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Impact of the Media on Fair Trial Rights: Panel on Protection of Reporters' Sources

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PROFESSOR HANSEN: The protection of news sources is a very interesting subject. It presents a number of questions: (1) Does the media really require confidentiality to obtain this information? (2) If so, how absolute a privilege from disclosure is needed to maintain these sources of information? (3) To what degree should nonconfidential information obtained by the press be protected from disclosure? (4) To what degree are the media's

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newsgathering needs protected by the First Amendment, i.e. to what extent should these needs be balanced against the needs of others such as criminal defendants for that same information?

These questions arise in various contexts: administrative proceedings, civil law suits, criminal grand jury proceedings and criminal actions. Many constitutional issues are interesting but rarely result in real-world disputes. Internal decisions within the press-room and outside requests for the media to reveal sources or non-confidential information occur relatively frequently.

Most of these situations never reach litigation. Yet, for those that are litigated, settlement is rarely an option. The needs of third parties for the information are strong and clash with the media's strongly held view that it must never voluntarily divulge both confidential sources and nonconfidential information.

The existence and scope of the privilege of the press not to disclose information is an issue that has troubled and frequently split the courts. The Supreme Court ruled 5-4 in *Branzburg v. Hayes*¹ that a reporter could not refuse to testify or produce documents in a grand jury. Justice Stewart, in dissent, thought the vote was closer: four and one-half to four and one-half.² (The one-half vote on each side was that of Justice Powell who frequently took a middle position during the Burger Court years.)³ The New York Court of Appeals split 4-3 on the scope of the New York shield law,⁴ and the Third Circuit split 6-6 on the right of the government to subpoena its documents leaked to the media.⁵

In short, these are interesting and difficult issues. I think we can look forward to a very interesting and informative panel dis-

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

2. *Branzburg*, 408 U.S. at 725.

3. See also *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (5-3) (law enforcement officials with search warrant may search newsroom); cf. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991) (5-4) (damage action allowed against newspaper for disclosure of its confidential source in violation of promise of confidentiality).

4. *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 505 N.Y.S.2d 368 (App. Div. 3d Dep't 1986), *aff'd*, 518 N.Y.S.2d 595 (N.Y. 1987) (law applies only to confidential information).

5. *In re Williams*, 963 F.2d 566 (3d Cir. 1992).

cussion. Our first speaker is Martin Adelman

* * *

MR. ADELMAN: I am excited to be here, especially with my friends from the press. I was introduced to talk mainly about privilege. I will, but I can't resist the opportunity to comment on the public's perception of criminal cases. Much of what I have to say will be from the perspective of a criminal defense practitioner.

I just want to make this point first. I see an incredible degeneration going on in terms of both press coverage of cases and defense lawyering. I am not talking about the easy targets—the Geraldo Riveras or Phil Donahues who exploit cases like [those of] Amy Fisher or Katie Beers. The prostitution of the press and prostitutorial lawyer seem to be symbiotic. We see defense lawyers parading on television saying that they have just arranged the confession of their client and getting themselves on television for that purpose.

What I do see happening is a basic pro-prosecution slant in a great deal of press coverage of major cases. [This has progressed] to the point where, if there is an acquittal in a major high-publicity case, it seems incomprehensible to the public. I'll give you three examples from recent memory: the Rodney King case in California, the Lemrick Nelson case in Brooklyn, and the case of El Sayyid Nosair, who was acquitted of murdering Meir Kahane here in New York.

I would think that if you asked the average person on the street what the defense's argument was in any given case, what the defense's evidence was, or what the defense's contentions were, he would be completely at a loss. I think it is because of the difficulty in covering what defense lawyers do at trial. Much of what we do occurs during cross-examination, and it takes patience and an understanding of the whole case. It's hard to [s]it in for one day [and understand the arguments]. It's much easier to cover the prosecution witness who says, "I saw the defendant kill the victim." That's dramatic. It takes twenty minutes for the prosecutor to elicit. Cross-examination, perhaps, takes more patience.

So, when testimony is reported the headline is, "I saw the vic-

tim killed by the defendant.” The first five paragraphs are the direct testimony of the witness, and then there may be a sixth paragraph on cross-examination: “The defense tried to establish that the witness was less than credible.” There is nothing to give a reader a flavor of what the conflict was in the courtroom and what the issue was for the jury to decide. This gets extremely difficult when the public’s reaction to an “unexplainable” acquittal is fueled by the press: “Well, it had to be racism. That was the basis for the acquittal.” In each of the three cases that I mentioned—Rodney King, Nosair, and Lemrick Nelson—that was bandied about as the only basis on which the jury could have acquitted. You heard phrases like, “It’s open season on Whites, Blacks, Jews, Italians.”

I think that there is a real problem afoot; one that I would ask all of us to think about. Obviously this is not subject to legislation, regulation, or control by any other outside agency, but I think the press really bears responsibility to report accurately what a case is about and not merely to repeat what the prosecution is saying.

I will turn to today’s main topic, which is the reporter’s privilege. It is an unbelievable hodgepodge of conflicting law and conflicting concepts. The first issue is constitutional, and the second issue is local and statutory interpretation. The example I use is that of a picture frame—we want to enclose a picture, but the frame is askew. We don’t quite cover enough of the picture, and we cover too much of the wall. I hope I can make that clear.

The first basic issue is whether there is a reporter’s privilege lurking somewhere in the First Amendment. *Branzburg v. Hayes*,⁶ which is the case we are talking about, basically said that there is no such immunity found in the First Amendment in the context of a grand jury proceeding.

The fact is that many lower federal courts and many state courts—and I think the movement is certainly going in that direction—are finding at least a qualified privilege for confidential sources. The qualified privilege is weighed against the tripartite

6. 408 U.S. 665 (1972).

test that the information sought is highly material, is critical to the litigant's claim, and is not otherwise available. If this tripartite test is applied against the qualified privilege and a court determines that the information is highly material, is critical to the litigant's claim, and is not otherwise available, then even though there is a qualified privilege, a court might order the reporter to reveal his sources.

I have tremendous conceptual difficulty with the test, because it seems to me that the test can only supply an answer to some neat encapsulation; a narrow question that a court chooses to employ in a particular case, and you get a ruling. It does not, however, enable a reporter to determine whether she will be called upon by a court to divulge the identity of the next confidential source that she is going to get a story from.

If Arnold Lubasch encountered a confidential source and this were the law—and he understood it to be the law—and the confidential source said, "I have a great story about . . . (fill in the blank whatever it is)." Arnold would say, "This is a fabulous story, I would love to run it." The confidential source would ask, "Can you assure me you will never disclose the fact that I gave you this information?" If Arnold worked in a jurisdiction that applied the tripartite test, and unless he were willing to go to jail like his brother Farber in the Doctor X case,⁷ he would have to answer, "Well, if I were going to comply with the law, maybe it will be confidential and maybe it will not." That, to me, is not a very useful privilege.

I guess that is part of the problem. We talk about protection of sources on the basis of a privilege, but we don't apply the law of privilege as it is applied in all other contexts.

I will go further and make the point that if qualified privilege is the law, the fact is—and think about it—that test will favor the prosecution. The prosecution will be the side able to get the information in a criminal case, not the defense. Why is that? Because the prosecution has a grand jury. If the prosecution has an instinct

7. *In re Farber*, 394 A.2d 330 (N.J.), cert. denied sub nom. *New York Times v. New Jersey*, 439 U.S. 997 (1978).

that there is information that could be useful in bringing a case, it will convene a grand jury and serve a grand jury subpoena, and we have the doctrine of *Branzburg v. Hayes* repeated endlessly, which is that the vital public interest is furthered by the activities of the grand jury. All citizens, including reporters, have the duty to appear and give evidence before a grand jury.

In another case, *Roche v. Florida*,⁸ the reporter disclosed the finding of a family court proceeding. A government investigation was commenced. The Florida court ordered compliance, again because of the sanctity and importance of a government investigation. That's fine, but when the test is applied against a defense request, that tripartite barrier is insurmountable. Most often we find judges saying, "All right, the press is here. They are resisting your subpoena. Tell me exactly what's in this material that you want?" Do you have a crystal ball? Can you predict with total accuracy what's in a document you haven't seen? [Yet], if you can't do that, then you can't begin to support your claim that the information is material and critical to your case. Basically, you get condemned, as a defense lawyer, for being on a fishing expedition.

What I am saying is that even if the test is applied in a neutral and logical manner, it basically means that the prosecution can get the information when they want it and the defense cannot. The defense is said to be on a fishing expedition and the prosecution has a fishing license. They can go fishing any time, and we can't fish at all. So, even if the test makes sense, as it is applied it basically allows the prosecution to intrude on the press and doesn't allow the defense to do so.

There is an intermediate mechanism that is supposedly afoot, and it's a clever potential solution, where the judge says, "Well, I'll examine the material in an in camera review. I'll hear what you have to say, and I'll see whether it seems to fit in to me." The fact is that in most contexts an in camera review basically means that the judge is going to deny the request. The reason for this is that the judge generally doesn't have a very good grasp of what the

8. 589 So. 2d 978 (Fla. Dist. Ct. App. 1991), *review denied*, 599 So. 2d 1279 (1992), *cert. denied*, 113 S. Ct. 1027 (1993).

case is about.

Now, why I am saying that? I try a lot of cases in federal court. The judge has read the indictment. Virtually no judges read the 3500 material⁹ such as the disclosure of witness's prior statements. The judges are spectators at the trial the same way the jury is. It unfolds in front of them.

There is an occasional exception. There is this very interesting case, *Sanusi*,¹⁰ in which the Secret Service was executing a search warrant. There was some mention of this case in an earlier panel. The Secret Service invited a CBS camera crew along into the defendant's home to show the execution of the search warrant. I never learned Spanish, but it's something along the lines of, "Their house is your house, so why don't you come in."

CBS filmed this search. The defendant's wife was there. She saw the cameras and tried to hide her face. The agents found nothing in the search. The defense subpoenaed the film that the CBS camera crew took and CBS resisted the subpoena. Judge Weinstein reached out and said, "I am going to look at the tape." He did so and made a really interesting ruling. He held that the tape was valuable for the defense, not because it proved that the agents found nothing on the search—the defense could have shown that with the agents' testimony in response to the question: "You had a search warrant and went in to execute it but did you find anything?"—the tape was not needed to prove that. Its real value is that it shows the avidness and the zeal of the agents to find something and make a case against this defendant.

It's a very interesting ruling because the average judge would rule that the whole topic was irrelevant at the defendant's trial. The issue is [whether] the defendant did this crime, and the subjective desire of the agents to go forward and find proof really is not relevant. Judge Weinstein held that to show the extent to which the agents were over-zealous, he was going to allow the defense to

9. 18 U.S.C. § 3500 (1988) (including statements of witnesses which are not discoverable until trial).

10. *United States v. Sanusi*, No. CR 92-410, 1992 WL 355436 (E.D.N.Y. Nov. 23, 1992).

have this tape. That is interesting law.

Friday night, following the World Trade Center explosion, I was watching CBS—it was the only channel I could get. At 10:00, on comes “Rescue 911.” William Shatner, now down to earth, televises police responses to 911 calls. That night they were in Tampa, Florida, [where] the major crime that night was a car theft by a teenager. The police were going to suspects’ houses and asking residents to consent to searches, and there was a CBS camera crew trailing after them. They arrested this particular 15 year-old, and there was his mother, fully identifiable, crying, “My son, my son!”

Now, Florida undoubtedly has a confidentiality law regarding juvenile arrests, and I’ll admit they didn’t show this kid’s face. But, if anyone knew the family, they would certainly recognize the mother. It meant that people who didn’t know who he was still didn’t know who he was, but people who knew who he was now knew he had been arrested. This is the same CBS, only four months after *Sanusi*, and they’re not deterred from the identical intrusion.

And I dare say, *Sanusi* was a case where a judge stepped [out of the norm]. The fact is that it’s not going to be followed. The defense won’t get this information.

I am almost towards the end, and, as I said, I don’t understand a privilege which is found to exist, but which yields to a determination of importance. This is a privilege, but gee, if it’s really important in the context of this case that we get the information, then forget the privilege.

I don’t see such a qualified privilege applied to a doctor or a lawyer or a social worker. I don’t see why the press should be burdened with it. The law recognizes the different values that are in conflict. The truth-finding aspect of a trial is of very high value in society. But we give up truth, for example, when we say the Fourth Amendment will bar this piece of evidence. If privilege is important for the press in this area, then I would give up the truth-finding aspect to respect that privilege.

I think that the constitutional framework in *Branzburg* is un-

workable. On the flip-side, I think that in jurisdictions with an overly strong privilege for the press, the privilege begins to get ridiculous in execution.

In New York State we have two major sources for the press privilege: one is the Court of Appeals case of *O'Neill v. Oakgrove Construction*¹¹ and the other is Civil Rights Law § 79-h.¹² Section 79-h doesn't employ a *Branzburg* test for confidential communications. It says if it's confidential, it's absolutely privileged. That aspect is consistent with my theory—Adelman's law. The second part is incredible to me. It says if the press has a nonconfidential communication which it hasn't yet published, it is also privileged, and the three-part test will be applied. Let us be clear. We are talking about a qualified privilege for nonconfidential communication. Where in the law is the theory that if someone doesn't speak in confidence, relying on a relationship that there is some privilege?

We do have a case, and it's an incredible case, *O'Neill v. Oakgrove Construction*¹³ in the New York Court of Appeals. Pat O'Neill was driving on a highway, past some construction, and he got into an accident. The police responded and Gannett Newspapers [also showed up]. Both took photos, and Gannett published one in the paper. O'Neill sued the construction company working on the highway claiming it had arrows pointing in the wrong direction. To prove his case he wanted the photographs that were taken of the scene. He asked Gannett if he could buy them. Gannett sought non-party discovery under the C.P.L.R. and Gannett went to court and said, "You can't have them; they're privileged." The newspaper said, "New York, interpret the New York State First Amendment analog¹⁴ and hold that these photographs in our hands are privileged."

Again, what are we talking about? There was no communication to the press. The [reporter took the photograph] when he went

11. *O'Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277 (N.Y. 1988).

12. N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992).

13. 523 N.E.2d 277 (N.Y. 1988).

14. N.Y. CONST. art. I, § 8.

out to see [the accident site]. I am going to quote, with your permission, two short sentences in the decision and ask you to think about the logic. Here is the first quote, which sets up why the second one is important: “[B]ecause journalists typically gather information about accidents, crimes, and other matters of special interest that often give rise to litigation, attempts to obtain evidence by subjecting the press to discovery as a non party would be wide spread if not restricted on a routine basis.”¹⁵

So, that states the problem: The press is out there doing crime scenes, accident scenes, taking photos, and they will get a lot of subpoenas. Second sentence: “The practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of newsgathering activity, would be particularly inimical to the vigor of a free press.”¹⁶

So, because it’s going to be hard for them and it stops them from doing what they like to do, we are going to find a privilege and decline the enforcement of a subpoena. Think about that logic as a reason to deny a litigant nonconfidential information. “It’s a pain in the ass to have to comply with a subpoena.”

This fellow O’Neill was in a bad accident and undoubtedly was taken to a hospital. That hospital exists to render care to its patients. Undoubtedly the police came, and they made a report. The police exist to stop crime and serve the community. O’Neill’s employer is a plumbing company; it has his work records. The plumbing company exists to make a living for the people who work there. All three of them are going to get subpoenas. The hospital is going to have to lay aside treating the ill to respond to a subpoena. The police department is going to have to stop responding to crimes to respond to a subpoena. The employer is going to have to produce his wage records to both sides. And you know what? They each have a subpoenaed record clerk—that’s part of the cost of doing business in our society.

For the press though, there is something sacred in this con-

15. *O’Neill*, 523 N.E.2d at 279.

16. *Id.*

text—if they have to give up nonconfidential information that's going to disrupt their First Amendment rights.

George Freeman of *The New York Times* is a wonderful lawyer. Why doesn't he go to court and say, "We shouldn't have to fill out payroll tax returns? You know, we are out there doing news. Why should we have to pay payroll taxes? Why do we have to pay city taxes? Why do we have to answer anything? The First Amendment is so incredibly strong." So, I think the frame is askew in section 79-h, which enacts a rule of law based on that kind of logic.

My basic view is that the press probably does a better job than any other institution in our society. I think that press representatives should recognize, [however], the basic pro-prosecution bias in what they do. Why do they write a story the day before a big trial is going to open, outlining everything that is against the defendant, including material that might have been suppressed two weeks earlier, that a jury would not . . . learn about? To help brief potential jurors who are waiting to be called on the case that morning? Why do they cover stories with such a pro-prosecution slant that the public can't accept acquittals? Why do they fight for a privilege beyond that which would be accorded to any other member of society?

These gentlemen will answer that question.

PROFESSOR HANSEN: Our next speaker is George Freeman.

* * *

MR. FREEMAN: Often when I give these types of talks I am preaching to the converted on panels where everyone is a media lawyer taking more or less the same positions. So, it really is both enlightening and something of a challenge when the lead off speaker is taking a position which is, at least in large part, contrary to our views. I think it's healthy and I welcome the opportunity.

Let me start out by taking Mr. Adelman up on his challenge. I—even before we get into First Amendment rights and the reporter's privilege—really do think that subpoenas, as he put it, "are a pain in the ass." I think it's quite remarkable what our system demands of third parties who have nothing to do with the litigation

in terms of the time, energy, and resources. The law seems to demand that anyone basically has to give assistance to an attorney who decides he might need that person's help in some way or other.

Which is to say, if you are preparing for your final exam in tax, but on that day it happens that a lawyer has decided that he wants your deposition because you saw, at a distance, someone hit another person, you have to drop what you are doing and show up or else all of a sudden you will be forced to spend a lot of money getting a lawyer to start making motions to quash.

It's really quite remarkable that this process can get initiated without a judge—just on a lawyer's say-so. Often it is a lawyer—unlike Mr. Adelman—who probably is unprepared, realizing at the last minute that he needs a case, and that he hasn't really properly prepared one. Maybe you can help him. So, he is going to go talk to you, and you have to drop everything you have to assist him.

Now I address those problems which apply equally to individuals, to the hospital, to the police—the police obviously are in the business of supplying this sort of information—and to the media. For obvious reasons that differentiate the media in their newsgathering function from everyone else, they apply with extra force to the argument that the media shouldn't be so burdened.

I would say at the outset that we get subpoenas all the time asking for advertising records, asking for personnel records of employees in divorce cases, asking for other records in contract or bankruptcy cases. We comply with them, despite the fact that it's a pain in the ass, just like any other company does.

I don't think that this system in itself is entirely proper or that it makes a lot of sense, because I think it's far too easy for lawyers to burden people when they could be doing the work themselves. Oftentimes we get a subpoena from a lawyer asking for back copies of *The New York Times*. "That picture that appeared sixteen years ago is relevant to my accident case. Could I have that picture please?" Or, "Could I have that article?" And I say, "Sure you can have the article. There is a building called the Donnell

Library on 53rd and Fifth. It has microfilm copies of *The New York Times*. Be my guest. You don't need me." "Well, yes, I need you because I don't want to spend the time to go find that picture." I say, "Well, neither do I."

Eventually, we get subpoenas for this. I just tell them that they have got to do it themselves, and they generally go away. So, the very notion that any lawyer can basically burden you when he doesn't want to spend the time himself strikes me as somewhat misplaced.

That's really the starting point, because a lot of times—as Mr. Adelman says—the media is in these places—is at crime scenes, is at accident scenes. I don't think that just because we are doing our constitutionally protected job of gathering the news in those places we should then be routinely victimized in terms of our time and our resources to be a paralegal or accident investigator on behalf of lawyers who, for whatever reason, aren't prepared to do the job themselves.

In terms of legal theory . . . the fact is we are different from the hospital; we are different from the police, because we are constitutionally protected and the hospital is not. Therefore, in terms of our newsgathering—as opposed to the business roles that I have been talking about so far—there is a privilege that does protect us for some of the reasons that Mr. Adelman mentioned and for some reasons that he didn't.

I would like to start by outlining the reasons for the reporter's privilege, which admittedly doesn't make a lot of sense to many people. I deal with lawyers all the time who subpoena us. They are aghast when they hear that there is such a thing as a reporter's privilege. We have papers in Alabama and Florida, and a lawyer [will] say, "Well, all I want you to do is to come and tell me what happened. You know, I don't care if you are a reporter. You are like anyone else." The answer is, "Well, we are not like anyone else because the Constitution has given us this added protection, and the courts have recognized that it applies to us in this context."

The reasons, I think, are four-fold. The first reason—and admittedly, this is far more powerful a reason in the case of a confi-

dential source than in a case of a nonconfidential source—is that, if we are going to testify about what people tell us, then it's very probable that people will stop giving us information.

Certainly that's true for the confidential source. If he tells us something based on a confidence, the reporter assures him that based on that confidence he won't disclose from where he got the information if it comes to court. If that promise is then breached, there is little question but that the next confidential source who comes down the pike will be less likely to give him information.

The result will be less information, in totality, out there—and probably more importantly—less information from small people, from the powerless, from the people with complaints about employers, from the people with complaints about products, because they really don't have a vehicle by which to make their complaints known. Rather, the press will be used by government and by big institutions who basically are advocates of the status quo and don't really need the press to voice their grievances. That doesn't seem to me to be a good thing. Therefore, I think the fact that a confidential source can get protection helps and protects unhappy, grieving people who give information to the press in secret because otherwise they would get in trouble, or would be punished, or would get fired.

The privilege in this particular regard is somewhat weaker where you are dealing with nonconfidential sources. On the other hand, one can easily make the argument that it is at least as important, and that those people might not be giving you that information for the purposes of testifying in court. They may be giving you the information so that you can put it in a newspaper. That doesn't necessarily mean they would want that information used against them, for example, in court. They give it to you on that basis.

Secondly, even with regards to a photograph situation, it is not unlikely that—if the press were required to hand these pictures over, such as in the *O'Neill* case—the police, or a guilty party to a traffic accident scene, or someone knowing that a photograph might be used against him in court, would therefore do what he could to deprive the press of access to that scene. Here again, the victim is the public, because there would be less information out

there; less opportunity for the media to gather the news and to disseminate it to the public.

The second reason—which applies equally in both the case of a confidential and a nonconfidential source—is that the media has a tough enough time out there without it being perceived as a stooge or as a slave for either side in a litigation. That is to say, the greatest asset of the media is its credibility. If the media is routinely subpoenaed by one side or another in litigation, that neutrality will undoubtedly be eviscerated because it will appear that the media is working—or at least helping—one side or another in that litigation.

I believe that this argument is all the stronger, when it comes to a subpoena posed by the government. It would be particularly dangerous . . . for the public to believe that newspapers and television stations are there to strengthen and fortify government in its prosecutions or in any other issues which might exist.

Mr. Adelman's notion that we are pro-prosecution couldn't, I think, be further from the truth. Not only is there no different law with respect to grand jury subpoenas than any other subpoenas, but as press lawyers, we oppose those as strenuously and as successfully as we do civil deposition subpoenas, for example. The fact of the matter is that we probably—to the extent we make any distinction at all, and we really don't—will fight even harder against the government subpoena because in our system of government, the press is supposed to be the watchdog over government, not its lap dog. The notion that we would be testifying on behalf of government is even more suspect than the notion that we would be testifying on behalf of anyone else. I think that the point is that if we testify for anyone, readers may begin to think that we are on the side of that party and question whether we can report disputes and litigation neutrally if we take that role.

Thirdly, is the point that the court made in the *O'Neill* case. I must say that—as a lawyer who wasn't involved in the case, but who did give some advice to the lawyers who argued it—my advice to them the week before the oral argument was not to emphasize point three, that the first two points I have just made really are the points the court will be more receptive to. As it turned out,

somewhat to my amazement, the New York Court of Appeals really wrote its opinion on the basis of point three, which is the pain-in-the-ass point—that is to say that the media's energy will be taken up by going to court, and they will therefore have less resources left for reporting the news.

I think that's true and it's particularly true because as we said the media are always on the crime scene, interviewing the crime victim, interviewing criminals, taking pictures of accident scenes, etc., and so they will be the greatest victim of recurring subpoenas like this. Indeed, because the newsgathering role is of constitutional weight and the importance of bringing news to the public is understood in our society, the court felt that this was, in and of itself, reason to ensure that there was a privilege that the press could not be taken away routinely from its professional and constitutional role, merely to get involved in third-party law suits.

A fourth point which is maybe a little more esoteric, although it just came up the other day, is that the media really shouldn't be seen as a vehicle for a government enterprise. Ultimately, the judicial system is a government enterprise. The argument can be made that—just as we talked about before in terms of perception and neutrality—we shouldn't really be a player, or at least a constant player in the government enterprise of the administration of justice. And by testifying in a court proceeding, we really are doing that. We are supposed to report on government and not be a party or a player in its process.

Indeed, just the other day . . . I got a call from our columnist Anthony Lewis. He was asked to testify in a senate hearing to commemorate the thirtieth anniversary of the *Gideon* case.¹⁷ The *Gideon* case—and I am sure [you know] the case better than I because I haven't taken constitutional law in a long time—deals with the constitutional right of a poor person to have a lawyer, to have a legal defense. Anthony Lewis wrote a prize-winning book called *Gideon's Trumpet*¹⁸ thirty years ago on that case. In a sense he was asked to testify, I think, more than anything else, [to pro-

17. *Gideon v. Wainright*, 372 U.S. 335 (1963).

18. ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

vide] a nice historical vignette of what happened thirty years ago. Presumably he might also [have been] asked for his comments about what he thought [of] the legal defense industry and the ability of poor people—of indigent people—to have a legal defense today.

He called me and asked if it would be a problem if he were to agree to testify to this congressional subcommittee, I think it was the judiciary committee, on this topic. I don't like these calls because basically we have a principle that we don't testify and that if we start deciding when we should testify and when we shouldn't—well, this is important and this isn't; this is innocuous and this isn't; this criminal defendant really needs our help and this one doesn't—then we kind of aggregate more power to ourselves which we don't really want. Therefore we take a position across the line that we don't testify. We won't be party to a litigation.

Indeed, once I remember Muhammed Ali called—actually I believe it was one of his assistants—asking for a photograph that we took of a boxing exhibition where he was basically sparring on Wall Street with Wall Street bankers and lawyers. It was a very nice charity affair and Ali had such a good time there that he wanted some photos of it which we had taken, but hadn't published in the paper. I had to tell him, "Sorry, Mr. Ali, we have this policy that we can't give you unpublished photos. I realize how innocuous this is, but we really can't make an exception."

With Anthony Lewis I thought we could make an exception, because it really wasn't litigation. It was an honor more than anything else. Ultimately, however, higher powers than me at the paper on the news side decided, just as I said before, that we shouldn't be a party to this government proceeding. We are covering government, not a part of it. Therefore, we suggested to Anthony Lewis that he not testify.

So, I think that those are the various reasons why this privilege exists, and I do believe that they are strong reasons. I agree that in the confidential source area they are probably stronger than where they are nonconfidential sources. I would like to think that I have tried to persuade you as to why even in the nonconfidential situation protection from reporters having to testify in court is

nonetheless very important.

I would just note very briefly two of the big cases last year that exemplified this. The best example really of the outrageousness of this whole subpoena process, I think, came as an outgrowth of the Anita Hill-Clarence Thomas debacle. The Senate Special Independent Counsel Peter Fleming subpoenaed a *Newsday* reporter Tim Phelps and a National Public Radio reporter Nina Totenberg in connection with leaks that arose about how the Senate Judiciary Committee had been aware that Anita Hill had informed the FBI that she had been sexually harassed by then- Justice-nominee Clarence Thomas.

It wasn't the Senate's finest hour as you will recall. In the eyes of public opinion, the Senate erred first in keeping the sexual harassment charges under wraps. And then after the publication of the charges first was disclosed by these reporters resulting in a public clamoring for more information, the Senate held the second round of hearings which didn't lend great dignity to Mr. Biden or his committee, or to the confirmation process.

In the aftermath of that controversy surrounding the hearings, Fleming's investigation, aimed solely at discovering who leaked the information which led to the second round of confirmation hearings, began. It was undisputed that the reporters broke no law in publishing the truthful information that they obtained in the context of their news gathering functions. Indeed, it was undisputed that even the leaker broke no law, and probably no Senate rule, in providing this information to the journalists. Further, the reporters' depositions were sought despite the fact that the Senate staffers themselves, who were probably the most likely suspects, hadn't been deposed.

Although the media doesn't usually have the support of public opinion in these subpoena cases, I think in this case the inappropriateness of the Senate's attempt to divert the public's criticism of it by threatening contempt against two individuals who were doing nothing more than their constitutionally protected job of gathering the news was critical.

The story, which focused on the performance of two branches

of government in the selection of a candidate for the highest position in the third branch was precisely the sort of reporting which the Constitution most intended to protect. Ultimately, as you know, the Senate backed down and the subpoenas were withdrawn.

This is an example where there were so many alternate sources available before the newspaper reporter and the radio reporter needed to be deposed, that the notion of going to the media in the first place just underscores the inappropriateness of this sort of thing.

I should mention in support of the various arguments I made, an example that occurred just last week in one of our TV stations in Pennsylvania which exemplifies why it is that we get subpoenaed and why this protection is so important. There was some sort of accident at a public gathering. I don't know if it was a hockey game or a concert, but there was litigation arising from a public performance where there were somewhere between five and ten thousand people in attendance. Therefore, there were five or ten thousand eye witnesses to the event which gave rise to this litigation. Of all those five and ten thousand people in Scranton, Pennsylvania, who gets subpoenaed? The anchorman on the news station. Why does he get subpoenaed? Does he know any more than anyone else in the audience? No. It's because he has credibility. He comes in with high public regard, I guess. He is in everyone's living room every night. So, therefore, the litigator decides to subpoena him rather than any of the five thousand other people to testify.

Now, it seems to me that this case exemplifies the notion of the news media being not only exploited, but also used in terms of litigation advantage by one side or the other. It seems to me that's a perfectly good example of why there needs to be protection. Or else in the end anchorpeople like that are going to be spending all day helping lawyers out in cases and that's not their job.

Finally, I would just mention the *Roche*¹⁹ case in Florida, which I think both exemplifies the appropriateness of the privilege, but

19. *Roche v. Florida*, 589 So. 2d 978 (Fla. Dist. Ct. App. 1991), *review denied*, 599 So. 2d 1279 (1992), *cert. denied*, 113 S. Ct. 1027 (1993).

also the difficulty the courts have with it as it now stands. Tim Roche was a reporter in Stuart, Florida, who reported on a court order in what essentially was a child abuse case. The court order deprived the natural parents of custody of the child because of child abuse and in fact, the previous death of one of their children.

Under Florida law, this sort of order is supposed to be confidential. However, the judge who made the order didn't seal it and didn't write any special order underscoring its confidentiality. Someone in the court system, we don't know who, disclosed it to a wide variety of reporters. For reasons that are somewhat unclear, the fact that reporter Roche published the story pissed the judge off particularly. The judge suggested that there be an investigation of Roche's publication of the story and how Roche got the information.

Why Roche was singled out is unclear, but at any rate, he was subpoenaed by a state attorney who investigated this complaint. He refused to testify as to who gave him the information. The Florida appellate courts were particularly inhospitable to his appeal, and ultimately Roche petitioned for certiorari to the U.S. Supreme Court.

What's interesting is that, on the one hand, it seems to be an awfully straightforward confidential source situation where the reporter ought to be protected, because he pledged confidentiality to his source. Certainly the publication of this was something that ought to be protected.

On the other hand, as the case was litigated in the Supreme Court, Roche's lawyer really did everything he could to avoid this being postured as a reporter's privilege case, because the signals the U.S. Supreme Court has given in recent years on the reporter's privilege are not terribly strong. Indeed, to say that *Branzburg* would even get four and one-half votes today in favor of quashing a subpoena is perhaps unlikely. So, what the lawyer did cleverly was not argue the case as a reporters' privilege case, but rather argue it as a case involving punishment for the truthful information of newsworthy facts. Something which under various other Su-

preme Court cases including *Florida Star*²⁰ and *Cox Broadcasting Corp. v. Cohn*²¹ is unconstitutional.

The Florida courts really helped in this regard. They were so irate that this news had been published that most of their opinions really dealt with the inappropriateness and the illegality, in their view, of Roche having published the news. They kind of almost forgot that the purpose of the inquiry was to get Roche to say where he got the news from.

So, the case was argued really as punishment for publishing truthful information, rather than as a reporter subpoena case. Fortunately—from my point of view—the Supreme Court denied certiorari, notwithstanding the fact that since it had originally granted a stay of Roche's incarceration meant that four justices were interested in the case.

Anyhow, when it came time to review it, they denied review. As I found out in Florida last weekend, Roche is now going before a special clemency board to try to keep out of jail for publishing what a lot of other people published and what routinely was given to him in his job as a reporter covering this case.

I guess I should stop at this point and let the panel answer. I will just answer Mr. Adelman's points on journalism, although my colleague Arnie Lubasch probably can do that better. Frankly, not being a partisan in criminal cases, I don't really see any of the one-sided reporting which he was talking about.

Indeed, in the last few days I have been reading articles about the rather terrible case in New Jersey involving the alleged rape or sexual assault of a girl. I have been trying to figure out which way the jury is likely to decide, because I find the case interesting and think the jury is going to have an awfully hard job. In reading our articles, anyhow, I have no idea because the reporter has not even hinted at the reporter's view of the case, much less at the view in the courtroom of how the jury is likely to decide. So, it strikes me that if I can't even figure out what kind of a result is likely to

20. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

21. 420 U.S. 469 (1975).

ensue having read all the articles through the case, and having read the summaries at the end of the case, it strikes me that's got to be pretty straightforward reporting.

The second example, I will just mention is in the *Westmoreland* case.²² As you know, General William Westmoreland sued CBS in the mid-80s in a libel case. In that case the *Times* was criticized terribly by both sides as being biased and unfair. Now, I start from the proposition as someone who has refereed a lot of basketball games that if you are criticized by both sides about equally you are doing a great job. That was the case in *Westmoreland*. It was interesting because Westmoreland was basically complaining that the *Times* favored CBS because it was another media company. On the other hand, CBS complained, as Mr. Adelman suggests, that we were helpful to Westmoreland because we basically covered more of his side of the case. After all, he was the plaintiff, he went first. In the course of the normal reporting day, he would be doing direct examination and cross would only come late in the day and might be somewhat disjointed.

The fact of the matter probably was that the reporter, by late in the day, was writing a story for deadline of what happened in the earlier part of the day. Occasionally it happens, not because of bias, but for practical reasons, that you tend to report more on one side of the story than the other. A disjointed cross-examination where they try to impeach the witness by establishing whether he did something at 6:37 or 6:38 is not as interesting to a reader, nor as much of a component part in a narrative, as the case that the prosecution is putting forth. Although, certainly, I would think that when defense has its part of the case, and its witnesses were there, they would be covered in the same fashion as the prosecution's.

In any event, those are my thoughts on the reporter's privilege.

PROFESSOR HANSEN: Thank you very much. I think now before we have the broad-based conversation, maybe we could ask for a few comments from each of the panelists on what they have heard—any insights they have from your own particular experience.

22. *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170 (S.D.N.Y. 1984).

Then we'll go into general questions that the panel can discuss. The first panelist is Professor Mark Conrad.

* * *

PROFESSOR CONRAD: I was struck not by contradiction, but something that I would be curious to bring up, particularly involving *Roche*. Mr. Freeman argued very strongly in terms of a source privilege noted New York Civil Rights Law § 79-h. As a converse to that, the press also claims that they have a right to publish truthful information. If it's truthful information, it should not be actionable in a privacy claim, and we are really talking about privacy or tort matters. Generally speaking, the Supreme Court, at least, has upheld that right, although by shrinking majorities as the years have gone by, for example in the *Florida Star* case.

Can you think of an instance—where it could possibly be the case that the press would not have the right to publish something that could be truthful in the legal context involving a court proceeding, juvenile victim, rape victim, etc., legally not ethically, because I know many papers don't, but legally? Should there be a line? Can there be a line?

When I teach these cases to my class, my students generally are very upset at these decisions, even with the First Amendment claim. They feel [that] this is just outrageous and should not be protected in the context of a privacy claim. So, what about the rights of the complainants in a crime, the victims of a crime?

Also of interest to note is that the case cited by the Supreme Court last year, *Cohen v. Cowles Media Co.*²³ did not come up in the context sources. It was a pretty interesting case. It dealt with contract notions as well as constitutional notions—I think that's something that should come up whether it signals a new trend on the high Court (given the close vote), or whether it's a restatement of an old common law doctrine.

PROFESSOR HANSEN: Next is Nicholas Jollymore.

* * *

23. 111 S. Ct. 2513 (1991).

MR. JOLLYMORE: I basically agree with George Freeman in his approach, which I guess isn't surprising. One of the things, though, that came to mind as I listened to George was the fact that the press is often perceived as being very arrogant in claiming special constitutional protection.

Once, when I was in private practice I represented a newspaper editor whom the FBI wanted to talk to and whom the Assistant U.S. Attorney was prepared to subpoena. We had a conference call with this Assistant, Dane W. Parver. When we invoked the substantial protection which exists under the Attorney General's Guidelines,²⁴ she was absolutely outraged and literally screamed at us, "Who do you think you are, God?"

I think that is a fairly common reaction—maybe somewhat stronger than usual—but the media often is perceived as being too arrogant, and maybe it acts somewhat too arrogantly in asserting its First Amendment privilege.

If you look at the First Amendment interests which are protected, however, I think the media's behavior makes more sense. It's not that the media enjoys constitutional protection for its own enjoyment or for the freedom of its reporters, so that they can act arrogantly. The protection exists so that the public can get a flow of accurate information.

I like Justice Stewart's article²⁵ in which he argues that the press is one of the only institution—I think he says—that enjoys special protection under the Bill of Rights; the remainder of the rights benefit individuals. In fact, I don't think that is literally accurate. In the First Amendment itself, the church is given the same kind of constitutional protection that the press receives—freedom from government control over the church as an institution.

If you look at the history of the First Amendment, you will find the Framers adopted a mechanism to protect free press rights which owes much to the doctrine of separation of powers. It is the same

24. 28 C.F.R. § 50.10 (1992); see, e.g., *United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982).

25. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

concept that was used to set up the three branches of government, though the concept wasn't articulated as fully in the First Amendment as it was in the body of the Constitution.

The notion which underlies the doctrine of separation of church and state, underlies the First Amendment's proscription that Congress shall make no law abridging freedom of speech, or of the press. It was a current notion when the First Amendment was adopted that the press was, indeed, a fourth estate. I think it was the intent of the Framers to erect a barrier between the state and the press, just as they intended to erect a barrier between church and state.

This vision of the First Amendment makes a lot of sense. It also defuses this view of the press as being an arrogant entity. The role of the press is as separate from the judiciary as is the role of the administration. It properly should be.

My company, for example, has a library on the 26th floor of the Time & Life building which is filled with file after file of newsclips. There are tons of interviews conducted by the correspondents of *Time*, *People*, *Fortune* and other magazines. All of our correspondents' files are stored in that library. It contains all kinds of information that was never published, which would be very interesting to many litigants, government officials, and defense attorneys. People who are interviewed by the press would be surprised, to say the least, to learn that a transcript of their comments might be turned over to a grand jury, a defense lawyer, to civil litigants, or investigative agencies. If the press willingly surrendered such information, I think it is literally true that sources would be less willing to talk to the press.

That is why the notion of separation of powers is important for protection of the press. The text of not only the free press clause, but also the establishment clause, demonstrate that the doctrine of separation of powers was in the minds of the Framers when they drafted the First Amendment. That notion makes sense. If you think of the press as a fourth estate which operates independently from the judicial system, then you should reach the conclusion that the press must operate independently and should not be required to respond to be subpoenas in any manner.

PROFESSOR HANSEN: Our next panelist is Arnold H. Lubasch.

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MR. LUBASCH: I think I am probably one of the very few people in this room who is not either a lawyer or about to become a lawyer, which I think puts me at somewhat of a disadvantage. I feel surrounded. But I deal with lawyers almost every day in the court, more so than with any other profession.

I think it was Professor Jollymore who was speaking of reporters—the press in general—being looked at askance by the public because of the perception of arrogance. Reporters, journalists, and lawyers seem to be among the lowest esteemed people in the country. Whenever they have these polls as to what the public thinks of professions, politicians rank right near the bottom and sometimes lawyers or journalists manage to beat them out for the lowest rung.

I think it's partly [for this reason that] I get along well for the most part with the lawyers I deal with. I think that both of us, both professions, are probably misunderstood—perhaps partly for the same reason. We both assert our constitutional rights for unpopular causes. Reporters, journalists, asserting our right to do things that people think we shouldn't be allowed to do, that people find arrogant or outrageous. But we have a very strong feeling that we need to protect our right to get all of the information [available], even if it's information that is going to offend some people.

Lawyers—particularly defense lawyers—very frequently defend causes and people who may be regarded as reprehensible: the child molester, the ax murder, the John Gotti's of the world. In that way, perhaps, it's because we are defending causes that are unpopular that the public perceives us as being arrogant and [wrong-minded].

[As regards my] own role as a reporter, I would agree with something George said; I think it's very important for reporters not to be players or participants at all. We are observers trying to be fair. If we are any good at our job, that's what we are trying to do.

PROFESSOR HANSEN: Our last panelist is William A.

Rome.

* * *

MR. ROME: Good morning, everyone. I would take on Mr. Adelman more directly on some of the points he made. His first point was to the effect that media coverage of criminal trials is generally pro-prosecution. I don't really think that's the case, and I think we need only look as far as the numerous trials in which John Gotti has been acquitted. In those trials, Gotti's attorney Bruce Cutler—and those attorneys who have since followed him—were able, in some people's views to co-opt the media and create a climate in which you could never impanel a fair jury for the prosecution. Although we have no empirical evidence on this point, this treatment may have resulted in Mr. Gotti's acquittal on a number of occasions.

I think that if there has been degeneration—which I am not quite prepared to disagree with you on—it has really been on both sides. In fact, what the defense attorneys do in high-profile cases is try to win the battle of public opinion as much as anything else. The newspapers are there to report on both sides.

So, I would disagree that newspaper coverage of these high-profile criminal trials tends to be pro-prosecution. In fact, in one of the Gotti cases, our office received criticism from the U.S. Attorney for emboldening Mr. Gotti through our coverage in the *New York Post* depicting him as a silk-stocking, seven-hundred-dollar-suit man who could take on the mighty and awful United States government.

I would also disagree with Mr. Adelman about the quantity and quality of the subpoenas. Most subpoenas that we receive on behalf of the *Post* are not from prosecutors. Prosecutors, as Mr. Adelman I am sure knows, have Justice Department guidelines which essentially incorporate the three-part test, and prosecutors don't often subpoena the media anyway because they don't want bad press, given that the chief prosecutor is usually a political servant.

In general, what do most of the subpoenas we receive deal

with? Personal injury cases like in *O'Neill*²⁶—some plaintiff's attorney wants to get a gruesome picture before a jury to increase the amount that he can wring from the jury—like a car accident picture. Various other things like that, as George quite properly framed it, are quite an imposition.

You get the reporter, the photographer who took the picture, and the editor upset. Each has to call the attorney. At the *Post*—where maybe we are on the outer limits of some journalistic practices—this is resented. We can get two, three, or four of these subpoenas a week, which are, in fact, an imposition. In some cases, and in fact most cases, two or three phone calls later, it has gone away. Why is that? Because in most cases the subpoena is a fishing expedition—either the defense attorney in a criminal case or the plaintiff's attorney in a personal injury case is just looking for something to decorate his case with—to spruce it up.

Nevertheless, where a subpoena would uncover exculpatory evidence in a criminal case, that is probably the toughest case for the press to argue because you have a straight-on Sixth Amendment/First Amendment conflict. In cases where the press does have the exculpatory material, having talked to someone who saw the crime, for example, maybe that's a case that the press should lose. In some cases, the press does lose if the subpoenaing party can show an exhaustion of sources. Thus, I would disagree that most of these subpoenas have a strong cogent purpose. Most of them do not. Finally, the other thing I would like to address that Mr. Adelman brought up was his rendition of the *Sanusi* case²⁷ which no doubt was described in the manner it was because he is an adversary. In fact, in *Sanusi*, although recognizing that the defendant could otherwise obtain Secret Service agent testimony at trial say that they didn't find anything at the apartment which would show the crime or the fruits of the crime, Judge Weinstein thought that the tape was so valuable that the defendant should have it—because, I suppose, a picture is worth a thousand words. Therefore, Judge Weinstein actually weighed the quality of the

26. *O'Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277 (N.Y. 1988).

27. *Sanusi*, No. CR 92-410, 1992 WL 355436.

evidence that he thought a defendant was entitled to. If more judges were to do that, we would have more defense attorneys like myself screaming about it, because that's a clear case where there was an alternative source—the testimony of the Secret Service agent. You could have a defense attorney as vigorous and as good as Mr. Adelman to cross-examine that secret service agent until his pants fell down—that you looked there for two hours, and you looked in that drawer, and this drawer, and that closet and you didn't find anything.

Judge Weinstein said no, you are entitled to the tape because that evidence might, as a practical matter, entitle that defendant to a not-guilty verdict. I think for the media that the *Sanusi* case, coming from Judge Weinstein, is very troublesome.

PROFESSOR HANSEN: I think we probably should allow rebuttal. Mr. Adelman spoke first, so Martin, why don't you start?

MR. ADELMAN: Well, I don't feel as under attack as Mr. Jollymore, who doesn't deal frequently with the U.S. Attorney's office and who repeated one conversation [where he was asked] "Who do you think you are?" I get abused by the U.S. Attorney's office hourly in the course of my practice. So, I don't have a problem with the style.

I was just . . . intrigued by Mr. Freeman's response that, because newsgathering is protected by the First Amendment, nonconfidential communications that are received or things that aren't even communications should equally be protected because that's how one upholds the exercise of the First Amendment.

I don't really think of myself as paranoid or having a bunker mentality. But, if the U.S. Attorney's office has subpoenaed a defense attorney to disclose who paid the fee in the case, and the John Gotti case being one instance, if they subpoena defense counsel, the defense counsel can't say, "Wait a minute. I am right here in the Bill of Rights. See the Sixth Amendment? It applies to me just as much as the First Amendment applies to the press. If you are going to burden me in a nonconfidential area like how much the fee is, or who paid it, you are inhibiting my client's exercise of his Sixth Amendment rights and our attorney-client relation-

ship—the institution for which the Sixth Amendment lives.” The Second Circuit refuses, “Go into that grand jury and answer the question.”²⁸

So, the press says, “We’re in the first ten amendments?” Defense lawyers would say the same, but the argument that Mr. Freeman makes would not and does not avail a defense lawyer who says if you make me answer questions like this, you kill my relationship with my client, and my relationship with future clients.

It is a *sui generis* rule, only for the press under a super-strong interpretation of the protection of the First Amendments. Anybody else who is covered in [the Bill of Rights] can’t argue that the non-core aspects of their work are also covered. I find that intriguing.

In terms of arguing the fairness of coverage, that’s easy. We are not in Greenland. You all read the papers every day. You can be the judge.

I certainly agree that there is some strange reason why *The New York Times* is covering the Glen Ridge rape trial in a fashion that I can’t recall another case being covered. What I mean by that is not that there is an article every day, but the fact that the articles not only report what occurred. They summarize and give impressions, which I think are very neutral. But the depth of that coverage reflects some thinking on the part of some editor in *The New York Times* which I can’t begin to penetrate as I read it.

I do think, though, if you considered any other case that occurred, or that will occur in the future—you read it. All direct doesn’t start in the morning, and all cross doesn’t happen in the afternoon. Examination goes day-by-day. The next time any of you folks want to see who is right, take a look at the report of a case—say summations. See how many paragraphs are devoted to what the prosecutor said, how many paragraphs are devoted to what the defense said, how generalized is the report of the defense argument, and how fact-specific is the prosecution’s argument.

I think that perhaps I didn’t express as well as I should have

28. *In re Two Grand Jury Subpoenae Duces Tecum*, 793 F.2d 69 (2d Cir. 1986); *In re Shargel*, 742 F.2d 61, 62 (2d Cir. 1984).

my view of the reporter's privilege. I think that there should be a privilege for confidential communications. I think the Supreme Court should go 9-0 for [this privilege]. I don't have a problem with that.

I think once you reach the softer ground of nonconfidential communications, you are only left with, "Boy, this is a pain in the ass." And I understand there are abuses and I understand there are bad attorneys doing it. That's the stuff at the fringes, and it doesn't avail us to argue about that. Looking at the core issue there is no logic on which nonconfidential communications should be protected and immune from discovery.

MR. JOLLYMORE: I would like to say something about nonconfidential sources. First, every source who gives an interview to a journalist does so with an understanding that the information is given only for possible use in the news media. There is a confidence, in a very real sense, that the information will not be used for other purposes. Second, the kind of confidential relationship envisioned under most state shield statutes is one which, in the real world, seldom exists. For example, I often get either a request for information, or a subpoena which requires me to ask our reporter, "Is this a confidential source?" I find that the terms "confidential source," "off the record," "not for attribution" or "NFA" are used so loosely among journalists that there is no common understanding of what is a confidential source in the "legal" sense.

So I ask the reporter, "All right, just tell me: Did you say to the source, 'I promise you that I will not disclose your identity or any unpublished information?'" The reporter responds, "Well, I don't have a formal agreement like that." More often than not, therefore, we are in a position where we can't put a reporter on a stand to testify that he or she made a binding agreement of confidentiality. The cases in which we can legally claim a confidential source in that sense—that is, cases in which reporters have promised they won't disclose identities of sources or unpublished information—are very limited. The legal notion of what constitutes a confidential source does not conform to reality. Mr. Adelman, you apparently believe that the news media has no legitimate claim for immunity from subpoenas when it relies on so called nonconfiden-

tial sources. Not only is that view unrealistic, it is bad policy. As I said earlier, all information is imparted to journalists under some confidence. I was thinking about this Friday as I watched television coverage of the bombing of the World Trade Center garage. Television journalists interviewed people coming down from the Trade Center towers exhausted, coughing, with their faces filled with soot. A lot of them were outraged that there was no instruction from the World Trade Center or the Port Authority on how they should get down. There was a complete breakdown of emergency communications. They freely told this to the television journalists.

Now, if a defense attorney or a prosecutor had approached these people and said, "Would you please come and testify before the grand jury about this," I bet nine-tenths of them would say, "Well, please, I don't want to get involved." Further, if they knew that by talking to a television news team that the videotape of their interviews would be subpoenaed, I think they would have the same reluctance. Yet, it was very important for this society that television stations were able to disseminate this information, because it prevented the Port Authority from skirting the issue of why there was a complete breakdown in emergency communications. Port Authority officials were forced to answer questions about this breakdown in a public forum, and it eventually came out that the Port Authority knew that the position in which the emergency generator was placed was vulnerable to flooding which would result from an emergency such as a bomb attack. Officials were forced to admit that they had actually studied and considered that issue.²⁹ They could have placed the generator on a higher floor, but they chose instead to place it in the basement. I think that this information may not have come out, and I think the generator might be rebuilt where it was before it was blown up if it hadn't been for

29. See, e.g., Anne Marie Kilday, *FBI Confirms Bomb Caused Blast in N.Y.*, *HOUSTON CHRON.*, Mar. 1, 1993, at 1; Michael Moss & Joseph W. Queen, *PA Knew of Flaws; Safety Violations Went Unfixed*, *NEWSDAY*, Feb. 28, 1993, at 3; Michael Moss & Joseph W. Queen, *Safety Gear; Crucial Systems Were Never Put In*, *NEWSDAY*, Mar. 2, 1993, at 5; Lawrence C. Levy, *Two Disasters—Twin Case of Bureaucratic Sin*, *NEWSDAY*, Mar. 3, 1993, at 91.

the willingness of the people who came down from the World Trade Center towers to talk to the reporters. Keep in mind that none of those people were confidential sources in the strict legal sense. If the media's protection from subpoenas did not extend to these nonconfidential sources, the videotapes of their interviews would be readily available to litigants in suits arising from the World Trade Center explosion. If litigants could routinely force the media to deliver up its nonconfidential out-takes, I expect that far fewer citizens would be willing to stand before a television crew and disclose controversial facts, such as the breakdown of the World Trade Center's emergency communications.³⁰

So, in some sense every conversation that a reporter has with a source is a conversation in which there is a confidence, because the source thinks, "I know this is a reporter. I know how it works. The information I am giving is either going to be published or it's going into the news organization's files. But it's not going to a grand jury. It's not going to a defense attorney." Sources are more often willing to speak, and speak truthfully, because they understand these ground rules. If you change the relationship between the media and its sources, the interest which suffers the most is the public interest. In this example, the public interest was served by news reports which forced the Port Authority to promise that when the emergency power generator is replaced, it will be on a high floor of the World Trade Center and not in the underground parking garage, where it is more vulnerable to damage in an emergency.

MR. LUBASCH: They won't be protected because the generator remains in the basement where it might be vulnerable to a bomb. I think that there is a real strong argument for protecting nonconfidential sources.

MR. ADELMAN: Well, if I didn't think there were different

30. As a result of the publicity concerning the failure of the emergency procedures immediately after the explosion in the World Trade Center parking garage, New York City officials announced they were considering new building codes to govern the placement of emergency power generators. See Clifford J. Levy, *The Twin Towers; Explosion May Yield New Building Codes*, N.Y. TIMES, Mar. 4, 1993, at B4.

values being weighed in the decision that has to be made, then obviously there wouldn't be a debate. I agree with you, there is a decision, which means there are good arguments on both sides.

I appreciate that argument, but, again within the continuum, from no protection for the press and no right to resist subpoenas to the other side—no response at all, nobody home. I think that the line should not be drawn at, "We don't do that business, we don't have a subpoenaed records window." I think that the line should be somewhere further back than that.

PROFESSOR HANSEN: George, would you like now to respond to some of these comments?

MR. FREEMAN: Yes, I will start out by responding to the last comment. I think that, as we have pretty well brought out in the course of the debate, in the case of a nonconfidential source, there is a balance. That balance is struck by the three-part test that Mr. Adelman set forth earlier.

I don't think one can fairly say that the test isn't a good test or that it doesn't set up the line about where it should be drawn. Personally, I think that line ought to exist in any subpoena that takes you away from your homework or takes a businessman away from his business. But it certainly ought to apply where it takes a newsgatherer away from gathering the news in the future, where, as Nick just said, it jeopardizes communication and dissemination of news in the future, and where it impugns the neutrality of the media.

Because the first part of that three-part test—it really is a two part test (it is called three parts, but it really is two parts)—is that the information can't be gotten elsewhere. There really seems to be little reason, I think, for anyone to argue why, in the case of Scranton, Pennsylvania that I mentioned earlier, you have to go to the TV people first. It seems not unreasonable, given that there is a constitutional protection, to go to the media last—only if there are no other equally availing sources. The reason that people go to the media first is because of the credibility we bring to the party in the first place. Yet, that ought not to be a reason because we are being exploited by the litigators. Often we get these accident

photo requests, even when the police have taken accident photos. Why do they want our accident photos? Because we are better photographers. Well, that is great, but it seems to me that is not enough of a weight to throw into the balance than the constitutional protections I have tried to enumerate.

The second part of the test is that the information is critical. It strikes me that if the information is not important—if it is just as Bill said, to adorn a case, to spruce it up—then I don't think that anyone should be bothered by a subpoena. That is just lawyers—a kind of lawyering—and I think that is why lawyers have bad images—because they are intrusive, as are the press sometimes in third party behavior.

I don't think there is any reason why any of us should be bothered for that, but again, particularly not the constitutionally protected media, which isn't to say that if the information is critical, as Bill said, then we might well lose. If it is critical, you can't get it elsewhere, and it is really important to the case, then those concerns might overcome the arguments I have made in favor of non-confidential information from nonconfidential sources. But where it was not critical, and you can get it elsewhere, then why come to the media first?

I would make one other comment answering Professor Conrad's question—which is a good question that we get quite often, and have gotten the last year at *The New York Times* quite often, in the wake of our publishing the alleged rape victim's name in the William Kennedy Smith case—whether it can ever be the case that publishing truthful information should be an act for which we should be held liable. The confidentiality law basically is that if it is truthful information, if we lawfully obtain it, and if it is in the public interest—that is a matter of legitimate public interest—then we are constitutionally immune from penalty. I would answer Professor Conrad's question that if we get information that comes out of a court proceeding, then basically, on a per se basis and absolute basis, it is in the public interest, it certainly is what happened, because we reported what happened in the court proceeding, assuming that we didn't somehow steal it or get by an illegitimate means on our part. It seems to me that in all cases that informa-

tion will be protected. However, that doesn't mean, necessarily, that all truthful information is protected. The Supreme Court hasn't really ruled on the invasion of privacy tort, in terms of a private and embarrassing fact being reported. One of that tort's elements is that the information is not newsworthy and that it is not in the public interest. In that sort of case, it is entirely possible that the media may someday lose a case in the Supreme Court, just as it has lost cases in the state and federal courts. The law is pretty good in terms of the scope of what is newsworthy and the balance against what is really offensive to a reasonable person. Nonetheless, certainly the case is, and I advise clients all the time, that there is no absolute immunity for publishing truthful information, notwithstanding that we got it lawfully, if it is not newsworthy. You have to balance the newsworthy nature of the information against the offensiveness to the individual.

PROFESSOR HANSEN: It is interesting that even Mr. Adelman is in the press's corner on some crucial issues. Some people, who you would expect to be against the press, fall into line. To some extent, the role of the press and the First Amendment is treated as a secular religious issue. There are the fundamentalists, the agnostics, and the heretics. Among the fundamentalists, one does not question first principles, such as the special role and status of the press generally and the need for great levels of confidentiality in order to secure information. I respect Nick's views very much, but it is difficult to accept an answer, which is meant to refute the charge of arrogance—that the press is a fourth branch of government. It seems to me that one of the problems with the fundamentalists, and Nick is clearly one, is this view that the press and media are a fourth branch of government, on an equal level with the branches of state and federal government.

I do not think that the public generally believe this, some might. Most, I think, are agnostics. Some may be atheists. I am probably in that category myself.

The courts have a full sampling of believers and non-believers. In the Supreme Court, Justice Stewart was the High Priest of the Press, and Justice White was the heretic, hurling bombs into the cathedral. The lower courts generally have been believers. They

have had their high priests also; Judge Kaufman in the Second Circuit, for instance.

What is interesting is that despite the strong beliefs in the press and in many lower courts, the Supreme Court generally seems to have remained agnostic. In *Zurcher v. Stanford Daily*,³¹ the Court decided 5-3 that under the Fourth Amendment, for a search warrant to issue, it doesn't matter whether the premises to be searched are a newspaper office or not. No special attention is given the press. This is high heresy for those who believe in the special role of the press. The possible dangers to confidentiality in searches of newsroom are much greater than in grand jury subpoenas, where the press can control what is revealed.

Likewise, under *Herbert v. Lando*,³² you can inquire into the editorial process and state of mind behind the printing of alleged libels. There is no special protection from that discovery for editors, although there is some dicta that indicates in some situations there might be.

In the most recent case, *Cohen v. Cowles Media Co.*,³³ regarding a promissory estoppel claim, the Court held that since the doctrine of promissory estoppel was a rule of general application, no special protection is afforded to the press—here for breaching a promise of confidentiality.

Probably what is the most troubling, I would think for the press, is some language in *University of Pennsylvania v. EEOC*,³⁴ a 1990 case which was decided 9-0. Justice Blackmun, who is usually on the press's side, reaffirmed the principles underlying the *Branzburg* opinion on whether or not a reporter has to testify in a grand jury. Blackmun stated:

In the course of rejecting the First Amendment argument [in *Branzburg*], this Court noted that 'the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal

31. 436 U.S. 547 (1978).

32. 441 U.S. 153 (1979).

33. 111 S. Ct. 2513 (1991).

34. 493 U.S. 182 (1990).

statutes of general applicability.' We also indicated a reluctance to recognize a constitutional privilege where it was 'unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury.' We were unwilling then, as we are today, 'to embark the judiciary on a long and difficult journey . . . to an unknown and uncertain destination.'³⁵

Certainly you would not think, from the amount of agreement we have had today among the panelists, that this was a statement from Justice Blackmun's opinion in a 9-0 decision. The Court is questioning a basic tenet of the press religion, that confidentiality is needed to get the information and by a bigger margin than in *Branzburg*.

I have two questions. In light of the fact, that today people are willing to go on the air and expose the innermost thoughts and most private experiences of their lives, does it really take confidentiality to get information? Especially when one considers that most sources have an axe to grind—strong motivation to reveal the information?

Second, how do you explain the Supreme Court's reluctance over the years to accept the press's arguments, that have generally been accepted by lower courts. Do you want to answer George?

MR. FREEMAN: Sure. I think the *EEOC* decision that you mentioned, which really didn't deal with the reporter's privilege, but just kind of mentioned it in passing, and it is the very reason that I, for one, was overjoyed that the *Roche* case wasn't taken by the Supreme Court.³⁶ I think that Professor Hansen is right that if the Supreme Court were to take *Branzburg* today or take one of these reporter's privilege cases, I wouldn't be terribly optimistic at the outcome. But what I find interesting is that despite the clear signs of their inhospitality to the reporter's privilege and all the media's griping about it over the past ten years, twelve years, this

35. *Id.* (citing *Branzburg*, 408 U.S. at 693).

36. *Roche*, 589 So. 2d 978.

Court, both through the Burger Court and the Rehnquist Court, has really been a very strong supporter of First Amendment rights. It has been an initiator of First Amendment rights in the access areas, as we might talk about this afternoon. In five cases in which unparalleled First Amendment access has been given to the courts and the court system to the press. It has really been hospitable in other areas, including an area, two years ago, that Professor Conrad brought up, which is the *Cohen v. Cowles Media Co.*³⁷ case, which involved, in essence, a contract claim made by a source who was burned by the newspaper. The newspaper had a fairly good reason to burn him. It turned out he had given dirty tricks about the opposition candidate in an electoral race, and he turned out to be actually working for the opposition. So therefore he had a motive and it was as newsworthy that his candidate, through him, was really giving this sort of information to the press—kind of sleazy information to the press—that was as newsworthy, if not more newsworthy, than the allegations that were being made about the opposing candidate.

So the newspaper's editors decided to overrule the reporter and disclose the name of the source. I think it has terrible facts. There was a clear understanding of confidentiality. It was not vague. It was unfortunate that the case ever got to the Supreme Court. But given those terrible facts, and given that the contract in that case was clear cut, I think the newspaper did pretty well. It lost only 5 to 4. It got 4 votes, which easily could have been none, as far as I could see. And nothing in the opinion really pointed out the inherent contradiction of, on the one hand, having this reporter's privilege supporting confidential sources, and on the other hand, the press claiming that we shouldn't be sued when we burn our source ourselves.

Obviously, there is a kind of contradictory position there. The Court let us escape without really kind of hitting us too hard on that point, and finally not really allowing a contract claim to survive, but rather a so-called promissory estoppel claim.

37. 111 S. Ct. 2513.

In general it seems to me that a 5-4 loss in that case, kind of a limited opinion, in a case where the contract was clear cut, really ain't too bad. The danger in that case, which I don't think is going to happen, is that other courts will allow claims like that to be brought, where the promises and the understandings between the reporter and the source are a lot more vague.

The usual case is when a source says, well "I will tell you about my being raped as long as you don't identify me," and the reporter says "fine." It comes out that there is an article where the source is identified, not by name, but by a few characteristics which may make her identifiable to some people, but certainly not to all people.

The question is in that case, what did "identify" mean, and I think that the answer is that you can't really tell. It isn't enough of a basis on which to bring a law suit. Anyhow, that is my brief, long answer to your question.

MR. JOLLYMORE: May I add one thing?

MR. FREEMAN: Yes.

MR. JOLLYMORE: I agree with George that, in most areas, the press has no reason to complain about its First Amendment rights or the general press protection. The courts have been extremely generous in protecting the press. The Supreme Court has led the way, and the lower courts have followed.

In the *Branzburg* case, look at Powell's enigmatic concurring opinion and you will see that he does, indeed, advocate a balancing test. When the lower courts are forced to look at that case there is no other way to read Powell's opinion than as part of the dissent. So the majority in that case was actually written by Justice Stewart and the other dissenters.

The reason why the courts have been generous with the news media is because there is a consensus in the society that the press is indeed a fourth estate. I see it in my class here at Fordham, for example, where my students are always generally pro-press. I think that they are very much in favor of legal precepts which treat the press as a separate autonomous institution.

This consensus is reflected in the events which followed the

Zurcher case.³⁸ That case was one of the relatively rare cases in which the Supreme Court didn't give First Amendment protection to the press. When it did not, Congress acted. It passed the Privacy Protection Act of 1980.³⁹ The *Branzburg* plurality opinion, by Justice White, is full of all kinds of invitations to state legislatures to enact statutes, and to state courts to construe their constitutions, for the protection of the press.

Indeed, many states, like New York, have done both, protecting the press from subpoenas through legislative action,⁴⁰ and through judicial construction of their own constitution.⁴¹ So, I don't think that either the courts or the legislature are being very stingy in recognizing this concept of the fourth estate.

PROFESSOR HANSEN: Well, let me just respond to that. *Branzburg* was four and one half, four and one half. The four and one half, the dissenters plus Powell are gone, and that was 1972. The Pennsylvania case was 1990, Blackmun writing 9-0 in dictum, just adopted the majority rationale.

But, so, I think that the "true believers" on the court, Brennan, Marshall, and Stewart are gone, and the people that replaced them are not "true believers." On a case by case [basis,] they may go this way or that way. You have more of the Souter replacing them who is now on your side, but he is like this. He balances carefully [based on long-standing precedent]. For Brennan, for Stewart, [and] for Marshall it was religion. So, I mean, you don't have that sure—that push. The *Cohen* case⁴² was 5-4, but today it would be 6-3, because I have no doubt that Marshall's replacement would vote the other way. Especially after, if for no other reason, because of his treatment by the press, perhaps.

38. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

39. 42 U.S.C. §§ 2000aa-2000aa-12 (1988).

40. *See, e.g.*, N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992) (reporter's shield statute); *cf. Knight-Ridder*, 505 N.Y.S.2d 368, *aff'd*, 518 N.Y.S.2d 595 (N.Y. 1987) (construing statute).

41. *See, e.g.*, O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277 (N.Y. 1988) (recognizing a qualified privilege based upon the state constitution which protects against forced disclosure of nonconfidential materials gathered by reporters).

42. 111 S. Ct. 2513.

I mean even today, we talk about those hearings as a disgrace. Why were those hearings a disgrace? Because someone had to [say] something bad about Anita Hill. The hearings were there to try to find the truth. We just sort of assume it. Well, he is wrong, she is right. Everything goes that way.

Even in *The New York Times*, she is right; he is wrong. And therefore if you try to ask her any questions, that is horrible. So I mean the whole—there are certain implications—almost certain things that you start with that you build up with. Most people probably have those, but if you don't have those, then you have trouble following on.

And I think there are some justices on the Supreme Court today, I am not necessarily talking about the lower court—who probably more than ever, and certainly White of course is probably the strongest—who don't buy into it.

And I think that it is perfectly reasonable to the legislatures. I think that was a good law after *Zurcher*.⁴³ What I am talking about is the idea that the Constitution necessarily mandates this womb around the press that no matter what they do they are going to be protected.

George, I was glad to [hear] your statement that really there was a sort of a contradiction. We need the Constitution to protect the sources, but when we give [them] up, we need the Constitution to [protect us from] being sued. I am actually glad to see that you see the problem in that.

I think that most of the people in the press would not even see a problem in that. I see that Mr. Rome wants to respond.

MR. ROME: [I would like to address the] point [regarding] the change over in the court and whether or not there would be a majority to adopt a qualified privilege based on the First Amendment. Contrary to George, I am actually near 50% confident that such a constitutional privilege would be recognized.

I think that the Supreme Court still believes in stare decisis, at

43. *Zurcher*, 436 U.S. 547.

least some of the time, and [it does so especially] when faced with seven or eight circuits that have a qualified privilege and state legislatures which have codified it and numerous [state] supreme courts and lower district courts. In most cases, there usually is a privilege, maybe the press doesn't win, but at least the privilege is found.

So, I think that if they ever get that case, we may be surprised to find something in the Constitution. *Roche v. Florida*, may in fact have been a case for the media which they would want to get to the Supreme Court—if the record had been further developed—because [in that] case there were all these state employees in judges chambers, court clerks, or other people, who clearly were the initial leakers and, therefore, it was a clear case for alternative sources. It is actually a shame that it didn't get there on a better record.

MR. ADELMAN: I would just like to say how much I enjoyed sitting with people who can predict with some happiness the result of the Supreme Court in their area of law.

MR. ROME: Only 50%.

MR. ADELMAN: Yes, but that is an improvement for those of us who practice in criminal defense where we rarely have anticipation of glee. I wanted to explain my seeming contradiction as someone pointed out before. The reason that I happen to be a fan of the press and a believer of the First Amendment is the same reason that I like the Sixth Amendment. They are both there to limit the power of government or at least make them answer questions about what they would like to accomplish.

[I also have a] problem [with] another point that was made before, when the press says that we do that from an ivory tower, and that we do not interfere with the things of this world, we don't have to answer for them, except under that test. The [result of the] test to me, if it is not uniformly applied, is that the prosecution wins in the grand jury and the defense loses in the trial court. And that is my problem with the position.

PROFESSOR HANSEN: Very good. We would like to have questions from the audience.

AUDIENCE MEMBER: Okay, this [question] involves the negative image of the press that we have been speaking about; it also follows Professor Hansen's comments. I understand the privilege that the press has and the concept that the press is the "fourth estate." However, I don't understand and I have a problem with who is entitled to claim that privilege? As journalism is not a licensed profession, I was wondering if you could briefly explain the safeguards that are in place to prevent the abuse of this privilege and the practical effect of their enforcement?

MR. LUBASCH: As a working reporter, I have an advantage working for *The New York Times*. It is generally accepted that I would have that privilege. If I would have a problem, I would holler for George who comes in to save me.

I think that there are certain areas on the fringe of journalism. People who are not working on a full-time basis for a major news organization. I know that the issue has risen sometimes with regard to people who are writing a book as opposed to somebody who is working for a news organization. What the legal decisions have been on that, I really don't know.

MR. JOLLYMORE: As Professor Schulz pointed out this morning, the New York shield statute, as do some other shield statutes, contains a definition of "journalist."⁴⁴ This is somewhat unfair. The definition might, for example, exclude what Mr. Justice White once termed the "lonely pamphleteer."⁴⁵

Like Mr. Lubasch, the reporters who work for the magazines I represent clearly can claim the First Amendment and statutory

44. See N.Y. CIV. RIGHTS LAW § 79-h (a)(6) (McKinney 1992). The statute reads: Professional journalist shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such a person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

Id.

45. *Branzburg*, 408 U.S. at 704.

privileges, because they are seen as the mainstream press. But the journalists who often need such protection the most may not fall within the definitions in some statutes. Some courts may not see fit to extend the First Amendment privilege to persons working for very small publications, underground publications, fringe media or publications which may be seen as a little more commercial than editorial.⁴⁶ I think that these privileges should be construed broadly because it is often the people who don't have high paid corporate lawyers, like George Freeman, to represent them who need the protection the most.

AUDIENCE MEMBER: I had one follow-up. If it is construed broadly, what safeguards are in place to prevent it's abuse, like ethical standards?

MR. FREEMAN: I think the answer really is that the safeguards are the public's willingness to support the press, either by paying for magazines or newspapers or whatever, and the public's opinion not to—in the end—put pressure to erode these privileges. In the end, the media are servants to public opinion. If it appears that we are abusing the privileges we have—both in terms of the fairness of our reporting and our standing on these sort of privileges—society is going to take notice of that and we will be the victim for it. Therefore, the discipline on us, is the acceptance by the public of our product and, ultimately, in accepting and not arguing about the legal standards we have been talking about.

MR. ROME: I think that the recent decision by Judge Weinstein in *U.S. v. Sanusi*⁴⁷ is a limitation on the press. The Judge was very upset with the Secret Service agents for letting the press accompany them on a search and said, "I want this opinion given to the highest," using the superlative, "person in the agency, running the Secret Service." I think that is a pretty good slap on the wrist. I think it will be a long time before any media accompany a search warrant being executed, certainly so in the Eastern District.

AUDIENCE MEMBER: I guess this next question goes to

46. Cf. *American Airlines Inc. v. Edwards*, 20 Med. L. Rep. (BNA) 1869 (S.D.N.Y. 1992) (refusing to find that the First Amendment protected a commercial newsletter).

47. No. CR 92-410, 1992 WL 355436 (E.D.N.Y. Nov. 23, 1992).

your perception of yourselves. I am intrigued by what appears to be that, which I may be misstating, you don't feel that the press ever attempts either intentionally or inadvertently to influence the outcome of a case. Is that what you truly believe? And if so, could you respond to that.

MR. JOLLYMORE: I sort of agree with Marty Adelman, that the press is not always fair in reporting on judicial proceedings. When I was a reporter, I covered the federal courts a lot. The defense attorneys would often be enraged over the coverage their cases received from my colleagues me.

Part of this is laziness on the part of the press. It is hard sometimes to find drama in the denials of defense witnesses or in meticulous cross-examination. Part of it, I have also often thought, is the fact that—as one Assistant U.S. Attorney told me—the government never brings a case unless it is sure that the guy is guilty. I am sure that the defense attorneys find that a grating statement, but there is some truth to it. Press coverage often reflects the fact defendants are more often guilty than not. There is no excuse for a bias, however, which does not reflect the strength of the evidence. To the extent that the press is irresponsible, none of us should condone it. I would be curious to see what Mr. Lubasch thinks about this.

MR. LUBASCH: I think that one of the problems is that what is important to a legal case is not necessarily what is important to a news story. So that a witness in a trial who says something very funny or very interesting, who may [actually] be a minor witness, the press may focus on that particular witness because what he said is more newsworthy because it was more interesting or more humorous or more readable on that particular day.

One thing that bothers me greatly is the questions that are posed, "the press," as if it is all one single, monumental entity. The *New York Post* and *The New York Times*, and every other newspaper, and different reporters on those newspapers, are going to cover trials differently. We all have our own perspective and our own skills or lack of skills. Just as different lawyers in a case will be very different—there are lawyers that I am sure Mr. Adelman trusts with his life and is happy to work with, and sees

every day. [On the other hand,] there are others, perhaps, in his profession that he doesn't think quite that highly of. I would be the same in my profession. Some reporters are better than others. Some are fairer than others, just as some lawyers are better or fairer than others.

As a whole, I think the tone of your question seems to suggest not only that this monumental press as a group doesn't always cover things fairly, but that we might have a desire to influence the outcome one way or the other. I think that is really never the case. I don't think that reporters covering a trial are rooting for one side or the other. If that happens, that is relatively rare. If we report something unfairly because of the nature of the case or because of the circumstances, or because of our lack of ability, that might be one thing. But I think that it is very rare that reporters are trying to influence the outcome of a case.

That raises one issue that I am curious about, and which frequently wonder about when talking to lawyers, and that is whether press coverage really influences a jury's verdict. I wonder how often there is influence and how significant it is. I doubt that happens very often.

PROFESSOR CONRAD: I would just like to say one thing. As a former journalist and somebody who watches the media, I think we should talk about television or broadcasting as opposed to print. Newspaper and broadcast outlets have quite different qualities.

Generally, I think one can say that what we have seen is what I call secondary effect coverage. Often it has been horrendous. I think that Rodney King is a good example of that because most of the reaction issues were covered by the major reporters, most of whom did not attend the trial.

I would like to throw one point out—and not to endorse the verdict or not—and that is how many of you have ever seen the complete tape in question? The entire tape, broadcast? It was a several minute tape. I have not. I think, maybe the other night I saw something about it. The beginning is a little bit fuzzy and then when it gets into focus you see the real beating scenes. The

jury saw the entire tape. I remember Ted Koppel saying, "How could have this happened?" during the marathon coverage afterward. Well, if he bothered to interview one of the journalists that covered the trial, maybe he would find out.

I think one problem is how things are covered after the trial. Again, I am not endorsing the verdict or not, I am just making a point. I think that you also see that on local television coverage, with the exception of New York One, which is actually pretty good. But coverage is often by reporters who really don't know the trial system well.

MR. ROME: I think that is where something like Court TV could be very effective, if it stays functioning. There you will get to see defense attorneys—like Mr. Adelman—lay the traps on cross-examination which play a lot better on TV than they do when a reporter—like Mr. Lubasch—can only give you a snippet and you don't see all of the drama that leads up to it. It actually is theater.

MR. ADELMAN: If I can just jump in on that. I had the pleasure of giving Arnold Lubasch an award from the State Bar Association for his excellence in reporting. The greatest distinction I have seen, comes with people like Arnold Lubasch and other reporters who regularly cover the courts. If they are not lawyers, they have been around awhile or they have lawyers whom they trust to provide background. High publicity cases bring high profile reporters who may have no idea what the case is about, and who are there for one day. They get briefed over whatever it is that they are drinking and go out and do a flashy story.

And when the professionals are reporting, I have always found the quality of reporting is much higher. But I've been in high publicity cases where a name columnist does the report on the star witness but has no idea what the case is about. And I think that is a distinction as well. The pros get it much better.

AUDIENCE MEMBER: Mr. Freeman you said that you are relieved that the Court didn't take the *Roche* case, and Mr. Rome, you seem to come a little bit on the other side. You were discussing that in terms of it being a confidential source case. The appellants actually argued it as much as they could as a right to publish truthful information. Do you think that the Court, if it took it like

that, would reach a better result? And should the Court take it on that theory versus confidential sources?

MR. FREEMAN: The answer to me is plain. If the Court took it as a publication of truthful facts case, then there is no question but that *Roche* would be let off, and that he would win. Under lots of precedent, he did nothing wrong. On the other hand, I thought that it was a clever rouse to get the Court to take the case, and if it took the case, take it as something that it is not.

But I don't think that they would have tricked the Supreme Court. I think that if they had taken it on that basis, in the end, the decision would have been on the reporter's privilege. That is essentially how the case started. The guy was subpoenaed to give away who his source was. That was the question and that was the way it would come out.

It was only the inanity of the Florida courts—which were so mad at this reporter that published this anyway—that allowed the cert. petition to be written that way. I don't think that it would have worked. I think that the case would have been decided as a reporter's privilege case. I am much less optimistic than Bill, although it is true that there were so many screw ups in the case, it might have actually been a good set of facts for the Supreme Court to have ruled in the press's favor.

Maybe Bill is right—you almost convinced me. But I do think that in the case that Mr. Adelman has been talking about, the case of a nonconfidential [source], I would be very pessimistic that the Supreme Court would buy a three-part test or any test. I would say there you are no better than anyone else.

In the case of a confidential source, maybe the Court would recognize the privilege for the various reasons that we have stated. You know, it is hard to predict what the Supreme Court would do, but, I don't think that had they taken this case, they would have disregarded the reporter's privilege issue.

MR. ROME: I don't think that I was disagreeing with George, all I was saying is that the facts, had they been developed, smelled like they would have had a good alternative source prong on the three prong test. But, as George said, I am also happy that they

didn't take it.

AUDIENCE MEMBER: Just one final question: Would the reporters on the panel—and actually everyone could take a shot at this—would you agree or disagree that the reporter's privilege should also be preempted in some cases, where there is an overriding public interest, or where there is ongoing criminal activity involved? Do you all have any thoughts on that?

MR. LUBASCH: As a working reporter dealing with people everyday on a confidential basis, I have just one simple rule. If I give my word to somebody that I won't say where I got that information, I will not say. I am going to have call on George to keep me out of the slammer, but I won't break my word to a source under any circumstances. I think that is the basic view that most reporters would have. I don't take lightly the idea of going to jail. I try to avoid putting myself in a position where I could be subpoenaed legitimately by some lawyer and have a judge give me an order that I am not going to be able to obey and I am going to wind up in jail. If comes to that, a reporter has to face that too, as Myron Farber did.

MR. JOLLYMORE: I will respond to that. There was a time, not too long ago, when Justice Douglas and Justice Black, espoused the opinion that in construing the language of the First Amendment that "Congress shall make no law . . . abridging freedom of speech, or of the press" that the courts should construe the word "no" to mean just that—"no." That was called the absolutist position. It appears to be rather unfashionable today. But I still like it. I guess if I were writing the law, I would write that there should be no exceptions.

I am not greatly appalled however, with the three part test. I am not appalled because in practice the way it works is almost absolute. Usually before I receive a subpoena, I will get a telephone call from a lawyer, either stridently or pleasantly, asking for voluntary disclosure of the identity of the source or the unpublished information. I often fax them cases or give them citations to educate them, if they don't know about shield statutes and the three part First Amendment test. That deters probably about 80% of the subpoenas. Motions to quash get rid of most of the others, and I

can't remember, offhand, in recent years, when we have been compelled to produce documents or give testimony. I am not saying, of course, that it doesn't happen.

MR. ROME: If the question is yea or nay on the three part test, I think under the circumstances it is workable and is probably the best the media can expect. I think that my empirical experience in the last five years is like Nick's. That you actually litigate very few. You talk attorneys out of a lot of them. The problem is that it is very easy to get a subpoena in New York signed and served.

MR. FREEMAN: I would just say that when the shield law was amended, there was one thing that I tried to get into this shield law, but was unsuccessful. What I thought more important than all of these three part tests, and all the legal mumbo-jumbo, was the notion that if the media wants to quash a subpoena in the state of New York, the shield law ought to say that it can do so by letter. In other words, the media could quash the subpoena simply by objecting. Then the subpoenaing party would have to make the first motion in court to compel production. That is the way it is done in the federal courts. Because that very notion that then the subpoenaing attorney would actually have to do a first brief to start this in play, would by itself, get rid of nine tenths of the subpoenas. Simply because of the work entailed.

The problem with a subpoena under the current New York rules is that it is too easy to file it, and it puts the burden on the media—the party being subpoenaed—to do all of the work and to make a motion, and get in front of a judge, and all of the rest of it. It sounds not terribly idealistic if you are sitting in law school, wondering, "This is the way the system works? Whoever has to do the most work loses," but that is kind of the way it really does work in practice.

PROFESSOR HANSEN: I would like to thank the panel for a very interesting presentation.

