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**September/October 2018 LD Brief**

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# Introduction

Friends of Premier Debate,

This is Premier’s first brief of the 2018-2019 season, and the topic is **“Resolved: In the United States, reporters ought to have the right to protect the identity of confidential sources.”**

This topic is difficult. Most states have effective shield laws regularly enforced by courts. The core controversy seems largely resolved by state legislatures and lower courts; that raises the question of what the affirmative is supposed to defend. One might think, as has been the case with some past LD topics, that the affirmative defends the status quo, and the negative must defend a change or shift away from shield laws. This arrangement of burdens is alien to policy debate, but we’ve seen it enough in LD that debaters should consider it as a realistic option.

Defending the status quo as the affirmative raises tricky questions in debate theory. How can the affirmative develop advantages to maintaining the status quo without knowing the negative’s proposal for changing it? Does the negative need to defend a clear proposal, in the form of a counterplan, a strategy traditionally maligned by NSDA rules and procedures?

On the other hand, the topic could be intended to illicit debates about expanding shield law protections for reporters. Two such options include (i) expanding the scope and uniformity of these laws through federal action and (ii) expanding the protections of these laws, e.g., to cover a wider set of reporters, to narrow the types of cases where exceptions apply, or to weaken those exceptions. If the NSDA intended this to be the topic for debate, they should have made that clear by including federal language or specifying expansion of the right, but these qualifiers are rare in LD resolutions.

While we lack strong language to support the affirmative expansion view, the NSDA wording also gives little indication that the affirmative should defend the status quo. The resolution could have read “reporters ought to maintain the right…” or “reporters’ right … ought not be curtailed.” But we have neither of those; the resolution gives little guidance.

All of this means that as the affirmative, you have many decisions to make when constructing your case. Are you defending an expansion in scope or strength of an existing right or merely defending existing rights? Either way, you might want to be ready to answer questions that go to the core of the reporters’ privilege. Is the right absolute or is it conditional such that it can be defeated by exceptions and other trumps in court? If there are exceptions, do they include national security concerns, criminal cases, or cases where there could be imminent harm if the source is not revealed? Further, who is entitled to the right? All persons who gather and publish news or only those who work for bona fide news organizations? What about journalists who are eyewitnesses to a crime? Does the type of crime make a difference?

In the past thirteen years, many federal bills addressing the reporters’ privilege have been proposed in Congress, and they often have different answers to these questions. For starters, we recommend debaters research the Free Speech Protection Act and Free Flow of Information Act. Outright defending a proposed bill might go beyond the scope of our topic, but researching them will give you a better sense of the state of federal and state law on the topic, the political landscape, and the issues at stake.

**This brief includes 150+ cards** to give you a running start on researching this topic. On the AFF, we’ve provided evidence for many advantage areas, cards for possible ACs, such as the Whistle-Blowers AC and the Bloggers AC. For the neg, we’ve prepped case turns and cards for a variety of CPs, DAs, and Ks to get you started on your off-case positions. We’ve also covered some relevant theory arguments and both sides of many prominent philosophical positions, including, Kant, Pragmatism, Virtue Ethics, Contracts, and more.

We want to remind the readers about standard brief practice to get the most out of this file. Best practice for brief use is to use it as a guide for further research. Find the articles and citations and cut them for your own personal knowledge. You’ll find even better cards that way. If you want to use the evidence in here in a pinch, you should at least re-tag and highlight the evidence yourself so you know exactly what it says and how you’re going to use it. Remember, briefs can be a tremendous resource but you need to familiarize yourself with the underlying material first.

We’re always looking for ways to make the briefs better, so please, let us know what you think! And, if you use these briefs please help us direct other debaters to premierdebate.com/briefs where we will continue uploading .doc versions of the briefs.

If you like what we’re doing and these cards have been helpful to you, **consider signing up for online coaching through Premier Debate.** Our coaches were elite competitors in their own right and have now coached students to elimination rounds, earning TOC bids, and qualifying to state and national championships. See premierdebate.com/coaching for more details on how to apply!

Finally, we’d like to thank Katya Ehresman, Jacob Fontana, Amy Santos, Reed Weiler, and the students at the 2018 Premier Debate Invitation-Only Week for their help in assembling this brief. These are some of the best, round-ready cards you’ll see on the topic, and we couldn’t have done it without them. Our briefs have always been free, and **if you’d like to support our writers and this project, please consider donating at** [**paypal.me/premierdebate**](https://www.paypal.com/paypalme/my/profile).

Good luck everyone. See you ‘round!

Bob Overing & John Scoggin

Directors | Premier Debate

# Affirmative

## Inherency

#### No increased protections for journalists are coming now

Smith 13, Dean C., journalist and author, A theory of shield laws: journalists, their sources, and popular constitutionalism, LFB Scholarly Publishing LLC, 2013. [Premier]

Constitutional scholars such as Jack Balkin have turned their attention increasingly to studying statutory and regulatory law as non-judicial means to constitutional ends. 19 “The most important decisions affecting the future of freedom of speech will not occur in constitutional law,”20 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**,21 **and federal courts have signaled they are not willing to extend a First Amendment-based privilege beyond circuits in which it is currently recognized.**22 **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**.

#### Courts aren’t acting now – it’s up to legislators to make change

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

**The Supreme Court's decision in Branzburg v. Hayes and the lower courts' interpretation of that case obviously have not resolved questions about the extent to which journalists are protected by a First Amendment-based testimonial privilege. Neither have the courts conclusively drawn a social architecture that clarifies how power should be distributed between the federal government and the media. Consequently, Congress again has begun considering shield law proposals**.98

#### Branzburg was a disaster – the functioning of the press is dependent on source confidentiality – fear of government subpoena power creates a chilling effect on dissidents and whistle blowers

Giordano 15 Giordano, Arielle. Managing Editor of CommLaw Conspectus. “PROTECTING THE FREE FLOW OF INFORMATION: FEDERAL SHIELD LAWS IN THE DIGITAL AGE”, CommLaw Conspectus. 2015. https://scholarship.law.edu/cgi/viewcontent.cgi?article=1553&context=commlaw. [Premier]

In addition to the Framers’ intent to protect all forms of journalism, nonjudicial actors and lawmakers demonstrate the need for a federal shield law.88 The Court’s ruling in Branzburg influenced a string of lawmaking that led to many states adopting shield laws to protect reporters.89 A large portion of these lawmakers referenced Justice Stewart’s dissent in Branzburg, which advocated protecting journalists through establishing shield laws.90 Justice Stewart’s dissent in Branzburg articulates many arguments in favor of shield laws, which harshly criticize the majority’s opinion.91 Justice Stewart charges the majority with inviting state and federal authorities to undermine the constitutionally guaranteed right of freedom of the press by attempting to morph journalism into an “investigative arm of government.”92 The holding of Branzburg, as Justice Stewart asserts, will continue to impair the press’ constitutionally protected rights, impede the free flow of information, and impair the administration of justice.93 The First Amendment right to gather and publish news, as articulated by Justice Stewart, implies a right to confidentiality between a reporter and a source or informant:94 This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality -- the promise or understanding that names or certain aspects of communications will be kept off the record -- is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power -- the absence of a constitutional right protecting, in any way, a confidential relationship from compulsory process -- will either deter sources from divulging information or deter reporters from gathering and publishing information.95 In order for the press to enjoy their constitutionally protected right to disseminate information, journalists must be able to create a trustworthy relationship with the subjects that are their sources of information.96 Confidential relationships are often developed between journalists and subjects, and are a vital part of the newsgathering and dissemination process.97 Sources will be deterred from revealing confidential information if the government possesses an unchecked power to compel journalists to reveal those sources.98 Reporters will also be deterred from publishing anything controversial out of fear that they may be compelled by the government to reveal information or sources.99 The decision in Branzburg demonstrates to possible informants that he or she may not ever be entirely assured of a promise of confidentiality.100 At any point, a journalist may be compelled to reveal a confidential source or information.101 This could have negative repercussions on the public’s gathering of information by possibly “chilling” dissident voices.102 Specifically, an individual who is not implicated in any crime may be fearful of revealing information that could show government corruption or wrongdoing because he is not truly afforded confidentiality.103 Sources and journalists alike face a similar dilemma in deciding whether to reveal potentially controversial information that could ultimately lead to trouble, or to just withhold and remain silent.104

#### Government actions since Branzburg vindicate these fears – unlimited subpoena power has silenced dissenting voices and created a culture of fear in journalists

Giordano 15 Giordano, Arielle. Managing Editor of CommLaw Conspectus. “PROTECTING THE FREE FLOW OF INFORMATION: FEDERAL SHIELD LAWS IN THE DIGITAL AGE”, CommLaw Conspectus. 2015. https://scholarship.law.edu/cgi/viewcontent.cgi?article=1553&context=commlaw. [Premier]

The fear among journalists and sources has not diminished since Branzburg. 105 Presidential administrations have held journalists in contempt of court and jailed them after they refused to reveal confidential sources, thus leading to journalists being deterred from the pursuit of well-balanced news.106 The conflict that journalists and sources face are further heightened by several recent events involving members of the media.107 The Obama Administration has waged a war against leaks.108 There have been several high profile examples of journalists being forced to compel information because it constituted a “leak,” and not necessarily ones that could be detrimental to national security.109 Some of the Obama Administration’s war includes: a subpoena for two months of records for 20 reporters at Associated Press, the charging of six government officials under the 1917 Espionage Act (more than double all past presidential administrations combined), and the seizure of the phone and e-mail records of Fox News Reporter James Rosen (who acted as a classic whistleblower).110 In addition to these prosecutions, many government officials have been subject to interviews and lie-detector tests in order to keep “leaks” under control.111 This has deterred many government officials from acting as whistle-blowers and has made them reluctant to speak to journalists.112 The Obama Administration’s war against leaks negatively impacts the field of journalism while simultaneously disregarding First Amendment protections.113 Congress needs to craft a law that protects journalists from compelled disclosure about confidential information and sources in order to protect the integrity of reporters and their informants. This type of government action is daunting to journalists. “When numerous subpoenas are issued by an administration avowedly and 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.”114 The considerable number of subpoenas being issued may silence dissident voices.115 With the rise of electronic and new media, government requests for information disclosure may grow.116 This, in turn, may lead to an increased number of subpoenas that seek sources of information as well as the content of information.117 This will instill widespread fear in journalists and have long-term consequences on journalism as a whole.118 These are just some examples as to why the United States needs a federal shield law to protect journalists. It is imperative that protections are afforded to the process of gathering and disseminating news; failing to do so would be contrary to the Framers’ intentions and would gravely threaten the free flow of information.119 Furthermore, the process of disseminating news is protected by the Constitution and precedential case law.120

## Solvency

### Generic Solvency Advocate

#### Reporters ought to have the right to protect the identity of confidential sources

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

**The nation needs a shield law that prevents an unhealthy concentration of power in the executive branch** of the government-or in any other branch. **And the nation needs a powerful press. That means** the nation needs **a strong shield law that will enable journalists to report on the workings of the federal government and other matters without fear of facing incarceration or other penalties if they later refuse to reveal the identities of their confidential sources** or to hand over confidential information or materials. This is a fundamental matter of the proper distribution of power among government, media, and citizens. Those in the executive branch who oppose the shield law should trust that a good government-one drawn as the Framers intended-can protect national security.

## Advantage Areas

### Democracy

#### The Trump administration is cracking down on leaks now.

**Murillo 17:** Murillo, Helen. “Trump is Going After Legal Protections for Journalists”. Foreign Policy Publications. August 10th, 2017.

<https://foreignpolicy.com/2017/08/10/trump-is-going-after-legal-protections-for-journalists/>. [Premier]

Last week, the Washington Post [published](https://www.washingtonpost.com/world/national-security/you-cannot-say-that-to-the-press-trump-urged-mexican-president-to-end-his-public-defiance-on-border-wall-transcript-reveals/2017/08/03/0c2c0a4e-7610-11e7-8f39-eeb7d3a2d304_story.html) leaked transcripts of President Donald Trump’s January phone calls with Mexican President Enrique Peña Nieto and Australian Prime Minister Malcolm Turnbull. Even with the administration beset by daily embarrassing leaks, this one was shocking, going well beyond the mere embarrassing portrayals of daily White House dysfunction. It is fair to presume that such transcripts are classified, and when asked about them, National Security Council spokesman Michael Anton [said only that](http://www.cnn.com/2017/08/04/politics/leaking-donald-trump-democrats/index.html) he “can’t confirm or deny the authenticity of allegedly leaked classified documents.” So nobody should have been surprised that on Friday morning, Attorney General Jeff Sessions and Director of National Intelligence Dan Coats held a [press conference](https://www.lawfareblog.com/department-justice-press-conference-leaks) condemning the many leaks and vowing investigation and prosecution of those responsible. Sessions called for “discipline” in executive agencies and Congress to stem leaks. He indicated that since January, the Department of Justice has tripled the number of active leak investigations, and he announced a new FBI counterintelligence unit to manage them. But then Sessions got to the press: “One of the things we are doing is reviewing policies affecting media subpoenas. We respect the important role that the press plays and will give them respect, but it is not unlimited. They cannot place lives at risk with impunity. We must balance the press’s role with protecting our national security and the lives of those who serve in the intelligence community, the armed forces, and all law-abiding Americans.” Coats reiterated that the administration is “prepared to take all necessary steps to … identify individuals who illegally expose and disclose classified information.” This marks a serious intervention in a delicate, decades-long [balancing act](https://foreignpolicy.com/2017/08/08/the-trump-administrations-leakers-deserve-to-be-investigated-sessions) between the federal government and professional journalists. A change in the policy about press subpoenas could have grave consequences for the government and press alike. A subpoena is the legal tool that forces an individual to testify or produce evidence. When subpoenas are issued to journalists (or their communications providers) in leak investigations, it is most often for the purpose of identifying a leaker: Match the relevant reporter’s telephone records to an individual with access to the classified information — or better yet, force the reporter to testify directly as to the source — and you’ve got your leaker. But you’ve also compromised the press’s ability to protect their sources, undermining their ability to do their job. Reporters who refuse to reveal their sources in compliance with such subpoenas risk contempt charges. To enforce subpoenas, courts and Congress have the authority to bring contempt charges against those who refuse to comply with lawful orders.

#### Bipartisan proposal for federal shield law—

**Handman 14:** Handman, Laura R. “Protection of Confidential Sources: A Moral, Legal, and Civic Duty”. Notre Dame Journal of Law Ethics, and Public Policy. Volume, 19, Issue 2. February 2014. <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1222&context=ndjlepp>. [Premier]

Despite three decades of federal courts recognizing a First Amendment privilege for reporters, the recent cases in which federal courts have held reporters in contempt for refusing to reveal their confidential sources suggest a troubling trend, unless corrected by the Supreme Court. If courts continue to conclude that uniform First Amendment protection does not already exist, or is easily overcome, even when the confidential sources are involved, Congress should pass a federal shield law to protect reporters from being forced to choose between releasing their confidential sources or facing jail time. Forty-nine states plus the District of Columbia offer some form of protection to journalists who refuse to disclose confidential sources. These protections are in the form of either court decisions or statutes, commonly known as "shield laws," which recognize the reporter's privilege. Foreign jurisdictions have also recognized that protecting confidential sources is vital to maintaining a free press.65 Further, since 1972, in the wake of Branzburg, the Justice Department has had a policy guideline applicable to federal prosecutors respecting a reporter's privi- lege.66 The current guideline admonishes: Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protetion for the news media from forms of compulsory process, whether civil or criminal, which might impair the news 67 gathering function. Congress is currently considering whether to pass a federal shield law. Representatives Mike Pence (R. Ind.) and Rick Boucher (D. Va.) in the House and Senator Richard Lugar (R. Ind.) in the Senate have proposed the Free Flow of Information Act of 2005 that would: \* Prohibit testimony to be compelled from a journalist in criminal cases unless the testimony is "essential to the investigation, prosecution or defense" of a criminal case; \* Prohibit testimony to be compelled from a journalist in civil cases unless the testimony sought is "essential to a dispositive issue of substantial importance"; and \* Provide absolute protection of the identity of confidential sources and prohibit disclosure of information that would lead to the discovery of the identity of such sources, including information from third parties. The shield law proposed could provide absolute protection for the identity of confidential sources. Anything less would still leave reporters and sources no real way to know in advance which sources would be protected and which sources would not. A federal shield law is not a political issue, as the need to have an informed citizenry does not fall on either side of the partisan divide. The events of the past few months have shown that a federal shield law is needed to protect reporters from harsh penalties for merely doing their jobs. A federal shield law will provide the certainty that a reporter's promise can be kept without fear of civil or criminal sanctions, independent of the happenstance of whether the subpoena issues from a state or fed- eral court.

#### Giving journalists the right to confidential sources is empirically successful at protecting leaks, and is a key check against totalitarianism

**Friedersdorf 14:** Friedersdorf, Conor, a staff writer at The Atlantic, where he focuses on politics and national affairs. He lives in Venice, California, and is the founding editor of [The Best of Journalism](http://thebestofjournalism.com/), a newsletter devoted to exceptional nonfiction. “Why It Shouldn’t Be Criminal To Report Government Secrets”. The Atlantic. June 9th, 2014. [Premier]

<https://www.theatlantic.com/politics/archive/2014/06/the-pointlessness-of-prosecuting-journalists-who-publish-leaks/372381/>

To review my position: On scores of prominent occasions, journalists have published classified information that served the national interest in significant ways. We can all think of multiple examples and public goods that directly resulted. Whereas it is very difficult to think of a classified secret exposed by journalists that caused significant harm. Ponder the damage done by history's most harmful journalism-enabled leaks. What are they? It's telling that no examples come to mind. That's not to say that no legal consequences should ever stem from a leak. The least-bad system is one where government decides what information is properly classified, leakers can be charged and punished for revealing classified secrets (which isn't to say that they always should be prosecuted), but where publishing journalism based on classified leaks is not criminalized. In reality, the government often does serious damage to the U.S. by making the wrong judgment call on classification. Officials are the most biased judges when it comes to these decisions because, often times, the truth reveals their own incompetence or illegal behavior, and suppressing the truth always inflates their relative power and importance. There is no more biased decider than government officials. In reality, journalists making "wrong calls" on classification have done so little damage that it's hard to cite examples that show any lasting harm. There aren't horror stories in which America was gravely damaged due to journalists spilling a precious secret (though government often predicts disasters that never come). We've gotten along quite well for decades without prosecuting any journalists, even though there were countless leaks in that period. There were some threats of prosecution in that period—and virtually all of them reflected badly on government in hindsight. Kinsley and Linker can only gesture at hypothetical harms that could occur if journalists published without fear of prosecution. They ground their whole position in a thought experiment rather than in decades of lived experience. Alarms are raised about vesting too much responsibility in journalists of "dubious" credentials. Fear is stoked at the superficially frightening idea that cute animal curators at BuzzFeed could wind up making the call. But no one explains how these people would come into America's top secrets. In what world will the cute puppy aggregator find himself holding a list with the names of every undercover CIA agent? And even then, wouldn't he probably not publish? In reality, it is almost always seasoned national-security reporters who get sensitive leaks. Linker implies that if they were the ones making the call he'd feel much better about my standard. Well, in practice, isn't that exactly how things typically work? In reality, the exceptions to that rule involve spies who sell directly to foreign governments, or unusual people like Daniel Ellsberg and Snowden, who are bound and determined to make classified information public one way or another. And come to think of it, Snowden went to "real journalists" by any reasonable definition. In reality, if CuteOverload's designated otter blogger can stumble onto highly classified information, it wasn't secure anyway and surely won't stay secret for long. In reality, the system Kinsley and Linker endorse, had it become accepted and uncontroversial years ago, would've helped to forever suppress J. Edgar Hoover's misdeeds, the Pentagon Papers, Watergate, aspects of 9/11 that reflected poorly on Bush, prisoner abuse at Abu Ghraib, warrantless wiretapping—the list of horrors goes on. No comparable list of horrors would've credibly happened had my system been in place. Contempt charges aim to compel compliance with the order and can include jail time. In 2005, New York Times reporter Judith Miller famously [submitted](http://www.nytimes.com/2005/07/07/politics/reporter-jailed-after-refusing-to-name-source.html) to jail time for contempt rather than reveal a confidential source in the Valerie Plame leak investigation. (After two and a half months in jail, Miller was [released early](http://www.washingtonpost.com/wp-dyn/content/article/2005/10/19/AR2005101900795.html) when Scooter Libby gave a waiver authorizing the government to question reporters about his conversations with them and Miller agreed to testify.) That's why I continue to stand by the conclusion of my earlier article—that opposition to my system seems rooted in general disdain for non-experts and a reflexive aversion to non-governmental actors exercising an important discretionary role in American governance. For many, it just cannot be that journalists are permitted to make these sorts of calls without risk of prosecution. But why? Exemption from prosecution has a proven track record of delivering public goods at a very low, mostly hypothetical cost. Having been permitted to publish secrets, the press has demonstrably performed better than the government in deciding what ought to be made public and what secrets should be kept. That wouldn't surprise the Framers, who predicted as much when they passed the First Amendment. "Congress shall make no law ... abridging the freedom of speech, or of the press." The Framers are emphatic: The press, not the government, better decides what is printed for the public. If publishing verified truths about government isn't covered, what is? The government can classify anything it wants. It can prosecute any government employee for leaking classified information. That is a significant amount of concentrated power. A free press that can publish without fear of prosecution is the check. Everything we know about history suggests that check is badly needed. Nothing in our history suggests that check is too dangerous to national security to maintain. Speaking of a world where any American can suddenly function as a journalist, a reality Linker and I agree upon, I have a question for him. Let's say that Snowden had walked into a bar in Honolulu, had a few tequila shots, started chatting with the 20-year-old surf instructor sitting next to him, and said, "Hey man, I work at the NSA, and just so you know, the government is using Section 215 of the Patriot Act to spy on every phone call anyone in America makes. That's messed up, right?" As a general matter, I assume Linker and I agree that it isn't ideal for 20-year-old surf instructors in Hawaii to be "the deciders" about whether national-security secrets are revealed. But let's say that the surfer takes out his iPhone, logs onto Twitter, and types, "Dude, drunk NSA employee just told me gov't uses Patriot Act to spy on all phone calls. Section 215 wut?" Then he tweets, "whoa I suddenly feel like an important journalist. What do you think @NYTIMES job offer lol?" As Linker sees it, the surfer has a plausible claim that he's engaging in journalism (or at least Linker thinks the profession shouldn't be regulated in a way that would exclude him). So does Linker think that the government should be able to prosecute the surfer-journalist for publishing classified information? If a random citizen is told a state secret in a bar, such as, "We're spying on all of you, suckers!" should that citizen be subject to punishment for revealing what was said to him by a security-cleared government employee? If you believe that anyone can be a journalist, and that journalists should be subject to prosecution for revealing classified information, then you believe that the government should have the power to prosecute that surfer for his tweet. That would be a gnarly bummer, dude.

#### Leaks expose flaws in the administration and can help avoid harmful policies

**Zimmerman 18:** Zimmerman, Nicholas. “Why Washington insiders decide to leak”. New York News and Politics, Daily Intelligencer. May 16th, 2018. <http://nymag.com/daily/intelligencer/2018/05/why-washington-insiders-decide-to-leak.html>. [Premier]

My conversations inevitably converged on a type of leak particularly idiosyncratic to this administration: one to embarrass or expose the president, whether that exposure is intended to emphasize his incompetence, distance oneself from certain policies, or put a spotlight on suspicious behavior with regard to Russia and/or the Mueller investigation. The Putin congratulatory call is a recent example, but the leak to make the president look foolish has been a constant companion to Trump. Just recall his January 2017 calls with the Mexican president and the Australian prime minister — in which he referred to Mexico’s “pretty tough hombres” and lambasted the Australian over a refugee agreement struck under Obama, before abruptly hanging up. Leaks to make the president look foolish have been a constant companion to Trump. “It’s hard to see a policy prerogative,” said the former senior NSC official. “These calls were only released months later, so that suggests it was mostly about embarrassment, about trying to underscore what a shit show the NSC was. I suppose you could construct a rationale that they were an effort to box in a president who seemingly can’t handle the basics of international diplomacy,” but he was skeptical of any strategic justification behind these leaks — which likely came from a senior White House official or Cabinet member, given how few individuals we estimated would have access to a president’s call transcript (15 to 20, if that). About whether such a leak is justified — in this environment, with this president — even current officials were torn. “I wish it were legitimate to leak just to embarrass him,” one told me. “I would personally give that person a high-five if we were at the bar. The thing is, though, the transcripts themselves are embarrassing, but it’s even more embarrassing that they leak in the first place. From a national-security perspective, I just wouldn’t want to see this as a general practice,” he said, for fear that foreign leaders would stop believing they could speak in confidence with the president. So how do you do the job without compromising your moral integrity? As we weaved through the “logic of leaking,” it was clear everyone was wrestling to adapt their playbook. They had just never seriously imagined we would elect an executive who might be compromised by a foreign adversary and, to quote James Comey, is so “morally unfit” for the job. One former appointee argued that “any leak that hurts this president that’s non-classified and exposes his unfitness is fair game.” Others disagreed vehemently. “If I don’t trust or believe in the president, then I need to resign. Period. If I feel a need to leak to protect the nation, to essentially try to put a fence around the president, that’s unethical and it’s wrong. Again, assuming we’re not talking about criminality, leaking is about weakening the president, and if your justification is that he’s a maniac, well, what if your guy wins next and you love him but others think he’s the maniac? It’s a slippery slope.” “I never leaked to sabotage a policy, never became a ‘policy entrepreneur,’ but if I’m in the White House and the administration is maybe going to cut 50 percent of the United Nations budget or totally roll back LGBTQ provisions, would I leak? Maybe,” said the former State Department official. “I’d like to believe that I’d leak to save lives even if it was against my institution’s desire, but I don’t know if I would. The best I can do is serve my boss, because the election results are the closest thing we have to the American people’s desires manifested.” His angst was widely shared among the career bureaucrats I spoke with, a strong counterpoint (even if anecdotal) to the claims of Trump’s supporters that the surge in leaks is the result of an entrenched bureaucracy engaged in an undemocratic attempt to neutralize Trump’s reform agenda. “I understand that you might want to undermine their credibility to render them ineffective, but you have to weigh the longer-term institutional costs versus the short-term benefit of undermining this administration,” said a former political appointee from the State Department. “I would resign before I would leak, but I believe it is ethical in those times when America’s compass loses its North Star,” the appointee said, citing the McCarthy-era witch hunts, the internment of Japanese-Americans during World War II, and Bush 43–era torture practices as past examples of when leaking would have been justified. When I ask if the present day was one of those times, he said, “Yes.”

#### Federal shield laws for journalists are necessary for a functioning democracy

**Stone 14:** Stone, Geoffrey R. Stone is a distinguished service professor of law at the University of Chicago. “Democracy Demands a Journalist-Source Law”. The Daily Beast. April 15th, 2014.

<https://www.thedailybeast.com/democracy-demands-a-journalist-source-shield-law> [Premier]

Although the journalist-source privilege has been recognized in 49 states, Congress, paralyzed as usual by divisiveness and infighting, has thus far refused to do so. As a consequence, if my hypothetical senator is prosecuted in federal court for taking a bribe, the reporter can be compelled to reveal his source and the source can be compelled to testify. Knowing this, the source in many instances will tell no one about what she overheard, and there will therefore be no investigation or prosecution for the bribe. Given the rather sensible reason for recognizing a journalist-source privilege, why does Gabriel Schoenfeld resist? He offers several reasons, none of which is persuasive. First, he maintains that enactment of such a law “would overrule a historic Supreme Court decision.” This is simply wrong. In 1972, the Supreme Court, in the case of Branzburg v. Hayes, held in a five-to-four decision that the First Amendment’s guarantee of “freedom of the press” did not, of its own force, require the recognition of such a privilege. Whatever one thinks of that decision, it says nothing at all about the wisdom of the privilege as a matter of sound public policy. It is for that reason that 49 states have recognized the privilege. In no way would Congress’s adoption of legislation recognizing a federal journalist-source privilege “overrule a historic Supreme Court decision.” Second, Schoenfeld maintains that recognizing such a privilege would require “the classification of ‘journalists’” in a way that would authorize some “journalists” to invoke the privilege and not others. This is true. Given the nature of modern media, a serious question arises over who qualifies as a “journalist” for purposes of the privilege. Do I, a law professor, get to invoke the privilege when I write a piece for The Daily Beast? Does a personal blogger writing on Facebook get to invoke the privilege? What about a student writing for a high school newspaper? These are, indeed, tricky issues that quite predictably divide “journalists” themselves. No one who thinks of himself as a “journalist” wants to be left out. But the law is full of hard choices, and what matters here is not that every tomdickandharry self-professed “journalist” gets to assert the privilege, but that sources can reasonably find journalists who can invoke the privilege when they want anonymity. It is no doubt true that, no matter how one draws the line, some folks will be unhappy. But as long as the statutory definition of “journalist” is reasonable, and is not couched in such a way to exclude journalists because of their particular ideological slant, this is not a serious obstacle. Indeed, if 49 states have managed to make this work, so can the federal government. Third, Schoenfeld argues that a “fundamental problem” with a reporter’s privilege is “that it places the professional needs of reporters above the need of the community to stop crime.” This misses the whole point of the privilege. The privilege is not about “the professional needs of reporters,” it is designed to further the legitimate needs of the American people—and of law enforcement—to gain access to information that otherwise might never see the light of day. Fourth, Schoenfeld argues that we don’t need the journalist-source privilege because people are willing to reveal information to reporters even without it. But this is an unsupportable assertion. Of course people who aren’t worried about being exposed disclose information to reporters without the benefit of the privilege. But the relevant people are those who do not reveal information to reporters because they do not want to be exposed. The absence of the privilege deprives the American people—and law enforcement—of that additional information, information that now never makes it into the public eye. Frankly, the fact that 49 states recognize the journalist-source privilege and don’t seem in any rush to abandon it is pretty good evidence that the federal government should recognize the privilege as well. This does not mean that there won’t be hard cases. In my view, the hardest case is when the source is violating the law when he reveals the information to a reporter. Suppose, for example, that a government employee or contractor with a top secret clearance wants to reveal classified information to a journalist. In this situation, the journalist has a First Amendment right to publish the information unless its disclosure would create a clear and present danger of grave harm to the nation, but the government employee, who has made a contract with the government, can be criminally punished for disclosing the classified information, except in extraordinary circumstances. In such circumstances, should the journalist be able to assert the privilege in order to protect the identity of the “leaker” who, let us assume, can be criminally punished for disclosing the classified information? On the one hand, one might say that because the leak was unlawful the leaker should not be protected. On the other hand, one might say that because the reporter has a right to publish the information he should be able to protect the identity of his source. It is the perplexity of this situation that has caused most of the paralysis in Congress. Should the privilege apply, or not? In my view, the best solution to this conundrum is to allow the reporter to invoke the privilege if the unlawful leak discloses information of significant public value. Of course, this raises the question of what one means by “significant public value.” To give two examples, I would say that Snowden’s revelation of the existence of the NSA’s telephone metadata program had “significant public value,” because it has generated serious public discussion about the legitimacy of the program. Therefore, if he had maintained his anonymity (which he did not), the reporter to whom he disclosed this information could not be compelled to reveal his identity. On the other hand, if a government employee leaks classified information about, say, the identities of secret American agents in Iran, I would conclude that that publication of the names of the secret agents does not have “significant public value” and that the reporter to whom the leaker disclosed the information could therefore be required to reveal the source’s identity. Needless to say, these are tricky questions. But however we resolve this specific dilemma, the journalist-source privilege is important to the functioning of our democracy and it is time for Congress to get its act together and to enact this privilege into law now.

#### Federal shield laws are a key component of democracy, civic engagement, and commitment to truth—passing the aff is a clear stance against Trump’s attack on the press

**Harris 7-27:** Harris, Margo. “Is it Time for a Federal Shield Law for Reporters?”. Kansas Press Association. July 27th, 2018.

<http://kspress.com/1337/it-time-federal-shield-law-reporters>. [Premier]

In February 2018, the Department of Justice notified New York Times reporter [Ali Watkins](https://twitter.com/AliWatkins) that her email and phone had been [seized](https://pressfreedomtracker.us/all-incidents/doj-secretly-seizes-phone-and-email-records-new-york-times-reporter-ali-watkins/) as part of a leak investigation — a case that resulted in the June 7 arrest of James Wolfe. Watkins’s three-year relationship with the high-ranking aide on the Senate Intelligence Committee (which she covered before joining the Times) soon became public fodder. The titillating nature of the story, coupled with the increasingly tense relationship between the Trump administration and the press, seemed to have reignited the public’s interest in a federal shield law. The Watkins case was met with a deluge of [think pieces](https://www.thedailybeast.com/the-trump-administrations-pursuit-of-ali-watkins-proves-we-need-federal-shield-law-now), Twitter wars and [outrage](https://www.nytimes.com/2018/06/08/business/media/ali-watkins-records-seized.html) from free press advocacy groups. The calls for federal protection of reporters’ privilege extended beyond an outraged internet; this past Tuesday, Rep. Jim Jordan (R-Ohio) led a [hearing](https://oversight.house.gov/hearing/shielding-sources-safeguarding-the-publics-right-to-know/) before the House Oversight and Government Reform Subcommittees on Intergovernmental Affairs and Healthcare, Benefits and Administrative Rules entitled “Shielding Sources: Safeguarding the Public’s Right to Know.” Representatives and witnesses representing a range of affiliations to the media industry discussed [H.R. 4382](https://www.congress.gov/bill/115th-congress/house-bill/4382), the Free Flow of Information Act, which was first introduced in the House in November 2017. The measure would provide federal protection for journalists, shielding them from being compelled to disclose their sources in court. Witness testimony shed light on the importance of a federal shield law — a necessary addition to the [state-level protections](https://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/shield-laws) journalists have now. According to Lee Levine, senior counsel at [Ballard Spahr, LLP](https://www.ballardspahr.com/), 49 states and the District of Columbia have adopted shield laws, but these protections vary in scope, and none can protect journalists from having to give up their source during a federal investigation.. Conflicting laws and judicial precedent have rendered journalists and the legal community wholly unsure about what rights journalists have to protect their sources. Rick Blum, policy director at the [Reporters’ Committee for Freedom of the Press](https://www.rcfp.org/) (RCFP) said that, “depending on what court you’re fighting the subpoena in, you may get a different result.” Indeed, some states have shield laws allowing journalists “absolute privilege,” while others have shield laws that cover only “qualified privilege” and contain some exemptions. A reporter fighting a subpoena in Oregon (an absolute privilege state), for example, would likely fare better in court than a reporter in North Carolina (a state with qualified privilege). While a federal shield law would not supersede state laws ([go here to see Kansas's shield law](http://kspress.com/sites/default/files/kansas_shield_law.pdf)), protection on the federal level would send a clear message about the importance of preserving the relationships journalists have with their sources. Jordan, the chairman of the subcommittee, stressed the urgency of reclaiming First Amendment protections and issued a stern reminder that Congress cannot look the other way while the government intimidates journalists in pursuit of their confidential sources. He went on to applaud earnest bipartisan efforts to move forward with a federal shield law, saying that both he and colleague Jamie Raskin (D-Md.) agree that the government cannot “intimidate or censor the town crier, be it the chief contributor to The New York Times or a freelance journalist from the 4th district of Ohio.” Raskin, meanwhile, echoed the sentiments of his late father, philosopher Marcus Raskin, reminding the assembled that “democracy and its operating principle, the rule of law, require a ground to stand on and that ground is the truth.” That truth, he explained, comes from the indispensable service that journalists provide. While not everyone can attend congressional hearings or city council meetings or travel to warzones to determine the meaning and reality of foreign policies, we are all impacted by these events and should be “equally invested in ascertaining the truth of what is happening in our names as citizens.” Without a robust and free press, this cannot happen. Subcommittee members and witnesses didn’t shy away from the role the current administration plays in the oppressive environment for journalists. Representative Raja Krishnamoorthi (D-Ill.), referencing the United States’ plummet to number 45 on the [World Press Freedom Index](https://rsf.org/en/ranking) (a list compiled by Reporters Without Borders to reflect the independence of the press around the world), asked witnesses to state the ways in which the Trump administration has specifically threatened a free press. The RCFP’s Blum emphasized that journalists have thick skin and can take personal jabs and criticisms from the president, but Donald Trump’s attempts to discredit the industry as a whole have damaging implications. When a leader calls the press “the enemy of the people” and tells the public they can’t believe what they read, journalists’ ability to tell the critical untold narratives is undermined. “It’s harder to write a story if their audience or sources don’t think they’ll be given a fair shake,” Blum said. Moreover, the public now struggles to determine what is true — an issue that rises above partisanship. Perhaps most importantly, witness testimony revealed the very tangible loss we’ll experience if reporters face continued intimidation. Sharyl Attkisson, investigative correspondent at [FullMeasure](http://fullmeasure.news/), [shared](https://oversight.house.gov/wp-content/uploads/2018/07/Attkisson-Statement-Shielding-Sources-7-24.pdf) with the committee some of the award-winning stories she’s reported — stories that only came to light because of confidential sources: an [investigation](https://www.cbsnews.com/news/red-faces-at-the-red-cross/) into fraud within the Red Cross after the influx of 9/11 donations; a [report](https://www.cbsnews.com/news/how-the-oil-leak-estimates-got-low-balled/) contradicting false information the government and BP provided in the wake of the 2010 oil spill — critical contributions to public discourse. Information from confidential sources can be “the genesis of a story,” she explained. Attkisson also alleged that the U.S. government engaged in unauthorized and illegal surveillance of her laptops and phones, and said she felt she could no longer guarantee her sources the protection they required to come forward. Raskin closed the hearing by reiterating that journalists underscore a healthy democracy — that they are “the life blood of American political culture.” The question remains, what happens next? Will the Free Flow of Information Act be put to a vote on the floor of the House? The apparent bi-partisan support bodes well for future legislative action, but shield laws have failed to gain traction in the past (most recently in [2011](https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2011/proposed-federal-shield-law-r)). The Alliance will be keeping a close watch on the legislation and will keep members updated as it progresses.

#### Now is the time for journalists to take a stance against Trump’s authoritarian regime in favor of democracy—any alternative risks repeating history’s worst atrocities

**Risen 8-16:** James Risen, August 16th, 2018. “Donald Trump is a Dangerous Demagogue. It’s Time for A Crusading Press to Fight Back”. The Intercept. James Risen, a best-selling author and former New York Times reporter, is The Intercept’s senior national security correspondent, based in Washington, D.C. Risen also serves as director of First Look Media’s Press Freedom Defense Fund, which is dedicated to supporting news organizations, journalists, and whistleblowers in legal fights in which a substantial public interest, freedom of the press, or related human or civil right is at stake. <https://theintercept.com/2018/08/16/donald-trump-media-enemy-of-the-people/>. [Premier]

WHEN ADOLF HITLER came to power, after the Nazis had shut down all of Germany’s independent newspapers and magazines and ended press freedom in the country, Hermann Ullstein, a member of a highly regarded German publishing family, fled to New York and wrote a penetrating memoir of the rise and fall of his family’s media empire. His father, Leopold Ullstein, a Jewish newspaper dealer, had founded Ullstein Verlag, the family publishing house, which at its pre-Nazi peak owned some of Germany’s most important publications, including the Vossische Zeitung newspaper. But when Hitler stole their press holdings, Hermann Ullstein and other family members fled, and by World War II, the Ullstein presses were being used to print Das Reich, a newspaper created by Nazi propaganda minister Joseph Goebbels. From his refuge in New York, Hermann Ullstein wrote critically of the failure of the German press to confront Hitler more aggressively when it still had a chance — before he came to power. In his 1943 book, Ullstein chastised the mainstream press in Germany for being too cautious in the pre-Nazi years, especially in comparison to the aggressive right-wing media that was rising during the late 1920s and boosting Hitler’s political fortunes. He lamented the weak response of “the loyal press,” his phrase for the pre-Nazi mainstream press “whose efforts were devoted to democracy, and whose failure was to a large extent due to mildness of language, to the tired and cautious spirit in which they fought.” Hermann Ullstein’s criticism of the mainstream press of the pre-Nazi era would sound eerily familiar to anyone following the American media today as it tries to confront Donald Trump. Trump has repeatedly castigated the American press as “the enemy of the people” and has brought his political supporters to such a crazed pitch that many of them now consider journalists to be traitors. Some of Trump’s backers even seem to think that physical attacks on reporters are acceptable. Trump uses his Twitter account to maliciously attack individual reporters, and journalists covering Trump’s dark and fevered rallies are now being forced to [hire security personnel](https://www.politico.com/story/2018/08/09/media-boosts-security-as-trump-ramps-up-enemy-rhetoric-768666) to protect themselves from the crowds. Trump seeks to discredit the mainstream press at every turn, while granting preferential access to news organizations that traffic in right-wing propaganda and conspiracy theories. He has pressured the Justice Department to launch a wide range of leak investigations of the press, and has politicized that process to such an extent that at least two of the first leak cases to be prosecuted by his administration have involved stories related to whether Russia has meddled in the American electoral system and whether the Trump campaign colluded with the Russians to help Trump win the 2016 election. Many in the American press today blanche at any comparisons between Trump and Hitler or other autocrats, and warn against overreacting to Trump. They also recoil at the notion that the press should go on a war-footing against Trump and eschew old-style journalistic crusades. They fear that such a confrontational approach will harm their credibility. Martin Baron, executive editor of the Washington Post, coined a phrase that succinctly captured this professional ethic — “We’re not at war, we’re at work.” To be sure, plenty of reporters are doing great work under enormous pressure. Many news organizations continue to engage in aggressive investigative reporting about Trump, and much of what we now know about Trump’s corruption and possible collusion with Moscow has come from the press. But while that investigative digging is underway, Trump’s daily efforts to denigrate and discredit the press continue unabated, and his subversive efforts to undermine the media have had an impact. A [recent poll](https://www.washingtonpost.com/news/politics/wp/2018/07/25/three-quarters-of-republicans-trust-trump-over-the-media/?utm_term=.e75ce97cfbb7) showed that nearly nine out of 10 Republicans disapprove of the way the media has covered Trump. The press often seems uncertain on how to respond. The White House press corps in particular seems determined to try to cover Trump as it has previous presidents, employing the same American journalistic standards and practices used in the past. Some press critics now believe that approach is too passive in the face of Trump’s malevolent approach. “When the most powerful person in the world declares war on journalism, you can respond in one of two ways,” [writes](https://medium.com/%40dangillmor/dear-journalists-the-war-on-what-you-do-is-escalating-eb584529a271) Dan Gillmor, co-founder of News Co/Lab and professor of practice at Arizona State University’s Walter Cronkite School of Journalism and Mass Communication. “The first adds up to surrender. I’m sorry to say that some of you appear to have done so, by normalizing what is grossly abnormal and letting your enemies take advantage of the craft of journalism’s inherent weaknesses.” It’s time to break with those civil traditions, other critics have added. “Journalists charged with covering him should suspend normal relations with the presidency of Donald Trump, which is the most significant threat to an informed public in the United States today,” [argues](https://twitter.com/jayrosen_nyu/status/1025153178910777344) Jay Rosen, a journalism professor at New York University. Some counter that Trump is only following in the press-bashing pattern set by Presidents George W. Bush and Barack Obama, who both also used leak investigations to target reporters. (Believe me, I know about that. Both Bush and Obama [came after me](https://theintercept.com/2018/01/03/my-life-as-a-new-york-times-reporter-in-the-shadow-of-the-war-on-terror/) in a leak investigation that lasted seven years.) But it is a mistake to see Trump as just another White House occupant following in a long tradition of presidential press-bashing. While the present-day U.S. is not Weimar Germany, Trump is not Hitler, and his incompetent administration has not come close to consolidating power in the way the Nazis did, Trump is nonetheless a dangerous demagogue who deploys some of the same tactics that Hitler did, and he has already gone further to attack the democratic institution of a free press than his predecessors did. He is seeking nothing less than the destruction of the legitimacy of the American press. As Hermann Ullstein warned, such dangerous threats to press freedom are sometimes only taken seriously in hindsight. In 1964, the New York Times echoed Ullstein, writing that his family had made one critical mistake. “That was to believe that Adolf Hitler’s early statements of anti-Semitism were merely campaign oratory. They failed to turn the power of their papers and magazines against the rising Hitler until it was too late.” Many in the American media believe that they are fighting back aggressively already. And indeed, in response to Trump’s attacks, hundreds of news organizations are publishing editorials about press freedom today. But that’s not enough. The response to Trump by the American press is still too tepid. Most American editors and reporters today disavow old-fashioned, crusading journalism, in which a news organization or even a group of news outlets throw all of their energy into an all-out assault on one story. They fear that crusades look partisan. But crusading journalism is what is needed now. And there is a model to follow from recent American history. In 1976, Don Bolles, an investigative reporter with the Arizona Republic newspaper in Phoenix who had become well-known for his coverage of the Mafia, was killed when his car blew up. In response, investigative reporters from all over America poured into Arizona to continue Bolles’s reporting. In 1977, those reporters, working through what became known in journalism as the Arizona Project, produced a 23-part series on corruption in Arizona. Today, more than 40 years later, American journalists should come together for a Trump Project.

#### Democracy is key to prevent the worst impacts of climate change—best data prove

**Looney 16:** Looney, Robert. “Democracy is the answer to Climate Change”. American University Library. June 1st, 2016. <https://foreignpolicy.com/2016/06/01/democracy-is-the-answer-to-climate-change/>. [Premier]

The [Paris agreement](http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html) of December 2015 raised new hopes that the worst effects of climate change might yet be averted. This agreement, whose signatories have agreed to substantially reduce greenhouse gas emissions on a voluntary basis, marks the first major international pact to combat climate change since the 1997 Kyoto Protocol. In contrast to Kyoto, however, whose signatories accounted for only about 14 percent of global emissions, the countries that signed the Paris deal account for a whopping 96 percent. Of course, the outstanding question is whether the agreement will actually be implemented. As its [critics](http://www.theguardian.com/environment/2015/dec/12/james-hansen-climate-change-paris-talks-fraud) are quick to point out, the Paris climate pact is a “[soft law](http://www.duqlawblogs.org/joule/the-pros-and-cons-of-international-environmental-soft-law/)” that lacks the legal clout to impose sanctions and penalties, but rather attempts to change behavior through norm-building and consensus. And past attempts by individual nations to control greenhouse gas emissions have produced [scant results](http://www.lrwc.org/canada-canadas-failure-to-reduce-greenhouse-gas-emissions-report/). Low-cost, effective ways of lowering emissions already exist. Low-cost, effective ways of lowering emissions already exist. A [universal carbon tax](http://www.nytimes.com/2015/06/07/opinion/the-case-for-a-carbon-tax.html?_r=0), which would raise the cost of producing emissions, could push countries toward this goal without major economic disruptions by making the development and adoption of green energy sources, such as wind and solar, as cheap or cheaper than fossil fuels. But as William Nordhaus, one of the world’s leading economic thinkers on climate change, has [argued](http://www.law.harvard.edu/students/orgs/elr/vol33_2/Hahn.pdf), most governments lack the political will to do so. In the United States, for example, lack of political will has forced policymakers to choose from a number of “[second best](http://www.economist.com/blogs/freeexchange/2007/08/making_the_second_best_of_it)” policies. Pressure from large domestic energy companies, anti-tax groups and climate change deniers — including many in Congress — has [forced](http://www.amazon.com/Handbook-Transitions-Routledge-International-Handbooks/dp/1857437454/ref%3Dsr_1_2?ie=UTF8&qid=1464535234&sr=8-2&keywords=Robert+Looney+climate+change) the executive branch to tax carbon indirectly or to subsidize wind and solar power. Unfortunately, such measures do little to discourage the continued use of fossil fuels. Pointing to the susceptibility of democratic governments to interest groups that have an economic stake in maintaining the status quo, environmental ethicist Dale Jamieson [questions](http://www.amazon.com/Reason-Dark-Time-Struggle-Against/dp/0199337667/ref%3Dsr_1_1?ie=UTF8&qid=1460823453&sr=8-1&keywords=Reason+in+a+Dark+Time%3A+Why+the+Struggle+Against+Climate+Change+Failed%E2%80%94and+What+It+Means+for+Our+Future) whether democracy is up to the challenge of climate change at all. Dale Jamieson [questions](http://www.amazon.com/Reason-Dark-Time-Struggle-Against/dp/0199337667/ref%3Dsr_1_1?ie=UTF8&qid=1460823453&sr=8-1&keywords=Reason+in+a+Dark+Time%3A+Why+the+Struggle+Against+Climate+Change+Failed%E2%80%94and+What+It+Means+for+Our+Future)whether democracy is up to the challenge of climate change at all. Scientist James Lovelock is similarly [pessimistic](https://www.theguardian.com/science/2010/mar/29/james-lovelock-climate-change), noting that human inertia is so great that, barring a catastrophic event, the best democratic governments can do is to adapt to climate change — i.e., building sea walls around vulnerable cities. Lovelock argues that, to make the hard decisions needed to deal effectively with climate change, it may be eventually be necessary to put democracy on hold, opting instead for some kind of [environmental authoritarianism](https://www.researchgate.net/publication/254232695_Authoritarian_environmentalism_and_China%27s_response_to_climate_change_Environ_Polit). But is it really necessary to choose between democracy and saving the planet? A comprehensive review of various countries’ progress towards environmental sustainability suggests otherwise. In fact, the case against democracy as a vehicle for environmental sustainability may be grossly overstated, based less on the actions of the world’s democracies as a whole than on the failures of a conspicuous few. Two data sets can help us identify the impact of democracy on climate change: The Economist Intelligence Unit’s (EIU) [Democracy Index 2015](http://www.yabiladi.com/img/content/EIU-Democracy-Index-2015.pdf) and the World Energy Council’s [Energy Trilemma Index](https://www.worldenergy.org/data/trilemma-index/). The Democracy Index divides 167 countries into four main groups: full democracies, flawed democracies, hybrid regimes, and authoritarian regimes. The countries are ranked best (Norway) to worst (North Korea). The Energy Trilemma Index ranks 130 countries in terms of their progress in three key energy performance measures: energy security (the availability of reliable supplies of energy), energy equity (the domestic price of energy) and environmental sustainability (the effect of the country’s energy sources on greenhouse gas emissions). Based on these measures, countries are ranked from best (Switzerland) to worst (South Africa). In 2015, the twenty countries grouped by the EIU as democracies had an average ranking of 34.2 on the energy sustainability index, while the 27 authoritarian regimes for which climate data existed scored much worse, with an average ranking of 85.6. In the two intermediate regime types, environmental sustainability fell off with democracy, with flawed democracies having an average ranking of 62.9 compared to hybrid countries at 67.5. The bad reputation of democracies in combatting climate change likely reflects the extremely low environmental sustainability scores of several of the more prominent members of this group, namely Canada (71), the United States (95), and Australia (110). As the name “Energy Trilemma” suggests, countries are forced to make trade-offs between energy security, energy equity, and environmental sustainability when determining their energy policies. For instance, a country that prioritizes energy equity might opt to import cheap fossil fuels at the expense of energy security and environmental sustainability until it can develop low-cost green domestic energy sources. Thus, the Energy Trilemma Index can provide insights not just into a country’s performance, but also into its priorities. As it turns out, countries that prioritized environmental sustainability ranked considerably higher on democracy than those that didn’t (75.4 vs. 103.5). These countries also had somewhat lower average per capita income ($25,015 vs. $37,095), demonstrating that taking action against climate change is far from a luxury that only the richest nations can afford. As these patterns clearly show, democracies are much more likely than authoritarian regimes to give environmental sustainability priority over either energy security or affordable energy supplies. This fact appears counter-intuitive, given that an often-cited flaw of democracy is that politicians are forced to make short-run decisions based on the election cycle. However, the effects of climate change, in the form of more severe storms, damaging droughts, falling agricultural yields, and increased flooding of coastal areas, are already being felt. And voters whose lives and livelihoods are increasingly impacted by climate change are beginning to demand immediate action, effectively forcing politicians to take a longer-run view. As a result, democratic governments become more likely to comply with global agreements that set specific targets for carbon reduction. Nevertheless, as noted above, several of the more prominent democracies — in particular, Canada, the United States, and Australia — have failed to adopt a national strategy for combatting climate change. The governments of these countries have not only come under pressure from their domestic fossil fuel industries, but from other constituencies that oppose changing the status quo, due in particular to the perception that environmentalism comes at the expense of jobs and low energy prices. In the U.S., a long-term campaign of [disinformation](http://www.ucsusa.org/press/2016/new-evidence-reveals-fossil-fuel-industry-funded-cutting-edge-climate-science-research) funded by the fossil fuel sector has given rise to a large group of climate-change naysayers, although their numbers may be [shrinking](http://ncse.com/news/2016/03/latest-climate-poll-from-gallup-0016974). Even in these countries, however, democracy is at work subtly prodding the government toward greater environmental responsibility. For now, this work is taking place at the provincial, state, and municipal levels. [British Columbia](http://www.economist.com/blogs/americasview/2014/07/british-columbias-carbon-tax) has imposed a carbon tax, [California](http://www.wsj.com/articles/how-cap-and-trade-is-working-in-california-1411937795) has initiated a cap-and-trade carbon plan, and [Melbourne](https://www.melbourne.vic.gov.au/SiteCollectionDocuments/zero-net-emissions-update-2014.pdf) has set a goal of zero net emissions by 2020. In most cases where local action has taken place, the effects of climate change have already begun to affect people’s lives. Once the consequences of climate change begin to be felt in other parts of these countries, it is reasonable to expect movements of this sort to gain momentum. Public concerns about the effects of climate change are unlikely to have the same force in authoritarian regimes as in democracies for two basic reasons. Authoritarian regimes almost invariably prioritize energy security and equity over environmental sustainability, since rising fuel prices risk social unrest. This overarching concern with [keeping energy prices low](https://www.researchgate.net/publication/240515305_Subsidies_for_fossil_fuels_and_climate_change_A_comparative_perspective) encourages increased usage of fossil fuels and a bias against green technologies. At the same time, authoritarian governments control information through state dominance of the media and access to official data. For example, China recently reported a sizable drop in coal consumption to placate citizens’ concerns about the country’s choking air pollution. According to the New York Times, however, Chinese coal consumption during the period of supposed reduction actually [rose](http://www.nytimes.com/2015/11/04/world/asia/china-burns-much-more-coal-than-reported-complicating-climate-talks.html) by 600 million tons, an increase equal to 70 percent of annual coal usage in the United States. Even as Chinese greenhouse gas emissions from coal grew, a [Pew Research report](http://www.theguardian.com/environment/2015/nov/05/climate-change-concerns-chinese-citizens-plummets) noted the number of Chinese who expressed serious concern about global warming fell from 41 percent in 2010 to just 18 percent in 2015. The only explanation for the drop the report’s author could suggest was a relative lack of public discussion of climate change. Fortunately, one of democracy’s greatest advantages is the ability of a free press to facilitate the dissemination of information and knowledge. Journalists have already begun to press home the direct link between human-induced climate change and weather-driven events, such as [California’s record drought](http://www.nytimes.com/2015/08/21/science/climate-change-intensifies-california-drought-scientists-say.html?_r=0) and the increased number and intensity of [Australian bushfires](http://www.theguardian.com/environment/2016/mar/20/australia-climate-council-urgent-action-temperature-records-summer-march). As voters become better informed, so too will democratic governments adopt better policies to promote climate stability

#### Confidential sources expose covert government action and encourage public debate and advocacy surrounding security, privacy, and state power.

Carlson 10. Carlson, Matt. “WHITHER ANONYMITY? Journalism and unnamed sources in a changing media environment,” Journalists, Sources, and Credibility: New Perspectives, Chapter 2, December 2010. [Premier]

This is not to ignore positive reporting made possible through unnamed sources. A year after apologizing for its prewar errors, the Times broke the story of the US government’s massive program of wiretapping citizens without warrants within its borders (Risen and Lichtblau, 2005). The front-page article informed readers that “Nearly a dozen current and former officials, who were granted anonymity because of the classified nature of the program,” came forward “because of their concerns about the operation’s legality and oversight” (p. A1). By exposing covert government actions, the reporting encouraged public debate over tensions between security and privacy, the limits of state power, and surveillance uses of communication technologies. While many on the right balked at the disclosure of an ongoing secret program, the reporters received professional acclaim, including a Pulitzer Prize. Such extremes demonstrate the complexity of unnamed sources and the variations of their usage. There are times when their use should be applauded and times when it should be scorned.

#### Guaranteeing reporter privilege to protect source confidentiality defends the anonymous-source doctrine which is key to sponsoring discourse and public decision making.

Anderson Jones 13 [RonNell Andersen Jones Associate Professor of Law, J. Reuben Clark Law School, Michigan Law Review Volume 111 | Issue 7 2013 Rethinking Reporter 's Privilege , Brigham Young Universit https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1049&context=mlr , Pg. 1250-1254]// [Premier]

In articulating the doctrinal contours of the right to speak anonymously, the Supreme Court has stressed the First Amendment value of ensuring a flow of information to the public. 186 This emphasis makes clear that the anonymous-speech right exists, at least in part, to meet the same important societal ends that the post-Branzburg reporter's privilege seeks to meet. 18 That is, both approaches recognize and are driven by what might be called "public-information" values. But the anonymous-speech approach also recognizes and is driven by what might be called "individual-liberty" values. An investigation of the development and operation of the anonymous speech doctrine plainly demonstrates the wider scope of First Amendment values served by the anonymous-speech right-and the clearer position that such a right occupies within the First Amendment framework. Public-information values have been carefully enunciated by the Court in anonymous-speech cases. When the Court first set forth the anonymous-speech doctrine in Talley, the historical argument in support of anonymous-speech protection was centered on a free-flow-of-information premise: the First Amendment must protect anonymous distributions of literature in order to ensure that certain literature will in fact be distributed. 1 88 The petitioner in Talley was a civil rights activist who had distributed unsigned handbills in Los Angeles calling for a boycott of merchants that he claimed sold goods manufactured by companies that discriminated against minorities in hiring.'89 When charged under a city ordinance forbidding the distribution of anonymous handbills, 190 Talley challenged the law as an unconstitutional abridgement of the freedom of speech.' 9' Writing for a six-three majority, Justice Black agreed that the ordinance was void on its face and stressed the importance of anonymous speech in [ensures] dialogue on "public matters of importance."' 92 Explaining that the Court had long recognized that "identification and fear of reprisal might deter perfectly peaceful discussions,"'93 the Talley Court stated that there could "be no doubt that [the] identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."'' 94 Setting forth numerous examples of ways in which anonymous communications "played an important role in the progress of mankind"' 95 -**including the publication of the constitutionally foundational Federalist Papers under fictitious names196** -the Court observed, "It is plain that anonymity has sometimes been assumed for the most constructive purposes."197 Thirty-five years later in McIntyre v. Ohio Elections Commission,19 the Court reaffirmed Talley's vibrant protection of anonymous speech when it declared unconstitutional 199 a law prohibiting the distribution of anonymous campaign literature.20 The Court held that "[a]n author generally is free to decide whether or not to disclose his or her true identity." 0 ' 1 The McIntyre Court found that a citizen who distributed handbills at public meetings opposing a school tax referendum and signed them "CONCERNED PARENTS AND TAX PAYERS," rather than with her own name,0 2 had a constitutional right to do so, notwithstanding the state's countervailing interests in helping voters assess validity and reduce fraud. 03 The provision of the Ohio Code forbidding anonymous speech was struck as unconstitutional, 2 0 4 with the Court again insisting that **under the First Amendment, speaking anonymously "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent**. 2 5 It underscored the public-information values of anonymous speech by citing the long tradition of influential authors writing anonymously or pseudonymously-including Mark Twain, 0. Henry, Benjamin Franklin, Voltaire, George Eliot, and Charles Dickens2 ° 6 -and by noting the importance of ensuring that information is not self-censored when speakers fear "economic or official retaliation," "social ostracism," or loss of privacy.207 Thus, the Court squarely recognized that protection of anonymous speech advances the First Amendment's public-information goals of encouraging community-serving information and increasing the contributions willingly made to the marketplace of ideas.20 8 First Amendment scholars and jurists have noted that removing barriers to the flow of information has the largescale societal benefits of enriching discourse2 0 9 and enhancing democratic self-governance .2 l It is the way that the First Amendment serves the many by protecting the one. Importantly, though, the case law makes clear that this set of public information values represents only half of the dual purposes served by protecting anonymity in communications. Constitutional protection of anonymous speech also advances the First Amendment's individual-liberty goals, facilitating the overarching "purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression-at the hand of an intolerant society."21' The freedom to speak anonymously, in other words, is designed to serve the one even when it does not serve the many, by acting as "a shield from the tyranny of the majority."212 It appears that the Court's motivation for protecting anonymous speech has thus gone beyond eliminating obstacles to individual communication of publicly useful information, and has additionally embraced the self-fulfillment and individual-autonomy goals of the First Amendment" 3 "by enabling individuals to explore new ideas, new means of expression, and even new identities" and by allowing some speakers simply to "derive internal satisfaction from not having their true identity revealed." '14 This protection allows a speaker to ensure that readers will not prejudge her message simply because they like or dislike its proponent,215 and thus works a direct, individual-liberty benefit upon the speaker herself. In recognizing these ways in which anonymous speech is valuable in preserving individual liberty of expression, the McIntyre Court gave an additional doctrinal justification for finding government interference with anonymity unconstitutional: it is strongly analogous to content control.216 Decades of First Amendment jurisprudence have firmly established that content-based regulations of speech ordinarily receive strict scrutiny.217 Unless the government can prove that a content-based regulation on speech is the least restrictive means of meeting a compelling governmental interest, the regulation will fail constitutional review. 21

#### Strong protections for journalists are necessary for democratic governance

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

During the 2007 House debate, Rep. John Conyers, Jr. (D-Mich.) described the role of the press in a democracy and the value of the shield law in helping the media fulfill that role:

Today, we are here in an attempt to reclaim one of the most fundamental principles enshrined by the Founding Fathers in the first amendment to the Constitution. **Freedom of the press is the cornerstone of our democracy. Without it, we cannot have a well-informed electorate and a government that truly represents the will of the people.**

**The measure before us ... helps restore the independence of the press so that it can perform its essential duty of getting information to the public. The bill will ensure that members of the press are free to utilize confidential sources without causing harm to themselves or their sources** ....227

In 2006, Sen. Dodd expressed similar lofty sentiments, quoting James Madison as saying, "**Popular government without popular information or the means of acquiring it is but a prologue to a farce, or tragedy, or perhaps both.,** 228 Pearlstine quoted from two U.S. Supreme Court cases to the effect that **the press "was designed to serve as a powerful antidote to any abuses of power by governmental officials** '229 **and "has been a mighty catalyst in awakening public interest in government affairs [and] exposing corruption among public officers and employees** ....230

Former Solicitor General Olson testified in 2006 about the watchdog function of the media:

**One of the most vital functions of our free and independent press is to function as a watchdog on behalf of the people--working to uncover stories that would otherwise go untold. Journalists in pursuit of such stories often must obtain information from individuals who, for fear of retribution or retaliation, are unwilling to be publicly identified**.231

Rep. Greg Walden (R-Or.), who graduated from journalism school and owns radio stations, said during the 2007 House debate: "**A vote for the Free Flow of Information Act is a vote to protect citizens and taxpayers from an ominous and oppressive government that seeks to silence its critics. And in America, such government power would threaten our freedom and our informed democracy**., 232

#### Subpoenas reduce media to another arm of government

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

**Media representatives, in addition to expressing concern about preserving their watchdog powers, expressed concern that by forcing the media to testify, the government was making the media an arm of law enforcement.**238 Media representatives insisted that they are not an arm of law enforcement and being perceived as such would hamper their newsgathering efforts. For example, Gordon of the Philadelphia Inquirer testified:

**Newspapers are not another arm of the government. When the government subpoenas the work of reporters and uses that work or testimony to convict someone, it undermines the public's view of newspapers as neutral observers of events. The primary job of a free press is to serve as a check on the abuses of government. Not to help convict or indict**.239

Westin, president of ABC News, agreed:

**In our system of government, the press is-and must be perceived to be-entirely independent of the government. If those with whom we deal were to conclude that we were, in effect, acting as potential fact-finders for the government, they would be far less willing to tell us what they know. Indeed, when it comes to our working overseas, such a perception could literally endanger the lives and well-being of our reporters.** 40

Safire said the media were "not the fingers at the end of the long arm of the law" and argued that **the government has "huge, powerful methods of gaining evidence" about crime-without relying on the media.**241 He observed that the government can "put people under oath and threaten to jail them if they don't tell the truth, it can subpoena e-mails. It can wiretap. It can offer immunity that overcomes the Fifth Amendment., 242

#### Lack of uniformity among state shield laws hurts the media’s checking function in our democracy – creates uncertainty about when reporters will be summoned and a chilling effect

Packer 09 summarizes, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

**Sen. Specter** and others, on the other hand, **offered the current disarray of reporter's privilege law as evidence of the need for a shield law**. Specter said, "**Rather than a clear, uniform standard for deciding claims of journalist privilege, the Federal courts currently observe a 'crazy quilt' of different judicial standards.** 262 **Pointing to the variations in reporter's privilege law among the federal circuits and among the states, he concluded:** "**There is little wonder that there is a growing consensus concerning the need for a uniform journalists' privilege in Federal courts. The system must be simplified**. 263 Former Solicitor General Olson argued that **a federal shield was needed to eliminate the inconsistencies in the "hodgepodge" of federal reporter's privilege law that hampered the press in its performance of its watchdog function.** 264 He said, "**Reporters cannot foresee where and when they may be summoned into court for questions regarding a particular story, and their editors, publishers, and lawyers are similarly hamstrung by the confusion and can provide little help**. 265

Sen. Dodd said **journalists were in jail because "they have committed the 'offense' of being journalists" and "[t]he chilling effect is obvious.**, 266

**We can only speculate as to how many editors and publishers put the brakes on a story for fear that it could land one of their reporters in a spider web spun by the Federal prosecutors that could include prison. If citizens with knowledge of wrongdoing could not or would not come forward to share what they know in confidence with members of the press, serious journalism would cease to exist,** in my view. **Serious wrongs would remain unexposed. The scandals known as Watergate, the Enron failure, the Abu Ghraib prison photos-none of these would have been known to the public but for good journalists doing their work.**2 67

Dodd also said that **when journalists and ordinary citizens fear prosecution for exposing wrongdoing, it is "more difficult to hold accountable those in power**., 268

Of course, many members of Congress and witnesses specifically noted the numbers of journalists in jail or threatened with jail. First Amendment attorney Abrams testified in the summer of 2005 that 70 journalists had battled federal prosecutors in the previous year and a half.269 "Some are or were virtually at the entrance to jail, and Judith Miller, not far from here, sits in a cell one floor removed from that of Zacarias Moussaoui. It is time to adopt a federal shield law." 270

Time magazine reporter Matthew Cooper, who was subpoenaed by a special prosecutor in 2005,271 testified that the 'Justice Department guidelines worked for many years because there was "a civil peace between prosecutors, who have avoided subpoenaing journalists, and the two camps have generally stayed out of each other's way., 272 Recently, however, "we have seen a run of federal subpoenas of journalists ... ," Cooper said.273 He called for a Congress to provide "a clear set of rules. 274

**Several people testified that the uncertainty in federal reporter's privilege law was having a chilling effect on journalists**. Attorney Levine, for example, said that in the wake of recent court decisions ordering reporters to reveal their sources, **the Cleveland Plain Dealer cancelled publication of two investigative reports based on information from confidential sources**.275 Levine said the Plain Dealer's editor told him that publishing **the stories would have led to a leak investigation "'and the ultimate choice, talk or go to jail, [and] because talking isn't an option, and jail is too high a price to pay, these two stories will go untold for now.**"'' 276

#### Shield laws can be assessed under a Madisonian view of democratic checks and balances

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

Most of what is known about the Framers' thinking as they drew the first, broad outlines of the nation's social architecture comes from The Federalist Papers. A series of articles published in 1787 and 1788 that advocate the ratification of the U.S. Constitution, **The Federalist Papers discuss the philosophical underpinnings of the new federal government. James Madison wrote at length in The Federalist about the distribution of power among the branches of the federal government,**25 **a subject that is both the foundation of our social architecture and the root of the debate over the federal shield law. Madison warned: "The accumulation of all powers legislative, executive and judiciary in the same hands... may justly be pronounced the very definition of tyranny.,** 26 He wrote, "**It is of great importance in a republic . . . to guard the society against the oppression of its rulers** ... ,27 Madison did not, however, define the concept of separation of powers or clarify what he meant by "executive," "legislative," or "judicial" powers.2 8 Law Professor Keith Werhan attributed those lapses to Madison's belief that nobody could clearly define the powers of the branches 29 and that the Framers did not design a government in which the branches were completely separate. 30 **It is clear, however, that Madison envisioned a complicated government in which powers were divided in ways that ultimately preserved the power of citizens by ensuring that no one branch would be sufficiently powerful to oppress them**.31

#### Lockean democracy means citizens are self-governing and need as much knowledge about government as possible

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

**The Framers were heavily influenced by the writings of John Locke**, a seventeenth century Enlightenment philosopher.32 In his book Second Treatise of Government, **Locke proposed a government based on the consent of the governed.**33 Locke said citizens would enter into **a social contract to create a government that would allow them to live safe, enjoyable lives and to protect their property**.34 **The basic terms of the contract were that the government would act with the consent of the majority, and, if the government failed to act with the consent of the majority, citizens were not obligated to obey**.35 In other words, **Locke proposed a social architecture in which power ultimately belonged to citizens, not those who governed them**. Although Locke did not explicitly say so, **historians expect that Locke would have believed that the government should be judged by citizens through the free exchange of ideas**,36 **including the exchange of ideas in the free press**. 37 **Locke would have believed citizens needed as much knowledge about government as possible.**38

### Credibility

#### Media is scrutinized heavily by the public

Martin et al 11, Jason Martin – PhD candidate, Mark Caramanica – PhD candidate, Anthony Fargo – prof of Journalism @ Indiana, “Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online,” 16 Comm. L. & Pol'y 89 (2011), lexis. [Premier]

The ultimate answer may depend in part on the nature of the comment. **In the past, a news organization would produce a story, sometimes with the help of confidential sources. After the story was published or broadcast, the newsgathering process was essentially over.** Audiences either consumed the story or did not. Options to interact with the news were limited, usually to letters to the editor or perhaps phone calls to the news organization, both of which the news organization could ignore. However, if the caller or letter writer pointed out errors or omissions in the story or provided additional information the journalist had not uncovered, that person could become a source for follow-up stories. **Now, with stories published on Web sites, audiences can add their own comments, including corrections to the reporter's story or additional information that enhances the story. But many comments are opinions, sometimes harsh and profane, about the subjects of stories, the writers, or the publication. In other words, some commenters serve a reporter-like or source-like function in adding relevant material to the story**. Others play a role more like audiences have for centuries, including being critical of what they read or hear. **Sometimes, their comments target journalists to hold them accountable to the public interest. The difference is that now audiences have a widely distributed public forum in which to act as "watchdogs on the watchdogs."** Journalists have for many years referred to themselves as "watchdogs" over powerful public and private interests in order to call the public's attention to abuses [\*118] of power. Journalists and scholars have argued since at least the nineteenth century that this watchdog role of the press justifies legal protection for the news media's activities, including extraordinary protection not available to the general public. But **as media corporations have grown larger and more powerful, some commentators and critics, including** at least one on the Supreme Court, **have argued that the media have become indistinguishable from other corporations and also need to be watched. The comment forums that media organizations provide on their Web sites help serve this function.** Whether that function is a "practice of journalism" is a complicated question, but **criticism of the media has a long pedigree, with the modern innovation being that the commentary is now more widely available to more people than ever.**

#### Use of anonymous elite sources improves news outlet credibility.

Carlson 10. Carlson, Matt. “WHITHER ANONYMITY? Journalism and unnamed sources in a changing media environment,” Journalists, Sources, and Credibility: New Perspectives, Chapter 2, December 2010. [Premier]

Access to elite sources has become a hallmark of being an elite news outlet, and anonymity displays a connectedness to influential sources that props up the authority and standing of the outlet without necessitating the identification of the source. A quote from a “senior White House official” denotes access to such authorities, but it also connotes the authority of the outlet itself. Individually, reporters compete within a newsroom through demonstrating their connection to sources while, organizationally, the outlet also flaunts its comparative access. Simultaneously, unnamed sources benefit from circulating messages in highly visible ways without being personally linked to them. All of this raises questions regarding the much more cloudy benefit to the public—if a benefit is to be had at all.

#### Reporters need confidential sources to maintain credibility and uncover the truth

**English 14:** English, Kathy. “Why Journalists Need Confidential Sources”. The Star. July 18th, 2014.

<https://www.thestar.com/opinion/public_editor/2014/07/18/why_journalists_need_confidential_sources_public_editor.html>. [Premier]

The [Star’s journalistic standards](https://www.thestar.com/opinion/public_editor/2011/12/07/toronto_star_newsroom_policy_and_journalistic_standards_guide.html) guide discourages anonymity in the news, stating that, “the public interest is best served when news sources are identified by their full names.” Knowing this, and understanding the importance of our journalistic credibility, why then does the Star ever allow the use of confidential sources in its reporting? Simply put: reporters need confidential sources to serve readers.. Many significant stories in the public interest could not be told if we could not report information from confidential sources. Indeed, confidential sources are “a lifeline to the truth,” reporter Bob Woodward, one-half of the reporting duo whose investigation into the Watergate scandal brought about president Richard Nixon’s 1974 resignation, told PBS’s Frontline in a 2007 [report on “why reporters need confidential sources.”](http://www.pbs.org/wgbh/pages/frontline/newswar/tags/confidentialsources.html).” Woodward’s partner, Carl Bernstein, expressed a similar view: “I know of very little important reporting of the last 30 to 40 years that has been done without use of confidential sources.” We’re not talking about anonymous sources here. As Kevin Donovan, the Star’s investigative reporter and editor, made clear to me, “anonymous” does not accurately describe sources who won’t talk to reporters without assurances their name will remain confidential. “Confidential sources is the correct term,” said Donovan who has led the [Rob Ford](https://www.thestar.com/news/gta/2014/06/11/toronto_star_wins_2013_michener_award_for_its_coverage_of_mayor_rob_ford.html)Star’s award-winning investigation into Mayor [Rob Ford](https://www.thestar.com/content/thestar/news/politics/policard.html#councillor/robford). “I always know who these sources are.” So why does the Star use information from confidential sources? “To get the story,” Donovan said. “In an ideal world people would provide information with their name attached. We do not live in that world. We try to get people on the record but on the most sensitive stories it is very difficult.” Indeed, sources with confidential information and a strong desire for the truth to be told are often fearful of being identified — as was certainly the case in much of the reporting on Ford. Donovan, who has considerable experience in breaking important investigative stories involving confidential sources, says that working with such sources — who are sometimes initially reluctant to talk — involves building a relationship of trust that can lead to the truth. Like many investigative reporters working today, Donovan was inspired by and learned much from the reporting of Woodward and Bernstein who relied much on confidential sources to uncover the Watergate scandal. “During the sometimes vicious assault by Ford nation and talk radio, I often tried to remind people to go back to Watergate and how that story was done. Read the book, watch the movie, I said. You will see that the reporters convinced people involved to tell them the truth. And almost every person who contributed to that investigation was a confidential source. Not anonymous, confidential.” I, too, urge you to read the book for better understanding of why confidential sources matter to journalists and democracy. A new edition of [,](http://www.amazon.com/All-Presidents-Men-Bob-Woodward/dp/1476770514)All the President’s Men, Woodward and Bernstein’s account of Watergate, subtitled “The greatest reporting story of all time,” was recently issued to mark the 40th anniversary of its first publication. On rereading this classic, I was reminded of both the critical importance of confidential sources to breaking important stories that hold the powerful to account and the responsibility of journalists to take great care in publishing information from sources who cannot be named. This is a core credibility issue and reporters’ reputations are always on the line. Without a source’s name to judge information, readers will gauge credibility based on the reporter’s name and track record and the overall trust they place in the news organization’s policies and practices. The Star’s policy demands considerable care. All information from confidential sources must be carefully evaluated before it can be published. Reporters must satisfy their editors that any information from confidential sources is credible and provide “a compelling argument” for why a source is entitled to anonymity. “Our readers need to know that all of the confidential information we report has been vetted by people at the Star,” Donovan said. Indeed, credibility depends much on this understanding of trust.

### IPV & Sexual Assault

#### Empirics at colleges prove - mandatory reporting and violating the reporters right to confidentiality for intimate partner violence disclosure empirically leads to a chilling effect of less survivors coming forward about their experiences and violates their trust.

Moody-Adams 15 [The Chronicle of Higher Education, March 11, 2015 by [Michele Moody-Adams](https://www.chronicle.com/blogs/conversation/author/mmadams/) <https://www.chronicle.com/blogs/conversation/2015/03/11/the-chilling-effect-of-mandatory-reporting-of-sexual-assault/> Michele Moody-Adams is an African-American philosopher and academic administrator. Between July 1, 2009, and September 2011 she served as Dean of Columbia College and Vice President for Undergraduate Education at Columbia University] // [Premier]

Imagine that you are a college freshman who has summoned the courage to seek advice from a trusted professor. But when you review the course syllabus you find a warning, in bold type, that your professor is required to report the content of any conversation that might indicate the occurrence of sexual violence, or any kind of gender discrimination, on campus. This is precisely what could happen at a growing number of college campuses. Moreover, in most cases, the institution reserves the right to conduct an investigation into what the faculty member discloses, even if the student objects. Faculty members have rightly [expressed](https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual) concern that universal mandated-reporter policies are “basically one-sided,” serving institutional needs but not addressing the needs of students. Have administrators who support such policies ever stopped to consider how students think**? It is precisely the most vulnerable students, those who most need a protected space in which they can share a troubling experience, who will be least likely to tell their stories if they cannot expect their communications to be kept confidential.** Colleges must try to keep students safe. At the same time, they must acknowledge their students’ legal rights, including due-process rights affirmed by state and federal courts. They must also accept their students’ needs to make choices that promote intellectual and personal maturity, even if some of those choices involve taking risks. Finding the right balance among these values has always been challenging, especially in responding to student misconduct. But institutions abrogate their responsibility to genuinely address the challenges when they adopt policies that place institutional anxiety about public censure above concern for their students’ well-being. Consider what it means for an institution to designate all of its faculty members as “mandatory reporters of sexual assault.” The policy effectively demands that every faculty member disclose the details of any student account of a sexual assault, whether it has been expressed in a course assignment, a classroom discussion, or a private conversation. Faculty will be required to make the disclosure to campus officials, even if the student has expressly indicated a desire not to file an official complaint. These requirements will have a chilling effect on students’ willingness to talk about difficult experiences with anyone on campus, even those experiences that may have nothing to do with sexual violence. Federal and state laws require colleges to report statistics about crimes that occur on or near their campuses. They also require them to identify employees (sometimes even specially trained faculty members) to serve as “campus security authorities” who collect information about crimes and disseminate it to campus reporting offices. But the statutes relevant to reporting sexual assault — most notably, the Campus Security Act, known as the [Clery Act,](http://chronicle.com/article/25-Years-Later-Has-Clery/228305/) in memory of a young woman murdered in a college residence — have long been interpreted as allowing post-secondary institutions to exclude most faculty members from any mandatory reporting requirement. The institutions that have now decided to reject this interpretation are giving their faculty a license to violate student privacy, to undermine the confidentiality of a relationship that depends upon mutual trust, and to override the wishes of students who may not be prepared to tell their stories to campus officials. The Association of Title IX Administrators, Atixa, [defends such policies](https://www.atixa.org/wordpress/wp-content/uploads/2013/08/Mandatory-Reporters-Policy-Template.pdf) as a way of avoiding “confusion” about who has reporting responsibilities, and thereby strengthening an institution’s ability to meet its reporting obligations. But the primary goal of sexual-assault policies should be to ensure student well-being, not to protect the institution against public censure. Atixa, and the colleges who have adopted their recommendation on mandatory reporting, have simply got things the wrong way around. Of course, in an elementary- or secondary-school setting, one of the most important means of promoting student welfare is to require schoolteachers to report any possibility of child abuse. Indeed, schoolteachers must regularly place concern for a child’s vulnerability above concern for the child’s autonomy. But when teaching or advising college students, an instructor must often put autonomy first: encouraging the young adults with whom they interact to find their own voices and, in particular, to learn how to stand up for themselves when they have been wronged. As the American Association of University Professors [has urged,](http://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures) faculty members can best support a victim of sexual violence by explaining procedures for dealing with their concerns and offering assistance in “navigating the campus bureaucracy.” To override a college student’s wishes in the matter of reporting suspected sexual violence is especially problematic, since sexual violence can be a particularly insidious kind of coercion, undermining a victim’s sense of control over the most personal details of human experience. Colleges should not be in the business of further wresting a student’s control over those details. Moreover, since most victims of sexual violence are women we must reject any policy that makes us complicit in cultural institutions and practices that tend to discourage young women from speaking in their own voices. Students, families, and lawmakers rightly challenge our nation’s colleges and universities to strike a better balance than we have so far managed among the disparate values that colleges should promote. But the solution to the problem is not to adopt policies that consistently elevate one of those values over the others, even if the value being elevated is public accountability. **We must reject any demand to place institutional compliance with reporting requirements above concern for the welfare of students.**

#### Current Title IX Laws require reporters to reveal the identity of students who speak out about sexual assault in confidence - these reports cause psychological harm and a chilling effect against future reporting

**Canon 15** [Scott, 9-27-15, When the rules keep victims of sexual assault from speaking up, Kansas City Star, http://www.chicagotribune.com/news/nationworld/sns-tns-bc-cmp-sexassault-rules-20150927-story.html] [Premier]

**When the rules keep victims of sexual assault from speaking up** Scott CanonThe Kansas City Star KANSAS CITY, Mo. Michael Williams wants his young college students to feel they can come to him for help. He's eager to guide them while working on an assignment or offer a sympathetic ear when things go sour in their personal lives. But if they confide something to the University of Kansas journalism professor about sexual harassment or worse? "I have said to the student, 'I'm really sorry this happened, but if you tell me more details, I have to report this' to others on campus, said Williams, president of KU's University Senate. "Sometimes, the student goes ahead and tells you everything anyway. They're seeking an adult they can trust. ... "But I've had students say, 'I don't want anyone else to know.' They don't tell you anything more. That's when the situation gets a little gray." And, say faculty at a number of colleges, a student who can't tell a professor something in confidence might not tell anybody. Those same professors embrace the need to track sexual harassment and assaults, to better root out campus rapists and to get a student help in a time of crisis. Yet some say a student looking for a familiar person to confide in might clam up if that means hearing from some other college official no matter how kind that third party might be. "I want to help that student," Williams said. "But if the first thing out of their mouth is 'I don't really want to report this,' what do you do?" The federal government continues to pressure college campuses to make sure that women, in particular, can pursue their studies safe from sexual harassment and assault. That's long been enshrined in Title IX of the Education Amendments of 1972 prohibiting sex discrimination on campus. Title IX may be best known for how it remade college sports by demanding that women get the same chance at athletic scholarships as men. But increasingly it's also grown as a tool to fight campus rape. Washington puts ever more exacting demands on schools to better document all manner of assault and harassment. New federal requirements kicked in over the summer that demand schools beef up both training for students and efforts to report potential Title IX violations. That followed a stern reminder issued by the U.S. Department of Education's civil rights office in 2011 widely interpreted on campuses to mean that with a few deliberate exceptions virtually anyone working for a university must alert administrators about suspected cases. That's why Williams feels obligated to warn students that telling him about a date that turned violent or a relationship that's become abusive means he must tell others. Angela Speck, who teaches astrophysics at the University of Missouri, is an outspoken advocate for logging assault cases. Such reporting, after all, can reveal where and how problems happen. And she speaks enthusiastically about various caring and competent professionals on campus ready to help someone who's been attacked. Still, she said, few students already know those professionals. "That's great if you know about it, if you feel comfortable dealing with absolute strangers," Speck said. Maybe, she said, at least one professor in a department should be left off the hook on reporting so students can confide in a familiar face. "Otherwise," she said, "how can you have a conversation in confidence if you know that you're talking to a mandatory reporter?" Research shows that college students might actually come under sexual attack slightly less than their peers who aren't in school, but their age group stands particularly vulnerable to such assaults. Campuses can be boozy places populated by people new to a certain freedom that puts them at added risk. Although a Rolling Stone article about a supposed gang rape at the University of Virginia was ultimately discredited, it touched a nerve with its criticisms of how universities sometimes flub reports of assault. The University of Missouri came under fire in the wake of Sasha Menu Courey's suicide in 2011. She wrote in a journal, found after her death, that she was raped. When the university found her rape allegations in emails after her death, an independent law firm concluded last year, MU should have launched an investigation. Meantime, U.S. Sen. Claire McCaskill has been pursuing legislation to toughen campus standards for assault prevention training, counseling efforts and clearer adjudication measures. Last year, her office released a survey that concluded many schools fall short in how they investigate and resolve such claims. This year, stories about legislators hitting on college interns working at the Missouri Capitol led to the resignation of the speaker of the House and a Kansas City area senator. That, in turn, sparked some alarms at colleges with students interning in Jefferson City. "Since those stories in Jeff City broke, we added some more Title IX training," said Bill Horner, an MU political science professor who conducts independent study courses with legislative interns in the state capital and Washington, D.C. Those various developments further propelled efforts on campuses to live up to Title IX requirements. Failing to do so would put federal funding, critical to any college, at risk. The National Institute of Justice found about 3 percent of women told surveyors they'd been subject to anything from rape to some form of unwanted touching in the last year. Research suggests the danger is greater for women this time of year, particularly if it's their first semester on campus. So all freshmen and incoming students at the MU system's four campuses this year must complete "Not Anymore" training. It reminds guys that a drunk woman is in no position to consent to sex, coaches bystanders how to step in to stop a dodgy situation, and pitches all range of campus services to those who come under assault. Online software training given to all new students mixes videos and quizzes that can take an hour or more to complete. Those who don't finish the training can't register for classes next semester. The videos use how-to skits paired with often emotional testimonials from people who were raped. "Consent must be the presence of yes ... enthusiastic consent. If someone isn't actively participating, they're not consenting," say the actors. "And remember, consent cannot be given by a person who is underage, drunk, drugged or mentally impaired." The software can run the college $5,000 to $10,000 a year, depending on the number of students and how much a campus wants to customize off-the-shelf material. With growing pressure to live up to Title IX rules, sales are booming. "We certainly increased the number of campuses we're working for," said Brian Cooley, the chief marketing officer of EverFi, which counts Emporia State University, Missouri State University, Central Missouri University and a handful of others in the region among 800 schools on its client list. Some students grouse about the training as yet another bureaucratic chore, Title IX officers at Missouri and Kansas schools say. A handful, said Mikah Thompson of the University of Missouri-Kansas City, worry that watching the videos will make them revisit a trauma. Typically an email to her office will get them an exemption. "But we get a lot of feedback from people who say they're glad somebody's talking about this," she said. Campus Title IX officers talk passionately about requiring professors to pass on tips about possible cases of harassment or assault. For starters, they read the federal Clery Act, which requires campuses to openly document crime, to include faculty among those with "significant responsibility" for students to be among mandatory reporters. More practically, they argue that without professors in the mix, much might go unnoticed. They also argue that professors become less anxious about their role when they understand that making a call to a Title IX office doesn't necessarily trigger a large-scale investigation. "There may be misconceptions with faculty about what it means," said Ellen Eardley, the Title IX administrator at MU. She was hired after MU elevated the job to a full-time position following the Menu Courey case. "They're connecting students with a central resource that can explain their options and what's available." A report from a professor typically means the student will get a phone call, said Sally Herleth, the executive director of human resources at Truman State University. "We're just letting them know what we can do for them," she said, "and what their options are." Most cases come directly from students, Herleth said. But she's fielded three reports from faculty so far this fall, including a student who spoke to one faculty member about an unwelcome hug from another instructor. The key to tracking problems, said Missouri State Title IX coordinator Jill Patterson, "is that students feel comfortable" getting help. Title IX coordinators, said Kansas State University math professor Andrew Bennett, "are better at this job than I am." "But sometimes a student says, 'I'm comfortable with this person,'" said Bennett, the president-elect of the K-State Faculty Senate. "'Maybe I want to talk privately about it with my teacher. But if I speak to the teacher about this, suddenly it's going to get out of my control.' ... We'd like it to be an option. We don't want to put up walls between us and the students." Or, as former Faculty Senate president Dave Rintoul said, "Those are serious decisions. I don't want to make those (reporting) decision for those kids."

#### Forcing the mandatory investigation of informal reports hurts students who come forward

**Moody-Adams 15**[Michele Moody-Adams is a professor of political philosophy and legal theory at Columbia University, and a former dean of Columbia College, 3-11-15, The Chilling Effect of Mandatory Reporting of Sexual Assault, The Chronicle] [Premier]

Faculty members have rightly expressed concern that universal **mandated-reporter policies** are “basically **one-sided**,” serving **institutional needs** but **not addressing the needs of students**. Have administrators who support such policies ever stopped to consider how students think? It is **precisely the most vulnerable students**, those who **most need a protected space** in which they can share a troubling experience, who will be **least likely** to tell their stories if they cannot expect their communications to be kept confidential. Colleges must try to keep students safe. At the same time, they must acknowledge their students’ legal rights, including due-process rights affirmed by state and federal courts. They must also accept their students’ needs to make choices that promote intellectual and personal maturity, even if some of those choices involve taking risks. Finding the right balance among these values has always been challenging, especially in responding to student misconduct. But institutions **abrogate** their responsibility to **genuinely address** the challenges when they adopt policies that place **institutional anxiety** about public censure **above concern for their students’ well-being**. Consider what it means for an institution to designate all of its faculty members as “mandatory reporters of sexual assault.” The policy effectively demands that every faculty member disclose the details of **any student account** of a sexual assault, whether it has been expressed in a **course assignment**, a **classroom discussion**, or a **private conversation**. Faculty will be required to make the disclosure to campus officials, **even if the student has expressly indicated a desire not to file an official complaint**. These requirements will have a chilling effect on students’ willingness to talk about difficult experiences with anyone on campus, even those experiences that may have nothing to do with sexual violence. Federal and state laws require colleges to report statistics about crimes that occur on or near their campuses. They also require them to identify employees (sometimes even specially trained faculty members) to serve as “campus security authorities” who collect information about crimes and disseminate it to campus reporting offices. But the statutes relevant to reporting sexual assault — most notably, the Campus Security Act, known as the Clery Act, in memory of a young woman murdered in a college residence — have long been interpreted as allowing post-secondary institutions to exclude most faculty members from any mandatory reporting requirement. The institutions that have now decided to reject this interpretation are giving their faculty a license to violate student privacy, to **undermine the confidentiality of a relationship** that depends upon mutual trust, and to **override the wishes of students** who may not be prepared to tell their stories to campus officials. The Association of Title IX Administrators, Atixa, defends such policies as a way of avoiding “confusion” about who has reporting responsibilities, and thereby strengthening an institution’s ability to meet its reporting obligations. But the primary goal of sexual-assault policies **should be to ensure student well-being**, **not to protect the institution against public censure**. Atixa, and the colleges who have adopted their recommendation on mandatory reporting, have simply got things the wrong way around.

### LGBTQ

#### Confidentiality is a necessary concern for reporters analyzing LGBT communities to inhibit further discrimination and give proper advocacy to those marginalized groups.

Baker, Durso and Ridings 16 [How to Collect Data About LGBT Communities By Kellan Baker, [Laura E. Durso](https://www.americanprogress.org/about/staff/durso-laura/bio/), and Aaron Ridings Posted on March 15, 2016, 9:01 am <https://www.americanprogress.org/issues/lgbt/reports/2016/03/15/133223/how-to-collect-data-about-lgbt-communities/>] // [Premier]

Collecting data related to the experiences of specific populations within LGBT communities—including LGBT people of color, older adults, youth, people receiving social welfare support services, people whose primary language is not English, and people interacting with the criminal justice system—may involve particular considerations related to issues such as terminology and confidentiality protections. For example, service providers collecting data from the individuals whom they serve should adopt and post clear nondiscrimination and confidentiality policies that indicate what protections are in place and how any data collected will be used and kept confidential. **Assurances of nondiscrimination and confidentiality are critical in these settings because LGBT individuals may have well-founded concerns that sharing SOGI information will expose them to discrimination, including denials of access to benefits and services.** In all cases where SOGI data are collected in program application or administration, data collection should be paired with technical assistance to help program administrators understand and use the data. In services for homeless youth, for instance, it is not sufficient to simply collect SOGI data: Program administrators must be able to understand how to use these data to inform their efforts to appropriately house and serve LGBT, queer, questioning, and gender-nonconforming youth. For communities with significant numbers of people whose primary language is not English—which advocacy organizations generally define as a community where more than 5 percent of individuals have a primary language other than English—the response options for SOGI questions should be translated into relevant local languages. Similarly, data collection efforts in communities that commonly use terminology that differs from LGBT, such as “two-spirit” in many Native American communities and “same-gender-loving” in some African American communities, should employ these specific terms. When feasible, SOGI data collection efforts should also include open field, or write-in, response options to allow individuals to describe themselves in their own words.

### Minority Civil Rights

#### The aff protects anonymous-speech analysis, key to allowing marginalized or oppressed groups to speak out against their oppressors. Negating eradicates this foundational civil rights framework

Anderson Jones 13 [RonNell Andersen Jones Associate Professor of Law, J. Reuben Clark Law School, Michigan Law Review Volume 111 | Issue 7 2013 Rethinking Reporter 's Privilege , Brigham Young Universit https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1049&context=mlr , Pg. 1249-1250]// [Premier]

A generation ago, the Supreme Court in Talley v. California made explicit something that had long been presumed about our First Amendment jurisprudence: in addition to having a freedom to speak, we also have a freedom not to disclose our identity when we do so.'80 The Talley Court noted that "[t]he obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government."'' **It emphasized that the right to speak anonymously was a vital component of our democracy because "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."''** 82 In subsequent opinions, Supreme Court justices have stressed both that the Framers considered a right to speak without identifying oneself to be foundational 183 and that it continues to be a fundamental right housed within the First Amendment's Speech Clause. 184 The constitutional protection of anonymous speakers should be the primary doctrinal focus in cases of anonymous speech to reporters. 185 This Part sets forth the theoretical foundation already established by the Supreme Court for protection of speakers who desire anonymity, the risks associated with acknowledging a strong right of anonymous speech, and the balance the Court has struck in favor of speakers in this area. Part III will then discuss the ways in which this anonymous-speech doctrine, which has heretofore been focused on other factual settings, could be applied in relatively seamless fashion to establish a speaker-focused protection of news sources who wish to remain confidential. Given the probability of third-party standing, this approach would retain the ability of newsgathering organizations to protect First Amendment values, as they assert the anonymous-speech rights of their sources. But it also would allow for the consideration of critically important First Amendment values beyond the newsgathering value and would largely eliminate the uncertainties and complexities that have plagued the reporter-focused post-Branzburg approach. In preparation for that discussion, this Part articulates additional underlying values that the Court itself has found are safeguarded through recognition of the anonymous-speech right. An understanding of these values-and of the central First Amendment doctrines that have animated the development of the anonymous-speech right-will demonstrate that grounding the confidential-source inquiry in the more stable anonymousspeech doctrine (1) would better align the constitutional analysis to the fuller Speech Clause issues at stake in the confidential-source situation, and (2) would invite courts to apply a clearer constitutional framework with which they already have expertise.

### Discourse

#### Not having journalist-source privilege chills communication and dialogue

Stone 05 Geoffrey R. An American law professor and noted First Amendment scholar. He is currently the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago Law School. WHY WE NEED A FEDERAL REPORTER’S PRIVILEGE. <https://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v34n01_bb4_ideas-essays_stone_final.pdf> [Premier]

The logic of the journalist-source privilege is similar to that described above. Public policy certainly supports the idea that individuals who possess information of significant value to the public should ordinarily be encouraged to convey that information to the public. We acknowledge and act upon this policy in many ways, including, for example, by providing copyright protection.11 Sometimes, though, individuals who possess such information are reluctant to have it known that they are the source. They may fear retaliation, gaining a reputation as a “snitch,” losing their privacy, or simply getting “involved.” A congressional staffer, for example, may have reason to believe that a Senator has taken a bribe. She may want someone to investigate, but may not want to get personally involved. Or, an employee of a corporation may know that his employer is manufacturing an unsafe product, but may not want coworkers to know he was the source of the leak. In such circumstances, individuals may refuse to disclose the information unless they have some way to protect their confidentiality. In our society, often the best way to reveal such information is through the press. But without a journalist-source privilege, such sources may decide silence is the better part of wisdom. A journalist-source privilege thus makes sense for the same reason as the attorney-client privilege, the doctor-patient privilege, and the psychotherapist-patient privilege. It is in society’s interest to encourage the communication, and without a privilege the communication will often be chilled. Moreover, in many instances the privilege will impose no cost on the legal system, because without the privilege the source may never disclose the information at all. Consider the congressional staffer example. Without a privilege, the staffer may never report the bribe and the crime will remain undetected. With the privilege, the source will speak with the journalist, who may publish the story, leading to an investigation that may uncover the bribe. In this situation, law enforcement is actually better with the privilege than without it, and this puts to one side the benefit to society of learning of the alleged bribe independent of any criminal investigation.

### Soft Power

#### Failure to protect journalists at the federal level embarrasses the US, decks the government’s credibility

Murillo’17 |Helen Klein Murillo is a student at Harvard Law School, where she is an editor of the Harvard Law Review. “Trump is Going After Legal Protections for Journalists”, Foreign Policy, August 10, 2017. [file:///Users/Kumail/Desktop/Trump%20Is%20Going%20After%20Legal%20Protections%20for%20Journalists%20%E2%80%93%20Foreign%20Policy.htm|](file:///C%3A%5CUsers%5CKumail%5CDesktop%5CTrump%20Is%20Going%20After%20Legal%20Protections%20for%20Journalists%20%C3%A2%C2%80%C2%93%20Foreign%20Policy.htm%7C) [Premier]

While the Constitution limits government intrusion on the freedom of speech and of the press, the law does not offer absolute protection for journalists against revealing their sources. Congress has not enacted robust protections and the Supreme Court has not interpreted the First Amendment as itself embodying such a privilege — nothing approximating a broad “press privilege” relieving reporters from revealing sources.

Such a privilege is protected at the state level in nearly all states. New York’s statutory press privilege, for instance, [broadly protects](https://www.rcfp.org/new-york-privilege-compendium/shield-law-statute) professional journalists against contempt charges “for refusing or failing to disclose news obtained or received in confidence or the identity of the source of such news coming into such person’s possession in the course of gathering or obtaining news for publication.”

But no such privilege has been recognized uniformly at the federal level. In 1972, the Supreme Court rejected a broad First Amendment press privilege in [Branzburg v. Hayes](https://www.law.cornell.edu/supremecourt/text/408/665). Justice Lewis Powell joined the five-justice majority to reject an unqualified press privilege against revealing confidential sources, but wrote a puzzling separate concurrence suggesting some limited privilege subject to a balancing against the government’s interest in a particular case. The state of the law remains uncertain but what we do know is that there is currently no broad, unqualified First Amendment privilege against revealing confidential news sources. (Importantly here, the U.S. Courts of Appeals for the District of Columbia has [agreed](https://www.justice.gov/archive/osc/documents/2006_02_03_opinion.pdf) that even if there is a First Amendment press privilege to not reveal sources, the privilege is not absolute.)

Instead, since 1970, the executive branch has voluntarily restrained itself by limiting the situations in which it will subpoena reporters in investigating leaks. Those self-restraints are codified in federal regulation. Those regulations explicitly recognize the need to “strike the proper balance among several vital interests: Protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society.”

In striking that balance, the Justice Department explains that subpoenas directed to the news media are “extraordinary measures, not standard investigatory practices.” As such, press subpoenas are to be approved by the attorney general (or other high-ranking DOJ officials in certain limited cases) and are to be issued only where the information is “essential” and only “after all reasonable alternative attempts have been made to obtain the information from alternative sources.”

A system of mutual restraint thus governs in the face of indeterminate legal boundaries. Reporters don’t want to go to jail and the government doesn’t want to provoke a sweeping Supreme Court ruling or congressional enactment of an absolute press privilege. So reporters notify the government of stories to be published and often respect government requests to hold stories for some period of time for national security reasons. The government reserves the right to subpoena in extraordinary cases, but agrees to correspondingly extraordinary procedures.

But critical to making this delicate system work is that the government maintains credibility — that the public believes the government pursues leak investigations, particularly those investigations that directly implicate press freedoms, for legitimate national security reasons, not simply because the leak is embarrassing. When the president lambasts leakers for imperiling national security and threatens to subpoena the press over embarrassing leaks, but then [**retweets news stories**](http://www.cnn.com/2017/08/08/politics/trump-retweet-fox-news-north-korea-story-haley/index.html) he finds favorable even if they are based on highly sensitive classified defense information, he erodes that credibility. He erodes the government’s foothold in that delicate balance with the press.

### Climate Whistle-Blowers

#### Executive Branch leaks help fight fossil fuels

Mark Hand, climate and environment reporter at ThinkProgress, 6-7-2018, "Everybody hates Trump’s coal and nuclear bailout plan ThinkProgress, <https://thinkprogress.org/renewable-and-nuclear-companies-oppose-trump-coal-bailout-plan-3bd1aa4fb3cf///> [Premier]

President Donald Trump’s fixation on bailing out the coal and nuclear power industries has proved confounding to renewable energy advocates and climate activists. But other sectors of the energy industry, including one that Trump purportedly wants to help, are also questioning the need for the radical intervention in energy markets proposed last week. The White House issued a statement last Friday that said Trump has directed Energy Secretary Rick Perry to “prepare immediate steps to stop the loss” of what the administration described as “fuel-secure power facilities,” a thinly veiled reference to coal and nuclear power plants. Also last Friday, Bloomberg News released a **leaked draft proposal from the Energy Department** that cited national security concerns as a reason for allowing Trump to require regional grid operators or electric utilities to purchase enough power from coal and nuclear plants to prevent them from closing. But most of the energy industry concedes there’s no emergency that requires the federal government to intervene on behalf of coal and nuclear power. Speaking earlier this week at an industry conference, Chris Crane, the CEO of Exelon Corp, the nation’s largest owner of nuclear plants, said the retirement of coal and nuclear plants is not a grid emergency that warrants urgent intervention from the federal government. The American Petroleum Institute (API), one of the president’s biggest industry supporters, also opposes Trump’s directive. The powerful oil and gas lobbying group has joined a diverse coalition that includes wind, solar, and energy storage trade groups to fight any proposed bailout of the coal and nuclear industries that may come from Trump’s Department of Energy. The renewable energy industry worries about the bailout plan’s potential negative impact on its finances. Investment banks and private equity firms may become skittish about investing in energy sectors that are not on the receiving end of Trump’s handouts. “It’s a very confused and conflicted and backward-leaning policy that is finding support in no quarters apart from the coal industry,” John Morton, senior fellow at the Global Energy Center at the Atlantic Council, told ThinkProgress. “It seems like a Hail Mary pass and a dangerous political gesture at best. There’s no support for it, not simply from the renewables industry but from most parts of the nuclear industry.” President Donald Trump embraces Energy Secretary Rick Perry June 29, 2017 in Washington, DC. On Friday, Trump called on Perry to bailout money-losing coal plants by raising U.S. electricity rates: CREDIT: Kevin Dietsch-Pool/Getty Images Trump plan to bail out coal industry punishes red states the most Trump plans to enrich his rich crony friends at the expense of American consumers. Morton was one of the speakers at an event on Thursday in Washington, D.C. — that offered a status update on the global move to a clean energy economy — sponsored by the Atlantic Council, the American Council on Renewable Energy (ACORE), and the Renewable Energy Policy Network for the 21st Century. Founded in 1961, the Atlantic Council is a think tank that focuses on international affairs. In his interview with ThinkProgress, Morton asked why the Trump administration would seek to interfere in an electric power marketplace that is functioning fairly efficiently. “There is only one answer,” Morton said in response to his own question. “And it’s pure politics and it’s pure politics to a relatively small base. In the long run, **it’s going to set us back in this race to a clean energy future.”** Tom Kiernan, CEO of of the American Wind Energy Association, pointed out at the event that despite claims of a pending catastrophe, the nation’s electric grid operators “are on the record saying that the orderly phaseout of some of these very expensive coal and nuclear plants does not constitute an emergency.” Kiernan emphasized that coal and nuclear plants do not necessarily improve grid resilience, even though they have onsite fuel supply. During the polar vortex of early 2014, huge amounts of coal-fired plants stopped operating due in large part to frozen equipment. Of the approximately 19,500 megawatts of capacity lost due to cold weather conditions, more than 17,700 megawatts was due to frozen equipment, according to a report on the polar vortex issued by the North American Electric Reliability Corp. There were also reports of frozen onsite supplies of coal that forced coal-fired generating facilities to shut down. In 2011, a terrible cold snap in Texas led to frozen coal supplies and prevented equipment on some coal plants from operating properly, forcing coal units to shut down. More recently, Hurricane Harvey knocked out two coal-fired power plants in Texas “because that wonderful onsite fuel was flooded,” Kiernan pointed out. Operators had to shut down a few wind farms in Texas due to tropical storm-strength winds. But other wind farms “powered right through” the storm, producing large amounts of electricity from the high wind speeds, he said. Nuclear plants also often face unscheduled outages due to equipment failures or extreme weather, calling into question whether their continued operation creates a more resilient electric grid. “The notion of promoting nuclear power on the basis of resilience is playing to its weakness,” argued Greg Wetstone, president and CEO of ACORE. “The one thing that history has demonstrated about nuclear power is that it is not resilient, and you can talk to the people at Fukushima about that.” Morton also fears the Trump administration’s pro-fossil fuel policies are skewing policymakers’ views on renewable energy. The transition to a low-carbon economy is occurring at an extraordinarily fast clip, and one that is faster than most people realize, he told the audience. View image on Twitter View image on Twitter David Livingston @DLatAC "Making policy without good data is inefficient, sub-optimal and, when comes to climate and clean energy, dangerous." Today at @AtlanticCouncil , @ACGlobalEnergy's John Morton kicks off our US launch of the @ren21 Global Renewables Status Report 2018, in partnership with @ACORE 6:22 AM - Jun 7, 2018 6 See David Livingston's other Tweets Twitter Ads info and privacy There is “a dangerous gap currently between the perception of where we are in this transition to a low-carbon economy and the reality of how quickly that transition is occurring,” he said. “If the U.S. pretends that we are playing in a world in which renewables is 2 percent of annual new energy installations and not 70 percent, which it was last year, you make a very different set of policy decisions about how to position your industry,” he said. The lack of awareness of renewable energy’s rapid growth — and a bias toward fossil fuels — is ingrained in the thinking of Trump administration officials. But Morton also cautioned that the current trajectory of the clean energy movement is still not occurring fast enough. “**We’re not on a 2-degree pathway** [set] in the Paris agreement goals,” he said. “And, of course, there are many people, myself included, that agree a 2-degree pathway is insufficient to save the world from the worst impacts of climate change.” Those who do support Trump’s directive last week have telling motivations. Murray Energy CEO Robert Murray, one of the few supporters of Trump’s bailout plan for the coal-fired generation, revealed the real reason he supports the initiative in an interview on Fox News Business on Thursday. He pointed to the fact that coal’s share of the nation’s electric generation capacity is projected to drop from its peak of 58 percent three decades ago to 27 percent by 2020. This will undoubtedly have a negative impact on Murray Energy’s domestic revenues, even though the company is one of the most financially stable coal companies in the nation. President Donald Trump holds up a "Trump Digs Coal" sign as he arrives to speak during rally in Huntington, West Virginia. CREDIT: SAUL LOEB/AFP/Getty Images Top energy regulator points to problematic wartime language in Trump’s coal bailout plan Trump uses national security as weapon to defend coal industry. On Wednesday, E&E News shed new light on the close relationship between Murray and the Trump administration. The news service reported that Murray presented Trump administration officials with half a dozen draft executive orders in 2017 aimed at exiting the Paris climate agreement and reducing coal regulations. Another one of the few supporters of Trump’s plan is FirstEnergy Solutions, the bankrupt nuclear plant-owning company that petitioned Perry earlier this year to use the emergency powers of the Federal Power Act to order regional grid operator PJM to bail out a long list of nuclear and coal power plants. At the time, NRG Energy, one of FirstEnergy’s competitors in the region, described the request as a “manufactured crisis.” A new filing in FirstEnergy Solutions’ bankruptcy case detailed how lobbyists at Akin Gump, a powerful law and lobbying firm in Washington, D.C., spent hundreds of hours in April working on a renewed campaign to secure bailouts for the utility’s coal and nuclear power plants from the Trump administration and state lawmakers in Ohio and Pennsylvania.

#### Protecting sources of information on climate is key – the status quo is a culture of fear

Shankman, quoting Clement (whistleblower), 17 Sabrina Shankman, Arctic Reporter, 7-20-2017, "Whistleblower Case Shows How Trump Tries to Silence Science," InsideClimate News, <https://insideclimatenews.org/news/20072017/whistleblower-trump-intimidation-abuse-power-climate-scientists-joel-clement-zinke> [Premier]

The report also describes the creation of hostile environments for scientific staff. "Evidence is growing that a **culture of fear** is increasing at government agencies, undermining scientific research and communication. **Scientists are speaking to the media anonymously out of fear of retaliation**; some are **afraid to utter the words 'climate change'**," the report says. The report points out that while Trump has appointed opponents of strong climate action to many key posts, the administration has left key science positions empty. "We risk reducing the role of science in policymaking by decades, just when science is more important than ever in addressing global challenges—from keeping our air and water clean and staving off global pandemics to mitigating and preparing for the effects of climate change," the authors wrote. Ignoring Climate Change Won't Make It Go Away For a while, Clement said he thought work related to adaptation and resilience might be safe from the politics—that the administration's ire might focus more on regulations related to greenhouse gas emissions. Then the president rescinded the North Bering Sea Climate Resilience Executive Order. The purpose of that order, issued by President Obama, was to increase consultation with Alaska native groups on issue that impact them, to require protections from increased shipping, and to prohibit oil, gas and mineral leasing in certain areas. "That's when it occurred to a lot of us that maybe **climate resilience and adaptation are actually in the crosshairs**," Clement said. Clement says the problems facing Alaskans are **all too real.** "**American lives are at risk.** I really worry about the coming storm system. I have for the last several years. I feel like every year we dodge a bullet," he said. Now that the administration has signaled that **these communities are not a priority**, Clement said he worries more. "Of all the climate adaptation and resilience things," he said, "this is the most pressing: The possibility that these communities could become refugees here in the U.S. It's not something I want to think about."

#### Whisteblowers are unsung heroes in the fight for renewable, sustainable energy

Basav Sen, Climate Justice Project Director @ Institute for Policy Studies, 9-5-2017, "How Energy Department Whistleblowers Outsmarted the Trump Administration," <https://ips-dc.org/how-energy-department-whistleblowers-outsmarted-the-trump-administration//> [Premier]

The Department of Energy just issued a new study on alleged threats to the reliability of the electric grid. Maybe that sounds boring and arcane to you, but the backstory is actually quite gripping. It’s a tale of high-level government corruption, an Inquisition-like atmosphere for career government scientists, and a sinister agenda that appears to be going off the rails, thanks partly to brave whistleblowers. In short, it has all the ingredients of what in normal times would’ve been a classic Washington scandal. A bit of background: In April, Energy Secretary Rick Perry ordered his staff to perform a study on how “continued regulatory burdens, as well as mandates and tax and subsidy policies, are responsible for forcing the premature retirement of baseload power plants.” The term “baseload” refers to fossil fuel and nuclear power plants that can generate power continuously, unlike intermittent renewable sources that generate power only when the sun shines or the wind blows. Cutting through the jargon, Perry ordered the study with a clear outcome in mind: to suggest that regulations on coal and government supports for clean energy were somehow destabilizing the U.S. power grid. Evidently Perry doesn’t know much about advances in energy. Technological change and market forces are making clean energy competitive with dirty fossil and nuclear energy, helped along by small tax credits (which are nonetheless dwarfed by much larger fossil fuel and nuclear subsidies). Coal-fired power generation capacity has decreased, nuclear capacity has stagnated, and even natural gas capacity has barely ticked upward — while solar and wind capacity have grown by double digits. Plus, according to Perry’s own department, wind and solar now employ hundreds of thousands more Americans than older industries like coal. Together with impressive advances in energy storage and smart grid technology, those trends are reducing the need for a large baseload capacity by making it possible to store renewable energy and distribute it wherever it’s needed. Thankfully, career experts at the Energy Department don’t share Perry’s ignorance or bias. To prove it, they leaked a draft of their completed study before political appointees could alter or bury the results. Unsurprisingly, they concluded that Perry’s starting premise was faulty — even as coal and nuclear plants are retired and the share of renewables in the grid grows, the grid has become more reliable. A number of independent experts share this conclusion. **Thanks to these brave whistleblowers, it’s easy to spot the subsequent meddling by political hacks.** And meddle they did. **However, the degree of tampering was less than what it could have been had the earlier draft not been released**. The overarching conclusion that the reliability of the grid has not been compromised — and in fact the grid has become more reliable — has not been altered. But new policy recommendations have been added that betray an obvious political footprint. For instance, the revised version actually calls for easing pollution control requirements for coal-fired power plants — a backwards and potentially illegal move. Another troubling recommendation calls for a mechanism to “compensate grid participants for services that are necessary to support reliable grid operations.” One such mechanism would be to add a premium to the price of coal power to pay for its supposed reliability — a ratepayer subsidy, in short, for struggling coal-fired power plants. Still, **it could’ve been much worse.** The administration could’ve used the report to argue for eliminating “Renewable Portfolio Standards” (RPS) that mandate grid space for non-polluting energy. **RPS policies have been instrumental in driving the rapid growth of solar and wind energy in the U.S. in recent years** — in fact, 29 states and D.C. have them. So it’s no surprise Perry’s fossil fuel allies are taking aim at them. Months ago, when asked about whether he’d use the findings to block state RPS policies, Perry stooped to the lowest trick of contemporary American demagogues — invoking “national security.” That framing led some to worry that Perry was plotting an unprecedented federal intervention in state energy policy. But thanks to career public servants who reported the facts and made it far more difficult for Perry’s cronies to manipulate or hide them, **these destructive ideas didn’t make it into the report.** That was no small risk in an administration that’s censored climate science on government websites and undermined the independent scientific boards that advise the EPA. (Not to mention that President Trump, EPA head Scott Pruitt, and Rick Perry himself all publicly deny much of the climate science — even though, in Perry’s case, his home state of Texas is presently underwater from Tropical Storm Harvey.) The **anonymous Energy Department whistleblowers are unsung heroes of our time**, helping to derail part of the administration’s destructive agenda on energy and the environment.

### Biopolitics

#### Leaks represent a disruption of hegemonic power and redistribute power over government to the people

Wirzburger 18 |Andrew Wirzburger is a Doctoral student of communication and research fellow at the Annenberg School for Communication, University of Pennsylvania. Research interests focus on the intersection of politics and journalistic media through studies of discourse and power. Recipient of an M.A. in Media Studies (2018) from the S.I. Newhouse School of Public Communication, Syracuse University, and a B.A. in English (2008) from Stonehill College. , "A critical discourse analysis of U.S. media coverage of government leaking during the Trump administration" (2018). Theses - ALL. 229 [Premier]

Power and leaking. The second research question sought to understand how the discourse affected power structures in the United States, what possible social roles the discourse revealed for government leaking and leakers, and the necessity of those roles for society. In particular, the role of elite sources in news media discourse about government leaking sheds light on how power functions in the relationship between the government, news media, and leakers. In the context of government leaking, this relationship is characterized by a struggle to control the communication of information originating from the government. In this relationship, leaking benefits and harms each party: the news media publish stories and inform the public but receive flak from the government, other media outlets, and segments of the public; the leakers satisfy their motivations for leaking but risk legal and professional ramifications; and the government dominates discourse with anti-leak construals but loses control of information to leakers and the media and risks triggering further leaks. Leaks represent a discursive disruption of power, power that originates with the government because of its role as producer of information as well as the laws and communication channels it has created to protect that information. Leakers, while not seizing the means of production in this economy of power, seize the product itself and enact the first redistribution of it by passing it along to the media. The media selectively release the leaked information to the public for mass consumption beyond the direct control of the government. Even at this stage, however, the government has some indirect power over the information, as claims about national security can lead editors to voluntarily withhold some leaked information from publication. The government employs anti-leak construals, by way of the news media, to reclaim and repair its lost power, and the news media facilitate this process when they fail to publish alternative construals to a competitive degree. The discourse about government leaking in news media discursively constructs the dominant position of the government as well as the subject position of the non-leaker, the citizen. The government, though fragmented into a complicated network of leakers and non-leakers itself, exists in discourse as a homogenous entity with a singular anti-leak stance due to the absence of dissent to the dominant construals. Citizens—“law-abiding”—are dialectically opposed to leakers and become everything leakers are not: they are the not-leakers, the patriots, and the victims. Ideally, citizens are compliant and respect the appropriate channels of communication established by the government. Dissent to the dominant construals in the form of alternative construals is scattered and divided. While a few alternative construals are present in the discourse, they are usually applied only to one or two leaks or leakers rather than being employed more consistently across leaking events. Nevertheless, these alternative construals afford glimpses of other ways of thinking about government leaking: leaks as tools for government oversight and the press’s traditional watchdog role, leaks as revealing or distracting from an incompetent or malevolent administration, and leakers as whistleblowers, innocents, and victims. None of these construals received support from quoted government officials and experts, and as a result, they did not often surface in coverage. The dominant construals, which demonized leaking and leakers, were able to proliferate with little significant resistance.

#### Shield laws are about POWER, negotiating a complex interplay of institutional forces

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

**Much if not most of the testimony at the Congressional hearings and debate on the proposed federal shield law focused on issues of social architecture-that is, on issues of how power should be distributed among groups in society. The research conducted for this article demonstrates that the federal shield law debate is above all else a debate about the allocation of power** to the Justice Department and to the media. **The debate is about how much power the Justice Department already has, how much power the department needs, and whether the courts and the media need a shield law to check that executive power. Likewise, the debate directly addresses the question of media power. Do the media have too much power, or do they need more?**

Another finding of this research is that members of Congress and others who testified at the hearings appeared to disagree about the context of the power arrangements they were contemplating. **To the Justice Department and other shield law opponents, the post-9/11 terrorist threat was the most important contextual consideration. The media and other shield law supporters instead focused primarily on the current uncertainty** in reporter's privilege law, the numbers of journalists incarcerated for refusing to comply with federal subpoenas, **and the resulting chilling effect on the media**.

Deep divisions remain among the interested parties, whose arguments have changed very little since 2005. The bills before the Congress did change, however. The bills contained increasing numbers of exceptions as shield law supporters in Congress attempted to craft legislation that would satisfy at least some of the law's opponents.

**Beyond these findings about the power-distribution arguments in the shield law hearings and debate, this research suggests two reasons that shield legislation was not enacted. Shield law legislation died in Congress because members of Congress and others were bogged down in a fight about power and because both sides of the debate were operating in a context of fear. The power issues are contentious, and deciding how to distribute power proved to be a messy business. Complicated bills with growing lists of exceptions to the testimonial privilege were introduced in attempts to protect the media without stripping too much power from the executive branch**. Each proposed change raised new concerns, however.

This research also reveals two weaknesses in the social architecture metaphor as a tool for analyzing and explaining congressional lawmaking. The social architecture metaphor seems better at describing the result of lawmaking than the lawmaking process because it fails to convey adequately the messiness of the task before Congress. The social architecture metaphor suggests an architect sitting in a quiet office drawing precise lines. As this research demonstrates, that is not how Congress worked on the shield law issue. **One should**, more aptly, **think of a county planning commission negotiating between a developer and a group of angry residents over plans for a new shopping mall**. The image of the architect working in a quiet office more closely depicts the work of an appellate court judge, although even that comparison ignores the give and take among judges.

**One should not be surprised that Congressional lawmaking is messy: Power rarely is ceded graciously. Therefore, the social architecture metaphor should be expanded to recognize that the process of distributing power very much differs, depending on whether decisions are made by one person or by a large group. Failure to recognize that difference oversimplifies the lawmaking process**. Expanding the metaphor to recognize that difference increases its explanatory power.

### Security

#### Attempts to restrict journalists are born out of the executive’s need to securitize – fear in the post 9/11 context undermines rights and checks on government

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

The social architecture metaphor also fails to acknowledge the critical importance of context to the arguments on both sides of the debate. **This research shows that both sides of the federal shield-law debate operated in the context, or climate, of fear. The Department of Justice, President Bush, and others who wanted to protect or increase executive branch power were operating in a post-9/1 1 context; they feared a shield law as a toodangerous threat to an already vulnerable nation. Journalists and others who testified about the current rash of media subpoenas and the chilling effect created by those subpoenas also operated in a climate of fear. Those shield law supporters viewed the media as under attack by the federal government and in need of a strong shield law to save investigative journalism.**

As Rep. Pence told the Senate Judiciary Committee, lawmakers need to look beyond "our times and their controversies and seize the opportunity to develop clear national standards that will protect the news-gathering function and promote good government. ''290 **Lawmakers should not allow their fears to induce them to make bad law. History is replete with examples of bad lawmaking that resulted from fear.** 91

## Whistle-Blowers AC

#### Attacks on reporters stop leaks and maintain secrecy within the Trump administration

Stewart 18 (Emily Stewart, General Assignment Reporter @ Vox, Trump’s targeting of a New York Times journalist, explained by experts, Vox, Jun 9 2018) [Premier]

The Trump administration took its war with the media to the next level this week when federal authorities seized years of phone records from New York Times reporter Ali Watkins as part of a federal investigation into leaks of classified information. Watkins, who previously worked for BuzzFeed News and Politico, had a three-year relationship with James Wolfe, a former Senate Intelligence Committee aide who was arrested on Thursday and charged with lying to federal agents investigating the classified leaks. The seizure set off alarm bells about the relationship between the administration and the media. The Department of Justice under Obama took phone records from Associated Press reporters and editors, named a Fox News reporter an unindicted “co-conspirator” in a leak case, and prosecuted multiple cases involving whistleblowers and leakers. So is what Trump doing more of the same? Or is a president who routinely bashes the media and threatens to jail leakers finally turning his rhetoric into reality? “It’s deeply alarming that the Trump administration has decided to build off of the worst of the Obama legacy on leak investigations and reporter-source protection,” said Alexandra Ellerbeck, the North America program coordinator for the Committee to Protect Journalists. I asked Ellerbeck and five other experts what they make of the Justice Department’s latest actions and how they compare to what the Obama administration did. The general response: What Obama did was bad, and what Trump is doing is likely worse. Their responses, edited for clarity and style, are below. David Schulz, senior counsel, Ballard Spahr LLP, and director of the Media Freedom and Information Access Clinic at Yale Law School The government’s secret collection of a reporter’s telephone and email records to locate a confidential source is a matter of grave concern. Alarms went off when the Obama administration seized the phone records of several AP bureaus in 2013, and alarms are going off today. A free and independent press able to reveal the truth about the actions of government is crucial in a democracy, and a reporter’s ability to promise confidentiality is essential to getting the truth. It is a matter of human nature and simple logic. The constitutional implications of governmental interference in the relationship between reporters and their sources have been recognized at least since President Nixon sat in the Oval Office nearly 50 years ago. Since then, Department of Justice guidelines have required government agents to exhaust alternative sources before seeking to compel information from the press, to minimize the scope of information requested from a reporter, and to notify the press in most circumstances so they can seek appropriate protection from a court before the government takes its records. Apparently, none of this happened here. The department’s actions revealed yesterday cry out for a full and immediate public accounting, as provided by Attorney General [Eric] Holder in the aftermath of the AP incident. In particular, why were so many years of records taken? Department of Justice regulations require that, in all cases and without exception, a subpoena for a reporter’s telephone records must be “as narrowly drawn as possible.” And why was no advance notice given to the reporter, so that a judge — and not a prosecutor alone — could decide whether the seizure would violate the constitutional protection of the press? Under current rules, such a step can only properly be taken if prior notice would “pose a substantial threat to the integrity” of an investigation, a claim that cannot credibly be made in this case where the source was already aware of the existence of the investigation. The concerns raised by this secret governmental seizure are not just that it has happened, but also with what will happen next. The years’ worth of records likely reference communications with a number of sources on a wide range of stories — information the government has no conceivable right to know. Who will have access to this information, and what will be done with it? Will it be reviewed only on a need-to-know basis by those working on this investigation, or made available more broadly to search for other leakers? Will records of communications by government staff be kept in personnel files and contacts with reporters taken into account in employment evaluations? The potential for misuse of the information is staggering and only compounds the need for an immediate accounting by the Department of Justice. Julian Sanchez, senior fellow, the Cato Institute I don’t think it can be argued that the DOJ is breaking fundamentally new ground here, in light of the subpoenas for phone records directed at the Associated Press and the monitoring of James Rosen during the Obama administration. The scope of the information-gathering on Watkins seems quite extraordinary, however, encompassing both telephone and email records reportedly stretching back, not for a few months, which is what we’ve previously seen in leak investigations focused on the origins of specific news stories, but spanning several years. That strikes me as significant because it means they’re not just getting a snapshot of what a reporter was working on at one particular moment, which is fraught enough, but in effect a detailed map of the source network she’s built up over the whole of her career. Alexandra Ellerbeck, North America program coordinator, the Committee to Protect Journalists This is the first instance, that we know of, in which the Trump administration has gone after a journalist’s communications records. There is nothing more vital to a functioning press than the ability of journalists to protect their sources, so the seizure of a journalist’s communications records sets a dangerous precedent. The past decade has seen repeated federal assaults on the ability of journalists to protect their sources. Under the Obama administration, the Justice Department came under fire for subpoenaing outgoing call records from 20 phone lines belonging to AP reporters or editors. The Obama administration also set the record for leak-related prosecutions. After the public outcry, the administration did make some modest positive steps. New leak prosecutions quieted down and the administration revised internal guidelines to make it harder to obtain journalist records. It’s deeply alarming that the Trump administration has decided to build off of the worst of the Obama legacy on leak investigations and reporter source protection. Attorney General Jeff Sessions has called for putting leakers in jail, and President Trump allegedly even floated the idea of putting journalists themselves in jail. Last fall, Sessions expressed a desire to roll back some of the protections put in place at the end of Obama’s term. So far, however, they are still in place. We urgently need an explanation of how the troubling actions taken by the DOJ adhere to the guidelines they have set out for themselves. Jonathan Turley, law professor, George Washington University The case raises a troubling pattern of surveillance targeting journalists. The Obama administration’s targeting of Rosen was far more serious, however. In this case, the journalist had an alleged intimate relationship with the target who was sharing highly classified information. That type of “pillow talk” risk is one of the primary dangers facing the government over the release of information. Indeed, it is a common tactic by foreign powers. The alleged use of such intimate relationships by a journalist raises serious journalistic ethical concerns. Nevertheless, the targeting of a journalist should be the last, not first, response. It is not clear if this was necessary since the targets emails and phone records were available. Moreover, recording [Rosen’s] conversations would inevitably include some calls with the journalist. Thus, it is not clear why the government would need to target the reporter or her communications. While the Supreme Court has sharply curtailed the constitutional protections afforded to journalists and has left them with the same basic protections afforded average citizens, there remains a longstanding policy against such intrusive measures. There is ample reason to be concerned about such cases and legitimate questions that should be answered by the Justice Department. Unfortunately, the Congress has never been a strong advocate of journalistic protections (as opposed to the states which passed shield laws protecting reporters). Michael Meltsner, law professor, Northeastern University, and author of With Passion: An Activist Lawyer’s Life Neither the Obama administration then or the Trump administration now has avoided intruding into the important newsgathering role of the press, but it’s a big mistake to equate the two. Attacking the press is pervasive with Trump. Obama practices were situational. Trump is playing his “nobody can criticize me” card. Wrong as his judgment may have been, Obama was motivated by a view of a government need for confidentiality. Steven Aftergood, director of the Federation of American Scientists’ project on government secrecy There are at least two factors that highlight the egregious nature of this move. First, even though reporter Ali Watkins is not accused or suspected of any criminal activity, her professional life has been unilaterally compromised by the administration. This is unjust and inappropriate on its face. Second, the work of a reporter is different than that of a farmer or an auto mechanic in a crucial respect. The operation of a free press is a structural element of our political way of life. By interfering in the reporting process in the way that it did, and outside of any judicial procedure that might have allowed the reporters to challenge the action, the administration is undermining the freedom of the press on which we all depend. Regrettably, this is not altogether unprecedented. The Obama administration took some similar steps in seizing Associated Press phone records in 2013. But the Obama Justice Department seemed chastened by the criticism it received and issued new guidance to moderate and regulate any such moves in the future. The Trump administration appears to have exceeded or ignored that guidance.

#### Trump is cracking down on leakers now – trying to smoke them out

Watkins and Dawsey 17 (Ali Watkins is a National Security Correspondent, Josh Dawsey is a White House reporter for The Washington Post, Trump’s leaks crackdown sends chills through national security world, Politico, 07/07/17) [Premier]

National security officials across the federal government say they are seeing new restrictions on who can access sensitive information, fueling fears in the intelligence and security community that the Trump administration has stepped up a stealthy operation to smoke out leakers. Officials at various national security agencies also say they are becoming more concerned that the administration is carefully tracking what they’re doing and who they’re talking to — then plotting to use them as a scapegoat or accuse them of leaks. One U.S. official voiced concern over even talking to superiors about a benign call from a reporter. The agency this official works for had started limiting staff access to information, they said, and it would make it far easier to figure out who was talking to people in the media. There was suspicion, the official said, that the agency was even tracking what they printed, to keep tabs on what information they were accessing. “I’m just trying to keep my head down,” another U.S. intelligence official recently told POLITICO. A half dozen officials across the national security community described to POLITICO a series of subtle and no-so-subtle changes that have led to an increasingly tense and paranoid working environment rooted in the White House’s obsession with leaks. President Donald Trump has regularly vented about his intense frustration with anonymously sourced stories, and has specifically targeted federal government entities, including intelligence agencies like the CIA and FBI, and the State Department. The most reliable politics newsletter. Sign up for POLITICO Playbook and get the latest news, every morning — in your inbox. Email Your email… Sign Up By signing up you agree to receive email newsletters or alerts from POLITICO. You can unsubscribe at any time. That the White House itself leaks to reporters was something of a joke in the administration’s early months in office. But after Trump grew angry about leaks earlier this year, "there was something of a crackdown" inside the White House, one senior administration official said. There was a particular frustration in the White House about the investigative and national security leaks — along with the details of Trump's foreign phone calls — that led White House officials to call the FBI and ask for leak investigations. The reverberations have spread in the weeks since, and several national security officials outside the White House have spoken of a strategic thinning of the ranks — limiting the number of people involved in certain sensitive matters, so that if something leaks, the suspects are obvious. “The circles on this are so small,” one U.S. intelligence official said of the various Russia investigations that have cast a shadow on Trump’s White House. Information on Trump and Russia has been so limited there would be fewer and fewer sources, the official said, putting those who are talking at risk. “Confirming [Russia news] is almost impossible,” the official said. In some cases, the official added, information has been so “choked down” that if something comes out in the press, “it’s either a bogus leak” or, the official said, the relevant agency will know exactly where it came from. And, the official said, they had heard several other government organizations had started doing the same. The concern isn’t limited to official communication channels. As Trump himself continues escalating his war with the media, how far the administration would go to keep tabs on the workforce is an unsettling unknown. “There’s an increasing concern that they may be moving beyond monitoring official communications,” the second U.S. official said. It’s “likely the case,” the official said, that the administration could be tracking the personal communications channels of federal employees — especially those close to the White House — including personal email accounts. White House press secretary Sean Spicer declined to comment on fears of a crackdown but said the administration takes leaks seriously. “This administration understands the importance of safeguarding classified and sensitive information. Those that leak classified and sensitive information threaten our national security,” Spicer said. But Steven Aftergood, who runs the Federation of American Scientists’ Project on Government Secrecy, said the drive against leaks — something that was also prominent under the Obama administration — has taken on a more aggressive tone under Trump. “What’s happening now is there seems to be a broader objection not to any individual leak so much as to the fact of independent reporting that is at odds with the White House narrative,” Aftergood said.

#### Subpoenas slow investigations against Trump

Simon and Ellerbeck 18 (Joel Simon/CPJ Executive Director and Alexandra Ellerbeck/CPJ North America Program Coordinator, The president's phantom threats, Committee to Protect Journalists, Feb 15 2018) [Premier]

During his tumultuous campaign, Donald Trump declared war on the press, pledging to "open up our libel laws" and impose fines on critical journalists if elected. Within a month of taking office, he vowed to go after leakers, comparing them to Nazis, and urged then-FBI director James Comey to jail reporters who published classified information. In response, money began pouring into legal defense funds set up to protect the press from the looming legal onslaught and defend the First Amendment. First Look Media, the news organization started by eBay founder Pierre Omidyar, put up $2 million and promised more; Jeff Bezos, owner of Amazon and The Washington Post, donated another $1 million to the Reporters Committee for Freedom of the Press. The Democracy Fund (also backed by Omidyar) threw in an additional $800,000 for legal support. In his first year in office, Trump has attacked the press relentlessly, describing critical media outlets as the enemy of the American people, fake, and failing. He singled out individual journalists by name. But the legal assault has not come. The US Press Freedom Tracker, a project of 30 organizations (including CJR) that documents press freedom violations in the United States, has logged 34 arrests and 44 physical attacks on journalists in the last year as of mid-January--but only one leak prosecution. More from Columbia Journalism Review Tweaking a global source of news Dangers from inside the newsroom Columbia Journalism Review Winter 2018 Issue So is Trump all bark and no bite? Should the legal defense funds be put to other uses? Not so fast, cautions Steven Aftergood, the director of the Federation of American Scientists' Project on Government Secrecy. "We're still in year one of the Trump administration and it does take time to build a case, identify a suspect, and make a decision to prosecute," Aftergood pointed out. "I think we should all be concerned and worried," added Lynn Oberlander, the general counsel for Gizmodo Media Group and board chair of the Media Law Resources Center. The clearest evidence that leak prosecutions might be coming is the public statements from Attorney General Jeff Sessions. "We have 27 investigations open today," Sessions said in a House Oversight Committee hearing last fall. "We intend to get to the bottom of these leaks." Sessions noted that in the last few years of the Obama administration--which was criticized for its aggressive posture toward leakers--the Justice Department averaged just three investigations per year. Sessions promised to do better, which has pleased Trump. "After many years of LEAKS going on in Washington, it is great to see the A.G. taking action! For National Security, the tougher the better!" the president tweeted over the summer. Naturally, all governments want to control leaks and reporters want to receive them, but it wasn't until the Nixon era that the government indicted journalistic sources under the World War I-era Espionage Act. Around the same time, subpoenas of reporters picked up in earnest and began to be considered a true danger to press freedom. A tenuous equilibrium came in the form of a 1972 Supreme Court case that the press actually lost. In a 5-4 decision in Branzburg v. Hayes, the court held that three reporters, including New York Times reporter Earl Caldwell (whose case involved his reporting on the Black Panthers), could be ordered to testify in court. In a concurring opinion, Justice Lewis Powell suggested that the First Amendment required some reasonable limits on the ability of prosecutors to subpoena journalists. James Goodale, the former Times general counsel (and CPJ senior advisor and former board member), latched on to Powell's stance and used it to develop a legal standard, upheld in lower court rulings, that limited the circumstances in which prosecutors could issue subpoenas to cases in which their testimony was central to a determination of guilt and innocence and the information could not be obtained elsewhere. The standard held until the Bush administration, when the DC Circuit Court upheld a subpoena against New York Times reporter Judith Miller. Later, under Obama, the 4th Circuit Court of Appeals also upheld a subpoena against New York Times reporter James Risen, dismissing the argument that Powell's concurrence represented a qualified reporter's privilege. At the same time that the new legal environment opened the door to subpoenaing reporters, the intelligence community, increasingly concerned by large-scale leaks and data dumps, began pushing for more aggressive prosecutions. The creation of the National Security Division in the Justice Department under the Bush administration added dedicated resources to this effort. "The main factor in the dramatic increase in leak prosecutions was technology," noted Times investigative reporter Scott Shane. "In almost every leak case, an electronic trail led from the source to the reporter that the FBI could file." This new environment opened the door for the Obama administration to launch an unprecedented legal effort targeting leakers that in several cases ensnared reporters, including Risen. All told, the Obama Justice Department prosecuted eight government employees or contractors accused of leaking to the media under the 1917 Espionage Act. "The war on leaks and other efforts to control information are the most aggressive I've seen since the Nixon administration," wrote former Washington Post Executive Editor Leonard Downie Jr. in a 2013 report published by CPJ. Following a public furor over the administration's aggressive tactics, a leading group of journalists and lawyers that included Downie; Karen Kaiser, general counsel for the Associated Press; and Bruce Brown from the Reporters Committee, met with former Attorney General Eric Holder to strengthen Justice Department guidelines based on the formula first articulated following the Branzburg decision. This meant the Justice Department would only issue subpoenas when the information was crucial and could not be obtained by other means. The Attorney General had to approve requests, although the FBI could still obtain journalists' records using National Security Letters, which were not covered under the guidelines. In the wake of the public backlash and after the revised guidelines were put in place, subpoenas slowed, as did the leak investigations. But in his Senate confirmation, and in subsequent statements, Sessions has indicated he does not look favorably on the guidelines, which are voluntary and have been in place in some form since the 1970s. In a press conference in August, he said the Justice Department was reviewing them. "We respect the important role that the press plays, and we'll give them respect, but it is not unlimited," he said. Without the guidelines in place, journalists may face a flurry of subpoenas if the Justice Department moves ahead with leak prosecutions. And there is evidence that the Justice Department is doing just that. "The Supreme Court has not recognized reporters' privilege, Congress has not passed a media shield bill. In the absence of those provisions, these self-imposed guidelines have been a meaningful constraint," points out David Pozen, a professor at Columbia Law School. In July, Republicans on the Senate Committee on Homeland Security gave Sessions a "study," which included a list of 125 news articles (with bylines) that had allegedly harmed national security. In December, FBI Director Christopher Wray said he had created a dedicated unit to go after leaks. One case that the Justice Department has pursued, involving a 26-year-old NSA contractor named Reality Winner, sets a chilling example and shows that prosecutors are willing to go to extremes to punish alleged leakers. Winner is accused of leaking a classified NSA report about Russian interference in the 2016 election to The Intercept. Winner was denied bail twice and may spend a year in prison before her trial even starts, despite her parents' offer to put up their house and everything they own to guarantee bail. Because the court has said her lawyers can only look at news reports containing classified information in secure facilities, they cannot even Google basic news stories from their office or discuss them with their client. Some experts have suggested that as technology makes it easier for the Justice Department to identify leakers by obtaining information through service providers, the government will have less of a need to subpoena journalists. But this assumes that the government wants to avoid issuing subpoenas to the press, while Sessions has indicated a specific desire to go after the media and drag journalists into the legal proceedings. Sessions personally approved a subpoena last February for John Sepulvado, a former reporter for Oregon Public Broadcasting, which required Sepulvado to testify about an interview he had with Ryan Bundy, one of the leaders of the group that forcibly occupied the Malheur National Wildlife Refuge in 2016. (The Obama administration had asked Sepulvado to voluntarily testify, but did not issue a subpoena when he declined.) The guidelines also require prosecutors to make all reasonable attempts to obtain the information elsewhere, something that RCFP attorney Selina MacLaren says they failed to do. "The Court found that the prosecutors had another way to get the information: by asking the defendant himself. This raises questions about how the guidelines were applied," she says. The subpoena was ultimately quashed. One looming test case involves WikiLeaks. Trump has said he loves WikiLeaks but there is no evidence that the Justice Departments shares his view. Widespread but unconfirmed reports suggest that a sealed indictment has been issued for Julian Assange, which is what is keeping him holed up in the Ecuadorean Embassy in London. If Assange were to be tried for violations of the Espionage Act, it would not only have a chilling impact on the media, but could ensnare the many journalists who had used Assange as a source. For all of these reasons, Bruce Brown of RCFP is continuing to build up the legal defense fund and planning for the worst. While larger media organizations have general counsels and the resources to mount an adequate defense, smaller ones could find themselves unprepared. Regarding leak investigations, "we know from experience that those often go through newsrooms," Brown points out. "There's nothing more existential to journalists than facing a subpoena. We have to be extremely vigilant."

#### Punishing whistleblowers creates a chilling effect

Hiltzik 18|Michael Hiltzik. Pulitzer Prize-winning journalist Michael Hiltzik writes a daily blog appearing on latimes.com. His business column appears in print every Sunday, and occasionally on other days. As a member of the Los Angeles Times staff, he has been a financial and technology writer and a foreign correspondent. He is the author of six books, including “Dealers of Lightning: Xerox PARC and the Dawn of the Computer Age” and “The New Deal: A Modern History.” Hiltzik and colleague Chuck Philips shared the 1999 Pulitzer Prize for articles exposing corruption in the entertainment industry. 7-12-2018, "Whistleblowers need help. This tech entrepreneur wants to provide it," latimes, http://www.latimes.com/business/hiltzik/la-fi-hiltzik-whistleblowers-high-tech-20180713-story.html|[Premier]

Whistleblowers themselves face institutional or family pressures to remain silent, or learn the consequences of coming forward only after the fact. “The price of not ignoring what you’re looking at is very damaging,” says Sherron Watkins, one of the three women featured by Time in 2002. Watkins had warned Enron Chairman Ken Lay that the company’s accounting was improper months before its collapse and bankruptcy. “Enron imploded too quickly for my career to be ruined there, but I can’t work in corporate America,” she says. “Some people will say I didn’t do enough, others that I come with too much notoriety.” She says one crucial piece of advice for would-be sources is how to remain anonymous: “That would be my biggest question.” In the 16 years since that Time magazine cover, secrecy has become not only embedded more deeply in business and government practice, but safeguarded by law and administrative fiat. At the federal government level, whistleblowers are expected to take their complaints about retaliation and claims for back pay to the Merit Systems Protection Board. But the three-member board can’t issue a decision without a quorum, and two of its seats are vacant and the third occupied by a holdover Obama appointee whose term ended in March. President Trump’s two nominees aren’t expected to get on the Senate’s confirmation calendar for months. That may not be a bad thing. The MSPB had become known for generally upholding agency claims against whistleblowers. A 2009 study by the nonprofit Government Accountability Project found that employees had won only three of more than 50 cases before the board since 2000. The federal Whistleblower Protection Act has proved to be toothless, in part because of rulings by the board. In the immediate aftermath of the financial crisis of 2008, Congress recognized that corporate officers aware of wrongdoing “often face the difficult choice between telling the truth and… committing ‘career suicide,’ ” the words of a Senate report on the Dodd-Frank Wall Street Reform and Consumer Protection Act. Dodd-Frank gave whistleblowers who had suffered retaliation the possibility of recovering double back pay and reinstatement. The source would be in line for up to 30% of any fines the government obtained. But Dodd-Frank offers its protections only to whistleblowers who bring their information to the SEC. The Supreme Court, in a unanimous 2018 decision written by Justice Ruth Bader Ginsburg, ruled that the protections excluded those who bring their complaints internally. Whistleblower advocates say the decision overlooked a half-century of case law treating internal complaints as tantamount to SEC enforcement. “That was the single greatest loss for whistleblowers in 50 years,” says Michael D. Kohn, a Washington-based attorney for sources. Some 90% of whistleblowing is done through internal procedures, Kohn told me, and the vast majority never reach the SEC. In many cases, the laws protecting whistleblowers from retaliation are “a patchwork with grave gaps” that are “difficult for lawyers to comprehend, let alone laypersons,” Kohn says. The work of whistleblowing is becoming only more complex and difficult. Daniel Ellsberg worked largely alone when he leaked the 7,000-page Pentagon Papers in 1971; but teams from more than 100 news organizations worked to mine the Panama Papers, a trove of 11.5 million documents related to offshore financial transactions leaked anonymously in 2015. “We’re at a time in world affairs when whistleblowers have never been needed more and on a fairly regular basis show why they’re important,” Gillmor says. “The need to help them seems obvious.”

#### Continued leaks are key undermine the Trump administration as chaotic and unaccountable

Allen 17 (Jonathan Allen is a co-author of “Shattered: Inside Hillary Clinton’s Doomed Campaign” and has covered Congress, the White House and elections over the past 16 years, Opinion: How Trump Could Plug the Leaks, Roll call, Aug 4 2017) [Premier]

So far, this White House has leaked like a frigate blown open from the inside and torpedoed from the outside at the same time. Some weeks, the flood of brackish water spilling onto news pages and cable television channels completely obscures the ship of state. While there are different types of leaks — transcripts of the president’s calls with foreign leaders, information about meetings between President Trump’s proxies and Russian officials during the campaign, and self-serving rifle shots designed to empower one White House official over another — they all have the effect of further impeding Trump’s agenda and making his administration look almost as chaotic as it is. No wonder he’s so focused on the leaks; it’s impossible to get anything done when the arms of the government — and, indeed, the White House staff — are wrestling with each other in public. But much as they exacerbate the tough job of governing, the leaks are less a cause of dysfunction than a symptom of it. That’s why Attorney General Jeff Sessions is right when he says the administration should be focused first on preventing the unauthorized dissemination of information (some of which may be criminal but much of which is simply unhelpful to Trump’s cause). As he said Friday, by the time the Justice Department is in the investigation and prosecution phases, the damage already has been done.

#### The Justice Department is sending the message that leakers will be punished

Zapotosky et. al. 18 (Matt Zapotosky covers the Justice Department for The Washington Post's national security team. He has previously worked covering the federal courthouse in Alexandria and local law enforcement in Prince George's County and Southern Maryland, Shane Harris covers intelligence and national security for the Post. He has been a writer at the Wall Street Journal, Foreign Policy, and other publications. He also has written two books, The Watchers and @War, Lynh Bui is a local reporter covering Prince George's County police, fire and courts. She joined The Washington Post in 2012 and has previously covered Montgomery County education. Karoun Demirjian is a congressional reporter covering national security, including defense, foreign policy, intelligence and matters concerning the judiciary. She was previously a correspondent based in The Post's bureau in Moscow, In charging Senate staffer and seizing reporter’s records, Justice Dept. ignites debate over leak crackdown, The Washington Post, Jun 8 18) [Premier]

The Justice Department took a significant step this week toward advancing its long-promised crackdown on leaks, charging a former Senate Intelligence Committee staffer with lying to the FBI about his contacts with reporters, and seizing the phone and email records of a journalist to help make its case. As the man charged in the brewing controversy made his first court appearance, free-press advocates warned that federal prosecutors’ heavy-handed tactics might send a further chill through the government, where officials already are reluctant to share information. To support the charges against James A. Wolfe, prosecutors obtained years of phone records from New York Times reporter Ali Watkins, who had been in a romantic relationship with Wolfe and previously covered the congressional committee where he worked as security director. “Seizing a journalist’s records sends a terrible message to the public and should never be considered except as the last resort in a truly essential investigation,” said Bruce Brown, executive director of the Reporters Committee for Freedom of the Press. “We call on the Justice Department to explain how its actions adhered to its own guidelines for protecting newsgathering from exactly these kinds of damaging intrusions.” [Ex-Senate staffer faces charges in leak investigation] A person close to the Intelligence Committee said investigators had obtained so much material from Wolfe’s devices, they would not have needed to seize Watkins’s records to bring charges. Wolfe, 57, appeared for the first time in U.S. District Court in Baltimore on Friday afternoon, wearing a white shirt and dark suit. He said little, except to answer yes or no questions from the judge, who informed him of his rights and released him from custody under certain conditions. Wolfe is scheduled to appear in court in Washington on Tuesday afternoon. He appeared first in Maryland because he was arrested in that state. The charges against Wolfe signal the downfall of a longtime Senate staffer who was trusted to handle some of the government’s most sensitive information. But they are perhaps more significant for what they say about the government’s increasingly aggressive campaign — spanning Democratic and Republican administrations — to stop leaks. Prosecutors in the Obama era brought nine leak cases, more than during all previous administrations combined. They called a reporter a criminal “co-conspirator” and secretly went after journalists’ phone records in a bid to identify reporters’ sources. Prosecutors also sought to compel a reporter to testify and identify a source, though they ultimately backed down from that effort. Facing heavy criticism, then-Attorney General Eric H. Holder Jr. issued updates in 2015 to the department’s policy on obtaining information from members of the media. Attorney General Jeff Sessions has taken a more aggressive posture. In August, he revealed that the department had more than tripled the number of leak investigations compared with the number ongoing at the end of the last administration. President Trump has complained vigorously about leaks, particularly those that paint him in an unflattering light. “This was a mistake when it happened under the Obama administration, as the officials involved ultimately admitted,” Brian Fallon, Holder’s former spokesman, wrote on Twitter of Watkins’s records being seized. “It is a sad day to see those mistakes repeated now.” Sarah Isgur Flores, the current Justice Department spokeswoman, insisted that the department followed the appropriate steps on obtaining information on members of the media, but she declined to offer details. The guidelines say that a reporter “shall be given reasonable and timely notice of the Attorney General’s determination before the use of the subpoena,” unless the attorney general determines that notice could pose a clear threat to the investigation or to national security. They also say that prosecutors should seek reporters’ records only “after all reasonable alternative attempts have been made to obtain the information from alternative sources.” The Times reported that it was “not clear whether investigators exhausted all of their avenues of information before confiscating Ms. Watkins’s information,” and that she was “not notified before they gained access to her information from the telecommunications companies.”

#### We need leakers to come forward with information about potential illegality in the Trump campaign

Wizner 17 (Ben Wizner is the director of the ACLU Speech, Privacy & Technology Project, How More Trump Leaks Can Save America, TIME Magazine, May 16 2017) [Premier]

The Washington Post recently raised eyebrows when it emblazoned the slogan “Democracy Dies in Darkness” beneath its front-page logo. It “sounds like the next Batman movie,” joked New York Times Executive Editor Dean Baquet. But Baquet would surely agree with both the express and implied messages that the slogan is meant to convey: that the survival of a vibrant democracy depends on an informed citizenry, and that the administration of President Donald Trump poses a unique threat to our democracy. That threat was very much on display last week, with Trump’s startling decision to fire FBI Director James Comey in the midst of an ongoing FBI investigation into potential criminal misconduct by members of his inner circle. The comparisons to Watergate were immediate and inescapable. In an episode commonly known as the “Saturday Night Massacre,” President Richard Nixon ordered the removal of a special prosecutor who had been appointed to investigate the Watergate break-in, and in so doing hastened his own resignation from office a year later. (Unsurprisingly, Google reported a significant jump in searches last week for the term “Saturday Night Massacre.”) The parallels are hard to ignore, but there’s a critical difference. In 1973, President Nixon’s actions were met by a skeptical Congress that was serious about following the investigation of Nixon wherever it might lead. Last week, notwithstanding the plainly absurd (and often contradictory) explanations put forward to justify Comey’s abrupt firing, the leaders of both the Senate and the House of Representatives endorsed the president’s troubling actions and dismissed the notion that any broader investigation might be warranted. The ACLU has joined others in calling for the appointment of a Special Prosecutor and the creation of a Select Committee to investigate allegations that Trump associates engaged in illegal activity during the campaign, but we need to be prepared for the possibility that with the president’s party in control of Congress, the formal mechanisms of constitutional oversight will be deliberately stymied. What then? In the face of a concerted effort by the president and congressional leadership to thwart a thorough investigation and to keep us in the dark, how will the American people have the information we need to hold our leaders accountable? In moments like this one, we should be grateful that the Constitution’s framers placed freedom of the press in the First Amendment. It’s precisely when the machinery of constitutional oversight breaks down that a fiercely independent, courageous, and free press is most vital. And in order for the press to play that vital role, it has always depended on unauthorized disclosures from government employees who were willing to risk their own jobs and freedom to ensure that the public knew the truth about matters of national importance. All joking aside, we have often needed a “Batman” to step forward to bring government wrongdoing out of the darkness and into the light. The New York Times was able to publish the secret history of the Vietnam War only because Daniel Ellsberg provided the classified evidence. The Washington Post was able to initiate the Watergate investigation because “Deep Throat” offered the clues. More recently, the public has depended on patriotic whistleblowers to learn the truth about grave abuses ranging from the CIA’s operation of “black-site” torture prisons to the NSA’s unlawful mass surveillance of U.S. citizens. Throughout our history, the ACLU has been proud to stand behind some of these brave Americans, and we are prepared to do so again. We may very well need new heroes to rise to the moment and ensure that the Trump administration does not succeed in sweeping criminal misconduct and abuses of power under the rug. If the United States is to remain a government of the people, by the people, and for the people, the people have to be informed. And if our elected officials abdicate that responsibility, it may once again fall to an ordinary American to show extraordinary courage.

#### Solvency advocate: A federal reporters’ privilege is crucial to protect whistleblowers

Layton 11 describes the advocacy (Laura Katherine Layton, Georgetown University Law Center, Defining “Journalist”: Whether and How A Federal Reporter’s Shield Law Should Apply to Bloggers, The National Law Review, Mar 16 2011) [Premier]

In 2005, New York Times reporter Judith Miller garnered national attention for her refusal to disclose the identity of her source outing Valerie Plame Wilson as an operative of the Central Intelligence Agency. The D.C. Circuit rejected Miller’s claim that the identity of the source was protected by a reporter’s privilege. Her refusal to comply with a grand jury subpoena meant she was in contempt of court, and she spent eighty-five days in jail as a result.[1] While Miller’s case reignited the public debate of the merits of a reporter’s privilege, the current issue for state and federal courts is defining the scope of the reporter’s shield law. Generally, a reporter’s shield law is a “statutory privilege which allows a news gatherer to decline to reveal sources of information”[2] and newsgathering materials. Like the attorney/client and doctor/patient privileges, the reporter’s privilege attempts to foster the flow of information into public discussion. The aim of the reporter’s privilege is to “increase the flow of information in circumstances in which society wishes to encourage open communication.”[3] The rationale for allowing nondisclosure about a reporter’s confidential source is based on the idea that forcing a reporter to reveal his source will cause sources to communicate less openly with reporters as a result of “fear of exposure” and will simultaneously cause “editors and critics to write with more restrained pens” due to “fear of accountability.”[4] The Second Circuit characterized the purpose of shield laws as the “public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters...”[5] To date, thirty-six states and the District of Columbia have enacted reporter shield laws codifying a reporter’s privilege,[6] though the scope of protection varies by state. Congress has considered adopting a federal shield statute many times in the last forty years but has yet to pass the legislation.[7] Though in Branzburg v. Hayes the Supreme Court refused to recognize a special First Amendment privilege for journalists not to reveal their sources in the grand jury context,[8] it remains unclear whether a reporter’s privilege exists in criminal and civil proceedings. Most states define the shield law protection by referring to a reporter or traditional news gatherer based on employment with an established media entity.[9] Currently, many courts are grappling with the scope of reporter’s shield laws due to the difficulty of defining who qualifies as a reporter, which is because of the changing nature of journalism—including the rise of internet publication of news by citizen journalists. There is a growing concern on how to define “journalist” so that current, unemployed, or freelance journalists are covered by the shield laws while “pajama-clad bloggers” are not entitled to invoke such a privilege.[10] There must be some limitation on the scope of the privilege; a shield law cannot apply to anyone with the ability to publish a blog on the internet. As renowned media attorney Floyd Abrams stated, “If everybody’s entitled to the privilege, nobody will get it.”[11] Congress should pass a shield law granting a qualified privilege to persons who gather and disseminate information to the public with a true intent to do so at the outset of the newsgathering process. If Congress were to draft a federal shield law, the main issue would be centered on how to define journalists. Implicit in that debate would be whether to include bloggers as persons covered by the privilege. Part I examines how state statutes have traditionally defined the privilege and how state courts have determined its scope. Part II analyzes the changing nature of journalism. Part III discusses the arguments in favor of and against including bloggers as journalists for shield law purposes, concluding that bloggers should qualify for protection. Part IV recommends how to appropriately tailor the privilege for citizen journalists publishing online. Part V weighs the costs and benefits of enacting a federal reporter’s shield law. Part VI recommends that Congress adopt a twopart test for a federal shield law for reporters that includes nontraditional journalists.

[They continue]:

IV. Defining “Journalist”: How to Include Bloggers in a Federal Shield Law Since it is “neither possible nor prudent to limit a reporter’s privilege to professional journalists,”[65] a qualified privilege should be available to persons who disseminate information to the public with a real intent to do so at the inception of the newsgathering process. Bloggers should be protected by reporter’s shield laws based on the function of journalism. Courts should examine the evidence of a blogger’s intent to publish in the same factspecific manner as the court in von Bulow when it found no indicia that Andrea Reynolds was a freelance author. In the 2009 version of a federal shield law, the Senate rightly defined “covered person” as a person (i) with the primary intent to investigate events and procure material in order to disseminate to the public news or information...or other matters of public interest, [who] regularly gathers, prepares, ...writes, edits, 4 reports or publishes on such matters... (ii) has such intent at the inception of the process of gathering the news or information sought; and (iii) obtains the news or information sought in order to disseminate the news or information by [any] means...[66] The “intent to disseminate” test is grounded in the rationale of the privilege— “to provide protection for the unfettered dissemination of information to the public.”[67] Those who contribute to the public discourse should be able to avail the privilege. However, one weakness of the standard is that it “focuses on the intent of the reporter at the time it was received.” [68] Most veteran reporters in the nation would “admit that many of their stories come to them when they are not even looking for them...Reporters often have no idea at the time they are collecting information whether they will in fact share that information with the public.”[69] Using the intent test alone, it is unclear whether a “reporter who has a friendly conversation with an acquaintance and then later decides to pursue a story based on what she learned in that conversation”[70] would be protected by the privilege. Although intended to disqualify a savvy person who “conveniently” characterizes herself as a journalist in order to invoke the privilege, the von Bulow intent test could also have the “effect of denying the privilege to even the most established and dedicated full-time journalists.”[71] This is why the federal statute should include a two-part test for the definition of a journalist: the traditional definition and the function test.[72] The first definition of a journalist should be the traditional definition that includes an association with a media entity, which would avoid the aforementioned problem of professional journalists possibly not being able to invoke the privilege. The second definition of journalist should be the intent based test based on the function of journalism, which would cover bloggers and other non-traditional journalists. The test would be a fact-based inquiry like the close examination of Reynolds’s intent to publish in von Bulow. This tough standard would ensure limitations on the privilege rather than extending it to anyone with a computer and an Internet connection. The qualified privilege could be overcome by showing three elements: “(1) the desired information is critical to the maintenance of a party’s claim, defense, or proof of an issue; (2) the information sought cannot be obtained by alternative means; and (3) there is a compelling interest in the information that outweighs the public’s interest in the free flow of information.”[73] The Senate essentially created the same parameters for a qualified privilege in its proposed legislation in 2009.[74] A qualified privilege would “soften the blow of an expansive definition of those persons and entities entitled to invoke it.”[75] The federal reporter’s shield law should also include narrow exceptions to the privilege for “circumstances in which countervailing societal interests outweigh any societal interest in preserving the privilege.” This includes circumstances when a subpoena is “directed to someone who witnessed or participated in a criminal or tortious activity (exclud[ing] ‘leaks’ of classified or national security information).” [76] Another exception would include times when a “direct and imminent threat to national security warrants compelling testimony”[77] or when “reasonably certain death or substantial bodily harm” may occur.[78] These three basic exceptions were also outlined in the Senate’s most recent attempt to pass a federal reporter shield law.[79] Most courts have held that journalists who participate in a crime are barred from invoking the privilege.[80] Accordingly, this exception does not harm the underlying purpose of the privilege since there is “no value in encouraging sources to commit crimes in front of journalists.”[81] Leaking classified information should not fall under the crime exception since “leaks of government information, whether classified or not, have become an essential means by which the public learns about government activities.” [82] Since current protection is inadequate for whistleblowers, and “as a result, leaking information to the press is often the only realistic means of shedding light on questionable or illegal government practices,”[83] a privilege protecting whistleblowers encourages such persons to come forward serves the public interest. Prosecuting those who leak national security or other classified information is not hindered by a reporter shield law.[84] Though most fears that a federal shield law would undermine national security are misplaced, there should be an exception to the privilege “if the reporter’s testimony would help prevent a direct and imminent threat to national security.” [85] The Supreme Court recognized an exception for “imminent threat” to national security in the Pentagon Papers case, which concluded that the “presumption against prior restraints could not be overridden absent an immediate and serious threat to national security.” [86] This is a reasonable standard that should apply to the reporter’s privilege. Finally, an exception for preventing “death or bodily harm to another human being applies to other testimonial privileges, including the attorney-client privilege.”[87] It is prudent to extend this exception to the reporter’s privilege “because in such cases the public’s interest in the information far outweighs the public’s interest in encouraging anonymous sources from coming forward.”[88] 5 V. The Costs and Benefits of a Federal Reporter Shield Law The most significant cost of any privilege is that it deprives courts of evidence. Critics claim that a privilege closes the courts for individuals harmed as a result of the free press, that a shield creates an exception to courts as a place to redress injury.[89] However, defamatory statements are actionable regardless of the enactment of a shield law. There is no privilege if the media caused the damage.[90]Moreover, some states “explicitly reject the privilege when a media entity is a party to the litigation, a situation that typically occurs in defamation cases,” while others supply the media with some “protection by requiring a plaintiff to demonstrate that the information is important for her case and that she has attempted to obtain the information through other means.”[91] According to opponents of the privilege, it benefits the media; enacting a federal shield law would lead to accountability problems if reporters are not forced to reveal anonymous sources.[92] The purpose of the privilege is to help the free flow of information to the public rather than aid the press. The privilege benefits the public and whistleblowers and does not hinder law enforcement. In fact, adopting a reporter’s privilege is viewed “as a necessary component of a larger criminal law reform, based on the hope that with this new protection reporters would be more willing to publish stories revealing criminal activity. The states’ enthusiasm for shield laws suggests that such laws enhance rather than detract from the ability of law enforcement to fight crime.” [93] Not having a federal privilege actually hinders attorneys general. Federal and state privileges should mirror each other since reporters do not know where a subpoena will come from. A federal reporter shield law creates certainty for reporters and attorneys. [94]Thirty-five states with shield laws submitted an amici curiae brief to the Supreme Court of the United States arguing for a grant of certiorari in Judith Miller’s case because the lack of a federal privilege undermines the judicial and legislative determinations of forty-nine states and the District of Columbia.[95] The irony of not enacting a federal shield law in an age of Wikileaks means that websites such as Wikileaks are more likely to receive information and documents than a reporter, who would verify the information, edit statements, and redact necessary portions. Without a reporter’s shield law, it is likely that sources will go to Wikileaks, which sends information directly to the public and is not subject to professional ethics. Wikileaks is empowered if reporters are not allowed to protect their sources. [96] VI. Conclusion A federal shield law for reporters and citizen journalists would benefit the public by protecting whistleblowers and encouraging anonymous sources to reveal information to responsible disseminators of the news. Because the purpose of the privilege is to help the flow of information to the public, Congress should pass a federal shield reporter’s shield law that protects traditional and citizen journalists. The privilege should not simply cover members of the traditional press, for “[t]he First Amendment does not guarantee the press a constitutional right... not available to the public generally.”[97] Congress should combine the traditional definition of a reporter associated with a media entity with an intent-based inquiry based on the function of journalism to create a federal reporter’s shield law to enhance the First Amendment and encourage the free flow of information in our democracy.

## Bloggers AC

#### Status quo shield laws are written for print journalism and don’t protect new media

Smith 13, Dean C., journalist and author, A theory of shield laws: journalists, their sources, and popular constitutionalism, LFB Scholarly Publishing LLC, 2013. [Premier]

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.136 As a matter of separation of powers, judges must avoid interpreting a statute to mean something other than what a legislature intended.137 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. 138 **That is especially true when interpreting shield laws** because statutes in derogation of the common law must be construed strictly.139 **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**.140

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 repeatedly denied protection to a journalist because of holes in statutory language**.141 **Litigation has arisen most often because**, as in the Trump case, **book authors have sought protection under statutes that did not expressly include them**,142 because **older statutes** that **did not include broadcast** had not been updated to include **television and radio,** 143 **and because a medium such as magazine had been excluded in a statute that otherwise included all news media**.144

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**. 145 In Price v. Time, 146 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 Yaeger for confidential sources used in an article alleging extra-marital affairs. In refusing, Yaeger invoked Alabama’s shield law, which offered absolute protection even in libel cases in which a journalist was the defendant**.147 However, **the 73-year-old statute only designated newspapers, television stations, and radio stations.** The federal district court hearing the case ruled against Yaeger twice, in 2003 and 2004.148

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.”149 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.”150 **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.”151

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.152

The court further explained that it must adhere to the canon of statutes in derogation of the common law.153 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 most, change in the common law.”154 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.155 (The court went on to grant Yaeger qualified protection under the First Amendment.156)

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**, 157 a decision that was trumpeted as an important victory for online journalism.158 **However, that case remains an outlier in a long history of cases in which courts have applied strict construction when interpreting shield laws.**159 **The strict interpretation that led to the result in Price v. Time is not the exception but the rule.**160

**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 older statutes do not contain language flexible enough to accommodate the Internet.**161 **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**.

#### Tech innovations change the way media is consumed – bloggers and freelance reporters are a key part of the media landscape, but the absence of a federal shield law leaves the vulnerable --- the impact is freedom

Giordano 15 Giordano, Arielle. Managing Editor of CommLaw Conspectus. “PROTECTING THE FREE FLOW OF INFORMATION: FEDERAL SHIELD LAWS IN THE DIGITAL AGE”, CommLaw Conspectus. 2015. https://scholarship.law.edu/cgi/viewcontent.cgi?article=1553&context=commlaw. [Premier]

“Democracy without a free press is no guarantee of freedom.”1 These words, spoken by New York State Senator Thomas C. Desmond, reflect the fundamental concept that freedom of the press is essential for a prospering free society. The medium through which American citizens receive their news has changed dramatically throughout history.2 As technology evolves, individuals increasingly access their news through a variety of non-traditional news sources.3 Independent news outlets, bloggers, freelance reporters, and student journalists are now important sources of online information.4 Despite the constantly evolving technological landscape, federal shield legislation has not developed as rapidly.5 Federal shield legislation is necessary to protect journalists from being compelled to reveal information or source identities.6 Forty states and the District of Columbia afford these protections to journalists through shield laws.7 Currently, the federal government does not have a comparable federal shield law, and consequently, journalists receive inadequate protection at the federal level.8 A federal shield law that protects journalists who disseminate the news through newer forms of media such as bloggers, contributors to independent news outlets, freelance reporters, and student journalists is desperately needed. Recent events, such as the Department of Justice’s secret subpoena of the Associated Press’s phone records, demonstrate the need for federal shield legislation for reporters.9 In May of 2013, two federal shield bills, known as The Free Flow of Information Act of 2013 (hereafter “FFOIA”), were introduced in the House and the Senate.10 The mischief11 the legislation intends to remedy is the scarcity of federal shield protections afforded to journalists.12 The legislation attempts to strike a balance between journalistic integrity and national security interests.13 Through specific, enumerated exceptions, the federal government could still compel a journalist to reveal a source or information in certain cases, such as one that jeopardizes national security.14 Despite both pieces of legislation having similar purposes, there are considerable differences between the language of the two bills.15 Among the most contested issues is how to define a “covered person” or a “covered journalist.”16 How these two terms are conceptualized is a wedge issue separating potential supporters. Each bill affords different levels of protections to journalists.17 It is important to note from the outset that a free press is essential to a healthy republic, and that this right is guaranteed under the United States Constitution. Given the rapidly changing nature of technology, it is increasingly important to protect all forms of journalism, including non-traditional outlets such as independent news sources, freelance reporters, and bloggers.18 This Comment asserts that a journalist’s right to gather information is vital to ensuring a free press. In order to protect the public’s access to unbiased and balanced media, it is necessary to protect the source of the information as well as those who print it.19 This Comment specifically examines the current state of shield laws and will illuminate how “covered persons” and “covered journalists” should be defined to safeguard all forms of journalism. Federal shield legislation is a necessity in a world where new media is quickly making old law obsolete.

#### A free press is vital to an informed citizenry – key to check corruption

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A free press is essential to a free society.71 The press provides the public with a wealth of important information about current events.72 The press “has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences….”73 Thus, by ensuring a free press, society is allowed to maximize its freedom of choice by having a wide range of credible news outlets available.74

#### Constitutional intent goes aff – historical evidence suggests a broad interpretation of “the press” as an information disseminating technology, not a vocation

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The right to a free press is rooted in the fundamental idea that the right to publish, gather, and disseminate information to the public is central to the First Amendment and vital to sustain a functioning constitutional republic.75 The idea that a federal shield law should protect all forms of journalism is not a new concept;76 studying the intentions of the Founding Fathers and current scholars in the journalism field demonstrate this.77 First Amendment scholars have debated two possible views of the press clause.78 Some argue that the clause protects the press “as a technology.”79 In other words, the press clause is intended to protect the activity of manually using a printing press (or modern equivalent) to convey information.80 Other scholars view the clause more narrowly, as referring only to the press “as an industry or profession,” which means that greater protections should only be afforded to those individuals at news stations and those in the press industry.81 However, despite arguments in favor of the press as industry model, historical evidence suggests that the Founding Fathers intended the press as a technology model to be constitutionally protected by the First Amendment.82 This evidence is gathered from early-American laws, state constitutions, and case law, all of which state that the idea of freedom of the press and its protections are afforded to all men involved in news dissemination, whether or not they technically work in the journalism industry.83 Furthermore, the Framers of the Constitution did not intend for only the press as industry model to be protected.84 This is demonstrated by the state of the newspaper industry when the framers drafted the Constitution, which reflects that there were only small enterprises with a few or even no employees.85 Despite newspapers contributing facts and opinions to the public forum, newspapers operating during the Colonial Era did not participate in continuous investigative journalism.86 Based on these facts, it is highly unlikely that the Framers intended to only afford press protections to such a limited industry and they provide strong support for the argument to expand press protections to all individuals who are involved in regular news circulation.87

#### Including new media and student journalists creates a more diverse, independent, and sophisticated press – only the plan solves while checking for overly broad interpretations of journalists and carving out exceptions for national security.

\* “regularity” restraint + “safety valve” where the court can rule in a case of ambiguity

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To determine a bright-line standard for the definition of journalist, there needs to be a realistic approach that does not exclude bloggers and freelance journalists. Protecting new media journalists guarantees better reporting by allowing journalists to gain more experience in the field.206 Independent journalists, freelance journalists, and bloggers are responsible for a plethora of groundbreaking news stories.207 The benefits of technologically advanced journalism far exceed the drawbacks.208 By allowing independent journalists to be covered by shield protections, we guarantee better, more educated news outlets and simultaneously promote small independent journalists and small news sources, such as blogs and bloggers, to continue working. Of the three versions of the FFOIA, the unamended, original Senate bill affords the greatest protections to new media. Before the Feinstein-Durbin amendment, the original bill’s broader language better protected journalists and bloggers.209 Senator Schumer emphasized that the legislation needs to be on par with our current technology, stating that, “[t]he world has changed. We’re very careful in this bill to distinguish journalists from those who shouldn’t be protected, WikiLeaks and all those […] but there are people who write and do real journalism, in different ways than we’re used to. They should not be excluded from this bill.”210 The bill can be written to protect independent journalists and exclude groups such as Wikileaks from the bill’s protections. The bill offers specific exceptions, which do not afford shield protections in matters of national security.211 To that end, the text of the original Senate bill offers the best wording to protect journalists, while still allowing the federal government exceptions for specific reasons. The text states a “covered person”: (A) means a person who— (i) 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, regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes on such matters by— (I) conducting interviews; (II) making direct observation of events; or (III) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form; (ii) has such intent at the inception of the process of gathering the news or information sought; and (iii) obtains the news or information sought in order to disseminate the news or information by 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; (B) includes a supervisor, employer, parent company, subsidiary, or affiliate of a person described in subparagraph (A).212 The text is broader than both the House and amended Senate bills, while still protecting the national interests of the United States.213 The text of the original Senate bill is worded in a way that affords journalists protections while still not creating a catchall for anyone who would like to consider himself or herself a journalist.214 The use of the word “regularly” in section 11(1)(A)(i) is what prevents the definition of covered person from becoming too broad.215 It allows protections to independent bloggers and journalists, but still limits it to those individuals who conduct regular activity, thus excluding individuals from claiming the journalism shield when they are not journalists. The use of the word “regularly” in the definition of “covered persons” should be defined within the context of the legislation, so there is a bright-line standard. “Regularly” can be defined as, “done or happening frequently,” as well as, “doing the same thing often or at uniform intervals.”216 Defining “regularly” provides a clearer understanding and removes any subjectivity the word may encompass. In addition to adopting this definition of the bill, a student clause should be included, such as section 11(1)(A)(II)(CC) of the amended legislation, in order to afford students proper protections and to encourage young people to study journalism. It is hard to define who qualifies as a journalist. Many opponents of the legislation insist that the legislature should define what encompasses journalism instead.217 This argument is entirely too broad. This could mean that any individual who witnesses and reports a crime could consider himself or herself a journalist. This argument would also apply to situations where an individual reports a news story for the first time, which would result in overly broad legislation. Furthermore, the “safety valve” clause that was added to the amended legislation should also be included, thus giving the courts some discretion by allowing them to make determinations in cases of ambiguity. Including the safety valve acts as a safeguard in instances of ambiguity or confusion.218 The Judicial Discretion clause (Sec. 11, 1(B)) allows a judge to exercise discretion to avail a journalist to the protections of the act if the judge determines that such protections would be in the interest of justice and to ensure effective newsgathering.219 The judicial discretion clause guarantees that in questionable situations, a judge has the discretion to make the determination, which guarantees that every case is treated with thorough care.220 The FFOIA started initially as an attempt to protect journalists in the wake of several controversies in the United States.221 The original Senate bill’s intentions protected journalists, while still affording the federal government sufficient enforcement powers.222 The House bill is too narrow, not taking into ac- count the changing landscape of the current journalism field. It ignores technological advances, as well as independent journalists, freelance journalists, bloggers, and students.223 It only affords protections to those journalists who are salary paid “bona-fide” journalists. The same complaints exist in the amended Senate bill, with an exception regarding students. The amended Senate bill, while at face value seems broad, is actually rather narrow and only protects individuals who are, or were, employees or independent contractors of a news outlet.224 As a result, a combination of the original Senate bill and the amended Senate bill is the best outcome for this legislation. By allowing small-scale journalists and bloggers who regularly disseminate news to be covered, the legislation will be in tune with changing technology. Furthermore, by having a clause for students, the United States will ensure more sophisticated and well-rounded journalists. This version would not be a catchall because it would have limits to regularly active journalists, as well as exceptions including national security safety concerns.225 Additionally, the judicial discretion clause leaves any ambiguity to the discretion of a judge.226 A free press is important to a constitutional republic, and ensures well-rounded news outlets, while promoting better and more accurate reporting. Journalists should be afforded a qualified privilege, like most states have, which still allows the government sufficient enforcement powers. Reconciling the two Senate bills strikes the right balance between journalists’ rights and the government’s enforcement power.

#### The status quo state of journalistic privilege remains a patchwork of state laws, the Branzburg decision, and Justice Department guidelines – this framework is insufficiently clear, lacks suitable legal recourse, and is often narrowly applied to traditional media outlets

Fennessy 06 Fennessy, Nathan. J.D. Candidate @ The Catholic University of America Columbus School of Law. “Bringing Bloggers into the Journalistic Privilege Fold.”, Catholic University Law Review. 2006. <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1159&context=lawreview>. [Premier]

To the extent that the Branzburg majority relied on "the great weight of authority" to limit First Amendment protections, 150 some have suggested that a constitutional privilege for journalists ought to be revisited.' Others have criticized the weight afforded to Justice Powell's concurring opinion in Branzburg over the years because he joined the majority in holding that there was no First Amendment protection.1 52 Justice White's opinion was not a plurality opinion and therefore Justice Powell's concurrence could neither limit nor expand upon the majority's holding. 53 The argument for revisiting Branzburg is that there exists a great deal of uncertainty among the circuits as to who has status to claim the journalist's privilege14 and as to what types of proceedings a journalist may claim the privilege.' Under the current system, a blogger working for the Washington Post or National Review would have status as a journalist to claim the privilege in the Second, Third, and Ninth Circuits against disclosure of confidential information. 6 However, an individual with no history of working for traditional media outlets and publishing exclusively on a website could not claim status as a journalist for protection in any circuit, unless his or her purpose is to disseminate the information to the public.' There is also an argument that the Department of Justice guidelines, which the Branzburg majority looked upon so favorably,"" have failed to rectify the problem of subpoenaing members of the media.'59 Although Justice White predicted that the Department of Justice guidelines for subpoenaing media witnesses could eliminate the problem in the future,'6 0 the problem of subpoenaing journalists continues •- 161 as journalists continue to face sanctions for refusing to testify. One of the main problems with the guidelines has been that they provide no legal recourse 4" for .• members 162 of the media who believe a prosecutor has abused his discretion. Lower courts have consistently held that "the guidelines . . . do 'not create or recognize any legally enforceable right in any person.' , 1 63 Still, some commentators praise the guidelines as a "shadow federal shield law" that has been effective in protecting journalists.'6 4 However, the Supreme Court is unlikely to revisit Branzburg and establish a constitutional privilege for journalists because the Court has resisted opportunities to do so in the past.' 65 Although there may have been a shift in the "great weight of authority,"'' 66 the strict constructionists on the Court, vociferous critics of relying on anything beyond the text of the Constitution, are highly unlikely to recognize the existence of a journalist's privilege. 67

#### States protections are insufficient – they don’t apply to federal cases, courts rule too narrowly, and the status of bloggers is ambiguous at best

Fennessy 06 Fennessy, Nathan. J.D. Candidate @ The Catholic University of America Columbus School of Law. “Bringing Bloggers into the Journalistic Privilege Fold.”, Catholic University Law Review. 2006. <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1159&context=lawreview>. [Premier]

Although many states responded to the Branzburg decision by enacting their own shield laws to protect journalists, some state shield laws do not provide as much protection to journalists as it may appear.168 For example, the California Supreme Court proclaimed in Mitchell v. Superior Court169 that the California shield law, which provides journalists absolute immunity from contempt,17 granted news organizations "virtually absolute protection against compelled disclosure."'' However, lower courts in California and commentators have called into question the California Supreme Court's assessment because the shield law provides news organizations no protection from other penalties for failing to testify and "yields to other conflicting rights in appropriate circumstances, including the due process rights of criminal defendants." 7 2 Much of the problem stems from the tension that shield laws create between the legislative and judicial branches.'73 The Supreme Court was concerned that a reporter's privilege would obstruct grand jury investigative proceedings by preventing grand juries from obtaining relevant evidence.174 As a result, courts have interpreted state shield statutes narrowly.175 In criminal proceedings, courts have found that the Sixth Amendment rights of the accused trump any state statute protecting journalists from testifying. 7 6 There is also a history of tension between some judges, who feel undermined by journalists who insist their constitutional rights trump judicial orders. A blogger without connections to traditional media outlets could be protected under statutes that define journalists broadly, such as Michigan's, which extends protection to "[a] reporter or other person who is involved in the gathering or preparation of news for broadcast or publication.. 78 However, such a general statute permits a court to interpret whether the blogger falls within the category of journalists to be protected and therefore provides no guarantee to a blogger that he will be able keep a promise of confidentiality.9 Independent bloggers would have no protection under a shield statute like Pennsylvania's, which narrowly limits protection to those "engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation." 8 ° It is somewhat less clear whether an independent blogger would qualify for protection under the New York statute. 18 Although the New York shield law provides an extensive definition of "professional journalist,"'82 it leaves open whether an independent blogger could claim protection under the provision that includes anyone working for any "professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public....3 Regardless of whether bloggers are entitled to protection under state shield laws, relying on the system of state shield laws to protect blogger journalists is inadequate because state shield laws provide little or no help in federal proceedings.s4 Although a reporter may be certain that his promise of confidentiality will be protected under state law at least in some states, there is no certainty that he can guarantee confidentiality if he is subpoenaed in federal court."'

#### The plan is key – court decisions lack flexibility and adaptability to changing circumstances --- only the plan creates a definition of journalists that is sufficiently inclusive of new media, while limiting protections to terrorists and gossip websites

\* law only applies to federal proceedings --- avoids ptx and federalism

Fennessy 06 Fennessy, Nathan. J.D. Candidate @ The Catholic University of America Columbus School of Law. “Bringing Bloggers into the Journalistic Privilege Fold.”, Catholic University Law Review. 2006. <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1159&context=lawreview>. [Premier]

Congress is the proper forum for determining the scope of the journalist privilege to protect confidential sources. 26 The determinations to be made about which individuals have status as journalists "do not flow from constitutional principle[s]., 229 Relying on the courts to make such determinations in this rapidly changing world of media will lock in place decisions that are likely to "look quite foolish a few years later," when the circumstances leading to the decision have changed.230 State legislatures have already shown the ability to craft "crisp" definitions in their own shield laws.23 ' There is no reason why Congress cannot do the 232 same. However, the bills currently before Congress do not provide the proper amount of protection for journalists. 2 3 The Free Flow of Information Act of 2005 only provides qualified protection from a federal entity compelling a reporter to produce information in "any proceeding or in connection with any issue arising under Federal law. 34 A journalist would have no protection under the proposal if a party 235 sought information through discovery in a diversity action. The bill also fails to extend protection to an independent blogger who publishes 236 exclusively on the Internet. The Free Speech Protection Act of 2005, on the other hand, defines 237 journalists too broadly. It incorporates a definition proposed by some commentators that only looks at whether the individual claiming the privilege is engaged in the journalistic process.238 Critics worry that such a broad definition of journalist would not only protect any person who sets up a blog, but would also apply to any individual employed by state- 239 owned foreign news agencies hostile to America Congress should enact a federal shield law that applies to all proceedings in federal courts. Although journalists might prefer a shield law that applies to both federal and state proceedings, there would be too much resistance to Congress "forc[ing] federal evidentiary rules upon state courts., 240 At the state level, most journalists enjoy at least a qualified privilege to protect confidential sources. 4 ' Therefore, a federal shield law should focus on protecting journalists, especially bloggerjournalists, in federal proceedings. A proper federal shield law should explicitly define "news media," "journalist," and "news," such as those in the New York media shield law, to clarify who has status to qualify for the journalistic privilege.242 To protect individuals who publish exclusively on the internet, the shield law should define "media" as a "newspaper, magazine, news agency, press association, wire service, radio or television station, online news service or website which has as one of its primary functions the purpose of disseminating news. 2 43 Similarly, the shield law should define "journalist" as: "a person who for gain or livelihood, is engaged in gathering, preparing, collecting, writing, filming, taping, or photographing news intended for dissemination by media and the person is professionally affiliated with the media disseminating the information.",2 " A blogger who charges a subscription fee or who is under contract with an online news service would qualify for protection because she would receive a monetary gain from her activities even if 245 blogging is not her full-time job. This proposed definition of journalist is a compromise between those commentators who believe the law should protect the process of journalism246 and those who believe that the law should provide the privilege only to the traditional media institutions. 4 The problem with using the journalistic process to define who is protected by the privilege is that bloggers do not adhere to the traditional journalistic process 24 because they rely on their readers to serve the editorial role. 2 Such a definition of journalist would be over-inclusive because it would protect publishers of gossip and rumor who • • 241 retract the false information they publish only after readers complain . On the other hand, if a shield law was to "carve up" the First Amendment to favor journalists tied to traditional media institutions at the expense of blogger-journalists and others operating in the "new media," it would be under-inclusive of individuals who deserve the protection of the privilege. ° This proposed definition would certainly leave some amateur bloggers providing newsworthy information without protection; however, this unfortunate consequence would be outweighed to the extent that such a definition would satisfy those critics concerned about an overly broad journalistic privilege.25 In addition, the federal shield law should distinguish between "news" and other forms of journalism in limiting the information that is protected from subpoena.2 2 Some commentators have criticized the inclusion of the term "news" in shield laws because they believe the government should not evaluate what qualifies as news. 253 However, the courts readily distinguish between other forms of speech under the First Amendment; therefore, Congress and the courts should be able to determine what is "news" and what is deserving of protection. 2 5 While the gripe and gossip websites may enjoy some of the same characteristics as Pulitzer Prize-winning reporting for the Washington Post, Congress and the courts can draw lines between the two.255 The inclusion of the term "news" into the shield law also alleviates the concerns of those who fear the creation of sham media in order for criminals and terrorists to 256 hide behind the shield law. It also mirrors the actions of what some federal courts have already been doing in limiting who can qualify as a journalist to be eligible to invoke the privilege.251

#### Plans good – Huge controversy in the lit

Smith 13, Dean C., journalist and author, A theory of shield laws: journalists, their sources, and popular constitutionalism, LFB Scholarly Publishing LLC, 2013. [Premier]

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 he**r.162 **She drew a line at the Internet, however: “I’m worried about the bloggers.”** 163 During the early years of the current period, **print journalists were noticeably resentful of the Internet in general and bloggers in particular.**164 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.165 Some scholars were sympathetic to the traditionalist’s view, 166 **but legal scholars mostly took the position that online journalists should be treated the same as those working in newspapers**, magazines, and broadcast. 167 **Legislators drafting shield laws in this period were lobbied in both directions**. 168 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.

## Foucault AC

#### Power is a complex web of actors, acts, and regimes – whistleblowing is one means of disrupting the status quo and enables ethical subjectivity within biopolitics

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Parrhesia and Whistleblowing as Social Practice Our conception of ‘practice’ is broadly consistent with Schatzki’s influential formulation in which practices are characterized as ‘embodied, materially mediated arrays of human activity centrally organized around shared practical understanding’ (Schatzki, 2001, p.2). For us, ‘shared practical understanding’, including how ‘individuals’ are defined and understood, is a product of powerinvested closure rather than an outcome of spontaneous, symmetrically negotiated consensus. In other words, practices are infused with relations of power. **Power is not above or beyond practices; rather, it circulates through complex webs of possible actions. The way power circulates through these webs has effects that are contingent and indeterminate.** Practices here are understood as ‘places where what is said and what is done, rules imposed and reasons given, the planned and the taken for granted meet and interconnect’ (Foucault, 1991, p.75). ‘**Regimes of practices’ are historically contingent ways in which diverse elements are assembled into relatively stable forms**. In an elementary sense, they are ‘fairly coherent sets of ways of going about doing things’ or ‘more or less organized ways’ (Dean, 2010, p. 31) of doing things such as administering, punishing and educating. The convergence of certain practices around specific understandings of phenomena constitutes a historically specific ‘regime of truth’ which comprises ‘ordered procedures for the production, regulation, distribution, circulation and operation of statements’ (Foucault, 1984, p. 132). **Such ‘regimes’ become accepted at specific historical moments: they provide specific legitimate ways of seeing and of speaking, of defining and of dealing with ‘problems’; they set the terms for enacting lay and scientific understandings of specific modes of practice, modes of being and relations to self and others** (see Weiskopf & Willmott, 2013). While they constitute historical conditions, they are never closed systems. In fact they are continuously modified in a ‘complex interplay between what replicates the same process and what transforms it’ (Foucault, 2003, p.277). **This approach allows us to explore whistleblowing as a practice that is conditioned, but not determined, by the configuration of practices in which it is embedded.** Similar to Perry (1998, p. 239), **we stress that whistleblowing incidents are ‘explicable not as the manifestation of prior ontological certainties or universal truths, but [are] constituted in and through the social order that generates them, the discourses that articulate them and the subject positions which realize them’** (Perry, 1998, p. 239). Going beyond Perry’s understanding we also consider that ‘**the alarm of the whistleblower is meant to disrupt the status quo: to pierce the background noise, perhaps the false harmony, or the imposed silence of “business as usual”’** (Bok, 1989, p.214, emphasis added), **thus a poststructuralist focus on the ‘“breaking” and “shifting” of structures in everyday crises and routines’** (Reckwitz, 2002, p. 255) **is pertinent. Such disruptions and breakdowns reveal the contingency of practices and need to be seen as spaces of potential transformation that allow a reconfiguration of practices** (Rabinow & Stavrianakis,2014).

While the reproduction of practices is governed by discourses as ‘regulated forms of veridiction’ (Foucault, 2010, p. 4) and by ‘procedures of governmentality’ (p.5) that constitute the normative matrix of behaviour, it always depends on some element of subjectivity. This makes it less than fully predictable and somewhat ‘out of joint’ with the smooth functioning of routine actions and the modus operandi that reproduces social and organizational relations (Contu, 2014, p. 2). A regime of practices may also be challenged and its reproduction interrupted by ‘critical practices’ (Messner et al., 2008) that question and problematize it. **In Foucault’s terms, the regime of practices that governs our relation to the self and others is supplemented by ‘critical practices’ that seek ‘not to be governed like that and at that cost’** (Foucault, 2003, p. 265). **Foucault’s concept of ‘critical practices’ enables us to consider how people who speak out ‘necessarily operate within powerfully determining and institutionalized regimes of truth’** (Ibarra-Colado, Clegg, Rhodes & Kornberger, 2006, p. 48) **yet can also become active and position themselves in relation to dominant discourses and procedures that are assumed to guide action**. In working through regimes of practices, in confronting obstacles and limitations, in struggling with and within power relations, **subjects are continuously formed, deformed and reformed.** In the active process of ‘stepping back’ and reflecting on the given as a problem (Foucault, 1997b, p.117), **individuals can develop an ‘ethical subjectivity’ in the sense of becoming the subject of their own moral action** (Ibarra-Colado et al., 2006; Iedema & Rhodes, 2010; Loacker & Muhr, 2009; Weiskopf & Willmott, 2013). **Foucault’s concept of parrhesia, which we now introduce, complements our understanding of practices. It interlinks critique, subjectivity and freedom** (Folkers, 2015) **and allows specifying the ‘space of freedom’** (Crane, Knights, & Starkey, 2008; Barratt, 2008) **within power-infused practices**.

#### Foucault’s parrhesiastic method describes how speaking truth to power is an act that undermines the state’s monopoly on objective truth and opens space for freedom and agency

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Foucault is known mostly for his work on the knowledge/power bind, tracing how the locus of power came to be the organized cognitive boundaries of what qualifies as knowledge. Following that analysis, many scholars have analysed the organization as a site where the knowledge/power bind operates to neglect personal criticism. **Less known is the foucauldian analysis of the parrhesiastic act that breaks up the power/knowledge bind. The parrhesiastes generates a critical dynamic when she ‘speaks truth’, but only when there is a public receptive for it. Hence, the parrhesiastes is the instance that exposes the knowledge/ power bind. Her ‘frankly speaking truth’ takes the form of ‘not this, without principle, without alternative’.** Foucault’s work on power has been widely used in the field of organization studies. However, during the years before his sudden death in 1984 he returned to his original research questions, the question of truth relating to speech-acts and the techniques of the self. This third period in the work of Foucault is perhaps the one where his philosophical views on ethics are most clear. **Foucault points out that the whole of western culture turns around an obligation towards truth, but this ‘truth’ takes many forms. Foucault clarified his position with the concept of critique. The personal truth emerging from the resistance towards a dominating truth, is always embedded in the play of the discourses** (Foucault 1984: 723). Hence, **in an organizational context, critique must be analyzed as an interactional truth, embedded in the power play of organizational praxis**.

**Practicing critique** is transgressive. It **questions the primacy of objective truth. Critique has an unbounding effect on existing limits to knowledge. Hence critique connects power and truth to the subject. To the extent that power-knowledge binds shape the subject, the truth of those power-knowledge binds (objective truth) are inaccessible to that subject. Where the subject distances itself** (de-subjectification or désassujettissement) **from proclaimed personal truths-as-shaped-by-powerknowledge, power and objective truth become accessible. These moments are moments of critique. They are moments in which the subject gives itself the right to question knowledge through its power effects, and to question power through its knowledge discourses.** In this sense, Foucault inserts critique as a moral attitude to acknowledge the subtle and vulnerable practices of power between truth and the subject (Foucault 1978).

The etymology of critique leads us back to the Greek between 200 B.C. and 400 A.D. Krinein means to separate, to distinguish and to decide. From krinein the word krisis was derived, which means in ancient Greek: decision, judgment, research, outcome. In the history of philosophy the concept of critique evolved along two separate lines: (1) the power of judgment and discernment of the human mind has been used by the Stoa in text-research and the allegorical explanation of text, and (2) a dialectic (opposed to rhetoric) doctrine of judgment or truth. Foucault’s work on parrhesia tries to dig up a radical conceptualization of critique, undoing the alterations of the meaning of critique throughout history (for a more thorough historical analysis see Langenberg 2008). One such derivation might be the appearance of contractual parrhesia. For example, under the Hellenic monarchs, the king's advisor was required to use parrhesia not only to help the king make decisions, but also as a means of tempering his power (Mansbach 2011). The examples we provide of our notion of the parrhesiastic chain in organizations, which we develop in this paper, illustrate the risk contractual parrhesia entails with regard to the meaning of critique. After more than a thousand years the word ‘parrhesia’ as directly related to the concept of critique, had disappeared. In the late Middle Ages it appeared again as text critique with the rise of humanism and its critical position towards the domination of Christianity and the origination of reason, science, discovery of new land, etc. The humanists wrestled themselves from the grasp of scholasticism and aimed at liberating the human being from traditional boundaries. Giovanni Pico della Mirandola was one of the first humanists who wrote about the dignity of the human being (De hominis dignitate in 1486). Critique against ecclesiastical dogmas was inspired by a rediscovery of Aristotle’s work and led to a revaluation of individual experiences: the human being perceived as the center of the world took the place of the divine logos. However this critique expressed itself mainly in text-critique. In the 16th-17th century the humanists were especially known for their text-critique as well as critique of historical sources (the writings of Aristotle). Apart from text-critique we know Kant for his (re-)discovery of the place of reason in relation to critique. There is the Kantian doctrine of judgment and critique set out in his three critiques. But the contextual interpretation of the place of critique can be found in his later political statements. In Modernity, since the Enlightenment at the end of the 18th century, we see the concept of critique is used as a purifying dialectic through distinction of opposites, competing theories, controversy, and parliamentary debate. Furthermore we see a revival of critique as self-critique in a highly developed sense in the questioning of the reasonableness of reason. It is here that the development of the human sciences takes off. Hence in the evolution of the meaning of critique three directions can be distinguished: (1) a negative one aimed towards improvement (Kant / 18th – 19th century), (2) critique of ideology aimed towards the analysis of explanatory worldviews (Frankfurter Schule / 19th – 20th century), and (3) a positive one aimed at the experience of ‘not that way… without principle, without alternative’. This third direction of critique entails a rupture with the prevailing order and leads to practices of freedom – Foucault’s parrhesia. Parrhesia means ‘frankly speaking the truth’, and stems from a moral motivation of the speaker. In this specific act, the meaning of ethics is reduced to critique as an attitude. In this sense parrhesia is the localized manifestation of critique as an attitude. **We can summarize Foucault’s analysis of the political meaning of parrhesia developed in his lectures** 1981-1984 as follows (Foucault 2001, 2009; van Raalte 2004): • **Parrhesia is a necessary condition for democracy: ‘Frankly speaking truth’ is a necessity and is elicited by the dynamic of the agora**; • Parrhesia is **done by someone who is inferior to those for whom the critical and moral motivated truth is intended;** • **Parrhesia is a democratic right: as a citizen of Athens, citizens had the right and some even had a moral obligation to use parrhesia;** • Parrhesia is a necessary condition for care because caring for the self as a matter of telling yourself the truth is presupposed in order to be able to take care of others, of the polis; • Parrhesia implies both having and displaying courage, because **speaking truth in public presupposes the courage to contradict the prevailing discourse, the public, the sovereign.** This could mean that the parrhesiastes might risk his/her life; • Parrhesia presupposes self-critique as a precondition for a moral attitude. In ‘frankly speaking the truth’ the connection between issue and person is found in the act itself. **This act is described by Foucault as a practice of freedom. It is free from analysis, free from proof. It does not need any of that because the issue is ‘me saying this’ rather than ‘me’ or ‘this’. And once I have said it, there is no way back**. However, from the moment that this personal moral activity is explained by means of a greater narrative (political, ethical, Christian), the effect of the act is formalized and removed from its original moral intention. The issue then ceases to be ‘me saying this’ and becomes either ‘this’ (and proof can be brought against it) or ‘me’ (was I saying this in the right forum, using the right procedure, and who am I to say this anyway).

In his last lectures at the Collège de France (1982-1984) Foucault frequently refers to the Kantian interpretation of Enlightenment (sapere aude) and connects this to the original, ancient relationship between attitude (ethos), critique, truth and speech. Foucault calls the Enlightenment a self-perpetuating, ever-changing critical activity which generates and surpasses its own context dependent norms. **The positive significance of critique leads to practices of freedom: ‘not that way, without principle, without alternative’. The dynamic of critique, an attitude of de-framing and re-framing, creates practices of freedom in its transgressive act. Thus critique becomes the ground itself in the name of which it works. There is no agenda or justifying principle. Critique becomes sovereign and the final agency without foundation. Nevertheless, critique can only exist through local events, topics, subjects in actuality. It has no fixed content yet is specific in its presentation. Critique can turn up everywhere; every indi vidual or group can use it unannounced and unprepared. In this sense critique is incomplete, restless and endless** (Sonderegger 2006). Another characteristic of the presentation of critique is its radicalism towards the subject that is criticized. Critique as such is inescapable and at the same time it disrupts existing limits, conventions, norms and has a transgressive effect: parrhesia unbounds the existing but at the same time it starts creating new boundaries.

#### Whistleblowing can be a parresiatic act of freedom and truth-making, but the right must be absolute and unhindered by procedural obstacles

Vandekerckhove and Langenberg 12 |Dr Wim Vandekerckhove is a Senior Lecturer in Organisational Behaviour, University of Greenwich Business School, “Can We Organize Courage? Implications of Foucault’s parrhesia”. Electronic Journal of Buisness Ethics and Organization Studies. Vol. 17 Number 2. 2012| [Premier]

One could argue that surely it must be possible to organize for ethics in a less directive way than what we perhaps in a caricature described in the previous section. Yes it is. Take whistleblowing for example. Whistleblowing is 'the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to affect action' (Near and Miceli 1985: 4). Following the increased amount of legislation protecting whistleblowers (Vandekerckhove 2006) as well as research showing whistleblowers tend to raise concerns inside their organization before they disclose to an external agency (Miceli and Near 1992), a growing number of organizations are implementing internal whistleblowing schemes. Such policies specify who can raise a concern and how they should do that. In return, whistleblowing policies promise to keep the whistleblower free from retaliation. The fact that these **policies** make these specifications makes it worthwhile to critically assess whether or not they fill the space they create for parrhesia. Of course, one **might** argue that they **jeopardise the occurrence of parrhesia merely by specifying how concern or critique should be raised. We prefer to take a less rigid approach** and take a closer look. The reason is that there are many ways to design and implement an internal whistleblowing scheme: in-house or outsourced, in writing or verbally, anonymous or confidential, number and level of possible recipients, availability of independent advice, etc. Because there are so many ways to design a scheme, and because more and more organizations are implementing such an internal scheme, a number of guidelines have been published by authoritative bodies such as Transparency International (TI), the International Chamber of Commerce (ICC), the British Standards Institute (BSI), and the European Article29 Data Protection Working Group (EU Art 29). These guidelines on how to design and implement an internal whistleblowing scheme are quite inconsistent. Hence depending on which guideline organizations use, they will end up with very different whistleblowing schemes (for a thorough comparison of these guidelines, see Vandekerckhove and Lewis 2012). Thus, having a whistleblowing policy is not a guarantee that there is enough opening for parrhesia to occur. So when does it get risky? Let us give some examples. Whereas the BSI, TI, and ICC guidelines advise to keep the categories of who can use the internal whistleblowing procedure and of what kind of concerns can be raised through them as wide as possible – including former employees and ‘company policy’ – the EU Art29 guideline advises to be very restrictive with regard to who can blow the whistle, and also advises to limit the subject of the concern to financial wrongdoing. Within the framework of our parrhesia chain, this amounts to actively discouraging the speaking of truth. Another example concerns the required motive of the whistleblower. All four guidelines agree that knowingly false reports should be met with disciplinary action. But they differ in terms of how they describe the ‘good faith’ requirement for whistle-blowers to be protected. ICC requires a whistle-blower to be bona fide while TI explicitly limits good faith to the honest belief that the information is true at the time of disclosure, regardless of the whistleblower’s motive. EU Art29 states the whistleblower’s identity may be disclosed when a report is both false and maliciously made. Introducing these conditions make it impossible for the whistleblowing to be parrhesiastic because the ‘me saying this’ of parrhesia is broken up into either ‘me’ (malicious or not) or ‘this’ (false report). This is not mere analytical zealousness from our side. **It is typical for whistleblowers who claim to be retaliated against that the focus is drawn to whether or not the whistleblower followed the right procedure. It is this procedural rigour - an effect of institutionalising the expression of personal moral motives - that destroys the occurrence of parrhesia.** In our parrhesia chain framework, **this also amounts to actively discouraging the speaking of truth.**

#### Whistleblowing is a form of autonomy within an organization – political behavior that can shape discourse and power within established regimes of truth

Weiskopf and Tobias-Miersch’16 |Richard Weiskopf University of Innsbruck, Austria Yvonne Tobias-Miersch University of Innsbruck, Austria. “Whistleblowing, Parrhesia and the Contestation of Truth in the Workplace”, Organization Studies 2016| [Premier]

‘The whistle-blower speaks out about illegal or unethical behaviour within his or her organization’ (Alford, 1999, p.266). Such ‘speaking out’ is often discussed in the context of (business) ethics where it appears as a ‘moral duty’ (Vandekerckhove & Tsahuridu, 2010), as an expression of ‘ethical autonomy’ (Alford, 2001) or ‘moral impulses’ (Painter-Morland & ten Bos, 2011) or is discussed and/or judged from the point of view of normative ethics (when and under which circumstances is whistleblowing justified or even demanded? What are the rules to be followed? (e.g. Bowie, 1982; Hoffman & Schwartz, 2015). Many authors depict whistleblowing as an ethical dilemma resulting from conflicting loyalties (Andrade, 2015; Larmer, 1992; Vandekerckhove, 2006). According to this view, ‘organizational loyalty versus preventing public harm’ features as ‘whistleblowing’s essential aporia’ (Andrade 2015, p. 328). Others have discussed it as a political act or as a form of resistance in organizations that seeks to transform established practices and normative orders (e.g. Contu, 2014; De Maria, 2008; Mansbach, 2007, 2009; Monk, Knights, & Page, 2015; Rothschild, 2008, 2013;Rothschild & Miethe, 1994). Within this stream of literature, whistleblowing is interpreted as ‘political behaviour’ that ‘is intended to change the way that the work gets done in the organization’ (Rothschild & Miethe, 1994, p. 255). In public debate, ‘whistleblowers’ are variously portrayed as ‘heroes’ standing up against a morally corrupt system or as ‘traitors’ who threaten the moral integrity of this very same system (Grant, 2002). As Perry has noted, the dualistic opposition of ‘moral wo/man against immoral organization; the spirited resistance of the precariously sovereign individual against repressive social control’ (Perry, 1998, p. 236) is frequently reproduced in analyses of whistleblowing which interpret it as an expression of individual motives or choices that characterize the ‘whistleblower personality’ (Miceli & Near, 1992). The ‘ethical resister’ (Glazer & Glazer, 1989), ‘men and women of conscience’ (De Maria, 2008), ‘principled individuals’ with ‘strong moral convictions’ (Avakian & Roberts, 2012; Graham, 1986) are positioned in opposition to the repressive organization, which is ‘dedicated to the destruction of ethical autonomy’ (Alford, 1999, p. 274; Alford, 2001). Perry offers an alternative interpretation of whistleblowing as a ‘historically determined, institutionally shaped, culturally mediated practice’ (1998, p. 239, emphasis added). Such an approach eschews a priori assumptions about the nature of the individual or the nature of the organization and sees the opposition of ‘individual’ and ‘organization’ not as a given but as one possible outcome of practices that need to be investigated. **We contribute to the development of this approach by conceptualizing whistleblowing as a ‘critical practice’** (Messner, Clegg & Kornberger, 2008; Weiskopf & Willmott, 2013) **that questions and problematizes established practices and regimes of truth.** More specifically, we contribute to understanding whistleblowing as a form of ‘truth-telling in the workplace’ (Mansbach, 2009). **While such truth-telling is tied to the subjectivity of the speaker, we argue that it needs to be understood as formed and shaped, yet not determined, by the discursive context in which it emerges and by the normative frame that governs it.**

#### Parrhesiastic truth-telling is a means for subjects to give themselves the right to question power and truth, a radical act of freedom

Weiskopf and Tobias-Miersch’16 |Richard Weiskopf University of Innsbruck, Austria Yvonne Tobias-Miersch University of Innsbruck, Austria. “Whistleblowing, Parrhesia and the Contestation of Truth in the Workplace”, Organization Studies 2016| [Premier]

**Parrhesia is a specific form of criticism. It ‘comes from “below”, as it were, and is directed towards “above”’** (Foucault, 2001a, p. 18). **The speaker is in a relatively weak position and risks his or her life in the extreme case. Parrhesia thus implies a specific relation to others and a specific relation to oneself. The critical self-relation connects parrhesia to ethics as a specific relation to oneself (**see also Catlaw et al., 2014; Luxon, 2008). **Without the ability to reflect on one’s own self and to risk one’s own given self-understanding, parrhesiastic truth-telling can easily slip into dogmatism. The parrhesiast exposes him or herself and thereby becomes open to criticism by others. The character of parrhesiastic critique is one of reflexive ‘insolence’** (Folkers, 2015; Foucault, 2003) **rather than rational argumentation based on evidence or universal norms. It is not a right given but rather a ‘movement by which the subject gives himself the right to question the truth on its effects of power and question power on its discourses of truth’** (Foucault, 2003, p. 266, emphasis added). The two final characteristics of parrhesia are freedom and duty. Parrhesiastic truth-telling is thus a voluntary act in which the subject uses his or her freedom to follow his or her own duty (‘the duty to challenge and speak’ (Foucault, 2011, p. 27) in the sense of a moral obligation. **In effect, parrhesia is a ‘dangerous exercise of freedom’** (2010,p.67). Foucault (2010) further clarifies the distinctiveness of parrhesia by contrasting it to performative speech acts. Performative speech acts are speech acts in which the content is realized as it is pronounced. For example, when a chairperson states ‘the meeting is open’, this person is ‘doing things with words’ (Austin, 1962). The meeting is in fact open at the very moment when the chairperson enunciates these words. The value and effectiveness of performative speech acts thus depend on (a) a certain context, which is more or less institutionalized, and (b) a person who possesses a specified institutional position. If these conditions are met, performative speech produces ‘codified effects’ (Foucault, 2010, p.62), i.e. effects that are predictable and calculable. We know in advance that the meeting will be open when the chairperson declares it so. In contrast, **parrhesiastic speech produces a series of effects which cannot be known in advance. Instead, what defines parrhesia is that the ‘introduction, the irruption of the true discourse determines an open situation, or rather opens the situations and makes possible effects which are, precisely, not known’** (Foucault, 2010, p. 62). Furthermore, the institutional status of the speaker is secondary: ‘What characterizes the parrhesiastic utterance is precisely that, apart from status and anything that could codify and define the situation, the parrhesiast is someone who emphasizes his own freedom as an individual speaking’ (Foucault, 2010, p. 65). At the centre of the parrhesiastic speech is therefore not the status of the subject but rather the courage of the speaker. Additionally, indifference about the content of speech is impossible in parrhesia but has little relevance in performative speech (e.g. the inner attitude of the chairperson is irrelevant for the opening of the meeting). In parrhesiastic speech, truth is spelled out on two different yet intertwined levels. On one level the parrhesiast truthfully says what the case is (‘this is wrong’, ‘this is unfair’, ‘this or that happened’, etc. and ‘that’s it’) and thus binds him or herself to the statement and the content. On a second level, which is indispensable, the parrhesiast makes it clear that the truth he or she is telling is also what he personally holds as true. He or she thus binds him or herself to the act of stating the truth and takes on the risks of its consequences (Foucault, 2010,p.65).

## Pragmatism AC

#### Reporters should use a pragmatist theory of truth

**Testino 15:** Testino, Laura D. “Theory of Pragmatism should be practiced by journalists”. Ethics and Diversity in Media. October 20th, 2015. <https://uajn499.wordpress.com/2015/10/20/theory-of-pragmatism-should-be-practiced-by-journalists/>. [Premier]

In 1964, Frank Sinatra covered a Frank Loesser tune called [“I Believe in You”](https://www.youtube.com/watch?v=FzlkxsLZI1Y)from Loesser’s Pulitzer-snagging Broadway smash “How to Succeed in Business Without Really Trying.” In the song, Sinatra croons, “You have the cool, clear eyes of a seeker of wisdom and truth.” Writer and journalist Gay Talese, who profiled Sinatra [in one of the most revered pieces of journalism in the 20th century](http://www.esquire.com/news-politics/a638/esq1003-oct-sinatra-rev/), would argue that he, however, is not a seeker of truth. And I would agree. And I would also agree and continue to argue that this paradox does not make Talese any less of a journalist. Maybe just more pragmatic – an ethical characteristic that could benefit the future of the public’s perception of the media. “I see many, many different points of view,” Talese told Robert S. Boynton in an interview published in [Boynton’s “The New New Journalism.”](http://www.newnewjournalism.com/) “So my point of view is a point of view that sees many sides! So where is the truth in that?” When deciphering what it really means to “seek the truth and report it,” journalists must look at truth, like Talese, and discover their relationship to it. Most basically, this can be divided into three theories: correspondence, coherence and pragmatic. Those who align with the correspondence theory believe in truth-telling and objectivity in the media, something Talese denounces. “I believe that that editorial choices about what appears in newspapers and magazines are so subjective that you almost never get the whole truth,” Talese said. “The editor’s fingerprints are on what he chooses to publish. The cast and characters in ‘The Kingdom and the Power,’ if nothing else, show you that there ain’t no such thing as ‘objective journalism.’” While some journalists argue that objectivity is a fine and achievable goal, the motion of the Society of Professional Journalists to remove the term from its code of ethics in its 1996 revision supports Talese’s claim. If complete objectivity isn’t a realistic goal to aspire to, why should journalists continue to declare that they report in that manner? The Coherence Theory relates to cognitive dissonance, or the idea of receiving new information that conflicts with what the journalist knows already knows. In response to this new information, the views can either be altered or remain the same. While this view supports one’s beliefs, it can be associated with closed-minded ideas that suggest incomplete research and reporting by journalists. The Theory of Pragmatism aligns with Talese’s view of truth in journalism. Pragmatism is based in relativism, which allows the journalist to acknowledge how one’s perspective of an event influences the perceived facts and truth. “There is no such thing as absolute truth,” Talese told Boynton. “Reporters can find anything they want to find. Every reporter brings the totality of his battle scars to the event. A reporter never gets it. He gets what he is capable of getting, what he wants to get.” Talese wrote “Frank Sinatra Has a Cold” without direct interviews from Sinatra. He then composed 15,000 words for Esquire, still full of detail and in a narrative style. Following the article in the 1970s, Tom Wolfe christened Talese a New Journalist, a category encompassing long-form non-fiction resembling the immersion journalism techniques of the likes of Hunter S. Thompson and others. Although Talese recognizes this was meant as a compliment, he does not welcome the New Journalist label, which could be attributed to the fact that his works are less surreal and more journalistic and research-based. Simply put: “That’s all bullshit,” Talese told Boynton. Talese prefers to write in a scene-oriented short-story style that uses real people and their real names, he said. And his background as a copy boy and reporter for the New York Times reiterated his need for accuracy in his work. The New Journalism trend quickly became associated with profile stories that didn’t include the months and years of research and reporting Talese put into his work, and he no longer wanted to associate with the genre. Talese works on one story at a time, following a meticulous writing method of pinning sentences to the wall, making each page – or scene – of his work tailored and concise. “I prefer today to praise the humble but honest work that should come with any journalism, new or old: reporting,” [said Maria Henson,](http://nieman.harvard.edu/stories/whys-this-so-good-no-39-gay-talese-diagnoses-frank-sinatra-by-maria-henson/) 1994 Neiman Fellow and Pulitzer Prize winner in editorial writing. Her article, “‘Why’s this so good?’ No. 39: Gay Talese diagnoses Frank Sinatra,” attributes the story’s success to the details about Sinatra’s origins, family life, minor life characters and vivid imagery. All factors that relate back to diligent reporting, rather than writing about objective truth. Some may argue that setting a goal for all journalists to report in the detail of Talese is unrealistic. And I agree. However, I think that Talese’s practice of pragmatic reporting is an attainable goal for all journalists. Instead of claiming to report in a robotic fashion, presenting ourselves to the public as omniscient bearers of complete truth, we, as journalists, should adopt a pragmatic title. The public should be aware of our circumstance and our human, relative view of the truth. This pragmatic view of truth can bring journalists back to the level of reality they are reporting upon. Combining accurate reporting with a pragmatic view of truth places us on the same level as the people we are writing for and about. “Although I can’t start the process being someone’s companion, that is my ultimate goal,” Talese told Boynton. “I need to stay with someone long enough for me to observe their life change in some significant way. I want to travel through time with them, to put myself in a position to see what they see.”

## Virtue Ethics AC

#### Virtue theory is most suitable for media ethics since only the doctrine of the mean can resolve the dilemma between privacy and the public’s right to know

**Kangas 15:** Kangas, Maria. “Aristotle”. Media Ethics in the Morning. February 12th, 2015. <https://mediaethicsmorning.wordpress.com/2015/02/12/aristotle/>. [Premier]

As members of the media, media professionals strive to do two ethical things: To tell the truth, and have evidence to back up that truth. In the journalism world, media professionals need to balance the public’s right to know vs. an individual’s right to privacy. So, media professionals would need to use Aristotle’s Doctrine of the Mean. For example, there was the Ray Rice situation all over the morning news and nightly news. However, what caused an ethical controversy is it correct to show the actual footage of him hitting his then fiancé. On one extreme, the public has the right to know about news and should see the evidence behind the story of domestic abuse. One the other extreme, Ray Rice’s then fiancé and himself deserve their privacy. Most news stations made the decision to show the video multiple times as well as attempt to interview Ray Rice and his now wife. Some news station made this decision for most likely two reasons: They wanted high ratings, or they thought it was the right thing to do so Ray Rice would not get away with his crime. Other stations may have not shown the video as frequently because they didn’t want to exploit his wife and because they believed in the victim’s right to privacy. If I were a news director looking for the mean, I would show the video only once, then interview as many sources as possible, however not show the video again. This would be my mean because it is wrong to exploit innocent victims, however the public should get a visual taste of the event.

#### The decision to maintain the promise of source confidentiality even in the face of punishment reflects moral courage

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James Risen is a 59-year-old veteran journalist who has built a [career](https://www.psychologytoday.com/us/basics/career) telling stories to the American public that American presidents would rather not have disclosed. He and a colleague won a Pulitzer Prize in 2006 for revealing the Bush administration’s illegal wiretapping of American citizens without warrants as part of its counterterrorism efforts. Now, under pressure from the Obama administration, Risen is facing the very real possibility of spending time in prison for keeping a promise to protect the identity of a confidential source for a story that embarrassed the CIA. The legal battle stems from Risen’s account of a botched mission during the Clinton administration to sabotage Iran’s nuclear weapons program. In 2003, Risen learned about it from confidential sources and prepared to publish it in The New York Times, but the paper agreed not to do so after considering national security concerns expressed by President Bush’s national security advisor, Condoleezza Rice. Risen later broke the story in his 2006 book, “State of War.” The case is the latest illustration of the long-standing tension between the [government](https://www.psychologytoday.com/us/basics/politics)’s need to maintain secrets and the Jeffersonian “watchdog” mandate of American journalism to scrutinize government behavior on behalf of our democratic society. Courts have ruled that journalists have no special “privilege” when ordered by a judge to testify about things they witness or participate in – including who they get their information from. Yet judges also have acknowledged the dangerous chilling effect of going after journalists to find the sources of leaks. Such cases, wrote one judge, “exalts the interests of government while unduly trampling those of the press, and in doing so, severely impinges on the press and the free flow of information in our society” (Liptak, 2014). Risen’s refusal to reveal his source can be viewed as maddening stubbornness on the part of a self-righteous, elite journalist who dangerously dismisses how government leaks of classified information can undermine national security and even threaten American lives. Yet moral psychology research suggests such judgments miss the point of the motivations of people such as Risen. Far from being oblivious to the risks entailed in their decisions, they are keenly aware of the stakes involved. Yet they have so deeply internalized a set of moral values that, when push comes to shove, they literally feel they have no choice but to manifest those values in their behavior. As Risen himself described it, prosecutors were asking him to “give up everything I believe in – or go to jail.” For Risen, that really isn’t a choice at all. The possible sacrifice and hardship attached to working as a watchdog journalist performing a public service becomes an accepted, though lamented, fact. Risen has even said he’s picked out what kinds of books to take with him if is sent to prison. We often call examples of this behavior moral courage. Those who are most successful at integrating [morality](https://www.psychologytoday.com/us/basics/ethics-and-morality) with their self-identity arguably respond to ethical challenges in ways that are different than others. To be motivated by principle in the face of daunting adversity, to persevere in a course of action despite great personal risk or hardship, to eschew expedience in the service of what is perceived to be a “right” or just cause – such behavior can be considered examples of a high degree of integration of morality into the self. “The self is progressively moralized when the objective values that one apprehends become integrated within the motivational and affective systems of [personality](https://www.psychologytoday.com/us/basics/personality) and when these moral values guide the construction of the [self-concept](https://www.psychologytoday.com/us/basics/identity) and one’s identity as a person,” explained Daniel Lapsley, a prominent moral psychology theorist (1996, p. 231). In other words, we successfully blend the moral with the mundane when we fully understand the compelling [nature](https://www.psychologytoday.com/us/basics/environment) of the universal concerns of dignity, respect and justice, and when we feel “the weight of obligation” to promote these claims independent of our own personal desires, [goals](https://www.psychologytoday.com/us/basics/motivation) and preferences. Such moral courage is not uncommon among media professionals. In a study I conducted to examine the moral reasoning and motivations of selected media “exemplars” around the country – Pulitzer Prize recipients like Risen, as well as corporate officers of public relations firms admired for their ethical [leadership](https://www.psychologytoday.com/us/basics/leadership) – the notion of moral courage quickly emerged as a recurring theme (Plaisance, 2014). Repeatedly, the media exemplars described their decisions to do what they felt was “the right thing” in terms of duty rather than choice. Once an individual embraced or internalized a moral principle, they not only felt obligated to live their lives accordingly, but the moral principle actually became intertwined with how they saw themselves. In a sense, what looks like courage actually becomes just examples of duty. The image of the reckless, egotistical journalist prizing his story above all else is too often a convenient caricature for those unhappy with news accounts that may challenge certain ideologies. If we’re going to make [intelligent](https://www.psychologytoday.com/us/basics/intelligence) judgments about behavior in media, it is important for us to recognize the moral psychology behind the motivations of media professionals.

#### Moral courage is a key virtue—it’s what links ethical thought and action

**Josephson 17:** Josephson, Michael. “The Importance of Moral Courage”. What will matter: quotes, insights, and images about a life that matters. 2017. http://whatwillmatter.com/2017/01/importance-moral-courage/. [Premier]

Courage comes in different forms. Most often, we think of physical courage or bravery. That’s the kind of courage demonstrated by those who risked their lives trying to help others on September 11th and by the soldiers in Afghanistan. It’s right and proper that we call these people heroes and acknowledge their valor. But there’s another form of courage that’s just as important; it’s called moral courage. It’s the kind of courage C. S. Lewis referred to when he said, “courage is not simply one of the virtues but the form of every virtue at the testing point.” The testing point is the place where living our lives according to moral principles may require us to put our comfort, possessions, relationships, and careers at risk. For most of us, the need for physical courage is rare. But our moral courage is tested almost every day. Being honest at the risk of disapproval, lost income or a maimed career; being accountable when owning up to a mistake can get us in trouble, making tough decisions and demands with our kids at the cost of their affection, being fair when we have the power to be otherwise, and following the rules while others get away with whatever they can – these things take moral courage, the inner strength to do what’s right even when it costs more than we want to pay. The sad fact is that people with moral courage rarely get medals. Instead, they risk ridicule, rejection and retaliation. Yet this sort of courage is the best marker of true character and a life your children can be proud of.

## Kant AC

#### Violating source confidentiality is inconsistent with the categorical imperative

**Miller 2k:** Miller, Mindie R. “The Ethics of Confidentiality: Professional Duties and the uncooperative HIV-infected Client”. University of Kansas. 2000. <https://kuscholarworks.ku.edu/bitstream/handle/1808/9461/auslegung.v23.n01.063-097.pdf;sequence=1>. [Premier]

In the previous section, I outlined Kant's derivation from the Categorical Imperative of a perfect duty against false promising. If breaking a client's confidence is equivalent to breaking a promise made to that client, then Kant would have to be opposed to performing such an action. Thus, it might be helpful for our purposes to conceptualize a breach of confidence as a broken promise. If breaking promises is always prohibited, and breaching client confidence is an instance of breaking a promise (and I will argue that it is), then we can conclude that Kant would advocate an absolute rule of confidentiality. Consider the following promise: "I promise to keep all client information in the strictest confidence, unless by breaking my client's confidence, I can prevent harm to a third party." In this case, the scope of the promise of confidentiality is limited by an exception, or a condition. This promise makes confidentiality conditional on the type of information shared by the client. If the client communicates intent to harm an innocent third party, then the promise is void because this type of information is not covered by the promise. In this example, then, warning third parties at risk of harm from your client is not a breach of confidence, nor a broken promise. However, a professional rule that entails such a promise is a foolish rule. If a client knows that information about intent to harm third parties is not covered by the promise of confidentiality, then the client will not divulge information of this nature. Thus, the professional will be in no position to protect a third party at risk of harm because he will not be aware that any danger exists. Hence, a promise of confidentiality with built-in exceptions defeats the purpose of having the exceptions to begin with, which in this particular case is to prevent harm to third parties at risk. Therefore, the only promise of confidentiality Kant could allow is one that is absolute, such as, "I promise to keep absolutely all client information in the strictest confidence." But if this is the promise made to clients, then all breaches of confidence are cases of breaking promises. And since Kant believes that false promising is morally prohibited, then breaking confidence under his view is never morally permissible. Thus, in regards to the professional's dilemma in the case of the uncooperative HIV/AIDS client, Kant would argue that the professional is obligated to remain silent, even though his motivation for speaking out is a concern for preventing the death of an innocent third party. There is one point, in Lectures on Ethics, where Kant diverges from his otherwise absolutist stance against lying or breaking promises. He writes, "The forcing of a statement from me under conditions which convince me that improper use would be made of it is the only case in which I can be justified in telling a white lie."41 Kant argues, in this segment, that a lie can justifiably be used as a "weapon of defense."4 2 However, he goes on to write that "a lie is a lie, and is in itself intrinsically base whether it be told with good or bad intent... There are no lies which may not be the source of evil."4 3 Furthermore, the rest of Kant's ethical writings indicate his belief in a moral prohibition against lying or breaking promises. Regardless of where Kant came down in the end, an argument against ever telling a lie or breaking a promise can be made using Kant's Categorical Imperative.

## Contracts AC

#### Confidentiality represents a contract, forcing the reporter to breach breaks these and prevents future contracts

Puerto 92 Puerto, Olga C. A lawyer in Miami, Florida focusing on various areas of law, , When Reporters Break Their Promises to Sources: Towards a Workable Standard in Confidential Source/Breach of Contract Cases, <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1897&context=umlr>, 1992 [Premier]

When a reporter promises a source confidentiality, the traditional contract elements are present.68 A source's request for confidentiality constitutes an offer.69 A reporter's consent to this condition constitutes acceptance. 70 The consideration flowing from the reporter is the reporter's promise of confidentiality, and the consideration flowing from the source is the information imparted to the reporter.7 I Reporter-source relationships are mutually beneficial. Reporters obtain newsworthy information otherwise not available, and sources achieve their aim of disclosing information while protecting their identities. The advantages both parties derive from these relationships explain the increase in the use of confidentiality source material over the past few years.72 An important principle of contract law is that remedies are based on strict liability, without regard to fault. 7 An aggrieved party need only establish the existence of the elements of a contract and that the defendant breached it in order to recover.74 Thus, any reasons offerred by media defendants to justify the breach of a promise to a confidential source are irrelevant under traditional contract doctrine. Similarly, the newsworthy value of the information published as a result of the breach is not a defense to a finding of liability. The confidential source/breach of contract cases clearly do not fit within traditional contract analysis, which does not provide an analytical vehicle for balancing as well as protecting the countervailing First Amendment interests. Therefore, any standard developed to accomodate these competing values must focus on the dynamics of the reporter source relationship.

## Internet Commenters AC

#### Current laws are inconsistent in shielding internet commenters and put all reporters at risk without clear protections

Martin et al 11, Jason Martin – PhD candidate, Mark Caramanica – PhD candidate, Anthony Fargo – prof of Journalism @ Indiana, “Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online,” 16 Comm. L. & Pol'y 89 (2011), lexis. [Premier]

When the anonymous person speaks through the conduit of a news media-sponsored Web site, however, **some newspapers have used shield laws, designed to protect journalists' ability to gather news by protecting their concealment of confidential sources, to shelter the anonymous** [\*125] **commenter**. Judges in six of the seven cases examined for this article have found this use of shield laws appropriate given the nature of language in the individual shield laws in their states. But **a judge in Illinois has raised questions about this practice, and a judge in New Jersey in an otherwise unrelated case also questioned whether the shield law in his state was meant to protect this type of information**. Also, **some commentators** have raised the speculative but not fanciful **concern that using shield laws to protect anonymous commenters may tempt legislators to amend shield laws to lessen protections for both commentators and journalists. This** concern **is particularly credible if news organizations attempt to protect the author's defamatory comments**, leaving plaintiffs with legitimate grievances little recourse to reclaim their reputations.

#### Protecting internet commenters as sources enhances the integrity and success of journalism; non-traditional reporters should be involved in the process of fact-checking and newsgathering

Martin et al 11, Jason Martin – PhD candidate, Mark Caramanica – PhD candidate, Anthony Fargo – prof of Journalism @ Indiana, “Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online,” 16 Comm. L. & Pol'y 89 (2011), lexis. [Premier]

But **news organizations may have strong ethical, as well as practical and business reasons, for defending the anonymity of commenters**. More than sixty years ago, the Hutchins Commission on Freedom of the Press, responding to perceived threats to the freedom and independence [\*121] of newspapers from government secrecy and interference, recommended that newspapers adopt five guiding principles to defend themselves from possible public backlash that could erode the press's justifications for First Amendment protection. Among the principles was that **newspapers should view themselves as forums "for the exchange of comment and criticism."** That sentiment is echoed in the same Society of Professional Journalists ethics code that discourages anonymity: "**Journalists should … [s]upport the open exchange of views, even views they find repugnant."** As a practical matter, the federal court in the Enterline case noted that **defending oneself from a subpoena could require an anonymous commenter to unmask herself in order to press her legal rights in open court. Therefore, the news organization may be the most logical party to defend the commenter's rights.** From a business perspective, two lawyers whose 2009 Communications Lawyer article is generally skeptical of using shield laws to protect the identities of anonymous commenters nevertheless note that news organizations have good reasons to fight subpoenas for those identities. The lawyers state that **anonymous comments "bring valuable information to media websites that can enhance not only public dialogue, but also the company's own reporting." In addition to enriching public debate on social issues, the authors write, the "vitality" of online comments can increase readership on news Web sites, which in turn can help news organizations develop "new digital revenue streams."**

While none of the concerns about the use of shield laws to protect anonymous commenters are frivolous, there is a more optimistic and less cynical way to view the development. **It could be that news organizations and the courts are trying to adapt the law to media changes spurred by new technology and audience expectations.** In this view, news organizations could be seen as attempting to adapt to the "new, right-brain, digital world" that Carl Sessions Stepp described. 189 **This could include embracing, to some degree, the more free-wheeling and** [\*122] **anonymous nature of online commentary and trying to protect that culture while adapting it to the standards and practices of the journalism profession, as witnessed by the recent attempts by many news organizations to rein in the comment forums somewhat.** 190

#### Courts are already protecting some anonymous commenters as sources – a move in favor of the aff upholds First Amendment rights in light of new technology

Martin et al 11, Jason Martin – PhD candidate, Mark Caramanica – PhD candidate, Anthony Fargo – prof of Journalism @ Indiana, “Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online,” 16 Comm. L. & Pol'y 89 (2011), lexis. [Premier]

For the courts, the willingness to allow newspapers to use shield laws to protect anonymous commenters may, in the more optimistic view, be evidence that the courts also are trying to adapt to the new "right-brain" world. Traditionally**, as new communication media have arrived and raised new issues, the Supreme Court has often adapted existing law and regulatory language to new situations. For example, decisions about the First Amendment rights of cable television operators** have made comparisons to newspapers and other pre-existing media while the Supreme Court tried to define cable's unique place in the free-expression sphere. 191 **In Reno v. ACLU, the Court compared Internet users to town criers and pamphleteers to locate their place on the First Amendment hierarchy** of rights.192

In regard to anonymous commenters to newspaper Web sites, **courts can be seen as trying to adapt existing laws not so much to a new technology but to a new use of technology, one that is arguably reshaping an aspect of the traditional newsgathering process. The reporting of a story that is posted on a Web site that enables audience comments does not have a clear conclusion, making it difficult to say that "sources" are only the people the journalist talked to before the story was posted. If collaborative newsgathering processes continue to evolve and further engage readers in the journalistic process, courts will likely be forced to reconsider the traditional conceptions of how news is generated. The cases discussed earlier out of Florida, Illinois, Montana, Oregon, North Carolina and Texas could thus be viewed as newspapers' and judges' attempts to adapt the law to changing circumstances**.

## Case Blocks

### AT Justice Dept. Guidelines

#### The Justice Department’s guidelines don’t stop prosecutors from obtaining subpoenas for revealing confidential sources – harms the public’s right to know about what the government is doing.

McCraw 17. McCraw, David. (Vice president and deputy general counsel of The New York Times.) “How a Crackdown on Leaks Threatens Confidential Sources,” The New York Times, September 4, 2017. https://www.nytimes.com/2017/09/04/insider/how-a-crackdown-on-leaks-threatens-confidential-sources.html [Premier]

It was just four years ago that roughly two dozen representatives of major news organizations crowded around a conference table at the Justice Department for a meeting with Attorney General Eric H. Holder Jr. Our agenda? Strengthening the Justice Department’s guidelines that limit when federal prosecutors can serve subpoenas on the news media. The issue was not theoretical. It had just been revealed that federal investigators had secretly seized the phone records of The Associated Press and the emails of a Fox News correspondent during leak investigations. The Justice Department had convened the meetings to address what we saw as a perilous trend. The media representatives — lawyers and executives from a range of news outlets, including CNN, Dow Jones, Hearst and the major broadcast networks — had come to make the point that when prosecutors go after journalists to find their sources, the price is ultimately paid by the public, which needs to know what its government is really up to. Mr. Holder may not have agreed with everything we had to say then and in future meetings, but the result was important: The Justice Department revised its internal guidelines to make it harder for prosecutors to obtain subpoenas for reporters’ testimony and records. That all seems very long ago now. Attorney General Jeff Sessions, after being chided by President Trump for being weak, recently declared a war on leakers and made clear that the news media was also on his mind. “We respect the important role that the press plays and will give them respect, but it is not unlimited,” he said. “They cannot place lives at risk with impunity.” Two days later, Rod J. Rosenstein, the deputy attorney general, tried to clean up the record. “The attorney general has been very clear that we’re after the leakers, not the journalists,” he said. For all the overblown statements about “lives at risk,” the administration has no poker face. Journalists’ inside sourcing about the wars within the White House walls, the Russia investigations and a shifting foreign policy has been the real driver of the anti-leak fervor. It seems all but certain that the Justice Department will try to chip away at the subpoena guidelines. Disputes over administrative regulations are rarely the stuff of high political drama. But this is one of those times when the public should be paying attention. The guidelines run for several pages, but at base they say that prosecutors are to seek testimony and evidence from journalists only as a last resort, and that news organizations should have a chance to go to court to challenge any subpoenas. The guidelines are far from ironclad. If a prosecutor were to ignore them, a journalist would have no right to go into court and demand they be followed.

#### Justice Department guidelines are insufficient --- empirics prove

Giordano 15 Giordano, Arielle. Managing Editor of CommLaw Conspectus. “PROTECTING THE FREE FLOW OF INFORMATION: FEDERAL SHIELD LAWS IN THE DIGITAL AGE”, CommLaw Conspectus. 2015. https://scholarship.law.edu/cgi/viewcontent.cgi?article=1553&context=commlaw. [Premier]

In addition to Rosenberg’s concerns over criminal investigations, he also mentions that the Justice Department has strict internal guidelines that prevent the agency from subpoenaing evidence from the press, except in rare circumtances.247 Similarly, Rosenberg references the minimal amount of subpoenas issued in the past to media personnel seeking confidential information.248 Ironically, that statistic seems irrelevant because recently, the Justice Department secretly obtained two months’ worth of home, cellular, and work phone records of journalists working for the Associated Press.249 This recent use of sweeping, unchecked power is disturbing to both journalists and their confidential sources.250 This secret use of coercive tactics is further proof that journalists need federal protections and that the American public may not truly know how often confidential information is forced out of journalists.

### AT Constitutionality

#### Congress can codify journalistic privileges in the federal rules of evidence

Fennessy 06 Fennessy, Nathan. J.D. Candidate @ The Catholic University of America Columbus School of Law. “Bringing Bloggers into the Journalistic Privilege Fold.”, Catholic University Law Review. 2006. <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1159&context=lawreview>. [Premier]

At least one commentator has suggested that Congress should codify the journalist's privilege in the Federal Rules of Evidence."" Although the judiciary has the right to add, delete, or amend other rules of evidence,18 7 "any . . . rule creating, abolishing, or modifying an evidentiary privilege [must be] . .. approved by Act of Congress., 188 Currently, the Federal Rules of Evidence do not provide any specific nonconstitutional privileges."9 The original draft of Rule 501 provided nine specific nonconstitutional privileges, but did not include a privilege for a reporter or journalist. 9 After outcry over the proposed privilege rules, including those concerned that reporters were being denied a privilege,' 91 the rule was revised to eliminate all the specific enumerated privileges and left the federal courts to develop the law of privileges.9 It is unlikely that Congress will attempt to codify the law of privileges again, particularly the journalistic privilege, because the first attempt drew tremendous opposition from academics93 and "[c]urrent and former members of the judiciary.', 9 4 Although the codification of the Federal Rules of Evidence was controversial in itself,'95 the "chair of the subcommittee that held hearings on the . . . rules, commented that '50 percent of the complaints in our committee related to the section on privileges." 1

#### Congress has the authority the enact a shield law under the Commerce Clause

Fennessy 06 Fennessy, Nathan. J.D. Candidate @ The Catholic University of America Columbus School of Law. “Bringing Bloggers into the Journalistic Privilege Fold.”, Catholic University Law Review. 2006. <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1159&context=lawreview>. [Premier]

The uncertainty surrounding the journalistic privilege at the federal level has led some commentators to suggest that a federal shield law should be enacted to protect the press. 97 During the six-year period following the Branzburg decision, Congress witnessed the introduction of close to one hundred proposed federal statutes to protect journalists.' The failure of these bills was partially a result of Congress' "inability to reach consensus on the definition of a 'journalist' and ... the insistence of the press on an absolute privilege, not a qualified one."' 99 It was also the result of opposition from the American Bar Association 00 and influential members of the media.' Currently, there are two bills before Congress which would create a federal shield law.202 However, only the Free Speech Protection Act of 2005, because of its broad definition of news media, contemplates protection of bloggers not connected to traditional media outlets. 3 The Branzburg decision certainly left open the possibility that Congress could fashion a shield law in the future. 2 It would not be the first time that Congress responded to an unfavorable Court decision against the press by enacting a law that limited the application of the Court's decision. For example, in Zurcher v. Stanford Daily, the Supreme Court held that a newspaper could not claim any First Amendment protection to prevent the government from searching its offices pursuant to a search warrant.21 Congress responded by enacting the Privacy Protection Act of 1980,207 prohibiting the government from using search warrants against the press when the press was not the subject of the criminal investigation.2 °8 The law provides a civil cause of action for damages against the federal government for not less than $1,000.2o 9 The law was enacted pursuant to Congress' constitutional powers under the Commerce Clause.21° The idea that Congress could use its powers under the Commerce Clause to enact a federal shield law to protect journalists is not new.2 11 Congress has treated the "gathering and dissemination of news as part of interstate commerce... to place the media under controls with respect to labor relations and anti-competitive activities., 21 2 In fact, the original proposed shield law following Branzburg would have applied to both federal and state proceedings.2 3 The Supreme Court has long recognized that the federal government has the authority to regulate broadcast radio and television.2 4 With the increasing consolidation of the telecommunications industry into "media hybrids" that deliver telephone, cable television, and internet access, Congress has an even greater need and authority to provide regulation to protect the public's First Amendment interests. 21 5 Although the Supreme Court has previously determined that the Internet lacks the invasive character of broadcast television or radio to require regulation,"' the changing nature of the Internet makes it more akin to television and radio than to print media.1 2121 Even with the decisions in United States v. Lopez 2 and United States v. Morrison,"' which have restricted Congress' power under the Commerce Clause, a federal shield law could pass judicial muster.220 The gathering and dissemination of news is an activity that has a substantial effect on interstate commerce, 21 and therefore fits into the third category of 222 activities that Congress may regulate under Lopez. The gathering and dissemination of news also satisfies the Morrison test 223 as a commercial activity because the search for truth has been subjugated to the demand 224 for profit. The changed nature of the institutional media from closelyheld family businesses to public corporations has made the media subject to the "expectations of investors, analysts, and fund managers. 225 Journalism has become driven by the need to please advertisers in order to make a profit as much as it is driven by a desire to inform the public.2 26 Although journalism may have been considered a noneconomic activity at one time, today it is certainly an economic activity that 1 227would qualify for congressional regulation under the Commerce Clause

#### The plan’s constitutional – First Amendment press freedoms + doctor-patient and lawyer-client confidentiality empirically disprove their arguments

Giordano 15 Giordano, Arielle. Managing Editor of CommLaw Conspectus. “PROTECTING THE FREE FLOW OF INFORMATION: FEDERAL SHIELD LAWS IN THE DIGITAL AGE”, CommLaw Conspectus. 2015. https://scholarship.law.edu/cgi/viewcontent.cgi?article=1553&context=commlaw. [Premier]

Aside from supporters of a federal shield law, there are many opponents who believe that a federal shield law would be unconstitutional and will only conflict with the investigative process and harm national security.227 These opponents assert that shield legislation will conflict with criminal investigations because journalists will not have to testify and even potentially cause conflicts with national security interests and issues.228 Furthermore, opponents fear that the bill will enable leaks to occur at higher volumes because they can seek asylum under the FFOIA.229 While these concerns may sound reasonable, the First Amendment protects freedom of the press and the qualified privilege in the FFOIA makes sufficient exceptions for criminal trials and to protect national security interests.230 This ensures that the government can protect the nation while simultaneously allowing the free flow of information. To begin with the constitutionality of a federal shield law, opponents argue that as American citizens, reporters must adhere strictly to the rules of the American Constitution. When reporters are granted special privileges they are no longer “equal under law” and that deems shield laws unconstitutional.231 This argument overlooks a specific right to freedom of the press encompassed within the First Amendment of the Constitution. The Founding Fathers viewed the right to publish individual views and news as a fundamental right, and classified a free press as a means to a vibrant republic.232 Freedom of press is a liberty that implies the ability to speak and be heard openly without government restraint.233 By failing to afford a federal reporter’s shield, the government instills fear in journalists, preventing them from speaking openly about the news they gather and publish, thus constraining freedom of the press. The California Supreme Court acknowledged the effect of constraining a journalist’s ability to publish news: [t]he press’ function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.234 The lack of a federal shield law allows the government to restrict the free flow of information, which could have a detrimental effect on the public’s right to know about governmental actions.235 Moreover, the argument that it grants reporters an unconstitutional unequal privilege is without merit, as there are a variety of situations where individuals are granted a special privilege. Eliminating special privileges would result in no doctor-patient privilege, no spousal privilege, and even no attorney-client privilege. Allowing privileges does not create inequality but is often afforded within the Fifth and Fourteenth Amendments of the Constitution.

#### The constitution protects confidential sources—courts prove

**Denniston 14:** Denniston, Lyle. Denniston is an American legal journalist, professor, and author, who has reported on the Supreme Court of the United States since 1958. “Constitution Check: Do journalists have the right to keep their sources secret?”. Constitution Daily. February 27th, 2014. **Bracketed for Gender**. <https://constitutioncenter.org/blog/constitution-check-do-journalists-have-a-right-to-keep-their-sources-secret>. [Premier]

Lyle Denniston looks at a rising chance that the Supreme Court might be persuaded to redefine privileges sought by reporters seeking to protect their sources. THE STATEMENTS AT ISSUE: “The law governing the relationship between reporters and their sources has become increasingly less clear. This Court has not considered whether journalists have any right not to reveal the identity of confidential sources since Branzburg v. Hayes was decided over 40 years ago….The lower courts have struggled to interpret the conflicting principles of Branzburg…” – Excerpt from an appeal filed in January at the Supreme Court for James Risen, a reporter for The New York Times, seeking to block a subpoena to compel him to testify in court about his sources for a discussion in a book about secret U.S. efforts to scuttle the nuclear arms program of Iran’s government. “The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not….We cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source, or evidence thereof…” – From the majority opinion in the Supreme Court’s 1972 decision in Branzburg v. Hayes, rejecting by a 5-4 vote claims by newspaper reporters in Kentucky, New York and Rhode Island for a constitutional “privilege” not to be forced to disclose the identity of news sources to grand juries investigating crimes involving drugs and the activities of militant groups. “Certainly we do not hold…that state and federal authorities are free to ‘annex’ the news media as ‘an investigative arm of government.”…The courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.” – From the separate opinion by Justice Lewis F. Powell, Jr., seeming to limit the scope of the Branzburg decision. His vote was necessary to make a majority for the ruling. WE CHECKED THE CONSTITUTION, AND… It is a long-standing legal principle, as countless courts have phrased it, that “the public has a right to every ~~man’s~~ [person’s] evidence.” But **there can be exceptions**, and probably the most obvious one is the Fifth Amendment’s promise that no one can be forced to reveal that they have committed a crime. And there are many “privileges” against forced testimony in court – for spouses about each other, for religious counselors and what the faithful say to them, for doctors’ diagnosis of their patients, for lawyers’ advice to their clients. But those “privileges” have grown up by the choice of legislatures and courts, not by the command of the Constitution, although some of these draw some theoretical support from constitutional principles – like the Sixth Amendment right to a lawyer in a criminal case and Fourth Amendment guarantees of privacy. No entity in America has been more diligent than the news industry in trying to gain constitutional status for a right not to be forced to give up information at the government’s command. If anything, news organizations have intensified that effort in recent years, as the number of subpoenas demanding to know reporters’ sources has ballooned to historic levels. The investigative zeal of the industry seems not to have cooled because of this, but reporters and their publishers fear increasingly that their secret sources will dry up if this trend goes on. Thus, the rising plea for a guaranteed form of constitutional protection. That plea had found sympathetic ears in a number of courts around the country, including the pace-setting federal courts of appeals. Six of those courts, in one degree or another, have recognized that the First Amendment does confer at least a qualified form of protection against compelled disclosure of news sources – a shield that generally applies if government could get the information elsewhere than from reporters. In addition, all but one of the states – Wyoming – recognize the same right under state law. The Supreme Court, in the meantime, has passed up a couple of chances to reconsider the claim of a testimonial “privilege,” and has discussed the Branzburg result in other cases without questioning it. But there is now a rising chance that the Court might be persuaded to reopen the issue because, for the first time, a federal appeals court has flatly refused to acknowledge such a privilege for reporters seeking to protect their sources. In doing so, that court relied directly on the Branzburg decision. The Fourth U.S. Circuit Court of Appeals, based in Richmond, Va., in a decision that news industry lawyers say conflicts directly with the results in six other federal appeals courts and the situation in nearly all of the states, turned down a privilege claim by New York Times reporter James Risen. That is the most visible source-protection dispute now unfolding in the country, and Risen’s lawyers have now asked the Supreme Court to step in and hear his claim. Risen, who specializes in covering national security matters and thus relies quite heavily upon sensitive sources to whom he promises confidentiality, is facing a Justice Department subpoena to reveal his dealings with Jeffrey Sterling, a former Central Intelligence Agency officer. Risen’s relationship supposedly would be a part of a government trial of Sterling on charges of leaking secret information. Risen’s problems originated in Chapter 9 of his 2006 book, “State of War.” In those pages, he described a secret CIA initiative – “Operation Merlin” – that supposedly was a botched attempt by the CIA to feed scientific misinformation to scientists in Iran in hopes of undermining the efforts of that country to build a nuclear war weapon. An FBI investigation led authorities to Sterling, and Risen’s book chapter led them to him on the theory that Sterling was a source for the “Operation Merlin” revelations. A federal judge ruled for Risen, but that was overturned by a divided decision of the Fourth Circuit Court last summer. With Risen’s appeal now awaiting the Supreme Court’s attention, the federal government has yet to reply. Its response is currently due in late March. The Court could act on the case within weeks after the Justice Department files its views. The court, of course, has complete discretion whether it wants to get involved, but a clear split among the appeals courts is often a reason for it to do so

#### More constitutionality offense—confidentiality k2 free speech, framers intent and court rulings prove

**Handman 14:** Handman, Laura R. “Protection of Confidential Sources: A Moral, Legal, and Civic Duty”. Notre Dame Journal of Law Ethics, and Public Policy. Volume, 19, Issue 2. February 2014. <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1222&context=ndjlepp>. [Premier]

The Supreme Court has long recognized that "[t]he constitutional guarantee of a free press . . . secures 'the paramount public interest in a free flow of information to the people concerning public officials."' 17 Accordingly, "news gathering is not without its First Amendment protections." As numerous courts of appeals have observed, routinely compelling "disclosure of... confidential [sources] would clearly jeopardize the ability of journalists and the media to gather information and, therefore, have a chilling effect on speech." This is especially so with respect to "reporting on governmental affairs," and "the axiom is almost always: the more important a story, the more likely the need for confidentiality."2" Federal courts have recognized a reporter's privilege grounded in the First Amendment that provides journalists with a qualified right to resist efforts to compel testimony about their confidential sources or about unpublished information gained in the course of researching a story. In Branzburg v. Hayes, four members of the Supreme Court held that there is no privilege on the part of the media to refuse to testify before the grand jury. Justice Powell's concurring opinion, however, held that courts should strike "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."2 2 In the three decades since, many courts interpreting Branzburg have held that Justice Powell's opinion, prescribing a balance of First Amendment and law enforcement interests, is controlling. Other courts have more recently held that, at least in the grand jury context, Branzburg provided no privilege to refuse to disclose confidential sources. 2 4 The very existence of reporter's privilege is currently before appellate courts and may reach the United States Supreme Court this term. However the privilege is ultimately interpreted, the First Amendment clearly does not relieve a reporter of all civic duty to provide testimony concerning a crime that he witnesses. Every citizen-including a reporter-has an obligation to give evidence. The law has long recognized a "general duty" on the part of citizens called before official proceedings to "give what testimony one is capable of giving."26 The law recognizes numerous exceptions to this obligation, however, such as the privilege against self-incrimination, the lawyer-client privilege, spousal privileges, physician-patient privilege, the clergy-penitent privilege, and, most recently, the psychother- apist-patient privilege recognized in Jaffee v. Redmond.2 7 These privileges reflect a societal value placed on the ability to withhold evidence, no matter how probative, no matter if available from no other source, in order to "promote[ ] sufficiently important interests" 8 which "outweigh the need for probative evidence." While the legal duty to answer a subpoena and supply a grand jury or a court with relevant information does not target the press, that legal duty has a particularly devastating effect on reporters' ability to gain the confidence of sources who can provide them with the information crucial to investigating important and newsworthy stories. If potential informants believe that a subpoena can convert the media into "an investigative arm of the government," they will be far less likely to share controversial information."0 Because of their investigative activities, reporters are more likely to be targets of subpoenas."' Sources seek confidentiality usually out of a well-grounded fear of retaliation and will be less likely to provide information if they risk disclosure. Reporters may be forced to decline to print newsworthy items from confidential sources if they believe that courts will not respect the need to preserve confidentiality. Reporters must now also factor in the potential consequences of publishing stories based on information from confidential sources, consequences that currently include substantial fines and jail time. 32 Curbing an over-reliance on confidential sources may not be all bad where confidentiality is not truly vital to get the informa- tion, where the source does not want to be identified because of risk of embarrassment rather than retaliation, where the source, hiding behind anonymity, provides deliberately false informa- tion, or where the story itself does not involve disclosure of seri- ous abuse. Unfortunately, refusal of any kind of protection would likely quash the important whistleblower stories that will not otherwise be told as well as celebrity gossip or other stories of less public moment. Courts must balance the needs of the reporter's privilege against the needs of the litigant seeking the information. In some situations the need for the information will be much more compelling than in others. For example, the situation in which confidential sources are most likely to be protected is one in which a reporter is merely a third-party witness in a civil lawsuit: In general, when striking the balance between the civil litigant's interest in compelled disclosure and the public interest in protecting a newspaper's confidential sources, we will be mindful of the preferred position of the First Amendment and the importance of a vigorous press .... Thus in the ordinary case the civil litigant's interest in dis- closure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most excep- tional cases, its value will be substantially diminished. 3 Even in civil cases where the reporters are merely third-party witnesses, these cautions have been recently dismissed. In the Privacy Act civil claim against the government for leaking details of the investigation of Wen Ho Lee, five reporters from four major news organizations have been ordered to reveal their sources.34 They have refused and have been found in con- tempt.3 5 The order requiring disclosure did not first determine, as a threshold matter, whether the identity of the agency or indi- vidual source was necessary to establish an otherwise meritorious claim, instead finding no reporter's privilege and, if there was one, it had been overcome.36 Reporters have also been subpoe- naed in the Privacy Act claim brought against the United States by Stephen Hatfill, the scientist named by the Attorney General as a "person of interest" in the anthrax investigation. Before a single government agent has been questioned, the testimony of reporters has been sought as a first resort, not a last resort.3 7 Further along the continuum is a situation in which a reporter is himself a defendant in a civil defamation suit. In Her- bert v. Lando," the Supreme Court held that there is no First Amendment privilege barring a plaintiff in a defamation lawsuit from inquiring into the editorial process because of the burden on the plaintiff to prove actual malice. Courts must evaluate how critical or necessary the information is, whether available from other sources, and whether the claim has substantial merit if the confidential information were disclosed.39 In addition, the con- sequences of non-disclosure in a defamation case need not be jail or a fine but can result in an evidentiary presumption against the news organization or allow the jury to draw an inference from the reporter's non-disclosure.40 In a suit against the Boston Globe arising out of stories about experimental chemotherapy treatments that resulted in a fatal overdose at a leading cancer clinic, the consequences for the news organization were carried to a new extreme.41 A default judgment was entered against the Globe for its refusal to disclose a confidential source which the plaintiff, the doctor involved in the fatal treatment, said was necessary in her claims, not against the Globe, but against the clinic. Ajury awarded damages against the Globe and its reporter in the amount of $2.1 million, absent any finding of falsity or actual malice, as constitutionally required for liability against the press for stories involving matters of public concern.4 2 The award was affirmed on appeal to the Supreme Judicial Court of Massachusetts, although that Court observed that with "the clarity granted by hindsight," the identity of the Globe's sources was "peripheral at best."

**SHE CONTINUES**

Whatever the merits of that particular leak, the "crime" of leaking, as a general matter, goes to the heart of the role of the press in our democracy. The Supreme Court has repeatedly stressed that "[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." "The press was protected" by the Constitution's Framers "so that it could bare the secrets of the government and inform the people." " The Supreme Court has recognized that there is and must be a First Amendment protection for newsgathering in order to fulfill that watchdog function.59 Forcing reporters to make the choice "would invite timidity and self-censorship and very likely lead to the suppression of information that would otherwise be published and that should be made available to the public."60 The balance set by the First Amendment requires protection of confidential sources, even if it is at some cost to the enforcement of the law. Anonymous speech has long been identified as central to democracy, with a lineage dating back to pre-Revolutionary days.' These First Amendment protections extend even when, as in a leak inquiry, the anonymous speaker has commit- ted a criminal act in disclosing the information to the press where the disclosure is of information of compelling public interest.

#### The original understanding of the Framers was that the First Amendment protected freedom of the press to be a check on government – those principles generally favor reporters over government officials

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

Little is known about how much power the Framers thought should be afforded to the press. 39 **Because the language of the First Amendment's press clause is so sparse** 40 **and The Federalist says little on the topic**,41 **discerning the meaning of the First Amendment usually has involved studying the writings of philosophers** such as John Milton42 and eighteenth century journalists such as John Trenchard and Thomas Gordon. 43 In the 1644 essay Areopagitica, the English philosopher and poet John Milton laid the foundation for many later theories of the free press an by arguing that truth would defeat falsity if the two were allowed to compete freely. Milton penned this famous quote: And though all the winds of doctrine were let loose to play on the earth, so Truth be in the field, we do injuriously by licensing and prohibiting misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter? 46

Around 1720, **Trenchard and Gordon began publishing the famous "Cato" essays.** 47 **The writers "thoroughly incorporated Locke's [idea] of... consent of the governed ... with Milton's marketplace concept to produce a series of essays explaining that a free and open press was a natural right of all who lived in a state where government created laws to meet the will of the majority,"** according to free-expression historian David A. Copeland.48 Trenchard and Gordon argued that freedom of expression was "the Right of every Man, as far as by it he does not hurt and controul the Right of Another; and this is the only check which it ought to suffer, the only Bounds which it ought to know. 49 They further argued that the people had a right to scrutinize the behavior of public officials. [I]t is the Part and Business of the People, for whose sake alone all publick Matters are or ought to be transacted, to see whether they be well or ill transacted; so it is the Interest, and ought to be the Ambition of all honest Magistrates, to have their Deeds openly examined and publickly scanned.50

**The idea that the free press is a tool to be used by citizens to learn about and respond to their government was well developed by the time of the American Revolution. "Americans from the 1720s on used the printed word for a multitude of purposes, and one of them was to engage in debate**," Copeland wrote. 51 **By the mid-1770s**, Copeland observed, **the press was viewed as a tool of freedom:**

[W]hen **[John] Adams** reflected on all that had happened in the turbulent decades of the 1760s and 1770s, he **said that the fighting of 1775 on was not the revolution. The revolution was found in the hearts and minds of the people. Anyone who wanted to find out what they thought, he suggested, need only consult the pamphlets and newspapers, "by which the public opinion was enlightened and informed." The press... was the means to an end. In order to obtain freedom, people needed a press that would allow them to discuss and debate matters of importance. Adams... would have said that nothing was more important than freedom from tyranny, and the chief catalyst in obtaining it was the press**. 5

Clearly **the First Amendment was designed to limit government power over citizens and the media.** However, neither the First Amendment itself nor the historical record concerning its adoption-or the adoption of the Constitution-delineates a social architecture that is sufficiently well developed to answer all the modem questions about media rights and government power.53 Therefore, **the courts and Congress often have had to fill in the lines between the broad strokes set down by the Framers**.

**[She continues]**

An excellent example of how the U.S. Supreme Court has filled in those lines in libel law and has used the First Amendment to distribute power between the government and the governed is **the landmark case of New York Times v. Sullivan**.54 In that 1964 case, the Supreme Court **decided that government officials who sue for libel must prove the allegedly libelous statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not.**",55 This difficult-toprove First Amendment standard was imposed on government officials in order to empower critics of the government. Writing for the Sullivan majority, **Justice** William **Brennan** explained the rule, in part, with this quote from James Madison: "[T]he censorial power is in the people over the Government, and not in the Government over the people. 56 The social architecture created by Sullivan **tipped the balance of power toward government critics and away from government officials.**

#### *Branzburg* did not definitively answer the question of the resolution

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

**The Branzburg Court did not decide whether journalists have a First Amendment right to refuse to testify in federal proceedings other than grand juries or how power should be distributed in cases that do not involve grand juries**.77 **The Court explicitly left that task to Congress**.78

### AT: Criminal Investigations

#### The plan carves exemptions for criminal investigations

Giordano 15 Giordano, Arielle. Managing Editor of CommLaw Conspectus. “PROTECTING THE FREE FLOW OF INFORMATION: FEDERAL SHIELD LAWS IN THE DIGITAL AGE”, CommLaw Conspectus. 2015. https://scholarship.law.edu/cgi/viewcontent.cgi?article=1553&context=commlaw. [Premier]

The assertion that federal shield laws would conflict with effective criminal investigations is without merit.236 Chuck Rosenberg, a former U.S. Attorney for the Southern District of Texas argues that all citizens have a responsibility to provide evidence and testimony to solve crimes.237 He argues that a federal shield law would prohibit law enforcement officials from obtaining evidence in important cases.238 While it is true that all citizens have a responsibility to provide evidence or give testimony to solve crimes, the legislation does not give reporters an absolute privilege.239 The legislation has specific exceptions regarding criminal investigations when alternative sources have been exhausted and when the testimony is critical to an investigation.240 This exemplifies the fact that the legislation will not prevent officers of the law from conducting effective criminal investigations.24

## Off-Case Blocks

### AT Treaties CP

#### CP fails – it’s non-binding and internet regulation guts solvency.

Martin and Fargo 15 Martin, Jason A. Assistant Professor, DePaul University College of Communication. Fargo, Anthony L. Associate Professor and Director, Center for International Media Law and Policy Studies, Indiana University School of Journalism. “ANONYMITY AS A LEGAL RIGHT: WHERE AND WHY IT MATTERS.” NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY VOLUME 16, ISSUE 2. JANUARY 2015. <http://ncjolt.org/wp-content/uploads/2015/01/Martin-_-Fargo_Final.pdf>. [Premier]

Despite any noble shared philosophical and legal intentions, a non-binding treaty or agreement may not have much practical influence in a global climate of increasing Internet regulation. This realization leads to a third suggestion, which calls for amendments to the United Nations’ Universal Declaration of Human Rights and related documents that acknowledge anonymous expression as a civil right and as an important component of public discourse. This solution is the most complicated, but it would perhaps be the most effective option in service of the protection of international legal rights to communicate anonymously online.

### AT UN CP

#### Legal anonymity rights already exist

Martin and Fargo 15 Martin, Jason A. Assistant Professor, DePaul University College of Communication. Fargo, Anthony L. Associate Professor and Director, Center for International Media Law and Policy Studies, Indiana University School of Journalism. “ANONYMITY AS A LEGAL RIGHT: WHERE AND WHY IT MATTERS.” NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY VOLUME 16, ISSUE 2. JANUARY 2015. <http://ncjolt.org/wp-content/uploads/2015/01/Martin-_-Fargo_Final.pdf>. [Premier]

Taking the special rapporteur’s report a step further, one legal scholar has suggested that international protection for anonymous speech already exists. 334 Molly Land of New York Law School argues that Article 19(2) of the International Covenant of Civil and Political Rights implicitly protects a right to use the Internet as a form of expression.335 Article 19(2) states: Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 336 Land goes on to suggest that Article 19(2) protects anonymity, which “is critically important for ensuring freedom of expression” because it allows people to express themselves on controversial issues without fearing negative consequences.337 However, noting that the Internet also poses an increased risk of harm, particularly to targeted groups in areas where ethnic tensions are raw and potentially dangerous, Land also recommends that it may be necessary to limit intermediary immunity (such as Section 230 in the United States) to provide an incentive for ISPs to control some harmful behaviors.338

### AT National Security DA

#### There’s no link to the national security disad --- any proposal would have exemptions for terrorism and criminal activity

Giordano 15 Giordano, Arielle. Managing Editor of CommLaw Conspectus. “PROTECTING THE FREE FLOW OF INFORMATION: FEDERAL SHIELD LAWS IN THE DIGITAL AGE”, CommLaw Conspectus. 2015. https://scholarship.law.edu/cgi/viewcontent.cgi?article=1553&context=commlaw. [Premier]

The purpose of the FFOIA is to prohibit a federal entity or employee of the executive branch, administration agency, or the federal government (in matters arising under federal law) from compelling a covered person to testify or pro-duce information related to an act of journalism.127 The legislation attempts to strike a balance between the rights of journalists to protect their sources, the needs of law enforcement, and the public’s right to know issues of local, state, national, and international importance.128 The FFOIA creates what is considered a “qualified privilege.”129 In certain situations, a court may order a journalist who possesses vital information (that was obtained in confidence) to provide the source of that information.130 Both bills define standards that would govern when an individual or organization has to reveal a confidential source, even if the source has been promised confidentiality.131 The broad standards created by the legislation govern both private and government actors and apply to both civil and criminal proceedings.132 Currently, forty states and the District of Columbia have state shield laws that afford protections to journalists.133 Many of these shield laws afford a qualified privilege similar to FFOIA.134 Some states afford more protections by allowing an absolute privilege.135 The qualified privilege articulated in H.R. 1962 and S. 987 grants authority to the United States government to keep the United States secure, while still affording federal protections to journalists against compelled disclosure.136 The qualified privilege in the FFOIA, in both versions of the bill, lists certain specific instances when the privilege will be waived: (1) alternative sources have been exhausted; (2) the testimony or document sought is critical to the investigation, prosecution, or defense of a crime or the successful completion of a noncriminal matter; (3) disclosure of an information source’s identity is necessary to prevent an act of terrorism, harm to national security, imminent death, significant bodily harm or to identify a person who has disclosed a trade secret, individually identifiable health information, or certain nonpublic personal information; and (4) the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.137 In these enumerated situations, the protections of the act do not apply, and the journalist will be compelled to turn over the confidential information.138 In cases involving the disclosure of unauthorized information, such as a leak, the FFOIA gives the court the authority to compel the disclosure of the source in order to prevent an act of terrorism or an act that could cause significant harm to national security.139 Conversely, a whistleblower that discloses information without any risk of harm will not be considered a threat to national security.140 Even if the case does not involve a leak of classified information, the Act allows the court to force disclosure of the source in order to identify the individual who committed an act of terrorism, or caused the act that ultimately led to significant harm to national security.141 Additionally, the legislation protections also do not shield eyewitness observations by the journalist, nor criminal conduct by the journalist.142 The protections of the legislation do not apply when the disclosure of the information is “reasonably necessary to stop, prevent, or mitigate a specific case of death, kidnapping, substantial bodily harm, certain offenses against minors, or the incapacitation or destruction of critical infrastructure.”143 Furthermore, the bill contains provisions to guarantee that law enforcement has access to national security information. This power is exclusive to the federal government and is omitted from state shield laws.144

#### The plan carves out exemptions for credible threats to national security without threating whistleblowers

Giordano 15 Giordano, Arielle. Managing Editor of CommLaw Conspectus. “PROTECTING THE FREE FLOW OF INFORMATION: FEDERAL SHIELD LAWS IN THE DIGITAL AGE”, CommLaw Conspectus. 2015. https://scholarship.law.edu/cgi/viewcontent.cgi?article=1553&context=commlaw. [Premier]

By the same token, a similar argument applies to concerns stemming from protecting national security interests. Critics worry that a federal shield law could jeopardize the government’s power to protect national security interests, and that if the bill passes, the government may not be able to avert disasters.242 Again, the qualified privilege protects the government in these situations.243 The legislation has clauses that force the disclosure of information to prevent an act of terrorism and to protect national security interests.244 These clauses within the legislation allow the government to compel the testimony in order to prevent disasters and to protect the nation’s security.245 These exceptions also apply to government officials who leak information that could compromise national security, but they do not apply to government whistleblowers.24

#### Judges will be involved in deciding whether reporters must testify on national security cases regardless of the aff – and they’re competent to do it

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

Countering that argument, Bruce A. Baird, a former assistant U.S. attorney, responded at the same Senate hearing that he could not understand the argument that **federal judges are** in**capable** **of deciding national security** **issues**. 150 He told the Senate Judiciary Committee: **We rely on judges to make very complicated decisions about balancing tests.** We require that **in many areas of law**. We require it every day .... **I recall a judge who taught himself patent law and electrical engineering** to decide a case, wrote a 300-page opinion full of circuit diagrams. ... You put judges on the bench who have that ability .... 151

Theodore B. **Olson, a former solicitor general**, **testified that judges already are involved in** deciding **whether reporters must testify in** **national security** cases, and they **will continue to be involved even if there is no federal shield law**. 152 He said:

What I think Mr. McNulty [of the Justice Department] did not acknowledge is that there is going to be judicial analysis of this process anyway. The Department standards do not require the Department to go to a judge. But what is going to happen is the reporter is going to decline to respond to the subpoena. He is going to make a motion to quash. **There is going to be a motion before a judge to hold the reporter in contempt for not responding to the subpoena .... So a judge is going to be considering these questions** .... , 1 s 3

Furthermore, Olson' 54 and Baird155 both pointed out that **federal judges make national security decisions in several other contexts, including Foreign Intelligence Surveillance Act (FISA) cases**.156

#### Public scrutiny through journalism is good – the status quo subpoena power quashes it and leaves it to prosecutors to decide whether to follow and enforce guidelines

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

Rep. Pete **Stark** (D-Calif.) **offered different figures on subpoenas and described a too-powerful executive branch in need of public and press** 210 **scrutiny**. Stark said:

Predictably, George Bush's Department of Justice opposes today's legislation, in part because **the Administration issued more than 300 subpoenas last year alone.** That's understandable**. If I had a track record of wasting money on a failing war, abusing civil liberties, suppressing scientific research, and failing to enforce important consumer protections and environmental regulations, I too would want to keep the press and the public in the dark**.21

At the 2007 House hearing, Department of Justice representatives and others were still debating the number of subpoenas issued by the department.212

Sen. Specter agreed with Rosenberg that the Justice Department's guidelines worked well.213 In fact, he said, that assumption is where he and his bill's co-sponsors started when they drafted their bill.214 However, Specter voiced two concerns about the Justice Department's guidelines. Both concerns suggest that **Specter viewed the Justice Department as more powerful than it should be and that he believed a shield law could remedy that problem. First**, Specter pointed out that **the Justice Department's guidelines do not apply to special prosecutors**. 21 5 "Special prosecutors are **often called upon in cases that are politically sensitive, may potentially be embarrassing to senior government officials, and are high profile**-**those** cases **that** seem to **carry the greatest risk of an overzealous prosecutor needlessly subpoenaing journalists,"** he said.216 **Second**, Specter said **the guidelines are enforced by the attorney general-not a neutral court**.217 "**This places the Attorney General in a difficult position;** namely, **the primary check on Federal prosecutors' ability to subpoena journalists is the nation's highest Federal prosecutor**," Specter said.21 8 "Most Americans, I believe, would feel more comfortable having the competing interests weighed by a neutral judge instead of a political appointee who answers to the President. 219 Specter said his **proposed shield law would "in large part" codify the Justice Department guidelines,** but the law would also apply those guidelines to special prosecutors **and rely on courts rather than "a political official"** to decide whether a media subpoena is warranted. 220

#### Shield laws are key to cut through dangerous secrecy in the executive branch – and jailing journalists makes the U.S. look bad

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

Miller of the New York Times countered the arguments of shield law opponents concerned about the post-9/l1 terrorist threat with this argument: **A shield law is needed to enable reporters to break through the wall of secrecy that had been built around federal government since the 2001 terrorist attacks**.277 She explained:

**[D]ramatically increased amounts and types of information are being classified as secret, and hence, are no longer available for public review**. Last year, **more documents were classified secret and top secret than ever before in American history**. In such a climate, **confidential sources**, **particularly in the national security and intelligence areas, are indispensable to government accountability**. 278

Government secrecy was more often cited in 2007 as a reason the nation needed a shield law.279 For example, Rep. William D. **Delahunt (DMass.) testified before the House that he supported the shield law as a response to the "surge of secrecy" in the Bush Administration**. 280 He complained:

So **what we have is a growing sense of secrecy or growing secrecy within the executive branch .... [T]he American public is being denied information that they have to have to make informed decisions. [Secrecy] is the predicate... for the need for this law... , and until we address it, we are putting at risk our democracy.28'**

Finally, shield law supporters argued that **jailing journalists who refused to comply with subpoenas put the United States in bad company internationally and exposed the nation to criticism for applying one standard of freedom to itself and a different standard to other nations**.282 As he introduced shield legislation into the Senate in 2006, Sen. Lugar pointed out that Reporters Without Borders, an international press freedom organization, had reported that **more than 100 journalists were then in jail around the world, more than half of them in China, Cuba, and Burma**. 283 "**This is not good company for the United States** of America," Lugar said.284 "**Global public opinion is always on the lookout to advertise perceived American double standards .... When we support the development of free and independent press organizations worldwide, it is important to maintain these ideals at home**. 285 Attorney Abrams observed:

**[V]irtually every other democratic country outside the United States, countries without a First Amendment, provide such protection. The notion that we provide or may provide no protection in federal courts when countries such as France, Germany, Austria, provide full protection and countries from Japan to Argentina and Mozambique to New Zealand provide such protection using language we would understand as being First Amendment like in its nature is, it seems to me, unacceptable**.286

### AT Crime DA

#### Shield laws are key to check overzealous prosecution and inform the public about criminal activity

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

While the Justice Department feared the shield law would undermine its law enforcement power, **shield law supporters argued that,** to the contrary, **the law would actually empower the media to help fight crime and would rein in the Justice Department's "overzealous" special prosecutors**. 195 For example, Philadelphia Inquirer Managing Editor Anne Gordon said the Justice Department was wrong when it posited the shield law would hamper law enforcement and threaten national security. 196 To the contrary, Gordon said, **forcing journalists to reveal their confidential sources deprives the public of information it needs, and thereby hampers law enforcement and threatens national security**.' 97 **She explained that forcing the disclosure of media sources would "jeopardize the public interest and security because concerned individuals, who fear for their own safety, protection and well being, will be too afraid to bring information to light**."'198 Gordon also said:

The implication [of the Justice Department's objections to the shield law] is that when the press tells its readers, as the Inquirer recently did, for example - that nearby refineries are vulnerable to attack and accidents that would imperil hundreds of thousands, it is threatening national security. The threat comes not from inadequate protection of these sites; [sic] the Justice Department seems to reason, but from the use of confidential sources to reveal these types of stories. In fact, **NOT publishing this material threatens national security.** 99

Many who participated in the hearings and debate expressed concern that federal special prosecutors had too much power. **There were numerous references to "overzealous prosecutors**,200 **and to the fact that the Justice Department guidelines governing media subpoenas do not apply to subpoenas from special prosecutors.** In addition, Sen. **Dodd referred to reporters landing "in a spider web spun by the Federal prosecutors**. 2 °1 Norman Pearlstine, then editor-in-chief of Time magazine,20 2 quoted a federal court judge in the Valerie Plame case as saying **special prosecutors have "vast power and immense discretion**" 20 3 **and there is a "a concomitant risk of overzealousness** .... New York Times columnist Safire said he could not tell the Senate Judiciary Committee his true feelings about the conduct of federal prosecutors because he feared government retaliation against Judith Miller, who was then in federal prison.20 5 "I am seething inside because I cannot tell you-with no holds barred-what I think of the **unchecked abuse of prosecutorial discretion**. . . ," Safire said.2°6

#### Strong media turns the disadvantage – reports on crime help deter

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

U.S. Attorney **Rosenberg said the Justice Department realized** that **the media play "a crucial role in keeping the American people informed** of what is happening overseas, in Washington, and in their hometown., 243 Moreover, he said **the media are "critical" to the department's crimeprevention efforts**. 244 "**Every day across the country, reporters file stories on the important work of the Department and thereby help to deter others from committing crimes in the future**," he said.245

### AT Shift DA

#### Empirically there’s no evidence that strengthening shield laws, even for particular groups, decreases protections overall or in the long run.

Martin et al 11, Jason Martin – PhD candidate, Mark Caramanica – PhD candidate, Anthony Fargo – prof of Journalism @ Indiana, “Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online,” 16 Comm. L. & Pol'y 89 (2011), lexis. [Premier]

History does not seem to bear out the second concern, however. **State shield laws have been amended at times over the years, but one is hard-pressed to find an example of protection for journalists being lessened as a result. For example, the shield laws in Michigan and Minnesota were amended to expand protection after courts in those states ruled against the media by interpreting the laws narrowly**. More recently, **the Maryland Legislature amended that state's shield law to extend its protection to college student journalists**. But concerns about legislators amending shield laws to narrow their protection are not farfetched. One example of the type of development some observers fear is the recent announcement by sponsors of the Senate version of the federal shield [\*120] law that they plan to amend the bill to exclude Web sites such as Wik-ileaks.com from protection. The move came after Wikileaks posted more than 75,000 classified documents related to the U.S. war effort in Afghanistan. The amendment, apparently aimed at keeping critics from using the Wikileaks example as an excuse to kill the Senate bill, was unavailable at this writing but would, according to the New York Times, clarify that the bill only protected "traditional news-gathering activities."

### AT Politics

#### Turn – Shield laws have all-time high support

Smith 13, Dean C., journalist and author, A theory of shield laws: journalists, their sources, and popular constitutionalism, LFB Scholarly Publishing LLC, 2013. [Premier]

**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. 230 **That phenomenon would make these shield laws “super-statutes” in the eyes of statutory law scholars** William Eskridge and John Ferejohn. 231 **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. 232 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**.233 **With the states edging ever closer to 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.”234

#### No link – Big statutes like proposed shield laws use constitutional language to create consensus and insulate from rollback

Smith 13, Dean C., journalist and author, A theory of shield laws: journalists, their sources, and popular constitutionalism, LFB Scholarly Publishing LLC, 2013. [Premier]

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**.”1 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**.2 **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.3 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;4 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**;5 **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 court-made and legislaturemade law**. 6 “Legislating in tight constitutional orbits,” he has concluded, “will tend to stabilize the law's overall course.”7

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**.8 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**.”9 **It also can help lawmakers reach consensus and avoid bill-killing arguments over details by simply “choosing the (solution) that worked before**.” 10 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. 11 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**.12

# Negative

## CPs

### Treaties CP

#### Text: Countries should adopt an international treaty recognizing the primacy of “core” online anonymous expression to public life modeled after the Berne Convention.

#### CP solves – spills over internationally and generates a multinational legal framework protecting anonymous expression.

Martin and Fargo 15 Martin, Jason A. Assistant Professor, DePaul University College of Communication. Fargo, Anthony L. Associate Professor and Director, Center for International Media Law and Policy Studies, Indiana University School of Journalism. “ANONYMITY AS A LEGAL RIGHT: WHERE AND WHY IT MATTERS.” NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY VOLUME 16, ISSUE 2. JANUARY 2015. <http://ncjolt.org/wp-content/uploads/2015/01/Martin-_-Fargo_Final.pdf>. [Premier]

Therefore, in the service of moving toward a more global solution, a second suggestion supports consideration of an international treaty or agreement recognizing the primacy of “core” online anonymous expression to public life, perhaps modeled after the Berne Convention321 on intellectual property and authorship rights. The Berne Convention provides one historical precedent to advance common interests in the protection of the legal right of communication against the realities of commercial market pressures and related government interests. At a minimum, such a treaty would advocate for protection of high-value anonymous online speech as an important international civil right with public and private benefits that cross sovereign jurisdictions. The widely held position that a global marketplace of ideas is rewarded with more, rather than fewer, contributors would be buoyed by an international agreement that respects anonymous expression as a legal right, and which formally recognizes that the Internet has fostered new pathways for introducing ideas and modes of discussion of public issues to people across traditional borders.322 Such an agreement would be rooted in the historical importance of anonymous public speech, which is reflected by the many nations that have recognized qualified legal rights for anonymity and expression. 323 The tradition of protecting anonymous speech on political and social topics also supports the clarification of a multinational understanding for how and when online anonymous expression should be balanced with other individual rights and social interests.324 Furthermore, similar international rights examinations were developing in late 2013 in relation to issues of human rights of privacy, surveillance, and whistleblower protection in an era of digital data. 325 An international treaty could generate discussion that places anonymous expression into the proper legal context along with related online considerations such as privacy, reputation, and intellectual property.

### UN CP

#### CP: The United Nations should amend the Universal Declaration of Human Rights to acknowledge anonymous expression as a civil right

#### Only the counterplan solves internationally and checks sovereign power structures--- the framework is already in place

Martin and Fargo 15 Martin, Jason A. Assistant Professor, DePaul University College of Communication. Fargo, Anthony L. Associate Professor and Director, Center for International Media Law and Policy Studies, Indiana University School of Journalism. “ANONYMITY AS A LEGAL RIGHT: WHERE AND WHY IT MATTERS.” NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY VOLUME 16, ISSUE 2. JANUARY 2015. <http://ncjolt.org/wp-content/uploads/2015/01/Martin-_-Fargo_Final.pdf>. [Premier]

Despite any noble shared philosophical and legal intentions, a non-binding treaty or agreement may not have much practical influence in a global climate of increasing Internet regulation. This realization leads to a third suggestion, which calls for amendments to the United Nations’ Universal Declaration of Human Rights and related documents that acknowledge anonymous expression as a civil right and as an important component of public discourse. This solution is the most complicated, but it would perhaps be the most effective option in service of the protection of international legal rights to communicate anonymously online. A 2011 report by the United Nations’ special rapporteur on the promotion of the right to freedom of opinion and expression329 arguably laid groundwork for such an international agreement. The special rapporteur, Frank La Rue, expressed concern about attempts by various governments to restrict citizens’ freedom to use the Internet, which he suggested should have even fewer legal limits than traditional media because of the Internet’s unique interactive nature.330 La Rue also warned of a chilling effect on speech when intermediaries, such as ISPs, are threatened with being held legally responsible for user content in some jurisdictions and are forced into censoring or informing on their users. 331 He cited anonymity as a privacy interest that facilitated public debate, and he criticized governments that attempted to identify Internet users or limit the right to be anonymous, saying that these governments could “impede the free flow of information and ideas online.”332 Later in the report, the special rapporteur recommended that nations “ensure that individuals can express themselves anonymously online” and avoid adopting real-name registration requirements for online forums.333 Taking the special rapporteur’s report a step further, one legal scholar has suggested that international protection for anonymous speech already exists. 334 Molly Land of New York Law School argues that Article 19(2) of the International Covenant of Civil and Political Rights implicitly protects a right to use the Internet as a form of expression.335 Article 19(2) states: Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 336 Land goes on to suggest that Article 19(2) protects anonymity, which “is critically important for ensuring freedom of expression” because it allows people to express themselves on controversial issues without fearing negative consequences.337 However, noting that the Internet also poses an increased risk of harm, particularly to targeted groups in areas where ethnic tensions are raw and potentially dangerous, Land also recommends that it may be necessary to limit intermediary immunity (such as Section 230 in the United States) to provide an incentive for ISPs to control some harmful behaviors.338 Another possible route to international protection for anonymity would be through a broader interpretation of the U.N. Universal Declaration of Human Rights. That Declaration covers arbitrary interference with correspondence; 339 the right to freedom of opinion and expression without interference; 340 the right to seek, receive, and share information “regardless of frontiers;”341 and the right of association.342 Although one may reasonably infer that anonymous online expression touches on all of these areas—and therefore deserves similar protection—explicit recognition would explicate international concern for this issue. Amending international human rights declarations also could offer protection for the inherently delicate nature of online anonymity. In many cases, the simple act of unmasking the defendant is the only goal sought by the plaintiff.343 This imbalance of rights and identity is acutely important when an individual tries to express unpopular viewpoints and becomes legally entangled with the interests of sovereign nations or other global power structures. Even in cases in which anonymous expression on important matters of political or social concern warrant protection, the reality of technology is that true anonymity online is fleeting at best and unobtainable at worst.344 Amendments could point to the long-standing heritage of anonymous expression and the inherently global nature of anonymous speech online as two deserving reasons to declare specific additional rights of anonymous expression to existing areas of similar content.

### Constitutional Inquiry CP

#### Counterplan text: The United States criminal justice system should abandon reporter-confidentiality approach and replace it with a constitutional inquiry. CP solves case and competes textually, Anderson Jones is the solvency advocate –

Anderson Jones 13 [RonNell Andersen Jones Associate Professor of Law, J. Reuben Clark Law School, Michigan Law Review Volume 111 | Issue 7 2013 Rethinking Reporter 's Privilege , Brigham Young Universit https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1049&context=mlr , Pg. 1224-1226] // [Premier]

Indeed, as the doctrine's very moniker makes clear, reporter's privilege laws aim to ensure the anonymous provision of socially important information by protecting the newsgatherer to whom that information is provided. The state statutory or common-law right belongs to the reporter herself-a privilege attached to a given occupational status, based on the public good produced by those holding that status.I It is perhaps no surprise, then, that when the Supreme Court in Branzburg tackled the question of whether the privilege should be recognized as a federal constitutional matter, it conducted its First Amendment analysis through this same lens. In that seminal case, the petitioners asked the Court to acknowledge a First Amendment-based reporter's privilegethat is, to hold that the U.S. Constitution guarantees a reporter the right to keep the confidence of a would-be anonymous news source when the reporter is later subpoenaed to testify regarding the confidential information. 12 While the split decision in Branzburg narrowly refused to recognize such a privilege,13 a First Amendment-based reporter's privilege nonetheless was launched by the case, as federal courts in the wake of Branzburg expressed a willingness to acknowledge the qualified privilege proposed by the Branzburg dissent, at least in cases that were not on all fours with that case's facts.' 4 In this way, a constitutional reporter's privilege doctrine emerged that is now recognized in some form in nearly all federal jurisdictions. Again, the courts' inquiries center on the journalists' rights to gather news and report it, rather than on any rights of the would-be anonymous sources. 15 What has emerged post-Branzburg is a doctrine that is uniformly regarded as confusing, resulting in a "privilege" that is ambiguous, 6 inconsistent, 7 and the subject of significant criticism.'8 And although the post-Branzburg privilege has been recognized as flawed in a variety of ways, 19 commentators and scholars have largely ignored what may be its most fundamental doctrinal shortcoming. By making the reporter the nucleus of the constitutional inquiry, the Court has unnecessarily complicated an analysis that has a much more natural doctrinal starting point, and in so doing has produced a test that is both unprincipled and impractical. most fundamental doctrinal shortcoming. **By making the reporter the nucleus of the constitutional inquiry, the Court has unnecessarily complicated an analysis that has a much more natural doctrinal starting point**, and in so doing has produced a test that is both unprincipled and impractical. This Article argues that the Court should abandon its reporter-based approach to confidential-source cases and replace it with a constitutional inquiry that focuses on the source whose name or other identifying information the reporter seeks to keep anonymous. Analyzing confidential-source cases based on the anonymous-speech rights of sources, rather than on the information-flow or newsgathering rights of the reporters, will have at least three salutary effects. First, it will eliminate the need to define who is a "reporter" for purposes of the privilege. 0 Second, it will enable the Court to abandon its complex and necessarily speculative investigations into how great a contribution the press makes to public dialogue (and what degree of privilege is necessary to ensure that continued contribution), and allow it to draw instead upon deeply rooted and well-defined principles regarding the protection of anonymous speech, which have been acknowledged since the nation's founding.2' Finally, and perhaps most importantly, **this approach will acknowledge the true breadth of interests and First Amendment values at stake in the confidential-source dynamic**. It will allow the source to assert her own First Amendment rights, but it will also permit reporters to take advantage of third-party standing doctrine when-as is virtually always the case-the reporter argues for anonymous-speech rights that in fact belong to someone other than herself.22 In so doing, this approach will continue to recognize the First Amendment's public-information values and the vital role of newsgathering, but without slighting the theoretical importance of the individual-liberty interest of the original speaker. Indeed, a wave of recent cases involving media assertions of third-party standing in somewhat analogous circumstances highlights the workability of this approach. In these cases, involving anonymous comments about completed stories posted on online media sites, courts have already essentially embraced this sensible analysis.23

### 50 States CP

#### Unanimity across 50 states – including updates to some older shield laws – is key to show public support and bring all states in line with best practices

Smith 13, Dean C., journalist and author, A theory of shield laws: journalists, their sources, and popular constitutionalism, LFB Scholarly Publishing LLC, 2013. [Premier]

As to the future of journalist privilege, three distinct lobbying efforts are called for. First, with shield laws now on the books in 40 states and the District of Columbia, **it would be worth mounting a lobbying campaign in the remaining states; achieving unanimity in all 50 states would create a powerful statement of public support for protecting journalists’ sources.** Second, as this study and others have indicated,23 **press advocates should direct some of their lobbying efforts to states with older shield laws, 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.

### Campaign Donations PIC

#### Counter plan text: In the United States, reporters should to have the right to protect the identity of confidential sources except in instances of disclosing identities of monetary contributors to political campaigns.

Anderson Jones 13 [RonNell Andersen Jones Associate Professor of Law, J. Reuben Clark Law School, Michigan Law Review Volume 111 | Issue 7 2013 Rethinking Reporter 's Privilege , Brigham Young Universit https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1049&context=mlr , Pg. 1257-1259] // [Premier]

Thus, although "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse, 2 42 for some or all of the reasons enumerated above, the Court has in some circumstances found that the government has in fact demonstrated a sufficiently important governmental interest in revealing the speaker's name. 243 Indeed, even in cases that most broadly defined and most stringently applied the anonymous-speech right, the Court has kept open the possibility that compelling counterinterests may be shown in other cases.24 The McIntyre Court noted that "**the right to remain anonymous may be abused when it shields fraudulent conduct**."245 It agreed that "[tihe state interest in preventing fraud and libel stands on a different footing. '24 6 The Watchtower Court highlighted the possible interests of "prevention of fraud," "prevention of crime," and protection of audience privacy 247 as interests that, although not demonstrated in that case, might suffice in another. And it explicitly stated that governmental limitations on anonymity "may well be justified ... by the special state interest in protecting the integrity of a ballot-initiative process or by the interest in preventing fraudulent commercial transactions ."24 Most notably, perhaps, in the distinctive setting of required disclosure of the identities of monetary contributors to political campaigns,2 49 the Court repeatedly has upheld restrictions on anonymous speech. In Buckley v. Valeo, appellants challenged a federal statute requiring disclosure of the identities of individuals making contributions to political campaigns that exceeded certain monetary thresholds. 2 ° The Court held that the interests of preventing "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions '25 1 sufficed to trump anonymous-speech rights,25 2 and it determined that the campaign disclosure requirements directly served those interests and "appear[ed] to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist. '253 Likewise, in McConnell v. Federal Election Commission, the Court addressed a challenge to the Bipartisan Campaign Reform Act ("BCRA"). 254 Relying on Buckley, the Court upheld the requirement that purchasers of television advertisements advocating the election or defeat of a candidate for federal office disclose their identities, given the very strong interests in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions. '255 Though Citizens United v. Federal Election Commission overruled many aspects of McConnell, it is significant that it did not invalidate the disclosure requirements of BCRA.2 5 6 Although scholars have criticized this isolated line of cases as inconsistent with the larger anonymous-speech doctrine 257 -and the debate continues as to whether constitutional values are in fact best served by forcing disclosure of contributors' identities 25 -it is notable that the Court in each of these cases continued to explicitly recognize the strong right of anonymous speech 259 and subjected limitations on such speech to heightened, "exacting scrutiny."260 All told, given the great value of anonymous speech not only to the free flow of public information but also to the individual-liberty interests served by the First Amendment, and given the content-based nature of any governmental effort to impede this anonymity, the Court has consistently recognized the right to speak anonymously as a fundamental constitutional right. In some settings, the government will be able to overcome the high constitutional barrier to unmasking such a speaker, but the Court has nevertheless recognized a foundational First Amendment protection for the citizen who chooses to "speak her mind, but sometimes not her name."26 '

#### Disclosing Campaign Contributions good for democracy – encourages transparency and reduces corruption.

The Transparency Policy Project. “Disclosing Campaign Contributions to Reduce Corruption” The Transparency Policy Project, Harvard Kennedy School Ash Center for Democratic Governance and Innovation, no date. [Premier]

Public disclosure of campaign contributions to congressional and presidential candidates represents one of the United States’ earliest, most sustainable, and most perennially controversial targeted transparency systems. From the beginning, the primary purpose of campaign finance disclosure was to reduce corruption in government. In Buckley v. Valeo, the 1976 Supreme Court decision that upheld the constitutionality of federal disclosure requirements, the Court concluded that disclosure reduced corruption in three ways. First, it provided the electorate with information about where money came from and how it was spent, in order to aid voters in evaluating those running for office, including alerting voters “to the interests to which a candidate is most likely to be responsive.” Second, disclosure helped to “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.” Such exposure “may discourage those who would use money for improper purposes either before or after the election,” because “a public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors thatmay be given in return.” Third, theCourt said, reporting was “an essential means of gathering data to detect violations of contribution limits.” Disclosure worked in tandem with a rule-based regulatory systemthat limited amounts and sources of contributions.

## DAs

### Courts DA

#### Constructionists and Constitutionalists hate the plan --- it also breaks with court precedent

Fennessy 06 Fennessy, Nathan. J.D. Candidate @ The Catholic University of America Columbus School of Law. “Bringing Bloggers into the Journalistic Privilege Fold.”, Catholic University Law Review. 2006. <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1159&context=lawreview>. [Premier]

However, the Supreme Court is unlikely to revisit Branzburg and establish a constitutional privilege for journalists because the Court has resisted opportunities to do so in the past.' 65 Although there may have been a shift in the "great weight of authority,"'' 66 the strict constructionists on the Court, vociferous critics of relying on anything beyond the text of the Constitution, are highly unlikely to recognize the existence of a journalist's privilege. 67

### Politics DA

#### Federal action on shield laws causes a firestorm – huge fights between Congress and the Executive, empirically true for decades

Smith 13, Dean C., journalist and author, A theory of shield laws: journalists, their sources, and popular constitutionalism, LFB Scholarly Publishing LLC, 2013. [Premier]

Adding to the news industry’s economic woes, the White House seemed to have declared war on the press.112 The administration of President George W. Bush was described as the most secretive since Richard Nixon’s.113 The classification of information skyrocketed after the terrorist attacks of Sept. 11, 2001. 114 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.115 The most dramatic of these, at least in terms of the front-page coverage it garnered and outcry it generated, was the ailing of then-New York Times reporter Judith Miller in 2005.116 **The jailing sparked urgent calls for Congress to adopt a federal shield law.**117

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**.118 **That was not to be**, however.119 **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**.120 A recurring claim was that a shield law would hamper the administration’s ability to fight terrorism.121

With the election of President Barack Obama in 2008, journalists and press advocates hoped the federal shield law effort would move forward.122 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 398-21,123 and Obama had pledged to press for final passage in the Senate.**124 **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**125 **and beyond**.126 Should the shield law protect **independent bloggers**? Would it be used nefariously by **terrorists?**127

While **this debate has continued to [stall]**paralyze **efforts at the federal level**,128 states have moved forward with shield laws of their own. From 2006 to 2011, seven states adopted statutory shield laws. 129 Seven statutes in four years bested the wave of seven statutes in five years that followed closely on Branzburg v. Hayes in the 1970s.130 While one of these shield laws was prompted by local events, a contempt dispute in Kansas, 131 the rest could be said to be part of a national zeitgeist triggered largely by the Judith Miller affair. In contrast to the local triggering events of the 1990s, this was a true triggering moment.

#### Trump fought shield laws even before he was President – he’ll fight the plan too

Smith 13, Dean C., journalist and author, A theory of shield laws: journalists, their sources, and popular constitutionalism, LFB Scholarly Publishing LLC, 2013. [Premier]

**A recent case involving** celebrity billionaire Donald **Trump was a timely reminder** of the importance of carefully drafting the coveredmedium, covered-person language in shield laws.132 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**. 133 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.” 134 However, the judge ruled, because both Trump and O’Brien conducted their business in New York, that state’s 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.135

### Federalism DA

#### Federal shield laws kill state rights—federalism link

**Robinson 17:** Robinson, Elizabeth L. “Post-Sterling Developments: The mootness of the federal reporters privilege debate”. North Carolina Law Review. Volume 95, number 4. May 1st, 2017. <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4965&context=nclr> [Premier]

As exemplified by the Sterling controversy, the perpetual inconsistency stemming from Branzburg has daunting repercussions for the fair treatment of reporters and implicates federalism concerns. On a fundamental level, conflicting Branzburg interpretations lead to inconsistent treatment and punishment of reporters. Because of these drastic jurisdictional variations, a reporter’s legal fate may be entirely dependent on where the reporter resides or chooses to conduct interviews.67 This widely varying treatment of reporters appears to create a lose-lose situation for reporters wishing to publish content exposing criminal activity, especially those situated in jurisdictions that have not expressly adopted or rejected a reporter’s privilege in criminal cases: those journalists must either publish the criminal behavior and take the risk of a court declining the privilege or avoid that risk by choosing to forgo publication altogether. But the practical effect of this legal inconsistency on the livelihood of reporters facing criminal subpoenas is not limited to their professional careers or reputations. The highly publicized D.C . Circuit case In re Judith Miller68 exemplifies what is truly at stake for reporters in these cases. While the case was on appeal, The New York Times journalist Judith Miller spent eighty-five days in jail for her continued refusal to reveal the identity of her confidential source.69 Similarly, a reporter for The Los Angeles Herald Examiner was held in contempt for forty-six days after failing to disclose his source for leaked testimony from the Charles Manson murder trial.70 And in 2007, video blogger Josh Wolf became the “longest-jailed journalist” to date after he refused to comply with a subpoena that ordered him to testify about criminal events that took place during a San Francisco protest.71 Thus, even though prison sentences for reporters are not particularly commonplace,72 these examples nonetheless reaffirm that reporters who fail to disclose a confidential source can face incarceration in many jurisdictions. Additionally, the division among federal jurisdictions regarding protections for journalists has been criticized by many states for its deleterious effect on state shield laws. When Branzburg was decided, the majority of states did not provide statutory protection for reporters. Now, over forty years later, nearly all states provide some form of a qualified reporter’s privilege, either through judicial or legislative action. This, however, has given rise to an entirely separate conflict: if a federal proceeding necessitates the disclosure of a confidential news source, the laws governing the state in which the publication occurred are wholly irrelevant. Essentially, even if the publication occurs in a state that provides complete protection for all confidential reporter-source communications, that protection is not applicable in federal court. The inconsistency between federal and state laws within the same jurisdiction serves to undermine the interests the states that have enacted shield laws sought to protect. As noted by the attorneys general of thirty-four states and the District of Columbia, A federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect “buck[s] file (sic) clear policy of virtually all states,” and undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them.79 Indeed, the Supreme Court itself has noted in its prior discussion of the psychotherapist-patient privilege that “any State’s promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court.”80 And considering the near-uniform acknowledgment of the importance of confidential reporter-source communications among the states, the lack of corresponding federal protection appears to have “undercut the State shield laws just as much as the absence of a federal privilege.”

### National Security DA

#### Unauthorized leaks harm foreign relations and hamstring national security

**Hoekstra 5:** Representative Peter Hoekstra, former member of the US House of Representatives. “Secrets and Leaks: The Costs and Consequences for National Security”. The Heritage Foundation. July 29th, 2005.

<https://www.heritage.org/homeland-security/report/secrets-and-leaks-the-costs-and-consequences-national-security-0>. [Premier]

The issue of leaks has been front and center in the news, in case some of you hadn't noticed. And I'm not just talking about Valerie Plame. While much has been made of the revelation of her name, it is not my intention to rehash or debate the particulars of that case today. In due time, the Independent Counsel will release his report, and all the facts of the situation will be made clear. But if you cut through all the partisan rhetoric surrounding this case, it does help to bring the issue of leaks to the forefront. At this moment we are debating in ways we never have before issues surrounding the revelation of classified information. There is a bill before the Senate to create a media shield law, there are discussions on the classification process and whether too much information is being classified, and most importantly, we are debating the public's right to know more about the activities of their government. At the outset, I want to make it clear that I am a firm believer in representative government and the people's right to know. As such, I am committed to doing more of the Intelligence Committee's hearings in public and to reviewing the issue of how much the government classifies. But today, my scope is more narrowly focused on the issue of leaks of classified information, which I break into three different categories: accidental, deliberate and espionage-related. It has become all too common-almost second nature-for people in Washington to leak information. Policymakers may leak for any number of reasons, such as to bring attention to a good news story or discredit a bad story. They may also leak information to gauge public interest on a new policy or issue. But some seemingly leak just because they can. These are the people, and especially those that have access to classified information, that we need to worry about. On the walls of the Intelligence Committee are framed posters from World War II that remind of the dangers of leaks. "LOOSE LIPS MIGHT SINK SHIPS," says one poster that was originally sponsored by the House of Seagram's. Another poster shows a ship in flames, its crew bobbing in the water and on lifeboats with the statement, "A CARELESS WORD … … A NEEDLESS SINKING." The ghosts of leaks past serve as potent reminders for us of the dangers of leaks today. Each year, countless unauthorized leaks cause severe damage to our intelligence activities and expose our capabilities. The fact of the matter is, some of the worst damage done to our intelligence community has come not from penetration by spies, but from unauthorized leaks by those with access to classified information. Were it not for a leak, there is a chance we could have brought Usama bin Laden to justice by now and have a better understanding of the al-Qaida operation. Several years ago, highly sensitive information was disclosed regarding the intelligence communities' ability to collect information on bin Laden. Reportedly as a result, bin Laden changed his methods of operation, and we lost a valuable means of understanding al-Qaida's movements and future plans. Now I realize there may be times when a person entrusted with classified information makes an unintentional disclosure. But, the Intelligence Community must be prepared to deal with these instances because all classified leaks can be dangerous. When it comes to deliberate disclosures of classified information, however, we must create a culture within the Intelligence Community where zero tolerance is the norm. People entrusted with a security clearance must realize their clearance is not a right, it is a privilege, and it must be treated as such. Just because a person has a security clearance does not give them the authority to exercise leadership in determining what should and should not be classified. Earlier this year, for example, the Department of Justice arrested Lawrence Franklin, a Pentagon defense analyst, for removing 83 documents from the Pentagon. Amazingly, this is not the first time Mr. Franklin was accused of compromising classified information, but his clearances were never suspended or revoked. We have to ask, did the previous leniency shown to Mr. Franklin contribute to his decision to go even further in revealing classified information? And then we should be outraged. It is painfully obvious we must change the culture within the Intelligence Community. The inability to protect our sources and methods from intentional leaks causes substantial damage to our intelligence services and national security. After 9/11, the intelligence community was blamed for not sharing information or translating pieces of intelligence in a timely manner to prevent the attacks from occurring. People should be equally upset that there are individuals who deliberately leak classified information. If that information gets into the hands of our enemies it can help them plan future attacks. We know the enemy pays very close attention to open-source materials, like U.S. newspapers and the Internet, in order to gain a better understanding of our objectives and capabilities. A June 2002 memo from the CIA discusses the damage caused when classified information is reported in the media. It reads in part, "Information obtained from captured detainees has revealed that al-Qaida operatives are extremely security-conscious and have altered their practices in response to what they have learned from the press about our capabilities. A growing body of reporting indicates that al-Qaida planners have learned much about our counter-terrorist capabilities from U.S. and foreign media." By combining traditional open source materials with leaked classified materials our opponents have gained powerful insights into what our plans, capabilities and intentions are. We also know that unauthorized leaks put strains on our relationships with foreign intelligence services. Despite being the best at what we do, it is impossible to collect every piece of intelligence in every corner of the world. As a result, we count on foreign intelligence services to help fill-in the gaps. Unauthorized leaks could have a significant impact on whether foreign governments continue to share critical information with our intelligence agencies. And quite frankly, I cannot blame them. The reality is, many foreign leaders and their governments provide us with valuable help in the war on terror, but they do so at tremendous political peril. If the United States cannot promise to protect classified information and where we got it from, why should we expect these leaders, or even our overt allies, to be willing to share their information? Information sharing with foreign intelligence services will play a significant role in our intelligence collection capabilities in the future. The loss of foreign partners would undoubtedly create overwhelming gaps in our ability to collect good intelligence around the globe. Some of you may have seen an article from a few weeks ago that discussed possible coordination between the U.S., France and other governments in the war on terror. While I understand the public has a certain interest in knowing what the government is doing to protect them, we have to ask, where is the balance. What was the benefit of publishing that story? Reports that discuss sensitive partnerships, whether accurate or not, hinder our abilities to work with our friends on intelligence activities. Some foreign nations work with our agencies because it is not widely known that they are doing it. That secrecy is important for future operations. The Commission on Weapons of Mass Destruction reports the Intelligence Community seriously misjudged the status of Iraq's biological weapons program in the 2002 National Intelligence Estimate and other pre-war intelligence products. The primary reason for this misjudgment was the Intelligence Community's heavy reliance on a source-codenamed "Curveball"-whose information later proved to be unreliable. This misjudgment could have been avoided if we were able to receive key information from our allies. The decision by a foreign intelligence service not to share a critical source seriously undermined our ability to assess his credibility. Despite numerous requests by the CIA, the foreign government refused to provide us direct access to Curveball because of past leaks from within our government. The classified annex to the Silberman-Robb Report on Weapons of Mass Destruction discusses numerous cases over the past several years that have cost American taxpayers plenty, not to mention the harm caused by the exposure of our assets, methods and capabilities. Because it is classified I cannot elaborate further, but you do not need to read a classified annex to get a sense of the frequency that leaks occur and the damage they cause. I am confident the terrorists are not reading the classified annex to get their information. Leaking sensitive information is like giving the enemy our playbook. In 2002 a newspaper obtained classified information about top-secret war plans leading up to the invasion in Iraq. Then last week, there were wire service stories on possible American and British plans to bring troops home by the end of the year. Whether accurate or not, these types of stories put our operational capabilities at risk and allow the enemy to manipulate the information for possible use against our brave men and women in uniform. How much damage has to be done before people finally say enough is enough? We must get serious about re-evaluating leaks and our response to them. The primary question is how do we do that? If you talk to the different agencies, especially the Justice Department, they will tell you that leaks occur so frequently because it is extremely difficult to identify who leaked the information and then obtain a successful prosecution. This is a problem I expect to get worse, not better, as we continue to press for increased information sharing community-wide. Agencies do not have the resources to spend months investigating a case when there is no way to narrow down the list of people who had access to the information. Simply put, more people have access to more information than ever before, and while it is necessary, it makes investigating leaks even that more difficult. We also have to contend with the fact that there is no comprehensive statute that provides criminal penalties for the unauthorized disclosure of classified information regardless of the type of information or the recipient involved. As a result, the Department of Justice is left with a "patchwork" of statutes to go after those who leak. Subsequently, there has only been one prosecution for non-espionage disclosure of classified information in the last 50 years. In the case of United States v. Morrison, the courts found the defendant guilty of providing classified information to Jane's Defense. And President Clinton pardoned Morison before he left office. We need to bring new energy to this debate. The threat leaks pose to our national security is alarming, and it is imperative we do more to protect our national secrets. Whether people deliberately leak information or they don't realize the information they are discussing is classified, the fact that leaks continue is evidence that people in the intelligence community are not being properly educated on the importance of protecting our secrets. The community, upon direction from the DNI, should implement a community-wide campaign to educate individuals about their legal obligations and possible penalties for failing to safeguard intelligence information. In addition, we need to give the Department of Justice all the tools it needs to identify and prosecute individuals who deliberately share classified intelligence. The time has come for a comprehensive law that will make it easier for the government to prosecute wrongdoers and increase the penalties, which hopefully will act as a deterrent for people thinking about disclosing information. In the coming months, I intend to hold a round of hearings on this issue and invite key officials from Justice, CIA and the Defense Department, among others, to testify on ways the Intelligence Community can do more to prevent leaks. If they agree to attend, I would also like to invite members of the press to testify before the committee. Journalists provide an important service to the American people, but they can also play a key role in preserving our national security. The recent interest in leaks has inspired some Members of Congress to introduce a Media Shield Law, which would protect journalists from disclosing their sources. While I believe this may be permissible in most cases, this bill could have serious implications if passed without exceptions when our national security is at risk. There needs to be a balance between protecting journalists and protecting national security. I believe we can find that balance. The Silberman-Robb Commission recognized "the enormous difficulty of this seemingly intractable problem" and concluded that "the long-standing defeatism that has paralyzed action on the topic of leaks is understandable but unwarranted." I too share that assessment, and I look forward to a full and vigorous debate on this issue. Thank you all for coming, and again, thank you to The Heritage Foundation for assembling today's panel and for beginning a focused, public dialogue on this issue.

#### Shield laws undermine executive power in national security cases and risk leaking classified documents during litigation

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

At the heart of the debate over the proposed shield law was disagreement about how power should be divided among the branches of the government. The U.S. Department of Justice opposed the shield law on the grounds that **the law would** improperly **reassign** some of its **national security responsibilities to the judicial branch** by **allowing unqualified judges**, not the Justice Department, **to** **decide** whether journalists could be compelled to testify. 137 Others countered that judges are qualified to decide how to apply a shield law in cases with national security implications because judges already deal with national security matters. 38 Moreover, the Justice Department argued in 2005 that Congress did not have the power to adopt a shield law because the U.S. Supreme Court already had ruled there was no reporter's privilege. 139

Justice Department representatives were the most outspoken opponents of the federal shield law. 140 Testifying before the Senate Judiciary Committee in 2005, U.S. Attorney Chuck Rosenberg enumerated five specific objections to the proposed law. 14 1 The objection most obviously about the separation of powers within the federal government was that the shield law would take away some of the Justice Department's authority its authority to use its own rules to decide whether to subpoena journalists-and would give that authority to the courts. 142 In the view of the Justice Department, the issue was the proper scope of the law enforcement and national security powers of the executive branch relative to the powers of the judicial branch. 143

Rosenberg said that "any legislation that would impair the discretion of the Attorney General to issue press subpoenas-or to exercise any other investigative options in the exercise of the President's constitutional powers-is unwarranted." 144 Likewise, Deputy Attorney General Paul J. McNulty reminded the Senate Judiciary Committee in 2006 that the U.S. Constitution assigned responsibility for national security to the executive branch of the federal government. 145 He told the committee that the shield law would undermine the separation of powers by shifting law enforcement decisions from the executive branch to the judicial branch, a shift he called "extraordinarily serious in the national security area .... ,,46 He said the executive branch has "the full array of information necessary to make informed and balanced national security judgments," and the shield law would thrust courts "into altogether unfamiliar territory of having to weigh national security interests against the public's interest in'receiving certain news. As numerous judges have recognized, **the courts lack the institutional resources and expertise to make those decisions**. 1 47

McNulty said the **proposed legislation** also **would assign the courts the task of deciding whether information is properly classified in cases involving government leaks**. 148 He cautioned that **this would be "a big undertaking" for judges because it would require them to know what harm would occur if classified information were to get into the hands of the enemy.** 49

#### Expanded shield laws make it impossible to find sources with vital national security information and prosecute leaks that damage national security interests, including the war on terror

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

In addition to focusing on the distribution of power among the branches of government, much of the federal shield law debate has focused more narrowly on the power of **the Justice Department** itself. Department officials **argued that the shield law would impair the department's ability--its power--to fight terrorism and other crimes by making it more difficult, if not impossible, to obtain critical information from journalists and others**.1 64 Justice Department officials also posited that a shield law was unnecessary because existing Justice Department guidelines for issuing subpoenas to journalists already struck the proper balance between the needs of law enforcement and the needs of the media. 165 Shield law supporters, on the other hand, argued that a shield law would actually help fight crime while also reining in the Justice Department's "overzealous" special prosecutors. 1 66

**U.S. Attorney Rosenberg testified** before the Senate Judiciary Committee in 2005 **that a federal shield law would "interfere... in an unnecessary and harmful way"**'167 **with the department's ability "to effectively enforce the law, fight terrorism, and protect national security**.'' 168 Specifically, Rosenberg argued that **the proposed shield law would deprive the department of the flexibility it needs to fight crime and prevent the government from obtaining information from media sources except** in cases involving "**imminent** and **actual harm** to national security.,, 169 He said, further, **a shield law would require the Justice Department to reveal in open court the reasons it needed a subpoena**, and bar subpoenas to non-media parties that could lead to the discovery of the identity of a source. 170 "**This** [the shield law] **may make it** difficult, if not **impossible, to obtain vital information on how national security information was disclosed** [by those illegally leaking classified government information] and to whom it was disclosed," Rosenberg said.' 7'

Rachel L. Brand, an assistant attorney general who represented the Department of Justice at the 2007 House Judiciary Committee hearing, noted that President Bush objected to the shield law because of his concern about leaks of classified information. 172 "As President Bush has said,... **leaks [of classified information] have threatened our national security, damaged our ability to pursue terrorists, and put our citizens and armed forces at risk,"** Bland testified. 173 Bland said that one of the Justice Department's most significant concerns about the proposed shield law was that **the law would make it "virtually impossible" to investigate and prosecute leaks of classified national security information**. 174

Rep. Darrell E. Issa (R-Calif.) agreed that federal prosecutors must be empowered to investigate illegal leaks of national security information to the news media.175 He said:

**We simply cannot erect obstacles which hamstring Federal law enforcement when sensitive government secrets are divulged. Such disclosures can be treasonous, and reporters should not be able to protect individuals who jeopardize our national security. American lives are more important** than the privilege of anonymity that reporters promise to a source who is compromising our nation's secrets. 176

Rep. Lamar S. Smith (R-Tex.) said that if the shield law is adopted**, "[t]he Department of Justice will be hamstrung as it goes about the business of conducting investigations and prosecuting criminals**."' 177 He explained that under the bill being debated by the House, media subpoenas would be allowed in national security cases only when there was a threat of "imminent and actual harm."' 7 8 Thus, he said, **the media could be subpoenaed to testify only about prospective events, not past events.** 1 79

For example, the Department may be able to acquire information about a source's identity to prevent a terrorist attack like September 11; but **if** **al Qaeda decides to tell a media outlet on September 12 how it planned and carried out the attack, DOJ could not compel that media outlet to reveal its terrorist sources** **while conducting an investigation**.' 80

#### Flexibility is key

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

For example, in 2005, **U.S. Attorney Rosenberg,** who spoke in opposition to the shield law, **said that "[t]he events of the past four years have shown that law enforcement must be more, rather than less, flexible to meet the challenges posed by international terrorist organizations and sophisticated criminal enterprises.,** 260 Also, Rep. Smith reported that the president's advisers "believe **the stakes are too high in a post-9/1 1 world to support the Free Flow of Information Act.** 261

### Crime DA

#### Stronger shield laws would hamper investigations of serious crimes

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

Furthermore, shield law opponents complained that the proposed law listed several instances in which reporters could be subpoenaed, but those **exceptions to the testimonial privilege would not allow the Justice Department to subpoena reporters in most of its criminal cases**. 18 **1 For example**, members of Congress said **the government would not be able to compel journalists to testify in cases involving child pornography**, 182 **child molestation**,' 83 **sexual assault**, '84 international **smuggling**,185 **gang violence**, 186 **murder**, 187 and **murder for hire,** 188 or the illegal **leaking of** individuals' **Social Security numbers**, 189 **sealed court documents,** 190 **or** of **the location of a domestic violence safe house**.' 9'

U.S. Attorney Rosenberg also testified that **requiring the Justice Department to reveal** in a public evidentiary hearing **the reasons it needed to subpoena the media would "place an unreasonable burden"** on the department' 92 **and** "would **pose serious threats to grand jury secrecy and the confidentiality of on-going [sic] criminal investigations."'** 193 A provision of the bill that would bar subpoenas to non-media parties that could lead to the discovery of the identity of a source was "impractical" and would hamper law enforcement efforts, he added. 194

### Separation of Powers DA

#### The affirmative would aggrandize the role of courts in criminal justice enforcement and national security at the expense of the executive – balance of powers is crucial in this area.

Packer 09 summarizes, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

At the heart of the debate over the proposed shield law was disagreement about how power should be divided among the branches of the government. The U.S. Department of Justice opposed the shield law on the grounds that **the law would improperly reassign** some of its **national security responsibilities to the judicial branch by allowing unqualified judges, not the Justice Department, to decide whether journalists could be compelled** to testify. 137 Others countered that judges are qualified to decide how to apply a shield law in cases with national security implications because judges already deal with national security matters. 38 Moreover, the Justice Department argued in 2005 that Congress did not have the power to adopt a shield law because the U.S. Supreme Court already had ruled there was no reporter's privilege. 139

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### Corporate Finance DA

#### Transparency and source disclosure for corporate financial reporting is key to prevent malpractice

**Fung 14:** Fung, Benjamin. “The Demand and Need for Transparency and Disclosure in Corporate Governance.” Horizon Research Publishing. 2014. <http://www.hrpub.org/download/20140105/UJM3-12101630.pdf>. [Premier]

Given the enormous volatility in the international capital markets which can give rise to uncertainty, the demand and need for adequate transparency, disclosure and suitable corporate financial reporting is essential to investors who can make better decisions on a more timely and informed basis. Escalating present capital market volatility is pushing for further demand on sound corporate governance practices and the demand for improved financial reporting and broader levels of transparency to lessen the fear and panic of investors. The stock exchanges around the world become increasingly conscious of their roles as self-regulatory institutions and explore the possibility of using the listing requirements as a tool for raising the standard of corporate governance. The issue of GCG is an imperative for ensuing successful corporate performance. A commitment to GCG in terms of well-defined shareholder rights, high levels of T&D and responsible board of directors, etc. will make a company both attractive to investors and more chance to achieve good performance. The corporate governance principles emphasize an effective board, prudent internal control, transparency and accountability to its shareholders. A high standard of GCG practices and procedures are essential for effective management to enhancing shareholders’ value. Building GCG is a shared responsibility among all stakeholders, each of whom may exert pressure to move forward a corporation. In short, greater transparency in disclosures is essential for effective financial reporting and supervision. By adopting greater financial transparency, companies provide the necessary information for investors to monitor their governance process and behavior. Management needs to avoid excessive disclosures which could impair competitiveness. Increasing transparency will be important key to future success of corporate governance. Only with transparency will it be possible to defer frauds, embezzlement and financial scandals and foster efficiency in allocation of resources decisions. More importantly, T&D allow firms to compete on the basis of their best offerings and to differentiate themselves from firms which do not practice good governance.

### Fake News

#### Confidentiality is manipulation and inconsistent with accountability and inhibits checks to reporter credibility – ‘journalist rights ethics’ are buzzworded generalities that have no teeth in source protection except for the reporter’s self-interest.

Wasserman 14 [NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY Vol. 19 Issue 2 Symposium on Media Ethics Article 11 February 2014 A Critique of Source Confidentiality Edward Wasserman John S. and James L. Knight Foundation Professor of Journalism Ethics, Washington and Lee University, Lexington, Va. Ph.D., London School of Economics, 1980; <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> pg.562-564]// [Premier]

PROTECTING SOURCES: Source confidentiality's most obvious function is to shield informants from potential harm. "Source protection" has an ethical ring to it, but journalists do not, by and large, recognize any generalized obligation to look out for the well-being of their sources. I think the silence of journalism ethics in this regard is regrettable. After all, many people who come forward with information are apprehensive, naive, and ripe for exploitation. Unsophisticated sources may unwittingly say things that expose them to ridicule, trusting the amiable and knowledgeable reporter who is encouraging their candor to warn them when they cross the line. 7 Too, a source may be vulnerable, and the relationship may develop in ways similar to some lawyer-client and doctor-patient relationships, with the informant susceptible to improper, extra-curricular approaches from the reporter. 2 Nevertheless, the boundary of journalistic solicitude for the well-being of sources is defined by the reporter's desire to preserve the conditions under which accurate information can be gathered. It follows that a reporter is more protective of an informant's interests if the source seems likely to be useful in the future. That implies greater consideration for officials and other consistently valuable informants. **Sources are awarded protection based not on their needs, but on their abilities.** CONFIDENTIALITY AS SOURCE PROTECTION: It follows that although confidentiality may protect a source, journalists accept no freestanding obligation to withhold an informant's identity even if they believed-or would believe, if they gave it any thought-that secrecy would be in the source's best interests. A reporter would not, for example, urge a source to demand concealment if the reporter understood-and the source did notthat exposure could be perilous. **Confidentiality is nothing more than a valuable information-gathering technique; its claim to ethical standing derives solely from the enhanced information its judicious use brings to the public**. It does not reflect an obliga- tion owed to the source, unless the source insists on it as a condition of providing that information. In that regard it is a technique of source self-defense, which the reporter accedes to and does not proffer.2 9 If instead the journalist did recognize an independent ethical duty to the informant to withhold the source's name if disclosure might be harmful, the source would not need to demand anonymity. That is not the case. In fact, journalists are typically admonished to grant confidentiality only if necessary.3" Confidentiality is part of a negotiation over the release of information and owes its ethical standing to the quality of the information it makes public-and to its being secured by a promise. In a moment we will look at the curious ethical status of that promise. CONFIDENTIALITY AS INCONSISTENT WITH OTHER OBLIGATIONS: Certain kinds of reporting routinely incorporate routine reliance on informants who will not talk unless they are assured of anonymity.3 1 Although sensitive political and governmental stories are the areas that first come to mind, business and financial news-especially coverage of closely-held companies, professional firms and the like-would be difficult if not impossible to assemble without source concealment. Yet **confidentiality poses ethical conflicts, chiefly because it may clash with two professional norms: accountability and verifiability**. 2 The result may impede truth-telling. Accountability involves an obligation to ensure that the ledger of significant actions and assertions be reported publicly in such a way that their authors are linked to them. Confidentiality enhances accountability when it helps expose subterranean agreements, decisions, and actions that would otherwise go unreported. But secrecy may also hinder accountability by interposing the journalist between informant and public, and preventing third-parties from challenging sources over inaccuracies, indiscretions, or lies. It may also scrub the record clean of grudges and personal agendas that have bearing on the information, and thereby prevent dishonest or tainted informants from being exposed as such. Verifiability, which is the closest journalism comes to offering a functional equivalent to the standards of social science, usually is premised on associating information with the person who provides it. That enables third-parties to determine that the words were spoken, just as reported, by the person who was said to have uttered them. Here again, confidentiality may impair accuracy. It can impede **testing the truthfulness** of information; nobody else can phone the reporter's secret source to confirm, refute, or modify the original information. Anonymity, USA Today founder Al Neuharth observed, enables sources to say more than they know and reporters to write more than they hear.33

#### Aff’s confidentiality and anonymity leads to confusion or fraud while hindering effective evaluation of the material by the listeners or readers.

Anderson Jones 13 [RonNell Andersen Jones Associate Professor of Law, J. Reuben Clark Law School, Michigan Law Review Volume 111 | Issue 7 2013 Rethinking Reporter 's Privilege , Brigham Young Universit https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1049&context=mlr , Pg. 1256-1258] // [Premier]

To be sure, this vibrant defense of anonymous communication is not cost free. As the Court in each of the above cases acknowledged, 2 8 and as scholars have continued to explore, 229 strong anonymity protection creates the risk that a speaker will shield her identity for less-than-noble purposes 230 or that the absence of attribution will lead to audience confusion,23 ' "serve as a cloak for the progenitor of irresponsible ideas,' 232 or enable outright lies. 233 Obviously, removing an attribution of the source removes a sometimesuseful tool for evaluating the message.234 Listeners and readers "rely on author identity to reduce the search costs involved in sorting and interpreting the constant barrage of messages they receive,' 235 and requiring identification of a source might well "advance the search for truth by permitting a more critical evaluation of facts, figures, and arguments presented. ' 236 Without this attribution, **audiences are left with the communicative equivalent of a generic product, unable to use brand name as a proxy for qualitative judgments**. 237 Indeed, speakers with poor reputations may have every incentive to hide their identities. 238 Likewise, anonymity may be the path chosen by those who wish to spread falsity with impunity, "settle a personal score," "sow the seeds of discontent, or control public opinion. '239 Anonymity can "shield speakers from liability for a variety of torts, including defamation, invasion of privacy, fraud, copyright infringement, and trade secret misappropriation.''240 It can impede important investigations in civil and criminal matters. 2 41 Thus, although "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse, 2 42 for some or all of the reasons enumerated above, the Court has in some circumstances found that the government has in fact demonstrated a sufficiently important governmental interest in revealing the speaker's name. 243 Indeed, even in cases that most broadly defined and most stringently applied the anonymous-speech right, the Court has kept open the possibility that compelling counterinterests may be shown in other cases.24 The McIntyre Court noted that "the right to remain anonymous may be abused when it shields fraudulent conduct."245 It agreed that "[tihe state interest in preventing fraud and libel stands on a different footing. '24 6 The Watchtower Court highlighted the possible interests of "prevention of fraud," "prevention of crime," and protection of audience privacy 247 as interests that, although not demonstrated in that case, might suffice in another. And it explicitly stated that governmental limitations on anonymity "may well be justified ... by the special state interest in protecting the integrity of a ballot-initiative process or by the interest in preventing fraudulent commercial transactions ."2

## Ks

### Performativity

#### Defining the public sphere and contours of public rights is irrelevant in a system that sustains an unjust criminal regime and control over bodies’ access to that sphere

Butler 18 |Judith Butler, writes comparative literature on gender theory and is a gender theorist who works at UC Berkeley, Hannah Arendt Chair at the European Graduate School, Developed the theory on Gender Performativity, LGBTQ activist, “Notes Toward A Performative Theory of Assembly”, First Harvard University Press paperback edition published in 2018 (copyright by the President and Fellows of Harvard College in 2015), pg. 80-83| [Premier]

Luckily, I think Arendt did not consistently follow this model from The Human Condition, which is why, for instance, in the early 1960s, she turned again to the fate of refugees and the stateless, and came to assert in a new way the right to have rights.9 The right to have rights is one that depends on no existing particular political organization for its legitimacy. Like the space of appearance, the right to have rights predates and precedes any political institution that might codify or seek to guarantee that right; at the same time, it is derived from no natural set of laws. The right comes into being when it is exercised, and exercised by those who act in concert, in alliance. Those who are excluded from existing polities, who belong to no nation-state or other contemporary state formation, may be deemed “unreal” only by those who seek to monopolize the terms of reality. And yet, even after the public sphere has been defined through their exclusion, they act. Whether they are abandoned to precarity or left to die through systematic negligence, concerted action still emerges from their acting together. And this is what we see, for instance, when undocumented workers amass on the street without the legal right to do so; when squatters lay claim to buildings in Argentina as a way of exercising the right to livable shelter; when populations lay claim to a public square that has belonged to the military; when refugees take part in collective uprisings demanding shelter, food, and rights of sanctuary; when populations amass, without the protection of the law and without permits to demonstrate, to bring down an unjust or criminal regime of law or to protest austerity measures that destroy the possibility of employment and education for many. Or when those whose public appearance is itself criminal—transgendered people in Turkey or women who wear the veil in France—appear in order to contest that criminal status and assert the right to appear. The French law that prohibits “ostentatious” religious display in public as well as the hiding of the face seeks to establish a public sphere where clothing remains a signifier of secularism and the exposure of the face becomes a public norm. The prohibition against hiding the face serves a certain version of the right to appear, understood as the right for women to appear unveiled. At the same time, it denies the right to appear for that very group of women, requiring them to defy religious norms in favor of public ones. That required act of religious disaffiliation becomes obligatory when the public sphere is understood as one that overcomes or negates religious forms of belonging. The notion, prevalent in French debate, that women who wear the veil cannot possibly do so from any sense of choice operates in the debate to veil, as it were, the blatant acts of discrimination against religious minorities that the law enacts. For one choice that is clearly made among those who wear the veil is not to comply with those forms of compulsory disaffiliation that condition the entrance to the public sphere. Here as elsewhere, the sphere of appearance is highly regulated. That these women be clothed in some ways rather than others constitutes a sartorial politics of the public sphere, but so too does compulsory “unveiling,” itself a sign of belonging first to the public and only secondarily, or privately, to the religious community. This is especially pronounced in relation to Muslim women whose affiliations to various versions of public, secular, and religious domains may well be coterminous and overlapping. And it shows quite clearly that what is called “the public sphere” in such cases is built up through constitutive exclusions and compulsory forms of disavowal. Paradoxically, the act of conforming to a law that requires unveiling is the means by which a certainly highly compromised, even violent, “freedom to appear” is established. Indeed, in the public demonstrations that often follow from acts of public mourning—as often occurred in Syria before half of its population became refugees, where crowds of mourners became targets of military destruction—we can see how the existing public space is seized by those who have no existing right to gather there, who emerge from zones of disappearance to become bodies exposed to violence and death in the course of gathering and persisting publicly as they do. Indeed, it is their right to gather, free of intimidation and the threat of violence, that is systematically attacked by the police, the army, hired gangs, or mercenaries. To attack those bodies is to attack the right itself, since when those bodies appear and act, they are exercising a right outside, against, and in the face of the regime. Although the bodies on the street are vocalizing their opposition to the legitimacy of the state, they are also, by virtue of occupying and persisting in that space without protection, posing their challenge in corporeal terms, which means that when the body “speaks” politically, it is not only in vocal or written language. The persistence of the body in its exposure calls that legitimacy into question and does so precisely through a specific performativity of the body.10 Both action and gesture signify and speak, both as action and claim; the one is not finally extricable from the other. Where the legitimacy of the state is brought into question precisely by that way of appearing in public, the body itself exercises a right that is no right; in other words, it exercises a right that is being actively contested and destroyed by military force and that, in its resistance to force, articulates its way of living, showing both its precarity and its right to persist. This right is codified nowhere. It is not granted from elsewhere or by existing law, even if it sometimes finds support precisely there. It is, in fact, the right to have rights, not as natural law or metaphysical stipulation, but as the persistence of the body against those forces that seek its debilitation or eradication. This persistence requires breaking into the established regime of space with a set of material supports both mobilized and mobilizing.

### Fem

#### When female journalists use confidential sources, it’s assumed it’s because they’re sleeping together and not because women are competent journalists leaking important stories.

Haines 17. Haines, Allison. Montreal Gazette. “Allison Hanes: Sexism on full display at police spying inquiry” Montreal Gazette, June 15, 2017. [Premier]

The police's apparently widespread assumption that if a female journalist has a scoop, she must have slept with her source is outrageous and insulting. If a female reporter gets a scoop, she must be sleeping with her source. If a male cop talks to a female journalist, he must be trying to have sex with her. If one reporter calls another, he must be feeding him or her an exclusive — even if they’re competitors. This is apparently the enlightened thinking of some of Quebec’s finest, according to affidavits and testimony from police now before the Chamberland Commission. Officers from the Sûreté du Québec, the Montreal force and the Laval Police have recently described for the inquiry on the protection of journalistic sources how their suspicions, assumptions and prejudices have figured into their investigations, mainly internal probes on leaks from within their respective forces. These offensive and strange ideas are alarming in themselves, betraying a Neanderthal mentality toward women and a major lack of comprehension about the workings of the media. But just as grave is the admission that idle and lascivious gossip has been used as the basis for criminal investigations that led to snooping in journalists’ phone records and undermined the role of the free press in a democratic society. As Radio-Canada investigative reporter Marie-Maude Denis put it, appearing Thursday before the Chamberland Commission, five years of her phone records were scrutinized by the SQ based on little more than grist for the office rumour mill. So much for the Supreme Court of Canada’s rigorous test for determining when it is appropriate to override protections for journalists’ confidential sources. Denis called the SQ’s false allegations “shameful.” It was equally appalling when Laval Police used similar unfounded arguments to target 98.5 FM crime and courts reporter Monic Néron to find out how she got a scoop on a big drug bust. Both Denis and Néron are excellent journalists who do important work informing us all about matters in which the public has a tremendous interest. Denis, in particular, has won awards for exposing corruption that has rocked governments and helped spawn inquiries. But according to the SQ, if an officer was in contact with Denis, they must have been having a liaison. If Néron got details on a major operation, it was because the officer who revealed the information “was thinking with his penis” and wanted to “bang her.” (Those are the actual words a Laval investigator used in a sworn affidavit). That these kinds of attitudes exist among some of those sworn to serve and protect is outrageous and bodes ill for all women they come into contact with, from fellow officers to victims of crime. These are disturbing examples of the classic misogynist stereotype that, if a woman is good at her job, she must have slept her way to the top; she couldn’t possibly be so competent and intelligent as to succeed on her own. It’s an insult to the professionalism of Denis and Néron. While sexist logic certainly isn’t being applied to their male colleagues — a maddening double standard — reporters of both sexes have nevertheless been subject to other bizarre assumptions on the part of police. A day earlier, an SQ inspector testified to his belief that journalists feed each other exclusives, even if they work for competing media. That curious rationale was employed by Montreal Police to obtain 24 warrants to monitor months of Patrick Lagacé’s phone records, even though he didn’t publish a single article using the information at the origin of the internal probe. Lagacé, the La Presse columnist at the centre of the spying scandal that sparked the Chamberland Commission, also took the stand Thursday. He assured the inquiry that he wasn’t acting as a conduit for leaks to his rivals, even if they are buddies. As any journalist will tell you, reporters from different media may be friends, but they jealously guard their hard-won scoops. It’s laughable, really, that police would have thought Lagacé was feeding competing outlets coveted exclusives — so much so that TVA reporter Félix Séguin took to Twitter to joke about it. Séguin mockingly thanked Lagacé for making his career with all the juicy information he’d supposedly been sending him. And in his testimony, Lagacé subtly teased Séguin, noting that, contrary to police assertions, the TVA reporter managed to get a particular story all by himself. But humour aside, Lagacé raised serious concerns about the low evidentiary bar and reliance on mistaken assumptions to justify intrusive investigations. Police have brought enormous resources to bear and cast a very wide net under the pretext of flimsy and feeble proof. That should be alarming, not only to journalists, but for society at large. It has had real consequences on investigative reporting, both Lagacé and Denis said, noting a chill effect on whistleblowers who bring forth information that the public deserves to know. But it also has grave implications for the fundamental rights of all Quebecers. “This doesn’t so much worry me as a journalist, this frightens me as a citizen,” said Lagacé, getting to the heart of the matter before the commission.

#### Female journalists’ sources are scrutinized far more than their male peers due to stereotypes of women reporters as promiscuous and unethical.

Gilbert 18. Sophie Gilbert. “The Lazy Trope of the Unethical Female Journalist” The Atlantic. August 20, 2018. <https://www.theatlantic.com/entertainment/archive/2018/08/sharp-objects-female-journalists-in-culture/567898/> [Premier]

Jokes aside, fictional tropes can have real-world consequences. In her New York story, Cogan pointed out that the trend of portraying women reporters as poisonous and promiscuous was creating a toxic environment for real journalists, whose professional overtures to sources were frequently mistaken for personal ones. And even though shows such as Sharp Objects aren’t intended to offer a serious critique of journalists and their methods—in Camille’s case, it’s to show how thoroughly she sabotages herself at every turn—these portrayals matter, especially in an environment where Americans trust journalists and their methods less than ever. In her 2016 book, Lonsdale writes that there’s something uniquely damaging about portraying women journalists as being willing to trade sex for stories. On the one hand, it undermines their profession further in the public eye. On the other, it further isolates them from their male counterparts, and underlines the suspicion that they’ve earned their positions illegitimately. And in light of the past year’s revelations about powerful men in journalism using their positions to inappropriately proposition women both at work and outside the office—something The Fourth Estate tackles in detail when a Times reporter is implicated—sexualized portrayals of women reporters seem even more insidious now than before. This is why series like The Fourth Estate are so valuable. It’s worth noting at this point that documentary portraits of female reporters are still relatively rare, with Haberman, Joan Didion, and Haberman’s colleague Margalit Fox (one of the primary characters in the recent film Obit.) being the exceptions. But when documentarians do follow female reporters around, what they capture is the opposite of the charged Hollywood fantasy. Instead, it’s visibly tired, multitasking women working relentlessly because they know the stories they’re reporting are stories that need telling. The reality might not indulge the fantasies of primarily male writers and directors in quite the same way, but as The Fourth Estate shows, it can still make for enthralling television.

#### Female journalists are seen as less credible.

Brann and Himes 10. Maria Brann & Kimberly Leezer Himes. “Perceived Credibility of Male Versus Female Television Newscasters,” Communication Research Reports. 27:3, 243-252, 27 Jul 2010, <https://doi.org/10.1080/08824091003737869>. [Premier]

As previously mentioned, this study found that credibility ratings were statistically higher for a male newscaster than the ratings for a female newscaster on the dimensions of competence, composure, and extroversion, confirming the findings of Balon et al. (1978). Not surprisingly, male newscasters were viewed to be more competent and extroverted. Historically, men have been expected to assertively exhibit expertise and knowledge in public forums. Also not surprising is that the male newscasters were viewed to be more composed than the female newscasters. When delivering serious— and sometimes dramatic—news, viewers may expect that a male newscaster will be better able to ‘‘handle’’ or be ‘‘in control of’’ such news. In contrast, if returning to traditional stereotypes of women, viewers may expect that female newscasters may be more emotional when delivering potentially devastating news. No differences were found in character or sociability of the newscasters. Neither sex appeared to be more virtuous or friendly, which suggests that not all dimensions are evaluated with a traditional sex role expectation. Still, it is interesting to note that, despite the many cultural and technological changes that have occurred since Balon et al.’s (1978) study, the outcome remains the same. Male newscasters continue to be rated higher in perceived credibility, perhaps indicating a stagnant mindset of television news viewers.

#### Gender disparity in journalism.

Segal 14. Segal, Corrinne (Corinne is the Senior Multimedia Web Editor for NewsHour Weekend. She serves on the advisory board for VIDA: Women in Literary Arts, and graduated from Tufts University, where she studied English literature.

The journalism industry is severely lacking in leadership by women and racial minorities, according to the Nieman Reports story published Wednesday.) “Why Journalism has a Gender Problem,” PBS News Hour, 12 September 2014. <https://www.pbs.org/newshour/nation/journalism-gender-problem> [Premier]

This year’s census by the American Society of News Editors (ASNE), which looked at diversity at print newspapers, shows women accounting for 35.4 percent of supervisors. This barely marks an increase from 1999, when women made up 33.8 percent of supervisors. Women run three out of the 25 biggest U.S. titles and one of the top 25 international titles. They make up 37.2 percent of overall newspaper employees, a whole three-tenths of a percent increase from 1999. Racial minorities fare even worse, comprising 13 percent of overall employees. In broadcast newsrooms, women make up 31 percent of news directors and 20 percent of general managers, according to a 2014 survey by the Radio Television Digital News Association. The fewest female leaders appear in radio, where they account for 23 percent of news directors and 18 percent of general managers. The trend is not limited to the U.S., or even to media. A survey of 500 media companies in nearly 60 countries discovered that men hold 73 percent of management positions. And among Fortune 500 CEOs, women account for 4.8 percent. There are, of course, high-profile exceptions; Arianna Huffington and Marissa Meyer among them. The ASNE survey shows women among the top three leaders at 63 percent of print organizations. But according to the numbers, these instances do little to mitigate a larger trend. Many say the imbalance is no accident, and instead the result of professional and social factors that inherently tip the scales for men. Women enter communications schools and the journalism industry at roughly the same numbers as men, according to the Nieman report. From there, the number drops off — only one-third of people with 20 or more years of journalism experience are women. One factor in this disparity is the fact that more men than women hold “hard” news beats such as politics and world news, where organizations often turn to hire management. An analysis of thousands of New York Times articles this year showed that men wrote most of the articles in the seven largest sections. And for women serving as primary child caretakers — the case in the majority of American families — irregular hours and travel make it difficult to commit to these beats, the Nieman report said. Women that make it through the pipeline in many industries face cultural attitudes that favor leadership by men. A Fortune study on performance reviews in the tech industry found that words like “bossy, abrasive, strident, and aggressive” appear in reviews of female leaders more frequently than men. Jill Abramson, who was fired from her position as editor of the New York Times this year, was frequently described as such. A Google search of “Jill Abramson abrasive” yields over 110,000 results. Some have voiced hopes that the emergence of digital media would upend hiring structures that are frequently skewed toward men. As news consumption goes digital, women are leading the way as consumers. Thirty percent of American adults use Facebook for news, and women make up 58 percent of those news consumers, according to a 2014 Pew Research Center report. But men are still leading as the creators in at least several high-profile instances. Vox.com and First Look Media were founded this year by men, and FiveThirtyEight was founded by two men and one woman. A Vanity Fair list of media disruptors, released on Wednesday, is comprised almost entirely of white men. Why is this important? The report cited several studies showing that diverse newsrooms do a better job at news coverage, and their policies favoring work-life balance are not as prohibitive for working parents of any gender. The issue of newsroom diversity is not limited to gender — it is also important to promote people of diverse socioeconomic and racial backgrounds, the report said. It cited McClatchy, where women serve as 13 out of 29 executive editors, as a company that has done this effectively. A more diverse newsroom can yield a wider range of possibilities for coverage, Keith Woods, vice president for diversity in news and operations at NPR, said in a report by The Atlantic. “When you fail to pursue the most diverse news staff, you fail to open up the possibilities created when you bring a broader range of life experience,” he said.

### Race

#### Hoaxes in the media due to untrustworthy sources are part of a pattern and structure of racism.

Cooper 96. Thomas W. Cooper “Racism, Hoaxes, epistemology, and news as a form of knowledge: The Stuart case as fraud or norm?” Howard Journal of Communications, 7:1, 75-95. 27 Feb 2009. <https://doi.org/10.1080/10646179609361714> [Premier]

Moreover, ongoing patterns may be detected. When the U.S.S. Maine exploded in 1898, reportedly killing 260 Americans, Spanish males were quickly blamed and attacked by the military and press without patience, perspective, or proper investigation. When gunfire exploded within the Stuart car 91 years later killing one White American, Black males were quickly blamed, searched out, and attacked by police and press without patience, perspective, or proper investigation. In the media-enhanced racially charged climates of both events, Hearst and Stuart were able to indict "likely" (and racially "inferior") scapegoats. An investigation of the history of press coverage of lynchings in the United States, of executions in South Africa, or of the Hitler press, the Mussolini press, the pre-Watergate Nixon press, or indeed of most journalism in most nations, suggests that it is the rule, not the exception, that the media help to reflect and define the shared deceptions and projections of their nations or cultures. Such deceptions historically have posited that the earth is flat, that sufficient bleeding helps the patient heal, that the earth is round, that the earth is the center of the solar system, that the Piltdown skull proves a theory of evolution, that Blacks are genetically inferior, that there are angels or batmen or unicorns on the moon, that Hitler would not attack neighboring countries, that the earth is not losing its natural resources, that Sacco and Vanzetti were guilty, that Dr. Sam Shephard is guilty, that Willie Bennett was guilty, and, more often than not, that the press is innocent. It is against this backdrop—in which the truth resembles human illusions and illusions are designed to look truthful, in which deceit is ordinary and truth debatable, in which credible scientific paradigms are quickly supplanted by new theories, in which even a U.S. President falls prey to a telephone prank (supposedly from a ranking Iranian diplomat), in which a U.S. president is a professional actor, and in which some newspapers run an entire column of corrections about the preceding day's news—that the Charles Stuart case must be reviewed. What is extraordinary is not the hoax, but that we find the hoax extraordinary.

### Illusions

#### News is an illusion and fosters racism, cultural bias, and deception.

Cooper 96. Thomas W. Cooper “Racism, Hoaxes, epistemology, and news as a form of knowledge: The Stuart case as fraud or norm?” Howard Journal of Communications, 7:1, 75-95. 27 Feb 2009. <https://doi.org/10.1080/10646179609361714> [Premier]

In this study I will suggest that news is an illusion, and thus by nature different from, although related to, what is taken to be truth and reality. Therefore the coverage of the Stuart case, in creating an illusion, is normal in its perpetration of human fantasy, if abnormal in its surface detail. One aspect of this illusion is the desire to reduce amorphous complexity to narrative simplicity, and thus often to alter shades of gray to black and white (figuratively and racially). Many ethical issues circumscribe the Stuart coverage—invasion of privacy, distortion, use of unnamed sources, factual inaccuracy, racial discrimination, and stereotyping, among others. I will review these issues as they relate to the overarching ethical question posed: Is news itself a deception, a sustained and commonly shared hoax? If Charles Stuart did indeed create a major illusion, should Stuart alone be held responsible for the deception? Or is the problem a deeper one, culturally and psychologically? Do our human desires for closure, certainty, instant understanding, and mental security contribute to both racial reductionism and news illusions? Do we seek knowledge presented in formats that reduce and over-simplify reality, not unlike ethnic stereotypes? In catering to human needs and fears, knowledge in such formats minimizes uncertainty, answers questions prematurely, delimits ambiguity, downplays ignorance, and confuses the issue by showing only its shadow. One such format could be called news. I contend that such formats, inseparable from the reductive nature of human communication tools and from human thought processes, foster a climate of shared and accepted cultural bias and deception.

#### There is a false notion that human perception of images and illusions dictates reality.

Cooper 96. Thomas W. Cooper “Racism, Hoaxes, epistemology, and news as a form of knowledge: The Stuart case as fraud or norm?” Howard Journal of Communications, 7:1, 75-95. 27 Feb 2009. <https://doi.org/10.1080/10646179609361714> [Premier]

In the presentation of news, isolated actors such as Charles Stuart, Carol Stuart, and Willie Bennett are depicted as racially discrete, contained, and separate physical entities acting in ways we can accurately measure, report, and document. But, for the moment let us consider the field of physics. In the thinking of Einstein, Heisenberg, and Bohm, among others, energy and mass are constantly interconverted and consequently we live in a sea of pulsation and vibration. We breathe in Charles Stuart and Willie Bennett and breathe out Catherine the Great and Confucius, so to speak, without racial or gender discrimination. Our minds, however, usually are unaware of the ongoing flux of recycled molecules, oceans of energy, and sub-atomic realities. The notions of solidity and separation, like apartheid, are illusions perpetuated by training and cultural agreement. Consequently we talk, act, and report as if our individual human perceptions of reality were reliable and valid. We view newspaper photos of Stuart and Bennett as if they were real, even when the Boston Herald runs a seven inch photo of Bennett that was another man entirely (Witherspoon, Caruso, & Ackerman, 1989). Moreover, we act as if Blacks and Whites were racially discrete entities, as if all humans did not have common ancestors, whether gods, fish, women, or molecules. Is anyone purely White? Black? Perceptual psychology is also revealing. We human beings have visual images projected upside down upon our retinas, which illusions are taken from a narrow slice of the light/ray spectrum. Despite our retinal blind spots, acoustical inefficiencies, and insensitivities to sounds heard by other species, and indeed to a vast spectrum of sensation and information beyond that, we act as if human perception is the basis for pure understanding. Such delimiting, inaccurate, and relative reductions of reality somehow become miraculously converted to "reliable sources," "official spokespersons," and "eye witness accounts" in the fictional construction of news. Perceptual psychology gives us an understanding of how we misinterpret and attempt to estimate elemental phenomena such as notions of black and white.

#### Illusions created by mass media do not reflect reality and maintain dominant structures and social hierarchy.

Cooper 96. Thomas W. Cooper “Racism, Hoaxes, epistemology, and news as a form of knowledge: The Stuart case as fraud or norm?” Howard Journal of Communications, 7:1, 75-95. 27 Feb 2009. <https://doi.org/10.1080/10646179609361714> [Premier]

Plato suggested that there were invisible patterns behind what appeared to be human reality. Using the analogy of shadows from the outside world projected on the walls of a cave, Plato argued in The Republic that prisoners within the cave would believe there were no realities except those shadows. Shadows are an excellent analogy not only for the reports transmitted to our brains by human perception but also for the reports given by the mass media. Moving pictures and print are either broadcast or cast impressions of previous or imagined events. Visual media even employ shadowlike two dimensional moving outlines that exaggerate or diminish a distant recorded pattern. Willie Bennett metaphorically is the dark shadow cast by white light. Taking Plato's observations of illusion even further, and also extending the views of John Locke, George Berkeley questioned, "What do we perceive besides our own ideas and sensations . . .?" (Greene, 1967, pp. 247-8). The Irish philosopher argued that what we perceive is nothing more than our own senses; that is, when we touch an object, we discover what it is like to have a human nervous system reporting the feelings through the nerve endings in human skin. It is not the object that we feel but rather the way we feel it. Nietzche's view of "perspectivism" is similar: "Facts is precisely what there is not," Nietzsche warned, "only interpretations" (Nietzsche, 1967, p. 267). He claimed that just as animal species have developed specialized types of vision, such as eyes on the sides of their heads, to better spy predators in order to survive, human beings have developed mental perspectives, not in alignment with some greater overall reality, but to support their own survival and justify a way of living. Reality is made to conform to each national and racial group's or individual's needs in order to gain and maintain power. Such philosophical theory is not distant from, for example, sociology. Berger and Luckmann's Social Construction of Reality (1966), Marx's notions of hegemony and superstructure, and Fanon's applications imply that human beings are not so much interested in discovering reality as in constructing a socially shared illusion that will protect their own positions, ethnic group, and comfort. In a similar vein, H. L. Mencken wrote, "No normal human being wants to hear the truth . . . what remains in the world is a series of long tested and solidly agreeable lies" (Fedler, 1989, p. 123). For many sociologists, such shared lies, myths, or ideologies may sustain or contribute to the maintenance of dominant cultures, tradition, and social hierarchy.

#### The alternative is to examine ourselves for symptoms of self-deception and murder the “they” – only way to solve the aff.

Cooper 96. Thomas W. Cooper “Racism, Hoaxes, epistemology, and news as a form of knowledge: The Stuart case as fraud or norm?” Howard Journal of Communications, 7:1, 75-95. 27 Feb 2009. <https://doi.org/10.1080/10646179609361714> [Premier]

It follows that wider recommendations would include that as humans we examine ourselves for symptoms of self-deception, a common condition of human nature, and that we open ourselves to a larger realm of thought. Reality cannot reveal itself to those encumbered by a narrow egocentric or ethnocentric outlook. These recommendations are intended to be constructive. "Media bashing," which is more negative, only creates a greater schism between news professionals and their critics. If we feel that media naively pointed a finger toward only Charles Stuart, why then naively point a finger toward only the media? Neither Stuart nor his coverage caravan taught us to steal cookies from the cookie jar, to lie when caught, to deceive ourselves about being "basically honest, impartial people." Such habits, like racism itself, are deep and universal. Indeed hiding our own personal Watergates is perhaps the greatest hoax in human consciousness. We believe, as if it is empirical fact, that it is always "they" who are at fault. "They" are the Stuarts of the world. But for Stuart and the Boston police "they" were Black males like Willie Bennett. For academic critics "they" are the slipshod, unscientific media. For Spiro Agnew "they" were "effete pseudointellectuals." For concerned citizens "they" are the hoaxters like Charles Stuart and Orson Welles who upset and alarm society. "They" are everywhere, themselves pointing at others, as if in a hall of mirrors. Indeed a global and cumulative content analysis of the diaries of overt racists would show that the word "they" appeared far more frequently than any single ethnic slur. Behind this primary illusion of "they," who seem totally separate from ourselves, is a reality clearly articulated by Edward R. Murrow at the end of his radio drama, "The Killing of Michael Farmer" (see Hilliard, 1984, p. 164). After researching this 1957 New York murder as shocking as that committed by Charles Stuart, Murrow investigated every "they" rumored to be responsible for the Farmer killing—an ethnic street gang, negligent parents, an inept justice system, overloaded social workers, an aloof government, and other "they" groups. Murrow predicted that crimes of this sort would continue, as the Stuart murder forty years later bears out, not due to any one of these "causes," but rather due to another culprit, named below. Similarly Fedler (1989) has predicted that media hoaxes will continue throughout the 21st century. Nor do racial and cultural illusions seem diminished. Criminologists predict that crimes worse than Stuart's will persist. Moreover, unethical media illusions and illusions about mass media ethics seem equally destined to continue in the information age. Murrow's conclusion about why such crime persists—why truth itself, is constantly murdered, and not by "they"—is still valuable: The problem ... continues. The experts may list all sorts of causes. But they agree on one answer to why these conditions continue to exist. We permit them to ...

## NCs

### Virtue Ethics

#### Privacy is key to human flourishing—that entails control over the use of one’s name and identity

**Van der Sloot 14:** Van der Sloot, Bart. “Privacy as Human Flourishing: could a shift towards virtue ethics strengthen privacy protections in the age of big data?”. Journal of Intellectual Property, Information Technology, and E-commerce Law. 2014. <https://www.jipitec.eu/issues/jipitec-5-3-2014/4097>. [Premier]

Although negative freedom and autonomy are thus important fundamentals underlying the right to privacy in the European Convention on Human Rights, in more and more recent cases, the Court focuses on the right to individual and group identity, the development of one’s personality and the right to human flourishing. The Court has provided protection to a range of activities under Article 8 ECHR that it sees as essential to the right to personal development. [[63](https://www.jipitec.eu/issues/jipitec-5-3-2014/4097#ftn.N102F7)] The obligation to wear prison clothes has been held to interfere with a prisoner’s private life due to the stigma it creates. [[64](https://www.jipitec.eu/issues/jipitec-5-3-2014/4097#ftn.N102FE)] The refusal of the authorities to allow an applicant to have his ashes scattered in his garden on his death was held so closely related to his private life that it came within the sphere of Article 8 of the Convention ‘since persons may feel the need to express their personality by the way they arrange how they are buried’. [[65](https://www.jipitec.eu/issues/jipitec-5-3-2014/4097#ftn.N10305)]The Court has accepted that a person has a right to live and work in a healthy living environment. [[66](https://www.jipitec.eu/issues/jipitec-5-3-2014/4097#ftn.N1030C)] And so one could go on. It goes too far to discuss all these cases. Four matters will be discussed instead: the protection of and freedom to develop one’s personal identity, minority identity, relational identity and public identity. Personal identity: As a general principle, the Court has held that birth, and in particular the circumstances in which a child is born, forms part of a child’s, and subsequently the adult’s, private life as guaranteed by Article 8 ECHR. [[67](https://www.jipitec.eu/issues/jipitec-5-3-2014/4097#ftn.N1031B)] It has on numerous occasions emphasized that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual’s entitlement to such information is of importance because of its formative implications for one’s personality. [[68](https://www.jipitec.eu/issues/jipitec-5-3-2014/4097#ftn.N10322)] Thus, the Court has accepted in its case law that the right to privacy includes, inter alia, the right to obtain information necessary to discover the truth concerning important aspects of one’s personal identity, such as the identity of one’s parents. [[69](https://www.jipitec.eu/issues/jipitec-5-3-2014/4097#ftn.N10329)] The vital interest people have in receiving the information necessary to know and to understand their childhood and early development may require states to adopt legislation facilitating a person’s quest. Moreover, an adult may be forced to submit himself to paternity proceedings, for example, through DNA-tests, and sperm-banks may under certain circumstances be held to reveal the identity of a sperm-donor. [[70](https://www.jipitec.eu/issues/jipitec-5-3-2014/4097#ftn.N10330)] Besides the right to establish details of one’s identity, it has been accepted that the right to respect for private life ensures a sphere within which everyone can freely pursue the development and fulfillment of his personality. ‘The right to develop and fulfill one's personality necessarily comprises the right to identity and, therefore, to a name’. [[71](https://www.jipitec.eu/issues/jipitec-5-3-2014/4097#ftn.N1033B)] In forming, creating, and maintaining one’s identity, the Court has held that personal names may be of pivotal importance. Consequently, it has assessed cases under the scope of Article 8 ECHR in which a spouse complained that she had to adopt the surname of her husband, even though she was known by her maiden name in her inner circle and in professional relationships. The Court has also accepted that, under certain circumstances, children have the right to choose their forename or their surname, and, finally, the Court has granted that individuals have the right to alter their birth-given name. [[72](https://www.jipitec.eu/issues/jipitec-5-3-2014/4097#ftn.N10342)

#### Confidentiality lets bad virtues such as dishonesty go unchecked

Wasserman 05 Wasserman, Edward. Professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley. A Critique of Source Confidentiality. Notre Dame Journal of Law, Ethics & Public Policy <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> [Premier]

Accountability involves an obligation to ensure that the ledger of significant actions and assertions be reported publicly in such a way that their authors are linked to them. Confidentiality enhances accountability when it helps expose subterranean agreements, decisions, and actions that would otherwise go unreported. But secrecy may also hinder accountability by interposing the journalist between informant and public, and preventing third-parties from challenging sources over inaccuracies, indiscretions, or lies. It may also scrub the record clean of grudges and personal agendas that have bearing on the information, and thereby prevent dishonest or tainted informants from being exposed as such. Verifiability, which is the closest journalism comes to offering a functional equivalent to the standards of social science, usually is premised on associating information with the person who provides it. That enables third-parties to determine that the words were spoken, just as reported, by the person who was said to have uttered them. Here again, confidentiality may impair accuracy. It can impede testing the truthfulness of information; nobody else can phone the reporter's secret source to confirm, refute, or modify the original information. Anonymity, USA Today founder Al Neuharth observed, enables sources to say more than they know and reporters to write more than they hear.33

#### Expressibility test shows bad virtues arise

Wasserman 05 [Wasserman, Edward. Professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley. A Critique of Source Confidentiality. Notre Dame Journal of Law, Ethics & Public Policy <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> [Premier]

Baier suggests that the morality of a trust relationship can be assessed by applying what she terms the expressibility test: Would the relationship withstand having its foundations laid bare? The hard-charging executive who trusts her chief aide without reservation because she secretly believes the assistant is too unimaginative to pose a threat-that is not a morally robust trust relationship and would crumble if its premises were articulated. Similarly, Baier's expressibility test is a promising way to examine a confidentiality agreement. A source who bases his reliance on the courage and honesty of a reporter enters into a morally different relationship than does one who relies on an avowedly partisan journalist's gullibility and blind loyalty. Suppose you, the reporter, are agreeing to withhold the name of the politician who is giving you a self-serving leak because you wish to endear yourself to the office-holder and get preferential access to information in the future. Is that something you would be comfortable disclosing to your readers, or would it undermine the trust they confer on you?

### Kant

#### Transparency in media is key to maintaining a system of equal freedom and respecting the rationality of other agents

**Plaisance 7:** Plaisance, Patrick Lee. Transparency: An Assessment of the Kantian Roots of a Key Element in Media Ethics Practice, Journal of Mass Media Ethics, 2007. 22:2-3, 187-207, DOI: <https://www.tandfonline.com/doi/pdf/10.1080/08900520701315855>. [Premier]

 The concept of transparency is critical to anyone concerned with ethics in communication because it does not simply address the content of our messages to other people, but it requires us to think about the form and nature of our interaction with others. Not only is transparency an issue regarding what we say, but regarding why we say it and even how we talk. Transparency has become a term of cachet, a buzzword used to trumpet integrity in government, business, and media. The annual international ‘‘bribery survey’’ conducted by Berlin-based Transparency International receives prominent news coverage around the globe every year. Public relations officials and other corporate officers point with pride at their efforts to achieve transparency with customers, clients, and investors. A rash of business and marketing books have recently been published that trumpet the usefulness of transparency as a smart business strategy (see Ind, 2005; Oliver, 2004; Pagano, 2004). Business leaders are recognizing that the concept is an effective ‘‘means’’ toward success. One American newspaper received industry praise by webcasting its daily news meet- ings as part of its ‘‘transparent newsroom’’ initiative (Smith, 2006). Transparent interaction is what allows us as rational, autonomous beings to assess each other’s behavior. Our motivations, aspirations, and intents are fully set forth for examination. ‘‘Moral communication,’’ Robert McShea wrote, ‘‘is possible among us to the extent to which we share: : : a common view of the facts’’ (1990, p. 221). Sissela Bok (1999) argued that when we use deception or stop short of full disclosure, we fail to treat others with the requisite dignity and respect. We fail as moral beings, in effect. Drawing from a range of theorists, transparent behavior can be defined as conduct that presumes an openness in communication and serves a reasonable expectation of forthright exchange when parties have a legitimate stake in the possible outcomes or effects of the communicative act. It is an attitude of proactive moral engagement that manifests an express concern for the persons-as-ends principle when a degree of deception or omission can reasonably be said to risk thwarting the receiver’s due dig- nity or the ability to exercise reason. This duty requires us to acknowledge the moral dimension of all communicative acts, yet does not require the sacrifice of autonomous agency when opacity or evasion serve legitimate privacy interests. Autonomy requires privacy, as several theorists have pointed out (Bok, 1982; Goff- man, 1963; Rosen, 2000). In her essay on the science of deception detection, Henig (2006) noted that learning to lie is an important step in human maturation. ‘‘What makes a child able to start telling lies, usually at about age 3 or 4, is that he has begun developing a theory of mind, the idea that what goes on in his head is different from what goes on in other people’s heads: : : : After a while, the ability to lie becomes just another part of his emotional landscape’’ (p. 76). Philosopher Thomas Nagel eloquently stated how neither individuals nor society can survive and flourish without secrecy: Each of our inner lives is such a jungle of thoughts, feelings, fantasies and impulses, that civilization would be impossible if we expressed them all, or if we could all read each other’s minds, just as social life would be impossible if we expressed all our lustful, aggressive, greedy, anxious or self-possessed feelings, and private behavior could be safely exposed to public view. (1998, p. 15)

#### Confidentiality treats people as a means to an end

Wasserman 05 Wasserman, Edward. Professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley. A Critique of Source Confidentiality. Notre Dame Journal of Law, Ethics & Public Policy <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> [Premier]

CONFIDENTIALITY AS SOURCE PROTECTION: It follows that although confidentiality may protect a source, journalists accept no freestanding obligation to withhold an informant's identity even if they believed-or would believe, if they gave it any thought-that secrecy would be in the source's best interests. A reporter would not, for example, urge a source to demand concealment if the reporter understood-and the source did not that exposure could be perilous. Confidentiality is nothing more than a valuable information-gathering technique; its claim to ethical standing derives solely from the enhanced information its judicious use brings to the public. It does not reflect an obliga- tion owed to the source, unless the source insists on it as a condition of providing that information. In that regard it is a technique of source self-defense, which the reporter accedes to and does not proffer.2 9 If instead the journalist did recognize an independent ethical duty to the informant to withhold the source's name if disclosure might be harmful, the source would not need to demand anonymity. That is not the case. In fact, journalists are typically admonished to grant confidentiality only if necessary.3" Confidentiality is part of a negotiation over the release of information and owes its ethical standing to the quality of the information it makes public-and to its being secured by a promise. In a moment we will look at the curious ethical status of that promise.

### Rousseau NC

#### The desire to hide ourselves and keep confidentiality is rooted in a desire for uniformity that lets all vices loose

Rousseau 1750 Jean – Jacques, Social Contract Theorist, Discourse on the Arts and Sciences 1750, <https://www.stmarys-ca.edu/sites/default/files/attachments/files/arts.pdf> [Premier]

Nowadays, when more subtle studies and more refined taste have reduced the art of pleasing into principles, a vile and misleading uniformity governs our customs, and all minds seem to have been cast in the same mould: incessantly politeness makes demands, propriety issues orders, and incessantly people follow customary usage, never their own inclinations. One does not dare to appear as what one is. And in this perpetual constraint, men who make up this herd we call society, placed in the same circumstances, will all do the same things, unless more powerful motives prevent them. Thus, one will never know well the person one is dealing with. For to get to know one's friend it will be necessary to wait for critical occasions, that is to say, to wait until too late, because it is to deal with these very emergencies that one needed to know him in the first place. What a parade of vices will accompany this uncertainty? No more sincere friendships, no more real esteem, no more wellfounded trust. Suspicions, offences, fears, coldness, reserve, hatred, and betrayal will always be hiding under this uniform and perfidious veil of politeness, under that urbanity which is so praised and which we owe to our century's enlightenment. We will no longer profane the name of the master of the universe by swearing, but we will insult it with blasphemies, and our scrupulous ears will not be offended. People will not boast of their own merit, but they will demean that of others. No man will grossly abuse his enemy, but he will slander him with skill. National hatreds will expand, but that will be for love of one's country. In place of contemptible ignorance, we will substitute a dangerous Pyrrhonism.\* There will be some forbidden excesses, dishonourable vices, but others will be decorated with the name of virtues. It will be necessary to have them or to affect them. Let anyone who wishes boast about the wise men of our time. As for me, I see nothing there but a refinement of intemperance every bit as unworthy of my praise as their artificial simplicity (2)

### Constitution NC

#### The Framers didn’t decide the question of the resolution, but the Supreme Court did – Branzburg v Hayes decided that journalists don’t have the right to refuse to testify

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

Just as **the Framers** left no record of what they thought were the ideal rules of libel law, they **left no recorded opinion as to whether the First Amendment should allow reporters to protect their confidential sources and information. In the area of reporter's privilege**, as in libel, **the U.S. Supreme Court accepted the task of filling in some of the lines between the broad strokes of the social architecture set down by the Framers. In Branzburg** v. Hayes, the landmark reporter's-privilege case, **the Supreme Court distributed power between federal grand juries and the media when it ruled that journalists do not have a First Amendment right to refuse to testify before a federal grand jury.**

#### Supreme Court ruled reporters don’t have a constitutional safeguard against testifying

Brooks Pierce 09 Brookspierce.com. Blog of qualified lawyers: The 2019 edition of The Best Lawyers in America © recognized 55 Brooks Pierce attorneys as industry leaders. Nine attorneys in the firm’s Greensboro office were also recognized as “Lawyer of the Year” in their respective practice areas. Does The Constitution (Still) Protect The Identity Of A Confidential Source? March 12 2009, <http://www.brookspierce.com/news-insights/does-constitution-still-protect-identity-confidential-source> [Premier]

In Branzburg v. Hayes, the Court held 5-4 that reporters served with a grand jury subpoena in a criminal matter do not have a First Amendment privilege against testifying. Branzburg actually decided three different cases, each of which involved a similar set of facts. In one of the cases, a reporter in Kentucky had published an investigative piece on the local drug trade in which he had personally observed people producing and using illegal drugs. The other two cases involved reporters who had been covering the activities of the Black Panther Party. In all three cases, local law enforcement officials who were pursuing criminal investigations sought to compel the reporters to reveal their confidential sources to a grand jury. Justice Byron White, writing for the majority, accepted the reporters’ argument that if journalists are regularly forced to disclose the identity of their confidential sources, those sources will soon dry up and the reporters will be unable to do their job. The question, Justice White said, is whether this potential burden on the rights of the press outweighs the legitimate needs of law enforcement officials to investigate and prosecute crimes. In the end, White said: [W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial. In the end, White said, reporters remain regular citizens and must comply with a legitimate subpoena just as any other citizen.

## On Case

### AT Solvency

#### Media Choice DA:

#### Media organizations can still decide whether to classify certain people or groups as sources, so they don’t necessarily get protections unless reporters CHOOSE to give them confidentiality in court

Martin et al 11, Jason Martin – PhD candidate, Mark Caramanica – PhD candidate, Anthony Fargo – prof of Journalism @ Indiana, “Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online,” 16 Comm. L. & Pol'y 89 (2011), lexis. [Premier]

Still, as noted earlier, the concerns about the use of shield laws to protect anonymous commenters are not fanciful. **The question becomes** one of **how to accommodate protection for anonymous commenters without risking legislative backlash.** The options include having news organizations alert commenters that they are being sought by litigants and then letting them defend themselves with a Dendrite-Cahill-Brodie theory; **continuing to protect the commenters with shield laws, but doing so** [\*123] **more selectively**; or expanding shield law protection, either through legislation or court interpretation, to protect all anonymous commenters as sources in all states that have shield statutes. The third option seems impractical because of the amount of coordination and time it would take to change the law nationwide, and it could exacerbate the risk that legislators would tinker with the laws in undesirable ways. The first option has the advantage of creating a relatively level playing field for all commenters to a Web site, regardless of who owns the site. But it does not address news organizations' ethical, practical and business reasons for wanting to protect the comment forums they have created or otherwise maintained.

**The best solution may be for news organizations to consider whether all comments are worthy of shield law protection and act accordingly. Consider** the following scenario: A newspaper publishes a story about a speech by a member of Congress who represents the paper's readership area. **One commenter** on the Web site's version of the story **writes: "Your paper should check out the congressman's ties with XYZ Corporation**. I bet you'd find something juicy there." **A second** commenter **writes: "I can't believe your newspaper is wasting space covering anything that lying, corrupt, egotistical sack of [excrement] has to say!" Both comments**, arguably, contribute to public dialogue about an elected official's performance. Both also **could be actionable,** the first by implying an improper relationship between the congressman and a corporation, the second by accusing the congressman of being corrupt and a liar. **Are both comments the types of information that news organizations traditionally have viewed as valuable enough that the organizations should protect their sources through shield laws? That is a question that, as a threshold matter, is one probably best left to media organizations to answer when they decide whether to classify anonymous commenters as "sources" or their identities as "information" protected by shield laws.**

#### The aff requires deciding who gets the privilege – which equates to government licensure, regulation, and surveillance of journalism

Apelis 08 (Markus Apelis, associate at Gallagher Sharp, focuses his practice on matters involving general liability, transportation, and insurance coverage issues, Fit to Print - Consequences of Implementing a Federal Reporter 's Privilege, Case Western Reserve Law Review Vol. 58 Is. 4, 2008) [Premier]

B. Licensing of Journalists Creating a federal reporter's privilege, especially by enacting a federal shield law, however, would create the danger of undue regulation of the media. Assuming the existence of a federal reporter's privilege, whether statutory or judicially created, as the above discussion illustrates, deciding who is a journalist (and, as such, could invoke the privilege) is a question that ultimately remains largely unanswered. It is likely, given the historic practice in the states and general public acceptance, that traditional media would be entitled to the protections of a reporter's privilege. A cogent argument may be advanced in favor of extending such protections to independent journalists and nontraditional media as well. It is at this margin where the question becomes most difficult, particularly where non-media entities are involved. At some point, however, a policy decision is required in order to define the limits of the reporter's privilege. Justice White deferred engaging in such analysis whose time had not yet come: We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege .... 13 ' Yet the question remains squarely at the forefront of First Amendment jurisprudence. It is the inability or unwillingness of courts to fashion a satisfactory answer to this question in which one of the great dangers of a reporter's privilege arises. When the legislature enacts a privilege, the legislature inherently also regulates the privilege's holders. Should Congress pass a federal shield law, whether because of judicial refusal or as a legislative response, enacting a federal reporter's privilege opens a Pandora's box to increased federal media regulation, including licensure of journalists. Upon careful examination, federal regulation of journalists through licensing provisions is not as remote a possibility as Orwellian fiction might suggest. Despite the admonition of the First Amendment, the media business is a heavily regulated industry, and courts have often grappled with the limitations on press freedoms. 132 Despite the judiciary's perpetual concerns for the First Amendment, media regulation is commonplace. In 1934, Congress created the Federal Communications Commission "[f]or the purpose of regulating interstate and foreign commerce in communication" and charged the FCC with administering and enforcing broadcast media regulations.1 33 These requirements concern not only the format of communications, but also the substance of communications, with an increasingly close eye to content.1 34 Moreover, the expansive authority of the FCC evidences the very real existence of federal licensing requirements. Federal regulations already require licenses for the operation of amateur and commercial radio stations, television studios, cable outfits, and satellite broadcasters. 135 As a result, radio and television broadcast journalists fall within the reach of FCC licensure. FCC regulations governing radio and television content cover myriad issues, including the truthfulness, objectivity, equality, and decency of broadcasts, including news.136 The agency also regulates the character of license applicants. 1 37 Given the prolixity of federal broadcast rules, it is clear that continued congressional intervention in the media industry would breed further regulation. It is very likely that enacting a federal statutory reporter's privilege would lead to the licensing of individual journalists. However, states with similar shield laws have not experienced this phenomenon. While no state shield law includes specific licensing provisions, many do narrowly circumscribe the limits of the privilege, extending protection only to traditional journalists or in particular circumstances. 138 Given the potential preemptive force of federal regulations and the interstate nature of the media business, state legislatures are without authority to impose the type of sweeping regulations that the federal government is able to promulgate. Finally, because the federal district and appellate courts have had little occasion to construe state shield laws, 139 the federal judiciary would be left to develop its own body of precedent concerning the specifics of a federal shield law. Finally, licensing as it relates to other federal evidentiary privileges is not a foreign concept. The Federal Rules of Evidence do not expressly recognize any privileges; however, the federal courts have enumerated several vocational privileges over time. 140 Each of these professional privileges, irrespective of whether recognized by the federal courts or created by state statute, requires the trustee of the privilege to be a licensed practitioner in his or her respective field. 41 Given this licensing requirement for other recognized vocational privileges, it would not be extraordinary for a reporter's privilege to require licensure of journalists. And so Justice White's remark in Branzburg that eventually journalists would be categorized becomes a prophetic insight. 42 Regulation of journalists by virtue of a federal shield law no longer raises the specter of licensing-that possibility becomes a distinct reality.

#### Shift DA:

#### Protecting broader swaths of so-called reporters results in weakened protections overall and legislative backlash

Martin et al 11, Jason Martin – PhD candidate, Mark Caramanica – PhD candidate, Anthony Fargo – prof of Journalism @ Indiana, “Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online,” 16 Comm. L. & Pol'y 89 (2011), lexis. [Premier]

Another concern is that using shield laws to protect anonymous com-menters could undermine the laws. The apprehension takes at least two forms. **In one scenario, expressed as early as 1972** in the Branzburg decision, **recognizing a constitutional privilege for journalists or defining a statutory privilege too broadly could allow anyone to claim she is a journalist protected by the shield, decreasing the number of people available to testify to grand juries or in courts of law. The Supreme Court in Branzburg went so far as to suggest that criminals could start sham newspapers to pass messages to each other and then claim constitutional protection for the details of their conspiracies.** While a bit far-fetched in 1972, **the Court's concern is more credible at a time when it is possible to start a blog or other type of Web site, or comment on a news story, without the multimillion-dollar investment** in presses and [\*119] equipment that a traditional ink-on-paper news journal requires. The second scenario, expressed most recently by several lawyers and scholars, is that **protecting** anonymous **commenters with shield laws** while the Web site hosts that publish their comments enjoy immunity under Section 230 of the Communications Decency Act **may create an unfair advantage for libel defendants**. With both scenarios, **the concern is that legislators will react to the imbalances by amending shield laws in ways that will narrow protections for journalists.**

#### Protecting broader sets of reporters, such as anonymous commenters, hurts journalistic credibility and will decrease confidentiality in the long-run

Martin et al 11, Jason Martin – PhD candidate, Mark Caramanica – PhD candidate, Anthony Fargo – prof of Journalism @ Indiana, “Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online,” 16 Comm. L. & Pol'y 89 (2011), lexis. [Premier]

Another concern is that **the news media's embrace and protection of anonymous commenters** is in conflict with the press's ethics and values, which **may in turn lead courts to become more skeptical of news organizations' attempts to analogize commenters with confidential sources**. The Society of Professional Journalists' Code of Ethics, for example, states that "[j]ournalists should … [i]dentify sources whenever feasible. **The public is entitled to as much information as possible on sources' reliability."** The ethics code also urges journalists to "[a]lways question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises." **After the press lost several high-profile confidential-source cases in federal courts in 2004 and 2005, and amid concerns that the use of anonymous sources in reporting damaged journalistic credibility, many news organizations announced that they were tightening rules on confidentiality. The news media may leave themselves vulnerable to challenges from opposing attorneys and judges that aggressively protecting anonymous commenters with laws designed to protect confidential sources is contradictory to both journalistic ethics and recent practice. The media may also be vulnerable to accusations that the protection of anonymous commenters is not so much about journalistic values as it is about attracting bigger audiences, and more revenue, in an increasingly challenging business environment**.

#### Legislators will narrow protections to exclude groups like wikileaks and limit to traditional news organizations – that turns case since they’re likely protected in the status quo

Martin et al 11, Jason Martin – PhD candidate, Mark Caramanica – PhD candidate, Anthony Fargo – prof of Journalism @ Indiana, “Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online,” 16 Comm. L. & Pol'y 89 (2011), lexis. [Premier]

History does not seem to bear out the second concern, however. State shield laws have been amended at times over the years, but one is hard-pressed to find an example of protection for journalists being lessened as a result. For example, the shield laws in Michigan and Minnesota were amended to expand protection after courts in those states ruled against the media by interpreting the laws narrowly. More recently, the Maryland Legislature amended that state's shield law to extend its protection to college student journalists. But **concerns about legislators amending shield laws to narrow their protection are not farfetched. One example of the type of development some observers fear is the recent announcement by sponsors of the Senate version of the federal shield** [\*120] **law that they plan to amend the bill to exclude Web sites such as Wik-ileaks.com from protection. The move came after Wikileaks posted more than 75,000 classified documents related to the U.S. war effort in Afghanistan. The amendment, apparently aimed at keeping critics from using the Wikileaks example as an excuse to kill the Senate bill,** was unavailable at this writing but **would**, according to the New York Times, **clarify that the bill only protected "traditional news-gathering activities.**"

#### Wide use of shield laws causes courts to distinguish between types of speech

Martin et al 11, Jason Martin – PhD candidate, Mark Caramanica – PhD candidate, Anthony Fargo – prof of Journalism @ Indiana, “Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online,” 16 Comm. L. & Pol'y 89 (2011), lexis. [Premier]

**Courts may** inevitably **have to make value judgments if news organizations use shield laws indiscriminately to protect commenters,** particularly in cases like the Alton Telegraph example, where the comments indicate knowledge of relevant information about the prosecution of a serious crime. As noted earlier, **courts in anonymous comment cases already have differentiated between "higher value" and "lower value" speech, mostly in the context of anonymity being used to conceal copyright violators, persons making threats, or** persons engaged [\*124] in **commercial speech**. At the same time, **judges**, most notably in the federal courts, **have been divided about whether** it is proper to consider whether **allowing a confidential source to remain unidentified serves a greater public interest than forcing disclosure** of the source's identity. Rather than wade into such turbulent waters when anonymous comments lie closer to the type of core political and social speech that the First Amendment has always protected, judges would be on safer ground in interpreting, as they always have, the language in shield laws.

### AT Kant AC

#### Keeping promise for the sake of being a promise leads to unintuitive results

Wasserman 05 Wasserman, Edward. Professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley. A Critique of Source Confidentiality. Notre Dame Journal of Law, Ethics & Public Policy <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> [Premier]

Still, the morality of keeping a promise is logically dependent on the morality of the conduct that the promise is meant to secure. It would be hard to defend a promise to commit murder as an ethical one unless the murder itself was warranted. The morality of that promise could not rest solely on the notion that failing to honor it might cause others to doubt one's resolve to keep non-homicidal commitments. Imagining confidentiality agreements that a journalist ought to break is not hard. Suppose exposing an informant would save a life, prevent a serious crime, or free an innocent prisoner. The argument for guarding those secrets seems grounded largely in concern for the reputational harm the journalist might sustain by burning the source, and whether that might cripple his or her future effectiveness. That is not chiefly an ethical calculation, however; it is an operational one.3 4 There is, in short, nothing about promise-keeping in itself that privileges it above such maxims as telling the truth, avoiding unnecessary harm, respecting privacy, and other imperatives that journalists embrace as professional norms. Breaking a promise might simply make it difficult for the journalist to continue practicing a certain kind of journalism.

#### Confidentiality as a promise is used to break other promises

Wasserman 05 Wasserman, Edward. Professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley. A Critique of Source Confidentiality. Notre Dame Journal of Law, Ethics & Public Policy <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> [Premier]

CONFIDENTIALITY AS A TOOL OF PROMISE-BREAKING: The paradox of the journalist's confidentiality agreement is that it often represents not only a promise, but a critique of promise-keeping. That is because it is frequently a device to provide cover for informants so they can break prior agreements of their own with impunity. Its claim to superior ethical standing rests on a presumption that all promises do not have equivalent moral weight. Why do reporters promise confidentiality? Informants may sometimes insist on anonymity simply to avoid the awkwardness that may come with notoriety. They may have personal reasons to keep out of the news. They may not want to spend time fending off other reporters once they are named publicly. Perhaps they are settling scores and do not want their targets to know the origin of the attack. Sometimes they are sharing painful and intimate experiences-sickness, poverty, the death of loved onesand would not do so if they were to be identified. But often, especially when the stories involve insider news from powerful institutions, sources insist on confidentiality because they are betraying prior commitments by giving away information that they have agreed, sometimes explicitly, to keep private. The journalist's secrecy pledge is, in this respect, an offer to shelter the informant from the consequences of dishonoring agreements of his or her own. It is a promise meant to induce promise-breaking. So, implicit in the confidentiality agreement is the insight that not all promises are equal. The conscience-stricken executive decides that his or her duties to the corporation, which certainly involve discretion and may also oblige silence, are less important than disclosing accounting chicanery or environmental felonies. The whistle-blower demands one promise from the reporter to enable him or her to break another to the corporation. The ethics of that exchange have much to do with the weight attached to such maxims as truth-telling and affirming community norms, as compared with employee loyalty and, yes, promise-keeping.

### AT Contracts AC

#### The Journalist-public relationship cannot be represented by a contractarian model

Wasserman 05 Wasserman, Edward. Professor of journalism and dean of the Graduate School of Journalism at the University of California, Berkeley. A Critique of Source Confidentiality. Notre Dame Journal of Law, Ethics & Public Policy <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1221&context=ndjlepp> [Premier]

CONFIDENTIALITY AND TRUST: Finally, I suggested earlier that confidentiality can be examined in terms borrowed from Annette Baier's thoughtful analysis of trust relationships. The relationship between journalist and public seems to comport more satisfactorily with Baier's description of trust than with a more contractarian model. That is, the relationship is one of a generalized reliance that is not formal or explicit and is not specific as to what particular behavior it covers; nor is it between parties of roughly equivalent power. Here it is built on the public's expectation that journalists will use their best judgment to gather and present an honest rendering of information that they believe the public needs to have.

### AT Totalitarianism

#### Enforcing court subpoenas is nothing like dictators jailing journalists in authoritarian states

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

George Washington University Law School Professor Randall Eliason countered in 2007 that arguments **comparing the jailing of U.S. journalists to the treatment of journalists in countries such as China, Burma, or Cuba "miss the mark**., 287 Eliason testified:

**In totalitarian societies, journalists are jailed because of the content of what they write. When journalists are jailed in the United States, it is because they are refusing to abide by a lawful court order, entered after a full and fair hearing and due process of law. Rather than demonstrating that the United States is akin to a totalitarian regime, these jailings demonstrate just the opposite; that we are a society governed by the rule of law, and that no one gets to pick and choose for herself which laws she will obey**.288

Only Rep. **Pence seemed to take the long view when he said he wanted to look beyond "our times and their controversies and seize the opportunity to develop clear national standards that will protect the news-gathering function and promote good government**.

### Bad for journalists/reporters

#### Harms journalists – Use of confidential sources puts reporters at a disadvantage when facing defamation suits.

Reporters Committee for Freedom of the Press, “The Limits of Promising Confidentiality,” Digital Journalists Legal Guide, Reporters Committee for Freedom of the Press, no date. https://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/limits-promising-confidentiality-0 [Premier]

The ability to report the news often depends on the ability to protect the confidentiality of news sources. When a journalist faces a defamation suit based on information provided by a confidential source, however, the promise of anonymity to that person may prevent the reporter from relying on certain defenses.

For example, because falsity is a [key element of a defamation cause of action](http://www.rcfp.org/handbook/?pg=1-1), the truthfulness of the allegedly defamatory statement is a complete defense to the claim. But proving the material in question is true becomes exceedingly difficult when the person who provided it must remain anonymous.

Likewise, a source’s identity could go a long way in helping to negate an allegation that a publisher acted with [reckless disregard](http://www.rcfp.org/djlg/index.php?action=show_item&cat=LIB&tid=24) when relying on the source’s information.

In these situations, [courts are likely to take one of several approaches](http://www.rcfp.org/news/mag/31-2/lib-aconfide.html) in attempting to balance the rights and interests of a defamation plaintiff with those of a reporter:

* Most often, the judge will simply preclude the journalist from relying on the anonymous source for any part of his or her defense. This prohibition includes a bar on merely telling the judge or jury that the reporter did in fact have sources for the information.
* Courts may also allow media defendants to offer evidence that supports a confidential source’s credibility without revealing its identity. This evidence, however, can only be offered to show a publisher’s state of mind and not to prove the truth of the matter asserted. Moreover, some courts have held that the introduction of such evidence [waives a reporter’s privilege](http://www.rcfp.org/djlg/index.php?action=show_item&cat=CON&tid=84) to refuse to disclose the identity of sources, even when the journalist can claim a very strong privilege under the state’s shield law.
* Some judges will assume at the outset of the proceeding, and instruct juries deliberating the case to presume likewise, that there was no source for the information attributed to an anonymous source.
* In the worst-case scenario, a court could issue a default judgment against an author or publisher who refused to reveal a confidential source.

#### Bad for reporters

**Robinson 17:** Robinson, Elizabeth L. “Post-Sterling Developments: The mootness of the federal reporters privilege debate”. North Carolina Law Review. Volume 95, number 4. May 1st, 2017. <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4965&context=nclr> [Premier]

While the implementation of a federal reporter’s privilege has been viewed as the easiest and most effective remedy to the post-Branzburg inconsistency, the post-Sterling developments indicate that this is no longer a realistic solution when confidential information is at issue. The lenient and unenforceable DOJ guidelines do not provide adequate protection for reporters, and the revisions made in response to the Sterling controversy do very little to remedy this problem. Even if the guideline revisions had filled in some of the gaps, advances in surveillance technology and the FBI’s use of NSLs appear to have rendered the reporter subpoena an essentially useless tool by providing the government with the means to bypass the subpoena process altogether. So long as the government is still able to gather information regarding confidential communications between a reporter and her source through other means, a federal testimonial privilege will be of little value to those that it is intended to protect. Only when the government is able to be truly transparent with its journalist surveillance techniques will the adverse effects begin to subside.

### Status Quo Solves

#### Squo solves – Justice department’s guidelines effectively protect press freedom and whistle-blowers.

McCraw 17. McCraw, David. (Vice president and deputy general counsel of The New York Times.) “How a Crackdown on Leaks Threatens Confidential Sources,” The New York Times, September 4, 2017. https://www.nytimes.com/2017/09/04/insider/how-a-crackdown-on-leaks-threatens-confidential-sources.html [Premier]

But they [the guidelines] are important. They are rooted in the country’s commitment to press freedom. And over the last four decades, they have, by and large, worked, allowing prosecutors to do their jobs while protecting journalists from routinely being dragged into criminal proceedings. The larger legal context matters here. There is no federal statute that gives reporters the right to protect the confidentiality of sources. But for many years, federal judges were willing to find in the Constitution and prior judicial decisions just such a right. They never saw it as an absolute, but they did require prosecutors to prove a need for the reporter’s testimony or records. In the past decade, the pendulum has swung in the opposite direction. Some courts have questioned whether those earlier decisions were right. Witness the long-running legal battle between the former Times reporter James Risen and prosecutors in a case involving a former C.I.A. officer, Jeffrey Sterling. Mr. Sterling was prosecuted and ultimately convicted of leaking classified information, but the case may best be remembered for Mr. Risen’s principled refusal to reveal whether Mr. Sterling (or anyone else for that matter) had been his source. In the end, faced with Mr. Risen’s refusal, the prosecutors simply abandoned their plans to call him — but not before they had won a significant appellate decision holding that reporters enjoyed no special privilege to resist criminal subpoenas. When federal courts dial back protection for reporters, the guidelines become an essential first line of defense against overzealous prosecutors. The guidelines are designed to balance the government’s need to prosecute and the public’s abiding interest in having a news media that can give voice — and protection — to whistle-blowers who want to come forward to shed light on wrongdoing, waste and misbegotten policies. If there is one lesson to be drawn from the coverage of Washington today, four years after that Holder meeting, it is this: Now is not the time to be rethinking the guidelines.

#### Civil procedure rules can still protect journalists without privilege protection

Peters 16, Jonathan Peters, JR’s press freedom correspondent. He is a media law professor at the University of Georgia, with posts in the Grady College of Journalism and Mass Communication and the School of Law, 8-22-2016, "Shield laws and journalist’s privilege: The basics every reporter should know," Columbia Journalism Review, <https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php> [Premier]

Regardless of whether a privilege exists, sometimes it’s possible under procedural rules to quash an order to disclose information. For example, rules of civil procedure can impose restrictions on subpoenaing a witness who resides, say, more than 150 miles from where a suit is pending. Rules of evidence might apply, too. They often prohibit duplicative testimony, so if other witnesses testify to the same facts, a journalist could argue that her testimony is duplicative. And courts can create their own rules. For example, after the New Mexico shield law was invalidated, the state supreme court enacted a rule giving journalists a privilege in state courts.

#### No chilling effect – empirics, and other guarantees of confidentiality

Eliason 08 (Randall D. Eliason is a Professorial Lecturer in Law, American University, Washington College of Law and George Washington University Law School, The Problems with the Reporter 's Privilege, American University Law Review Vol. 57 Is. 5, 2008) [Premier]

MYTH #3: THE PRIVILEGE IS NECESSARY TO ENCOURAGE CONFIDENTIAL SOURCES TO SPEAK TO REPORTERS The key factual claim in support of the reporter’s privilege is that the privilege is necessary to encourage confidential sources to come forward and speak to reporters. This will, in turn, increase the flow of information to the public and ensure a robust free press. In the absence of a privilege, the argument runs, there will be a “chilling effect” on confidential sources, and the flow of information to reporters and to the public will dry up.51 Privilege advocates speak in apocalyptic terms about this alleged chilling effect, claiming that without a privilege reporters will be reduced to “spoon feeding the public the ‘official’ statements of public relations officers.”52 This claim is the very raison d’être for the privilege; indeed, the proposed federal legislation—the Free Flow of Information Act—embodies this concept in its title. In Branzburg, the Supreme Court was skeptical of this factual premise. The Court observed that the lessons of history suggested the free press had always flourished without a privilege.53 Claims about “chilling effects” and harm to the press, the Court noted, were largely speculative and consisted primarily of the opinions of reporters themselves, and so “must be viewed in the light of the professional self-interest” of those making the claims.54 Overall, the Court concluded it was “unclear how often and to what extent informers are actually deterred from furnishing information” when reporters are compelled to testify.55 This skepticism seems as fully justified today as it was thirty-six years ago.56 The strongest argument against the supposed chilling effect is simply the argument of history. There has never been a federal shield law, and investigative journalism in this country has flourished, with no shortage of confidential sources. Watergate, Iran-Contra, Abu Ghraib, secret CIA prisons, domestic National Security Agency (“NSA”) surveillance—all of these stories and countless others were reported through the use of confidential sources, and all without a federal shield law.57 Even the images of Judith Miller being jailed and forced to testify had no discernable effect on investigative reporting or on the number of stories relying upon confidential sources.58 One can grant that confidential sources are important to journalism without agreeing that a shield law is necessary or appropriate. In other words, it is a myth to suggest that reporters can’t promise confidentiality without a shield law. It is important to distinguish between a reporter’s promise of confidentiality to a source and the existence of a legal privilege. As history makes clear, reporters may promise sufficient confidentiality to encourage sources to speak even in the absence of a privilege, simply by promising not to name the source in a story and never to identify the source voluntarily. In fact, if this were not the case and if the alleged chilling effect were real, investigative journalism would have foundered long ago for want of a federal privilege.59 It’s reasonable to assume that most sources who wish to remain anonymous are concerned primarily with not having their names in the paper in a story the reporter writes the next day. They are not if that effort is unsuccessful. Again, this agreement guarantees a great deal of confidentiality because the chances of the reporter actually being compelled to testify are very small. Dr. Tucker and Professor Wermiel argue that I am being unrealistic when I say that sources will agree to talk to reporters even in the absence of a shield law. They use the example of a hypothetical government employee who learns of the Bush Administration’s unlawful warrantless surveillance program, and calls New York Times reporters Eric Lichtblau and James Risen to tell them about it.65 In the absence of a federal shield law, they argue, the reporters would not be able to assure the source of adequate confidentiality and the source would refuse to talk to them. The problem with this argument is that, in reality, such a source apparently did contact those reporters, there was no federal shield law, the source talked anyway, and the story was reported—and to my knowledge, despite the grumblings of the Bush Administration, the reporters have not been subpoenaed to reveal their sources for those stories. It’s hard to see how this story supports the argument that a shield law is necessary. What’s more, the proposed federal shield law favored by Dr. Tucker and Professor Wermiel contains an exception for leaks of information that have harmed or will harm national security, which the government would certainly argue was true of these leaks.66 If sources are truly as skittish as Dr. Tucker and Professor Wermiel claim, they could not feel comfortable that their identities would be protected even if the federal shield law were enacted. According to an article by Lori Robertson in the American Journalism Review, the Dallas Morning News requires reporters to tell anonymous sources that in rare instances the reporter may be forced to identify them if efforts to protect them are exhausted in a legal dispute.67 Similarly, New York Times Executive Editor Bill Keller has said that some reporters now agree with sources they will protect them to the extent legally possible, but if they lose a court fight they are not going to go to jail to protect the source.68 There is no indication that reporters at those papers have suffered from a lack of confidential sources. Robertson also describes the experience of Fred Schulte, an investigative reporter for the Baltimore Sun for twenty-five years. Schulte reports that he tells his sources he will protect them up to the point of a grand jury investigation, but if he is called before a grand jury he will have to testify. All of his sources have agreed to these terms.69 Again, the purported evidence that the chilling effect exists is largely anecdotal and unreliable, consisting of a few reports of self-interested journalists. Most evidence is in the form of affidavits of journalists submitted in various lawsuits, affirming the importance of confidential sources and citing examples where such sources were essential to their work.70 But considering that all of the sources in these past stories agreed to come forward without a federal shield law, such examples do not provide much support for the argument that a shield law is needed. Such affidavits may demonstrate that confidential sources are important to journalism, but they also demonstrate, albeit unintentionally, that reporters can develop confidential sources without a federal shield law. As evidence of the supposed chilling effect, privilege supporters also like to cite a claim by the editor of Cleveland’s Plain Dealer that the paper has withheld publication of two stories of “profound importance” due to the fear of a leak investigation because the stories rely on confidential sources.71 The trouble with this “evidence,” of course, is that its veracity can’t be tested because the editor will refuse to reveal the information necessary to evaluate his claim. Relevant questions would include: What efforts has the paper made to go back to the sources to probe how concerned they are about confidentiality? What efforts have been made to develop additional sources who may be willing to go on the record? And is the editor really saying that if a federal shield law with its various exceptions and qualifications were enacted, that would make all the difference?7 Untested assertions such as those by the Plain Dealer editor may be the stuff of lore within the journalism community, but such unsubstantiated, isolated anecdotes provide a poor factual foundation for proposed federal legislation. Dr. Tucker and Professor Wermiel essentially concede that this supposed chilling effect cannot be established. They conclude that it is “unnecessary to resolve the question of whether the lack of a shield law causes a chilling effect” because “that is a policy decision left to the legislative branch” and if Congress passes the shield law, the courts will enforce it.73 This may be true, but it leaves unanswered the question of just what Congress is supposed to rely upon when making this policy decision, other than the desires of the large media corporations lobbying for the law. The argument essentially boils down to this: “We can’t really demonstrate that this law is necessary, but the press wants it, and if we can convince Congress to pass it then we’ll be home free.” This is hardly a ringing endorsement of the legal merits of the shield law. History demonstrates that reporters are able to guarantee sufficient confidentiality without a federal shield law. As argued below concerning Myth #4, of all of the risks of exposure that a source faces, the danger that the reporter will be subpoenaed and compelled to testify is probably the most remote. Privilege advocates are therefore necessarily arguing that there are a substantial number of sources who would willingly assume all of the greater and more immediate risks of exposure by leaking information, but will be deterred from coming forward solely by the most remote risk of all—the risk of the reporter being forced to testify. Common sense and the historical record suggest this is not the case. Some sources may well be afraid of exposure, and may seek assurances of confidentiality. But these assurances may be given without a privilege and, considering the basket of risks a source faces, the presence or absence of a legal privilege is unlikely to weigh heavily in a source’s decision about whether to speak to a reporter.

#### And if those guarantees are insufficient than the aff doesn’t solve either - reporter’s privilege provides no guarantee of identity confidentiality – many other far more significant alt causes for exposure – terminal defense.

Eliason 08 (Randall D. Eliason is a Professorial Lecturer in Law, American University, Washington College of Law and George Washington University Law School, The Problems with the Reporter 's Privilege, American University Law Review Vol. 57 Is. 5, 2008) [Premier]

MYTH #4: IF THERE WERE A SHIELD LAW, REPORTERS COULD GUARANTEE SOURCES THEY WOULD REMAIN ANONYMOUS A corollary of the argument that sources are chilled by the lack of a privilege is the suggestion that, if we only had a federal shield law, reporters could guarantee sources they would remain anonymous and thus sources would never be deterred from coming forward. This is another myth. Leaking can never be made risk-free, and reporters—at least if they were being honest—could never guarantee sources that they would not be identified, even if there were an ironclad, absolute privilege law. A confidential source who decides to leak information to a reporter faces a number of risks that she will be exposed. The source’s company or agency may conduct an internal investigation to discover the source of the leaks.74 Private lawsuits or government investigations may lead to the discovery of the source’s identity without testimony from the reporter. Others who know of the leaks may come forward to expose the leaker.75 The reporter may decide that the public interest requires that the source be disclosed,76 or may identify the source inadvertently.77 Information in the story may allow others to guess the identity of the source. All of these risks exist whether or not there is a shield law, and whether or not the reporter is ever compelled to testify. A reporter simply cannot assure a source that he or she will never be identified. There are too many ways for a source to be revealed that are out of the reporter’s hands. This would be true even if there were an absolute, ironclad privilege with no exceptions. In reality, of course, any shield law passed by Congress will not be absolute; the proposed Free Flow of Information Act is full of exceptions, qualifications, and balancing tests.78 Even if that law were in place, therefore, reporters still could not guarantee their sources that a judge would not someday find that one of the many exceptions applied and the privilege had to give way. There is no doubt that some sources are worried about being exposed. The fallacy is believing that the presence of a federal shield law could ease those worries in any substantial way. A source has far more serious and immediate risks to think about than the remote chance that the reporter might be compelled to testify a year or two down the road. It is a myth to suggest that a federal shield law would allow reporters to put a source’s mind at ease and would thereby increase the flow of information to the public.

#### Major leaks occur in the status quo – the media is fulfilling its watchdog function without a strengthened shield law

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

While supporters of the shield law used famous examples of investigative reporting to substantiate the importance of reporters' use of confidential sources, opponents of the shield law used similar examples to argue that a federal shield law was unnecessary-that **reporters were doing just fine without a shield law. For example,** attorney Lee Levine testified in 2005 and 2007 that media subpoenas would threaten important reporting like that on the Watergate scandal, on the BALCO performance-enhancingdrugs scandal, and on the abuse of detainees at Abu Ghraib prison in Iraq.233 Levine explained that those stories relied on confidential sources who might not have talked to journalists if they had not been confident the journalists could protect their identities.234 At a hearing the following year, Cornell University Law **Professor** Steven D. **Clymer pointed to two similar stories-the National Security Agency wiretapping program and the CIA detention of al Qaeda operatives overseas-as evidence that journalists can and do investigate important stories without a federal shield law**.235 Clymer said **the debate "boils down to the question of whether the present law in its present form is an impediment to the free flow of information**. And, quite frankly, I think that is a hard case to make., 236 Clymer said **the media's continuing use of confidential sources "suggests to me that people who are inclined to make leaks of that kind of information are going to make leaks whether or not there is Federal protection for anonymous sources**. 237

#### Safeguards exists in the status quo, and the federal subpoena power is rarely used against journalists anyway

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

Deputy Attorney General McNulty countered that **since the Justice Department had never abused its subpoena power, a federal shield law that would curtail that power was unnecessary**.20 7 He reported that **the Justice Department had subpoenaed source information from the media in fewer than 20 cases in the past 15 years;** this fact, he said, was evidence that the department's guidelines governing media subpoenas adequately balanced the department's need for evidence in criminal proceedings against the interests of the free press.20 8 **The Justice Department guidelines require that the news media be subpoenaed only as a last resort to obtain important information about a criminal case, and then the attorney general must approve each contested subpoena**.20 9

### Objectivity/Transparency Good

#### **Use of confidential sources harms transparency and objectivity in journalism and puts reporters in bad positions when sources come under fire.**

Carlson 10. Carlson, Matt. “WHITHER ANONYMITY? Journalism and unnamed sources in a changing media environment,” Journalists, Sources, and Credibility: New Perspectives, Chapter 2, December 2010. [Premier]

Unnamed sources vary from conventional practices in three key ways. First, the absence of identification entails a lack of transparency into newsgathering practices. Information—quoted or not—appears without a name, with only a vague identifier signaling the category of the unnamed source (e.g. “senior White House official”) and perhaps a fuzzy—and often circular—explanation for why anonymity was granted (e.g. “granted anonymity because not authorized to speak”). This relates to a second difference, which is the assumption of extra responsibility for the statements of unnamed sources. Conventional sourcing provides a cushion to journalists who may deflect blame onto their sources when reporting comes under fire (Tuchman, 1972). Without this valve, journalists not only take on more responsibility for the material they use, but also become susceptible to scrutiny over what may or may not have occurred out-of-sight. Allegations are easy in the absence of supporting or dissuasive evidence, a topic discussed below. The third difference pertains to the explicit agency journalists assume when granting anonymity to a source. While conventional sourcing pushes journalists to the background by foregrounding source statements, the deployment of unnamed sources situates the journalist as seeking out and negotiating with sources. It substitutes the selfpresentation of a mirror view of journalism (Epstein, 1973) with journalists taking an active role as participants in creating stories. This move occasions some discord with journalism’s own image of the passive reporter maintaining objectivity while collecting information for her stories. Such a shift often occurs hand-in-hand with investigative journalism modes (Ettema and Glaser, 1998). The flagrancy of active involvement becomes exasperated by the opacity of the practices involved, which problematically heightens the need for trust (Boeyink 1990). Confronting a news text even more incomplete than usual, the public is left with little recourse to adjudicate or verify claims.

#### Use of confidential sources results in faulty, unverifiable claims and harms public interest.

Carlson 10. Carlson, Matt. “WHITHER ANONYMITY? Journalism and unnamed sources in a changing media environment,” Journalists, Sources, and Credibility: New Perspectives, Chapter 2, December 2010. [Premier]

Criticisms levied at the use of unnamed sources emerge from two different but related levels of analysis: grounded examples of their misuse and the normative assumptions justifying their application. At the level of practice, journalists have repeatedly found themselves apologizing for and cleaning up after controversies involving some aspect of journalist-unnamed source relations. The New York Times, the unofficial flagship of US journalism, provides some recent examples illustrating how thorny source anonymity can be, including misinformed accusations of nuclear scientist Wen Ho Lee (Scheer, 2000) and the fabrications of Jayson Blair (Mnookin, 2005). Of the latter, the trade journal Editor & Publisher shifted blame from the individualized malfeasance of Blair to an organizational inability to police unnamed source use: “the Times has developed an addictive tolerance for anonymous sources, the crack cocaine of journalism” (Editor & Publisher, 2003). The prescience of this editorial could only be fully realized months later with the unraveling of the newspaper’s unfounded reports of Iraq’s weapons of mass destruction (Wheeler, 2007). Claims of an imaginary arsenal were hardly unique to the Times, but its front-page exposés received much attention in the debate over war before the March 2003 invasion of Iraq and in the aftermath of reconstructing how it had gone so wrong. More than a year after the invasion, editor Bill Keller blamed reporting failures on a newsroom-wide blindness brought on by competitive pressures (Keller, 2004). This resulted in anonymously supplied claims by administration officials unduly corroborating public statements. How the Times’s prewar reporting laundered faulty intelligence claims while stifling antiwar discourse demonstrates the chilling consequences when unnamed sources work against the public interest.

#### Source transparency is key for reporters to build credibility and strengthen relationships with the public

**Silverman 14:** Silverman, Craig. “The Best Ways for Publishers to Build Credibility Through Transparency”. American Press Institute. September 24th, 2014. <https://www.americanpressinstitute.org/publications/reports/strategy-studies/transparency-credibility/>. [Premier]

As so much in the world of news and information changes, the fundamental bond of trust between journalists and the communities they serve is one of the few things that doesn’t. In fact, its importance has grown. One of the most important ways journalists and news organizations earn the trust of the public trust is by being transparent about who we are and the work we do. “ Every newsroom, and basically also every single story must show why they deserve more trust than dozens or even hundreds of others on the same topic. ” We attribute information to the source to show provenance. We have bylines and credits to provide a sense of ownership and accountability. We offer opportunities for people to respond to what they read, hear and see. We invite the public to report errors and request corrections, and we publicly admit our errors. Today, journalists are rapidly adapting and enhancing these basic frameworks for transparency and accountability, both to suit digital platforms — and for a world of abundant sources of information. This paper is part of the American Press Institute’s ongoing series of [Strategy Studies](http://www.americanpressinstitute.org/categories/publications/reports/strategy-studies/), deep examinations of how publishers can build new revenue models and grow audiences. The studies draw insights from multiple examples, focusing less on the examples themselves and more on the lessons and actionable insights for others to borrow. They are designed to be pragmatic and realistic, noting potential obstacles and emphasizing the how-to elements. For this Strategy Study we talked with experts and newsroom leaders, and reviewed academic literature and research findings, to examine how practices related to transparency and credibility are evolving in five key areas: [Show the reporting and sources](https://www.americanpressinstitute.org/publications/reports/strategy-studies/show-sources/) that support your work [Collaborate with the audience](https://www.americanpressinstitute.org/publications/reports/strategy-studies/transparent-collaboration/) [Curate and attribute information](https://www.americanpressinstitute.org/publications/reports/strategy-studies/ethical-curation-attribution/) responsibly [Offer disclosures](https://www.americanpressinstitute.org/publications/reports/strategy-studies/disclosures-values/) and statements of values [Correct website and social media errors](https://www.americanpressinstitute.org/publications/reports/strategy-studies/digital-corrections/) effectively Transparency has emerged as one of the most-discussed and evangelized aspects of practicing ethical journalism in the networked age. As traditional notions of journalistic objectivity are challenged and also criticized, transparency has emerged as an ideal that newsrooms and individual journalists strive for. But it can also be overhyped and offered as a panacea. “ If journalists are truth seekers, it must follow that they be honest and truthful with their audiences, too. ” “Transparency is more than a buzzword,” wrote journalism professor and ethicist Stephen Ward in an article, [“Why Hyping Transparency Distorts Journalism Ethics.”](http://www.pbs.org/mediashift/2013/11/why-hyping-transparency-distorts-journalism-ethics/) “Too often it is a magical idea — a norm with seemingly magical powers to restore democracy. It is a ‘god’ of institutional ethics.” Rather than exploring abstract — or “magical” — notions of transparency, this study focuses on tangible actions and practices. For example, journalists can make a greater effort to link to original source material, to offer ways for the audience to participate in the newsgathering process, or to be responsive to requests for correction. The digital environment provides journalists new and more effective ways to practice transparency. Well-established transparency practices can be updated and adapted to a multi-platform world, and new, digitally native ones can also be applied. Transparency adds value to the work we do, but it’s also a fundamental part of how we do our work, according to Bill Kovach and Tom Rosenstiel in their book, “The Elements of Journalism.” (Rosenstiel is the executive director of the American Press Institute.) “If journalists are truth seekers, it must follow that they be honest and truthful with their audiences, too — that they be truth presenters,” they wrote. “If nothing else, this responsibility requires that journalists be as open and honest with audiences as they can about what they know and what they don’t. How can you claim to be seeking the truth when you’re not truthful with the audience in the first place?” Transparency also has other virtues, according to the authors. “It signals the journalist’s respect for the audience” and “… also helps establish that the journalist has a public interest motive, the key to credibility.” It’s important to be realistic about the impact of transparency. It will not necessarily result in immediate changes in traffic, or engagement, though some initiatives will certainly have positive effects. It is not a cure-all, but it does have value. Here’s how an editor at The Washington Post put it in an interview for a recently published academic paper, [“Newsrooms and Transparency in the Digital Age”:](http://www.tandfonline.com/doi/abs/10.1080/17512786.2014.924737#.U9ZVnoBdX2k) We are really aware that people have very high levels of suspicion about the media generally. Rightly or wrongly, the public does not trust us and so we have to make an effort to “show” readers that we are professional in the way we do our job … also there’s definitely the aspect of competition … what we are selling in effect is our credibility compared to say a blog or a smaller outlet and so being more forthcoming is one way of doing it. In the same paper, an editor at the Los Angeles Times said that “transparency is telling people how we got the story … reporting why we included what we did. What was left out and why, who our sources are.” Implementing processes, policies and tools that enhance accountability and credibility are not just good journalism — they can be a competitive advantage, a differentiator. “[I]n the digital world, where information is infinite and infinitely replicable, being transparent about provenance and sourcing helps distinguish journalism from other content on the web,” wrote Martin Moore, the executive director of the [Media Standards Trust](http://mediastandardstrust.org/), in [a blog post that listed the arguments in favor of transparency](http://martinjemoore.com/tag/transparency-initiative/). Mathew Ingram, who [covers the media for the website Gigaom](http://gigaom.com/author/mathewingram/) and was formerly the first community editor of Canada’s Globe And Mail, has compared aspects of practicing transparency to a disaster preparedness plan. “Its value only becomes obvious in extreme circumstances,” he said in an interview for this study. “… 99 percent of the of time no one will look, but then something does happen and they can go and look.” “ Implementing processes, policies and tools that enhance accountability and credibility are not just good journalism — they can be a competitive advantage, a differentiator. ” Transparency must therefore be linked with consistency: determine how you will practice transparency and the areas in which you will apply it — and then keep doing it. By making it a habit, it has more of an effect both internally and externally. And it provides the kind of worst-case scenario protection cited by Ingram. In a 2009 paper, [“Transparency in Journalism: Credibility and trustworthiness in the digital future,”](http://www.docstoc.com/docs/158868842/foj2009-Meier) Dr. Klaus Meier of Catholic University Eichstaett-Ingolstadt argued that “evidence of trustworthiness must be given repeatedly” in a competitive digital environment. “Every newsroom, and basically also every single story must show why they deserve more trust than dozens or even hundreds of others on the same topic,” he wrote. Kovach and Rosenstiel highlighted two key transparency questions journalists should ask themselves in the course of their work: “What does my audience need to know to evaluate this information for itself? And is there anything in our treatment of it that requires explanation?” These go to the heart of transparency. In the digital world, there is a third question to add: What elements of this story can I share that will help the audience contribute valuable information or perspective to improve the reporting?

#### A commitment to transparency in journalism is needed now more than ever to resist the Trump administration’s assault on objectivity in the media—that’s necessary for a functioning democracy

**Pulliam 17:** Pulliam, David. “Can Extreme Transparency Fight Fake News and Create More Trust With Readers?”. Nieman Reports. 2017. <http://niemanreports.org/articles/can-extreme-transparency-fight-fake-news-and-create-more-trust-with-readers/>. [Premier]

The Transparency Project, as Frontline is calling the effort, is one of a number of new attempts by media to open up the process they use to create their journalism to engender more trust with audiences. In [a January Gallup/Knight Foundation poll of more than 19,000 Americans](https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/242/original/KnightFoundation_AmericansViews_Client_Report_010917_Final_Updated.pdf), respondents ranked their trust of media at only 37 out of 100. Just 50 percent of respondents said they had enough information to sort out facts in the face of media bias, down from 66 percent in 1984. Among Republicans, that number was even lower, only 31 percent. Frontline has long been putting the complete transcripts of its interviews online—but putting the searchable videos online is a dramatic expansion of that proposition, laying bare the process of making documentaries, warts and all. “You see the real deal, people swiping their face, laughing, looking nervous,” Aronson-Rath says. In many ways, the new push for transparency is a response to the current media environment of “fake news”—both the dissemination of actual false stories online and through social media, and the cries from the current administration that stories it doesn’t like are “fake.” As more and more Americans get their news through social media, content gets divorced from context that allows readers to decide whether a story is trustworthy. ALSO IN THIS ISSUE [“Money Stories are People Stories”: After decades as a business journalist, Marilyn Geewax, NF ’95, turns to teaching to inspire the next generation](http://niemanreports.org/articles/money-stories-are-people-stories-after-decades-as-a-business-journalist-marilyn-geewax-nf-95-turns-to-teaching-to-inspire-the-next-generation/) [The End of the Ad World as We Knew It](http://niemanreports.org/articles/the-end-of-the-ad-world-as-we-knew-it/) [Hyperallergic, at Age 9, Rivals the Arts Journalism of Legacy Media](http://niemanreports.org/articles/hyperallergic/) “People are getting their news through every possible medium and on every possible device,” says Melody Kramer, senior audience development manager at the Wikimedia Foundation and columnist for the Poynter Institute. “It’s a challenge to figure out the veracity of the information, where it came from, what the point of view is, or how it was put together.” That creates more of an imperative for news organizations to pull back the curtain to explain to readers how they report and write stories. “It becomes incumbent upon organizations—that are trying to improve our lower-d democracy—to open up a window into how they do the work they do.” At the same time, transparency can serve a defensive function, insulating the media from attacks of political bias or unfairness. As far back as 2009, Harvard technologist David Weinberger declared that “[transparency is the new objectivity](http://www.hyperorg.com/blogger/2009/07/19/transparency-is-the-new-objectivity/),” making a writer more credible in the eyes of readers not through adherence to a supposed standard of impartiality, but by making clear the “sources and values that brought her to that position.” Among those organizations leading the current charge to increase transparency is the American Press Institute (API), which in 2014 produced a report entitled “[Build Credibility Through Transparency](https://www.americanpressinstitute.org/publications/reports/strategy-studies/transparency-credibility/).” The report advocated for publications to “show their work” by being clearer about their sources and correcting mistakes. In the run-up to the 2016 election, API consulted with news organizations about how to better disclose sources, using PolitiFact as a model. But it was unprepared for the level of hostility toward media and the allegations of bias and “fake news.” “That’s when we started seeing a problem with misinformation, of which ‘fake news’ is part of that universe,” says Jane Elizabeth, accountability program director, who was surprised by the lack of media literacy among audiences and their willingness to believe outlandish stories with little sourcing, such as the debunked [Pizzagate conspiracy theory](https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html?utm_term=.f837d3b3da5b). “Readers were confused and unable to tell the difference between misinformation, disinformation, and ‘fake news,’” Elizabeth says. She places most of the blame on the current administration for deliberately sowing that confusion. “Trump’s candidacy had everything to do with this,” she says. “It was the type of campaign we had never dealt with before.” At the same time, she faults the media for not opening its doors to show the level of editorial care and vetting that goes into the news. “People think anyone can write something and press a button and it appears online.”

#### Transparency is a necessary good in the modern age of surveillance—it’s a key aspect of democratic engagement

**Allen 8:** Allen, David S. “The Trouble with Transparency: the challenge of doing journalism ethics in a surveillance society”. Routlege Journalism Studies. April 24th, 2008. [Premier]

As such, transparency has changed the understanding of press control in important ways. In a transparent surveillance society, threats to press freedom no longer come primarily from governmental sources. The fear that government is watching is no longer the only threat facing journalists; surveillance also comes from newer media, private corporations, private citizens, and even from within the profession itself. Surveillance has become, in important ways, more democratic and perhaps more powerful. In an attempt to address criticism and jurisdictional challenges from newer media, transparency has also become a new methodology for journalists. As journalists attempt to capture politically manufactured reality today, in some situations it has become necessary to be transparent about admitting the constructed nature of that reality. As argued earlier, in some areas and under some conditions, journalists seem to have come to realize that the best that they can do is admit that they are being manipulated and report the fact that they know they are being manipulated. Both Habermas and Foucault urge journalists to be suspicious of this development, suggesting that being transparent is not enough. In Habermas’s later work, he seems to suggest that the public sphere needs more than transparency\*that the media need to ‘‘be kept free from the pressure of political and other functional elites’’ (1996, p. 442). He also argues that political and social actors should only be allowed to ‘‘use’’ the public sphere ‘‘insofar as they make convincing contributions to the solution of problems that have been perceived by the public or have been put on the public agenda with the public’s consent’’ (1996, p. 379). Following Habermas, pseudo-events are a form of strategic action that require more from journalists than admitting the fact that they are being manipulated. They require an independent assessment by journalists about the validity and truth-claims contained in those events. While Habermas would see little good in pseudo-events themselves, Foucault would recognize them for what they are\*a part of the battle for power within society. The discourse about pseudo-events is a site for battle over power in public life. They are a way of producing reality within society and need to be contested by opposing discourses. Journalistic transparency about pseudo-events is a contribution to those discourses and a site of oppositional interpretations. As such, unlike Habermas, Foucault would offer no assessment of the good or bad of pseudo-events or how journalists might cover them. The best that can be done is to uncover the power structures and offer opposition, since power cannot exist in Foucault’s world without opposition. As Cohen and Arato (1995) note, for Foucault communication cannot be anything but strategic. It is ‘‘only a means of transmitting information and (through the making of truth claims) controlling and disempowering opponents’’ (Cohen and Arato, 1995, p. 293). Foucault encourages ‘‘an interrogative attitude more than a judgmental one’’ (Cooper and Blair, 2002, p. 269). In that way, Foucault forces journalists to realize that they cannot hide behind the notion of objectivity when deciding how to cover pseudo-events. Decisions to cover them or not, to tell the truth or not, involves an active moral choice (see Ettema and Glasser, 1998). Journalists can no longer escape responsibility in a transparent society and trying to do so by falling back on journalistic methodologies will likely hinder legitimacy. In the end, then, Habermas and Foucault offer a complex understanding of transparency in democratic society. It at once has elements central to the establishment of truth and also those that play a role in promoting the social control of individuals and institutions. There are important lessons to be learned from both. Transparency should not be looked at through an instrumental lens. Journalists should not adopt transparency as a way of improving public standing or increasing legitimacy because it probably will not work. Legitimacy is maintained not through transparency, but rather by making difficult ethical decisions that often involve difficult story decisions. Transparency ought to be seen as a good in itself. That is, that it ought to be adopted not in an attempt to resolve some problem, but rather because it is believed that being transparent will aid in the establishment of a democratic discourse. But we also need to understand that transparency comes with a price. That as journalists become more transparent, they are subjected to forces of discipline and surveillance that might, in the end, run counter to the very goals that they seek.

### Journalist Class bad

#### A shield law would force the government to create a “journalist class” which hinders actual reporting and crushes the creative potential of media

**Schutze 13:** Schutze, Jim. Schutze has been the city columnist for the Dallas Observer since 1998. He has been a recipient of the Association of Alternative Newsweeklies’ national award for best commentary and Lincoln University’s national Unity Award for writing on civil rights and racial issues. In 2011 he was admitted to the Texas Institute of Letters. “Why Journalists don’t need (and shouldn’t want) a shield law”. June 3rd, 2013. The Dallas Observer. <https://www.dallasobserver.com/news/why-journalists-dont-need-and-shouldnt-want-a-shield-law-7125997> [Premier]

Forgive me if I see not just some irony but a couple red flags in the new right-wing support for a federal shield law for reporters. Oh, now that it's a way to defend Fox News and get back at Obama, well, sure, we need a shield law. Count me out. As somebody who has been a reporter all his life, I'm choosy about the skirts I dive under for protection. Bill Keller, former executive editor of The New York Times, has [a thoughtful op-ed about it](http://www.nytimes.com/2013/06/03/opinion/keller-secrets-and-leaks.html?pagewanted=all) in the Times today. He recites some of the serious misgivings that serious people in the business have had about shield laws in the past, then comes down somewhere in the middle, favoring a law that might best be described as a shield with holes in it. I'm for no shield. The best recent piece to read, if you want to know why, was by Julian Assange, the Wikileaks guy. It ran Sunday, [also in the Times](http://www.nytimes.com/2013/06/02/opinion/sunday/the-banality-of-googles-dont-be-evil.html?pagewanted=all&_r=0), and it wasn't about shield laws at all. It was basically a review of a new book by two top Google officials called The New Digital Age, all about the ways in which digital technology in general and, yeah, well, Google in particular, are going to make human beings a happier, wealthier, wiser species. I grew up in Detroit, so I'm sort of immune personally to the "What's good for General Motors" argument, but apparently, if one judges by the jacket blurbs, this book is being taken very seriously, maybe because reading it is like surfing for cool new devices. Anyway, Assange's op-ed in the Times was, I thought, a brilliant take-down of the whole suggestion that we can ever make life better by ceding individual liberty and privacy to central authority and then asking the authority to compensate us with comfort and safety. Assange concludes: "This book is a balefully seminal work in which neither author has the language to see, much less to express, the titanic centralizing evil they are constructing." The trick, in understanding the basic argument for a shield law, is understanding that shield laws turn journalists into the bellwethers who lead everybody else into that final suffocating embrace. For one thing, under the law today, there is no such thing as a journalist, in the sense of a distinct class of persons who qualify for a special status in the law. Freedom of the press is about expression itself, not the people who make money at it. A shield law would create such a class. Now all of a sudden journalism becomes a true "profession," and the journalism schools of the world achieve their institutional erotic dream. Maybe they can double tuitions. But for real reporting to work, the last thing reporters should be, the very last thing they should imagine themselves to be, is some kind of priesthood whose status and very definition are an endowment bestowed on them by government. Screw government. Screw everybody else, as a matter of fact. A shield law does the same thing the so-called open records and freedom of information laws have done: put the whole reporting process back in the hands of government and lawyers. All of a sudden reporters are busy filling out forms instead of being about the real business of reporting, which involves getting the people with information drunk and, even though I certainly never did it myself, sleeping with them if necessary. You figure out who's got an incentive to dish, and then you figure out how to get them to do it. Not only do we not need a law for that, we do not wanta law for that. Reporters belong in back alleys, not front offices. IF YOU LIKE THIS STORY, CONSIDER SIGNING UP FOR OUR EMAIL NEWSLETTERS. SHOW ME HOW What about the thing of getting caught, the whole punishment business, assuming you, your editors, your publisher and their lawyers are jointly witless enough to publish something that's illegal to publish but not worth going to jail for? Yes, indeed, that is the chance you take, because getting caught and punished is the chance all Americans take for breaking the law. If the bet's not worth it, don't make the bet. What about being forced to give up your sources? Well, we all have choices there. What did you promise your sources? I tell mine, if it comes down to the courthouse and me being behind bars, in that event I'm going to give you up. I lose good stories that way. But what if I tell my source I will never give him up no matter what? Fine. Then my choices are three: 1) perjure myself and risk prison, 2) go straight to jail anyway for contempt or 3) screw the guy and go back on my word. Those are the real rules. There's not a way to fiddle those rules without fiddling liberty itself. Reporters are not worth that sacrifice. They can get the same story other messier riskier ways. I thought that was why we liked this job. The closer reporters drift to the status of a special class, the more they become embeds, isolated among the people they cover, even wearing their uniforms and inevitably craving their approval because that's how human nature works. Instead they belong far outside the campfire ring, like feared hairy things lurking in the forest gloom. That's who steals the meat, not some dude with a laminated ID chained to his neck.

#### Common reasons for using confidential sources make flawed assumptions and are flat out wrong.

Carlson 10. Carlson, Matt. “WHITHER ANONYMITY? Journalism and unnamed sources in a changing media environment,” Journalists, Sources, and Credibility: New Perspectives, Chapter 2, December 2010. [Premier]

First, defenses of journalistic confidentiality assert that journalists, through the authority of their professional standing, should have rights above other citizens. Such a notion finds doubters even within mainstream journalism, including Chicago Tribune columnist Steve Chapman who wrote: “Journalists like nothing better than exposing selfseeking behavior by special interests who care nothing for the public good. In this case, they can find it by looking in the mirror” (Chapman, 2005, p. 9). The question should be asked whether empowering journalism to set itself apart from the rest of society is truly beneficial beyond journalism (Carey, 1979). A second assumption collapses the universe of unnamed sources into the idealized figure of the whistle-blower—a brave insider coming forward with valuable and unattainable information only on the condition of anonymity out of fear of a backlash. This condensation into an ideal-type belies a whole array of unnamed sources who crave anonymity to offer unattributed opinions or information. In the examples from the New York Times above, this is especially apparent. Top administration officials coming forward to provide secret prewar intelligence findings were hardly whistle-blowers—mostly officials abused anonymity to echo public statements. Additionally, the unnamed producer quoted for her opinion about Julia Roberts had nothing to do with exposing malfeasance. A third assumption holds that journalistic rights are transferrable to sources granted anonymity. This results in certain sources having more rights than others. The final assumption holds that journalists should be able to operate without transparency. To expose unseen practices at other institutions, journalists advocate for their own evasion of scrutiny. Yet, as with any institution, a lack of public oversight risks a loss of trust and legitimacy. Taken together, these assumptions underlying normative arguments for a confidentiality privilege show the vulnerability arising from source anonymity. Coupled with their checkered record in practice, unnamed sources have become a questionable component of news discourse.

### Bad for Democracy

#### Shield laws give too much power to the government to decide who deserves protections—it’s a slippery slope that ultimately harms democracy

**Pincus 13:** Pincus, Walter. Member of the Washington Post Writers Group. “Risks of Federal Shield Law for Journalists Outweigh Benefits”. The Oregonian. June 2nd, 2013.

<https://www.oregonlive.com/opinion/index.ssf/2013/06/risks_of_federal_shield_law_fo.html>. [Premier]

 WASHINGTON -- The siren song of a congressionally drafted federal shield law has arrived to answer the news media's cries for help. I turn to the adage, "Be careful what you wish for." First, let's deal with the standard argument that if the District of Columbia and 49 states (all except Wyoming) can have shield laws, why not the federal government? One answer is that since most criminal and civil cases go through state courts, shield laws at that level are needed to prevent prosecutors or lawyers from automatically subpoenaing reporters who have covered events, talked to witnesses, gathered records and done work that those involved in such cases otherwise would have to do. But states do not generate the same sort of national security and confidential-source criminal issues as those at the center of the contests between the media and the Justice Department. The Supreme Court made it clear in the 1972 Branzburg decision that the First Amendment is no protection for a journalist called to testify before a federal grand jury in a criminal case. In recent decisions, some lower-court federal judges have indicated a path to some sort of common law privilege for journalists, but a federal shield law has over time seemed like a quicker route. The late, great journalist Anthony Lewis, who wrote the book about the First Amendment, rightly said in 2007 during a panel titled "Are Journalists Privileged?" that "a wise federal shield law is difficult to draft." During that panel at the Benjamin Cardoza School of Law, he cited as one "inescapable problem": "defining who is a journalist." Lewis -- and others -- focused mainly on those hundreds of thousands of individuals who publish news, commentary and photographs on the Internet. I have a different worry: that Congress in past federal shield law efforts has tried to regulate who the protected journalists will be by using more dangerous standards. The slippery slope of standards has involved such things as who the journalists work for or their organizational associations. The White House recently asked Sen. Charles Schumer, D-N.Y., to take the lead in developing a shield law similar to one he sponsored that passed the Senate Judiciary Committee in 2009. On the CBS program "Face the Nation" last Sunday, Schumer said he would work with a new bipartisan "Gang of Eight" on a bill that would require the government in each case to go to a judge who would balance the need to find a leaker against the journalist's desire to protect sources. But Schumer's earlier effort excluded from being a journalist, or "covered person," individuals on or "reasonably likely to be" on various government lists. For example, it eliminated a person who is an "agent of a foreign power," as defined by the Foreign Intelligence Surveillance Act of 1978. That definition would include a person working for "an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments." The legislators apparently were after Al Jazeera, partially owned by the government of Qatar, and perhaps the Iranian government-owned news services. But wouldn't that also mean journalists from the BBC, Agence France-Presse and some Russian government-owned services? Other non-covered journalists were those "reasonably likely" to be working for groups on the State Department's list of foreign terrorist organizations or Treasury's Specially Designated Global Terrorist list, and anyone "attempting the crime of providing material support" to a terrorist group or anyone "aiding, abetting, or conspiring in illegal activity with a person or organization" on any terrorist list. As I wrote about the first Schumer bill, what if it had been proposed in the 1950s, when Congress would have excluded from its journalist designation anyone associated with the Communist Party or liberal groups designated as fellow travelers? In the 1960s and 1970s, it probably would have excluded those associated with anti-Vietnam War groups or radical civil rights organizations. Who would be added to such a list by a future Congress? As others have noted, Schumer's bill would not have prevented Justice from getting the Associated Press phone records or the e-mails of Fox News' James Rosen. Perhaps it could have delayed things for months or years, but who would have benefited from that? Another of my old objections to a federal shield law is that it results in media lobbyists going to Congress to seek a privilege from the lawmakers journalists cover. The attorney-client privilege in federal law and those granted clergy, doctors and social workers all arose out of judicial decisions, not from lawmakers. And why are we seeking a federal shield law now? The leaker or leakers in the AP and Fox stories were not whistleblowers exposing government malfeasance. They passed classified materials in violation of criminal law. These journalists were witnesses to those violations and should be treated like other citizens. National security reporters protect their sources and should take the same chances with the law as those who provide them with classified information. Max Frankel, former executive editor of The New York Times who appeared with Lewis at that 2007 Cardoza panel, put it this way: "The law is especially political and there is no law that we could write to address this issue, especially when you wave national security in front of the judges." He added that no judge could do the balancing between harm to the national security and informing the public, since "no one can anticipate the ultimate consequence of any given story." Frankel said, "At certain moments, if the country is panicked with fear, it may be willing to put a reporter or two in jail. So be it. The contest must go on. It is a political contest for which . . . the law has no answer." I'll go along with Frankel: As he put it, "I trust the politics of this game to decide the issue in each generation of journalists."

#### Shield laws are harmful to democracy and skew the public’s ability to determine truth

**Trageser 9:** Trageser, Jim.  “Shield Laws Bad News for Everyone”. The San Diego Union-Tribune. March 15th, 2009. <http://www.sandiegouniontribune.com/sdut-trageser-shield-laws-bad-news-for-everyone-2009mar15-story.html>. [Premier]

Shield laws are harmful to reporters on two fronts. The more immediately troubling issue, even to many of those who support shield laws, is that a shield law is a sort of backdoor government licensing of journalists. While many nations require a budding reporter or editor to register with the government before they can begin work as a journalist, the United States has never had such a system. The First Amendment of the Constitution gives every American citizen the right to free speech -- meaning anyone can be a reporter without so much as a "by your leave" from the government. But shield laws, because they exempt only reporters and editors from the normal subpoena process, practically demand that a judge decide who is and who isn't a "real" journalist -- if only because attorneys trying to get to those sources are going to argue that Reporter X or Editor Y isn't covered by the local shield law because they're not real journalists. Is a part-time reporter for the local alternative weekly covered by a state or federal shield law? What about a blogger who quotes an unidentified source? With both print and broadcast news outlets in economic disarray and more and more folks getting their news online, it may not be long before judges see bloggers as more legitimate than those working in the more traditional media. Regardless, the concept of judges determining who is and who isn't a "real" reporter ought to worry anyone who cares about a free press. A second way in which shield laws hurt the very folks who are seeking them is that they drive an unnecessary wedge between journalists and our readers and viewers. Because we've traditionally relied upon the same First Amendment free-speech rights available to any U.S. citizen, there's always been a bond between reporters and our audience. More than a profession, we've really been a service industry -- as the posters for the Will Ferrell spoof "Anchorman" put it, "They bring you the news so you don't have to get it yourself." There was a truth in that: Most folks are too busy working and raising their families and otherwise living to have time to go sit in the courthouse, at the state legislature, at the police department and find out what's going on. So we do it for them -- not through any special powers, but just as interested citizens using universal rights under the First Amendment and sunshine laws, who then report on what we've seen and heard. Giving us legal protection not available to everyone else can only weaken that relationship and create resentments and indifference to our arguments on other issues of interest to everyone, like sunshine laws. If shield laws become commonplace, they can only result in an increased reliance on unnamed, often unidentified sources in our reporting. And this would rob our readers and viewers of important contextual information in the news we provide them. It is difficult, if not impossible, to judge the credibility of sources when they're not fully identified. When we get sources to talk about a story on the record, our readers then know exactly who is making what claims. Readers can then decide for themselves whether this person has an ax to grind on the issue at hand. Without that information, readers have no way to determine how much weight to give claims made in a story. Beyond the above damage to the journalism industry and the deleterious effect on the credibility of our reporting, there is the larger reality that shield laws would be harmful to our representative form of governance. This nation was founded on the concept of the primacy of the individual -- that we all have the same rights, simply through our existence. Assigning rights based on employment goes against the concept of universal equality and tears at the fabric of our representative democracy Besides, whether shield laws can even pass constitutional muster is highly questionable. The Constitution's Sixth Amendment specifically says those charged with a crime can compel testimony from witnesses; it says nothing about citizens in certain lines of work being able to opt out of that process. And Congress does not have the statutory power to change the Constitution. Here's hoping it doesn't take a judge to make that clear.

### No Impact

#### It’s really hard to issue subpoenas and there are way easier methods for getting info

Eliason 08 (Randall D. Eliason is a Professorial Lecturer in Law, American University, Washington College of Law and George Washington University Law School, The Problems with the Reporter 's Privilege, American University Law Review Vol. 57 Is. 5, 2008) [Premier]

MYTH #2: REPORTERS ARE ROUTINELY SUBPOENAED AS A FIRST CHOICE OR EASY SHORTCUT TO OBTAIN INFORMATION Another popular claim by those who support the federal shield law is that it is now common for lazy prosecutors or litigants to subpoena journalists as a quick and easy way to obtain information and shortcut the need to investigate a case themselves. For example, Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) recently argued that the federal privilege is needed because “the press has become the first stop, rather than the last resort, for our government and private litigants when it comes to seeking information.”36 The facts suggest otherwise. In general, it is nonsense to suggest that subpoenaing a reporter can be a shortcut to obtaining anything. Far from being quick and easy, subpoenaing a reporter is almost certain to slow down a case dramatically, with no guarantee that the relevant information will even be discovered in the end.37 The party issuing the subpoena can expect a lengthy and expensive legal battle as the journalist fights the subpoena on various grounds.38 This battle may be financed by a large media corporation, which can and will hire some of the best First Amendment lawyers from the best law firms in the country. And at the end of that long, expensive battle, even if the party seeking the information prevails, there is a good chance the reporter will refuse to testify anyway and will choose instead to be held in contempt of court. Given any remotely hopeful alternative, a prosecutor or litigant with any sense at all will pursue that alternative rather than subpoenaing a reporter. Department of Justice attorneys are required by internal regulations to seek to subpoena a journalist only when they can demonstrate to senior DOJ officials that the information is essential to their case and that they have exhausted all other reasonable alternatives.39 For a DOJ attorney, attempting to subpoena a journalist and complying with those regulations means additional time, paperwork, levels of review and approval, and jumping through various hoops to seek authorization from Washington. As a former federal prosecutor, I can assure you that busy DOJ attorneys do not eagerly seek out opportunities to complete additional paperwork and seek approvals from Main Justice. If there are other avenues to the information, they will be pursued, not only because the regulations require it, but because any alternative means will almost always be faster, easier, and more productive than trying to get the information from a reporter.40 There is another reason prosecutors will hesitate to subpoena a reporter. As former Attorney General Richard Thornburgh once noted, “Most prosecutors are very wary for a practical reason: You don’t want to get the media mad at you.”41 Prosecutors have a strong interest in maintaining good will and a reputation for fairness in the community in which they work and from which their jury pools are drawn. The media are hardly powerless to defend themselves if they feel a prosecutor has stepped out of line. One need only recall the savaging that distinguished career prosecutor Patrick Fitzgerald received at the hands of the media when he subpoenaed reporters in the CIA leak case.42 This calls to mind the wisdom of the old adage attributed to Mark Twain: “Never pick a fight with a man who buys his ink by the barrel.” Prosecutors have little to gain, and much to lose, by antagonizing the press with unnecessary subpoenas. Private litigants who are not bound by the DOJ regulations are similarly unlikely to subpoena a reporter except as a last resort. For a civil litigant, just as for a DOJ attorney, trying to obtain information from a reporter will not be quick and easy. Just ask Dr. Steven Hatfill, who has been fighting for years to discover which government employees wrongfully leaked private information about him that caused him to be accused in the press of the anthrax attacks in Washington, D.C., in 2001.43 In addition, in those jurisdictions that do recognize a qualified reporter’s privilege in civil or some criminal cases, the courts generally require a litigant to demonstrate that all other reasonable alternatives have been exhausted before the court will consider whether to override the privilege.44 Thus, private litigants, for both practical and legal reasons, generally will subpoena a reporter only when there is no reasonable alternative. As evidence that the “shortcut” claim is a myth, we need only look at the recent high-profile cases that have largely fueled the drive for a federal shield law. In every one of those cases, without exception, journalists were subpoenaed not as an easy first choice, but only when, according to a federal judge, the party seeking the information had exhausted all other reasonable options. This was true in the CIA leak/Valerie Plame case,45 the BALCO case,46 the Jim Taricani case,47 the Wen Ho Lee case,48 the Hatfill case,49 and others.50 There is simply no evidence that prosecutors or litigants are now seeing journalists as “the first stop, rather than the last resort,” as Senator Leahy claimed. Most litigants are barred by regulation, statute, or court rulings from pursuing such a course. Even those who are not barred will, if they have any sense, look for alternative means of obtaining information before picking a fight with a reporter. Arguing that one should subpoena a reporter as a shortcut to obtain information is akin to arguing that when driving from Washington, D.C., to New York City one should take a shortcut through Los Angeles. Once again, the facts don’t match up with the rhetoric of privilege advocates.

#### Subpoenas for confidential source information are rare

**Shafer 8**

[Shafer, Jack. “we don’t need no stinkin shield law”. Slate.com. <http://www.slate.com/articles/news_and_politics/press_box/2008/04/we_dont_need_no_stinkin_shield_law_part_1.html>] [Premier]

Are federal subpoenas really so numerous that a new law is needed? The First Amendment lobby would have you believe that journalists are being buried alive in them, but that's not the case. In a 2006 op-ed, Department of Justice official Michael Battle wrote, "In the past 15 years, in only 13 cases have subpoenas been issued to reporters for 'confidential source' information—an average of less than one case a year. It's difficult to conceive of a 'chilling effect' on legitimate journalism from this record." Under Department of Justice guidelines (PDF), which date back to the Nixon administration, before a federal prosecutor subpoenas a member of the press, he's [they’re] supposed to file a request with the attorney general. The Reporters Committee for Freedom of the Press, a press advocacy group, learned via a FOIA request that the attorney general had approved 65 media subpoenas between 2001 and 2006—13 in 2001, seven in 2002, 16 in 2003, 19 in 2004, seven in 2005, and three in 2006. Hardly a landslide of subpoenas.

#### There is no subpoena crisis

Eliason 08 (Randall D. Eliason is a Professorial Lecturer in Law, American University, Washington College of Law and George Washington University Law School, The Problems with the Reporter 's Privilege, American University Law Review Vol. 57 Is. 5, 2008) [Premier]

MYTH #1: THERE IS CURRENTLY AN INTOLERABLE FLOOD OF SUBPOENAS BEING ISSUED TO JOURNALISTS There is one fact that almost everyone involved in the privilege debate seems to accept as a given: reporters today are being subpoenaed at an unprecedented clip, resulting in a crisis within the journalism community. As far back as 1999, the Reporters Committee for Freedom of the Press was lamenting that journalists were “drowning in a sea of subpoenas.”3 A witness before the House Judiciary Committee in 2007 declared that there has been a “deluge” of subpoenas to reporters in recent years.4 But despite the watery metaphors, one searching for evidence of this crisis will come up dry. Indeed, it is remarkable how little factual support there is for this claim, given how widely it is assumed to be true.5 It is true that there has been a handful of high-profile cases in the past few years involving subpoenas to reporters. These include the Central Intelligence Agency (“CIA”) leak/Valerie Plame investigation where former New York Times reporter Judith Miller went to jail for refusing to identify a source;6 the case involving grand jury subpoenas to two reporters from the San Francisco Chronicle for information concerning their source for stories on the Bay Area Laboratory Co operative (“BALCO”) steroids investigation;7 the case in Rhode Island where television reporter Jim Taricani was sentenced to six months of home confinement for contempt after refusing to identify a source;8 and the Privacy Act9 lawsuits filed by Dr. Wen Ho Lee10 and by Dr. Steven Hatfill.11 Recent calls for a shield law have been largely spurred by these cases, particularly by the jailing of Judith Miller. Virtually every article or argument in support of the privilege cites these same few cases as evidence of the supposed crisis. These cases did generate a good deal of publicity, in part because it is so rare for reporters to be subpoenaed. But despite the level of publicity, they remain only a few cases. A handful of cases over several years is more a trickle than a deluge, given the countless thousands of newspaper, television, radio, and Internet news reports filed every day. Walter Pincus, a veteran investigative reporter for the Washington Post who was subpoenaed in both the Valerie Plame and Wen Ho Lee cases, was closer to the mark when he wrote that these recent high-profile cases represent merely a “blip” in the number of subpoenas issued to reporters.13 Privilege advocates who repeatedly invoke these same few cases as proof of the flood of subpoenas are committing a common logical fallacy known as “hasty generalization.” The error lies in generalizing to an entire population based upon a sample that is too small to be meaningful. Examples would include arguing, “Joe, the Australian, stole my wallet. I guess all Australians are thieves,” or “The plane that crashed was being flown by a woman. I guess women don’t make very good pilots.”14 By way of analogy, consider that there are more than a dozen shark attacks on swimmers in the United States each year.15 Each attack may generate some publicity, and no doubt each is an important event to those involved. Nevertheless, we don’t conclude there is a crisis because everyone recognizes that, relative to the total number of swimmers each year, the number of shark attacks is very small. By the same token, a couple dozen federal subpoenas to journalists over the past few years do not, without more, signify a crisis, given the enormous number of stories being reported every day. Privilege proponent and former Solicitor General Ted Olson provided a recent example of this fallacy in an op-ed piece in the Washington Post. 16 Olson claimed that it has become “almost routine” for journalists to be subpoenaed: “From the Valerie Plame imbroglio to the Wen Ho Lee case, it is now de rigueur to round up reporters, haul them before a court and threaten them with fines and jail sentences unless they reveal their sources.”17 Citing only two recent well-known cases, therefore, Olson concludes that the extraordinary circumstances of those cases are now “routine” around the country. This makes for fine rhetorical flourishes, but it is a flawed argument. These cases attracted so much attention precisely because they were so unusual. It is simply false to claim that the exceptional is now the norm. There is surprisingly little data on exactly how frequently reporters are subpoenaed.18 Indeed, at the same time press representatives were testifying before Congress that journalists were facing an unprecedented flood of subpoenas that had reached “epidemic” proportions,19 the Reporters Committee for Freedom of the Press was admitting on its website that “we simply cannot know for certain” how many subpoenas journalists receive, or whether that number is on the rise.20 Given this admitted uncertainty, it’s remarkable that journalists would claim they are facing a crisis requiring congressional intervention. One can only imagine how the press would react if, for example, the Bush Administration claimed publicly that we were facing a “deluge” of new terrorists in our midst, while admitting in other documents that it really had no idea whether or not this was true. Department of Justice (“DOJ”) attorneys are required by regulation to seek the Attorney General’s approval for subpoenas to the media, and to demonstrate that the information is essential and all reasonable alternatives have been exhausted.21 Data from the DOJ indicates that, on average, there have been about a dozen DOJapproved subpoenas to journalists each year over the past six years, and that number has been declining.22 DOJ subpoenas that actually seek confidential source information are even more rare, averaging only about one a year since 1991.23 As far as the DOJ is concerned, therefore, evidence of a deluge is lacking.24 Other information concerning the number of subpoenas to reporters is largely anecdotal and potentially misleading.25 For example, Eve Burton, general counsel to the Hearst Corporation, has claimed that Hearst news organizations received about one hundred subpoenas during a thirty-two-month period from 2005–2007.26 It would be a simple matter for Hearst to compile a list of those subpoenas in order to bolster its arguments in favor of the privilege, but no such list has been forthcoming. If we had such a list, we could answer a few key questions. For example, how many of those subpoenas were from state or local tribunals? The vast majority of litigation occurs at the state level, and it is fair to assume that most of the one hundred subpoenas were also from the state level.27 A federal privilege statute would not affect state subpoenas, and so the presence of such subpoenas does not support the need for a federal law.28 Claiming there have been a hundred subpoenas likewise tells us nothing about the circumstances underlying each subpoena. For example, how many were really serious attempts that resulted in a court battle, and how many were half-hearted or impulsive efforts by an attorney who backed down as soon as the journalist’s lawyers objected?29 How many of these subpoenas sought the identity of a source or other truly confidential information, and how many merely sought peripheral information or material that had already been published and was not confidential?30 Finally, given that Hearst is one of the largest media companies in the world, one can legitimately question whether an average of less than one subpoena a week nationwide is really as staggering a number as Burton appears to believe.31 Even if one could establish that the overall number of subpoenas to the media has increased in recent years, this would have to be considered in light of the changed media environment. At the time Branzburg v. Hayes32 was decided in 1972, the media consisted largely of three television networks, local newspapers, and radio. There has been an explosion of new media outlets since that time. We now live in an era of 24/7 non-stop news coverage streaming from the Internet, cable television, and satellite transmissions, in addition to the more traditional print and broadcast formats. The media is more pervasive and more intertwined with our lives than ever before. Given the huge growth in the number of media outlets and formats, as well as in the number of proclaimed journalists,33 it would be remarkable if the overall number of subpoenas to the media was not rising. However, such an increase in the number of subpoenas would not necessarily indicate a change in the legal landscape. If there are ten times as many journalists as there were thirty years ago, then even if there are ten times as many subpoenas, things are simply staying about the same.34 As columnist Jack Shafer recently noted in Slate, “The First Amendment lobby would have you believe that journalists are being buried alive in [subpoenas], but that’s not the case.”35 The widely held belief about the epic flood of subpoenas to the press appears to be a myth.

#### Government doesn’t go after journalists – only five cases in ten years empirically

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

**Beginning in 2001, unprecedented numbers of journalists who refused to comply with federal grand jury subpoenas began being sent to jail or fined**.92 Among them was Vanessa Leggett, an aspiring book author who spent 168 days in jail in 2001 and 2002.93 More famously, New York Times reporter Judith Miller spent 85 days in jail in 2005.9 4 **The record for the longest time in jail was set by Joshua Wolf, a California video blogger and freelance journalist who was incarcerated for 226 days** in 2006 and 2007.95 **In all, five journalists have spent time in jail or under house arrest since 1998**.96 Many others have paid costly fines or settlements.97

# Topicality/Theory

## Aff

### Exceptions OK

#### Exceptions are normal means – proposed legislation in the 2000s included many exceptions to the right

Packer 09, Cathy, prof @ UNC, The Politics of Power: A Social Architecture Analysis of the 2005-2008 Federal Shield Law Debate in Congress, 31 Hastings Comm. & Ent. L.J. 395 (2009) [Premier]

**For example, the bill passed by the House would have provided a qualified privilege** for the protection of both confidential sources and information. 117 In the context of that bill, the qualified privilege meant **journalists could not be compelled** to reveal confidential sources or information **unless the sources** or information **were needed for** one of **four purposes**: "to prevent, or to identify a perpetrator of, an act of **terrorism" or** other harm to **national security; to prevent "imminent death or** significant **bodily harm**"; to reveal the sources of **leaks of trade secrets** of significant value, individually **identifiable health** information, **or other personal or financial information** revealed in violation of existing federal laws; or to identify persons who illegally disclosed classified information that can harm national security. 1 ' 8 In all cases **the** shield **law** also **would have required a court to balance "the public interest in compelling disclosure** of the information or document involved" **against** "the public interest in **gathering or dissemination of news** or information."' 19

### Can be Absolute or Qualified

#### Shield laws can be absolute or qualified – here are some examples

Weishen Law Project n.d.**,** [Weishen Law Project, Protecting News Sources: A Study of Shield Law, https://weishenlawproject.wordpress.com/differences-between-state-shield-laws/, no date] [Premier]

In general, shield laws of different states provide reporters either an absolute privilege or a qualified one. The shield law in Alabama offers absolute reporter privilege. According to Alabama Code Section 12-21-142 (2006), a “news-gathering person” is exempted from disclosing sources in any trial or before any court. In contrast, the Florida statute regarding protection of confidential sources restricts reporter’s privilege in certain conditions. Florida Evidence Code Section 90.5015 (2012) says that the journalist privilege “does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes.” Besides specifically identifying what kind of information is protected, Florida, like most other states adopt qualified shield laws, offers opportunity to overcome reporter’s privilege based on the three-part test Justice Stewart proposed in Branzburg v. Hayes. Such fundamental differences exist across states shield laws and most of them maintain conditions in which journalists cannot expect or pursue their privilege.

### 50 States CP Bad

#### The counterplan is fiat abuse – it’s obviously impractical and the literature proves

Martin et al 11, Jason Martin – PhD candidate, Mark Caramanica – PhD candidate, Anthony Fargo – prof of Journalism @ Indiana, “Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online,” 16 Comm. L. & Pol'y 89 (2011), lexis. [Premier]

Still, as noted earlier, the concerns about the use of shield laws to protect anonymous commenters are not fanciful. The question becomes one of how to accommodate protection for anonymous commenters without risking legislative backlash. The options include having news organizations alert commenters that they are being sought by litigants and then letting them defend themselves with a Dendrite-Cahill-Brodie theory; continuing to protect the commenters with shield laws, but doing so [\*123] more selectively; or **expanding shield law protection**, either **through legislation or court interpretation**, to protect all anonymous commenters as sources **in all states** that have shield statutes. The third option **seems impractical because of the amount of coordination and time it would take to change the law nationwide, and it could exacerbate the risk that legislators would tinker with the laws in undesirable ways.** The first option has the advantage of creating a relatively level playing field for all commenters to a Web site, regardless of who owns the site. But it does not address news organizations' ethical, practical and business reasons for wanting to protect the comment forums they have created or otherwise maintained.

## Neg

### T - reporters

#### Definition--/Reporters are distinct from journalists and do their work in the field, which requires an authentic connection with their sources

**Maheta n.d.:** Maheta, A Nitin. “What is the difference between journalist and reporter?”. No date given. Making Different Blog. <https://www.makingdifferent.com/what-is-the-difference-between-a-journalist-and-a-reporter/>. [Premier]

The function of a reporter is much narrower as compared. such a wide field of work in journalism. Reporters are those people who do most of the fieldwork, covering events physically and then reporting it. if we go through the definition of a reporter the, a reporter is a person who physically engages in any event and gathers the information either directly or from doing first person interactions. The information which a reporter collects is usually what has actually happened at the event or the interactions through the people present at that event. Now this information is not always true means that, it is not what incident has happened in front of the ey...And thee why this information is sent to the editors for further refinement before presenting in front of the audience. Since a reporter is a person who attends the campaigns and even., thus, he/she needs to be active and have good communication skills to interact with people. The person also must have some good information sources from where he can get real news. Moreover, he should also be able to create new information sources at the moment quickly. He should be very agile to switch from one event to other . most of the time reporters cover different events day to day and under tight deadlines. Reporters should be such who can keel precise, informative notes so that real news can reach to readers. After all, that a reporter reports is what a reader is going to read. With the rapid increase in the growth of new information sources, like podcasts and blogs, a question arises that "who is a journalist and who is not?" There was a time when people who worked as writers in newspapers, broadcast news services, and wire services call themselves as journalists. But now, people who witness the events and share information through the social media also started calling themselves as journal... And this particularly has blurred a line between a bystander and a professional journalist.

### Must Spec

#### To assess the right to confidential sources, we first need to know who gets the right

Peters 16, Johnathan Peters 2016 (First amendment lawyer and Scholar, <https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php>) [Premier]

The first question: Who’s a journalist? That might be a tired debate in some circles, but when it comes to journalist’s privilege, it’s a question that has to be answered. Some privilege schemes are narrow and apply only to full-time employees of professional news outlets, while others are broad and extend to bloggers, filmmakers, freelancers, book authors, and student journalists. In other words, some are inclusive and others are exclusive. The problem here, of course, is that innovations in technology have complicated the endeavor of defining journalists and journalism.

#### The central question of whether to implement shield laws is who deserves protections, or who qualifies as a “reporter” or “journalist”

**Pincus 13:** Pincus, Walter. Member of the Washington Post Writers Group. “Risks of Federal Shield Law for Journalists Outweigh Benefits”. The Oregonian. June 2nd, 2013.

<https://www.oregonlive.com/opinion/index.ssf/2013/06/risks_of_federal_shield_law_fo.html>. [Premier]

 WASHINGTON -- The siren song of a congressionally drafted federal shield law has arrived to answer the news media's cries for help. I turn to the adage, "Be careful what you wish for." First, let's deal with the standard argument that if the District of Columbia and 49 states (all except Wyoming) can have shield laws, why not the federal government? One answer is that since most criminal and civil cases go through state courts, shield laws at that level are needed to prevent prosecutors or lawyers from automatically subpoenaing reporters who have covered events, talked to witnesses, gathered records and done work that those involved in such cases otherwise would have to do. But states do not generate the same sort of national security and confidential-source criminal issues as those at the center of the contests between the media and the Justice Department. The Supreme Court made it clear in the 1972 Branzburg decision that the First Amendment is no protection for a journalist called to testify before a federal grand jury in a criminal case. In recent decisions, some lower-court federal judges have indicated a path to some sort of common law privilege for journalists, but a federal shield law has over time seemed like a quicker route. The late, great journalist Anthony Lewis, who wrote the book about the First Amendment, rightly said in 2007 during a panel titled "Are Journalists Privileged?" that "a wise federal shield law is difficult to draft." During that panel at the Benjamin Cardoza School of Law, he cited as one "inescapable problem": "defining who is a journalist." Lewis -- and others -- focused mainly on those hundreds of thousands of individuals who publish news, commentary and photographs on the Internet. I have a different worry: that Congress in past federal shield law efforts has tried to regulate who the protected journalists will be by using more dangerous standards. The slippery slope of standards has involved such things as who the journalists work for or their organizational associations. The White House recently asked Sen. Charles Schumer, D-N.Y., to take the lead in developing a shield law similar to one he sponsored that passed the Senate Judiciary Committee in 2009. On the CBS program "Face the Nation" last Sunday, Schumer said he would work with a new bipartisan "Gang of Eight" on a bill that would require the government in each case to go to a judge who would balance the need to find a leaker against the journalist's desire to protect sources. But Schumer's earlier effort excluded from being a journalist, or "covered person," individuals on or "reasonably likely to be" on various government lists. For example, it eliminated a person who is an "agent of a foreign power," as defined by the Foreign Intelligence Surveillance Act of 1978. That definition would include a person working for "an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments." The legislators apparently were after Al Jazeera, partially owned by the government of Qatar, and perhaps the Iranian government-owned news services. But wouldn't that also mean journalists from the BBC, Agence France-Presse and some Russian government-owned services? Other non-covered journalists were those "reasonably likely" to be working for groups on the State Department's list of foreign terrorist organizations or Treasury's Specially Designated Global Terrorist list, and anyone "attempting the crime of providing material support" to a terrorist group or anyone "aiding, abetting, or conspiring in illegal activity with a person or organization" on any terrorist list. As I wrote about the first Schumer bill, what if it had been proposed in the 1950s, when Congress would have excluded from its journalist designation anyone associated with the Communist Party or liberal groups designated as fellow travelers? In the 1960s and 1970s, it probably would have excluded those associated with anti-Vietnam War groups or radical civil rights organizations. Who would be added to such a list by a future Congress? As others have noted, Schumer's bill would not have prevented Justice from getting the Associated Press phone records or the e-mails of Fox News' James Rosen. Perhaps it could have delayed things for months or years, but who would have benefited from that? Another of my old objections to a federal shield law is that it results in media lobbyists going to Congress to seek a privilege from the lawmakers journalists cover. The attorney-client privilege in federal law and those granted clergy, doctors and social workers all arose out of judicial decisions, not from lawmakers. And why are we seeking a federal shield law now? The leaker or leakers in the AP and Fox stories were not whistleblowers exposing government malfeasance. They passed classified materials in violation of criminal law. These journalists were witnesses to those violations and should be treated like other citizens. National security reporters protect their sources and should take the same chances with the law as those who provide them with classified information. Max Frankel, former executive editor of The New York Times who appeared with Lewis at that 2007 Cardoza panel, put it this way: "The law is especially political and there is no law that we could write to address this issue, especially when you wave national security in front of the judges." He added that no judge could do the balancing between harm to the national security and informing the public, since "no one can anticipate the ultimate consequence of any given story." Frankel said, "At certain moments, if the country is panicked with fear, it may be willing to put a reporter or two in jail. So be it. The contest must go on. It is a political contest for which . . . the law has no answer." I'll go along with Frankel: As he put it, "I trust the politics of this game to decide the issue in each generation of journalists."

#### Defining who gets the right is critical – courts do it very inconsistently and several different tests and analogies have been devised

Smith 13, Dean C., journalist and author, A theory of shield laws: journalists, their sources, and popular constitutionalism, LFB Scholarly Publishing LLC, 2013. [Premier]

Justice Byron White was a doctrinalist, 54 a judge who preferred a common-law method of judging that demanded grounding decisions in prior court precedents. 55 That preference went to the heart of the “lonely pamphleteer” portion of his opinion in Branzburg, 56 in which he warned that trying to define “journalist” for the purposes of a privilege represented “conceptual difficulties of a high order.” 57 He said defining a privileged class would be “a questionable procedure,”58 and he inveighed against departing from “the traditional doctrine” that said freedom of the press is a fundamental right belonging to every individual and applicable to every form of publication. 59 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. 60 Further, scholars have noted, **eligibility for protection would represent a “threshold question” that would require answering before any other issue could be reached**.61

**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. 62 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.63 In Silkwood v. Kerr McGee of 1988,64 **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.65 The court reasoned that the filmmaker’s investigative work was **similar enough to a newspaper reporter’s 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.66 That discussion in Silkwood was refined in the von Bulow case of 1987,67 the first in which **a court tried to fashion a test to answer the journalist-definition question.** Extrapolating from Silkwood68—and citing the New York Shield Law for support69—**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**.70 **This** became known as “the von Bulow Test” and **has been adopted by other circuits**.71

#### Defining reporter matters for constitutional issues like the First Amendment

Smith 13, Dean C., journalist and author, A theory of shield laws: journalists, their sources, and popular constitutionalism, LFB Scholarly Publishing LLC, 2013. [Premier]

**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.**”200 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 applies to everyone practicing free speech in the U.S.”201 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.”202 **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**.”203 **All of these people seemed to be demanding that the federal shield law comport with First Amendment norms**.

#### The right could cover just professional reporters or otherwise be more stringent than status quo common law

Smith 13, Dean C., journalist and author, A theory of shield laws: journalists, their sources, and popular constitutionalism, LFB Scholarly Publishing LLC, 2013. [Premier]

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**204 achieves medium neutrality by **simply omitting covered media from its definitions section altogether**. 205 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.”** 206 **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 had the intent to publish all along.**207 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.”** 208 **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**.

#### Must specify the occupation of reporter – Topic lit proves that this topical threshold was debated over during the Branzburg supreme court case.

Anderson Jones 13 [RonNell Andersen Jones Associate Professor of Law, J. Reuben Clark Law School, Michigan Law Review Volume 111 | Issue 7 2013 Rethinking Reporter 's Privilege , Brigham Young Universit https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1049&context=mlr , Pg. 1239-1242] // [Premier]

By its very designation, a constitutional reporter's privilege applies only to a "reporter," and thus mandates a threshold showing that the party seeking the constitutional protection qualifies occupationally for the privilege. Even assuming that this determination was one that could have fairly been made four decades ago-an assumption the Branzburg majority flatly rejectedl1 '-it is a task that has now become complicated to a degree of near impossibility, 12 especially as technological changes have altered the primary mechanisms for gathering and disseminating news." 3 Because "[p]referential treatment of the press requires some definition of the intended beneficiaries," it seems clear that "[i]n a world in which many, if not most, business entities are information providers, it [will not be] easy to determine which of them are press." ' 4 As "[e]stablished news media are disappearing or morphing into forms indistinguishable from new media that are anything but established,"' ' the Branzburg focus on the journalist has "led to a kind of definitional football over whether ... it is possible to define the press with sufficient specificity and whether it is prudent for one class of speaker to be preferred over another.""' 6 **These concerns of prudence and specificity resonate throughout the case law and scholarship on this topic**. On the question of prudence, our most basic constitutional principles seem to dictate that we avoid differentiating between categories of similarly situated speakers, particularly on less than clear bases." 7 Even assuming that factors such as the social or democracy-enhancing value of the disseminated information could be used to limit the privilege,' 18 these content-based determinations run the real risk of themselves violating the First Amendment." 9 More to the point, a Court-declared delineation of this sort "as a matter of First Amendment interpretation would fly in the face of more than two hundred years of constitutional wisdom," because "[tihe idea of defining or 'licensing' the press in this manner is anathema to our constitutional traditions.' ' 2 0 Thus, while perhaps expected and even appropriate when designing the contours of a reporter's privilege as a statutory matter,'12 this definitional line drawing is at best knotty as a basis for a constitutional doctrine. **On the question of specificity, judges faced with applications of the reporter's privilege have repeatedly bemoaned the "vexing nature of [the] question" of who would be entitled to a reporter's privilege**. 22 Judges have noted, in particular, that "[t]he proliferation of communications media in the modern world makes it impossible to construct a reasonable or useful definition of' a reporter. 123 Judge Sentelle of the D.C. Circuit outlined the conundrum: Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? 24 Faced with this technological moving target, scholars and jurists have spilt gallons of ink setting forth proposed definitional approaches, ranging from exceptionally narrow classifications that would essentially include only professional journalists at established traditional media outlets, 125 to very broad ones that would extend the privilege to any person performing the basic functions of a reporter.16 Some courts addressing the definitional issue in "cases involving traditional media entities have been so worried about the expansive scope of the privilege that they have been throwing the baby out with the bathwater and refusing to recognize the privilege at all."' 27 It is no exaggeration to say that the "futility of trying to decide as a matter of constitutional law who should have the right to protect confidential sources" is "[t]he most compelling objection to" a constitutional reporter's privilege with a Branzburg journalist focus. 128 All told, if the only constitutional framework available for assessing the flow of confidential information to the public is one that focuses on the reporter, the doctrine is destined to be mired in definitional difficulties in at least some cases, and likely in a growing number of them.