

**LEGISLATING THE FIRST AMENDMENT:  
STATUTORY SHIELD LAWS AS NON-JUDICIAL PRECEDENTS**

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## ABSTRACT

DEAN SMITH: Legislating the First Amendment:  
Statutory Shield Laws as Non-Judicial Precedents  
(under the direction of Cathy Packer, Ph.D.)

Legal scholars have long sought to explain how the meaning of the U.S. Constitution changes over time. Increasingly, scholars have focused on the role of non-judicial actors working outside the courts. Among scholars working under the banner of “popular constitutionalism,” Professor Michael Gerhardt at University of North Carolina Law School has propounded a theory of “non-judicial precedents” to describe how non-judicial actors make judgments about constitutional meaning and implement those judgments through, for example, social norms, codes of ethics, legislature-made statutes, and agency-made regulations. Non-judicial precedents pre-exist judicial pronouncements on many issues, and regardless of whether they are absorbed into court-made law, they gain normative force by being widely accepted over time.

This dissertation has sought to test Gerhardt’s theory by applying it to a specific question in First Amendment law: Should there be a testimonial privilege to shield journalists from having to reveal confidential sources? The U.S. Supreme Court addressed that issue once, in 1972’s *Branzburg v. Hayes*, but the debate runs the length of American history, and state legislatures began creating statutory shield laws as early as 1896. To bridge statutory and constitutional law, and to bridge pre-*Branzburg* and post-

*Branzburg* eras, this dissertation has woven a single narrative by transporting the entire issue into the realm of constitutional theory. In applying Gerhardt's theory, this dissertation explored five distinct periods in journalist-privilege history, each of which advanced the issue to the benefit of journalists and, more important, helped drive debate over the meaning of the phrase "freedom of the press." These episodes, stretching to 1894, show that, as a normative matter, the journalist-privilege issue was a First Amendment issue long before courts recognized it as such. Furthermore, when courts cite shield laws as evidence of public support for a privilege, they validate the constitutional role these statutes play. As Gerhardt's theory would describe, shield laws acted as mechanisms for implementing deeply felt First Amendment values. As Gerhardt's theory would predict, statutes such as shield laws can empower non-judicial actors to participate in the nation's ever-evolving constitutional culture.

For my mother and father,  
my best friends in this world

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## CHAPTER I

### INTRODUCTION: JOURNALISTS, SHIELD LAWS, AND POPULAR CONSTITUTIONALISM

John Henry Wigmore, the great legal treatise writer and expert on evidence,<sup>1</sup> was wrong at least once. In 1923, when Maryland still had the nation's only statutory shield law to protect journalists from compelled disclosure of confidential sources, Wigmore declared the law "as detestable in substance as it is crude in form"<sup>2</sup> and predicted it would "probably remain unique."<sup>3</sup> Today, however, there are similar shield laws on the books in 38 states and the District of Columbia.<sup>4</sup> From 2006 to 2010 alone, seven state legislatures adopted such statutes, and the Utah Supreme Court created a *de facto* shield law as part of the state's rules of evidence.<sup>5</sup>

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<sup>1</sup> See WIGMORE ON EVIDENCE (Arthur Best, ed. 4th ed. 2008).

<sup>2</sup> 5 WIGMORE ON EVIDENCE §2286, n.7 (2d ed. 1923).

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

<sup>4</sup> The Reporter's Committee for Freedom of the Press maintains a frequently updated state-by-state list of existing shield laws. See *Privilege Compendium*, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, available at <http://www.rcfp.org/privilege> (last visited Dec. 30, 2009).

<sup>5</sup> The states that adopted legislature-made statutes were Connecticut, Washington, Maine, Hawaii, Texas, Kansas, and Wisconsin. See Casey Murray, (Connecticut) *Legislature Passes Qualified Reporter's Shield Law*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, May 4, 2006, <http://www.rcfp.org/news/2006/0504-con-legisl.html>; Elizabeth Soja, (Washington) *Reporter's Shield Bill Will Become Law*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Apr. 27, 2007, <http://www.rcfp.org/newsitems/index.php?i=4721>; Amy Harder, *Maine Governor Signs Shield Bill Into Law*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Apr. 21, 2008, <http://www.rcfp.org/newsitems/index.php?i=6710>; Matthew Pollack, *Hawaii Governor Signs Shield Law*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, July 7, 2008, <http://www.rcfp.org/newsitems/index.php?i=6845>; Samantha Fredrickson, *Texas Governor Signs Shield Bill*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, May 14, 2009,

That intense burst of activity at the state level has coincided with a five-year push to pass a journalist's shield law that would operate at the federal level. Prompted by the headline-generating jailings of then-*New York Times* reporter Judith Miller and video blogger Josh Wolf in 2005,<sup>6</sup> Congress in 2007 came the closest it ever has to adopting a long-sought federal shield law when the House of Representatives voted overwhelmingly in favor of the Free Flow of Information Act of 2007.<sup>7</sup> In 2009, the House again voted overwhelmingly in favor of a current bill, and the Obama administration,<sup>8</sup> after some hesitation, came out fully in support of the bill now being reviewed by the Senate Judiciary Committee.<sup>9</sup> Last-minute haggling has focused on who would be protected – only traditional journalists or independent bloggers as well – but senators have pleased

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<http://www.rcfp.org/newsitems/index.php?i=10753>; Cristina Abello, *Kansas Governor Signs New Shield Law*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Apr. 10, 2010, <http://www.rcfp.org/newsitems/index.php?i=11376>; Scott Bauer, *Wisconsin Shield Law Passed by Assembly, Awaits Further Approvals*, ASSOCIATED PRESS, Sept. 23, 2009, [http://www.editorandpublisher.com/eandp/news/article\\_display.jsp?vnu\\_content\\_id=1004014984](http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1004014984). See also Matthew Pollack, *(Utah) State Supreme Court Passes Shield Rule*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Jan. 25, 2008, <http://www.rcfp.org/newsitems/index.php?i=4860>.

<sup>6</sup> See Kristen Mitchell, *Judith Miller Freed From Jail After Agreeing to Testify*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Sept. 30, 2005, <http://www.rcfp.org/newsitems/index.php?i=4351>; Elizabeth Soja, *Video Blogger Is Now Longest Jailed American Journalist*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Feb. 6, 2007, <http://www.rcfp.org/newsitems/index.php?i=4648>.

<sup>7</sup> Matthew Pollack, *House Passes Federal Shield Law*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Oct. 16, 2007, <http://www.rcfp.org/news/2007/1016-con-housep.html> (stating, "The U.S. House of Representatives voted 398-21 to pass a federal shield law for the first time ever.").

<sup>8</sup> Samantha Fredrickson, *House Passes Federal Shield Bill*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Mar. 31, 2009, <http://www.rcfp.org/newsitems/index.php?i=10682> (last visited Mar. 10, 2010).

<sup>9</sup> Cristine Abello, *Obama Administration Publicly Endorses Shield Bill*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Nov. 5, 2009, <http://www.rcfp.org/newsitems/index.php?op=cat&cat=3> (last visited Mar. 10, 2010).

new-media advocates by dropping any mention of employment status in favor of a broadly worded statute that would hinge on journalistic activity alone.<sup>10</sup>

This new wave of front-page headlines, press advocacy, and legislative debate is only the latest chapter in the long history of the journalist-privilege issue: 119 years of statute-passing in the states and more than 80 years of attempts in Congress.<sup>11</sup> In that time, the U.S. Supreme Court has addressed the issue as a First Amendment matter just once, in 1972's *Branzburg v. Hayes*, when the Court declined to ground a reporter-source privilege in the First Amendment.<sup>12</sup> That single opinion has attracted the lion's share of scholarly attention over the years,<sup>13</sup> though it has seemed apparent that the Court has no intention of revisiting the issue.<sup>14</sup> Even as Congress has pressed toward adopting a long-

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<sup>10</sup> *Id.* (stating, "Under the revised version of the law, a journalist will not be required to be a salaried employee of a media company, but rather a person gathering news for the purpose of disseminating the information to the public, which could include unpaid online journalists.").

<sup>11</sup> Dean C. Smith, *Price v. Time Revisited: The Need for Medium-Neutral Shield Laws in an Age of Strict Construction*, 14 COMM. L. AND POL'Y 235, 237-38 (discussing adoption of the first state shield law, in Maryland in 1896, and the first attempts to pass a federal shield, in 1929).

<sup>12</sup> 408 U.S. 665 (1972). The issue was tangentially part of a case that went before the Court in 1915, but the case turned on Fifth Amendment self-incrimination grounds, and the Court disposed of the case on narrow technical grounds. *See Burdick v. United States*, 236 U.S. 79 (1915) (holding that if a presidential pardon is rejected, it cannot be forced upon its intended subject). *See also* Margaret A. Blanchard, *The Fifth-Amendment Privilege of Newsman George Burdick*, 55 JOURNALISM Q. 39 (1978).

<sup>13</sup> *See* Rodney Smolla, SMOLLA & NIMMER ON FREEDOM OF SPEECH §13.03 (1994) (citing more than a dozen scholarly articles on the First Amendment issue). *See, e.g.,* Margaret Sherwood, *Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CAL. L. REV. 1198 (1970); Note, *The Emerging Constitutional Privilege to Conceal Confidential News Sources*, 6 U. RICH. L. REV. 129 (1971-72); James Goodale, *'Branzburg v. Hayes' and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975).

<sup>14</sup> *See In re Grand Jury Subpoena to Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005). Judith Miller's appeal to the U.S. Supreme Court was only the most recent time that the Court has declined to hear a journalist privilege case since *Branzburg*.

sought statutory shield law, many scholars have continued to focus solely on the question of whether the First Amendment should provide a testimonial privilege to journalists.<sup>15</sup>

So thoroughly has the Constitutional dimension saturated the journalist-privilege issue that recent debates over a federal statute have been suffused with First Amendment rhetoric.<sup>16</sup> For example, *The Los Angeles Times*' well-known media critic summed up consternation over the proposed federal law this way: "The whole notion of letting the government define a journalist is abhorrent to anyone who values the 1st Amendment."<sup>17</sup> An online-media expert at the Poynter Institute for journalism voiced opposition this way: "For me, it comes back to a core constitutional issue. (The First Amendment's) guarantee applies to *everyone* practicing free speech in the U.S."<sup>18</sup> An editorialist for the *Detroit News*, even while supporting the bill, opined: "We still believe the First Amendment provides all the protection (a reporter) needs."<sup>19</sup>

It would be easy for legal scholars to dismiss such statements as ignorant of the distinction between constitutional law and statutory law, between what the First Amendment does and does not cover. Frederick Schauer has observed a kind of "First Amendment magnetism" that leads people to invoke it like a talisman in any speech- or

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<sup>15</sup> See, e.g., William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARD. ARTS & ENT. L.J. 635 (2006); Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201 (2005).

<sup>16</sup> For a thorough discussion of the free-press dimensions of the recent debate over a federal shield law, see Cathy Packer, *The Politics of Power: A Social Architecture Analysis of the 2005-2008 Shield Law Debate in Congress*, 31 HASTINGS COMM. & ENT. L. J. 395 (2009).

<sup>17</sup> See Tim Rutten, *Don't Just Shield 'Pro' Journalists*, L.A. TIMES, Oct. 20, 2007, at E1.

<sup>18</sup> See Amy Gahrn, *Proposed Federal Shield Law: Who Would It Really Cover?*, E-MEDIA TIDBITS, POYNTER ONLINE, Oct. 17, 2007, available at <http://www.poynter.org/column.asp?id=31&aid=131585> (last visited Jan. 8, 2009).

<sup>19</sup> See Editorial, *Reporters Need Federal Shield Law*, DETROIT NEWS, Nov. 11, 2008, at A14.



press-related situations;<sup>20</sup> in another instance, he acidly derided “the ubiquity of doctrinally implausible First Amendment rhetoric.”<sup>21</sup> Perhaps, however, Michael W. Lewis was correct when he said that we diminish our understanding of how law evolves over time – and how the Constitution acquires new meaning over time – when we ignore “alternative stories” and dismiss voices of lay people as “inconsequential, unintelligible, or absurd.”<sup>22</sup> Rights rhetoric, Lewis would say, is a healthy indication that people are in touch with constitutional traditions, that they see themselves as stakeholders. Thus, the blurring of the line between constitutional law and statutory law in the journalist-privilege debate would not be a vice but a virtue: It would show, to borrow historian John Semonche’s phrase, that people are keeping faith with their Constitution.<sup>23</sup>

## POPULAR CONSTITUTIONALISM: A CONCEPTUAL FRAMEWORK

This dissertation has adopted the emerging theory of legislative constitutionalism<sup>24</sup> to offer a unifying description of what legislatures are doing when

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<sup>20</sup> Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1787 (2003-2004).

<sup>21</sup> Frederick Schauer, *Hohfeld’s First Amendment*, 76 GEO. WASH. L. REV. 914, 930 (2008).

<sup>22</sup> Michael W. Lewis, *Law’s Tragedy*, 21 RHETORIC SOC. Q. 11, 18 (1991).

<sup>23</sup> John E. Semonche, *KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT* (2000). Legal historians, as opposed to legal philosophers, have long accepted that political and social forces outside the courts influence judicial behavior and, therefore, guide the evolution of the law over time. This approach to legal history, drawing heavily on social, political, even economic trends, can be traced especially to the groundbreaking work of J. Willard Hurst. *See, e.g.*, J. WILLARD HURST, *THE LAW MAKERS* (1950); *LAW AND SOCIAL PROCESS IN U.S. HISTORY* (1960). Following in Hurst’s footsteps, legal historians such as Morton J. Horwitz have cast an even more critical eye on the long-held conceit that judges operate in a realm pristinely separate from politics and social movements. *See, e.g.*, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1994).

<sup>24</sup> *See, e.g.*, Tsvi Kahana, *Legalism, Anxiety and Legislative Constitutionalism*, 31 QUEEN’S L. J. (2005-2006). Some scholars have adopted an older term, “legispurdenance,” for the proposition that legislatures play an important role in interpreting the Constitution. *See, e.g.*, LUC J. WINTGENS, *LEGISPRUDENCE: A NEW APPROACH TO LEGISLATION* (2002). That term dates to the 1950s and 1960s. *See, e.g.*, Julius Cohen,

they adopt statutory shield laws: They are expressing an interpretive view of what the Press Clause of the First Amendment means. The idea that legislators play a role in helping to interpret the Constitution is not new; it flows from the Jeffersonian idea of “departmentalism” – that is, all three branches of the government are co-equally responsible for fidelity to the Constitution, especially when their actions touch on fundamental personal rights.<sup>25</sup> The idea of departmentalism was eclipsed by the rise of judicial review more than 200 years ago, and over time, judicial review has hardened into an almost universally accepted sense of judicial supremacy, with the Supreme Court alone as interpreter.<sup>26</sup> However, for more than 20 years, a growing number of scholars have theorized that constitutional meaning emerges over time through a kind of national dialogue that includes many more voices than those of judges alone.<sup>27</sup>

A key axis of this ongoing dialogue runs between courts and legislatures, with court opinions and legislative enactments acting as a kind of running record of their interaction. Legal scholar Ira Lupu has observed that statutes revolving in constitutional-

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*Towards Realism in Legisprudence*, 59 YALE L. J. 886 (1950). Contemporary scholars seem to prefer the more descriptive term “legislative constitutionalism.” See, e.g., Daniel A. Farber, *Legislative Constitutionalism in a System of Judicial Supremacy*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 431 (Richard W. Bauman & Tsvi Kahana eds., 2006).

<sup>25</sup> Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 106 (2004) (summarizing the debate among constitutional scholars as “a choice between ‘judicial supremacy,’ which emphasizes the need for the political branches to defer to the Court as the ‘ultimate interpreter of the Constitution,’ and ‘departmentalism,’ which recognizes the authority of each federal branch or ‘department’ to interpret the Constitution independently”).

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1992-1993). Friedman’s thesis:

Our Constitution is interpreted on a daily basis through an elaborate dialogue as to its meaning. All segments of society participate in the constitutional interpretive dialogue, but courts play their own unique role. Courts serve to facilitate and mold the national dialogue concerning the meaning of the Constitution, particularly but not exclusively with regard to the meaning of our fundamental rights.”

*Id.* at 580-581.

law orbits often draw on the language of court-made law because legislators are self-consciously treading into substantive areas, such as freedom of the press, normally left to the U.S. Supreme Court.<sup>28</sup> “Legislative selection of judge-made concepts of constitutional law helps to minimize the risk of subsequent invalidation on constitutional grounds,” he has written.<sup>29</sup> A First Amendment example would be the way local governments often model parade and demonstration ordinances on language from court cases such as *Shuttlesworth v. Birmingham*.<sup>30</sup>

Conversely, debates and lawmaking in the statutory realm can influence the development of constitutional law. Legal scholar Anuj Desai has shown convincingly how Congressional statutes and regulatory rules governing the U.S. Postal Service nurtured the concept of a constitutional right to receive information.<sup>31</sup> Those non-judicial rules were promulgated and refined decades before the U.S. Supreme Court articulated a right now considered a bedrock First Amendment doctrine.<sup>32</sup> “Policymakers likely understood at some level the importance of their choices as a matter of communications policy,” Desai has said, “but it seems just as likely that they did not realize the impact

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<sup>28</sup> Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993). Lupu’s title is a play on the title of a famous address, later published, by California Supreme Court Chief Justice Roger Traynor; see Roger J. Traynor, *Statues Revolving in Common Law Orbits*, 17 CATH. U. L. REV. 401 (1968). In that essay, Traynor observed that statutes revolving in common-law orbits have influenced court-made law when, for example, judges have seen merit in policy decisions made by legislators and have borrowed ideas or even verbatim language from the statutory realm.

<sup>29</sup> Lupu, *supra* note 28 at 22.

<sup>30</sup> *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (holding unconstitutional the literal application of a state statute to prevent a civil rights march, stating that application of the statute seemed to target ideas). Lupu just as easily could have used as an example the way proposed federal shield laws track closely to the Court’s language in *Branzburg v. Hayes*.

<sup>31</sup> Anuj C. Desai, *The Transformation of Statutes Into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HAST. L.J. 671 (2007).

<sup>32</sup> See *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

their choices were going to have on First Amendment jurisprudence in the twentieth century.”<sup>33</sup>

This transfer of ideas between legislature-made law and court-made law illustrates what legal scholar Robert Post has described as the “porous membrane dividing constitutional law from constitutional culture.”<sup>34</sup> While constitutional law is ultimately articulated by the Supreme Court, the Court’s decisions are influenced by many non-judicial actors participating in the wider constitutional culture – lawmakers in Congress, the president in the White House, state legislators, legal scholars, and, yes, journalists and other members of the public who have a stake in the outcome of a given constitutional debate. “Constitutional law could not plausibly proceed without incorporating the values and beliefs of non-judicial actors,” Post has written, so “constitutional law will be as dynamic and as contested as the cultural values and beliefs that inevitably form part of the substance of constitutional law.”<sup>35</sup>

Because non-judicial and judicial actors are “locked in a dialectical relationship,”<sup>36</sup> that helps to shape and reshape the law over time, legal scholars have begun to examine more seriously the role that non-judicial actors play in articulating constitutional values. Marouf Hasian has observed that “vernacular legal discourse” – how ordinary people talk about the law – precedes judicial pronouncement of a right because, after all, ordinary

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<sup>33</sup> Desai, *supra* note 31 at 727.

<sup>34</sup> Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 9 (2003-2004).

<sup>35</sup> *Id.* at 10.

<sup>36</sup> *Id.*

people generate disputes that give rise to litigation.<sup>37</sup> “We have too often focused almost exclusively on the hermeneutic interpretations of the Supreme Court and its edicts,” Hasian has written, and “inadvertently constricted the number of social actors that should be credited with having crafted our conceptions of free expression and its limitations.”<sup>38</sup>

The role of non-judicial actors in constitutional interpretation is, in fact, at the forefront of legal scholarship, and controversy,<sup>39</sup> today. When Yale Law School convened a conference of leading scholars in 2005 to debate the future of U.S. constitutional law, the dominant theme of discussion was the process of constitutional meaning-making outside the courts.<sup>40</sup> Some of the most recognizable names in constitutional law circles, from Mark Tushnet to Owen Fiss, have turned their attention in recent years to the role that legislatures play in interpreting the constitution in partnership with the courts.<sup>41</sup> While Post has talked of a broader “constitutional culture” at work,<sup>42</sup>

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<sup>37</sup> Marouf Hasian, Jr., *Vernacular Legal Discourse: Revisiting the Public Acceptance of the ‘Right to Privacy’ in the 1960s*, 18 POL. COMM. 89 (2001).

<sup>38</sup> Marouf Hasian, Jr., *Communication Law as a Rhetorical Practice: A Case Study of the Masses Decision*, 1 COMM. L. & POL’Y 497, 501 (1996).

<sup>39</sup> While many legal scholars applaud the idea of constitutional interpretation outside the courts, many others deplore the idea of eroding the U.S. Supreme Court’s authority. *See, e.g.*, Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000). Alexander and Schauer write that challenging the Court’s supremacy on constitutional matters threatens to erode the stability that is the key aim of constitutional law, as opposed to mutable statutory law. On the subject of Court decisions that many people disagree with, they write:

The undeniable fact that a judicial interpretation of an attempted legal settlement may be incorrect does not and should not call into question its authority, for it is inherent in all legal settlements of what ought to be done that such settlements claim authority even if those subject to them believe the settlements to be morally and legally mistaken.

*Id.* at 457.

<sup>40</sup> THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009) (a collection of essays by more than 20 of the nation’s leading constitutional scholars that grew out of the 2005 conference at Yale Law School).

<sup>41</sup> *See, e.g.*, THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE (Richard W. Bauman & Tsvi Kahana eds., 2006).

<sup>42</sup> Post, *supra* note 34.

Reva B. Siegel has written extensively about “social movements and political mobilizations” as driving forces;<sup>43</sup> together, they have sketched out a theory of “democratic constitutionalism.”<sup>44</sup> Larry D. Kramer, in his recently expounded theory of “popular constitutionalism,” has called for a return to the Jeffersonian idea of departmentalism, in which the judicial, legislative, and executive branches would be co-equal partners in interpreting the Constitution.<sup>45</sup> Mark Tushnet, in theorizing a “populist constitutionalism,” similarly has called into question the idea of judicial supremacy in articulating society’s constitutional values: “Constitutional theory must make sense of how people deal with the Constitution away from the courts if it is to provide an accurate account of our constitutional practice.”<sup>46</sup>

What all of these theories have in common is a belief that, contrary to the traditional conceit of judicial independence, constitutional law is not separate from politics and society, nor should it be. This is the core assertion of democratic constitutionalism as Post and Siegel have conceived it: “The democratic legitimacy of our constitutional law in part depends on its responsiveness to popular opinion. The ongoing possibility of shaping constitutional meaning helps explain why Americans remain faithful to their Constitution even when their constitutional views do not prevail.”<sup>47</sup> In

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<sup>43</sup> See, e.g., Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PENN. L. REV. 297 (2001); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470-1547 (2004).

<sup>44</sup> Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020* 25 (Jack M. Balkin & Reva B. Siegel eds., 2009).

<sup>45</sup> LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2006).

<sup>46</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* x (2000).

<sup>47</sup> Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 383 (2007).

their model of constitutional change, controversy over constitutional questions is not a weakness of our system but a strength because disagreement invites dialogue among institutions, groups, and individuals. A controversial Supreme Court decision might stir people and groups to protest or lobby political representatives; legislators might be moved to draft legislation to solve a problem left unsolved by the Court; the Court itself might be swayed over time to alter or overturn a decision. “To criticize a judicial decision as betraying the Constitution is to speak from a normative identification with the Constitution,” Post and Siegel have written. “When citizens speak about their most passionately held commitments in the language of a shared constitutional tradition, they invigorate that tradition.”<sup>48</sup>

In their work, Post and Siegel have often used the struggle for women’s equality in the 1960s and 1970s to show how popular mobilization led to the passage of both Court-made constitutional law and Congress-made statutory law that tracked closely to the emerging constitutional values expressed in the drive for an Equal Rights Amendment.<sup>49</sup> A key insight in their work is illuminating Congress’ role as an equal partner to the Court in giving meaning to the Fourteenth Amendment. Constitutional rights announced by the Court and statutory protections created by Congress that embodied those rights, taken together, created the framework of equal rights for women. Post and Siegel have adopted the “legislative constitutionalism”<sup>50</sup> terminology to describe this elevated role for Congress.

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<sup>48</sup> *Id.* at 375.

<sup>49</sup> Robert Post & Reva Siegel, *Legislative Constitutionalism and Section 5 Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1980-2020 (2002-2003).

<sup>50</sup> *Id.*

Working in a similar vein for more than a decade, Michael Gerhardt has tried to outline systematically ways in which people outside the courts participate in ongoing dialogues about constitutional meaning.<sup>51</sup> He theorizes that a wide range of social actors – including activists, journalists, industry leaders, lobbyists, and legislators – contribute to the creation of what he has dubbed “non-judicial precedents.” These can include legislative statutes, regulatory rules, professional standards, even long-held social norms that feed into constitutional discourse.<sup>52</sup> Non-judicial precedents usually “pre-exist judicially created constitutional doctrine, and so they govern particular constitutional matters ... unless or until they are addressed by courts,” Gerhardt has observed, and “consequently, they fill gaps in evolving constitutional doctrine.”<sup>53</sup> Statutes play an especially important role in Gerhardt’s model because they are the strongest types of non-judicial precedents: They carry the force of law.

When non-judicial actors create non-judicial precedents, they often do so by initiating a dialogue about a constitutional concept long before the U.S. Supreme Court has said anything about it.<sup>54</sup> “All the ways in which the public expresses constitutional judgments,” Gerhardt has observed, can help put an issue (such as journalist privilege)

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<sup>51</sup> Michael J. Gerhardt, *Constitutional Decision-Making Outside the Courts*, 19 GA. ST. U. L. REV. 1123 (2002-2003).

<sup>52</sup> See Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008). Gerhardt’s premise: The conventional perspective equates precedent with judicial decisions, particularly those of the Supreme Court, and almost totally ignores the constitutional significance of precedents made by public authorities other than courts. Yet non-judicial actors produce precedents which are more pervasive than those made by courts in constitutional law. *Id.* at 714-15.

<sup>53</sup> *Id.* at 718.

<sup>54</sup> *Id.* at 776.



into play as individuals interact with elected officials.<sup>55</sup> This dialogue can result in statutes, Gerhardt has said, intended “to make a point, to appease important constituencies, to encourage other States to follow suit.”<sup>56</sup> Such non-judicial precedents also can “send a signal to courts”<sup>57</sup> about how the public feels about an issue.<sup>58</sup>

Gerhardt could have been talking about the 76 years of journalist-privilege history preceding the Supreme Court’s decision in *Branzburg*. During those years, legislators in 18 states adopted shield laws, often in reaction to controversial court rulings that left journalists feeling defenseless and defensive. Using Gerhardt’s words, these statutes were designed to “fill gaps” in common law and constitutional law and to “send a signal to courts.” Gerhardt’s model also would account for the 20 statutes adopted since the Supreme Court’s long-lamented decision in *Branzburg*, as well as the current drive for a federal shield law. He would see these non-judicial precedents as reactions to the Court’s judgment that the First Amendment does not provide a testimonial privilege to journalists and as non-judicial aspirations about what freedom of the press should entail.

The purpose of this dissertation is to tell the larger story of journalist privilege in a new way: by moving the entire discussion into the realm of constitutional theory. This study has recast statutory shield laws as non-judicial precedents created by non-judicial actors as their way of participating in what Post calls our constitutional culture. It has

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<sup>55</sup> *Id.* at 748.

<sup>56</sup> *Id.* at 775.

<sup>57</sup> *Id.* at 785.

<sup>58</sup> The paradigmatic example of Gerhardt’s model that would be familiar to all media scholars would be reaction to the Court’s 1978 ruling that the First Amendment did not give newsroom’s any special protection from police searches; following outcry and lobbying by press advocates, Congress created stringent rules for such searches. *See Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *but see* Privacy Protection Act of 1980, 42 U.S.C. 2000aa.

considered these usually separate areas of law, court-made and legislature-made, as two sides of an ongoing dialogue between judicial and non-judicial actors. It has re-envisioned the burgeoning of statutory shield laws as a form of legislative constitutionalism, and it has tried to account for some of the ways in which journalists and press advocates created non-judicial precedents that helped move the issue forward at critical moments in history.

This dissertation has two primary audiences and two distinct goals. The first goal, which would be of interest to legal scholars generally, is to test two theories at the forefront of contemporary constitutional scholarship: legislative constitutionalism and non-judicial precedents. While Post, Siegel, and Gerhardt have pointed to various areas of the law to expound their theories, the journalist-privilege issue represents a perfect laboratory, with an extensive history and multiple actors, in which to gauge the analytic potential of their models. In particular, Gerhardt's notion of non-judicial precedents acting on and being acted upon by judicial rulings is applied throughout. The hope is that, beyond the journalism issue involved, this specific application of their theories will further illuminate how constitutional meaning coalesces, how it changes over time, and how that process transpires both inside and outside the courts. This study also extends these new constitutional-law theories to the state level for the first time.

The second goal, aimed at media-law scholars, is to reposition *Branzburg* in the middle of a sequence of events that began much earlier than many acknowledge and to re-envision that decision as one important point in a long trajectory that continues to unfold today. *Branzburg* was neither the beginning nor the end, only what Post would call "an opening bid in a conversation that the Court expects to hold with the American

public.”<sup>59</sup> This study emphasizes the fact that non-judicial actors had said quite a lot about the journalist-privilege issue long before the Court uttered a word, and it shows how non-judicial actors have responded to *Branzburg* by, for example, adopting 21 additional shield laws in the states since 1972. With Congress now poised to have its say by adopting a shield law at the federal level,<sup>60</sup> the Post-Siegel-Gerhardt model offers an important framework to reassess the role that journalists, press advocates, and legislators have played in articulating norms and values they ascribe to the First Amendment. Seen in this theoretical light, statutory shield laws might look less like inferior substitutes for a Court-articulated right and more like important pieces in a larger infrastructure that, taken as a whole, creates what we popularly think of as freedom of the press.

## LITERATURE REVIEW

The title of a paper recently presented at the national convention of the Association of Education in Journalism and Mass Communication sums up a key deficiency in the journalist privilege literature to date.<sup>61</sup> In titling his paper “*Garland v. Torre* and the Start of Reporter’s Privilege,” Stephen Bates inadvertently highlighted the fact that many legal scholars see the history of the issue starting with arguments in favor of a privilege based on the First Amendment in that 1958 case, and they tend to de-emphasize or completely ignore the long evolution – one could call it a trajectory – of statutory law stretching back to 1896. In another recent article, Bates has characterized

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<sup>59</sup> Post, *supra* note 34 at 104.

<sup>60</sup> Cristina Abello, *Federal Shield Bill Passes Senate Judiciary Committee*, REPORTER’S COMMITTEE FOR FREEDOM OF THE PRESS, Dec. 10, 2009, <http://www.rcfp.org/newsitems/index.php?i=11167>.

<sup>61</sup> Stephen Bates, *Garland v. Torre and the Start of Reporter’s Privilege* (unpublished conference paper presented at the annual meeting of the Association for Education in Journalism and Mass Communication, Aug. 5, 2009, Boston, Mass.) (on file with this author).

lower court rulings that have recognized a First Amendment-based privilege as a kind of overruling of the Supreme Court's decision in *Branzburg*, but nowhere has he made the analogy that a federal shield law would essentially perform the same function because he has never written about the statutory realm of journalist privilege.<sup>62</sup>

Bates and other scholars can be forgiven for such scholarly myopia. Because the U.S. Supreme Court and Congress have never provided a conclusive answer to the journalist privilege question at the federal level, the issue has spread into various areas of the law – from common law and statutory law to constitutional law and even administrative law<sup>63</sup> – and scholars have tended to focus on either constitutional or statutory law. Scholarly writing about journalist privilege can be divided fairly neatly between pre-*Branzburg* and post-*Branzburg* periods, with the First Amendment largely absent from the former and in eclipsing abundance in the latter. Post-*Branzburg* literature has focused overwhelmingly on the constitutional debate. Writing about the statutory realm has been preponderantly about proposals for a federal shield law, with much less attention to state-level efforts. Throughout the literature, scholars have touched on ways in which journalists, press advocates, and other non-judicial actors have attempted to alter, and have altered, the course of the law. They also have returned again and again to the question of who should be covered by a journalist privilege.

***The Pre-Branzburg Era.*** There remains a dearth of writing about the early years of the journalist-privilege issue. Although journalist privilege was part of a case that went

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<sup>62</sup> Stephen Bates, *Overruling a Higher Court: The Goodale Gambit and Branzburg v. Hayes*, 14 CHAPMAN'S J. OF L. AND POL'Y 17 (2009).

<sup>63</sup> Although not binding law, the Department of Justice guidelines for issuing subpoenas to journalists are frequently cited as a quasi-shield law. See 28 C.F.R. §50.10 (2005). For an up-to-date overview of the various areas of the law that control journalist privilege, see, e.g., Cathy Packer, *Confidential Sources and Information*, in COMMUNICATION AND THE LAW (W. Wat Hopkins ed., 2010).

to the U.S. Supreme Court as early as 1915, that case was argued on Fifth Amendment self-incrimination grounds; the First Amendment played no part. Perhaps for that reason, the case has received little attention from media-law scholars.<sup>64</sup>

The dominant theme in legal writing about journalist privilege in the early decades was universal disgust. As early as 1897, a year after Maryland adopted the nation's first shield law, one writer decried it as "making the most irresponsible tramp reporter a privileged person in the matter of communications the same as doctors and lawyers."<sup>65</sup> When lobbying efforts in the 1930s and '40s led to the adoption of 11 more statutes similar to Maryland's, legal scholars wrote uniformly against these efforts. To them, the matter was straightforward: Such a privilege had never been recognized at common law.<sup>66</sup> "The code of journalistic ethics forbidding disclosure by a reporter is of no binding consequence in a court of law and at most amounts only to a promise not to testify when requested to do so," one typical scholar wrote, "in effect, an undertaking to not to obey the law."<sup>67</sup> As late as 1950, another scholar argued, "The present tendency toward the indiscriminate privileging of occupational groups is unhealthy."<sup>68</sup>

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<sup>64</sup> *Burdick v. United States*, 236 U.S. 79 (1915) (holding that if a presidential pardon is rejected, it cannot be forced upon its intended subject). For a discussion of the case, including its privilege aspect, see Margaret A. Blanchard, *The Fifth-Amendment Privilege of Newsman George Burdick*, 55 JOURNALISM Q. 39 (1978).

<sup>65</sup> See John Henderson Garnsey, *Demand for Sensational Journals*, 18 ARENA 683 (November 1897).

<sup>66</sup> See, e.g., Note, *Privilege of Newspapermen to Withhold Sources of Information From the Court*, 45 YALE L.J. 357 (1936); Note, *Evidence – Privileged Communications – Newspaper Reporter Not Privileged to withhold Source of Information*, 5 BROOK. L. REV. (1935-1936).

<sup>67</sup> Note, *Evidence – Witnesses – Privilege of a Newspaper Reporter to Refuse to Testify Concerning Information Confidentially Received*, 22 CORNELL L. Q. 115, 117 (1936-1937).

<sup>68</sup> Note, *The Right of a Newsman to Refrain From Divulging the Sources of His Information*, 36 VA. L. REV. 61, 83 (1950).

Although legal scholars did not explicitly advance First Amendment arguments for a journalist privilege in the early decades, the contours of the debate were firmly in place by 1943. In his survey of the issue published that year in *Journalism Quarterly*, Walter A. Steigleman boiled down six arguments for and six arguments against a journalist privilege that sound as though they could have been taken from recent Congressional hearings over a federal shield law.<sup>69</sup> He cited these arguments against a shield law: 1) Courts fear authority weakened, fair trials impossible; 2) anonymous sources lead to sensational press; 3) public officials held up to ridicule with no accountability by press; 4) journalists would use anonymity to shield lawbreakers; 5) there would be no proof that a source actually existed; and 6) only a small percentage of articles truly need anonymous sources. He cited these arguments in favor: 1) without confidentiality, important sources would dry up; 2) reporters need confidentiality to expose government corruption and wrongdoing; 3) compelled disclosure endangers freedom of the press; 4) a reporter-source relationship is akin to an attorney-client relationship; 5) disseminating news and information is a public good; and 6) libel law offers adequate protection against reckless publications. Although Steigleman was a journalism professor, he did not favor a journalist privilege, a point he made clear in a chapter on the subject in his once-popular textbook published in 1950.<sup>70</sup> It is important to note that, surveying the issue's history as early as 1943, Steigleman counted freedom of the press, the checking function of the press, and the free flow of information to the

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<sup>69</sup> Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM Q. 230, 236 (1943).

<sup>70</sup> Walter A. Steigleman, *THE NEWSPAPERMAN AND THE LAW* 197 (1950).

public as prominent arguments in favor of a shield law. These were essentially First Amendment arguments, though no one had ever made them in court.

The issue was heating up around that time because, building on a wave of lawmaking in the states, New York was close to adopting a shield law in 1949.<sup>71</sup> The bill's sponsor, N.Y. Sen. Thomas C. Desmond, recounted that, following the fining and jailing of two reporters in 1948, "ministers, business and civic leaders thundered their denunciation of the imprisonment, and newspapers throughout the country clamored for the protection of a confidence law."<sup>72</sup> More than eight years before First Amendment arguments for a privilege arrived in a court of law, Desmond held up the checking function of the press as the main rationale for his bill. "Democracy without a free press," he wrote, "is no guarantee of freedom."<sup>73</sup>

Although early shield law statutes and debates over the issue focused almost exclusively on newspaper reporters, the question of who would be covered by such a testimonial privilege also began to appear in the literature around this time. As early as 1956, one legal scholar called attention to the "covered person" issue by criticizing the newspaper-only bias of most of the 12 shield laws on the books at the time.<sup>74</sup> He also questioned statutory requirements that a journalist seeking protection be "employed by or connected with" the institutional press. "Such elements have, at best, only remote

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<sup>71</sup> See, e.g., Thomas C. Desmond, *The Newsmen's Privilege Bill*, 13 ALB. L. REV. 1 (1949) (arguing for a shield law in New York); Earl H. Gallup, Jr., *Further Consideration of a Privilege for Newsmen*, 14 ALB. L. REV. 16 (1950) (arguing against a shield law in New York).

<sup>72</sup> Desmond, *supra* note 72 at 5.

<sup>73</sup> *Id.* at 8.

<sup>74</sup> W.D. Lorensen, *The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed?*, 35 NEB. L. REV. 562 (1955-1956).

connection with the essential policy questions involved,” he wrote.<sup>75</sup> His sentiments would echo in debates, sparked by the Internet, 40 years later.

*Garland, Branzburg, and Beyond.* Legal scholars reacted coolly after Justice Potter Stewart, as a visiting judge on the Court of Appeals for the Second Circuit in 1958, suggested for the first time that there may be circumstances in which the First Amendment would protect newsgathering from judicial inquiries.<sup>76</sup> Writing less than a year after that decision in *Garland v. Torre*,<sup>77</sup> the *Harvard Law Review* concluded, “The court properly rejected the appellant’s contention that it should recognize the evidentiary privilege of a journalist not to reveal news sources.”<sup>78</sup> When a First Amendment claim to a privilege was tried again in 1968, in the Oregon Supreme Court case of *State v. Buchanan*, scholars reacted by emphasizing the need for a statutory remedy, not a constitutional one.<sup>79</sup> That was the conclusion of Talbot D’Alemberte in one of the most frequently cited articles on the heels of *State v. Buchanan* and on the eve of *Branzburg*.<sup>80</sup> Representative of pre-*Branzburg* thinking, he urged that statutory protections be limited to journalists employed by traditional news outlets;<sup>81</sup> presaging post-*Branzburg* thinking, he urged that statutory protections not contain circulation requirements for print

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<sup>75</sup> *Id.* at 566.

<sup>76</sup> Comment, *Confidentiality of News Sources Under the First Amendment*, 11 STAN. L. REV. 541 (1959).

<sup>77</sup> *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 79 S. Ct. 237 (1958).

<sup>78</sup> See Note, *Journalist Must Reveal News Source in Pretrial Examination*, 72 HARV. L. REV. 768 (1959).

<sup>79</sup> See, e.g., James E. Beaver, *Newsman’s Code, Claim of Privilege and Everyman’s Right to Evidence*, 47 OR. L. REV. 243 (1967-68); Note, *Compulsory Disclosure of a Newsman’s Source: A Compromise Proposal*, 54 NW. U. L. REV. 243 (1959-1960).

<sup>80</sup> Talbot D’Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. ON LEGIS. 307 (1968-1969).

<sup>81</sup> *Id.* at 336.



publications and that protections be extended to all electronic media as well.<sup>82</sup> He, like nearly all scholars since *Branzburg*, argued for a qualified, not absolute, privilege.<sup>83</sup>

It was not until this short stretch of years, between *Buchanan* in 1968 and *Branzburg* in 1972, that legal scholars and even some practitioners began to espouse and explicate First Amendment rationales for a privilege.<sup>84</sup> In one of the earliest journal articles of this genre, two practicing attorneys from Massachusetts made the case that the absence of a journalist privilege at common law, the traditional argument of opponents, was the wrong yardstick against which to measure the issue.<sup>85</sup> Rather than see a journalist privilege as an exception to a rule in favor of compelled disclosure, they wrote, judges should see compelled disclosure by journalists as an exception to a rule in favor of freedom of the press.<sup>86</sup> They also suggested that public sentiment favored the journalists' cause at that time and that this sentiment was attuned to trends in First Amendment law: "The intuitive reaction is that it seems unfair to force newsmen to go to jail, accept criminal convictions, pay fines and embarrass their families in order to assure the flow of news. First Amendment decisions support this reaction."<sup>87</sup>

Similarly, Margaret Sherwood observed widespread anger in the press matched by dismay among a supportive public as a signal that court-created protection was warranted. "When numerous subpoenas are issued by an administration avowedly and

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

<sup>83</sup> *Id.* at 339.

<sup>84</sup> See, e.g., Note, *The Emerging Constitutional Privilege to Conceal Confidential News Sources*, 6 U. RICH. L. REV. 129 (1971-72).

<sup>85</sup> James A. Guest & Alan L. Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U. L. REV. 18 (1969-1970).

<sup>86</sup> *Id.* at 56.

<sup>87</sup> *Id.* at 47.

openly hostile to the news media, the possibility arises that putting a gag on the press may be as much an objective as eliciting information from it,” she wrote.<sup>88</sup> Sherwood attributed the “furor over the spate of federal subpoenas”<sup>89</sup> to coverage of anti-war, student, and minority protests, which meant that dissident voices were at risk of being “chilled” if left unprotected; the rise of electronic and alternative media, which meant a rise in the amount of material that could be requested by prosecutors; and the rise in the number of subpoenas seeking not sources of information but the content of confidential communications as well. “The courts which have considered the issue are in hopeless disagreement,” she wrote, and it was “time for the Supreme Court to clear up the confusion.”<sup>90</sup>

*Branzburg* itself did not clear up the confusions but inspired a flood of journal articles. Many of these focused on the constitutional question as lower federal courts struggled to interpret *Branzburg* in the years following the decision.<sup>91</sup> As early as 1981, Lawrence J. Mullen documented how a vast majority of courts facing the issue in the years following *Branzburg* had recognized a privilege based on some combination of federal or state constitutional law and federal or state common law.<sup>92</sup> He also noted that several federal courts had pointed to state shield laws in their circuits as evidence of “the

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<sup>88</sup> Sherwood, *supra* note 13 at 1199.

<sup>89</sup> *Id.* at 1249.

<sup>90</sup> *Id.* at 1250.

<sup>91</sup> See, e.g., George M. Killenberg, *Branzburg Revisited: The Struggle to Define Newsman’s Privilege Goes On*, 55 JOURNALISM Q. 703 (Winter 1978); Paul Marcus, *Reporter’s Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815 (1984).

<sup>92</sup> Lawrence J. Mullen, *Developments in the News Media Privilege: The Qualified Constitutional Approach Becoming Common Law*, 33 Me. L. Rev. 401 (1981).

public interest in giving newspaper reporters protection.”<sup>93</sup> He went on to conclude that “shield statutes ... do act as a declaration of public policy and force the courts to consider the First Amendment interest” involved in forcing a journalist to reveal sources.<sup>94</sup>

Although many journalists strongly preferred a Court-made solution – and would not accept anything less than First Amendment protection<sup>95</sup> – scholarly attention turned to the possibility of a statutory solution. The single best account of the effort to pass a federal shield law in the wake of *Branzburg*, however, was written not by a scholar but by then-Sen. Sam J. Ervin, Jr., who presided over extensive hearings on the question of creating a federal shield law.<sup>96</sup> He described how the Court’s decision “came as a bombshell” in a period already raw with feelings of anger and resentment among members of the press and at a time when public support was solidly behind the press.<sup>97</sup> The main obstacle to passage of a shield law, he observed, was the insistence by some journalists on an absolute privilege, which Ervin and other members of Congress felt would be impossible to pass.<sup>98</sup> Legal scholars such as Mark Neubauer tried at the time to point out to journalists that it was not an either-or situation – that a federal shield law would work in tandem with the First Amendment to strengthen qualified protections that courts were beginning to recognize in spite of *Branzburg* and that a statute would assure

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<sup>93</sup> *Id.* at 442.

<sup>94</sup> *Id.* at 443.

<sup>95</sup> See, e.g., Charles L. Bennett, *The Potential Dangers of Shield Legislation* in CONGRESS AND THE NEWS MEDIA (Robert O. Blanchard ed., 1974). Bennett was managing editor of *The Daily Oklahoman*, and this article was adapted from a talk he gave to the American Society of Newspaper Editors on May 4, 1973, in Washington, D.C.

<sup>96</sup> Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 255 (1973-1974).

<sup>97</sup> *Id.* at 259. Ervin cites a Gallup poll showing 57 percent of those polled supported a press privilege.

<sup>98</sup> *Id.* at 270.

that protection existed in circuits where courts had not recognized a First Amendment-based privilege.<sup>99</sup>

Although scholars for decades also tended to take an either-or approach, focusing on constitutional law or statutory law in isolation, some have more recently returned to the idea of seeing constitutional and statutory privileges as interlocking parts of a whole.<sup>100</sup> As one scholar recently put it, “A national reporter’s shield law will protect the First Amendment.”<sup>101</sup> Another recently has shown that the notion of using statutory law to bolster the First Amendment permeated hearings held in the U.S. House of Representatives on the heels of *Branzburg*.<sup>102</sup> Jason M. Shepard’s research indicates that Rep. Robert Kastenmeier, who led the hearings, held deeply felt beliefs about the press’ role in society, worked behind the scenes to support *The New York Times* in printing the Pentagon Papers, and vocally supported *The Miami Herald* in the fight the newspaper ultimately won in *Miami Herald v. Tornillo*.<sup>103</sup> In trying to negotiate the debate over who would and would not be covered by a federal statute – and questioning scholar Vincent Blasi’s assertion that “this is not for amateurs, this is for professionals”<sup>104</sup> – Kastenmeier seemed self-consciously to steer lawmakers toward constitutional norms expressed by the Court in *Branzburg*. “It seems to me,” he said, “we have to be able ... to define what we

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<sup>99</sup> Mark Neubauer, *The Newsman’s Privilege After Branzburg: The Case for a Federal Shield Law*, 24 UCLA L. REV. 160 (1976-1977).

<sup>100</sup> Joel G. Weinberg, *Supporting the First Amendment: A National Reporter’s Shield Law*, 31 SETON HALL LEGIS. J. 149 (2006).

<sup>101</sup> *Id.* at 189.

<sup>102</sup> Jason M. Shepard, *After the First Amendment Fails: The Newsmen’s Privilege Hearings of the 1970s*, 14 COMM LAW AND POL’Y 373 (Summer 2009).

<sup>103</sup> *Id.* at 403-04.

<sup>104</sup> *Id.* at 399.

are talking about when we talk about freedom of the press and the application of the First Amendment to the press.”<sup>105</sup>

***State-Level Efforts to Protect Journalists.*** While attempts to adopt a federal shield in the 1970s and again in recent years generated abundant scholarly interest, lawmaking at the state level has never garnered much attention or, until recent decades, much approval. In the pre-*Branzburg* era, legal scholars treated protections created by a growing list of shield laws as “novel privileges” that did not rise to the level of attorney-client and husband-wife privileges recognized at common law.<sup>106</sup> While dismissing shield laws as a dangerous deviation from common law, two scholars working in this early era at least acknowledged the seriousness of journalists’ claims, writing, “Proponents of legislation privileging reporters rely on a concept of newspapers as guardians of the public interest with a duty to expose waste and corruption.”<sup>107</sup>

The most important early scholarly treatment of state shield laws was not undertaken until 1950 in a *Virginia Law Review* note still cited frequently today.<sup>108</sup> The article created a kind of template for assessing shield laws through textual analysis, and it compared and contrasted the 12 existing shield laws based on elements such as whether protection applied in both criminal and civil proceedings, who could waive the privilege, and whether a journalist must have published an article related to material being sought.

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<sup>105</sup> *Id.* at 385.

<sup>106</sup> See, e.g., Lloyd S. Adams, Jr., & Mary Elizabeth Polk, *Privileged Communications: Some Recent Developments*, 5 VAND. L. REV. 590 (1951-1952).

<sup>107</sup> *Id.* at 602.

<sup>108</sup> Note, *The Right of a Newsmen to Refrain From Divulging the Sources of His Information*, 36 VA. L. REV. 61 (1950). Although scholars have frequently cited this article, apparently none has noticed that it was written by Bowie K. Kuhn, who would go on to become one of the most celebrated commissioners of National League Baseball in the sport’s history. At the time, Kuhn was in his final year at University of Virginia Law School and was Associate Decisions Editor of the law journal.

Central to the author's analysis was the question of persons and media protected by these statutes; he noted that existing statutes almost uniformly covered persons "engaged in" or "connected with" newspapers and, in a few cases, magazines.<sup>109</sup> While concluding that these shield laws were unwise and unnecessary, he noted the role that public sentiment played in their passage: "The only possible remaining purpose of a confidence statute is to protect the newsman from what is popularly considered to be judicial abuse when he refuses to violate his code. The public is shocked when a newsman is jailed or fined for so acting and has demanded through certain of its state legislatures that he be protected."<sup>110</sup>

Scholarly attention to state statutes did not noticeably increase until the *Garland*-through-*Branzburg* period sparked interest in the constitutional realm. Ahead of the *Branzburg* decision, well-known First Amendment scholar Vincent Blasi attempted to quantify the effectiveness of then-existing statutes by conducting survey research in states with and without such laws.<sup>111</sup> The results from nearly 1,000 responses by journalists in 46 states showed, among other things, that journalists relied on confidential sources anywhere from 22 to 34 percent of the time,<sup>112</sup> that journalists themselves were leery of using confidential sources,<sup>113</sup> and that only 18 percent of journalists surveyed ever had been subpoenaed.<sup>114</sup> Surprising to Blasi, his survey found that, among

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<sup>109</sup> *Id.* at 63-64.

<sup>110</sup> *Id.* at 83.

<sup>111</sup> Vincent Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971-1972).

<sup>112</sup> *Id.* at 247.

<sup>113</sup> *Id.* at 248.

<sup>114</sup> *Id.* at 260.

journalists in states with shield laws, only 35 percent knew that the laws existed, 50 percent were not sure, and 14 thought their states did not have shield laws.<sup>115</sup> Less than a year after the study was published, these findings would be used by Justice Byron White in making the case that lack of a testimonial privilege has not hampered the free flow of news.<sup>116</sup>

While the number of state-level shield laws has more than doubled since *Branzburg* – from 18<sup>117</sup> to 39<sup>118</sup> – scholarship on these statutes has been spotty and parochial. Scholars have focused on the pros and cons of laws in states with shield laws including Maryland,<sup>119</sup> Michigan,<sup>120</sup> Minnesota,<sup>121</sup> New Jersey,<sup>122</sup> Oregon,<sup>123</sup> and Pennsylvania.<sup>124</sup> They also have called for legislative action in states without shield laws

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<sup>115</sup> *Id.* at 275.

<sup>116</sup> *Branzburg*, 408 U.S. at 694.

<sup>117</sup> In his opinion for the court, Justice White erroneously reported that there were 17 existing shield laws at the time, but there were 18. See *Branzburg*, 408 U.S. at 689 n27.

<sup>118</sup> That is 38 states plus the District of Columbia.

<sup>119</sup> Bruce L. Bortz & Laurie R. Bortz, *Pressing Out the Wrinkles in Maryland's Shield Law for Journalists*, 8 U. BALT. L. REV. 461 (1978-79).

<sup>120</sup> Scott A. Mertens, *Michigan's Shield Law: A Free or Fettered Press?*, 16 T.M. COOLEY L. REV. 511 (1999).

<sup>121</sup> Nancy V. Mate, *Piercing the Shield: Reporter Privilege in Minnesota Following State v. Turner*, 82 MINN. L. REV. 1563 (1998).

<sup>122</sup> Robert W. Smith, *Newsperson Have Absolute Privilege Under New Jersey Statute Not to Disclose Editorial Process in Civil Libel Actions*, 13 SETON HALL L. REV. 599 (1982-1983).

<sup>123</sup> John R. Bittner, *Politics and Information Flow: The Oregon Shield Law*, 39 WESTERN SPEECH 51 (1975).

<sup>124</sup> Malcolm J. Gross, *Subpoenas and Newsrooms: The Impact of Pennsylvania's New Reporter's Privilege and Newly Interpreted Shield Law*, 65 PA BAR ASSN. Q. 51 (1994).

such as Texas,<sup>125</sup> Virginia,<sup>126</sup> and Utah.<sup>127</sup> So thin is the literature that scholars today must rely on the work of students to learn about the adoption of statutes in New York<sup>128</sup> and North Carolina.<sup>129</sup> The only comprehensive survey of state shield laws that predates the current debate over a federal shield was done by Laurence B. Alexander and Leah G. Cooper in 1997, an updating of the textual analysis from 1950 mentioned earlier.<sup>130</sup> At a time when the World Wide Web was gaining widespread use, they addressed the difficulty that might be caused by the covered person/covered medium language of then-existing statutes and noted “it would be premature to conclude that the privilege could not be extended to include those who are disseminating news in the new environment.”<sup>131</sup>

No scholar has done more to add to the literature on journalist privilege in general and shield laws in particular than Anthony L. Fargo. He has studied such state-based issues as the treatment of nonconfidential information in states with shield laws<sup>132</sup> and in

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<sup>125</sup> Robert T. Sherwin, *Source of Protection: The Status of the Reporter's Privilege in Texas and a Call to Arms for the State's Legislators and Journalists*, 32 TEX. TECH L. REV. 137 (2000).

<sup>126</sup> Phillip Randolph Roach, Jr., *The Newsmen's Confidential Source Privilege in Virginia*, 22 U. RICH. L. REV. 377 (1987-1988).

<sup>127</sup> Edward L. Carter, *Reporter's Privilege in Utah*, 18 BYU J. PUB. L. 163 (2003).

<sup>128</sup> Jeffrey Clayton Slagle, *The New York State 'Shield Law': Its Legislative History and Judicial Interpretation* (1992) (unpublished master's thesis, University of North Carolina) (on file with Davis Library, University of North Carolina).

<sup>129</sup> Allison Huntley Stiles, *Privilege and Politics: A Legal History of North Carolina's Journalists' Shield Law* (2000) (unpublished honors essay, University of North Carolina) (on file with Davis Library, University of North Carolina).

<sup>130</sup> See Laurence B. Alexander and Leah G. Cooper, *Words That Shield: A Textual Analysis of the Journalist's Privilege*, 18 NEWSPAPER RESEARCH J. 51 (Winter/Spring 1997).

<sup>131</sup> *Id.* at 64.

<sup>132</sup> Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States With Shield Laws*, 4 COMM. L. & POL'Y 325 (1999).



states without shield laws;<sup>133</sup> he was early to report on concerns about erosion of press protections during the Bush administration;<sup>134</sup> he was quick to update the field in the wake of the Judith Miller jailing;<sup>135</sup> and he has explored little-studied alternatives to a First Amendment-based privilege.<sup>136</sup> When Congress began again to consider a federal shield law, Fargo supplied a brief overview of the history of the problem, assessed the various methods that have been tried to solve it, and concluded that a statutory solution was now necessary.<sup>137</sup> As members of Congress began drafting and debating competing bills, Fargo urged them to look to the existing body of state shield laws for guidance and for models.<sup>138</sup> “Many states have already dealt with issues likely to arise in debates over the federal bills, including how to define ‘journalist’,” he noted. After assessing the strengths and weaknesses of the existing laws, he concluded that defining who should be covered by a federal shield law “may prove to be the toughest part of the bill to draft.”<sup>139</sup>

***Covered Persons and Covered Media.*** The debate over who should, and who should not, be protected by a journalist privilege has been a hallmark of the post-*Branzburg* era. In statutory parlance, this is the “covered person/covered medium” issue.

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<sup>133</sup> Anthony L. Fargo, *The Journalist’s Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL’Y 241 (2002).

<sup>134</sup> Anthony L. Fargo, *Evidence Mixed on Erosion of Journalists’ Privilege*, 24 NEWSPAPER RESEARCH J. 50 (Spring 2003).

<sup>135</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 (2005-2006).

<sup>136</sup> 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).

<sup>137</sup> Anthony L. Fargo, *The Concerto Without the Sheet Music: Revisiting the Debate Over First Amendment Protection for Information Gathering*, 29 U. ARK. LITTLE ROCK L. REV. 43 (2006).

<sup>138</sup> See Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn From the States*, 11 COMM. L. & POL’Y 35, 71-2 (2006).

<sup>139</sup> *Id.* at 71.

Because of *Branzburg*'s emphasis on freedom of the press as a fundamental personal right and the Court's veneration of the "lonely pamphleteer,"<sup>140</sup> the case created a distinct dividing line in the literature: little discussion of this issue among scholars before *Branzburg* and a keen interest in it afterward. Almost immediately in the wake of *Branzburg*, scholars fretted that a statutory shield law, in place of a First Amendment-based privilege, would heavily favor the institutional press at the expense of the alternative press, which had grown in importance during the protest years of the '60s.<sup>141</sup> As early as 1978, scholars in Maryland urged legislators there to expand the state's historic shield law to include book authors, documentary filmmakers, newsletter writers, and student journalists.<sup>142</sup> "If the press shield law protects television and radio employees," they wrote, "there is no logical reason why it should not also protect these other bona fide news-gatherers."<sup>143</sup> The issue of how to treat the so-called "non-traditional journalist" had moved to the center of the legal debate.

Scholars in the 1990s continued to focus on the question of who could invoke a privilege, not because of shield law debates but because of a string of cases<sup>144</sup> in which

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<sup>140</sup> *Branzburg*, 408 U.S. at 706. In one of his strongest arguments against a First Amendment-based privilege for journalists, Justice White stated:

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>141</sup> William S. Hurst, *Has Branzburg Buried the Underground Press?*, 8 HARV. C.R.-C.L. L. REV. 181 (1973).

<sup>142</sup> Bortz, *supra* note 120.

<sup>143</sup> *Id.* at 481.

<sup>144</sup> See, e.g., *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992). *In re Madden*, 151 F.3d 125 (3d Cir. 1998). The last of these created what became known as the Madden Test, which stated that someone claiming a First Amendment privilege must show that she 1) is engaged in

federal courts struggled to apply a First Amendment privilege to non-traditional journalists.<sup>145</sup> Most scholars, extrapolating from *Branzburg* and its progeny, came to agree that the medium in which someone worked should be set aside as irrelevant.<sup>146</sup> Instead, scholars theorized, determining who should be a covered person should be based on evidence of the journalistic process;<sup>147</sup> or process plus evidence of journalistic standards;<sup>148</sup> or process and standards plus evidence of financial gain.<sup>149</sup> These approaches fall under the short-hand term “functional definitions” of journalists.

As scholarly focus shifted from courts to Congress and efforts to create a federal shield law, the journalist definition issue remained front and center. Some scholars argued that the rise of independent online journalists, aka bloggers, drew attention away from journalists who most needed a testimonial privilege – i.e., those employed by traditional media outlets.<sup>150</sup> Laurence B. Alexander has summed up this argument: “Most troubling for journalists and others who want to preserve a free press ... is that so many divergent groups of persons could be called journalists that the protection of the privilege

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investigative reporting, 2) is gathering news, and 3) had the intent of disseminating the information at the start of the news-gathering process. *In re Madden*, 151 F.3d at 131.

<sup>145</sup> See, e.g., Comment, *Are Oliver Stone & Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69 WASH. L. REV. 739 (1994).

<sup>146</sup> See Clay Calvert, *And You Call Yourself a Journalist? Wrestling With a Definition of 'Journalist' in the Law*, 103 DICK. L. REV. 411 (1999).

<sup>147</sup> See 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).

<sup>148</sup> Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 395 (2006).

<sup>149</sup> See Nathan Fennessy, *Bringing Bloggers Into the Journalist Privilege Fold*, 55 CATH. U. L. REV. 1059 (2006).

<sup>150</sup> 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 (2002).

would be dissolved.”<sup>151</sup> Other scholars have argued in favor of including bloggers and non-traditional journalists under the umbrella of a federal shield law using the “functional” approach described above.<sup>152</sup> Jennifer Elrod has summed up this argument: “In part, this problem has been addressed by limiting the protection of journalists through the language ‘regularly engaged in newsgathering,’ ” as Elrod would do in her model shield law and as current proposals for a federal statutory shield law would do.<sup>153</sup>

While many scholars have attributed the evolution of the journalist-definition issue to developments in federal courts<sup>154</sup> – most notably in the *von Bulow* case of 1987<sup>155</sup> – others have taken care to note that experiments in expanding the journalist definition were pioneered by legislators drafting state-level shield laws in the 1970s.<sup>156</sup> The most thorough analysis of this area of the journalist-privilege literature was done by Mary-Rose Papandrea, prompted by the rise of so-called “citizen journalism” and its awkward place in the federal shield law debate.<sup>157</sup> By examining how the journalist-definition question had been addressed in constitutional, statutory, and scholarly realms, she concluded that the trajectory unmistakably points to the broadest of definitions. “Let

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<sup>151</sup> *Id.* at 101.

<sup>152</sup> Leslie Siegel, *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 OH. ST. L. J. 469, 515 (2006) (arguing that a shield law “would apply to a blogger whose ... ‘sole purpose’ is the dissemination of news with the ‘sole intent’ of passing along that news to the general public”).

<sup>153</sup> See Free Flow Information Act of 2007, H.R. 2102, 110th Cong., 1st sess. (2007), at §4(2).

<sup>154</sup> See, e.g., Calvert *supra* note 147.

<sup>155</sup> *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987) (creating what later became known as the von Bulow Test, which states that a person seeking the privilege must have had the intention of disseminating news and information to the public at the start of the information-gathering process).

<sup>156</sup> See, e.g., Fargo *supra* note 139.

<sup>157</sup> Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L.R. 515 (2007). *Id.* at 584.

everyone who disseminates information to the public have a presumptive qualified right to refuse to testify in any judicial or administrative proceeding concerning the identity of their sources and any other published or unpublished information they have gathered, received or processed.”<sup>158</sup> The breadth of the definition would be tempered by the fact that the privilege would be qualified by employing some version the three-part test from Justice Stewart’s dissent in *Branzburg*.<sup>159</sup> Despite recent attempts to narrow the language to cover only those associated with mainstream news organizations, the shield law currently being weighed by Congress comes close to matching Papandrea’s recommendations.<sup>160</sup>

***Holes in the History.*** The greatest challenge facing scholars researching journalist privilege today is the absence of a comprehensive history of the subject. One must glean pieces of the history from a patchwork of sources, such as the articles by Steigleman,<sup>161</sup> Kuhn,<sup>162</sup> and D’Alemberte<sup>163</sup> mentioned earlier. Moreover, there was a noticeable turn away from history in favor of court-focused doctrinal analysis after *Branzburg*, a scholarly preference that has continued to this day.<sup>164</sup> Contemporary

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<sup>158</sup> *Id.* at 584.

<sup>159</sup> *Id.*

<sup>160</sup> Cristina Abello, *Obama Administration Publicly Endorses Shield Bill*, NEWS RELEASE, REPORTER’S COMMITTEE FOR FREEDOM OF THE PRESS, Nov. 5, 2009, <http://www.rcfp.org/newsitems/index.php?op=cat&cat=3> (reporting that language in the bill that had limited protection to paid employees of traditional media outlets was removed).

<sup>161</sup> Steigleman, *supra* note 70.

<sup>162</sup> Note, *supra* note 69.

<sup>163</sup> D’Alemberte, *supra* note 81.

<sup>164</sup> David Anderson’s most recent article, which bills itself as a reconsideration of the issue of confidential sources, focuses squarely on federal court-made law from *Garland v. Torre* to the present. See David A. Anderson, *Confidential Sources Reconsidered*, 61 FLA. L. REV. 883 (2009).

scholars such as Fargo have sometimes taken the time to trace the pre-*Branzburg* history, to add context to current debates;<sup>165</sup> most have given a quick nod to history, using mostly secondary sources, before fast-forwarding to contemporary issues.<sup>166</sup> One problem with this lack of ongoing historical research is the perpetuation of small mistakes in the narrative, such as wrongly attributing Maryland's 1896 shield law to the jailing of Baltimore *Sun* reporter John T. Morris in 1886.<sup>167</sup>

A more pressing problem with this lack of historical research is that potentially revealing events have been glossed over or ignored. For example, David Gordon published a single article adapted from his doctoral dissertation on the passage of the nation's first state shield law, and the subject has not been revisited since.<sup>168</sup> Gordon's well-researched article is important in several respects: It made clear that the John T. Morris affair was related to, but not the immediate impetus for, passage of the shield law a decade later;<sup>169</sup> it illuminated the role of journalists in pressing for the legislation;<sup>170</sup> it showed public support for journalists such as Morris;<sup>171</sup> and it showed that, even in this early stage in shield-law history, journalists were propounding arguments that scholars today would recognize as the checking function of the press and the public's right to

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<sup>165</sup> See Fargo, *supra* note 138 at 44-52

<sup>166</sup> See, e.g., Papandrea, *supra* note 158 at 534.

<sup>167</sup> This commonly received notion is probably most attributable to the Virginia Law Review article, *supra* note 69, which makes this claim prominently in its opening section. According to one database, Hein Online, this article has been cited by more than 50 subsequent articles.

<sup>168</sup> David Gordon, *The 1896 Maryland Shield Law: The American Roots of Evidentiary Privilege for Newsmen*, JOURNALISM MONOGRAPHS, No. 22 (Feb. 1972).

<sup>169</sup> *Id.* at 10.

<sup>170</sup> *Id.* at 37-39.

<sup>171</sup> *Id.* at 20.

know.<sup>172</sup> Oddly, Gordon treated the whole affair as a local matter, peculiar to Maryland, without considering the fact that a national controversy over confidential sources, the trial of John S. Shriver, was unfolding at the same time in Washington, D.C., and that Shriver was from one of the most prominent families in Maryland.<sup>173</sup>

Other obvious topics of interest have been neglected. One would think that, with Congress debating a federal shield law off and on for the last 80 years, there would be a well-developed record of the first attempt to pass such a law, in 1929. Yet that important event has remained but a footnote in the literature, and often an incorrect footnote at that.<sup>174</sup> Some of the pre-*Branzburg* scholars briefly recounted the events surrounding submission of that first shield-law bill,<sup>175</sup> but the story has remained largely untold outside of journalism textbooks.<sup>176</sup>

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<sup>172</sup> *Id.* at 14 (quoting a court filing on behalf of John T. Morris, which stated in part, “The public assuredly has a deep concern in all occurrences affecting the integrity of public officers, and recent trials in the city of New York have shown that publicity given to details in a far more specific form than in the article complained of is an important aid to the administration of justice.”).

<sup>173</sup> See *Digest of Decisions and Precedents of the Senate and House of Representatives, for the Senate Special Committee to Investigate Attempts at Bribery, etc.*, GOVERNMENT PRINTING OFFICE (Henry H. Smith ed., 1894) (reporting on the contempt citations against John S. Shriver and others in relation to the so-called Sugar Tariff Scandal). See also Unsigned, *John S. Shriver's Trial, Newspaper Correspondent's Case Goes on in Washington*, N.Y. TIMES, June 17, 1897, at A4 (reporting that the three-year controversy stemming from Shriver's reporting on bribes to members of Congress was going to trial).

<sup>174</sup> The fact that Capper introduced the first shield law bill into Congress has been noted frequently by legal scholars, but usually in a footnote and without explanation. The most noteworthy example of this – because it has been the source of erroneous footnotes ever since – is the frequently cited article that Sen. Sam Ervin wrote after he led an unsuccessful attempt to pass a shield law in the 1970s. See *supra* note 97 at 241. Footnote 23 states that Capper introduced S. 2175 on Oct. 30, 1929, but that is wrong. That bill was actually Capper's second, introduced on Nov. 20. The first bill was S. 2110, introduced in the Senate on Nov. 14. The date Oct. 30 refers to the legislative day recorded in the Senate record, which is the same for both because that “legislative day” stretched for the whole of the special session, from gavel to gavel. See 71 CONG. REC. 5832 (1929). Many legal scholars have duplicated that slightly wrong information. See, e.g., Siegel, *supra* note 153 at 507.

<sup>175</sup> See, e.g., Steigleman, *supra* note 70 at 234.

<sup>176</sup> Perhaps the fullest account of these events, running about two pages, was included in a journalism text book, so scholars have no citations to lead them to further resources. See Curtis D. MacDougall, NEWSROOM PROBLEMS AND POLICIES 320 (1949).

Two of the most valuable pieces of historical research, one old and one new, have gone unpublished. Gordon devoted his doctoral dissertation to journalist privilege in 1970, on the eve of *Branzburg*, and produced one of the most extensive records to date of early cases and early shield-law efforts.<sup>177</sup> Nearly alone among scholars, Gordon compiled a trove of unreported cases alongside the familiar reported ones<sup>178</sup> – cases that today would remain hidden to scholars using computer databases such as Westlaw. Another key strength of his work was that he did not view court cases in isolation; he developed the history of state shield laws alongside court-made law to illuminate the relationship between the two.<sup>179</sup> In the end, he concluded that successive battles between press and bar had swayed attitudes in favor of recognizing a testimonial privilege, even among many in the legal community. “Increasingly,” he wrote, “the old inflexible position of the Law, in opposition to newsman’s privilege, has been questioned by thoughtful observers who recognize that changing conditions require more than the same old common law answers.”<sup>180</sup>

More recently, Robert Spellman has returned to a string of 19th-century cases that might be familiar to media-law scholars, such as the Nugent case of 1848, and has added new research to illuminate their importance.<sup>181</sup> By examining these dozen cases together,

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<sup>177</sup> David Gordon, *Protection of News Sources: The History and Legal Status of the Newsman’s Privilege* (1971) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with Davis Library, University of North Carolina).

<sup>178</sup> *Id.* at 527.

<sup>179</sup> *Id.* at 566.

<sup>180</sup> *Id.* at 855-56.

<sup>181</sup> Robert Spellman, *Defying the Law in the 19th Century: Journalistic Culture and the Source Protection Privilege* (paper presented at the annual meeting of the International Communication Association, New Orleans, La., May 27, 2004) (on file with this author).



Spellman has highlighted the fact that journalist-privilege controversies that rose into the headlines and sparked national debate, starting in 1800, invariably involved clashes between Congress and the Washington press corps.<sup>182</sup> Reporting on corruption and bribery was usually at the root of these controversies, and Congress only exacerbated its conflict with the press by flexing its muscle with passage of a law designed specifically to punish the press, the Contempt Act of 1857.<sup>183</sup> Spellman has shown that, by century's end, Washington journalists' determination to protect confidential sources had hardened into an ethical canon, long before protecting sources was added to the Society of Professional Journalists' Code of Ethics in the 1930s and long before a journalist privilege had achieved widespread recognition in the law.<sup>184</sup>

There does seem to be growing interest among some media-law scholars in using the tools of the historian to shed new light on familiar cases and events of the past. The debates in the U.S. House of Representatives on the heels of *Branzburg* had never been studied until the Shepard study referenced above.<sup>185</sup> Stephen Bates has recently revisited the original First Amendment privilege case, *Garland v. Torre*, to bring to light the clashing personalities involved and infighting among journalists themselves over the desirability of a legally recognized privilege.<sup>186</sup> It might surprise press advocates today to learn, as Bates has shown, that the American Newspaper Publishers Association and the

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<sup>182</sup> *Id.* at 4-8.

<sup>183</sup> *Id.* at 12-15. *See* Act of Jan. 24, 1857, 11 Stat. 155; *now codified at* 2 U.S.C. §192 (making contempt of Congress a criminal offense).

<sup>184</sup> *Id.* at 35-40.

<sup>185</sup> Shepard, *supra* note 103.

<sup>186</sup> *See* Bates, *supra* note 62 at 28.

American Newspaper Guild attacked rather than supported reporter Marie Torre during her landmark legal battle.<sup>187</sup> Fellow journalists said that she was “irresponsible,” “unscrupulous,” “scrounging in the gutter,” and a liar.<sup>188</sup>

In a similar vein, Eric Easton has returned to *Branzburg* itself to shed new light on the actions and motives of the litigants in that historic case.<sup>189</sup> By delving into the record beyond court filings and judicial pronouncements, and by interviewing reporter Earl Caldwell himself, Easton has shown that the press’ defeat in *Branzburg* and its subsequent failure to secure a statutory shield law from Congress was largely its own fault.<sup>190</sup> *The New York Times*’ lack of support for Caldwell and its adamant opposition to appealing his initial loss in court cast a pall of discord early on.<sup>191</sup> However, Easton has shown, the case was vigorously “pursued by mainstream media organizations as part of a continuing effort to shape the First Amendment doctrine under which journalists practice their craft.”<sup>192</sup> By recasting *Branzburg* in this way – not as a singular event but as a chapter in an ongoing struggle between press and bar – Easton provided a vivid example of how non-judicial actors participate in shaping the law, including constitutional law.<sup>193</sup>

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<sup>187</sup> *Id.* at 30.

<sup>188</sup> *Id.* at 30-31.

<sup>189</sup> Eric Easton, *A House Divided: Earl Caldwell, the New York Times, and the Quest for a Testimonial Privilege*, Forthcoming, UTAH L. REV. (2009), available at <http://ssrn.com/abstract=1368750> (last visited Nov. 30, 2009).

<sup>190</sup> *Id.* at 40-51.

<sup>191</sup> *Id.* at 9.

<sup>192</sup> *Id.* at 3.

<sup>193</sup> *Id.* at 52-54. Easton does not use the term non-judicial precedent, but he recounts how lawyers and amici for Earl Caldwell repeated pointed to the Department of Justice’s recently adopted rules for subpoenaing journalists as a non-judicial precedent that should sway the Court. Constitutional law scholar Alexander Bickel said in his amicus brief that the DOJ rules “evince most authoritatively a developing consensus of what the law should be.” *Id.* at 37.

*A Dearth of Theory.* If the state of historical research in the area of journalist privilege could be said to be sketchy but improving, the same could be said for theoretical work on this topic in recent years. Although the renewed drive for a federal shield law has inspired a welcome burst in scholarly activity, recent articles largely recapitulate theoretical grounds for a First Amendment privilege and public-policy arguments for a statutory privilege surveyed by *Branzburg*-era advocates and scholars such as James Goodale<sup>194</sup> and Carl C. Monk.<sup>195</sup> Freedom of the press requires freedom from government interference in newsgathering, and the public's right to know requires a free flow of information. Alexander Meiklejohn's<sup>196</sup> self-government theory and Vincent Blasi's checking theory<sup>197</sup> thread through the literature. Blasi's famous thesis, grounding the press' role as a check on government in the First Amendment, could in fact be seen as a scholarly refutation of *Branzburg* and its assertion that the press clause is merely part of the speech clause and belongs to everyone, not just those with the means to publish. Not all media scholars agreed with Blasi's approach, even at the time. Journalism historian Margaret A. Blanchard, for one, sided with the Court's approach and chided journalists for reacting out of emotion to the decision as though it were a personal defeat.<sup>198</sup>

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<sup>194</sup> Goodale, *supra* note 19.

<sup>195</sup> Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1 (1986).

<sup>196</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

<sup>197</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

<sup>198</sup> Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225 (1978).

Journalist-scholar Anthony Lewis argued against a First Amendment privilege as ahistorical: The “press” of the First Amendment didn’t mean journalism institutions.<sup>199</sup>

In recent years, writing on the issue has been largely descriptive of the problem and the writer’s preferred solution. To take one random example, Leslie Siegel’s frequently cited 2006 article for the *Ohio State Law Journal* is thorough scholarship that surveys the history of the problem and makes a convincing case in support of a federal shield law.<sup>200</sup> However, her conclusion after 55 pages is purely pragmatic: “Because the Supreme Court seems unwilling to revisit the issue of a journalistic privilege, only Congress can put a stop to the steady stream of reporter subpoenas.”<sup>201</sup> She and many others do not theorize a role for statutory law as anything other than a Plan B to Supreme Court recognition of a privilege. Even scholars who have trained their attention on the seemingly new issue of what to do about the Internet merely echo earlier articles prompted by the arrival of radio and television.<sup>202</sup> The key point was made elegantly enough as early as 1993: “In those areas in which the electronic press resembles the institutional press, it should be treated as the institutional press.”<sup>203</sup>

More interesting are scholarly arguments that suggest a special role for statutory law or even a preference for shield laws based on the First Amendment.<sup>204</sup> Fargo began

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<sup>199</sup> Anthony Lewis, *A Preferred Position for Journalism*, 7 HOFSTRA L. REV. 595 (1978-1979).

<sup>200</sup> See Siegel, *supra* note 153.

<sup>201</sup> *Id.* at 524.

<sup>202</sup> See, e.g., Note, *Protecting the New Media: Application of the Journalist’s Privilege to Bloggers*, 120 HARV. L. REV. 996 (2007) (calling for a federal shield law to treat bloggers like print journalists); compare Lorensen, *supra* note 75 (calling for state shield laws to treat radio and television like print journalism).

<sup>203</sup> Tung Yin, *Post-Modern Printing Presses: Extending Freedom of the Press to Protect Electronic Information Services*, 8 HIGH TECH. L. J. 311, 332 (1993).

<sup>204</sup> See, e.g., Fargo *supra* note 139.

his call for a federal shield law in 2006 with a lengthy discussion of the history of the First Amendment, starting in the Colonial Era, and continued with a thorough survey of the key speech and press theories that emerged in the 20<sup>th</sup> Century. He then dissected the First Amendment jurisprudence of the Supreme Court and lower federal courts and lamented what he saw as a disconnect between the courts' narrow interpretation of press rights and the public's belief in broad protection for the press. "If this situation seems to us to be at odds with founding principles," he wrote, "what can we do to correct the problem?" His answer would be a federal shield law to "correct" the courts' wrongly narrow interpretation. He acknowledged the unease some journalists might have in securing a privilege through the political process, but he concluded with the question: "Why should the press – and the public it is supposed to inform – not benefit from it?" Without putting it in exactly these words, Fargo has suggested that passage of a federal shield would represent popular participation in interpretation of the First Amendment and a way of overruling judicial actors.

Constitutional-law scholar Eric M. Freedman has gone so far as to argue that a federal statute can better protect First Amendment values than a court-created First Amendment privilege.<sup>205</sup> "Any qualified reportorial privilege which depends on judicial balancing of the importance of disclosure in individual cases is inherently structurally defective," he has written, because it creates a "biased framework" akin to setting a "tempting dessert" on the table before a hungry diner, the judge.<sup>206</sup> Freedman's solution would be an absolute privilege created by statute so that a journalist's decision to reveal

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<sup>205</sup> Eric M. Freedman, *Reconstituting Journalists' Privilege*, 29 CARDOZO L. REV. 1381 (2007-2008).

<sup>206</sup> *Id.* at 1388.

or not reveal confidential sources and information would be hers and hers alone; it would not be up to any governmental actor.<sup>207</sup> This would mirror other First Amendment values the Court has articulated: “Under the First Amendment, decisions on what should or should not be published are left to the independent judgment of the press even though elected officials believe themselves to have sounder views.”<sup>208</sup>

William E. Lee has similarly argued for a federal shield law to advance First Amendment values, but unlike Freedman, he would urge journalists to emphasize their special role in society.<sup>209</sup> On his reading of *Branzburg*, the journalist-definition issue was of paramount importance, all other arguments marginal. The debate on display in the majority opinion by Justice White and dissenting opinion by Justice Stewart was “theoretical, not just rhetorical,” Lee has written, for they were debating the role of the journalist in society, which to Lee is the nub of the journalist-privilege issue.<sup>210</sup> White saw no special role for the press’ speech that transcended the importance of any other form of speech, while Stewart argued that the press played a unique role in facilitating a free flow of information to the public.<sup>211</sup> Because White prevailed, the Court preserved its long-held position that the Press Clause of the First Amendment is a subsidiary part of the Speech Clause. To maintain that doctrine, however, the Court had to reject the idea of defining a journalist for the sake of a privilege. “Because freedom of the press is a ‘fundamental personal right,’ it is difficult to exclude any citizen from the class of

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<sup>207</sup> *Id.* at 1393.

<sup>208</sup> *Id.*

<sup>209</sup> Lee, *supra* note 15.

<sup>210</sup> *Id.* at 646.

<sup>211</sup> *Id.* at 647

journalists,” Lee observed. “Thus, rather than create a First Amendment-based privilege for everyone, the Court chose to deny the existence of a privilege for anyone.”<sup>212</sup>

Lee’s solution would be a statutory privilege that takes the decision of who should and should not be allowed to invoke a testimonial privilege away from judges. “These are precisely the broad social issues legislatures commonly examine and resolve,” Lee noted, echoing Justice White’s reasoning in *Branzburg*. In the next breath, however, Lee urged that the definition of “journalist” for the sake of a federal shield law should reflect the First Amendment norms articulated in *Branzburg*: “Justice White was concerned that a judicially-created reporter’s privilege would be under-inclusive and that any distinctions, say between a professional journalist and the lonely pamphleteer, would be arbitrary and content discriminatory.”<sup>213</sup> Congress could exclude bloggers from a federal shield law, Lee acknowledged, but a narrow journalist definition would hamper the development of new forms of journalism. Instead, Lee pointed to the Privacy Protection Act of 1980 as a model of statutory language that would protect any person disseminating information to the public.<sup>214</sup> Thus, a similarly worded shield law would embody the First Amendment principles Justice White articulated.

Cathy Packer, in advancing the only truly new theory to emerge in recent years, has made similar claims about Congress’ ability to imbue statutory law with constitutional norms.<sup>215</sup> Packer has adopted the metaphor of “social architecture” from

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<sup>212</sup> *Id.* at 647-48.

<sup>213</sup> *Id.* at 676

<sup>214</sup> *Id.* at 684. *See also* 42 U.S.C. 2000aa (defining protected persons 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”).

<sup>215</sup> Packer, *supra* note 16.

privacy-law scholar Daniel Solove to illuminate the subtext of political discourse as Congress has debated a federal shield law over the last three years. Social architecture, she has written, stands for the proposition that power is distributed among institutions, groups and individuals in society and that the law creates a framework to determine how that power is distributed.<sup>216</sup> Lawmakers' primary goals in constructing or adjusting social architecture are 1) to create an ordered society while preserving individual liberty and 2) to constrain government power and keep the government accountable to the people.<sup>217</sup> "In the context of the proposed federal shield law," she has written, "this social architecture analysis focuses on the proper distribution of power among the U.S. Department of Justice, Congress, and the media, and what a proposed federal shield law might contribute to – or subtract from – that optimal distribution of power."<sup>218</sup>

Packer has used this "social architecture" lens to systematically analyze distinct aspects of the shield law debate – separation of powers, executive branch power to fight terrorism, media power to scrutinize government, and so on. However, she has grounded this seemingly new approach in traditional constitutional concerns: the Framers' objectives in drafting the Constitution, the goal of three co-equal branches of government, the extent of protection intended by the First Amendment.<sup>219</sup> She also has acknowledged a role for Congress in interpreting the founding texts: "Neither the First Amendment itself nor the historical record concerning its adoption ... delineates a social

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<sup>216</sup> *Id.* at 396-97.

<sup>217</sup> *Id.* at 397, quoting Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 CAL. L. REV. 1083, 1087 (2002).

<sup>218</sup> *Id.* at 399.

<sup>219</sup> *Id.* at 399-403.



architecture that is sufficiently well developed to answer all the modern questions about media rights and government power. Therefore, the courts and Congress often have had to fill in the lines between the broad strokes set down by the Framers.”<sup>220</sup>

The implications of Packer’s approach would include heightening lawmakers’ awareness of the self-interested motives of parties both advocating and opposing a shield law.<sup>221</sup> Altering the current social architecture can seem like a zero-sum game for those who perceive a threatened loss of power, so acknowledging that dynamic at work in the debate could help lawmakers distinguish between genuine policy concerns and rhetorical strategies designed merely to win the argument.<sup>222</sup> Above all, Packer has written, Congress must not let power politics distract it from using the tools of lawmaking to construct or adjust a social architecture in line with the broad framework Madison left in the First Amendment. “The Framers,” she wrote, “have given Congress ample guidance for the lawmaking task it faces today.”<sup>223</sup> Although Packer would not consider her article to be legal history, the framework she used to analyze the most recent Congressional debate over a federal shield law could be applied to milestone events in the story of journalist privilege stretching back to the jailing of John Peter Zenger.<sup>224</sup>

**Conclusions.** Scholarly writing on the journalist-privilege issue remains as fractious as the patchwork of laws that have developed over the last 113 years in the absence of clear guidance from either Congress or the U.S. Supreme Court. Scholars have

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<sup>220</sup> *Id.* at 403.

<sup>221</sup> *Id.* at 436-39.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 439.

<sup>224</sup> See JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (Paul Finkelman ed., 1997) (1736).

tried to account for and stay abreast of developments at the state and federal levels, in constitutional law and statutory law, in common law and administrative law. One is left with a series of glimpses.

Legal writing in the early decades was shaped by the parochial concerns of law school professors and legal practitioners. Their single lens for viewing the issue was the common law as they understood it: A testimonial privilege did not exist. Legal writing became more probing and innovative as the journalist-privilege issue moved into the constitutional realm. Once *Garland v. Torre* hinted at the possibility of a First Amendment-based privilege, scholars began to theorize rationales based on, among other theories, the role of the press in a democratic society, the press as a check on government power, and the press as a conduit for the free flow of information to the public. Perhaps because of the hortatory power of these arguments, scholars from *Branzburg* to the present have formed a noticeable consensus in favor of a journalist privilege, even if courts remain divided.

Scholars have written preponderantly about the First Amendment dimension of the issue, with much less attention paid to the statutory realm. Writing in that realm has naturally focused on intermittent attempts to pass a federal shield law, with much less attention paid to the body of law that has accrued at the state level.

Historical research that might add valuable context to current debates remains spotty. The quality of historical scholarship is noticeably higher in the pre-*Branzburg* decades; scholars turned decisively toward court-centered doctrinal analysis once the issue was constitutionalized. That has begun to change as a handful of scholars have

recently begun to add research to the literature that challenges conventional understanding of well-known cases and controversies.

A recurring theme that emerges in literature almost from the beginning is the debate over who should and should not be protected by a legally recognized journalist privilege. Although it might seem like a debate sparked by the rise of the Internet as a medium for journalism, similar debates occurred with the arrival of radio and television. In fact, the debate started as early as 1929, with the question of whether shield laws should cover only newspapers or magazines as well.

Most noticeably absent from the literature is material that would shed light on the development of shield laws at the state level. The little scholarship there hints at the role that journalists, press advocates, and the public have played in helping to shape the direction of the law. Of particular interest is the way in which these non-judicial actors developed and rehearsed what were essentially First Amendment arguments in favor of a journalist privilege long before those arguments became part of judicial discourse.

Theorizing about the journalist-privilege issue has remained fairly static since the *Branzburg* era. Traditional First Amendment theories about the checking function of the press and the public's right to know are most frequently invoked. More recently, scholars have begun to explore the journalist-privilege issue as an intersection of constitutional and statutory law, marshalling First Amendment claims to support legislature-made law. These melded approaches suggest interesting ways in which scholars could bridge the divide separating constitutional law and statutory law. They also suggest ways in which the pre-*Branzburg* and post-*Branzburg* histories, long cleaved, could be made whole.

Of particular interest to this study are recent articles by Fargo, characterizing statutory shield laws as a way to respond to First Amendment interpretation in the courts; by Freedman, characterizing statutory law as a way to take interpretation away from judges and put it in the hands of the people through their representatives; by Lee, characterizing the journalist-privilege issue as an ongoing discussion about the journalist's role in society; and by Packer, characterizing shield law debates as negotiations over how much power should be assigned to the press. All of these scholars advocate statutory shield laws, but they do so based on constitutional grounds. All of them agree, in essence, that statutory shield laws can advance First Amendment norms and values, whether those norms and values are espoused by the courts or not. All of these lenses could be used to see the journalist-privilege issue, past and present, in a new light and to see statutory law in an elevated role: not merely as a second-best work-around, but as a valuable outlet for the people to express what their Constitution means to them. That is the kind of lens this dissertation has adopted.

## **RESEARCH QUESTIONS**

**RQ1:** How did non-judicial actors shape the debate over journalist privilege? What rationales for a testimonial privilege did they articulate, and how, if at all, did those rationales change over time?

**RQ2:** How have judicial actors responded to non-judicial precedents? How, if at all, did the influence of non-judicial precedents change over time?

**RQ3:** How have non-judicial actors responded to judicial decisions? How, if at all, did the influence of judicial precedents change over time?

**RQ4:** What do these research findings suggest about the robustness of contemporary theories of “legislative constitutionalism” and “non-judicial precedents” advanced by scholars Post, Siegel, and Gerhardt? More specifically, how, if at all, can those theories help predict the future direction of the journalist-privilege issue? What, if anything, can this study show about the relationship between court-made law and legislature-made law in a constitutional culture such as ours?

## **METHODOLOGY**

This dissertation has employed a multi-disciplinary approach blending historical research, textual analysis, and case analysis. It does not claim to present a complete history of the journalist privilege debate, but it is organized chronologically to trace how the debate in statutory and constitutional realms evolved over time and to examine how First Amendment values might have driven debate in both legal realms. Rather than a continuous historical narrative, chapters focus on seminal moments and turning points in the debate. These include creation of the first state-level shield law, first attempts to adopt a federal shield law, and first attempts to argue for a First Amendment-based privilege.

The tools of the historian are used in chapters that flesh out the roles of non-judicial actors, such as journalists, press advocates, and legislators. Research in this vein has uncovered unexpected events in a little-remarked year in journalist privilege history, 1929, when the first attempts were made to adopt a federal shield law.<sup>225</sup> A striking feature of the discussion in that year was the use of rhetoric that tracks closely to

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<sup>225</sup> Dean C. Smith, *Journalist Privilege in 1929: Sen. Arthur Capper and the Start of the Shield Law Movement in America* (unpublished conference paper presented Aug. 7, 2009, Association for Education in Journalism and Mass Communication, Boston, Mass.) (on file with the author).

Meiklejohn's self-government rationale and Blasi's checking-function rationale, press theories not fleshed out until decades after this early skirmish. Research also indicates that creation of the nation's first state-level shield law, in Maryland in 1896, has been long misconstrued as a local reaction to a local event, the jailing of John T. Morris.<sup>226</sup> On the contrary, legislators in Maryland were reacting to a national scandal in Washington that involved the threatened jailing of a prominent journalist from Baltimore<sup>227</sup> – a national news event that sparked a nationwide lobbying campaign that led to shield-law bills in several states and talk of a federal shield law in Washington. A fresh look at early events such as these suggests that non-judicial actors, including journalists themselves, were beginning to articulate First Amendment justifications for a journalist privilege long before the argument was ever made in a court of law.<sup>228</sup> Sources for this research have included reports in the popular press and trade press, Congressional and state legislative reports, court filings, and archival material.

Textual analysis is used in two distinct ways: At times, the analysis focuses on the language of adopted statutes, as well as proposed statutes, to track the evolution in thinking on the journalist-privilege issue and the emergence of trends in lawmaking;

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<sup>226</sup> See, e.g., *The Reporter's Privilege Compendium: An Introduction*, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, available at <http://www.rcfp.org/privilege/item.php?pg=intro> (last visited Dec. 30, 2009). David Gordon was perhaps the first scholar to note that the jailing of John T. Morris could not have been the immediate impetus for the Maryland shield law because the Morris incident happened 10 years earlier. See Gordon, *supra* note 178.

<sup>227</sup> See, e.g., *War on the Correspondents: Senator Gray's Committee Has Its Way in Senate, The Newspaper Writers Who Refused to Betray Confidence in Danger of Criminal Indictment*, N.Y. TIMES, May 30, 1894, at A8 (detailing the start of a three-year legal struggle in which the Senate tried to force reporter John S. Shriver to reveal his sources for stories about alleged bribery in Washington, an incident that became known as the Sugar Tariff Scandal). See also *Trial of John S. Shriver: Another Recusant Witness of the Sugar Investigation in Court Before Judge Bradley*, N.Y. TIMES, June 16, 1897, at A4 (reporting on the long-awaited trial of reporter Shriver, in which the judge dismissed all charges and declined to force Shriver to testify).

<sup>228</sup> *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958).

other times, the analysis focuses on the rhetoric of debate as state legislators and members of Congress have weighed shield law proposals. The research shows, among other things, that the evolution of statutory language tracks closely to events in a given era, developments in legal scholarship, the emergence of new technologies, and reactions to adverse court opinions.<sup>229</sup> A small, but humorous, example was the way that some post-*Branzburg* shield laws expressly extended protection to pamphleteers.<sup>230</sup> Previous research by Packer, discussed earlier, provides an example of how a close reading of a Congressional debate can reveal much about the motives and aspirations of non-judicial actors, or at least the way they *portray* their motives and aspirations, while staking out positions on the issue.<sup>231</sup> This study employs a similar technique to gauge the presence and uses of First Amendment rhetoric by non-judicial actors – a key marker of “legislative constitutionalism,” or the theory that statutory law can protect and advance constitutional norms. The research indicates that as early as 1936, in Congress’ first hearing on the privilege issue, First Amendment rhetoric was in abundance.<sup>232</sup>

Case analysis comes to the fore in some chapters, but in a way that deviates slightly from traditional doctrinal analysis. Because legislative constitutionalism envisions judicial and non-judicial actors conducting an ersatz dialogue over time, dicta will be as important to this study as final holdings. How did judges answer the claims of

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<sup>229</sup> Smith, *supra* note 11 (describing the evolution of statutory language in light of new technology and as a reaction to *Branzburg*).

<sup>230</sup> The reference is to Justice White’s oft-quoted nod to “the lonely pamphleteer.” See *Branzburg*, 408 U.S. at 703.

<sup>231</sup> Packer, *supra* note 16.

<sup>232</sup> *Prohibiting Revelations of Confidential Communications Made to Editors, News Reporters, Correspondents, Journalists, and Publishers: Hearing on H.R. 10381 Before the H. Comm. on the Judiciary*, 74th Cong., 2nd Sess. (1936) (unpublished hearings).

non-judicial actors? How did they account, if at all, for the number of state shield laws accumulating on the books? Did non-judicial precedents exert any hortatory power at all? The research shows that judges in early First Amendment cases, including *Branzburg*, had to resort to discussion of non-judicial materials, including legal scholarship, in the absence of judicial precedents to cite.<sup>233</sup> As legal scholars turned from hostile to generally supportive of the idea of a qualified privilege for journalists, their work was used to support recognizing a qualified privilege in federal circuits that did so in the years after *Branzburg*. Tracing rhetoric from the non-judicial realm into the judicial realm helps illuminate the thought processes of judges, especially when viewed over a period as long as the history of journalist privilege.

Finally, because the author agrees with William Lee's assertion that the question of who should be covered by a journalist privilege has been *the* centrally important question throughout decades of debate,<sup>234</sup> the study uses this question as a unifying thread. The issue flared up as early as 1929, with the first failed attempt to adopt a federal shield law,<sup>235</sup> and it has been a serious stumbling block in recent debates over a federal law.<sup>236</sup> Nearly every chapter includes at least a brief discussion of this issue, and later chapters zero in on the journalist-definition as a focal point for debate over how the First Amendment should be interpreted, both in court decisions and in statutory shield laws. If

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<sup>233</sup> Dean C. Smith, *Statutory Shield Law in Constitutional Orbits: The Rise of the Covered Person Issue* (unpublished conference paper presented Aug. 7, 2009, Association for Education in Journalism and Mass Communication, Boston, Mass.) (on file with the author).

<sup>234</sup> Lee, *supra* note 15.

<sup>235</sup> Smith, *supra* note 226.

<sup>236</sup> Ansley Schrimpf, *Senators Announce Compromise on Federal Shield Bill*, NEWS RELEASE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Oct. 30, 2009, <http://www.rcfp.org/newsitems/index.php?i=11091>.



there is a close nexus between the evolution of statutory and constitutional law in a First Amendment-implicated area such as press rights – as “legislative constitutionalism” would suggest – then the covered-person issue should track closely in both realms over time. This goes to the heart of this study: It supports that nexus.

## **LIMITATIONS**

While media-law scholars could greatly benefit from a complete chronological history of the development of statutory shield laws in America, that task is far beyond the scope of this dissertation. Rather, each chapter focuses on a signal event as a snapshot that captures the state of the debate at a certain moment in time.

One of the difficulties in writing about state-level statutory law is the lack of legislative histories, especially in the early decades of the 20<sup>th</sup> century. Accounts in the popular and trade press must play a key role in sketching out debates in the legislatures and positions on the issue taken by legislators. Scholarly literature on state shield laws is scant, but some published articles provide insights into attitudes at the time various statutes were debated. Similarly, because some of the early court battles were unreported cases, this study frequently relies on accounts from the popular and trade presses. To try to avoid speculating about the motives of state legislators, textual analysis of shield laws emphasizes neutral observations of what the statutes actually say, the language that was actually adopted, as the clearest indication of what statute-drafters intended.

## CHAPTER II

### JOURNALIST PRIVILEGE IN THE 1890s: THE REAL STORY OF THE NATION'S FIRST SHIELD LAW

Legal historian Robert Gordon once said of 19th-century legal historiography, which focused narrowly on court decisions, it was “like listening to one side of a telephone conversation, with all its tantalizing ambiguities about what the other side is saying.”<sup>1</sup> Throughout the 20th century, legal historians broadened their focus to add richer and richer context to key developments – to explain law’s role in society, to challenge law’s autonomy, and to illuminate connections between law, culture, and politics.<sup>2</sup> Although history long had been viewed in the academy as a low priority for lawyers in training, it gained special prominence in the 1970s with the rise of Critical Legal Studies, which relied heavily on history to theorize law as a mechanism of social

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<sup>1</sup> Robert W. Gordon, *Recent Trends in Legal Historiography*, 69 LAW LIBR. J. 462, 465 (1976). He predicted:

[T]he older sort of doctrinal history ... is probably on its way out. ... [T]he newer (methods) are likely to emphasize similarities and connections – to compare courts to other means of dispute resolution and norm creation, to study legislative as well as judicial reasoning, to compare legal with other social sanctions, lawyers with other professionals, jurisprudence with philosophy and the social sciences.  
*Id.* at 467-68.

<sup>2</sup> See, e.g., JOHN E. SEMONCHE, KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT (1998) (casting constitutional law as a “civic religion” that binds society). See also TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ (Daniel W. Hamilton & Alfred L. Brophy, eds. 2010) (surveying impact of Horwitz’ critical approach on the field); Jonathan Rose, *Musing on Clio: Why Study the Past, History, and Legal History*, University of Texas Tarlton Law Library Legal History Series (2009) (recent address to legal historians surveying history of the field), available at <http://www.ssrn.com/abstract=1411875> (last visited Sept. 3, 2010).

architecture.<sup>3</sup> The nexus between that brand of theory and the field of history itself led Gordon in the 1990s to announce the arrival of a distinct branch of scholarship he dubbed Critical Legal History, the aim of which was to use the tools of the historian to upset or at least challenge conventional wisdom about a particular case or doctrine.<sup>4</sup>

A key strategy of that critical approach has been to shift attention from the final pronouncements of judges to the claims and aspirations of people outside the courts.<sup>5</sup> Administrative and statutory law scholar Peter Shane has explained the shift succinctly: “One way of understanding the capacity of nonjudicial actors to create the operational meaning of our Constitution is to relate the topic to a larger problem perennially plaguing U.S. constitutional theorists, namely, accounting for legal change.”<sup>6</sup> For that reason, constitutional-law scholars who do not necessarily consider themselves historians have increasingly incorporated history into their work to support various, and sometimes radical, theories: that constitutional law evolves over time through a kind of national dialogue;<sup>7</sup> that constitutional law is shaped by an ambient “constitutional culture” in

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<sup>3</sup> Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (first laying out his vision for how the theorizing of Critical Legal Studies would influence or be brought into the field of legal history). See also Cathy Packer, *The Politics of Power: A Social Architecture Analysis of the 2005-2008 Shield Law Debate in Congress*, 31 HASTINGS COMM. & ENT. L. J. 395 (2009) (bringing the post-modern idea of law as a social construct into the realm of media law and applying it to the privilege issue for the first time).

<sup>4</sup> Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1996-1997) (asserting that enough legal historians had taken up this style of historiography to dub it a branch of legal history).

<sup>5</sup> See, e.g., Michael J. Gerhardt, *Constitutional Decision-Making Outside the Courts*, 19 GA. ST. U. L. REV. 1123 (2002-2003).

<sup>6</sup> Peter M. Shane, *Voting Rights and the “Statutory Constitution,”* 56 L. CONTEMPORARY PROBLEMS 243 (1993) (arguing that statutes play a larger role than as mere policy, that they often are the mechanisms by which the government carries out broad constitutional mandates, such as the right to vote).

<sup>7</sup> Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1992-1993) (focusing on the relationship between Congress and the Court and casting their roles as co-equal interpreters of the Constitution).

which many people participate;<sup>8</sup> that alternative narratives of what the Constitution means should call into question whether the Supreme Court is the only, or even the best, interpreter;<sup>9</sup> and that judicial supremacy should be abandoned in favor of a more democratic system of interpretation.<sup>10</sup> In the First Amendment realm, Alexis J. Anderson has used history to show that we cannot possibly understand how notions of freedom of expression were changing in the late 19th century by studying only legal materials because new ideas were emerging in society long before lawyers gave voice to them in courts.<sup>11</sup> “The rubric of ‘First Amendment theory’ must be broadened,” she has written, to account for novel claims about what the First Amendment should mean – claims that were adopted by courts decades later.<sup>12</sup>

First Amendment scholar Jack Balkin has noted this “historical turn” among many scholars as they have shifted focus from “internal” twists of court-made doctrine to “external” influences – “understanding the law in its political, social, and historical

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<sup>8</sup> Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 9 (2003-2004) (arguing that the Supreme Court is much more responsive to politics outside the courts than it likes to admit and that this responsiveness is positive because it helps protect the court’s legitimacy in the eyes of the public).

<sup>9</sup> Mark Tushnet, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* x (2000) (arguing for a much weaker version of judicial review and greater deference to Congress and state legislatures).

<sup>10</sup> Larry D. Kramer, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2006) (calling for increased use of “direct democracy” methods, such as the Article V amendment process).

<sup>11</sup> Alexis J. Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, 24 AM. J. LEGAL HIST. 56 (1980). Anderson focuses on repressive local ordinances and the people who challenged them – usually African Americans, women, Communists and other disadvantaged minorities. Of them, she wrote, “By confronting the public with their free speech concerns, these nineteenth century individuals were instrumental in hammering out the principles behind a mature theory for protecting the free speech guarantee during the twentieth century.” *Id.* at 59.

<sup>12</sup> *Id.*

contexts.”<sup>13</sup> Balkin has used historical context to compare the legal formalism of the *Lochner* Era to the neo-formalism some see in the Court today, for example.<sup>14</sup> In a history-rich piece examining how a woman’s claim to a right to vote went from ridiculous<sup>15</sup> to obvious,<sup>16</sup> he proposed a Spectrum of Plausibility to describe how the claims of non-judicial actors can penetrate the legal realm and gain acceptance over time: Claims on the Constitution proceed in steps from 1) completely “off the wall,” to 2) “interesting but wrong,” to 3) “plausible but unconvincing,” to 4) “plausible and possibly right,” to 5) “the better argument,” to 6) “natural and completely obvious.”<sup>17</sup>

Michael Gerhardt’s theory of non-judicial precedents, more external than internal in focus, is especially helpful in illuminating the early stages of that process because it accounts for norms, customs and traditions created outside the courts.<sup>18</sup> Non-judicial precedents, he has written, “pre-exist judicially created constitutional doctrine and thus govern and shape particular constitutional matters unless or until they are addressed by

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<sup>13</sup> Jack M. Balkin, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEORGETOWN L. J. 173, 174-75 (2001) (praising the historically informed work of Mark Tushnet and others who have departed from traditional doctrinal analysis).

<sup>14</sup> Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 BOSTON U. L. REV. 677, 680-706 (2005) (arguing that the Court’s decision was perfectly in tune with the formalist era in judicial interpretation that did not fully disappear until as late as 1937).

<sup>15</sup> *Minor v. Happersett*, 88 U.S. 62 (1874) (denying women a right to vote under the 14th Amendment).

<sup>16</sup> Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 37 SUFFOLK U. L. REV. 27, 52 (2005). His key observation:

[T]he constitutional text and the materials of constitutional interpretation are *resources* for social movements, and successful social movements are those that make the most out of the limited resources the Constitution provides. ... Thus, the fact that a particular claim is “off the wall” at a particular point in history does not mean that it must always remain so.

*Id.* (emphasis in original).

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

<sup>18</sup> Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008) His definition: “I define non-judicial precedents as any past constitutional judgments of non-judicial actors that courts or other public authorities imbue with normative authority.” *Id.* at 715.

courts.”<sup>19</sup> For that reason, non-judicial precedents can be “history in the making” and help “chronicle constitutional history.”<sup>20</sup> Non-judicial judgments of constitutional meaning can remain and endure outside the courts – through statutory law, for example – but they also can create “background norms or default rules” that in time influence judicial precedents.<sup>21</sup>

***Statutes Revolving in Common Law Orbits.*** The claim that statutes can and do influence judge-made law is not new. More than 40 years ago, one of the nation’s most prominent judges, Roger Traynor, then Chief Justice of the California Supreme Court, urged judges to look more often to statutory law for inspiration when confronting legal questions for the first time.<sup>22</sup> “It would be wasteful for courts not to utilize such statutory materials when they are so readily available for analogy as well as for adoption,” he wrote.<sup>23</sup> Legislatures are more free than judges to make innovations in the law, to respond quickly to changes in society; legislature-made law often serves to reveal “a gap or aberration” in longstanding court-made law.<sup>24</sup> Traynor pointed to the changing role of

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<sup>19</sup> *Id.* at 716.

<sup>20</sup> *Id.* at 772.

<sup>21</sup> *Id.* at 774-75.

<sup>22</sup> Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401 (1967-1968).

<sup>23</sup> *Id.* at 416. Judge Traynor admonished those who would claim that court-made law exists in pristine isolation from inferior statutory law:

It should not surprise us that such judicial rules analogized from statute are at one with other judicial lawmaking. They always have been, despite the protestations of those who would have us believe that judicial rules and statutory rules are like set pieces of an automaton clock, springing from separate covertures to make wooden appearances at separate times.

*Id.*

<sup>24</sup> *Id.* at 402. Adding that his court in California sometimes looked to Congressional statutes for answers to novel problems, he wrote, “When there are riches available to a court, it should matter little whether geographically they are a few paces or many miles from the courthouse.” *Id.* at 420.

women in society in the late 19th century: At common law, they could not own property, manage an estate, enter into a contract, or file a lawsuit; in an age of legal formalism, that was not likely to change if left to judges.<sup>25</sup> Rather, state legislatures made the first move by adopting so-called Married Women Statutes, granting women “rights” that courts had denied.<sup>26</sup> In turn, judges began to build decisions based on those statutes, extending privileges far beyond the express terms of the laws themselves.<sup>27</sup> Thus, in Traynor’s view, legislatures and courts working in concert created “an impressive edifice resting upon statute”<sup>28</sup> and reflecting changing norms over time.<sup>29</sup>

The primary goal of this chapter will be to show how a process like the one Traynor described emerged in the late 19th century with regard to protecting confidential sources. It will do this by applying Gerhardt’s theory of non-judicial precedents to a key moment in journalist privilege history: creation of the nation’s first statutory shield law in Maryland in 1896. It will show that the events leading up to and following adoption of that statute exhibited many of the key functions Gerhardt has ascribed to non-judicial precedents: 1) “serving as modes of constitutional argumentation,” 2) “facilitating national dialogues on constitutional law,” 3) “settling legal disputes” outside the courts,

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<sup>25</sup> *Id.* at 412.

<sup>26</sup> *Id.* at 413.

<sup>27</sup> *Id.* at 414-15.

<sup>28</sup> *Id.* at 413 (quoting James Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 223 (1934) ).

<sup>29</sup> He could have added that the 19th Amendment giving women the right to vote was itself based on a statute, adopted in Wyoming 1869. *See* An Act to Grant to the Women of Wyoming Territory the Right of Suffrage and to Hold Office, 1869 Wyo. Sess. Laws 371. Five years later, the U.S. Supreme Court would decline to grant women the right to vote under the Fourth Amendment. *See* Minor v. Happersett, 88 U.S. 162 (1874).

and 4) shaping “constitutional culture and history.”<sup>30</sup> These events, from 1894 through 1897, unfolded decades before claims of a journalist privilege based on the First Amendment plausibly could be made in court.<sup>31</sup> Yet as Gerhardt’s theory would predict, non-judicial actors at the time were beginning to articulate First Amendment rationales. Their success in securing a statutory shield law moved their claim to a privilege into the legal realm for the first time, enhanced the plausibility of that claim, and increased the chances of judicial recognition in the future.

A second important goal of this chapter will be to correct the record surrounding passage of Maryland’s landmark law. A mistake printed in 1934<sup>32</sup> – attributing the law to the jailing of Baltimore *Sun* reporter John T. Morris in 1886 – has been perpetuated in books<sup>33</sup> and scholarly articles<sup>34</sup> for more than 70 years. Original historical research will

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<sup>30</sup> See Gerhardt, *supra* note 18, at 717.

<sup>31</sup> A First Amendment claim was not made in a federal court until 1958. See *Garland v. Torre*, 259 F.2d 545 (2nd Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

<sup>32</sup> Ellen Ryniker, *Press Winning Fight to Guard Sources*, EDITOR & PUBLISHER, Sept. 1, 1934, at 9 (basing the connection on an account of events written by contemporary editors at the Baltimore *Sun* at a time when the Baltimore *American* no longer existed and participants in the events were no longer on the scene).

<sup>33</sup> See, e.g., NORMAN PEARLSTINE, *OFF THE RECORD: THE PRESS, THE GOVERNMENT, AND THE WAR OVER ANONYMOUS SOURCES* 157 (2008); MATTHEW W. SEEGER, *FREE SPEECH YEARBOOK* 27 (2000); C. THOMAS DIENES, LEE LEVINE & ROBERT C. LIND, *NEWSGATHERING AND THE LAW* 648 (1997); MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA* 27 (1992); WILLIAM E. FRANCOIS, *MASS MEDIA LAW AND REGULATION* 404 (1986); MATTHEW PAGE ANDREWS, *HISTORY OF MARYLAND: PROVINCE AND STATE* 591 (1965); CURTIS DANIEL MACDOUGALL, *THE PRESS AND ITS PROBLEMS* 319 (1964); WALTER A. STEIGLEMAN, *THE NEWSPAPERMAN AND THE LAW* 197 (1950); GERALD WHITE JOHNSON & FRANK RICHARDSON KENT, *THE SUN PAPERS OF BALTIMORE* 215 (1937).

<sup>34</sup> See, e.g., Kyu Ho Youm, *International and Comparative Law on the Journalist's Privilege: The Randal Case as a Lesson for the American Press*, 1 J. INT'L MEDIA & ENT. L. 1, 9 (2006-2007); Nathan Fennessy, *Bringing Bloggers Into the Journalistic Privilege Fold*, 55 CATH. U. L. REV. 1059, 1073 (2005-2006); Sharon K. Malheiro, *Journalist's Reportorial Privilege: What Does It Protect and What Are Its Limits*, 38 DRAKE L. REV. 79, 85 (1988-1989); J.S. Bainbridge, Jr., *Subpoenaing the Press*, 74 A.B.A. J. 68, 72 (1988); Phillip Randolph Roach, Jr., *Newsman's Confidential Source Privilege in Virginia*, 22 U. RICH. L. REV. 377, 387 (1987-1988); Diane Geraghty & Alan Raphael, *Reporter's Privilege and Juvenile Anonymity: Two Confidentiality Policies on a Collision Course*, 16 LOY. U. CHI. L.J. 43 (1984-1985); John J. Watkins, *The Journalist's Privilege in Arkansas*, 7 UALR L. J. 473, 477 (1984); Stephen R. Hofer, *Fallacy of Farber: Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases*, 70 J. Crim. L. &



show definitively that the law was not prompted by the Morris affair of 1886 but by the criminal indictments of reporters John S. Shriver and Elisha J. Edwards in 1894; passage of the law was not connected to local events but was sparked by a national scandal unfolding in Washington; the drive for a shield law was not isolated to Maryland but was part of a national effort that included talk of a federal shield law; and the Maryland effort did not emanate from the Baltimore *Sun* but from the Baltimore *American*, one of whose editors actually drafted the law. This shift in perspective is important because it shows that journalists and press advocates were not merely reacting to a local problem but succeeded in putting their grievance with the courts and their claim to a privilege on the national agenda.<sup>35</sup> The signaling function of non-judicial precedents – to galvanize opinion and talk back to courts – is a key feature of Gerhardt’s theory.<sup>36</sup>

The chapter will address these research questions: How have non-judicial actors responded to judicial decisions? How have they shaped the debate over journalist privilege? What rationales for a testimonial privilege have they articulated, and how, if at all, have those rationales changed over time? The study will show that journalists and press advocates in the late 19th century were in a strong position to assert a professional status for journalists and analogize a journalist-source privilege to an attorney-client privilege. After a string of court defeats stretching back decades, they were self-

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Criminology 299, 302 (1979); Bruce L. Bortz & Laurie R. Bortz, *Pressing Out the Wrinkles in Maryland's Shield Law for Journalists*, 8 U. Balt. L. Rev. 461 (1978-1979); Robert L. Berchem, *Evidence: Privilege: Statutory Privilege Against Disclosure of Reporter's Sources Should Be Liberally Construed to Include Information in Documents*, 9 VILL. L. REV. 155, 158 (1964); W.D. Lorensen, *The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed*, 35 NEB. L. REV. 562, 574 (1955-1956); B.K.K., *The Right of a Newsmen to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61 (1950); Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM QUARTERLY 230 (1943).

<sup>35</sup> *Id.* at 765-66.

<sup>36</sup> *Id.*

consciously aware of seizing a high-profile dispute in Washington to shape a test case that might focus public attention on the issue. Moving beyond unsuccessful normative arguments based on personal honor and professional ethics, they were pioneering Constitutional arguments based on the Fifth Amendment and, without expressly citing the First Amendment, freedom of the press. Finally, they were thinking strategically by launching a national campaign to adopt statutory shield laws in the states and, in turn, pointing to such laws as evidence of public support for their position.

The first part of this chapter will sketch the position of the press in society in the late 19th century and its legal footing when the Shriver-Edwards affair unfolded. The second part will profile key non-judicial actors driving events, including a former judge-turned-celebrity attorney and a Civil War hero-turned-newspaper publisher. The next four parts will reconstruct events year by year and link them to passage of the Maryland shield law – a connection that never has been shown. The final part will offer an interpretation of these events through the lens of Gerhardt’s theory of non-judicial precedents.

## **POSITION OF THE PRESS IN SOCIETY**

Journalism historian W. Joseph Campbell, in his critically acclaimed study *The Year That Changed Journalism: 1897 and the Clash of Paradigms*, cited the trial of reporters John S. Shriver and Elisha J. Edwards<sup>37</sup> as one of the hallmarks of a transformation under way in the 1890s, a turn that led American journalism away from

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<sup>37</sup> SUPREME COURT OF THE DISTRICT OF COLUMBIA: UNITED STATES V. JOHN S. SHRIVER AND ELISHA J. EDWARDS: RECORD OF PROCEEDINGS AND ARGUMENTS OF COUNSEL (1897); *hereinafter* SHRIVER. Only Shriver actually stood trial. The court dismissed the case against Edwards based on the result in Shriver’s case. Shriver’s newspaper, the *Mail and Express* in New York, memorialized the events with a book it self-published, compiling the court decisions along with key court filings and Senate reports. This citation is to that book rather than the court case and, for convenience, will be used throughout.

the parochial traditions of the 19th century and toward a more professional model for the 20th.<sup>38</sup> Journalists were trading their pencils and note pads for the newest model typewriters,<sup>39</sup> and the first half-tone photographs appeared in print.<sup>40</sup> President William McKinley's inauguration was captured on film, pointing to news reels of the future, and Guglielmo Marconi incorporated the first wireless telegraph company, an innovation that soon would accelerate journalism to 20th-century speed.<sup>41</sup> Reporters like Francis Scovel were defining what it meant to be a "star reporter," and bylines atop stories were proliferating.<sup>42</sup> Perhaps most significant, the "yellow journalism" of William Randolph Hearst's *New York Journal* was being eclipsed by the objective reporting style of Adolph Ochs' *The New York Times*.<sup>43</sup> The professionalization movement was under way.<sup>44</sup>

***Legal Footing of the Press.*** Unfortunately for journalists, the law was not keeping pace with progress in the field. The First Amendment was languishing in its "forgotten years," before the U.S. Supreme Court began to map the contours of its

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<sup>38</sup> W. Joseph Campbell, *THE YEAR THAT CHANGED JOURNALISM: 1897 AND THE CLASH OF THE PARADIGMS* 13 (2006). Campbell devotes only a paragraph to the case, but he pegs its significance: Although Shriver won on a technicality, journalists at the time interpreted it as a victory for a testimonial privilege, putting them on the same professional plane as attorneys and doctors.

<sup>39</sup> *Id.* at 14-16.

<sup>40</sup> *Id.* at 21-22.

<sup>41</sup> *Id.* at 3.

<sup>42</sup> *Id.* at 122-30.

<sup>43</sup> *Id.* at 69-118.

<sup>44</sup> Campbell summed up the period:  
American journalism faced the riptide of profound change in the late nineteenth century, and emerged the stronger for it. The turbulence of 1897 helped give rise to a newsgathering model that has served American journalism well for more than 100 years.  
*Id.* at 200.

modern jurisprudence with the famous quartet of free speech cases in 1919.<sup>45</sup> Between 1791 and 1889, the Court heard only 12 First Amendment cases; between 1890 and 1917, it heard 53, about two a year.<sup>46</sup> All of these cases, constitutional scholar Michael Gibson has observed, “are examples of how the Constitution’s guarantees of free speech and a free press should not be interpreted.”<sup>47</sup> The Court did not adjudicate a Press Clause case until 1907, in *Patterson v. Colorado*,<sup>48</sup> and there the Court ruled the First Amendment did not provide a basis to strike down a contempt-of-court conviction against a newspaper.<sup>49</sup> The same year as Shriver’s trial, in 1897, journalists saw a glimmer of change in a ruling by a federal court in Virginia – where newspaper lawyers successfully used the First Amendment to get a tax on newspapers in Norfolk struck down – but that groundbreaking decision was reversed by the Supreme Court of Appeals in Richmond.<sup>50</sup> Presaging the Supreme Court’s decision in *Patterson*, the Court of Appeals said flatly, “A tax imposed upon the business of publishing a newspaper is not an abridgement of the freedom of the press.”<sup>51</sup>

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<sup>45</sup> See generally DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS: 1870-1920* (1999).

<sup>46</sup> Michael T. Gibson, *The Supreme Court and Freedom of Expression From 1791 to 1917*, 55 *FORDHAM L. REV.* 263, 270 (1986-1987). Gibson points out that many of the procedural and substantive rules created by the Judiciary Act of 1789 simply precluded the Court’s hearing many speech and press cases. For example, declaratory judgments were not allowed, and the court was severely limited in its authority to review lower court decisions. *Id.* at 267-69.

<sup>47</sup> *Id.* at 267.

<sup>48</sup> 205 U.S. 454 (1907).

<sup>49</sup> See Gibson, *supra* note 9 at 283-90. Justice Oliver Wendell Holmes wrote the decision, which Gibson called “a narrow and dangerous interpretation of the First Amendment.” *Id.* at 286. In recanting the decision later, Holmes said, “I surely was ignorant.” *Id.* at 288.

<sup>50</sup> That court would become what we know today as the Fourth Circuit U.S. Court of Appeals. See *City of Norfolk v. Norfolk Landmark Publishing Co.*, 3 VA. L. REG. 890 (1897-1898).

<sup>51</sup> *Id.* at 891.

In his seminal history of journalism, Frank Luther Mott said of the decade of the 1890s, “[f]ew important attacks on freedom of the press are to be noted.”<sup>52</sup> That could not be further from the truth. As the Shriver-Edwards affair began, in 1894, a newspaper in Illinois was fined \$50,000 in a libel suit for an article it did not even write; the winning plaintiff then vowed to sue every paper in the country that ran the Associated Press item at issue.<sup>53</sup> In 1895, a California judge held a reporter in contempt of court and ordered him to serve 100 days in jail and pay a fine of \$2,000 – an enormous sum in that day.<sup>54</sup> That same year, New York *Sun* editor Charles Dana was arrested and charged with criminal libel in a case that was covered nationwide as front-page news.<sup>55</sup> The same year as the Shriver-Edwards trial, in 1897, there was a drive in state legislatures to pass statutes making it libelous to publish a photograph without someone’s permission.<sup>56</sup> Also that year, Shriver’s ally Gen. Agnus was sued for \$100,000 in another libel case that made national headlines – the 53rd suit against the publisher.<sup>57</sup>

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<sup>52</sup> Frank Luther Mott, *AMERICAN JOURNALISM: A HISTORY: 1690-1960* 605 (3rd ed. 1962).

<sup>53</sup> See *An Extraordinary Verdict*, *FOURTH ESTATE*, Jan. 11, 1894, at 4. The wire service defense did not emerge until 1933. See *Layne v. Tribune Co.*, 108 Fla. 177 (1933); James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 *HASTINGS COMM. & ENT. L.J.* 455, 458–66 (1991).

<sup>54</sup> *American Law Review*, *Newspaper Enterprise and Contempt of Court*, 29 *AM. L. REV.* 585 (1895). The writer mockingly predicted journalists would depict the verdict as “muzzling the freedom of the press.” *Id.*

<sup>55</sup> Dana ultimately won. See, e.g., *Sues Charles Dana for Libel*, *CHICAGO DAILY TRIBUNE*, Feb. 23, 1895, at 1; *C.A. Dana Indicted, He and W.M. Laffan Charged With Criminal Libel*, *CHICAGO DAILY TRIBUNE*, Mar. 8, 1895, at 1; *They Saw It in The Sun, Says It's Not So and Brought Suit Against Mr. Dana*, *ATLANTA CONSTITUTION*, Mar. 9, 1895, at 1; *In Favor of Editor Dana*, *WASH. POST*, Jun. 25, 1895, at 1.

<sup>56</sup> *American Law Review*, *Preventing Newspaper From Publishing Portraits of Persons Without Their Consent*, 31 *AM. L. REV.* 421 (1897).

<sup>57</sup> Agnus ultimately won. See, e.g., *Wellington Charges Libel, Gen. Felix Agnus Prosecuted by the Maryland Senator*, *N.Y. TIMES*, Dec. 1, 1897, at 1; *Wellington Turned Down, Grand Jury Ignores the Libel Charge Against Gen., Agnus*, *WASH. POST*, Dec. 16, 1897, at 1.

In fact, from 1894 to 1897, the press felt so threatened during this period that it mounted an unprecedented lobbying campaign to rewrite libel laws to stanch a deluge of lawsuits that had given rise to the phrase “the libel industry.”<sup>58</sup> Press associations in the states, inspired by a successful campaign in Georgia, began to lobby state legislatures to adopt uniform libel laws,<sup>59</sup> chiefly to bar plaintiffs from collecting punitive damages if a newspaper had printed a retraction and making it a misdemeanor for lawyers to file nuisance suits that had little chance of success.<sup>60</sup> At the federal level in 1894, the American Newspaper Publishers’ Association began a lobbying campaign to persuade Congress to pass a libel law that would supersede state statutes and thus harmonize the law nationwide.<sup>61</sup> The Shriver-Edwards affair would add a campaign for shield laws to these ongoing efforts.<sup>62</sup>

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<sup>58</sup> As *The Sun* summed up the situation: “The law of libel as far as newspaper are concerned is chiefly employed at the present day for blackmailing purposes, or to silence or punish journalists whose criticisms have stung or terrified political offenders and plunders.” See Editorial, *Amend the Law of Libel*, *SUN* (Baltimore, Md.), Feb. 27, 1894, at 4.

<sup>59</sup> *Id.* (noting bills had been submitted in the legislatures of New York, New Jersey, and Massachusetts). See also Special to *The Sun*, *Virginia Legislature, A newspaper Libel Bill*, *SUN* (Baltimore, Md.), Feb. 1894, at 2 (on debate in Virginia about adopting a new statute); *Leads the World in Journalism, Gen. Atkins’ Tribute to Chicago Papers, New Libel Laws Needed*, *CHICAGO DAILY TRIBUNE*, Feb. 22, 1894, at 10 (detailing lobbying efforts in Illinois).

<sup>60</sup> These drives were the seeds for retraction statutes and anti-SLAPP statutes, common fixtures in media law today but bitterly opposed by the legal community at the time. See, e.g., D.M. Mickey, *Reforms in the Law of Newspaper Libel*, 42 *CENT. L.J.* 475 (1896).

<sup>61</sup> See *A National Law: Libel Measure Endorsed by Publishers*, *FOURTH ESTATE*, March 15, 1894, at 1; *The Libel Laws: Text of the Ainsworth Bill as Amended*, *FOURTH ESTATE*, March 22, 1894, at 1.

<sup>62</sup> A final word about the shifting landscape in libel law: This era also saw the roots of the “actual malice” defense, which some might think sprang from whole cloth in *New York Times v. Sullivan*. In an 1894 case against the *Buffalo Express*, the newspaper’s lawyers argued that “unless the defendants were moved by actual malice in the publication of the libel, the jury should not award damages by way of punishment.” The judge in the case agreed, saying, “Yes, I charge you they must be moved by actual malice if you find they failed to make an investigation as the truthfulness of the charge.” On that basis, the jury found the paper liable. See *Another Libel Decision*, *FOURTH ESTATE*, July 26, 1894, at 2.

*Status of the Privilege.* Journalist-privilege disputes played out most often in state courts, and journalists' claims to a testimonial privilege at common law were summarily dismissed as novel and absurd.<sup>63</sup> From a modern perspective, it would seem surprising that a First Amendment argument was not pressed in court until 1958<sup>64</sup> in light of the number of disputes in the 19th century that pitted the press against the U.S. Congress. As journalism historian and ethicist Robert Spellman has documented,<sup>65</sup> there were a dozen high-profile cases involving journalists threatened under Congress' self-asserted contempt power during the century, starting with the four-day imprisonment of William Duane in 1800<sup>66</sup> and ending with Shriver's trial in 1897. In 1848, jailed reporter John Nugent mounted the first legal challenge to Congress' contempt power, but not on First Amendment grounds. Nugent argued simply that Congress had exceeded its authority under the Constitution by giving itself quasi-judicial power; the judge in his case dispensed with the constitutional argument by saying Congress had that power as a matter of common law.<sup>67</sup> Nine years later, emboldened by that victory and incensed by

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<sup>63</sup> See, e.g., *People ex rel. Phelps v. Fancher*, 2 Hun. 226 (N.Y. 1874); *Pledger v. State*, 3 S.E. 320 (Ga. 1887); *People v. Durant*, 48 P. 75 (Cal. 1897). The most notable exception would be the conviction of John Nugent in 1848, often cited as the first significant case of the Congress holding a journalist in contempt, a case heard in a federal court in the District of Columbia. See *Ex Parte Nugent*, 18 F. Cas. 471 (1848).

<sup>64</sup> See *Garland v. Torre*, 259 F.2d 545 (2nd Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

<sup>65</sup> Robert Spellman, *Defying the Law in the 19th Century: Journalist Culture and the Source Protection Privilege* (conference paper presented at the annual meeting of the International Communication Association, May 17-31, 2004, New Orleans) (on file with the author).

<sup>66</sup> *Annals of the Congress: The Debates and Proceedings in the Congress of the United States*, 6th Cong., 1st Sess. 63 (1800).

<sup>67</sup> Spellman has constructed a detailed account of the incident and the judicial ruling against Nugent. See Spellman, *supra* note 65, at 8-12.

bribery accusations in *The New York Times*,<sup>68</sup> Congress codified its common law contempt power into a statute making it a misdemeanor for anyone to refuse to testify.<sup>69</sup>

Shriver and Edwards were the only journalists ever prosecuted under that statute.<sup>70</sup> Yet their defense team did not use the occasion to advance a First Amendment argument. In light of the Supreme Court's non-existent First Amendment jurisprudence, such a claim would have seemed absurd or, to quote Balkin, "off the wall."<sup>71</sup> The case was nonetheless important because, as Spellman concluded, "protecting sources in defiance of the law solidified in the second half of the century as the press corps became larger, more professional and more concentrated along newspaper row."<sup>72</sup> The individual choice of refusing to testify, by 1897, had hardened into an accepted and expected profession-wide norm,<sup>73</sup> and this study will show, journalists began to justify that norm by tying it to freedom of the press as a deeply engrained part of America's national ethos.<sup>74</sup>

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<sup>68</sup> *Id.* at 12-15 (recounting the case against *New York Times* reporter James Simonton).

<sup>69</sup> 2 U.S.C. §192. It currently reads:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

*Id.*

<sup>70</sup> See Spellman, *supra* note 65, at 38.

<sup>71</sup> See Balkin, *supra* note 16, at 52.

<sup>72</sup> See Spellman, *supra* note 65, at 41.

<sup>73</sup> *Id.* at 41-42.

<sup>74</sup> This phenomenon – of popular discourse pushing its way into legal discourse – has been dubbed "law talk" by legal historian Steven Wilf, who has shown that the way ordinary people talked about law and



## KEY NON-JUDICIAL ACTORS IN THE SHRIVER-EDWARDS AFFAIR

The Shriver-Edwards affair was the 19<sup>th</sup>-century equivalent of the Judith Miller affair of 2005<sup>75</sup> – a high-profile dispute that journalists thrust into headlines to spark a national debate, which led to a major lobbying effort to adopt shield laws in the states and in the U.S. Congress. Journalists were able to seize on the Shriver-Edwards affair as a *cause celebre* partly because of the high profile of the non-judicial actors involved: two Ivy League-educated journalists, one of whom held a J.D. from Yale Law School; a former judge who had become a celebrity attorney, a Johnny Cochran of his day; and a decorated Civil War hero who had become the powerful publisher of the *Baltimore American* newspaper and an active politician on the national scene.

**John S. Shriver.** Shriver was not just “any tramp reporter,” as one legal writer called journalists in reaction to passage of the Maryland shield law.<sup>76</sup> He was a scion of one of Maryland’s most famous families, the Shrivvers of Baltimore.<sup>77</sup> He was the grandson of John S. Shriver and son of J. Alexander Shriver, both early presidents of the

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justice in the 18th century did in time affect the direction of American law in its formative years. STEVEN WILF, *LAW’S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA* 1-4 (2010).

<sup>75</sup> See, e.g., Kelley Vlahos, *Journalists Press for Protection in Wake of Plame Prosecution*, FOX NEWS CHANNEL, Aug. 09, 2005, available at <http://www.foxnews.com/story/0,2933,165131,00.html> (last visited Mar. 10, 2011); Press Release, *Jail Time for Miller Stresses the Need for Federal Shield Law*, NEWSPAPER ASSOCIATION OF AMERICA, July 6, 2005, available at <http://www.naa.org/PressCenter/SearchPressReleases/2005/Jail-Time-for-Miller-Stresses-the-Need-for-Federal-Shield-Law.aspx> (last visited Mar. 10, 2011); Press Release, *In Light of Miller/Cooper Case, a Federal Shield Law Is Vital for Freedom of the Press*, PEN CENTER USA, July 6, 2005, available at <http://penusa.org/go/news/comments/194> (last visited Mar. 10, 2011).

<sup>76</sup> John Henderson Garnsey, *Demand for Sensational Journals*, 18 ARENA 683 (November 1897).

<sup>77</sup> More recent members included Robert “Sargent” Shriver, Jr., Eunice Kennedy Shriver, Maria Shriver.

transportation empire built around the historic Ericsson Line.<sup>78</sup> The younger Shriver was born into wealth in 1857, started his own home-printed newspaper as a boy, and went on to graduate from Princeton University with honors in 1878. The author of three books,<sup>79</sup> Shriver worked for much of his journalism career as a correspondent for *The* (Baltimore) *American* newspaper;<sup>80</sup> at the time of the events recounted in this chapter, he was working as a Washington correspondent for the New York *Express and Mail*. Based in Washington as a correspondent for 25 years, he was a founding member of the Gridiron Club for journalists.<sup>81</sup> Perhaps because of his prominent background, Shriver was on friendly terms with Presidents Harrison, McKinley, and Roosevelt; President Taft, a lifelong friend, was a pallbearer at his funeral in 1915.<sup>82</sup>

***Elisha J. Edwards.*** Edwards was the scion of one of the nation's most famous families,<sup>83</sup> the branch of the Edwards family that traced its roots to the great American theologian-philosopher Jonathan Edwards.<sup>84</sup> Born in Norwich, Conn., in 1847, he

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<sup>78</sup> The line was significant because it was the first in the nation to use propeller-driven ships, as opposed to steam-driven. See, e.g., *Death of Mr. Shriver, Well-Known President of the Ericsson Line of Steamers*, SUN (Baltimore, Md.), March 2, 1891, at 4.

<sup>79</sup> "Almost, a Novel," published in 1888, about the adventures of an impressionable young man traveling with his two aunts across Europe; "Through the South and West With the President, April 14-May 15, 1891," published in 1891 and billed as "the only complete and authorized collection of President Harrison's great and eloquent speeches made during the tour"; and "The Conduct of the War," published in 1898, a correspondent's chronicle of the Spanish-American War.

<sup>80</sup> See *John S. Shriver Dead, For Many Years a Washington Correspondent*, SUN (Baltimore, Md.), April 12, 1915, at 12.

<sup>81</sup> Obituary, *John S. Shriver*, N.Y. TIMES, Apr. 12, 1915, at 9.

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

<sup>83</sup> Jonathan Edwards' biographer, George Marsden, has written that "the Edwards family produced scores of clergymen, thirteen presidents of higher learning, sixty-five professors, and many other persons of notable achievements." See George Marsden, JONATHAN EDWARDS: A LIFE 500-01 (2003).

<sup>84</sup> Elisha Jay Edwards, *Greenwich: A Community of Beautiful Estates*, CONNECTICUT MAGAZINE, Vo. XI (1907) at 619 (containing a short biography of the author by the editor of the magazine).

graduated from Yale University in 1870 and Yale Law School in 1873; he went on to earn a doctorate in law from Seton Hall College in 1898.<sup>85</sup> While his rich journalism career included a stint as managing editor of *The New York Evening Sun*, he gained national and international acclaim writing under the pen name “Holland.”<sup>86</sup> Beginning in 1889, Edwards as Holland sent nearly daily dispatches to the *Philadelphia Press* that tartly addressed topics as diverse as business and finance, art and culture, law and society.<sup>87</sup> An instant success, these letters were syndicated nationally and widely read throughout the United States and Europe.<sup>88</sup> His most famous dispatch, besides the one that is the focus of this chapter, was one in which he disclosed that President Cleveland secretly had cancer.<sup>89</sup> As E.J. Edwards, he wrote voluminously for *The Wall Street Journal*, *The New York Times*, *The Atlanta Constitution*, and numerous magazines until his death in 1924.<sup>90</sup>

**A.J. Dittenhoefer.** Shriver and Edwards hired Dittenhoefer to represent them. He was something of a Johnny Cochran of his day. Dittenhoefer gained fame for representing Enrico Caruso when the opera star was accused of “molesting” a woman at

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<sup>85</sup> *Id.*

<sup>86</sup> Marson La France, *A Few Facts About Stephen Crane and “Holland,”* AMERICAN LITERATURE, Vol. 37, No. 2, 195-202, 197 (May 1965).

<sup>87</sup> Edwards’ interest in the law is evident in many of his articles. *See, e.g.,* E.J. Edwards, *Members of the Supreme Court as Human Beings*, N.Y. TIMES, May 15, 1910, at SM6.

<sup>88</sup> Biographical Record of the Class of ’70, in YALE UNIVERSITY: 1870-1904 75-76 (Lewis W. Hicks ed., 1904).

<sup>89</sup> Robert H. Ferrell, ILL-ADVISED: PRESIDENTIAL HEALTH AND PUBLIC TRUST 9 (1996).

<sup>90</sup> *See Holland Dead*, WALL STREET JOURNAL, April 28, 1924, at 2; Obituary, *Elisha Jay Edwards*, N.Y. TIMES, April 27, 1924, at S6.

the Brooklyn Zoo.<sup>91</sup> His oft-cited claim to fame was that he was the last surviving elector who had cast a vote giving Lincoln the presidency in 1864.<sup>92</sup> Lincoln later offered him a federal judgeship in his native South Carolina, but he turned it down.<sup>93</sup> Dittenhoefer graduated first in his class from Columbia University, was admitted to the New York bar at age 21, and was a year later selected as a judge for the City Court of New York.<sup>94</sup> As an expert in law related to the theater, especially contract and copyright law, Dittenhoefer was instrumental in lobbying for changes to U.S. copyright law to better protect theatrical materials.<sup>95</sup> On behalf of the press, he successfully defended the legality of New York's placement of newspaper stands on the streets.<sup>96</sup> In 1897, *The American Lawyer* cited his defense of Shriver and Edwards as a milestone of his career.<sup>97</sup>

**Gen. Felix Agnus.** Behind the scenes, Agnus was the main connection linking Shriver's plight with the Maryland shield law. He was a decorated war hero of both Napoleon's army in France and the Union Army during the Civil War.<sup>98</sup> After the war, he joined the staff of the *Baltimore American* and became its publisher in 1883,<sup>99</sup> a job he

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<sup>91</sup> See *Caruso Convicted But Will Appeal*, N.Y. TIMES, Nov. 24, 1906, at 1. Caruso paid the \$10 fine and soon dropped his appeal for fear of more bad publicity.

<sup>92</sup> *American Lawyer, History of the Bench and Bar of the Greater New York*, 5 AM. LAW. 345, 363 (1897).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See *Judge Dittenhoefer Dies of Hemorrhage*, N.Y. TIMES, Feb. 4, 1919, at 13.

<sup>96</sup> See *American Lawyer*, *supra* note 91, at 363.

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

<sup>98</sup> See *Gen. Agnus Passes at Baltimore*, L.A. TIMES, Nov. 1, 1925, at 7.

<sup>99</sup> *Id.*

held for nearly 40 years.<sup>100</sup> He also was a founding member of the Associated Press.<sup>101</sup>

Born in 1839 in Lyons, France, Gen. Agnus nonetheless became an influential player in the Republican party in the United States<sup>102</sup> and, at the time of the events in this chapter, was being courted to run for the U.S. Senate to represent Maryland.<sup>103</sup>

***Press Clubs.*** The advantage that these men had over journalists involved in earlier privilege disputes can be attributed to a hallmark of the professionalization movement: organization. “The nineties were the great years of the press clubs,” historian Frank Luther Mott has said of this decade.<sup>104</sup> These organizations helped bring journalists together, helped them develop higher standards, and helped transform the image of the drunken Bohemian into that of a competent professional.<sup>105</sup> Once organized, they were better able to mobilize and make coordinated campaigns to affect the law.<sup>106</sup>

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<sup>100</sup> Unsigned, *Munsey Buys Two Papers*, N.Y. TIMES, Nov. 20, 1920, at 12.

<sup>101</sup> Unsigned, *Associated Press*, SUN (Baltimore, Md.), Feb. 14, 1895, at 6.

<sup>102</sup> Unsigned, *General Agnus One of Big Four*, N.Y. TIMES, May 4, 1916, at 22 (reporting that he would be a “super delegate” at the Republican National Convention that year).

<sup>103</sup> Editorial, *Gen. Agnus for Senator*, WASH. POST, Nov. 14, 1895, at 6.

<sup>104</sup> See Mott, *supra* note 52, at 604.

<sup>105</sup> Unsigned, *The Influence of Press Clubs*, FOURTH ESTATE, March 8, 1894, at 10. The writer summed up: “The old order has changed, giving place to new, and the press club is responsible in a large measure for the metamorphosis. The Saloon is no longer the newspaper man’s home.” *Id.*

<sup>106</sup> Eric Easton, *The Press as an Interest Group: Mainstream Media in the United States Supreme Court*, 14 UCLA ENT. L. REV. 247 (2007). Easton’s empirical study of 100 cases involving the journalistic press showed a winning average of 53 percent, a slimmer margin than he had anticipated, but it showed conclusively that coordinated efforts by, among others, the American Newspaper Publishers Association contributed to press success. *Id.* at 259. Other scholars have observed that that win-loss ratio has not yielded the kind of robust First Amendment protection the journalistic press needs to encourage serious public-interest journalism – the very thing the Court has said warrants constitutional protection. See William Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169 (1994).

Both Gen. Agnus and Shriver were longtime members of the Journalists' Club of Baltimore, one of the oldest<sup>107</sup> and most politically influential of the press clubs.<sup>108</sup> That Baltimore club was intimately entwined in Maryland politics, for many of the state's leading politicians were former journalists and newspaper owners.<sup>109</sup> (The governor at the time, Lloyd Lowndes, was owner of the *Cumberland Daily News*.)<sup>110</sup> On the eve of the Shriver-Edwards affair, the club hosted a talk by U.S. Vice-President Adlai Stevenson and, fatefully, a discussion by two U.S. Senators about legislation to change tariffs on commodities such as sugar.<sup>111</sup>

Gen. Agnus was also a founding member and officer of the International League of Press Clubs, an umbrella organization of more than 40 press clubs stretching from Philadelphia to Portland, Ore.<sup>112</sup> While most clubs were segregated by gender,<sup>113</sup> the league was the first to bring journalists of both sexes together, and many of its earliest officers were women.<sup>114</sup> The club was organized in 1891 and was launched with great

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<sup>107</sup> It was started in 1884. See Unsigned, *Maryland Legislature*, SUN (Baltimore, Md.), March 28, 1884, at 4 (announcing that incorporation of the club had been approved).

<sup>108</sup> The club routinely had national political leaders at its meetings as guests and speakers, and reports of its meetings made it into The New York Times. See, e.g., Unsigned, *Wilson and Reed to Discuss the Tariff, Baltimore Journalists Will Listen to Interesting Addresses*, N.Y. TIMES, Dec. 24, 1893, at 8.

<sup>109</sup> See Gordon, *supra* note 18 at 38.

<sup>110</sup> See Biographical Series, *Lloyd Lowndes, Jr. (1845-1905)*, ARCHIVES OF MARYLAND, available at <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/001400/001474/html/1474bio.html> (last visited June 1, 2010).

<sup>111</sup> See *Journalists' Club Banquet, Vice-President Stevenson, Congressmen Wilson and Cummings Present*, SUN (Baltimore, Md.), Dec. 29, 1893, at 8.

<sup>112</sup> Harry Wellington Wack, *The International League of Press Clubs*, OVERLAND MONTHLY, Vol. XXIX, No. 174 (June 1897), at 631.

<sup>113</sup> See, e.g., *Clubs and Associations*, FOURTH ESTATE, March 22, 1894, at 6 (a weekly column reporting on club news, in this case leading with news from the Women's Press Association of Boston).

<sup>114</sup> See Wack, *supra* note 111, at 625.

fanfare with a convention in 1892 in San Francisco.<sup>115</sup> Five years later, about the time of Shriver's trial, one writer predicted that in unifying the press clubs, the league would "rear an organization of tremendous power."<sup>116</sup>

Finally, the professionalization movement meant Shriver and Edwards had a thriving nationalized press corps on their side to generate public awareness and support.<sup>117</sup> The 1890s saw the rise of professional trade journals such as *The Journalist* and *Newspapering*.<sup>118</sup> *The Fourth Estate*, forerunner of *Editor & Publisher*, was started the same year the Shriver-Edwards affair began.<sup>119</sup> Journalists at these publications and at newspapers covering the events bolstered a sense that important non-judicial precedents were being set by consistently framing discussion of the issue in terms we would recognize today as First Amendment rhetoric. At stake to them, as will be shown, were the "rights" of journalists and the meaning of freedom of the press.

## **1894: A MODE OF CONSTITUTIONAL ARGUMENT**

The Shriver-Edwards affair began with the publication of two controversial news reports in 1894: One by E.J. Edwards under the pen name "Holland" on May 14 in the

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<sup>115</sup> Travel from the East Coast was a considerable undertaking in 1892. The journalists' journey for the League's convention was immortalized in a book. See Thomson P. McElrath, *A PRESS CLUB OUTING: A TRIP ACROSS THE CONTINENT TO ATTEND THE FIRST CONVENTION OF THE INTERNATIONAL LEAGUE OF PRESS CLUBS* (1893).

<sup>116</sup> See Wack, *supra* note 111, at 631.

<sup>117</sup> See Mott, *supra* note 52, at 577 (calling the period from 1892 to 1914 "a great news period"). Mott noted that a signal of the newspapers' reach and influence at this time was the introduction of Sunday editions, some of them up to 50 pages and quite profitable. *Id.* at 584.

<sup>118</sup> See *Along the Line: Journals of Interest to Newspaper Men*, *FOURTH ESTATE*, Mar. 1, 1894, at 5.

<sup>119</sup> *The Fourth Estate* started in 1894. See Editorial, *Our Second Year*, *FOURTH ESTATE*, Mar. 7, 1895, at 2.

*Philadelphia Press* and one by John S. Shriver on May 19 in the *New York Mail and Express*. The central claim of both was that executives of sugar refining companies – aka the Sugar Trust – had bribed members of the Senate to keep tariffs on imported sugar high to protect the companies’ domestic monopoly.<sup>120</sup> The sums reported were high, as much as \$500,000 in bribes directed to Democrats and potential profits for the sugar refiners of \$50 million.<sup>121</sup> In a passage that drew considerable attention and outrage, Edwards quoted one sugar company executive as saying, “We don’t care what the House does. We own the Senate, and we control the people at the other end of the avenue.”<sup>122</sup>

On May 16, Sen. Lodge of Massachusetts introduced a resolution calling for a Senate investigation into the bribery allegations.<sup>123</sup> On May 17, a resolution was entered in the Senate directing the U.S. Attorney General to investigate the possibility of prosecuting the Sugar Trust under the Sherman Anti-Trust Act.<sup>124</sup> The same day, the Senate adopted the Lodge resolution and formed a five-member Special Committee to Investigate Bribes.<sup>125</sup> On May 19, Shriver’s article appeared, largely reiterating the allegations in Edwards’ story.<sup>126</sup> On the same day, *The New York Times* ran an editorial

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<sup>120</sup> The stories were put in the record. *Senate Report 457, Part 2, for the Special Committee to Investigate Attempts at Bribery in the Senate of the United States*, 53rd Cong., 2nd Sess. (June 4, 1894), at 16.

<sup>121</sup> *Id.* at 18.

<sup>122</sup> *Id.*

<sup>123</sup> *See To Investigate*, THE WALL STREET JOURNAL, May 16, 1894, at 4.

<sup>124</sup> *See Fifty-Third Congress*, THE SUN, May 18, 1894, at 2.

<sup>125</sup> *Id.*

<sup>126</sup> *Senate Report 457 for the Special Committee to Investigate Attempts at Bribery in the Senate of the United States*, 53d Cong., 2nd Sess. (June 4, 1894). Shriver’s article is reproduced in the Senate record. *Id.* at IV.



(embarrassingly) calling allegations against the Democrats ridiculous.<sup>127</sup> On May 21, the committee met for the first time and issued subpoenas to Edwards and Shriver.<sup>128</sup>

***The Testimony.*** Edwards arrived in Washington on the evening of May 23.<sup>129</sup> The next morning, *The New York Times* ran a story saying that the committee's decision to bar the public from its proceedings had created the appearance of a "star-chamber investigation."<sup>130</sup> Making a farce of the attempt at secrecy, the *Times* said, reports of each day's testimony were leaked to the press and published daily in newspapers nationwide.<sup>131</sup>

On May 24, the committee grilled Shriver and Edwards for several hours in the morning and again in the afternoon.<sup>132</sup> Because of a delay, Judge Dittenhoefer had not yet arrived to represent them.<sup>133</sup> Both reporters refused to reveal the name of the Congressman who had told them of the alleged bribery scheme. Edwards justified his refusal by saying, "The information was given to me under obligations of the highest confidence by the one who entailed that obligation, so that I do not feel at liberty to

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<sup>127</sup> Editorial, *That Memorandum*, N.Y. TIMES, May 19, 1894, at 4. That denial of Democrat wrongdoing would be proved quite wrong. The Democrats – most notoriously, Sen. Nelson Aldrich of Rhode Island – were eventually revealed to have been thoroughly bought off by the Sugar Trust. See, e.g., Lincoln Steffens, *Rhode Island: A State For Sale*, MCCLURE'S MAGAZINE, Feb. 1904, at 337; David Graham Phillips, *The Treason of the Senate: Aldrich, The Head of It All*, COSMOPOLITAN, March 1906, at 1; Jerome L. Sternstein, *Corruption in the Gilded Age Senate: Nelson W. Aldrich and the Sugar Trust*, CAPITOL STUDIES, Vol. 6, No. 1 (Spring 1978), at 14.

<sup>128</sup> See Senate Report 457, *supra* note 125, at I.

<sup>129</sup> See *Buttz Before the Committee*, THE NEW YORK TIMES, May 24, 1894, at 5.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> The *Times* called the proceedings "the star chamber Sugar Trust investigation" even in news pages. See *The Bribery Investigation, Little Information Given by Witnesses*, N.Y. TIMES, May 25, 1894, at 4.

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

reveal his name.”<sup>134</sup> Shriver justified his refusal by saying, “A newspaper man considers when information is given to him in confidence he should not violate the confidence.”<sup>135</sup> These were normative arguments that had never gained traction in court. When a member of the committee asserted to Shriver that the only legal ground on which he could refuse would be if he thought he might incriminate himself, Shriver said he didn’t think that was a danger – “No not at all.”<sup>136</sup>

On May 25, the reporters continued testifying before the committee, this time having consulted with Dittenhoefer.<sup>137</sup> Shriver told the committee that, on advice of counsel, he would decline to reveal his sources.<sup>138</sup> Asked on what grounds, he said that he had not gotten the sources’ permission and that revealing his sources would damage “my entire reputation as a newspaper correspondent.”<sup>139</sup> Asked if those were the only grounds, he said, “There may be others; I do not know until I see my counsel” again.<sup>140</sup>

Edwards then arrived with Dittenhoefer.<sup>141</sup> When the committee chairman asked his first question, Dittenhoefer intervened and verbally elaborated a legal argument on Edwards’ behalf. He told the committee that Edwards objected because: 1) determining

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<sup>134</sup> See Senate Report 457, *supra* note 125, at II.

<sup>135</sup> *Id.* at V. Shriver then elaborated:

You know, when a newspaper man is told a thing, he is generally supposed to hold the confidence of the man. ... And this is a case where I have requested the Congressman to use his name, and he declines to allow me to do it.

*Id.*

<sup>136</sup> *Id.* at IV.

<sup>137</sup> See *Correspondents’ Mouths Closed*, N.Y. TIMES, May 26, 1894, at 8.

<sup>138</sup> See Senate Report 457, Part 2, *supra* note 119, at 48.

<sup>139</sup> *Id.*

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

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

the source of the news story was not part of the Senate resolution creating the committee; 2) the question did not fall within the Senate's power to compel an outside witness to testify; 3) the identity of the reporter's source was wholly unnecessary for the committee's investigation into the truth or falsity of the bribery allegations, an investigation that could seek information elsewhere; 4) answering the question could incriminate the witness; and 5) being a journalist, the witness was under an "honorable obligation" to keep his confidences and violating them would "degrade him" in the eyes of his colleagues and the community.<sup>142</sup>

After those objections were overruled, questioning continued, and Edwards again refused to reveal his sources.<sup>143</sup> Asked if he would continue to refuse because the evidence might incriminate him, Edwards answered, "I would (refuse) on that ground alone."<sup>144</sup> When Shriver was recalled for a third round of questioning, his answers had grown terse: "Under advice of my counsel, I formally decline to answer."<sup>145</sup> A legal dispute was coming into focus.

***The Indictments.*** A unique feature of this case was the severity of the Senate's effort to force the journalists to comply – a severity that transformed the affair into a Judith Miller-type rallying cry for the nation's press. While the committee initially was unsure what steps it could take, the committee's clerk researched the issue and seized on the idea of using the Congressional contempt statute adopted in 1857.<sup>146</sup> The statute

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<sup>142</sup> *Id.* at 49.

<sup>143</sup> *Id.* at 50.

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

<sup>145</sup> *Id.* at 51.

<sup>146</sup> *See War on the Correspondents*, N.Y. TIMES, May 30, 1894, at 8.

allowed a maximum penalty of \$1,000 and 12 months in jail.<sup>147</sup> During a contentious debate on May 29 in the Senate, Sen. Joseph Dolph of Oregon defended the committee's decision to use the long-forgotten law, and he pushed through a resolution to certify to the district attorney of the District of Columbia that Shriver and Edwards had refused to answer pertinent questions and were indictable.<sup>148</sup> On May 31, Vice-President Stevenson, as presiding officer of the Senate, certified the facts of the case to District Attorney Arthur Birney, who predicted on June 1 that the grand jury would issue indictments immediately and the trial would be over by month's end.<sup>149</sup>

Because the indictments of Shriver and Edwards were being considered along with indictments of several sugar company executives, the process slowed as the grand jury weighed the strength of the cases against them.<sup>150</sup> Shriver and Edwards were twice notified of days to appear and post bail, and both times the orders were rescinded at the last minute.<sup>151</sup> Finally, on July 3, the grand jury handed down indictments, 20 pages apiece, against the reporters.<sup>152</sup> Offers flowed in from prominent journalists and even

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<sup>147</sup> 2 U.S.C. §192. The statute was never again used against a journalist. Congress has tried to use it in other contexts, however, such as during the House Un-American Activities hearings in the 1950s. *See, e.g.,* Quinn v. United States, 203 F.2d (D.C. Cir. 1952) (reversing a lower court's conviction under the statute and remanding for a new trial on the facts).

<sup>148</sup> *See War on Correspondents*, *supra* note 145. *The Times* described Sen. Dolph's advocacy of prosecuting the journalists as a "ridiculous attempt made by Mr. Dolph to induce the Senate to assume the responsibility of 'disciplining' the correspondents." *Id.*

<sup>149</sup> *See District Attorney to Act*, WASH. POST, June 1, 1894, at 1.

<sup>150</sup> *See Correspondents Not Yet Indicted*, WASH. POST, June 12, 1894, at 4; *Grand Jury and Recalcitrant Witnesses*, WASH. POST, Jun. 16, 1894, at 3.

<sup>151</sup> *See Holding Witnesses in Suspense, Queer Conduct of the Government Touching Shriver and Edwards*, CHICAGO DAILY TRIBUNE, Jun. 22, 1894, at 3; *Grand Jury Reluctant to Act*, CHICAGO DAILY TRIBUNE, June 23, 1894, at 4.

<sup>152</sup> *See Are Indicted at Last*, WASH. POST, Jul. 4, 1894, at 5.

some members of Congress to post the reporters' \$1,000 bonds for them, but they accepted financial help from two fellow reporters instead.<sup>153</sup> It was a heroic moment, as reported in the press.<sup>154</sup>

***Rhetoric in the Press.*** A key distinction was emerging that would set this case apart from earlier cases, such as the jailing of John T. Morris: It was tied to a national scandal unfolding in Washington, so it was generating nationwide newspaper coverage, often on front pages.<sup>155</sup> In a multi-deck headline, *The New York Times* framed the issue as a stand-off between the Senate and the press: “The War of the Correspondents and the Senate, The Writers Will Submit to Imprisonment Rather Than Reveal the Names of Their Informants, Ready to Fight the Senate in Defense of Their Prerogatives.”<sup>156</sup> The tone of the coverage turned noticeably combative after the Senate took the unusual step of bringing indictments. *The New York Times* was especially vicious in its attacks on Sen. Dolph for advancing the idea. It called him “bloodthirsty” and “unintelligent,” and it accused him of using the incident to intimidate the entire press corps.<sup>157</sup>

A frequent rhetorical frame that the press employed in reporting and editorializing mirrored the key assertion Shriver and Edwards had made to the committee: that to reveal their confidential sources would damage their honor as journalists. Edwards' paper, *The*

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<sup>153</sup> *Id.*

<sup>154</sup> See *The Newspaper Men Indicted, Many Offers of Bail for Messrs. Shriver and Edwards*, N.Y. TIMES, Jul. 4, 1894, at 1.

<sup>155</sup> See, e.g., *Correspondents Indicted*, THE ATLANTA CONSTITUTION, Jul. 4, 1894, at 1.

<sup>156</sup> N.Y. TIMES, May 28, 1894, at 4.

<sup>157</sup> See *Merciless Senator Dolph, Another Long Speech Devoted to the Wicked Newspaper Correspondents*, N.Y. TIMES, June 1, 1894, at 4. The over-the-top column included saying that Dolph wanted to set up a “prison pen” in the Senate and use “a rack and thumbscrews” on the reporters. *Id.*

*Press* of Philadelphia, said in an editorial that his refusal to reveal a source “goes to the very heart of the honor, honesty, independence and public fidelity of journalism.”<sup>158</sup> It warned that the investigating committee threatened to “muzzle journalism, shield wrongdoers and leave the public without defense.” In a similar vein, the Milwaukee *Sentinel* editorialized that for a reporter to reveal confidential sources “is distinctly dishonorable, and no amount of browbeating is likely to have any effect” on Shriver and Edwards.<sup>159</sup>

*The Fourth Estate*, by contrast, consistently employed rights rhetoric and First Amendment allusions in its coverage, even running the *Press* editorial discussed above under the headline “The Rights of Journalism.”<sup>160</sup> In an editorial at the time of the indictments, the magazine emphasized not the journalists’ honor but the press’ role in a democracy and journalism’s service to the public as a conduit of information about the government.<sup>161</sup> “The newspaper and its correspondents have their rights no less than the legislative bodies,” the editorial asserted. “They are no less indispensable to liberty.” The editorial pointed out that these “rights” have been “won in a long contest, for the most part from legislative bodies.” Then, uncannily, it predicted that the Senate’s actions could cause a backlash in the form of a drive to secure the “right” to protect confidential sources. “Before their fruitless contest and conflict is over,” it concluded, “they will find

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<sup>158</sup> The editorial was reprinted in *The Fourth Estate* magazine. See *The Rights of Journalism*, FOURTH ESTATE, May 31, 1894, at 3.

<sup>159</sup> *Id.*

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

<sup>161</sup> Editorial, *The Issue at Washington*, FOURTH ESTATE, June 21, 1894, at 3.

themselves face to face with the aroused press of the land, and they will but establish another precedent in defense of a free press.”<sup>162</sup>

***The Demurrers.*** The Shriver-Edwards affair marked a milestone in the journalist privilege issue, as Spellman has noted, because moving beyond normative arguments, the case advanced substantive legal arguments for the courts to grapple with.<sup>163</sup> Although similar demurrers on behalf of two stock brokers indicted along with Shriver and Edwards were overruled Nov. 14 by the federal district court in Washington,<sup>164</sup> Dittenhoefer felt confident he could succeed by drawing a distinction between the non-journalists and the journalists.<sup>165</sup> On Nov. 24, he filed demurrers on behalf of Shriver and Edwards, again making front-page news.<sup>166</sup>

Building on the verbal objections he had made before the investigative committee, Dittenhoefer’s demurrer laid out 24 points for the court to consider.<sup>167</sup> Most of them were technical and procedural, having to do with whether the Senate had jurisdiction to compel testimony from non-members, whether the Senate resolution launching the investigation had given the committee power to compel such testimony, and whether the Senate could delegate responsibility for enforcing that power to the district court. More particular to Shriver and Edwards, he argued that the source of their information was not relevant to

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

<sup>163</sup> See Spellman, *supra* note 65, at 40.

<sup>164</sup> See *Decision Against the Sugar Witnesses, Judge Cole Says They Must Testify*, CHICAGO DAILY TRIBUNE, Nov. 14, 1894, at 3.

<sup>165</sup> See *Another Move in the Sugar Cases*, CHICAGO DAILY TRIBUNE, Nov. 18, 1894, at 11 (quoting Dittenhoefer as saying, “I feel confident . . . the indictments found against Shriver and Edwards cannot on other grounds be sustained.”).

<sup>166</sup> See *Attacking the Indictments*, WASH. POST, Nov. 25, 1894, at 1.

<sup>167</sup> See SHRIVER, *supra* note 37, at 73-75.

the committee's investigation, only the information itself.<sup>168</sup> Furthermore, forcing them to reveal "private, confidential and privileged communications" would degrade them. Finally, Dittenhoefer offered two Constitutional arguments: that to force them to reveal the information would violate their Fourth Amendment rights against improper search and seizure and that it would violate their Fifth Amendment rights against self-incrimination.<sup>169</sup> He did not mention the First Amendment.

In a lengthy and eloquent brief filed simultaneously, Dittenhoefer expanded on 11 main points of the demurrer.<sup>170</sup> In one, he distinguished Shriver and Edwards from the non-journalist defendants based on the fact that a reporter's communications with a confidential source are privileged.<sup>171</sup> He emphasized the changing role of the press in society: "The public press has become an important agent to ferret out crime and dishonesty."<sup>172</sup> He emphasized the need to protect whistleblowers as an incentive for their coming forward.<sup>173</sup> He noted that some courts had, on a case-by-case basis, released journalists from testifying.<sup>174</sup>

Dittenhoefer argued that the law had fallen behind a rapidly changing society and did not reflect professionalization in the field of journalism.<sup>175</sup> He urged the court to use

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<sup>168</sup> *Id* at 74.

<sup>169</sup> *Id.* at 74-75.

<sup>170</sup> *Id* at 75-90.

<sup>171</sup> *Id.* at 83-84.

<sup>172</sup> *Id.* at 83.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* Dittenhoefer observed:



this case as an occasion to catch up. “New principles have been established and old doctrines have been changed and enlarged to make them applicable to the new conditions created by the telegraph, telephone and the steam engine,” he said, “and the courts should not hesitate ... to include the modern newspaper within the protection of privileged communications.”<sup>176</sup> As in the demurrer, even while trying to draw a distinction between the reporters and the non-journalist defendants, Dittenhoefer did not invoke the First Amendment as a justification for that distinction.

Dittenhoefer presented his case to Judge C.C. Cole in the Supreme Court of the District of Columbia, sitting in criminal session,<sup>177</sup> on Dec. 8.<sup>178</sup> Lawyers for two of the non-journalists – stock brokers Elverton Chapman and John MacArtney – had vowed to appeal the denial of their demurrers all the way the U.S. Supreme Court.<sup>179</sup> The fate of Shriver and Edwards would hang on whether the court saw a distinction between these two classes of recalcitrant witnesses.<sup>180</sup>

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When the doctrine of privileged communications was first established, the newspaper had not exhibited its great usefulness and power to aid in the administration of justice. It is only within the last quarter of a century that this power has been fully developed, requiring the broadening of the doctrine so as to include communications made to newspaper men.

*Id.*

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

<sup>177</sup> Before the Judiciary Act of 1925 reorganized the courts, the Supreme Court of the District of Columbia was a federal court that served as both a trial court, when sitting in criminal session, and an appeals court, when sitting in appellate session. *See In re Chapman*, 156 U.S. 211, 215-16 (1894) (in which Chief Justice Fuller described the creation of this court under the Judiciary Act of 1893).

<sup>178</sup> *See Argued on the Demurrers*, WASH. POST, Dec. 9, 1894, at 7.

<sup>179</sup> *See Appeal From Judge Cole’s Decision, Senate Witness Cases to Be Taken to the Supreme Court if Necessary*, WASH. POST, Nov. 18, 1894, at 4.

<sup>180</sup> *See Postponed His Decision*, THE ATLANTA CONSTITUTION, Jan. 13, 1895, at 15.

## 1895: FACILITATING A NATIONAL DIALOGUE ON CONSTITUTIONAL LAW

It did not bode well for Shriver and Edwards that Judge Cole consolidated their cases with those of two non-journalists: H.O. Havemeyer, the millionaire president of the American Sugar Refining Co., and John E. Searles, the company's secretary and treasurer.<sup>181</sup> On Jan. 17, Judge Cole delivered an oral opinion from the bench that started by noting his earlier denial of demurrers in the cases of Chapman and MacArtney, the stock brokers. He then announced that all of the cases would be decided the same way – denied – because, he said, “I do not see any difference between them.”<sup>182</sup>

As for Shriver and Edwards, Judge Cole said that their cases were largely the same as those of Chapman and MacArtney, with two additional points to address: Whether asking them for their sources was pertinent to the investigation and whether answering those questions would tend to incriminate them.<sup>183</sup> On the issue of pertinence, Judge Cole said that knowing the source became pertinent when the reporters admitted that they had no direct knowledge of the events they wrote about, that the information came to them only through their sources; therefore, he reasoned, knowing the sources became urgently relevant to the committee so that it might summon those sources to testify.<sup>184</sup> On the issue of self-incrimination, Judge Cole noted that declining to answer for fear it might incriminate is a personal privilege that must be claimed or waived by an individual; since the record did not indicate that either Shriver or Edwards claimed in

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<sup>181</sup> See SHRIVER, *supra* note 37 at 91.

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

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

their testimony before the committee that they feared self-incrimination, then, *ipso facto*, they had waived the privilege.<sup>185</sup>

Judge Cole then addressed the specific question of whether their communications were privileged because they were journalists.<sup>186</sup> That claim, he wrote, “is new.” He said he knew of no court precedent anywhere to sustain such a claim.<sup>187</sup> He acknowledged that the case represented a chance to establish a precedent: “If that ought to be the law and ought to be declared law by courts, some court has first got to do it; and if the argument seemed a sound one to me, I should have no hesitation in extending the rule to cover that class of people and that class of communications.”<sup>188</sup> However, he ruled, “there could be no more dangerous doctrine” than to allow people to pass on libelous material to journalists and remain hidden by a cloak of confidentiality.<sup>189</sup> It would be, he wrote, “very demoralizing.”<sup>190</sup> In the end, he overruled the demurrers of all four defendants.<sup>191</sup> All would have to stand trial.<sup>192</sup>

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 92.

<sup>187</sup> *Id.*

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

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* In his written opinion, filed two days later, Judge Cole added the following oft-quoted passage: “Let it once be established that the editor or correspondent cannot be called upon in any proceeding to disclose the information upon which the publications in his journals are based and the great barrier against libelous publications is at once stricken down.” See DIGEST OF DECISIONS AND PRECEDENTS OF THE SENATE AND HOUSE OF REPRESENTATIVES 856 (Henry H. Smith, ed. 1894).

<sup>191</sup> See SHRIVER, *supra* note 37, at 94.

<sup>192</sup> See *Demurrers All Void, Judge Cole Rules Against the Senate Witnesses*, WASH. POST, Jan 18, 1895, at 7; *The Sugar Trust Witnesses, Judge Cole Decides That Their Demurrers Are Void and That They Will Have to Stand Trial*, SUN (Baltimore, Md.), Jan. 18, 1895, at 9.

***Appeal to the Supreme Court.*** Shriver decided to make a dramatic stand to draw attention to his case. Five days after Judge Cole delivered his opinion, Robert Wynne, the *Tribune* reporter who had put up the \$1,000 bond for Shriver, walked into the Supreme Court of the District of Columbia and, with Shriver at his side, withdrew his pledge of surety for the appearance of Shriver in future proceedings and demanded to be released from the obligation.<sup>193</sup> With Shriver then in default of bail, the U.S. Marshal for the District of Columbia took Shriver into custody to await further action in his case.<sup>194</sup> Shriver would go to jail rather than reveal his sources.

On Jan. 23, Dittenhoefer filed a petition for habeas corpus and for certiorari with the U.S. Supreme Court. “Said imprisonment of said petitioner and the deprivation of his liberty is unlawful and wholly without any jurisdiction or authority of said court to make,” Dittenhoefer began.<sup>195</sup> He recapitulated only a handful of arguments from the earlier proceedings, mostly technical and procedural, and he reiterated the claim that Congress’ contempt statute was unconstitutional under the Fourth and Fifth amendments.<sup>196</sup> He also claimed that forcing Shriver to testify would be “manifestly unconstitutional” because it would compel him to answer questions that “may disgrace him or otherwise render him infamous.”<sup>197</sup> However, he did not draw any distinction

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<sup>193</sup> To be released on bond in the District of Columbia at this time, a defendant had to be released on someone else’s recognizance, someone who pledged to make sure the defendant appeared in court when summoned.

<sup>194</sup> See SHRIVER, *supra* note 37, at 94 (containing a copy of Shriver’s petition for habeas corpus and certiorari to the U.S. Supreme Court). The record does not indicate how long Shriver stayed in the county jail. Presumably, he waited for the Supreme Court to decide on his petition, then reposted his bond to go free. No news accounts recorded his release.

<sup>195</sup> *Id.* at 95.

<sup>196</sup> *Id.* at 95-96.

<sup>197</sup> *Id.* at 96.

between Shriver and the non-journalist witnesses; he did not even identify Shriver as a journalist in the petition. Nor did he say why making Shriver answer the questions posed to him would “disgrace him.” The freedom-of-the-press rhetoric of his earlier filings was completely absent.<sup>198</sup>

On the same day that Dittenhoefer filed the petition for Shriver, the lawyers of Elverton Chapman, one of the indicted brokers, did the same.<sup>199</sup> They argued on largely the same grounds as Dittenhoefer had: that it was not within the Senate’s jurisdiction to compel outside witnesses to testify and that the contempt statute was unconstitutional under the Fourth and Fifth amendments.<sup>200</sup> The Court handed down its decision on Feb. 4, denying Chapman’s petition.<sup>201</sup> Writing for the majority, Chief Justice Melville Fuller ruled that the Court did not have appellate jurisdiction over the Supreme Court of the District of Columbia when it was operating in criminal session.<sup>202</sup> “We discover no exceptional circumstances which demand our interposition in advance of adjudication by the courts of the District upon the merits of the case before them,” he concluded.<sup>203</sup> Seeing no material difference between Chapman’s case and Shriver’s, the Court denied Shriver’s appeal with a one-sentence ruling.<sup>204</sup> They would have to stand trial.<sup>205</sup>

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<sup>198</sup> *Id.* at 94-97.

<sup>199</sup> *See The Recusant Witnesses, Their Case Is Now Before the United States Supreme Court*, SUN (Baltimore, Md.), Jan. 23, 1895, at 2.

<sup>200</sup> *Id.* at 857-59.

<sup>201</sup> *In re Chapman*, 156 U.S. 211 (1895).

<sup>202</sup> *Id.* at 217-18.

<sup>203</sup> *Id.* at 218.

<sup>204</sup> *In re Shriver*, 156 U.S. 218 (1895).

***Mobilization in Baltimore.*** The day before the Supreme Court handed down its ruling, *The New York Times* reported that the Journalists' Club of Baltimore on Feb. 2 had adopted a resolution calling for a national campaign to adopt statutory protections for confidential sources.<sup>206</sup> *The Times* reported that the campaign was to be directed at states legislatures and the U.S. Congress. *The Sun* in Baltimore carried a similar item on Feb. 4.<sup>207</sup> It added that the effort was prompted specifically by the indictments of Shriver and Edwards.<sup>208</sup>

The club's resolution was written by Edgar Goodman, who worked for Gen. Agnus as a telegraph editor at *The American*.<sup>209</sup> Their newspaper ran a complete copy of the resolution.<sup>210</sup> The resolution opened by noting that the law governing journalism had not kept up with society: "The judiciary throughout the country is not yet educated to an understanding of the necessity of confidential relations between newspaper men and their sources."<sup>211</sup> It asserted that a journalist-source privilege was as much in the public's interest as an attorney-client privilege.<sup>212</sup> It called for creating a three-person committee whose job it would be to lobby the Maryland legislature in its next session, and it called

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<sup>205</sup> See *No Habeas Corpus Can Issue, Chapman and Shriver Must Answer Their Indictments*, N.Y. TIMES, Feb. 5, 1895, at 16; *Will Have to Stand Trial*, ATLANTA CONSTITUTION, Feb. 5, 1895, at 1; *They Must Stand Trial*, WASH. POST, Feb. 5, 1895, at 4.

<sup>206</sup> See *The Rights of Newspaper Writers, Appeal for Their Protection Against the Violation of Confidences*, N.Y. TIMES, Feb. 3, 1895, at 4.

<sup>207</sup> See *Journalists' Club, An Effort to Legalize the Secrecy of Confidential Information*, SUN (Baltimore, Md.), Feb. 4, 1895, at 6.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> See *Journalists' Club Resolution*, AMERICAN (Baltimore, Md.), Feb. 3, 1895, at 5.

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

<sup>212</sup> *Id.*

for submitting the same resolution to the International League of Press Clubs at its next meeting.<sup>213</sup> *The Sun* noted that the resolution was adopted unanimously, after which the club elected five delegates to attend the International League's next meeting. Gen. Agnus was elected to go.<sup>214</sup>

***Mobilization of the League.*** On June 11, more than 100 delegates convened in Philadelphia for the fifth annual meeting of the International League of Press Clubs.<sup>215</sup> In its opening session, Gen. Agnus pushed the journalist-privilege issue to the top of the agenda and onto the front page of *The Washington Post*.<sup>216</sup> He read the Baltimore club's resolution in full and urged the league to adopt it.<sup>217</sup> Protecting sources was made the topic of a special session the following day.<sup>218</sup>

The first order of business on June 12 was Gen. Agnus' proposal for a concerted lobbying campaign for shield laws.<sup>219</sup> "We come," he said, "to protest against the insults to our profession."<sup>220</sup> He said the topic was urgent, then he related in detail the plight of Shriver and Edwards.<sup>221</sup> Charles Emory Smith of the *Philadelphia Press* – the paper that

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<sup>213</sup> *Id.*

<sup>214</sup> *See Journalists Club, supra* note 206.

<sup>215</sup> *See International League of Press Clubs Meets in Philadelphia*, ATLANTA CONSTITUTION, June 12, 1895, at 1.

<sup>216</sup> *See Protection of Newspaper Men, Their Relations With Sources of Information to Be Discussed*, WASH. POST, June 12, 1895, at 1.

<sup>217</sup> *See International League of Press Clubs, Movement to Protect Newspaper Men in the Preservation of Confidences*, N.Y. TIMES, June 12, 1895, at 9.

<sup>218</sup> *Id.*

<sup>219</sup> *See Liberty of the Press, The Sources of Information Should Be Privileged, Protection for Newspaper Men*, WASH. POST, June 13, 1895, at 3.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

published Edwards' work – then read a proposed resolution based on the one drafted in Baltimore.<sup>222</sup> It called for the league's member clubs to form committees to lobby legislatures in every state.<sup>223</sup> Smith sparked "thunderous applause" by pledging that every "worthy journalist ... would rather rot in jail than betray his confidences," and the resolution was adopted unanimously.<sup>224</sup> Thus, on June 12, 1895, the shield law movement in America was begun.

***Rhetoric in the Press.*** The league's meeting and discussion of the privilege issue was covered extensively in newspapers across the country.<sup>225</sup> In these reports, two dominant frames emerged. One was about protecting the "dignity" of the press and recognition of its stature as a profession. *The Daily Journal* in Kansas City, Mo., in an editorial echoing Gen. Agnus' speech at the convention,<sup>226</sup> concluded, "The dignity of the

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.* It read:

Resolved, That the International league of Press Clubs urges all press clubs, members of the League, to appoint committees to secure from the legislatures of the various States in which such league clubs are located, the adoption of laws to protect newspaper men in preserving inviolate confidential information communicated to them in the ordinary course of their duties.

*Id.*

<sup>224</sup> *Id.* Joel Cook of the Washington press corps added an interesting observation: "If laws cannot be enacted, custom can lead to the recognition of the privilege." *Id.*

<sup>225</sup> See, e.g., *League of Press Clubs, Legislation to Be Asked to Pass a General Libel Law*, RECORD-UNION (Sacramento, Calif.), June 13 1895, at 1; *Protection for Newspaper Men in the Preservation of Confidences*, DAILY GLOBE (St. Paul, Minn.), June 12, 1895, at 5; *Protecting the Press, Unanimous Demand for a Law on the Confidence Question*, DAILY GLOBE (St. Paul, Minn.), June 13, 1895, at 5; *Press Asks for More Liberal Laws, Confidences Should Be Held Sacred and Libel Laws Less Stringent*, DAILY BEE (Omaha, Neb.), June 13, 1895, at 1.

<sup>226</sup> In talking about the insult that the press endures at the hands of judges, Agnus said "the press sometimes takes a poor boy and by its power makes him a judge, yet he turns on those who elevated him." See Unsigned, *To Protect Newspaper Men, International League of Press Clubs Takes Important Action*, DAILY JOURNAL (Kansas City, Mo.), June 13, 1895, at 4.



newspaper profession calls for legislation of this sort.”<sup>227</sup> The other dominant frame cast the issue as a matter of “rights” and “freedom of the press,” even though it was statutory law under discussion. In the same editorial, the *Daily Journal* went on to say that statutory protection was needed to safeguard the “rights of professional men” and protect the “sacred right” of keeping confidences.<sup>228</sup> *The New York Times*’ early coverage of the Baltimore resolution ran under the headline “The Rights of Newspaper Writers.”<sup>229</sup> *The Washington Post*’s front-page coverage of the league meeting ran under the headline “LIBERTY OF THE PRESS, The Sources of Information Should Be Privileged.”<sup>230</sup> They were lobbying for statutory protections but articulating First Amendment norms.

#### **1896: SETTling A LEGAL DISPUTE OUTSIDE THE COURTS**

The cases against Shriver and Edwards ground to a halt in 1896. The delay was caused by Elverton Chapman, one of the indicted stock brokers. He was convicted in February, fined \$100 and ordered to serve 30 days in jail.<sup>231</sup> He appealed and lost again in April.<sup>232</sup> When he applied to the U.S. Supreme Court for a writ of error, lawyers in the other cases asked for a continuance until a ruling in Chapman’s petition came down.<sup>233</sup>

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<sup>227</sup> Editorial, *Timely Action*, DAILY JOURNAL (Kansas City, Mo.), June 14, 1895, at 4.

<sup>228</sup> *Id.*

<sup>229</sup> See *supra* note 205.

<sup>230</sup> See *supra* note 218. Capitalization in original.

<sup>231</sup> See *Punished for not Testifying*, L.A. TIMES, Feb. 2, 1896, at 1.

<sup>232</sup> See *The Sugar Trust Witnesses, Chapman’s Sentence Affirmed by Court of Appeals*, N.Y. TIMES, Apr. 8, 1896, at 1.

<sup>233</sup> See *The Sugar Witness Cases, Application for a Writ of Error Filed by Mr. Chapman*, N.Y. TIMES, Apr. 17, 1896, at 1.

During the delay, focus shifted to the states, where the International League's shield law campaign was gaining traction. Bills were submitted in the legislatures of Massachusetts, Minnesota, and Utah, which had recently become a state.<sup>234</sup> These early efforts failed, though the Massachusetts bill did make it through the state Senate before being defeated in the House.<sup>235</sup>

In Maryland, a draft bill was drawn up by Edgar Goodman,<sup>236</sup> the telegraph editor at *The American* who also held a law degree from University of Maryland and was a member of the bar.<sup>237</sup> On March 10, Sen. Hattersley Talbott introduced the bill in the Senate just as Goodman had written it.<sup>238</sup> *The American* assured its readers that the bill was not intended to protect newspapers from libel suits, that similar bills had been introduced in other states, and that these bills had the support of the International League of Press Clubs.<sup>239</sup> On March 18, when the bill was read for a second time in the Senate, a paragraph stating that nothing in the bill precluded libel suits was struck.<sup>240</sup> (*The Sun* noted that only 14 Senators were present.)<sup>241</sup> On March 20, the bill passed in the Senate and

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<sup>234</sup> See Wack, *supra* note 111, at 629.

<sup>235</sup> *Id.* The article went on to say, "The League is now bending its energies to enact a uniform ... law in every State. That it will before long accomplish this, the prospect assuredly indicates." *Id.*

<sup>236</sup> See *The Maryland Bill*, FOURTH ESTATE, Apr. 9, 1896, at 2.

<sup>237</sup> Beta Theta Pi, CATALOGUE OF BETA THETA PI IN THE SIXTY-SEVENTH YEAR OF THE FRATERNITY 287 (1905) (listing Goodman's degrees and employment at *The American*).

<sup>238</sup> See *Forecast for Baltimore and Vicinity*, SUN (Baltimore, Md.), Mar. 11, 1896, at 1.

<sup>239</sup> See *A Bill to Protect Newspaper Confidences*, AMERICAN (Baltimore, Md.), Mar. 11, 1896, at 3.

<sup>240</sup> See *Work of the Senate and House: Proceedings in Detail of Each Branch of the General Assembly*, SUN (Baltimore, Md.), Mar. 19, 1896, at 2.

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

was sent to the House of Delegates.<sup>242</sup> On March 30, it passed in the House without debate.<sup>243</sup> On April 2, Gov. Lloyd Lowndes signed the nation's first shield statute into law.<sup>244</sup> Thus, a professional norm had become a legal norm.

*The New York Times* reported on April 4 that the bill was “pressed at the Legislature by all the correspondents” and that it passed with only five votes against it.<sup>245</sup> *The Fourth Estate* trumpeted the press victory in a large-type headline that read “WORTH WINNING, Maryland Newspaper Men Triumph Over Legal Tyranny.”<sup>246</sup> The trade magazine applauded Gen. Agnus for having “fought in season and out of season for the new law.”<sup>247</sup> When looking back on developments in the press a few months later, the magazine summed up: “In the legislative acts of the past year, none has been more important than a bill passed in Maryland largely through the personal efforts of General Felix Agnus of the Baltimore *American*.”<sup>248</sup>

***The Morris Disconnect.*** None of the contemporary accounts directly tied passage of the shield law to the jailing of John T. Morris; only the *Times* report even mentioned the Morris incident, and only in passing. The oft-repeated connection between the Morris incident and the Maryland shield law was not questioned until 1970, when A.

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<sup>242</sup> See *Forecast for Baltimore and Vicinity*, SUN (Baltimore, Md.), Mar. 21, 1896, at 1-2.

<sup>243</sup> See *Forecast for Baltimore and Vicinity*, SUN (Baltimore, Md.), Mar. 31, 1896, at 2.

<sup>244</sup> Special Dispatch, *Legislative Matters, A Large Batch of Bills for the Governor to Sign*, SUN (Baltimore, Md.), Apr. 2, 1896, at 2 (listing shield law as among dozens of bills Gov. Lowndes would sign that day).

<sup>245</sup> See *A Law to Protect Confidential Sources*, N.Y. TIMES, Apr. 9, 1896, at 2.

<sup>246</sup> Editorial, *Worth Winning*, FOURTH ESTATE, Apr. 9, 1896, at 2.

<sup>247</sup> *Id.*

<sup>248</sup> See *The Year Behind*, FOURTH ESTATE, Jan. 7, 1897, at 3.

David Gordon did the first – and only – significant research into the bill’s passage.<sup>249</sup> Expanding on a chapter from his doctoral dissertation, his 1972 monograph<sup>250</sup> reconstructed in detail the events surrounding Morris’ jailing for contempt of court and definitely pinned the date to 1886, not 1896.<sup>251</sup> He also debunked the claim that an editorial campaign led by Morris’ newspaper, *The Sun*, helped push the shield law toward passage.<sup>252</sup> Not a single newspaper in Maryland, Gordon showed, published an editorial in support of the bill in 1896.<sup>253</sup> In its news pages, *The Sun* did not run a single separate story about the bill, Gordon showed, only fleeting mentions in roundups of legislative activity.<sup>254</sup> Lobbying for the law was, he showed, “a backstage effort.”<sup>255</sup>

Yet after presenting his extensive research, Gordon concluded, oddly, “It thus appears that the Morris incident of 1886 set in motion an effort by the Baltimore Journalists’ Club to secure legal protection against a repetition.”<sup>256</sup> He seemed to go out

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<sup>249</sup> See David Gordon, *Protection of News Sources: The History and Legal Status of the Newsman’s Privilege* (1971) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with Davis Library, University of North Carolina-Chapel Hill).

<sup>250</sup> David Gordon, *The 1896 Maryland Shield Law: The American Roots of Evidentiary Privilege for Newsmen*, JOURNALISM MONOGRAPHS, No. 22 (Feb. 1972).

<sup>251</sup> *Id.* at 7-22 (deploying an impressive array of press account, court documents, and government records). Gordon’s monograph also contains the only detailed account of the failed attempt to pass a shield law the same year in Utah. *Id.* at 36-37. Gordon also is the only media-law scholar ever to note that the nation’s first shield law bill was introduced in the Iowa legislature in 1890. *Id.* at 1.

<sup>252</sup> That claim first appeared in a 1943 article in *Journalism Quarterly*. See Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM Q. 230 (1943).

<sup>253</sup> See Gordon, *supra* note 249, at 26.

<sup>254</sup> *Id.* at 29-31.

<sup>255</sup> *Id.* at 25.

<sup>256</sup> *Id.* at 25. It seemed equally odd that, after presenting meticulous research into the time element of the Morris incident, Gordon would conclude, “No indication was found . . . as to the origin of the error that switched one digit in the year Morris was jailed and created this 10-year mistake which has been quoted faithfully since the 1930s.” *Id.* at 41. The paper trail seems perfectly clear: *The New York Times*, in its initial report on passage of the shield law in 1896, vaguely mentioned the Morris incident without

of his way to minimize the role that Gen. Agnus played<sup>257</sup> and even implied that contemporary accounts crediting him were wrong.<sup>258</sup> Although Gordon himself noted that *The American* published more detailed reports about the bill than any other newspaper Maryland,<sup>259</sup> his account speculated that *The Sun* was the shield law's main champion.<sup>260</sup> He concluded, finally, that it must have been *The Sun*'s capital correspondents who pushed the law through.<sup>261</sup>

***The Shriver Connection.*** The missing piece that might have altered Gordon's conclusions was Shriver – longtime resident of Baltimore, member of the Journalists' Club, and close friend to Gen. Agnus.<sup>262</sup> *The Sun*'s own report on the launch of the Journalists' Club effort said, "The resolution was the outcome of the arrest of two Washington correspondents for refusal to reply to certain questions asked some time ago by a Senate investigating committee."<sup>263</sup> Nearly every news account of Gen. Agnus' speech at the Philadelphia convention, when he pressed the League of Press Clubs to

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indicating a date. *Editor & Publisher* magazine, relying on the *Times* story, made the connection in an article in 1934. The editors of *The Sun* valorized that connection in a keepsake book about the history of their newspaper in 1937, in a chapter written by H.L. Mencken. The error passed into the media law canon in a 1943 article in *Journalism Quarterly* and a textbook by the same author, Walter A. Steigleman, in 1950. The error passed into legal scholarship with the publication of an oft-cited article in *Virginia Law Journal* in 1950. Finally, it passed into historical scholarship with the publication of a history of the state of Maryland in 1965. *See supra* note 33.

<sup>257</sup> *See* Gordon, *supra* note 249, at 42.

<sup>258</sup> *Id.* at 31-32.

<sup>259</sup> *Id.* at 24, 28.

<sup>260</sup> *Id.* at 39-41.

<sup>261</sup> *Id.* at 32.

<sup>262</sup> *See supra* notes 75-102 and accompanying text.

<sup>263</sup> *See Journalists' Club, An Effort to Legalize the Secrecy of Confidential Information*, SUN (Baltimore, Md.), Feb. 4, 1895, at 6.

adopt the shield law campaign, said the drive was inspired by the legal ordeal of Shriver and Edwards.<sup>264</sup> He also was one of the most influential Republicans in the state in an era when Democrats had just been driven from power in a landslide election,<sup>265</sup> when he was being courted to run for the U.S. Senate,<sup>266</sup> and when he was rumored to be on a short list for President McKinley's cabinet.<sup>267</sup> His exact role in lobbying for the shield law can't be known,<sup>268</sup> but he was deeply involved in a Republican party<sup>269</sup> that controlled the governor's mansion<sup>270</sup> and the House of Delegates, and nearly controlled the Senate as well.<sup>271</sup> In that light, it would seem hard to maintain that a Democrat-aligned newspaper

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<sup>264</sup> See, e.g., *Liberty of the Press, The Sources of Information Should Be Privileged, Protection for Newspaper Men*, WASH. POST, June 13, 1895, at 3.

<sup>265</sup> See *Lowndes Elected, He Sweeps Our Maryland and Baltimore Against the Bosses, The People Victory, Legislature Is Republican*, SUN (Baltimore, Md.), Nov. 6, 1895, at 1.

<sup>266</sup> Editorial, *For the New Maryland Senator*, WASH. POST, Nov. 10, 1895, at 6.

<sup>267</sup> See *Making Up the Cabinet, Washington Politicians Are Mentioning Names*, N.Y. TIMES, Nov. 11, 1896, at 3 (reporting that Agnus was being considered for postmaster general).

<sup>268</sup> The Felix Agnus Papers are housed at the University of Maryland. Unfortunately, they cover only his military career and experiences during the Civil War. See Finding Aid, Felix Agnus Papers, University of Maryland Archives, available at <http://www.lib.umd.edu/archivesum/actions.DisplayEADDoc.do?source=MdU.ead.histms.0012.xml&style=ead#series2.a> (last visited June 1, 2010).

<sup>269</sup> Agnus led the campaign effort in Baltimore for Gov. Lloyd Lowndes. See, e.g., *Grand Republicans*, SUN (Baltimore, Md.), Oct. 14, 1895, at 1 (detailing rally for Lowndes, presided over by Agnus, on the eve of a landslide election for the Republicans).

<sup>270</sup> Agnus also happened to be a personal friend of the governor's. See, e.g., *Governor-Elect Lowndes Here*, N.Y. TIMES, Nov. 15, 1895, at 2 (reporting on Gov. Lowndes trip to New York and noting that "after dinner, he and Gen. Felix Agnus of Baltimore went to the Horse Show").

<sup>271</sup> See *The Maryland Election*, SUN (Baltimore, Md.), Nov. 7, 1895, at 2.

like *The Sun* – whose influential Democrat publisher had died two years earlier<sup>272</sup> – would have held more sway over local politics in 1896 than Agnus and the *American*.<sup>273</sup>

## 1897: SHAPING CONSTITUTIONAL CULTURE AND HISTORY

The new year started with a macabre twist in the ongoing Sugar Trust scandal: On Jan. 1, William Park, an agent of the Trust accused of embezzling, shot and killed himself in Duluth, Minn., to avoid arrest.<sup>274</sup> On April 19, the U.S. Supreme Court finally handed down its decision on Elverton Chapman's second petition for a writ of error: It was denied,<sup>275</sup> and the non-journalist recalcitrant witness agreed to pay a \$1,000 fine and serve 30 days in jail.<sup>276</sup> Trials of the journalists could proceed.<sup>277</sup>

After nearly three years, Shriver's trial finally began May 15 in the Supreme Court of the District of Columbia, sitting in criminal session, Judge A.C. Bradley presiding.<sup>278</sup> Dittenhoefer was joined by Jere Wilson, another retired judge, to represent

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<sup>272</sup> Obituary, *George W. Abell Dead*, *SUN* (Baltimore, Md.), May 2, 1894, at 1; *Death of George W. Abell*, *WASH. POST*, May 2, 1894, at 4.

<sup>273</sup> This section is not meant as criticism. Gordon's work remains invaluable. In 1970, however, he simply did not have the advantage that computerized databases provide today.

<sup>274</sup> See *Forecast for Baltimore and Vicinity*, *SUN* (Baltimore, Md.), Jan. 2, 1897, at 1.

<sup>275</sup> *In re Chapman*, 166, U.S. 661 (1897) (in which the Court said Congress' contempt statute was constitutional and that the court in the District of Columbia had jurisdiction to render a judgment in Chapman's case).

<sup>276</sup> See *Chapman Goes to Jail, Occupies Two Cells and Lives Like a Prince*, *CHICAGO DAILY TRIBUNE*, May 18, 1897, at 1. H.O. Havemeyer, the millionaire president of the Trust, was found not guilty on May 27. See *Havemeyer Goes Free*, *CHICAGO DAILY TRIBUNE*, May 28, 1897, at 6.

<sup>277</sup> See *To Try Two Newspaper Men*, *ATLANTA CONSTITUTION*, June 2, 1897, at 2.

<sup>278</sup> See *SHRIVER*, *supra* note 37, at 120.

Shriver at trial.<sup>279</sup> While Dittenhoefer declined to make an opening statement, District Attorney Henry Davis accepted.<sup>280</sup>

After reviewing the facts for the jury, Davis, anticipating the defense team's legal arguments, said the prosecution would rest its case on just two key points: the questions posed to Shriver were pertinent to the committee's investigation, and he "willfully refused" to comply under the terms of Congress' contempt statute.<sup>281</sup> Dittenhoefer interrupted to object several times,<sup>282</sup> most pointedly when Davis proposed to have Shriver's article about the Sugar Trust entered into the record. His objection stemmed from the fact that Shriver's article did not appear in print until two days after the Senate had passed its resolution launching the investigation; therefore, he said, the article could not properly be part of that investigation.<sup>283</sup>

When it came the defense team's turn to question the day's first witness, Sen. George Gray, a member of the Sugar Trust investigation committee, Dittenhoefer used his questions to hammer two points: Was the *name* of the Congressman who spoke to Shriver necessary for the committee's investigation into the bribery allegations? And couldn't the Senate, which had considerable power to punish its own members, have obtained this information elsewhere?<sup>284</sup> "Then pray," Dittenhoefer asked, "what was the

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<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 91.

<sup>281</sup> *Id.* at 133-34.

<sup>282</sup> *Id.* at 134-36.

<sup>283</sup> *Id.* at 138.

<sup>284</sup> *Id.* at 146-47.



purpose ... of asking a newspaper man who his informant was when they had the Senators themselves to make this admission, and no action was taken by the Senate?”<sup>285</sup>

After the government finished calling its witnesses for the day, Dittenhoefer moved that the case be dismissed on six grounds, mostly technical and having to do with the committee’s jurisdiction.<sup>286</sup> However, bringing back the journalistic arguments he had propounded three years earlier, Dittenhoefer argued that Shriver’s communication with his source was privileged.<sup>287</sup> “The court will take judicial notice of the fact that many of the most flagrant crimes affecting the welfare of society have been exposed and brought to punishment through the agency of the newspaper,” he said.<sup>288</sup> Then he compared the role of the journalist’s source with that of a police informant: “To bring about the discovery of crime, the law permits information to be given to the Government and will not compel the name of the person giving the information to be revealed. ... The same rule should be applied for the same reasons.”<sup>289</sup>

The trial’s second day began with a lengthy opening statement by Dittenhoefer.<sup>290</sup> Putting aside the technical legal reasons set out in his motion to dismiss, the ex-judge engaged Judge Bradley in an unusually frank discussion about the need to change the law under which journalism operated.<sup>291</sup> “I know that I am approaching a question that has

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<sup>285</sup> *Id.* at 146.

<sup>286</sup> *See Trial of John S. Shriver*, N.Y. TIMES, Jun. 16, 1897, at 4.

<sup>287</sup> *See Shriver*, *supra* note 37, at 146.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 167-71.

<sup>291</sup> *Id.* at 177-180.

not as yet received much judicial consideration,” he said, “but it is an immensely important question.”<sup>292</sup> Dittenhoefer pointed to quotes by Thomas Jefferson, law journal articles, and treatises by experts on the rules of evidence – non-judicial precedents he urged the judge to consider.<sup>293</sup> He talked about changes in society, about how the arrival of the telegraph and telephone led to changes in the law, and about how journalism played an increasingly important role as a check on wrongdoing and corruption.<sup>294</sup> “Some Judge, some court, will have the honor at some time to lay down the all-important principle which I am now asking this court to establish,” Judge Dittenhoefer<sup>295</sup> told Judge Bradley. “So I now ask this court, on the ground of public policy, to extend the principle of privilege to the profession of journalism.”<sup>296</sup>

On the trial’s third day, co-counsel Wilson presented the defense’s closing arguments and a motion to direct a verdict of not guilty.<sup>297</sup> After reviewing legal points that had been made in filings and in court, Wilson returned to the issue of a testimonial privilege for journalists. This former judge engaged Judge Bradley in a remarkably candid discussion about judicial precedents and how the law responds – or fails to

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<sup>292</sup> *Id.* at 178.

<sup>293</sup> *Id.* at 178-80. At one point, Judge Bradley interjected, “I do not see how you could have a free government without a free press.” Dittenhoefer responded: “That, of course, is so. The principle was stated in that epigrammatic and concise way, a method often adopted by Mr. Jefferson in the statement of his propositions.” *Id.* at 178.

<sup>294</sup> *Id.* at 178. He pointed to judicial precedents for changing the law to reflect changing times: “We are making wonderful progress every day, requiring the application of new principles of law. Some court always must make the beginning. The creation of the telegraph and telephone have compelled the courts to extend the old law of common carrier to their operations.” *Id.*

<sup>295</sup> He always was referred to as Judge Dittenhoefer in the press, though he had not been a judge for many years.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 202-11.

respond – to changes in society.<sup>298</sup> “I admit now we have no precedent upon which we can go in this case,” he began.<sup>299</sup> He then pointed out that while common-law judges had never recognized such privileges as the doctor-patient privilege or the priest-penitent privilege, state legislatures had stepped in to create what the courts would not.<sup>300</sup>

Then, in a remarkable stroke of creative lawyering, Wilson directed the judge’s attention to the nation’s one and only shield law. “In the State of Maryland,” he said, “a statute has been enacted by which this privilege is extended to this class of persons, newspaper men.”<sup>301</sup> The statute was the strongest sort of precedent he could cite. He was asking the judge to analogize a common-law rule from the statute.

“Why is such legislative action necessary?” Wilson asked, and answered that it was because no court had addressed the question in light of modern journalism.<sup>302</sup> He, like Dittenhoefer, discussed the role of the press in an increasingly complex society; he talked about the need to protect confidential sources of information in order to encourage whistleblowers to come forward.<sup>303</sup> He asked rhetorically if the time had not come to create a journalist privilege “either through judicial action or through legislative

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<sup>298</sup> *Id.* at 209-11. He criticized the inflexibility of the courts:

The question is, when new conditions arise, whether the courts are to be limited in dealing with these new conditions and the precedents that have been established in respect of other matters and under different conditions and for certain matters of public policy.

*Id.*

<sup>299</sup> *Id.* at 210.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 209.

<sup>302</sup> *Id.* at 210.

<sup>303</sup> *Id.* at 210-11.

action.”<sup>304</sup> The broad question in this case, he said, “is whether the courts will themselves do that or whether the courts will lag behind and ... wait until the legislative authority has commanded the courts to do that which the courts ought to do.”<sup>305</sup> The related narrow question, he said, was whether seeking Shriver’s source was pertinent.<sup>306</sup> The defense rested, and the court adjourned.<sup>307</sup>

**Judicial Precedent Set.** On May 18, Judge Bradley made journalist-privilege history by directly addressing the question of whether journalists should be privileged as a distinct class.<sup>308</sup> He pointed out that only the attorney-client and husband-wife privileges had been recognized at common law.<sup>309</sup> He acknowledged that states, through statutes, had extended testimonial privileges to the doctor-patient and priest-penitent

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<sup>304</sup> *Id.* at 211.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* He concluded: “I submit that upon the one question alone ... this motion that we have made should prevail.” *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 212. The significant passage of his decision read in full:

Communications by client to attorney in the course of professional employment, and confidential communications between husband and wife, are privileged at common law, and protected from disclosure in judicial proceedings. In some of the States of the Union, this protection has been extended by the statute to confidential communications made by a patient to his physician in his professional capacity, and to information obtained by the physician in his attendance upon the patient. It has been extended by state in some of the States to communications made to spiritual advisers. It appears that communications made to editor, or reporters, or correspondents of newspapers, have received such legislative protection in but one of the States. The Congress of the United States has not yet so yielded to the force of the demand of public policy for such legislation, strenuously urged in argument, as to provide a statute protecting newspaper men, called as witnesses before a Congressional committee, or before a court of justice, from disclosing relevant facts within their knowledge. Until it does, I will not be able to distinguish the public duty of the newsgatherer from that of other individuals to make such disclosures when called to do so by a court of justice, or by an inquisitorial body having jurisdiction of the subject.

*Id.*

<sup>309</sup> *Id.*

relationships.<sup>310</sup> He acknowledged that the Maryland shield law similarly extended the privilege to journalists, but he pointed out that it was the only one of its kind in the nation.<sup>311</sup> He also pointed to the lack of a shield law at the federal level, which would be controlling in his court.<sup>312</sup> He acknowledged the defense team's urging that he analogize from the state statutes.<sup>313</sup> He concluded, however, that he could not draw a distinction between journalists and non-journalists as a matter of common law.<sup>314</sup>

Nevertheless, Judge Bradley directed the jury to return a verdict of not guilty.<sup>315</sup> He reached this result on two grounds the defense team had argued. On a technical point, he agreed that the Senate committee had not followed correct procedures in issuing a summons to Shriver to appear.<sup>316</sup> On a more substantive point, he agreed that seeking the reporter's source was not "pertinent" to the committee's investigation.<sup>317</sup> After quoting a dictionary and citing several treatises on the rules of evidence, he deduced that "pertinent" was sufficiently synonymous with "relevant" to conclude that the committee had run afoul of accepted rules of evidence by seeking the name of the source, rather than the information provided by the source.<sup>318</sup> He admonished the committee for having

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<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 216.

<sup>316</sup> *Id.* at 213-14.

<sup>317</sup> *Id.* at 214-15.

<sup>318</sup> *Id.* The judge explained his logic:

The reason given by the committee for its insistence upon an answer ... was that, given the name of the member of Congress, he could be summoned and compelled (to testify).

undertaken, in modern parlance, a fishing expedition: “If a Congressional committee sees fit to roam in the realm of collateral, irrelevant, immaterial, impertinent matters, the witness who refuses to accompany it will not be amenable to the penalties of this statute.”<sup>319</sup>

On Judge Bradley’s direction, the jury returned a verdict of not guilty, Shriver’s bail was canceled, and he was discharged.<sup>320</sup> In a similar memorandum, Judge Bradley directed a verdict of not guilty for Edwards as well.<sup>321</sup> The journalists had won.

***Rhetoric in the Press.*** The national press covered Shriver’s trial day by day and never failed to underscore the fact that Shriver, unlike Chapman and other Sugar Trust witnesses, was a journalist.<sup>322</sup> The press seized on the argument that the court should use the occasion to establish a journalist privilege.<sup>323</sup> The *Washington Post* said hopefully that the court might “establish a precedent as to liberty of the press.”<sup>324</sup>

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... This shows that an answer giving the name might have been a matter of convenience to the committee, but it does not indicate that the name would be a material fact in proving or disproving the charges specified.

*Id.*

<sup>319</sup> *Id.* at 215.

<sup>320</sup> *Id.* at 216.

<sup>321</sup> See *Acquitted Both Men, Shriver and Edwards Not Legally Summoned, The Questions Not Pertinent*, WASH. POST, June 19, 1897, at 2.

<sup>322</sup> See *Trial of John S. Shriver, Another Recusant Witness of the Sugar Investigation in Court Before Judge Bradley, A New York Newspaper Man*, N.Y. TIMES, June 16, 1897, at 4. The article did a remarkably thorough job of summarizing Dittenhoefer’s legal arguments in his motion to dismiss. It ends with his citation of a legal treatise for the proposition that “those persons which are the channel by means of which” wrongdoing is communicated to the public should not be disclosed or punished – the essence of the free-flow-of-information argument that would be made for the same proposition today. *Id.*

<sup>323</sup> See *Shriver’s Trial Goes On, Judge Dittenhoefer Advances Another Ground for Dismissal – For the Protection of Newspaper Men*, N.Y. TIMES, June 18, 1897, at 4. The article noted that Edwards was in attendance along with Charles Emory Smith, Edwards’ boss at the *Philadelphia Press* and the officer who presented the resolution to start a shield law campaign at the League of Press Clubs’ meeting. *Id.*

<sup>324</sup> See *Wait Court’s Decision, End of Argument on Motion to Dismiss*, WASH. POST, June 18, 1897, at 10.

Coverage of Judge Bradley's ruling prompted a deluge of articles coast to coast in newspapers large and small.<sup>325</sup> Stories in the popular press praised the decision as a victory for journalism in general.<sup>326</sup> While legal writers emphasized that the decision rested on technical grounds, particularly the defective summons,<sup>327</sup> the journalistic press seized on the result as establishing a precedent.<sup>328</sup> Most stories quoted or paraphrased Dittenhoefer's interpretation of the case: By accepting the argument that the identity of Shriver's source was not relevant, a precedent was set whereby a journalist asked to reveal a source in a future case might argue and win on the same grounds.<sup>329</sup> "It practically amounts to the same thing" as a journalist privilege, Dittenhoefer wrote in a follow-up essay in Shriver's newspaper, *The Mail and Express*.<sup>330</sup>

While legal writers condemned the result as an invitation to print libelous material with impunity,<sup>331</sup> the press hailed it as progress for a maturing profession and for the normative ideal of freedom of the press. A multi-deck headline in *The Mail and Express* neatly encapsulated those two rhetorical frames: "RIGHTS OF THE PRESS, Judge Dittenhoefer Discusses Acquittal of Mr. Shriver, VICTORY FOR JOURNALISM, The Newspaper Has Become a Most Potent Factor in the Detection of Crime and the

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<sup>325</sup> See SHRIVER, *supra* note 37 at 250-61. The book memorializing the trial, published by Shriver's *Mail and Express*, compiled 18 articles drawn from a variety of sources.

<sup>326</sup> *Id.*

<sup>327</sup> See, e.g., The Albany Law Journal, *Current Topics*, 55 ALB. L.J. 425, 426 (1897).

<sup>328</sup> See *Shriver and Edwards Free*, N.Y. TIMES, Jun. 19, 1897, at 3.

<sup>329</sup> *Acquitted Both Men, Shriver and Edwards Not Legally Summoned*, WASH. POST, June 19, 1897, at 2.

<sup>330</sup> See Shriver, *supra* note 37, at 250-251.

<sup>331</sup> The Albany Law Journal, *Current Topics*, 56 ALB. L.J. 37, 38 (1897-1898).

Correction of Wrongs.”<sup>332</sup> *The Boston Post* likewise framed its coverage, in headline and text, as “rights of the press” and the “right” of a journalist to protect confidential sources.<sup>333</sup> *The Washington Post*’s interpretation, under the headline “The Liberty of the Press,” went so far as to claim that Judge Bradley “has affirmed (for the press) its right and its duty as one of the great bulwarks of a free government to be ever vigilant, fearless and the faithful servant of the people.”<sup>334</sup> *The Democrat and Chronicle* in Rochester, N.Y., asserted that to force any journalist to reveal a source was “a clear violation of the constitutional right of free criticism of existing government.”<sup>335</sup> These non-judicial actors, as Gerhardt’s theory would predict, were making “constitutional judgments” that courts and legislatures in 1897 were only beginning to “imbue with normative authority.”<sup>336</sup>

## DISCUSSION AND CONCLUSIONS

“There is ... no such thing as an inherently ‘frivolous’ legal argument considered transhistorically,” Jack Balkin and Sandy Levinson have contended.<sup>337</sup> “The judgments of

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<sup>332</sup> The capitalization was in the original. See SHRIVER, *supra* note 37, at 250.

<sup>333</sup> *Id.* at 260.

<sup>334</sup> *Id.* at 259.

<sup>335</sup> See *The Albany Law Journal*, *supra* note 326, at 432 (in which the editorial is reprinted).

<sup>336</sup> See Gerhardt, *supra* note 18, at 715.

<sup>337</sup> Jack M. Balkin and Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEORGETOWN L.J. 173, 180 (2001). “Indeed,” they wrote, one of the most remarkable features of any study of American legal history is watching arguments migrate from the category of ‘frivolous’ or ‘unthinkable’ ... to being so overwhelmingly persuasive that to criticize them is to be tarred with the brush of ‘frivolity.’ ”

*Id.*



well-socialized lawyers about what is more plausible and less plausible, and even between what is ‘on the wall’ and what is totally ‘off the wall,’ are not fixed,” they have written; “rather, they evolve over time in response to historical and political forces in addition to the inevitable internal changes in legal doctrine.”<sup>338</sup> On this view of legal history, you could draw a line from the arguments made by the Shriver-Edwards legal team in 1897 to the parallel arguments made by Justice Potter Stewart in his dissent in *Branzburg v. Hayes* 75 years later.<sup>339</sup> They argued that 1) the names of Shriver’s and Edwards’ sources were not relevant to the Senate committee’s investigation of the Sugar Trust scandal; 2) the committee had not exhausted other sources for its investigation, such as members of the Senate; and 3) knowing the names of the reporters’ sources would not prove or disprove the allegations of bribery under investigation.<sup>340</sup> The key difference between their three-prong argument and Stewart’s proposed three-part test for a privilege is that they could not plausibly have staked that claim on the First Amendment. In 1897, that would have seemed totally “off the wall,” to borrow Balkin and Levinson’s term.

Michael Gerhardt’s theory of non-judicial precedents can track the progress of claims about constitutional meaning by focusing especially on the first movers in the

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<sup>338</sup> *Id.* at 179.

<sup>339</sup> 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

<sup>340</sup> *Id.* at 743. Stewart proposed a three-part test that was later adopted by many federal courts: [W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that 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.

*Id.*

evolutionary process Balkin and Levinson described.<sup>341</sup> Non-judicial actors operating outside courts often establish non-judicial precedents whose functions include “settling legal disputes, serving as modes of constitutional argumentation, facilitating national dialogues on constitutional law ... (and) shaping national identity, judicial doctrine, and constitutional culture and history.”<sup>342</sup> Non-judicial precedents – including norms and customs, statutes and regulations – can remain operable outside court-made law, or they can be absorbed into constitutional doctrine.

When the Shriver-Edwards affair began in 1894, the U.S. Supreme Court had not begun to map the contours of a First Amendment jurisprudence we would recognize today; the Court did not even hear its first Press Clause case until 1907.<sup>343</sup> With the First Amendment languishing in its “forgotten years,” as David Rabban has dubbed this era, journalists in the 1890s were at the mercy of hostile common-law judges.<sup>344</sup> At the end of a century of defeats in court, journalists and their advocates developed a two-prong strategy: to take their case to legislatures in hope of winning popular support and to frame the protection of confidential sources as serving a public good related to the Founders’ vision of a free press. Such a strategy, viewed through Gerhardt’s model, would be a way of “implementing constitutional values”<sup>345</sup> outside the courts.

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<sup>341</sup> Gerhardt, *supra* note 18.

<sup>342</sup> *Id.* at 717.

<sup>343</sup> *Patterson v. Colorado*, 205 US 454 (1907) (holding that a contempt conviction and monetary fine against a newspaper that published an article critical of a court decision did not offend the First Amendment).

<sup>344</sup> See RABBAN, *supra* note 45, at 15 (in which he wrote, “no group of Americans was more hostile to free speech claims ... than the judiciary, and no judges were more hostile than the justices on the United States Supreme Court”).

<sup>345</sup> Gerhardt, *supra* note 18, at 775.

Shriver and Edwards were the only journalists ever to be indicted under the Contempt of Congress Act of 1857, which prescribed a fine of up to \$1,000 and a jail term of up to a year. To fight back, these Ivy League-educated reporters retained a former judge-turned-celebrity lawyer to represent them, and they enlisted the help of a former Civil War hero-turned-publisher to rally public and political support. By self-consciously seizing on their headline-generating plight and tying it closely to a corruption scandal unfolding in Washington, these non-judicial actors were, in accord with Gerhardt's theory, helping to set the legal agenda and facilitating a national debate about constitutional values.<sup>346</sup>

The journalistic press was well positioned for such a fight in the late 1890s. Casting off the stigma of "yellow journalism," journalists were adopting a more professional image by cultivating the "objectivity standard" and by building powerful press clubs and national associations to foster best practices and codes of ethics. Legal historian Eric Easton has identified this period as the birth of The Press as a force for lobbying, as a special interest that could command attention in the corridors of power.<sup>347</sup> In the same period, Robert Spellman has shown,<sup>348</sup> a defiant stance struck by individual journalists to protect sources in the past had hardened into an industry-wide norm expected of all journalists. Still, in Gerhardt's model, such a non-judicial precedent might seem weak and susceptible to challenge because it would not carry the force of law.<sup>349</sup>

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<sup>346</sup> *Id.* at 765-70.

<sup>347</sup> Eric Easton, *The Press as an Interest Group: Mainstream Media in the United States Supreme Court*, 14 UCLA ENT. L. REV. 247 (2007).

<sup>348</sup> See Spellman, *supra* note 65.

<sup>349</sup> See Gerhardt, *supra* note 18, at 763.

Journalists and press advocates set out to change that in 1895. After Shriver and Edwards lost their case in a federal court in the District of Columbia and the U.S. Supreme Court refused to hear their plea for a writ of *habeas corpus*, the newly organized press mobilized. Using the annual meeting of the International League of Press Clubs as a platform, leaders launched a national campaign to press state legislatures to adopt statutes that would become known as shield laws; there was even talk of lobbying Congress for such a law at the federal level. Their first success came a year later, in Maryland, with adoption of the nation's first shield law. That success can be partly explained by a connection that has remained hidden until the historical reconstruction of this study: Shriver was from one of Maryland's most powerful families, he had worked at the Baltimore *American*, and he was a close friend of that newspaper's publisher, Felix Agnus, who led the nationwide lobbying campaign. Although Maryland's statute would remain unique for decades, Gerhardt's theory would count it as a significant development for it marked the instantiation of a professional norm into law – his model of a non-judicial precedent.<sup>350</sup>

That strengthened non-judicial precedent held the potential to influence court-made law in the future. To borrow Judge Roger Traynor's metaphor, Maryland had launched a statute into a common-law orbit, and its presence could exert influence on judges confronting the journalist-privilege question for the first time; the statute might be considered a model of sound policy, one that courts might analogize in common law. This is exactly how the Shriver-Edwards defense team depicted it during the reporters' appeal in 1897. In a remarkably candid three-day exchange with the judge in the case, the

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<sup>350</sup> *Id.* at 715 (in which he writes, "I define non-judicial precedents as any past constitutional judgments of non-judicial actors that courts or other public authorities imbue with normative authority.").

lawyers pointed to the Maryland statute as evidence of popular and elite support for the reporters' claim to a privilege, and they expressly urged the judge to analogize a common-law rule based on the statute.

This episode precisely fulfilled a prediction of Gerhardt's theory. The campaign for shield laws in the states could not have directly helped Shriver and Edwards; their case was being heard in a federal court. Instead, the defense team was counting on the signaling function of such a strong non-judicial precedent on the books. "Non-judicial actors send signals to courts," Gerhardt has written, and "non-judicial actors also seek to construct precedents to influence not only the agendas of their respective states but also the agendas of other states and the federal government."<sup>351</sup>

At trial, the Shriver-Edwards defense team made two explicitly Constitutional arguments: that forcing the reporters to divulge their sources would violate their rights against improper search and seizure and against self-incrimination. More important, they laid out for the first time in a journalist-privilege case an elaborate argument based on freedom of the press: that journalism had grown professional and reliable enough to be considered a public utility; that journalism played a vital role as an intermediary between the people and their government; that journalism was an important check on government corruption. We would recognize these as First Amendment rationales today, though lawyers in 1897 could not plausibly have argued on that basis. Instead, according to Gerhardt's theory, they were facilitating a dialogue about constitutional values.<sup>352</sup>

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<sup>351</sup> *Id.* at 765-66.

<sup>352</sup> *Id.* at 778-79.

The trial ended with an order to the jury to find the reporters not guilty. Like Justice Stewart in his holding in *Garland v. Torre* in 1958,<sup>353</sup> Judge A.C. Bradley conceded that there was merit in the policy argument for protecting reporters' sources, though he said that it should be left to the legislatures. Further, like Justice Stewart in his dissent in *Branzburg* in 1972, Judge Bradley based his decision partly on his belief that the names of the sources were not relevant. The judge emphasized that he was not establishing a journalist privilege as a matter of common law, but headlines nationwide hailed the decision as a victory for the "rights of the press" and the "rights of journalists." This same sort of rights rhetoric suffused the shield-law campaign. Journalists hailed the passage of the Maryland law as a victory for "freedom of the press," one that secured a journalist's "right" to protect his or her sources.

Gerhardt would not chastise those journalists for blurring the lines between common law, constitutional law and statutory law. Telling journalists in the 1890s that only courts conferred rights while legislatures made public policy would have been a distinction without a difference. At a time when courts had said next to nothing about the First Amendment, these non-judicial actors were first movers in defining the aspirations of a free press. They were, as Gerhardt's theory would predict, shaping national identity<sup>354</sup> and shaping legal history.<sup>355</sup> The journalists, not the courts, were establishing a concrete norm they believed would give substance the vague promise of the Press Clause; a legislature, not a court, instantiated that norm into law for the first time. These non-judicial actors were putting the journalist-privilege issue on a trajectory that would 1)

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<sup>353</sup> *Garland v. Torre*, 259 F.2d 545 (2nd Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

<sup>354</sup> *Id.* at 774.

<sup>355</sup> *Id.* at 772.

lead to the proliferation of shield-law statutes in decades to come, and 2) suffuse future debate with First Amendment rhetoric to sway public and elite opinion. Those will be the subjects of the next chapter.

### CHAPTER III

#### JOURNALIST PRIVILEGE IN 1929: NON-JUDICIAL ACTORS AND THE QUEST FOR A FEDERAL SHIELD LAW

While the legal landscape of the 19th century was dominated by common-law judges shaping and reshaping common-law precedents, the 20th century saw the rise of statutory law as the engine of an increasingly complex administrative state.<sup>1</sup> Judge-turned-academic Guido Calabresi famously lamented in 1999 that courts were “choking on statutes.”<sup>2</sup> Yet, despite its prevalence and importance, statutory law has remained largely understudied and undertheorized in the academy.<sup>3</sup>

Scholars who specialize in statutory law have criticized constitutional-law scholars for focusing too narrowly on court decisions, especially those of the U.S. Supreme Court, and for failing to account for the work that statutes do in giving practical meaning to broad constitutional principles. Eminent scholars such as Peter M. Shane and William N. Eskridge, Jr., working separately, have theorized a sort of “statutory constitution” that operates in concert with court-made law.<sup>4</sup> They both envision a broad

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<sup>1</sup> GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1999).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> WILLIAM N. ESKRIDGE, JR. *DYNAMIC STATUTORY INTERPRETATION* 1-8 (1994). *See also* WILLIAM N. ESKRIDGE, JR., & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (laying out a new theory that integrates statutory law within a constitutional framework).

<sup>4</sup> Peter M. Shane, *Voting Rights and the “Statutory Constitution,”* 56 *L & CONTEMPORARY PROBLEMS* 243 (1993); William N. Eskridge, Jr., *American’s Statutory “Constitution,”* 41 *U.C. DAVIS L. REV.* 1 (2007-2008).



framework that joins the “large C Constitutional law” created by courts with a “small c constitutional law” created by statutes that operationalize constitutional principles such as equality and non-discrimination.<sup>5</sup> Both Shane and Eskridge use as an example the Equal Protection principles announced in *Brown v. the Board of Education*<sup>6</sup> but given a mechanism for enforcement in the Civil Rights Act of 1964.<sup>7</sup> Both have used voting rights as another example: You cannot understand the evolution of those rights by studying only court decisions; those must be situated in a complex matrix of federal and state rules, starting with the Voting Rights Act of 1965.<sup>8</sup> Court-myopic scholarship, they have argued, is blind to the reality of how complex and dynamic America’s constitutional system actually is.<sup>9</sup>

Michael Gerhardt’s theory of non-judicial precedents tries to solve that problem by elevating the role that non-judicial actors play in creating norms, customs, and rules that almost always precede recognition in court-made law.<sup>10</sup> “Virtually every question of constitutional law that the Court hears,” he has written, “already has been considered by one or more non-judicial actors.”<sup>11</sup> Four aspects of Gerhardt’s theory seem especially

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<sup>5</sup> See SHANE, *supra* note 4, at 243-45; ESKRIDGE, *supra* note 4, at 3-6.

<sup>6</sup> 347 U.S. 483 (1954).

<sup>7</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

<sup>8</sup> Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973, 1973a-1973p). See also SHANE, *supra* note 4, at 252-69; ESKRIDGE, *supra* note 4, at 12-17.

<sup>9</sup> Shane has summed up the problem this way: “One way of understanding the capacity of nonjudicial actors to create the operational meaning of our Constitution is to relate the topic to a larger problem perennially plaguing U.S. constitutional theorists, namely, accounting for legal change.” See SHANE, *supra* note 4, at 243.

<sup>10</sup> Michael Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 714 (2008).

<sup>11</sup> *Id.* at 746.

relevant to the early history of the journalist-privilege issue: 1) Non-judicial precedents can help set the public agenda by drawing attention to an issue in need of resolution;<sup>12</sup> 2) non-judicial precedents can help facilitate dialogue about a Constitutional question, especially a novel one that courts have not directly addressed;<sup>13</sup> 3) non-judicial precedents can help implement Constitutional values by interpreting broad concepts, such as freedom of the press, into workable rules – with or without a court’s imprimatur;<sup>14</sup> and non-judicial precedents can help shape legal history.<sup>15</sup>

The primary goal of this chapter will be to apply Gerhardt’s theory to an early turning point in journalist-privilege history: the first attempts, in 1929, to persuade Congress to adopt a federal shield law.<sup>16</sup> These attempts significantly raised the stakes in the long-running debate over journalists’ claims for a need to protect confidential sources. With only one state-level shield law on the statute books at the time,<sup>17</sup> the campaign in Washington raised the specter of the legislative branch intervening in an issue long controlled by the judiciary. Seen through Gerhardt’s theory, the drive for a federal shield law also represented an opportunity for non-judicial actors to help give meaning to the constitutional value of freedom of the press, which was largely undefined by courts at that time.

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<sup>12</sup> *Id.* at 765.

<sup>13</sup> *Id.* at 766.

<sup>14</sup> *Id.* at 775.

<sup>15</sup> *Id.* at 772.

<sup>16</sup> A Bill Exempting Newspaper Men From Testifying With Respect to the Sources of Certain Confidential Information, S. 2110, 71st Cong., 1st Sess. (Oct. 30, 1929).

<sup>17</sup> Maryland was unique from 1896 to 1933. *See, e.g.,* David Gordon, *The 1896 Maryland Shield Law: The American Roots of Evidentiary Privilege for Newsmen*, JOURNALISM MONOGRAPHS, No. 22 (Feb. 1972).

A second important goal of this chapter will be to correct the historical record about the events of 1929 and to illuminate their significance. Although Congress has debated adopting a shield law off and on for 80 years and although it has been the focus of intense debate in the last five years,<sup>18</sup> the campaign of 1929 has remained but a footnote.<sup>19</sup> Some mid-century media scholars took note of these events,<sup>20</sup> but the story has remained largely untold outside of undocumented textbooks.<sup>21</sup> The history reconstructed here will emphasize the role that non-judicial actors – including William Randolph Hearst and Fiorello La Guardia – played in leading a national debate about journalism, sources and, as Gerhardt’s theory would predict, the meaning of freedom of the press. It also will tie these events directly to a raft of shield laws adopted in the 1930s and 1940s, a link that never has been shown (see APPENDIX).

The chapter will address these research questions: How have non-judicial actors responded to judicial decisions? How have non-judicial actors shaped the debate over journalist privilege? What rationales for a testimonial privilege have they articulated, and

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<sup>18</sup> See, e.g., 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 (2005-2006) (one of many recent articles calling on Congress to adopt a shield law to respond to a growing number of subpoenas issued against journalists in the face of diminishing protection in federal courts).

<sup>19</sup> See, e.g., Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 241 (1973-1974). Footnote 23 states that Capper introduced S. 2175 on Oct. 30, 1929, but that is wrong. That bill was actually Capper’s second, introduced on Nov. 20. The first bill was S. 2110, introduced in the Senate on Nov. 14. The date Oct. 30 refers to the legislative day recorded in the Senate record, which is the same for both because that “legislative day” stretched for the whole of the special session, from gavel to gavel. See 71 CONG. REC. 5832 (1929). Many legal scholars have duplicated that slightly wrong footnote. See, e.g., Leslie Siegel, *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 STATE L.J. 468 (2006).

<sup>20</sup> See, e.g., Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM Q. 230, 234 (1943).

<sup>21</sup> The fullest account of these events, running about two pages, was included in an unfootnoted journalism textbook, so scholars have no citations to lead them to further resources. See Curtis D. MacDougall, *NEWSROOM PROBLEMS AND POLICIES* 320 (1949).

how, if at all, have those rationales changed over time? The study will show that journalists and press advocates in 1929 were well-organized and more forceful than ever in their response to defeats in court; they assertively sought to sway public and elite opinion by emphasizing journalism's role as a public good; they were in the process of abandoning unsuccessful legal arguments, such Fifth Amendment claims against self-incrimination; they were instead explicitly framing the journalist-privilege question in First Amendment terms; and they seemed willing to turn away from the courts and to seek relief in the legislatures.

The first substantive section of this chapter will sketch the position of journalists in society in 1929 and the press' legal footing at the time. The second part will sketch the key non-judicial actors driving the events of 1929. The third part will reconstruct the events leading up to and growing out of this initial drive for a federal shield law. The final part will offer an interpretation of these events through the lens of Gerhardt's theory of non-judicial precedents.

## **POSITION OF THE PRESS IN SOCIETY**

The journalistic press was at the height of its powers in the late 1920s, bolstered by strong economic conditions and improved government relations. Although the press was still fighting fundamental legal battles, it could point to some significant victories in this era. On the journalist-privilege issue, however, the press and its advocates appeared to be losing ground in the courts or, at the least, standing still.

***Image and Influence.*** Nineteen-twenty-nine was a peak-performance year for the news industry. *The New York Times* reported a daily circulation of 426,007 and a

Sunday circulation of 706,927.<sup>22</sup> *Editor & Publisher's* annual industry survey reported that aggregate advertising revenue had reached a record of \$240 million for the year.<sup>23</sup> Newspapers such as the *San Antonio Express* were opening million-dollar headquarters.<sup>24</sup> Newspapers were investing in new-fangled methods of reporting, including buying and manning private airplanes.<sup>25</sup> In November of that year, William Randolph Hearst's Fox Film Corp. opened a theater in New York devoted solely to showing news reels, back to back, a forerunner to today's cable news channel.<sup>26</sup>

The press also enjoyed heightened prestige on the national political scene. After suffering through one of the most repressive eras in its history, during World War I,<sup>27</sup> the press began to push back during the 1920s.<sup>28</sup> Nothing before had cemented the popular image of the press as a check on government corruption like coverage of the Teapot Dome oil-and-kickback scandal, which broke into the headlines early in President Warren G. Harding's administration and remained there through the end of the decade.<sup>29</sup> Paul Y. Anderson of the St. Louis *Post-Dispatch* was one of several reporters whose work was

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<sup>22</sup> See *Circulations, Rates and Personnel of U.S. Daily Newspapers*, EDITOR & PUBLISHER, Jan. 25, 1930, at 76. For the sake of brevity and convenience, *Editor & Publisher* shall be referred to in notes as E&P.

<sup>23</sup> *1929 Record Year for National Copy; \$240,000,000 Spent, Ad Bureau Says*, E&P, Jan. 11, 1930, at 12.

<sup>24</sup> C.M. Meadows, Jr., *San Antonio Dailies in New Plant*, E&P, Oct. 5, 1929, at 12.

<sup>25</sup> Jerome H. Walker, *Planes Broadened News Field in 1929*, E&P, Dec. 28, 1929, at 9.

<sup>26</sup> John F. Roche, *First Theater Showing All-News Films Opens in New York*, E&P, Nov. 9, 1929, at 28. The theater operated 10 a.m. to midnight, and news buffs paid a quarter for admission.

<sup>27</sup> See, e.g., Margaret A. Blanchard, "Why Can't We Ever Learn?" *Cycles of Stability, Stress and Freedom of Expression in United States History*, 7 COMM L. & POL'Y 347-378 (2002).

<sup>28</sup> WILLIAM L. RIVERS, *THE ADVERSARIES: POLITICS AND THE PRESS* 24 (1970) (recalling that members of the press had "discovered the full thrust of their power" during the Teapot Dome scandal).

<sup>29</sup> See FRANK LUTHER MOTT, *AMERICAN JOURNALISM: A HISTORY, 1690-1940*, 700 (3rd ed. 1962).

cited as evidence by Congressional investigators,<sup>30</sup> and he ultimately won a Pulitzer Prize for it in 1929.<sup>31</sup> The years-long scandal peaked on Oct. 25 that year, when Albert Fall, former interior secretary under then-dead President Harding, was convicted and sentenced to a year in prison with a \$100,000 fine – the first Cabinet member ever brought down by the press.<sup>32</sup>

One explanation for an empowered press during the 1920s was improved relations with the White House. While Woodrow Wilson's presidency had ended on a bitter note, especially after the United States declined to join the League of Nations,<sup>33</sup> the arrival of Harding was greeted by cheers in the press corps.<sup>34</sup> Harding was a newspaperman-turned-politician, and upon his inauguration, 600 newspaper editors from around the country presented him with an editor's chair for the White House.<sup>35</sup> Even after scandal engulfed his presidency, the press carefully protected Harding, often by casting him as a naïf

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<sup>30</sup> *Id.*

<sup>31</sup> See The Pulitzer Prizes for 1929, available at <http://www.pulitzer.org/awards/1929> (last visited Mar. 10, 2011).

<sup>32</sup> See David H. Stratton, *Behind Teapot Dome: Some Personal Insights*, BUSINESS HIST. REV., Vol. 31, No. 4 (Winter 1957), at 385-402.

<sup>33</sup> See RIVERS, *supra* note 26, at 24. Rivers recalled: "[Wilson] was supersensitive, and he blamed the correspondents for reporting criticism of his Administration voice by Congress. ... He gradually withdrew into a shell of persecution." *Id.*

<sup>34</sup> See MOTT, *supra* note 27, at 721.

<sup>35</sup> See *Harding Gets Gift of Editorial Chair, Offering of Friendship From 600 Editors Is Made From Timber of the Old Revenge*, N.Y. TIMES, July 14, 1921, at A2. Sen. Arthur Capper of Kansas was quoted saying:

We believe the American press, exemplified by your own honorable part in its upbuilding, does much to make men more thoughtful and considerate and upright in the forming of the highest ideals of American citizenship. That the newspaper men have complete confidence in your ability and determination to measure up to the great demands of the time is shown in this spontaneous expression today.

*Id.*

surrounded by crooks.<sup>36</sup> When Calvin Coolidge took the helm in 1923, he vowed to keep press relations cordial and continued Harding's custom of frequent meetings with the press, though he imposed a strict rule: He was never to be quoted. Not only did this help create the image of "Silent Cal," but it also drove reporters to shift their focus from the White House to Congress;<sup>37</sup> the Senate became the coveted beat.<sup>38</sup> Even Herbert Hoover enjoyed a friendly relationship with the press, at least for a time. He had owned an interest in the *Washington Herald* until 1922, and he was a reliable source for the press during his stint as commerce secretary in Coolidge's administration. His troubles with the press did not begin in earnest until the stock market crash in late October 1929.<sup>39</sup>

***Legal Footing.*** Just as in the 1890s, the 1920s saw a rising tide of libel lawsuits.<sup>40</sup> It became common in this period for large newspapers to hire in-house legal counsel to review sensitive articles for potential problems.<sup>41</sup> By 1929, *Editor & Publisher* magazine reported a stream of new suits and decisions week after week, sometimes lumped under the sub-headline "Libel Epidemic."<sup>42</sup> The tide crested in early 1930 with

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<sup>36</sup> *Id.* See also RIVERS, *supra* note 26, at 25. He wrote: "Toward the end, as the correspondents and the Congress revealed more of the scandals of his subordinates, Harding seemed to withdraw from life. He died in 1923, leaving a memory of a man who was only gradually becoming aware that he had surrounded himself with thieves." *Id.*

<sup>37</sup> See MOTT, *supra* note 27, at 722.

<sup>38</sup> See RIVERS, *supra* note 26, at 25.

<sup>39</sup> See MOTT, *supra* note 27, at 722-23.

<sup>40</sup> See KATHY ROBERTS FORDE, LITERARY JOURNALISM ON TRIAL 87-88 (2008).

<sup>41</sup> *Id.*

<sup>42</sup> *Libel Epidemic, Three St. Louis Dailies Defendants in Actions Totaling \$300,000*, E&P, Sept. 28, 1929, at 3.

the largest libel lawsuit filed up to that time: \$48 million in damages sought from nine newspapers and wire services.<sup>43</sup>

Unimaginable today, the press in the 1920s also operated under the onerous threat of indirect contempt, also known as contempt by publication.<sup>44</sup> Writers, editors, and cartoonists were routinely cited and fined for criticizing or even questioning judicial decisions.<sup>45</sup> In the late 1920s, fines of up to \$1,000 were common.<sup>46</sup> The U.S. Supreme Court in 1907 had ruled that the First Amendment did not protect the press from this sort of contempt citation.<sup>47</sup> So although journalists routinely talked of indirect contempt as a threat to freedom of the press, they were forced to seek relief through statutory law.<sup>48</sup> In 1929, two major lobbying campaigns were launched, in New York<sup>49</sup> and in Washington, D.C.<sup>50</sup> At the federal level, Sen. Arthur Vandenberg of Michigan, who was a newspaper publisher, led the effort to adopt a law curtailing judges' powers to hold newspapers in

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<sup>43</sup> *World's Greatest Libel Suit, Asking \$45,000,000, Filed by Durant*, E&P, Feb. 8, 1930, at 6.

<sup>44</sup> See WAYNE OVERBECK, *MAJOR PRINCIPLES OF MEDIA LAW* 321-23 (2006).

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., Jerome H. Walker, *Judges Differ in Views on Contempt, Review of Noted Cases Shows Lack of Unanimity in Administering Law*, E&P, Dec. 7, 1929.

<sup>47</sup> *Patterson v. Colorado*, 205 U.S. 454 (1907). The Court would not use the First Amendment to curtail so-called indirect contempt until 1941, in *Bridges v. California*, 314 U.S. 252.

<sup>48</sup> See, e.g., *Revision of Contempt Laws Discussed*, E&P, Nov. 2, 1929, at 32 (stating, "The need for revision of the laws of new York State relating to contempt of court, if the freedom of the press is to be safeguarded" was the topic of a meeting of the Western New York Publishers' Association).

<sup>49</sup> *Id.*

<sup>50</sup> George H. Manning, *Vandenberg Would Limit Power of Judges in Indirect Contempt*, E&P, Sept. 14, 1929, at 10.



contempt for what the newspapers published.<sup>51</sup> There was talk at the time that Vandenburg's bill, if adopted, might also be a solution to the journalist-privilege issue.<sup>52</sup>

Another fundamental legal battle the press was waging in 1929 was against prior restraints – or, as *Editor & Publisher* dubbed the problem, “Censorship by Injunction.”<sup>53</sup> In one particularly egregious case that year, a streetcar company in Milwaukee sought an injunction to prevent a newspaper from printing a letter to the editor written by a dissatisfied customer; when the newspaper pressed its case in court on First Amendment grounds, the court sided with the streetcar company.<sup>54</sup> The issue was brought to a climax in December that year, when the Minnesota Supreme Court rejected, for a second time, a First Amendment challenge to the state's so-called gag law.<sup>55</sup> Immediately, Robert McCormick, the powerful publisher of the *Chicago Tribune*, vowed to put his paper's influence and money behind an appeal to the U.S. Supreme Court<sup>56</sup> – an effort that led 18 months later to the landmark decision in *Near v. Minnesota*.<sup>57</sup>

Amid these ongoing battles, the press managed to achieve at least one unqualified – and unquestionably important – legal victory in 1929. Since 1789, the Senate had

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<sup>51</sup> George H. Manning, *Editors Acclaim Move to Bring Contempt Cases Before Impartial Tribunal*, E&P, Sept. 28, 1929, at 1. The bill died in committee the following year. See George H. Manning, *Contempt Bill Held in Committee*, E&P, Feb. 15, 1930, at 5.

<sup>52</sup> *Id.*

<sup>53</sup> Editorial, *Censorship by Injunction*, E&P, Jan. 11, 1930, at 32.

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

<sup>55</sup> See *Minnesota Suppression Law Upheld, State Supreme Court Rules That Act Does Not Infringe Freedom of Press Guarantee*, E&P, Dec. 28, 1929, at 7.

<sup>56</sup> *Id.*

<sup>57</sup> 283 U.S. 697 (1931), handed down June 1. For a complete and compelling account, see FRED W. FRIENDLY, *MINNESOTA RAG: CORRUPTION, YELLOW JOURNALISM, AND THE CASE THAT SAVED FREEDOM OF THE PRESS* (2003).

conducted much of its business behind closed doors, in “executive session,” including its votes on presidential appointments to the federal bench. That dramatically changed in May 1929, in a bitter fight over President Hoover’s appointment of Irvine Lenroot to the U.S. Court of Customs & Patents, not because it was a high-profile post but because Lenroot’s name had become tainted by the Teapot Dome oil-and-kickback scandals. Rather than merely report that Lenroot’s nomination had gone through 42 to 27, United Press reporter Paul Mallon used confidential sources to piece together a nearly flawless roll call of who supported the controversial nominee and who did not.<sup>58</sup>

The ensuing “bad blood fight” between the Senate and the press included Democratic Senators vowing to conduct a closed-door investigation into Mallon’s reporting, to hold him in contempt, and, if he still refused, to throw him in jail.<sup>59</sup> After Sen. David Reed of Pennsylvania railed against “the so-called ethics of your so-called profession” and the Senate barred all reporters from the floor, the press went on the attack; it castigated the senators as a secretive elite and praised reporters as representatives of the people.<sup>60</sup> Sen. Robert La Follette, Jr., a progressive Republican and a newspaper publisher,<sup>61</sup> vowed to start reporting everything done in secret to his

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<sup>58</sup> Journalists of that era have recounted these events with relish. *See, e.g.,* HUGH BAILLIE, *HIGH TENSION: RECOLLECTIONS OF HUGH BAILLIE* 288 (1959); RAY THOMAS TUCKER, *SONS OF THE WILD JACKASS* 165 (1969); WALTER TROHAN, *POLITICAL ANIMALS: MEMOIRS OF A SENTIMENTAL CYNIC* 157 (1975).

<sup>59</sup> Special to the New York Times, *Senate Floor Closed to Press*, N.Y. TIMES, May 23, 1929, at A1. *See also* Editorial, *Senate v. Press*, TIME, June 3, 1929, available at <http://www.time.com/time/magazine/article/0,9171,732427,00.html> (last visited Mar. 10, 2011).

<sup>60</sup> M. Farmer Murphy, *Blow at U.P. Closes Senate Floor to Press*, SUN (Baltimore, Md.), May 23, 1929, at A1.

<sup>61</sup> Robert La Follette, Sr., started the left-wing political newspaper *La Follette’s Weekly* in 1909. In 1929, the junior La Follette changed the name of the paper to *The Progressive*, and it is still published under that name. *See* *The Progressive, History and Mission*, available at <http://www.progressive.org/mission> (last visited Mar. 10, 2011).

constituents in Wisconsin and dared the Democrats to bar him from the floor along with the reporters.<sup>62</sup> After a week of merciless press coverage, the Senate backed down: It canceled the investigation of Mallon<sup>63</sup> and rewrote the rules of the chamber to end closed-door sessions.<sup>64</sup> Washington reporting was forever changed.<sup>65</sup>

***Status of the Privilege.*** The decade began with a major setback, in the eyes of the press, in the quest for a testimonial privilege. When the U.S. Supreme Court denied *certiorari* in the 1921 case of Hector Elwell, managing editor of the *Wisconsin News*,<sup>66</sup> journalists interpreted it as a reversal of an apparent trend toward recognition of a privilege.<sup>67</sup> *Editor & Publisher* went so far as to announce in a large-type headline, “U.S. Supreme Court Made New Law in Elwell Contempt Case.”<sup>68</sup> The trade magazine recounted a string of cases that suggested a *de facto* privilege or at least a tacit willingness on the part of judges to excuse reporters from revealing sources based on

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<sup>62</sup> Associated Press, *Press Row Defense Given, Rules Committee Denounced, La Follette Dares Senate to Expel Him for Telling How He Votes*, L.A. TIMES, May 24, 1929, at A1.

<sup>63</sup> See, e.g., Special to the New York Times, *Senators Drop Plan for Secret Inquiry*, N.Y. TIMES, May 25, 1929, at A2; United Press, *Senate Gets Report Urging Publicity*, WASH. POST, May 29, 1929, at A2.

<sup>64</sup> See, e.g., Richard V. Oulahan, *Favor Publishing All Senate Votes; Rules Committee Members Advise Ending Secret Roll-Calls on Nominations*, N.Y. TIMES, May 29, 1929, at 24.

<sup>65</sup> Since then, the U.S. Senate has held closed-door sessions just a handful of times. See generally Marjorie Cohn, *Senate Impeachment Deliberations Must Be Public*, 51 HASTINGS L.J. 365 (2000).

<sup>66</sup> *Elwell v. United States*, 275 F. 775 (7th Cir. 1921), *cert. denied*, 257 U.S. 647 (1921) (holding that a court decides from the circumstances whether Fifth Amendment protection applies; it is not up to a witness’s discretion).

<sup>67</sup> See, e.g., *No Confessional Seal on News Sources*, E&P, Oct. 29, 1921, at 14 (saying in a sub-headline, “U.S. Supreme Court Says Elwell Was Guilty of Contempt in Not Giving Grand Jury Information – Will Go to Jail, is Belief”).

<sup>68</sup> Frank Leroy Blanchard, *U.S. Supreme Court Made New Law in Elwell Contempt Case*, E&P, Nov. 5, 1921, at 15 (saying in a sub-headline, “Overthrows Theory That Reporter’s News Sources Are Privileged, Which Has Been Upheld by Lower Courts Actively and by Inference”).

technical grounds or the belief that the information was not relevant.<sup>69</sup> The journalists' sense of a trend was not unfounded: When the question of a journalist privilege first made it to the High Court, in the *Burdick* case of 1915, the reporter won – though only on narrow technical grounds, not because the Court accepted his claim to protection under the Fifth Amendment.<sup>70</sup> When Elwell's petition for *cert.* was denied, journalists interpreted it to mean that the Fifth Amendment argument, which he also had made, was effectively foreclosed.<sup>71</sup> "In other words," *Editor & Publisher* editorialized, "there is no law that will protect an editor or reporter in his refusal to tell from whom he has obtained news in confidence."<sup>72</sup>

Thus, journalists in 1929 were in roughly the same position as journalists in the 19th century: There was no solid judicial precedent they could cite to support a testimonial privilege based on common law, based on the Fifth Amendment's mandate against self-incrimination, or, two years before *Near v Minnesota*, based on the Press Clause of the First Amendment.<sup>73</sup> That was why, as *Editor & Publisher* predicted,<sup>74</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *Burdick v. United States*, 236 U.S. 79 (1915). The circumstances in this rarely cited case were peculiar in the extreme. It involved a presidential pardon and the question of whether the reporter was obligated to accept it. No, the Court said, because doing so might tend to incriminate him. The case did not focus squarely on whether testifying and revealing sources alone would tend to incriminate him. See Margaret A. Blanchard, *The Fifth-Amendment Privilege of Newsmen George Burdick*, 55 JOURNALISM QUARTERLY 39 (1978).

<sup>71</sup> Editorial, *Privileged News and the Profession*, E&P, Nov. 5, 1921, at 34 (saying the denial "finally establishes beyond question the right of the courts to compel newspapers to reveal the sources of information in cases coming before them").

<sup>72</sup> *Id.*

<sup>73</sup> 283 U.S. 697 (1931). Until *Near*, the press had never won a significant case under the Press Clause before the U.S. Supreme Court. See, e.g., *Patterson v. Colorado*, 205 U.S. 454 (1907) (holding that a contempt citation against a newspaper for publishing articles critical of a court did not violate the First Amendment).

journalists would have to seek protection in a federal statute. “Its success,” the magazine said, “will assure to the press the freedom from persecution that is implied, if not called by name, in the nation’s fundamental law.”<sup>75</sup>

### KEY NON-JUDICIAL ACTORS

The dispute of 1929 initially centered on three *Washington Times* reporters who, though young, understood they were playing central roles in a legal struggle important to the entire profession. The dispute was transformed from a local matter into a national *cause célèbre* by the intervention of three high-profile public figures, who instantly commanded media attention.

***The Reporters.*** Gorman M. Hendricks, 35, was a 12-year veteran of the national press corps, having worked at the *Washington Herald* and *Post* before his stint at the *Times*.<sup>76</sup> Linton Burkett, 30, had 10 years of newspaper experience, mostly at papers in the South such as the *Charlotte (N.C.) Observer*, before arriving in Washington just months before the dispute began.<sup>77</sup> Jack Nevin, Jr., 24, was only a year into his first full-time newspaper job, but he was the son of veteran Washington reporter John E. Nevin of the International News Service.<sup>78</sup> Because they worked for the *Washington Times*, they were supported by the considerable legal and financial resources of Hearst Newspapers,

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<sup>74</sup> *Id.* (predicting that “a campaign will have to be undertaken in the near future to establish by Federal statute the privileged character of information given to a reporter or editor in line of duty”).

<sup>75</sup> *Id.*

<sup>76</sup> George H. Manning, *Three Washington Reporters Sent to Jail for Refusing to Reveal Source of News*, E&P, Nov. 2, 1929, at 1.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

one of the largest chains in the nation.<sup>79</sup> After being held in contempt of court for refusing to reveal their confidential sources, they chose to go to jail in order to take a stand and draw attention to the journalist-privilege issue.<sup>80</sup> “As we all stated some 45 days ago, when it might have been a question of doing a year or more,” Hendricks later recounted, “we were ready.”<sup>81</sup> Their roles would be as martyrs of the First Amendment.

**William Randolph Hearst.** Because of his immense wealth, outsize ego, political ambitions, and business acumen, Hearst was a larger-than-life figure in this era.<sup>82</sup> With newspapers stretching coast to coast, Hearst had added radio stations to his empire in the 1920s and, in 1929, created Hearst Metrotone News, a newsreel production company.<sup>83</sup> Reports of his activities that year included a feature package in *The New York Times* about his opulent castle in California<sup>84</sup> and, around the time of the jailing of his reporters, news of a party for the visiting British Chancellor of the Exchequer Winston Churchill.<sup>85</sup> Upon hearing of the jailing, he ordered the *Times* to double the reporters’ salaries as long as they remained in jail, and he promised them bonuses after their release.<sup>86</sup> His role would be to use his celebrity as a bully pulpit from which to lionize the journalists and sway public opinion.

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<sup>79</sup> Hearst added the *Washington Times* to his media empire in 1919. See Staff report, *W.R. Hearst Buys Washington Times*, WASH. POST, Nov. 18, 1919, at 8.

<sup>80</sup> George H. Manning, *Reporters Go Back to Jail*, E&P, Nov. 9, 1929, at 6.

<sup>81</sup> George H. Manning, *Ovation Given Jailed Reporters*, E&P, Dec. 14, 1929, at 7.

<sup>82</sup> See generally DAVID NASAW, *THE CHIEF: THE LIFE OF WILLIAM RANDOLPH HEARST* (2001).

<sup>83</sup> *Id.* at 414-415.

<sup>84</sup> *Id.* at 417.

<sup>85</sup> *Id.* at 423.

<sup>86</sup> See George H. Manning, *supra* note 72.

**Fiorello La Guardia.** Having won a seat in the U.S. House of Representatives in 1923, the future mayor of New York had become “a national gadfly” and media magnet known for his colorful antics in Congress.<sup>87</sup> A progressive Republican representing one of the poorest neighborhoods in New York City, he had turned his own humble roots into *bona fides* as a champion of the people.<sup>88</sup> To align himself with the public’s growing anger over Prohibition in 1929, he once defied alcohol agents to arrest him while he mixed drinks in front of a group of reporters in Washington.<sup>89</sup> He was in the headlines throughout the year as he mounted his first (unsuccessful) campaign for New York mayor against the notoriously corrupt Jimmy Walker.<sup>90</sup> His role in the journalists’ dispute would be to champion a shield-law bill in the House while trying to turn the journalist-privilege issue into a populist political cause.

**Arthur Capper.** One of the longest serving members in U.S. Senate history, Sen. Capper of Kansas was at the height of his political powers in 1929.<sup>91</sup> A confidant to three presidents,<sup>92</sup> Capper made national and international headlines throughout the year as chief sponsor of the so-called Capper Resolution, which would have outlawed

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<sup>87</sup> See HARRY PAUL JEFFERS, *THE NAPOLEON OF NEW YORK: MAYOR FIORELLO LA GUARDIA* 123 (2002).

<sup>88</sup> See THOMAS KESSNER, *FIORELLO H. LA GUARDIA AND THE MAKING OF MODERN NEW YORK* (1989).

<sup>89</sup> *Id.* at 113.

<sup>90</sup> See JEFFERS, *supra* note 79, at 15-38.

<sup>91</sup> See generally HOMER E. SOCOLOFSKY, *ARTHUR CAPPER: PUBLISHER, POLITICIAN, AND PHILANTHROPIST* (1962). Socolofsky was Capper’s chief biographer and published several books and articles on the politician.

<sup>92</sup> Capper had warm relations with the three Republican presidents of the 1920s, Harding, Coolidge and Hoover. Capper was with Coolidge in 1927 when Coolidge stunned the press by announcing he would not seek re-election. See Letter from Everett Sanders, Secretary to President Coolidge, Dec. 1, 1938, in the Arthur Capper papers, Kansas State Historical Society (recounting events of that day in Rapid City, S.D.).

international arms sales.<sup>93</sup> Like La Guardia, Capper was a progressive Republican whose people-centered political causes included championing equality for women<sup>94</sup> and improving the lives of African Americans.<sup>95</sup> Like Hearst, Capper was a successful newspaper publisher who built an empire of holdings that, by 1929, reached more than three million readers in four states.<sup>96</sup> In 1926, the same year he made the cover of *Time* magazine,<sup>97</sup> Capper pushed through a bill to help create the National Press Building, still home to the bulk of the Washington press corps.<sup>98</sup> Six months before the journalist-privilege dispute, Capper gave a keynote address at the 1929 meeting of the American Society of Newspaper Editors that extolled the role of a free press in a democracy: “American newspapers are the breath of life for this government. Without them, it would perish – disintegrate.”<sup>99</sup> His role in the dispute would be to champion a shield-law bill in the all-important Senate, to work behind the scenes to build

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<sup>93</sup> The Capper Resolution was a proposed amendment to the recently ratified international treaty known as the Kellogg-Briand Peace Pact, which outlawed wars of aggression. *See, e.g.,* Edwin L. James, *Capper Moves to Back Peace Pact With Trade Embargo on Violators*, N.Y. TIMES, Feb. 11, 1929, at 1; *Senator Capper’s Anti-War Proposal Wins Praise Here and Abroad*, N.Y. TIMES, Feb. 11, 1929, at 2. Capper’s proposal was never adopted.

<sup>94</sup> Capper was one of the earliest champions of an Equal Rights Amendment to the Constitution. *See, e.g.,* Editorial, *Adopt a Program for “Equal Rights,”* N.Y. TIMES, Dec. 8, 1929, at 16.

<sup>95</sup> Capper was one of the earliest sponsors of anti-lynching legislation in Congress. *See, e.g.,* *New Lynching Ban Offered in Senate*, N.Y. TIMES, Jan. 20, 1939, at 4.

<sup>96</sup> *Id.* at 143.

<sup>97</sup> Cover Story, *The Bloc at Work*, TIME, Jan. 18, 1926, at 1. Capper was mentioned at this time as a possible presidential candidate for 1928.

<sup>98</sup> Letter from Harvey D. Jacob, General Counsel, National Press Building Corp., Apr. 17, 1926, in the Arthur Capper Papers, Kansas State Historical Society (thanking Capper for championing legislation to change District of Columbia zoning laws to allow construction of the press building).

<sup>99</sup> Arthur Capper, *Speech to the American Society of Newspaper Editors*, Apr. 19, 1929, in PROBLEMS OF JOURNALISM: PROCEEDINGS OF THE SEVENTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF NEWSPAPERS 64-74 (1929).



support among newspaper publishers, and to frame the issue in persuasive First Amendment terms.

## RECONSTRUCTION OF EVENTS

Gerhardt has defined non-judicial precedents as “any past constitutional judgments of non-judicial actors that courts or other public authorities imbue with normative authority.”<sup>100</sup> As of 1929, press advocates had persuaded public authorities in just one state, Maryland, to imbue the practice of shielding confidential sources with the normative authority of law. However, that shield law, as a non-judicial precedent, would lend legitimacy to the campaign to adopt a similar law at the federal level.

***Journalist Claims and Judicial Reaction.*** Events that transformed the question of a journalist privilege from a local issue into a national one began with a series of articles published in October 1929 in the *Washington Times*. The three reporters – Hendricks, Burkett, and Nevin – took readers on a tour of 49 speakeasies serving liquor illegally in the heart of the nation’s capital. They withheld exact addresses but described each “joint” in a way that might have been recognizable to local denizens. They withheld names of proprietors and customers, but they alluded mysteriously to the “Man in the Green Hat,” who regularly, they said, provided liquor to members of Congress.<sup>101</sup>

When a grand jury was convened Oct. 30 to investigate Prohibition violations in the District of Columbia, the journalists were its central focus.<sup>102</sup> First to testify, city

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<sup>100</sup> Gerhardt, *supra* note 10, at 715.

<sup>101</sup> See, e.g., Walter A. Steigleman, *THE NEWSPAPERMAN AND THE LAW* 198 (1950).

<sup>102</sup> See, e.g., Special to the New York Times, *Capital Reporters Jailed for Withholding Bootleggers’ Names From Grand Jury*, N.Y. TIMES, Oct. 31, 1929, at 14.

editor Daniel O’Connell reminded the grand jury that journalists were not prosecutors or policemen or “stool pigeons,” and he invited the grand jury to summon witnesses and conduct an investigation of its own. When the reporters appeared, they refused to reveal their sources and claimed that all the relevant information could be found in their published stories. On their behalf, their counsel argued that to reveal the names would 1) be a breach of a confidentiality agreement they had made with their sources; 2) tend to hold them up to dishonor (a common law argument), 3) would violate the ethics of their profession (a normative argument that had never been recognized by a court), and 4) would hurt their ability to earn a livelihood (a common law argument known as loss of estate).<sup>103</sup> No Fifth Amendment argument was offered.

District court Judge Peyton Gordon summarily rejected the reporters’ claims based on the fact that a journalist-source privilege had never been recognized at common law. In addition to sentencing each to 45 days in jail, he warned them that he would re-sentence them to an additional 45 days if they continued to be recalcitrant. In an unusual step, the judge also refused to grant them bail and ordered them taken into custody on the spot.<sup>104</sup> In something of a rebuke to Judge Gordon, Justice Frederick L. Siddons of the District Supreme Court the next day granted a writ of habeas corpus and ordered the reporters released on bonds of \$500 apiece.

The reporters, vowing to remain silent, were portrayed as defiant celebrities. “Their release came at the end of a full day in jail, during which they reported that they

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<sup>103</sup> George H. Manning, *Three Washington Reporters Sent to Jail for Refusing to Reveal Source of News*, E&P, Nov. 2, 1929, at 1. This was an unreported case, so legal proceedings must be gleaned from press reports.

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

had been accorded splendid treatment,” the Associated Press reported. “Other reporters calling to interview them found one in the jail barber shop and another finishing a second helping of breakfast.”<sup>105</sup> As if to heighten the drama surrounding their case, the reporters announced four days later that they would surrender themselves to the court rather than appeal its decision and would serve out their sentences in full.<sup>106</sup>

***Non-Judicial Mobilization.*** On the same day the reporters reported to jail to serve their terms, *Washington Times* managing editor Ralph Benton sent a letter to Sen. Arthur Capper, as chairman of the Senate’s District of Columbia Committee, asking him to begin the process of securing legislation that would grant journalists a testimonial privilege in federal courts. Louis Fehr, publisher of the *New York American*, agreed to lead a campaign to organize newspaper publishers to support legislative efforts at the state level.<sup>107</sup> Capper told reporters in the press corps of his intentions to act as early as Nov. 11, and even small newspapers such as the *Morning Call* in Mississippi carried wire reports saying Capper was drafting a bill that would create a federal law similar to the one in Maryland.<sup>108</sup> Besides forcing reporters to betray personal confidences, Capper was quoted as saying, compelling disclosure of sources “paralyzes the power of the press as

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<sup>105</sup> Associated Press, *Court Grants Bail to Capital Reporters*, N.Y. TIMES, Nov. 1, 1929, at 14.

<sup>106</sup> Special to the New York Times, *Reporters Go Back to Jail: Washington Times Men Accept Sentence for Contempt of Jury*, N.Y. TIMES, Nov. 5, 1929, at 57.

<sup>107</sup> George H. Manning, *Reporters Go Back to Jail, Refusing Confidential Data to Grand Jury*, E&P, Nov. 9, 1929, at 6.

<sup>108</sup> See *Measure for Protection of U.S. Press: Senator Capper Says He Will Push Act Through*, MORNING CALL (Laurel, Miss.), Nov. 12, 1929, at 8. The article mentions Capper was speaking to reporters of Universal Service, one of several wire outfits in competition with the Associated Press at the time.

an agent of public good and renders the press useless to a large extent in exposure of political and public evils.”<sup>109</sup>

On Nov. 14, Capper introduced the first bill to create a federal shield law.<sup>110</sup> An Associated Press’ dispatch appeared the next day in papers coast to coast.<sup>111</sup> This and many other early reports echoed Capper’s emphasis not on the personal rights of the reporters but on the need to protect confidential sources who help journalists serve the public. Editorializing just four days after Capper introduced his bill, the *Herald Examiner* in Chicago argued that reporters working “in the line of duty” are public servants who deserve legal protection. “That is what the Capper bill proposes to do,” the paper said, “compel all federal courts to recognize the quasi-public relation of the newspaper to the public and to protect the newspaper in the faithful discharge of its public obligation.”<sup>112</sup> Putting its First Amendment rhetoric in large type, the *San Antonio Light* ran its staff-written story under the headline “Bill of Rights Asked for Reporters” and said the plight of the jailed reporters had sparked “nationwide interest” in the issue.<sup>113</sup>

***Facilitating a Constitutional Dialogue.*** Gerhardt would explain that infusion of First Amendment rhetoric into a discussion of a statutory shield law as fulfilling a key function of non-judicial precedents: They facilitate debate about Constitutional principles

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

<sup>110</sup> See S. 2110, 71st Cong., 1st Sess. (legislative day Oct. 30, calendar day Nov. 14, 1929).

<sup>111</sup> See, e.g., Associated Press, *Immunity for Reporters Asked by Capper in Senate*, N.Y. TIMES, Nov. 15, 1929, at 22; Associated Press, *Capper Bill Would Protect News Sources*, SAN ANTONIO EXPRESS, Nov. 15, 1929, at 20; Associated Press, *Bill to Free Scribes of Pressure by Courts*, INDEPENDENT (Helena, Mont.), Nov. 15, 1929, at 2.

<sup>112</sup> Editorial, *Capper Bill to Protect Public Obligations of Nation’s Press*, HERALD EXAMINER (Chicago), Nov. 16, 1929, at 12.

<sup>113</sup> *Bill of Rights Asked for Reporters: Capper Measure Outgrowth of Imprisonment of Newspapermen*, SAN ANTONIO LIGHT, Nov. 19, 1929, at 6.

– to educate the public, to hash out competing claims, to rehearse theories not yet recognized by courts.<sup>114</sup> Capper’s strategy of generating public awareness and emphasizing the importance of a free press<sup>115</sup> played a central role in the debate of 1929. Obviously coordinated with Capper in advance, coverage in the weekly trade magazine *Editor & Publisher* included quotes from Capper and the full text of his bill just two days after he entered it in the Senate.<sup>116</sup> “I do not know whether we can get a law through Congress or not,” Capper told the magazine. “I am aware that it is a controversial question ... (but it is) a subject that ought to have attention.” Capper hoped that action on the floor of the Senate would lead the Judiciary Committee to debate the merits of a shield law. “My bill,” he said, “will at least serve the purpose of promoting thought and discussion on the subject.”<sup>117</sup>

The lead editorial in the same issue of *Editor & Publisher* excoriated the “merciless, mean, unjust and indecent case” against “three honest reporters sent to jail like common criminals,” and it lamented “another instance of blind and staggering justice exacting penalties of blood and torture from those who dare serve spiritual causes!”<sup>118</sup> More soberly, the editorial praised Capper’s effort as the start of an important public

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<sup>114</sup> Gerhardt, *supra* note 10, at 766.

<sup>115</sup> See, e.g., *Senator Capper Seeks to Protect Information Received Confidentially*, *Intelligencer* (Edwardsville, Ill.), Nov. 18, 1929, at 8 (saying Capper declares “the power of courts to force newspapermen to reveal the sources of their information endangers freedom of the press”).

<sup>116</sup> George H. Manning, *Capper Author of Bill Protecting News Men in Contempt Cases*, *E&P*, Nov. 16, 1929, at 8.

<sup>117</sup> *Id.*

<sup>118</sup> Editorial, *Hardboiled*, *E&P*, Nov. 16, 1929, at 36. To underscore the idea of unjust rulers punishing truth-tellers, *E&P* placed a filler quote from the Bible next to the editorial: “And the king said to him, How many times shall I adjure thee that thou say nothing but the truth to me in the name of the Lord?” – II. Chronicles, XVII; 15.”

debate: “He can do nothing for the three reporters in jail, but he might do something for the future.”<sup>119</sup> After decrying the fact that no coordinated legal effort was made to support the reporters, the editorial tried to rally journalists around Capper’s effort: “We join newspaper men in thanking Senator Capper, a man with a heart as well as head.”<sup>120</sup>

Two days later, on Nov. 18, *La Guardia* put the issue back into national headlines by introducing a companion to Capper’s bill in the House and by going much further. While Capper’s bill would have covered reporters, editors, and publishers “connected with any newspaper published in the District of Columbia,” *La Guardia*’s bill would have covered journalists in any federal court or before any federal grand jury proceeding anywhere – truly a federal shield law.<sup>121</sup> Noting that the jailing of the *Washington Times* reporters was “creating discussion all over the country,” Rep. Louis Ludlow, an Indiana Democrat who had been a Washington correspondent for nearly 30 years before going into politics, echoed Capper’s free-press rationale for supporting *La Guardia*’s shield law. “A free, alert and courageous press is the nation’s strongest safeguard,” he told the *New York Times*. “There can be no free press in this republic if newspaper reporters are to live in terror of grand jury inquisitions and jail sentences.”<sup>122</sup>

Following *La Guardia*’s action by two days, on Nov. 20, Capper returned to the Senate floor to submit a second bill, this one omitting language that would have limited

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<sup>119</sup> *Id.* In case the reader was not sufficiently sympathetic to the reporters’ plight, the editorial went on: “Perhaps the three young men in jail, one the father of five children of whom one is a two-months infant, will consider [the shield law effort] sufficient compensation for their sacrifice. We doubt, however, if their mothers, fathers, wives or children would agree.”

<sup>120</sup> *Id.*

<sup>121</sup> Special to The New York Times, *La Guardia Bill Would Absolve Reporters Who Refuse to Reveal Their News Sources*, N.Y. TIMES, Nov. 19, 1929, at 23.

<sup>122</sup> *Id.*

protection to newspapers in the District of Columbia.<sup>123</sup> This prompted a new wave of editorials in which Capper's talking points had crystallized: newspapers perform a public service; fulfilling that public service deserves the protection of the law; reporters who go to jail while performing that public service are "martyrs to an important cause."<sup>124</sup>

***Generating Public Support.*** Hearst and editors at the *Washington Times* capitalized on the jailing to portray the reporters as popular heroes and make the case for a privilege in the court of public opinion. Having ordered the newspaper to double the reporters' salaries while in jail, Hearst also announced that a gold watch, \$1,000 apiece, and an extra week of vacation would be waiting for them upon their release.<sup>125</sup> When the reporters were released on the 40th day of their 45-day sentences (released early for good behavior), the newspaper rented out the Belasco Theatre on Washington's Lafayette Square and staged a standing-room-only celebration that included speeches and Vaudeville entertainment.<sup>126</sup> Col. Frank Knox, general manager of Hearst's newspaper chain, presented each with a watch inscribed, "From W.R. Hearst for loyalty to newspaper ethics." In toasting them, Knox said, "I believe I speak the sentiments all the editors in America when I express unbounded admiration for the high courage of these three young men, who kept the faith, preserved the honor of their profession and suffered

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<sup>123</sup> See S. 2175, 71st Cong., 1st Sess. (legislative day Oct. 30, calendar day Nov. 20, 1929).

<sup>124</sup> Reproductions of wire service articles and editorials were widespread. See, e.g., Editorial, *The Service of News*, OIL CITY DERRICK (Oil City, Penn.), Nov. 30, 1929, at 6; Editorial, *The Service of News*, MORNING CALL (Allentown, Penn.), Nov. 30, 1929, at 8. The editorials in these sister papers were identical.

<sup>125</sup> George H. Manning, *Ovation Given Jailed Reporters*, E&P, Dec. 14, 1929, at 7.

<sup>126</sup> *Id.*

hardships rather than be false to the traditions, ethics and standards of their profession.”<sup>127</sup>

La Guardia used the occasion to pit the journalists, as defenders of the people, against callous judges and to generate support for his shield-law bill. He said the reporters were “victims of judicial stupidity” and said his bill was needed “to guard against a type of intellect that, through accident, or politics or otherwise, happens to fall upon the bench.”<sup>128</sup>

By this time, mid-December 1929, the bills submitted by Capper and La Guardia were in the Senate and House judiciary committees, dying without debate. Momentous news had moved into the headlines as the jailed reporters’ story unfolded: Black Thursday on Oct. 24, Black Monday on Oct. 28 and, the greatest stock market crash of them all, Black Tuesday on Oct. 29.<sup>129</sup> Capper himself was busy fighting other uphill battles: re-submitting the so-called “Capper Resolution” to create a ban on international arms sales,<sup>130</sup> fighting against a taxpayer bailout of Wall Street speculators,<sup>131</sup> fighting for

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See JAMES STUART OLSON, *HISTORICAL DICTIONARY OF THE 1920S* 80 (1988).

<sup>130</sup> Special to the New York Times, *To Urge Arms Embargo at December Session; Senator Capper Says He Will Call Up His Resolution to Enforce Kellogg Pact*, N.Y. TIMES, Oct. 12, 1929, at 3.

<sup>131</sup> Special to the New York Times, *Says Speculators Should Get No Aid; Capper, in Radio Talk, Declares Only Legitimate Business Deserves Help*, N.Y. TIMES, Nov. 18, 1929, at 3.



a long-sought tariff bill protective of Midwest farmers,<sup>132</sup> and reassuring the Farm Bloc that the stock market crash would not spell doom for agriculture.<sup>133</sup>

The shield-law idea fell by the way at the federal level, and the *Washington Times* incident shriveled to an unsatisfying end. In a brief item, the *New York Times* reported that “The Man With the Green Hat” was identified as George L. Cassiday and was arrested while delivering liquor to the Senate Office Building. Police were able to make the arrest because the *Washington Times*’ city editor provided the information his reporters had tried to protect.<sup>134</sup>

***Creating Network Effects.*** One of the key functions of non-judicial precedents is creating what Gerhardt has dubbed “network effects,”<sup>135</sup> whereby Constitutional interpretations of non-judicial actors are affirmed and strengthened over time. “The more often that public authorities ... cite or seek to invest past non-judicial activities with normative power,” he has written, “the more their meaning and value increase.”<sup>136</sup> The existence of the 30-year-old Maryland shield law provided an instant starting place for discussions of a federal law, and it was mentioned in nearly all of the news coverage of the Capper and La Guardia bills.<sup>137</sup>

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<sup>132</sup> Special to the New York Times, *Capper Forecasts ‘Fair’ Tariff Bill; Kansan Defends Senate Against attacks on Its Delay With the Measure*, N.Y. TIMES, Nov. 27, 1929, at 2.

<sup>133</sup> Special to the New York Times, *Capper Says West Is in Fine Shape; Senator, in Radio Talk, Predicts There Will Be No Buyers’ Strike as in 1921*, N.Y. TIMES, Dec. 4, 1929, at 46.

<sup>134</sup> Associated Press, *Capital Jury Indicts ‘Man in the Green Hat,’* N.Y. TIMES, Dec. 18, 1929, at 2.

<sup>135</sup> Gerhardt, *supra* note 10, at 719.

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., *Maryland Law of 1896 Safeguards Newspaper Men in Jury Probe*, E&P, Nov. 9, 1929, at 8 (a sidebar story focusing on the benefits of a shield law, which accompanied coverage of Capper’s earliest effort).

Network effects from the dispute in Washington rippled almost immediately through the states. Just a week after Capper and La Guardia submitted their bills in Congress, Rep. Michael Zack introduced a similar bill in the Massachusetts legislature.<sup>138</sup> Within months, legislators had introduced shield-law bills in half a dozen state houses,<sup>139</sup> five bills in New York alone.<sup>140</sup> Lobbying continued into 1931, spurred on by the jailing of “youthful, dapper Edmond M. Barr,” a reporter for the *Dallas Dispatch*, hailed by *Time* magazine as a “martyr” for refusing to divulge his sources.<sup>141</sup> None of those efforts found success, but momentum was building.

Just weeks after Capper had submitted his first bill in Congress, Rep. Harry W. Vanderbach in the New Jersey General Assembly announced he would introduce similar shield legislation there.<sup>142</sup> Submitted at the beginning of 1930, the Vanderbach bill was modeled on the existing Maryland law and offered sweeping protection against disclosure in any legal or legislative proceeding, including before grand juries.<sup>143</sup> Less than three years later, the legislature adopted the second shield law in the nation, exactly as

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<sup>138</sup> See *Seeks New Statute to Protect News Men*, E&P, Dec. 7, 1929, at 7.

<sup>139</sup> See NEW YORK LAW REVISION COMMISSION, LEG. DOC. NO. 65 (A) (1949), at 59-88.

<sup>140</sup> *Id.* at 101-02.

<sup>141</sup> See Editorial, *Professional Secret*, TIME, Mar. 23, 1931, available at <http://www.time.com/time/magazine/article/0,9171,741282,00.html> (last visited Mar. 10, 2011) (noting that “straightaway” a bill was entered into the state legislature, tying the measure to Capper’s unsuccessful attempt at a federal shield law in 1929).

<sup>142</sup> See *Has Bill Protecting News Confidences*, E&P, Dec. 14, 1929, at 10.

<sup>143</sup> *Id.* The bill read:

That no person engaged in, connected with or employed on any newspaper shall be compelled to disclose, in any legal proceedings or trial, before any court or before a grand jury of any county or a petit jury of any court or before the presiding officer of any tribunal or his agent or agents, or before any committee of the legislature or elsewhere, the source of any information procured by or obtained by him, and published in, the newspaper on which he is engaged, connected with or employed.

*Id.*

Vanderbach had submitted it.<sup>144</sup> Coverage explicitly tied that press victory to Capper's efforts at the federal level.<sup>145</sup> Thus, passage of the New Jersey shield law grew directly from the dispute of 1929.

The cycle began anew in 1935 with the headline-generating case of Martin Mooney, a crime reporter for Hearst's *New York American* newspaper.<sup>146</sup> Subpoenaed by a grand jury following a series of stories on racketeering in New York City, Mooney refused to testify. After Mooney was fined \$250 and ordered to serve 30 days in jail, his lawyers initiated a series of appeals that worked their way through the court system – and kept the issue in the headlines – for nearly a year. “Reporter’s Rights Debated in Court,” the *New York Times* declared in a headline, echoing the First Amendment rhetoric that had emerged in 1929.<sup>147</sup> When the New York Court of Appeals upheld Mooney’s sentence in 1936, it was front-page news, played for outrage.<sup>148</sup>

The court’s decision underscored an important legal point for press advocates: If there were to be a reporter-source privilege comparable to the priest-penitent and

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<sup>144</sup> N.J. STAT. ANN. (West Co.) 2:97-11 (1933); *codified at* N.J. STAT. ANN. §2A:84A-21 (Thomson West/Westlaw through 2010).

<sup>145</sup> See Editorial, *Off the Record*, TIME, May 22, 1933, available at <http://www.time.com/time/magazine/article/0,9171,745593,00.html> (last visited Mar. 10, 2011) (noting that “in 1929, Senator Arthur Capper proposed a like measure to Congress”).

<sup>146</sup> See *Reporter’s Writ Stays Jail Term, Freed After Court Reaffirms 30-Day Sentence for Silence Before Grand Jury*, N.Y. TIMES, May 17, 1935, at 5.

<sup>147</sup> See *Reporter’s Rights Debated in Court*, N.Y. TIMES, May 28, 1935, at 9. Mooney’s lawyer framed his defense in freedom-of-the-press rhetoric as well:

It cannot be doubted that newspapers have been largely instrumental in the exposure of crime and bringing about reform, and to now rule that communications made to a reporter in confidence by an informant are not privileged would be to destroy the efficacy of this great instrument of the public welfare.

*Id.*

<sup>148</sup> See Special to the New York Times, *High Court Upholds Jailing Reporter ... Mooney Sentence Stands*, N.Y. TIMES, Jan. 8, 1936, at A1.

husband-wife privileges, it would have to be created by legislative statute, not court decision.<sup>149</sup> Not long after Mooney began serving out his sentence in Queens County jail,<sup>150</sup> lobbying and legislative action began in response. Capper returned to the U.S. Senate with a bill identical to his 1929 attempt, and he vowed “to push for its passage.”<sup>151</sup> State legislators launched a new raft of bills, seven in New York state alone in 1935-36.<sup>152</sup> Despite opposition by bench and bar,<sup>153</sup> shield laws were successfully adopted in Alabama and California in 1935, Kentucky and Arkansas in 1936.<sup>154</sup>

***Implementing Constitutional Values.*** When non-judicial actors create non-judicial precedents, Gerhardt has written, it is often in response to incomplete or imperfect interpretations of Constitutional values, especially those that courts have not elaborated on.<sup>155</sup> In his speeches and writings,<sup>156</sup> Capper often elaborated his own

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<sup>149</sup> See *People ex rel. Mooney v. Sheriff of New York County*, 199 N.E. 415 (N.Y. 1936). The court concluded: “It seems clear that this court should not now depart from the general rule in force in many of the states and in England and create a privilege in favor of an additional class. *If that is to be done, it should be done by the Legislature*, which has thus far refused to enact such legislation.” *Id.* at 295 (emphasis added).

<sup>150</sup> See *Reporter Starts 30-Day Term in Jail*, N.Y. TIMES, Jan. 18, 1936, at 32.

<sup>151</sup> See Special to the New York Times, *Would Protect Reporter, Capper Offers Bill to Bar Forcing Press to Divulge New Source*, N.Y. TIMES, Feb. 25, 1936, at 21 (noting that “six years ago, Mr. Capper introduced a similar measure but Congress took no action upon it”). See also S. 4076, 74th Cong., 2nd Sess. (1936).

<sup>152</sup> See NEW YORK LAW REVISION COMMISSION, LEG. DOC. NO. 65 (A) (1949), at 59-88 and 101-02.

<sup>153</sup> See *News Privilege Bill Is Opposed by Bar*, N.Y. TIMES, Feb. 3, 1936, at 4.

<sup>154</sup> See ALA. CODE §12-21-142 (Thomson West/Westlaw through 2010); CAL. EVID. CODE §1070(a) (Thomson West/Westlaw through 2010); KY. REV. STAT. ANN. §421.100 (Thomson West/Westlaw through 2010); ARK. CODE ANN. §15-85-510 (Thomson West/Westlaw through 2010).

<sup>155</sup> Gerhardt, *supra* note 10, at 716, 784.

<sup>156</sup> See, e.g., Arthur Capper, address to the Iowa School of Journalism, Apr. 13, 1934, in the Arthur Capper Papers, Kansas State Historical Society. He wrote:

Nothing can be of greater importance to a people living under a democratic form of government than, (1) full information about what is happening day by day in every

interpretation of the First Amendment's guarantee of freedom of the press, and that meant, above all, complete independence from government interference. That belief could be seen in his seemingly contradictory stance on radio: He was a pioneer of the new medium, owning one of the most powerful broadcast stations in the Midwest,<sup>157</sup> yet he did not see radio as a force in journalism on par with newspapers. The radio's most important journalistic function, as he saw it, was in delivering bulletins of breaking events.<sup>158</sup> More critically, Capper felt that the very definition of "freedom of the press" precluded the kind of direct government involvement represented by the Radio Act of 1927.<sup>159</sup> "Broadcasting stations now operate in the United States under government license," he wrote in 1941, "therefore, radio broadcasting does not have freedom of expression."<sup>160</sup> In that vein, for him, shielding journalists from compelled disclosure was about maintaining a strict separation between government and the journalistic process.

Capper's ongoing effort to pass a shield law at the federal level made an important advance in 1936. U.S. Rep. Michael Curley of New York, who had entered a

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department of human activity, and, (2) full opportunity for the discussion of the import, meaning and significance of what transpires.

*Id.*

<sup>157</sup> See, e.g., *Capper to Improve WIBW at Topeka*, N.Y. TIMES, Oct. 27, 1929, at 13; *Senator Capper Urges Wider Use of Radio as Aid to Farmers*, NYACK NEWS (Nyack, N.Y.), Apr. 2, 1929, at A14.

<sup>158</sup> Arthur Capper, *Power of Radio vs. Press*, Undated Memo, in the Arthur Capper Papers. He wrote: The radio is not likely, in my estimation, ever to take the place of the newspaper. The radio is useful in a news way chiefly for getting brief bulletins on important happenings to the public promptly and for broadcasting notable speeches.

*Id.*

<sup>159</sup> Arthur Capper, *Freedom of the Press*, typed essay dated 1941, in the Arthur Capper Papers. He wrote: If Government should use its licensing powers to control expression over the radio, then the people would have little practical guarantee of effective expression of views, of opinions, and public policies affecting them.

*Id.*

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

companion bill to Capper's in the House, was able to get a hearing before a subcommittee of the House Judiciary Committee, which would have to approve the bill if it were to move forward.<sup>161</sup> In making his case for a federal shield law, he told the committee that he was prompted in part by the Mooney case,<sup>162</sup> he pointed to the fact that several states had already adopted shield laws,<sup>163</sup> and he read from a prepared statement of support from William Randolph Hearst.<sup>164</sup> However, the crux of his appeal rested on the First Amendment, which he quoted,<sup>165</sup> and the role of the press in a well-functioning democracy. He said that subpoenas against reporters were "absolutely placing a stranglehold" on the press as it tried to fulfill its constitutionally sanctioned role, and "we all know that the newspaper reporters have done a great public service in showing up criminal conditions throughout the country."<sup>166</sup> He urged the committee to allow his bill to go to the floor of the House and to "let us have an open debate upon the question on the merits of it alone."<sup>167</sup>

Capper wanted a similar debate on the Senate side. After submitting another bill in 1937,<sup>168</sup> he worked behind the scenes to generate publicity and pressure the Senate

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<sup>161</sup> *Prohibiting Revelations of Confidential Communications Made to Editors, News Reporters, Correspondents, Journalists, and Publishers, Hearing on H.R. 10381 Before the H. Comm. on the Judiciary*, 74th Cong., 2nd Sess. (1936) (unpublished hearings).

<sup>162</sup> *Id.* at 2.

<sup>163</sup> *Id.* at 6.

<sup>164</sup> *Id.* at 11.

<sup>165</sup> *Id.* at 5.

<sup>166</sup> *Id.* at 9.

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

<sup>168</sup> *See* S. 627, 75th Cong., 1st Sess. (1937).

Judiciary Committee into holding a hearing. Capper contacted J.W. Brown, editor of *Editor & Publisher* magazine, who agreed to launch a series of articles on the journalist privilege issue. He also invited Capper to write a guest column about his bill. “This will serve to focus the attention of the fraternity on the subject,” Brown wrote back.<sup>169</sup>

At Brown’s suggestion, Capper wrote to A.H. Kirchhofer, editor of the *Buffalo Evening News* who was serving as president of the American Society of Newspaper Editors. “We think this is desirable legislation,” Kirchhofer wrote back, “and shall be glad to do what we can to help prove the necessity for it.”<sup>170</sup> Capper also contacted James G. Stahlman, president of the *Nashville Banner* who was serving as president of the American Newspaper Publishers Association. Stahlman promised to put the matter on the agenda of the group’s next meeting.<sup>171</sup> More important, Stahlman promised to line up witnesses for a Congressional hearing who would be unequivocally behind Capper’s bill. “We want to be certain that we do not have any namby-pambies of the press testifying in any wishy-washy manner before the committee,” he wrote to Capper. “We want a clean-cut, frank, fair and honest statement that will clinch the question.”<sup>172</sup>

One of those “namby-pambies of the press” was Col. Robert McCormick, the powerful editor of the *Chicago Tribune* who also was chairman of ANPA’s Committee on Freedom of the Press. As someone trained in the law and a member of the Illinois Bar Association, he had “spoken vigorously in opposition” to shield law bills such as

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<sup>169</sup> Letter to from J.W. Brown, Dec. 15, 1937, in the Arthur Capper Papers.

<sup>170</sup> Letter from A.H. Kirchhofer, Dec. 21, 1937, in the Arthur Capper Papers.

<sup>171</sup> Letter from James G. Stahlman, Dec. 21, 1937, in the Arthur Capper Papers.

<sup>172</sup> *Id.*

Capper's.<sup>173</sup> Stahlman, on the other hand, saw the issue as Capper did: in First Amendment terms. "The people of this country are guaranteed a free press," Stahlman told Capper, and "they are entitled to all the facts pertaining to the operation of government."<sup>174</sup> In pledging his support for Capper's bill, Stahlman concluded: "If the Congress and the courts of the land have the right to compel every editor and reporter to divulge the confidential sources of their information, we would have a censorship the like of which this country has never seen, and it would not be long before there would be no free press to which a free people are entitled."<sup>175</sup>

***Extending Network Effects.*** Capper and Stahlman never got a hearing before the Senate Judiciary Committee, which let Capper's bill die. True to form, however, Capper submitted yet another bill when the next Congress convened in 1939.<sup>176</sup> Meanwhile, press advocates in the states were making significant progress. Legislators were able to push through shield-law bills in Pennsylvania and Arizona in 1937 and in Indiana and Ohio in 1941.<sup>177</sup> It appeared that the shield-law attempts in Washington, D.C., though unsuccessful, were themselves acting as non-judicial precedents that helped bolster lobbying efforts in the states.<sup>178</sup>

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<sup>173</sup> *Id.* McCormick's position mirrored the consensus among lawyers, judges and legal scholars.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See S. 1027, 76th Cong., 1st Sess. (1939).

<sup>177</sup> See 42 PA. CONS. STAT. ANN. §5942 (Purdon's Pennsylvania Statutes and Consolidated Statutes Annotated 2010); ARIZ. REV. STAT. ANN. §12-2237 (Thomson West/Westlaw through 2010); IND. CODE §§34-46-4-1 (Thomson West/Westlaw through 2010 2008); OHIO REV. CODE ANN. §§2739.04, 2739.12 (Baldwin's Ohio Revised Code 2010).

<sup>178</sup> See, e.g., Editorial, *The Press: Professional Secret*, TIME, Mar. 23, 1931 (referring to the Capper bills when reporting on a shield-law campaign in Texas).



The recurring pattern of press-averse judicial actions followed by press-friendly legislative responses continued into the next decade. A high-profile case in 1943,<sup>179</sup> this one ensnaring reporters for the *Jersey Journal*, prompted another bill by Capper<sup>180</sup> and was followed by the adoption of a shield law in Montana that year.<sup>181</sup> Another high-profile case in 1948,<sup>182</sup> this one involving the Gannett chain's newspaper in Newburgh, N.Y.,<sup>183</sup> prompted a flurry of bills in the states<sup>184</sup> and was followed by passage of a shield law in Michigan.<sup>185</sup>

***Shaping Legal History.*** When non-judicial actors create non-judicial precedents, Gerhardt has observed, they are often shaping legal history, especially if the norms they establish endure over time and can be cited in the future as having created longstanding custom or tradition.<sup>186</sup> When journalists and press advocates launched their quest for a federal shield law in 1929, they redirected the trajectory of the journalist-privilege issue away from courts and decisively toward the legislatures. From 1929 to 1949, a dozen

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<sup>179</sup> See *State v. Donovan*, 30 Atl. (2d) 421 (1943) (denying a reporter protection under New Jersey's 10-year-old shield law because, the court held, it protected sources but not confidential information).

<sup>180</sup> See S. 752, 78th Cong., 1st Sess. (1943). See also *Capper Renews Newspaper Bill*, N.Y. TIMES, Feb. 23, 1943, at 14. Apparently, the reporter for the *Times* did not speak to Capper, for he or she got the facts wrong: "The Senator's aides said that Mr. Capper had been introducing such legislation for several sessions, prompted by the plight of certain newspapermen in the Lindbergh kidnapping case." The Lindbergh kidnapping case was in 1935.

<sup>181</sup> See MONT. CODE ANN. §§26-1-901 (Thomson/West 2008).

<sup>182</sup> See *People ex rel. Clarke v. Truesdell*, 79 N.Y. Supp. 2d 413 (1948).

<sup>183</sup> See Editorial, *There Ought to Be a Law*, TIME, Mar. 8, 1948, available at <http://www.time.com/time/magazine/article/0,9171,853268,00.html> (last visited Mar. 10, 2011).

<sup>184</sup> See NEW YORK LAW REVISION COMMISSION, LEG. DOC. NO. 65 (A) (1949), at 59-88, 101-02. Five bills were submitted into the New York Senate and Assembly. Despite the concerted effort, New York did not adopt a shield law until 1970. See N.Y. CIV. RIGHTS LAW §79-h(a)1-8 (Thomson West/Westlaw through 2010).

<sup>185</sup> See MICH. COMP. LAWS ANN. §767.5a (Thomson West/Westlaw through 2010).

<sup>186</sup> Gerhardt, *supra* note 10, at 717, 772.

bills to create a federal shield law were submitted in Congress, six by Capper alone.<sup>187</sup> In that time, the number of state-level shield laws grew from one to a dozen.<sup>188</sup> No longer could legal scholars dismiss the Maryland shield law as an undesirable aberration.<sup>189</sup> Journalists were winning over public support for their cause, and a bona fide movement was under way.<sup>190</sup> Although journalists and press advocates would continue to fight for recognition of a privilege in courts in decades to come, the dispute of 1929 and the legislative victories that followed provided an enduring model for non-judicial mobilization that resulted in concrete changes in the law.

## DISCUSSION AND CONCLUSIONS

Michael Gerhardt has observed that non-judicial precedents are legal “history in the making” and that non-judicial precedents often “chronicle constitutional history.”<sup>191</sup> Viewing the history of the journalist-privilege issue through that lens, one can see that, to borrow from Faulkner, the past is not even past.<sup>192</sup> When reporter Judith Miller was jailed

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<sup>187</sup> *The Newsmen’s Privilege, Report Submitted by the Subcommittee on Administrative Practice and Procedure to the S. Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966), at 62.

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

<sup>189</sup> *See, e.g.*, Note, 45 YALE L. J. 357 (1935) (decrying passage of a shield law in New Jersey in 1933 and the drive for more).

<sup>190</sup> *See* Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM QUARTERLY 230, 236 (1943) (observing that by the 1940s, “Congressmen and many sections of the general public (were) sympathetic to this ‘customary practice’ ” of refusing to reveal confidential sources).

<sup>191</sup> Gerhardt, *supra* note 10, at 772. Gerhardt offered the example of President Thomas Jefferson’s unilateral decision to execute the Louisiana Purchase. That act set the stage for future debates about the constitutionality of such an executive decision without Congressional authority; the non-judicial precedent he set could be used to argue both for and against such a use of executive power. *Id.*

<sup>192</sup> WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951) (writing, “The past is never dead. It’s not even past.”).

for 85 days in 2005 for refusing to reveal confidential sources to a grand jury,<sup>193</sup> all of the events that followed were predicted by the privilege dispute of 1929: outcry among journalists to put the issue on the national agenda, invocations of freedom of the press to win public opinion, lobbying in Washington to adopt a federal shield law, lobbying in the states to signal support for a federal law, failure at the federal level but success in the states,<sup>194</sup> then silence. The only significant legal difference between these two events was that Miller's lawyers could plausibly make a First Amendment claim to a privilege in court, whereas lawyers in the 1920s would have been highly unlikely to do so.

That argument was not readily available in 1929, when three reporters for the *Washington Times* were sentenced to 45 days in jail for contempt. It was far too early for any well-trained lawyer to make such a Constitutional claim in court. The U.S. Supreme Court's only press-specific cases at that point were inapposite. In the *Patterson* case of 1907,<sup>195</sup> the Court ruled that the First Amendment did not shield journalists from post-publication punishments such as contempt citations. In the *Burdick* case of 1915,<sup>196</sup> the unusual facts of the case did not necessarily support the press' frequent claim that the Fifth Amendment should shield them from testifying. In the *Elwell* case of 1921,<sup>197</sup> the

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<sup>193</sup> Susan Schmidt & Jim VandeHei, *N.Y. Times Reporter Released From Jail; Miller to Testify in CIA Leak Probe*, WASH. POST, Sept. 30, 2005, at A1.

<sup>194</sup> See, e.g., Elizabeth Coenia Sims, *Reporters and Their Confidential Sources: How Judith Miller Represents the Continuing Disconnect Between the Courts and the Press*, 5 FIRST AMEND. L. REV. 433 (2006-2007); Daniel Joyce, *The Judith Miller Case and the Relationship Between Reporter and Source: Competing Visions of the Media's Role and Function*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555 (2006-2007).

<sup>195</sup> *Patterson v. Colorado*, 205 U.S. 454 (1907).

<sup>196</sup> *Burdick v. United States*, 236 U.S. 79 (1915).

<sup>197</sup> *Elwell v. United States*, 275 F. 775 (7th Cir. 1921), *cert. denied*, 257 U.S. 647 (1921).

Court's denial of *certiorari* seemed to confirm the Fifth Amendment argument was dead. Doctrinally, no Constitutional avenue was open.

Faced with another defeat in a long line of cases denying a reporter-source privilege based on common law, the press took its case to the legislatures instead. This strategy was foretold by the events surrounding the Shriver-Edwards affair of the 1890s, discussed in Chapter 2, which led to passage of the nation's first shield law, in Maryland in 1896. Significantly different in 1929, however, was the fact that the newspaper industry was at the zenith of its influence, financially strong and enjoying much improved government relations in Washington, thanks in part to the number of journalists in high positions of power. The press was in a better position to take the fight for statutory protection to the federal level and did, resulting in the first shield-law bills submitted in the U.S. Congress.

In harnessing the influence of nationally known public figures such as William Randolph Hearst, Sen. Arthur Capper, and Rep. Fiorello La Guardia, press advocates were, on Gerhardt's view, putting the journalist-privilege issue on the public's agenda.<sup>198</sup> This was also the point of having the three reporters at the center of the dispute refuse to appeal their convictions and go to jail instead – to increase the perceived urgency for public and Congressional attention. Because the dispute was unfolding in Washington, because it included accusations of Congressional corruption, and because it involved the deeply unpopular issue of Prohibition, shield-law advocates were able to generate coverage in newspapers coast to coast.

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<sup>198</sup> Gerhardt, *supra* note 10, at 765. Gerhardt uses the term “agenda-setting” but not in the sense that media scholars would use it.

In consistently framing their arguments for a shield law in First Amendment rhetoric, journalists and press advocates were, according to Gerhardt's theory, "facilitating Constitutional dialogue"<sup>199</sup> and "shaping national identity."<sup>200</sup> Invoking the First Amendment could appeal to Americans' pride in their democracy and their Constitutional system, but courts at the time had offered no concrete guidance as to what freedom of the press meant or what it protected. So the journalists themselves used the privilege issue to launch a discussion, to voice opinions, to articulate theories, to rehearse arguments. Many of the ideas they discussed in 1929 – journalism's role in self-government, the checking function of the press – would find their way into scholarly theories and court decisions decades later.<sup>201</sup>

In trying to anchor a testimonial privilege for journalists in the First Amendment, journalists and press advocates were trying themselves to implement Constitutional values.<sup>202</sup> Many of the mandates in the Constitution and Bill of Rights are so broadly worded as to mean little on their face. Freedom of the press on its own could be described as a "background right" that is "aspirational, embodying ideals."<sup>203</sup> In arguing for a testimonial privilege to protect confidential sources, journalists were proposing a concrete rule they believed would contribute to implementing that larger aspiration.

In lobbying for a federal shield law to create that concrete rule, journalists pointed repeatedly to the existence of such a law in Maryland, on the books more than 30 years.

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<sup>199</sup> *Id.* at 766.

<sup>200</sup> *Id.* at 774.

<sup>201</sup> See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

<sup>202</sup> See Gerhardt, *supra* note 10, at 775.

<sup>203</sup> *Id.* at 779.

This fulfilled another key prediction of Gerhardt’s theory: The longer a non-judicial precedent stands and the more it is cited, the more legitimate it becomes as an influence on future decision-making.<sup>204</sup> Once the lobbying campaign of 1929 got under way, shield-law bills proliferated in state legislatures from New York to Texas and, within three years, began to be adopted. More bills and more adopted statutes created “network effects,”<sup>205</sup> as Gerhardt would predict, so that subsequent campaigns in the late 1930s and 1940s were easier and more fruitful. As a result, the number of state shield laws grew from one to a dozen from 1929 to 1949.

Although success eluded journalists at the federal level – and still does<sup>206</sup> – Gerhardt would view that first wave of shield laws as important. Such state-level enactments are often made, he has observed, “to make a point, appease important constituencies, encourage other states to follow suit.”<sup>207</sup> What had been merely a professional norm – protecting confidential sources – now was firmly entrenched in the legal realm. What had seemed an aberration – Maryland’s singular statute – now was legitimated by other laws that used it as a model. Less than 10 years after this first wave of lawmaking ended,<sup>208</sup> these non-judicial precedents would serve another important function: influencing the path of Constitutional law. That will be the subject of the next chapter.

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<sup>204</sup> *Id.* at 784.

<sup>205</sup> *Id.* at 719.

<sup>206</sup> See Charlie Savage, *After Afghan War Leaks, Revisions in a Shield Bill*, THE NEW YORK TIMES, Aug. 3, 2010, at 2 (reporting that the latest attempt to adopt a federal shield law is still stalled in the U.S. Senate).

<sup>207</sup> Gerhardt, *supra* note 10, at 766.

<sup>208</sup> Lawyers first made a First Amendment argument for a journalist privilege in court in 1958. See *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

## CHAPTER IV

### JOURNALIST PRIVILEGE IN 1968: THE TRIALS OF ANNETTE BUCHANAN AND THE ROAD TO *BRANZBURG* v. *HAYES*

“Rights,” a prominent judge recently observed, “lead dual lives, much like Dr. Jeekyll and Mr. Hyde.”<sup>1</sup> Writing in the *California Law Review*, Judge J. Harvie Wilkinson III set out to describe and to reconcile the tension between the life of rights as they exist in society’s rhetoric about them and the life of rights as they exist in practice in courts of law. “Our words and our deeds serve different ends,” he wrote, “both of which help maintain a vigorous body politic and each of which reinforces the other.”<sup>2</sup> People tend to talk of rights such as freedom of the press and the right to a fair trial in absolutist rhetoric; in practice, when such rights come into conflict, they must be qualified, contingent upon facts and context. It would be a grave mistake, however, to dismiss the high-flown rhetoric as merely the naïve ramblings of laymen who do not understand the law, Wilkinson warned. “The absolute language of rights helps protect rights from being obliterated by competing concerns,” he wrote.<sup>3</sup> “Our rights rhetoric is a critical part of

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<sup>1</sup> J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CAL. L. REV. 277 (2010). Wilkinson is a judge on the U.S. Court of Appeals for the Fourth Circuit.

<sup>2</sup> *Id.* at 279.

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

our shared life as a nation. The undiluted language of liberty provides the threads from which we weave our national identity.”<sup>4</sup>

Scholars who specialize in communication and language have long recognized the crucial role that rhetoric plays in defining the law at any given moment and in driving change in the law over time.<sup>5</sup> Influential communication scholar Michael Calvin McGee more than 30 years ago developed a theory that explains Wilkinson’s more recent observations.<sup>6</sup> Words such “liberty” and phrases such as “freedom of the press” are ideographs – “a high-order abstraction representing collective commitment to a particular but equivocal and ill-defined normative goal.”<sup>7</sup> Ideographs are abstract to the point of functioning like empty vessels that society must invest with specific meanings over time. “Earlier usages become precedent, touchstones for judging the propriety of the ideograph in a current circumstance,” McGee observed.<sup>8</sup> “The body of nonstatutory ‘law’ is little more than a literature recording ideographic usages in the common law and case law.”<sup>9</sup>

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<sup>4</sup> *Id.* at 307. He continued:

It does this by signposting our most important values and beliefs and telling each of us what we as a nation are about. The simplicity, and even hyperbole, is necessary in order to identify those core principles our cherished rights protect. ... It creates a *lingua franca* of legal relationships, one that lends itself to the development of a coherent unifying theory of what America is and of what it means to be an American. *Id.*

<sup>5</sup> See, e.g., JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); JAMES BOYD WHITE, *HERACLES’ BOW* (1985); JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* (1990).

<sup>6</sup> Michael Calvin McGee, *The “Ideograph”: A Link Between Rhetoric and Ideology*, 66 *QUARTERLY J. OF SPEECH* 1 (1980).

<sup>7</sup> *Id.* at 15.

<sup>8</sup> *Id.* at 10. He emphasized: “The significance of ideographs is in their concrete history as usages, not in their alleged idea-content. ... [A]wareness of the way an ideograph can be meaningful *now* is controlled in large part by what it meant *then*.” *Id.* at 10-11.

<sup>9</sup> *Id.* at 11.



Ideographs unite us as a society when we read them as symbols that “signify and ‘contain’ ” component parts that we have agreed upon, McGee observed.<sup>10</sup> For example, we can agree that the ideograph “freedom of the press” contains component parts that have been legitimated by the courts, such as the propositions that prior restraints are almost always unconstitutional<sup>11</sup> or that discriminatory taxes represent a kind of prior restraint.<sup>12</sup> However, McGee noted, ideographs divide us when we disagree about the “identity, legitimacy, or definition”<sup>13</sup> of a word or phrase in the law, and “society will inflict penalties on those who use ideographs in heretical ways.”<sup>14</sup> Through McGee’s lens, then, the journalist-privilege issue could be cast as a question: Should the ideograph “freedom of the press” contain the proposition that journalists are shielded from compelled disclosure of confidential sources? The answer to such a question, according to McGee, should be found by searching the full history of usages of that ideograph – not just the internal legal history of case law but also “what might be called ‘popular’ history” outside the courts.<sup>15</sup>

The tragedy of law to communication scholar William Lewis lies in the fact that legal discourse tries so hard *not* to look at usages outside the courts.<sup>16</sup> In any dispute, “a

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<sup>10</sup> *Id.* at 7.

<sup>11</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>12</sup> *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

<sup>13</sup> *See McGee*, *supra* note 6, at 8.

<sup>14</sup> *Id.* at 15.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> William Lewis, *Law’s Tragedy*, 21 RHETORIC SOC. QUARTERLY 11 (1991).

great deal depends on the kinds of stories that are told,”<sup>17</sup> he has written, but there is a “resistance to change that is built into the social form and the social practice of legal discourse.”<sup>18</sup> Lawyers come into court with competing narratives of what the law should be or how it should be applied; judges act as gatekeepers, conferring legitimacy on the version of history that shall be woven into the law and rejecting other historical narratives.<sup>19</sup> Because judges prefer the versions that are based on the internal history of the law itself, it is easy to reject the external history of lived experience outside the court.<sup>20</sup> The journalist-privilege issue provides an example of Wilson’s observation: Over many decades, no matter the stories told about changing circumstances in journalism and its role in society, it was a simple matter for judges merely to note that such a privilege had never been recognized at common law and, therefore, didn’t exist. “The alternative possibilities that ... alternative stories might encompass are likely, from an imperial perspective such as the law, to appear as inconsequential, unintelligible, or absurd,” Wilson has said of non-legal narratives and novel legal claims.<sup>21</sup> “The political result is that trials are likely to reinforce the legitimacy of the law and conceive the nature of a particular case within relatively narrow ideological constraints, and in that way to reinforce the dominant structures of power and authority.”<sup>22</sup>

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<sup>17</sup> *Id.* at 12.

<sup>18</sup> *Id.* at 11.

<sup>19</sup> *Id.* at 12-13.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 18.

<sup>22</sup> *Id.* at 12.

Another tragedy of law, according to communication scholar Marouf Hasian, Jr., is that by focusing narrowly on the internal legal narratives found in court documents while ignoring the external narratives sounding in the wider culture, legal scholars give a false impression of how rights have evolved and who played a role.<sup>23</sup> “In such scenarios, it is empowered individuals with ‘sublime’ powers who help us obtain fundamental rights,” he has written. “The roles of other social agents in the communicative processes are bracketed out so that we can focus on the key words of knowledgeable elites who have handed down this wisdom in the precedents and seminal texts.”<sup>24</sup> The boundary between “legal” and “popular” discourses is permeable, Hasian has argued; vernacular legal discourse – how ordinary people talk about the law and make novel claims on the Constitution – always precedes court-conferred recognition of rights. Privacy law provides a paradigmatic example: The ideograph “right to privacy” was born, nurtured, and given meaning wholly outside the courts by a variety of non-judicial actors, from activists and social critics to newspaper editorialists, popular writers, and legal scholars.<sup>25</sup> The idea of and demand for such a “right” was firmly embedded in the culture when the U.S. Supreme Court finally began to recognize such a right in 1965.<sup>26</sup> “The supposed ‘extra-judicial’ forces that operated within the broader public community helped to provide a series of key rationales for accepting the ‘right to privacy’,” Hasian

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<sup>23</sup> Marouf Hasian, Jr., *Vernacular Legal Discourse: Revisiting the Public Acceptance of the “Right to Privacy” in the 1960s*, 18 POL. COMM. 89 (2001).

<sup>24</sup> *Id.* at 90.

<sup>25</sup> *Id.* at 91-101.

<sup>26</sup> *Id.* at 102.

concluded.<sup>27</sup> “While orthodox legal scholars pride themselves on the autonomy of the ‘rule of law,’ many of their arguments are based on selective appropriations of tropes and other prefigurations that have circulated in the larger rhetorical culture for years.”<sup>28</sup>

The same could be said of freedom of speech and press, according to First Amendment scholars such as Tom Donnelly.<sup>29</sup> An account of the First Amendment that focused on courts and bracketed out the narratives of non-judicial actors would also bracket out much of the nation’s history.<sup>30</sup> If viewed only through the lens of the U.S. Supreme Court, the ideograph “freedom of the press” would appear an empty vessel until the Court’s breakthrough opinion of 1931 in *Near v. Minnesota*.<sup>31</sup> The truth is much richer, as Donnelly has shown by examining history and civics textbooks used in public high schools dating back to 1900. The Court did not even make an appearance in these textbooks until the 1950s, he found.<sup>32</sup> Instead, the history was told through “foundational narratives” and “popular episodes,” such as the story of John Peter Zenger or the uproar over the Aliens and Sedition Act of 1798.<sup>33</sup> “The popular free speech tradition grew up outside the courts” and was “rooted in the work of political activists, editors, ministers, and other Americans,” his study concluded.<sup>34</sup> “If legal scholars are serious about popular

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<sup>27</sup> *Id.*

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

<sup>29</sup> Tom Donnelly, *A Popular Approach to Popular Constitutionalism: The First Amendment, Civic Education, and Constitutional Change*, 28 QUINNIPIAC L. REV. 321 (2010).

<sup>30</sup> *Id.* at 331.

<sup>31</sup> *Id.* at 328.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 329.

<sup>34</sup> *Id.* at 331.

constitutionalism, they must move beyond (the) studies of elite discourse and examine how popular constitutional meaning is shaped ‘on the ground.’ ”

Michael Gerhardt’s theory of non-judicial precedents reconciles the tension between court-centered legal scholarship and the historian’s demand for richer social and political contexts to explain how constitutional meaning has evolved over time.<sup>35</sup> The theory fully recognizes the role that vernacular legal discourse plays in articulating new claims on the Constitution and rehearsing rationales that may, or may not, be legitimated by courts in the future.<sup>36</sup> Furthermore, the theory acknowledges that non-judicial actors might use non-judicial means, such as statutory law, to implement what they believe are constitutional values.<sup>37</sup> Particularly relevant to the criticisms voiced by the scholars above, Gerhardt’s theory emphasizes that the formation of non-judicial precedents can 1) set the agenda for constitutional concerns urgently in need of addressing,<sup>38</sup> 2) facilitate dialogues about constitutional meaning,<sup>39</sup> and 3) help shape national identity.<sup>40</sup>

The purpose of this chapter will be to apply Gerhardt’s theory, along with insights of communication scholars, to an important but overlooked episode in journalist-privilege history: the trials of Annette Buchanan in 1966 and 1968. Her contempt conviction in a state district court for refusing to reveal confidential sources sparked a national debate about whether the Press Clause of the First Amendment should be the basis for a

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<sup>35</sup> Michael Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008).

<sup>36</sup> *Id.* at 736-35.

<sup>37</sup> *Id.* at 745-54.

<sup>38</sup> *Id.* at 765.

<sup>39</sup> *Id.* at 766.

<sup>40</sup> *Id.* at 774.

testimonial privilege for journalists;<sup>41</sup> her appeal to the Oregon Supreme Court prompted a decision that represented the most thoroughgoing judicial pronouncement on that question to that point.<sup>42</sup> The Buchanan affair also was important because she was a 20-year-old student working for a university newspaper. Her status as someone working outside the traditional mainstream press thrust the question of who should be covered by a journalist privilege to the center of debate. How the Oregon Supreme Court addressed that issue could be seen as a model for Justice Byron White's opinion for the U.S. Supreme Court in *Branzburg v. Hayes*<sup>43</sup> four years later.

All three research questions are addressed in this chapter: How have non-judicial actors shaped the debate? What rationales for a testimonial privilege have they articulated? How have judicial actors responded to those arguments, and how have non-judicial actors responded to judicial pronouncements? This chapter will show that journalists and press advocates seized on Buchanan's case to create a *cause celebre* to try to sway public opinion; they created a Joan of Arc narrative that cast Buchanan as a martyr to the cause of press freedom; they infused media coverage with First Amendment rhetoric, even when discussing the possibility of statutory shield laws as alternatives to judicial rulings; they shifted the focus of debate from the rights of journalists to the public's right to know; they emphasized the need to protect the watchdog role of the press; and they castigated officials for trying to turn the press into an investigative arm of the government. The study also will show that, while press advocates were honing First

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<sup>41</sup> The case was unreported, and the decision was announced from the bench. Later sections of the chapter will rely on press accounts and law journal articles.

<sup>42</sup> *State v. Buchanan*, 436 P.2d 729, 732 (Ore. 1968), *cert. denied*, 392 U.S. 905 (1968).

<sup>43</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Amendment rationales in favor of a privilege, judges were honing rationales against the privilege. By seizing on the vexing question of how to define “journalist,” the Oregon Supreme Court articulated a powerful argument that was itself based on First Amendment principles, thus laying the groundwork for a key pillar of White’s decision in *Branzburg*.

The first substantive section of this chapter will sketch the social and political context in which the Buchanan affair unfolded, including the legal footing of the press and status of the privilege issue. The next section will sketch key non-judicial actors who drove events and provided stereotypical characters that journalists wove into a narrative intended to sway public and elite opinion. The next two sections will use original historical research to reconstruct the events of 1966 and 1968 with special attention paid to the rhetoric and narratives deployed, both for and against a privilege, in the popular press, in law journals, and in court decisions. The chapter will conclude with a discussion of these events through the lens of Gerhardt’s theory of non-judicial precedents.

## **POSITION OF THE PRESS IN SOCIETY**

The nation was fighting a second Civil War<sup>44</sup> by the time the Buchanan affair began in 1966. The so-called “four little girls”<sup>45</sup> were killed in the bombing of a black church in Birmingham, Ala., in 1963; race riots flared in New York, Philadelphia, and

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<sup>44</sup> The metaphor comes from historian David Goldfield. See DAVID R. GOLDFIELD, *STILL FIGHTING THE CIVIL WAR: THE AMERICAN SOUTH AND SOUTHERN HISTORY* (2002) (characterizing the protest movements of the 1950s, ’60s and ’70s as a continuation and, finally, resolution of the divisions that led the nation to war in the nineteenth century).

<sup>45</sup> The phrase oft-repeated at the time was immortalized in the 1997 documentary film by Spike Lee called “4 Little Girls.” See Internet Movie Database at <http://www.imdb.com/title/tt0118540> (last visited Nov. 15, 2010).

Chicago in 1964; 34 people were killed in six days of rioting in Los Angeles in 1965.<sup>46</sup> By the time of Buchanan's appeal to the Oregon Supreme Court in 1968, violent anti-war and student protests added to the race-related violence;<sup>47</sup> Martin Luther King, Jr., and Robert Kennedy were assassinated that year; and President Lyndon Johnson shocked the nation by announcing he would not seek re-election.<sup>48</sup> Throughout that tumult, the language of constitutional law echoed in every call for change, based on the rights of African Americans, the rights of women, the rights of the accused, the rights of the poor<sup>49</sup> – “the right!” as King thundered the night before his death, “to protest *for* our rights!”<sup>50</sup>

***Image and Influence*** For the press, the 1960s represented a welcome contrast to the 1950s. In the 1950s, the public remained indifferent as journalists were attacked with McCarthy Era red-baiting, called before the House Un-American Activities Committee, and forced to abandon jobs and careers.<sup>51</sup> The anti-establishment mood of the 1960s

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<sup>46</sup> See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 509-10 (2000) (including a time line of events from the era set alongside major cases of the Court).

<sup>47</sup> See, generally, DAVID OBST, *TOO GOOD TO BE FORGOTTEN: CHANGING AMERICA IN THE '60S AND '70S* (1998) (a first-person account of campus protests, particularly in California).

<sup>48</sup> See POWE, *supra* note 46.

<sup>49</sup> See, generally, BRIAN WARD, *THE 1960S: A DOCUMENTARY READER* (2009) (a compilation of primary source material, including court cases, acts of Congress, and major speeches, that chronicle the major protest themes of the era).

<sup>50</sup> King delivered the “I’ve Been to the Mountaintop Speech” on April 3, 1968, in Mason Temple in Memphis, Tenn. It is available in full text and video at <http://www.americanrhetoric.com/speeches/mlkivebeentothemountaintop.htm> (last visited Nov. 12, 2010).

<sup>51</sup> See, generally, EDWARD ALWOOD, *DARK DAYS IN THE NEWSROOM: MCCARTHYISM AIMED AT THE PRESS* (2007) (the first in-depth history of how the McCarthy Era directly affected the field of journalism). Alwood concluded that the chilling effect on the press during the 1950s was so bad that many publishers and journalists would not even come to the defense of colleagues under attack:

Publishers failed to recognize the journalists’ refusal to cooperate with investigative committees as a dramatic act of civil disobedience against a dangerous assault on press freedom. Publishers also failed to recognize that the divide-and-conquer strategy used by political opportunists left journalism more vulnerable than before. During the 1950s, editors and publishers were more concerned with government restrictions on information than with the vulnerability of individual journalists to government intimidation.

*Id.* at 143.



meant a dramatic swing in public opinion against any perceived form of government repression, including of the press.<sup>52</sup> The public was increasingly enamored of the press through the 1960s and into the 1970s. Just as press support in the 1920s and 1930s manifested in the popular culture through Broadway plays and Hollywood films, the popular image of the press in this era included the endearing Mary Tyler Moore, the hard-nosed Lou Grant, and the muckraking Woodward and Bernstein.<sup>53</sup> Popular sentiment was partly due to the fact that more people were taking part in publishing and broadcasting thanks to the media democratization movement.<sup>54</sup> “Speaking out” became possible for more people because of the rise of many alternative presses alongside traditional media outlets: the underground press, the radical black press, and, especially important, the student press.<sup>55</sup> Even broadcasting became more accessible through the so-called “community antennae” movement,<sup>56</sup> spurred on by passage of the Public Broadcasting Act of 1967.<sup>57</sup>

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<sup>52</sup> See, e.g., MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS* 279-333 (1992).

<sup>53</sup> The 1920s and '30s saw the rise of a distinct genre on Broadway and in Hollywood in which journalists were portrayed as popular heroes battling corrupt politicians and greedy businessmen. Typical was 1928's "Freedom of the Press," starring Lewis Stone, 1929's "Gentleman of the Press," starring Walter Huston, and 1931's "The Front Page," starring Pat O'Brien; all of them started as Broadway plays. Frank Capra helped pioneer this genre with 1928's "Power of the Press," and one of his most famous films, 1934's "It Happened One Night" with Clark Gable, also had a journalism theme. The later Branzburg era saw the arrival on television of "Mary Tyler Moore" in 1970 and "Lou Grant" in 1977; "All the President's Men," the film adaptation of Bob Woodward and Carl Bernstein's book about breaking the story of Watergate, won four Academy Awards when it premiered in 1976. See Internet Movie Database, <http://www.imdb.com> (last visited Dec. 22, 2010).

<sup>54</sup> See, generally, THEODORE ROSZAK, *THE MAKING OF A COUNTER CULTURE* (1969) (documenting how alternative communication outlets were the life blood of the various protest movements of the 1960s).

<sup>55</sup> See, generally, ROBERT GLESSING, *THE UNDERGROUND PRESS IN AMERICA* (1968) (documenting the crucial role of the press in protest movements throughout the nation's history).

<sup>56</sup> See ERIK BARNOUW, *TUBE OF PLENTY* (2d ed. 1990). Barnouw summarized broadcast's role: Throughout the rise of the Vietnam war and the military atmosphere it involved, many Americans were turning from commercial television and responding to new media. To

Popular support for the press also rose in inverse proportion to support for President Johnson and his increasingly unpopular foreign policy. Although Johnson enjoyed a honeymoon with the press into the first year of his administration, while the country mourned the assassination of John F. Kennedy,<sup>58</sup> relations had begun to sour by 1966, when the press turned on him over the now-largely-forgotten invasion of the Dominican Republic;<sup>59</sup> press-president relations had grown outright hostile by 1968, when coverage and criticism surrounding the Tet Offensive in Vietnam helped doom his presidency.<sup>60</sup> David Obst, a student protest leader who helped Seymour Hersch break the story of the My Lai Massacre and helped Daniel Ellsberg leak the Pentagon Papers, concluded in his memoir of the era that anything the press did that could be perceived as anti-establishment burnished its image, especially among young people.<sup>61</sup> Support for an adversarial press in the 1960s, Obst wrote, reached a crescendo under President Nixon in the 1970s.<sup>62</sup> “After My Lai, the Pentagon papers, and *All the President's Men*, virtually

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some extent, noncommercial television, along with segments of radio, became a part of this movement of dissent.

*Id.* at 391.

<sup>57</sup> 47 U.S.C. §396 (establishing the Corporation for Public Broadcasting, the Public Broadcast Service, and National Public Radio and also establishing a funding mechanism for local affiliate stations).

<sup>58</sup> BRIGITTE LEBENS NACOS, *THE PRESS, PRESIDENTS, AND CRISES* 49-104 (1990) (examining press relations during the Johnson Administration).

<sup>59</sup> *Id.* at 49-78.

<sup>60</sup> *Id.* at 6 (noting Walter Cronkite’s famously contradicting government reports of success in Vietnam by reporting first-hand that the war had become “a bloody stalemate,” which led President Johnson to say to an aide that if he had lost Cronkite, he had lost the nation).

<sup>61</sup> See OBST, *supra* note 45, at 4. Obst also was the literary agent who helped Bob Woodward and Carl Bernstein publish their memoir of the Watergate scandal “All the President’s Men.”

<sup>62</sup> *Id.*

every kid who came into the field was swinging for the fences,” he wrote. “‘Gotcha’ journalism was on all of their minds: the chance to hit the ball out of the park.”<sup>63</sup>

*Legal Footing of the Press* The U.S. Supreme Court itself did much to foster pro-press sentiment in the wider culture. Its Equal Protection and Due Process decisions alone, starting with *Brown v. Board of Education*<sup>64</sup> in 1954 but much more noticeably in the 1960s, were enough to lead scholars to label the Court under Chief Justice Earl Warren as “unique and revolutionary.”<sup>65</sup> As historian John E. Semonche has noted, the Court’s criminal justice decisions<sup>66</sup> made it clear by 1963 that the justices had come to believe “their solemn responsibility under the rule of law requires that they protect the rights of the individual,”<sup>67</sup> and that meant “nationalizing the standards that the Bill of Rights contained.”<sup>68</sup> That larger project notably included the First Amendment, and journalists took both pride and comfort<sup>69</sup> from the fact that the Court nationalized libel law in 1964’s landmark *New York Times v. Sullivan*.<sup>70</sup> Because the decision went so

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

<sup>64</sup> 347 U.S. 483 (1954) (holding that so-called separate but equal schools for blacks and whites were unconstitutional under the Fourteenth Amendment).

<sup>65</sup> See, e.g., MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 3 (1999) (calling the Court and this period “a unique and revolutionary chapter in American Constitutional history”).

<sup>66</sup> See, especially, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the Sixth Amendment into the Fourteenth Amendment to make it binding on the states); *Douglas v. California*, 372 U.S. 353 (1963) (holding that denying counsel to indigent defendants violates their rights under the Due Process Clause of the Fourteenth Amendment).

<sup>67</sup> JOHN E. SEMONCHE, *KEEPING THE FAITH, A CULTURAL HISTORY OF THE U.S. SUPREME COURT* 359 (1998).

<sup>68</sup> *Id.* at 363.

<sup>69</sup> See POWE, *surpa* note 46, at 307-10.

<sup>70</sup> 376 U.S. 254 (1964).

clearly in favor of *The Times* and so significantly strengthened First Amendment protection for journalism, as one scholar put it, “The press ... was in love.”<sup>71</sup>

The *Branzburg* era did not begin with the U.S. Supreme Court case of that name. As a historical matter, the era’s start could more aptly be pegged to President Kennedy’s assassination in 1963, which elevated Johnson to the presidency and began a period of press-president antagonism that would intensify under Nixon and Ford, ending in 1976. That measure of the era would perfectly coincide with the increase of subpoenas directed at journalists, which was what put the issue of journalist privilege in the headlines in the first place.<sup>72</sup> The era also could be measured by the most innovative period of the Warren Court, which continued to influence First Amendment law well into the Burger Court years that followed;<sup>73</sup> from a media-law perspective, that would be from *Sullivan* in 1964 to *Virginia Board of Pharmacy* in 1976.<sup>74</sup>

***Status of the Privilege*** Perhaps the most meaningful way of measuring the era for the purposes of this discussion would be through the lens of lawmaking in the states, which clearly reflected a sustained focus on the journalist-privilege issue for an extended period of time. From 1963 to 1977, thirteen states adopted shield-law statutes, a record

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<sup>71</sup> See POWE, *supra* note 46, at 309.

<sup>72</sup> See, e.g., Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233 (1973-1974) (recounting conflicts between the press and the White House and attributing the drive for shield laws, both state and federal, to those recurring conflicts).

<sup>73</sup> Constitutional scholars such as Lucas Powe date the start of the Warren Court’s revolutionary period beginning with the retirement of legal pragmatist Felix Frankfurter in 1963, when Arthur Goldberg replaced him. See POWE, *supra* note 46, at 211.

<sup>74</sup> *Va. State Bd. Of Pharmacy v. Citizens Consumer Council*, 425 U.S. 748 (1976) (establishing for the first time that purely commercial speech was protected by the First Amendment). For a discussion of the Court’s invention of the right to receive information in the commercial speech realm, see, e.g., Michael Hoefges & Milagros Rivera-Sanchez, *Vice Advertising Under the Supreme Court’s Commercial Speech Doctrine: The Shifting Central Hudson Analysis*, 22 HASTINGS COMM. & ENT. L.J. 345 (199-2000).

that bested the 11 statutes adopted between 1933 and 1949 and that has never been duplicated since.<sup>75</sup> Six of those statutes arrived in the run up to *Branzburg*, seven in its wake.<sup>76</sup> Set in its proper place in cultural, political, and legal contexts, then, *Branzburg* came in the middle of the period, in the middle of a national debate already under way.

The Buchanan affair was one of the drivers of the era's record-setting wave of shield law activity. Significantly, four states adopted shields on the heels of her conviction and appeal, none of them prompted by local journalist-privilege disputes.<sup>77</sup> Furthermore, it was her conviction in 1966, not *Branzburg*, that prompted the initial steps in this era's strenuous effort to pass a federal shield law in Washington. In direct response to her case, members of Congress asked the Congressional Research Service to prepare its first-ever report on the journalist-privilege issue, a step that usually precedes statute-drafting and debate.<sup>78</sup> That 60-page report, one of the most extensive scholarly treatments of the issue up to that time, ended by recommending that Congress create a statutory privilege to operate in federal courts.<sup>79</sup> Thus, a pattern of judicial pronouncements in the constitutional realm followed by non-judicial responses in the statutory realm played out at both state and federal levels because of her case.

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<sup>75</sup> See APPENDIX.

<sup>76</sup> *Id.*

<sup>77</sup> The states were Louisiana, Alaska, New Mexico, and Nevada. Neither legislative histories nor accounts in the popular press indicate that controversial cases in those states led to lobbying and passage of those shield laws. Rather, as in the years following *Branzburg*, it appears that those laws grew out of the general climate of the time.

<sup>78</sup> *The Newsman's Privilege, Report Submitted by the Subcommittee on Administrative Practice and Procedure to the S. Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966). The Legislative Reference Service is known today as the Congressional Research Service.

<sup>79</sup> *Id.* at 57-60.

The constitutional question was more complex in this era than a focus on *Branzburg* alone would suggest. Journalists had rhetorically linked protection of confidential sources to the First Amendment's guarantee of a free press for many decades,<sup>80</sup> though no lawyer made that argument in a recorded case in the courts until 1958, in *Garland v. Torre*.<sup>81</sup> That argument was tried again in 1961, in the Hawaii Supreme Court case of *In re Goodfader's Appeal*.<sup>82</sup> In those early cases, the emerging constitutional argument might have seemed, as First Amendment scholar Jack Balkin would say, "completely off the wall."<sup>83</sup> The courts in those cases quickly disposed of the constitutional claims by focusing narrowly on prior cases, which never recognized such a privilege.<sup>84</sup> However, by the time of Buchanan's appeal in 1968, the U.S. Supreme Court itself had begun to reject many of its earlier holdings and had radically expanded the scope of the First Amendment: In 1963, the Court incorporated the Redress of Grievances Clause in *Edwards v. South Carolina*,<sup>85</sup> and it invented the right of "expressive

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<sup>80</sup> See *supra* Chapter Two, notes 107-15 and accompanying text.

<sup>81</sup> 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

<sup>82</sup> 45 Hawaii 317 (1961). That same year, a similar case was heard and similarly decided by the Colorado Supreme Court, but it was unreported. See *Murphy v. Colorado*, – Colo. –, *cert. denied*, 365 U.S. 843 (1961).

<sup>83</sup> Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 37 SUFFOLK U. L. REV. 27, 52 (2005). His key observation:

[T]he constitutional text and the materials of constitutional interpretation are *resources* for social movements, and successful social movements are those that make the most out of the limited resources the Constitution provides. ... Thus, the fact that a particular claim is "off the wall" at a particular point in history does not mean that it must always remain so.

*Id.*

<sup>84</sup> *Garland v. Torre*, 259 F.2d at 548-49.

<sup>85</sup> *Edwards v. South Carolina*, 372 U.S. 229 (1963).

association” in the civil rights case of *NAACP v. Button*;<sup>86</sup> in 1964, as mentioned, it constitutionalized an entire field of law in *Sullivan* and created the hard-to-surmount actual malice standard for some libel plaintiffs; in 1965, it suggested the idea of the emerging right to receive information in the contraceptive case *Griswold v. Connecticut*<sup>87</sup> and solidified the concept in the subversive-literature case of *Lamont v. Postmaster General*;<sup>88</sup> in 1966, the Court said that a silent protest amounted to speech protected by the First Amendment in *Brown v. Louisiana*;<sup>89</sup> and in 1967, it expanded the actual malice standard in libel to include public figures in the *Walker* and *Butts* cases.<sup>90</sup> Thus, given the Court’s own dramatic innovations, a journalist’s claim to a testimonial privilege under the First Amendment did not necessarily seem off the wall at all by 1968.

### **KEY NON-JUDICIAL ACTORS**

While Buchanan’s appeal to the Oregon Supreme Court was significant because it prompted a more thorough judicial response to the First Amendment question than any case to that point, it also was important for the discussion and debate it inspired outside the courts. The main actors in the drama, besides Buchanan herself, included the young lawyer who defended her; the district attorney who subpoenaed her; the journalism professor who mentored her; the journalists who supported her; and the legal scholars

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<sup>86</sup> *NAACP v. Button*, 371 U.S. 415 (1963). It is interesting to note the Court decided a similar case based on the idea of “expressive association” five years earlier but originally based the right on the Fourteenth Amendment’s Due Process Clause. *See NAACP v. Alabama*, 357 U.S. 449 (1958).

<sup>87</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>88</sup> *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

<sup>89</sup> *Brown v. Louisiana*, 383 U.S. 131 (1966).

<sup>90</sup> *Curtis Publishing v. Butts*, 385 U.S. 811, *decided with Associated Press v. Walker*, 385 U.S. 812 (1967).

who, because of her case, began to champion the need for a journalist privilege, some based on the First Amendment and some by calling for new shield laws.

**Annette Leslie Buchanan** She was born Sept. 17, 1945, in England to an English war bride and an American serviceman stationed there at the time.<sup>91</sup> As an undergraduate student at the University of Oregon, she found a direction for her life when she joined the staff of the student newspaper, the *Oregon Daily Emerald*, in her junior year. After a year as a reporter and editor, she was named managing editor in her senior year, clinching for her a chosen career path. “In a really screwed-up society where so much is phony and so much is fake ... you get in this business and you really know what’s happening under the façade,” she told an interviewer. “It’s one of the most valid things around.”<sup>92</sup> She would be cast rhetorically in the role of a martyr for the cause of journalism and freedom of the press.

**Warren C. Price** He was a longtime professor in the School of Journalism and Communication at the University of Oregon. He was best known to fellow scholars for his book *The Literature of Journalism, An Annotated Bibliography*,<sup>93</sup> which won the Frank Luther Mott/Kappa Tau Alpha Research Award for 1959.<sup>94</sup> At the time of the Buchanan affair, he was at work on a follow-up book, *An Annotated Journalism*

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<sup>91</sup> See *National Attention Focuses on UO Student Editor’s Refusal to Talk to Grand Jury*, OREGONIAN (Portland, Ore.), June 16, 1966, at A37.

<sup>92</sup> Fred Crafts, *The Trials of Annette Buchanan*, OLD OREGON, September-October 1966, at 29 (article in the University of Oregon’s alumni newsletter).

<sup>93</sup> WARREN C. PRICE, *THE LITERATURE OF JOURNALISM, AN ANNOTATED BIBLIOGRAPHY* (1959).

<sup>94</sup> See Frank Luther Mott/Kappa Tau Alpha Research Awards, *available at* <http://www.kappataualpha.org/mott-win.html> (last visited Nov. 12, 2010).



*Bibliography: 1958-1968.*<sup>95</sup> He also was the well-known chairman of the History Division of the Association for Education in Journalism and Mass Communication.<sup>96</sup> Price was Buchanan's instructor in four courses, including media law. He saw her as a good student and an indispensable member of the *Emerald* staff – "one of those 'on-the-line' hard-working staffers whom any newspaper needs."<sup>97</sup> He would play the role of confidant, advocate, and behind-the-scenes support-builder.

**Arthur C. Johnson** He was a young lawyer in the firm of Johnson, Johnson, and Harrang in Eugene, Ore.<sup>98</sup> He also was a University of Oregon alumnus, having graduated in 1950; in 1953, he graduated from Harvard Law School.<sup>99</sup> Price, Buchanan's mentor, described her school-hired attorney as soft-spoken but an excellent trial lawyer. "If anyone could make a case for a liberal interpretation of Oregon's strict law on contempt," Price felt, "Johnson could."<sup>100</sup> Johnson would play the role not only of Buchanan's defense counsel but also of defender of a free press.

**William F. Frye** He was a 1956 graduate of the University of Oregon School of Law and, at the time of the Buchanan affair, district attorney for Lane County, which includes Eugene, Ore. He could not be accused of hating the press: He was a graduate of the same journalism school Buchanan attended and was a former reporter and editor on

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<sup>95</sup> WARREN C. PRICE, AN ANNOTATED JOURNALISM BIBLIOGRAPHY: 1958-1968 (1970).

<sup>96</sup> See *Division Heads Have Been Distinguished Scholars*, CLIO, Vol. 40, No. 3 (Spring 2006) (newsletter of the History Division, commemorating the division's 40<sup>th</sup> anniversary).

<sup>97</sup> See Warren C. Price, *State of Oregon, Plaintiff, v. Annette Lesley Buchanan, Respondent*, at 3 (unpublished paper presented the annual Association for Education in Journalism annual convention, Iowa City, Iowa) (on file with Knight Library, University of Oregon Library).

<sup>98</sup> The firm today is Johnson, Clifton, Larson and Schaller, and Johnson is the senior partner. See the firm's Web site at <http://www.jclslaw.com> (last visited Nov. 5, 2010).

<sup>99</sup> *Id.*

<sup>100</sup> See Price, *supra* note 96, at 6.

the same student newspaper; later, he worked as an editor of a military newspaper while serving in the Air Force.<sup>101</sup> Despite the journalism background, he took a tough line on the responsibilities of the press. When the state legislature in 1955 adopted a so-called retraction statute limiting damages that successful plaintiffs could recover in libel actions against the press, he wrote an article for the *Oregon Law Review* condemning it.<sup>102</sup> Frye was also active in state politics and had attended the 1964 Democratic National Convention as a delegate representing Oregon.<sup>103</sup> At the time the Buchanan affair began, he had just been defeated in his first attempt to be elected to the Oregon state legislature.<sup>104</sup> In fact, Buchanan's newspaper had opposed him and endorsed his opponent.<sup>105</sup> He would be cast in the role of a villain wielding the law as a cudgel to punish the press.

***Journalists and Legal Scholars*** As scholars have noted in other contexts, the popular press and law journals can play important roles in sending signals to courts about popular and elite opinion surrounding novel legal claims.<sup>106</sup> During the Buchanan affair, journalists turned what might have been a local dispute into national headline news; they seized on her case to put the issue of a journalist privilege on the public's agenda; they

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<sup>101</sup> Harry Trimborn, *Law, Morality Collide Head On as Coed Shields News Sources*, L.A. TIMES, June. 19, 1966, at B1.

<sup>102</sup> William F. Frye, *Libel and Slander – Damages – Constitutionality of Statute Limiting Recovery of General Damages in Libel Actions*, 36 ORE. L. REV. 1 (1956).

<sup>103</sup> See William Frye, THE POLITICAL GRAVEYARD, at <http://politicalgraveyard.com/bio/fryall-fullam.html> (last visited Nov. 12, 2010).

<sup>104</sup> Letter from Henny Willis to Warren Price, July 20, 1966, in the Warren C. Price Papers, Knight Library, University of Oregon.

<sup>105</sup> *Id.*

<sup>106</sup> For an extensive discussion about how novel legal claims can make their way from the political arena into the legal realm, see, e.g., Balkin, *supra* note 78.

used the occasion to link protecting confidential sources with the First Amendment; and they advocated the still-emerging concept of the public's right to know. Legal scholars used the Oregon Supreme Court's 1968 decision as an occasion mainly to explore the First Amendment dimensions of the issue, and some of them sided with the journalists' view. Writers in both the popular and elite press played the role of mediators in a national debate sparked by events in the spring of 1966.

### **HISTORICAL RECONSTRUCTION: THE CONVICTION OF 1966**

Annette Buchanan did not set out to test the limits of the First Amendment when she went to the campus Student Union on May 22, 1966. She went to get coffee. While there, several students approached her to share their concerns about recent articles the *Emerald* had printed about the rise in drug use on the nation's campuses. They felt the stories were one-sided and biased toward official condemnation.<sup>107</sup> This gave Buchanan the idea of balancing those stories with one from a drug-using student's perspective. "They suggested that the *Emerald* was anti-marijuana and that we wouldn't print the other side of the story, even if we could get it," she said later, and she took that as a challenge.<sup>108</sup>

Two days later, the *Emerald* ran Buchanan's answer to the students at the top of its front page under the provocative headline "Students Condone Marijuana Use."<sup>109</sup> The story was preceded by an editor's note that included this caveat: "For obvious reasons, the names used here are not actually those of the students interviewed." Seven students

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<sup>107</sup> See, e.g., *Police Investigating LSD at University*, ORE. DAILY EMERALD, May 17, 1966, at A1; Robert Jacobs, *Students Testify on Drug Use*, ORE. DAILY EMERALD, May 20, 1966, at A6.

<sup>108</sup> See Crafts, *supra* note 87, at 29.

<sup>109</sup> See Annette Buchanan, *Students Condone Marijuana Use*, ORE. DAILY EMERALD, May 24, 1966, at A1.

were quoted saying that marijuana should not be categorized alongside narcotics such as LSD and heroine and that it should be legalized in the United States. “Marijuana is no more addicting than cigarettes,” one student said.<sup>110</sup> “Someone using pot is not irresponsible like someone who is drunk,” another said.<sup>111</sup> In a line that would draw the interest of law enforcement officials, one student asserted, “We know about 200 students who use pot.”<sup>112</sup>

Frye, the district attorney, was a faithful reader of his alma mater’s student newspaper, and he read Buchanan’s story the day it was published.<sup>113</sup> In fact, he was the subject of an editorial in the *Emerald* the day before Buchanan’s pot story ran. The paper came out against him in his run for the state legislature and endorsed his opponent. Of her story, he said, “It screamed out for inquiry and investigation,” and he met the next day with the city’s police chief.<sup>114</sup>

On June 1, Buchanan appeared on a local radio show to discuss the story and defend the students’ views.<sup>115</sup> At 5 p.m. that day, a man she didn’t know entered the office of the *Emerald* and asked, “Which one of you is Annette Buchanan?” When she responded, he handed her a subpoena. “I’m sorry, I can’t come. I have a class then,” she

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at A2.

<sup>112</sup> *Id.*

<sup>113</sup> See Crafts, *supra* note 87, at 29.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

said. “You’d better come, honey,” he replied.<sup>116</sup> She was ordered to appear June 13 before a grand jury Frye had convened to investigate illegal drug use at the university.

Buchanan immediately sought out Price, her journalism mentor. She caught him coming out of a faculty meeting, showed him the subpoena, and told him what had happened. “He’s looking for names,” Price told her, “but don’t worry, nothing will happen.”<sup>117</sup> However, something unusual happened the next day. On June 2, 1966, *The Oregonian* newspaper in Portland ran a news item saying that Frye had launched an investigation of drug use at the university in Eugene and that he had subpoenaed Buchanan and three other staffers of the student newspaper. The item carried a photograph of Frye reading the *Emerald* with Buchanan’s story. In order to make the paper’s deadline, he had sent a press release and the picture by special courier to the Portland paper while withholding the information from the paper in Eugene, *The Register-Guard*. Too late for deadline, Frye telephoned the local paper’s courts reporter at home to let him know what he had done. “The phone call and the fact that he had sent a press release to my paper’s primary opposition before giving it to us seemed in character at the time due to Frye’s apparent bitterness over the primary defeat he suffered,” *Register-Guard* reporter Henny Willis later recalled.<sup>118</sup> The *Register-Guard* also had endorsed Frye’s opponent in the legislative election that Frye recently had lost.<sup>119</sup>

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<sup>116</sup> *Id* at 30.

<sup>117</sup> See Price, *supra* note 96, at 5.

<sup>118</sup> Letter from Henny Willis to Warren Price, July 20, 1966, in the Warren C. Price Papers.

<sup>119</sup> *Id.* Willis wrote of Frye:

He was very bitter at the press throughout the case, for he is quite sensitive to his “public image.” Any editorial criticism of Frye would anger him, and he reacted to it as if it were

The university community immediately rallied to Buchanan's defense.<sup>120</sup> President Arthur Flemming and other top administrators retained the services of Johnson, the young attorney from Eugene. Buchanan was scheduled to make her first appearance before the grand jury on June 3, 1966. The afternoon before, she went to see Price for advice.<sup>121</sup> All of her colleagues and friends urged her to remain silent, she said, to protect the identities of the students in her article. Price told her that the situation wasn't that clear cut – that some would label her a scofflaw, that some would interpret her actions as grandstanding, that some might even suggest she couldn't reveal the names because she'd made up the whole story.<sup>122</sup> "You know you don't have any law on your side," Price told her. "And if they start turning on pressure over this drug issue, they'll be brutal."<sup>123</sup>

The evening before her grand jury appearance, Buchanan called her journalism ethics professor to tell him she would not be able to turn in a paper that was due. "I was too busy *being* an ethic," she later quipped.<sup>124</sup> She went out for a steak dinner at London Grill in downtown Eugene with her roommate. She tried to sleep, but she spent the night contemplating her situation and wondering what to do. "I lay in bed just rigid with fear," she later recalled, "shaking all over and practically in tears."<sup>125</sup>

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a personal attack. ... He mentioned several times after the primary that "this town needs another newspaper."  
*Id.*

<sup>120</sup> See Price, *supra* note 96, at 3.

<sup>121</sup> *Id.* at 4.

<sup>122</sup> *Id.*

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

<sup>124</sup> See Crafts, *supra* note 87, at 30.

<sup>125</sup> *Id.*

The national press arrived in Eugene on June 3 to see what the “girl editor” would do.<sup>126</sup> She arrived at the courthouse that morning wearing a high-necked blue dress, her hair pulled into a tight bun.<sup>127</sup> Johnson, her lawyer, was forced to wait outside the grand jury room along with about 20 reporters. Inside, Buchanan was seated at a table facing seven grand jury members, all women, and Frye. “Will you tell the Grand Jury the names of the students that you remember that you interviewed in connection with writing this story?” Frye asked her. “No,” she said, “I will not.”<sup>128</sup>

With that reply, Frye walked across the hall to the chambers of Circuit Judge Edward Leavy and requested an order forcing her to talk. Johnson her lawyer requested a 10-day delay in the proceedings, which the judge granted.<sup>129</sup> “I’m not through with you yet,” Frye told Buchanan as she left the grand jury room.<sup>130</sup>

By the time of Buchanan’s June 13 appearance at the courthouse – this time in a hearing in Judge Leavy’s court – the case had become a national media event.<sup>131</sup> Faculty members and students filled the spectators’ gallery to show their support.<sup>132</sup> Buchanan

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<sup>126</sup> The fact that Buchanan was a 20-year-old female student proved to be an irresistible hook for the press. She was variously described as “girl editor” or “coed editor,” and her clothing often was elaborately described. *See, e.g.,* Henny Willis, *Student Editor to Stand Firm on Refusal to Give Names*, REGISTER-GUARD (Eugene, Ore.), June 15, 1966, at A1 (in which she is referred to as “the brown-haired coed”).

<sup>127</sup> *See* Crafts, *supra* note 87, at 30.

<sup>128</sup> *Id.*

<sup>129</sup> *See* Special to the New York Times, *Student Editor Balks Drug Inquiry*, N.Y. TIMES, June 4, 1966, at A7.

<sup>130</sup> *See* Price, *supra* note 96, at 8.

<sup>131</sup> Letter from Henny Willis, *supra* note 103. Willis recalled: “The Associated Press out of Portland and a couple of West Coast newspapers began calling daily for periodic reports on the case. It began mushrooming into a ‘national interest’ type of case.” *Id.*

<sup>132</sup> *See* Special to the New York Times, *Girl Editor Told to Give Drug Data*, N.Y. TIMES, June 14, 1966, at A14.

arrived at 9:35 a.m. wearing a dark green skirt and light green blouse – “composed, but looking under strain,” one newspaper reported.<sup>133</sup>

For the first time, Johnson was given time to lay out a multi-prong case for Buchanan: He argued that he had not been allowed to represent her before the grand jury, which denied her of her right to counsel.<sup>134</sup> He argued that the subpoena was beyond the authority of the grand jury and that to enforce such a subpoena would force Buchanan to commit a breach of professional ethics.<sup>135</sup> On that last point, half a dozen professional journalists took the witness stand in Buchanan’s defense. Stephen Still, managing editor of *The* (Oakland, Calif.) *Tribune*, said any reporter who violated a confidence “would be drummed out of the business.”<sup>136</sup> When asked if he thought the journalism code of ethics should trump the law on this issue, he said, “in most instances, yes.”<sup>137</sup>

Johnson’s main argument was based on the First Amendment and the press clause of the Oregon constitution.<sup>138</sup> “In most instances, the right of free speech and of free press should yield to the right of the court to ascertain truth,” he said, “but these guarantees should not be required to yield more than is absolutely necessary to achieve proper judicial objectives.”<sup>139</sup> Johnson asked the court to balance freedom of the press

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<sup>133</sup> See Henny Willis, *Coed Ordered to Give Names Used in Story*, REGISTER-GUARD (Eugene, Ore.), June 14, 1966, at A1.

<sup>134</sup> *Id.*

<sup>135</sup> See *Student Editor Refuses Names*, SUN (Baltimore, Md., June 4, 1966, at A4.

<sup>136</sup> See *Girl Editor Leaves Stand Smiling*, CHICAGO TRIBUNE, June 28, 1966, at A3.

<sup>137</sup> *Id.*

<sup>138</sup> Special to The New York Times, *Girl Editor Told to Give Drug Data*, N.Y. TIMES, June 14, 1966, at 44.

<sup>139</sup> Harry Trimborn, *Law, Morality Collide Head on as Coed Shields New Sources*, L.A. TIMES, June 19, 1966, at B1.



and the need to administer justice as competing interests, and he urged that the prosecutor be required to show that the information being sought was sufficiently important to override the journalist's interest in confidentiality.<sup>140</sup>

Frye's rebuttal was based on the simple fact that no precedent existed in Oregon law to justify a testimonial privilege for journalists: "There is no common law, there is no historic right which makes it possible for a journalist to decline under oath to testify."<sup>141</sup> Johnson countered by asking the judge if he could enter evidence to show that the subpoenas were intended mainly to generate publicity for the district attorney and to punish the *Emerald* for its criticisms of him. "Through the history of journalism in the state of Oregon," Johnson said, "the press has been free of this kind of harassment. If this should be changed, news people are going to find it even more difficult to get sources for sensitive information."<sup>142</sup>

Judge Leavey denied Johnson's request to submit evidence to show bad faith on the part of Frye, and he announced his decision from the bench: "It will be the order of the court that this witness answer each of the questions put to her."<sup>143</sup> Two days later, Buchanan again refused to answer questions before the grand jury, and Frye again asked her to be held in contempt. Judge Leavy then set a date for her to stand trial on the contempt charge.<sup>144</sup>

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

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

<sup>142</sup> *Id.*

<sup>143</sup> Wallace Turner, *College Editor Is Facing Prison*, N.Y. TIMES, June 26, 1966, at L60 (recounting the events on the eve of her trial).

<sup>144</sup> Associated Press, *Coed Editor Again Refuses to Name Sources*, SUN (Baltimore, Md.), June 16, 1966, at A1.

Price, Buchanan's journalism mentor, began working behind the scenes to drum up support, both moral and financial.<sup>145</sup> Buchanan spent much of her time before the trial answering requests for interviews and responding to hundreds of letters that flowed in from around the country.<sup>146</sup> The media and public attention became so overwhelming that Buchanan had to compose a form letter to send out *en masse*. "It's inspiring to realize that so many people have taken the time to write and support my position," she wrote.<sup>147</sup>

More unusual – and raising ethical questions – Frye went on the attack in public in the weeks leading up to the trial. He wrote letters to the editor that were published in the Medford, Ore., *Mail Tribune* on June 14, the Eugene, Ore., *Register-Guard* on June 23, and the *Seattle Post-Intelligencer* on June 27, the day of the trial. He also appeared on a local television show in Eugene, and he gave a talk spelling out his views at a regional meeting of Sigma Delta Chi, the journalists' fraternity.<sup>148</sup> "Sound law enforcement depends upon the willingness of every citizen who has knowledge of criminal activity to come forward and to testify if necessary," he wrote in the *Register-Guard*. "Exempting news reporters from the responsibility which other citizens have would not be in the best interest of society."<sup>149</sup>

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<sup>145</sup> Letter to Prof. Robert Cranford, School of Journalism, University of Nebraska, June 22, 1966, in the Warren C. Price Papers. Price wrote, "Annette is quite likely to be cited for contempt next Monday, since she has nothing more on her side here than moral conviction." He asked Cranford to reserve time for him to address members of the Association in Education in Journalism to discuss Buchanan's case.

<sup>146</sup> See Crafts, *supra* note 87, at 31.

<sup>147</sup> Letter from Annette Buchanan, undated, in the Warren C. Price Papers.

<sup>148</sup> See Price, *supra* note 96, at 11.

<sup>149</sup> William Frye, *D.A.'s Position in Oregon Case*, REGISTER-GUARD (Eugene, Ore.), June 23, 1966, at A20.

Frye repeated that argument in court on June 27.<sup>150</sup> Johnson repeated the series of arguments he had made at the earlier hearing, emphasizing the federal and state constitutions. When Buchanan took the stand, her face was pale, her smile strained, her voice low.<sup>151</sup> “I can visualize myself up to the jail door, but not beyond that,” she said when asked about the possibility of serving up to six months on a contempt-of-court conviction. “I’ve never seen the inside of a jail except on television or in the movies.”<sup>152</sup>

The courtroom was packed on the trial’s second day, when Frye and Johnson made closing arguments.<sup>153</sup> Johnson asked to introduce the statements of supportive newspaper publishers as evidence, but the judge refused. Johnson also asked that Buchanan be given a jury trial, but the judge refused that request as well. Johnson concluded with a relatively weak journalism-ethics argument, saying, “She felt bound by her pledge of her word and what she felt to be the traditions of her profession.” Judge Leavy explained in delivering the verdict that it was a straightforward matter of Oregon law: Buchanan was guilty of contempt of court and was to pay the maximum fine of \$300, though she was spared any jail time.<sup>154</sup> Johnson immediately announced he would appeal the case to the Oregon Supreme Court.<sup>155</sup>

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<sup>150</sup> See Wallace Turner, *Coed Editor Refuses to Identify Sources at Trial*, N.Y. TIMES, June 28, 1966, at A52.

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

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

<sup>153</sup> See Wallace Turner, *Coed Editor Convicted on Coast for Refusing to Name Sources for Marijuana Article*, N.Y. TIMES, June 29, 1966, at A23.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

No journalist in Oregon's history had ever been held in contempt for refusing to reveal confidential sources.<sup>156</sup> To Price and other media supporters, the first concern was whether Buchanan's conviction would embolden other prosecutors in Oregon to begin sending subpoenas to journalists.<sup>157</sup> Some press advocates also wondered whether it would be better to pay the fine and let the case die rather than appeal to the supreme court and risk losing.<sup>158</sup> "Unwittingly," Price wrote in a letter to *The Register-Guard*, "she may now have become the one whose undervalued courage will be used to advocate a privilege law for reporters. Many will now say that such legislative action is necessary to forestall future threats of contempt citations."<sup>159</sup>

Just days after the trial, a lobbying effort for a shield law in Oregon began.<sup>160</sup> Secretary of State Tom McCall, who was a former television news commentator, helped rally the effort. His argument for the law emphasized the checking function of the press: "Without the confidence of anonymous news sources, much of the news as well as answers and truths concerning criminal actions would be lost."<sup>161</sup> The Oregon Newspaper

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<sup>156</sup> Letter to Curtis MacDougall, School of Journalism, Northwestern University, June 28, 1966, in the Warren C. Price Papers. In drumming up support for Buchanan, Price wrote, "She knew there was no law in Oregon on her side; she knew that if a reporter gave a promise and was later asked to break it, the reporter had only conscience and courage to back him up. And she took conscience and courage literally."

<sup>157</sup> Letter to Frank Logan, President of the Oregon Association of Broadcasters, July 27, 1966, in the Warren C. Price Papers. Price wrote, "There is a danger that, once a conviction has been had, we shall have the peril of a contempt citation ever present."

<sup>158</sup> Letter to Curtis MacDougall, July 18, 1966, in the Warren C. Price Papers. Price wrote, "There is some sharp difference of opinion among the press about the merits of an appeal – which of course is a handicap to Miss Buchanan; many think it would be wiser to try to get a privilege law through the legislature in 1967."

<sup>159</sup> Warren C. Price, *Letters to the Editor*, REGISTER-GUARD (Eugene, Ore.), June 29, 1966, page unavailable, in the Warren C. Price Papers.

<sup>160</sup> Unsigned, *Law to Protect Journalists in Oregon Urged*, L.A. TIMES, Jun. 30, 1966, at A8.

<sup>161</sup> *Id.*

Publishers Association drafted a model statute and planned to lobby for it during the legislature's next session.<sup>162</sup>

With lobbying under way on the legislative front, Price organized an Annette Buchanan Legal Defense Fund to help pay for her court appeal. Despite lackluster support from newspaper editors, it raised more than \$2,500, mostly from concerned individuals sending small sums.<sup>163</sup> Curtis MacDougall, a well-known journalism professor and media-law scholar, sent a token donation of \$5 and a supportive note: "Tell your girl she's not alone. All over the country and/or world, there are many who admire her and feel grateful to her."<sup>164</sup>

***Rhetoric in the Press*** As with the case against reporter Marie Torre eight years earlier,<sup>165</sup> the national press used the Buchanan affair to draw attention to the journalist-privilege issue, to put it on the public's agenda, and to try to sway opinion in favor of the journalist's side of the debate. Although news coverage appeared to balance both sides of that debate, rhetorical devices and narrative techniques betrayed a desire to persuade. Less about rival points of law than about human rivals,<sup>166</sup> articles that appeared in seven

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<sup>162</sup> Kenneth D. Stephens, A "Shield Statute for Oregon?", 46 ORE. L. REV. 99, 100 (1966).

<sup>163</sup> Letter to Curtis MacDougall, July 5, 1966, in the Warren C. Price Papers.

<sup>164</sup> Letter from Curtis MacDougall, June 30, 1966, in the Warren C. Price Papers.

<sup>165</sup> *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958) (declining to recognize a First Amendment-based privilege). Some news outlets drew a parallel between Buchanan's case and the earlier case of Marie Torre. See, e.g., Editorial, *Reporting: Problems of Protecting a Source*, TIME, Jun. 24, 1966, available at <http://www.time.com/time/magazine/article/0,9171,835832,00.html> (last visited Nov. 5, 2010).

<sup>166</sup> ProQuest Historical Newspapers database includes *The Atlanta Journal-Constitution*, *The Sun of Baltimore*, *Chicago Tribune*, *The Los Angeles Times*, *The New York Times*, *Wall Street Journal*, and *The Washington Post*. Because of its national scope, *Time* magazine also was consulted.

of the nation's largest daily newspapers relied on the archetypal story form of David versus Goliath, with Annette Buchanan as the popular hero.

Newspapers often gave their Buchanan articles prominent play, with large display headlines, sometimes on front pages.<sup>167</sup> *The Washington Post's* headline for the first trial declared "Crucial Decision on Sources Seen."<sup>168</sup> The accompanying article focused almost solely on the First Amendment dimension of Buchanan's legal defense and warned of possible ramifications. "The ruling of this court," the paper quoted Buchanan's lawyer as saying, "will tell newsmen whether they can protect their sources."<sup>169</sup> Coverage tended to cast the issue as one affecting the public as much as journalists. *The Los Angeles Times*, in reprinting an editorial from a rival newspaper, explained that it was doing so "because of the intense national and local interest in a potentially landmark case, and cases to follow."<sup>170</sup> Coverage appealed to readers' sense of Americanness by invoking the shared values of the nation's founding. As *Time* magazine put it on the eve of Buchanan's trial: "To Annette and most Americans, freedom of the press is an all-encompassing concept that is guaranteed by the Bill of Rights."<sup>171</sup>

Even in news stories, reporters depicted Buchanan in the most sympathetic terms. In a United Press story circulated nationwide, the reporter described Buchanan as "bright,

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<sup>167</sup> See, e.g., *Coed Is Ruled in Contempt for Silence in Dope Probe*, SUN (Baltimore, Md.), Jun. 29, 1966, at A1.

<sup>168</sup> See *Oregon Coed Editor Goes on Trial; Crucial Decision on Sources Seen*, WASH. POST, June 28, 1966, at A3.

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

<sup>170</sup> Harry Trimborn, *Law, Morality Collide Head on as Coed Shields New Sources*, L.A. TIMES, June 19, 1966, at B1.

<sup>171</sup> Editorial, *Reporting: Problems of Protecting a Source*, TIME, June 24, 1966, available at <http://www.time.com/time/magazine/article/0,9171,835832,00.html> (last visited Nov. 5, 2010).

articulate and keenly aware of events around her,” then intoned ominously, “She also is in deep trouble for the first time in her life.”<sup>172</sup> Another United Press story printed in many papers said she was “visibly shocked” when the judge issued his order.<sup>173</sup> *The New York Times* said that she smiled during most of her first court appearance but “bowed her head” when the judge delivered his ruling.<sup>174</sup> In her second court proceeding, *The Times* said, “her face was pale and her smile strained.”<sup>175</sup> Alternatively, *The Los Angeles Times* described her as “a tough little newschick” and “the collegiate Brenda Starr.”<sup>176</sup> That writer went on to relate to readers how Buchanan was “terrified” of going to jail.<sup>177</sup>

Reporters selected quotes to speak for Buchanan that cast her as a scrappy underdog. United Press International quoted her on her duty as a journalist: “My own inclination is that I’m not going to tell anybody, ever.”<sup>178</sup> UPI also quoted her on her shock at being punished for merely doing her job: “I never once thought of a grand jury subpoena.”<sup>179</sup> *The New York Times* said the incident made her “believe deeply in the principle involved.”<sup>180</sup> *The Times* also implied that public support was clearly on her

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<sup>172</sup> United Press International, *Silent Coed May Face Jail*, L.A. TIMES, June 12, 1966, at B1.

<sup>173</sup> United Press International, *Judge Orders Coed Editor to Tell Sources*, L.A. TIMES, June 14, 1966, at A8.

<sup>174</sup> Special to The New York Times, *Girl Editor Told to Give Drug Data*, N.Y. TIMES, June 14, 1966, at 44.

<sup>175</sup> Wallace Turner, *Coed Editor Refuses to Identify Sources at Trial*, N.Y. TIMES, June 28, 1966, at A52.

<sup>176</sup> Paul Coates, *She Has Principles*, L.A. TIMES, June 15, 1966, at A3.

<sup>177</sup> *Id.*

<sup>178</sup> United Press International, *Silent Coed May Face Jail*, L.A. TIMES, June 12, 1966, at B1.

<sup>179</sup> *Id.*

<sup>180</sup> Wallace Turner, *Coed Editor Refuses to Identify Sources at Trial*, N.Y. TIMES, June 28, 1966, at 52.

side, quoting her as saying, “I’ve had stacks and stacks of mail, all favoring my stand in refusing to name my sources, and not one crank telephone call.”<sup>181</sup>

Reporters also chose quotes by others that supported Buchanan’s cause; the only person regularly quoted agreeing with the district attorney’s position was the district attorney himself.<sup>182</sup> In this, *The Los Angeles Times* was representative. Mary Garber, then editor of the University of Southern California’s student newspaper, told the *Times*, “As long as she promised her sources she would not reveal names, I admire her for keeping her word.”<sup>183</sup> Patsy Aufrane, Buchanan’s 20-year-old roommate, told the paper Buchanan had “sort of a righteous attitude toward journalism.”<sup>184</sup> Larry Lange, a fellow editor at *The Emerald*, felt she had been put into an unfair position: “She believes she is right, so what else can she do?”<sup>185</sup> Even the chief of police in Eugene, Ore., was quoted voicing sympathy: “As a policeman, I think she did wrong by not answering. As a non-policeman, I admire the kid for keeping her promise.”<sup>186</sup> In a sign that Buchanan’s legal defense had penetrated popular discourse, one Portland State College student told the *Emerald*: “She’s not an arm of the law. . . . I think it’s a breach of freedom of the press.”<sup>187</sup>

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<sup>181</sup> *Id.*

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

<sup>183</sup> See *USC Editor Says News Sources Must Be Protected*, L.A. TIMES, June 16, 1966, at SG1.

<sup>184</sup> Harry Trimborn, *Coed Journalist’s Trial Set June 27*, L.A. TIMES, June 16, 1966, at A1.

<sup>185</sup> Harry Trimborn, *Law, Morality Collide Head on as Coed Shields New Sources*, L.A. TIMES, June 19, 1966, at B1.

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

<sup>187</sup> See Larry Lange, *Residents of Small Town View Buchanan Controversy*, ORE. DAILY EMERALD, June 30, 1966, at A12.



Many newspapers editorialized in support of Buchanan and the principle of protecting sources. Writing in *The Los Angeles Times*, well-known columnist Paul Coates emphasized the universal importance of Buchanan's legal fight, saying "now this 20-year-old kid's in the thick of a battle that involves all of us."<sup>188</sup> Like many other journalists arguing in favor of a privilege, he said the issue was not about protecting journalists but about protecting the public's right to know. "Corruption in government," he emphasized, "would go largely unreported."<sup>189</sup> Without the ability to protect sources, he wrote, "tales that vitally concern the entire community might never be told."<sup>190</sup>

Following the trial, newspapers used their editorial pages to condemn the decision. *The Sun* in Baltimore, saying Buchanan's conduct seemed more "mature and sensible" than that of her elders, underscored the fact that law enforcement officials should have conducted their own investigation rather than subpoenaing a journalist.<sup>191</sup> *The Los Angeles Times* ran a scathing letter to the editor sent in by Vint Cerf – who later would become known as the Father of the Internet – in which he excoriated the trial and the ruling on First Amendment grounds: "Does it occur to (Judge) Leavy, or to anyone else for that matter, that the First Amendment guarantees the right to speak and with it, the right to silence?"<sup>192</sup> *The New York Times* hammered home the point that the press should not be used as an investigative arm of the government. "If the district attorney and

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<sup>188</sup> Paul Coates, *She Has Principles*, L.A. TIMES, June 15, 1966, at A3.

<sup>189</sup> *Id.*

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

<sup>191</sup> Editorial, *Mark of Distinction*, SUN (Baltimore, Md.), Jun. 30, 1966, at A16.

<sup>192</sup> Vinton G. Cerf, *Ruling Criticized*, L.A. TIMES, July 1, 1966, at A4. In fact, the U.S. Supreme Court the same year came close to agreeing with Cerf in its decision in the Civil Rights protest case of *Brown v. Louisiana*, 383 U.S. 131 (holding that a silent sit-in in a library was protected under the First Amendment).

other law enforcement officers had done their own investigative work competently,” the newspaper wrote, “they would not have had to try to coerce a college student to turn unwilling informer.”<sup>193</sup> Interestingly, the *Times* questioned the legal argument for a privilege based on the First Amendment.<sup>194</sup>

*The Oregonian*, in a lengthy editorial essay, fully embraced the constitutional argument and wove the Buchanan affair into the history of a free press in America.<sup>195</sup> It reached back to the famous trial of John Peter Zenger in 1735 as evidence of a long and steadfast tradition of protecting confidential sources. It pointed out that in Oregon’s history, no journalist had ever been punished for refusing to testify. It called on the Oregon legislature to adopt a statute to provide certain protection. It ended with a warning couched in constitutional terms: “The substance of a free press and the right of people to know cannot be maintained ... if sources of information are to be eroded and editors are to be intimidated in their duty by the courts.”<sup>196</sup>

Harry Trimborn, who covered the Buchanan affair extensively for *The Los Angeles Times*, took note of the rights rhetoric that permeated the affair. Buchanan’s case was a “collision between the law and morality,” he wrote, and the two had “come together with a bang heard around the nation.” The incident had “touched off loud protests about ‘freedom of the press,’ about the ‘right’ of an individual to keep a promise.” The protesters, he wrote, “have invoked the Bill of Rights and other greater or

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<sup>193</sup> Editorial, *Child’s Play in Oregon*, N.Y. TIMES, June 29, 1966, at Z46.

<sup>194</sup> *Id.*

<sup>195</sup> Editorial, *Press Confidentiality Is Vital to a Free People*, L.A. TIMES, July 8, 1966, at A5.

<sup>196</sup> *Id.*

lesser laws of the land.”<sup>197</sup> To many, he wrote, “Miss Buchanan’s refusal has cast her in the role of heroine holding high the banner of free speech.”<sup>198</sup>

Many journalists took care to explain to readers that there were statutory shield laws in a dozen states when the Buchanan affair began, but Oregon lacked one. Interestingly, even when discussing these legislature-made laws, journalists tied them to the First Amendment. “Under ‘shield laws’ in twelve states, newsmen can refuse to reveal their sources,” *Time* magazine said, “but Oregon puts no such priority on freedom of the press.”<sup>199</sup> *The Oregonian* editorial page explained its call for a state shield law in terms that First Amendment scholar Vince Blasi would enshrine 10 years later as the checking function of the First Amendment.<sup>200</sup> “In a democratic society, the free press is the watchdog for the public,” it said, “and no such regime has long endured where this was not so. This is why freedom of the press is guaranteed in the Bill of Rights.”

The constitutional argument remained unpersuasive to most legal scholars.<sup>201</sup> However, there were signs that the popular interpretation of the First Amendment was gaining some currency in the legal realm. Attorney and future legal scholar Raymond E. Brown penned an eloquent guest column for *The Seattle Times*, reprinted in the *Register-Guard*, in which he championed the arguments Johnson made in court. “The authors of the First Amendment were deeply conscious of the value of a free press,” he wrote.

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<sup>197</sup> Harry Trimborn, *Law, Morality Collide Head on as Coed Shields New Sources*, L.A. TIMES, June 19, 1966, at B1.

<sup>198</sup> *Id.*

<sup>199</sup> Editorial, *Reporting: Silence on Sources*, TIME, Jul. 8, 1966, available at <http://www.time.com/time/magazine/article/0,9171,835954,00.html> (last visited Nov. 5, 2010).

<sup>200</sup> Vincent Blasi, *The Checking Value of the First Amendment*, 1977 AM. B. FOUND. RESEARCH J. 521 (1977).

<sup>201</sup> See Stephens, *supra* note 161 (putting aside the First Amendment argument in favor of a shield law).

“Reflecting both the letter and the spirit, they intended that no laws and no compulsions, no matter how subtle, were to interfere with the right of the press to accumulate as well as to disseminate information. That is what Miss Buchanan’s position is all about.”<sup>202</sup>

Press rhetoric regarding statutory protection, via shield laws, strengthened in the wake of Buchanan’s conviction. Oregon legislators had considered adopting a shield law twice before, in 1949 and in 1959.<sup>203</sup> Upon hearing of a new drive in the wake of the Buchanan case, Rep. Sam Wilderman of Portland wrote to the *Oregon Journal* to chide journalists for not lobbying more aggressively for a shield law. As the main sponsor of the 1959 bill, he wrote, “I received no support, no editorial comment, and just a line or so in the papers that I had introduced the bill.”<sup>204</sup>

Buchanan’s case won over some press advocates who had once opposed the idea of statutory shield laws, including her mentor Warren Price. “I have never been an advocate, for they may bring up as many problems as they solve,” he was quoted as saying in the trade journal *The Quill*, “but if it is necessary for Oregon to become the thirteenth state to require passage of such a law in order to prevent prosecutions like this, then maybe it is necessary.”<sup>205</sup> In fact, Price was instrumental in getting the Oregon Association of Broadcasters to support a drive in the state legislature for a shield law.<sup>206</sup>

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<sup>202</sup> See Raymond E. Brown, *Attorney Defends Editor’s Silence*, REGISTER-GUARD (Eugene, Ore.), Aug. 4, 1966, at A27.

<sup>203</sup> See Price, *supra* note 96, at 21.

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

<sup>205</sup> Letter to Clarence O. Schlaver, Executive Editor, THE QUILL, June 29, 1966, in the Warren C. Price Papers.

<sup>206</sup> Letter to Frank Logan, President, Oregon Association of Broadcasters, July 27, 1966, in the Warren C. Price Papers.

Not surprisingly, Buchanan's newspaper editorialized strongly in favor of such a law for Oregon.<sup>207</sup> The newspaper emphasized two recurring themes that emerged in arguments for a privilege: That the information being sought must be essential and that those seeking the information have exhausted other means. "Oregon legislators," the paper wrote, "should move as quickly as possible to pass a law which would require officials like Mr. Frye to show that the information they want is essential to the administration of justice and cannot be obtained any other way before they can force newsmen to reveal sources of information."<sup>208</sup>

Finally, journalists and press advocates succeeded in using the Buchanan case to put the journalist-privilege issue on the national agenda. Shortly after the conviction, members of the U.S. Congress ordered the Congressional Research Service to prepare a report on the issue, a sign that preparations were being made for statute-drafting and debate on a possible federal shield law.<sup>209</sup> The 60-page report for the Senate Judiciary Committee, like the *Emerald* editorial just discussed, recommended a qualified privilege that would require those seeking information to show that it was essential and that other means for getting it had been exhausted.<sup>210</sup> Thus, six years before *Branzburg*, the key themes of Justice Potter Stewart's famous dissent, in which he favored a qualified First

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<sup>207</sup> See Editorial, *We Need a Shield Law*, ORE. DAILY EMERALD, June 30, 1966, at A14.

<sup>208</sup> *Id.*

<sup>209</sup> *The Newsmen's Privilege, Report Submitted by the Subcommittee on Administrative Practice and Procedure to the S. Comm. on the Judiciary*, 89th Cong., 2nd Sess. (1966). The Legislative Reference Service is known today as the Congressional Research Service.

<sup>210</sup> *Id.* at 58-60.

Amendment privilege,<sup>211</sup> were being articulated and rehearsed by journalists and their supporters outside the judicial realm.

### **HISTORICAL RECONSTRUCTION: THE APPEAL OF 1968**

The Oregon Supreme Court heard oral arguments in Buchanan's case on Dec. 4, 1967.<sup>212</sup> Less than two months later, it handed down its decision: "Nothing in the state or federal constitution compels the courts, in the absence of a statute, to recognize such a privilege."<sup>213</sup> The holding by itself was not surprising. It mirrored the Hawaii Supreme Court's holding in the only other state-level case in which the First Amendment argument was made, the Marvin Goodfader case of 1961.<sup>214</sup> It also was in accord with the only federal-level case in which the First Amendment argument was made and rejected, the Marie Torre case of 1958.<sup>215</sup>

Unlike those earlier cases, in which the courts quickly explained away the First Amendment argument as a matter of lack of precedent, the Oregon Supreme Court offered a lengthy and multifaceted discussion of its rationale.<sup>216</sup> Of central importance was its discussion of the definitional problem: If courts were to recognize such a testimonial privilege for journalists, how would they decide who was a journalist and

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<sup>211</sup> *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

<sup>212</sup> See Associated Press, *Contempt Plea in Oregon*, N.Y. TIMES, Nov. 25, 1967, at A2.

<sup>213</sup> See Special to the New York Times, *Editor Loses Plea in Contempt Case*, N.Y. TIMES, Jan. 25, 1968, at A49.

<sup>214</sup> *In re Goodfader's Appeal*, 376 P.2d 472 (Hawaii 1961).

<sup>215</sup> *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

<sup>216</sup> *State v. Buchanan*, 436 P.2d 729, 732 (Ore. 1968), *cert. denied*, 392 U.S. 905 (1968).

who was not?<sup>217</sup> Four years later, that question would form a pillar of the U.S. Supreme Court’s holding in *Branzburg*. In fact, the Oregon opinion read like a succinct outline for the much longer *Branzburg* opinion.

Writing for the seven-member court, Justice Alfred T. Goodwin noted that such a privilege had never been recognized at common law.<sup>218</sup> He contended that such a testimonial privilege “should be left to the Legislative Assembly” to create.<sup>219</sup> He asserted that the U.S. Constitution had never been read to protect newsgathering activity, as opposed to publishing.<sup>220</sup> In balancing competing interests, he held that the First Amendment rights of the press must yield to the duty of every citizen to testify in court.<sup>221</sup> Finally, he asserted that designating a class for such a privilege would smack of English licensing schemes rejected by the founding fathers.<sup>222</sup>

Presaging Justice Byron White’s majority opinion in *Branzburg*, Justice Goodwin explained, “Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing.”<sup>223</sup> Further presaging *Branzburg*, Justice Goodwin wrote:

It would be dangerous business for courts, asserting constitutional grounds, to extend to an employee of a “respectable” newspaper a privilege which would be denied to an employee of a disreputable

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<sup>217</sup> *Id.* at 731-32.

<sup>218</sup> *Id.* at 730 n3, n4.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 731 (stating that other press privileges, “such as access to war zones and seats on a presidential aircraft,” are conferred as a matter of governmental largesse, not constitutional right).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

newspaper; or to an episodic pamphleteer; or to a free-lance writer seeking a story to sell on the open market; or, indeed, to a shaggy nonconformist who wishes only to write out his message and nail it to a tree.<sup>224</sup>

Therefore, he concluded, “there is no constitutional reason for creating a qualified right for some, but not others, to withhold evidence as an aid to newsgathering.”<sup>225</sup>

With little judicial precedent to draw on besides *Garland* and *Goodfader*, Goodwin’s opinion discussed and relied upon non-legal material such as history and scholarship. It noted that the journalists’ canon of ethics commands reporters to protect their sources.<sup>226</sup> It quoted a *New York Times* editorial complaining that law enforcement officers had not conducted a thorough investigation before subpoenaing Buchanan.<sup>227</sup> It cited and reproduced in full the text of a shield-law bill pending before the Oregon legislature.<sup>228</sup> It cited an 18-year-old law journal article to show that some scholars supported the idea of a privilege.<sup>229</sup> It cited and quoted a historical work on freedom of the press to discuss the important role the press plays in a democratic society.<sup>230</sup> Finally, it acknowledged that the court’s “attention has been directed to the enactment in thirteen states” of statutory shield laws, and it cited them.<sup>231</sup> Still, even if these non-judicial

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<sup>224</sup> *Id.* at 732.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 730 n.5.

<sup>227</sup> *Id.* at 731 n.6.

<sup>228</sup> *Id.* at 730 n.7.

<sup>229</sup> *Id.* at 731 n.9 (citing Note, *The Right of a Newsman to Refrain From Divulging the Sources of His Information*, 36 Va. L. Rev. 61 (1950) ).

<sup>230</sup> *Id.* at 733 n.13.

<sup>231</sup> *Id.* at 734 n.17.



precedents were evidence of sentiment in favor of a journalist privilege, it did not follow that a right to such a privilege should emanate from the First Amendment.<sup>232</sup>

With uncanny similarity, Justice Byron White's 30-page discussion in *Branzburg* four years later could be seen as a scholarly elaboration on the themes outlined in *State v. Buchanan*.<sup>233</sup> Most striking was the uncredited<sup>234</sup> similarity between Justice Goodwin's invocation of "the episodic pamphleteer" and Justice White's invocation of "the lonely pamphleteer":

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.<sup>235</sup>

White grounded that premise in the doctrine that freedom of the press is a "fundamental personal right" that "is not confined to newspaper and periodicals."<sup>236</sup> He concluded that a "covered person" under a First Amendment-based privilege would also potentially include "lecturers, political pollsters, novelists, academic researchers, and dramatists" – virtually "any author."<sup>237</sup>

With little judicial precedent directly on point, White, like Justice Goodwin before him, deployed a striking amount of non-judicial material. He acknowledged "a

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<sup>232</sup> *Id.* at 734.

<sup>233</sup> *Branzburg v. Hayes*, 408 U.S. 665, 669-709 (1972).

<sup>234</sup> *Id.* at 687. Justice White cites *State v. Buchanan* early in his decision as a precedent for the general proposition that the First Amendment does not support a journalist privilege but did not cite it again.

<sup>235</sup> *Id.* at 703.

<sup>236</sup> *Id.* (quoting *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938), as stating "the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion").

<sup>237</sup> *Id.*

great deal” of legal scholarship and cited nearly a dozen law journal articles.<sup>238</sup> He also acknowledged other types of privileges that journalists enjoy, such as access to the White House.<sup>239</sup> He quoted “The Works of Jeremy Bentham”<sup>240</sup> to support the time-honored rule that every man must give his evidence for the sake of the administration of justice. He discussed an empirical study by First Amendment scholar Vincent Blasi that, he said, contradicted the claim that journalists were being burdened by subpoenas.<sup>241</sup> He cited acts of Congress,<sup>242</sup> Department of Justice guidelines,<sup>243</sup> the American Legal Institute’s Model Code of Evidence,<sup>244</sup> even ancient statutes of the British Parliament<sup>245</sup> to support the proposition that journalists already enjoyed necessary protections. He pointed out that 17 states had at the time adopted statutory shield laws<sup>246</sup> and that several bills proposing a federal shield law had been introduced in Congress.<sup>247</sup> Still, these non-judicial arguments in favor of a testimonial privilege for journalists did not persuade him that a constitutional privilege necessarily must follow.

Viewed in this light, the Court’s decision in *Branzburg* owed much to the Buchanan affair. Her appeal to the Oregon Supreme Court inspired a more thorough

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<sup>238</sup> *Id.* at 681 n.20 and 691 n.29.

<sup>239</sup> *Id.* at 684 n.22.

<sup>240</sup> *Id.* at 688 n.26.

<sup>241</sup> *Id.* at 695 n.33.

<sup>242</sup> *Id.* at 692 n.30.

<sup>243</sup> *Id.* at 707 n.41.

<sup>244</sup> *Id.* at 691 n.29.

<sup>245</sup> *Id.* at 696 n.34.

<sup>246</sup> *Id.* at 691 n.27.

<sup>247</sup> *Id.* at 691 n.28.

analysis of the arguments for and against a journalist privilege than any previous court had undertaken. As important, because she was a student and not a professional, it pushed the issue of who should be covered by such a privilege to the center of discussion. As Price, her mentor, put it: “The *Emerald*’s being non-professional didn’t stop the D.A. from moving against its managing editor; she should not have this fact thrown into her face now.”<sup>248</sup> Giving voice to a claim about the First Amendment that would become frequently repeated by legal scholars in the years ahead, he concluded, “The press to me is the whole press – high school or university, corporate or subsidized specialty press.”<sup>249</sup>

***Rhetoric in the Press vs. Elite Opinion.*** In stark contrast with the trial of 1966, the appeal to the Oregon Supreme Court garnered little attention in the national press.<sup>250</sup> *The Los Angeles Times* and other papers ran short accounts provided by wire services.<sup>251</sup> The *Tribune* in Chicago did put an Associated Press item on A1, but it offered no further coverage or editorial comment. *The New York Times* commissioned a correspondent to write an original article, but it ran to just six paragraphs and was buried on page 49.<sup>252</sup> The loud headlines and passionate rhetoric of the earlier trial were completely missing.

The more important discussion of Buchanan’s appeal unfolded in the nation’s law journals. While legal scholars had long frowned on conferring a testimonial privilege to

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<sup>248</sup> See Price, *supra* note 96, at 19.

<sup>249</sup> *Id.*

<sup>250</sup> The Chicago Tribune was typical in running only a short briefing item in advance of the court ruling, though it did contend somewhat editorially that “her conduct was in keeping with journalistic practice.” See *News Briefs*, CHICAGO TRIBUNE, June 12, 1967, at 3.

<sup>251</sup> See, e.g., United Press International, *Court Studies Plea for College Editor*, L.A. TIMES, Dec. 5, 1967, at 18; Associated Press, *Editor’s Fine on Marijuana Story Upheld, Oregon Court Cites Lack of State Law*, CHICAGO TRIBUNE, Jan. 25, 1968, at A1.

<sup>252</sup> Special to The New York Times, *Editor Loses Plea in Contempt Case*, N.Y. TIMES, Jan. 25, 1968, at 49.

journalists, even through statute, Buchanan's case prompted a string of articles in the years leading to the U.S. Supreme Court's decision in *Branzburg*. Many of them adopted and refined arguments for a constitutional privilege that had sounded only in vernacular legal discourse to that time.<sup>253</sup> One article went so far as to contend there appeared to be an emerging consensus in favor of a First Amendment-based privilege.<sup>254</sup>

In reviewing Buchanan's case shortly after the Oregon Supreme Court handed down its decision, the influential *Harvard Law Review* concluded that "the court's reasoning seems inadequate."<sup>255</sup> It reasoned that courts had already moved in the direction of protecting the newsgathering process, not just publishing.<sup>256</sup> It cited the existence of a dozen shield laws in the states and contended that they had not harmed the administration of justice.<sup>257</sup> It said judges were well-equipped to determine if justice would be harmed, and it recommended a case-by-case balancing of interests.<sup>258</sup> It criticized District Attorney Frye's attempt to use the press for a criminal investigation without exhausting other means, concluding, "The need for free expression and discussion seems more important here ... and a privilege should have been accorded."<sup>259</sup>

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<sup>253</sup> See, e.g., James A. Guest & Alan L. Stanzler, *Constitutional Argument for Newsmen Concealing Their Sources*, 4 Nw. U. L. Rev. 18 (1969-1970); Jeffrey G. Sherman, *Constitutional Protection for the Newsmen's Work Product*, 6 HARV. C.R.-C.L. L. REV. 119 (1970-1971); Ted R. Coggin, *Journalists' Privilege Under the First Amendment Guarantee of Freedom of the Press*, 2 CUMB.-SAMFORD L. REV. 223 (1971).

<sup>254</sup> J.P.W., *The Emerging Constitutional Privilege to Conceal Confidential News Sources*, 6 U. RICH. L. REV. 129 (1971-72).

<sup>255</sup> Note, *Recent Cases*, 82 HARV. L. REV. 1384, 1385 (1968).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 1387.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 1390.

Significantly, the article addressed the issue of who should be covered by a First Amendment privilege. It contended that such a constitutional guarantee could not be limited to those who are employed by traditional media outlets and that journalistic function was the proper consideration – “because the functions rather than the existing institutions of the press are the essential objects of first amendment protection.”<sup>260</sup> Three years before Justice White invoked the image of the “lonely pamphleteer” in *Branzburg*,<sup>261</sup> the Harvard writer concluded, “A man who publishes only a single pamphlet on his favorite cause should have the same right to gather news as an established newsman.”<sup>262</sup>

Other scholars contended that statutory shield laws, including a federal one, were the best approach. Writing for the *Harvard Journal on Legislation* shortly after Buchanan’s failed appeal, Talbot D’Alemberte summarized the six arguments journalists themselves traditionally had made in favor of a privilege: 1) Their code of ethics demands confidentiality; 2) breaching a confidence would hurt their ability to earn a living; 3) their employers demand they protect sources; 4) freedom of the press guarantees them protection; 5) if they speak, they might incriminate themselves; and 6) the information being sought is not relevant.<sup>263</sup>

D’Alemberte contended that the First Amendment argument seemed the most compelling but that Buchanan’s case showed courts were unlikely to recognize such a

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<sup>260</sup> *Id.* at 1391.

<sup>261</sup> 408 U.S. at 703.

<sup>262</sup> *Id.*

<sup>263</sup> Talbot D’Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. ON LEGIS. 307, 314-17 (1968-1969).

privilege and were honing arguments against it.<sup>264</sup> “The court took a unique tack in refuting the reporter’s argument,” he wrote of the opinion’s focus on the journalist-definition issue. He concluded that it was a strong argument against a constitutional privilege because such a privilege would be in high tension with two other First Amendment values: that freedom of the press is a fundamental personal right, not an institutional one, and that the government cannot reserve for itself the right to license or otherwise limit who shall enjoy freedom of the press.<sup>265</sup> “If the government has the power to grant a privilege to a special class of ‘news-gatherers,’” he wrote, “it has the power to limit that class.”<sup>266</sup> Since the First Amendment would not allow such distinctions, he concluded, the job of creating a privilege must fall to the legislatures.

In crafting a model shield law for legislators to consider, D’Alemberte offered a covered-person definition that would address the Oregon Supreme Court’s concern with creating a special, narrow class for protection. His definition would have included any person “engaged in the work of” journalism through any type of medium, not just professional journalists at traditional news outlets.<sup>267</sup> “The considerations persuasive of the need for a privilege,” he wrote, “are equally applicable to other organizations and

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<sup>264</sup> *Id.* at 324-17.

<sup>265</sup> *Id.* at 319-20.

<sup>266</sup> *Id.* at 320.

<sup>267</sup> *Id.* at 341. The relevant section would read:

No person engaged in the work of gathering, writing, publishing, or disseminating news for any newspaper, periodical, newsreel, press association, wire service or radio or television station, shall be compelled by any judicial, legislative, or administrative body to disclose the source of any information procured or obtained by him while so engaged....

*Id.*

individuals engaged in the dissemination of news.”<sup>268</sup> Thus, in D’Alemberte’s formulation, a statutory shield law could be imbued with an important First Amendment value articulated by the courts: that protection could potentially apply to anyone.

**Epilogue.** Annette Buchanan went on to a long career in journalism. She worked for more than 20 years as a copy editor at daily *The Oregonian*.<sup>269</sup> Her place in the annals of journalism history<sup>270</sup> and the history of the student press is assured.<sup>271</sup> Her role in helping to shape constitutional discourse about the journalist-privilege issue has remained little remarked, but as this reconstruction of events has shown, her court battle helped shift the way legal scholars approached the issue of journalist privilege, from treating it rigidly as a matter of statutory law to more fully considering that it might fall into the domain of the First Amendment.

## DISCUSSION AND CONCLUSIONS

“Whoever controls our languages,” communication scholar James Boyd White once wrote, “has the greatest power of all.”<sup>272</sup> As historians implore legal scholars to remember that law is inherently historical, so communication scholars contend that law is inherently rhetorical. Words such as “liberty” and phrases such as “freedom of the press” are empty ideographs until courts imbue them with meaning, these scholars would say,

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<sup>268</sup> *Id.* at 343.

<sup>269</sup> E-mail interview with Therese Bottomly, Managing Editor, *The Oregonian*, Oct. 10, 2008 (on file with the author). Annette Buchanan later became Annette Conard. According to those who know her, she is suffering from Alzheimer’s Disease and living in a nursing home in Oregon.

<sup>270</sup> See, e.g., LOUIS EDWARD INGELHART, *FREEDOM FOR THE COLLEGE STUDENT PRESS: COURT CASES AND RELATED DECISIONS DEFINING THE CAMPUS FOURTH ESTATE BOUNDARIES* (1985).

<sup>271</sup> See, e.g., Student Press Law Center, *State-by-State Guide to Reporter’s Privilege for Student Media*, available at <http://www.splc.org/legalresearch.asp?id=58> (last visited Mar. 10, 2010).

<sup>272</sup> James Boyd White, *Law and Literature: No Manifesto*, 39 *MERCER L. REV.* 739, 747 (1988).

and courts do not perform that task alone. How people talk about law outside the courts matters, and cases weighing novel claims on the Constitution are essentially debates about whether new meaning will be added to ideographs such as “freedom of the press.” Judges, from a rhetorician’s point of view, act as gatekeepers with the power to use the language of law at any moment to resist change or accommodate it.

Constitutional scholar Michael Gerhardt has long acknowledged the role that vernacular legal discourse outside the courts can play in articulating normative aspirations about the Constitution.<sup>273</sup> Viewed through the lens of his theory of non-judicial precedents,<sup>274</sup> journalists have tried for decades to “send signals to courts”<sup>275</sup> about their belief that “freedom of the press” should include protection of confidential sources. Individual journalists have gone to jail rather than reveal their sources, thereby creating non-judicial precedents. Journalists have ensconced the sanctity of protecting sources in their professional code of ethics, creating a stronger non-judicial precedent. Legislatures in many states have adopted statutory shield laws barring compelled disclosure, even stronger precedents. “Non-judicial precedents convey agendas just as judicial precedents do,” Gerhardt has written.<sup>276</sup> They also facilitate dialogues “designed to educate the public, or others, about constitutional issues.”<sup>277</sup> Furthermore, such non-judicial

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<sup>273</sup> Michael J. Gerhardt, *Constitutional Decision-Making Outside the Courts*, 19 GA. ST. U. L. REV. 1123 (2002-2003).

<sup>274</sup> See Gerhardt, *supra* note 35.

<sup>275</sup> *Id.* at 765-66.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 767.



precedents are “instrumental in constructing national identity” and can be deployed in “arguments about what makes the American people or nation distinctive.”<sup>278</sup>

Journalists seized on the case of Annette Buchanan to fulfill all three of those functions of Gerhardt’s theory: They used her case to put the journalist-privilege issue on the national agenda, to facilitate a dialogue about freedom of the press, and to depict the journalist’s fight to protect sources as part of the American ethos. When Buchanan was convicted of contempt in a state court in Oregon in 1966, the nation was ripe for such a debate. With the Civil Rights movement energizing various other protest movements – for women, for students, the accused, the poor – rights rhetoric seemed woven into daily conversation. As the anti-war movement showed rising discontent with President Johnson’s war in Vietnam, public support for the press and belief in the potential of its watchdog role were growing. Perhaps that was because the protest movements themselves relied upon the power of the media – especially the underground press, the student press, college radio, and community television – to communicate with constituents and make their voices heard. Perhaps it also was because the U.S. Supreme Court under Chief Justice Earl Warren was at the height of its rights-discovering power, and legal innovations of the era included dramatic expansions of protection for speech and press. If the entire field of libel law could be constitutionalized in 1964, who was to say that the “right” of journalists to refuse to reveal sources could not be “discovered” in the penumbras of the First Amendment two years later?

Journalists in the national press used their unique position to transform Buchanan’s case from a local dispute into a national *cause celebre*. They gave her initial trial extensive coverage, often on front pages. They seized on the fact that she was a 20-

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<sup>278</sup> *Id.* at 774.

year-old college student to create a Joan of Arc narrative of a martyr who risked going to jail in the name of freedom of the press. They suggested that if the courts would not defend the First Amendment, then legislatures would have to intervene. As Gerhardt's theory would describe it, they were setting the national agenda.

Throughout their news articles and editorials, journalists subtly and not-so-subtly vilified the district attorney who subpoenaed Buchanan for the sources of an article about drug use at the University of Oregon. They portrayed him as the stereotypical government figure abusing his power to thwart the press as it tried to perform its function as a tribune of the people. In the journalists' narrative, Buchanan, as David to the district attorney's Goliath, was upholding one of the noblest traditions of her profession, a hero in the mold of the folkloric John Peter Zenger. They were, as Gerhardt would observe, arguing from national ethos.

As a constitutional matter, journalists framed Buchanan's case as one potentially affecting all journalists. They decried the use of the press as an investigative arm of the government. They claimed that the press' role as a check on government power was in peril. They emphasized that what was at stake was not Buchanan's rights as an individual journalist but the public's right to know. As Gerhardt's theory would describe it, they were facilitating a dialogue about constitutional meaning.

To emphasize the public's right to know was an interesting rhetorical device to employ in 1966. It suggested shifting the focus of the First Amendment from protecting a speaker to protecting a listener, from protecting a journalist to protecting her audience. The U.S. Supreme Court had employed such a shift in focus just a year earlier, but only

with regard to information about contraceptives<sup>279</sup> and political literature.<sup>280</sup> The Court would not apply that concept broadly to the media until 1969, in *Red Lion v. F.C.C.*<sup>281</sup> Thus, journalists were spreading a novel legal argument far beyond the courtroom in Oregon, giving it wide circulation and winning support for it.

When Buchanan's case was appealed to the Oregon Supreme Court in 1968, the court's decision represented a significant development in journalist-privilege history even though it dealt a defeat to journalists. While a First Amendment claim to a privilege had been attempted twice before in the courts, most famously in *Garland v. Torre*,<sup>282</sup> it was quickly rejected in those cases as unsupported by precedent. Rather than merely waving away the claim, the Oregon court more thoroughly engaged the constitutional argument and, in the process, articulated a strong argument against it.<sup>283</sup>

The court acknowledged the press' concerns about the possible chilling effect of subpoenas directed at journalists, it acknowledged the canon of the journalist's code of ethics commanding protection of sources, and it noted that more than a dozen states had adopted shield laws as a matter of public policy.<sup>284</sup> However, just as journalists seized on Buchanan's status as a college co-ed to try to win sympathy for her cause, the court seized on her status to show why her cause was misguided.

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<sup>279</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>280</sup> *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

<sup>281</sup> *Red Lion v. F.C.C.*, 395 U.S. 367 (1969).

<sup>282</sup> 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

<sup>283</sup> *State v. Buchanan*, 436 P.2d 729, 732 (Ore. 1968), *cert. denied*, 392 U.S. 905 (1968).

<sup>284</sup> *Id.* at 244-45.

Freedom of the press is a fundamental personal right, the court said, and it cannot be applied selectively to any special class of persons.<sup>285</sup> If the court recognized a privilege only for professional journalists, it would not apply to Buchanan because she was a student working at a student newspaper.<sup>286</sup> If it applied such a privilege to her, it would suggest that the privilege would apply to everyone – including “an episodic pamphleteer” or “a shaggy nonconformist who wishes only to write out his message and nail it to a tree.”<sup>287</sup> Thus, the court turned the First Amendment itself against the journalist’s claim and, in so doing, articulated a key rationale that the U.S. Supreme Court would use to reject a constitutional privilege four years later.<sup>288</sup>

Journalists and press advocates responded to Buchanan’s court defeats by organizing legislative responses. A bill for a shield law was entered in the Oregon legislature in 1967. Several states adopted shield laws around this time. Buchanan’s 1966 case prompted some members of Congress to order an extensive study of the privilege issue be prepared by the Congressional Research Service, usually a prelude to bill-drafting and debate. All of these non-judicial responses could be seen, on Gerhardt’s view, as continuing the dialogue and sending a signal to courts.

Significantly, legal scholars entered the discussion in a new way at this time. The journalist-privilege issue had never received extensive treatment in law journals, and when it did, scholars were nearly unanimous in opposing such a privilege. After Buchanan’s first trial in 1966, the few articles that appeared were typical: notes by

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<sup>285</sup> *Id.* at 248.

<sup>286</sup> *Id.* at 248.

<sup>287</sup> *Id.* at 249.

<sup>288</sup> *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972).

student writers that reviewed the facts and detailed the court's decision. After Buchanan's appeal in 1968, however, the *Harvard Law Review* published an article disagreeing with the court's decision and asserting that it should have recognized a qualified privilege. This was the first of a string of articles stretching from *State v. Buchanan* to *Branzburg v. Hayes* in which legal scholars argued in favor of a journalist privilege, some of them through statute and some based on the First Amendment.

Gerhardt's theory would predict that this dialogue about constitutional meaning outside the courts could have one of two possible outcomes: These popularly held meanings could eventually be adopted by judges and made part of the First Amendment, or they could continue to live outside the courts in the form of shield laws that, in the minds of their creators, "implement constitutional values."<sup>289</sup> If the boundary between legal and vernacular discourse is as permeable as his theory implies, however, a third possibility could be both at once: Judicial precedents would exert influence in the statutory realm, and non-judicial precedents would exert influence in the constitutional realm. That possibility will be the subject of the next chapter.

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<sup>289</sup> See Gerhardt, *supra* note 35, at 775.

## CHAPTER V

### JOURNALIST PRIVILEGE FROM 1972 TO 1982: TALKING BACK TO *BRANZBURG* IN CONGRESS, THE STATES, AND THE COURTS

Constitutional scholars for nearly 50 years have agonized over the so-called “counter majoritarian difficulty” of judicial supremacy, the fear that giving unelected judges the last word in interpreting the Constitution runs counter to democratic self-government.<sup>1</sup> The solution, scholars such as Robert Post have said, is dialogue.<sup>2</sup> “Constitutional law could not plausibly proceed without incorporating the values and beliefs of non-judicial actors,” Post has written.<sup>3</sup> When the U.S. Supreme Court issues an opinion people disagree with, he has argued, it is not the last word on a given subject but rather “an opening bid in a conversation that the Court expects to hold with the American public.”<sup>4</sup>

The dialogue metaphor has gained currency among constitutional scholars in recent years.<sup>5</sup> Dialogue theory, or dialogic constitutional interpretation, was pioneered by

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<sup>1</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962). For a review of legal scholarship inspired by Bickel’s work and his concerns, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

<sup>2</sup> Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *HARV. L. REV.* 4 (2003-2004).

<sup>3</sup> *Id.* at 10.

<sup>4</sup> *Id.* at 104 (2003-2004).

<sup>5</sup> For a comprehensive overview of scholars working in this field and the various iterations of dialogue theory they espouse, see Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 05-24, available at <http://ssrn.com/abstract=852884> (last visited Feb. 1, 2011).

Canadian scholars; their system, under the Canadian Charter of Rights, is structured in such a way that Parliament is assigned a role alongside the Canadian Supreme Court in interpreting the nation's constitutional law.<sup>6</sup> While Canadians have focused on the dialogue between those co-equal branches of their government, American scholars such as Barry Friedman have widened the scope of the potential dialogue to include legal scholars and other academics, journalists and other commentators, members of state legislatures and town councils, indeed any non-judicial actors who engage the Supreme Court by criticizing, or supporting, its decisions.<sup>7</sup>

In this view, the Supreme Court often acts as a facilitator of a national dialogue already under way. A decision by the Court, Friedman has observed, can help reframe the debate in proper constitutional terms, redirect the debate toward a concern the Court has, or prompt legislative action that solves the problem without further court action.<sup>8</sup>

"Prompting, maintaining, and focusing debate about constitutional meaning is the primary function of judicial review,"<sup>9</sup> Friedman has written, so despite the fear of an imperial Court indifferent to popular will, ongoing dialogue helps assure that the Court rarely strays far from the political mainstream at any given time.<sup>10</sup> "In the long run," he

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<sup>6</sup> *Id.* at 12-13, 52-55.

<sup>7</sup> See, e.g., Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CINN. L. REV. 1257 (2004).

<sup>8</sup> *Id.* at 1295-96.

<sup>9</sup> *Id.* at 1295.

<sup>10</sup> *Id.* at 1296.

has concluded, “as popular opinion shifts, judicial decisions and thus constitutional meaning shift with it.”<sup>11</sup>

Because a key role that legislators play is to channel the will of their constituents, Congress is often the focus of this ongoing dialogue about constitutional meaning. First Amendment scholar Owen Fiss has observed that Congress’ dialogic responses to Supreme Court decisions usually take one of two forms, combative or cooperative, which he would categorize as “rights-restricting” or “rights-enhancing.”<sup>12</sup> An example of the combative sort might be legislation restricting a woman’s access to abortion; though such a law almost certainly would be struck down, legislators frequently promulgate such bills as a way to register anger at the Court’s decision in *Roe v. Wade*.<sup>13</sup> In the First Amendment realm, this type of combative dialogue could be seen in repeated proposals for a Constitutional amendment outlawing flag-burning in response to the Court’s 1989 decision in *Texas v. Johnson*.<sup>14</sup>

Less controversially, Congress can act as a cooperative partner of the Court when it promulgates rights-enhancing laws that complement Court decisions.<sup>15</sup> Fiss would offer

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<sup>11</sup> *Id.* at 1295.

<sup>12</sup> Owen Fiss, *Between Supremacy and Exclusivity*, in *THE LEAST EXAMINED BRANCH* 452-67 (Richard W. Bauman & Tsvi Kahana, eds. 2006).

<sup>13</sup> 410 U.S. 113 (holding that a woman’s right to an abortion is protected under the Due Process Clause of the Fourteenth Amendment). The latest bill of this type was introduced in the U.S. Congress by Rep. Joe Pitts (R-Pa.). It would bar any federal money from being used to fund abortions even if the mother’s life was at risk. See Felicia Sonmez, “*Protect Life*” bill to ban federal abortion funding is debated, WASH. POST, Feb. 9, 2011, available at <http://voices.washingtonpost.com/44/2011/02/abortion-funding-debate-contin.html> (last visited Feb. 10, 2011).

<sup>14</sup> 491 U.S. 397 (1989) (holding that flag-burning is a form of political speech protected by the First Amendment).

<sup>15</sup> See Fiss, *supra* note 12 at 459-60.



as a paradigmatic example the Civil Rights Act of 1964,<sup>16</sup> a legislative enactment that extended the Court's demand for Equal Protection in the school setting<sup>17</sup> to public accommodations as well. In Fiss' model, the Court has established a baseline of some right, such as Equal Protection under the 14th Amendment, and Congress has created a statutory extension to broaden protection beyond what the Court would do. For example, the Court ruled in 1974 that the 14th Amendment did not shield pregnant women from employment discrimination,<sup>18</sup> so Congress adopted the Pregnancy Discrimination Act of 1978 to do just that.<sup>19</sup> The Court said in 1978 that the First Amendment did not shield newsrooms from police searches,<sup>20</sup> so Congress created statutory protection in the Privacy Protection Act of 1980.<sup>21</sup> A federal shield law adopted in the wake of *Branzburg v. Hayes*<sup>22</sup> would have fulfilled the statutory extension model.

First Amendment scholar Anuj Desai has observed that the dialogue can flow in the opposite direction; ideas for a right can begin in the statutory realm and flow into the judicial realm.<sup>23</sup> He has illustrated that flow by tracing the roots of the First Amendment right to receive information to Congressional statutes governing the U.S. Postal Service.

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<sup>16</sup> Pub.L. No. 88-352, 78 Stat. 241 (1964).

<sup>17</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding segregation in public schools unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

<sup>18</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>19</sup> Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. §§12101 to 12213).

<sup>20</sup> *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

<sup>21</sup> 42 U.S.C. §2000aa (1980).

<sup>22</sup> 408 U.S. 665 (1972) (not recognizing a First Amendment testimonial privilege for journalists called to testify in grand jury investigations).

<sup>23</sup> Anuj C. Desai, *The Transformation of Statutes Into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HAST. L.J. 671 (2007).

“Policymakers likely understood at some level the importance of their choices as a matter of communications policy,” Desai has written, “but it seems just as likely that they did not realize the impact their choices were going to have on First Amendment jurisprudence in the twentieth century.”<sup>24</sup> Similarly, it seems likely that legislators adopting the first statutory shield law for journalists in Maryland in 1896<sup>25</sup> did not realize the impact their choices were going to have on First Amendment jurisprudence in the twentieth century.

*Statutes Revolving in Constitutional Law Orbits* Those uses of the dialogue metaphor are recent, but scholar Ira Lupu in 1993 observed that there exists a special class of statutes that he said scholars must begin accounting for in their theories of constitutional change.<sup>26</sup> Where Judge Roger Traynor once saw statutes revolving in common-law orbits, Lupu extended the metaphor to theorize statutes revolving in constitutional-law orbits with similarly provocative results.<sup>27</sup> “Attempts to legislate constitutional norms – that is, to enact statutes revolving in constitutional law orbits – raise particularly perplexing issues,” he has written, yet “the orbiting phenomenon is far more common than might be expected.”<sup>28</sup> Statutes revolve in constitutional orbits when

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<sup>24</sup> *Id.* at 727.

<sup>25</sup> Law of April 2, ch. 249 Md. Laws 437 (1896); *codified at* Md. Code Ann. Cts. & Jud. Proc. §9-112 (Thomson/West 2010).

<sup>26</sup> Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993).

<sup>27</sup> Lupu’s title is a play on the title of a famous address, later published, by California Supreme Court Chief Justice Roger Traynor; *see* Roger J. Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U. L. REV. 401 (1968). In that essay, Traynor observed that statutes revolving in common-law orbits have influenced court-made law when, for example, judges have seen merit in policy decisions made by legislators and have borrowed ideas or even verbatim language from the statutory realm; the influence can flow the other way when legislators adopt language used by courts when they are dealing with sensitive issues such as privacy, speech rights or due process.

<sup>28</sup> *See* Lupu, *supra* note 26, at 5.

legislators tread into areas normally associated with courts – from the realm of pure policy, such as setting a minimum wage, into the realm of rights, such as attempted bans on “hate speech.”<sup>29</sup> “Some statutes reside in a legal context in which muscular constitutional constraints directly impinge on policy choices,” Lupu has noted, such as attempts to restrict abortion. “Other statutes are enacted in contexts in which constitutional constraints, though not binding, nevertheless exert normative influence.”<sup>30</sup>

Legislators design statutes to revolve in constitutional orbits, Lupu has observed, primarily to 1) extend a constitutional protection to an area where courts have not done so, 2) extend constitutional limits from state actors to private actors as well, 3) restore some constitutional concept that courts have abandoned, or 4) respond to judicial pronouncements on constitutional rights that legislators disagree with.<sup>31</sup> The telltale sign of statutes revolving in constitutional orbits is that they contain language borrowed from court doctrines and concepts related to the substantive area being legislated. “Concepts spawned in First Amendment adjudication ... have been a prolific source of orbiting statutes,” Desai has written. Regulations restricting lawyers’ solicitations of prospective clients, for example, track closely to language used by the Supreme Court in *Ohralik v. Ohio State Bar*.<sup>32</sup> Campus speech codes, even at private universities under no obligation,

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<sup>29</sup> *Id.* at 12-17. Statutes can orbit because of remedial, procedural and jurisdictional issues, Lupu has written, but the most interesting are those that orbit for substantive reasons. *Id.* at 14.

<sup>30</sup> *Id.* at 7-8.

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.* at 15 (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) ).

often import the fighting words doctrine of *Chaplinsky v. New Hampshire*.<sup>33</sup> Incitement statutes often quote *Brandenburg v. Ohio*.<sup>34</sup>

Although legislators might adopt language from court-made law for the sake of convenience or to protect a statute from being struck down as unconstitutional,<sup>35</sup> Lupu has asserted that a more important reason for the kinship is that legislators are participating in a dynamic and ongoing process of constitutional change. “Contemporary understandings of constitutional values and history, acts of Presidents, enactments of Congresses, and activities of state and local governments, all constitute competing sources of norms for constitutional decisionmaking,” Lupu has concluded.<sup>36</sup> “(Congressional) statutes are assertions of constitutional authority by a branch co-equal with the Supreme Court, and they therefore compete with judicial decisions for status and recognition in the constitutional culture.”<sup>37</sup>

The descriptive power of Michael Gerhardt’s theory of non-judicial precedents is robust enough to synthesize these various forms of dialogue.<sup>38</sup> His theory, like Lupu’s, is at base an account of how constitutional law changes over time.<sup>39</sup> His theory, like Desai’s, valorizes the fact that rights sometimes originate outside courts long before

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<sup>33</sup> *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ).

<sup>34</sup> *Id.* at 16 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) ).

<sup>35</sup> *Id.* at 19-21.

<sup>36</sup> *Id.* at 77.

<sup>37</sup> *Id.* at 78.

<sup>38</sup> Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008).

<sup>39</sup> *Id.* at 772-74.

being absorbed into judge-made law.<sup>40</sup> His, like Fiss', recognizes that statutes can be designed to both contradict and complement court-made law.<sup>41</sup> His, like the Canadians', envisions a special relationship between the Supreme Court and Congress as co-equal partners in interpreting the Constitution.<sup>42</sup> And his, like Post's, sees an "ongoing dialectic" among judicial and non-judicial actors participating in a deeply felt "constitutional culture."<sup>43</sup> Moreover, Gerhardt's theory would predict that non-judicial actors would respond to a disputed Supreme Court opinion such as *Branzburg* by creating non-judicial precedents to 1) further a national debate about an important constitutional question,<sup>44</sup> 2) send signals to courts and appease important constituencies,<sup>45</sup> and 3) correct what they perceive to be "incomplete or imperfect implementation of constitutional values."<sup>46</sup>

The purpose of this chapter will be to use Gerhardt's theory to examine ways in which people talked back to the Court in *Branzburg*'s wake. All three research questions are vividly in play: How have non-judicial actors responded to judicial precedents? How have judicial actors responded to non-judicial precedents? How have non-judicial actors articulated rationales for a journalist privilege? The first substantive section of the chapter will examine responses to *Branzburg* that centered on Congress' efforts to adopt a federal shield law. The next section will examine responses in the states in the form of new

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<sup>40</sup> *Id.* at 775-76.

<sup>41</sup> *Id.* at 776-78.

<sup>42</sup> *Id.* at 778-80.

<sup>43</sup> *Id.* at 766-67.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 765-66.

<sup>46</sup> *Id.* at 775-76.

shield laws. The next section will examine responses in the federal circuits and consider how, if at all, judges acknowledged views expressed outside the courts. The chapter will conclude with a discussion of these events through the lens of Gerhardt's theory.

## RESPONSES IN THE CONGRESSIONAL REALM

"To criticize a judicial decision as betraying the Constitution," Robert Post and Reva Siegel have written, "is to speak from a normative identification with the Constitution."<sup>47</sup> Fulfilling that observation, criticism of the Court's decision in *Branzburg* was grounded in journalists' identification with the Press Clause as a grant of autonomy built into the nation's constitutional order by the Founding Fathers themselves. They wasted no time using their unique position in the court of public opinion to denounce the Court's decision and try to influence opinion in popular, elite, and political realms.

***Swaying Public Opinion.*** Front-page news articles spun the ruling as a blow to the press with headlines such as "Press Loses Plea to Keep Data From Grand Juries,"<sup>48</sup> and they often emphasized the dissenting opinions by Justices Stewart and Douglas.<sup>49</sup> Often, the decision was cast not as a defeat for the press but a defeat for the public's right to know.<sup>50</sup> Editorials framed in First Amendment rhetoric lamented the decision as "A

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<sup>47</sup> Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 375 (2007) (adding, "When citizens speak about their most passionately held commitments in the language of a shared constitutional tradition, they invigorate that tradition.").

<sup>48</sup> See, e.g., Special to The New York Times, *Press Loses Plea to Keep Data From Grand Juries*, N.Y. TIMES, June 30, 1972, at A1; Jack Nelson, *Newsmen Must Answer Queries of Grand Juries*, L.A. TIMES, June 30, 1972, at A1; Washington Bureau, *Court Rules Reporters Must Testify*, SUN (Baltimore, Md.), June 30, 1972, at A1.

<sup>49</sup> Editorial, *A Free Press and a Free Society*, THE WASHINGTON POST, July 1, 1972, at A18 (reprinting a lengthy excerpt from Justice Stewart's dissenting opinion in favor of a journalist privilege).

<sup>50</sup> Richard Phalon, *Editors Declare Ruling on Newsmen Is 'a Blow to Right of People to Be Informed'*, N.Y. TIMES, Jun. 30, 1972, at 15. The article included a representative quote from Barry Bingham, editor of *The*

Blow to Press Freedom.”<sup>51</sup> *The Washington Post* decried “the stories that will never be written about the hopes and plans of political dissenters.”<sup>52</sup> *The Chicago Tribune* emphasized that most reporting that has required confidential sources has involved government corruption and concluded that “the court has turned itself into the protector of corruption and incompetence in government.”<sup>53</sup>

Newspapers enlisted well-known opinion leaders to help sway the public to their point of view. *The New York Times* in its Sunday magazine published a six-page article by Brit Hume, then a protégé of famed investigative journalist Jack Anderson, under the headline “A Chilling Effect on the Press”; it was illustrated with the First Amendment in script on parchment, to which a footnote was added in pencil, “But the courts can compel a reporter to reveal his sources under threat of prison.”<sup>54</sup> Attorney-turned-journalist Fred Graham, who helped start the advocacy group Reporters Committee for Freedom of the Press, warned on the front of the *The Times*’ well-read Week In Review section that “the emerging Nixon court” had sided with the government over the press, signaling that more subpoenas were sure to follow.<sup>55</sup> Civil rights leader Vernon Jordan, at the time president of the United Negro College Fund, characterized *Branzburg* as a broader signal that the

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*Louisville Courier-Journal*: “The decision will have a heavy impact on the ability of the press to carry out its responsibility in the field of investigative reporting and in the long term, I feel that the public will suffer.” *Id.*

<sup>51</sup> See, e.g., Editorial, *A Blow to Press Freedom*, CHICAGO TRIBUNE, July 8, 1972, at S6.

<sup>52</sup> Editorial, *The “Nixon Court” and the First Amendment*, WASH. POST, July 1, 1972, at A18.

<sup>53</sup> *Id.*

<sup>54</sup> Brit Hume, *A Chilling Effect on the Press*, N.Y. TIMES, Dec. 17, 1972, at SM13.

<sup>55</sup> Fred P. Graham, *Defeated – And More Subpoenas To Come?*, N.Y. TIMES, July 2, 1972, at E1.

Court was reneging on its commitment to civil liberties.<sup>56</sup> “Unless the courts are prepared to play their essential role,” famed defense attorney Alan Dershowitz wrote in a guest column in *The Times*, “the First Amendment can be subtly strangled.”<sup>57</sup>

***From Popular to Elite Opinion*** Just six months after the Court announced its decision in *Branzburg*, a nationwide Gallup poll showed that public opinion on the privilege issue had swung in favor of the press by a margin of 57 to 34 percent.<sup>58</sup> Perhaps more important for the legal debate, scholars were increasingly adopting the journalists’ positions and shaping them into legal arguments that would appeal to other scholars, lawyers, and judges. Some scholars argued that the Court erred in focusing on the rights of the journalist when instead it should have been weighing the First Amendment right of anonymous speech possessed by the sources.<sup>59</sup> Others argued that Justice White’s opinion did not thoroughly explore the emerging right to gather news as a prerequisite to the right to publish.<sup>60</sup>

Practicing attorney Donna Murasky, in an exhaustive article for the *Texas Law Review*, summarized what she and others saw as the three gravest errors of the decision: Justice White 1) did not give enough weight to the content of the information the journalists had gathered, its context, and its value to society; 2) held the press to an

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<sup>56</sup> Vernon E. Jordan, *High Court Said to Be Retreating on Rights*, NEW YORK AMSTERDAM NEWS, Jul. 29, 1972, at A5 (an historically important black newspaper).

<sup>57</sup> Alan M. Dershowitz, *Into the Void Left by the Courts*, N.Y. TIMES, Dec. 3, 1972, at E2.

<sup>58</sup> See Hume, *supra* note 5, at SM18.

<sup>59</sup> See, e.g., Note, *The Rights of Sources: The Critical Element in the Clash Over Reporter’s Privilege*, 88 YALE L.J. 1202 (1979).

<sup>60</sup> See, e.g., Commentary, *The Right of the Press to Gather Information after Branzburg and Pell*, 124 U. PA. L. REV. 166 (1975); Comment, *Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440, 1445 (1975).



impossible standard of proof when dismissing concerns about a chilling effect on sources; and 3) did not sufficiently articulate the government's need for the *names* of sources, as opposed to the information gathered from them.<sup>61</sup> Murasky noted that, in contrast to White, judges hearing journalist-privilege cases in the two years following *Branzburg* seemed to be more sensitively considering the relevance of the information sought, its availability from other sources, and its centrality in a given case – essentially the three-part test recommended by Justice Stewart in dissent.<sup>62</sup> “Thus,” she concluded, “the very considerations urged by the press in *Branzburg*, although rejected there, seem to be playing a greater role in the adjudication of newsman's privilege cases than they did prior to that decision.”<sup>63</sup>

***Influencing Political Opinion*** Decrying what they perceived to be the Court's misinterpretation of the First Amendment, journalists called on Congress to pass legislation that would advance their vision of freedom of the press. Sigma Delta Chi, the journalists' fraternity, joined with the American Society of Newspaper Editors in issuing a joint statement the day the ruling came down, denouncing the holding and calling on Congress to begin debating shield-law legislation as soon as possible.<sup>64</sup> The next day, Sen. Alan Cranston, a California Democrat and a former journalist, introduced the first of many shield-law bills that would, as he said, “fill the void” created by the Court in

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<sup>61</sup> Donna J. Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 Tex. L. Rev. 829, 916 (1974).

<sup>62</sup> *Branzburg v. Hayes*, 408 U.S. at 740 (Stewart, J., dissenting).

<sup>63</sup> See Murasky, *supra* note 61, at 916.

<sup>64</sup> Richard Phalon, *Congress Urged to Act on Issue, Law Is Sought to Protect Confidentiality of News Sources of Reporters*, N.Y. TIMES, June 30, 1972, at A15; Pal L. Montgomery, *Statute for Newsman Immunity Pushed by Congress Democrats*, N.Y. TIMES, July 1, 1972, at A10.

*Branzburg*.<sup>65</sup> In supporting the bill, *The New York Times* editorialized that a shield law would help to counter “a subtle trend toward erosion of the Bill of Rights.”<sup>66</sup> *The Washington Post* more explicitly linked creation of a shield law with interpretation of the First Amendment. “Freedom of the press is a phrase which has a fine-sounding ring to it until it begins to take shape and definition in the whang and clangor of the legislative and judicial processes,” the paper wrote, and “that process of definition is going on in our country today.”<sup>67</sup>

Less than three months after *Branzburg*, in September 1972, Rep. Robert Kastenmeier of Wisconsin convened Congress’ first substantial hearings on the journalist-privilege issue, in a subcommittee of the House Judiciary Committee.<sup>68</sup> Those hearings sparked 15 more, stretching out over three legislative sessions between 1972 and 1975, in which the subcommittee debated 86 shield-law bills and took testimony from 69 witnesses, mostly journalists.<sup>69</sup> In 1973 alone, 143 members of the House introduced or co-sponsored 55 shield bills.<sup>70</sup> There was no question in Kastenmeier’s mind that what he and his colleagues were doing was helping to interpret the First Amendment. “Should

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<sup>65</sup> Associated Press, *Bill to Protect News Sources Is Introduced*, WASH. POST, July 1, 1972, at A2.

<sup>66</sup> Editorial, *Loss for the Public*, N.Y. TIMES, July 15, at A22.

<sup>67</sup> Editorial, *A Free Press and the Congress*, WASH. POST, Sept. 21, 1972, at A22. On the interchangeability of a court-created protection or a legislature-made protection, the paper summed up: “The question is: How are those rights to be protected? We believe that the court in (*Branzburg*) squeezed them dangerously and a new safeguard – replacing the old informal arrangements – must be erected. ... The Judiciary Committee should proceed with its work on (a shield law bill).” *Id.*

<sup>68</sup> *Newsman’s Privilege, Hearings Before Subcommittee No. 3 of the H. Committee on the Judiciary*, 92rd Cong., 2nd Sess. (1972) (hearings on Sept. 21, 27, 28 and Oct. 4-5, 1972).

<sup>69</sup> Jason M. Shepard, *After the First Amendment Fails: The Newsman’s Privilege Hearings of the 1970s*, 14 Comm. L. & Pol’y 373, 374 (2009).

<sup>70</sup> *Id.* at 383.

Congress provide newsmen with the *right* to refuse to testify about their confidential news sources and information?” he asked rhetorically in a guest column in *The Washington Post*. “This is one of the most perplexing Constitutional issues of our day.”<sup>71</sup>

In the Senate, Sen. Sam J. Ervin, Jr., of North Carolina presided over high-profile hearings in 1973 before the Senate Judiciary Committee’s Subcommittee on Constitutional Rights.<sup>72</sup> He saw Congress’ role as trying to correct what he and others perceived as a faulty interpretation of the First Amendment.<sup>73</sup> Although he had initially opposed a statutory privilege, *Branzburg* convinced this Harvard Law School graduate that a shield law was necessary. “The Supreme Court decision,” Ervin later recalled, “removed what to me was the best approach – the so-called qualified or balancing approach adopted by the Ninth Circuit” in a ruling overturned by *Branzburg*.<sup>74</sup> Thus, he espoused the approach mapped out in Justice Stewart’s dissent.

***Bills Revolving in Constitutional-Law Orbits.*** While criticisms of the Court and calls for corrective action were steeped in First Amendment rhetoric, the language of constitutional interpretation also seeped into the actual bills drafted on the heels of *Branzburg*. Many of these bills began with preambles or findings sections stating their legislative intent, often framed in First Amendment terms.<sup>75</sup> The bill Sen. Ervin introduced in the Senate, for example, stated that “this Act is necessary to protect the

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<sup>71</sup> Robert W. Kastenmeier, *The Case for a Media Shield Law*, WASH. POST, Mar. 25, 1974, at A20.

<sup>72</sup> *Newsmen’s Privilege Hearings Before the Subcommittee on Constitutional Rights of the S. Committee on the Judiciary*, 93rd Cong., 1st Sess. (1973).

<sup>73</sup> Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGISLATION, 233, 267 (1973-1974).

<sup>74</sup> *Id.*

<sup>75</sup> *Newsmen’s Privilege Hearings Before the Subcommittee No. 3 of the H. Committee on the Judiciary*, 93rd Cong., 1st Sess. (1973), at 588-754; *Newsmen’s Privilege Hearings Before the Subcommittee on Constitutional Rights of the S. Committee on the Judiciary*, 93rd Cong., 1st Sess. (1973), at 407-62.

freedom of speech and of the press.”<sup>76</sup> Sen. Cranston amended his original bill with a lengthy findings section that concluded “this Act is necessary to implement the first and fourteenth amendments to the Constitution.” Rep. Reid in the House introduced a bill whose findings section asserted that “the values embodied in the First Amendment to the Constitution are currently under sustained and most dangerous siege” and that compelling journalists to reveal sources “violates the essence of the First Amendment.”<sup>77</sup> Reid’s bill, in an apparent swipe at the Court, was titled the First Amendment Protection Act.

These post-*Branzburg* bills reflected dialogue with the Court in more substantive ways. First, most of them addressed one of Justice White’s chief concerns in *Branzburg* and perhaps the strongest public policy assertion of his opinion: that journalists who witnessed criminal activity and refused to testify thwarted the administration of justice.<sup>78</sup> In response, many of the bills drafted after *Branzburg* included what came to be known as an eyewitness exception.<sup>79</sup> Sen. Ervin’s bill was representative. It contained this proviso: “Nothing in ... this Act shall be construed to excuse a newsman from testifying to the identity of any person who commits a crime in his presence.”<sup>80</sup>

Post-*Branzburg* bills also addressed the Court’s unease with the idea of an absolute privilege; both Justice Powell in concurrence<sup>81</sup> and Justice Stewart in dissent<sup>82</sup>

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<sup>76</sup> S. 1128, 93rd Cong., 1st Sess. (1973).

<sup>77</sup> H.R. 6739, 93rd Cong., 1st Sess. (1973).

<sup>78</sup> *Branzburg v. Hayes*, 408 U.S. at 692-93.

<sup>79</sup> See Ervin, *supra* note 71, at 269 (explaining that the eyewitness exception became a consuming topic of Senate hearings and he “felt such an exception was necessary, not only for passage of the bill, but to accommodate the legitimate interest of society in enforcing its laws”).

<sup>80</sup> S. 1128, 93rd Cong., 1st Sess. (1973).

<sup>81</sup> 408 U.S. at 710-11 (Powell, J., concurring).

showed a preference for a qualified privilege administered case by case. While Sen. Cranston's bill and some others called for absolute protection in all circumstances,<sup>83</sup> harking to older state shield laws adopted in the 1930s and 1940s,<sup>84</sup> many of these new bills incorporated elements of the three-part test prescribed by Justice Stewart in his press-friendly dissent. Sen. Lawrence Eagleton submitted a bill that was representative of this newer style of drafting; it required that the party seeking confidential information would have to show that the information was "material to the controversy before the court" and that "the same or equivalent information is not available to the court from any source other than a newsman."<sup>85</sup>

Most significantly, this draft legislation revealed legislators grappling with what Justice White had deemed "practical and conceptual difficulties of a high order"<sup>86</sup> — chiefly, how to define "those categories of newsmen who qualified for the privilege,"<sup>87</sup> which he considered "a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer ... as much as of the large metropolitan publisher."<sup>88</sup> Because freedom of the press is a fundamental personal right,

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<sup>82</sup> 408 U.S. at 746-51 (Stewart, J., dissenting).

<sup>83</sup> In a letter to the editor published in *The Washington Post*, Cranston explained why he favored an absolute privilege: "My bill is brief and absolute — for a good reason. Any attempt to qualify the privilege of a newsman's source, I believe, would lead to opening the door wider and wider until there is no protection left." See Alan Cranston, *Protecting News Sources*, WASH. POST, Sept. 6, 1972, at A19.

<sup>84</sup> See, e.g., ALA. CODE 1975 § 12-21-142 (State of Alabama through 2011 Sess.) (adopted in 1935 and still offering journalists an absolute privilege, even in libel cases in which they are a party).

<sup>85</sup> S. 870, 93rd Cong., 1st Sess. (1973).

<sup>86</sup> 408 U.S. at 704.

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

<sup>88</sup> *Id.*

not an institutional one, White concluded that the First Amendment would demand such a privilege be applied equally to “novelists, academics researchers, and dramatists”<sup>89</sup> – in other words, any person claiming to be gathering and disseminating information to the public.

While some of the shield bills debated in 1973 included language modeled on pre-*Branzburg* state statutes that limited protection to journalists working for traditional media outlets, many attempted to absorb the teachings of *Branzburg*. Ervin, for example, in his first draft bill had said that protection would extend to journalists disseminating information to the public “by means of a newspaper, a magazine, or a radio or television broadcast”<sup>90</sup>; in his second draft bill, he said “by any means of communication.”<sup>91</sup> Many other bills contained so-called covered-medium language that took pains to make it clear that protection extended beyond traditional news outlets such as newspapers; Cranston amended his original bill to enumerate “newspaper, periodical, book, other published matter, radio or television broadcast, cable television transmission, or other medium of communication.”<sup>92</sup> In a nod to Justice White’s veneration of the rights of “the lonely pamphleteer,”<sup>93</sup> some of these post-*Branzburg* bills included pamphlets in their lists of covered media.<sup>94</sup>

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<sup>89</sup> *Id.* at 705.

<sup>90</sup> S. 917, 93rd Cong., 1st Sess. (1973).

<sup>91</sup> S. 1128, 93rd Cong., 1st Sess. (1973).

<sup>92</sup> S. 158, 93rd Cong., 1st Sess. (1973).

<sup>93</sup> *Branzburg v. Hayes*, 408 U.S. at 703.

<sup>94</sup> *See, e.g.*, H.R. 7330, 93rd Cong., 1st Sess. (1973).

Similarly, many of these bills abandoned the narrow covered-person definitions of earlier shield laws, which required those seeking protection to be employees of traditional news outlets.<sup>95</sup> Rep. Whalen introduced one of many bills in the House that clarified that protection would be extended to someone “connected with or employed by the news media or press, *or who is independently engaged in gathering information for publication or broadcast.*”<sup>96</sup> Some bills dropped any mention of employment or remuneration; they said simply that the covered person must be “engaged in” gathering news and information to disseminate to the public.<sup>97</sup>

Some bills went even further. A bill introduced by Rep. Jerome Waldie of California that attracted many co-sponsors defined a covered person as “any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico or any foreign country.”<sup>98</sup> It said a covered medium “*includes, but is not limited to, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system.*”<sup>99</sup> It added that the covered person could be gathering “any written, oral, or pictorial news *or other material.*”<sup>100</sup>

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<sup>95</sup> See, e.g., H.R. 1735, 93rd Cong., 1st Sess. (stipulating that the person seeking protection must be “connected with or employed by” a traditional news outlet).

<sup>96</sup> H.R. 2230, 93rd Cong., 1st Sess. (1973) (emphasis added).

<sup>97</sup> H.R. 3482, 93rd Cong., 1st Sess. (1973) (saying that the persons “is engaged or has been engaged in” disseminating news).

<sup>98</sup> H.R. 7330, 93rd Cong., 1st Sess. (1973).

<sup>99</sup> *Id.* (emphasis added).

<sup>100</sup> *Id.* (emphasis added).

Thus, the any-person standard that Justice White said the First Amendment demanded was translated into the statutory language of a shield-law bill.

In the end, nothing came of these experiments in statute-drafting. Many journalists would not support the effort to pass a shield law in Congress because, for them, nothing less than a reversal of *Branzburg* would do.<sup>101</sup> Even journalists who supported the idea of a shield law could not agree whether it should be qualified or absolute.<sup>102</sup> By the summer of 1973, Sen. Ervin later recalled, attention to the issue was “beginning to fizzle.”<sup>103</sup> No bills made it out of committee in either the House or the Senate.<sup>104</sup>

## RESPONSES IN THE STATES

Just as the oft-discussed *Garland v. Torre* was by no means the start of the journalist-privilege issue in this country,<sup>105</sup> *Branzburg* was by no means the last word on the subject. On the contrary, strong and vocal reaction to the decision launched an unprecedented wave of lawmaking in the states.<sup>106</sup> As Congress debated bills in 1973, four states adopted laws that year. The post-*Branzburg* wave numbered eight statutes

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<sup>101</sup> See Ervin, *supra* note 71 at 273-75.

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

<sup>103</sup> *Id.* at 274.

<sup>104</sup> *Id.* at 275.

<sup>105</sup> Stephen Bates, *Garland v. Torre and the Birth of Reporter's Privilege*, 15 COMM. L. & POL'Y 91 (2010). Of course, Bates means simply the start of a First Amendment-based privilege. States had been adopting statutory shield laws since 1896, and various bills to create a federal shield law had been entered in Congress since 1929. But his title reflects the crabbed view of the issue among many media-law scholars, who tend to place a wall of separation between constitutional and statutory approaches without seeing a relation between the two.

<sup>106</sup> See APPENDIX.



adopted between 1972 and 1982, seven in just five years.<sup>107</sup> The percentage of states with shield laws went from a minority 36 percent to a majority 52 percent during the 10 years.<sup>108</sup>

There can be no question that most of these statutes were adopted largely in response to *Branzburg* and to the fact that subpoenas to journalists actually increased in the years following the decision.<sup>109</sup> Legislators in Tennessee might have been reacting to triggering events happening on the ground there,<sup>110</sup> but that was not true in most states. In Oregon, for example, the legislature did not adopt a shield law in 1973 in response to the contempt conviction of student editor Annette Buchanan, as is often claimed; survey research has shown instead that legislators there were responding mostly to *Branzburg* and the general climate of the era.<sup>111</sup>

*Statutes Revolving in Constitutional Law Orbits* Another sign of the responsive nature of these shield laws is the marked difference in drafting styles before and after *Branzburg*.<sup>112</sup> Statutes for decades had been modeled on the Maryland statute of 1896 – short, often one paragraph, and limited to employees of newspapers and, sometimes,

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<sup>107</sup> The states were Tennessee (1972); Nebraska, North Dakota, Oregon, Minnesota (1973); Oklahoma (1974); Delaware (1977); Illinois (1982).

<sup>108</sup> See APPENDIX.

<sup>109</sup> See Ervin, *supra* note 71, at 255-59 (calling the decision a “green light” to prosecutors and recounting a string of incidents that followed on the Court decision).

<sup>110</sup> *Id.* at 258 n.97 (detailing journalist-privilege disputes in Memphis and Chattanooga, Tenn.).

<sup>111</sup> See John R. Bittner, *Politics and Information Flow: The Oregon Shield Law*, 39 WESTERN SPEECH 51 (1975).

<sup>112</sup> For a discussion of the evolution of shield law formats, see 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, 242-48 (2009).

magazines.<sup>113</sup> The newer statutes were similar to the bills in Congress discussed above – multi-part, often including findings, definitions, and exceptions.<sup>114</sup> The Nebraska legislature adopted a lengthy findings section, similar to some of bills in Congress, in which it declared the purpose of the shield law was “to implement the first and fourteenth amendments and Article I, section 5, of the United States Constitution, and the Nebraska Constitution.”<sup>115</sup>

The dialogic character of these post-*Branzburg* statutes also could be seen in the way legislators acknowledged Justice White’s concern over journalists who witnessed criminal activity.<sup>116</sup> Several of these statutes included some form of the so-called eyewitness exception;<sup>117</sup> nearly every state shield law adopted since that era has done so.<sup>118</sup> More noticeably, many of these statutes incorporated some form of the three-part qualified-privilege test sketched out in Justice Stewart’s dissent. Some copied it nearly verbatim;<sup>119</sup> others reduced it to a two-part test.<sup>120</sup> The test has become such an expected feature of shield laws that Louisiana legislators amended their 1964 statute in 1989 to add

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<sup>113</sup> For an example of a post-*Branzburg* statute that still followed the old one-paragraph model, see N.D. CENT. CODE § 31-01-06.2 (Thomson West/Westlaw through 2011).

<sup>114</sup> See, e.g., OR. REV. STAT. § 44.510 (Thomson West/ Westlaw through 2011) (setting out definitions of “information,” “medium of communication,” “processing,” “published information,” and “unpublished information”).

<sup>115</sup> NEB. REV. STAT. § 20-145 (Thomson West/Westlaw through 2011).

<sup>116</sup> *Branzburg v. Hayes*, 408 U.S. at 692-93.

<sup>117</sup> See, e.g., OR. REV. STAT. § 44.520(2) (Thomson West/Westlaw through 2011).

<sup>118</sup> See, e.g., N.C. GEN. STAT. § 8-53.11(d) (Thomson West/Westlaw through 2011 Reg. Sess.).

<sup>119</sup> See, e.g., Tenn. Code Ann. § 24-1-208(2) (Thomson West/Westlaw through 2011 Reg. Sess.).

<sup>120</sup> See, e.g., Okla. Stat. Ann. Tit. 12, § 2506(B)(2) (Thomson West/Westlaw through 2011 Reg. Sess.).

it.<sup>121</sup> (It should be noted, in the spirit of dialogue, that journalists and press advocates had said for decades that a seeking party should be required to show that the information being sought was essential and could not be obtained elsewhere before forcing them to divulge it.<sup>122</sup> In fact, Rhode Island adopted a shield law two years before *Branzburg* containing qualifications similar to Stewart’s formulations.<sup>123</sup>)

***Covered Medium? Covered Person?*** More strikingly, the language of these statutes showed legislators grappling with the “conceptual difficulties of a high order” that Justice White feared in trying to determine who and what would be covered by a privilege.<sup>124</sup> While declining “to embark the judiciary on a long and difficult journey,”<sup>125</sup> he acknowledge that, in the statutory realm, legislatures were free “to fashion standards and rules as narrow or broad as deemed necessary.”<sup>126</sup> In a marked departure from pre-*Branzburg* shield laws, state legislators began to fashion covered-medium and covered-person provisions noticeably more broad than narrow.

Technology already had begun to force this change because of the rise of radio, television, and, first appearing in a shield law in 1967, cable.<sup>127</sup> Beginning in 1949,

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<sup>121</sup> La. Rev. Stat. Ann. §§ 45:1451-59 (Thomson West Westlaw through the 2011 Second Extraordinary Sess.).

<sup>122</sup> See Chapter Two, *supra* notes 119-79 and accompanying text.

<sup>123</sup> R.I. Gen. Laws § 9-19.1(c) (Thomson West/Westlaw current with 2011 legislation) (qualifying that the privilege must yield in situations where it is “necessary to permit a criminal prosecution for the commission of a specific felony, or to prevent a threat to human life, and that the information or the source of the information is not available from other prospective witnesses”).

<sup>124</sup> *Branzburg v. Hayes*, 408 U.S. at 704.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 706.

<sup>127</sup> See N.M. Stat. Ann. § 38-6-7(b)2 (Thomson West/Westlaw through 2011 2<sup>nd</sup> Reg. Sess.).

legislatures in a dozen states with laws on the books – none of which covered radio and only three of which covered magazines<sup>128</sup> – began a decades-long process of adding broadcast and periodicals to their statutes.<sup>129</sup> However, even in the run-up to *Branzburg*, with shield laws adopted in six states between 1964 and 1971, protection was mostly limited to employees of traditional news media. Legislators in New York, in adopting a statute in 1970, took pains to limit coverage to “professional” journalists, and they elaborately defined “newspaper,” “magazine,” “press association,” and so on.<sup>130</sup>

Less than a year after *Branzburg*, Tennessee’s shield law announced a new approach. It dispensed with the enumerated list of designated media common to most shield laws and simultaneously loosened the typical employment requirement, reading in the relevant part:

A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, *or who is independently engaged in gathering information for publication or broadcast*, shall not be required ... to disclose ... the source of any information procured for publication or broadcast.<sup>131</sup>

States that followed Tennessee experimented with other ways to open the “covered medium” parameters: Oregon,<sup>132</sup> Oklahoma,<sup>133</sup> and Nebraska<sup>134</sup> expanded the traditional list to include cable, books and, acknowledging *Branzburg*, pamphlets; Nebraska also

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<sup>128</sup> See Smith, *supra* note 108, at 243-45.

<sup>129</sup> *Id.*

<sup>130</sup> N.Y. CIV. RIGHTS LAW § 79-h(a)1-8 (Thomson West/Westlaw through 2011).

<sup>131</sup> TENN. CODE ANN. § 24-1-208(a) (Thomson West/ Westlaw through 2011 2nd Reg. Sess.) (emphasis added).

<sup>132</sup> OR. REV. STAT. § 44.510 (Thomson West/Westlaw through 2007).

<sup>133</sup> OKLA. STAT. ANN. TIT. 12 § 2506 (Thomson West/Westlaw through 2010 2nd Reg. Sess.).

<sup>134</sup> NEB. REV. STAT. § 20-145(7) (Thomson/West 2004).

added the caveat “but not limited to”;<sup>135</sup> North Dakota’s statute defined a covered medium as “any organization engaged in publishing or broadcasting news”;<sup>136</sup> Minnesota’s protected “any transmission, dissemination or publication to the public”;<sup>137</sup> and Delaware’s covered “the mass reproduction of words, sounds, or images in a form available to the general public.”<sup>138</sup>

These experiments in statutory language established a broad-based approach that would become the norm. When Illinois adopted its shield law in 1982,<sup>139</sup> the only one from that decade, it extended coverage to “any newspaper or other periodical . . . whether in print or electronic format”<sup>140</sup> and to a “news service whether in print or electronic format.”<sup>141</sup> A decade before the arrival of the World Wide Web, that wording anticipated statutes of the 1990s.

Some of the statutes also showed a willingness to tackle the trickier question Justice White lamented: *Who* would be covered? The “engaged in, employed on or connected with” formulation echoed in the Tennessee statute mentioned above traces to the nation’s first shield law, adopted in Maryland in 1896.<sup>142</sup> The vast majority of state shield laws have retained some variation of that formulation, but a few in this post-

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<sup>135</sup> *Id.*

<sup>136</sup> N.D. CENT. CODE § 31-01-06.2 (Thomson West/Westlaw through 2011).

<sup>137</sup> MINN. STAT. § 595.023 (Thomson West/Westlaw through 2010 Reg. Sess.).

<sup>138</sup> DEL. CODE ANN. TIT. 10 § 4320 (Thomson West/Westlaw through 2010 Reg. Sess.).

<sup>139</sup> 735 ILL. COMP. STAT. ANN. 5/8-901 to -909 (Thomson West/Westlaw through 2008 Reg. Sess.).

<sup>140</sup> *Id.* at §8-902(b).

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

<sup>142</sup> Law of April 2, ch. 249 Md. Laws 437 (1896); *codified at* MD. CODE ANN. CTS. & JUD. PROC. §9-112 (Thomson West/Westlaw through 2010).

*Branzburg* era experimented with ways to loosen the covered-person language as well: In Louisiana, a covered person needed only to be “regularly engaged in the business of” newsgathering;<sup>143</sup> in New Mexico, a covered person would need to be doing journalism “for gain”;<sup>144</sup> Delaware specified in unusual detail that a person had to be working in at least a part-time capacity,<sup>145</sup> but it broadened the range of covered persons to include a “journalist, scholar, educator, polemicist or other individual.”<sup>146</sup>

As if to show they were listening carefully to Justice White’s instructions about the First Amendment, legislators in Nebraska opened the “covered person” definition to its widest apogee. Their shield law would protect any person merely “engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public,”<sup>147</sup> and the word “person” would mean “any individual, partnership, limited liability company, corporation, association, or other legal entity existing under or authorized by the law of the United States, any state or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.”<sup>148</sup> In other words: Any person (or company).

Thus, as with post-*Branzburg* bills debated in Congress, state shield laws adopted between 1972 and 1982 tested innovative statutory approaches 1) to address concerns

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<sup>143</sup> LA. REV. STAT. ANN. §45:1451 (Thomson West/Westlaw through 2010).

<sup>144</sup> N.M. STAT. ANN. § 38-6-7(B)(7) (Thomson West/Westlaw through 2010).

<sup>145</sup> DEL. CODE ANN. TIT. 10, § 4320(4)(a) (Thomson/West through 2010 Reg. Sess.) (stipulating that “[a]t the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks, had spent at least 20 hours engaged in the practice”).

<sup>146</sup> *Id.*

<sup>147</sup> NEB. REV. STAT. § 20-146 (Thomson West/Westlaw through 2010).

<sup>148</sup> NEB. REV. STAT. § 20-145(7) (Thomson West/Westlaw through 2010).

raised in Justice White's majority opinion, 2) to follow the road map for a qualified privilege laid out in Justice Stewart's dissent, and 3) to manifest non-judicial actors' beliefs about the meaning of freedom of the press. A key difference between efforts in Congress and efforts in the states was that state legislators went further in embracing the any-person standard Justice White said the First Amendment demanded. Another key difference was that state efforts were successful.

## RESPONSES IN THE COURTS

Lani Guinier, the Harvard Law School scholar and former Supreme Court nominee, has described the process by which certain dissenting opinions become the law of the land as “demosprudence through dissent.”<sup>149</sup> A demosprudential dissent is one that does not merely convey a judge's disagreement but challenges the majority as out of step with the nation, gives voice to those on the losing side, and maps out an alternate approach for activists, lawyers, and judges in the future.<sup>150</sup> Such dissents can overcome majority opinions years later – famously, Justice Harlan's dissent in *Plessy*<sup>151</sup> – but they also can act as an immediate show of solidarity that encourages those pressing for change to keep pressing. “Dissenting Justices may educate, inspire, and mobilize citizens,” Guinier has written, for demosprudential dissents “inform and are informed by the wisdom of the people.”<sup>152</sup>

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<sup>149</sup> Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 1 (2008).

<sup>150</sup> *Id.* at 14.

<sup>151</sup> *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

<sup>152</sup> See Guinier, *supra* note 33 at 15-16.

Guinier could have pointed to Justice Stewart’s dissent in *Branzburg* as an example.<sup>153</sup> Signaling his solidarity with journalists and press advocates shocked by the decision, he decried the Court’s “crabbed view of the First Amendment” and its “insensitivity to the critical role of an independent press.”<sup>154</sup> Giving voice to the journalists’ side of the issue, he warned against turning the press into “an investigative arm of government”;<sup>155</sup> he insisted that the right to publish implied a “right to gather news”;<sup>156</sup> and he predicted that the Court’s decision meant “valuable information will not be published and the public dialogue will inevitably be impoverished.”<sup>157</sup>

While the majority opinion rejected the linchpin of the journalists’ argument – that lack of a privilege would cause sources to dry up – Stewart adopted that position and, more important, translated it into a form lawyers and judges would recognize as well-reasoned and well-supported.<sup>158</sup> In addition to copious case citations, Stewart marshaled an unusual amount of non-judicial material to support his retelling of the journalist-privilege debate: the writings of James Madison;<sup>159</sup> classic works on First Amendment theory by Alexander Meiklejohn, Zecharia Chafee, and Thomas Emerson;<sup>160</sup> biographies

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<sup>153</sup> *Branzburg v. Hayes*, 408 U.S. at 725.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 727.

<sup>157</sup> *Id.* at 735.

<sup>158</sup> *Id.* at 727-37.

<sup>159</sup> *Id.* at 728.

<sup>160</sup> *Id.* at 728 n.4.



and autobiographies of famous journalists;<sup>161</sup> law journal articles in favor of a privilege;<sup>162</sup> affidavits filed by prominent journalists such as Walter Cronkite and Dan Rather;<sup>163</sup> and the American Newspaper Guild's code of ethics.<sup>164</sup>

As a doctrinal matter, Stewart cited and quoted from his own opinion<sup>165</sup> for the Second Circuit Court of Appeals in *Garland v. Torre*,<sup>166</sup> Justice Powell's "enigmatic concurrence"<sup>167</sup> in *Branzburg* and the Ninth Circuit Court of Appeals' decision in the *Caldwell* case,<sup>168</sup> which *Branzburg* overturned, as possible openings for lawyers and judges in the future. He concluded by outlining a three-part test to operationalize a qualified privilege on a case-by-case basis.<sup>169</sup> Thus, a demosprudential dissent was born.

In the fourteen years following *Branzburg*, Courts of Appeal in nine of the 13 circuits recognized some form of qualified First Amendment privilege for journalists. The case-by-case analysis below asks, What rationales did they use to reach a conclusion that, in 1972 at least, would seem at odds with the Supreme Court? More particularly, Did they, like Justice Stewart, reach to non-judicial materials to support their decisions? These are the nine-precedent-setting cases in which these nine circuits established a First Amendment-based privilege.

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<sup>161</sup> *Id.* at 730 n.8.

<sup>162</sup> *Id.* at 732 n.14.

<sup>163</sup> *Id.* at 736 n.20.

<sup>164</sup> *Id.* 732 at 10.

<sup>165</sup> *Id.* at 743.

<sup>166</sup> *Garland v. Torre*, 259 F.2d 545, *cert. denied* 358 US 910 (1958).

<sup>167</sup> *Branzburg v. Hayes*, 408 U.S. at 725.

<sup>168</sup> *Id.* at 746-52.

<sup>169</sup> *Id.* at 740.

*In the Second Circuit* The precedent-setting case in this circuit, *Baker v. F&F Investment*,<sup>170</sup> was a federal class-action lawsuit under the Civil Rights Act involving alleged racial discrimination in housing in Chicago. African-American plaintiffs filed an interlocutory appeal to compel Alfred Balk, editor of the *Columbia Journalism Review*, to reveal the sources for a story he wrote that would support the plaintiffs' claims of discrimination. With the *Branzburg* decision less than 11 months old, the appeals court flatly rejected its applicability outside a grand jury inquiry. "Appellants urge us to extend to this civil case the limited principle" articulated in *Branzburg*, the court began. "We decline that invitation."<sup>171</sup>

Testifying before a lower court, Balk had cooperated fully and answered every question put to him with only one exception, the demand for the name of his confidential source. He said his refusal was based on "the First Amendment ... which [protects] not only the right to disseminate, but the right to gather information."<sup>172</sup> In an opinion delivered before *Branzburg* had been handed down, the judge in the lower court used a balancing approach to conclude that the identity of the source was not necessary, and the appeals court affirmed the decision.<sup>173</sup>

Explaining its decision, the appeals court first acknowledged that "federal law on the question ... is at best ambiguous."<sup>174</sup> As a doctrinal matter, the court drew sharp

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<sup>170</sup> *Baker v. F&F Investment*, 470 F.2d 778 (2d Cir. 1972).

<sup>171</sup> *Id.* at 780.

<sup>172</sup> *Id.* at 781.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

distinctions between the case before it and *Garland* and *Branzburg*.<sup>175</sup> In *Garland*, the reporter was a party to the libel action, the plaintiffs had exhausted other means to get the information being sought, and the information went to the heart of the plaintiff's case;<sup>176</sup> *Branzburg* involved a grand jury investigating criminal activity, and the fair administration of justice under such a circumstance required compulsory testimony.<sup>177</sup> Finally, the appeals court quoted strategically from the Powell concurrence in *Branzburg* to emphasize that the holding should be read narrowly in the context of the facts of that case, that it did not compel journalists "to give information bearing only a remote and tenuous relationship to the subject" of a given case, and that even in criminal proceedings, balancing competing interests "on a case-by-case basis accords with the tried and traditional way" of settling such disputes.<sup>178</sup> Thus, the appeals court closely followed the path marked out by Stewarts' dissent.

However, the appeals court went further by noting that, even with *Garland* and *Branzburg* as established precedent, those cases did not completely settle the question of compelled disclosure "in each and every case, both civil and criminal, in which the issue is raised."<sup>179</sup> To support that proposition, the court noted pre-*Branzburg* legal scholarship supportive of a journalist privilege.<sup>180</sup> The court then noted the lack of a federal shield law that could answer the question for the courts; it opined that courts were left "to divine

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<sup>175</sup> *Id.* at 783.

<sup>176</sup> *Id.* at 783-84.

<sup>177</sup> *Id.* at 784-85.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 781.

<sup>180</sup> *Id.* at 783.

the contours of a non-statutory federal law”; and it insisted that courts must “rely on both judicial precedent and a well-informed judgment as to the proper federal public policy to be followed in each case.”<sup>181</sup>

The appeals court applauded the lower court for looking to state law in New York and Illinois, the states of the parties in the case, for signs of consensus about the question of public policy involved.<sup>182</sup> The appeals court quoted passages from both of those states’ shield laws, and it quoted extensively from policy statements by the governors of those states made upon passage of the laws.<sup>183</sup> Echoing the First Amendment rhetoric employed in those policy statements, the court concluded that “New York and Illinois State law reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.”<sup>184</sup>

The court also accepted the argument long made by journalists – but expressly rejected in *Branzburg* – that compelled disclosure would dry up vital sources of news. Deterring confidential sources from confiding in journalists, the appeals court reasoned, “threatens freedom of the press and the public’s need to be informed” and, therefore,

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<sup>181</sup> *Id.* at 781.

<sup>182</sup> *Id.* at 781-82.

<sup>183</sup> *Id.* at 782. The excerpt chosen from N.Y. Gov. Nelson Rockefeller’s remarks reflects the belief that, in enacting the shield law, he and the legislators who voted for it were serving constitutional ends: Freedom of the press is one of the foundations upon which our form of government is based. A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news. ... This (shield law) affords a stronger safeguard of the free channels of news and communication ... by protecting newsmen from being compelled to disclose the information they gather, as well as the identity of their informants.

*Id.*

<sup>184</sup> *Id.* at 782 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964) ).

“undermines values which traditionally have been protected by federal courts applying federal public policy.”<sup>185</sup> Beyond the policy rationale, the appeals court concluded with a rhetorical flourish: “It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free, so too will a people remain free.”<sup>186</sup> Those appeals to constitutional values and to national ethos echoed the participation-in-self-government theme that ran through Stewart’s dissent in *Branzburg*.<sup>187</sup>

***In the Ninth Circuit*** This famous case involved a *habeas corpus* appeal by *Los Angeles Herald-Examiner* reporter William T. Farr.<sup>188</sup> He had been jailed for contempt of court after refusing to reveal the source of sealed court documents, leaked to him, related to the trials of Charles Manson and several of his followers after the sensational Tate-LaBianca murders in California.<sup>189</sup> A lower court denied Farr’s appeal on First Amendment grounds, and the appeals court affirmed that decision.<sup>190</sup> In explaining that decision, however, the appeals court made clear that a qualified First Amendment privilege for journalists was operational in the circuit.

To reach that conclusion, the court acknowledged the evolving history of the journalist-privilege issue. “Until very recent times,” the court began, “it was not seriously thought by most” that the First Amendment provided a testimonial privilege to

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 785.

<sup>187</sup> *Branzburg v. Hayes*, 408 U.S. at 725-26, 739, 745 (Stewart, J., dissenting).

<sup>188</sup> *Farr v. Pritchess*, 522 F.2d 464 (9th Cir. 1975).

<sup>189</sup> *Id.* at 466-67.

<sup>190</sup> *Id.* at 469.

journalists.<sup>191</sup> “A change has been in the making in more recent times,” the court continued.<sup>192</sup> It then pointed to the adoption of shield laws in many states, and it acknowledged efforts to adopt a shield law by Congress to operate at the federal level.<sup>193</sup>

The shortest of the precedent-setting cases in the circuits, the Ninth Circuit’s opinion seemed unsupported to the point of being cavalier. The court simply declared the U.S. Supreme Court had answered the question of the existence of a privilege in the affirmative and said *Branzburg* “appears to have fashioned at least a partial First Amendment shield available to newsmen.”<sup>194</sup> The court pointed out that Justice Powell’s short concurrence was needed to reach a five-majority, though it quoted neither from Justice White’s opinion nor from Powell’s concurrence. With no citations to support its conclusions, the court asserted simply, “It is clear that *Branzburg* recognizes some First Amendment protection of news sources”;<sup>195</sup> at another point, it off-handedly mentioned “the First Amendment protection announced by *Branzburg*,” again without citation.<sup>196</sup> The court concluded that *Branzburg*’s application to non-grand jury cases required judicial balancing of First and Sixth Amendment interests and,<sup>197</sup> so balancing, ruled against Farr’s petition.<sup>198</sup> Aside from the nod to shield-law history, the court offered scant

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<sup>191</sup> *Id.* at 467 (emphasizing that “freedom of the press” meant only freedom from prior restraints).

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

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 468.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 469.

support for its assertions.<sup>199</sup> It did not even mention the precedent-setting case in the Second Circuit for hortatory support for its decision.

***In the Tenth Circuit*** The precedent-setting case in this circuit, *Silkwood v. Kerr-McGee*,<sup>200</sup> was significant in two respects: For the first time, a court deployed the three-part test from Stewart’s *Branzburg* dissent in full, and a court faced for the first time the question of whether a non-traditional journalist should be covered by a First Amendment privilege. The case involved a former free-lance reporter who, while in film school, set out to make a documentary film about the suspicious death of union organizer Karen Silkwood.<sup>201</sup> The energy company Kerr-McGee subpoenaed the filmmaker as a non-party witness in a federal case in which it was sued by members of the Silkwood estate.

In overturning a lower court’s denial of a privilege, the appeals court read *Branzburg* as having created a qualified privilege. To do that, it highlighted passages from Justice White’s opinion that emphasized what the Court was *not* saying – that it did not “question the significance of free speech, press, or assembly”; that it did not think “news gathering does not qualify for First Amendment protection”; and that “no attempt is made to require the press to publish its sources.”<sup>202</sup> The appeals court concluded, “We infer that the present privilege is no longer in doubt.”<sup>203</sup> Because *Branzburg* involved a grand jury investigating a crime and the case before it did not, the appeals court said, “the

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<sup>199</sup> It cited these three cases to support only the proposition that *Branzburg*’s teachings should inform decisions beyond cases involving grand juries: *Carey v. Hume* 492 F.2d 631 (D.C. Cir. 1974); *United States v. Liddy*, 478 F. 2d 586 (D.C. Cir. 1972); *Bursey v. United States* 466 F.2d 1059 (9th Cir. 1972).

<sup>200</sup> *Silkwood v. Kerr-McGee*, 563 F.2d 433 (10th Cir. 1977).

<sup>201</sup> *Id.* at 434-35.

<sup>202</sup> *Id.* at 437 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972) ).

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

actual decision of the Supreme Court is not surprising nor is it important in the solution of our problem.”<sup>204</sup>

The appeals court also criticized the lower court for ruling that, even if a journalist privilege existed, it would not apply to a filmmaker. The court acknowledged that discussions of a privilege normally involved newspaper journalists, but it emphasized that the defendant was doing investigative work of the kind associated with journalism, that he had spent considerable time and effort compiling information, and that his intention from the start was to create a film to be seen by the public.<sup>205</sup> “The Supreme Court has not limited the privilege to newspaper reporting,” the appeals court concluded.<sup>206</sup> “It has in fact held that the press comprehends different kinds of publications which communicate to the public information and opinion.” The appeals court, just as Justice White did, cited *Lovell v. City of Griffin*<sup>207</sup> for that proposition.

Finally, the appeals court reached back to *Garland* to support the three-part test that Justice Stewart later articulated in his *Branzburg* dissent – that the information has to be relevant, that the party seeking the information has exhausted other means of obtaining the information, and that the information goes to the heart of the plaintiff’s case.<sup>208</sup> “From these criteria, it has to be concluded that compulsory disclosure in the course of a ‘fishing expedition’ is ruled out in the First Amendment case,” the court concluded. It ruled that

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

<sup>205</sup> *Id.* at 436-37.

<sup>206</sup> *Id.* at 437.

<sup>207</sup> *Id.* (citing *Lovell v. City of Griffin*, 303 U.S. 444 (1938) ).

<sup>208</sup> *Id.* at 438.



there was insufficient evidence on the record to answer these questions, and it remanded the case to the lower court for further fact-finding.<sup>209</sup>

Unlike the lightly annotated opinion of the Ninth Circuit discussed above, this Tenth Circuit opinion was well-anchored by citations to *Branzburg* and other federal cases,<sup>210</sup> and it acknowledged the emerging privilege in other circuits.<sup>211</sup> Unlike the lengthy and discursive opinion of the Second Circuit discussed above, the Tenth Circuit opinion was carefully grounded in internal legal material and did not lean at all on external narratives or statutory law.

***In the Third Circuit*** The precedent-setting case, *Riley v. City of Chester*,<sup>212</sup> was unusual in that the court anchored its decision in statutory law, Rule 501 of the Federal Rules of Evidence adopted by Congress in 1975.<sup>213</sup> The case grew out of a civil rights action in which a police officer running for mayor had accused several city employees of illegally thwarting his political campaign. The investigation included third-party subpoenas issued to a longtime reporter at the *Delaware County Daily Times* in Pennsylvania, who refused to testify and was cited for contempt.<sup>214</sup>

As in decisions discussed above, the Third Circuit court distinguished the civil case before it from the grand-jury context of *Branzburg* to conclude that “the limitation imposed ... on the ability of a journalist to refuse to disclose information is not applicable

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<sup>209</sup> *Id.* at 439.

<sup>210</sup> *Id.* at 438 (citing *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Carey v. Hume*, 492 F. 2d 631 (D.C. Cir. 1974) ).

<sup>211</sup> *Id.* at 438 (citing *Baker v. F&F Investment* 470 F.2d 778 (2d Cir. 1972) ).

<sup>212</sup> *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979).

<sup>213</sup> FED. R. EVID. 501.

<sup>214</sup> *Id.* at 710-13.

to the facts in this case.”<sup>215</sup> Unlike Justice White’s more jaundiced view of newsgathering in *Branzburg*, the Third Circuit court asserted that “the interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring”<sup>216</sup> – an echo of Justice Stewart’s position in his dissent. “The strong public policy which supports the unfettered communication to the public ... and the Constitutional dimension of that policy ... lead us to conclude that journalists have a federal common law privilege,” the court concluded.<sup>217</sup>

To reach that conclusion, the court quoted at length from Rule 501 of the Federal Rules of Evidence, which did not enumerate testimonial privileges but said courts should base any new ones on “common law principles.”<sup>218</sup> The court then explored the legislative history of the rule to conclude that the statutory language was intentionally left flexible to include a journalist privilege.<sup>219</sup> “This was one of the primary focuses of the congressional review of the proposed evidentiary rules, stemming in part from the ‘nationwide discussion of the newspaperman’s privilege,’ ” the court wrote.<sup>220</sup> To support that view, the court highlighted Congressional testimony by the Reporters Committee for Freedom of the Press,<sup>221</sup> and it quoted at length from statements made by Rep. William

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<sup>215</sup> *Id.* 714.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 714.

<sup>219</sup> *Id.* 714 (citing Advisory Committee’s Notes, H.R. Doc. No. 46, 93rd Cong., 1st Sess. 78 (1973) ).

<sup>220</sup> *Id.* at 714 (citing Rules of Evidence, Hearing Before the House Special Subcomm. on Reform of Federal Criminal Laws of Comm. on the Judiciary, 93rd Cong., 1st Sess. 5 (1973) ).

<sup>221</sup> *Id.*

Hungate, the primary draftsman of the rules.<sup>222</sup> The revised language of the statute, the court concluded, was meant “to leave the law of privilege in its current state to be developed by the federal courts.”<sup>223</sup>

To bolster its finding in favor of the journalist, the court turned next to Pennsylvania’s statutory shield law for guidance. “Although we are not bound to follow the Pennsylvania law,” the court wrote, “neither should we ignore Pennsylvania’s public policy giving newspaper reporters protection from divulging their sources.”<sup>224</sup> The appeals court quoted at length from an opinion by the Pennsylvania Supreme Court that, in soaring First Amendment rhetoric, interpreted the shield law as a crucial bulwark against government corruption.<sup>225</sup> “The interests behind the Pennsylvania statute and the federal common law in this regard are congruent,” the appeals court concluded, “each stemming from an independent base of authority but both leading to protection of the vital communication role played by the press in a free society.”<sup>226</sup>

The court justified case-by-case balancing by citing Justice Powell’s concurring opinion in *Branzburg*.<sup>227</sup> Without mentioning Stewart’s dissent by name, the court

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<sup>222</sup> *Id.* at 714. Citing 120 Cong. Rec. H. 12253-54 (daily ed. Dec. 18, 1974), the court quoted Rep. Hungate: The language of Rule 501 permits the courts to develop a privilege for newspaper people on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspaper people any protection they may have from State newsperson’s privilege laws.

*Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 715.

<sup>225</sup> *Id.* (quoting *In re Taylor*, 412 Pa. 32 (1963) ).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 716.

assembled his three-part test by citing other cases to bolster each piece: It grounded the assertion that the information being sought must be highly relevant in the Supreme Court case of *United States v. Nixon*.<sup>228</sup> It rested the exhaustion prong on the Tenth Circuit's decision in *Silkwood*.<sup>229</sup> It supported the assertion that the information being sought must go to the heart of the matter by pointing to the Second Circuit decision in *Baker*.<sup>230</sup> In applying the test and ruling in favor of the reporter, the court quoted from a speech by Justice Brennan about the "fundamental and necessary interdependence of the Court and the press," and it admonished judges who seemed too quick to hold journalists in contempt.<sup>231</sup> "Because of the importance to the public of the underlying rights protected by the federal common law news writer's privilege," the court wrote, "trial courts should be cautious to avoid an unnecessary confrontation between the courts and the press."<sup>232</sup>

***In the First Circuit*** The precedent-setting case in this circuit, *Bruno & Stillman v. Globe Newspaper*, was significant in that it established a strong journalist privilege even in libel cases in which the journalist was a party; furthermore, the First Circuit court reached repeatedly to legal scholarship to support its decision.<sup>233</sup> The case involved a libel suit filed by the Bruno & Stillman boat company against a reporter at the *Boston Globe*. After ruling that the manufacturer was not a "public figure" for purposes of the

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<sup>228</sup> *Id.* (citing *United States v. Nixon*, 418 U.S. 683 (1974) ).

<sup>229</sup> *Id.* (citing *Silkwood v. Kerr-McGee*, 563 F.2d 433 (10th Cir. 1977) ).

<sup>230</sup> *Id.* (quoting *Gulliver's Periodicals, Ltd. v. Chas Levy Circulating*, 455 F.Supp. 1197, 1204 (N.D. Ill. 1978) ).

<sup>231</sup> *Id.* at 718 (quoting Address by William J. Brennan on the Dedication of the Samuel I. Newhouse Law Center, Rutgers University, Newark, N.J. (Oct. 17, 1979) ).

<sup>232</sup> *Id.*

<sup>233</sup> *Bruno & Stillman, Inc., v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980).

suit,<sup>234</sup> the court went on to rule that Bruno & Stillman had failed to show that the identities of the reporter's confidential sources was relevant enough to overcome a qualified privilege based on the First Amendment.

As a doctrinal matter, the appeals court linked the U.S. Supreme Court decisions in *Branzburg* and *Herbert v. Lando* to assert that the High Court had left room for a qualified testimonial privilege.<sup>235</sup> The court acknowledged that the Supreme Court had ruled against the journalists in both of those cases. "Yet, despite this refusal to give doctrinal recognition to any automatic, categorical, across-the-board privileges," the appeals court asserted, "in neither case did the Court suggest the opposite, that the interests underlying the asserted privileges were *a priori* and by definition beyond the pale of any protection."<sup>236</sup> The court emphasized Justice Powell's concurring opinions over Justice White's majority opinions in both of those cases,<sup>237</sup> and concluded: "Whether or not the process of taking First Amendment concerns into consideration can be said to represent recognition by the Court of a 'conditional' or 'limited' privilege is, we think, largely a question of semantics."<sup>238</sup>

To support its decision, the court pointed to two federal statutes. First, the court cited and quoted from the Federal Rules of Civil Procedure, which, it said, gave "ample

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<sup>234</sup> *Id.* at 592-93.

<sup>235</sup> *Id.* at 594, *citing* *Herbert v. Lando*, 441 U.S. 153 (1979) (requiring journalist defendants in a libel suit to answer questions of discovery).

<sup>236</sup> *Id.* at 594.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 595.

powers” to judges to use their discretion in administering privileges.<sup>239</sup> It pointed specifically to Rule 26 – which states that information being sought in pre-trial discovery must be relevant<sup>240</sup> – and it emphasized that the requirement of relevancy “should be firmly applied, and the district courts should not neglect their power to restrict discovery.”<sup>241</sup> The court also pointed to Rule 501 in the Federal Rules of Evidence, as the Third Circuit had done, to support the idea that Congress had created space for the courts to fashion a case-by-case approach for balancing the interests of journalists and those demanding confidential material.<sup>242</sup>

More unusual, the court incorporated contemporary legal scholarship into its decision, particularly to support ideas that the Supreme Court had never fully articulated. Asserting that a journalist’s First Amendment right to protect sources actually reflects the public’s right to know, the court cited and quoted constitutional scholar Alexander M. Bickel’s book of essays *The Morality of Consent*.<sup>243</sup> “That right is the reporter’s by virtue of the proxy which the freedom of the press clause of the First Amendment gives to the press in behalf of the public,” the court quoted Bickel as saying.<sup>244</sup> To support its choice of balancing approach based on the Federal Rules of Civil Procedure, the appeals court quoted Bickel again, this time observing that the Supreme Court itself had “devised

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<sup>239</sup> *Id.* at 594.

<sup>240</sup> FED. R. CIV. PROCEDURE RULE 26(B)(1).

<sup>241</sup> *Id.* at 594.

<sup>242</sup> *Id.* at 596.

<sup>243</sup> *Id.* at 595 n.12.

<sup>244</sup> *Id.*

special procedures” tailored to “avoiding a clash with First Amendment values.”<sup>245</sup> To support the claim that a reporter’s decision to grant confidentiality is a crucial part of the editorial function, the court quoted Bickel yet again.<sup>246</sup> The court concluded by finding that the plaintiffs had failed to satisfy the three-part test articulated by Justice Stewart in *Garland*, and it remanded the case to the lower court for further fact-finding.<sup>247</sup>

***In the D.C. Circuit*** The precedent-setting case, *Zerilli v. Smith*,<sup>248</sup> was significant for fleshing out what has become known as the exhaustion prong, the second part of Stewart’s three-part test, requiring that a journalist be compelled to disclose confidential material only after the seeking party has exhausted other means. The case arose when two men accused of Mafia-related criminal activity sued the U.S. government for violating their rights under the Privacy Protection Act and the Fourth Amendment. They subpoenaed a reporter of the *Detroit News* who had written stories based on leaked documents and sought the source of the leaks.<sup>249</sup>

By 1981, the doctrinal moves needed to cabin the *Branzburg* holding to cases involving grand juries investigating criminal activity were well rehearsed enough that the D.C. court could assert flatly, “The Supreme Court explicitly acknowledged the existence of First Amendment protection for news gathering in *Branzburg*.”<sup>250</sup> The court also had an abundance of cases from other circuits it could cite to support the existence of a First

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<sup>245</sup> *Id.* at 596 (quoting again from Bickel’s *Morality of Consent*).

<sup>246</sup> *Id.* at 597.

<sup>247</sup> *Id.* at 598-99.

<sup>248</sup> *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

<sup>249</sup> *Id.* at 706-10.

<sup>250</sup> *Id.* at 711 n.39.

Amendment privilege. “Every other circuit that has considered the question has also ruled that a privilege should be readily available in civil cases,” the court wrote, “and that a balancing approach should be applied.”<sup>251</sup> The court also had an important precedent from within the circuit, *Carey v. Hume*, in which it already had suggested that the *Branzburg* holding would not be controlling outside the grand jury context.<sup>252</sup>

A weak link in the argument for a First Amendment privilege continued to be the necessary assertion that the lack of a privilege would cause confidential sources to dry up, a contention directly disputed by Justice White in his majority opinion in *Branzburg*. Where the First Circuit court had reached to the writings of Alexander Bickel to help bolster this claim, the D.C. Circuit court cited an unsigned student note published in the *Yale Law Journal*.<sup>253</sup> “Unless reporters and informers can predict with some certainty” that confidentiality will be respected, the court quoted, “the flow of information to the public will be diminished.”<sup>254</sup> The court also cited that article for the proposition that a First Amendment privilege should be weaker in libel suits in which a journalist is a party to the case, stronger in cases where, as in this one, the journalist was a third party.<sup>255</sup> Finally, having marshaled both judicial and non-judicial material to establish the privilege and institute the three-part test, the court ruled that the plaintiffs had not exhausted other sources and could not overcome the journalist’s privilege.<sup>256</sup>

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<sup>251</sup> *Id.* at 712 (citing all of the cases previously discussed in this section).

<sup>252</sup> *Id.* at 711-12, *citing* *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974), *cert. denied*, 417 U.S. 938 (1974).

<sup>253</sup> *Id.* at 711, n.40.

<sup>254</sup> *Id.* at 712, n.46.

<sup>255</sup> *Id.* at 714, n.51.

<sup>256</sup> *Id.* at 715.



*In the Fifth Circuit* Establishing a journalist privilege in *In re Selcraig*<sup>257</sup> was as easy as pointing to an earlier case within the circuit. Three years earlier, in *Miller v. Transamerican Press*, the Fifth Circuit court had said that it would recognize a qualified First Amendment privilege based on a circumscribed reading of the majority and concurring opinions in *Branzburg*, though it did not sustain the privilege in that case.<sup>258</sup> The *Selcraig* case arose out of a Civil Rights Act action in which a fired school official was suing his former employer for wrongful termination and subpoenaed a reporter of the *Dallas Morning News* for the names of administrators who had spoken to him in confidence.<sup>259</sup> In ruling in the reporter's favor, the court held that the plaintiff had not adequately shown that the information being sought was essential to his case – the third prong of the circuit's so-called *Miller* test, which was based on the three-part test first articulated by Justice Stewart in *Garland*.<sup>260</sup> The court did not cite the precedent-setting cases in the other circuits for support. It did, however, cite and quote a law journal article supportive of a First Amendment privilege written by James Goodale,<sup>261</sup> the executive vice president of *The New York Times* who represented reporter Earl Caldwell in one of the key cases leading to *Branzburg*.<sup>262</sup>

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<sup>257</sup> *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983).

<sup>258</sup> *Id.* at 792, citing *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980), *modified on rehearing*, 628 F.2d 932 (5th Cir. 1980), *cert denied*, 450 U.S. 1041 (1981).

<sup>259</sup> *Id.* at 791-95.

<sup>260</sup> *Id.* at 799 n.14.

<sup>261</sup> *Id.* at 799 n.15 (citing James Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 708 (1975) ).

<sup>262</sup> *See Caldwell v. United States*, 434 F.2d 1081 (1970).

***In the Fourth Circuit*** The precedent-setting case arose in the context of an unsuccessful libel suit filed by political gadfly Lyndon LaRouche against NBC News.<sup>263</sup> The appeals court upheld a lower court's refusal to compel a reporter to reveal sources based on Larouche's failure to exhaust other sources of the information. The appeals court justified its recognition of a First Amendment-based privilege in three short sentences with citations to the Powell concurrence and the precedent-setting cases in the Second and Fifth circuits.<sup>264</sup> No other material was cited.

***In the Eleventh Circuit*** The precedent-setting case, *United States v. Caporale*, was a complex appeal by eight people convicted on RICO racketeering charges.<sup>265</sup> They argued that the lower court erred in not forcing two reporters to testify;<sup>266</sup> the appeals court disagreed.<sup>267</sup> The court confirmed the existence of a First Amendment privilege in the circuit in two short sentences, and it cited only the two cases out of the Fifth Circuit discussed above.<sup>268</sup> *Branzburg* was nowhere to be found.

Thus, from 1972 to 1986, nine of thirteen federal circuits used a narrow reading of *Branzburg* in order to recognize a qualified privilege for journalists. Nearly all of them followed the road map suggested in Justice Stewart's dissent by citing and frequently quoting the Powell concurrence along with *Garland*. Also like Stewart, several circuit courts cited and quoted scholarly books and law journal articles to bolster their decisions.

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<sup>263</sup> LaRouche v. Nat. Broadcasting Co, Inc., 780 F.2d 1134 (4th 1986).

<sup>264</sup> *Id.* at 1139.

<sup>265</sup> *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986).

<sup>266</sup> *Id.* at 1503.

<sup>267</sup> *Id.* at 1504.

<sup>268</sup> *Id.*

Two circuits cited and quoted extensively from state shield laws as evidence that a journalist privilege represented wise public policy; one of them quoted policy statements by governors as further evidence. One circuit grounded its holding in statutory law, citing the Federal Rules of Evidence adopted by Congress in 1975 and saying the statute left it up to the courts to create new testimonial privileges as a matter of federal common law. One circuit grappled with the covered-person issue in deciding that the any-person standard Justice White articulated in *Branzburg* meant a documentary filmmaker should indeed fall within the ambit of a privilege. As the period wore on, courts seemed to feel less and less compelled to cite anything more than their own precedent-setting cases; the last case in the series did not even mention *Branzburg*. Justice White's holding was effectively quarantined to a subset of journalist-privilege cases, those involving grand jury investigations.

## DISCUSSION AND CONCLUSIONS

“The multiple functions of non-judicial precedents,” Gerhardt has written, “largely expose the exaggeration of the counter-majoritarian difficulty in constitutional theory.”<sup>269</sup> That is partly because judicial decisions tend to be grounded in majoritarian preferences manifest in our culture – norms, traditions, history, court precedents and the Constitution itself.<sup>270</sup> That is also because non-judicial precedents give non-judicial actors a way to participate in our constitutional culture, to express their views on constitutional meaning, and to talk back to the courts when they disagree.<sup>271</sup> “Judicial

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<sup>269</sup> See Gerhardt, *supra* note 37, at 717.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 764-75.

precedents are instrumental to an exchange of opinions about questions of constitutional meaning,” Gerhardt has observed. “The dialogue may serve many different ends, not the least of which is educating the public about constitutional law.”<sup>272</sup>

When the U.S. Supreme Court handed down its decision in *Branzburg v. Hayes* in 1972, seemingly denying the First Amendment provided a testimonial privilege to journalists, journalists had been fighting for one in common law courts most of the length of American history. Many went to jail on contempt convictions to make their point. Refusing to reveal confidential sources hardened into an expected professional norm by the late 19th century, and it was made part of the journalist’s code of ethics in the 1930s. State legislatures began adopting statutory shield laws in 1896, and there were 18 on the books by the time of *Branzburg*. Gerhardt would recognize these developments as a strengthening body of non-judicial precedents, and the Court’s decision threatened to upset what for many was settled principle. “The longer it takes for courts to review non-judicial precedents,” he has written, “the longer the precedents endure.”<sup>273</sup>

Journalists used their news pages to put the issue on the nation’s agenda and their editorial pages to criticize the *Branzburg* ruling. In making their case in the court of public opinion, journalists and press advocates invoked the First Amendment and quoted the Founding Fathers; they pointed to the crucial role the press plays in a well-functioning democracy; they emphasized the watchdog role of the press in ferreting out government corruption; they said the Court’s decision undermined the press’ independence and threatened to turn it into an investigative arm of government; they consistently shifted the focus of debate from the rights of journalists to the public’s right

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<sup>272</sup> *Id.* at 766.

<sup>273</sup> *Id.* at 753.

to know. Public opinion in a Gallup poll showed strong support for the press' position. Gerhardt's theory would have predicted this backlash against the Court, for its decision seemed to contradict so many long-standing non-judicial precedents. "The point is not that judicial decisions are wrong because they fail to follow majoritarian preferences," he has written. "Rather, judicial decisions deviating from concrete expressions of majoritarian preferences are more vulnerable to attack in the public sector and to the interposition of non-judicial precedents."<sup>274</sup>

*Branzburg* also appeared vulnerable to attack in the academy; it sparked an unprecedented wave of scholarly articles. Mirroring public opinion, legal scholars seemed more willing than ever to take the journalists' position, a significant shift in elite opinion. Their role in the dialogue was to act as mediators, to translate the journalists' long-held beliefs about the First Amendment into language that would be recognizable to lawyers and judges as plausible. Giving their imprimatur to efforts to protect journalists' sources, including shield laws and press-friendly court decisions, would help legitimate departures from the *Branzburg* holding. "The more often precedents are cited approvingly, the more their meaning and value increase," Gerhardt has written. "The citation patterns of judicial and non-judicial precedents are interconnected, as their meaning and value often depend on the frequency with which they are cited positively by courts and non-judicial authorities."<sup>275</sup>

Bills to create a federal shield law had been submitted in Congress off and on for decades, but *Branzburg* sparked the first serious effort. Extensive hearings were convened by committees in both chambers, and dozens of journalists were interviewed.

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<sup>274</sup> *Id.* at 782.

<sup>275</sup> See Gerhardt, *supra* note 57 at 717.

The proceedings were suffused with First Amendment rhetoric; the vast majority of those who testified felt the Supreme Court had incorrectly interpreted the First Amendment, and they called on Congress to, in a sense, overrule it. “Incomplete, or imperfect, implementation of constitutional values results from tensions ... between judicial and non-judicial decisions,” Gerhardt has written.<sup>276</sup> Hundreds of bills were drafted and dozens debated, but in the end, none were successful. Gerhardt’s theory would count the Congressional effort itself as a non-judicial precedent, however, because a key feature of non-judicial precedents is their signaling function. “Non-judicial precedents convey agendas just as judicial precedents do,” he has written. “Non-judicial authorities send signals in part to make the Court aware of pertinent non-judicial precedents.”<sup>277</sup>

*Branzburg* also set off an extraordinary period of lawmaking in the states. Four shield laws were adopted in 1973 alone, seven in the five years following the decision, eight for the entire period from 1972 to 1982. The shield-law count went from a minority 34 percent of states before *Branzburg* to a majority 52 percent at the end of the period. Gerhardt would describe that trend as “creating network effects,”<sup>278</sup> whereby the signaling function of these non-judicial precedents increases as they spread from state to state. “Non-judicial actors,” he has observed, “seek to construct precedents to influence not only the agendas of their respective states but also the agendas of other states and the federal government.”<sup>279</sup>

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<sup>276</sup> *Id.* at 718.

<sup>277</sup> *Id.* at 765-66.

<sup>278</sup> *Id.* at 766.

<sup>279</sup> *Id.*

While the pervasive use of constitutional rhetoric among these non-judicial actors showed them to be in a kind of dialogue with the Court, so too did the language of the bills they drafted in Congress and the statutes they adopted in the states. Many of these bills and statutes directly addressed Justice White's key concern in *Branzburg* – journalists who witnessed criminal activity but refused to testify – by crafting what would become known as the eyewitness exception, now a standard feature of shield laws. Nearly all of the shield laws adopted after *Branzburg* abandoned the absolute approach that many journalists demanded in favor of the type of qualified privilege Justice Stewart outlined in his influential dissent.

More dramatically, these federal bills and state statutes spoke directly to Justice White's contention that a journalist privilege would be impossible to administer because the First Amendment could not single out a special class for protection, that freedom of the press was a fundamental personal right and not an institutional one. While he had said legislatures were free to fashion statutes as narrow or broad as they deemed necessary, many of them moved to the "broad" end of the spectrum. Statutes adopted before *Branzburg* were uniformly narrow; they covered journalists employed by traditional news outlets, and many of the older ones covered only newspapers. After *Branzburg*, lawmakers in Congress and, especially, the states experimented with the so-called covered medium and covered person language in their bills and statutes to reflect the any-person standard White had articulated in *Branzburg*. All of them took care to broaden the list of covered media to include all types of broadcast; some added cable television and news reels; some added books and, in a nod to Justice White, pamphlets; a few moved to complete medium neutrality with phrases such as "via any medium."

With regard to covered persons, most bills and statutes still used the “employed by, connected with” language found in older statutes to limit who could claim the privilege. However, several of the successful shield laws in the states added caveats such as “or who is independently engaged in” to signal that coverage could be extended to freelancers, book authors, or other non-traditional journalists. One state, Nebraska, broadened the language of its shield law to cover any person engaged in journalistic activity in any medium – a statutory translation of the First Amendment values Justice White had emphasized in *Branzburg*. These shield laws fulfilled the highest purpose of non-judicial precedents in Gerhardt’s theory: implementing constitutional values. “The Constitution is not self-executing,” he has written. “The interaction of judicial and non-judicial precedents is instrumental to affecting constitutional directives and guarantees.”<sup>280</sup>

The repudiation that journalists felt from Justice White’s majority opinion was lessened by Justice Stewart’s dissent. His account of the history of the issue legitimated the journalists’ point of view, and he pointed for support to an array of non-judicial materials – scholarly books and law journal articles, histories of journalism and interviews with journalists. He embraced the linchpin of their argument, rejected by Justice White, that compelled disclosure caused important sources to dry up and lack of a privilege acted as a disincentive for future whistleblowers. The three-part test he proposed to create a case-by-case qualified privilege was based largely on arguments journalists and press advocates had been making for decades: 1) the information being

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<sup>280</sup> *Id.* at 775.



sought must be relevant, 2) the seeking party must have exhausted other means to get it, and 3) it must be centrally important to the case.

Besides signaling solidarity with the journalists, Stewart's dissent provided a road map for future litigants, lawyers and judges. Less than a year after *Branzburg*, the Second Circuit Court of Appeals excused a journalist from testifying by announcing a First Amendment-based privilege in that circuit by proclaiming that *Branzburg* was applicable only in cases involving federal grand juries. As Justice Stewart had done, the appeals court emphasized the short passage in Justice Powell's concurrence urging a narrow reading of *Branzburg*, along with Justice Stewart's 1958 opinion for that circuit in *Garland v. Torre*.<sup>281</sup> Also following Powell's lead, the court bolstered its opinion by pointing to an array of non-judicial material, including the shield laws in the litigants' home states and policy statements made by the governors of those states when the shield laws were adopted. Echoing Gerhardt's contention that the constitution is implemented by judicial and non-judicial actors working in tandem, the appeals court said it "must rely on both judicial precedent and a well-informed judgment as to the proper federal public policy to be followed in each case."<sup>282</sup>

By 1986, nine of the thirteen circuits had established First Amendment-based privileges in spite of *Branzburg*; most of them used Stewart's dissent as a guide to isolate that holding to the grand jury context; some of them, like the Second Circuit, cited non-judicial material to support their decisions; and one of them, the Eleventh, did not even mention *Branzburg*. This evolution in constitutional law ran congruently with repeated

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<sup>281</sup> 259 F.2d 545, *cert. denied* 358 US 910 (1958).

<sup>282</sup> *Baker v. F&F Investment*, 470 F.2d 778, 781 (2d Cir. 1972).

attempts to pass a federal shield law in Congress and the most active period in shield-law history in the states. In Gerhardt's theory, it would be implausible to view the development of a First Amendment privilege in the courts as a phenomenon separate from events unfolding in the statutory realm; they must be discussed in tandem. "The difficulty with much constitutional scholarship," he has concluded, "is that it fails to account for, much less examine, how the interplay between judicial and non-judicial precedents ... affects the implementation of constitutional ideals."<sup>283</sup>

It is interesting to re-read *Branzburg* through the lens of Gerhardt's theory, for it illuminates a note of generosity that journalists and their advocates perhaps undervalued when their anger was fresh. After declining to base a privilege in the First Amendment, Justice White urged Congress to create a federal shield law, and he encouraged state legislatures to continue their own shield-law efforts.<sup>284</sup> If one believes, as Gerhardt does, that non-judicial precedents such as statutes are valuable means of implementing constitutional values, then Justice White was effectively inviting non-judicial actors to participate in the interpretive process.

Questions at the end of this period remained: Would Congress ever take up that invitation? Would the states continue to do so? And would they continue to imbue statutory shield laws with the First Amendment values highlighted in *Branzburg*? Those will be the subjects of the next chapter.

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<sup>283</sup> See Gerhardt, *supra* note 57 at 776.

<sup>284</sup> *Branzburg v. Hayes*, 408 U.S. at 706.

## CHAPTER VI

### **JOURNALIST PRIVILEGE IN THE 1990S AND THE 2000S: LEGISLATIVE *STARE DECISIS* AND THE RISE OF SUPER-STATUTES**

Ira Lupu has urged his fellow legal scholars to pay more attention to a special class of statutes that he has observed “revolving in constitutional law orbits.”<sup>1</sup> The most important of these, he has written, are those that tread into substantive areas people assume to be the special province of courts, such as the right to privacy or the right to free speech.<sup>2</sup> A hallmark of these special statutes is that they borrow concepts or even exact wording from judicial precedents in the substantive area they are treading in, usually decisions of the U.S. Supreme Court.<sup>3</sup> Statute-drafters do this 1) for efficiency, because it simplifies the drafting process and because employing language used by the Court can act as a cue to other courts interpreting the statute in the future;<sup>4</sup> 2) to delegate some responsibility, because they might be having difficulty coming to agreement and borrowing a concept or exact language from the Court might help them reach consensus;<sup>5</sup> and 3) to create a safe harbor, because using concepts or language enunciated by the Court might protect the statute from being struck down and establish continuity between

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<sup>1</sup> Ira Lupu, *Statutes Revolving in Common Law Orbits*, 79 VA. L. REV. 1, 2 (1993).

<sup>2</sup> *Id.* at 14-16.

<sup>3</sup> *Id.* at 19.

<sup>4</sup> *Id.* at 20.

<sup>5</sup> *Id.* at 21.

court-made and legislature-made law.<sup>6</sup> “Legislating in tight constitutional orbits,” he has concluded, “will tend to stabilize the law’s overall course.”<sup>7</sup>

Constitutional scholar Mark Tushnet has taken that observation of desirable continuity a step further by asserting that legislators observe a kind of “legislative *stare decisis*” when drafting new laws.<sup>8</sup> As with Lupu’s efficiency argument, Tushnet has concluded that legislative *stare decisis* helps lawmakers save time and energy because “rather than rethinking the question and coming to the same conclusion that everyone else has, the decisionmaker can simply take what others have conclude as a predicate for the decision at hand.”<sup>9</sup> It also can help lawmakers reach consensus and avoid bill-killing arguments over details by simply “choosing the (solution) that worked before.”<sup>10</sup> Similarity in statutory language from bill to bill within one legislative body or among bills drafted by different legislative bodies would be examples of legislative *stare decisis* in action.<sup>11</sup> Another way it operates, according to Tushnet, is as a restraining mechanism: A newly elected Congress would be loathe to rescind wholesale the laws enacted by previous Congresses because 1) it would be politically unpalatable to do so, and, more important, 2) past statutes may have created “rights” or protections that the public has come to expect the government to observe.<sup>12</sup>

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<sup>6</sup> *Id.* at 22.

<sup>7</sup> *Id.* at 83.

<sup>8</sup> Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339 (2007-2008).

<sup>9</sup> *Id.* at 1340.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1341-45.

Laws that have created normative expectations in this way are rarely rescinded, according to William Eskridge and John Ferejohn, because they have become “super-statutes.”<sup>13</sup> A super-statute to them is “a law or series of laws that 1) seeks to establish a new normative ... framework for state policy and 2) over time does ‘stick’ in the public culture such that 3) the super-statute and its institutional or normative principles have a broad effect on the law.”<sup>14</sup> To qualify as a super-statute, they have written, the law must have arisen from a long debate about a vexing social problem.<sup>15</sup> More important, Eskridge and Ferejohn have argued, the law or series of laws “must also prove robust as a solution, a standard, or a norm over time ... and its policy and principles become axiomatic for the public culture.”<sup>16</sup> Their paradigmatic example: The Sherman Act of 1890; its core principle of safeguarding competition by outlawing monopolies has become deeply embedded in American law and culture.<sup>17</sup> Another example: the Pregnancy Discrimination Act of 1978, which was adopted after the Supreme Court refused to interpret the 14<sup>th</sup> Amendment as protecting a pregnant woman against workplace discrimination; the PDA stood in for the Equal Protection Clause in creating a protection women today would assume to be a fundamental right.<sup>18</sup> “Prescriptively, super-statutes mediate the tension between ... popular accountability and the evolution of

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<sup>13</sup> William N. Eskridge, Jr., & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2000-2001).

<sup>14</sup> *Id.* at 1216.

<sup>15</sup> *Id.*

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

<sup>17</sup> *Id.* at 1231-37.

<sup>18</sup> *Id.* at 1241.

higher law at the hands of unelected judges,”<sup>19</sup> these scholars have concluded. “Super-statutes contribute to a complex process by which fundamental law evolves with a strong connection to the people and popular needs.”<sup>20</sup>

Eskridge, considered the nation’s leading expert on statutory law, has taken the idea of super-statutes a step further to theorize “America’s statutory constitution.”<sup>21</sup> He has rejected the conventional view that only courts interpreting the Constitution confer rights and that legislatures writing statutes merely set public policy.<sup>22</sup> To understand the state of constitutional law today, he has written, one must take into account both “the Large C” Constitution as interpreted by the courts and the “small c” constitution of super-statutes that fill in gaps courts have not addressed or, as with the Pregnancy Discrimination Act example above, that create quasi-constitutional “rights” closely aligned with core values, such as non-discrimination.<sup>23</sup> A major example of this premise, he has offered, is the Freedom of Information Act of 1966,<sup>24</sup> for it created a quasi-constitutional “right to know” that is stronger than the Supreme Court has recognized under the First Amendment but that is widely accepted as an expression of a fundamental American value. “Small ‘c’ constitutions reveal a nation’s normative aspirations and commitments” as well as – and often better – than court interpretations,<sup>25</sup> he has

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<sup>19</sup> *Id.* at 1276.

<sup>20</sup> *Id.*

<sup>21</sup> William N. Eskridge, Jr., *America’s Statutory “Constitution,”* 41 U.C. DAVIS L. REV. 1 (2007-2008).

<sup>22</sup> *Id.* at 5-6.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 16 (citing Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. § 552 (2000) ).

<sup>25</sup> *Id.* at 20.

concluded. Many of “America’s great public values are ... announced exclusively in federal, and sometimes state, statutes and regulations.”<sup>26</sup>

Michael Gerhardt’s theory of non-judicial precedents brings together many of these strains of thought.<sup>27</sup> Like Eskridge’s theory, his sees judicial and non-judicial precedents working in tandem, and it claims the highest purpose of non-judicial precedents is to implementing constitutional values.<sup>28</sup> Like Lupu’s theory, Gerhardt’s acknowledges that non-judicial precedents often borrow from the language of constitutional law because it is a persuasive mode of argumentation.<sup>29</sup> Like Tushnet’s theory, Gerhardt’s observes that non-judicial actors use non-judicial precedents not only to send signals to courts but also to send signals to one another, to coordinate their action.<sup>30</sup> Like Eskridge and Ferejohn, Gerhardt has observed that non-judicial precedents can strengthen over time as their ideas catch on and generate network effects.<sup>31</sup> “The more often public authorities, including courts, cite or seek to invest past non-judicial activities with normative power,” he has written, “the more their meaning and value increase.”

The purpose of this chapter will be to use the ongoing struggle to define “journalist” for the sake of a testimonial privilege as a case study for Gerhardt’s theory. The chapter will proceed in two main parts, the first devoted to the 1990s and the second

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<sup>26</sup> *Id.* at 21.

<sup>27</sup> Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008).

<sup>28</sup> *Id.* at 775.

<sup>29</sup> *Id.* at 764.

<sup>30</sup> *Id.* at 765-66.

<sup>31</sup> *Id.* at 719.

to the 2000s. The first part will discuss 1) how the press was faring politically and socially in the earlier era; 2) how courts were grappling with the journalist-definition issue in the constitutional realm; and 3) how state legislators were dealing with the same issue in the statutory realm. The second part will discuss 1) how the press was faring politically and socially in the later era; 2) how judicial actors were interpreting the journalist-definition issue in shield-law cases in the courts; 3) how states were dealing with the same issue in newly minted shield laws of the era; and 4) how Congress has addressed the issue in bills for a federal shield law. The chapter will conclude with a discussion of these events through the lens of Gerhardt's theory.

#### **THE 1990S: TRIGGERING EVENTS AND LEGISLATIVE *STARE DECISIS***

Press-government relations during this period were a mix of good, bad and very ugly. President Bill Clinton came into office in 1992 with a pledge of transparency and cooperation with the press, and empirical research has shown that his administration largely made good on that promise.<sup>32</sup> However, before Clinton's first term was out, the press became focused on, and some said vicious about, a series of scandals from the firing of White House Travel staff to the allegedly illegal Whitewater land deal.<sup>33</sup> Finally, press-president relations reached a nadir with the media circus surrounding the Monica

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<sup>32</sup> See, e.g., Minjeong Kim, *Numbers Tell Part of the Story: A Comparison of FOIA Implementation Under Clinton and Bush*, 12 COMM. L. & POL'Y 313 (2007) (finding that the Clinton Administration's record of disclosing government information under Freedom of Information Act requests was markedly better than his successors).

<sup>33</sup> HOWARD KURTZ, *SPIN CYCLE: HOW THE WHITE HOUSE AND THE MEDIA MANIPULATE THE NEWS* 76 (1998) (saying that "Clinton particularly despised *The New York Times* for the intensity of its coverage" and suggesting that the press made the Whitewater story seem more important than it actually was).



Lewinsky sex scandal and impeachment hearings in the U.S. House of Representatives.<sup>34</sup>

One red-faced exchange with reporters captured Clinton's feelings about the press. "I have fought more damn battles here for more things than any President in the last 20 years," he shouted, "and have not gotten one damn bit of credit for it from the knee-jerk liberal press."<sup>35</sup>

Clinton's accusation of bias pointed up another battle the journalistic press was waging through this period: one with itself. Since the Nixon years and Vice-President Spiro Agnew's withering description of the press corps as "nattering nabobs of negativism," accusations of liberal bias were a staple of partisan politics.<sup>36</sup> However, the rise of A.M. talk radio and cable news during the 1990s meant that there were powerful voices making that charge within the media itself.<sup>37</sup> The end of the Federal Communications Commission's so-called Fairness Doctrine in 1987 paved the way for the growth of partisan talk radio during the 1990s.<sup>38</sup> The rise of cable news networks meant television news shows competed fiercely for celebrity pundits and political commentators, injecting more partisan rhetoric into the news and blurring the line between journalists and political operatives.<sup>39</sup> Partisan bickering among journalists about

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<sup>34</sup> MARVIN KALB, ONE SCANDALOUS AFFAIR: CLINTON, LEWINSKY, AND THIRTEEN DAYS THAT TARNISHED AMERICAN JOURNALISM (2001) (harsh critique of press treatment of Clinton by former director of Shorenstein Center for the Press, Politics and Public Policy).

<sup>35</sup> Jann S. Wenner & William Greider, *President Clinton*, ROLLING STONE, Dec. 9, 1993, at 81 (concluding his tirade by saying, "and I am sick and tired of it, and you can put that in your damn article").

<sup>36</sup> TIM GROELING, WHEN POLITICIANS ATTACK: PARTY COHESION IN THE MEDIA 51 (2010) (recounting Agnew's crusade against the media on behalf of the Nixon administration).

<sup>37</sup> See ERIC ALTERMAN, WHAT LIBERAL MEDIA (2003).

<sup>38</sup> *Id.* at 70-75.

<sup>39</sup> *Id.* at 330-33.

who was biased and who was objective distracted from the press' watchdog role, according to longtime media critics such as Eric Alterman. "Good journalism has become increasingly devalued by the very people who are supposed to support it," he has concluded, "the media companies."<sup>40</sup>

More pressing for the media companies during this period was a wrenching business climate.<sup>41</sup> Struggling to survive, many newspapers merged with others or sold themselves; the decade saw an almost wholesale transition from privately owned to public companies, and pressure from Wall Street investors was enormous.<sup>42</sup> At the same time, newspapers and magazines were being hit by record-level prices for raw materials.<sup>43</sup> The hammer blow for print journalism, however, was the rise of the Internet in the second half of the decade.<sup>44</sup> As early as 1995, as online classified advertising at low or no cost spread nationwide, it was clear to editors at one of the nation's largest newspaper chains that the Internet might "become the substitute technology that would destroy newspapers."<sup>45</sup> That chain no longer exists.<sup>46</sup>

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<sup>40</sup> *Id.* at 266.

<sup>41</sup> See PHILIP MEYER, *THE VANISHING NEWSPAPER: SAVING JOURNALISM IN THE INFORMATION AGE* (2nd ed. 2009).

<sup>42</sup> *Id.* at 164-75.

<sup>43</sup> *Id.* at 176.

<sup>44</sup> *Id.* at 175-76.

<sup>45</sup> *Id.* at 176.

<sup>46</sup> David Lieberman, *McClatchy to Buy Knight Ridder for \$4.5 Billion*, USA TODAY, Mar. 13, 2006, available at [http://www.usatoday.com/money/media/2006-03-13-knight-ridder\\_x.htm](http://www.usatoday.com/money/media/2006-03-13-knight-ridder_x.htm) (last visited Mar. 6, 2011).

As for the journalist-privilege issue, the decade did not represent a national moment like the aftermath of *Branzburg v. Hayes*<sup>47</sup> discussed in Chapter 5 – no controversial Court decision to debate, no high-profile jailing to decry, no hearings in Congress or calls for a federal shield law.<sup>48</sup> However, it was an eventful period of shield law-making in the states, where press advocates seized on a series of triggering events to lobby for new statutes: In Georgia, the campaign for shield law grew out of a contempt holding against a reporter who interviewed a drug dealer;<sup>49</sup> in Colorado, the controversy involved reporting on leaked details of grand jury indictments;<sup>50</sup> in South Carolina, it involved reporting on a federal probe into state government corruption;<sup>51</sup> in Florida, it involved a newspaper reporter's jailhouse interview with a convicted murderer;<sup>52</sup> in North Carolina, it involved a television reporter's interview with a murder suspect's lawyer.<sup>53</sup> In all, six shield laws were adopted from 1990 to 1999, bringing the national total to 31 states and the District of Columbia.

Thus, the 1990s can be distinguished from the *Branzburg*: The decade of the 1990s was an era of triggering events, local disputes that did spark local lobbying and lawmaking but did not generate widespread public interest in the rest of the nation, whereas the *Branzburg* era was a triggering moment that did briefly put the journalist-

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<sup>47</sup> 408 U.S. 665 (1972).

<sup>48</sup> See Chapter 5, *supra* notes 47-101 and accompanying text.

<sup>49</sup> See *Vaughn v. State*, 381 S.E.2d 30 (Ga. 1989).

<sup>50</sup> See *Pankratz v. Dist. Ct.*, 609 P.2d 1101 (Colo. 1980).

<sup>51</sup> See *In re Shain*, 978 F.2d 850 (4th Cir. 1992).

<sup>52</sup> *Legislature Passes Nation's 31st Shield Law After Long Struggle*, NEWS MEDIA & THE L., Summer 1998, at 40.

<sup>53</sup> See *In re Owens*, 496 S.E.2d 592 (N.C. Ct. App. 1998).

privilege issue on the nation's agenda, did launch a national discussion about freedom of the press, and did drive lobbying efforts in many states where there were no local disputes unfolding. That distinction will be important to the analysis at chapter's end.

This section will proceed in two parts. First, it will examine two seminal federal cases in which judges grappled with the definition of "journalist" for the sake of administering a First-Amendment-based privilege. Second, it will compare and contrast how state legislators, faced with the same definitional challenge, resolved it in the statutory realm. For the sake of brevity, the terms "covered person" and "covered medium" sometimes will be collapsed into the phrase "journalist definition."

***Journalist Definition in Federal Courts.*** Justice Byron White was a doctrinalist,<sup>54</sup> a judge who preferred a common-law method of judging that demanded grounding decisions in prior court precedents.<sup>55</sup> That preference went to the heart of the "lonely pamphleteer" portion of his opinion in *Branzburg*,<sup>56</sup> in which he warned that trying to define "journalist" for the purposes of a privilege represented "conceptual difficulties of a high order."<sup>57</sup> He said defining a privileged class would be "a questionable procedure,"<sup>58</sup> and he inveighed against departing from "the traditional doctrine" that said freedom of the press is a fundamental right belonging to every

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<sup>54</sup> Comment, *A Barometer of Freedom of the Press: The Opinions of Mr. Justice White*, 8 PEPP. L. REV. 157 (1980-1981).

<sup>55</sup> *Id.* at 185 (observing, "White has chosen to view common law principles as restricting the First Amendment to a protection of political criticism and from prior restraint" and nothing more).

<sup>56</sup> *Branzburg v. Hayes*, 408 U.S. 665, 703-04 (1972).

<sup>57</sup> *Id.* at 704.

<sup>58</sup> *Id.*

individual and applicable to every form of publication.<sup>59</sup> This any-person, any-medium argument was one of the strongest parts of the decision, for it met a First Amendment claim to a privilege with a purely First Amendment rebuttal.<sup>60</sup> Further, scholars have noted, eligibility for protection would represent a “threshold question” that would require answering before any other issue could be reached.<sup>61</sup>

That question played a central role in just three noteworthy cases in the federal courts in the 20 years following *Branzburg*. In the *Appicella* case of 1975, a federal district court in New York held that the chief executive of a medical newsletter should be covered under a First Amendment privilege.<sup>62</sup> To reach that conclusion, the court considered in tandem the passages from *Branzburg* cited above and passages from New York’s shield law, which, while not controlling, bolstered the court’s contention that a journalist privilege was wise public policy.<sup>63</sup> In *Silkwood v. Kerr McGee* of 1988,<sup>64</sup> the Tenth Circuit Court of Appeals also pointed to the “pamphleteer” portion of *Branzburg* to hold that a documentary filmmaker was covered by the privilege.<sup>65</sup> The court reasoned that the filmmaker’s investigative work was similar enough to a newspaper reporter’s

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<sup>59</sup> *Id.* (citing and quoting from *Lovell v. City of Griffin*, 303 U.S. 444 (1938)).

<sup>60</sup> Kraig L. Baker, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist’s Privilege*, 69 WASH. L. REV. 739, 748-49 (1994) (one of the earliest scholarly works to deal with this subject).

<sup>61</sup> Clay Calvert, *And You Say You Are a Journalist? Wrestling With a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411 (1998-1999) (noting there were scant cases to work with).

<sup>62</sup> *Appicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 85-86 (E.D.N.Y. 1975).

<sup>63</sup> *Id.* at 84 (concluding that “[I]nsofar as reasonably possible, this state substantive policy should be followed”).

<sup>64</sup> 563 F.2d 433 (10th Cir. 1977).

<sup>65</sup> *Id.* at 436-37.

work to qualify it as “news” and that earning a degree from a film school showed he intended to disseminate his work to the public.<sup>66</sup> That discussion in *Silkwood* was refined in the *von Bulow* case of 1987,<sup>67</sup> the first in which a court tried to fashion a test to answer the journalist-definition question. Extrapolating from *Silkwood*<sup>68</sup> – and citing the New York Shield Law for support<sup>69</sup> – the Second Circuit Court of Appeals held that a person claiming to be a journalist for purposes of the privilege 1) must be gathering information to disseminate to the public, and 2) must have intended to disseminate that information to the public at the start of the information-gathering process.<sup>70</sup> This became known as “the von Bulow Test” and has been adopted by other circuits.<sup>71</sup>

In the 1990s, two important cases affirmed and extended the *von Bulow* approach to the journalist-definition question. In *Shoen v. Shoen* in 1993,<sup>72</sup> the Ninth Circuit Court of Appeals deployed the two-part *von Bulow* test to hold that a non-fiction book author was covered. *Shoen* further bolstered *von Bulow* in that the Ninth Circuit emphasized that the “journalist’s privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public.”<sup>73</sup> Finally, in the *Madden* case of 1998,<sup>74</sup>

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

<sup>67</sup> *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987) (holding that a former employee writing a book about the legal travails of her former employer did not qualify as a journalist).

<sup>68</sup> *Id.* at 143-44 (noting, “On rare occasions the journalist’s privilege has been invoked successfully by persons who are not journalists in the traditional sense of that term.”).

<sup>69</sup> *Id.* at 144 (stating, “Although we are not bound to follow New York law, neither should we ignore New York’s policy of giving protection to professional journalists.”).

<sup>70</sup> *Id.* at 145.

<sup>71</sup> *See Baker*, *supra* note 7, at 749, 751, 754.

<sup>72</sup> 5 F.3d 1289 (9th Cir. 1993) (holding that a book author who was the target of a third-party subpoena in a libel action was covered by the privilege).

<sup>73</sup> *Id.* at 1293.

the Third Circuit Court of Appeals sharpened the language of the *von Bulow* Test and added a third prong. The court held that a person claiming the privilege must show “that they: 1) are engaged in investigative reporting; 2) are gathering news; and 3) possess the intent at the inception of the newsgathering process to disseminate this news to the public.”<sup>75</sup> The court said that merely proclaiming oneself a journalist was not good enough;<sup>76</sup> however, as in the previous cases discussed, the court did not say that a person had to be employed by a news medium or make money to claim the privilege. “This test does not grant status to any person with a manuscript, a web page or a film, but requires an intent” to publish, the court said.<sup>77</sup> However, it underscored, “because this test emphasizes the intent behind the newsgathering process rather than the mode of dissemination, it is consistent with the Supreme Court’s recognition that the ‘press’ includes all publications that contribute to the free flow of information.”<sup>78</sup>

Thus, the any-person, any-medium standard Justice White said the First Amendment demanded in *Branzburg*<sup>79</sup> was fashioned into workable tests to answer the journalist-definition question. As these courts operationalized a First Amendment standard, two benchmarks emerged: 1) All of these courts emphasized that medium did

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<sup>74</sup> In re Madden, 151 F.3d 125 (3rd Cir. 1998) (holding that a journalist who worked on the side doing comedic phone recordings about wrestling was not covered by the privilege when working in that entertainment capacity).

<sup>75</sup> *Id.* at 131.

<sup>76</sup> *Id.* at 130.

<sup>77</sup> *Id.* at 129.

<sup>78</sup> *Id.*

<sup>79</sup> *Branzburg v. Hayes*, 408 U.S. at 703-04.

not matter, and 2) none of them tied coverage under the privilege to employment status or financial gain.

***Journalist Definition in the Statutes.*** State legislators began grappling with the journalist privilege 76 years before *Branzburg*. When Maryland adopted the nation's first shield law in 1896, in a much simpler media environment, its statute covered those "engaged in, connected with, or employed on" a newspaper or magazine,<sup>80</sup> and many shield laws have duplicated that formulation nearly to the present day.<sup>81</sup> Of nearly a dozen shield laws adopted from 1933 to 1949, only two covered magazines, and none covered radio.<sup>82</sup> That restrictive approach changed dramatically in the wake of *Branzburg*, as statute-drafters in the states began to experiment with ways to account for non-traditional journalists in covered-person and covered-medium language. Innovative approaches included Tennessee's statute, which included the caveat "or is independently engaged in" gathering news,<sup>83</sup> and Delaware's statute, which said a covered person could include a "scholar, educator, polemicist or other individual."<sup>84</sup> Many of the post-*Branzburg* statutes included laundry lists of media types so as not to leave anything out.<sup>85</sup>

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<sup>80</sup> LAW OF APRIL 2, CH. 249 MD. LAWS 437 (1896); *codified at* MD. CODE ANN., CTS. & JUD. PROC. §9-112 (Thomson West/Westlaw through 2010).

<sup>81</sup> *See, e.g.*, CONN. GEN. STAT. ANN. 52-146t, 2006 P.A. 06-140 (West 2010).

<sup>82</sup> *See* Dean C. Smith, *Price v. Time Revisited: The Need for Medium-Neutral Shield Laws in and Age of Strict Construction*, 14 COMM. L. & POL'Y 235, 242-45 (2009).

<sup>83</sup> TENN. CODE ANN. § 24-1-208 (Thomson West/Westlaw though 2010).

<sup>84</sup> *Id.*

<sup>85</sup> *See, e.g.*, OR. REV. STAT. § 44.510 (Thomson West/Westlaw through 2010 Special Sess.).



In a nod to Justice White, some added pamphlets.<sup>86</sup> Others used elastic phrases such as “transmission, dissemination or publication.”<sup>87</sup>

In the 1990s, statutory language in state shield laws reflected some of that experimentation but also seemed to be coalescing around certain elements that could be seen as established features. Most of the six statutes adopted during this period included some form of the so-called eyewitness exception, whereby a journalist who witnessed criminal activity could not invoke the shield.<sup>88</sup> Most of the six statutes included some form of the three-part qualified-privilege test sketched by Justice Powell in his *Branzburg* dissent.<sup>89</sup> Because there were many cases in the 1990s involving the question of whether nonconfidential material should be protected,<sup>90</sup> five of the six statutes adopted in this period covered that material as well.<sup>91</sup>

On the question of a covered person, four of the six shield laws abandoned what had become known as the scope-of-employment test.<sup>92</sup> Only statutes in the District of Columbia<sup>93</sup> and Florida<sup>94</sup> required that a person seeking the privilege be “employed by” a media outlet. Florida’s law was the only statute that said someone must be a

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<sup>86</sup> See, e.g., OKLA. STAT. ANN. TIT. 12 § 2506 (Thomson West/Westlaw through 2010 2nd Sess.).

<sup>87</sup> See MINN. STAT. § 595.023 (Thomson West/Westlaw through 2010).

<sup>88</sup> See, e.g., COLO. REV. STAT. ANN. § 13-90-119(2)(c) (Thomson West/Westlaw through 2010).

<sup>89</sup> See, e.g., GA. CODE ANN. § 24-9-30 (Thomson West/Westlaw through 2010).

<sup>90</sup> See Anthony L. Fargo, *The Journalist’s Privilege for Nonconfidential Information in States With Shield Laws*, 4 COMM. L. & POL’Y 325 (1999).

<sup>91</sup> *Id.* at 338, n.78.

<sup>92</sup> See, e.g., *State v. Buchanan*, 436 P.2d 729, 732 (Ore. 1968) (questioning whether a student editor would qualify for a privilege since she was not employed by a professional newspaper).

<sup>93</sup> D.C. CODE ANN. § 16-4701 (District of Columbia through Jan. 11, 2011).

<sup>94</sup> FLA. STAT. ANN. § 13-90-5015(1) (a) (Thomson West/Westlaw through 2010 2nd Sess.).

“professional journalist.”<sup>95</sup> Florida’s law also took the unusual step of expressly *excluding* book authors, the only shield law ever to do so.<sup>96</sup> More representative of the period, Georgia’s statute designated for coverage “any person” engaged in journalism “for the public”;<sup>97</sup> Colorado’s designated “any member of the mass media”;<sup>98</sup> South Carolina’s designated “a person, company, or entity engaged in” journalism;<sup>99</sup> and North Carolina’s designated “any person regularly engaged in the business of” journalism.<sup>100</sup>

On the question of a covered medium, statutes adopted in Georgia<sup>101</sup> and Colorado<sup>102</sup> in 1990 came five years before the Internet’s widespread adoption; subsequently, they employed a traditional list of news outlets; Georgia’s also included books.<sup>103</sup> Florida’s narrowly worded shield law, discussed above, also limited protection to traditional news outlets.<sup>104</sup> However, three of the six shield laws of the period were drafted in such a way as to cover any medium. The District of Columbia’s law added to the traditional list of media the elastic phrase “or any printed, photographic, mechanical, or electronic means”;<sup>105</sup> South Carolina’s list included books and added the caveat “or

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

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

<sup>97</sup> GA. CODE ANN. § 24-9-30 (Thomson West/Westlaw through 2010 Reg. Sess.).

<sup>98</sup> COLO. REV. STAT. ANN. § 13-90-119(1)(a) (Thomson West/Westlaw through 2011 1st Sess.).

<sup>99</sup> S.C. CODE ANN. § 19-11-100(A) (State of South Carolina through 2010).

<sup>100</sup> N.C. GEN. STAT. § 8-53.11(a)(1) (Thomson West/Westlaw through 2010 Reg. Sess.).

<sup>101</sup> GA. CODE ANN. § 24-9-30 (Thomson West/Westlaw through 2010).

<sup>102</sup> COLO. REV. STAT. ANN. § 12-90-119(1)(a) (Thomson West/Westlaw through 2010).

<sup>103</sup> GA. CODE ANN. § 24-9-30 (Thomson West/Westlaw through 2010).

<sup>104</sup> FLA. STAT. ANN. § 13-90-5015(1)(a) (Thomson West/Westlaw through 2010 Reg. Sess.).

<sup>105</sup> D.C. CODE ANN. § 16-4701 (District of Columbia through Jan. 11, 2011).

other medium”; and North Carolina’s statute, the last of the period, dispensed with the list all together in favor of the phrase “via print, broadcast, or other electronic means accessible to the general public.”

Thus, the any-person, any-medium standard Justice White said the First Amendment demanded was manifesting in many state shield laws. At the same time that federal courts were operationalizing that standard in the First Amendment context, so state legislatures were experimenting with shield laws that would bring that First Amendment value into the statutory realm. Implementation was not uniform across all statutes. All but one strove for medium neutrality, and half still required some connection to a media enterprise. Still, the trend was clear: Although Justice White said legislators were free to “fashion rules as narrow or broad as deemed necessary,”<sup>106</sup> most of the lawmakers in this period were choosing to err on the side of broad.

### **THE 2000S: A TRIGGERING MOMENT AND THE RISE OF SUPER-STATUTES**

Journalism was dying, at least according to many members of the establishment press.<sup>107</sup> Statistics showed an industry in serious decline: From 2001 to 2010, full-time employment at the nation’s newspapers fell by more than 25 percent; newspapers shed 6,000 employees in 2008 alone; and newsroom employment at the end of the decade stood at 41,500, a level not seen since the mid-1970’s.<sup>108</sup> Those numbers echoed the rise

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<sup>106</sup> *Branzburg v. Hayes*, 408 U.S. at 706 (1972).

<sup>107</sup> ROBERT MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM* (2010) (arguing that the traditional business model for news organizations is gone and cannot be restored).

<sup>108</sup> Press Release, *Decline in Newsroom Jobs Slows*, AM. SOC. OF NEWSPAPER EDS., Apr. 11, 2010, available at [http://asne.org/annual\\_conference/conference\\_news/articleid/763/decline-in-newsroom-jobs-slows.aspx](http://asne.org/annual_conference/conference_news/articleid/763/decline-in-newsroom-jobs-slows.aspx) (last visited Mar. 10, 2011).

in online news readership: From 2000 to 2010, the percentage of Americans polled who got their news from newspapers dropped from 47 percent to 31 percent, while the percentage who got their news online rose from 24 percent to 34 percent;<sup>109</sup> adding smart phones and other handheld devices pushed the audience share for electronic media to 44 percent.<sup>110</sup> In the most recent survey by the Project for Excellence in Journalism, online news consumption rose to 41 percent – the only media type whose audience grew from 2010 to 2011.<sup>111</sup>

Adding to the news industry's economic woes, the White House seemed to have declared war on the press.<sup>112</sup> The administration of President George W. Bush was described as the most secretive since Richard Nixon's.<sup>113</sup> The classification of information skyrocketed after the terrorism attacks of Sept. 11, 2001.<sup>114</sup> Even more troubling, the number of subpoenas aimed at journalists skyrocketed as well, leading to a string of high-profile cases in which journalists were jailed or threatened with jail.<sup>115</sup> The most dramatic of these, at least in terms of the front-page coverage it garnered and outcry

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<sup>109</sup> See *Americans Spending More Time Following the News*, PEW RESEARCH CTR. FOR PEOPLE AND PRESS, Sept. 12, 2010, available at <http://people-press.org/report/652/> (last visited Mar. 10, 2011).

<sup>110</sup> *Id.*

<sup>111</sup> Marisa Guthrie, *Cable News Viewership Declines Double Digits in 2010*, HOLLYWOOD REPORTER, Mar. 14, 2011, available at <http://www.hollywoodreporter.com/news/cable-news-viewership-declines-double-167181> (last viewed Mar. 14, 2011).

<sup>112</sup> Nicholas Ehrenberg, *Bush's War on the Press*, CBS NEWS, Nov. 18, available at <http://www.cbsnews.com/stories/2005/11/18/opinion/main1056150.shtml> (last visited Nov. 9, 2011).

<sup>113</sup> Lori Robertson, *In Control*, AM. JOURNALISM REV., Feb./Mar. 2005, at 26.

<sup>114</sup> Scott Shane, *Since 2001, Sharp Increase in the Number of Documents Classified by the Government*, N.Y. TIMES, July 2, 2005, at A14.

<sup>115</sup> Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of Federal Journalist's Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1063-67 (2005-2006) (reviewing a spate of cases in which journalists were jailed or threatened with jail).

it generated, was the jailing of then-*New York Times* reporter Judith Miller in 2005.<sup>116</sup>

The jailing sparked urgent calls for Congress to adopt a federal shield law.<sup>117</sup>

When Congress convened high-profile hearings on the issue starting in 2005, journalists were optimistic that a federal shield law, with bipartisan support, was at hand.<sup>118</sup> That was not to be, however.<sup>119</sup> Hearings and committee debates stretching over three years seemed to devolve into power struggles pitting the executive branch and Department of Justice against Congress and the courts.<sup>120</sup> A recurring claim was that a shield law would hamper the administration's ability to fight terrorism.<sup>121</sup>

With the election of President Barack Obama in 2008, journalists and press advocates hoped the federal shield law effort would move forward.<sup>122</sup> After all, a year earlier, the U.S. House of Representatives had passed its version of the Free Flow of Information Act of 2007 by a vote of 398-21,<sup>123</sup> and Obama had pledged to press for final

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<sup>116</sup> See, e.g., David Johnston & Douglas Jehl, *Times Reporter Free From Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1; Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

<sup>117</sup> Press Release, *Jail Time for Miller Stresses the Need for Federal Shield Law*, NEWSPAPER ASSOC. OF AMERICA, (July 6, 2005), available at <http://www.naa.org/PressCenter/SearchPressReleases/2005/Jail-Time-for-Miller-Stresses-the-Need-for-Federal-Shield-Law.aspx> (last visited Mar. 9, 2011).

<sup>118</sup> Editorial, *Time for a Federal Shield Law*, N.Y. TIMES, July 21, 2005, available at <http://www.nytimes.com/2005/07/21/opinion/21thu2.html?scp=1&sq=time%20for%20a%20federal%20shield%20law&st=cse> (last visited Mar. 9, 2011).

<sup>119</sup> 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 (2008-2009).

<sup>120</sup> *Id.* at 414.

<sup>121</sup> *Id.* at 418.

<sup>122</sup> See David Jackson, *McCain, Obama Back Law Shielding Reporters*, USA TODAY, Apr. 14, 2008, at A5.

<sup>123</sup> See Free Flow of Information Act of 2007, H.R. 2102, 110th Cong., 1st Sess. (2007).

passage in the Senate.<sup>124</sup> However, the question of who should be covered by the shield law – the so-called covered-person issue – continued to be a contentious roadblock both inside Congress<sup>125</sup> and beyond.<sup>126</sup> Should the shield law protect independent bloggers? Would it be used nefariously by terrorists?<sup>127</sup>

While this debate has continued to paralyze efforts at the federal level,<sup>128</sup> states have moved forward with shield laws of their own. From 2006 to 2010, seven states adopted statutory shield laws.<sup>129</sup> Seven statutes in four years bested the wave of seven statutes in five years that followed closely on *Branzburg v. Hayes* in the 1970s.<sup>130</sup> While one of these shield laws was prompted by local events, a contempt dispute in Kansas,<sup>131</sup> the rest could be said to be part of a national zeitgeist triggered largely by the Judith

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<sup>124</sup> See Editorial, *Surge for the Shield*, SAN FRANCISCO CHRON., Apr. 17, 2008, at B6.

<sup>125</sup> See Richard S. Dunham, *Cornyn's Open Government Effort No Secret*, HOUSTON CHRON., Mar. 22, 2008, at A18. Sen. John Cornyn is quoted as saying, "Trying to find a reasonable definition that accounts for bloggers, student journalists, freelancers, as well as the mainstream press, has proved difficult."

<sup>126</sup> See Patrick J. Fitzgerald, *Shield Law Perils*, WASH. POST, Oct. 4, 2007, at A24 (saying that a broad "covered person" definition would allow terrorists to hide criminality).

<sup>127</sup> Concerning the Free Flow of Information Act of 2007: Hearing on H.B. 2101, Before the H. Comm. on the Judiciary, 110th Cong., 1st Sess. (2007) (statement of Rachel L. Brand, Assistant Attorney General, U.S. Department of Justice). In her prepared statement, Brand wrote:

A broad definition would accord the status of "covered person" to a terrorist operative who videotaped a message from a terrorist leader threatening attacks on Americans because he would be engaged in recording news or information that concerns international events for dissemination to the public.

*Id.* at 20.

<sup>128</sup> Jeffrey Benzing, *Falling on Their Shield*, AM. JOURNALISM REV., Mar./Apr. 2011,

<sup>129</sup> The states were Connecticut (2006), Washington (2007), Maine (2008), Hawaii (2008), Texas (2009), Kansas (2010), and Wisconsin (2010). See APPENDIX.

<sup>130</sup> See Chapter 5, *supra* notes 106-08 and accompanying text.

<sup>131</sup> Christina Abello, *Kansas Governor Signs New Shield Law*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Apr. 15, 2010, available at <http://www.rcfp.org/newsitems/index.php?i=11376> (last visited Mar. 10, 2010) (noting controversy involving reporter who had been held in contempt for refusing to reveal her sources and ended up losing her job because of the incident).

Miller affair. In contrast to the local triggering events of the 1990s, this was a true triggering moment.

This section will proceed in three parts. First, it will briefly discuss the importance of precise statutory language through the lens of litigation sparked by the covered-medium, covered-person language of state statutes in the courts. Second, it will examine the recent wave of state shield laws to gauge how broadly or narrowly their covered-person, covered-medium language sweeps. Third, it will compare those approaches with the current bill for a federal shield law in Congress. For brevity, the terms covered person and covered medium sometimes will be collapsed into the phrase journalist definition.

***Journalist Definition in the Courts.*** A recent case involving celebrity billionaire Donald Trump was a timely reminder of the importance of carefully drafting the covered-medium, covered-person language in shield laws.<sup>132</sup> The case involved veteran *New York Times* journalist Timothy O’Brien, who had written a book saying Trump’s net wealth was a fraction of the amount the real estate mogul boasted of. Suing for defamation in a New Jersey court, Trump subpoenaed O’Brien for his confidential sources.<sup>133</sup> If New Jersey’s broadly worded shield law applied, the judge hearing O’Brien’s motion to quash reasoned, he would win – “there’s no doubt about it.”<sup>134</sup> However, the judge ruled, because both Trump and O’Brien conducted their business in New York, that state’s

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<sup>132</sup> Trump v. O’Brien, 958 A.2d 85 (N.J.Super. 2008).

<sup>133</sup> *Id.* at 286-92.

<sup>134</sup> *Id.* at 292 (quoting the lower court judge).

narrowly worded statute must apply, and O’Brien must lose because the New York law does not name “books” in its list of covered media.<sup>135</sup>

The case points up the most serious disadvantage of a privilege created by statute, as opposed to one administered under the First Amendment: judges do not have much leeway when interpreting a statute, even to avoid an illogical result like the one above.<sup>136</sup> As a matter of separation of powers, judges must avoid interpreting a statute to mean something other than what a legislature intended.<sup>137</sup> Above all, that means following the Plain Meaning Rule, which states that where the meanings of words are clear on their face, interpretation must come to an end.<sup>138</sup> That is especially true when interpreting shield laws because statutes in derogation of the common law must be construed strictly.<sup>139</sup> Strictly construing a shield law often will mean holding that where legislators took the time to name some forms of media, they must have meant to exclude others – *inclusio unius est exclusio alterius*, as the rule in Latin states.<sup>140</sup>

In fact, the reasoning and result in the Trump case are not unusual. In cases stretching back to 1960, state and federal courts interpreting state shield laws have

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<sup>135</sup> *Id.* Ultimately, O’Brien won on appeal because, reviewing the legislative history of the New York statute, the appeals court found that the state legislature had amended the statute in 1981 in response to a similar situation and meant the amended working to take in books as well. *Id.* at 293-95.

<sup>136</sup> See Smith, *supra* note 82, at 254 (explaining rules that constrain judges when interpreting statutes).

<sup>137</sup> *Id.* at 254-55.

<sup>138</sup> *Id.* at 256-57.

<sup>139</sup> *Id.* at 256.

<sup>140</sup> *Id.* at 256. The rules mentioned here are part of the Canons of Statutory Construction. These canons, or rules of interpretation, grew out of the common law. They are not strictly binding rules but guides that judges use when deciding how to interpret statutes, especially when the statutory language is thought to be vague or inconclusive.



repeatedly denied protection to a journalist because of holes in statutory language.<sup>141</sup>

Litigation has arisen most often because, as in the Trump case, book authors have sought protection under statutes that did not expressly include them,<sup>142</sup> because older statutes that did not include broadcast had not been updated to include television and radio,<sup>143</sup> and because a medium such as magazine had been excluded in a statute that otherwise included all news media.<sup>144</sup>

From 2003 to 2005, a highly watched case that went all the way to the United States Eleventh Circuit Court of Appeals demonstrated this potential pitfall of statutory shield laws.<sup>145</sup> In *Price v. Time*,<sup>146</sup> University of Alabama football coach Mike Price had sued Don Yeager, a veteran investigative reporter who worked full-time for *Sports Illustrated*. As part of discovery, Price subpoenaed Yeager for confidential sources used in an article alleging extra-marital affairs. In refusing, Yeager invoked Alabama's shield law, which offered absolute protection even in libel cases in which a journalist was the defendant.<sup>147</sup> However, the 73-year-old statute only designated newspapers, television stations, and radio stations. The federal district court hearing the case ruled against Yeager twice, in 2003 and 2004.<sup>148</sup>

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<sup>141</sup> Smith, *supra* note 82, at 258-68.

<sup>142</sup> *Id.* at 259 (describing *People v. LeGrand*, 67 A.D.2d 446 (N.Y. App. Div. 1979)).

<sup>143</sup> *Id.* at 260 (describing *In re Contempt of Stone*, 397 N.W.2d 244 (Mich. Ct. App. 1986)).

<sup>144</sup> *Id.* at 259 (describing *Cepeda v. Cohane*, 233 F. Supp. 465 (S.D.N.Y. 1964)).

<sup>145</sup> For a more detailed account, *see Id.* at 236-42.

<sup>146</sup> 416 F.3d 1327 (11th Cir. 2005).

<sup>147</sup> ALA. CODE 1975 § 12-21-142 (State of Alabama through 2010 Reg. Sess.).

<sup>148</sup> *See Price v. Time, Inc.*, Memorandum Opinion, No. Civ. A. CV03S1868S, N.D. Ala. Dec. 8, 2003 (unreported); *see also Price v. Time, Inc.*, 304 F. Supp. 2d 1294 1309 (N.D. Ala. 2004).

In accepting an interlocutory appeal from the lower court, the Court of Appeals agreed that answering the covered-medium question was important because “its significance extends beyond this case.”<sup>149</sup> The court explained that, in interpreting the statute, it had to put itself in the shoes of the Alabama Supreme Court and look “to the plain meaning of the words as written by the legislature.”<sup>150</sup> Judge Edward Earl Carnes summed up the dilemma with wit:

It seems to us plain and apparent that in common usage, “newspaper” does not mean “newspaper and magazine.” There are some meanings so plain that no further discussion should be necessary, but sometimes judges and lawyers act like lay lexicographers, love logomachy, and lean to logorrhea. And so it is here. The lawyers representing the defendants insist that “newspaper” means more than newspaper, the more being “magazine.”<sup>151</sup>

In deploying the Plain Meaning Rule, the court explored various definitions of the word “newspaper” from dictionaries, encyclopedias, and thesauri. It also cited twenty Alabama statutes that use the words “newspaper” and “magazine,” both separately and together.<sup>152</sup>

The court further explained that it must adhere to the canon of statutes in derogation of the common law.<sup>153</sup> Since a shield law confers a privilege to journalists not found in the common law of Alabama, Judge Carnes wrote, that rule of interpretation is most relevant: “Where there is any doubt about the meaning of statutes in derogation of the common law, Alabama courts interpret the statute to make the least, rather than the

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<sup>149</sup> Price v. Time, Inc., 416 F.3d 1327, 1335 (11th Cir. 2005) (quoting the lower court).

<sup>150</sup> *Id.*

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

<sup>152</sup> *Id.* at 1336-41.

<sup>153</sup> *Id.* at 1342.

most, change in the common law.”<sup>154</sup> Thus, the appeals court upheld the lower court’s ruling that a full-time reporter for *Sports Illustrated* was not eligible for protection under Alabama’s shield law.<sup>155</sup> (The court went on to grant Yaeger qualified protection under the First Amendment.<sup>156</sup>)

In another closely watched case that same year, a California appeals court extended protection under that state’s shield law to a group of bloggers being sued by Apple computer company,<sup>157</sup> a decision that was trumpeted as an important victory for online journalism.<sup>158</sup> However, that case remains an outlier in a long history of cases in which courts have applied strict construction when interpreting shield laws.<sup>159</sup> The strict interpretation that led to the result in *Price v. Time* is not the exception but the rule.<sup>160</sup>

Thus, lawmakers have a practical incentive to draft carefully worded covered-medium, covered-person language in future shield laws and, as important, to amend older statutes whose language has been made outmoded by changes in the media. Some older statutes, adopted in the 1930s and 1940s, omit magazines to this day, and most of these

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<sup>154</sup> *Id.* at 1342-43.

<sup>155</sup> *Id.* at 1343.

<sup>156</sup> In vacating the order against Yaeger to testify, the court concluded that the exhaustion prong of the three-part qualified-privilege test had not been met. *See Price v. Time*, 416 F.3d at 1347.

<sup>157</sup> *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Cal. App. 2006) (holding that the bloggers’ Web site was, *eiusdem generis*, similar enough to a magazine or periodical to qualify for protection).

<sup>158</sup> *See, e.g.,* SCOTT GANT, *WE’RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE* (2007) (an extended legal discussion in which the *O’Grady* decision was the centerpiece case).

<sup>159</sup> *See Smith, supra* note 82, at 258-68.

<sup>160</sup> *Id.* at 268 (concluding that “[c]ourts in only one jurisdiction, New Jersey, have an extensive record of liberally construing a statute’s covered-medium language. Courts in only one jurisdiction, California, have a strong precedent for liberally construing a pre-Internet state to cover Web sites or bloggers.”). *Id.*

older statutes do not contain language flexible enough to accommodate the Internet.<sup>161</sup>

The cautionary tale of cases like *Price* should be especially poignant today, as lawmakers grapple with the proper place of the Internet in general and independent bloggers in particular in statutory frameworks.

***Journalist Definition in the States.*** When former *New York Times* reporter Judith Miller was interviewed after serving 85 days in jail for refusing to reveal confidential sources, she said she strongly supported shield laws to protect journalists like her.<sup>162</sup> She drew a line at the Internet, however: “I’m worried about the bloggers.”<sup>163</sup> During the early years of the current period, print journalists were noticeably resentful of the Internet in general and bloggers in particular.<sup>164</sup> Like Miller, many voiced the opinion that online journalists should not be included in the raft of shield law bills being drawn up in Congress and in the states at that time.<sup>165</sup> Some scholars were sympathetic to the traditionalist’s view,<sup>166</sup> but legal scholars mostly took the position that online journalists

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<sup>161</sup> *Id.* at 242-45.

<sup>162</sup> Jan Biles, *Former N.Y. Times Reporter Decries Bush Policies*, TOPEKA CAP.-J. (Kan.), Nov. 11, 2006, available at [http://cjonline.com/stories/111106/kan\\_miller.shtml](http://cjonline.com/stories/111106/kan_miller.shtml) (last visited Mar. 10, 2011).

<sup>163</sup> *Id.*

<sup>164</sup> See, e.g., Troy McCullough, *Don’t Confuse Blogging With Real Journalism*, SUN (Baltimore, Md.), Mar. 19, 2006, available at [http://articles.baltimoresun.com/2006-03-19/news/0603180014\\_1\\_blogs-journalism-media-outlets](http://articles.baltimoresun.com/2006-03-19/news/0603180014_1_blogs-journalism-media-outlets) (last visited Mar. 10, 2011); Nicholas Lehmann, *Amateur Hour*, NEW YORKER, Aug. 7, 2006, at 4.

<sup>165</sup> See, e.g., Tim Rutten, *How to Decide Who Gets a Shield*, L.A. TIMES, Aug. 8, 2007, at A4; Randy Dotinga, *Are Bloggers Journalists? Do They Deserve Press Protections?*, CHRISTIAN SCIENCE MONITOR, Feb. 2, 2005, at A3; Michael McGough, *Are Bloggers Journalists?*, PITTSBURGH POST-GAZETTE, Feb. 21, 2005, available at <http://www.post-gazette.com/pg/05052/460559.stm> (last visited Mar. 10, 2011).

<sup>166</sup> See, e.g., 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 (2002); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2004-2005).

should be treated the same as those working in newspapers, magazines, and broadcast.<sup>167</sup>

Legislators drafting shield laws in this period were lobbied in both directions.<sup>168</sup> What follows is a state-by-state examination of the seven statutes adopted from 2006 through 2010 to see how legislators handled the journalist-definition issue. It will use the status of online bloggers as a kind of litmus test of the breadth of protection offered.

Connecticut's 2006 statute includes the seemingly broad phrase "whether by print, broadcast, photographic, mechanical, electronic or any other means or medium."<sup>169</sup> However, protection is limited to persons who are or have been connected with certain designated entities: "Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite or other transmission system or carrier, or channel or programming service for such station, network, system or carrier, or audio or audiovisual production company."<sup>170</sup> This construction essentially would seem to limit coverage to traditional media outlets.

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<sup>167</sup> That point was made as early as 1993; see Tung Yin, *Post-Modern Printing Presses: Extending Freedom of Press to Protect Electronic Information Services*, 8 HIGH TECH L.J. 311 (1993). 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); Nathan Fennessy, *Bringing Bloggers Into the Journalist Privilege Fold*, 55 CATH. U. L. Rev. 1059 (2006); Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 395 (2006); Laura Durity, *Shielding Journalist-Bloggers: The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 DUKE L. & TECH REV. 11 (2006); Donald J. Kochan, *The Blogosphere and the New Pamphleteers*, 11 NEXUS J. OP. 99 (2006).

<sup>168</sup> See, e.g., Amy Harder, *Debate Over Hawaii Shield Law Delays Vote*, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Mar. 28, 2008, available at <http://www.rcfp.org/newsitems/index.php?i=401> (last visited Mar. 10, 2010) (describing disagreement over covered-person language that would have potentially limited protection to traditional journalists).

<sup>169</sup> CONN. GEN. STAT. ANN. § 52-146t(1)(A) (Thomson West/Westlaw through 2010 Reg. Sess.).

<sup>170</sup> *Id.*

Washington's 2007 statute was the first to mention the Internet specifically as a covered medium.<sup>171</sup> It defined "news media" as:

Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or 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, print broadcast, photographic, mechanical, internet, or electronic distribution.<sup>172</sup>

The statute went on to define "covered person" as "any person who is or has been an employee, agent, or independent contractor" of the listed entities.<sup>173</sup> So a journalistic Web site definitely would be covered; whether a blogger would be covered would depend on how courts in the future define the word "agent."

Hawaii's 2008 statute addressed the question of independent online journalists separately to give guidance to judges on when a blogger may or may not qualify.<sup>174</sup> The statute's covered-medium language was aimed at traditional news outlets: "[A]ny newspaper or magazine or any digital version thereof operated by the same organization, news agency, press association, wire service, or radio or television transmission station or network."<sup>175</sup> However, the statute went on to allow that individuals *not* associated with traditional news outlets might qualify if they can show they have "regularly and materially participated in the reporting or publishing of news or information of

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<sup>171</sup> WASH. REV. CODE § 5.68.010 (Thomson West/Westlaw through 2010 Reg. Sess.).

<sup>172</sup> *Id.* at § 5.68.010(5)(a).

<sup>173</sup> *Id.* at § 5.68.010(5)(b).

<sup>174</sup> See *Governor Signs Journalist Shield Law*, HONOLULU ADVERTISER, July 2, 2008, available at <http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20080702/BREAKING01/80702111/-1/RSS01> (last visited Mar. 10, 2011).

<sup>175</sup> H.B. 2557, § 621(a), 24TH LEG. (Hawaii 2008).

substantial public interest for the purpose of dissemination to the general public by means of tangible or electronic media.”<sup>176</sup> The word “materially” could limit protection to bloggers who profit from their work; courts would have to decide that in the future.

Maine’s 2008 statute took the unusual step of dispensing with covered-medium and covered-person language altogether.<sup>177</sup> Just before enacting the law, legislators struck the entire definitions section of the bill to, in their words, “allow the court to determine on a case-by-case basis whether a person claiming the protection from compelled disclosure is eligible for such protection.”<sup>178</sup> The law’s only limitation on who or what might be covered was written into the text’s requirement that the information being sought was “obtained or received in confidence by the journalist acting in the journalistic capacity of gathering, receiving, transcribing or processing news or information for potential dissemination to the public.”<sup>179</sup> Journalistic Web sites and independent online journalists both could fall within the shield law’s ambit.

Texas’ 2009 statute went to unusual lengths to emphasize complete medium neutrality.<sup>180</sup> Its definition of “news medium” included more than a dozen possible modes, including books and the Internet.<sup>181</sup> It went on to broadly cover “any means,” including print, television, radio, photographic, mechanical, electronic, and “other means,

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<sup>176</sup> H.B. 2557 § 621(b) (emphasis added).

<sup>177</sup> 2008 ME. LAW, CH. 654 (signed Apr. 18, 2008, to be codified as 16 ME. REV. STAT. ANN. § 61).

<sup>178</sup> *Id.* A summary of the amended bill is available at <http://janus.state.me.us/legis/LawMakerWebexternalsiteframe.asp?ID=280027551&LD=2047&Type=1&SessionID=7>.

<sup>179</sup> *Id.* at § 61(1)(c).

<sup>180</sup> TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon through 2010 Reg. Sess.).

<sup>181</sup> *Id.* at § 3.

known or unknown, that are accessible to the public.”<sup>182</sup> Unusual among shield laws, the statute expressly included a “scholar, or researcher employed by an institution of higher education.”<sup>183</sup> However, in contrast to that wide-open covered-medium language, the covered-person definition would limit protection to those who disseminate information “for a substantial portion of the person’s livelihood or for substantial financial gain.”<sup>184</sup> That would disqualify most bloggers, who mostly write as an avocation.

Kansas’ 2010 statute<sup>185</sup> would seem on its face to have been aimed only at traditional news outlets when it said that a protected journalist was “employed by a newspaper, magazine, news wire service, television station or radio station.”<sup>186</sup> However, it went on to provide that a journalist also could be employed by “an online journal in the regular business of newsgathering and disseminating news or information to the public.”<sup>187</sup> This language could be seen as a breakthrough for it recognized that there are many online news sites that never had a print counterpart and yet perform the same functions as any so-called traditional news organization. Another way to say this would be to note that, in this statutory formulation, an online news site is no longer treated as non-traditional. That said, the statute would not cover a blogger working independently.

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<sup>182</sup> *Id.* at § 3(G).

<sup>183</sup> *Id.* at § 2(B).

<sup>184</sup> *Id.* at § 2.

<sup>185</sup> H.B. 2585 (Kansas 2010).

<sup>186</sup> *Id.* at § 1(a).

<sup>187</sup> *Id.*



Wisconsin's 2010 statute took an approach similar that of the Kansas statute above.<sup>188</sup> Its covered-medium language was all-inclusive, and books were expressly mentioned.<sup>189</sup> Its covered-person language provided protection for "any person who is or has been engaged in" journalistic activity.<sup>190</sup> However, the statute stipulated that the journalistic activity must have been done for a "business or organization that ... disseminates news or information to the public."<sup>191</sup> So online journalism done for an established Web site would fall within the statute's ambit; an independent blogger probably would not.

Thus, all seven of the statutes from this period strove for medium neutrality. Three expressly mentioned the Internet and Web sites. While only three clearly would extend protection to independent online journalists, aka bloggers, all of these laws signaled acceptance of the Internet's role in journalism and found ways to assure its inclusion in their protections. The only distinction remaining between the approaches taken in these statutes and the approaches taken by courts in the First Amendment realm was the continued requirement in four of these shield laws that the covered person must be either connected with a media enterprise or doing journalism for financial gain. Still, the trend line is clear: toward an any-person, any-medium standard.

***Journalist Definition in Congress.*** Prompted most immediately by the jailing of Judith Miller in 2005, a major lobbying effort in Washington led both houses of Congress

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<sup>188</sup> WIS. STAT. ANN. § 885.14 (Thomson West/Westlaw through 2010).

<sup>189</sup> *Id.* at § 885.14 (a).

<sup>190</sup> *Id.* at § 885.14 (b).

<sup>191</sup> *Id.* at 885.14 (a).

to begin drafting and debating federal shield law bills.<sup>192</sup> Six bills were introduced in 2005-2006 alone.<sup>193</sup> As bills were introduced and re-introduced over succeeding years, various amendments were proposed and some adopted, mostly having to do with public policy questions, such as exceptions for clear threats to national security and information relating to terrorism.<sup>194</sup> Some of the most hotly debated amendments involved the so-called covered-person issue, including attempts to limit protection to paid members of the establishment press.<sup>195</sup>

A recurring and curious feature of the debate over the covered-person issue was the prominence of constitutional rhetoric in a discussion about statutory law. For example, *The Los Angeles Times*' well-known media critic summed up consternation over the proposed shield laws this way: "The whole notion of letting the government define a journalist is abhorrent to anyone who values the 1st Amendment."<sup>196</sup> An online-media expert at the Poynter Institute for journalism voiced her opposition this way: "For me, it comes back to a core constitutional issue. (The First Amendment's) guarantee

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<sup>192</sup> Joel Campbell, *States Revising Reporter's Privilege Laws*, SOCIETY OF PROFESSIONAL JOURNALISTS, available at <http://www.spj.org/rrr.asp?ref=30&t=foia> (last visited Mar. 10, 2011) (noting that the Judith Miller affair energized lobbying efforts both in Washington and in the states).

<sup>193</sup> See Packer, *supra* note 119, at 410.

<sup>194</sup> See Charlie Savage, *Shield Law Compromise Would Protect Reporters and Bloggers*, N.Y. TIMES, Oct. 30, 2009, available at <http://thecaucus.blogs.nytimes.com/2009/10/30/shield-law-compromise-would-protect-reporters-bloggers/?scp=3&sq=%22shield+law%22&st=nyt> (last visited Mar. 10, 2011) (detailing several changes to the Senate's shield law bill).

<sup>195</sup> See Cristina Abello, *Federal Shield Bill Passes Senate Judiciary Committee*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Dec. 10, 2009, available at <http://www.rcfp.org/newsitems/index.php?I-11167> (last visited Mar. 10, 2011) (describing an attempt to make paid employment a requirement of the Senate shield law bill).

<sup>196</sup> See Tim Rutten, *Don't Just Shield 'Pro' Journalists*, L.A. TIMES, Oct. 20, 2007, at E1.

applies to *everyone* practicing free speech in the U.S.”<sup>197</sup> An editorialist for the *Detroit News* who supported the shield law bills opined: “We still believe the First Amendment provides all the protection (a reporter) needs.”<sup>198</sup> A legal scholar who opposed the shield law bills said of their broad covered-person language: “I think this is actually a good definition in terms of defining a journalist because anything narrower ... is going to run into sever First Amendment problems.”<sup>199</sup> All of these people seemed to be demanding that the federal shield law comport with First Amendment norms.

If that were the yardstick, the covered-person, covered-medium language in the two leading bills currently alive in Congress contains slight but important differences. The House bill<sup>200</sup> achieves medium neutrality by simply omitting covered media from its definitions section altogether.<sup>201</sup> It defines a covered person as someone 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.”<sup>202</sup> That language tracks closely to the Madden Test employed by federal courts, which stipulates that the material being shielded must be newsworthy and that the person seeking protection is not just a one-time publisher but

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<sup>197</sup> See Amy Gahran, *Proposed Federal Shield Law: Who Would It Really Cover?*, E-Media Tidbits, Poynter Online, Oct. 17, 2007, available at <http://www.poynter.org/column.asp?id=31&aid=131585>.

<sup>198</sup> See Editorial, *Reporters Need Federal Shield Law*, DETROIT NEWS, Nov. 11, 2008, at A14.

<sup>199</sup> *Concerning the Free Flow of Information Act of 2007, Hearing Before the H. Comm. on the Judiciary*, 110th Cong., 1st Sess.) (testimony of First Amendment scholar Randall Eliason).

<sup>200</sup> Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009-2010). This is also known as the Boucher bill because its chief sponsor was Rep. Frederick Boucher (D-Va.). To check its status, see <http://www.govtrack.us/congress/bill.xpd?bill=h111-985> (last visited Mar. 10, 2011).

<sup>201</sup> H.R. 985 § 4.

<sup>202</sup> H.R. 985 § 4 (2).

had the intent to publish all along.<sup>203</sup> However, the bill further stipulates that the covered person must be involved in the journalistic activity “for a substantial portion of the person’s livelihood or for substantial financial gain.”<sup>204</sup> That would surely limit protection to part-time and full-time media employees, a kind of requirement no court has required in the First Amendment setting.

The Senate bill<sup>205</sup> achieves medium neutrality by spelling out this all-inclusive list of protected media:

... means of print (including newspapers, books, wire services, news agencies, or magazines), broadcasting (including dissemination through networks, cable, satellite carriers, broadcast stations, or a channel or programming service for any such media), mechanical, photographic, electronic, or other means.<sup>206</sup>

The bill defines a covered person as someone who “regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes,” with no mention of employment or remuneration.<sup>207</sup> However, the covered person must be engaged in these activities “with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest.” The bill says journalistic activity can take on many forms – conducting interviews, making direct observations, analyzing communications,

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<sup>203</sup> See *supra* notes 72-78 and accompanying text.

<sup>204</sup> H.R. 985 § 4 (2).

<sup>205</sup> Free Flow of Information Act of 2009, S. 448, 110th Cong. (2009-2010). This is also known as the Specter bill because its chief sponsor was Sen. Arlen Specter (D.-Pa.) To check its status, see <http://www.govtrack.us/congress/bill.xpd?bill=s111-448&tab=related> (last visited Mar. 10, 2011).

<sup>206</sup> S. 448 § 11 (2) (A) *iii*.

<sup>207</sup> S. 448 § 11 (2) (A) *i*.

memoranda, reports, records, and so on.<sup>208</sup> However, the bill reiterates that the covered person must have the “intent at the inception of the process of gathering the news or information” to disseminate it to the public.<sup>209</sup>

Thus, the Senate bill, more than the House bill and more than any state shield law to date, precisely mirrors the approach taken by federal courts administering a First Amendment-based privilege. All of the elements of the so-called Madden Test<sup>210</sup> are incorporated: The covered person does not have to be employed by a media organization and does not have to work in a particular medium, but he or she must 1) be gathering newsworthy information, 2) intend to disseminate it to the public, and 3) must have had the intention to disseminate from the start. The Senate bill’s journalist definition represents the First Amendment teachings of *Branzburg* channeled through the federal courts and crystallized into statutory form.

## DISCUSSION AND CONCLUSIONS

In one important respect, Justice White was wrong. Although he warned ominously that trying to define “journalist” for the purpose of a First Amendment privilege would embark judges on “a long and difficult journey,”<sup>211</sup> the issue played a significant role in just a handful of cases in the 30 years following his decision in *Branzburg*. In five cases from 1975 to 1998, judges proved that the issue was not so intractable after all, and, looking back, their decisions seem straight-forward and well-

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<sup>208</sup> S. 448 § 11 (2) (A) *i* (I, II, III).

<sup>209</sup> S. 448 § 11 (2) (A) *ii*.

<sup>210</sup> See *supra* notes 72-78 and accompanying text.

<sup>211</sup> *Branzburg v. Hayes*, 408 U.S. at 706.

reasoned.<sup>212</sup> In two important cases in the 1990s, in fact, federal appeals courts fashioned what would become an enduring test for determining if a litigant qualified as a so-called covered person under a qualified First Amendment privilege: The covered person must be 1) gathering newsworthy information, 2) must have the intention of disseminating it to the public, and 3) must have had the intention to disseminate the information from the start of the gathering process. From these cases, two additional caveats were emphasized: that 1) the medium in which the covered person works does not matter, and 2) the covered person does not have to be employed by a traditional media outlet to qualify.<sup>213</sup> Thus, federal judges operationalized “the traditional doctrine” that freedom of the press is a fundamental personal right, not an institutional one.<sup>214</sup>

In another important respect, then, Justice White was exactly right. By refusing to depart from that doctrine, he angered members of the establishment press, but he injected an important First Amendment principle into the decades-long debate over a journalist privilege that had never played a significant role. The any-person, any-medium standard that Justice White insisted the First Amendment demands became so deeply engrained in America’s constitutional culture that even legislators drafting statutes began to experiment with statutory language that tracked closely to the court-made approach outlined above.<sup>215</sup> Before *Branzburg*, it was typical and uncontroversial for statutory shield laws to offer protection only to traditional news organizations, sometimes only to newspapers; after *Branzburg*, such a narrow approach would be unthinkable. To this day,

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<sup>212</sup> See *supra* notes 72-79 and accompanying text.

<sup>213</sup> See *supra* notes 74-78 and accompanying text.

<sup>214</sup> *Branzburg v. Hayes*, 408 U.S. at 706.

<sup>215</sup> See *supra* notes 200-04 and accompanying text.

non-judicial actors, including journalists, invoke the image of “the lonely pamphleteer” to insist that shield laws must sweep broadly in their covered-person, covered-medium language in order to comport with the First Amendment.<sup>216</sup> The teachings of *Branzburg* have become embedded in the nation’s statutory shield laws.

Gerhardt’s theory of non-judicial precedents would anticipate that phenomenon of non-judicial actors using non-judicial means to express their beliefs about constitutional meaning. “The public’s expression of constitutional judgments ... may have the potential to become precedent,” he has observed, because “popular sovereignty is a major theme and influence in our constitutional development.”<sup>217</sup> Furthermore, he has argued, the nation’s ongoing constitutional dialogue is not by any means limited to the federal level and debates centered on Congress. “State officials render constitutional judgments in at least as many forms as federal officials do,” he has concluded.<sup>218</sup>

The states were the center of shield-law activity during the 1990s. This was not one of those special national moments, as during the *Branzburg* era, when a high-profile case or controversial jailing put the journalist-privilege issue on the national agenda, captured the public’s attention, and facilitated a national dialogue about freedom of the press. Rather, a series of triggering events led to local lobbying efforts that resulted in six states adopting shield laws during the period. Although these shield laws failed to generate a national dialogue about constitutional values – a hallmark in Gerhardt’s theory – they were important in other respects. As constitutional scholar Mark Tushnet would

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<sup>216</sup> See *supra* notes 192-99.

<sup>217</sup> See Gerhardt, *supra* note 27 at 742.

<sup>218</sup> *Id.* at 740.

describe it, a kind of legislative *stare decisis* emerged in this body of laws.<sup>219</sup> In contrast to the widely divergent experiments in statutory language exhibited by the shield laws of the *Branzburg* era, these shield laws settled into a predictable pattern marked by common features. For example, all of them included the so-called eyewitness exception, all included some form of the three-part qualified privilege test, and nearly all of them included protection for non-confidential material. More on point for this study, nearly all of these statutes strove toward medium neutrality, and a few even opened their covered-person provisions to achieve the any-person standard that courts had operationalized in the First Amendment realm. Gerhardt’s theory would account for this growing consensus on the journalist-definition issue as part of the signaling function of non-judicial precedents: “Non-judicial actors ... seek to construct precedents to influence not only the agendas of their respective states but also the agendas of other states and the federal government.”<sup>220</sup>

In contrast to the 1990s, the decade of the 2000s represented a true triggering moment, a time of high tension in press-government relations marked by an increase in subpoenas aimed at the press and a series of high-profile cases involving journalists that put the issue into national headlines and on the public’s agenda.<sup>221</sup> The jailing of then-*New York Times* reporter Judith Miller was the catalyzing event that led to intense lobbying for a federal shield law in Washington, high-profile Congressional hearings, and a raft of shield law bills.<sup>222</sup> Another hallmark of a triggering moment, as in the *Branzburg*

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<sup>219</sup> See *supra* notes 8-12 and accompanying text.

<sup>220</sup> See Gerhardt *supra* note 27 at 765-66.

<sup>221</sup> See *supra* notes 107-21 and accompanying text.

<sup>222</sup> *Id.*



era, was that national events led to lobbying at the state level as well, and a wave of states shield laws were adopted in this period not based on local events but on a sense of urgency reverberating from the national level.<sup>223</sup> Fulfilling several predictions of Gerhardt's theory, these non-judicial activities were "sending signals to courts,"<sup>224</sup> and "facilitating constitutional dialogues"<sup>225</sup> about freedom of the press.

A remarkable feature of the state shield laws adopted during this period was the unprecedented rapidity with which they were drafted, debated, and adopted. From 2006 to 2010, seven states adopted new laws, thereby besting the record of seven laws in five years set in the immediate wake of *Branzburg*.<sup>226</sup> That phenomenon would make these shield laws "super-statutes" in the eyes of statutory law scholars William Eskridge and John Ferejohn.<sup>227</sup> The policy and principles behind these statutes – that protecting journalists' confidential sources is necessary for the press to fulfill its First Amendment-mandated role – have become so engrained that they "have become axiomatic for the public culture," according to their theory.<sup>228</sup> Gerhardt's theory would add that this rapid addition of shield laws to the statute books – increasing the total to 39 states and the District of Columbia – would create "network effects," which would increase the signaling power of these non-judicial precedents.<sup>229</sup> With the states edging ever closer to

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 765.

<sup>225</sup> *Id.* at 766.

<sup>226</sup> See Chapter Five, *supra* notes 107-08 and accompanying text.

<sup>227</sup> See *supra* notes 13-20 and accompanying text.

<sup>228</sup> See *supra* note 16 and accompanying text.

<sup>229</sup> See Gerhardt, *supra* note 27 at 784.

unanimity, it would be hard to argue that there is not widespread public, political, and elite support for such laws. “The greater the network effects of precedents,” he has observed, “the more secure their meaning and value become.”<sup>230</sup>

Another remarkable feature of the statutes adopted in this period was how tightly they began to revolve in constitutional law orbits, to borrow Ira Lupu’s metaphor.<sup>231</sup> Carrying forward the teachings of *Branzburg*, all of these statutes strove for medium neutrality; some mentioned the Internet by name; others employed powerful modifiers such as “or any medium” to assure they would be interpreted broadly in the future.<sup>232</sup> Wary of extending protection to independent bloggers, most of these statutes retained some form of the traditional requirement that a covered person be connected with a journalistic organization.<sup>233</sup> That was the only material way in which some of these statutes did not fully live up to the any-person, any-medium standard of the First Amendment. The same could be said of the current bill for a federal shield law in the U.S. House of Representatives, which achieves complete medium neutrality but still requires a covered person to be doing journalism “for substantial financial gain.”<sup>234</sup>

Even more remarkably, the U.S. Senate has drafted a bill that, if adopted, would create a shield law revolving in the tightest of constitutional orbits according to Lupu’s

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<sup>230</sup> *Id.*

<sup>231</sup> *See supra* notes 1-7 and accompanying text.

<sup>232</sup> *See supra* notes 162-91 and accompanying text.

<sup>233</sup> *Id.*

<sup>234</sup> *See supra* note 204 and accompanying text.

theory.<sup>235</sup> In addition to carrying forward the teachings of *Branzburg*, it borrows directly from judicial precedents in the First Amendment realm. Tracking closely to federal court decisions in the *von Bulow* and *Madden* cases, its journalist-definition language makes clear that it does not matter what medium the covered person is working in and does not matter whether the covered person is doing journalism for financial gain.<sup>236</sup> Rather, borrowing directly from judicial precedent in the First Amendment realm, the proposed statute requires that the covered person be gathering newsworthy information, have the intention of disseminating it to the public, and had the intention to disseminate from the start.<sup>237</sup> Thus, First Amendment principles articulated in the courts are fully manifested in statutory language.

It is important to emphasize that legislators drafting statutory shield laws are under no obligation to set the parameters of their statutes so wide. Recall that Justice White, in urging Congress to create a federal shield law, emphasized that “legislatures are free to fashion standards as narrow or broad as deemed necessary.”<sup>238</sup> However, as Gerhardt’s theory would predict, non-judicial actors use non-judicial precedents to convey their judgments about what the Constitution requires.<sup>239</sup> This goal the Senate has taken to its logical end in the journalist-definition section of its shield-law bill. The Senate’s bill fulfills the highest function of non-judicial precedents under Gerhardt’s

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<sup>235</sup> See *supra* 205-10.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Branzburg v. Hayes*, 408 U.S. at 706.

<sup>239</sup> See Gerhardt, *supra* note 27, at 715 (defining non-judicial precedents as “any past constitutional judgments of non-judicial actors that courts or other public authorities imbue with normative authority”).

theory – implementing constitutional values<sup>240</sup> – and, if adopted, would lend credence to the possibility of legislating the First Amendment. That will be the topic of the final discussion.

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<sup>240</sup> *Id.* at 778.

## CHAPTER VII

### DISCUSSION AND CONCLUSIONS

“Constitutional history,” scholar Richard Primus has observed, “is a record of struggles and resolutions, with heroes and perhaps villains, but certainly with lessons about what values the Constitution embodies and indeed about what the story of America means.”<sup>1</sup> Differing versions of history compete for recognition in constitutional discourse as litigants and lawyers seek to ground claims on the Constitution in the episodes and narratives they believe embody “deep truths” about the American experience.<sup>2</sup> Judges act as gatekeepers, picking and choosing which versions of history will prevail and become woven into the official judicial account of constitutional history.<sup>3</sup> “When judges make historical arguments,” Primus has written, “they are exercising both the power to interpret history and the power to choose which history is worth interpreting.”<sup>4</sup> The problem, to Primus, is that judges work from an extremely circumscribed account of the history of any given subject, a blinkered view that is exacerbated by the fact that judges tend to

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<sup>1</sup> Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 181 (2006).

<sup>2</sup> *Id.* at 173.

<sup>3</sup> *Id.* at 177-78. Of the role of history in court decisions, he has observed:  
[T]he mobilizable stock of historical materials plays an important role in constitutional thought. Just as text and precedent can constrain constitutional reasoning, different understandings of history will yield different ranges of conclusions that constitutional interpreters are willing to accept. ... To the extent that constitutional law is a form of customary law, history offers a record of the traditional practices that comprise the constitutional system.

*Id.*

<sup>4</sup> *Id.* at 182.

prefer to look to past judicial texts for guidance.<sup>5</sup> “The resulting judicial opinions make particular aspects of constitutional history much more visible than others,” he has lamented,<sup>6</sup> thereby undercutting episodes in history that might support a different interpretation. The solution, he has written, is to mobilize history more often and more strategically in constitutional argumentation, rather than leaving history to judges to ignore or marginalize.<sup>7</sup> “One contribution that law professors can make to constitutional discourse,” Primus has concluded, “is the nurturing of new mobilizable histories... to introduce new information into the collective memory or to raise the prominence of narratives and images that are already included in the memory but marginally so.”<sup>8</sup>

This dissertation has sought to mobilize forgotten or marginalized episodes from the past to begin sketching a history of the journalist-privilege issue in a new way, one that recognizes constitutional discourse running the entire length of that history and that highlights the important contributions journalists themselves have made to that discourse. While it is necessary at times for scholars to draw a bright line between statutory law and constitutional law, this dissertation has tried to show connections and overlap between developments in the realm of statutory shield laws and developments in the realm of a First Amendment-based testimonial privilege – and to put the two on equal footing. Because of its place at the pinnacle of our constitutional system, the U.S. Supreme Court’s single pronouncement on this issue, in *Branzburg v. Hayes*, has remained a

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<sup>5</sup> *Id.* at 173-74.

<sup>6</sup> *Id.* at 174.

<sup>7</sup> *Id.* at 175.

<sup>8</sup> *Id.* (defining a mobilizable history as “a narrative, image, or other historical source that is sufficiently well-known to the community of constitutional decision-makers so as to be able to support a credible argument in the discourse of constitutional law”).

consuming focus of media-law scholars for more than 35 years.<sup>9</sup> However, focusing on the issue from *Branzburg* forward brackets out more than 75 years of debate, lobbying, and lawmaking in the statutory realm, starting with the nation's first shield law in 1896.<sup>10</sup> That is a significant period that, when more thoroughly explored, yielded new insights into how journalists, press advocates, legal scholars, and even the public helped shape the issue on its long journey to the High Court. To bring together the usually separate histories of statutory shield laws and a First Amendment-based privilege, and to bridge pre-*Branzburg* and post-*Branzburg* eras, this dissertation has tried to weave a single narrative by transporting the entire issue of a journalist's testimonial privilege into the realm of constitutional theory.

Michael Gerhardt's theory of non-judicial precedents provides a robust framework in which to discuss constitutional and statutory law in tandem.<sup>11</sup> His is a normative theory that, like other contemporary theories that fall under the rubric of "popular constitutionalism," highlights the role played by non-judicial actors outside the courts in helping to shape constitutional discourse and, sometimes, the path of constitutional law. Non-judicial actors do this by creating non-judicial precedents – ethical norms, professional standards, agency regulations, and legislative statutes – that embody some shared judgment about a constitutional question that courts have not addressed or that courts have addressed in a way non-judicial actors disagree with.<sup>12</sup> To apply that idea to the journalist-privilege issue, Gerhardt might say that when journalists

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<sup>9</sup> See Chapter One, *supra* notes 64-100 and accompanying text.

<sup>10</sup> *Id.*

<sup>11</sup> Michael Gerhardt, *Non-Judicial Precedent*, 181 VAND. L. REV. 714 (2008).

<sup>12</sup> *Id.* at 714-16.

consistently refused to reveal confidential sources, they created a non-judicial precedent; when they made protecting confidential sources part of their professional codes of ethics, they created a stronger non-judicial precedent; and when they persuaded state legislators to adopt statutory shield laws, they created the strongest type of non-judicial precedent, since statutes carry the force of law.

A key insight of his theory is especially apt when discussing the pre-*Branzburg* history of the journalist-privilege issue: Non-judicial precedents “pre-exist judicially created constitutional doctrine and thus govern and shape particular constitutional matters unless or until they are addressed by courts.”<sup>13</sup> Another key insight of Gerhardt’s theory is apt when discussing the post-*Branzburg* era: Non-judicial precedents give people a way to “send signals to courts” about how the public feels about an issue and to “facilitate constitutional dialogues” about a disputed issue.<sup>14</sup> Further, Gerhardt has observed that non-judicial precedents can be “constitutional history in the making,”<sup>15</sup> for non-judicial actors might be first movers in articulating some judgment about constitutional meaning that becomes accepted over time, and such judgments often are grounded in claims about “what makes the American people or nation distinctive.”<sup>16</sup> Finally, Gerhardt offers his theory as an answer to the decades-long scholarly debate about the supposed “countermajoritarian difficulty”: The fear that unelected judges have too much control over constitutional law is overstated because non-judicial precedents give people outside the courts a way to express and implement deeply felt constitutional

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<sup>13</sup> *Id.* at 716.

<sup>14</sup> *Id.* at 765-66.

<sup>15</sup> *Id.* at 773.

<sup>16</sup> *Id.* at 774.



values, whether courts accept their judgments or not.<sup>17</sup> “The equilibrium-producing interaction between judicial and non-judicial precedents,” he has concluded, “shows how non-judicial actors democratize constitutional law.”<sup>18</sup>

## **SUMMARY OF PRECEDING CHAPTERS**

In applying Gerhardt’s theory to journalist-privilege history, this dissertation posed the following research questions: 1) How did non-judicial actors shape the debate over journalist privilege? What rationales for a testimonial privilege did they articulate, and how, if at all, did those rationales change over time? 2) How have judicial actors responded to non-judicial precedents? How, if at all, did the influence of non-judicial precedents change over time? And 3) How have non-judicial actors responded to judicial decisions? How, if at all, did the influence of judicial precedents change over time? To answer those questions, this dissertation explored five distinct episodes or periods in journalist-privilege history, each of which significantly advanced the evolution of the privilege to the benefit of journalists and, more important, helped drive constitutional discourse over the meaning of the phrase “freedom of the press.”

***Journalist Privilege in the 1890s.*** Chapter Two used original historical research to reconstruct the events that led to and followed creation of the nation’s first statutory shield law, in Maryland in 1896. The research revealed that the law was not spurred by a local dispute and jailing of a reporter in Baltimore, as has been widely claimed for

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<sup>17</sup> *Id.* at 781.

<sup>18</sup> *Id.*

decades.<sup>19</sup> Rather, the law was prompted by a national scandal unfolding in Washington, D.C., where John S. Shriver and Elisha J. Edwards were convicted of contempt of court in 1894 for refusing to reveal the names of sources for articles in which they accused several senators of taking bribes in what would become known as the Sugar Trust Scandal.<sup>20</sup> These Ivy League-educated reporters hired a former judge-turned-celebrity lawyer, and their case became a national *cause celebre*.<sup>21</sup> In 1895, the International League of Journalists used the case as a springboard for a national lobbying campaign that included talk of securing a federal shield law.<sup>22</sup> Shield-law bills were entered into several state houses, and, in 1896, the Maryland legislature adopted one.<sup>23</sup>

When the reporters' case was heard on appeal in 1897, the reporters' attorneys urged the judge hearing the case to create a testimonial privilege for journalists as a matter of common law, and their defense team pointed to the Maryland shield law as evidence of public support for such a privilege.<sup>24</sup> The team also argued that 1) forcing journalists to reveal confidential sources threatened to interfere with "liberty" of the press, 2) the names of the sources were not "relevant" to the Senate's investigation of the Sugar Trust bribes, and 3) the committee investigating the bribes should call members of the Senate as witnesses before making the journalists testify.<sup>25</sup> The judge in

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<sup>19</sup> See Chapter Two, *supra* notes 180-212 and accompanying text.

<sup>20</sup> *Id.* at notes 145-53 and accompanying text.

<sup>21</sup> *Id.* at notes 75-96 and accompanying text.

<sup>22</sup> *Id.* at notes 213-22 and accompanying text.

<sup>23</sup> *Id.* at notes 234-46 and accompanying text.

<sup>24</sup> *Id.* at notes 288-99 and accompanying text.

<sup>25</sup> *Id.* at notes 282-88 and accompanying text.

the case emphasized that he was not recognizing a journalist privilege as a matter of common law, but he excused Shriver and Edwards from testifying because, he agreed, the names of their sources were not relevant.<sup>26</sup> The press hailed the decision as a partial victory and praised the judge's use of discretion as a model for case-by-case decisionmaking in the future.<sup>27</sup> Thus, several of the features that would later play a part in Justice Stewart's dissent in *Branzburg* – case-by-case balancing, the relevancy of information being sought, the exhaustion of other means to get the information – played a role in this forgotten-but-important case.

***Journalist Privilege in 1929.*** Chapter Three used original historical research to reconstruct the events leading up to and following the first bills entered into the U.S. Congress to create a federal shield law.<sup>28</sup> These events were sparked by the jailing of three reporters for the *Washington Times*, who refused to reveal their sources for an expose that accused members of Congress of frequenting illegal speakeasies in Washington, D.C., during Prohibition.<sup>29</sup> Journalists were able to thrust the jailing incident into national headlines partly by enlisting some of the era's highest-profile politicians as advocates: U.S. Sen. Arthur Capper of Kansas, a powerful progressive Republican who also was a lifelong newspaper publisher; U.S. Rep. Fiorello LaGuardia, a popular Democrat from New York; and William Randolph Hearst, the larger-than-life publisher of the *Washington Times* and would-be presidential candidate.<sup>30</sup> While press advocates

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<sup>26</sup> *Id.* at notes 306-17 and accompanying text.

<sup>27</sup> *Id.* at notes 320-28 and accompanying text.

<sup>28</sup> See Chapter Three, *supra* notes 18-21 and accompanying text.

<sup>29</sup> *Id.* at notes 101-02 and accompanying text.

<sup>30</sup> *Id.* at notes 82-99 and accompanying text.

involved in the Shriver-Edwards affair of the 1890s spoke generally of the “liberty” of the press, press advocates in the 1920s forcefully invoked the First Amendment as justification for protecting confidential sources; they dubbed the jailed reporters martyrs of a free press; they emphasized the public’s right to receive information about their government; and they warned that the independent watchdog role of the press was in peril. In arguing that the reporters’ pledge of confidentiality must not be violated, they argued that the name of their source was not crucial to an investigation of illegal speakeasies since the reporters already had provided detailed descriptions of the locations; they further argued that a Congressional committee investigating the speakeasies could call members of Congress to testify instead.<sup>31</sup> Journalists and press advocates also seized on these events to organize and launch a nationwide lobbying effort that yielded dozens of shield-law bills in the states and, ultimately, passage of a raft of statutes in the 1930s;<sup>32</sup> Capper continued his efforts on behalf of a federal shield law through out the 1930s and 1940s, ultimately submitting six bills in all in the U.S. Senate before retiring in 1950.<sup>33</sup> Thus, much of the First Amendment rhetoric and many of the same pro-press arguments that would echo in the era surrounding the Supreme Court’s *Branzburg* decision were fully in evidence in the late 1920s and 1930s; moreover, the pattern of a high-profile case followed by concerted lobbying, first seen in the 1890s, was replicated with greater success in the form of tangible efforts in Congress and nearly a dozen successfully adopted shield laws in the states.

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<sup>31</sup> *Id.* at notes 106-24 and accompanying text.

<sup>32</sup> *Id.* at notes 135-54 and accompanying text.

<sup>33</sup> *Id.* at notes 161-87 and accompanying text.

***Journalist Privilege in 1968.*** Chapter Four explored the 1966 contempt conviction of college journalist Annette Buchanan and her 1968 appeal to the Oregon Supreme Court.<sup>34</sup> Ten years after *Garland v. Torre* and four years before *Branzburg*, Buchanan’s case significantly advanced the debate over a journalist privilege based on the First Amendment. Editor of the student newspaper at the University of Oregon, Buchanan was convicted in a state court for refusing to reveal her sources for a story about marijuana use on campus. Because the state had no statutory shield laws, her lawyers attempted a First Amendment defense.<sup>35</sup> Using the news hook of Buchanan’s status as a “co-ed editor,” the national news media turned her several court appearances into something of a media circus and portrayed her as a “Joan of Arc of journalism.”<sup>36</sup> In both news articles and editorials, journalists consistently argued that protecting confidential sources was necessary for the press to fulfill its First Amendment-mandated role as a check on government power; they emphasized the need for independence and decried the specter of the press as an investigative arm of government; and they framed the issue not as one of Buchanan’s rights as a journalist but of the public’s right to know.<sup>37</sup> Significantly, the *Harvard Law Review* joined journalists in condemning Buchanan’s conviction and loss on appeal largely based on the fact that the district attorney who subpoenaed her had conducted no investigation of his own; in other words,

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<sup>34</sup> See Chapter Four, *supra* notes 41-43 and accompanying text.

<sup>35</sup> *Id.* at notes 107-43 and accompanying text.

<sup>36</sup> *Id.* at notes 165-201 and accompanying text.

<sup>37</sup> *Id.*

he had not exhausted other means of obtaining the information before resorting to the journalist as a source.<sup>38</sup>

More significantly, Buchanan's case put the question of who should be covered by a First Amendment-based privilege in the center of debate.<sup>39</sup> In ruling against Buchanan, the Oregon Supreme Court opined that if it recognized a privilege broad enough to cover a student volunteering at a college newspaper, it would be creating a privilege that would apply equally to every "episodic pamphleteer" or "shaggy dissenter."<sup>40</sup> If, on the other hand, it recognized a privilege that covered only "legitimate" journalists, such a privilege would not protect Buchanan and would violate the First Amendment doctrine that freedom of the press is a fundamental personal right that applies equally to all individuals.<sup>41</sup> Thus, the Oregon Supreme Court fully articulated what would become a key pillar of Justice White's majority opinion four years later in *Branzburg*. Also similar to events that would surround *Branzburg*, Buchanan's case prompted a flurry of lobbying efforts in state legislatures, including in Oregon, and prompted the U.S. Congress to commission its first extensive study of the issue.<sup>42</sup>

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<sup>38</sup> *Id.* at notes 155-58 and accompanying text.

<sup>39</sup> *Id.* at notes 215-24 and accompanying text.

<sup>40</sup> *Id.* at notes 223 and accompanying text.

<sup>41</sup> *Id.* at notes 221 and accompanying text.

<sup>42</sup> *Id.* at notes 206-10 and accompanying text.

***Journalist Privilege From 1972 to 1982.*** Chapter Five surveyed non-judicial and judicial responses to *Branzburg* to probe Gerhardt's assertion that Supreme Court decisions do not necessarily settle contentious constitutional questions but act instead as catalysts for ongoing constitutional dialogue.<sup>43</sup> Journalists used news articles and editorials to decry Justice White's majority opinion as a blow to First Amendment values, and they recapitulated the lawyerly arguments that had been mounted in defense of a constitutional privilege – that the free flow of information to the public demanded protection of confidential sources, that compelled disclosure would cause important sources of news to dry up, that the press's historic function as an independent watchdog was in peril.<sup>44</sup> Significantly, many legal scholars espoused those same arguments in the increasing number of journal articles on this subject that followed in *Branzburg*'s wake.<sup>45</sup> First Amendment rhetoric permeated a series of high-profile hearings convened in both houses of Congress, and dozens of shield-law bills were submitted in both chambers.<sup>46</sup> Although lobbying at the federal level faded with no statute adopted, legislatures in seven states adopted shield laws in the five years following *Branzburg*.<sup>47</sup>

A significant feature of the bills in Congress and statutes adopted in the states was their broad treatment of who and what would be protected, their covered-person and covered-medium language. Before *Branzburg*, it was typical and uncontroversial for statutory shield laws to offer protection only to employees of traditional news outlets;

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<sup>43</sup> See Chapter Five, *supra* notes 38-47 and accompanying text.

<sup>44</sup> *Id.* at notes 48-57 and accompanying text.

<sup>45</sup> *Id.* at notes 58-63.

<sup>46</sup> *Id.* at notes 12-17 and accompanying text.

<sup>47</sup> *Id.* at notes 17-23 and accompanying text.

most of the early statutes from the 1930s covered only newspapers. That changed dramatically after *Branzburg*. Justice White's emphasis on freedom of the press as a fundamental personal right – his veneration of the pamphleteer on equal footing with the metropolitan editor – seemed to sink deep into the public consciousness. Legislators at both federal and state levels experimented liberally with statutory formulations that would cover every conceivable medium; many of the state shield laws from this era also expanded covered-person definitions to include independent journalists, documentary filmmakers, book authors, and other so-called non-traditional journalists.<sup>48</sup> Thus, Justice White's instruction that the First Amendment demanded a kind of any-person, any-medium standard began to manifest in statutory shield laws.

Similar discussions of the meaning of *Branzburg* were playing out in the federal courts. Between 1972 and 1986, nine of the thirteen federal circuits departed from a strict reading of *Branzburg* to hold that, in those circuits, the First Amendment did provide a qualified testimonial privilege to journalists after all. As a doctrinal matter, nearly all of these courts followed the road map outlined by Justice Stewart in his *Branzburg* dissent by emphasizing Justice Powell's concurrence over Justice White's majority opinion. More interesting for the purposes of this study, many of these courts, like Justice Stewart, reached beyond court documents to support their decisions; some discussed the history of the journalist-privilege issue; some cited and quoted legal scholarship; several cited and quoted state shield laws as evidence of support for the idea of a journalist privilege as sound public policy.<sup>49</sup> One circuit court also confronted the question of whether a non-

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<sup>48</sup> *Id.* at notes 86-100, 124-48 and accompanying text.

<sup>49</sup> *Id.* at notes 170-268 and accompanying text.



traditional journalist should be covered by a First Amendment-based privilege and, in explaining its decision to extend protection to a documentary filmmaker, suggested that Justice White might have overstated the difficulty posed by the journalist-definition question; the medium did not matter, the court said, but journalistic activity did.<sup>50</sup> Thus, the journalist-privilege debate continued on parallel tracks in First Amendment and statutory realms; judicial and non-judicial actors alike grappled with how to implement the teachings of *Branzburg*; and they often arrived at similar solutions.

***Journalist Privilege in the 1990s and 2000s.*** Chapter Six followed the covered-person, covered-medium debate into the contemporary era with a keen eye on how judicial and non-judicial actors responded to the arrival of a new medium, the Internet, and a new class of non-traditional journalists, independent online bloggers.<sup>51</sup> Unlike earlier eras discussed, the era of the 1990s did not represent a significant triggering moment for a national debate on the journalist-privilege issue; there was no drive for a federal shield law in Congress. However, six shield laws adopted in the states advanced the debate in incremental ways. The divergent experiments of the 1970s gave way to predictable patterns and recurring features in statute-drafting: Nearly all of the shield laws from the era contained the so-called eyewitness exception whereby a journalist who witnessed criminal activity could not invoke a shield; all of the shield laws from the era contained some form of the three-part qualified privilege test proposed in Justice Stewart's dissent in *Branzburg*. On the covered-person, covered-medium question, all but one statute from this decade strove for medium neutrality, and two of the six used

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<sup>50</sup> *Id.* at notes 200-07 and accompanying text.

<sup>51</sup> See Chapter Six, *supra* notes 211-37 and accompanying text.

statutory language to achieve something close to the any-person standard Justice White said the First Amendment demanded.<sup>52</sup>

Those broad-based approaches in statutory language coincided with the emergence in the judicial realm of a multi-part test designed to answer the covered-person question with precision.<sup>53</sup> Building on earlier cases in which courts confronted non-traditional journalists such as filmmakers and book authors, the Ninth Circuit Court of Appeals announced what would become known as the Madden Test.<sup>54</sup> It stated that a covered person 1) must be gathering newsworthy information, 2) must have the intention of disseminating that information to the public, and 3) must have had the intention to disseminate at the start of the gathering process.<sup>55</sup> Like other federal courts before it, the Ninth Circuit further emphasized that 1) the medium in which a covered person works does not matter, and 2) a covered person's employment status is irrelevant.<sup>56</sup>

In contrast to the 1990s, the era of the 2000s provided a true triggering moment that put the journalist-privilege issue onto the public's agenda and sparked a national debate.<sup>57</sup> Amid a string of high-profile cases involving subpoenas aimed at journalists, the jailing of Judith Miller in 2005 acted as a catalyzing event for an intense effort to secure a federal shield law in Congress and a nationwide lobbying campaign that resulted

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<sup>52</sup> *Id.* at notes 88-107 and accompanying text.

<sup>53</sup> *Id.* at notes 64-71 and accompanying text.

<sup>54</sup> *Id.* at notes 74-78 and accompanying text.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at notes 107-17 and accompanying text.

in shield laws being adopted in seven states in four years.<sup>58</sup> Statutes in the states extended the trends in statutory language established in the previous decade. All of the new statutes achieved complete medium neutrality, and two mentioned the Internet by name; three of the seven included broadly worded covered-person definitions that could be seen as accommodating independent online journalists.<sup>59</sup>

Following contentious hearings in Congress in which the covered-person issue took center stage, the U.S. House of Representatives voted in favor of a shield law bill that tracks closely to the shield laws adopted in the states; it achieves complete medium neutrality but still requires that a covered person be doing journalism for “substantial financial gain.”<sup>60</sup> In a significant breakthrough, however, the U.S. Senate resisted calls to limit the protection its bill would offer. As currently worded, the Senate bill’s covered-medium, covered-person definitions are drawn directly from the Madden Test used in federal courts to administer a First Amendment-based privilege.<sup>61</sup> A covered person’s medium of transmission and employment status do not matter; instead, a covered person must be gathering newsworthy information, must intend to disseminate it to the public, and must have had the intention to disseminate that information from the start.<sup>62</sup> Thus, if the Senate’s bill is adopted, First Amendment values articulated by the Supreme Court and filtered through the circuit courts will be fully manifested in federal statutory law.

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<sup>58</sup> *Id.* at notes 128-31 and accompanying text.

<sup>59</sup> *Id.* at notes 162-91 and accompanying text.

<sup>60</sup> *Id.* at notes 200-04 and accompanying text.

<sup>61</sup> *Id.* at notes 205-09 and accompanying text.

<sup>62</sup> *Id.*

**Conclusion.** These episodes stretching back to the late nineteenth century show that, as a normative matter, the journalist-privilege issue was a First Amendment issue long before courts began recognizing it as such. There is no question that journalists and press advocates, from the earliest days, believed that protecting confidential sources was an important mechanism for fulfilling the First Amendment's mandate for a free press. There is no question, judging from legislative debates and statements in the press, that legislators drafting and adopting statutory shield laws believed that these laws would advance the First Amendment goal of facilitating a free flow of information to the public.

The constitutional rhetoric that has suffused lobbying, debate, and lawmaking in the statutory realm for more than a century testifies to the fact that shield laws convey what their creators believe are deeply felt constitutional judgments. Responding to the U.S. Supreme Court's decision in *Branzburg v. Hayes* by adopting a raft of shield laws at the state level and nearly adopting one at the federal level showed non-judicial actors to be locked in an ongoing dialogue with the courts. The fact that nine of the thirteen federal courts also have recognized a qualified testimonial privilege for journalists based on the First Amendment lends credence to the idea that these statutes are intended to, and do, implement First Amendment values.

## RECOMMENDATIONS FOR ACTION AND RESEARCH

Constitutional scholars such as Jack Balkin have turned their attention increasingly to studying statutory and regulatory law as non-judicial means to constitutional ends.<sup>63</sup> “The most important decisions affecting the future of freedom of speech will not occur in constitutional law,”<sup>64</sup> Balkin has contended. Balkin’s observation will no doubt hold true for the journalist-privilege issue for the foreseeable future. The U.S. Supreme Court shows no signs of revisiting the issue,<sup>65</sup> and federal courts have signaled they are not willing to extend a First Amendment-based privilege beyond circuits in which it is currently recognized.<sup>66</sup> Journalists, press advocates, and media-law scholars would do well to heed Balkin’s advice and focus attention on First Amendment-enhancing laws created outside the courts.

As to the future of journalist privilege, three distinct lobbying efforts are called for. First, with shield laws now on the books in 39 states and the District of Columbia, it would be worth mounting a lobbying campaign in the remaining states; achieving uniformity in all 50 states would create a powerful statement of public support for protecting journalists’ sources. Second, as this study and others have indicated,<sup>67</sup> press advocates should direct some of their lobbying efforts to states with older shield laws,

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<sup>63</sup> Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2008-2009).

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

<sup>65</sup> *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied sub nom.*

<sup>66</sup> See Erik W. Laursen, *Putting Journalists on Thin Ice: McKevitt v. Pallasch*, 73 U. CIN. L. REV. 293 (2004-2005) (reviewing Seventh Circuit Court of Appeals’ refusal to recognize a First Amendment privilege and Judge Posner’s attack on past readings of *Branzburg* that have allowed other circuits to recognize such a privilege).

<sup>67</sup> See Dean C. Smith, *Price v. Time Revisited: The Need for Medium Neutral Shield Laws in and Age of Strict Construction*, 119 COMM. L. AND POL’Y 235 (2009) (detailing legal problems created by older shield laws with incomplete or outmoded covered-medium language).

especially those with statutes adopted in the 1930s and 1940s, to bring these laws in line with best practices; achieving uniformity in these laws, especially with regards to broadly worded covered-person and covered-medium definitions, also would create a powerful public policy statement. Third, the campaign for a federal shield law must continue, and the Senate's current bill should be held up as a model for drafting covered-person language that truly lives up to the idea of using statutory law to implement First Amendment values.

Scholars are not responsible for lobbying, of course, but media-law scholars could take a cue from Primus' suggestion above and think in terms of mobilizable scholarship to bolster efforts they believe serve worthwhile ends. For example, research by this author has thoroughly explored the covered-medium language in existing shield laws, has pinpointed problems, and has made proposals for amending older statutes to avoid costly and avoidable litigation. Similarly, Anthony Fargo has used extensive research to shine a light on the problem of statutes that do not protect a journalist's non-confidential material, such as notes and video outtakes.<sup>68</sup> Media-law scholars should continue to home in on aspects of existing shield laws – waiver provisions and types of proceedings covered, for example – to identify problem areas and propose best practices.

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<sup>68</sup> Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States With Shield Laws*, 4 COMM. L. & POL'Y 325 (1999); Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL'Y 241 (2002).

Extending the idea of legislating the First Amendment, media-law scholars should continue to demonstrate ways in which statutes can be used to advance constitutional values. The same process of policing shield laws for statutory language that has caused problems in the past or that might cause problems in the future can be brought to bear on public-record laws, for example. Should these laws apply to e-mail communications and computer instant-message systems? If so, how should legislators craft statutory language that would simultaneously protect the public's right to know and preserve the privacy of public employees where necessary?

This study has shown that Gerhardt's metaphor of statutes as non-judicial precedents is a powerful one. When courts cite shield laws as evidence of public support for a journalist privilege, they validate the constitutional role that these statutes play. Media-law scholars should investigate other ways in which judicial precedents lean on, and hence validate, non-judicial precedents. Scholars should actively seek to shift the attitudes of journalists and press advocates from seeing statutes as second-class substitutes for First Amendment decisions in the judicial realm to seeing statutes as valid, and sometimes superior, mechanisms for achieving First Amendment goals. As Gerhardt's theory urges us to see, statutes empower non-judicial actors to participate in the nation's ever-evolving constitutional culture. Statutes democratize constitutional law.

## **APPENDIX**

### **CHRONOLOGY OF SHIELD LAWS AND CURRENT CODIFICATIONS**

- 1896** Maryland – MD. CODE ANN., CTS. & JUD. PROC. §9-112 (Thomson West/Westlaw through 2010).
- 1933** New Jersey – N.J. STAT. ANN. §§2A:84A-21 to 21.13 (Thomson West/Westlaw through 2010).
- 1935** California – CAL. EVID. CODE §1070 (Thomson West/Westlaw through 2010).
- 1935** Alabama – ALA. CODE 1975 §12-21-142 (Thomson West/Westlaw through 2010).
- 1936** Kentucky – KT. REV. STAT. ANN. §421.100 (Baldwin though 2010).
- 1936** Arkansas – ARK. CODE ANN. §16-85-510 (West 2003 & Supp. 2010).
- 1937** Pennsylvania – 42 PA. CONS. STAT. ANN. §5942 (Purdon’s Pennsylvania Statutes 2010).
- 1937** Arizona – ARIZ. REV. STAT. ANN. §12-2237 (Thomson West/Westlaw through 2010).
- 1941** Indiana – IND. CODE ANN. §§34-46-4-1 to 2 (Thomson West/Westlaw through 2010).
- 1941** Ohio – OHIO REV. CODE ANN. §§2739.04, 2739.12 (Baldwin’s Ohio Revised Code 2010).
- 1943** Montana – MONT. CODE ANN. §§26-1-901 to 903 (Thomson West Westlaw through 2010).
- 1949** Michigan – MICH. COMP. LAWS ANN. §767.5a (Thomson West/Westlaw through 2010).
- 1964** Louisiana – LA. REV. STAT. ANN. §§45:1451-1459 (Thomson West/Westlaw through 2010).
- 1967** Alaska – ALASKA STAT. §§09.25.300-390 (Matthew Bender 2010).
- 1967** New Mexico – N.M. STAT. ANN. §38-6-7 (Thomson West/Westlaw through 2010).
- 1969** Nevada – NEV. REV. STAT. §§49.275, 49.385 (Thomson West/Westlaw through 2010).
- 1970** New York – N.Y. CIV. RIGHTS LAW §79-h (McKinney’s Consol. 2010).
- 1971** Rhode Island – R.I. GEN. LAWS §§9-19.1-1 to 1.3 (Thomson West/Westlaw through 2010).
- 1972** Tennessee – TENN. CODE ANN. 24-1-208 (Thomson West/Westlaw through 2010).
- 1973** Nebraska – NEB. REV. STAT. §§20-144 to 147 (Thomson West/Westlaw through 2010).
- 1973** North Dakota – N.D. CENT. CODE §31-01-06.2 (Matthew Bender 2010).
- 1973** Oregon – OR. REV. STAT. §§44.510 to 540 (Thomson West/Westlaw through 2010).
- 1973** Minnesota – MINN. STAT. §§595.021-025 (Thomson West/Westlaw through 2010).



- 1974** Oklahoma – OKLA. STAT. ANN. TIT. 12, §2506 (Thomson West/Westlaw through 2010).
- 1977** Delaware – DE. CODE ANN. TIT. 10, §§4320-4326 (Thomson West/Westlaw through 2010).
- 1982** Illinois – 735 ILL. COMP. STAT. ANN. 5/8-901 to 909 (Thomson West/Westlaw through 2010).
- 1990** Georgia – GA. CODE ANN. §24-9-30 (Thomson West/Westlaw through 2010).
- 1990** Colorado – COLO. REV. STAT. ANN. §13-90-119 (Thomson West/Westlaw through 2010).
- 1992** Dist. of Columbia – D.C. CODE ANN. §§16-4701 to 4704 (District of Columbia through 2011).
- 1993** South Carolina – S.C. CODE ANN. § 19-11-100 (State of South Carolina through 2010).
- 1998** Florida – FLA. STAT. ANN. § 90.5015 (Thomson West/Westlaw though 2010).
- 1999** North Carolina – N.C. GEN. STAT. ANN. §8-53.11 (Thomson West/Westlaw through 2010).
- 2006** Connecticut – CONN. GEN. STAT. ANN. 52-146t, 2006 P.A. 06-140 (Thomson West/Westlaw through 2010).
- 2007** Washington – WASH. REV. CODE 5.68.010 (Thomson West/Westlaw through 2010).
- 2008** Maine – 16 ME. REV. STAT. ANN. §61(Thomson West/Westlaw through 2010).
- 2008** Hawaii – HAW. REV. STAT. §621 (Thomson West/Westlaw through 2010).
- 2009** Texas – TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 2010).
- 2010** Kansas – House Bill No. 2585 (Kansas 2010).
- 2010** Wisconsin – WIS. STAT. ANN. §885.14 (Thomson West/Westlaw through 2010).

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