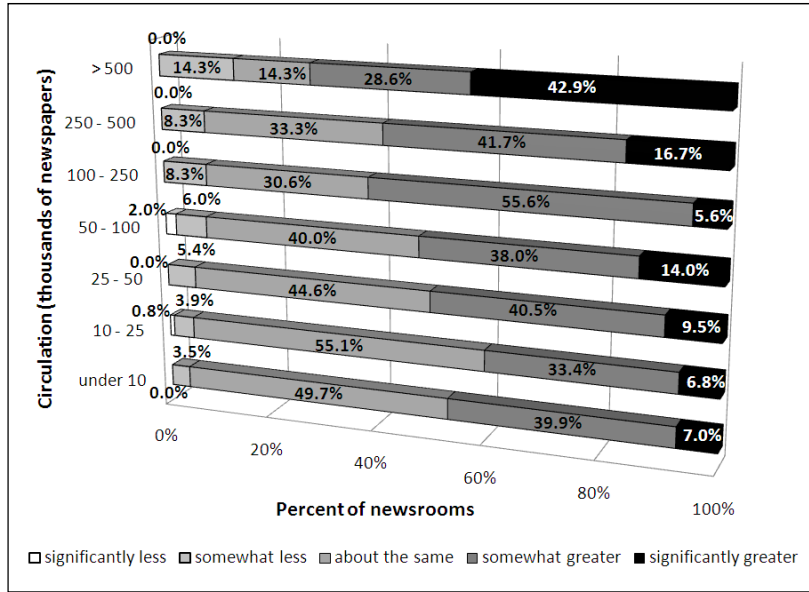


Figure 28a Perceived subpoena risk, compared to five years ago, by newspaper size

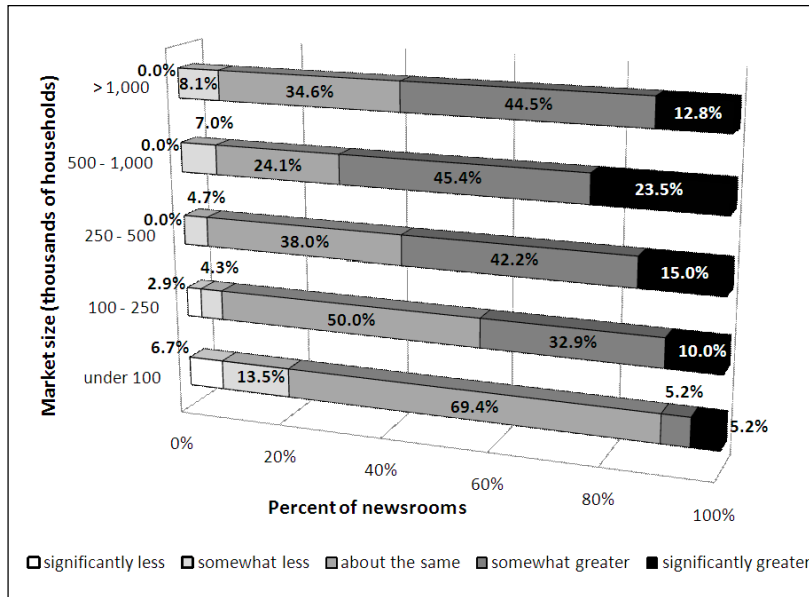


Figure 28b Perceived subpoena risk, compared to five years ago, by broadcaster size

State	somewhat or significantly less
MA	100.0%
RI	100.0%
TN	94.2%
NM	88.0%
MD	83.5%
KS	83.4%
NY	83.1%
OK	82.1%
KY	81.5%
ND	79.9%
AZ	78.9%
CA	78.4%
TX	78.3%
VT	77.3%
LA	77.3%
MN	76.8%
SC	76.1%
MI	75.2%
NV	74.6%
CO	74.2%
NC	73.7%
CT	73.6%
AL	71.3%
VA	68.3%
GA	67.5%
OR	67.4%
NH	66.7%
AR	66.0%
IL	65.5%
OH	64.4%
UT	63.3%
IA	62.5%
AK	62.2%
MO	61.3%
FL	61.2%
WI	60.0%
NJ	59.6%
PA	58.0%
HI	58.0%
ME	57.4%
IN	53.0%
WA	52.1%
ID	48.5%
WY	46.9%
SD	46.1%
MS	45.6%
MT	43.9%
DC	42.0%
WV	29.2%
NE	24.9%
DE	NA

Figure 29 Perceived protection from courts, compared to five years ago, by state

State	somewhat or significantly greater
AK	100.0%
NV	100.0%
RI	100.0%
AR	90.6%
OK	86.6%
WY	85.3%
AL	84.2%
ND	83.7%
TN	82.0%
MS	79.1%
HI	79.0%
AZ	78.9%
NM	77.8%
SC	77.4%
MN	75.2%
MO	73.6%
WI	72.8%
KY	72.2%
TX	71.1%
VA	71.1%
WA	70.3%
PA	68.8%
GA	68.4%
NH	66.7%
IN	66.5%
CA	63.8%
MA	63.6%
NJ	63.5%
UT	63.3%
KS	62.3%
NY	62.0%
ME	61.7%
IA	59.7%
FL	58.3%
MD	57.0%
MI	56.4%
OH	56.3%
NC	53.2%
CO	49.6%
LA	46.9%
NE	46.8%
MT	45.9%
OR	45.5%
IL	45.4%
WV	45.2%
SD	42.6%
DC	42.0%
CT	39.7%
ID	38.2%
VT	18.5%
DE	NA

Figure 30 Perceived frequency of subpoenas, compared to five years ago, by state

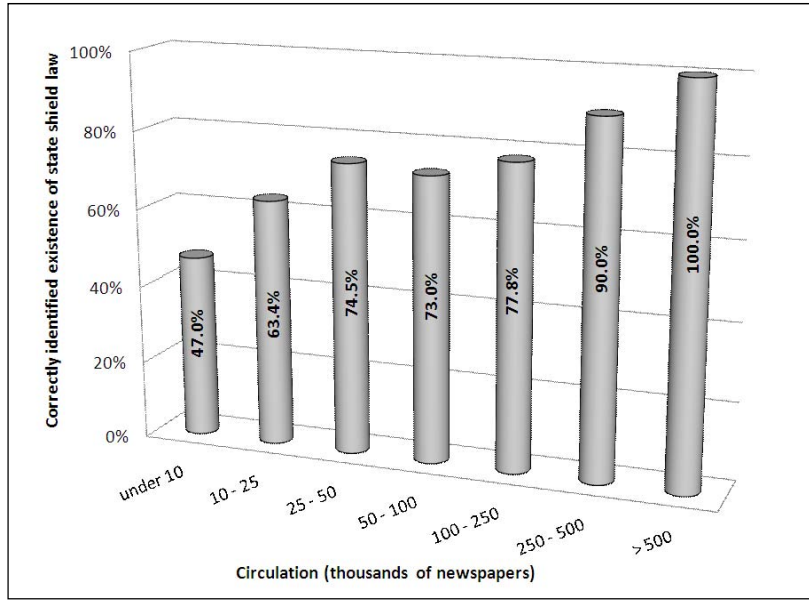


Figure 31a Correctly identified existence of state shield law, by newspaper size

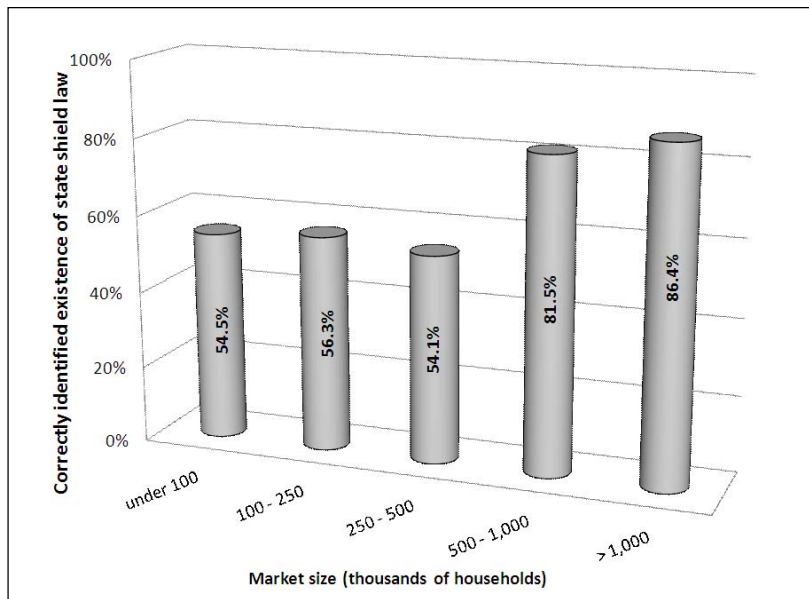


Figure 31b Correctly identified existence of state shield law, by broadcaster size

State	Correct Awareness
WV	28.6%
IA	28.8%
SD	29.4%
WI	32.0%
ME	33.3%
SC	35.4%
NM	35.7%
AK	37.8%
NC	38.5%
ND	40.8%
MI	45.8%
IL	46.3%
OH	51.3%
LA	51.3%
ID	52.2%
IN	54.9%
MD	55.4%
DC	59.2%
KS	61.2%
VT	61.8%
PA	63.6%
RI	64.4%
NV	64.5%
NY	64.5%
OR	64.8%
HI	65.3%
AL	66.3%
FL	66.7%
AR	67.9%
WA	68.0%
MA	68.9%
GA	69.3%
MT	69.6%
CO	71.7%
MS	71.9%
AZ	73.0%
UT	73.4%
VA	75.5%
WY	77.5%
OK	78.4%
MO	78.8%
KY	79.3%
TX	81.1%
NJ	81.5%
CT	81.7%
NE	82.3%
MN	83.7%
TN	86.3%
CA	91.3%
NH	100.0%
DE	NA

Figure 32 Correct awareness of state shield law, by state