

# William & Mary Bill of Rights Journal

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Volume 20 (2011-2012)  
Issue 4

Article 8

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May 2012

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## NEEDED: MORE THAN A PAPER SHIELD

Sandra Davidson\* and David Herrera\*\*

[I]t is essential to the democracy of the United States that journalists may report important information to the public without fear of intimidation or imprisonment.<sup>1</sup>

### INTRODUCTION

“When governments repress their people, press freedom is among the most powerful vehicles for exposing misdeeds,” declared United Nations Secretary-General Ban Ki-moon on World Press Freedom Day 2011.<sup>2</sup> “Today it is the peoples of North Africa and the Middle East mobilizing for their democratic rights and freedoms,” Secretary Ban continued, “[a]nd they are doing so with a heavy reliance on new media.”<sup>3</sup> WikiLeaks could not have been far from the Secretary’s mind. The website’s slow release of 251,287 diplomatic cables from the U.S. State Department, beginning in November 2010,<sup>4</sup> has been cited as a contributing cause of the 2011 “Arab Spring” uprisings in Tunisia, Egypt, Libya, Syria, and elsewhere.<sup>5</sup>

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<sup>1</sup> S. Res. 192, 109th Cong. (2005).

<sup>2</sup> Ban Ki-moon, U.N. Sec.-Gen., Remarks on World Press Freedom Day (May 4, 2011), available at <http://www.un.org/apps/sg/sgstats.asp?nid=5242> (last visited May 1, 2012).

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., Scott Shane & Andrew W. Lehren, *Leaked Cables Offer a Raw Look Inside U.S. Diplomacy*, N.Y. TIMES, Nov. 29, 2010, at A1.

<sup>5</sup> See, e.g., Robert Mackey, *Qaddafi sees WikiLeaks Plot in Tunisia*, N.Y. TIMES: THE LEDE BLOG, (Jan. 17, 2011, 12:30 PM), <http://thelede.blogs.nytimes.com/2011/01/17/qaddafi-sees-wikileaks-plot-in-tunisia/>; Peter Walker, *Amnesty International Hails WikiLeaks and Guardian as Arab Spring ‘Catalysts’*, GUARDIAN (U.K.), May 13, 2011, <http://www.guardian.co.uk/world/2011/may/13/amnesty-international-wikileaks-arab-spring>. Assange himself said WikiLeaks was responsible in part for the regime changes in Egypt and Tunisia. See *Wikileaks’ Julian Assange Takes Credit for Tunisian and Egyptian Revolutions*, DAILY MAIL, Feb. 14, 2011, <http://www.dailymail.co.uk/news/article-1356754/Wikileaks-Julian-Assange-takes-credit-Tunisian-Egyptian-revolutions.html#ixzz1JniuB74Zntstu>. Even Libya’s Muammar

For those interested in shield laws for journalists, WikiLeaks exemplifies the new, complex reality facing the legal community.<sup>6</sup> The website maintains a policy of protecting its sources, even from news outlets with which it collaborates on document releases.<sup>7</sup> But protecting it from whom? WikiLeaks' servers are located worldwide,<sup>8</sup>

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Qaddafi joined in. See Matthew Weaver, *Muammar Gaddafi Condemns Tunisia Uprising*, GUARDIAN (U.K.), Jan. 16, 2011, <http://www.guardian.co.uk/world/2011/jan/16/muammar-gaddafi-condemns-tunisia-uprising>.

The *Bangkok Post* reported: "For those seeking to better understand the events in Egypt, by far the best source of information is WikiLeaks. The huge release of cables from the US [sic] embassy in Cairo offer fascinating insights and background into the drama unfolding in Tahrir square." Imtiaz Muqbil, *WikiLeaks: Clues to a Failed U.S. Policy*, BANGKOK POST, Feb. 6, 2011, <http://www.bangkokpost.com/news/local/220085/wikileaks-clues-to-a-failed-us-policy>. Fascinating and disturbing, if one agrees with the position of the Bangkok paper: "[T]he cables show how Arab and Islamic leaders have allowed themselves to be made complete fools, why their peoples are rising up to say that enough is enough and why that political tsunami will strike many shores right across the world." *Id.*

The *Guardian's* website has maintained a timeline of events from the Arab Spring. *Arab Spring: An Interactive Timeline of Middle East Protests*, GUARDIAN (U.K.), <http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline> (last visited May 1, 2012). For more on the release of unredacted cables in September 2011 and Assange's concern that this could jeopardize the gains of the Arab Spring, see *infra* notes 138-42 and accompanying text.

<sup>6</sup> Yochai Benkler states:

Wikileaks was born a century after President Theodore Roosevelt delivered the speech that gave muckraking journalism its name, and both hailed investigative journalism and called upon it to be undertaken responsibly. In 2010, four years after its first document release, Wikileaks became the center of an international storm surrounding the role of the individual in the networked public sphere. It forces us to ask how comfortable we are with the actual shape of democratization created by the Internet.

Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. REV. 311, 311 (2011). And this was written before the September 2011 posting of 251,000 unredacted cables by WikiLeaks. See *infra* notes 138-42 and accompanying text on the unredacted cables. For general coverage of WikiLeaks' history prior to Fall 2011, see Benkler, *supra*, *passim*.

<sup>7</sup> See Eric Schmitt, *In Disclosing Secret Documents, WikiLeaks Seeks 'Transparency'*, N.Y. TIMES, July 26, 2010, at A11.

<sup>8</sup> See *id.* Often the servers are located in countries more sympathetic to source protection, such as Sweden. See Afua Hirsch, *Iceland Aims to Become a Legal Safe Haven for Journalists*, GUARDIAN (U.K.), July 11, 2010, <http://www.guardian.co.uk/media/2010/jul/12/iceland-legal-haven-journalists-immi>. WikiLeaks also took advantage of Icelandic laws favorable to journalists by working in the country to produce the video of a U.S. helicopter attack on civilians in Baghdad. *Id.*; see also Raffi Khatchadourian, *No Secrets: Julian Assange's Mission for Total Transparency*, THE NEW YORKER, June 7, 2010, at 40. The organization also helped draft

so it has no real home. One scholar termed it “the world’s first *stateless news organization*.”<sup>9</sup>

And protecting WikiLeaks against what? WikiLeaks’ founder, Julian Assange,<sup>10</sup> has not clearly stated how he received<sup>11</sup> the diplomatic cables—nor the Brobdingnagian caches of military reports from the Afghanistan<sup>12</sup> and Iraq<sup>13</sup> wars released in July and October 2010—so it is not clear that he or WikiLeaks would qualify as “journalists” under existing shield laws.<sup>14</sup>

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a pending law in Iceland that would provide even stronger protections for journalists, including of confidential sources and information and of free speech. See Jonathan Stray, *What Will Iceland’s New Media Laws Mean for Journalists?*, NIEMAN JOURNALISM LAB (June 16, 2010, 11:51 AM), <http://www.niemanlab.org/2010/06/what-will-icelands-new-media-laws-mean-for-journalists/>.

<sup>9</sup> Jay Rosen, *The Afghanistan War Logs Released by Wikileaks, the World’s First Stateless News Organization*, PRESSTHINK, July 26, 2010, <http://pressthink.org/2010/07/the-afghanistan-war-logs-released-by-wikileaks-the-worlds-first-stateless-news-organization/>.

<sup>10</sup> For a profile of Assange and the creation of WikiLeaks, see Khatchadourian, *supra* note 8.

<sup>11</sup> Not knowing the source is by design, according to Assange. See *PBS Frontline: WikiSecrets*, PBS TELEVISION BROADCAST, (May 24, 2011) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/wikileaks/etc/transcript.html>). He says that WikiLeaks’ software prevents it from identifying the source of documents it receives. *Id.* “Instead of keeping source identities secret, we simply do not collect them at all. . . . [O]ur technology does not permit us to understand whether someone is one of our sources or not because the best way to keep a secret is to never have it.” *Id.* On WikiLeaks’ claim that its technology prevents tracing sources that have transmitted secret information to it, see Charlie Savage, *After Afghan War Leaks, Revisions in a Shield Bill*, N.Y. TIMES, Aug. 4, 2010 at A12.

<sup>12</sup> The Afghan War Diary is available at [http://wikileaks.org/wiki/Afghan\\_War\\_Diary,\\_2004-2010](http://wikileaks.org/wiki/Afghan_War_Diary,_2004-2010). Prior to releasing these files, WikiLeaks gave the *New York Times*, London’s *Guardian*, and Germany’s *Der Spiegel* access to them. See *Piecing Together the Reports, And Deciding What to Publish*, N.Y. TIMES, July 26, 2010, at A8. These three newspapers released reports simultaneously with the public release of the files. *Id.*

<sup>13</sup> *Iraq War Logs*, available at <http://wikileaks.org>. The *New York Times* and some other organizations call the collective set of Iraq and Afghanistan reports “The War Logs.” See, e.g., *The War Logs: The Afghan Struggle: A Secret Archive*, N.Y. TIMES, July 26, 2010, at A1. WikiLeaks expanded early access to the Iraq files to other media besides the original three newspapers, including France’s *Le Monde* newspaper and the Qatar-based *Al Jazeera* network. See, e.g., David Leigh, *Iraq War Logs: WikiLeaks v Washington*, GUARDIAN (U.K.), Oct. 22, 2010, <http://www.guardian.co.uk/world/2010/oct/22/iraq-war-logs-wikileaks-washington?INTCMP=SRCH>.

<sup>14</sup> At least one writer has compared Assange’s penchant for publishing leaked materials to that of legendary political columnist—and, in the writer’s words, “seasoned reporter”—Jack Anderson. See Mark Feldstein, *Spreading Leaks Before WikiLeaks*, AM. JOURNALISM REV., Sept. 2010, <http://www.ajr.org/Article.asp?id=4958>.

Some statutes define “journalist” in relation to whether one works for a news organization. See *infra* notes 218–51 and accompanying text. WikiLeaks published the War Diaries with

The situation in the United States, which lacks a federal shield law, is equally thorny. WikiLeaks' release of the War Logs arguably affected support for a federal shield law.<sup>15</sup> According to *Washington Post* reporter Paul Farhi, "news organizations thought they were cruising toward a long-cherished goal: Congressional passage of a federal shield law to protect journalists from being forced to reveal confidential sources. Then came WikiLeaks."<sup>16</sup> WikiLeaks "complicated, and possibly imperiled," passage of a shield law, he said.<sup>17</sup> But supporters of a shield law say it would not cover WikiLeaks, anyway, because WikiLeaks is a "virtual" organization, devoid of a physical address or "country of origin."<sup>18</sup>

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some, but not extensive, commentary. Assange did, however, submit to several news interviews after publishing the Afghanistan and Iraq documents. *See, e.g.*, Bill Keller, *The Boy Who Kicked the Hornet's Nest*, N.Y. TIMES, Jan. 30, 2011 (Magazine), at 35, 47; Schmitt, *supra* note 7. He has said the files were "significant for journalistic investigation" and that he hoped they would cause people to reconsider their position on the wars. *See* Jo Adetunji, *Wikileaks Founder Julian Assange: More Revelations to Come*, GUARDIAN (U.K.), July 26, 2010, <http://www.guardian.co.uk/media/2010/jul/26/wikileaks-julian-assange>.

Yet the law would presumably be less forgiving to an organization classified as a terrorist organization, as Rep. Peter King (R-N.Y.) has suggested. *See* Jennifer Epstein, *King: Prosecute WikiLeaks, Assange*, POLITICO (Nov. 29, 2010, 8:28 PM), <http://www.politico.com/news/stories/1110/45667.html>. Rep. Peter King would like to see WikiLeaks prosecuted. *Id.*

Ironically, King has come under attack for his reported connection with the Irish Republican Army (I.R.A.). *See* Justin Elliott, *At U.K. Terror Inquiry, Rep. King Defends I.R.A. Terror*, SALON (Sept. 13, 2011, 3:59 PM), <http://www.salon.com/2011/09/13/peter-king-ira-terrorism>. "King built his career in the Irish Catholic community of Nassau County as a pro-I.R.A. firebrand in the 1980s, and was even involved with a fundraising organization suspected of providing the militant group with money and weapons." *Id.* When he appeared in front of Great Britain's Parliament during a hearing on Muslim radicalization on September 13, 2011, Labour MP David Winnick quoted King's statement from 1985 that "[i]f civilians are killed in an attack on a military installation, it is certainly regrettable, but I will not morally blame the I.R.A. for it." *Id.* King said he stood by those words "in the context of when it was said." *Id.*; *see also* Justin Elliott, *IRA Terror Victim Speaks Out Against Peter King*, SALON (Jan. 7, 2011, 1:30 PM), <http://www.salon.com/2011/01/07/peter-king-ira-bombing-survivor/> (quoting Amnesty International official Tom Parker as saying, "What really bothers me is the hypocrisy of the man . . .").

But what about punishment of the disseminator of information? Assange could stand in the shoes of the *New York Times* or the *Washington Post* in the Pentagon Papers case, *New York Times v. United States*, 403 U.S. 713 (1971), provided that Assange had 'clean hands' and merely received the information instead of in some way instigating the theft of that information.

<sup>15</sup> Paul Farhi, *Wikileaks is Barrier to Shield Arguments*, WASH. POST, Aug. 21, 2010, at C1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; *see also* Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form*, 63 FED. COMM. L.J. 667 (2011).

In the wake of WikiLeaks' releases, some U.S. senators announced that language in any developing proposals for a shield law should specifically exclude organizations disseminating classified or confidential material without additional reporting or contextualization. *See, e.g.*,

WikiLeaks has collaborated with the *New York Times* and the *Washington Post*.<sup>19</sup> Those relationships have become rockier over time, starting with a debate among the newspapers and WikiLeaks over redacting names from the Afghanistan documents.<sup>20</sup> Although WikiLeaks ultimately attempted to scrub documents for informants' names, Assange at first was reluctant to do any redaction, and the "harm minimization" process, as Assange called it, was not totally successful.<sup>21</sup> Some vulnerable people were still exposed, and less than forty-eight hours after publication of the Afghan War Logs, according to Nick Davies, an investigative reporter at the *Guardian*, competitors of "*The Guardian* and *The New York Times* ran big stories saying, 'We've been on the WikiLeaks Web site. We found material which could get people killed.'" <sup>22</sup> The *New York Times* said that its search through a sample of the WikiLeaks documents found "the names of dozens of Afghans credited with providing credible information to American and NATO troops" and that the *Times*, *Guardian*, and *Der Spiegel* had only posted a selection of redacted WikiLeaks documents containing no identifying information that could jeopardize informants' safety.<sup>23</sup> Martin Smith said

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Adam L. Penenberg, *Yes, He's a Journalist Too*, WASH. POST, Jan. 30, 2011, at B3. Charlie Savage of the *New York Times* said that Democratic senators who had been working on shield law legislation were "backpedaling from WikiLeaks" and Senators Charles Schumer (D-N.Y.) and Dianne Feinstein (D-Cal.) were working on an amendment that would provide shield protection to traditional news gathering but withhold it from websites that disseminate massive amounts of secret information. See Savage, *supra* note 11; see also John Eggerton, *Is Shield Law the Next WikiLeaks Victim?: D.C. Debates Effect of Leaked Docs on Bill Protecting Journalists*, BROADCASTING & CABLE, Dec. 6, 2010, available at [http://www.broadcastingcable.com/article/460623-Is\\_Shield\\_Law\\_the\\_Next\\_WikiLeaks\\_Victim\\_.php](http://www.broadcastingcable.com/article/460623-Is_Shield_Law_the_Next_WikiLeaks_Victim_.php).

WikiLeaks did publish some commentary in the War Diary. See *Iraq War Logs*, *supra* note 13. But perhaps shield protection or lack thereof for WikiLeaks is immaterial. If indeed tracing of its sources is technologically impossible, then WikiLeaks is shielded from subpoenas regardless of the law. See *supra* note 11 and accompanying text.

<sup>19</sup> See Keller, *supra* note 14, at 35, 37.

<sup>20</sup> See, e.g., *PBS Frontline: WikiSecrets*, *supra* note 11. From the beginning, Assange and the newspapers were concerned about minimizing the risks that could flow from the leaks. After the release of the Afghanistan documents, the *Guardian* crowed: "Well, we always wanted stories from data: now we've got it. In spades. With bells on. The Wikileaks' Afghanistan war logs are a fantastic victory for investigative data based journalism [sic], not only here at the Guardian but at the New York Times and Der Spiegel too." Simon Rodgers, *Wikileaks' Afghanistan War Logs: How our Datajournalism Operation Worked*, GUARDIAN (U.K.) (July 27, 2010, 7:12 PM), <http://www.guardian.co.uk/news/datablog/2010/jul/27/wikileaks-afghanistan-data-datajournalism>. But the *Guardian* also made clear that it was concerned that the war logs be redacted: "It was central to what we would do quite early on that we would not publish the full database. Wikileaks was already going to do that and we wanted to make sure that we didn't reveal the names of informants or unnecessarily endanger Nato [sic] troops." *Id.*

<sup>21</sup> See *PBS Frontline: WikiSecrets*, *supra* note 11.

<sup>22</sup> *Id.*

<sup>23</sup> Eric Schmitt and Charlie Savage, *Pentagon Studies Risks to Afghans From Leaks*, N.Y. TIMES, July 29, 2010, at A1.

that the *New York Times* “lost trust” in Assange’s redaction process and would not link to WikiLeaks.<sup>24</sup>

Could the United States government order Assange to identify his source? Leaving aside jurisdictional considerations, Assange could not be ordered to name a source if indeed his software design prevented him from gaining that knowledge.<sup>25</sup>

Is Assange, himself, a “source” for the news media he works with? Bill Keller, the top editor at the *New York Times*, wrote in January 2011 that the *Times* “regarded Assange throughout as a source, not as a partner or collaborator, but he was a man who clearly had his own agenda.”<sup>26</sup>

The *Times*’ story continued:

The founder of WikiLeaks, Julian Assange, has said that the organization withheld 15,000 of the approximately 92,000 documents in the archive . . . to remove the names of informants in what he called a “harm minimization” process. But the 75,000 documents WikiLeaks put online provide information about possible informants, like their villages and in some cases their fathers’ names.

*Id.*

<sup>24</sup> See *PBS Frontline: WikiSecrets*, *supra* note 11. A furious Assange threatened to deny the *New York Times* access to the diplomatic cables. *Id.*

Julian Assange, in an editorial, said: “David Leigh secretly passed the entire archive [of diplomatic cables] to Bill Keller of the *New York Times*, in September 2011, or before, knowingly destroying WikiLeaks plans to publish instead with the *Washington Post & McClatchy*.” Editorial, *Guardian Journalist Negligently Disclosed Cablegate Passwords*, WIKILEAKS, Sept. 1, 2011, <http://wikileaks.org/Guardian-journalist-negligently.html>.

Later, WikiLeaks gave the *Washington Post* secret documents about the United States prison at Guantanamo Bay, published in April 2011. See Peter Finn, *New Revelations on al-Qaeda’s 9/11 Movements*, WASH. POST, Apr. 25, 2011, at A1. WikiLeaks did not give the documents to the *New York Times*, which obtained a copy of the documents from another news outlet and nearly scooped WikiLeaks in publishing stories about the documents. See *A Note to Readers: The Background*, N.Y. TIMES, Apr. 25, 2011, at A10.

<sup>25</sup> See *supra* note 11 and accompanying text. Shortly after WikiLeaks’ release of the Afghanistan data, the United States government declared Pfc. Bradley Manning a “person of interest” in the case. See David S. Cloud, *Army Officer a ‘Person of Interest,’* L.A. TIMES, July 28, 2010, at A6. Manning and the government had a prior history. The government had already arrested Manning on suspicion of giving WikiLeaks hundreds of thousands of secret diplomatic cables and a classified video of a helicopter attack, in Iraq, in which two journalists died. See Elisabeth Bumiller, *Army Broadens Inquiry into Disclosure of Reports to WikiLeaks*, N.Y. TIMES, July 31, 2010, at A4. Manning was in custody when WikiLeaks released the Afghanistan and Iraq materials. For further discussion of Manning see *infra* Part I.C., and for the potential for prosecutions under the Espionage Act, see *infra* note 155.

<sup>26</sup> Keller, *supra* note 14, at 34. The *New York Times* does not appear to be in the Administration’s crosshairs, according to the *Times*:

“Do you think that what you do is consistent with what you understand Assange and WikiLeaks did?” [Attorney General] Holder asked a reporter. “Would I have liked not to see the stuff appear? Yes. But did The *Times* act in a responsible way? I would say yes. I am not certain I would

Is Assange a journalist? Adam L. Penenberg argues that “Assange has wrapped himself in the cloak of journalism. . . . WikiLeaks has peppered its ‘about’ page with the words ‘journalism’ and ‘journalist,’ which appear a combined 19 times, and as a self-described ‘not-for-profit media organization’ lists its primary goal as bringing ‘important news and information to the public.’”<sup>27</sup> While Penenberg says that Assange “fits the definition of a journalist” under many shield law statutes, he acknowledges that opponents of Assange would not classify Assange as a journalist.<sup>28</sup> His evidence for that includes the State Department calling Assange “an anarchist,” former Alaska Governor Sarah Palin calling him “an anti-American operative with blood on his hands,” and Senator Dianne Feinstein (D-Cal.) calling him an “agitator intent on damaging our government.”<sup>29</sup>

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say that about those people who were responsible for the initial leaks and the wholesale dumping of materials.”

Charlie Savage, *For Attorney General, New Congress, New Headaches*, N.Y. TIMES, Dec. 31, 2010, at A12.

Since 1980, prosecutorial guidelines have existed to help curb the overzealous pursuit of journalists’ sources. Published in the Code of Federal Regulations, the guidelines explain the rationale for limiting prosecutors’ power over journalists as preserving the functioning of the press:

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter’s responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function.

28 C.F.R. § 50.10 (2011).

To balance the Justice Department’s concern for the functioning of “news media” with its concern for “the fair administration of justice,” the “guidelines shall be adhered to by all members of the Department in all cases.” *Id.* The guidelines apply both to issuing subpoenas to members of the news media or to requesting their telephone toll records. *Id.* § 50.10(a). “[T]he approach in every case must be to strike the proper balance between the public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement and the fair administration of justice.” *Id.*

Before issuing subpoenas or requesting phone records, the Department of Justice must first make “[a]ll reasonable attempts” to get the wanted information from other sources. *Id.* § 50.10(b). Another general safeguard for news media, with some conditions, is that no subpoenas or phone requests may be made without the Attorney General’s “express authorization.” *Id.* § 50.10(e).

The guidelines make clear that the Attorney General’s authorization will only be sought in criminal cases if information from “nonmedia sources” provide “reasonable grounds to believe” a crime occurred and, further, that the information sought from the news media is “essential” to the investigation, and not “peripheral, nonessential, or speculative.” *Id.* § 50.10(f).

<sup>27</sup> Penenberg, *supra*, note 18.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*



Glenn Greenwald considers Assange to be “engaging in the crux of investigative journalism” with his push for “transparency and whistleblowing.”<sup>30</sup> Assange, sensing the legal risk he might face in America, has followed a strategy to try to provide WikiLeaks with First Amendment protection.<sup>31</sup>

The domestic issues have expanded beyond Assange and WikiLeaks, however. What will happen when the government seeks documents submitted to news organizations through their own versions of WikiLeaks, such as SafeHouse, a place to “[s]ecurely share information with *The Wall Street Journal*?”<sup>32</sup>

Pierce-proof shield laws are, thus, important not only for journalists but also for this country. The United States, if it is to be a leader for press freedom in our complex world,<sup>33</sup> must not dissemble by crafting shield-law exceptions that inevitably create bias against reporters.

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<sup>30</sup> Glenn Greenwald, *WikiLeaks Grand Jury Investigation Widens*, SALON, June 9, 2011, [http://www.salon.com/2011/06/09/wikileaks\\_27](http://www.salon.com/2011/06/09/wikileaks_27).

<sup>31</sup> Julian Assange said,

We insisted on bringing in *The New York Times*. We also insisted on *The New York Times* publishing first. So if there was any debate before a jury about, had it been published first in a foreign publication or a U.S. publication, it would be very clear it was published first in a U.S. publication.

*PBS Frontline: WikiSecrets*, *supra* note 11. Assange made clear that he wanted First Amendment protection. *Id.*

<sup>32</sup> WALL ST. J. SAFEHOUSE, <https://www.wsjsafehouse.com/> (last visited May 1, 2012). The *Journal* faced heavy criticism after opening SafeHouse for lax security measures, see Riva Richmond, *Wall Street Journal Leak Site Works on Security Fixes*, BITS (May 6, 2011, 6:40 PM), <http://bits.blogs.nytimes.com/2011/05/06/wall-street-journal-leak-site-works-on-security-fixes>, and for the Terms of Service acknowledging that the newspaper would not be able “to ensure the complete confidentiality or anonymity of anything you send to us.” *Terms of Use for SafeHouse*, WALL ST. J. SAFEHOUSE, <https://www.wsjsafehouse.com/terms.html> (last visited May 1, 2012). The site was reportedly working quickly on improvements. See Richmond, *supra*.

<sup>33</sup> In 2010, the United States ranked 20th out of 178 countries in press freedom worldwide in Reporters Without Borders’ rankings, and China ranked 171st. See *Press Freedom Index 2010*, REPORTERS WITHOUT BORDERS, <http://en.rsf.org/press-freedom-index-2010,1034.html> (last visited May 1, 2012).

The Obama Administration has come under press scrutiny for its alleged mistreatment of journalists. See, e.g., Dylan Stableford, *Jay Carney and Jake Tapper Clash Over ‘Aggressive’ Reporting*, YAHOO! NEWS (Feb. 23, 2012), <http://news.yahoo.com/blogs/cutline/wake-reporter-deaths-syria-white-house-grilled-aggressive-154806577.html> (last visited May 1, 2012); see also *Tapper v. The White House*, CNN: RELIABLE SOURCES (Feb. 26, 2012), <http://reliablesources.blogs.cnn.com/2012/02/26/tapper-vs-the-white-house/> (last visited May 1, 2012) (discussing how the Obama Administration treats whistleblowers).

For example, when White House Press Secretary Jay Carney began a February 2012 press conference by praising Anthony Shadid and Marie Colvin, two reporters who died in Syria, he received press opposition. See Stableford, *supra*. ABC News Senior White House Correspondent, Jake Tapper, questioned Carney: “The White House keeps praising these

This Article presents a brief history of cases relevant to shield laws, critiques current state statutes and offers suggestions for their improvement, and proposes a model shield law. The model law would afford protection for persons who promise sources confidentiality that is equivalent to the protection current law offers to attorneys and priests. In short, this Article argues for absolute shield law protection, even in the age of WikiLeaks.

The United States and its constituent states should send a clear message to the world: The democratic imperative of freely flowing information from journalists means no jailing of journalists who are keeping their promises to their sources.<sup>34</sup>

### I. JAILING JOURNALISTS

Do journalists need good shield laws? Unfortunately, this is not a mere academic question. Judges in the United States are jailing journalists.<sup>35</sup> For example, Josh Wolf, spent 224 days in captivity in California before being released from jail in April 2007.<sup>36</sup> His offense was refusing to testify before a federal grand jury and hand over raw

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journalists . . . who've been killed. . . . How does that square with the fact that this administration has been so aggressively trying to stop aggressive journalism in the United States by using the Espionage Act to take whistleblowers to court?" *See id.* He continued, "I think you've invoked it the sixth time, and before the Obama administration, it had only been used three times in history." *See id.* Carney referred Tapper to the Justice Department, and he added, "I think that there are issues here that involve highly sensitive classified information, and I think . . . divulging that kind of information is a serious issue, and it always has been." *See id.*

For more on the Obama Administration's treatment of whistleblowers, see, for example, *NSA Whistleblower Thomas Drake Prevails Against Charges in Unprecedented Obama Admin Crackdown*, DEMOCRACY NOW!, Mar. 21, 2012, [http://www.democracynow.org/2012/3/21/in\\_unprecedented\\_obama\\_admin\\_crackdown\\_nsa](http://www.democracynow.org/2012/3/21/in_unprecedented_obama_admin_crackdown_nsa) (last visited May 1, 2012).

<sup>34</sup> Iceland, for example, may soon surpass the United States in the protections afforded to journalists. In June 2010, the Icelandic parliament directed the government to begin rewriting its laws on, *inter alia*, protecting journalists from having to reveal sources, ensuring public access to government documents, and preventing enforcement of libel judgments from other countries against journalists. *See Hirsch, supra* note 8. Activists who formulated the proposal adopted by parliament drew on press freedom laws from Sweden, Norway, the United States, and elsewhere. *Id.* It is not yet clear, however, what the final law will stipulate or how far it will reach. *See id.*; Sylvia Hui, *Iceland Parliament Votes for Strong Media Laws*, GUARDIAN (U.K.), June 17, 2010, <http://www.guardian.co.uk/world/feedarticle/9132550>.

<sup>35</sup> At a celebration of the 40th year of the Freedom of Information Act, Lucy Dalglish, the executive director of The Reporters Committee for Freedom of the Press, recounted that she knew of at least 50 recent cases of reporters being subpoenaed. *See* John E. Mulligan, *A Subdued Birthday for Freedom of Information*, PROVIDENCE J., Mar. 17, 2006, at A2. According to Dalglish, "We have not seen numbers like that since the Nixon administration." *Id.*

<sup>36</sup> *See* Jesse McKinley, *8-Month Jail Term Ends as Maker of Video Turns Over a Copy*, N.Y. TIMES, Apr. 4, 2007, at A9; *see also* Jesse McKinley, *Jail Record Near for Videographer who Resisted Grand Jury*, N.Y. TIMES, Feb. 6, 2007, at A15.

videotape of a G-8 Summit protest that injured a police officer on July 8, 2005, in San Francisco.<sup>37</sup> The judge maintained that the First Amendment did not protect Josh because he was a blogger.<sup>38</sup>

Jim Taricani, a 55-year-old heart-transplant recipient, spent four months under house arrest from 2004 to 2005 after refusing a federal judge's order to reveal the source of an FBI videotape showing a Providence, Rhode Island, official accepting an envelope full of cash from an undercover FBI agent.<sup>39</sup> Taricani had won four Emmys.<sup>40</sup> His conviction came in the wake of a federal investigation called "Operation Plunder Dome," which netted convictions for at least three city officials, including Providence Mayor Vincent Cianci, Jr., and his top aide, Frank Corrente.<sup>41</sup> Corrente received the cash in the videotape that aired on the NBC affiliate employing Taricani.<sup>42</sup> Six days after Taricani's conviction, the confidential source—a defense attorney—admitted under oath to giving Taricani the videotape.<sup>43</sup>

Judith Miller, a former *New York Times* reporter, spent eighty-five days in jail from 2004 to 2005 after refusing to reveal the source of a leak in the Valerie Plame case.<sup>44</sup>

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<sup>37</sup> McKinley, *Jail Record Near for Videographer Who Resisted Grand Jury*, *supra* note 36.

<sup>38</sup> *Id.* Wolf had a partial change of mind. As a result, Josh's judge got part of what he wanted—namely, the raw videotape—which Josh agreed to release as part of a deal Josh cut with prosecutors. See McKinley, *8-Month Jail Term Ends as Maker of Video Turns Over a Copy*, *supra* note 36. Prosecutors in turn agreed not to compel Josh to testify before a grand jury. *Id.*

<sup>39</sup> See *In re Special Proceedings*, 291 F. Supp. 2d 44 (D.R.I. 2003), *aff'd* 373 F.3d 37 (1st Cir. 2004); see also Lynne Tuohy, *Reporter Convicted; Shielded Source*, HARTFORD COURANT, Nov. 19, 2004, at A1.

On November 18, 2004, the federal judge convicted Taricani in Providence, Rhode Island. *Id.* Earlier, the judge had fined Taricani \$85,000—\$1,000 per day—for his refusal. See Tracy Breton, *Judge Shortens Taricani's Time in Confinement*, PROVIDENCE J., Apr. 7, 2005, at A1. His TV station paid the fine. *Id.* Then on December 9, 2004, the judge sentenced Taricani to house arrest for six months. *Id.*

On April 6, 2005, four months after Taricani's sentencing, the judge released him, which the judge had promised to do if Taricani abided by the terms of his confinement. See Breton, *supra*. His terms had included a prohibition on working or using the Internet, but he could receive visitors daily from 2:00 p.m. to 4:00 p.m. *Id.* Taricani left his house three times during his confinement, for two appointments with his transplant doctor and for an emergency trip to his dentist. *Id.*

<sup>40</sup> See Tuohy, *supra* note 40.

<sup>41</sup> See Breton, *supra* note 40.

<sup>42</sup> *Id.*

<sup>43</sup> See *id.*; Tuohy, *supra* note 40; see also Pam Belluck, *TV Reporter Facing Jail Says Source Rejected Plea*, N.Y. TIMES, Dec. 7, 2004, at A18.

<sup>44</sup> See Michael Duffy & Viveca Novak, *Let's Make a Deal*, TIME, Oct. 10, 2005, at 24. In Washington, D.C., on October 7, 2004, Judge Thomas F. Hogan ordered Miller to jail. See Robert Zelnick, *Essay on Source Confidentiality: Journalists and Confidential Sources*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 541 (2005). One week later, he ordered Cooper to jail. *Id.* But the reporters' sentences were stayed while their consolidated cases were on appeal. *Id.*

A federal special prosecutor, Patrick Fitzgerald, sought contempt charges against Judith Miller and Matthew Cooper, of *Time* magazine—with imprisonment for up to 18 months and fines of up to \$1,000 per day.<sup>45</sup> Miller and Cooper, along with some other reporters, apparently got the information on Plame from the same source.<sup>46</sup> One curious fact is that neither Miller nor Cooper revealed Plame's name, and Miller never even wrote a story about Plame. Journalist Robert Novak was actually first to reveal Plame's name.<sup>47</sup> Also curious is why the prosecutor did not pursue Novak. Speculation is that

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<sup>45</sup> Duffy & Novak, *supra* note 44.

<sup>46</sup> See G. Robert Hillman, *Libby Indicted, Quits*, DALL. MORNING NEWS, Oct. 29, 2005, at 1A.

<sup>47</sup> Duffy & Novak, *supra* note 44. Cooper's source released him after *Time* magazine released Cooper's notes to the prosecutor. For commentary on waivers, see Rachel Smolkin, *Waivering*, AM. JOURNALISM REV., Feb.–Mar. 2006, at 32.

The literature on Miller and Cooper is massive. On July 11, 2005, Senator Frank Lautenberg (D-N.J.) introduced Senate Resolution 192, "Affirming that the First Amendment of the Constitution of the United States guarantees the freedom of the press and asserting that no purpose is served by sentencing journalists Judith Miller and Matthew Cooper, nor any similarly situated journalists, to prison for maintaining the anonymity of confidential sources." S. Res. 192, 109th Cong. (2005). The resolution contained the following clause: "Whereas Robert Novak, the columnist first to publish the identity of a covert Central Intelligence Agency officer by name, stated that the Government should not imprison journalists for maintaining the anonymity of confidential sources." *Id.*

For a detailed report on the Plame outing and the ensnaring of journalists, including a timeline of events. See Nancy Gibbs, *The Rove Problem*, TIME, July 25, 2005, at 22.; see also Matthew Cooper, "What I Told the Grand Jury," TIME, July 25, 2005, at 38–40. On Miller's jailing, see, for example, Duffy & Novak, *supra* note 44. On Libby's indictment, see, for example, Hillman, *supra* note 46 and Doyle McManus & Mary Curtius, *Indictment in CIA Leak Case*, L.A. TIMES, Oct. 29, 2005, at A18.

For scholarly analyses, see, for example, Clay Calvert, *Victories for Privacy and Losses for Journalism? Five Privacy Controversies from 2004 and Their Policy Implications for the Future of Reportage*, 13 J.L. & POL'Y 649, 690–95 (2005); Eunice Eun, Note, *Journalists Caught in the Crossfire: Robert Novak, the First Amendment, and Journalist's Duty of Confidentiality*, 42 AM. CRIM. L. REV. 1073 (2005); Zelnick, *supra* note 44.

For more about Valerie Plame, see her memoir, VALERIE PLAME WILSON, *FAIR GAME: MY LIFE AS A SPY, MY BETRAYAL BY THE WHITE HOUSE* (2007). The book contains blackened lines to mark redaction demanded by the CIA, and the Second Circuit Court of Appeals ruled in favor of the CIA over Wilson's First Amendment challenge. See *Wilson v. CIA*, 586 F.3d 171, 182–83 (2d Cir. 2009); Plame Wilson *supra*. The book then became a movie, *Fair Game*, that received some critical acclaim. See, e.g., Roger Ebert, *Fair Game*, CHI. SUN-TIMES, Nov. 3, 2010, <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/20101103/REVIEWS/101109993/1023>.

The Judith Miller story also apparently inspired a movie in 2008, titled *Nothing but the Truth*, about a reporter who reveals an undercover CIA agent's name, refuses to disclose her source's identity, and then goes to prison. See *Nothing but the Truth: Synopsis*, MSN MOVIES, <http://www.movies.msn.com/movies/movie-synopsis/nothing-but-the-truth.4/>. In the movie, the Supreme Court hears the reporter's case, deciding 5–4 against her and against reversing *Branzburg v. Hayes*. *Id.* For coverage of *Branzburg*, see *infra* Part I.B. The movie deviates

someone in the Bush administration “outed” Plame in retaliation for accusations by her husband, retired diplomat Joseph Wilson, that the Administration misrepresented that Saddam Hussein had tried to buy depleted uranium from Niger.<sup>48</sup> Ultimately, on June 27, 2005, the Supreme Court refused to grant certiorari for the claims of Miller or Cooper.<sup>49</sup> On July 6, 2005, Judge Hogan ordered Miller to jail.<sup>50</sup> She remained in jail until grand jury proceedings ended with the indictment of Lewis “Scooter” Libby.<sup>51</sup>

Vanessa Leggett, incarcerated in 2001, was a freelancer who spent 168 days in jail for refusing a federal judge’s order to hand over notes and tapes of interviews she had made while writing a book about the murder of a Houston, Texas, socialite, Doris Angleton.<sup>52</sup> Leggett’s source was the socialite’s husband, who was a suspect in the murder.<sup>53</sup> A federal judge in Texas found Leggett guilty of contempt.<sup>54</sup> A federal grand jury indicted the husband for murder and did not need Leggett’s notes to do so. Leggett stayed in jail until the expiration of the grand jury.<sup>55</sup>

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far from the Miller story, with brutal prison conditions, the murder of the CIA agent, and a surprise twist at the end. *See Nothing but the Truth: Synopsis, supra.*

<sup>48</sup> *See* Gibbs, *supra* note 47.

<sup>49</sup> Cooper v. United States, 545 U.S. 1150 (2005).

<sup>50</sup> *See* Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005 at A1.

<sup>51</sup> *See* Hillman, *supra* note 46.

<sup>52</sup> *See* Guillermo X. Garcia, *The Vanessa Leggett Saga*, AM. JOURNALISM REV., Mar. 2002, at 20.

Prior to Leggett’s record 168 days in jail, the record had been held by a reporter from Los Angeles, William Farr, who spent 46 days in jail in 1972. *See* Garcia, *supra*. Farr was covering the Charles Manson murder trial. *Id.* The judge had ordered attorneys, witnesses, and court employees not to release any information to the public. *See High Court Rejects a Newsmen’s Petition for Review*, N.Y. TIMES, Nov. 14, 1972 at 23. Farr got hold of a deposition that told, among other things, about plans the Manson “family” had made for future murders. *Id.* Apparently two prosecution attorneys had leaked the information to Farr, who wouldn’t tell the judge which two. *Id.*

In *In re Farber*, a case from New Jersey, reporter Farber paid a \$1,000 flat fine and stayed in jail until the end of the trial—40 days. 394 A.2d 330, 332 (N.J.), *cert. denied*, 439 U.S. 997 (1978). In addition, the *New York Times* paid a \$100,000 flat fine and daily \$5,000 fines. *Id.* After a pardon by New Jersey’s governor, the *Times* and Farber’s contempt convictions were cleared and, \$101,000 in fines was refunded. *See* Jonathan Friendly, *Times and Reporter Granted Byrne Pardon in ‘Dr. X’ Case*, N.Y. TIMES, Jan. 19, 1982, at A1. What landed Farber in jail was his investigative work for the *Times* that led to the indictment of a doctor for murder. The doctor wanted Farber’s notes. *In re Farber*, 394 A.2d at 332; *see also As Courts Clamp Down Harder on the Press*, U.S. NEWS & WORLD REP., Aug. 14, 1978, at 27. The doctor was acquitted without them. *See* Friendly, *supra*.

<sup>53</sup> Garcia, *supra* note 53, at 23.

<sup>54</sup> *Id.* at 24.

<sup>55</sup> *See id.* at 27; *see also* Samara Kalk, *Jailed Journalist Tells of Her Ordeal*, CAPITAL TIMES, May 30, 2002, at 3A; Sharyn Wizda Vane, *Jailed Writer Shares the Tale*, AUSTIN AM.-STATESMAN, July 21, 2002, at B1.

And there are many other examples.<sup>56</sup> These journalists suffered from the absence of a federal shield law.<sup>57</sup> Unfortunately, they would have suffered the same fate in state courts under many of the forty shield laws states<sup>58</sup> now have in place.<sup>59</sup>

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<sup>56</sup> Mark Fainaru-Wada and Lance Williams co-authored the book *Game of Shadows: Barry Bonds, Balco and the Steroids Scandal that Rocked Professional Sports* while working as reporters for the *San Francisco Chronicle*. MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS: BARRY BONDS, BALCO AND THE STEROIDS SCANDAL THAT ROCKED PROFESSIONAL SPORTS* (2006). Anthony Lewis succinctly summarized the Balco case:

Two reporters for the *San Francisco Chronicle* obtained documents from a federal grand jury investigation and wrote stories—important stories—about baseball players’ use of performance-enhancing drugs. Grand jury proceedings are secret. The reporters were subpoenaed and asked the source of the documents. They refused to answer but were saved from going to jail for contempt when the prosecutors found the source themselves. He was a lawyer who had represented the defendants indicted by the grand jury. When the stories based on his leaks appeared, he moved to dismiss the charges against his clients on the ground of improper disclosures! I hope I am right in believing that many journalists would not want to protect that kind of trickery.

Anthony Lewis, Panel Discussion, *Are Journalists Privileged?*, 29 *CARDOZO L. REV.* 1353, 1358 (2008).

In April 2011, Bonds was convicted of obstruction of justice in a federal court. See Lance Williams, *Barry Bonds Guilty of Obstruction of Justice*, SFGATE.COM (Apr. 14, 2011), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/04/13/MN491J01BR.DTL>. A mistrial was declared on three other counts of perjury after the jury could not reach a verdict. *Id.* Prosecutors had alleged that Bonds lied under oath regarding his steroid use. *Id.*

For more on the extensively covered BALCO case, see, Sean W. Kelly, Note, *Black and White and Read All Over: Press Protection After Branzburg*, 57 *DUKE L.J.* 199 (2007), Josi Kennon, Note, *When Rights Collide: An Examination of the Reporter’s Privilege, Grand Jury Leaks, and the Sixth Amendment Rights of the Criminal Defendant*, 17 *S. CAL. INTERDISC. L.J.* 543 (2008); Peter Meyer, Note, *BALCO, the Steroids Scandal, and What the Already Fragile Secrecy of Federal Grand Juries Means to the Debate over a Potential Federal Media Shield Law*, 83 *IND. L.J.* 1671 (2008).

<sup>57</sup> For the saga of reporters who recently suffered from contempt charges for refusing to reveal confidential sources, see *Lee v. Dep’t of Justice*, 413 F.3d 53 (D.C. Cir. 2005) (a Privacy Act case).

<sup>58</sup> Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin. See *infra* Part II. The District of Columbia also has a shield statute, and that statute will also be examined in this paper. *Id.* New Mexico, however, is an anomaly, with its Supreme Court gutting its shield law. See *infra* notes 119–21 and accompanying text.

<sup>59</sup> *But see* HAW. REV. STAT. § 621(5)(d) (West 2008) (stating that “No fine or imprisonment shall be imposed against a person claiming the privilege pursuant to this section for refusal to disclose information privileged pursuant to this section,” although Hawaii does not specify whether a reporter could be fined or jailed after a court rules in favor of disclosure).

The only shield that is truly worthy of the name is an absolute shield—a declaration that journalists will not be jailed for refusing to divulge the names of confidential sources. Period. Many commentators favor absolute shield laws. For example, Eric M. Freedman, arguing for absolute shield protection, says, “The mainstream press has suffered multiple blows . . . .”<sup>60</sup> Freedman says the current “environment” renders “remote” the prospects of courts using the First Amendment to expand the journalists’ privilege.<sup>61</sup> The function of a statute is to gain that greater protection for journalists.<sup>62</sup> He says that the lesson to be learned from the current situation is that “any qualified reportorial privilege which depends on judicial balancing of the importance of disclosure in individual cases is inherently structurally defective.”<sup>63</sup> Freedman argues that a qualified privilege fails to provide a “predictable standard” for when judges will require disclosure, thus defeating the purpose of a journalists’ privilege.<sup>64</sup> As Freedman says, “[a] reporter’s promise, ‘I will not reveal your name unless it meets a three-part legal test that has been subject to varying judicial interpretations’ is hardly calculated to inspire a source’s confidence.”<sup>65</sup>

Freedman concludes that “[a]s the birds come home to roost, it’s time to rebuild the rookery.”<sup>66</sup> In short, a federal shield law should discard the case-by-case method of a qualified privilege and give journalists “an absolute privilege” based on the attorney-client privilege.<sup>67</sup> “When a client confesses a past crime to a lawyer,” Freedman says,

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<sup>60</sup> Eric M. Freedman, *Reconstructing Journalists’ Privilege*, 29 CARDOZO L. REV. 1381, 1386 (2007). Among those blows, he lists:

[T]he unprecedented and much-publicized testimony of a string of prominent journalists in the Scooter Libby trial following a profoundly unedifying series of prevarications, compromises, and surrenders which deeply stained the image of both the privilege and its champions; and [P]ost-[September] 11[th] pushback from the federal government and supporters of its security policies against journalists doing precisely the sort of excellent investigative work that brings them into inevitable conflict with the authorities.

*Id.* at 1387.

<sup>61</sup> *Id.* The function of a statute is to gain that greater protection for journalists. He says that the lesson to be learned from the current situation is that “any qualified reportorial privilege which depends on judicial balancing of the importance of disclosure in individual cases is inherently structurally defective.”

<sup>62</sup> *Id.* at 1387–88.

<sup>63</sup> *Id.* at 1388.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* He also argues that a qualified privilege produces a “biased framework” for the judge and that the judge is asked to answer the wrong question of “how reasonable it is to make the reporter provide the requested information in this case.” *Id.* Freedman says, “[t]hat focus simply ignores the good the privilege seeks to protect: disclosure to a journalist in the next case, not this one.” *Id.* Last, a qualified-privilege test asks a judge “to perform a predictive task that requires more foresight than can realistically be expected.” *Id.* at 1389.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1390.

“it makes no difference to the applicability of the privilege that the client is a slimy scuzzball, nor that the client is the only available source respecting the facts of the crime . . . .”<sup>68</sup>

As Keith Werhan points out, “[t]he government’s interest in prosecuting crimes does not ordinarily trump other testimonial privileges, and for good reason: They then would be privileges in name only. Hampering law enforcement is the social cost of every testimonial privilege, including a journalist’s privilege.”<sup>69</sup> Favoring an absolute privilege for sources, Joel G. Weinberg says, “[o]ver half of the state shield statutes render *absolute* a reporter’s privilege not to disclose confidential sources, and in virtually all of the remaining state statutes, the standard for piercing the reporter’s privilege is high, requiring more than simple relevance to the proceeding.”<sup>70</sup>

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<sup>68</sup> *Id.* Use of the attorney-client model is certainly not Freedman’s invention. As he points out, immediately after the *Branzburg* decision, Senator Alan Cranston introduced legislation that would have established an absolute privilege at the federal and state levels, using the attorney-client privilege as a model. *Id.* at 1393–94. Cranston noted that attorneys could not even violate a confidence in national-security cases. *Id.* at 1394.

<sup>69</sup> Keith Werhan, Essay, *Rethinking Freedom of the Press After 9/11*, 82 TUL. L. REV. 1561, 1605 (2008). “In light of the courts’ traditional acceptance of testimonial privileges protecting the confidentiality of sensitive relationships—husband-wife, physician-patient, attorney-client—it seems appropriate to . . . ask why the relationship between journalists and their sources should be denied similar respect under the law.” *Id.* at 1602; see Kristen Anastos, Note, *Protecting the Public Interest? Why Qualified Legislative Protection Undermines the Need for a Federal Reporters’ Privilege*, 31 SETON HALL LEGIS. J. 463, 464 (2006) (discussing the implications of privilege legislation); Leslie Siegel, Note, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469 (2006) (arguing for an absolute federal shield law); Nathan Swinton, Note, *Privileging a Privilege: Should the Reporter’s Privilege Enjoy the Same Respect as the Attorney-Client Privilege?*, 19 GEO. J. LEGAL ETHICS 979, 989–90 (2006) (arguing for an absolute privilege and discussing Watergate).

<sup>70</sup> Joel G. Weinberg, *Supporting the First Amendment: A National Reporter’s Shield Law*, 31 SETON HALL LEGIS. J. 149, 174 (2006).

According to Joel M. Gora, in civil cases, there is almost an absolute privilege:

Indeed, starting shortly after *Branzburg*, in civil cases, courts had consistently rebuffed efforts to probe confidential sources (except perhaps in libel and similar suits against the press itself for serious derelictions of responsible reporting or editing) so much that one could almost say that in civil cases there was a de facto “absolute privilege.”

Joel M. Gora, *The Source of the Problem of Sources: The First Amendment Fails the Fourth Estate*, 29 CARDOZO L. REV. 1399, 1406 (2008).

Scott A. Mertens’s model statute, in his words, “proposes an absolute privilege for confidential information and sources (except when the journalist is the subject of the inquiry), and a qualified privilege for unpublished information.” Scott A. Mertens, Comment, *Michigan’s Shield Laws—A Free or Fettered Press?*, 16 T.M. COOLEY L. REV. 511, 531 (1999).

Douglas E. Lee maintains that even an absolute shield law does not always provide protection, using the example of *Svoboda v. Clear Channel Communications, Inc.*, 805 N.E.2d



That is not to say that the authors of this Article are optimistic about the passage of an absolute shield law at the federal level; if Congress could repeal the First Amendment, it very well might.<sup>71</sup> But absolute shield protection is necessary because the

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559 (Ohio Ct. App. 2004), a case involving a newspaper reporter who became a plaintiff after a radio news director aired a statement from a confidential source who said the reporter was romantically involved with one of her newspaper's publishers. Douglas E. Lee, *Do Not Pass Go, Do Not Collect \$200: The Reporter's Privilege Today*, 29 U. ARK. LITTLE ROCK L. REV. 77, 93–94 (2006).

Sweden has absolute shield protection for journalists. See TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] (Swed.) [The Freedom of the Press Act], available at <http://www.riksdagen.se/Global/dokument/dokument/laws/the-freedom-of-the-press-act-2012.pdf>. In fact, Swedish journalists would be guilty of violating law if they revealed their sources:

[A] principle contained in the Freedom of the Press Act is the freedom to communicate information. According to this principle, all persons in Sweden are entitled to communicate to the press information that they consider important and necessary to make public. The publisher of the material is not entitled to reveal the source if the individual in question wishes to remain anonymous. It is a punishable offence for anyone, for example the head of a public agency, to try to find out who has leaked information to the media.

*Freedom of the Press Act*, RIKSDAGEN, <http://www.riksdagen.se/Global/dokument/dokument/laws/the-freedom-of-the-press-act-2012.pdf> (last visited May 1, 2012). According to *Reporters Without Borders*, Sweden distinguished itself in 2010 by passing its Press Freedom Act, thus ranking in the top half-dozen countries for press freedom. See *Press Freedom Index 2010*, REPORTERS WITHOUT BORDERS, <http://en.rsf.org/press-freedom-index-2010,1034.html> (last visited May 1, 2012).

Could the “trade secrets” rubric perhaps be expanded by U.S. courts to protect confidential sources? See, e.g., *Paperloop.com, Inc. v. Gow*, No. 322044, 2001 WL 1674804 (S.F. Cnty. Super. Ct., 2001); Alfredo A. Barrera III, Comment, *Trade Secrets and the Fourth Estate: Can Employers Claim Trade Secret Protection over a Reporter's Confidential Sources?*, 39 HOUS. L. REV. 1157, 1158 (2002) (exploring the question: “If a reporter cultivates a source while employed by a publisher, can a quasi-property interest be claimed in this confidential relationship, and can it be protected as a trade secret by her former employer?”); see also Clay Calvert & Robert D. Richards, *Journalism Sources As Trade Secrets: Whose Source Is It Anyway?*, 23 WHITTIER L. REV. 985 (2002).

<sup>71</sup> Why do journalists fight so hard to protect sources and confidential information? Some object that compelling disclosure of sources is equivalent to turning journalists into investigators for the government or a party in a lawsuit. See *Branzburg v. Hayes*, 408 U.S. 665, 725–32 (1972) (Stewart, J., dissenting). More important, some fear confidential sources would dry up, obstructing the free flow of information to the public. For more commentary on why journalists protect their sources, see *infra*, Conclusion and Suggestions.

Of course, not everyone favors shield-law protection. Arkansas U.S. district judge, Susan Webber Wright, says:

I do not believe that any statutory reporter's privilege should be used to defeat other interests that are important to our constitutional form of government. It is true that freedom of the press is essential to our form of

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government. But, equally essential are the constitutional rights to indictment by a grand jury and a fair trial, in both criminal and civil cases.

Susan Webber Wright, *A Trial Judge's Ruminations on the Reporter's Privilege*, 29 U. ARK. LITTLE ROCK L. REV. 103, 117 (2006).

Louis J. Capocasale argues:

To provide the news media with an absolute privilege to withhold confidential sources may increase the temptation for the news media to print false "scandalous," or "controversial" stories about individuals in an effort to sell newspapers, since when confronted about the factual substance of the story if a federal investigation ensues, the newsgatherer could raise his or her shield.

Louis J. Capocasale, Comment, *Using the Shield as a Sword: An Analysis of how the Current Congressional Proposals for a Reporter's Shield Law Wound the Fifth Amendment*, 20 ST. JOHN'S J. LEGAL COMMENT. 339, 372 (2006).

He also says that:

Since reporters assume the role of watchdogs for the people, sniffing out individual and government crime on the trail of truth, it is illogical to afford them the right to sit idly by while another citizen or public official faces possible reputational harm, impeachment, or imprisonment by being accused of a crime.

*Id.* at 377.

The sentiment against press arrogance was forcefully stated by Erik Ugland:

A few weeks after the U.S. Supreme Court's 1979 decision in *Herbert v. Lando*, in which the Court refused to prohibit libel plaintiffs from inquiring about journalists' editorial processes, Justice William Brennan delivered his renowned address at Rutgers University . . . [H]e chided Jack Landau, then head of the Reporters Committee for Freedom of the Press, for his overheated claim that *Herbert* would destroy the press's "last constitutional shred of . . . editorial privacy and independence from the government." Brennan was an unlikely critic of the press, but he was just one of a chorus of people who had begun to warn journalists that their overzealous self-advocacy was eroding the support they had cultivated in the years following Watergate and that by arrogantly staking out an elite social position for themselves and demanding a set of "special . . . rights" not possessed by the public generally, they were courting a backlash.

Three decades later, the charge of media arrogance and exceptionalism is still at the core of the contemporary American press critique. The news media remain the targets of reprobation in part because the public perceives them as demanding a unique set of legal protections. This is particularly true in the context of the reporter's privilege and the debates over the proposed federal shield law, in which journalists' pleas are frequently dismissed as attempts to position themselves as "a priestly class above everybody else."

Erik Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. PA. J. CONST. L. 375, 375-77 (2009) (citations omitted).

ability of judges to weigh interests almost inevitably means that they will deny protection in cases such as Judith Miller's. Miller's judge was emphatic: no protection for her under a balancing test.<sup>72</sup>

Journalists should take scant comfort in any shield laws that permit balancing. Balancing is often inadequate because it is dependent on the proclivities of the balancer. Some judges like to puncture shield laws.<sup>73</sup> These judges are loathe to let legislators tell them, the judges, how they should run their courts. A further complication at the state level is the fact that some judges are elected and thus might fear appearing to be "soft" on journalists and crime if they grant shield protection.<sup>74</sup>

So long as there is no federal shield law, federal judges can, in effect, trump state shield laws. Where state legislators have given shield protection, federal judges can thwart state legislative intent. But the same would be true if a federal qualified shield law permitted the federal judge to balance interests and deny shield protection in circumstances in which state law would grant a shield.

Some commentators, of course, prefer a qualified shield law. For example, Rodney A. Smolla concludes, "The privilege should be qualified, not absolute, and

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For other articles expressing anti-shield-law sentiment, see Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385 (2006) (discussing history and future of shield laws); Randall D. Eliason, *The Problems with the Reporter's Privilege*, 57 AM. U. L. REV. 1341 (2002) (arguing that privilege laws are flawed and unnecessary); Edward Garris, *The Problem with a Federal Reporters' Shield Law: Speculative and Divergent*, 20 CBA REC. 48 (June–July 2006) (discussing possible solutions for shield law problems); Markus E. Apelis, Note, *Fit to Print? Consequences of Implementing a Federal Reporter's Privilege*, 58 CASE W. RES. L. REV. 1369 (2008) (expressing concern that licensing of journalists would be a consequence of shield protection); Kennon, *supra* note 56, at 546 (arguing against recognition of a reporter's privilege in cases involving grand jury leaks); Kara A. Larsen, Note, *The Demise of the First Amendment–Based Reporter's Privilege: Why This Current Trend Should Not Surprise the Media*, 37 CONN. L. REV. 1235 (2005) (analyzing the expansion of privilege laws); John T. White, Comment, *Smoke Screen: Are State Shield Laws Really Protecting Speech or Simply Providing Cover for Criminals Like the Serial Arsonist?* 33 ARIZ. ST. L.J. 909 (2001) (analyzing Arizona's shield law).

<sup>72</sup> *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 983 (D.C. Cir. 2005).

<sup>73</sup> See *supra* note 35 and accompanying text.

<sup>74</sup> At least some judges in thirty-nine states face elections in some manner. See AM. JUD. SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2010), available at [http://www.judicialselection.us/uploads/documents/Judicial\\_Selection\\_Charts\\_1196376173077.pdf](http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf) (last visited May 1, 2012); see also Genelle I. Belmas & Jason M. Shepard, *Speaking from the Bench: Judicial Campaigns, Judges' Speech, and the First Amendment*, 58 DRAKE L. REV. 709, 709 n.1 (2010) (explaining methodology for counting election states). A wide literature exists on the merits and demerits of electing judges—specifically, whether politics influence their work. See, e.g., sources cited *supra*. In this case, the risk, at least, is that public sentiment against a journalist might cause an elected judge to opt towards unjustly jailing or otherwise punishing the journalist.

should borrow from the rich body of case law and statutory experience with the statutory and common-law balancing tests that have been employed by many state and federal courts.<sup>75</sup>

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<sup>75</sup> Rodney A. Smolla, *The First Amendment, Journalists, and Sources: A Curious Study in "Reverse Federalism,"* 29 CARDOZO L. REV. 1423, 1429 (2008). Smolla does, however, want to see passage of a federal shield law:

To extend a newsgathering privilege to our federal court system is not a radical proposition. The fact that some 49 states and the District of Columbia have extended some form of newsgathering privilege to citizens is a "national referendum" attesting to this country's sense of the critical role that a vibrant press plays in a free society. Federal legislation would simply put the federal court system, and most importantly, the federal government itself, within the rubric of the same balance that has been struck by most states. The experience of the states and the District of Columbia have served as a valuable proving ground for the value of a reporter's privilege, and the possibility of crafting such a privilege in a nuanced manner that balances the competing societal interests.

*Id.*

Nuance is also stressed by Matthew P. Burke:

States with absolute shield laws generally do not force disclosure of sources under any circumstances. While such protection sounds appealing, common sense dictates that there must be either various exceptions to such an absolute privilege or, perhaps better labeled, a qualified privilege where courts can compel disclosure under certain limited circumstances. A potential shield law should provide that compelled disclosure is never appropriate unless disclosure is necessary to prevent a grave injustice and the party seeking disclosure cannot obtain information critical to their [sic] case by any other reasonable means.

Matthew P. Burke, Note, *Big Dig Confidential: Why Massachusetts Needs a Statutory Journalist's Shield Law if it Wants to Keep the Big Stories Coming*, 42 SUFFOLK U. L. REV. 899, 914 (2009).

For other commentators advocating passage of a qualified federal shield law, see Rex S. Heinke & Galit Avitan, *Reconciling Branzburg and Daily Mail: A Proposal for a Qualified Reporter's Privilege*, 32 OHIO N.U. L. REV. 503 (2006); James Thomas Tucker & Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 AM. U. L. REV. 1291 (2008); Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. LAW & PUB. POL'Y 113 (2008); Robert Zelnick, *Journalists and Confidential Sources*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541 (2005) (discussing primarily the Judith Miller case and arguing for a qualified shield law); Jaime M. Porter, Note, *Not Just "Every Man": Revisiting the Journalists' Privilege Against Compelled Disclosure of Confidential Sources*, 82 IND. L.J. 549, 572 (2007) (arguing, in part, for a qualified federal shield law); Michael D. Saperstein, Jr., Comment, *Federal Shield Law: Protecting Free Speech or Endangering the Nation?*, 14 COMMLAW CONSPPECTUS 543 (2006); Devin M. Smith, Comment, *Thin Shields Pierce Easily: A Case for Fortifying the Journalists' Privilege in New Zealand*, 18 PAC. RIM L. & POL'Y J. 217 (2009) (arguing for a qualified shield law based on Washington State's law).

Qualified shield laws give journalists a false sense of security. A shield that can be punctured is not a shield that can be relied upon. For newsgatherers who are promising confidentiality to a source, the problem is similar to a truth-in-advertising problem. The newsgatherer would need to qualify the promise of confidentiality unless, of course, the newsgatherer were sure that he or she would choose jail over breaking a promise of confidentiality. But even if the newsgatherer felt confident in his or her resolve to choose jail over disclosing the source's identity, the fact that the newsgatherer might be put to that choice would seem a material fact that the newsgatherer should disclose to the source. The newsgatherer could say, "I promise confidentiality. A judge might order me to reveal your identity, but I would rather go to jail."

Given the current state of shield law, some federal prosecutors are arguably making an end run around the First Amendment.<sup>76</sup> They are not going after publishers directly but are calling grand juries and subpoenaing journalists. This prosecutorial tactic could jeopardize potential sources' willingness to give information to the press, thus resulting in information drying up. Indirectly, then, federal prosecutors could restrain publication of information the government wants to keep secret, even information about alleged governmental wrongdoing.

#### *A. A Little History*

The history of jailing journalists for refusing to identify sources is, unfortunately, a long one.<sup>77</sup> In fact, Justice Clarence Thomas has noted:

[T]he earliest and most famous American experience with freedom of the press, the 1735 Zenger trial, centered around anonymous political pamphlets. The case involved a printer, John Peter Zenger, who refused to reveal the anonymous authors of published attacks on the Crown Governor of New York. When the Governor and his council could not discover the identity of the authors, they prosecuted Zenger himself for seditious libel.<sup>78</sup>

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<sup>76</sup> See generally Ugland, *supra* note 75.

<sup>77</sup> See, e.g., Lucy A. Dalglish & Casey Murray, *Déjà Vu All Over Again: How a Generation of Gains in Federal Reporter's Privilege Law is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13, 13 (2006) ("The first known American reporter punished for refusing to identify the source of published information was Benjamin Franklin's brother, James, in 1722." (citing BENJAMIN FRANKLIN: HIS AUTOBIOGRAPHY 30 (H. Weld ed., N.Y., Harper & Brothers 1848)). But see Geoffrey R. Stone, *The Responsibilities of a Free Press*, 40 BULL. AM. ACAD. ARTS & SCI. 7 (1987) (discussing the jailing of James Franklin, editor of the New England Courant, for writing a sarcastic article about the government building a ship to chase coastal pirates)).

<sup>78</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring) (citing JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 9-19 (Stanley Nider Katz ed., 1972)).

Zenger kept his promise of confidentiality, and his fellow citizens rallied around him.<sup>79</sup> The jury acquitted him.<sup>80</sup> This case shows the deeply rooted, historic value placed on anonymity.<sup>81</sup> In Justice Thomas's words: "Although the case set the Colonies afire for its example of a jury refusing to convict a defendant of seditious libel against Crown authorities, it also signified at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind."<sup>82</sup> The case also demonstrates the depth of conviction from an early journalist to protect his source.

In 1848, *New York Herald* reporter John Nugent chose to go to jail rather than tell Congress who gave him a copy of a secret treaty with Mexico.<sup>83</sup> As for protection for journalists, Maryland passed the first shield law in 1896.<sup>84</sup>

The claim of First Amendment protection first got attention in a ground-breaking case in 1958, *Garland v. Torre*.<sup>85</sup> Actress and singer Judy Garland sued reporter Marie Torre for libel.<sup>86</sup> The reporter argued for a First Amendment shield for reporters. Although she lost,<sup>87</sup> the Second Circuit seriously considered her argument.<sup>88</sup>

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See id.*

<sup>82</sup> *Id.*

<sup>83</sup> *See Ex parte Nugent*, 1 Hay. & Haz. 287 (D.C. Cir. 1848); *see also* David Rudenstine, *A Reporter Keeping Confidences: More Important Than Ever*, 29 CARDOZO L. REV. 1431, 1431 (2008).

<sup>84</sup> *See* Jane E. Kirtley, *Reporter's Privilege in the 21st Century: Despite the Ongoing Controversy Concerning Adoption of a Federal Reporter's Privilege Statute, the Idea is Neither New, Nor Novel*, 25 DEL. LAW., Winter 2007/2008, at 12, 13.

<sup>85</sup> 259 F.2d 545 (2d Cir. 1958).

<sup>86</sup> *Id.* at 547.

<sup>87</sup> *Id.* at 550.

<sup>88</sup> *Id.* The Second Circuit framed Torre's argument in this manner:

The first contention is a Constitutional one—to compel newspaper reporters to disclose confidential sources of news would, it is asserted, encroach upon the freedom of the press guaranteed by the First Amendment, because "it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish pro tanto the flow of news to the public."

*Id.* at 547–48. For commentary, *see* Stephen Bates, *Garland v. Torre and the Birth of Reporter's Privilege*, 15 COMM. L. & POL'Y 91 (2010).

Anthony Lewis commented on the *Garland* case, highlighting its importance:

The first time the claim for such a privilege was made in the courts was in 1958, in the case of *Garland v. Torre*. Garland was Judy Garland, the singer. Torre was Marie Torre, a television columnist for *The Herald-Tribune*. She wrote that, according to a CBS executive, Ms. Garland was not scheduling a special on CBS because she thought she was too fat. Ms. Garland sued, and demanded the name of the alleged CBS executive—which Marie Torre refused to produce, claiming a constitutional privilege.

*B. Branzburg v. Hayes*

A shield law would not be necessary if the Supreme Court had said that the First Amendment protects journalists from incarceration.<sup>89</sup> But the Court, in a 5–4 decision,

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In the Court of Appeals, Judge Potter Stewart—who would later be promoted to the Supreme Court—said that the harm to news-gathering by compelled disclosure of a source “must give place under the Constitution to a paramount public interest in the fair administration of justice.”

Lewis, *supra* note 56, at 1355 (citations omitted).

<sup>89</sup> For a scholarly article arguing that the Supreme Court should have recognized a First Amendment privilege for reporters to protect their sources, see Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201 (2005).

Some commentators believe that Rule 501 of the Federal Rules of Evidence offers a solution to the problem of granting shield-law protection to journalists. See, e.g., Anthony L. Fargo & Paul McAdoo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist's Privilege Problem*, 33 WM. MITCHELL L. REV. 1347 (2007).

Rule 501 says:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, *the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.*

See FED. R. EVID. 501 (emphasis added). The rule continues, saying, “However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.” *Id.*

Judge David Tatel opined:

Given *Branzburg's* instruction that “Congress has freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned,” 408 U.S. at 706, 92 S.Ct. 2646, Rule 501’s delegation of congressional authority requires that we look anew at the “necess[ity] and desirab[ility]” of the reporter privilege—though from a common law perspective.

*In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 989 (D.C. Cir. 2005).

Erik Ugland argues for recognition of a common-law privilege for journalists. He says, Debate over the proposed federal shield law . . . has focused almost entirely on the sanctity of confidential source relationships and the value of leaks as a tool for preserving government accountability. In addition, congressional testimony, newspaper editorials, and other public communications . . . all highlight the need to maintain an expressive channel for whistleblowers and other anonymous speakers.

Erik Ugland, *The New Abridged Reporter's Privilege: Policies, Principles, and Pathological Perspectives*, 71 OHIO ST. L.J. 1, 4–5 (2010). The result? “All of this rhetorical framing encourages a one-dimensional view of the privilege that is oriented around source confidentiality

refused to do so in *Branzburg v. Hayes*.<sup>90</sup> The Court did say, however, that the federal government and the states could fashion statutory privileges for journalists,<sup>91</sup> and today a majority of states have done so, with varying degrees of success.

Currently, forty states and the District of Columbia have passed their own renditions of shield laws, and more are contemplating a shield law, as is the federal government.<sup>92</sup> But current shield laws may aptly be compared to an insurance policy that protects a journalist from everything but what happens to that journalist.

Piercing-of-the-shield is precisely what happened to poor journalist Branzburg. Branzburg wrote a *Louisville Courier-Journal* article that included a detailed report

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even though 97% of journalist subpoenas are for nonconfidential information.” *Id.* at 5. On the subject of nonconfidential information, see, for example, Anthony L. Fargo, *The Journalist’s Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL’Y 241 (2002).

Elizabeth A. Graham urges the Supreme Court to recognize a “common-law reporter’s privilege” under Rule 501. Elizabeth A. Graham, Comment, *Uncertainty Leads to Jail Time: The Status of the Common-Law Reporter’s Privilege*, 56 DEPAUL L. REV. 723, 753 (2007). Speaking of “the policy concerns which must be taken into account when considering the common-law reporter’s privilege,” she says:

Most important among these concerns is the need for clarity, so reporters and their sources will be aware of the consequences of their actions. There is clearly disagreement among the courts about the proper approach to analyzing the issue; the best way to address that is for the Supreme Court to grant certiorari and recognize a common-law reporter’s privilege.

*Id.* at 757.

The New York Bar’s Committee on Communications & Media Law agrees, saying, “*Branzburg* plainly poses no obstacle to judicial recognition of a federal common law privilege for journalists under Rule 501 of the Federal Rules of Evidence, and such a privilege should plainly be recognized.” Comm. on Commc’ns & Media Law, *The Federal Common Law of Journalists’ Privilege: A Position Paper*, 60 RECORD 214, 214 (2005).

Kristen Anastos argues that if federal shield-law protections pass, then “the media would gain a much-needed federal protection. The media, however, would also be squandering the full protection the First Amendment affords by not fighting for the recognition of an absolute reporters’ privilege under the Federal Rules of Evidence.” Anastos, *supra* note 69, at 486.

Jaynie Randall opines that “Federal courts should use their common law power under Federal Rule of Evidence 501 to articulate a flexible newsgathering privilege for reporters analogous to the work product immunity that exists for attorneys.” Jaynie Randall, Comment, *Freeing Newsgathering from the Reporter’s Privilege*, 114 YALE L.J. 1827, 1827 (2005).

But Arkansas U.S. District Judge Susan Webber Wright argues against a common-law privilege, saying, “I conclude that any reporter’s privilege is so different from the privileges recognized at common law that there really should be no reporter’s privilege at common law.” Wright, *supra* note 71, at 110.

<sup>90</sup> 408 U.S. 665, 667 (1972).

<sup>91</sup> *Id.* at 688–89.

<sup>92</sup> See *infra* Part II (discussing the differences in current shield laws); see also *supra* note 58 (listing states with shield laws).



of two young people who were making hashish from marijuana, as well as a picture of hands working above a laboratory table that had hashish on it.<sup>93</sup> The article said Branzburg “had promised not to reveal the identities of the two hashish makers.”<sup>94</sup> That statement was somewhat similar to waving a red flag at a bull.

Branzburg then received a subpoena to appear before a grand jury.<sup>95</sup> The Kentucky court said the state’s shield law protected a journalist from “divulg[ing] the identity of an informant who supplied him with information.”<sup>96</sup> But “the statute did not permit a reporter to refuse to testify about events he had observed personally.”<sup>97</sup> Branzburg, of course, had observed the two people making hashish. The courts pierced the shield.<sup>98</sup>

*Branzburg* was a combination of three cases involving journalists who refused to testify before grand juries and left murky waters in its wake.<sup>99</sup> In one case, the Ninth Circuit Court of Appeals ruled that the First Amendment gave a reporter a qualified privilege.<sup>100</sup> In another, the Supreme Judicial Court of Massachusetts said the First Amendment did not protect journalists from testifying in front of grand juries.<sup>101</sup> In the third case, the Kentucky Court of Appeals said Kentucky’s shield law did not protect Branzburg, nor did the First Amendment.<sup>102</sup>

In deciding that the First Amendment does not give journalists shield protection, the Court balanced competing interests and concluded that the obligation to appear in front of a grand jury and give testimony when subpoenaed to do so outweighs First Amendment considerations.<sup>103</sup> The Court said, with barbed language, “[W]e cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.”<sup>104</sup> The Court did

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<sup>93</sup> *Branzburg*, 408 U.S. at 667.

<sup>94</sup> *Id.* at 667–68.

<sup>95</sup> *Id.* at 668.

<sup>96</sup> *Id.* at 669.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 669–70.

<sup>99</sup> See *Branzburg*, 408 U.S. at 667–79. See generally Anthony L. Fargo, *What They Meant to Say: The Courts Try to Explain Branzburg v. Hayes*, 12 JOURNALISM & COMM. MONOGRAPHS 65 (2010) (providing an extensive review of federal cases citing, and attempting to interpret, *Branzburg* on shield law and other matters). For a first-person account of Earl Caldwell, a party in the *Branzburg* case, see Eric B. Easton, *A House Divided: Earl Caldwell, The New York Times, and the Quest for a Testimonial Privilege*, 2009 UTAH L. REV. 1293 (2009). For coverage of the extensive 1972–1975 hearings in Congress on the “newsmen’s privilege,” headed by Wisconsin Congressman Robert W. Kastenmeier, see Jason M. Shepard, *After the First Amendment Fails: The Newsmen’s Privilege Hearings of the 1970s*, 14 COMM. L. & POL’Y 373 (2009). For an argument for U.S. Supreme Court recognition of shield law, see generally Nestler, *supra* note 89.

<sup>100</sup> *Branzburg*, 408 U.S. at 679.

<sup>101</sup> *Id.* at 674.

<sup>102</sup> *Id.* at 670.

<sup>103</sup> *Id.* at 701–02.

<sup>104</sup> *Id.* at 692.

recognize that some sources may dry up and that there may be some constriction of news, but found the question of how much too “speculative.”<sup>105</sup>

Also, the Court mentioned a practical consideration: If it granted a “constitutional newsman’s privilege,” then sooner or later the Court was going to have to define who qualifies as a “newsman.”<sup>106</sup> This question, who should qualify as a journalist, remains a complex one, as will be discussed later.<sup>107</sup>

The only privilege journalists have in front of a grand jury is the Fifth Amendment privilege against self-incrimination that every citizen has, according to the Supreme Court.<sup>108</sup> There is an exception where First Amendment considerations would outweigh the obligation to testify: when a grand jury investigation is not held in good faith.<sup>109</sup> “Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification,”<sup>110</sup> the Court said, but proving bad faith could indeed be difficult.<sup>111</sup> The bottom line on *Branzburg* is that there is “no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation.”<sup>112</sup>

Justice Lewis F. Powell wrote a concurring opinion in which he said:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the

<sup>105</sup> *Id.* at 693–94.

<sup>106</sup> *Id.* at 703–04. The Court also said:

The administration of a constitutional newsman’s privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

*Id.*

<sup>107</sup> *See infra* Part II.A.

<sup>108</sup> *Id.* at 689–90.

<sup>109</sup> *Id.* at 707.

<sup>110</sup> *Id.* at 707–08.

<sup>111</sup> The notion of “good faith” or “bad faith” fortunately gets little play in state shield statutes. Arizona requires a good-faith statement: “That the subpoena is not intended to interfere with the gathering, writing, editing, publishing, broadcasting and disseminating of news to the public . . .” ARIZ. REV. STAT. ANN. § 12-2214(A)(6) (2011). Arkansas also mentions “bad faith,” but from the perspective of the reporter, saying that before a reporter may be forced to disclose sources, “it must be shown that the article was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare.” ARK. CODE ANN. § 16-85-510 (2011). Thus, despite the inactive “it must be shown” language, clearly the seeker of sources must prove bad faith and malice on the part of the reporter and that the reporter’s article was “not in the interest of the public welfare.” *Id.* Proving bad faith and proving a negative—“not in the interest of the public welfare”—might well be very difficult tasks.

<sup>112</sup> *Branzburg*, 408 U.S. at 708.

obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.<sup>113</sup>

Based on this concurring opinion, some legal scholars have said that the *Branzburg* decision is a plurality decision only.<sup>114</sup> With Justice Powell in the middle, *Branzburg* could be viewed as a 4–1–4 decision. For example, Rodney A. Smolla said:

[T]he opinion of Justice Powell in *Branzburg* has proven a model of muddle. Justice Powell's opinion, on the one hand, seemed to profess agreement with the Chief Justice. Yet the opinion of Justice Powell also proceeded, somewhat opaquely, to hint that it may be appropriate to balance the competing interests at stake on a case-by-case basis.<sup>115</sup>

David Rudenstine has commented that "Powell's opinion in *Branzburg* left the law in a muddle."<sup>116</sup> He continued:

Even Justice Stewart could not resist poking fun at the uncertainty and confusion Justice Powell's enigmatic opinion created. Justice Stewart wrote: "In the cases involving the newspaper reporters' claims that they had a constitutional privilege not to disclose their confidential news sources to a grand jury, the Court rejected the claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half."<sup>117</sup>

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<sup>113</sup> *Id.* at 710 (Powell, J., concurring).

<sup>114</sup> William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 637 (2006) ("For more than thirty years, media lawyers have claimed with a surprising level of success that Justice White's opinion for the *Branzburg* Court was a plurality opinion and the crucial opinion was Justice Powell's concurring opinion, which arguably implied that some form of reporter's privilege should be recognized.").

<sup>115</sup> Smolla, *supra* note 75, at 1426; *see also* Michele Bush Kimball, *The Intent Behind the Cryptic Concurrence that Provided a Reporter's Privilege*, 13 COMM. L. & POL'Y 379 (2008) (concluding that, based on his papers, among other sources, Justice Powell supported a case-by-case application of a qualified reporter's privilege).

<sup>116</sup> David Rudenstine, *A Reporter Keeping Confidences: More Important than Ever*, 29 CARDOZO L. REV. 1431, 1436 (2008).

<sup>117</sup> *Id.* (citing Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 635 (1975)); *see also In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring) (speaking of "*Branzburg's* internal confusion").

Justice William O. Douglas, dissenting in *Branzburg*, commented on the case of *Caldwell v. United States*, one of the three cases that the Court heard in the consolidated *Branzburg* case.<sup>118</sup> Earl Caldwell was reporting for the *New York Times* about activities of the Black Panther Party, which had publicly threatened to kill then-President Richard Nixon.<sup>119</sup> The Court of Appeals for the Ninth Circuit determined that the First Amendment granted a limited privilege not to appear in front of a grand jury probing Panther activities.<sup>120</sup> Justice Douglas said:

The New York Times, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government. My belief is that all of the “balancing” was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in the case.<sup>121</sup>

Justice Potter Stewart, joined by Justices William Brennan and Thurgood Marshall, wrote an impassioned dissent.<sup>122</sup> “The Court’s crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society,” Stewart said. He then presented a three-part test that he would have used:

I would hold that the government must (1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>123</sup>

This test of relevance, lack of alternative sources, and compelling need had been used by the Ninth Circuit in one of the cases consolidated by *Branzburg*, and Stewart’s use

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On a positive note, C. Edwin Baker concluded, “Justice Powell’s concurrence in *Branzburg* allowed many, probably most, lower courts faced with the issue to conclude that the First Amendment does justify at least some special attention to the press’s claims not to be required to reveal confidential sources.” C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 984 (2007).

<sup>118</sup> *Branzburg*, 408 U.S. at 711 (Douglas, J., dissenting).

<sup>119</sup> *Id.* at 675–77 (majority opinion).

<sup>120</sup> *Id.* at 679. For a further synopsis of Caldwell, see *id.* at 676–79.

<sup>121</sup> *Id.* at 713 (Douglas, J., dissenting).

<sup>122</sup> *Id.* at 725 (Stewart, J., dissenting).

<sup>123</sup> *Id.* at 743.

of it helped the test become very influential.<sup>124</sup> Even Stewart's test, however, probably would not have helped Taricani, Miller, or even Leggett.<sup>125</sup>

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<sup>124</sup> See *id.* at 678, 743; Fargo, *supra* note 99, at 80. The Supreme Court could have reviewed its decision in *Branzburg v. Hayes*, but on November 15, 2010, the Court chose not to do so and also chose not to comment on its refusal. See *High Court Won't Hear Free-Speech Challenge to Grand Jury Subpoenas*, FIRST AMENDMENT CENTER, (Nov. 16, 2010), <http://www.firstamendmentcenter.org/high-court-wont-hear-free-speech-challenge-to-grand-jury-subpoenas>.

Siobhan Reynolds and her organization, the Pain Relief Network, opposed the federal government's attempts to restrict prescriptions for pain killers, believing that the government's actions were leaving patients to suffer chronic pain unnecessarily. Roxana Hegeman, *Kan. Advocate's Supporters: Grand Jury Retaliatory*, SAN DIEGO UNION-TRIB., Nov. 10, 2010, <http://www.utsandiego.com/news/2010/nov/10/kan-advocates-supporters-grand-jury-retaliatory/?page=#article>. She took up the cause of Dr. Stephen Schneider and his wife, who received federal sentences of thirty and thirty-three years respectively for conspiracy in an alleged moneymaking scheme that resulted in sixty-eight deaths from overdose in a Kansas clinic. FIRST AMENDMENT CENTER, *supra*. Reynolds and her group sponsored a highway billboard, saying, "Dr. Schneider never killed anyone." *Id.* Federal prosecutors attempted to gain a gag order against Reynolds, but after that failed, prosecutors convened a grand jury. *Id.* Reynolds refused to turn over documents that included e-mails. *Id.*

Her attempts to quash the subpoena and to overturn a contempt citation failed. *Id.* Even though organizations such as The Reporters Committee for Freedom of the Press and the Institute for Justice and Reason Foundation took up Reynolds's cause, the Supreme Court refused to hear her case. *Id.* The case climbed mostly in secret to its rebuff by the high Court, with the Tenth Circuit Court of Appeals sealing the court docket in Reynolds's contempt case. See *id.* The Tenth Circuit had sealed the amicus brief filed by the Reporters Committee, but the Associated Press got a copy of the brief after it was posted anonymously on Scribd.com in October. See *id.*; Hegeman, *supra*. The brief said of the Reynolds case, "Here the Assistant U.S. Attorney sought the subpoenas in question after the district court denied the government's motion to gag. The sequence of facts strongly suggests that the government has issued these subpoenas in direct retaliation for (Reynolds') political advocacy." Hegeman, *supra*; FIRST AMENDMENT CENTER, *supra*. Roxana Hegeman, who has written extensively on the Siobhan Reynolds case, said, "The Associated Press obtained a copy of the sealed amicus brief after it was anonymously uploaded to the public document-sharing website Scribd last month. Institute of Justice attorney Paul Sherman denied his organization posted the document but confirmed its contents." Hegeman, *supra*.

*Branzburg* had said that the only privilege journalists have in front of a grand jury is the Fifth Amendment privilege against self-incrimination that every citizen has. *Branzburg*, 408 U.S. at 689–90. But there is an exception where First Amendment considerations would outweigh the obligation to testify: when a grand jury investigation is not held in good faith. *Id.* at 707. "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification," the Court said, but there is "no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation." *Id.* at 707–08. Was the Reynolds case one of a "bad faith" grand jury? What constitutes a "bad faith" grand jury? The Supreme Court has so far not offered any clarification.

Jacob Sullum complains, "Perhaps the Court was impressed by the 10th Circuit's reasoning. We can't judge for ourselves, because the appeals court's decision is sealed, like almost every

### C. *The Value of Openness*

Heidi Kitrosser questions the “conventional assumption” that volumes of information exist that would be dangerous in enemy hands, and she reports that persons from all political viewpoints have suggested that the United States unnecessarily classifies a lot of information.<sup>126</sup> For example, she questions the Bush Administration’s rationale for trying to keep the NSA eavesdropping a secret.<sup>127</sup>

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other document related to Reynolds’ case.” Jacob Sullum, *Chilling Her Softly*, REASON MAG., Nov. 17, 2010, <http://reason.com/archives/2010/11/17/chilling-her-softly>.

In the meantime, Reynolds, on December 29, 2010, sent out a message to the members of the Pain Network Organization, saying:

The Members of the Board of Directors and I have decided to shut down PRN as an activist organization because pressure from the US Department of Justice has made it impossible for us to function. I have fought back against the attack on me and PRN but have received no redress in the federal courts; so, the board and I have concluded that we simply cannot continue.

Siobhan Reynolds, *The End of PRN*, PAIN RELIEF NETWORK, Dec. 29, 2010 (on file with author).

<sup>125</sup> On December 8, 2004, a three-judge panel of the United States Court of Appeals for the District of Columbia heard arguments on whether to grant Miller and Cooper any protection. *In re Grand Jury, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). Judge Sentelle repeatedly asked how this case differed from *Branzburg v. Hayes*. *Id.* at 977–79. Judge Tatel, through his concurrence, perhaps seemed amenable to balancing the equities in this case. *See id.* at 987–88 (Tatel, J., concurring). But balancing leaves the decision up to the decisionmaker, of course, and proving relevance, lack of other sources, and need, arguably, is not that difficult for prosecutors.

<sup>126</sup> Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1066 (2008).

<sup>127</sup> *Id.* at 1067–68. So does Anthony Lewis:

We have lately had some dramatic illustrations of the fact that journalists can often do their most important work only by relying on confidential sources to get at official secrets. One example was the *Times* report two years ago that President Bush had ordered the National Security Agency to tap international telephone calls without obtaining the warrants that are required by law. It was a vitally important story, bringing to light—and to a degree of accountability—a lawless executive activity. Another example was the *Washington Post* report on the CIA’s use of secret prisons in Europe to hold and interrogate alleged enemy combatants. Neither of those stories could have been reported without the use of confidential sources. And without, I should add, great courage on the part of the journalists and their newspapers. The response of the Bush Administration and its political supporters was to threaten the reporters, call them traitors and so on; that is, to focus on the leaks instead of one of the flagrant violations of law that officials had committed.

Lewis, *supra* note 56, at 1354; *see also* Note, *Media Incentives and National Security Secrets*, 122 HARV. L. REV. 2228, 2228 (2009) (“In recent years, journalists have exposed many stories that the government claims will imperil efforts in the war on terrorism, including the Bush

Yet confidentiality exists, and given confidentiality's close relationship to matters of national security, it often adds complexity to the reporting process. Mary-Rose Papandrea says leaks have become the primary method of communicating information, even classified information, to the public through a compliant press.<sup>128</sup> Today in the era of WikiLeaks, protection for leakers is all the more divisive. The old chess board between the press and government has been upended by new and wily—and sometimes reckless—players.<sup>129</sup>

Bradley Manning is the government's prime, and only, suspect in the release of hundreds of thousands of secret documents to WikiLeaks.<sup>130</sup> The Army charged him

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Administration's secret domestic surveillance of al Qaeda affiliates . . ."). For an extended piece on wiretapping done by presidents, and particularly President George W. Bush, see generally Heidi Kitrosser, *It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401 (2010).

Kitrosser also comments about another risk:

[There also is a risk] that secrecy . . . will intentionally be misused by those set on manipulating public debate toward their own ends. Indeed, McCarthy's exploitation of government secrecy calls to mind Vice President Cheney's recent attempts to perpetuate the theory of a link between Al Qaeda and Saddam Hussein through vague public allusions to evidence in the administration's possession of which others, including the 9-11 Commission, supposedly were not aware.

Kitrosser, *Congressional Oversight of National Security Activities*, *supra* at 1067 (quoting Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 537–40 (2007)).

Ralph Nader also decries overclassification. See STAFF OF H. COMM. ON THE JUDICIARY, 111TH CONG., ESPIONAGE ACT AND WIKILEAKS 87 (Comm. Print 2011) (statement of Ralph Nader); *see also* Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625 (2010).

<sup>128</sup> Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 236–37 (2008).

<sup>129</sup> Daniel Domscheit-Berg, who worked at WikiLeaks until September 2010, said this of WikiLeaks:

It has set in motion a cultural change, in some way that it has created this whole debate that we are having today. What is secrecy? And is there a need for secrecy? . . . The goal is not to get rid of all secrets in this world, but the goal is to foster transparency. And that I think is a really important cause.

*PBS Frontline: WikiSecrets*, *supra* note 11.

<sup>130</sup> David S. Cloud, *WikiLeaks Probe Brings New Charges*, L.A. TIMES, Mar. 3, 2011, at AA6. News media generally mention Manning and WikiLeaks in the same sentence, all but stating outright that he was WikiLeaks' likely source. *See, e.g.*, John F. Burns & Ravi Somaiya, *WikiLeaks Chief on Run, Trailed by His Notoriety*, N.Y. TIMES, Oct. 24, 2010, at A1; Leigh, *supra* note 13.

In March, the government imprisoned Manning at Quantico, Virginia. On his conditions of imprisonment there, *see, for example*, Charlie Savage, *Soldier in Leaks Case Will Be Made to Sleep Naked Nightly*, N.Y. TIMES, Mar. 5, 2011, at A8. P.J. Crowley, the then-State

in March 2011 with twenty-two counts, including the capital offense of aiding the

Department spokesman, spoke out at a private gathering about Manning's conditions, calling them "ridiculous and counterproductive and stupid." See Ellen Nakashima, *Manning's Treatment is 'Stupid,' U.S. Official Says*, WASH. POST, Mar. 12, 2011, at A2. The following day, President Obama said the Pentagon had given him assurances that "basic standards" were being met for Manning. *Id.* Apparently, Crowley's negative words ended his job. See *Crowley Quits over Manning Comments*, AL JAZEERA ENG., Mar. 13, 2011, <http://english.aljazeera.net/news/americas/2011/03/201131317356184984.html/day/2011/03/14>. In April 2011, the U.S. military moved Manning to Fort Leavenworth, Kansas, where conditions are ostensibly better. Brad Knickerbocker, *Alleged 'WikiLeaker' Bradley Manning Sent to Less Restrictive Prison*, CHRISTIAN SCI. MONITOR (Apr. 21, 2011), <http://www.csmonitor.com/USA/Justice/2011/0421/Alleged-WikiLeaker-Bradley-Manning-sent-to-less-restrictive-prison>.

Manning's treatment has become a matter of international interest, if not scandal. After his 14-month investigation, the United Nation's "special rapporteur on torture," Juan Mendez, has formally accused the United States government of mistreating Manning. See Ed Pilkington, *Bradley Manning's Treatment Was Cruel and Inhuman, UN Torture Chief Rules*, GUARDIAN (U.K.), Mar. 12, 2012, <http://www.guardian.co.uk/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un>. According to the *Guardian*, Mendez concluded that "the US military was at least culpable of cruel and inhumane treatment in keeping Manning locked up alone for 23 hours a day over an 11-month period in conditions that he also found might have constituted torture." See *id.*; see also Eyder Peralta, *Treatment of Bradley Manning Was Cruel and Inhuman, Says U.N. Official*, NPR (Mar. 12, 2012), <http://www.npr.org/blogs/thetwo-way/2012/03/12/148453334/treatment-of-bradley-manning-was-cruel-and-inhuman-says-u-n-official>.

In the meantime, Assange was facing difficulties of his own because of allegations that he raped two women in Sweden. Burns & Somaiya, *supra*. While in London, under house arrest, he fought extradition. On his court loss, see Esther Addley, *Julian Assange Plea After Extradition Defeat: 'Make this Case Bigger Than Me,'* GUARDIAN (U.K.), Feb. 24, 2011, <http://www.guardian.co.uk/media/2011/feb/24/julian-assange-extradition-defeat>. On his appeal, see, for example, Stefano Ambrogi, *WikiLeaks' Assange in UK Court Extradition Appeal*, REUTERS (July 11, 2011), <http://uk.reuters.com/article/2011/07/11/uk-britain-assange-appeal-idUKTRE76A77Q20110711>.

As of mid-March 2012, Assange's fate on charges of sexual misconduct remained undetermined, and the facts of the case remained unclear. John Pilger, *The Dirty War on WikiLeaks: Media Smears Suggest Swedish Complicity in a Washington-Driven Push to Punish Julian Assange*, GUARDIAN (U.K.), Mar. 9, 2012, <http://www.guardian.co.uk/comment/isfree/2012/mar/09/julian-assange-wikileaks>. In part because of the murkiness of this case, some of the commentary against this legal pursuit of Assange has been scathing. *Id.* For example, John Pilger wrote this commentary in the *Guardian*:

Assange will soon know if the supreme court in London is to allow his appeal against extradition to Sweden, where he faces allegations of sexual misconduct, most of which were dismissed by a senior prosecutor in Stockholm. On bail for 16 months, tagged and effectively under house arrest, he has been charged with nothing. . . . If he is passed from Sweden to the US, an orange jumpsuit, shackles and a fabricated indictment await him. And there go all who dare challenge rogue America.

*Id.* Pilger ends with this question: "Should his extradition be allowed, and with Damocles swords of malice and a vengeful Washington hanging over his head, who will protect him and provide the justice to which we all have a right?" *Id.*



enemy.<sup>131</sup> On February 23, 2012, Bradley Manning's court-martial began.<sup>132</sup> He entered no plea to the charges that could lead to life in prison if he is convicted.<sup>133</sup>

Although WikiLeaks has not named Manning as a collaborator, the website said that it had offered Manning legal counsel or money to help pay for his defense.<sup>134</sup> Manning also received public support from Daniel Ellsberg, who leaked the Pentagon Papers in 1971, the last dramatic leak case that faced the United States government prior to the WikiLeaks War Logs.<sup>135</sup> "Bradley Manning has been defending and supporting our constitution," Ellsberg said.<sup>136</sup>

Did WikiLeaks and its source (or sources) "aid the enemy"? Have they endangered national security? United States Secretary of State Hillary Clinton, for one, called the 2010 diplomatic cable leak "not just an attack on America—it's an attack on the international community."<sup>137</sup> The stakes potentially rose higher, however, after September 2, 2011, when Assange dumped more than 251,000 unredacted diplomatic cables onto the Internet.<sup>138</sup> The release of the entire box of diplomatic cables restarted many of

<sup>131</sup> See, e.g., Cloud, *supra* note 130. Perhaps the severity of the charges was a pressure tactic to get Manning to plea bargain. *Id.*

<sup>132</sup> See, e.g., Julie Tate, *Pvt. Manning Enters No Plea at Arraignment*, WASH. POST, Feb. 24, 2012, at A3.

<sup>133</sup> *Id.*

<sup>134</sup> See Schmitt, *supra* note 7.

<sup>135</sup> See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); Burns & Somaiya, *supra* note 130. Scott Shane compared the ease of leaking information today, when "[a] bureaucrat can hide a library's worth of documents on a key fob," compared to the Pentagon Papers' days: "Four decades ago, using a photocopier, a leaker might have needed a great many reams of paper and a tractor-trailer." Scott Shane, *Keeping Secrets WikiSafe*, N.Y. TIMES, Dec. 12, 2010, at WK1.

<sup>136</sup> Chris McGreal, *Michael Moore Campaigns to Free Bradley Manning in War Logs Case*, GUARDIAN (U.K.), Sept. 15, 2010, <http://www.guardian.co.uk/world/2010/sep/15/bradley-manning-campaign-michael-moore>; see also Interview by Amy Goodman with Daniel Ellsberg, DEMOCRACY NOW! (Dec. 10, 2010), at [http://www.democracynow.org/2010/12/10/whistleblower\\_daniel\\_ellsberg\\_julian\\_assange\\_is](http://www.democracynow.org/2010/12/10/whistleblower_daniel_ellsberg_julian_assange_is).

<sup>137</sup> See Scott Neuman, *Clinton: WikiLeaks 'Tear at Fabric' of Government*, NPR (Nov. 29, 2010), <http://www.npr.org/2010/11/29/131668950/white-house-aims-to-limit-wikileaks-damage>.

<sup>138</sup> See James Ball, *WikiLeaks Publishes Full Cache of Unredacted Cables*, GUARDIAN (U.K.), Sept. 2, 2011, <http://www.guardian.co.uk/media/2011/sep/02/wikileaks-publishes-cache-unredacted-cables>; see also *'The Principle of WikiLeaks Has Been Destroyed'*, DER SPIEGEL ONLINE (Sept. 2, 2011), <http://www.spiegel.de/international/world/0,1518,784048,00.html>.

Assange, in an editorial he posted on WikiLeaks the day before, September 1, 2011, had said:

Revolutions and reforms are in danger of being lost as the unpublished cables spread to intelligence contractors and governments before the public. The Arab Spring would not have started in the manner it did if the Tunisian government of Ben Ali had copies of those WikiLeaks releases which helped to take down his government. Similarly, it is possible that the torturing Egyptian internal security chief, Suleiman—Washington's proposed replacement for Mubarak—would now be the acting ruler of

the debates about diplomacy and secrecy that began after the initial leaks.<sup>139</sup> The State Department again condemned the release of the files and United States Representative Candice Miller reportedly released a statement saying that the release of the cables “once again proves [WikiLeaks is] a terrorist operation.”<sup>140</sup> The *New York Times* also quoted Dinah PoKempner, the general counsel of Human Rights Watch, regarding the safety of people named in the cables: “We are not aware of anyone who has been arrested or injured because they were named in the cables. . . . We remain concerned about the potential for reprisal.”<sup>141</sup>

Journalists have only begun to rummage through the files, but the files’ effects were felt quickly. In one notable instance, the *Al Jazeera* news director resigned after cables showed him discussing the network’s coverage of the Iraq War with American diplomats.<sup>142</sup> Some, sensing the beginning of the end for WikiLeaks, also began thinking about its legacy and its potential future, along with the future of other

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Egypt, had he acquired copies of the cables that exposed his methods prior to their publication.

Indeed, it is one of the indelible stains on Hillary Clinton that she personally set course to forewarn dozens of corrupt leaders, including Hosni Mubarak, about some of the most powerful details of WikiLeaks’ revelations to come.

Editorial, *Guardian Journalist Negligently Disclosed Cablegate Passwords*, WIKILEAKS (Sept. 1, 2011), <http://wikileaks.org/Guardian-journalist-negligently.html>.

Assange in his editorial was publicly venting his rage over news broken by *Der Spiegel* three days earlier, on August 29, 2011, that unredacted State Department cables had “inadvertently been released” and “that the lives of informants could be at risk.” See *Accidental Release of US Cables Endangers Sources*, DER SPIEGEL ONLINE (Aug. 29, 2011), <http://www.spiegel.de/international/world/0,1518,783084,00.html>.

Assange blamed David Leigh of the *Guardian* for “knowingly” and “recklessly” releasing the cables’ decryption password in a book he co-authored with Luke Harding. See Editorial, WIKILEAKS, *supra*; *WikiLeaks: Secret U.S. Cables Exposed*, POLITICO (Aug. 31, 2011, 9:07 PM), <http://politico.com/news/stories/0811/62451.html>. Leigh and Harding have denied that their book, *WikiLeaks: Inside Julian Assange’s War on Secrecy* divulged the password. See, e.g., *id.*

The explanation that Assange gave for releasing the unredacted cables came during his keynote address to a technology trade fair in Berlin on September 6, 2011. See David Rising, *WikiLeaks’ Assange Accuses UK Paper of Negligence*, SAN DIEGO UNION-TRIB., Sept. 6, 2011, <http://www.utsandiego.com/news/2011/sep/06/wikileaks-assange-accuses-uk-paper-of-negligence/>. Via video link, he said that because of the negligent release of the password, intelligence agencies had access to the cables while those who were mentioned in the cables did not. See *id.* “So you have a race between the bad guys and the good guys,” he said, “and it was necessary for us to stand on the side of the good guys.” See *id.*

<sup>139</sup> See Scott Shane, *WikiLeaks Prompts New Round of Diplomatic Uproar*, N.Y. TIMES, Sept. 1, 2011, at A15.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See David D. Kirkpatrick, *After Disclosures by WikiLeaks, Al Jazeera Replaces its Top News Director*, N.Y. TIMES, Sept. 21, 2011, at A12.

document-soliciting sites, such as OpenLeaks.<sup>143</sup> The *Economist* said, “WikiLeaks was not the first site to create an electronic dead-letter drop, but it was the first to try to combine it with a legal structure as impervious as its technical one, by basing its servers in countries with strong privacy laws.”<sup>144</sup>

On October 24, 2011, Julian Assange announced that WikiLeaks might be forced to shut down permanently because of the “financial blockade” against it.<sup>145</sup> PayPal, MasterCard, Visa, and Western Union refused to accept payments to WikiLeaks, starting late in 2010.<sup>146</sup> WikiLeaks has not shut down as of April 2012. For example, on February 27, 2012, WikiLeaks began posting around five million secret emails from Stratfor, a private intelligence firm.<sup>147</sup> Calling the files *The Global Intelligence Files*, Wikileaks called Stratfor a “Texas headquartered ‘global intelligence’ company.”<sup>148</sup> WikiLeaks’ website proclaimed:

The e-mails date between July 2004 and late December 2011. They reveal the inner workings of a company that fronts as an intelligence publisher, but provides confidential intelligence services to large corporations, such as Bhopal’s Dow Chemical Co., Lockheed Martin, Northrop Grumman, Raytheon and government agencies, including the US Department of Homeland Security, the US Marines and the US Defence Intelligence Agency. The emails show Stratfor’s web of informers, pay-off structure, payment laundering techniques and psychological methods.<sup>149</sup>

The hacker group Anonymous supplied the Stratfor emails to Wikileaks.<sup>150</sup> Ironically, those files contained an email suggesting the United States Department of Justice has a secret indictment against Julian Assange.<sup>151</sup> *Democracy Now!* reported:

“Somehow you have a private intelligence company, Stratfor, a ‘shadow CIA,’ as people have called it, having information about

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<sup>143</sup> See *Swept Up and Away*, *ECONOMIST*, Sept. 10, 2011, at 65.

<sup>144</sup> *Id.*

<sup>145</sup> See, e.g., John F. Burns, *Founder Says WikiLeaks, Starved of Cash, May Close*, *N.Y. TIMES*, Oct. 25, 2011, at A15; Mark Memmott, *WikiLeaks Suspends Operations, May Have to Close*, *NPR* (Oct. 24, 2011), <http://www.npr.org/blogs/thetwo-way/2011/10/24/141649293/wikileaks-suspends-operations-may-have-to-close>.

<sup>146</sup> See, e.g., Burns, *supra* note 145; Memmott, *supra* note 145.

<sup>147</sup> The files are available at <http://wikileaks.org/gifiles/releasedate/2012-02-28-15-stratfor-emails-reveal-us-has-a-sealed.html>.

<sup>148</sup> *Global Intelligence Files*, *WIKILEAKS*, <http://wikileaks.org/gifiles/releasedate/2012-02-28-15-stratfor-emails-reveal-us-has-a-sealed.html>.

<sup>149</sup> *Id.*

<sup>150</sup> See Interview by Amy Goodman with Michael Ratner, *DEMOCRACY NOW!* (Feb. 29, 2012), [http://www.democracynow.org/2012/2/29/leaked\\_stratfor\\_email\\_suggests\\_secret\\_us](http://www.democracynow.org/2012/2/29/leaked_stratfor_email_suggests_secret_us) (last visited May 1, 2012).

<sup>151</sup> *Id.*

this sealed indictment—secret again—that Julian Assange doesn't have, that WikiLeaks doesn't have, that his lawyers don't have," says Michael Ratner of the Center for Constitutional Rights, who is a legal adviser to both Assange and to WikiLeaks. "What you see here is secrecy, secrecy, secrecy."<sup>152</sup>

On February 28, 2012, Assange released a statement attacking United States Attorney General Eric Holder and the use of a secret grand jury.<sup>153</sup> Assange said, in part: "This neo-McCarthyist witch hunt against WikiLeaks may be Mr. Holder's defining legacy. Any student of American history knows that secret justice is no justice at all. . . . Eric Holder has betrayed the legacy of Madison and Jefferson. He should drop the case or resign."<sup>154</sup>

If WikiLeaks and its source really have endangered national security, what should happen to them?<sup>155</sup> As importantly, what should happen to the journalists and news organizations that have worked with WikiLeaks or drawn on its material?

The executive power to punish the press for publishing leaks should be "extremely limited," Mary-Rose Papandrea says: "the government should be required to prove that the individual acted either with intent to harm the United States or help a foreign nation, or with reckless indifference to whether the release of information would have that result."<sup>156</sup>

To create balance between "truly important national security" interests and the watchdog press, Rodney A. Smolla favors "qualified protection for promises of

<sup>152</sup> *Id.*

<sup>153</sup> *See id.*

<sup>154</sup> *See id.* For more on Stratfor and the leaked emails, see, for example, Paul J. Weber & Raphael Satter, *Leaked Emails Shine Rare Light on Stratfor*, MSNBC.COM (Feb. 28, 2012, 9:10 AM), [http://www.msnbc.msn.com/id/46555168/ns/us\\_news-security/t/leaked-emails-shine-rare-light-stratfor/](http://www.msnbc.msn.com/id/46555168/ns/us_news-security/t/leaked-emails-shine-rare-light-stratfor/).

<sup>155</sup> In May 2011, a federal grand jury began hearing testimony to determine whether Assange and WikiLeaks could face prosecution under the 1917 Espionage Act. *See* Ed Pilkington, *WikiLeaks: US Opens Grand Jury Hearing*, GUARDIAN (U.K.), May 11, 2011, <http://www.guardian.co.uk/media/2011/may/11/us-opens-wikileaks-grand-jury-hearing>. The *Guardian*, citing Glenn Greenwald of *Salon*, reported that the hearing concerned "possible violations of federal criminal law involving, but not necessarily limited to, conspiracy to communicate or transmit national defence information in violation of" the Espionage Act." *Id.*; *see also* Glenn Greenwald, *FBI Serves Grand Jury Subpoena Likely Relating to WikiLeaks*, SALON, (Apr. 27, 2011, 1:28 PM), [http://www.salon.com/2011/04/27/wikileaks\\_26/singleton/](http://www.salon.com/2011/04/27/wikileaks_26/singleton/).

Whether this grand jury probe has any relationship to the indictment suggested in the leaked Stratfor email is not clear. On the leaked Stratfor e-mail, see *supra* notes 147-52.

<sup>156</sup> Papandrea, *supra* note 128, at 237; *see also* Derigan A. Silver, *National Security and the Press: The Government's Ability to Prosecute Journalists for the Possession or Publication of National Security Information*, 13 COMM. L. & POL'Y 447, 447 (2008) (arguing that Congress should amend federal law "to limit prosecution to instances when there is evidence of intent to harm the United States").

confidentiality” by newsgatherers.<sup>157</sup> Yet, he tips the balance toward national security—with the reservation that “the invocation of the national security interest would be overridden by courts when it is a sham.”<sup>158</sup>

While Anthony Lewis flatly states that “the press does not always have right and justice on its side,” he values protecting confidential sources.<sup>159</sup> Still, he acknowledges the “serious obstacle” to passage of a federal shield law posed by the government’s claim that testimony is necessary for national security.<sup>160</sup> Geoffrey Stone has suggested a way around this obstacle—a shield-law provision saying that journalists could be subpoenaed to testify about an “imminent threat to the national-security.”<sup>161</sup> But Lewis says such a provision “could easily become as wide as a barn door” because the government cries “national security” whenever the press makes its “most important” disclosures, such as the Pentagon Papers or the Bush Administration’s wiretapping sans warrants.<sup>162</sup> And then judges are skittish about second-guessing the government when it says that the fate of the nation is at stake.<sup>163</sup>

Jane Kirtley agrees with Lewis that national security poses an obstacle to enactment of a federal shield law:

The [shield-law] bills have been vigorously opposed by the Justice Department, whose representative testified at a hearing in June 2007 that they would protect unauthorized leaks and disclosure of sensitive information, as well as threaten national security. Justice has also asserted that the bill’s definition of “covered persons” who could invoke the law would include “a terrorist operative who videotaped a message from a terrorist leader threatening attacks

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<sup>157</sup> Smolla, *supra* note 75, at 1430.

<sup>158</sup> *Id.*

<sup>159</sup> See Lewis, *supra* note 56, at 1353.

<sup>160</sup> *Id.* at 1357.

<sup>161</sup> *Id.* (citing Geoffrey R. Stone, Op-Ed., *Half a Shield Is Better Than None*, N.Y. TIMES, Feb. 21, 2007, at A21).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* Justice Potter Stewart recognized the threat that subpoenas could pose to the news-gathering process, saying:

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality—the promise or understanding that names or certain aspects of communications will be kept off the record—is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power—the absence of a constitutional right protecting, in *any* way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.

*Branzburg v. Hayes*, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting).

on Americans, because he would be engaged in recording news or information that concerns international events for dissemination to the public.”<sup>164</sup>

Lewis also has company in thinking that a national security exception to shield protection could become way too broad.<sup>165</sup> Like Lewis, Keith Werhan is concerned about subpoenas.<sup>166</sup> “If journalists are routinely drawn into . . . investigations and are compelled to identify their sources, government employees will be far less likely to leak classified information,” Werhan says.<sup>167</sup> He fears sources of secret information about government activities will dry up if prosecutors pursue journalists, and then the public will never know what the government is doing in its name.<sup>168</sup> Making the case for shield-law protection of confidential sources, Werhan says, may boil down to believing journalists’ claims that the flow of information will be impeded if journalists cannot promise confidentiality.<sup>169</sup>

In *Smith v. Daily Mail Publishing Co.*, the Supreme Court showed its own discomfort over the government controlling the flow of information.<sup>170</sup> The Court stated: “A free press cannot be made to rely solely upon the sufferance of government to supply it with information.”<sup>171</sup>

#### *D. You Can Lead Judges to Water—But Making Them Drink?*

Part of the success, or lack thereof, of shield laws will depend on the mindset of judges.<sup>172</sup> Some judges may be reluctant to apply shield laws because of the doctrine

<sup>164</sup> See Kirtley, *supra* note 84, at 15 (quoting STAFF OF H. COMM. ON THE JUDICIARY, 110TH CONG., FREE FLOW OF INFORMATION ACT OF 2007, at 20 (2007) (statement of Rachel L. Brand, Assistant Attorney General, Office of Legal Policy)).

<sup>165</sup> For example, Kristen Anastos says of proposed federal shield legislation: “The national security exception, without which this or any future-proposed Act has little chance of passing, gives the government too wide a loophole with which to bypass the constraints of the Act.” Anastos, *supra* note 69, at 465 (citation omitted).

W. Cory Reiss suggests treating national security information differently than other information, arguing that this would “mitigate” some concerns over a shield law expressed by intelligence agencies. W. Cory Reiss, Comment, *Crime that Plays: Shaping a Reporter’s Shield to Cover National Security in an Insecure World*, 44 WAKE FOREST L. REV. 641, 664–65 (2009). He proposes a three-part test for gaining a privilege when national security is involved: “a track record, a process of deliberation and verification, and transparency.” *Id.* at 668.

<sup>166</sup> Werhan, *supra* note 69, at 1584.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1583–84. He says, “Recent experiences, admittedly anecdotal, suggest that the prosecutorial restraint which largely had prevailed before 9/11 may be eroding.” *Id.* at 1598. Werhan points to the subpoenas in the Scooter Libby case as an example. See *id.*

<sup>169</sup> *Id.* at 1603.

<sup>170</sup> *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979).

<sup>171</sup> *Id.* at 104.

<sup>172</sup> Judge Richard Posner has remarked that in reporter’s privilege cases since *Branzburg*, some courts have used the ruling to justify a privilege, while some have ignored it entirely,

of separation of powers; other judges may consider that their inherent powers to run the business of the courts should overrule shield laws made by legislatures.<sup>173</sup> In short, some judges have antipathy to legislatures telling them how to run their courts. Perhaps nowhere is this clearer than in the open warfare that occurred in New Mexico. In 1976, New Mexico's Supreme Court gutted the state's shield law.<sup>174</sup>

In *Ammerman v. Hubbard Broadcasting Inc.*,<sup>175</sup> the New Mexico Supreme Court said:

[N]o person has a privilege, except as provided by constitution or rule of this court . . . under our Constitution the Legislature lacks power to prescribe by statute rules of evidence and procedure, this constitutional power is vested exclusively in this court, and statutes purporting to regulate practice and procedure in the courts cannot be binding . . . .<sup>176</sup>

But the courts in New Mexico did give some shield protection back to journalists in New Mexico Rule of Evidence 11-514:

A person engaged or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose: (1) the confidential source from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered in the course of pursuing professional

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others say it actually creates the privilege, while still others see the majority as really a plurality opinion. See *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003). In declining to apply a shield law privilege in *McKevitt*, Posner and his Seventh Circuit colleagues wrote that speaking of a journalists' "privilege" made less sense than asking courts to "make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas." *Id.* at 533. As Judge Posner noted, the *Branzburg* majority specified that grand jury investigations engaged in "harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972)).

<sup>173</sup> See Anthony Fargo, *Evidence Mixed on Erosion of Journalists' Privilege*, 24 NEWSPAPER RES. J. 50, 57-58 (2003) (offering anecdotal evidence of cases in which judges showed increasing hostility towards journalists' privilege).

<sup>174</sup> See *infra* notes 175-76 and accompanying text.

<sup>175</sup> 551 P.2d 1354 (N.M. 1976), *cert. denied*, 436 U.S. 906 (1978).

<sup>176</sup> *Id.* at 1359.

activities; and (2) any confidential information obtained in the course of pursuing professional activities.<sup>177</sup>

The episode in New Mexico demonstrates how judges can make a real difference in the effectiveness of shield protection. But for now, this Article turns to an analysis of current shield laws.

## II. HOW CURRENT SHIELD LAWS VARY IN THEIR PROTECTIONS

Some shield laws give better protection than others, in part, based on how broad their provisions are in scope.<sup>178</sup> Some statutes are long, others are short. Sometimes less—in the way of a statute—is more—in the way of protection. State statutes vary in a various ways, but this Article will analyze the following four basic differences among the statutes:

- How broad is the definition of a journalist?
- Under what circumstances does the privilege apply: grand juries only, other court proceedings, legislative committees, or libel cases?
- Does the shield law only cover confidential sources, or does it also cover confidential information?
- Does the statute provide only qualified protection by presenting tests for adjudicators to apply?

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<sup>177</sup> N.M. R. EVID. 11-514 (2011). In 1988, the New Mexico Supreme Court reaffirmed the holding of *Ammerman*, saying:

In *Ammerman* . . . this Court held legislation creating a testimonial privilege in a judicial proceeding unconstitutional. The statute constituted an evidentiary rule, traditionally considered to be “adjective law” or “procedural law,” the promulgation of which is a power vested in this Court by virtue of its superintending control over all inferior courts under Article VI, Section 3, of the New Mexico Constitution.

Sw. Cmnty. Health Servs. v. Smith, 755 P.2d 40, 42 (N.M. 1988) (citations omitted).

<sup>178</sup> Some statutes include a “statement of public policy,” and that statement can be a flag. For example, the statement of “Public Policy” in Minnesota says:

In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. To this end, the freedom of press requires protection of the confidential relationship between the news gatherer and the source of information. The purpose of [Minnesota’s shield law] is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its sources.

MINN. STAT. § 595.022 (2011).

The modification needed in both the statement of the policy and the law itself is that instead of a “substantial privilege,” the Minnesota statute needs an “absolute privilege.”



*A. How Broad Is the Definition of a Journalist?*

Who should qualify as a journalist is a truly difficult question, one that the Supreme Court clearly wanted to avoid in *Branzburg*. Even before the age of the Internet, the question was difficult, and jurisdictions came up with conflicting answers.<sup>179</sup> For example, one case involved Karen Silkwood, who worked at a Kerr-McGee nuclear power plant and died under mysterious circumstances while driving to meet a reporter, apparently to give him information about unsafe working conditions.<sup>180</sup> Her family filed a civil suit against Kerr-McGee, and Kerr-McGee subpoenaed a man who was making a documentary film about Silkwood.<sup>181</sup> The Court of Appeals for the Tenth Circuit concluded that, for purposes of that film, he was an investigative reporter.<sup>182</sup> On the other hand, a freelance writer in California, who was reporting on John Belushi's death from an apparent drug overdose, did not receive California shield-law protection.<sup>183</sup>

In 2011, both the Supreme Court of New Jersey and the United States Court of Appeals for the Second Circuit denied shield protection on the ground that the persons seeking shield protection did not qualify as journalists.<sup>184</sup> First, New Jersey's high court said that Shellee Hale, who posted negative comments on an Internet message board, was not a journalist.<sup>185</sup> New Jersey Chief Justice Rabner succinctly stated the question

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<sup>179</sup> See *infra* notes 180–83 and accompanying text.

<sup>180</sup> *Karen Silkwood Biography*, BIO., <http://www.biography.com/people/karen-silkwood-9542402> (last visited May 1, 2012).

<sup>181</sup> *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 434 (10th Cir. 1977).

<sup>182</sup> *Id.* at 436.

<sup>183</sup> See Paul Feldman, *Writer in Belushi Case Jailed After He Defies Judge*, L.A. TIMES, Oct. 10, 1985, at V1.

<sup>184</sup> See *infra* notes 185, 193 and accompanying text.

<sup>185</sup> See *Too Much Media, LLC v. Hale*, 20 A.3d 364 (N.J. 2011). The Supreme Court of New Jersey affirmed denial of shield law protection to Shellee Hale, who allegedly defamed Too Much Media, which produced software for use by the online adult entertainment industry. *Id.* at 367–68. Hale contended that she investigated the industry and reported on its corruption. *Id.* at 367. Hale posted negative comments about Too Much Media on an Internet message board called “Oprano.” *Id.* at 367–68. Oprano’s platform let people post unscreened messages about the adult entertainment industry. *Id.* at 368. Oprano called itself the “Wall Street Journal for the online adult entertainment industry.” *Id.* at 369.

Hale hailed from Washington state. *Id.* at 369. Using video technology over the Internet, she operated her business as a “certified life coach.” *Id.* But she claims, “cyber flashers” pretended to want her help as a life coach only to expose themselves via Web cameras. *Id.* When her complaints to the online service she used proved unproductive, she started investigating technology’s use in abusing women and the “criminal activity in the online adult entertainment industry.” *Id.* Her investigation, she claimed, included conversing with the “offices of the Washington State Attorney General, . . . attend[ing] six adult industry trade shows, interview[ing] people in the industry, collect[ing] information from porn web blogs, and reviewing information in the mainstream press and on message boards involved in the industry.”

the case presented: “whether the newsperson’s privilege extends to a self-described journalist who posted comments on an Internet message board.”<sup>186</sup> As the judge noted, “[m]illions of people with Internet access can disseminate information today in ways that were previously unimaginable.”<sup>187</sup> Clearly, the judge did not want to extend shield protection to all of those millions.

In upholding the appellate court’s decision, the New Jersey Supreme Court made clear that this case involved “the Shield Law, not freedom of speech.”<sup>188</sup> Hale had

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*Id.* She also claimed she investigated “reports of a security breach of” Too Much Media that might “expose[] personal information of . . . customers who believed they had signed up anonymously for pornographic websites.” *Id.*

Too Much Media’s software enabled adult entertainment websites to track access to “keep track of access to affiliated websites and to determine what commissions are due the referring sites.” *Id.* at 368. Her investigation included talking to “sources on a confidential basis.” *Id.* at 369. She posted on Oprano that Too Much Media’s two owners might threaten the life of anybody who reported the specifics about their conduct. *Id.* at 369–70. Then she posted that one of the owners “personally contacted me to let me know he has not threatened anyone[,] but I was told something different from someone who claims differently and a reliable source.” *Id.* at 370 (internal quotation marks omitted).

Hale maintained that her postings were intended to inform the public about technology misuse and to promote debate. *Id.* Still, the Appellate Division denied her New Jersey shield law protection because:

there was no “mutual understanding or agreement of confidentiality” between defendant and her sources; she did not have “credentials or proof of affiliation with any recognized news entity” or adhere to journalistic standards “such as editing, fact-checking or disclosure of conflicts of interest”; . . . she did not identify herself as a reporter “so as to assure [her sources] their identity would remain anonymous and confidential”; she “merely assembl[ed] the writings and postings of others” and “created no independent product”; she never contacted TMM to get its side of the story; and, citing to the trial court’s finding, because “there is little evidence (other than her own self-serving statement) that [defendant] actually intended to disseminate anything newsworthy to the general public.”

*Id.* at 371–72 (citing *Too Much Media, LLC v. Hale*, 993 A.2d 845 (2009)).

<sup>186</sup> *Id.* at 367.

<sup>187</sup> *Id.* In denying Hale protection, Judge Rabner opined:

New Jersey’s Shield Law provides broad protection to the news media and is not limited to traditional news outlets like newspapers and magazines. But to ensure that the privilege does not apply to every self-appointed newsperson, the Legislature requires that other means of disseminating news be “similar” to traditional news sources to qualify for the law’s coverage. We do not find that online message boards are similar to the types of news entities listed in the statute, and do not believe that the Legislature intended to provide an absolute privilege in defamation cases to people who post comments on message boards.

*Id.* at 368.

<sup>188</sup> *Id.* at 373.

freedom to post, and the “actual malice” standard formulated in *New York Times Co. v. Sullivan* applied in her defamation suit.<sup>189</sup> But she was not covered by New Jersey’s shield law even though it is, in the New Jersey Supreme Court’s words, “among the broadest in the nation.”<sup>190</sup> New Jersey’s law protects “any person engaged in, engaged on, connected with or employed by news media.”<sup>191</sup> Thus, anyone claiming its protection must have a “nexus” to news media. The court concluded that because she had not shown a “sufficient relationship or connection to ‘news media,’” Hale’s “intent alone cannot validate her claim of privilege.”<sup>192</sup>

The Second Circuit denied shield protection to a filmmaker hired by a party to a dispute in Ecuador over alleged environmental degradation by an oil company.<sup>193</sup>

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<sup>189</sup> *Id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

<sup>190</sup> *Id.* at 375.

<sup>191</sup> *Id.* at 376 (quoting N.J. STAT. ANN. § 2A:84A-21a(b) (West 2012)).

So the question becomes “whether defendant satisfies the required nexus to ‘news media.’” *Id.* at 377. But this begs the question of what constitutes “news media.” The statute does not limit “news media” to the traditional news media such as newspapers but does require a similarity to traditional news media: “newspapers, magazines, press associations, news agencies, wire services, radio, television or other *similar* printed, photographic, mechanical or electronic means of disseminating news to the general public.” *Id.* at 376 (emphasis added) (quoting § 2A:84A-21a(a)). And thus, the New Jersey Supreme Court distills the question to “whether an online message board is similar to” traditional news media. *Id.* at 378.

Message boards are not similar to traditional news media, the court concluded. *Id.* at 379. They are “little more than forums for conversation.” *Id.* Some online sites can qualify for shield protection, such as the online news magazine given protection in California in *O’Grady v. Superior Court*, or Matt Drudge’s “Drudge Report.” *Id.* at 379–80 (citing *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Ct. App. 2006); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998)). For coverage of *O’Grady*, see *infra* note 207 and accompanying text. But *intent* is not enough. As the court said, “If the Legislature had wanted to create an intent test alone, it could have done so.” *Too Much Media*, 20 A.3d at 380. Instead, the Legislature created a tripartite test, looking to (1) intent, (2) purpose to collect or disseminate news, and (3) materials obtained while “pursuing professional newsgathering activities.” *Id.* (citing § 2A:84A-21.3). And all elements must be met for shield-law coverage. *Id.* at 380–81.

<sup>192</sup> *Id.* at 381.

The court also said: “The Legislature is free to expand the law’s coverage as a matter of policy. In an era of ever-changing technology, with new and rapidly evolving ways of communicating, the Legislature may choose to reconsider who is a newsperson and add new criteria to the Shield Law.” *Id.* at 383. For commentary on *Too Much Media*, see, for example, Aaron Mackey, *N.J. Shield Law Not Limited to Professional Journalists*, REP. COMM. FOR FREEDOM OF THE PRESS (June 7, 2011), <http://www.rcfp.org/browse-media-law-resources/news/nj-shield-law-not-limited-professional-journalists>.

<sup>193</sup> See *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011). The Second Circuit affirmed an order that Joseph Berlinger produce outtakes of a film for use in legal proceedings in Ecuador. *Id.* at 311. Berlinger claimed that he should receive a journalist’s privilege. *Id.* at 300. He created *Crude*, a documentary film about litigation over alleged environmental damage in Ecuador caused by the oil exploration and extraction of a Chevron affiliate. *Id.*

The plaintiffs in the environmental litigation had hired Joseph Berlinger to make a film to tell their side of the story, and Berlinger made changes to the film that the plaintiffs requested.<sup>194</sup> Thus, Berlinger, who claimed to be an investigative reporter, failed to carry his burden of proof to show that he engaged in *independent* reporting.<sup>195</sup> The court opined: “A person need not be a credentialed reporter working for an established press entity to establish entitlement to the privilege . . . . Nonetheless, in collecting the information in question, the person must have acted in the role . . . of the *independent* press.”<sup>196</sup>

The problem of who is a journalist is only more difficult today. What about freelance journalists who primarily do their work over the Internet? What about bloggers? Bloggers have done some interesting news stories. A blogger led the way on cracking open the infamous Dan Rather story on President Bush’s Texas Air National Guard service record.<sup>197</sup> Should not a report of that magnitude of newsworthiness force a court to say that the blogger is a journalist?

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Explaining that not all attempts to disseminate information are “on equal footing,” the court gave this example:

Consider two persons, Smith and Jones, who separately undertake to investigate and write a book . . . about a public figure in national politics. Smith undertakes to discover whatever she can through her investigations and to write a book that reflects whatever her investigations may show. Jones has been hired . . . by the public figure to write a book extolling his virtues and rebutting his critics. Smith unquestionably presents a stronger claim of entitlement to the press privilege. . . . Jones . . . either possesses no privilege at all or, if she possesses the privilege, holds one that is weaker and more easily overcome.

*Id.* at 307–08.

On September 19, 2011, the United States Court of Appeals for the Second Circuit ruled against Chevron in its 18-year-old battle to escape paying \$18 billion in damages ordered by a judge in Ecuador for pollution of the Amazon rain forest. *See* Basil Katz, *U.S. Court Unfreezes \$18 Billion Award vs Chevron*, REUTERS (Sept. 19, 2011), <http://www.reuters.com/article/2011/09/20/us-chevron-ecuador-idUSTRE78I68620110920>; *Court Ruling Backs Ecuadorian Effort to Hold Chevron Accountable for Amazon Pollution*, DEMOCRACY NOW!, (Sept. 20, 2011), [http://www.democracynow.org/2011/9/20/court\\_ruling\\_backs\\_ecuadorian\\_effort\\_to](http://www.democracynow.org/2011/9/20/court_ruling_backs_ecuadorian_effort_to).

The Amazon Defense Coalition says that WikiLeaks’ diplomatic cables show Chevron’s close ties to United States embassy officials in Ecuador as well as Chevron’s extensive lobbying of the government in Ecuador to try to stop legal proceedings. *See* Amazon Defense Coalition, *WikiLeaks Cables Expose Chevron’s Lobbying of Ecuador Government to Kill \$18 Billion Environmental Case*, CHEVRONTOXICO (Sept. 21, 2011), <http://chevrontoxico.com/news-and-multimedia/2011/0921-wikileaks-cables-expose-chevron-lobbying-of-ecuador-government-to-kill-environmental-case.html>.

<sup>194</sup> *Chevron* 629 F.3d at 304.

<sup>195</sup> *Id.* at 300, 304, 309.

<sup>196</sup> *Id.* at 307 (citations omitted).

<sup>197</sup> *See, e.g.,* Marie Cocco, *We Can Trust Blogs Only So Far*, TIMES UNION, Mar. 20, 2006, at A7; *see generally*, SCOTT GANT, *WE’RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE* (2007).

Many commentators favor recognizing bloggers as journalists.<sup>198</sup> Some focus on “function.” For example, Rodney Smolla said of shield protection:

The privilege should not be confined to “mainstream,” “professional” journalists, but should extend more broadly to others (such as internet bloggers) who gather information from confidential sources for the purpose of disseminating news or commentary on issues of public concern to the general public. A federal shield law should thus include language that would encompass those who engage in the “functional equivalent” of traditional journalism, even though we would not consider them part of the mainstream or traditional press.<sup>199</sup>

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<sup>198</sup> See *infra* notes 199–200.

<sup>199</sup> Smolla, *supra* note 75, at 1429. Additionally, Joseph S. Alonzo supports extending privilege protection to bloggers, pointing to the value of their contributions to society and thus their function:

The journalist’s privilege is justified by the journalist’s role of providing information that the public would otherwise be unable to acquire. Broad availability of information is an essential element of a strong democracy—quality collective decision-making and electoral accountability both depend upon an informed polity. Hence, the benefit of additional information outweighs the cost of the lost testimonial evidence when journalists claim the privilege and refuse to testify. Bloggers and other private Internet publishers who disseminate news fulfill the same function as the mainstream press: informing the public. In addition, bloggers benefit society by providing increased access to the marketplace of ideas and thereby combat the effects of media consolidation.

Joseph S. Alonzo, Note, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 751, 752 (2006); see also Gora, *supra* note 70, at 1420.

Susan M. Gilles draws on libel law to explore the definition of “journalist,” again emphasizing function:

Both constitutional libel law and privilege use a combination of function and product approaches; both identify a good journalist as one engaged in disseminating information that is the product of classic journalistic practices such as investigating, writing, and editing; and both define a good journalist as one who produces news or “information on a matter of public concern.”

Susan M. Gilles, *The Image of “Good Journalism” in Privilege, Tort Law, and Constitutional Law*, 32 OHIO N.U. L. REV. 485, 500 (2006). She also says, “One objection to the creation of a journalist/source privilege is that it will allow the courts to regulate journalism. The lesson is that we are too late.” *Id.*

Erik Ugland points to function, as well. Ugland, *supra* note 71, at 391, 409. He did a survey of media briefs and court responses in Supreme Court cases between the 1971–1972 and 2006–2007 Terms. *Id.* at 379. Ugland says, “The media litigant briefs largely reflect an

Others point to the power of bloggers in reporting the news.<sup>200</sup> Matthew Bloom supports

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autonomy-model of the First Amendment, which is not built around the special status or identity of the claimants but around the functions they perform.” *Id.* at 409.

Anne Flanagan also focuses on function, along with process, she says:

The journalistic process test is a valuable and workable test to determine when one is functioning as a journalist no matter what label is applied to the person’s employment or publication medium. It can be implemented practically by requiring a showing of customary adherence to a code of journalist professionalism. This would establish that a person followed acceptable and recognized journalistic processes for gathering, evaluating, validating and publishing information. Professional codes could, therefore, be used as the journalist process test for granting special protections and privileges . . . . Compliance with objective professional standards evinces considerable intent and procedural steps to ensure that the facts communicated were of greater validity than disinformation and mere rumor.

Anne Flanagan, *Blogging: A Journalist Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 425–26 (2006). Flanagan also looks to English law as a source of help in determining if a blogger is a journalist. She maintains that the United Kingdom has already “effectively put a journalist process test into practice,” with protections that are broad enough to encompass blogs. *Id.* at 426. And she says that “Congress should seriously consider this approach in any future debate for a federal shield law.” *Id.* at 427; *see also* Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003); Michael Russo, *Are Bloggers Representatives of the News Media Under the Freedom of Information Act?*, 40 COLUM. J.L. & SOC. PROBS. 225, 225 (2006) (proposing “that the current functional test be supplemented by an inquiry into the content of the requested material”); David Abramowicz, Note, *Calculating the Public Interest in Protecting Journalists’ Confidential Sources*, 108 COLUM. L. REV. 1949 (2008) (arguing that courts should look at the process by which the information flowed instead of focusing on the question of who is a journalist); Amy Bauer, Note, *Blogging on Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining When Media Shield Laws Apply to Bloggers*, 10 MINN. J.L. SCI. & TECH. 747, 768–70 (2009) (arguing for coverage of bloggers who pass a test of form and function that looks at the number and types of sources, verification procedures and subject matter); Anne M. Macrander, Note, *Bloggers as Newsmen: Expanding the Testimonial Privilege*, 88 B.U. L. REV. 1075, 1077 (2008) (proposing “that the criteria for determining who qualifies for the federal [shield] privilege should be based on the product an individual produces”).

<sup>200</sup> *See, e.g., Developments in the Law—The Law of Media: II. Protecting the New Media: Application of the Journalist’s Privilege to Bloggers*, 120 HARV. L. REV. 996, 1007 (2007) (“[I]f the activity of news-oriented blogging is to be afforded the same protection as is given to the traditional media, then blogging, when assessed as a collective enterprise, must be seen as contributing to the public interest.”); Laura Durity, Note, *Shielding Journalist-“Bloggers”:* *The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 DUKE L. & TECH. REV. 11 (2006); Nathan Fennessy, Comment, *Bringing Bloggers into the Journalistic Privilege Fold*, 55 CATH. U. L. REV. 1059 (2006); Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 VAND. J. ENT. & TECH. L. 609 (2006).

The FTC also apparently recognizes the power of bloggers, with regulations promulgated in 2009 that say that bloggers must disclose if they are being paid to endorse products. *See*

extending “journalistic privileges” to bloggers.<sup>201</sup> Pointing to the power of bloggers, he says:

“[T]he lonely pamphleteer” is becoming less useful as an analog for bloggers, many of whom are wielding important influence over public opinion. For example, *Power Line* was largely responsible for debunking the memos in the CBS newsroom that purportedly forged information about President George W. Bush’s National Guard service. Another blog, the *Talking Points Memo* is described as “a must-read among the Democratic elite.” [In 2006,] *Talking Points Memo* boast[ed] over 100,000 readers per day, larger than the circulation of all but about seventy-five of the newspapers in the United States.<sup>202</sup>

He also says that because of their power, bloggers are starting to be treated like “traditional journalists.”<sup>203</sup> As an example of this, he points out that “Garrett Graff, who writes the *fishbowlDC* blog about the Washington press,” received White House press credentials in March 2005, with the support of traditional White House Correspondents Association journalists.<sup>204</sup> And bloggers also now ride on campaign planes.<sup>205</sup>

Courts, of course, are struggling with whether to classify bloggers as journalists. For example, a California appellate court granted a blogger protection in 2006 in *O’Grady v. Superior Court*.<sup>206</sup> The *O’Grady* court opined that posting news was indeed “indistinguishable” from publishing a newspaper.<sup>207</sup> And in 2011, the United States

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Press Release, FTC, *FTC Publishes Final Guides Governing Endorsements, Testimonials* (Oct. 5, 2009), available at <http://www.ftc.gov/opa/2009/10/endortest.shtm>.

<sup>201</sup> Matthew Bloom, Comment, *Subpoenaed Sources and the Internet: A Test for When Bloggers Should Reveal Who Misappropriated a Trade Secret*, 24 YALE L. & POL’Y REV. 471 (2006).

<sup>202</sup> *Id.* at 474 (citing Randy Dotinga, *Are Bloggers Journalists? Do they Deserve Press Protections?*, CHRISTIAN SCI. MONITOR, Feb. 2, 2005, at USA3).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* (internal quotation marks omitted).

<sup>206</sup> *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Ct. App. 2006).

<sup>207</sup> *Id.* at 99. As for the facts, Apple Computer, Inc. sued blogger “John Doe,” claiming a website had wrongfully published Apple’s secret plans for a device that would allow Apple computers to create live sound recordings. *Id.* at 76. Apple then received authorization to issue subpoenas to the website’s publisher and to one of the publisher’s e-mail service providers. *Id.* The publishers then asked the trial court “for a protective order to prevent any such discovery,” but “the trial court denied the motion on the ground that the publishers” were involved in misappropriation of Apple’s trade secret. *Id.* at 76–77. But the appellate court reversed, holding the trial court erred because of the federal Stored Communications Act, 18 U.S.C. §§ 2701–2712, bar to subpoenaing the email service provider; California’s shield-law protection, CAL. EVID. CODE, § 1070 (West 2012) “the conditional constitutional privilege against compulsory disclosure of confidential sources” under *Mitchell v. Superior Court*, 690

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P.2d 625 (Cal. 1984). *O’Grady*, 44 Cal. Rptr. 3d at 77. In short, the appellate court “issue[d] a writ of mandate directing the trial court [in the Apple case] to grant the motion for a protective order.” *Id.* at 77. For coverage of the *Mitchell* factors, see *infra* note 320.

The court said:

We have already noted the pervasive misuse of the verb “post” by Apple and allied amici. . . . Here they compound the problem by conflating what occurred here—the open and deliberate publication on a news-oriented Web site of news gathered for that purpose by the site’s operators—with the deposit of information, opinion, or fabrication by a casual visitor to an open forum such as a newsgroup, chatroom, bulletin board system, or discussion group. Posting of the latter type, where it involves “confidential” or otherwise actionable information, may indeed constitute something other than the publication of news. But posting of the former type appears conceptually indistinguishable from publishing a newspaper, and we see no theoretical basis for treating it differently.

*O’Grady*, 44 Cal. Rptr. 3d at 99 (citations omitted). This language would arguably seem applicable to the WikiLeaks situation. On WikiLeaks, see *supra* notes 129–55 and accompanying text.

The *O’Grady* court refused to define “legitimate” news:

We decline the implicit invitation to embroil ourselves in questions of what constitutes “legitimate journalis[m].” The shield law is intended to protect the gathering and dissemination of *news*, and that is what petitioners did here. We can think of no workable test or principle that would distinguish “legitimate” from “illegitimate” news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace.

*O’Grady*, 44 Cal. Rptr. 3d at 97. For commentary, see, for example, Charles B. Vincent, Note, *Cybersmear II: Blogging and the Corporate Rematch Against John Doe Version 2.006*, 31 DEL. J. CORP. L. 987 (2006) and *Calif. Appeals Court: Shield Law Protects Online Reporters, Bloggers*, FIRST AMENDMENT CENTER (May 30, 2006), <http://www.firstamendmentcenter.org/calif-appeals-court-shield-law-protects-online-reporters-bloggers>.

In a more recent incident involving Apple and bloggers, Jason Chen, an editor for Gawker Media, which owns the technology blog Gizmodo, had a computer seized from his home. Brian Stelter & Nick Bilton, *Computers Seized from Home of Blogger in iPhone Inquiry*, N.Y. TIMES, Apr. 27, 2010, at B7. The search-warrant said officers had probable cause to believe Chen’s house “was used as the means of committing a felony.” *Id.* He had blogged about the next-generation Apple iPhone after, he said, he bought it for \$5,000 from a person who allegedly found it in a California bar. *Id.* Gizmodo returned the phone to Apple, but San Mateo, California officials contemplated criminal charges for sale of stolen property against both the person who allegedly found the device and against Chen. *Id.* Gawker sought return of the property, claiming that Chen was a journalist. *Id.*

One question raised by the Gawker case is whether Chen is a journalist because California and federal law give greater protection against search warrant seizures for journalists than is the general rule. See, e.g., *id.*; Carlin DeGuerin Miller, *Gizmodo Editor Jason Chen’s Home Raided: Felony Charges to Follow iPhone Scoop?*, CBS NEWS (Apr. 27, 2010), [http://www.cbsnews.com/8301-504083\\_162-20003511-504083.html](http://www.cbsnews.com/8301-504083_162-20003511-504083.html). The federal law in question is the Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa–2000aa-12 (2006). Authorities dropped



District Court for the District of Oregon ruled that a blogger does not receive Oregon's shield-law protection based on that state's definition of "medium of communication."<sup>208</sup>

Anthony Lewis, in commenting on bloggers, clearly worried about sliding down the slippery slope.<sup>209</sup> Anthony L. Fargo thinks that the existence of bloggers greatly complicates passage of a shield law.<sup>210</sup> He concludes: "[T]here are dangers there, particularly in regard to defining who may claim protection. There is, in short, no perfect way to balance the needs of journalists and triers of facts."<sup>211</sup>

Of course, not everybody favors recognizing bloggers as journalists.<sup>212</sup> If everyone who wants to make his or her information public through a blog is a journalist, then shield-law protection arguably applies too broadly. Virtually anyone with access to

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charges against Chen, in a case that got international attention. See Seher Dhillon, *Authorities Drop Charges Against Gizmodo*, TOP NEWS (U.K.), (July 17, 2010) <http://topnews.co.uk/29181-authorities-drop-charges-against-gizmodo>.

<sup>208</sup> Obsidian Fin. Grp., LLC v. Cox, No. CV-11-57-HZ, 2011 WL 5999334, at \*1 (D. Or. Nov. 30, 2011); see *infra* note 327.

<sup>209</sup> Lewis, *supra* note 56, at 1357–58. He wrote:

We are in the new age of the blogger—forty million of them or so. Anyone with a cell phone camera can be a news photographer. Are all to be treated as journalists if they happen upon some contested event, and to be excused from testifying about it? That is not a theoretical question. . . . [Josh Wolf] was not affiliated with any news organization, but advocates of press freedom called him a journalist and pressed for his release. I think they were right. But how do you draft a shield law that does not, potentially, excuse millions of people from the citizen's obligation to testify?

*Id.*

<sup>210</sup> Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1111 (2006).

<sup>211</sup> *Id.* at 1119.

<sup>212</sup> Scott A. Mertens proposed a narrow definition of who qualifies as a journalist: "A 'journalist' is a regular employee or a freelancer who is or was engaged in the gathering, photographing, writing, editing, filming, taping, or recording of news intended for dissemination to the public." Mertens, *supra* note 70, at 530. Mertens was writing in 1999, before blogging became common. But since blogging has become commonplace, some would still propose a narrow definition of "journalist." See, e.g., Scott Neinas, Comment, *A Skinny Shield is Better: Why Congress Should Propose a Federal Reporters' Shield Statute that Narrowly Defines Journalists*, 40 U. TOL. L. REV. 225 (2008).

On the general subject of who should qualify for shield privilege, see, for example, Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 130 (2002) (proposing that "news media" includes "online news services," "news" is "information of public interest or concern relating to local, statewide, national, or worldwide issues or events," and "[a] 'journalist,' is any person who is engaged in gathering news for public presentation or dissemination by the news media"); Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411 (1999); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 520 (2007) ("a qualified privilege should apply

a computer and enough confidence (or hubris) to make public his or her words would be cloaked by this now-gigantic shield.<sup>213</sup>

On the other hand, perhaps this broad definition of journalist is precisely what modern technology calls for. Anyone with a computer and a little bit of knowledge about how to use it can disseminate his or her information instantaneously and globally!<sup>214</sup>

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to anyone disseminating information to the public who is called to testify in a judicial or administrative proceeding”); Sunny Woan, *The Blogosphere: Past, Present, and Future: Preserving the Unfettered Development of Alternative Journalism*, 44 CAL. W. L. REV. 477 (2008); Justin Krypel, Note, *A New Frontier or Merely a New Medium? An Analysis of the Ethics of Blawgs*, 14 MICH. TELECOMM. TECH. L. REV. 457 (2008); and Carol J. Toland, Comment, *Internet Journalists and the Reporter’s Privilege: Providing Protection for Online Periodicals*, 57 U. KAN. L. REV. 461 (2009) (analysis of shield law in Kansas, with *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) as controlling on the federal level).

<sup>213</sup> William E. Lee, who favors considering bloggers to be journalists, observed the following:

During the December 8, 2004 oral argument of *In Re Grand Jury Subpoena, Judith Miller*, prominent First Amendment attorney Floyd Abrams conceded that web bloggers should have a constitutional privilege to refuse to disclose their confidential sources, just like journalists at major news outlets. Abrams’ concession caused a “collective flinch” to ripple “through the establishment media in the gallery.” The notion that bloggers are journalists does not sit well with those journalists who consider themselves “a priestly class” set apart from the rest of society by the First Amendment’s Press Clause.

Lee, *supra* note 114, at 635 (citations omitted).

<sup>214</sup> Courts have struggled to devise fair standards to apply when trying to determine whether to order disclosure of anonymous Internet posters.

*In re Anonymous Online Speakers*, involved what the Court of Appeals for the Ninth Circuit called an “acrimonious and long-running business dispute between” Amway Corporation’s successor (Quixtar) and Signature Management TEAM, LLC (TEAM). *In re Anonymous Online Speakers*, No. 09-71265, 2011 U.S. App. LEXIS 487, at \*1–2 (9th Cir. Jan. 7, 2011). Quixtar sued for libel, claiming TEAM had orchestrated a “smear campaign” of anonymous, disparaging postings and videos on the Internet. *Id.* at \*2. During discovery, Quixtar sought the identity of five anonymous online speakers from a TEAM employee, who refused on First Amendment grounds. *Id.* “The district court ordered [the employee] to disclose the identity of three of the five speakers.” *Id.* Then Quixtar sought a writ of mandamus to order the trial court to include the other two in its order, while the Anonymous Online Speakers sought a writ of mandamus directing the court to vacate its order to disclose the identity of the three. But the Ninth Circuit turned down both requests. *Id.*

The Ninth Circuit recognized the right to anonymous speech, citing history:

Undoubtedly the most famous pieces of anonymous American political advocacy are *The Federalist Papers*, penned by James Madison, Alexander Hamilton, and John Jay, but published under the pseudonym “Publius.” . . . It is now settled that “an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the *First Amendment*.”

*Id.* at \*5–6 (citations omitted).

The writ of mandamus, the Ninth Circuit said, “is an ‘extraordinary’ remedy limited to ‘extraordinary’ causes.” *Id.* at \*8 (citations omitted). In looking at the standards other courts have used for ordering revelation of confidential sources, the Ninth Circuit looked from high—the “prima facie” standard—to low—the “good faith” standard. *Id.* at \*14–16. The Ninth Circuit said the trial court in the case at bar had used the “most exacting standard, established by the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).” *Id.* at \*15. “The *Cahill* standard requires plaintiffs to . . . ‘submit sufficient evidence to establish a *prima facie* case for each essential element’ of [a] defamation claim.” *Id.* at \*15–16 (quoting *Cahill*, 884 A.2d at 463). *Cahill*, in effect, required plaintiffs to surmount a hypothetical summary judgment motion, concluding that this high standard was necessary to prevent the chilling of First Amendment rights of anonymous posters. *Id.* Instead of a low standard, “the summary judgment standard more appropriately balances a defamation plaintiff’s right to protect his reputation and a defendant’s right to speak anonymously.” *Id.* at \*16 (quoting *Cahill*, 884 A.2d at 462).

Like the Ninth Circuit, the California Court of Appeals in *Krinsky v. Doe 6*, looked high and low at other courts’ standards. 72 Cal. Rptr. 3d 231, 241 (Ct. App. 2008). According to the *Krinsky* court, the trial court should have quashed a subpoena in a libel case involving anonymous postings because the plaintiff did not make a prima facie case that the statements at issue were libelous. *Id.* at 251. Messages from *Doe 6*, posted on a Yahoo! financial message board, were crude and offensive—using insults such as, “mega scum bag” and “cockroach”—but not libelous statements of fact. *Id.* at 235, 251. The appellate court ultimately concluded that “[b]ecause plaintiff stated no viable cause of action that overcame *Doe 6*’s First Amendment right to speak anonymously, the subpoena to discover his identity should have been quashed.” *Id.* at 251.

The Ninth Circuit and *Krinsky* court both cited as an example of the lowest, “good faith” standard of protection the case of *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26 (2000), which was reversed on other grounds in *America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001). *In re Anonymous*, No. 09-71265, 2011 U.S. App. LEXIS at \*14; *Krinsky*, 72 Cal. Rptr. 3d at 241. The Virginia court required the Internet service provider to disclose John Doe identities based on the plaintiff’s “good-faith” allegation of an actionable claim and of the necessity of the disclosure for the advancement of the claim. *See Krinsky*, 72 Cal. Rptr. 3d at 241 (quoting *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. at 37). The *Krinsky* court, like the Ninth Circuit, did not adopt that standard, and the plaintiff in *Krinsky* did not even ask the court to do so. *Id.*

The *Krinsky* court adopted the high standard of *Dendrite Int’l. Inc. v. Doe No. 3*, which involved a corporation that claimed that multiple defendants defamed it on a Yahoo! message board. 775 A.2d 756 (2001). As the *Krinsky* court pointed out, the New Jersey appellate court expressed concern that plaintiffs might try to use discovery to intimidate and silence their Internet critics, and so devised a four-part test to avoid that result:

First, the plaintiff must make an effort to notify the anonymous poster that he or she is the subject of a subpoena or application for a disclosure order, giving a reasonable time for the poster to file opposition. [Second,] [t]he plaintiff must also set forth the specific statements that are alleged to be actionable. Third, the plaintiff must produce sufficient evidence to state a prima facie cause of action. If this showing is made, then the final step should be undertaken: to balance the strength of that prima facie case against the defendant’s First Amendment right to speak anonymously. In *Dendrite*, the appellate court affirmed the trial court’s denial of the discovery application.

*Id.* (citations omitted).

So long as states do not license journalists, the problem of defining who is a journalist remains.<sup>215</sup> Because of the lack of licenses, there is no neat roll to review as there is with doctors, lawyers, and other licensed professionals. This problem, however, of defining who is a journalist should not be considered an argument for licensing journalists. That “cure” would be worse than the problem as it would undoubtedly infringe on the rights of a free press. The very word “license” would doubtless activate the gag reflex of any freedom-loving journalist.

But the difficulty in defining who qualifies as a journalist should not be the kiss of death for shield protection. It is hard to say where orange leaves off and yellow begins, but the difficulty does not preclude differentiation between yellow and orange. Likewise, the difficulty, in some cases, of determining who is a journalist does not mean the job cannot be done.

States have made a variety of attempts at solving the problem of who is a journalist. Some states have merely used a term to denote a journalist without attempting to define it. For example:

- Delaware says “reporter.”<sup>216</sup>
- Illinois says “reporter.”<sup>217</sup>
- Louisiana says “reporter.”<sup>218</sup>
- Maine says “journalist.”<sup>219</sup>

Thus, the legislators in these four states are leaving it up to judges to decide who falls into the journalistic camp—the camp of those they cannot order to jail. Many judges, one might guess, would be willing to narrow, as much as possible, this group that they cannot compel, and for that reason, these nondefinitions are simply unacceptable.

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For discussion of whether privilege protection extends to anonymous posters on news websites, see Jane E. Kirtley, *Mask, Shield, and Sword: Should the Journalist's Privilege Protect the Identity of Anonymous Posters to News Media Websites?*, 94 MINN. L. REV. 1478 (2010). See also Ryan M. Martin, Comment, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217 (2007); Yang-Ming Tham, Comment, *Honest to Blog: Balancing the Interests of Public Figures and Anonymous Bloggers in Defamation Lawsuits*, 17 VILL. SPORTS & ENT. L.J. 229 (2010); Jeff Swiatek, *Former Junior Achievement CEO Broadening Defamation Lawsuit*, INDIANAPOLIS STAR, Mar. 1, 2011, <http://www.indystar.com/article/20110301/BUSINESS/110301006/Former-Junior-Achievement-CEO-broadening-defamation-lawsu> (reporting on a defamation lawsuit that was expanded “to include people who criticized him anonymously on news media-run websites”).

<sup>215</sup> For an interesting argument that shield protection should be extended to the “work process” and not be based on a definition of who is a journalist, see Berger, *supra* note 199, at 1375.

<sup>216</sup> DEL. CODE ANN. tit. 10, § 4321 (2011).

<sup>217</sup> 735 ILL. COMP. STAT. ANN. 5/8-901 (West 2012).

<sup>218</sup> LA. REV. STAT. ANN. § 45:1452 (2011).

<sup>219</sup> ME. REV. STAT. ANN. tit. 16, § 61 (2011).

On the other hand, some states have definitions that are just too narrow to include freelancers and certainly bloggers. These states' shields cover what one might loosely refer to as "card-carrying" journalists. In addition, these states do not clearly rule in or out purely Internet transmissions:

- Alabama: "No person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity . . . ."<sup>220</sup>
- Alaska: A "reporter . . . while acting in the course of duties as a . . . reporter."<sup>221</sup>
- Arizona: "A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station."<sup>222</sup>
- Colorado: "[A]ny member of the mass media and any employee or independent contractor of a member of the mass media . . . ."<sup>223</sup>
- Florida: "[A] person regularly engaged in writing . . . for gain or livelihood, who obtained the information sought while working as a salaried employee of . . . a newspaper, news agency . . . ."<sup>224</sup>
- North Dakota: "No person . . . while the person was engaged in gathering, writing, photographing, or editing news and was employed by or acting for any organization engaged in publishing or broadcasting news . . . ."<sup>225</sup>
- Ohio: This state divides broadcasters from print reporters. "No person engaged in the work of, or connected with, or employed by any non-commercial educational or commercial radio broadcasting station, or any noncommercial educational or commercial television broadcasting station, or network of such stations, for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, or broadcasting news . . . ."<sup>226</sup> And: "No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news . . . ."<sup>227</sup>
- Oklahoma: "[A]ny person . . . preparing news for any newspaper . . . ."<sup>228</sup>
- Pennsylvania: "No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any

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<sup>220</sup> ALA. CODE § 12-21-142 (2011).

<sup>221</sup> ALASKA STAT. § 09.25.300 (2011).

<sup>222</sup> ARIZ. REV. STAT. ANN. § 12-2237 (2011). This language would appear to mean that Arizona's statute covers no bloggers or freelancers.

<sup>223</sup> COLO. REV. STAT. § 13-90-119 (2011).

<sup>224</sup> FLA. STAT. ANN. § 90.5015 (West 2011).

<sup>225</sup> N.D. CENT. CODE § 31-01.06.2 (2011).

<sup>226</sup> OHIO REV. CODE ANN. § 2739.04 (West 2011).

<sup>227</sup> *Id.* § 2739.12.

<sup>228</sup> OKLA. STAT. ANN. tit. 12, § 2506 (West 2011).

radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news . . . .”<sup>229</sup>

- West Virginia: “A person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns matters of public interest for dissemination to the public . . . .”<sup>230</sup>

New Jersey law clearly includes the Internet in its protection:

- “[A] person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated . . . .”<sup>231</sup>

So does Arkansas:

- “[A]ny editor, reporter, or other writer for any newspaper, periodical, or radio station, television station, or Internet news source, or publisher of any newspaper, periodical, or Internet news source, or manager or owner of any radio station . . . .”<sup>232</sup>

Georgia seems to rule out the Internet:

- Shield protection covers “[a]ny person, company, or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast . . . .”<sup>233</sup>

Some states do appear to cover freelancers. Michigan, however, may not cover the freelancers working online:

- “A reporter or other person who is involved in the gathering or preparation of news for broadcast or publication . . . .”<sup>234</sup>

Other states have statutes that are broad enough to cover freelancers working online:

- Connecticut: “[T]hat disseminates information to the public, whether by . . . electronic or any other means or medium[.]”<sup>235</sup>

<sup>229</sup> 42 PA. CONS. STAT. ANN. § 5942 (West 2000).

<sup>230</sup> W. VA. CODE ANN. § 57-3-10 (West 2011).

<sup>231</sup> N.J. STAT. ANN. § 2A:84A-21 (West 2011). Would this statute cover the Internet? Would it cover bloggers? If the bloggers were transmitting news for the general public, then they would seem to be covered, as would freelancers.

<sup>232</sup> ARK. CODE ANN. § 16-85-510 (2011).

<sup>233</sup> GA. CODE ANN. § 24-9-30 (2011). The Internet is not covered. Also a journalist is not covered when that journalist is a party in a lawsuit, and that poses a problem for defamation defendants.

<sup>234</sup> MICH. COMP. LAWS ANN. § 767.5a (West 2011). “Other person” seems broad enough to encompass freelancers. Perhaps a court could interpret “publication” to be broad enough to include the Internet.

<sup>235</sup> CONN. GEN. STAT. ANN. § 52-146t (West 2011).

- Nebraska: “No person engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public shall be required to disclose . . . .”<sup>236</sup>
- North Carolina: “Journalist—Any person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium.”<sup>237</sup>
- Oregon: “No person connected with, employed by or engaged in any medium of communication to the public shall be required to disclose . . . .”<sup>238</sup>
- Utah: “News reporter” means:

a publisher, editor, reporter or other similar person gathering information for the primary purpose of disseminating news to the public and any newspaper, magazine, or other periodical publication, press association or wire service, radio station, television station, satellite broadcast, cable system or other organization with whom that person is connected.<sup>239</sup>

- Washington: “The term ‘news media’ means . . . [a]ny person who is or has been an employee, agent, or independent contractor [of news media] . . . who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity.”<sup>240</sup> The coverage extends to parents, subsidiaries, or affiliates if compulsory orders seek information from them.<sup>241</sup>
- Wisconsin: “‘News person’ means . . . [a]ny person who is or has been engaged in gathering, receiving, preparing, or disseminating news or information” electronically, but only from a “business or organization,” of which the law gives examples, including “newspaper . . . wire service . . . cable or satellite network.”<sup>242</sup>

The more recently passed shield laws explicitly include the Internet:

- Hawaii protects “A journalist or newscaster . . . employed by or otherwise professionally associated with any newspaper or magazine or any digital

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<sup>236</sup> NEB. REV. STAT. ANN. § 20-146 (LexisNexis 2011).

<sup>237</sup> N.C. GEN. STAT. § 8-53.11 (2011).

<sup>238</sup> OR. REV. STAT. ANN. § 44.520 (West 2011).

<sup>239</sup> UTAH CT. R. 509 (2011).

<sup>240</sup> WASH. REV. CODE ANN. § 5.68.010 (West 2011).

<sup>241</sup> *Id.*

<sup>242</sup> WIS. STAT. ANN. § 885.14 (West 2011).

version thereof,” thereby including the Internet for some journalists, and possibly freelancers.<sup>243</sup>

Hawaii also offers to extend shield protection to anyone who demonstrates, *inter alia*, that he or she “has regularly and materially participated in” publicly disseminating news “of substantial public interest” through any “tangible or electronic media,” has a position “materially similar or identical to that of a journalist or newscaster,” and that “[t]he public interest is served by affording the protection[ ]” in the instant case.<sup>244</sup>

Other states with similar statutes include:

- Kansas: “Journalist” means:

(1) A publisher, editor, reporter or other person employed by a newspaper, magazine, news wire service, television station or radio station who gathers, receives or processes information for communication to the public; or (2) an online journal in the regular business of newsgathering and disseminating news or information to the public.<sup>245</sup>

- Texas: “‘Journalist’ means” a “person” who “gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information” through a news medium, which includes electronic means. However, the person must earn a “substantial portion” of their livelihood or “substantial financial gain” by his or her work to qualify.<sup>246</sup>
- Washington: “The term ‘news media’ means . . . any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to . . . internet, or electronic distribution.”<sup>247</sup>

Thus, three states—Nebraska, North Carolina, and Oregon—have language that seems broad enough to include freelancers and bloggers on the Internet. Kansas and Washington may include freelancers and bloggers, if they write frequently. In Texas

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<sup>243</sup> HAW. REV. STAT. § 621(a) (West 2011). Unusually, Hawaii’s shield law was set to expire in June 30, 2011, just a few years after it passed. Rachel Costello, *Hawaii Senate Committee Approves Shield Law Extension*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS (Apr. 8, 2011), <http://www.rcfp.org/newsitems/index.php?i=11813>. In late April 2011, Hawaii approved a two-year extension of its shield law. *Legislators Extend Shield Law Protecting Journalists’ Sources*, STAR ADVERTISER, Apr. 28, 2011, *available at* <http://www.staradvertiser.com/news/breaking/120944789.html>. The House voted unanimously to accept the Senate’s version of the bill. *Id.*

<sup>244</sup> HAW. REV. STAT. § 621(b) (West 2011).

<sup>245</sup> KAN. STAT. ANN. § 60-480 (West 2011).

<sup>246</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 22.021(2) (West 2011).

<sup>247</sup> WASH. REV. CODE ANN. § 5.68.010(5)(a) (West 2011).



and West Virginia,<sup>248</sup> their status depends on their earnings; in Connecticut their status depends on whether the website counts as an “other periodical.”<sup>249</sup> Nebraska and Oregon also have the admirable quality of brevity.<sup>250</sup> In short, Nebraska and Oregon have excellent provisions.

Some states have what might be called a “has been” problem. These states give shield protection to persons who have been reporters. Does that mean that the octogenarian who worked for newspapers until the age of twenty-five would, forever and always, receive shield protection? Perhaps the octogenarian has been told a secret that he or she wants to keep—say, where some stolen loot is being kept—but did not gather that information with any thought of disseminating it to the public. The statute would have to clarify the relationship between past work and the current ability to assert a privilege. Clearly, a person who has quit journalism but is being asked to reveal information gathered while a journalist should be covered.

“Has been” states that do not clearly include freelancers or bloggers are:

- California:

(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed . . . (b) . . . a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed . . .<sup>251</sup>

- District of Columbia: “[A]ny person who is or has been employed by the news media in a news gathering or news disseminating capacity.”<sup>252</sup>
- Indiana:

This chapter applies to the following persons: (1) any person connected with, or any person who has been connected with or employed by: (A) a newspaper or other periodical issued at regular intervals and having a general circulation; or (B) a recognized

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<sup>248</sup> W. VA. CODE ANN. § 57-3-10 (West 2011). Student reporters at an “accredited educational institution” are exempt from the financial requirement if they otherwise meet the definition of a “reporter.” *Id.*

<sup>249</sup> See CONN. GEN. STAT. ANN. § 52-146t(a)(2)(A)–(B) (West 2011).

<sup>250</sup> See NEB. REV. STAT. ANN. § 20-146 (LexisNexis 2011); OR. REV. STAT. ANN. § 44.520 (West 2011).

<sup>251</sup> CAL. EVID. CODE § 1070 (West 2011).

<sup>252</sup> D.C. CODE § 16-4702 (2011). The District of Columbia statute also uses the phrase “person while employed by the news media and acting in an official news gathering capacity.” *Id.* § 16-4702(1). This phrase raises the question, what constitutes “an official news gathering capacity”? *Id.*

press association or wire service; as a bona fide owner, editorial or reportorial employee, who receives or has received income from legitimate gathering, writing, editing and interpretation of news; and (2) any person connected with a licensed radio or television stations as owner, official, or as an editorial or reportorial employee who receives or has received income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news.<sup>253</sup>

- Maryland: “[A]ny person who is, or has been . . . employed by the news media in any news gathering or news disseminating capacity.”<sup>254</sup>
- Nevada: “No reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station . . . .”<sup>255</sup>
- New York:

‘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 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.<sup>256</sup>

New York also says, “[N]o professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news to the public . . . .”<sup>257</sup>

One “has been” state, Tennessee, would clearly cover freelancers, but not bloggers:

- “A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who

<sup>253</sup> IND. CODE ANN. § 34-46-4-1 (West 2011).

<sup>254</sup> MD. CODE ANN., CTS. & JUD. PROC. § 9-1112(b) (West 2011).

<sup>255</sup> NEV. REV. STAT. ANN. § 49.275 (West 2011).

<sup>256</sup> N.Y. CIV. RIGHTS LAW § 79-h(a)(6) (Consol. 2001).

<sup>257</sup> *Id.* § 79-h(c). New York also includes definitions of newspapers and magazines that say that they must have been produced and distributed “for at least one year.” *Id.* § 79-h(a)(1)–(2). New York also defines “news agency,” “press association,” and “wire service.” *Id.* § 79-h(a)(3)–(5).

is independently engaged in gathering information for publication or broadcast . . . .”<sup>258</sup>

Two “has been” states would seem to cover freelancers and bloggers, and for this reason, these statutes could be rated among the best and most protective:

- Minnesota: “[P]erson who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public . . . .”<sup>259</sup>
- South Carolina: “A person, company, or entity engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, radio, television, news or wire service, or other medium. . . .”<sup>260</sup>

Texas also includes “has been” coverage, which might extend to bloggers and freelancers depending on their income from journalism.<sup>261</sup> Wisconsin’s “has been” protection likely extends to freelancers, and maybe bloggers as well.<sup>262</sup> The solution to the “has been” problem is to make clear that the source or information was gathered while the person was engaged in the gathering for the purpose of dissemination.<sup>263</sup>

Arguably, Nebraska and Oregon have the best definition sections. The language used by these states is lean and broad:

- Nebraska: “[P]erson engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public . . . .”<sup>264</sup>
- Oregon: “[P]erson connected with, employed by or engaged in any medium of communication to the public.”<sup>265</sup>

The worst definition is perhaps Rhode Island’s for its inclusion of the word “accredited”:

[N]o person shall be required . . . to disclose any confidential information . . . received or obtained by him or her in his or her capacity as a reporter, editor, commentator, journalist, writer, correspondent, newsphotographer, or other person directly engaged

<sup>258</sup> TENN. CODE ANN. § 24-1-208(a) (2011).

<sup>259</sup> MINN. STAT. § 595.023 (2011). “Transmission” or “dissemination” arguably should be deemed by courts to be broad enough to include Internet transmission.

<sup>260</sup> S.C. CODE ANN. § 19-11-100(A) (2011). The language “or other medium” clearly would encompass the Internet.

<sup>261</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 22.021(2)(B) (West 2011).

<sup>262</sup> WIS. STAT. ANN. § 885.14 (West 2011). Wisconsin websites would need to prove that they qualify as a “business or organization” under Wisconsin law. *See id.*

<sup>263</sup> Washington state’s shield law includes just such protection. *See* WASH. REV. CODE ANN. § 5.68.010(5)(b) (West 2011); *see also supra* note 247, and accompanying text.

<sup>264</sup> NEB. REV. STAT. ANN. § 20-146 (LexisNexis 2011).

<sup>265</sup> OR. REV. STAT. ANN. § 44.520(1) (West 2011).

in the gathering or presentation of news for any *accredited* newspaper, periodical, press association, newspaper syndicate, wire service, or radio or television station.<sup>266</sup>

The use of the term accredited raises the question: What might that accrediting agency be?<sup>267</sup>

Not even in the running for the definition of “journalist” were statutes containing sexist language, with two exceptions: California, which used sexist language in a header, “*Newsman*’s refusal to disclose news source” but the statutory language uses “person,”<sup>268</sup> and Ohio, which used the term “his” as noted below.

- Alabama: “The sources of any information procured or obtained by *him* and published in the newspaper, broadcast by any broadcasting station, or televised by any television station on which *he* is engaged, connected with or employed.”<sup>269</sup>
- Arizona: “[T]he source of information procured or obtained by *him* for publication in a newspaper or for broadcasting over a radio or television station with which *he* was associated or by which *he* is employed.”<sup>270</sup>
- Delaware: “A reporter is privileged . . . to decline to testify concerning either the source or content of information that *he* obtained within the scope of his professional activities.”<sup>271</sup>

But then Delaware clears up its sexism problem in the very next section: “A reporter is privileged in an adjudicative proceeding to decline to testify concerning the source or content of information that *he* or *she* obtained within the scope of his or her professional activities if the reporter states under oath . . . .”<sup>272</sup>

- Kentucky: “Newspaper, radio or television broadcasting station personnel . . . in a newspaper or by a radio or television broadcasting station by which *he* is engaged or employed, or with which *he* is connected.”<sup>273</sup>
- Louisiana: “[N]o reporter shall be compelled to disclose . . . the identity of any informant or any source of information obtained by *him* from another person while acting as a reporter.”<sup>274</sup>

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<sup>266</sup> R.I. GEN. LAWS § 9-19.1-2 (2011) (emphasis added).

<sup>267</sup> See also W. VA. CODE ANN. § 57-3-10 (West 2011) (exempting student journalists from the law’s “for a substantial portion of the person’s livelihood” requirement only if the student comes from an “accredited educational institution”).

<sup>268</sup> CAL. EVID. CODE § 1070 (West 2011) (emphasis added).

<sup>269</sup> ALA. CODE § 12-21-42 (2011) (emphasis added).

<sup>270</sup> ARIZ. REV. STAT. ANN. § 12-2237 (2011) (emphasis added).

<sup>271</sup> DEL. CODE ANN. tit. 10, § 4321 (2011) (emphasis added).

<sup>272</sup> *Id.* § 4322 (emphasis added).

<sup>273</sup> KY. REV. STAT. ANN. § 421.100 (West 2011) (emphasis added).

<sup>274</sup> LA. REV. STAT. ANN. § 45.1452 (2011) (emphasis added).

- New Jersey: “[A] person,”<sup>275</sup> but then “information obtained in the course of pursuing *his* professional activities . . . .”<sup>276</sup>
- Ohio: “shall be required to disclose the source of any information procured or obtained by such person in the course of *his* employment . . . .”<sup>277</sup>

These statements are in contrast to some notably non-sexist provisions:

- Colorado: “Privilege for *newsperson* . . . .”<sup>278</sup>
- Illinois: “[O]rdering *him or her* to disclose *his or her* source . . . .”<sup>279</sup>
- Montana: “Without a person’s consent, a person, including any newspaper, magazine, press association, news agency, news service, radio station, television, station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news . . . .”<sup>280</sup>
- Rhode Island: “[N]o *person* . . . received or obtained by *him or her* in *his or her* capacity as a reporter, editor, commentator, journalist, writer, correspondent, newsphotographer, or other person directly engaged in the gathering or presentation of news for any accredited newspaper, periodical, press association, newspaper syndicate, wire service, or radio or television station.”<sup>281</sup>

#### B. Where (In What Type of Proceeding)?

May state statutes determine whether federal courts may compel testimony? Alaska says that its law on privilege shall “also apply to proceedings held under the laws of the United States or any other state where the law of this state is being applied.”<sup>282</sup> Nebraska says “in any federal or state proceeding.”<sup>283</sup> But could a state court presume to tell a federal judge what testimony the judge can compel in his or her courtroom?

Well, yes and no. In a civil diversity case, where parties from different states are in federal court, the federal court would apply the privilege laws of the state whose substantive law applies in that particular case.<sup>284</sup> According to the Federal Rules of Evidence, Rule 501: “[I]n a civil case, state law governs privilege regarding a claim

<sup>275</sup> N.J. STAT. ANN. § 24:84A-21 (West 2011).

<sup>276</sup> *Id.* § 24:84A-21(b) (emphasis added).

<sup>277</sup> OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 2011) (emphasis added).

<sup>278</sup> COLO. REV. STAT. § 13-90-119 (2011) (emphasis added).

<sup>279</sup> 735 ILL. COMP. STAT. ANN. 5/8-903 (West 2011) (emphasis added).

<sup>280</sup> MONT. CODE ANN. § 26-1-902(1) (2011). Montana’s laws were gender neutralized in 2009. 2009 Mont. Laws Ch., 56. Community antenna television service is something covered explicitly only by Montana law. Also, “disseminating news” might be broad enough to cover the Internet, and the “no person” language might be broad enough to cover bloggers and freelancers.

<sup>281</sup> R.I. GEN. LAWS § 9-19.1-2 (2011) (emphasis added).

<sup>282</sup> ALASKA STAT. § 09.25.350 (2011).

<sup>283</sup> NEB. REV. STAT. ANN. § 20-146 (LexisNexis 2011).

<sup>284</sup> FED. R. EVID. 501.

or defense for which state law supplies the rule of decision.”<sup>285</sup> But if a federal court is hearing a case “under the laws of the United States,” it would be applying federal law concerning privileges, and there is currently no federal shield statute. In short, state legislatures are reaching when they try to say that their shield laws will apply in “any” federal proceeding or in “proceedings held under the laws of the United States,” but state shield laws would apply in federal courts in diversity cases applying state laws.

On the other hand, Oklahoma is perhaps shortchanging journalists when it uses the terse phrase “in a state proceeding.”<sup>286</sup> The shield law should also apply in federal diversity cases where Oklahoma law applies.

The more general question of “where” has to do with the type of proceedings to which the shield law applies.<sup>287</sup>

- Illinois’s statute is too narrow because it only applies to courts and not to other proceedings such as legislative hearings. Illinois says “[n]o court.”<sup>288</sup>
- Michigan’s statute would not apply to life-imprisonment cases. Michigan does not list places but says “in any inquiry . . . except an inquiry for a crime punishable by imprisonment for life . . . .”<sup>289</sup>
- Georgia has a provision that excludes cases where the journalist is a defendant: “in any proceeding where the one asserting the privilege is not a party.”<sup>290</sup>

Many states have broad coverage but lengthy statutes, often including a lengthy laundry list plus the catch-all phrase of “or elsewhere.” Seventeen states arguably fall into this category:

- Alabama: “[I]n any legal proceeding or trial, before any court or before a grand jury of any court, before the presiding officer of any tribunal or his agent or agents or before any committee of the Legislature or elsewhere.”<sup>291</sup>
- Arizona: “[I]n a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere . . . .”<sup>292</sup>

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<sup>285</sup> *Id.*

<sup>286</sup> OKLA. STAT. ANN. tit. 12, § 2506(B) (West 2011).

<sup>287</sup> For an analysis of shield-law protection in criminal cases, see generally Karl H. Schmid, *Journalist’s Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals’ Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441 (2002).

<sup>288</sup> 735 ILL. COMP. STAT. ANN. 5/8-90 (West 2011). Utah’s shield protection comes in the form of state court rules, so the protection applies only in courts. See UTAH R. EVID. 509; see also W. VA. CODE ANN. § 57-3-10 (West 2011) (“any civil, criminal, administrative or grand jury proceeding in any court in this state”).

<sup>289</sup> MICH. COMP. LAWS ANN. § 767.5a(1) (West 2011).

<sup>290</sup> GA. CODE ANN. § 24-9-30 (2011). So, in Georgia, the location does not matter. The only thing that counts is that the journalist is not a defendant—which means no protection for libel cases.

<sup>291</sup> ALA. CODE § 12-21-142 (2011).

<sup>292</sup> ARIZ. REV. STAT. ANN. § 12-2237 (2011).

- California speaks in terms of “judicial, legislative, administrative body, or any other body having the power to issue subpoenas . . . .”<sup>293</sup>
- Delaware: “[N]onadjudicative proceeding[s]” are covered in one section, and “adjudicative proceeding[s]” are covered in another.<sup>294</sup>
- District of Columbia: “[J]udicial, legislative, administrative, or other body with the power to issue a subpoena . . . .”<sup>295</sup>
- Kentucky:

[I]n any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere . . . .<sup>296</sup>

- Kansas: “[A] judicial, legislative, administrative body or any other body having the power to issue subpoenas . . . .”<sup>297</sup>
- Maryland: “[A]ny judicial, legislative, or administrative body, or anybody that has the power to issue subpoenas . . . .”<sup>298</sup>
- Minnesota: “[A]ny court, grand jury, agency, department or branch of the state, or any of its political subdivisions or other public body, or by either house of the legislature or any committee, officer, member, or employee thereof . . . .”<sup>299</sup>
- Nevada: “[I]n any legal proceedings, trial or investigation: 1. Before any court, grand jury, coroner’s inquest, jury or any officer thereof. 2. Before the legislature or any committee thereof. 3. Before any department, agency, or commission of the state. 4. Before any local governing body or committee thereof, or any officer of a local government.”<sup>300</sup>
- New Jersey: “[I]n any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.”<sup>301</sup>
- New York: “[B]y any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, now

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<sup>293</sup> CAL. EVID. CODE § 1070(a) (West 2011).

<sup>294</sup> DEL. CODE ANN. tit. 10, §§ 4321, 4322 (2011).

<sup>295</sup> D.C. CODE § 16-4702 (2011).

<sup>296</sup> KY. REV. STAT. ANN. § 421.100 (West 2011).

<sup>297</sup> KAN. STAT. ANN. § 60-481 (West 2011).

<sup>298</sup> MD. CODE ANN., CTS. & JUD. PROC. § 9-112(c) (West 2011).

<sup>299</sup> MINN. STAT. § 595.023 (2011).

<sup>300</sup> NEV. REV. STAT. ANN. § 49.275 (West 2011).

<sup>301</sup> N.J. STAT. ANN. § 2A:84A-21 (West 2011).

shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers.”<sup>302</sup>

- North Carolina: “Legal proceeding—Any grand jury proceeding or grand jury investigation; any criminal prosecution, civil suit, or related proceeding in any court; and any judicial or quasi-judicial proceeding before any administrative, legislative, or regulatory board, agency or tribunal.”<sup>303</sup>
- Ohio: “[I]n any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.”<sup>304</sup>
- Oregon: “[A] legislative, executive or judicial officer or body, or any other authority having power to compel testimony or the production of evidence.”<sup>305</sup>
- Tennessee: “[A] court, a grand jury, the general assembly, or any administrative body, to disclose before the general assembly or any Tennessee court, grand jury, agency, department, or commission . . . .”<sup>306</sup>
- Washington: “[N]o judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process . . . .”<sup>307</sup>

Nine statutes have fewer words but still have broad coverage:

- Arkansas: “[A]ny grand jury or to any other authority.”<sup>308</sup>
- Florida: “[I]n the proceeding for which the information is sought.”<sup>309</sup>
- Indiana: “[I]n any legal proceedings or elsewhere . . . .”<sup>310</sup>
- Louisiana: “[I]n any administrative, judicial or legislative proceedings or anywhere else . . . .”<sup>311</sup>
- Montana: “[I]n any legal proceeding” and “by a judicial, legislative, administrative, or any other body having the power to issue subpoenas . . . .”<sup>312</sup>
- North Dakota: “[I]n any proceeding or hearing . . . .”<sup>313</sup>
- Pennsylvania: “[I]n any legal proceeding, trial or investigation before any government unit . . . .”<sup>314</sup>

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<sup>302</sup> N.Y. CIV. RIGHTS LAW § 79-h(8)(b) (Consol. 2001).

<sup>303</sup> N.C. GEN. STAT. ANN. § 8-53.11 (2011).

<sup>304</sup> OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 2011).

<sup>305</sup> OR. REV. STAT. ANN. § 44.520(1) (West 2011).

<sup>306</sup> TENN. CODE ANN. § 24-1-208 (2011).

<sup>307</sup> WASH. REV. CODE ANN. § 5.68.010(1) (West 2011).

<sup>308</sup> ARK. CODE ANN. § 16-85-510 (2011).

<sup>309</sup> FLA. STAT. ANN. § 90-5015(2)(a) (West 2011).

<sup>310</sup> IND. CODE ANN. § 34-46-4-2 (West 2011).

<sup>311</sup> LA. REV. STAT. ANN. § 45:1452 (2011).

<sup>312</sup> MONT. CODE ANN. §§ 26-1-902(1), (2) (2011).

<sup>313</sup> N.D. CENT. CODE § 31-01-06.2 (2011).

<sup>314</sup> 42 PA. CONS. STAT. ANN. § 5942(a) (West 2011).



- Rhode Island: “[A]ny court, grand jury, agency, department, or commission of the state . . . .”<sup>315</sup>
- South Carolina: “[I]n any judicial, legislative, or administrative proceeding . . . .”<sup>316</sup>

Colorado uses few words, but its coverage is too narrow because legislative and administrative proceedings need to be covered, too, and Colorado’s statute talks only in terms of “judicial proceedings.”<sup>317</sup>

The best language is arguably from North Dakota, which includes “any proceeding or hearing . . . .”<sup>318</sup> Wisconsin avoids defining any type of proceeding and simply bars anyone “having the power to issue a subpoena” from “compelling a news person to testify about or produce or disclose . . . .”<sup>319</sup>

### 1. Defamation

When might a journalist need shield-law protection most? In a libel case. Without protection, journalists who are sued for libel have a real problem if they have relied on confidential sources whom they do not want to disclose. The judge may, if no law prevents it, turn to the jury and say something<sup>320</sup> to this effect: “Ladies and gentlemen

<sup>315</sup> R.I. GEN. LAWS § 9-19.1-2 (2011).

<sup>316</sup> S.C. CODE ANN. § 19-11-100(A) (2011).

<sup>317</sup> COLO. REV. STAT. § 13-90-119(2) (2011).

<sup>318</sup> N.D. CENT. CODE § 31-01-06.2.

<sup>319</sup> WIS. STAT. ANN. § 885.14(2) (West 2011).

<sup>320</sup> See, e.g., Robert G. Berger, *The “No-Source” Presumption: The Harshes Remedy*, 36 AM. U. L. REV. 603, 614 n.83 (1987) (citing *Rancho La Costa, Inc. v. Penthouse Int’l*, 6 Media L. Rep. (BNA) 1540, 1540–41 (Cal. Super. 1980) (ruling that as consequence of magazine-defendant’s failure to comply with disclosure order, jury would be instructed that no undisclosed sources(s) existed), *cert. denied*, 450 U.S. 902 (1981)).

Still, famed journalist Anthony Lewis argues against giving protection to journalists in libel cases. See Lewis *supra* note 56, at 1356. He wrote, among other works, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991). He appeared in a panel discussion exploring the topic of “Are Journalists Privileged,” and he shared these observations:

Consider the interest of reputation. One of the great press victories in the Supreme Court, *New York Times v. Sullivan* in 1964, made it very hard for public officials who are subjected to criticism to recover damages for libel. They can do so, the Court said, only if they prove that someone published a false charge about them with knowledge of its falsity or in reckless disregard of its truth or untruth. . . .

Now suppose a federal shield law were in place. A newspaper publishes a story that a cabinet member has taken a bribe—according to an unnamed confidential source. To recover his good name, the official sues for libel. To win, he must find out the name of the source—to show that the source was unreliable, say, or non-existent. But the shield allows the journalist or publisher to avoid disclosing the name, so the official has no way to redeem his reputation. That is not a far-fetched possibility. Think about the case of Wen Ho Lee, the nuclear scientist who was described in

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press reports as a spy for China. He was arrested, charged with 59 felony counts and held in solitary confinement for nine months. Then the government dropped all but one count, and Mr. Lee agreed to plead guilty of mishandling information. The judge apologized to Mr. Lee and said the case had “embarrassed our entire nation.” Wen Ho Lee sued the government for violation of his privacy in the leaks to the press. He subpoenaed reporters and asked them to name the source or sources of the leaks. They refused to answer. Would we want a shield law that would support that refusal and effectively deprive Mr. Lee of any chance to repair a ruined life? I would not.

*Id.* (citations omitted).

Patrick M. Garry also criticized use of anonymous sources, saying that “use of anonymous sources can degrade the quality of political discourse by obscuring the identity and biases of those injecting alleged facts into that discourse.” Patrick M. Garry, *Anonymous Sources, Libel Law, and the First Amendment*, 78 TEMP. L. REV. 579, 603–04 (2005). He also said that “defamatory statements made by such sources . . . can harm the entire political process by discouraging good candidates from seeking office.” *Id.* at 604.

Garry does not think that journalists should receive both a “qualified privilege of confidentiality” and “actual malice” protection. *Id.* He argues, that this “double protection” both unduly encourages use of confidential sources and “overly muffles society’s interest in the protection of reputation.” *Id.* at 600. He opines that promising confidentiality has a “speculative effect on the media’s newsgathering abilities,” and he questions whether there is a need for promises of confidentiality in “the contemporary world where it seems as if no one hesitates to seek out publicity.” *Id.* at 605.

To “curb” what Garry calls “the abuses caused by the media’s reliance on anonymous sources,” he suggests giving journalists a choice: “if the press chooses to use anonymous sources, then the *New York Times v. Sullivan* actual malice standard will not protect any defamatory statements made by those sources.” *Id.* Garry does not mince words in stating his opinion:

With the use of anonymous sources escalating by the day, and with the number of Internet entities willing to use such sources similarly escalating, the courts can no longer continue to tip the balance so strongly in favor of anonymity and against reputational and accountability interests. In a media age when pervasive anonymity threatens to turn the Internet into a gossip pen at best and a libelous cesspool at worst, the last thing the law should do is provide extra incentive for the use of anonymous sources.

*Id.*

Granted, the notion of protection of confidential sources in libel cases comes under harsh criticism, but the balance even in actual malice cases is perhaps not so tipped against media plaintiffs as Garry wishes to argue. Juries can always assess the credibility of a journalist if he or she does not name a confidential source. Juries, in short, can decide on whether they think the journalist has credibility or whether the journalist has created a confidential-source smokescreen.

*Mitchell v. Superior Court*, 690 P.2d 625 (Cal. 1984), stemmed from a libel suit over an article in *Reader’s Digest* that told about the Mitchells’ winning a Pulitzer Prize for a series of articles that criticized a church, and the article included some of those criticisms. *Id.* at 626–27. The church sued. *Id.* The Mitchells wanted to avoid disclosing their confidential sources in a libel case and asserted a privilege based not on statutory law, but on the press freedoms guaranteed by the First Amendment of the Constitution and article I, section 2 of the California Constitution. *Id.* at 627. The court concluded that a qualified privilege not to disclose confidential source did exist in civil cases, but that the scope of such a privilege was dependent on

of the jury, the defendant has refused to disclose the names of sources used by the defendant in preparation of the article (or broadcast) at issue. Therefore, you will presume that there is no such source.” If that source were critical to establishing the truth of the article or broadcast, then the judge has just handed a victory to the plaintiff. The judge has told the jury to presume no such source exists, and thus the defendant journalist is left hanging in the wind.

Three states specifically say that their law does not apply if the journalist is “a party.”<sup>321</sup> But of course, a journalist is a party when being sued for defamation, and, ergo, the statutes would deny shield coverage in libel cases.

- Georgia says specifically that its shield law applies “in any proceeding where the one asserting the privilege is not a party . . . .”<sup>322</sup>

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the weighing of five factors. *Id.* at 632. These factors are: (1) “the nature of the litigation and whether the reporter is a party”; (2) “the relevance of the information sought to plaintiff’s cause of action”; (3) “whether the party seeking a confidential source’s disclosure has exhausted all alternative sources of obtaining the needed information”; (4) “the importance of protecting confidentiality in the case at hand”; and (5) in a libel case, whether the plaintiff had made a prima facie case that the statements at issue were false. *Id.* at 632–34.

The court in *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Ct. App. 2006), commented on the fifth *Mitchell* factor:

As extrapolated to actions not sounding in defamation, this factor translates into consideration of the demonstrated strength of the plaintiff’s case on the merits. . . . Obviously the journalist’s interest in withholding information should merit less protection if it appears likely that the journalist has indeed committed a tort against the plaintiff. . . . [A] *weak* showing of ultimate success tends to militate *against* disclosure because it increases the likelihood that any disclosure, and the accompanying violence to expressional interests, will prove to have been needless.

*Id.* at 115.

The *Mitchell* court granted the Mitchells a protective order, concluding that “the California courts should recognize a qualified reporter’s privilege, depending upon a balancing of the relevant considerations in each case” and that here, “the generality of plaintiffs’ requests, the absence of a showing that alternative sources had been exhausted, and the absence of a prima facie showing of falsity” tipped the balance toward the Mitchells. *Mitchell*, 690 P.2d at 635. In short, the Mitchells could not be compelled to disclose their confidential sources or information supplied by those confidential sources. *Id.*

In Germany, journalists receive an absolute privilege in libel cases. See Alexander Bruns, *Access to Media Sources in Defamation Litigation in the United States and Germany*, 10 DUKE J. COMP. & INT’L L. 283, 303 (2000). Bruns says that “in order to maintain the free flow of information, informants’ identities are absolutely privileged. This characteristic feature of German law reflects that, unlike American evidence law, German civil procedure is not governed by the hearsay rule.” *Id.* at 303–04. The result is that “the journalist may testify about the contents of confidential conversations without revealing an informant’s identity.” *Id.* at 304.

For some coverage of the related topic of protecting the identity of anonymous posters in libel suits, see *supra* note 214.

<sup>321</sup> See *infra* notes 322–24.

<sup>322</sup> GA. CODE ANN. § 24-9-30 (2011).

- Hawaii says its privilege does not apply if “[p]robable cause exists to believe that the person claiming the privilege has committed, is committing, or is about to commit a crime.”<sup>323</sup>
- South Carolina says “in any judicial, legislative, or administrative proceeding in which the compelled disclosure is sought and where the one asserting the privilege is not a party in interest to the proceeding.”<sup>324</sup>

Four states have language that would specifically deny shield protection to journalists in libel cases:

- Illinois: “In libel or slander cases where a person claims the privilege . . . [not to disclose a source], the plaintiff may apply in writing to the court for an order divesting the person named therein of such privilege and ordering him or her to disclose his or her source of information.”<sup>325</sup>
- Oklahoma: “This subsection does not apply with respect to the content or source of allegedly defamatory information, in a civil action for defamation wherein the defendant asserts a defense based on the content or source of such information.”<sup>326</sup>
- Oregon: “The provisions of [Oregon’s shield law] do not apply with respect to the content or source of allegedly defamatory information, in [a] civil action for defamation wherein the defendant asserts a defense based on the content or source of such information.”<sup>327</sup>

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<sup>323</sup> HAW. REV. STAT. § 621(c)(1) (West 2011).

<sup>324</sup> S.C. CODE ANN. § 19-11-100(A) (2011).

<sup>325</sup> 735 ILL. COMP. STAT. ANN. 5/8-903 (West 2011).

<sup>326</sup> OKLA. STAT. ANN. tit. 12, § 2506.B(2) (West 2011).

<sup>327</sup> OR. REV. STAT. ANN. § 44.530(3) (West 2011). In November 2011, a district judge in Oregon applied the language that denies shield protection to journalists in libel proceedings to Crystal Cox, a blogger accused of defaming a lawyer involved in a bankruptcy case. *See Obsidian Fin. Grp., LLC v. Cox*, No. CV-11-57-HZ, 2011 WL 5999334, at \*1 (D. Or. Nov. 30, 2011).

The judge first denied Cox any protection from Oregon’s shield law because her work did not fall into the statute’s definition of “medium of communication”: “any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system.” *Id.* But the judge added that because the case was a civil action for defamation, Cox would not have been allowed to protect the source of her blog post “even if she were otherwise entitled to those protections.” *Id.*

The ruling initially alarmed many in the news media, who worried that the judge had unreasonably narrowed the definition of “journalist.” *See, e.g.,* David Carr, *When Truth Survives Free Speech*, N.Y. TIMES, Dec. 12, 2011, at B1; C.J. Cornell, *After Crystal Cox Verdict, It’s Time to Define Who Is a Journalist*, MEDIASHIFT IDEA LAB (Jan. 31, 2012), <http://www.pbs.org/idealab/2012/01/after-crystal-cox-verdict-its-time-to-define-who-is-a-journalist026.html>; Kashmir Hill, *Why an Investment Firm was Awarded \$2.5 Million After Being Defamed by Blogger*, FORBES (Dec. 7, 2011, 5:57 PM), <http://www.forbes.com/sites/kashmirhill/2011/12/07/investment-firm-awarded-2-5-million-after-being-defamed-by-blogger/>. Some of those who had worried, however, later began to rethink their stance after looking more closely at

- Tennessee: “[The shield law] shall not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information.”<sup>328</sup>

Two states give reporters explicit protection from contempt in civil suits, which include libel suits, but do not say anything about a presumption that there is no source.

- Montana says that reporters “may not be adjudged in contempt . . . for refusing to disclose or produce the source of any information,” but the law does not give the protection needed in defamation cases, namely, protection from the presumption that not naming a source means there is no source.<sup>329</sup>
- New York says “no professional journalist or newscaster . . . shall be adjudged in contempt by any court in connection with any civil or criminal proceeding . . . .”<sup>330</sup>

Colorado gives journalists adequate protection against both contempt and the presumption that there is no source. Colorado’s statute says that a newsperson shall not “be compelled to disclose, be examined concerning refusal to disclose, [or] be subjected to any legal presumption of any kind.”<sup>331</sup>

The New Jersey Supreme Court has determined that New Jersey’s shield law gives an absolute privilege in libel cases.<sup>332</sup> In 2011, the court said: “In evaluating the scope of the Shield Law, it is important to recall that in civil defamation and libel cases, the privilege is absolute.”<sup>333</sup> New Jersey’s law says:

A person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has *a privilege to refuse to disclose, in any legal or quasi-legal proceeding* or before any investigative body, including, but not limited to, any court, grand jury, petit jury,

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Cox’s work and background. *See Carr, supra*; Hill, *supra* (calling Cox’s blog posts “unhinged” and reporting that Cox later emailed the firm where the lawyer worked to offer it “PR Services and Search Engine Management Services starting at \$2,500 a month to . . . protect online reputations and promote businesses”).

The jury decided on a \$2.5 million award for the plaintiff, an investment firm. *See, e.g., Hill, supra.*

<sup>328</sup> TENN. CODE ANN. § 24-1-208(b) (2011).

<sup>329</sup> MONT. CODE ANN. § 26-1-902(2) (2011).

<sup>330</sup> N.Y. CIV. RIGHTS LAW § 79-h(b) (Consol. 2001).

<sup>331</sup> COLO. REV. STAT. § 13-90-119.2 (2011).

<sup>332</sup> *Too Much Media, LLC v. Hale*, 20 A.3d 364, 383 (N.J. 2011).

<sup>333</sup> *Id.* (citing *Maressa v. N.J. Monthly*, 445 A.2d 376 (N.J. 1982)).

administrative agency, the Legislature or legislative committee, or elsewhere.<sup>334</sup>

*C. Sources of Information—Or, Information, Too?*

States have many permutations on what information is covered by their shield statutes. Arguably, the most limited coverage is that of sources for only published or broadcast material, which means that confidential information is not covered, nor are confidential sources if their information is not published or broadcast. States falling in this camp include:

- Alabama: “[T]he sources of any information procured or obtained by him and published in the newspaper, broadcast by any broadcasting station, or televised by any television station on which he is engaged, connected with or employed.”<sup>335</sup>
- Arkansas shield law only covers “the source of information used as the basis for any article.”<sup>336</sup>
- Kentucky: “[T]he source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.”<sup>337</sup>

Some statutes say “source only,” which could be published or unpublished information.

- Alaska says “source of information.”<sup>338</sup>
- Illinois says “source” only.<sup>339</sup>
- Louisiana says “the identity of any informant or any source of information.”<sup>340</sup>
- Ohio says “the source of any information.”<sup>341</sup>
- Pennsylvania says “the source of any information.”<sup>342</sup>

Some courts have found source to mean only “source.”<sup>343</sup> Some statutes say source and any unpublished information.<sup>344</sup>

<sup>334</sup> N.J. STAT. ANN. § 2A:84A-21 (West 2011) (emphasis added). New Jersey revamped its shield-law statute in the wake of *In re Farber*, discussed, *supra* note 52.

<sup>335</sup> ALA. CODE § 12-21-142 (2011).

<sup>336</sup> ARK. CODE ANN. § 16-85-510 (2011). Would a broadcast piece qualify? Judges might strictly construe the statute.

<sup>337</sup> KY. REV. STAT. ANN. § 421.100 (West 2011).

<sup>338</sup> ALASKA STAT. § 09.25.320 (2011).

<sup>339</sup> 735 ILL. COMP. STAT. ANN. 5/8-901,-903 (West 2011).

<sup>340</sup> LA. REV. STAT. ANN. § 45.1452 (2011).

<sup>341</sup> OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 2011).

<sup>342</sup> 42 PA. CONS. STAT. ANN. § 5942(a) (West 2000).

<sup>343</sup> See *State v. Geis*, 441 N.E.2d 803, 808 (Ohio Ct. App. 1981); *Commonwealth v. Bowden*, 838 A.2d 740, 749 (Pa. 2003).

<sup>344</sup> Perhaps it is easier in some cases, such as those involving broadcasts, for the defendant to produce the information than for the plaintiff to have to try to get it through other means.

- California: “The source of any information” and “any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.”<sup>345</sup>

California also offers a definition:

As used in this section, “unpublished information” includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.<sup>346</sup>

- Colorado: “The privilege of nondisclosure shall not apply to the following: (a) [n]ews information received at a press conference; (b) [n]ews information which has actually been published or broadcast through a medium of mass communication.”<sup>347</sup>
- District of Columbia: Prohibits compelled disclosure of “[t]he source of any news or information procured by the person while employed by the news media and acting in an official news gathering capacity, whether or not the source has been promised confidentiality”<sup>348</sup> and “[a]ny news or information procured by the person while employed by the news media in the course of pursuing professional activities that is not itself communicated in the news media, including any: (A) Notes; (B) Outtakes; (C) Photographs or photographic negatives; (D) Video or sound tapes; (E) Film; or (F) Other data, irrespective of its nature, not itself communicated in the news media.”<sup>349</sup>
- Hawaii protects sources and information that could lead to the source, and “[a]ny unpublished information obtained or prepared by the [journalist or newscaster] while so employed or professionally associated.”<sup>350</sup>

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Likewise, it might be easier for a newspaper to produce back issues. Clearly, there is no confidentiality concern if the information has already been made public.

<sup>345</sup> CAL. EVID. CODE § 1070(b) (West 2011).

<sup>346</sup> *Id.* § 1070(c).

<sup>347</sup> COLO. REV. STAT. § 13-90-119 (2011).

<sup>348</sup> D.C. CODE § 16-4702(1) (2011). The “whether or not the source has been promised confidentiality” gives very broad protection. On the other hand, what does an “official news gathering capacity” mean? Does this imply that there could be a “non-official” news gathering capacity? The term “official” should be scrapped as a potential source of unnecessary obfuscation.

<sup>349</sup> *Id.* § 16-4702(2). The D.C. statute should have stopped there, but it continues, requiring application of the three-part *Stewart* test. *See id.* § 16-4703(a); *see supra* note 123 and accompanying text.

<sup>350</sup> HAW. REV. STAT. § 621(a)(2) (West 2011).

- Maryland says:

“(1) The source” and (2) Any news or information procured by the person while employed by the news media, in the course of pursuing a professional activity, . . . for communication to the public but which is not so communicated, in whole or in part, including: (i) Notes; (ii) Outtakes; (iii) Photographs or photographic negatives; (iv) Video and sound tapes; (v) Film; and (vi) Other data, irrespective of its nature, not itself disseminated in any manner to the public.”<sup>351</sup>
- Michigan: “The identity of an informant, any unpublished information obtained from an informant, or any unpublished matter or documentation, in whatever manner recorded, relating to a communication with an informant.”<sup>352</sup>
- Minnesota: The source is “the person or means from or through which information was obtained” and “any unpublished information procured by the person in the course of work or any of the person’s notes, memoranda, recording tapes, film or other reportorial data whether or not it would tend to identify the person or means through which the information was obtained.”<sup>353</sup>
- Oklahoma: “1. The source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public” and “2. [A]ny unpublished information.”<sup>354</sup>
- Oregon:

(a) The source of any published or unpublished information obtained by the person in the course of gathering, receiving or processing information for any medium of communication to the public; or (b) Any unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public.”<sup>355</sup>
- Rhode Island: “[C]onfidential association, . . . any confidential information, or . . . the source of any confidential information received or obtained by him or her.”<sup>356</sup>

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<sup>351</sup> MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2011).

<sup>352</sup> MICH. COMP. LAWS ANN. § 767.5a(1) (West 2011).

<sup>353</sup> MINN. STAT. § 595.023 (2011).

<sup>354</sup> OKLA. STAT. ANN. tit. 12, § 2506(B) (West 2011).

<sup>355</sup> OR. REV. STAT. ANN. § 44.520 (West 2011).

<sup>356</sup> R.I. GEN. LAWS § 9-19.1-2 (2011).



Other state statutes cover both sources and information, whether published or unpublished.

- Connecticut covers “any information obtained or received, whether or not in confidence, . . . or the identity of the source of any such information, or any information that would tend to identify the source.”<sup>357</sup>
- Delaware’s law covers both the “source or content of information that he obtained within the scope of his professional activities.”<sup>358</sup>
- Georgia covers “disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news.”<sup>359</sup>
- Indiana covers the source as well as information that is “published or not published” or “broadcast or not broadcast.”<sup>360</sup>
- Kansas covers sources and information from a specific source or procured independently. “Information” is defined as published or unpublished information, including “notes, outtakes, photographs, tapes and other recordings or other data of whatever sort.”<sup>361</sup> Kansas also covers the information “whether or not related information has been disseminated.”<sup>362</sup>
- Montana covers “the source of any information” or “any information obtained or prepared in gathering, receiving, or processing information in the course of the person’s business.”<sup>363</sup>
- Nebraska: “(1) The source of any published or unpublished, broadcast or nonbroadcast information obtained in the gathering, receiving, or processing of information for any medium of communication to the public,” or “(2) Any unpublished or nonbroadcast information obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public.”<sup>364</sup>
- Nevada includes “any published or unpublished information obtained or prepared by such person in such person’s professional capacity in gathering, receiving or processing information for communication to the public or the source of any information. . . in any legal proceedings, trial, or investigation.”<sup>365</sup>

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<sup>357</sup> CONN. GEN. STAT. ANN. § 52-146t(b) (West 2011). Connecticut defines “information” by “its ordinary meaning,” but also notes several protected kinds of information, including “notes, outtakes,” or “other data of whatever sort in any medium.” *Id.* § 52-146t(a)(1).

<sup>358</sup> DEL. CODE ANN. tit. 10, § 4321 (2011).

<sup>359</sup> GA. CODE ANN. § 24-9-30 (2011). The law does not use the term “source.” Arguably, however, a source is simply one form of “information” covered by the law.

<sup>360</sup> IND. CODE ANN. § 34-46-4-2 (West 2011).

<sup>361</sup> KAN. STAT. ANN. § 60-480 (West 2011).

<sup>362</sup> *Id.*

<sup>363</sup> MONT. CODE ANN. § 26-1-902(2) (2011).

<sup>364</sup> NEB. REV. STAT. ANN. § 20-146 (LexisNexis 2011).

<sup>365</sup> NEV. REV. STAT. ANN. § 49.275 (West 2011).

- New Jersey covers both “a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.”<sup>366</sup>
- North Carolina recognizes that “[a] journalist has a qualified privilege against disclosure in any legal proceeding of any confidential or non-confidential information, document, or item obtained or prepared while acting as a journalist.”<sup>367</sup>
- North Dakota covers “[a]ny information or the source of any information.”<sup>368</sup>
- South Carolina recognizes “a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news.”<sup>369</sup>
- Tennessee covers “any information or the source of any information procured for publication or broadcast.”<sup>370</sup>
- Texas broadly includes “any confidential or nonconfidential information, document, or item,” or their source.<sup>371</sup>
- Utah protects information “likely to lead directly to the disclosure” of a “person who gives information to a news reporter with a reasonable expectation of confidentiality”—this protection extends to confidential sources—“information,” including notes and outtakes, gathered “on condition of confidentiality”; and “information, other than confidential unpublished news information, that is gathered by a news reporter.”<sup>372</sup>
- Wisconsin covers confidential source identities and information likely to uncover them, as well as “news or information obtained or prepared in confidence.” A final section covers all other “news, information, or identity of any source of any news or information” obtained or prepared by a news person while preparing information for dissemination.<sup>373</sup>
- Washington provides coverage for sources or “information that would tend to identify the source,” but limits the protection to those sources who

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<sup>366</sup> N.J. REV. STAT. § 2A:84A-21 (West 2011).

<sup>367</sup> N.C. GEN. STAT. § 8-53.11 (2011). Like the Georgia statute, this law does not use the term “source.” However, “information” should be broad enough to include source, as well.

<sup>368</sup> N.D. CENT. CODE § 31-01-06.2 (2011).

<sup>369</sup> S.C. CODE ANN. § 19-11-100 (2011). Like the Georgia and North Carolina statutes, this law does not use the term “source.” However, “information” should be broad enough to include source, too.

<sup>370</sup> TENN. CODE ANN. § 24-1-208 (2011).

<sup>371</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 22.023(a)(1) (West 2011).

<sup>372</sup> UTAH EVID. R. 509(a).

<sup>373</sup> WIS. STAT. ANN. § 885.14(2)(a) (West 2011).

have a “reasonable expectation of confidentiality.”<sup>374</sup> Conceivably, then, a court could rule that a source did not have that reasonable expectation, whatever a journalist’s intentions. Washington also covers information obtained for “potential” public dissemination, including “any notes, out-takes, photographs, video or sound tapes, film, or other data” in future media.<sup>375</sup> However, the state qualifies information protection by excluding “physical evidence of a crime.”<sup>376</sup>

- West Virginia covers “the confidential source of any published or unpublished information” unless the source consents.<sup>377</sup>

Maine falls somewhere in the middle. Confidential sources and information are protected while nonconfidential sources and information are not,<sup>378</sup> and publication or a journalist’s “consent[ing] to disclosure” of the source or information waives the privilege.<sup>379</sup>

In some states, the word “observation” poses a problem. This is the problem that tripped up *Branzburg*, in Kentucky, when he photographed the hands working at the lab table, turning marijuana into hashish.<sup>380</sup> Conceivably, any of the states that only protect confidential sources could have the *Branzburg* problem.

- In Colorado, the nondisclosure law does not apply to “[n]ews information based on a newsperson’s personal observation of the commission of a crime if substantially similar news information cannot reasonably be obtained by any other means”—Colorado requires a lack of alternate sources for this segment of the law—or to “[n]ews information based on a newsperson’s personal observation of the commission of a class 1, 2, or 3 felony.”<sup>381</sup>
- Florida: “This privilege [not to be a witness or reveal information or sources] applies only to information or eyewitness observations obtained within the normal scope of employment and does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes.”<sup>382</sup>
- Hawaii revokes its privilege if the person claiming it “observed the alleged commission of a crime.” However, it reinstates the privilege if the interest

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<sup>374</sup> WASH. REV. CODE ANN. § 5.68.010 (West 2011).

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> W. VA. CODE ANN. § 57-3-10 (West 2011).

<sup>378</sup> *See* ME. REV. STAT. ANN. tit. 16, § 61(1) (2011).

<sup>379</sup> *Id.* § 61(4).

<sup>380</sup> *See* *Branzburg v. Hayes*, 408 U.S. 665, 667, 708–09 (1972).

<sup>381</sup> COLO. REV. STAT. § 13-90-119(2) (2011). Colorado does not require a lack of alternate sources for this segment of the law.

<sup>382</sup> FLA. STAT. ANN. § 90.5015(2) (West 2011).

in maintaining it outweighs the “public interest in disclosure,” or if publishing the information or documents in question was the crime itself.<sup>383</sup>

In New York, the protection journalists receive for both confidential news and its sources is absolute:

*Absolute protection for confidential news . . . no professional journalist or newscaster . . . shall be adjudged in contempt . . . for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person’s possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person.*<sup>384</sup>

New York’s language of “absolute protection for confidential news” is highly protective of journalists, of course. Note, however, that this absolute protection would only apply to “professional journalists” working for professional publications or broadcasters.<sup>385</sup> Honorable mention should also go to the District of Columbia for saying that courts may not compel the disclosure of sources.<sup>386</sup>

Nebraska uses the very broad language of “for any medium of communication,” which would include the Internet, of course:

(1) The source of any published or unpublished, broadcast or non-broadcast information obtained in the gathering, receiving, or processing of information for any medium of communication to the public; [and] (2) Any unpublished or nonbroadcast information

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<sup>383</sup> HAW. REV. STAT. § 621(c) (West 2011).

<sup>384</sup> N.Y. CIV. RIGHTS LAW § 79-h(b) (Consol. 2001) (emphasis added).

<sup>385</sup> *Id.* While New York exempts “professional journalists and newscasters” from contempt, by granting an “absolute protection for confidential news,” it grants a “qualified protection for nonconfidential news.” *Id.* § 79-h(c).

<sup>386</sup> D.C. CODE § 16-4702(1) (2011).

obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public.<sup>387</sup>

But the statutory provision is rather long and somewhat convoluted.

North Dakota ultimately wins for breadth combined with brevity, covering “any information or the source of any information.”<sup>388</sup>

*D. Qualified Privilege and Stewart’s Three-Part Test or a Variant of It*

Even if Judith Miller had the benefit of the Stewart test, she would still have spent eighty-five days in jail. The information she had was highly relevant, the alternate sources were also journalists, and the need was arguably compelling because the federal prosecutor was investigating misdeeds that, perhaps, reached to the highest levels of the federal government. Judge Henderson said in Miller’s case: “[M]y colleagues and I agree that any federal common-law reporter’s privilege that may exist is not absolute and that the Special Counsel’s evidence defeats whatever privilege we may fashion . . . .”<sup>389</sup>

In its Memorandum in Opposition to a Joint Motion for a Scheduling Conference, the government noted that “the Court of Appeals did not provide any guidance concerning the common law but only echoed th[e] [district] Court’s conclusion that the Special Counsel’s *ex parte* evidentiary submission would be able to meet even the most of [sic] stringent of balancing tests.”<sup>390</sup>

If any prosecutor tells a judge, in all sincerity, that the information being sought is relevant and truly needed, the only remaining question is one of alternatives. Say the prosecutor declares, “Your Honor, I don’t know anybody else with this information. If I did, I wouldn’t be going after this reporter.”

As it does in other areas of the law, balancing must occur when it comes to shield law. But the balancing has, arguably, been done incorrectly. Take, for instance, constitutional protection for senators and representatives, who receive absolute protection for statements they make on the floor of the House or Senate.<sup>391</sup> The reason for this unqualified privilege is the importance of free debate. Similarly, the importance of the

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<sup>387</sup> NEB. REV. STAT. ANN. § 20.146 (LexisNexis 2011).

<sup>388</sup> N.D. CENT. CODE § 31-01-06.2 (2011).

<sup>389</sup> *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 982 (D.C. Cir. 2005) (Henderson, J., concurring), *superseded by In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006).

<sup>390</sup> *In re Special Counsel Investigation*, 374 F. Supp. 2d 238 (D.D.C. 2005) (citations omitted). Stuart Taylor, Jr. quotes Judge Hogan’s words that the special prosecutor could meet the most stringent balancing test, and he argues that the balancing test does not give enough protection. See Stuart Taylor Jr., *Should Reporters Go to Jail for Doing Their Jobs?*, NAT’L J. MAG., (Oct. 16, 2004), available at <http://www.nationaljournal.com/magazine/opening-argument-should-reporters-go-to-jail-for-doing-their-jobs--20041016>.

<sup>391</sup> U.S. CONST. art. 1, § 6.

free flow of information in this country should take precedence. So long as a test such as the Stewart test is applied, however, journalists face a “clear and present danger” that judges will order them to reveal their sources or else face jail time.

Some states rely on a version of the Stewart test. In Alaska, for example, a reporter must appear in court, and a full-blown evidentiary hearing might be held on the question of whether to grant or deny the privilege.

When a public official or reporter claims the privilege in a case being heard before the supreme court or a superior court of this state, a person who has the right to question the public official or reporter in that proceeding, or the courts on its own motion, may challenge the claim of privilege. The court shall make or cause to be made whatever inquiry the court thinks necessary to a determination of the issue. The inquiry may be made *instanter* by way of questions put to the witness claiming the privilege and a decision then rendered, or the court may require the presence of other witnesses or documentary showing or may order a special hearing for the determination of the issue of privilege.<sup>392</sup>

This statute emphasizes the compelling-need aspect of the Stewart test:

The court may deny the privilege and may order the public official or the reporter to testify, imposing whatever limits upon the testimony and upon the right of cross-examination of the witness as may be in the public interest or in the interest of a fair trial, if it finds the withholding of the testimony would (1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or (2) be contrary to the public interest.<sup>393</sup>

If a reporter refuses to divulge the source, the issue may come before the state supreme court or a superior court. The seeker of the information must make an application:

setting out the reasons why the disclosure is essential to the administration of justice, a fair trial in the instant proceeding, or the protection of the public interest. . . . The court shall make or cause to be made whatever inquiry the court thinks necessary, and make a determination of the issue . . .<sup>394</sup>

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<sup>392</sup> ALASKA STAT. § 9.25.310(a) (2011).

<sup>393</sup> *Id.* § 9.25.310(b).

<sup>394</sup> *Id.* § 9.25.320(c).

In short, the privilege is not a sure thing, and the reporter may well face intensive scrutiny as the court makes “whatever inquiry the court thinks necessary.”<sup>395</sup>

Other states employ slightly different variations of the Stewart test.

- Arizona: In civil or criminal cases, to subpoena “a person engaged in gathering, reporting, writing, editing, publishing or broadcasting news to the public,” one must show that the information is relevant and that the information could not be gained from alternate sources. In addition, those alternate sources must be identified. But there is no requirement to show a compelling public need.<sup>396</sup>
- Connecticut: Courts may compel disclosure if parties show by “clear and convincing evidence” that the information sought is “critical or necessary” to a claim, not available elsewhere, and that disclosure fulfills “overriding” public interest.<sup>397</sup> However, those seeking information must engage in “prior negotiations” with news media before beginning compulsory proceedings.<sup>398</sup>
- District of Columbia: A court may compel disclosure of information not made public if the seeker proves by “clear and convincing evidence” the relevancy, lack of alternate sources, and an “overriding public interest.”<sup>399</sup> However, the District of Columbia says that courts may not compel disclosure of sources.<sup>400</sup>
- Florida uses a version of the Stewart three-part test—“information is relevant and material,” it “cannot be obtained from alternative sources,” and a “compelling interest exists.”<sup>401</sup>

Freelancers and bloggers appear to be unprotected by Florida law. “A professional journalist has a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news.”<sup>402</sup>

Also, “[t]his privilege applies only to information or eyewitness observations obtained within the normal scope of employment and does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes.”<sup>403</sup>

<sup>395</sup> *Id.*

<sup>396</sup> ARIZ. REV. STAT. ANN. § 12-2214 (2011).

<sup>397</sup> CONN. GEN. STAT. ANN. § 52-146t(d) (West 2011). Connecticut also forces parties who try to subpoena information not covered by its statute to pay to the media party the cost that would have gone into copying the desired information. *Id.* § 52-146t(i).

<sup>398</sup> *Id.* § 52-146t(c).

<sup>399</sup> D.C. CODE § 16-4702 (2011). The use of “clear and convincing” evidence creates a higher standard than the normal standard in civil cases of “preponderance of the evidence.” See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that this higher standard applies in actual malice cases).

<sup>400</sup> D.C. CODE § 16-4702.

<sup>401</sup> FLA. STAT. ANN. § 90.515(2) (West 2011).

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

- Georgia’s test for disclosure is whether the information sought—which would appear to include sources—“[i]s material and relevant,” “[c]annot be reasonably obtained by alternative means,” and “[i]s necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.”<sup>404</sup>
- Hawaii states five reasons its privilege may disappear: When the reporter witnesses or has committed a crime;<sup>405</sup> when “substantial evidence” suggests the source or information is material to a prosecution or claim, unavailable elsewhere, noncumulative, and “necessary” to a charge or claim; when the information sought is “critical to prevent serious harm to life or public safety”; or when the source consents to disclosing documents or “other tangible materials provided by the source.”<sup>406</sup>
- Illinois’s statute uses the relevancy and availability of sources as factors, plus looks at the type of proceeding, the merits on both sides, and the availability of remedies:

In granting or denying divestiture of the privilege [not to name a source,] . . . the court shall have due regard to the nature of the proceedings, the merits of the claim or defense, the adequacy of the remedy otherwise available, if any, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove.<sup>407</sup>

- Kansas: Parties are granted a trial to determine whether the information sought is “material and relevant,” unobtainable elsewhere, and is of “compelling interest,” defined as evidence likely to be admissible and of “probative value that is likely to outweigh any harm done to the free dissemination of information to the public through the activities of journalists.”<sup>408</sup> The law states that information that would prevent imminent death or great bodily harm, or prevent a miscarriage of justice, would meet the probative value test.<sup>409</sup>

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<sup>404</sup> GA. CODE ANN. § 24-9-30 (2011).

<sup>405</sup> HAW. REV. STAT. § 621(c) (West 2011).

<sup>406</sup> *Id.* This, obviously, takes the decision out of the journalist’s hands. See *McKevitt v. Pallasch*, 339 F.3d 530, 533–34 (7th Cir. 2003) (dismissing a journalists’ privilege claim in part because the source was known and had already consented to releasing tape-recorded interviews with him). *But cf.* *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (“Nor does the fact that the government has obtained waivers from its witnesses waive the privilege. The privilege belongs to CBS, not the potential witnesses, and it may be waived only by its holder.”).

<sup>407</sup> 735 ILL. COMP. STAT. ANN. 5/8-906 (West 2011).

<sup>408</sup> KAN. STAT. ANN. § 60-482 (West 2011).

<sup>409</sup> *Id.*



- Michigan: Protection does not apply in felony cases punishable by life in prison, but in other cases, Michigan applies a higher standard than the Stewart test's "relevance," namely, "essential to the purpose of the proceedings." "In any inquiry . . . except an inquiry for a crime punishable by imprisonment for life when it has been established that the information which is sought is essential to the purpose of the proceeding and that other available sources of the information have been exhausted."<sup>410</sup>
- New York offers absolute protection for confidential information and sources.<sup>411</sup> For unpublished information and for sources, regardless of whether they were promised confidentiality, New York applies an enhanced Stewart test, requiring that the information be "highly" relevant and "critical or necessary" to the case.<sup>412</sup>

Qualified protection for nonconfidential news . . . no professional journalist or newscaster . . . shall be adjudged in contempt . . . for refusing or failing to disclose any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news . . . or the source of any such news, whe[ther] such news was not obtained or received in confidence, unless the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source. A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing.<sup>413</sup>

- North Carolina: The qualified privilege applies to both confidential and nonconfidential information, and the compelling need part of the Stewart test is modified to "essential to the . . . claim or defense":

A journalist has a qualified privilege against disclosure in any legal proceeding of any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist. In order to overcome the qualified privilege . . . , any

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<sup>410</sup> MICH. COMP. LAWS ANN. § 767.5a(1) (West 2011).

<sup>411</sup> See *supra* note 386 and accompanying text.

<sup>412</sup> N.Y. CIV. RIGHTS LAW § 79h-(c) (Consol. 2001).

<sup>413</sup> *Id.* Confidential information and sources receive absolute protection. See *supra* note 151 and accompanying text.

person seeking to compel a journalist to testify or produce information must establish by the greater weight of the evidence that the testimony or production sought: (1) Is relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought; (2) Cannot be obtained from alternate sources; and (3) Is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought.<sup>414</sup>

- North Dakota: The statute calls for no disclosure “unless directed by an order of a district court of this state which, after hearing, finds that the failure of disclosure of such evidence will cause a miscarriage of justice.”<sup>415</sup> This “miscarriage of justice” language would seem to present a huge loophole for journalists needing protection.
- South Carolina: The qualified privilege applies to “any information,” and the compelling need part of the Stewart test is modified to require only that information be “necessary” to the case:

The person, company, or other entity may not be compelled to disclose any information or document or produce any item obtained or prepared in the gathering or dissemination of news unless the party seeking to compel the production or testimony establishes by clear and convincing evidence that this privilege has been knowingly waived or that the testimony or production sought: (1) is material and relevant to the controversy for which the testimony or production is sought; (2) cannot be reasonably obtained by alternative means; and (3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.<sup>416</sup>

- Tennessee: The language appears to poke a huge hole in the shield: “Any person seeking information or the source thereof protected under this

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<sup>414</sup> N.C. GEN. STAT. § 8-53.11(b)–(c) (2011). “Greater weight of the evidence” is the typical “preponderance” standard used in civil cases and is a lower standard than used, for example, in the District of Columbia, which uses “clear and convincing evidence.” D.C. CODE § 16-4703 (2011).

<sup>415</sup> N.D. CENT. CODE § 31-01-06.2 (2011).

<sup>416</sup> S.C. CODE ANN. § 19-11-100(B) (2011). The statute adds: “Publication of any information, document, or item obtained in the gathering and dissemination of news does not constitute a waiver of the qualified privilege against compelled disclosure . . . .” *Id.* § 19-11-100(C). Washington’s shield law includes a similar provision. *See* WASH. REV. CODE ANN. § 5.68.010(4) (West 2011) (stating that publication does not waive a journalist’s qualified privilege against compelled disclosure).

section may apply for an order divesting such protection. Such application shall be made to the judge of the court having jurisdiction over the hearing, action or other proceeding in which the information sought is pending.<sup>417</sup> So “any person seeking information” protected under the shield may apply to pierce the shield. But the statute gives no guidelines to the judge, no test to apply, in determining whether to grant an “order divesting” shield protection. Arguably, this amorphous provision devastates the shield law.

- Texas employs a six-part test, adding to Stewart’s test that the (1) disclosure sought must not be overbroad and limit itself to published information when possible; (2) that the news organization have had adequate notice of the demand; and (3) that the material sought is not “peripheral, nonessential, or speculative.”<sup>418</sup>
- Washington: A judge may force disclosure if the information sought is “highly material or relevant,” “critical” to a party’s claim or defense, and unobtainable elsewhere.<sup>419</sup> The judge must also find a “compelling public interest” in disclosure, and may consider whether the information came from a confidential source in determining that interest.<sup>420</sup> However, Washington state’s protection also covers orders issued to: “A nonnews media party where such subpoena or process seeks records, information, or other communications relating to business transactions between such nonnews media party and the news media for the purpose of discovering the identity of a source or obtaining news or information . . . .”<sup>421</sup> So, although this clause appears to protect journalists against back-door subpoenas for information, it might also justify a judge’s waiving protection altogether because information was not obtainable elsewhere—when the shield law itself rendered the information unobtainable.
- Wisconsin circuit court judges may compel disclosure of information or sources.<sup>422</sup> The law uses the three-part Stewart test, with a fourth part stipulating that the information be “critical or necessary” to a party’s claim or to proof of a material issue.<sup>423</sup>

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<sup>417</sup> TENN. CODE ANN. § 24-1-208(c)(1) (2011).

<sup>418</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 22.024 (West 2011).

<sup>419</sup> WASH. REV. CODE ANN. § 5.68.010(2) (West 2011).

<sup>420</sup> *Id.*

<sup>421</sup> *Id.*

<sup>422</sup> WIS. STAT. ANN. § 885.14(2) (West 2011).

<sup>423</sup> *Id.* Wisconsin also uses a three-part test for whether non-media parties must disclose information. *Id.* § 885.14(3). Unlike some tests for news media subpoenas, such as in Kansas, courts need not take into account non-media subpoenas’ probable impact on journalists or the free flow of information. *Id.*; see *supra* notes 408–09.

Maine uses a similar four-part test. ME. REV. STAT. ANN. tit. 16, § 61(2) (2011).

Another qualification appearing in two states' statutes requires broadcasters to keep information for a year or lose shield protection:

- New Jersey provides that:

The provisions of this rule insofar as it relates to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least 1 year from the date of an actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.<sup>424</sup>

- Pennsylvania provides that:

The provisions [of the shield law]. . . as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.<sup>425</sup>

Kansas includes a variation on the Stewart test, but it also attempts to curb the test's use. In Kansas, judges may force parties seeking disclosure to pay "costs and attorney fees" to their targets if the judge finds the attacking party "had no reasonable basis to request such disclosure."<sup>426</sup> However, judges also may force those seeking protection under the law to pay costs and fees if that party is found to lack a "reasonable basis to claim such privilege."<sup>427</sup>

Utah provides different tests based on the kind of information sought.<sup>428</sup> Confidential sources can be disclosed only if the person seeking the source "demonstrates by clear and convincing evidence that disclosure is necessary to prevent substantial injury or death."<sup>429</sup> Confidential unpublished information can be disclosed on a showing that the "need for [the] information . . . substantially outweighs the interest of a continued free flow of information to news reporters."<sup>430</sup> The test for other unpublished information is reversed: It is the journalist who must show that an interest in the continued free flow of information outweighs the need for disclosure. In all cases, a court must

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<sup>424</sup> N.J. REV. STAT. § 2A:84A-21 (West 2011).

<sup>425</sup> 42 PA. CONS. STAT. ANN. § 5942 (West 2000).

<sup>426</sup> KAN. STAT. ANN. § 60-484 (West 2011).

<sup>427</sup> *Id.*

<sup>428</sup> *See generally* UTAH R. EVID. 509(b)–(d) (providing a variety of tests for compelling disclosure).

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

conduct an in camera review of the information before making a final determination about disclosure.<sup>431</sup>

West Virginia simply says its protection is lost when a reporter's testimony or information would be necessary "to prevent imminent death, serious bodily injury or unjust incarceration" without specifying who decides how or when that test is met.<sup>432</sup>

### *E. Summary*

This section reviews the best statutes from previous sections as good starting places for any legislator attempting to construct (or reconstruct) a shield law for journalists.

Who receives protection from the law? Nebraska and Oregon have perhaps the best language. They are unencumbered by concerns about the use of a particular medium (or not-yet-invented media), freelancing, or the content of the journalism. They also do not give judges a completely blank slate with which to twist the definition of "journalist."

In what type of proceedings are journalists protected? Here, North Dakota's brief but broad language might be best: "in any proceeding or hearing."<sup>433</sup> But legislators must also address the risk that journalists protecting a source will get toasted in a libel case. For that, Colorado's protection against journalists being "subjected to any legal presumption of any kind"<sup>434</sup> for protecting a source deserves attention. So does New Jersey's language of "privilege to refuse to disclose, in any legal or quasi-legal proceeding."<sup>435</sup>

Does the law only protect sources or also information? Confidential or not confidential? Many states address these questions with a laundry list of qualifications or clarifications about what information is protected. North Dakota skips all that by simply saying "any information or the source of any information."<sup>436</sup>

What about Justice Stewart's three-part test or other tests? There is no good language to use. Any variation of the Stewart test, ultimately and unjustifiably, endangers journalists.

## III. THE PROPOSED FEDERAL STATUTES

On March 31, 2009, the House approved the Free Flow of Information Act of 2009 by a voice vote.<sup>437</sup> The 2009 Act was the latest effort at the federal level to pass a

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<sup>431</sup> *Id.*

<sup>432</sup> W. VA. CODE ANN. § 57-3-10 (West 2011).

<sup>433</sup> N.D. CENT. CODE § 31-01-06.2 (2011).

<sup>434</sup> COLO. REV. STAT. § 13-90-119 (2011).

<sup>435</sup> N.J. REV. STAT. ANN. § 2A:84A-21 (West 2011).

<sup>436</sup> N.D. CENT. CODE § 31-01-06.2.

<sup>437</sup> H.R. 985, 111th Cong. (2009); see Bill Summary & Status 111th Congress (2009–2010), THOMAS, available at <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=111/> (search "H.R. 985") (last visited May 1, 2012) (providing data on vote allocation).

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Here is an abbreviated history of federal shield law, leading up to the 2009 proposal:

The “Free Speech Protection Act of 2004,” proposed by Sen. Christopher Dodd (D-Conn.), would have provided an absolute privilege for confidential information and a qualified privilege for nonconfidential information. S. 3020, 108th Cong. (2004). When he introduced this Act, Senator Dodd said, “This legislation is fundamentally about good government and the free and unfettered flow of information to the public.” See *Federal Reporter’s Shield Law Proposed*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS (Nov. 22, 2004), <http://www.rcfp.org/browse-media-law-resources/news/federal-reporters-shield-law-proposed>. Earlier attempts, in the 1970s and 1980s, failed to pass because of an inability to agree about what a shield law should contain. *Id.* In 2005, S. 340, and its revision S. 1419, and H.R. 581, and its revision H.R. 3232, likewise would have granted absolute privilege for confidential information but qualified privilege for nonconfidential information.

Shield legislation, the “Free Flow of Information Act,” passed the House in 2007. On October 16, the House bill, H.R. 2102, passed overwhelmingly, with a 398-to-21 margin. See Bill Summary & Status 110th Congress (2007–2008), THOMAS, available at <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=110> (search “H.R. 2102”) (last visited May 1, 2012). As the Reporters Committee for Freedom of the Press noted, this was “the first time ever” the House had passed shield legislation. See Matthew Pollack, *House Passes Federal Shield Law*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS (Oct. 16, 2007), <http://www.rcfp.org/browse-media-law-resources/news/house-passes-federal-shield-law>.

The Senate Judiciary Committee had passed its version, S. 2035, on October 4. See Bill Summary & Status, 110th Congress (2007–2008), *supra*. Then-Senator Barack Obama and then-Senator Hillary Clinton cosponsored the legislation. Senator John McCain also supported the proposed shield law. *SPJ Leaders Pleased with Democratic Hopefuls’ Support of a Federal Shield Law*, SOC’Y OF PROF. JOURNALISTS (Apr. 15, 2008), <http://www.spj.org/news.asp?ref=789>.

That version of the law would only have provided protection if a source were promised confidentiality or if documents were gained through a promise of confidentiality. See S. 2035, 110th Cong. (2007). On July 30, 2008, the Senate bill failed a cloture motion on a vote of “51 Ayes” and “43 Nays.” See *S. 2035: Free Flow of Information Act of 2007*, GOVTRACK, <http://www.govtrack.us/congress/bill.xpd?bill=s110-2035> (last visited May 1, 2012).

The House version would not have provided broad coverage. Narrowed by an eleventh-hour amendment by Representative Fredrick “Rick” Boucher (D-Va.), the law would not have covered bloggers or many freelance journalists. See Amy Gahrn, *House Passes Shield Law, “Covered” Language Tightens Further*, POYNTER (Oct. 18, 2007, 2:47 PM), <http://www.poynter.org/how-tos/digital-strategies/e-media-tidbits/85055/house-passes-shie> (last updated Mar. 3, 2011) (citing David Ardia, Citizen Media Law Project). A “covered person” had this restrictive definition:

a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.

*Id.* (quoting H.R. 2102, 110th Cong. (2007)).

David Ardia of the Citizen Media Law Project asked, “Do we really want judges to be deciding whether a journalist is earning enough money to qualify for protection?” Gahrn,

shield law for journalists.<sup>438</sup>

The Act, if it had become law, would have covered people who “regularly” gather information concerning events or “other matters of public interest” and who do so for “a substantial portion of the person’s livelihood or for substantial financial gain.”<sup>439</sup>

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*supra*. But the law also contained exceptions. The proposed law permitted “disclosure of the identity of . . . a source” if:

(A) . . . necessary to prevent, or to identify any perpetrator of, an act of terrorism against the United States or its allies or other significant and specified harm to national security with the objective to prevent such harm, (B) . . . necessary to prevent imminent death or significant bodily harm . . . ; (C) . . . necessary to identify a person who has disclosed— (i) a trade secret . . . ; (ii) individually identifiable health information . . . ; or (iii) nonpublic personal information . . . ; or (D)(i) disclosure of the identity of such a source is essential to identify in a criminal investigation or prosecution a person who without authorization disclosed properly classified information and who at the time of such disclosure had authorized access to such information; and (ii) such unauthorized disclosure has caused or will cause significant and articulable harm to the national security . . .

H.R. 2102, 110th Cong. § 2(a)(3) (2007); *see also*, Pollack, *supra*.

Despite these exceptions, President Bush’s advisors in a press release announced that they would counsel the President to veto the legislation. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2102—PROVIDING CONDITIONS FOR THE FEDERALLY COMPELLED DISCLOSURE OF INFORMATION BY CERTAIN PERSONS CONNECTED WITH THE NEWS MEDIA (2007). The press release said,

The Administration believes that H.R. 2102 would create a dramatic shift in the law that would produce immediate harm to national security and law enforcement. The legislation would make it extremely difficult to prosecute cases involving leaks of classified information and would hamper efforts to investigate and prosecute other serious crimes.

*Id.*

On various versions of federal shield law from 2004 through 2009, *see*, for example, Jill Laptosky, *Protecting the Cloak and Dagger with an Illusory Shield: How the Proposed Free Flow of Information Act Falls Short*, 62 FED. COMM. L. J. 403, 421–27 (2010).

<sup>438</sup> During his confirmation hearings, Attorney General Eric Holder said of a federal shield law that a “carefully crafted . . . law is appropriate.” Walter Pincus, *Senate Weighs New Shield Law*, WASH. POST, Sept. 13, 2009, at A5.

Lobbying expenditures for the 2009 House bill included \$10,000 by the *Washington Post* and \$50,000 by the National Newspaper Association. *Id.* Although lobbying expenditures by News Corporation, General Electric and Time Warner numbered in the millions, the exact amount spent specifically on shield-law lobbying cannot be precisely calculated. *Id.*

<sup>439</sup> H.R. 2102, 110th Cong. § 4(2) (2007). Specifically, the proposed Act would have covered anyone who “regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood or for substantial financial gain.” *Id.* It also evades the security concerns of those such as Patrick Fitzgerald, the United States Attorney, by specifying that it does not

The Act presumably applied to journalists' works published in any media, as it does not explicitly list any to which it applies. However, the financial requirements for covered persons would likely have excluded most bloggers, who rarely earn enough money to qualify.<sup>440</sup>

The proposed House law offered a qualified privilege against any "Federal entity" compelling covered persons to provide testimony or "documents,"<sup>441</sup> related to information the person obtained while engaging in "journalism."<sup>442</sup>

The proposed House law used a variation on the Stewart test for its qualification. A court would have been allowed to rescind the privilege if, by a preponderance of the evidence, it could be shown that the information sought was "critical" to the investigation of or defense against a criminal case, or "completion of the matter" in noncriminal cases; would have prevented a terrorist attack or identified suspected terrorists, or prevented "imminent death or significant bodily harm"; or was necessary to identify a person who leaked trade secrets, other protected consumer information, or classified information.<sup>443</sup> The party seeking information must have also exhausted other means of obtaining it,<sup>444</sup> and demonstrated that the interest in disclosure outweighs that of "gathering or disseminating news or information."<sup>445</sup>

Representative Mike Pence (R-Ind.) invoked Judith Miller's name in urging the passage of the qualified shield law.<sup>446</sup> Use of the Miller incident by Pence was misleading, at best. Federal Special Counsel Patrick J. Fitzgerald was investigating a misdeed that perhaps reached to the highest levels of the federal government—the misdeed of outing undercover CIA agent Valerie Plame.<sup>447</sup> If Judith Miller had the benefit of the

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apply to foreign agents or terrorists. H.R. 985 111th Cong. § 4(2) (2009); H.R. 2102 § 4(2). On Fitzgerald's concerns surrounding potential terrorists posing as journalists, see Patrick J. Fitzgerald, *Shield Law Perils . . .*, WASH. POST, Oct. 4, 2007, at A25.

<sup>440</sup> See Matt Sussman, *Day 4: Blogging Revenues, Brands and Blogs: SOTB 2009*, TECHNORATI (Oct. 22, 2009, 6:00 AM), <http://technorati.com/blogging/article/day-4-blogging-revenues-brands-and/> (reporting survey results suggesting that 83% of respondents did not use their blog as their primary source of income).

<sup>441</sup> H.R. 985, 111th Cong. § 4(3) (2009). Defined as "writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.)." *Id.*

<sup>442</sup> *Id.* § 4(5). Journalism is defined as "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." *Id.*

<sup>443</sup> *Id.* § 2(a).

<sup>444</sup> *Id.* § 2(a)(1).

<sup>445</sup> *Id.* § 2(a)(4). The law also includes sections dictating the procedure for obtaining a reporter's information regarding his or her own alleged criminal conduct, *id.* § 2(e), and information held by various communication service providers, *id.* § 3.

<sup>446</sup> See Mike Pence, *Congressman, Marking 'Sunshine Week,' Calls for Passing a Federal Shield Law in 2009*, EDITOR & PUBLISHER, Mar. 18, 2009, available at <http://www.editorandpublisher.com/Columns/Article/Congressman-Marking-Sunshine-Week-Calls-For-Passing-a-Federal-Shield-Law-in-2009>.

<sup>447</sup> See *supra* notes 45–48 and accompanying text.



limited protection of the Free Flow of Information Act of 2009, she almost certainly would still have gone to jail.<sup>448</sup>

In his concurring opinion in *In re Grand Jury Subpoena, Judith Miller*, Judge David S. Tatel commented that Miller's case "involves a clash between two truth-seeking institutions: the grand jury and the press" and that he agreed with tipping the balance toward the grand jury in her case:

Because I agree that the balance in this case, which involves the alleged exposure of a covert agent, favors compelling the reporters' testimony, I join the judgment of the court. . . . I believe that the consensus of forty-nine states plus the District of Columbia—and even the Department of Justice—would require us to protect reporters' sources as a matter of federal common law were the leak at issue either less harmful or more newsworthy.<sup>449</sup>

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<sup>448</sup> Representative Pence said in his editorial:

The Free Flow of Information Act simply provides qualified protection for members of the news media against compelled disclosure of confidential sources. In doing so, this legislation strikes a balance between the public interest in the free flow of information against the public interest in compelling testimony in limited circumstances such as situations involving grave risk to national security or imminent threat of bodily harm.

Pence, *supra* note 447. Then Pence recounted briefly the history of his legislation and his hope that it will pass:

In October 2007, the House of Representatives overwhelmingly passed the Free Flow of Information Act. Unfortunately, the Senate did not pass the legislation before the end of the last Congress. On February 11, 2009, I was pleased to join Congressman Boucher, House Judiciary Committee Chairman John Conyers, Vice Ranking Member Bob Goodlatte and 35 of our colleagues in reintroducing the same legislation that previously garnered 398 votes.

I believe that sufficient bipartisan majorities exist in both the House and the Senate to enact this critical legislation this year. President Obama pledged his support for a federal media shield when he was serving as a U.S. Senator. The time for ensuring the free flow of information is now.

*Id.* Later in his editorial, Pence emphasized the importance of his legislation—and he specifically named Miller:

The protections provided by the Free Flow of Information Act are necessary so that members of the media can bring forward information to the American public without fear of retribution or prosecution. Without the free flow of information from sources to reporters, stories will not be written that could better inform the public and strengthen our democracy. In recent years, we have famously seen reporters such as Judith Miller jailed . . . .

*Id.*

<sup>449</sup> 397 F.3d 964, 986–87 (D.C. Cir. 2005) (Tatel, J., concurring).

Judge Hogan said in Miller's case of *In re Special Counsel Investigation*, "the Court of Appeals . . . echoed this Court's conclusion that the Special Counsel's *ex parte* evidentiary submission would be able to meet even the most of [sic] stringent of balancing tests."<sup>450</sup> In short, Special Counsel Fitzgerald would have met any balancing test, thus forcing Miller to reveal the source or go to jail.

The House version of the Free Flow of Information Act specifically would have covered compelled revelation of a source where:

- (i) disclosure of the identity of such a source is essential to identify in a criminal investigation or prosecution a person who without authorization disclosed properly classified information and who at the time of such disclosure had authorized access to such information; and
- (ii) such unauthorized disclosure has caused or will cause significant and articulable harm to the national security . . .<sup>451</sup>

Miller would have been compelled to disclose her source under both of these provisions. Scooter Libby was convicted of disclosing classified information.<sup>452</sup> And outing a CIA agent arguably could have a significant effect on national security.<sup>453</sup>

<sup>450</sup> 374 F. Supp. 2d 238, 240 (2005).

<sup>451</sup> H.R. 985, 111th Cong. § 2(a)(3)(D) (2009).

This Act specifically did not cover libel cases in either federal or state courts: "(d) Rule of Construction—Nothing in this Act shall be construed as applying to civil defamation, slander, or libel claims or defenses under State law, regardless of whether or not such claims or defenses, respectively, are raised in a State or Federal court." *Id.* § 2(d).

<sup>452</sup> See, e.g., Neil A. Lewis, *Libby, Ex-Cheney Aide, Guilty of Lying in C.I.A. Leak Case*, N.Y. TIMES, Mar. 7, 2007, at A1.

"The perjury prosecution of Scooter Libby indicates that the game of leaks can be sloppy and imperfect, but the reality is that this is the system of information control and dissemination in the United States." Papandrea, *supra* note 128, at 237.

Former CIA Director Porter J. Goss's explicit call for prosecutors to uncover government leakers by subpoenaing journalists, coupled with the successful reliance on journalist witnesses in the prosecution of Scooter Libby, make vivid the potential use of *Branzburg* to routinely enlist journalists in the prosecution of government leakers, and thereby to dry up journalists' sources of classified information.

Werhan, *supra* note 69, at 1598.

<sup>453</sup> Noah Goldstein opined, "Some believe that a qualified privilege or a privilege that involves a balancing of interests will be successful in the United States. Nevertheless, in light of the [Scooter] Libby trial and its outcome, the privilege recognized should be absolute." Noah Goldstein, *An International Assessment of Journalist Privileges and Source Confidentiality*, 14 NEW ENG. J. INT'L & COMP. L. 103, 134 (2007).

Kristen Anastos had also denigrated the proposed qualified shield:

[T]he fight for the enactment of a federal reporters' privilege—the Free Flow of Information Act of 2006 has been proposed as our new Civil

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Rights Act. If passed, it would be a farce; a qualified legislative protection that will facially resolve the inconsistency of circuit court rulings in federal media subpoena cases, send a positive message to the international community that we care about democratic freedoms at home, and temporarily placate reporters willing to face fines and jail time to protect confidential communications essential in sustaining the public's right to know.

Anastos, *supra* note 69, at 464–65.

Likewise, Eric M. Freedman did not like a proposed federal shield law that, in his opinion, would leave journalists vulnerable. He said:

Just before leaving for its August 2007 recess, the House Judiciary Committee cleared legislation that would allow compulsory disclosure of a source in a range of cases . . . This bill is worse than useless. It is harmful. Not only would it not have helped the press in most of the high profile battles of recent years, but its passage could leave sources with even less protection than at present. In most federal circuits there is a judicially-created privilege that might provide more protection than this statute does.

Freedman, *supra* note 60, at 1396 (citations omitted).

Although not giving a clear answer, Leila Wombacher Knox also addressed the issue of whether there should be an absolute federal shield law, saying:

Clearly, there is a need for reporters to offer their sources confidentiality if the press is going to operate in the vigorous manner that the Framers envisioned. The primary issue is how far any federal shield law should stretch: should it be an absolute protection against being compelled to reveal anonymous sources, or a qualified privilege with a balancing test similar to what many courts read from *Branzburg*? An examination of state shield laws can prove helpful in clarifying this issue.

Leila Wombacher Knox, Note, *The Reporter's Privilege: The Necessity of a Federal Shield Law Thirty Years After Branzburg*, 28 HASTINGS COMM. & ENT. L.J. 125, 139 (2005) (citation omitted) (comparing state shield laws and Senator Dodd and Senator Lugar's proposed federal legislation and apparently concluding that the more common qualified privilege is preferable to an absolute privilege).

A problem that Joel M. Gora emphasizes in relation to Miller is that the absence of a federal shield law undercuts states' rights to protect journalists such as Miller.

Indeed, in the Miller/Cooper case, the journalists' request for Supreme Court review was supported by a coalition of thirty-four state attorneys general. These state law enforcement officials took the position that the absence of federal constitutional or other uniform protection for journalist sources *undermines the States' policy* choices to protect journalists' sources and ignores the fact that law enforcement in those states are able to function effectively without having to impose upon journalists. The states' point was that often the journalist or the source will not know if the subject matter of the story will lead to possible federal judicial proceedings—where confidentiality may not be available—or state judicial proceedings—where there is probably a protective shield law. This uncertainty undermines the likelihood that the source will cooperate with the journalist and thereby undercuts the states' policy of protecting journalists' sources.

The Senate Judiciary Committee passed its own version of a shield law<sup>454</sup> in December 2009 after completing negotiations with the Obama Administration regarding national security provisions.<sup>455</sup> The full Senate did not pass the bill.<sup>456</sup>

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For more articles on the federal shield-law debate, see, for example, Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn From the States*, 11 COMM. L. & POL'Y 35 (2006) (comparing the proposed federal shield laws of Senator Christopher Dodd and Senator Richard Lugar); Michelle C. Gabriel, *Plugging Leaks: The Necessity of Distinguishing Whistleblowers and Wrongdoers in the Free Flow of Information Act*, 40 LOY. U. CHI. L.J. 531 (2009); Cathy Packer, *The Politics of Power: A Social Architecture Analysis of the 2005–2008 Federal Shield Law Debate in Congress*, 31 HASTINGS COMM. & ENT. L.J. 395 (2009); and Mark Gomsak, Note, *The Free Flow of Information Act of 2006: Settling the Journalist's Privilege Debate*, 45 BRANDEIS L.J. 597 (2007).

For an article that favors passing a federal shield law and also compares shield laws in other countries, see, Goldstein, *supra* note 454, at 112–26 (comparing protection or lack thereof internationally). Lee Levine forcefully argues for a shield law in STAFF OF S. COMM. ON THE JUDICIARY, 109TH CONG., REPORTERS' PRIVILEGE LEGISLATION: ISSUES AND IMPLICATIONS 99 (Comm. Print 2005).

Incidents that happen in states can likewise shed light on the debate for appropriate federal shield laws. For example, the importance of a broad definition of the covered media came to the fore in the 2005 decision of *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005). The Court of Appeals for the Eleventh Circuit noted that Alabama's shield law, enacted in 1935, "bestows an absolute privilege," but, unfortunately for the Sports Illustrated reporter involved in a libel suit, the statute did not mention "magazine" under the covered media. *Id.* at 1335, 1340–41. It covered persons "engaged in, connected with or employed on any newspaper, radio broadcasting station or television station." *Id.* at 1335. The court said, "It seems to us plain and apparent that in common usage 'newspaper' does not mean 'newspaper and magazine.'" *Id.* at 1336. For commentary, see, for example, Dean C. Smith, *Price v. Time Revisited: The Need for Medium-Neutral Shield Laws in an Age of Strict Construction*, 14 COMM. L. & POL'Y 235 (2009).

On the importance of adequate language in state shield laws, see generally, Edward L. Carter, Note, *Reporter's Privilege in Utah*, 18 BYU J. PUB. L. 163 (2003) (Utah); L. Michael Higgins, Jr., Comment, *Rusty Shields for Those Who Wield the Pen: The State of Alabama's Reporter Shield Law in the Aftermath of Price v. Time*, 37 CUMB. L. REV. 263 (2006–2007) (Alabama); Caroline Lynch Pieroni, Note, *Staying Out of Jail . . . Sometimes: Maintaining a Free Press Through Journalist Shield Laws Requires Changes Not Only at the Federal Level, but Also Among the States*, 47 U. LOUISVILLE L. REV. 803 (2009); Richard Rosen, Comment, *A Call for Legislative Response to New York's Narrow Interpretation of the Newspersons' Privilege: Knight-Ridder Broadcasting Inc. v. Greenberg*, 54 BROOKLYN L. REV. 285 (1988) (New York); Toland, *supra* note 212 (Kansas); Leita Walker, Comment, *Saving the Shield with Silkwood: A Compromise to Protect Journalists, Their Sources, and the Public*, 53 U. KAN. L. REV. 1215 (2005) (Kansas); and John T. White, Comment, *Smoke Screen: Are State Shield Laws Really Protecting Speech or Simply Providing Cover for Criminals Like the Serial Arsonist?*, 33 ARIZ. ST. L.J. 909 (2001) (Arizona).

<sup>454</sup> S. 448, 111th Cong. (2009).

<sup>455</sup> *Senate Committee Passes Shield Law*, N.Y. TIMES, Dec. 11, 2009, at A28.

<sup>456</sup> J.C. Derrick, *Federal Shield Law Introduced in House Once More*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS (Sept. 19, 2011), <http://www.rcfp.org/node/98369>.

The Senate bill contained some notable differences compared to the House bill. One difference is that, in criminal cases, the burden of proof fell on the covered person to establish “by clear and convincing evidence” that disclosure of information would be contrary to the public interest,<sup>457</sup> though the burden fell on the party seeking information in noncriminal cases.<sup>458</sup> The Senate bill also outlined several exceptions to the privilege absent from the House bill, when the information sought regarded cases of kidnapping, sex offenses against minors, or damage to critical infrastructure.<sup>459</sup>

The Senate bill also appeared to protect bloggers. It defined “covered person” by whether the person’s “primary intent” at the inception of collecting information was to disseminate it publicly and the information involved events or issues of public interest.<sup>460</sup> Unlike the House bill, it did not list any requirements regarding “substantial livelihood.”<sup>461</sup> It did, however, list media through which the information must be disseminated, including print, broadcasting, “electronic” or “other means.”<sup>462</sup>

Notably missing from the House and Senate proposals was absolute protection for journalists concerning their confidential sources. An earlier bill introduced in the Senate, the Free Flow of Information Act of 2005, provided absolute protection:

in any proceeding or in connection with any issue arising under Federal law, no Federal entity may compel a covered person to disclose—(1) the identity of a source of information—(A) from whom the covered person obtained information; and (B) who the

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<sup>457</sup> The reporter is to “tak[e] into account” the public interest in the flow of information, as well as any potential harm to national security. S. 448 § 2(a)(2)(A)(iv).

<sup>458</sup> *Id.* § 2(a)(2)(B)(ii).

<sup>459</sup> *Id.* § 4.

As the *Washington Post* reported on the 2009 legislation: “The House and Senate measures would not cover people who work as agents of foreign powers or are affiliated with government-named terrorist organizations.” Pincus, *supra* note 439; *see also* S. 448 § 11(1)(c)(ii); H.R. 985, 111th Cong. § 4 (2) (2009).

Thus, if WikiLeaks were classified as a terrorist organization, as Rep. Peter King wants, WikiLeaks would not receive shield protection. On Rep. King, *see supra* note 14.

On the other hand, under the proposed 2009 legislation,

When classified information is involved, the protection of the source or the information would require the government to show the materials were properly classified. Then a judge would have to find after an evidentiary hearing that their disclosure could cause significant harm to national security that would outweigh benefits to the public interest with its publication.

Pincus, *supra* note 439, at A5; *see* H.R. 985 § 2(c). The *Post* quoted Sen. Schumer as saying, “This compromise accommodates both the need for Americans to be safe and the right of Americans to be free in a country with an unencumbered press.” Pincus, *supra* note 439, at A5.

<sup>460</sup> S. 448 § 11(2)(A).

<sup>461</sup> *Compare id.* § 11(2), with H.R. 985 § 4(2).

<sup>462</sup> S. 448 § 11(2)(A)(iii).

covered person believes to be a confidential source; or (2) any information that could reasonably be expected to lead to the discovery of the identity of such a source.<sup>463</sup>

The proposed 2005 law would have protected reporters, such as Jim Taricani and Judith Miller, who refused to reveal their sources. Under the 2009 proposals, neither Taricani, Miller, nor Vanessa Leggett might be so fortunate.

#### CONCLUSION AND SUGGESTIONS

In too many jurisdictions, lawyers fighting on behalf of journalists are going into battle with a paper shield or no shield at all. Journalists, using that term in the broadest sense, need a bulletproof shield.

The Supreme Court's decision in *Branzburg* was unfortunate in its denial of shield protection under the First Amendment, but at least the Court invited states and the federal government to create shield laws. "It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute," the Court said.<sup>464</sup> Now it is up to legislators to craft shield laws that really do give protection instead of maybe just giving a false sense of security.<sup>465</sup>

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<sup>463</sup> S. 340, 109th Cong. § 4 (2005). Section 6 of the proposed law said: "The publication or dissemination of any testimony or document (or portion of such testimony or document), identity, or information described in section 4 shall not waive the prohibition described in such section." *Id.* § 6. This means that no journalist may lose the privilege against revealing sources because of any prior revelation about the source, whether in a publication or when testifying.

<sup>464</sup> *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

<sup>465</sup> Arguments to the effect that journalists should have no special privileges perhaps fail to consider this: Congress in the past has come to journalists' defense in other situations, creating special laws for journalists. *See, e.g.*, Newspaper Preservation Act, 15 U.S.C. §§ 1801–1804 (2006) (exempting newspapers from certain provisions of antitrust laws).

Consider this example from antitrust law: Congress acted after the decision in 1969 in *Citizen Publishing Co. v. United States* (known as the "Tucson Case"), when the Supreme Court declared that "joint operating agreements" were illegal. 394 U.S. 131 (1969). The agreements, according to the Court amounted to "price fixing," "profit pooling," and "market control," all of which are illegal under the Sherman Act. *Id.* at 134–35. At that time, two dozen other cities besides Tucson had papers with joint operating agreements. The following year, 1970, Congress passed the Newspaper Preservation Act. Pub. L. No. 91-353, 84 Stat. 466 (codified at 15 U.S.C. §§ 1801–1804 (2006)). This Act permits joint operating agreements for newspapers if at least one of the two newspapers is "failing" or "in probable danger of financial failure." 15 U.S.C. §§ 1802(5), 1803(6). Also, new joint operating agreements, agreements not in existence in 1970 when the act was passed, have to have written consent of the Attorney General of the United States.

Congress also passed the Privacy Protection Act of 1980 in the wake of the United States Supreme Court's 5–3 decision in *Zurcher v. Stanford Daily*, 463 U.S. 547 (1978), which permitted knock-and-enter searches of newsrooms. *See* 42 U.S.C. §§ 2000aa (2006).

Having some protection in only some areas is tantamount to having no protection. Being protected from the heat of reentry everywhere on one's spaceship, but not in the few little places where falling foam has stripped the protective tiles away, is tantamount to having no protection. The heat can do its deadly job through a small portal.

Likewise, with shield laws, prosecutors can get the job done in the heat of the courtroom when shield laws provide less than absolute protection. Being jailed after the prosecutor convinces the judge that some multipart test is met is just as bitter as going to jail without the oratory. It may be more bitter because the shield law implied that it would do what it could not, namely, shield a reporter.

Inadequate shield laws leave journalists as too-easy targets for judges who do not like to hear journalists, or anyone else, tell them "No." Imprisonment should not be an option for these journalists because some judges will use that option. Freedom of the press, under those circumstances, becomes a sham. No matter how one tries to parse the phrase, freedom of the press cannot truly exist so long as journalists face the real possibility of going to jail for just doing their jobs.

Perhaps journalists, in part, have not done a good enough job lobbying for themselves. Legislators and their constituents may sometimes wonder, why should journalists be so adamant about protecting sources, and why should this country care?

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The *Zurcher* case started when a student newspaper, the *Stanford Daily*, published a staff member's photographs of a student demonstration that got out of hand. *Zurcher*, 463 U.S. at 550–51. Demonstrators occupied the administrative offices of Stanford University Hospital, barricading the adjacent hall at both ends. *Id.* at 550. When police tried to forcibly enter from the west, students armed with clubs attacked nine policeman stationed at the east end. *Id.* All nine officers were hurt. *Id.* Most reporters had been at the west end; the one *Stanford Daily* photographer had been at the east. *Id.*

After the paper published the pictures, four policemen, armed with a search warrant, looked for photographs, negatives, and film in the paper's filing cabinets, desks, photography laboratory, and wastebaskets. *Id.* at 551. *Zurcher* was the chief of police. *Id.* at 552. The newspaper and its staff members sued, claiming violation of their rights under the First and Fourth Amendments. *Id.* Although the Supreme Court upheld the search of the *Stanford Daily*'s newsroom, outraged journalists ultimately prevailed in convincing Congress to pass a federal law aimed at limiting such occurrences in the future.

The law defines a covered person as "a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce." 42 U.S.C. § 2000aa(a). The Privacy Protection Act applies to federal, state, and local authorities. *Id.* §§ 2000aa(a), 2000aa-7(c). Quite simply, the law generally forbids officers to perform a knock-and-enter search of a newsroom with a search warrant. *Id.* § 2000aa(a)–(b).

But the protection is qualified, not absolute. Under the law, an officer can only search a news office with a search warrant if probable cause exists to believe the reporter was involved in the crime, there is danger of bodily harm or loss of life, or there is danger the material will be destroyed. *Id.* Otherwise, the police have to ask the reporter to hand over the material voluntarily, or the police have to get a subpoena duces tecum, which provides an opportunity for a legal challenge to the propriety of surrendering information before the reporter turns it over. *Id.* § 2000aa(c). If the reporter fails to respond to the subpoena, then the police do have a fourth ground upon which to obtain a search warrant. *Id.* § 2000aa(b)(4).

Journalists should be willing to explain that their goal in promising confidentiality to a source is to gain information that the journalist could not gain otherwise. The source is either the only individual who knows that information or is part of a small group that knows the information. The source is divulging information to the journalist despite the fact that it would be adverse to the source's self-interest if he or she were known to be the source of that information. The adversity that the source could experience, if his or her identity became known, includes criminal prosecution, loss of a job, loss of esteem in the community due to the source's participation in wrongdoing, the source's being viewed as disloyal, or, in the most egregious circumstances, even loss of life.<sup>466</sup>

Journalists should also explain that refusing to reveal the identity of a source is considered by responsible journalists to be a fiduciary duty. This fiduciary duty to the source is an obligation of the highest order because of the enormous personal risks the source may be taking in furnishing information to the journalist.

The source is placing his or her trust in the journalist based on the journalist's promise of confidentiality. The source's confidence that the reporter will keep that promise is key to the source's divulging sensitive information. The reporter's living up to the fiduciary obligation of keeping the promise of confidentiality may literally make the difference in the source's living, or, at least, living well.

The enormity of the consequences to the source creates the enormity of the fiduciary obligation; a source may be risking his or her life on the promise by the journalist to keep the source's identity secret, forever.<sup>467</sup> What trust could be greater? What fiduciary duty could be greater? None.

The source places his or her security in the hands of the reporter, trusting in the good faith, integrity, and fidelity of the reporter who made the promise. Vigilance

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<sup>466</sup> After deciding that he or she should promise confidentiality, the reporter must then turn his or her attention to gaining support for this decision from his or her editors. The reporter might have to divulge the identity of the source to the editors. Sometimes editors want to know the source of the story because they want to assure themselves that the source is credible. These editors consider it part of their duty, as responsible editors, to weigh the credibility of the source because the whole news organization could be on the line for suit if the source's information turns out to be wrong and libelous. Also, editors fear a loss of credibility with the public if the information disseminated by their news organizations turns out to be misinformation. Sometimes editors do not want to know the source of the information because they trust the judgment of the reporter and because they want to limit the number of persons who know the source's identity. An editor's not wanting to know might also be a matter of self-interest because the editor does not want to be subject to jail time or fines if ordered by a judge to reveal the source's identity. For the dangers of editors voluntarily burning sources after the reporter has promised confidentiality, see generally *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

<sup>467</sup> "The legislation should contain an explicit provision that extends the privilege after the death of a journalist," according to Rodney A. Smolla. Smolla, *supra* note 75, at 1430. He suggests using the case of *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), as a model to follow. Smolla, *supra* note 75, at 1430. The Supreme Court in that case held that the attorney-client privilege indeed survives death. *Swidler & Berlin*, 524 U.S. at 402.



and faithfulness in the execution of this fiduciary duty are imperative; the promise of confidentiality must be held inviolable.

Perhaps protection of sources and confidential information, as well, boils down primarily to a matter of credibility. After all, credibility is a journalist's stock in trade. Of course, credibility is essential with a public that relies on the accuracy of the information disseminated by journalists.

However, credibility is also essential among potential confidential sources of unique information. Otherwise, the sources will not trust the journalists and will not reveal the information. As a result, the question about the public's view of the credibility of that information will be moot because the public will never receive that information and the sources will not reveal information because they do not consider the journalists' promises of confidentiality credible.

Thus, if the credibility circle is broken between the source and the journalist, the credibility circle cannot even be formed between the journalist and the public. A gap in information will occur, and the effect on society of that gap will depend on the importance of that lost information to society.

In short, confidence in confidentiality is imperative because a breakdown in confidence ultimately leads to a loss of information for society—a loss of knowledge. Perhaps James Madison expressed most tersely the importance of knowledge to our society: "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."<sup>468</sup>

Journalists, in short, deserve shield protection—real shield protection—because their free and unfettered performance is critical to the functioning of this country.

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<sup>468</sup> Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* THE COMPLETE MADISON 337 (Saul K. Padover ed., 1953).