largely uncovered except by the AP, Reuters, and the *Des Moines Register*."

Fleeson is not unsympathetic to the editors' dilemma: hard news or enterprise. But she reaches an "uncomfortable" conclusion: Despite all the talk, "fewer and fewer mainstream news organizations bother any anymore with dailies *or* enterprise stories."

Privileged Reporters?

"The Reporter's Privilege, Then and Now" by Stephen Bates, in *Society* (July–Aug. 2001), Transaction Periodicals Consortium, Rutgers Univ., P.O. Box 10826, New Brunswick, N.J. 08903.

There's one story the news media never tire of running: Somewhere in America, a reporter has gone heroically off to jail after defying a court order requiring him to turn over notes or tapes to the authorities. It's a First Amendment issue, journalists cry. Without a "right to silence" they will become de facto investigators for the state, and the chilling effect on sources will compromise the constitutional guarantee of a free press. In the eyes of government, however, journalists have the same obligations as other citizens.

The law is equivocal, notes Bates, literary editor of the *Wilson Quarterly* and formerly a lawyer in the office of the Whitewater Independent Counsel. There's no record of any reporter claiming such a privilege before 1848, when John Nugent of the *New York Herald* refused to reveal to Congress who had supplied him with a secret draft treaty with Mexico. He was jailed for 10 days but kept his secret. By 1896, the question of privilege apparently had arisen often enough that Maryland passed a "shield" law protecting journalists from state subpeonas. (Today, 31 states have such laws.) It wasn't until 1957 that a case involving a clear First Amendment argument reached a high federal court. The reporter lost.

Things changed in the 1960s, as a new generation of politically liberal and generally more adversarial journalists took the stage. Early in the Nixon administration, moreover, federal prosecutors aggressively pursued media subpeonas, as did Congress. News organizations mostly complied but warned loudly of the dangers to liberty. Finally, in 1972, the Supreme Court weighed in. In *Branzburg v. Hayes*, it rejected by a 5-4 majority three reporters' separate claims of journalistic privilege, noting that the only "testimonial privilege" afforded by the Constitution is the Fifth Amendment's protection against self-incrimination. Worries about a chilling effect, the Court said, were largely "speculative." It pointed out that judges could still intervene if a malicious prosecutor used subpeonas to harass the press.

However, Justice Lewis E. Powell, Jr.'s concurring opinion left a number of doors open, and some lower federal courts have marched through, often recognizing a testimonial privilege after applying a three-point test to media subpeonas. The Supreme Court, while sticking by *Branzburg* in principle, according to Bates, has passed up opportunities to correct the lower courts.

What to do? Above all, Bates argues, government and the news media must strive to avoid situations in which journalists defy the rule of law. "The law suffers when court orders are flouted without shame—or, indeed, with pride." Strict guidelines already limit the number of media subpeonas pursued by the U.S. Department of Justice to one or two dozen annually. (In 1997, there were 2,725 media subpeonas, mostly from civil litigants and criminal defendants; federal prosecutors accounted for fewer than 25.) Some federal independent counsels may arguably have been incautious in seeking *particular* media subpeonas, but Congress isn't likely to reenact the now defunct law needed to create future independent counsels. (It has also declined to pass a shield law or other limits on media subpeonas.)

The news media must also exercise self-restraint, Bates says. When the New York State police posted newspaper photos on its Web site to aid in the identification of criminals at the Woodstock '99 festival, the Associated Press and Syracuse Online forced their removal, claiming copyright infringement. That was simply bad citizenship, declares legal ethicist Stephen Gillers. He warns, says Bates, that inflating such "trivial incursions . . . may numb the public to the dangers posed by true First Amendment violations."