ARTICLE

SHIELDING THE UNMEDIA: USING THE PROCESS OF JOURNALISM TO PROTECT THE JOURNALIST'S PRIVILEGE IN AN INFINITE UNIVERSE OF PUBLICATION

*Linda L. Berger**

TABLE OF CONTENTS

I. INTRODUCTION 1373

II. THE PROBLEM: WE ARE ALL JOURNALISTS NOW AND IT'S HARD TO SEE THE DIFFERENCE AMONG US 1378
A. The Big Media 1380
B. The "Unmedia" 1382

III. BACKGROUND OF THE JOURNALIST'S PRIVILEGE 1383
A. Federal Law: Application of the Journalist's Privilege Depends on Whether the Claimant Is Acting as a Journalist as Determined by Looking at Purpose, Process, and Product 1387
B. State Law: Application of the Journalist's Privilege Depends Not Only on Whether the Claimant Is Acting as a Journalist but Also on Whether There Is a Substantial Connection with an Established News Organization 1392

* Associate Professor of Law, Thomas Jefferson School of Law. Professor Berger was a newswoman with the Associated Press before attending law school and practiced media law before becoming a professor. Many thanks to my research assistant, Joe Kracht, and to my colleague, Professor Bryan Wildenthal, for their insightful comments on earlier drafts.

1. The Journalist Must Have a Substantial Connection with or Relationship to Recognized or Traditional News Media 1393
2. The Journalist Must Be Practicing Journalism, that Is, Gathering or Processing Information Intended for Dissemination to the Public, at the Time of Obtaining Information 1395

IV. LEGAL AND WORKING DEFINITIONS: WHAT KIND OF PRESS AND WHAT KIND OF PRESS BEHAVIOR ARE WE INTERESTED IN PROTECTING? 1396
A. The Legal View: We Can Identify the "Press" that Should Be Protected Because It Contributes to Self-Government by Examining Its Purpose, Content, or Function 1397
B. The Profession's View: We Can Identify the "Journalists" Who Should Be Protected by Examining Whether They Are Engaged in a Process Aimed at Finding and Printing the Truth.... 1401

V. THE PROPOSAL: EVEN IF ALL OF US ARE POTENTIAL JOURNALISTS, ONLY SOME OF US ARE ENGAGED IN JOURNALISM 1406
A. Eliminating "Who," "What," and "How" as Possible Limitations 1406
1. Deciding Which Journalists Should Be Eligible for Protection Based on Their Job Titles or Employment Status Excludes Too Many Whose Work Is Journalism 1406
2. Deciding What Publications Should Be Protected Based on Their Content Violates First Amendment Neutrality 1409
3. Deciding What Media or Modes of Communication Should Be Protected Based on Their Format Is Unrelated to the Purpose of the Privilege 1410
B. Adopting a Functional Definition: Is the Claimant "Engaged in the Process of Journalism?" 1411
1. Does the Process Show a Commitment to Regular and Public Dissemination of "Journalistic Truth" as Evidenced by a Track Record of Gathering and Publicly Disseminating Usually Truthful Information?.. 1412

2. Does the Process Show a Commitment to Regular and Public Dissemination of "Journalistic Truth" as Evidenced by the Presence of Internal Mechanisms Designed to Verify and Evaluate Information Before It Is Disseminated? 1414
3. Does the Process Show a Commitment to Regular and Public Dissemination of "Journalistic Truth" as Evidenced by Publication of Information from Which Readers Can Judge the Degree of Independence from Both Inside and Outside Forces? 1415

VI. CONCLUSION 1416

I. INTRODUCTION

Like a self-absorbed version of the political pamphleteer, "bloggers" use online journals to post their innermost thoughts and personal political views.[1] Like a high-tech update of the patriot printer, independent and politically affiliated groups band together to publish the news on their own websites.[2]

When anyone can be a journalist, it may be impossible to decide who should be protected by the "journalist's" privilege afforded by thirty-one states and, in most federal circuits, by the First Amendment.[3] But if it really is impossible to distinguish the

1. A "blogger" is someone who posts a "web log" or an online diary containing notes and thoughts about various topics. Louise Kehoe, *Bloggers Slip the Surly Bonds of Print*, FIN. TIMES (London), Apr. 6, 2002, at 11. Andrew Sullivan, formerly an editor and columnist for *The New Republic*, announced in April 2002 that his web log was making money, with more than 800,000 visits by more than 200,000 individual readers during March 2002. *Id.* The vision of bloggers as a "narcissistic throwback" to the colonial pamphleteer comes from Tim Rutten, *To Err Is Human but to Think Out Loud . . .* , L.A. TIMES, June 21, 2002, at E1, E4.

2. "Independent Media Centers" are reported to have been organized in more than thirty cities internationally to report on government actions and meetings such as the World Trade Organization meeting in Seattle. Steve Geimann, *Task Force on the Professions in the New Millennium*, *in* ASS'N FOR EDUC. IN JOURNALISM & MASS COMMUNICATION, JOURNALISM AND MASS COMMUNICATION EDUCATION: 2001 AND BEYOND 5, 9 (2001) [hereinafter JOURNALISM AND MASS COMMUNICATION EDUCATION], *available at* http://www.aejmc.org/pubs/2001.html (last visited Jan. 15, 2003).

3. *See* Stephen Bates, The Reporter's Privilege, Then and Now 1, 6–7 (2000) (Research Paper No. R-23, The Joan Shorenstein Center on the Press, Politics, and Public Policy, Harvard University) (discussing the judicial and statutory evolution of the journalist's privilege protecting reporters and other journalists from divulging confidential information and sources to the courts), *available at* http://www.ksg.harvard.

protected from the unprotected, no privilege can be justified.[4] Thus, those who hope to preserve a constitutional or statutory privilege shielding some newsgatherers from having to comply with some subpoenas must develop a rational limitation on its application.

The most appropriate limit would reap the benefits of the privilege without incurring too many of the costs: enhancing the free flow of information to the public while only slightly diminishing the accuracy and efficiency of judicial or governmental processes by allowing witnesses to withhold information. Devising such a limit is especially difficult, however, because the limitation itself may violate the First Amendment principle of neutrality by favoring one kind of speaker, one kind of content, or one medium of communication over all others.

In proposing a functional limitation rather than one based on speaker, content, or medium, this Article focuses on the context within which the need for a privilege and the balance of costs is most clear. That context occurs when government investigators or criminal prosecutors subpoena a journalist for testimony about sources or for unpublished information.[5] Testifying or turning over the names or the information would, in the journalist's view, undermine journalism's constitutionally protected function in two ways: (1) "subpoenaing a journalist threatens to transform the independent press into an investigative arm of the government," and (2) "it silences potential confidential sources, which reduces the flow of information to the citizenry."[6] The journalist's privilege protects journalistic independence and allows journalists to gather the kinds of information that can be obtained only when

---

edu/presspol/publications/pdfs/100831%20R-23.pdf (last visited Jan. 14, 2003).

4. Because of the difficulties of defining who should be protected, some authors predict a loss of special protection for journalists. *E.g.*, Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 100–01 (2002); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 528–30 (2002) [hereinafter Anderson, *Freedom*].

5. In criminal cases where the defendant subpoenas the reporter or the reporter's materials, and in civil cases where a party subpoenas the reporter as either a party or a non-party, the courts are likely to balance shield law protection with a particular defendant's or litigant's need for the evidence. *See* Branzburg v. Hayes, 408 U.S. 665, 709–10 (1972) (Powell, J., concurring) (noting that an "asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony," and that "balanc[ing] . . . these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions").

6. Bates, *supra* note 3, at 1 (describing journalists' belief that their constitutionally protected function is to "keep[] the public informed").

knowledgeable, but reluctant, sources believe that they can count on a journalist's word. Therefore, shield law protection is designed for neither the source nor the journalist gathering the current story; instead, it is provided to protect and encourage the free flow of information, so that the source for the next story will be willing to talk to the next journalist.[7]

For example, had the sources who talked to *Washington Post* reporters about Watergate not believed those reporters' pledges of confidentiality, based in part on a culture of kept promises, it seems likely that some abuse of governmental power would never have been discovered.[8] For reporting that brings down a President, almost everyone would agree that the benefits of past shield law protection outweigh the costs.[9]

The Watergate example suggests several approaches to assure that protection is provided in similar newsgathering situations in the future. First, the focus of protection could be on "who" is gathering information from unnamed sources. So the privilege could be applied at least to reporters employed by newspapers like the *Washington Post* and similar established news media organizations. Second, the focus of protection could be on "what" product is likely to result from the newsgathering process. So the privilege could be applied at least to those who are looking for "news" of political interest or criminal activity. Third, the focus could be on the kind of journalistic work process that seems most likely to result in the publication of information that will be important to decisionmaking by a self-governing citizenry.

This Article suggests that the third approach is both practical and rationally related to the purpose of the journalist's privilege. That is, the appropriate way to limit the journalist's privilege is not to define "who is a journalist?" or "what is news?" Instead, protection should be extended to the work process of journalism. When individuals are engaged in this protected journalistic work process, they should be eligible for the privilege no matter who they are, in what medium they publish, or, within

---

7. *See* Alexander, *supra* note 4, at 111–13 (identifying several state shield law statutes containing provisions explicitly protecting the free flow of information).

8. The reporters dedicated their book "*[t]o the President's other men and women—in the White House and elsewhere—who took risks to provide us with confidential information. Without them there would have been no Watergate story told by the* Washington Post." CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN 7 (1974).

9. In one sense shield law protection is not necessary, because most journalists will not reveal the names of sources to whom they have promised anonymity regardless of their legal protection. Refer to note 56 *infra* (listing various news media codes of ethics requiring journalists to keep their promises not to reveal the names of sources).

certain limits, what kind of content results. If the work process can be classified as the protected process of journalism, the person who is engaged in it should be protected against forced disclosure of confidential information, confidential sources, and unpublished information obtained while practicing journalism.

To define the protected process of journalism, this Article analyzes legal definitions of "the press" but relies primarily on journalists' definitions of the values, standards, mission, and work practices of their profession. Journalists focus on those definitions when they claim that "Matt Drudge Is Not My Colleague,"[10] or that the Internet is full of people who are posing as journalists.[11] In an article in the magazine published by the Society of Professional Journalists, Tom Rosenstiel describes it this way: "You can't say, 'I'm a journalist, here's my press pass.' You have to say, 'I'm a journalist. Here's my work.'"[12]

The need for something other than a definition for "journalist" or "news" has been recognized in the broader contexts of defining "the press"[13] and distinguishing its constitutionally protected speech.[14] The difficulty of defining "news" is widely acknowledged:[15] making judgments about what is news and what is entertainment or deciding whether a particular story is a matter of legitimate public concern opens up subjective value judgments that are inherently suspect given much First Amendment jurisprudence.

---

10. Gloria Borger, *Matt Drudge Is Not My Colleague*, HARV. INT'L J. PRESS/POL., Summer 1998, at 132 ("Matt Drudge is the gossip you hear around the watercooler[,] . . . not what you're reading . . . on the front page of the *New York Times*. [But] people are still grouping us all together. . . . [A]t some point, that's got to stop because we're just too diverse.").

11. *See* Janet Forgrieve, *Net a Fret: Cronkite Says That's Way It Is; Web Infested with People Pretending to be Journalists, Famed Newsman Says*, ROCKY MTN. NEWS, June 13, 2002, at 2B (reporting Walter Cronkite's contention that many Internet reporters only pretend to be journalists because they are not held to the same standards as other journalists nor do they face similar penalties for printing unsubstantiated rumors).

12. Gina Barton, *What Is a Journalist?*, QUILL, May 2002, at 11.

13. Anderson, *Freedom*, *supra* note 4, at 430 (concluding that recent conglomeration of media companies and activities makes it difficult to distinguish journalism from the vastness of the information business).

14. Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 760 (1999) [hereinafter Bezanson, *Editorial Judgment*] (suggesting that the press's strongest claim to constitutional protection comes when its judgment is "independent, audience oriented, and grounded in a reasoned effort to publish information" that is "useful and important" to a self-governing society).

15. *See, e.g.*, Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411, 411 & n.4 (1999) (listing several authors who have attempted the difficult task of defining what is and is not news).

Although it is possible to define who is a journalist by listing job titles and employers, such definitions are increasingly unhelpful. Given economic and technological change and the purpose of the privilege, such definitions invite equal protection challenges. Journalists' shield laws, whether constitutional or statutory, are designed to protect the free flow of information, not to protect individual or institutional status.[16] In particular, their purpose is to protect the process through which information that is useful to self-governance is gathered and provided to the public. It may be that those who fall within a definition of journalist are those most likely to produce the desired information, but they are certainly not the only individuals who might do so.

Acknowledging that we are interested in protecting only specific subject matter—that is, information helpful to self-governance—but also that courts should not judge the value or the content of information, this Article will attempt to identify the key components of the process of journalism most likely to lead to the gathering and publishing of the right kind of information. If those components can be identified as objectively measurable tools, then we can protect those who are engaged in such a process.[17] Because shield laws impose costs—in the short run, a decrease in the amount of information available to the public whenever a shield is used—there must be a limit on their application. That limit should be based on criteria that will protect journalistic independence but increase the chances that the public will, in the end, receive more of the kind of information that will aid in self-governance. Such criteria can be found in the values espoused by journalists,[18] as well as in the reasoning underlying decisions used as the basis for finding at least some constitutional protection for the newsgathering activities of a free press.[19]

---

16. Refer to note 7 *supra* and accompanying text (addressing the public policy reasons for the creation of most state shield law statutes).

17. When determining whether a claimant should be eligible for protection against forced disclosure of sources and information, there is no need to differentiate between the protection provided by the U.S. Constitution and the protection provided by state constitutions and state shield statutes nor between the use of civil or criminal subpoenas to newsgatherers.

18. BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT 17–18 (2001). The book resulted from a three-year study undertaken by a group of respected and influential journalists called the Committee of Concerned Journalists. *Id.* at 10–12. Kovach was curator of the Nieman Foundation for Journalism at Harvard; Rosenstiel is head of the Project for Excellence in Journalism and a former press critic at the *Los Angeles Times*. *Id.* at "About the Authors."

19. That is, "[t]he reporter's constitutional right to a confidential relationship with

II. THE PROBLEM: WE ARE ALL JOURNALISTS NOW AND IT'S HARD TO SEE THE DIFFERENCE AMONG US

Given technological, cultural, ideological, and economic changes, some commentators predict an imminent end of special protections for the press and a merger of the First Amendment's Free Speech and Free Press Clauses.[20] When everyone can be a member, the club can no longer promise special treatment.

As these commentaries demonstrate, if real questions of eligibility for press privileges lie ahead, they will more likely be raised by technological and economic changes than by tabloid journalism. So far, few questions involving shield law coverage of nontraditional journalists have arisen in the context predicted by this Article. Most subpoenas seeking information from journalists are served on those who unquestionably are "journalists," and the issues presented are not whether the journalists are protected, but to what extent and for what materials.[21] Much attention has been given to claims of shield law protection by freelance writers, investigative book authors,[22] talk

---

his source stems from the broad societal interest in a full and free flow of information to the public." Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting) (criticizing the majority's holding that a newsman's testimony before state or federal grand juries is not protected by the freedom of speech and press guarantees of the First Amendment). "A corollary of the right to publish must be the right to gather news. . . . [which] implies, in turn, a right to a confidential relationship between a reporter and his source." *Id.* at 727–28 (Stewart, J., dissenting).

20. *See, e.g.*, Anderson, *Freedom*, *supra* note 4, at 430–35 (recommending that new ways be found to differentiate between "the press" and other content providers in order to preserve protection); Mike Godwin, *Who's a Journalist?—II: Welcome the New Journalists on the Internet*, 13 MEDIA STUD. J. 38, 38–39 (1999) (lauding the end of special privileges for the established press).

21. The lawyers who serve subpoenas on reporters appear to choose the recipients carefully. For example, it appears that these lawyers think videotaped information will be more helpful than a print reporter's notes. *See* THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1999 1 (2001). In 1999, 77% of television newsrooms but only 35% of newspapers reported receiving at least one subpoena. *Id.* The organizations who reported receiving at least one subpoena received an average of 6.6, down from 9.1 in 1989. *Id.* Seventy-eight percent of challenged subpoenas were quashed, compared with 77% in 1989. *Id.* at 3. Fifty-five percent of the reported subpoenas were issued in criminal cases, 31% of all subpoenas by defendants and 23% of all subpoenas by prosecutors. *Id.* at 5–6. Television stations fully complied with the subpoenas served upon them 70% of the time, while newspapers fully complied only 22% of the time. *Id.* at 12.

22. *E.g.*, Shoen v. Shoen, 5 F.3d 1289, 1290–91 (9th Cir. 1993) (extending the journalist's privilege to the author of an investigative book compelled to testify and produce notes of interviews conducted with the defendant in a defamation suit); von Bulow v. von Bulow, 811 F.2d 136, 138–40, 147 (2d Cir. 1987) (declining to extend the journalist's privilege to the author of an unpublished book manuscript because the author failed to demonstrate her "intent to use material sought to disseminate information to the public and that such intent existed at the inception of the newsgathering process").

show hosts,[23] and pay-per-minute wrestling commentators,[24] but such claims are unlikely to pose major problems. For example, the recent five-month incarceration of a Texas English teacher and "novice crime writer" gained notoriety as the longest reported jail term ever for a U.S. "journalist" who was refusing to disclose information.[25] Nonetheless, the eventual decision by the Fifth Circuit did not even address the question of whether Vanessa Leggett, with no track record as an investigative author or reporter, was a journalist.[26] Instead, the Fifth Circuit assumed that she was a journalist but held that the First Amendment simply did not protect any journalist from questioning by a federal grand jury.[27]

What does raise the eligibility question is a whole new class of potential journalists: "With a $1,000 desktop computer and a connection to the Internet, anybody can reach an audience of thousands or millions . . . ."[28] Currently, only some journalists or some members of the press, as defined by federal court opinions and state statutes, are eligible for shield law protection—the right to refuse to reveal confidential sources and unpublished information.[29] Technological change challenges traditional definitions of "the press" that have been created and applied by a range of governmental bodies for a variety of purposes: who gets a press pass, who gets to be in the courtroom or on a press plane,

---

23. W. Zachary Malinowski, *Operation Plunder Dome: Independent Man Claims Privileges as a Newsman in Fighting Subpoena*, PROVIDENCE J.-BULL., Oct. 27, 2001, at A03 (reporting a radio talk show host's resistance to a subpoena and statement: "'I collect information. I protect sources. Then, I present the information to my audience . . . . That's a journalist.'").

24. *In re* Madden, 151 F.3d 125, 126–27, 131 (3d Cir. 1998) (holding that a wrestling commentator was not entitled to invoke the journalist's privilege shielding him from disclosing the identities of certain sources).

25. *Odds & Ends: Supreme Court Rejects Leggett's Appeal*, QUILL, June 2002, at 6–7 [hereinafter *Odds & Ends*] (discussing events leading up to the incarceration of Vanessa Leggett for refusing to turn over to a federal grand jury information pertaining to the murder of a Houston socialite); Daniel Scardino, *Vanessa Leggett Serves Maximum Jail Time, First Amendment-Based Reporter's Privilege Under Siege*, COMM. LAW., Winter 2002, at 1 (same).

26. In re Grand Jury Subpoenas, No. 01-20745 (5th Cir. Aug. 17, 2001).

27. *Id*. At the time she resisted a government subpoena, Leggett had no publication contract; however, after her release, she sold the "right to publish her planned book about the crime, her experience and the prosecutors' handling of the case." *Odds & Ends*, *supra* note 25, at 6–7.

28. Godwin, *supra* note 20, at 39 (debating whether or not a new generation of people publishing on the Internet qualify for the title of "journalist").

29. *See* Alexander, *supra* note 4, at 115 (noting that most state shield law statutes determine coverage by listing qualifying occupations and by listing the type of media with which the privilege user should be identified).

and what institutions are members of "the press" for some forms of taxation and other statutory regulations and privileges.[30]

Technological and economic changes push and pull at the journalistic value of maintaining independent voices: large media conglomerates threaten to result in too few independent voices; Internet publishing may bring too many. Market conglomeration and audience segmentation have grown up together.[31]

A. The Big Media[32]

The growing size and geographic range of many companies that own traditional news media entities have two effects: (1) it threatens the independence of the journalists who work for those entities, and (2) it blurs the lines that used to divide traditional news media forms.[33] For the first time in history, much of the news carried by traditional news media outlets is being produced by companies that originated outside journalism; it is, the journalists fear, "self-interested commercialism posing as news."[34] The owners of the major news media

> seem indistinguishable in most respects from other conglomerates. They devote their resources to a vast array of activities, only a fraction of which involve the gathering and dissemination of information to the public, and it is difficult to believe that they are any less eager to influence politics than their nonmedia counterparts.[35]

In the newspaper segment of the media, publicly held newspaper companies and other newspaper chains have become "dominant, owning 80[%] of the nation's nearly fifteen hundred daily newspapers, . . . a change that is diminishing the amount of

---

30. *See* Anderson, *Freedom*, *supra* note 4, at 430–32 (listing areas in which the press has received greater protection or more benefits than the public has under the First Amendment).

31. *See* Todd Gitlin, *Introduction* to PATRICIA AUFDERHEIDE ET AL., CONGLOMERATES AND THE MEDIA 11 (1997) (noting that the current diversity of media sources amounts to "immense varieties of segmented entertainment").

32. Because the "media" include many conduits and sources of information that no one would consider to be protected by the Free Press Clause of the First Amendment, I have tried to be consistent about referring to potentially protected media sources as the "news media," "the press," or "journalists." In this heading, aesthetics trumped precision.

33. *See generally* AUFDERHEIDE ET AL., *supra* note 31; GILBERT CRANBERG ET AL., TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY (2001); LEAVING READERS BEHIND: THE AGE OF CORPORATE NEWSPAPERING (Gene Roberts et al. eds., 2001).

34. KOVACH & ROSENSTIEL, *supra* note 18, at 13 (warning against losing the press "as an independent institution, free to monitor the other powerful forces and institutions in society").

35. Anderson, *Freedom*, *supra* note 4, at 455 (footnote omitted).

real news available to the consumer"[36] and "compromising the newspaper's continued role as a fiercely independent source of information and opinion judged relevant and necessary for public understanding in a free, democratic, capitalist society."[37] In particular, public ownership by "passive investors interested in financial return, not news quality, has distorted the direction of change caused by economic and technological forces."[38] Not only are newspaper journalists threatened by broadcasting, with its many forms and its emphasis on entertainment, but both economic and cultural forces imperil journalism's belief in its political role as the guardian of the public trust.[39] Thus, for example, daily newspaper readership has declined from the 60% who in 1994 said they had read a newspaper the day before to 47% in 2000 and to 41% in 2002.[40]

Because of conglomeration, many media companies now provide news through multiple outlets: broadcasting, print, and online. In addition, differences between news media sources are evaporating so that "[w]e are all going to be just media journalists,"[41] rather than newspaper reporters or broadcast journalists or web publishers. Almost all daily newspapers now

---

36. CRANBERG ET AL., *supra* note 33, at xi, 2.

37. *Id.* at 6.

38. *Id.* at 7.

39.

> This is journalism's age of melancholy. Newspaper people, once celebrated as founts of ribald humor and uncouth fun, have of late lost all their gaiety, and small wonder. They have discovered that their prime duty is no longer to maintain the republic in well-informed condition—or to comfort the afflicted and afflict the comfortable . . . —but to serve the stock market with a good earnings report every three months . . . .

Russell Baker, *What Else Is News*, N.Y. REV. BOOKS, July 18, 2002, at 4 (reviewing, among others, LEONARD DOWNIE, JR. & ROBERT G. KAISER, THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL (2002), and TODD GITLIN, MEDIA UNLIMITED: HOW THE TORRENT OF IMAGES AND SOUNDS OVERWHELMS OUR LIVES (2002)), *available at* www.nybooks.com/articles/15581 (last visited Jan. 4, 2003).

40. *See Newspapers Face Ongoing Challenges*, QUILL, July–Aug. 2002, at 8 (citing poll results reported in June 2002 by the Pew Research Center for the People & the Press measuring the number of people who had read a newspaper the day before).

41. Geimann, *supra* note 2, at 5 (quoting Dan Potter, news director at WBAP-AM in Dallas-Fort Worth, at the Radio-Television News Directors Association 2000 convention). The Association for Education in Journalism and Mass Communication (AEJMC) Task Force on Teaching and Learning in the New Millennium recommended that journalism education should emphasize cross-media rather than media-specific education, and offer content specializations rather than concentrations along the lines of particular types of news media. *See* John Pavlik et al., *Information Technology: Implications for the Future of Journalism and Mass Communication Education*, *in* JOURNALISM AND MASS COMMUNICATION EDUCATION, *supra* note 2, at 17–18. For a discussion of how journalism education can accommodate these changes, see Jeff South & June Nicholson, *Cross-Training: In an Age of News Convergence, Schools Move Toward Multimedia Journalism*, QUILL, July–Aug. 2002, at 10.

have websites, which they often treat "as a first draft of tomorrow's newspaper."[42] Some large newspapers update their websites on a twenty-four-hour basis.[43] In addition to the blurring of medium lines, some commentators foresee a merger of serious and tabloid journalists.[44] When commercial interests predominate, news media may serve only small segments of audience, rather than as bridges across audiences. This concern is significant given the prevailing view of the purpose of journalism: to serve readers as citizens.[45] Finally, journalism's role in national politics is undergoing scrutiny because of growing globalization of the subject matter, constituency, institutions, and methods of journalism.[46]

B. The "Unmedia"[47]

Internet availability of literally innumerable sources of news has shifted newsgathering power from journalists to an audience that can pick and choose from among the seemingly infinite information resources available on the Web. By the summer of 2000, half of all U.S. residents sometimes went online to get information or news.[48] Over three-fourths of those surveyed in 2001 said that the Internet should have the same First Amendment protection as books and newspapers, a significant increase from the 56% who said the Internet deserved full First Amendment protection four years earlier.[49] Statistics alone do not show the rapid rise, broad stretch, and widespread acceptance of

---

42. Geimann, *supra* note 2, at 7.

43. *Id.* at 8.

44. Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?*, 9 DEPAUL-LCA J. ART. & ENT. L. & POL'Y 1, 6–7, 33 (1998) (asserting that "the convergence . . . comes more from the 'serious side,' . . . into the tabloid world").

45. THOMAS C. LEONARD, NEWS FOR ALL: AMERICA'S COMING-OF-AGE WITH THE PRESS 177 (1995) ("When the editorial content of a publication is incidental, a newspaper or magazine may live on and hold an audience, but its readers as citizens are gone.").

46. *See* WILLIAM E. BERRY ET AL., LAST RIGHTS: REVISITING FOUR THEORIES OF THE PRESS 175–76 (John C. Nerone ed., 1995) (contending that the press is no longer "uniquely important to the functioning of a democracy" because it is no longer the main conduit of information between the people and the government, no longer a model public sphere, on the decline as a "definer of facticity," and only one voice among many, not the "voice of the nation-state").

47. By "unmedia," I mean nontraditional sources of news and information. Again, the less precise term is used in this heading for aesthetic reasons.

48. Geimann, *supra* note 2, at 6.

49. *See* Kenneth A. Paulson, *Good News, Bad News in Latest First Amendment Survey*, *Foreword* to FIRST AMENDMENT CENTER, STATE OF THE FIRST AMENDMENT 2001 1, 3 (Natilee Duning ed., 2001) (summarizing results of a survey of Americans' views on the current state of First Amendment freedoms of speech, press, assembly, religion, and petition), *available at* http://www.freedomforum.org/templates/document.asp?documentID=14295 (last visited Jan. 4, 2003).

Internet journalism. Reports already are marking ten years of research about online journalism[50] and studying 175 online news sites to see whether they include credibility statements.[51]

Because of Internet news availability, "[t]he notion of the press as a gatekeeper . . . no longer strictly defines journalism's role."[52] Yet, "[i]t is impractical to imagine people being their own editor and sorting through reams of unfiltered information[;] . . . the press needs to concentrate on synthesis and verification."[53]

Many Internet "journalists" are affiliated with recognized news media organizations and doing recognized news media jobs, such as reporter and editor. They must logically be covered by press privileges despite the new medium in which they are working. The real coverage question concerns the nontraditional Internet journalist: "Should those news and information disseminators who have no institutional backing, credentials or credibility be afforded the same protections as those who work for established newspapers, magazines and broadcast stations?"[54]

III. BACKGROUND OF THE JOURNALIST'S PRIVILEGE

Reporters have an ethical or moral obligation not to reveal certain information no matter what the law provides.[55] Thus, for example, the American Society of Newspaper Editors' Statement of Principles requires: "Pledges of confidentiality to news sources

---

50. *See* ASS'N FOR EDUC. IN JOURNALISM & MASS COMMUNICATION, COMMUNICATION TECH. & POL'Y DIV., 2002 MIAMI BEACH CONVENTION PAPER ABSTRACTS, *at* http://www.aejmc.org/convention/2002convabs/ctp02.html (last visited Jan. 4, 2003) (producing the paper abstract for Jane B. Singer & Sheryl Thiel, *In Search of the Forest Amid a Growing Number of Trees: Online Journalism Scholarship at the 10-Year Mark*).

51. *See id.* (producing the paper abstract for William P. Cassidy, *Offering Help Creating "The Daily Me": A Content Analysis of the Credibility and Editorial Policy Statements of Online News Sites*). According to the abstract, Web-only news sites were more likely than sites affiliated with newspapers to publish credibility statements, which should include information about their "standards, values, and corporate relationships." *Id.*

52. KOVACH & ROSENSTIEL, *supra* note 18, at 23 (arguing that even if the *New York Times* decides not to publish something, one of countless websites will).

53. *Id.* at 47 (emphases omitted).

54. Alexander, *supra* note 4, at 125.

55. *See, e.g.*, JACK FULLER, NEWS VALUES: IDEAS FOR AN INFORMATION AGE 58–60 (1996) ("Legal concerns have unfortunately come to dominate the debate over promises of confidentiality to news sources. But let's put the legal arguments aside and deal with what journalists should and should not do, based on their values and disciplines."). The author goes on to say that journalists promise confidentiality for many reasons but that they are most justified when confidentiality can actually increase the total amount of useful information available to the public. *Id.* at 58. He also cautions that "[t]he dangers of relying on anonymous sources should lead newspapers to discourage . . . unequivocal promises." *Id.* at 59–60.

must be honored at all costs, and therefore should not be given lightly."[56]

American reporters' belief in keeping promises to sources has deep roots: Benjamin Franklin's brother was imprisoned for refusing to name the author of a story in his newspaper,[57] and John Peter Zenger, in jail for libeling a British colonial governor in 1734, also refused to give the sources of his information.[58] The first claim that an American reporter was "privileged" not to reveal the name of a confidential source apparently was made in 1848 when a *New York Herald* reporter refused to reveal the source of a copy of a treaty and Congress held him in contempt.[59] In 1896, the Maryland legislature adopted the first state statute granting a testimonial privilege to reporters;[60] not until 1933 was the next state shield law adopted.[61] Having achieved little recognition of the journalist's privilege in the courts or the legislatures, the American Newspaper Guild in 1934 adopted a canon that required a newsperson to refuse to reveal confidential sources before a court or an investigative body.[62]

Whether journalists succeed in their claims for protection of the newsgathering process seems to depend on the current balance between the credibility of news organizations and the

---

56. AMERICAN SOCIETY OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES art. VI (1996), *available at* http://www.asne.org/kiosk/archive/principl.htm (last visited Oct. 14, 2002). Other representative codes of ethics and statements of principles say much the same thing: identify your sources whenever possible, use confidential sources only when necessary, but keep your promises. *See* SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (1996), *available at* http://www.spj.org/ethics.asp (last visited Oct. 17, 2002); ASSOCIATED PRESS MANAGING EDITORS, CODE OF ETHICS (1995), *available at* http://www.apme.com/about/code_ethics.shtml (last visited Oct. 14, 2002); RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, CODE OF ETHICS AND PROFESSIONAL CONDUCT (2000), *available at* http://www.rtnda.org/ethics/coe.html (last visited Oct. 14, 2002).

57. *See* Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 234 (1973) (quoting B. FRANKLIN, AUTOBIOGRAPHY 30 (H. Weld ed., 1848)).

58. *See* MAURICE VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS: THE CITIZEN'S RIGHT TO KNOW VERSUS THE LAW'S RIGHT TO CONFIDENTIAL NEWS SOURCE EVIDENCE 5–6 (1979) (noting that Zenger's acquittal by a sympathetic colonial jury set a precedent "whereby journalists could expose practices of public officials that might be used to hold them accountable to the people").

59. *See* Mark Neubauer, Comment, *The Newsman's Privilege After* Branzburg*: The Case for a Federal Shield Law*, 24 UCLA L. REV. 160, 161 & n.7 (1976) (discussing *Ex parte* Nugent, 18 F. Cas. 471 (D.C. Cir. 1848)).

60. Ervin, *supra* note 57, at 236 & n.7; Scardino, *supra* note 25, at 16 (observing that by the end of the nineteenth century the press had enough public support to advocate for a testimonial privilege in "the political arena rather than the courtroom").

61. Ervin, *supra* note 57, at 236 & n.8 (explaining that during this thirty-seven year gap courts remained reluctant to recognize any testimonial privilege).

62. *Id.* at 236 & n.10, 237 (stating that although this canon may have led to some activity by state legislatures, it did not cause "the courts to alter their previous posture in press privilege cases").

visibility of government efforts to use reporters as investigators.[63] In the late 1960s, so many subpoenas were issued to reporters that many questioned whether the government's motives were to harass the press or to gather information.[64] The Nixon Administration was "singularly inhospitable to the press," and commentators depicted the administration's subpoenas as "part of a comprehensive anti-press strategy."[65] The Reporters Committee for Freedom of the Press was created in 1970 in response to the many subpoenas issued by the Justice Department, in particular the subpoena issued to *New York Times* reporter Earl Caldwell, who was ordered to reveal his sources within the Black Panther party to a federal grand jury.[66] Caldwell's case would become one of three consolidated cases in which the U.S. Supreme Court decided in *Branzburg v. Hayes* that the First Amendment provided no journalist's privilege.[67] Before that decision, there were seventeen state shield statutes.[68] In the six years after *Branzburg*, nine states enacted state shield laws.[69] By 2000,

---

63. *See id.* at 241–60 (chronicling the press-government conflicts leading up to and following the Supreme Court's landmark decision refusing to shield reporters in *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

64. *See, e.g.*, Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 229–30 (1971) [hereinafter Blasi, *Newsman's Privilege*] (observing that although the volume of subpoenas eventually subsided, "everyone dug in for a long legal siege"); Neubauer, *supra* note 59, at 162 n.13, 164 n.25 (documenting the "remarkable" number of newsman subpoenas issued during the Nixon Administration and asserting that during the first eighteen weeks of 1975, more subpoenas were issued against newsmen than during the entire previous three-and-one-half year period); Margaret Sherwood, Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CAL. L. REV. 1198, 1200–01, 1202 & n.17 (1970) (advancing several reasons for the "sudden rash of subpoenas" and noting that it was virtually impossible to determine the total number issued).

65. Bates, *supra* note 3, at 4.

66. *See Reporters Committee for Freedom of the Press: About the Reporters Committee for Freedom of the Press*, at http://www.rcfp.org/about.html (last visited Nov. 25, 2002) (emphasizing that the Committee was formed in order to provide legal assistance to journalists whose First Amendment rights come under fire).

67. *See* Caldwell v. United States, 434 F.2d 1081, 1089 (9th Cir. 1970) (holding that Earl Caldwell was not required to appear before a federal grand jury absent government demonstration of a "compelling need for the witness's presence"), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972); Branzburg v. Pound, 461 S.W.2d 345, 348 (Ky. 1970) (refusing to extend the journalist's privilege to a Kentucky newspaperman called to reveal the identity of his sources before a state grand jury), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972); *In re* Pappas, 266 N.E.2d 297, 302–03 (Mass. 1971) (holding that "there exists no constitutional privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury"), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

68. James C. Goodale et al., *Reporter's Privilege*, 580 PLI/Pat 27, 37 (1999).

69. *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5426, at 744 & n.65 (1980).

thirty-one states and the District of Columbia had adopted shield laws.[70]

Although there are recurring questions as to whether a constitutionally based privilege even exists—after all, the Supreme Court held in *Branzburg* that the First Amendment did not provide one—many federal courts not only have recognized a privilege, but also have applied it to a broad range of claimants as long as they are acting as journalists.[71] State statutes, on the other hand, are more likely to limit coverage to those with a substantial connection to established news organizations.

If press credibility is necessary to expand press protection, the early twenty-first century may not be a good time to expect success.[72] In 1999, only 21% of Americans said they thought the press cared about people, and less than half, only 45%, thought the press protected democracy.[73] In a 2001 survey, 82% of respondents said it was important for the news media to "hold the government in check," but 71% said it was important for the government to "hold the media in check."[74] More people were concerned about too much news media freedom than were concerned about too much government censorship.[75]

---

70. The states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, and Tennessee. For a jurisdiction-by-jurisdiction review with citations and descriptions, see Goodale et al., *supra* note 68, at 37 & n.4, 82–426.

71. *See* Scardino, *supra* note 25, at 17–18 (observing that many lower federal courts, in allowing the privilege, focus on whether the sources sought are confidential, whether the person asserting the privilege is a journalist, and whether the information sought is "news").

72. *See* FIRST AMENDMENT CENTER, *supra* note 49, at 13–15 (revealing that, according to studies, Americans have expressed less support for the freedom of the press relative to other First Amendment freedoms); *see also* Sandra F. Chance, *The First Amendment in the New Millennium: How a Shifting Paradigm Threatens the First Amendment and Free Speech*, 23 U. ARK. LITTLE ROCK L. REV. 169, 169 (2000) (declaring that while Americans have traditionally appreciated and valued broad First Amendment freedoms, during the past ten years there has been a "distinct and alarming shift" as the media faced an unprecedented backlash, "new anti-media legislation, and a rise in court decisions that chip away at . . . First Amendment protections for the news media").

73. KOVACH AND ROSENSTIEL, *supra* note 18, at 10 (stating that these figures were down from 41% and nearly 55%, respectively, in 1985).

74. Paulson, *Foreword* to FIRST AMENDMENT CENTER, *supra* note 49, at 1 (suggesting that although most Americans respect the principles of free speech and free press in theory, they are "often troubled by their practice").

75. *Id.* (revealing further that 46% of Americans believe that the press, in particular, enjoys too much freedom).

A. Federal Law: Application of the Journalist's Privilege Depends on Whether the Claimant Is Acting as a Journalist as Determined by Looking at Purpose, Process, and Product

The theoretical foundation for a federal journalist's privilege may be found in the rules of evidence as well as in the Constitution.[76] Under the common law, commentators[77] and judges did not recognize a journalist's privilege,[78] but judges often were lenient with reporters who claimed it.[79] Under the Federal Rules of Evidence, the federal courts are authorized to decide the privilege of a witness under "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[80] Using this authority, and despite the holding by the Supreme Court in *Branzburg v. Hayes* that there is no journalist's First Amendment privilege, a number of lower federal courts have recognized and defined a journalist's privilege that applies in some circumstances.[81]

Two First Amendment reasons are given to support the privilege: (1) the need to protect the free flow of information and ideas, and (2) the need to keep the government from interfering with the press or using it as an investigative arm.[82] First, the right to publish is said to be worthless without the right to gather information; shield law protection is necessary because

---

76. *See* Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1, 2–3 (1986) (recounting the development of the journalist's privilege in American law and identifying its theoretical basis).

77. In Professor Wigmore's view, a privilege should be recognized when the communication originates in confidence, confidentiality is essential to the relationship, the relationship is one which the community wants to foster, and the injury to the relationship from the disclosure would outweigh the benefit to the outcome of litigation. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (John T. McNaughton ed., 1961). Professor Wigmore concluded that the journalist's privilege, like some other profession-based privileges, did not meet these criteria and that the privilege should not be adopted without evidence that the occasional disclosure "would be injurious to the general exercise of the occupation." *Id.* § 2286, at 532.

78. 23 WRIGHT & GRAHAM, *supra* note 69, § 5426, at 716 (recognizing that "it is now universally conceded that there was no journalist's privilege at common law" and explaining that the courts found no favor in journalists' arguments that compelled disclosure would breach journalistic ethics, violate employer regulations, or constitute an uncompensated taking of a reporter's proprietary interest in information).

79. *See* Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 817–20 (1984) (noting that some judges refused to compel disclosure for "technical reasons," and others ordered disclosure but imposed only weak penalties for failure to comply).

80. FED. R. EVID. 501.

81. *E.g.*, von Bulow v. von Bulow, 811 F.2d 136, 141–42, 147 (2d Cir. 1987) ("We hold that an individual claiming the journalist's privilege must demonstrate, through competent evidence, the intent to use material sought to disseminate information to the public and that such intent existed at the inception of the newsgathering process.").

82. *See* Monk, *supra* note 76, at 14–15.

some reporting is dependent on informants, and some informants are unwilling to be named because of fear of embarrassment or harm.[83] Those informants will be deterred by the threat of being named and, as a result, reporters will either not get or not publish important information.[84] As a result of the journalist's privilege, we can read stories based on information obtained from inside sources with details about official corruption, government abuse, business malfeasance, and organized crime. Just as important, according to an empirical study conducted in the early 1970s, confidential sources often are used to verify information or to more accurately assess its importance.[85] On the other hand, public disclosure of confidential sources used to gather information has a number of unfortunate consequences: it "discourage[s] individuals . . . from coming forward with information," "open[s] an organization to unwanted scrutiny," and makes a reporter's investigation "impossible to carry out."[86] Furthermore, the extent of interference with the journalistic process is significant: "[s]ubpoenas are inherently, invariably, inescapably burdensome."[87] Moreover, even though responding to subpoenas requires much time and expense, the subpoenas often seek information that is only marginally relevant.[88] Complying with a subpoena may also have an adverse impact on a journalist's credibility, as testifying for one side may make the journalist look partisan.[89]

---

83. 23 WRIGHT & GRAHAM, *supra* note 69, § 5426, at 719 (summarizing the arguments supporting legislative creation of the journalist's privilege).

84. *Id.* ("[I]n either event, the public will be deprived of access to information needed for intelligent exercise of First Amendment rights."). Other arguments mentioned by the treatise authors are that journalists should have parity with other professional groups such as doctors and lawyers and that journalists, because they are information gatherers, are more susceptible to being subpoenaed. *Id.* § 5426, at 720–22.

85. Blasi, *Newsman's Privilege*, *supra* note 64, at 245–53. Blasi concluded that "good reporters use confidential source relationships mainly for the assessment and verification opportunities that such relationships afford" and that "the adverse impact of the subpoena threat has been primarily in 'poisoning the atmosphere' so as to make insightful, interpretive reporting more difficult rather than in causing sources to 'dry up' completely." *Id.* at 284.

86. FULLER, *supra* note 55, at 63–64 (noting that the reasons advanced by government agencies for nondisclosure of information are often the same).

87. Bates, *supra* note 3, at 10 (arguing that subpoenas devour time and resources better used for other purposes and entangle people in the criminal process).

88. *Id*. (quoting Judge Richard Posner's statement that subpoenas can lawfully require testimony about activities both "intensely private and entirely marginal to the purpose of the inquiry").

89. *See* Blasi, *Newsman's Privilege*, *supra* note 64, at 266–67 (suggesting that the subpoena threat may puncture the cooperative atmosphere between reporter and source by redirecting attention to the question of the reporter's loyalties). Finally, complying with subpoenas may subject journalists to suit for breaking confidences. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991) (concluding that the First Amendment does

Despite the constitutional arguments for a journalist's privilege, the U.S. Supreme Court ruled in *Branzburg v. Hayes* that a journalist could not rely on an absolute First Amendment-based privilege to refuse to testify when questioned by a grand jury.[90] As already noted, within the next ten years, nearly every circuit court had nevertheless found a qualified journalist's privilege based on the odd combination of opinions in *Branzburg*:[91]

> The majority rejected the claim of a reporter's testimonial privilege; Justice Powell seemingly recognized it. The majority rejected the call for a case-by-case, conditional balancing of interests; Justice Powell mandated it. The majority indicated that a journalist could quash a subpoena only by showing that it was issued in bad faith; Justice Powell extended the zone to good-faith subpoenas seeking "remote and tenuous" information. The majority said that prosecutors must treat journalists like other citizens; Justice Powell suggested that, in response to a motion to quash, prosecutors may need to demonstrate that the information sought is relevant or necessary, a showing not required for ordinary witnesses. Yet Justice Powell joined the majority opinion. Indeed, his vote *made* it the majority opinion.[92]

Thus, after *Branzburg*, federal courts continued to develop the federal common law on a case-by-case basis,[93] and most recognized a qualified journalist's privilege, at least in a non-

---

not prohibit a plaintiff from recovering damages for a reporter's breach of a promise of confidentiality).

90. 408 U.S. 665, 706–09 (1972). The first claim by a reporter that the First Amendment justified a refusal to provide information came in a case in which a columnist reported several allegedly defamatory statements from an anonymous CBS source about actress Judy Garland. Garland v. Torre, 259 F.2d 545, 547 (2d Cir. 1958). Garland sued CBS; in her deposition, the reporter refused to answer questions about the source of the statements. *Id.* The Second Circuit held that the First Amendment did not confer a right to refuse to answer questions—at least when the questions "went to the heart of the . . . claim." *Id.* at 548–50.

91. The Sixth Circuit refused to recognize a journalist's privilege in a grand jury context and criticized other circuits for relying on the dissenting opinions in *Branzburg* to find a privilege in other contexts. *See In re* Grand Jury Proceedings, 810 F.2d 580, 584–85 (6th Cir. 1987). The First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and District of Columbia Circuits have recognized a qualified privilege in some circumstances. Shoen v. Shoen, 5 F.3d 1289, 1292 n.5 (9th Cir. 1993); *see also* Goodale et al., *supra* note 68, at 82–189 (producing a jurisdiction-by-jurisdiction review of the journalist's privilege).

92. Bates, *supra* note 3, at 6.

93. *See* Riley v. City of Chester, 612 F.2d 708, 714 n.6 (3d Cir. 1979) (quoting a comment by the principal drafter of the Federal Rules of Evidence that "[t]he language of Rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis").

grand jury setting.[94] Their decisions were based on Justice Powell's concurring view that even in a grand jury setting, "[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."[95] In recognizing a qualified privilege, as Justice Powell appeared to suggest, many lower courts also adopted the balancing test specifically advocated by Justice Stewart in his dissent.[96]

By the late 1990s, however, the Fifth Circuit had joined the Sixth Circuit in reading *Branzburg* literally and began to severely limit the First Amendment privilege in criminal cases. First, the Fifth Circuit rejected the existence of a privilege in criminal cases when the information sought is nonconfidential.[97] Then, in the highly publicized Vanessa Leggett case of 2001, the Fifth Circuit held that the First Amendment provided little or no protection for reporters in a grand jury investigation; only governmental harassment or oppression would relieve a reporter from appearing before a grand jury.[98]

Assuming that a federal journalist's privilege exists in other settings, three widely discussed federal appellate court cases have addressed the question of when a nontraditional "journalist" is protected by the journalist's privilege.[99] Based on the reasoning in those cases, eligibility for the federal constitutional privilege is based on the purported journalist's purpose, process, and product, not on the claimant's employment

---

94. In addition to the sources cited in note 81 *supra*, see Calvert, *supra* note 15, at 413.

95. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

96. *See id.* at 743 (Stewart, J., dissenting) (arguing that when a reporter is subpoenaed by the grand jury and asked to reveal confidences, the government must show probable cause that the reporter has information relevant to a specific violation of law, the information could not be obtained through other means less destructive of First Amendment rights, and a compelling and overriding interest exists in the information).

97. United States v. Smith, 135 F.3d 963, 969, 972 (5th Cir. 1998) (reasoning that Justice Powell's concurrence in *Branzburg* meant that the First Amendment protected only against harassment of newspersons summoned to testify before grand juries). The Fifth Circuit previously had recognized a qualified privilege not to disclose the identities of confidential sources in civil cases. *See* Miller v. Transamerican Press, Inc., 621 F.2d 721, 725 (5th Cir. 1980) (explaining, however, that the privilege is not absolute and that it must yield in the present libel case).

98. *In re* Grand Jury Subpoenas, No. 01-20745 (5th Cir. Aug. 17, 2001) (per curiam).

99. Refer to notes 101–03 *infra* and accompanying text (discussing von Bulow v. von Bulow, 811 F.2d 136 (2d Cir. 1987); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993); and *In re* Madden, 151 F.3d 125 (3d Cir. 1998)). Coverage of nontraditional reporters was raised in several earlier federal cases; the courts usually applied the privilege to anyone whose function or purpose was similar to "investigative reporting." *See, e.g.*, Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436–37 (10th Cir. 1977) (concluding that a documentary filmmaker was not precluded from the privilege because his mission was investigative reporting for use in preparing a documentary film).

status or on the medium or mode of communication. That is, the claimant must have the intent to disseminate information to the public at the time of newsgathering, must be engaged in investigative reporting, and must be gathering "news."[100]

In the first opinion, the Second Circuit decided that the lack of intent to disseminate information to the public at the time the information was gathered made the gatherer ineligible for the journalist's privilege, though she now intended to write a book.[101] Expanding on that rationale, the Ninth Circuit found an investigative book author eligible for the journalist's privilege because "[w]hat makes journalism journalism is not its format but its content."[102] Following the reasoning of the Second and Ninth Circuits, the Third Circuit held that a reporter who produced recorded wrestling commentaries for a pay-per-minute telephone hotline was not eligible for the privilege in connection with his commentaries.[103] Instead, the First Amendment privilege was available only to those who were (1) engaged in investigative reporting, (2) gathering news, and (3) intending to disseminate the news to the public at the beginning of the process.[104] In particular, the Third Circuit held, the reporter was not a journalist while he was engaged in the wrestling commentaries because his "primary goal [was] to provide advertisement and entertainment—not to gather news or disseminate information."[105]

Since *Branzburg*, there have been recurring calls for a federal shield law or for a reconsideration of that decision.[106] Nearly one hundred proposed federal statutes were introduced in the six years after the *Branzburg* decision.[107] None were passed, a failure attributed in part to an inability to reach consensus on

---

100. Calvert, *supra* note 15, at 430–31 (distilling several principles from the *von Bulow*, *Shoen*, and *Madden* trilogy of federal decisions).

101. *von Bulow*, 811 F.2d at 145–46 (remarking that "[a]n individual's 'memories' are not privileged by virtue of the First Amendment merely because, at a later date, those memories are committed to writing").

102. *Shoen*, 5 F.3d at 1293 (explaining that the privilege is designed to protect investigative reporting, not a particular medium of communication).

103. *Madden*, 151 F.3d at 131.

104. *Id.* at 131.

105. *Id.* at 130. Other federal courts have applied the privilege to the editors and employees of newsletters with specific audiences as well as scholarly journals; two business school professors writing a book about computer software battles also were protected. See the discussion in Alexander, *supra* note 4, at 120–23.

106. *See, e.g.*, Marcus, *supra* note 79, at 866–67 (calling for a uniform national standard for the national newsgathering media).

107. Monica Dias, *Leggett's Case Revives Talk About Shield Law*, NEWS MEDIA & L., Winter 2002, at 7, *available at* http://www.rcfp.org/news/mag/v.cgi?26-1/cov-leggetts (last visited Oct. 14, 2002).

the definition of a "journalist" and to the insistence of the press on an absolute privilege, not a qualified one.[108] In addition, because most circuits soon recognized a qualified journalist's privilege, and because the Attorney General put into place more journalist-friendly guidelines for the issuance of subpoenas, "most of the post-*Branzburg* conflicts . . . arose in state courts."[109]

B. State Law: Application of the Journalist's Privilege Depends Not Only on Whether the Claimant is Acting as a Journalist but Also on Whether There Is a Substantial Connection with an Established News Organization

In contrast to the federal decisions, most state shield statutes predicate protection on the journalist's connection with an established news media entity as well as the journalist's involvement in journalistic activities. Like the federal journalist's privilege, most state shield statutes appear to be based on the rationale of protecting the free flow of information to further self-governance.[110] As of summer 2002, thirty-one states and the District of Columbia had enacted statutes shielding reporters from contempt citations for refusing to reveal the names of their confidential sources.[111] In addition to protecting against

---

108. *Id.*

109. 23 WRIGHT & GRAHAM, *supra* note 69, § 5426, at 738–39, 745–47, 748 & n.91, 749 (concluding that the press eventually lost interest in seeking a federal legislative solution to the subpoena problem). The Department of Justice guidelines established in 1970 called for the department to: balance First Amendment values with the need for the information sought by the subpoena; make a reasonable attempt to get the information from alternative sources; negotiate with the news media before issuing a subpoena; get Attorney General approval before issuing a subpoena; and specify reasonable grounds for belief that the information sought by the subpoena is essential. *See* 28 C.F.R. § 50.10 (1970).

110. For example, Minnesota's statute states:

> In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. . . . The purpose . . . is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its sources.

MINN. STAT. ANN. § 595.022 (West 2000). However, "[o]nly a few states . . . really give a strong indication of the policy reasons behind enactment." Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Court Interpretation of the Journalist's Statutory Privilege*, 23 J. LEGIS. 215, 228 (1997) (exploring the effectiveness of state shield laws and how they have been interpreted by state appellate courts).

111. *See* Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States with Shield Laws*, 4 COMM. L. & POL'Y 325, 338–54 (1999) (reporting on the thirty states plus the District of Columbia with shield laws as of 1999); Alexander, *supra* note 4, at 107 (noting that it was not until the last half of the twentieth century that most states began passing shield laws); Alexander & Bush, *supra* note 110, at 219–29 (reporting results of a study regarding how state shield law protections are "faring in court when they are asserted by journalists or challenged by others"); Goodale

disclosure of confidential sources and confidential information, eighteen states and the District of Columbia protect against disclosure of any unpublished information, even if the disclosure is nonconfidential.[112] Some shield laws provide absolute protection, while most provide a qualified privilege.[113] When a state statute provides an absolute privilege but the information is sought by a criminal defendant, the privilege may be balanced against constitutional protections for criminal defendants.[114]

A survey of state court interpretation and application of the shield statutes concluded that their effectiveness "varies tremendously from state to state, both because of the difference in shield law language and in how state courts interpret them."[115] According to the survey, courts in states with absolute privileges are more likely than courts in other states to protect the names of sources, and courts in all states are more likely to protect the names of sources "and possibly confidential information rather than eyewitness and nonconfidential information."[116]

State statutes define the protected class in many different ways, but the protected journalist usually must meet two requirements: (1) he or she must have a substantial connection with or relationship to a recognized or traditional news media entity, and (2) he or she must be engaged in recognized or traditional news media activities.

1. The Journalist Must Have a Substantial Connection with or Relationship to Recognized or Traditional News Media. For example, California defines the protected class as including "[a] publisher, editor, reporter, or other person connected with or

---

et al., *supra* note 68, at 82 (introducing a jurisdiction-by-jurisdiction review). North Carolina was added to the list in 1999. Alexander, *supra* note 4, at 97. In addition to the thirty-one states with shield statutes, state court protections for journalists have been recognized in another fifteen states. Alexander & Bush, *supra* note 110, at 217 & n.18.

Most states provide a privilege against testifying. A few provide immunity from contempt, a difference that affects the sanctions that can be imposed on a journalist who is a party to a civil lawsuit. *See, e.g.*, CAL. EVID. CODE § 1070 (West 1995).

112. Fargo, *supra* note 111, at 349 (explaining that protection is not uniform among the states recognizing a nonconfidential privilege).

113. Alexander & Bush, *supra* note 110, at 218 (finding that most states with a qualified privilege "require a First Amendment balancing test to determine whether the privilege applies to a given situation").

114. *Compare* Delaney v. Super. Ct., 789 P.2d 934, 965 (Cal. 1990) (holding that California's state constitutional and statutory shield law protection may be overcome if not disclosing the information would deprive a criminal defendant of the federal constitutional right to a fair trial), *with* Miller v. Super. Ct., 986 P.2d 170, 179 (Cal. 1999) (declaring that California's shield law protection, enacted as a state constitutional amendment, does not yield to the prosecutor's state constitutional rights to due process).

115. Alexander & Bush, *supra* note 110, at 226.

116. *Id.*

employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed."[117] Pennsylvania requires that the journalist be "engaged on, connected with, or employed by any newspaper . . . or any magazine of general circulation."[118] New York's statute includes only "professional" journalists, a category which includes regular employees as well as those who are "otherwise professionally affiliated for gain or livelihood" with traditional news media organizations.[119]

Perhaps because of this specificity, few state courts have interpreted or applied state shield statutes in cases involving nontraditional news media.[120] In California, for example, only one case has raised the issue of extending the statute beyond its plain language.[121] In that case, the California Court of Appeal held that because of his connections with traditional news media entities, the newsperson's shield law encompassed a freelance writer both before and after he entered into a publication agreement with a magazine.[122]

Even more specific are the state statutes requiring that the journalist must be frequently or regularly employed, or be employed for financial gain, as a journalist. This particular subcategory, requiring either regular employment or financial gain, seems suspect on equal protection grounds.[123] Alaska, Oklahoma, and Louisiana all define the protected class as including only those individuals who are "regularly engaged" in the business or activities of journalism.[124] Illinois allows reporters to qualify as "regularly engaged" in journalism if they work for

---

117. CAL. CONST. art. 1, § 2(b); CAL. EVID. CODE § 1070(a) (West 1995).

118. 42 PA. CONS. STAT. § 5942 (2002).

119. N.Y. CIV. RIGHTS LAW § 79-h (Consol. 2002).

120. For example, in holding that an investigative book author was covered by the journalist's privilege, the court in *Shoen v. Shoen* noted that the trial court had found the author was excluded under Arizona's press shield law, which specifies that the person claiming the shield must be "engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station." 5 F.3d 1289, 1291 n.3, 1294 (9th Cir. 1993); *see also* ARIZ. REV. STAT. ANN. § 12-2237 (West 1994).

121. *See* People v. Von Villas, 13 Cal. Rptr. 2d 62, 78–79 (Cal. Ct. App. 1992).

122. *Id.* at 79. The appellate court upheld the trial court on the ground that both the pre-contract and the post-contract information was protected, in part because the claimant's position as a freelancer was not distinguishable from that of an employee, but it also upheld the trial court's alternative conclusion that the pre-contract unpublished information was irrelevant. *Id.* at 232.

123. *See* Monk, *supra* note 76, at 29 (explaining that these requirements may exclude salaried journalists who are less than full-time, or reporters for student newspapers, both of whom are "equally likely to be engaged in the kind of investigative reporting for which confidential sources and information are often important").

124. ALASKA STAT. § 09.25.390(4) (Michie 2000); LA. REV. STAT. ANN. § 45:1451 (West 1999); OKLA. STAT. tit. 12, § 2506(7) (1997).

news media organizations, even if they do so on a part-time basis.[125] Delaware requires those claiming the privilege to have earned their "principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks [to have] spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination . . . to the general public."[126]

2. The Journalist Must Be Practicing Journalism, that Is, Gathering or Processing Information Intended for Dissemination to the Public, at the Time of Obtaining Information. California's statute is fairly typical of those imposing this requirement—granting immunity to all those who qualify for refusing to disclose the names of sources and "for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public."[127] The meaning of this phrase was interpreted in Rancho Publications v. Superior Court, where the Court of Appeal held that paid advertorials criticizing a local community hospital, although published in a weekly newspaper, did not qualify as "information for communication to the public" protected by the journalist's shield law.[128] Because the primary purpose of California's journalist's shield law is to safeguard the news media's "future ability to gather news," the claimant must "be engaged in legitimate journalistic purposes, or have exercised judgmental discretion in such activities."[129] The court insisted that there was a fundamental distinction between the reporting and editorial functions of a newspaper and the buying, selling, and placing of commercial advertisements.[130] Although the journalist's shield law might cover paid advertorials under certain circumstances, the newspaper in Rancho Publications did not make the required showing that its employees obtained the advertorials for the journalistic purpose of communicating information to the public.[131] Recognizing that journalists are not always engaged in journalism, other state court cases have withheld the journalist's privilege from traditional reporters who were not engaged in what

125. 735 ILL. COMP. STAT. ANN. 5/8-902 (West Supp. 2002).

126. DEL. CODE ANN. tit. 10, § 4320(3)(a) (1999).

127. CAL. EVID. CODE § 1070 (West 1995).

128. 82 Cal. Rptr. 2d 274, 275, 276 & n.2 (Cal. Ct. App. 1999). The decision was based in part on the statement by the California Supreme Court in *Delaney v. Superior Court*, 789 P.2d 934, 940 n.8 (Cal. 1990), that the shield applied only to information obtained by a journalist who was at the time engaged in gathering, receiving, or processing news. *See Rancho*, 81 Cal. Rptr. 2d at 277 (citing *Delaney*, 789 P.2d at 940 n.8).

129. *Rancho*, 81 Cal. Rptr. 2d at 276–78 (citations omitted).

130. *Id*. at 278.

131. *Id.* at 279.

the court considered to be the traditional journalism function, but instead were engaged in lobbying or political activism.[132]

IV. LEGAL AND WORKING DEFINITIONS: WHAT KIND OF PRESS AND WHAT KIND OF PRESS BEHAVIOR ARE WE INTERESTED IN PROTECTING?

Courts often assert that "the press" are subject to general laws and receive no special privileges. In particular, the U.S. Supreme Court has mostly refused to provide special protection for the press's newsgathering activities, including its efforts to protect confidential sources and to gain access to places.[133] Nonetheless, the "First Amendment routinely protects those citizens behaving as press from being singled out for abuse, and it also permits government to favor them with privileges that go well beyond those it gives to other citizens."[134] But what does it mean to be "behaving as press?"[135]

The answer can help courts and legislatures determine which journalists should be eligible for the constitutional privilege and state shield statutes that allow some members of the press to withhold some information now for the sake of more or better information later. Assuming that some individuals should be eligible for protection and that others should not, what criteria will increase the chances that the purpose of the journalist's privilege will be served? In other words, what limitation will best balance the "relative gain for dissemination of news compared with the extent of harm to correct disposal of the

---

132. Anti-Defamation League v. Super. Ct., 79 Cal. Rptr. 2d 597, 609–10 (Cal. Ct. App. 1998) (holding that private disclosure to foreign governments of non-public information "could not conceivably constitute a legitimate and constitutionally protected journalistic activity").

133. *See* Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1143–45 (2000) (recommending an intermediate scrutiny standard before imposing tort, criminal, or contract liability for newsgathering activities).

134. Jon Paul Dilts, *The Press Clause and Press Behavior: Revisiting the Implications of Citizenship*, 7 COMM. L. & POL'Y 25, 35 (2002).

135. After some hiatus, this question is again receiving a great deal of attention. *See, e.g.*, Anderson, *Freedom*, *supra* note 4, at 435–46 (surveying the methods by which courts and commentators alike have identified the press); C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 317–48 (1998) [hereinafter Baker, *Media Citizens Need*] (describing four democratic theories—elitist democracy, liberal pluralism or interest group democracy, republican democracy, and complex democracy—and the media that each would support); Bezanson, *Editorial Judgment*, *supra* note 14, at 755–56 ("It simply wouldn't do, in the long run, to recognize constitutional privileges for publications by the press without confronting the meaning of 'the press.'"); Dilts, *supra* note 134, at 25 (suggesting that judicial interpretation appears to be based on principles about both "what the press is and what its behavior should be").

immediate litigation?"[136] To better understand what kind of press and what activities of the press should be protected by the journalist's privilege, this Article draws on recent commentary from legal scholars, journalism scholars and researchers, and working journalists.

A. The Legal View: We Can Identify the "Press" that Should Be Protected Because It Contributes to Self-Government by Examining Its Purpose, Content, or Function

The classical liberal view is that the purpose of journalism is "to provide citizens with the information they need to be free and self-governing."[137] The press's role in informing the public is essential because "[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."[138]

For that reason, the First Amendment protects journalistic expression in the form of publication of information as well as providing some protection for the journalistic work practices that result in expression, that is, the exercise of independent editorial judgment[139] and "legitimate" or "routine" newsgathering activities.[140] Both the process and the product are protected because they make a contribution "to democracy and democratic legitimacy"[141]—but only when they make such a contribution are they protected.

As discussed in Part III, federal case law applies the journalist's privilege to anyone who is acting as a journalist, as gauged by the journalist's purpose (intent to disseminate information to the public), process (investigative reporting), and

---

136. Monk, *supra* note 76, at 10 (explaining that if the journalist's privilege is absolute, there will likely be instances when the outcome of litigation is, as a result, incorrect).

137. KOVACH & ROSENSTIEL, *supra* note 18, at 17.

138. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (recounting a debate between Justices Black and Harlan as to whether the First Amendment affords citizens "absolute" rights).

139. For examples, see Bezanson, *Editorial Judgment*, *supra* note 14, at 756 (cataloguing and assessing federal and state case law in which First Amendment claims of editorial judgment and editorial freedom were made).

140. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103–04 (1979) (holding that the state could not punish the publication of information obtained through routine newsgathering techniques).

141. Baker, *Media Citizens Need*, *supra* note 135, at 387–88 (assuming that the purpose of the Free Press Clause is to protect the press because of this crucial contribution).

product (news).[142] Similar categories for determining protection emerge from recent discussions about whether the Press Clause of the U.S. Constitution protects something more than what is protected by the Speech Clause and, if so, whether the shape of that protection should derive from the press's institutional form, its purpose, its content, or its function.

First, although there is debate about whether "the press" should be protected as an institutional Fourth Estate,[143] there is virtually no support for basing shield law protection on a specific institutional form or news media entity. Not only is the institutional form irrelevant to the reason for a journalist's privilege, but including some news media entities and excluding others is "reminiscent of the abhorred licensing system of Tudor and Stuart England."[144]

Professor Randall Bezanson is the leading proponent of using a "purpose" inquiry to distinguish protected press activities from unprotected ones.[145] In his view, the First Amendment protects neither the content of the news nor the process of newsgathering.[146] Instead, protection applies only when a

---

142. Other legal authors addressing who and what should be covered by journalist's shield laws primarily rely on the analysis and guidelines developed in the federal case law. *See, e.g.*, Kraig L. Baker, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69 WASH. L. REV. 739, 755 (1994) (proposing adoption of the *von Bulow* test to determine whether a "journalist" has standing to assert the journalist's privilege); Calvert, *supra* note 15, at 418–51 (scrutinizing federal case law and, in particular, the *Madden* test in order to develop a definitive guideline for evaluating claims of privilege).

143. *E.g.*, David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 533–34 (1983) (arguing that the Press Clause gives the press a structural role in a republican government); David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 89–90 (1975) (criticizing a Fourth Estate reading of the Press Clause as unpersuasive); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 597 (1979) (criticizing Justice Stewart's claim of a preferred constitutional position for the professional press); Potter Stewart, *Or Of the Press*, 26 HASTINGS L.J. 631, 633 (1975) (advocating a preferred constitutional position for the institution of the press); William W. Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761, 769 (1977) (challenging the press's argument that its First Amendment entitlements flow from a position as "the designated guardian of the people's right to know").

144. First Nat'l Bank v. Bellotti, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring) (arguing that such narrow reading of the Press Clause fosters the type of "system the First Amendment was intended to ban from this country").

145. After examining a large body of case law, Professor Bezanson concluded that courts are examining the journalist's process to determine whether the journalist had a constitutionally protected purpose. *See* Bezanson, *Editorial Judgment*, *supra* note 14, at 853. The cases, he writes, ask a single question: "Was the challenged publication decision animated by the purposes that underlie the free press guarantee—the independent choice of current information and opinion of value to the public?" *Id.*

146. *See* Randall P. Bezanson, *Means and Ends and* Food Lion*: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 896–97

member of the press is "'speaking' in a constitutionally protected way."[147] That occurs only when the press's "speech is a product of a process of judgment that is independent, audience oriented, and grounded in a reasoned effort to publish information (typically current or currently relevant) judged useful and important for the maintenance of freedom in a self-governing society."[148] What distinguishes the protected press from other, unprotected, information businesses is the use of editorial judgment—the "independent choice of information and opinion of current value, directed to public need, and borne of non-self-interested purposes."[149]

The judgment process must be independent in the sense of being "free of forces from government or from outside of government that compromise the free independent judgment of those assigned the task of writing and composing the publication."[150] The judgment must be "impersonal . . . in the sense that it must reflect a judgment that such views are important for an audience," and finally, the judgment "must be made in the service of the public informing and checking functions to which the press, as a speaker under the First Amendment, is devoted."[151] Given that some distinction is necessary, the exercise of independent "editorial judgment is as good a way to think about definitional boundaries as any."[152]

As for the third possibility, Professor David Anderson argues that content discrimination is inevitable given current technological, ideological, and economic forces that make it increasingly difficult to differentiate protected "journalism" from other information businesses.[153] To continue any special protection for the press will require "judgments [to be exercised] about the importance of different types of speech."[154] Unless courts and legislators engage in content discrimination, they must abolish preferential treatment for the press "because there

---

(1998) ("[N]ewsgathering . . . has little to do with independent editorial judgment, and is thus only incidentally related to press freedom; . . . . [therefore] generally applicable restrictions on newsgathering should be presumed constitutional . . . .").

147. Bezanson, *Editorial Judgment*, *supra* note 14, at 760.

148. *Id.*

149. *Id.* at 856. Although many journalists would agree with these criteria for exercising appropriate editorial judgment, some are contrary to current legal thinking about the need for accountability and the likelihood that individuals and institutions will act in their own self-interests. *See* Anderson, *Freedom*, *supra* note 4, at 452.

150. Bezanson, *Editorial Judgment*, *supra* note 14, at 760.

151. *Id.*

152. *Id.* at 854.

153. Anderson, *Freedom*, *supra* note 4, at 434, 442–43, 469–70, 498, 507, 530.

154. *Id.* at 530.

is no other rational basis for distinguishing the press from many other information businesses."[155]

Finally, as for defining the desired function or activity and then protecting anyone who is performing that function, the easiest obstacle to overcome is the argument that the First Amendment protects only expression, not conduct. If that were all that it did, the Press Clause would be simply redundant.[156] Instead, the current view is that the Speech Clause protects individual liberty and free expression while the Press Clause protects the public service, social responsibility, or "citizenship" activities of the press—informing citizens, building community, and "checking" government.[157] In this social role, "behaving as press" includes engaging in an aggressive newsgathering process.[158] That process is protected by the First Amendment because it directly serves important First Amendment purposes:[159] gaining and sharing information about the government, as well as informing the public about a range of matters important to their lives.[160] So, for example, even while finding that there was no journalist's privilege in *Branzburg*, the Supreme Court wrote that "without some protection for seeking out the news, freedom of the press could be eviscerated."[161]

---

155. *Id*. In particular, Professor Anderson suggests careful consideration of ways to make sure that the new communications technologies "serve not only individual information desires, but also the societal needs previously served by the press." *Id*.

156. *See* Meiklejohn, *supra* note 138, at 255 ("The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.'").

157. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 225–34 (1989) (developing an interpretation of the Press Clause independent of the Speech Clause); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528 (illuminating the "checking value" of the press—the power to expose and, in a sense, censure the government).

158. *See* Chemerinsky, *supra* note 133, at 1158–60 ("Aggressive newsgathering . . . is often the key to gathering . . . information. . . . [about] unhealthy practices in supermarkets or fraud by telemarketers or unnecessary surgery by doctors. . . . the media can expose . . . and [from which exposure] the public directly benefits . . . ."); *see also* Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145, 1147, 1156–60 (1996) (arguing for recognition of a qualified First Amendment privilege against the imposition of liability for "surreptitious newsgathering").

159. Professor C. Edwin Baker has argued that the Press Clause should protect all conduct that advances First Amendment values because press activity is an important facilitator of key democratic values. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990 (1978) (positing that as long as the conduct is non-coercive, it deserves First Amendment protection if it promotes First Amendment values); *see also* Dilts, *supra* note 134, at 27–28 (illustrating that some conduct of the press has been protected because it advances First Amendment principles).

160. Chemerinsky, *supra* note 133, at 1158–60.

161. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

This view is reflected in some recent cases protecting routine newsgathering activities, although other courts have restricted such routine activities as taking photos at crime scenes, attending meetings, gaining access to documents, and protecting confidential sources.[162] When it is protected, press behavior has been "associated with political and social concerns . . . but only insofar as behavior is consistent with the ideals of engaged citizenship."[163]

B. The Profession's View: We Can Identify the "Journalists" Who Should Be Protected by Examining Whether They Are Engaged in a Process Aimed at Finding and Printing the Truth

Many of the characteristics we associate with the kind of press that we think we want derive not from the law, but from the traditions of England and colonial America, from the history, culture, and "professionalization" of journalism, and from the economic power of the news media.[164] American journalism often has been defined by lawyers as a matter of rights or by historians as a series of accidents.[165] Recent efforts by journalism scholars and working journalists convey instead a continuing evolution growing out of changing cultural, economic, and technological contexts[166] and attempt to extract a set of principles, values, standards, and norms.[167]

The early traditions of a free press included some degree of "independence" and "autonomy"; some sense of "journalistic integrity"; and a "commitment to some vision of [acting in] the public interest."[168] But it was not until the latter half of the nineteenth century and the early years of the twentieth century that many American journalists began to engage in an active process of gathering and then publishing the news.[169]

When the First Amendment was written, the "press" was literally the same as the printing press, merely a tool that any

---

162. *See* Dilts, *supra* note 134, at 26.

163. *Id.* at 25.

164. *See* Anderson, *Freedom*, *supra* note 4, at 482–85.

165. BERRY ET AL., *supra* note 46, at 2–3 (contending that the legal emphasis makes it difficult to discuss the operation of the press as an institution and that historical studies explain away freedom of the press as an accident or expedient).

166. *See id.* at 7; MITCHELL STEPHENS, A HISTORY OF NEWS: FROM THE DRUM TO THE SATELLITE 1–9 (1988).

167. *See, e.g.*, KOVACH & ROSENSTIEL, *supra* note 18, at 11–12 (identifying "some clear principles that journalists agree on" and formulating these principles into nine elements of journalism).

168. Anderson, *Freedom*, *supra* note 4, at 482–84 (reciting the various strands of a free press tradition).

169. *See id.* at 447.

citizen could use to speak.[170] In the 1800s, the term "press" came to mean newspapers and the news media generally; the press was then a tool that was supposed to represent public discourse, mostly by reproducing and amplifying its other forms—speeches, debates, legislation, and judicial decisions.[171] In the late 1800s and early 1900s, journalism scholars first defined journalism as "the active collection and rendition into reports of matters of public interest," with journalists taking the role of expert public servants trying to speak *to* citizens rather than *for* citizens.[172]

At the same time they began to actively gather news, journalists also began to focus primarily on printing "the truth," a goal that would shift in perspective over time.[173] Newspapers were expected to be partisan in the 1800s, but by the 1960s, objectivity was an "emblem of American journalism."[174] Objectivity itself would soon be criticized because "'objective' reporting reproduced a vision of social reality which refused to examine the basic structures of power and privilege."[175] In 1996, the Society of Professional Journalists dropped "objectivity" from its code of ethics.[176]

Journalists' thinking about the institution of the press was greatly influenced by the Hutchins Commission report, published in 1947, which advanced the concept that the news media must exercise "social responsibility,"[177] and by a book entitled *Four Theories of the Press*, published in 1963.[178] The Hutchins Commission identified five responsibilities that the press must

---

170. BERRY ET AL., *supra* note 46, at 156 (noting that, in this sense, "freedom of the press was thought of in the same terms as freedom of speech").

171. *Id*.

172. *Id.* at 156–57 (suggesting that the early version of the press was not "engaged in journalism as we understand the term").

173. *See* FULLER, *supra* note 55, at 3–4 (observing that formal training for journalists and the "idea that news was a profession rather than a trade" eventually led to the belief that journalism "should aspire to some higher standard of veracity").

174. MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 9 (1978).

175. *Id.* at 160 (reciting the critics' view that "objectivity" represented "collusion with institutions whose legitimacy was in dispute").

176. DAVID T.Z. MINDICH, JUST THE FACTS: HOW "OBJECTIVITY" CAME TO DEFINE AMERICAN JOURNALISM 5 (1998).

177. COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 92 (1947) [hereinafter HUTCHINS COMMISSION].

178. FREDERICK SEATON SIEBERT ET AL., FOUR THEORIES OF THE PRESS (1963). As for the four theories—authoritarian, libertarian, social responsibility, and Soviet communism—critics would later claim that these were instead four examples of one theory, classical liberalism, in which the political world is divided into individuals versus society or the state. BERRY ET AL., *supra* note 46, at 21. These critics contend that "[a] truly free press would be free not just of state intervention but also of market forces and ownership ties and a host of other material bonds." *Id.* at 22.

fulfill: providing (1) "a truthful, comprehensive, and intelligent account of the day's events"; (2) "a forum for . . . comment and criticism"; (3) "a representative picture of the constituent groups"; (4) "the goals and values of the society"; and (5) a place for the public to have "full access to the day's intelligence."[179] These responsibilities were to be fulfilled by performing three central tasks: providing information, enlightening the public for self-government, and serving as a watchdog for government activities.[180] Partly because of growing monopoly power, the press must "hold[] freedom of the press in trust for the entire population."[181]

In the latter part of the twentieth century, some journalists began to replace the social responsibility theory of the press with a theory of "'civic' or 'public journalism.'"[182] Under a theory of public journalism, rather than standing outside the process, the press should intervene in a process that is oriented toward "citizens as participants, politics as problem solving, [and] democracy as thoughtful deliberation" about common interests.[183] The theory suggests that instead of citizens having a democracy and needing information to participate in it, citizens *have* information and need to participate in democracy so that they will want and need to be further informed.[184] The Press Clause therefore protects any citizen "who choose[s] to be the press" by choosing to be "engaged in the political process of gathering information for public dissemination."[185] In this view, there are no special privileges for the institution; rather, the press would be treated as "the archetype of the energetic, critical citizen in a democracy[:] . . . politically active, aggressive in its scrutiny of government, vigorous in its public service and energetic in its pursuit of 'news.'"[186] At the same time, the press would be viewed as "the kind of good citizen that the courts might expect to give up a source to a grand jury to solve a crime, to be circumspect about intruding into courtrooms and bedrooms

179. HUTCHINS COMMISSION, *supra* note 177, at 21–28.

180. SIEBERT ET AL., *supra* note 178, at 74.

181. *Id.* at 90.

182. Baker, *Media Citizens Need*, *supra* note 135, at 353, 354 & n.88.

183. JAY ROSEN, GETTING THE CONNECTIONS RIGHT: PUBLIC JOURNALISM AND THE TROUBLES IN THE PRESS 16 (1996). Professor Baker writes that, like social responsibility, the theory of public journalism is compatible with the economic interests of an increasingly concentrated news media business. Baker, *Media Citizens Need*, *supra* note 135, at 355.

184. ROSEN, *supra* note 183, at 83.

185. Dilts, *supra* note 134, at 48–49.

186. *Id.* at 33.

and hesitant to demand privileges of access beyond those of other engaged citizens."[187]

The most comprehensive current effort by working journalists to define journalism began in 1999, when the Committee of Concerned Journalists undertook a three-year study that culminated in the publication of *The Elements of Journalism*.[188] The book's list of nine general elements begins with journalism's obligation to "'journalistic truth,'" that is, to "a sorting-out process that develops between the initial story and the interaction among the public, newsmakers, and journalists over time."[189] It is "more helpful, and more realistic, to understand journalistic truth as a process—or continuing journey toward understanding—which begins with the first-day stories and builds over time."[190] After truth, the authors identified the following elements: (2) "[journalism's] first loyalty is to citizens," (3) "[i]ts essence is a discipline of verification," (4) "[i]ts practitioners must maintain an independence from those they cover," and (5) "[i]t must serve as an independent monitor of power," (6) "provide a forum for public criticism and compromise," (7) "make the significant interesting and relevant," (8) "keep the news comprehensive and proportional," and (9) allow "[i]ts practitioners . . . to exercise their personal conscience."[191]

Like other professions, journalists have a common base of working rules, accepted strategies, and ethics codes (but theirs are voluntary).[192] Journalists themselves look to these

187. *Id.* (footnotes omitted).

188. KOVACH & ROSENSTIEL, *supra* note 18, at 10–12.

189. *Id.* at 42.

190. *Id.* at 43.

191. *Id.* at 12–13 (explaining that the list is limited to only nine elements because familiar ideas like "fairness" and "balance" are "too vague to rise to the level of essential elements of the profession").

192. *See, e.g.*, SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (1996) (asking journalists to seek truth and report it, minimize harm, act independently, and be accountable), *available at* http://www.spj.org/ethics.asp (last visited Oct. 17, 2002); AMERICAN SOCIETY OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES art. VI (1996) (emphasizing responsibility to the public trust, guarding freedom of the press, maintaining independence, ensuring truth and accuracy, and upholding impartiality and fair play), *available at* http://www.asne.org/kiosk/archive/principl.htm (last visited Oct. 14, 2002); ASSOCIATED PRESS MANAGING EDITORS, CODE OF ETHICS (1995) (requiring responsibility, accuracy, integrity, and independence), *available at* http://www.apme.com/about/code_ethics.shtml (last visited Oct. 14, 2002); RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, CODE OF ETHICS AND PROFESSIONAL CONDUCT (2000) (promoting acting as trustees for the public; pursuing truth aggressively; presenting news accurately, fairly and with integrity; defending independence; and being accountable), *available at* http://www.rtnda.org/ethics/coe.html (last visited Oct. 14, 2002) Additionally, each of these codes or statements includes a mandate to journalists to keep

components of the newsgathering process to describe what they would require of other journalists. According to Ted Gup, a journalism professor and newspaper and magazine writer, a journalist is "[a]nyone who recognizes and protects the sanctity of what we do, who subscribes unswervingly to an ethical canon grounded in balance, fairness, restraint and service. Published on-line or in print, it matters not."[193] Tom Rosenstiel, one of the authors of *The Elements of Journalism*, contends that the only way to judge who is a journalist is to look at the work the individual does, rather than his or her education, manner of delivery, employment, or intent.[194] Seth Effron, deputy curator of the Nieman Foundation for Journalism at Harvard University, says that it is critical that a journalist is "someone who participates in the seeking of facts with an open mind and seeks to organize and present them in a way that informs the reader or viewer to act in their own best interest."[195] Similarly, Lucy Dalglish, executive director of the Reporters Committee for the Freedom of the Press, says, "I look for independence. I look to see somebody acting independently in gathering information."[196]

From this, the protected process of journalism can be defined as work that demonstrates a commitment to regular and public dissemination of "journalistic truth." Moreover, some universally accepted components or tools of the process of journalism can be identified.[197] Three components seem fairly susceptible to

---

their promises to sources. Refer to note 56 *supra* and accompanying text.

193. Ted Gup, *Who's a Journalist?—I: The Answer Lies in Training, Character and Attitude*, 13 MEDIA STUD. J. 34–35, 37 (1999).

194. *See* Barton, *supra* note 12, at 11, 13.

195. *Id.* at 11–12.

196. *Id.* In contrast to these functional views, media attorney Ronald Goldfarb is quoted in the same article as saying that a journalist is "somebody who has been judged by the marketplace by being published in a legitimate medium, which rules out the Internet." *Id.* at 12.

197. For example, Warren G. Bovée defines journalism as "a type of mass communications" that provides "useful and practical . . . knowledge," "at least purports to be literally true," "is provided by persons who have at least some control over the content," and helps its audience make decisions on current issues. WARREN G. BOVÉE, DISCOVERING JOURNALISM 28 (1999). Other attributes commonly associated with modern journalism could be used to describe the process—such as balance, objectivity, and significance—but these are less likely to lend themselves to objective measurement. The authors of *The Elements of Journalism* left out common concepts like "fairness, balance, and neutrality. . . . because [they] are goals, not tools," of the journalism process. *See* Barton, *supra* note 12, at 13 (quoting Tom Rosenstiel).

The problem with using a standard such as "objectivity" is that an objective tone is no guarantee that an objective approach was in fact taken. Thus, for instance, David Brock's book about Anita Hill was praised in book reviews in the *New York Times*, the *Washington Post*, and *Newsday*, although Brock later wrote that the book was intentionally deceptive. *See* DAVID BROCK, BLINDED BY THE RIGHT: THE CONSCIENCE OF AN EX-CONSERVATIVE xiii (2002). "Brock's first book proved that there was no limit to the

objective assessment without requiring a court to intrude too far into the editorial process or to interfere too much with journalistic independence: (1) the track record of past publication, (2) the presence of internal verification measures, and (3) the availability of information that allows readers to assess the claimant's independence.

V. THE PROPOSAL: EVEN IF ALL OF US ARE POTENTIAL JOURNALISTS, ONLY SOME OF US ARE ENGAGED IN JOURNALISM

The purpose of the journalist's privilege suggests rejecting some of the proposed limitations on its application. Limiting application to recognized or established "journalists" is too narrow, while limiting protection to those who gather "news" is too subjective, and limiting protection to those who publish in only certain kinds of news media is irrelevant.

A. Eliminating "Who," "What," and "How" as Possible Limitations

1. Deciding Which Journalists Should Be Eligible for Protection Based on Their Job Titles or Employment Status Excludes Too Many Whose Work Is Journalism. The profession recognizes as journalists those who have employment or other significant relationships with recognized news media organizations as well as those with long track records of journalistic activity.[198] Functionally, journalists are the people who are responsible for gathering, preparing, and disseminating news and information; by job description, journalists are "reporters, writers, correspondents, columnists, photojournalists and editors."[199]

These are the common descriptions, both within the profession and under the state shield statutes. Even though such descriptions are common, journalists and legal scholars are universally hostile to requiring certification for journalists,

---

impact that extreme views with the slightest basis in fact could have if they reached the mainstream presented not as political opinion, but disguised as dispassionate, professionally obtained, and therefore accurate news." Jane Mayer, *True Confessions*, N.Y. REV. BOOKS, June 27, 2002, at 6.

198. *See* Alexander, *supra* note 4, at 99 (declaring, however, that several prominent journalists from traditional media outlets embrace recognition of nontraditional journalists).

199. *Id.* at 98, 99 & n.7 (referencing a study conducted by journalism professors David H. Weaver and G. Cleveland Wilhoit). The Weaver and Wilhoit study consisted of the employees of "mainstream general interest news media," including "daily and weekly newspapers, news magazines, radio and television stations, and . . . news or wire services"; it did not include employees without direct responsibility for the content of the publication, like librarians and technicians. *Id.* at 99 n.7.

whether based on professional training, education, employment, or experience.[200] The objection is fundamental: no one should have to obtain a license to speak. The objection also is historical: no patriot printer or colonial pamphleteer had a journalism degree.[201] Certification by a government agency or by a professional group carries the possibility of de-certification based on value judgments or viewpoints.[202] Some kind of certification is of course already required for press privileges in certain circumstances, such as issuance of White House and congressional press passes,[203] but wider use of certification to determine eligibility for press protection is unlikely.

Nonetheless, certification based on education or training would at least be related to the purpose of the journalist's privilege. It would provide some assurance that the person claiming the privilege has some knowledge of common journalistic principles, along with some experience applying them and some sense of obligation to a professional model of journalism. That is, certification would provide some evidence that the individual is capable of gathering and intends to disseminate truthful information to the public. On the other hand, as journalists often attest, no specific education or training is necessary to be a journalist, and journalists are unlikely to set or require such standards for others.[204] Moreover, the journalist's

---

200. *See*, *e.g.*, Barton, *supra* note 12, at 13 (quoting Tom Rosenstiel, who defines a journalist by the work created and not by anything else, including education or employment).

201. The problem of designating some journalists as qualified and some journalists as not qualified was one of Justice White's objections to a federal journalist's privilege in *Branzburg*: "Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . ." Branzburg v. Hayes, 408 U.S. 665, 703–05 (1972).

202. For example, drawing a distinction between an entertainer and a reporter "may be the proper distinction, but, by drawing it, the government takes a small step toward what the First Amendment plainly proscribes—licensing the press." Bates, *supra* note 3, at 11.

203. The publisher of an online newsletter was turned down for congressional press credentials because "he could not show that his newsletter was published for profit, he did not receive a salary, and he was not a full-time journalist." Anderson, *Freedom*, *supra* note 4, at 434.

204. *See* RICHARD REEVES, WHAT THE PEOPLE KNOW: FREEDOM AND THE PRESS 2 (1998) ("I had stumbled upon an important fact: you become a reporter by saying you're a reporter. No qualifications. No license. Almost no training.").

The first few journalism courses were offered beginning in the 1890s; the first "program" was begun at the University of Missouri in 1908, and Joseph Pulitzer endowed the journalism school at Columbia University in 1912. LEONARD, *supra* note 45, at 206. The same period saw the establishment of Sigma Delta Chi, now the Society of Professional Journalists, and the Pulitzer Prizes. *Id.* By 1930, more than fifty colleges and universities had journalism programs. *Id.* at 208. Still, it was "'a profession with no

privilege is unlike traditional privileges based on professional relationships—such as attorney-client and doctor-patient—because those relationships are governed by structured ethical codes as well as statutes and case law.[205] In contrast, different journalism organizations and entities make their own rules about how to handle such issues as when confidential sources should be used, how much corroboration is needed, and when the journalist is no longer bound by a promise of confidentiality;[206] and compliance with those rules is voluntary.

Requiring the individual claiming protection to have been working as a journalist—that is, to be engaged in the business or the profession of journalism as an employee of a recognized news media company or under contract with a recognized news media publisher—would accomplish the same thing as certification based on education or training. If an individual is working for an established news organization in a recognized news-related job, chances are that the individual intends to disseminate information to the public and that such publication will in fact result from his cultivation of relationships with sources. In addition, a connection with a recognized news organization may assure that the marketplace is not flooded with "unmediated," incredible, or unchecked information, but that instead, common journalistic practices—such as fact-checking, editing, and the exercise of editorial judgment—are taking place to synthesize and make sense of the vast amounts of available information.[207]

Focusing specifically on news media shield statutes, one journalism professor has proposed a model statute that would require a journalist to have a substantial connection with established news media sources. Professor Alexander's proposal is "written exclusively to protect journalists," fearing that wider application risks "doing great harm to the free flow of information undergirding the concept of a journalist's privilege."[208] Professor Alexander defines a journalist by function

---

professional standards, no professional discipline, no examining or accrediting bodies, no agreement upon norms for testing competence.'" *Id.* at 209 (quoting LEO ROSTEN, THE WASHINGTON CORRESPONDENTS 159 (1937)).

205. Bates, *supra* note 3, at 11.

206. *Id.* (listing individual reporter-made rules concerning the obligation of confidentiality).

207. *Cf.* Robert C. Berring, *Symposium of the Law in the Twentieth Century: Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1676–79, 1696–1703 (2000) (examining "a changing user environment, corporate consolidation, and the Internet" as the factors that have upset the legal community's former comfort in conferring cognitive authority—trust in a source—upon a small set of resources).

208. Alexander, *supra* note 4, at 99, 131. Professor Alexander has a law degree. *See id.* at 97 n.d1.

as "any person who is engaged in gathering news for public presentation or dissemination by the news media."[209] But he would nonetheless require that the person "be connected in some substantial way with the news media,"[210] which he defines as including traditional outlets plus "online news services, or any other regularly published news outlet used for the public dissemination of news."[211] He defines "news" as "information of public interest or concern related to local, statewide, national, or worldwide issues or events."[212]

Even though requiring a claimant to be educated, trained, employed, or experienced as a journalist would be rationally related to the purpose of the journalist's privilege, the requirement excludes too many whose current function or activity is journalism. Journalism can be practiced well by those who practice only part of the time, and it can be practiced well by individuals whose educational backgrounds and employment are not primarily journalistic. It can be practiced by college students and freelance writers. Restricting the protected class to those who are "professional" journalists or who are associated with "established" news media would make a distinction not required by the purpose of the privilege or by the Press Clause of the First Amendment. Both seek "to protect a flow of information," not a particular status.[213] When you are engaged in certain kinds of activities, you are part of that flow of information and you are a journalist.[214]

2. Deciding What Publications Should Be Protected Based on Their Content Violates First Amendment Neutrality. Given the purpose of the privilege, it may be that "[t]he only sensible basis for preferring some information providers over others is the subject matter of the information they provide."[215] Both constitutional and

---

209. *Id.* at 130.

210. *Id.* at 132.

211. *Id*. at 130.

212. *Id.*

213. *See Newsmen's Privilege: Hearings on S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 917, S. 1128 and S. J. Res. 8, Bills to Create a Testimonial Privilege for Newsmen, Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 93d Cong. 256–57 (1973) (quoting Rep. Jerome R. Waldie, Representative from California) (proposing that the definition of a protected journalist should include anyone "conveying to the public information" and "anyone that is engaged in the dissemination of information [or] . . . the gathering for dissemination").

214. BOVÉE, *supra* note 197, at 28–29 (asserting that anyone with the ability to communicate can become a journalist).

215. Anderson, *Freedom*, *supra* note 4, at 528. On the other hand, Professor Bezanson criticizes analysis of the end product because of his view that constitutional protection rests more on the exercise of independent editorial judgment—"the

statutory shield laws are designed to protect the gathering and dissemination of the kind of information that is of value to a public that must make intelligent decisions to govern itself. Shield laws are not intended to protect gossip, nonsense, or disinformation. But requiring that the end publication contain a particular kind of content—whether it is defined as "news" or information of legitimate public concern—is both constitutionally suspect[216] and unworkable. Cases examining newsworthiness prove the point: if newsworthiness is judged from a purely normative standpoint, "courts could become to an unacceptable degree editors of the news and self-appointed guardians of public taste."[217]

Moreover, predicating shield protection on the content of the expression misses the point; it is the acquisition and not the publication of information that is being protected. Subpoenas in criminal cases often are issued before there is any publication. Even when they are issued after publication, subpoenas seek sources or data about unpublished information obtained while the journalist was talking to confidential sources, conducting undercover investigations, attending meetings, watching government workers, and examining government documents—events that often occur long before the journalist knows that anything of "legitimate public concern" will ever be published.[218]

3. Deciding What Media or Modes of Communication Should Be Protected Based on Their Format Is Unrelated to the Purpose of the Privilege. Deciding protection based on the format of the publication not only is unworkable, it is irrational. The medium in which the information is communicated bears no relationship to the purpose of the protection—except to the extent that the medium should reach the public. Given the changes that are merging traditional forms of media, the "obvious alternative is to define press in some functional way, attempting to identify an activity or

---

communicative acts and choices" that precede publication—than on the end result. Bezanson, *Editorial Judgment*, *supra* note 14, at 798, 854, 856. "Content analysis represents an effort to identify editorial judgment through the content of the publication that results from it." *Id.* at 854. But a finding that the content of a publication is "news," for example, "bears no necessary relation to the type or quality of decision that led to its publication." *Id.* at 797–98.

216. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 705 n.40 (1972) (noting that the First Amendment "ordinarily prohibits courts from inquiring into the content of expression" and that doing so would allow for discrimination based on content). "In current First Amendment thought, the idea that government has no business evaluating the importance of various kinds of speech is, if not an article of faith, at least a strong presumption." Anderson, *Freedom*, *supra* note 4, at 529.

217. Shulman v. Group W Prods., Inc., 955 P.2d 469, 481 (Cal. 1998).

218. *See* Dilts, *supra* note 134, at 31 (arguing that these events raise First Amendment concerns).

function that remains constant and essential while forms of media morph and metastasize."[219] That leaves for discussion the last two issues: What activities should be shielded? What purposes should be protected?

B. Adopting a Functional Definition: Is the Claimant "Engaged in the Process of Journalism?"

The goal of journalist's shield laws is to support the process of gathering and disseminating information necessary for self-governance. Any limitation on them must balance two searches for "truth"—the public's right to the free flow of information that leads to the truth, and the public's right to the testimony of witnesses that leads to the truth.

Too many theoretical and practical problems are involved in judging the value of the published information—whether it is of public interest or concern, whether it is news or entertainment—and in judging the purpose or intent of the newsgatherer—whether he or she acted unselfishly, and whether he or she acted independently. On that basis, this Article rejects Professor Alexander's proposed requirements that the claimant have a substantial connection with an established news organization and that the end product be found to include information of public interest or concern. Also on that basis, and in contrast with Professor Bezanson's work, this proposal focuses on the newsgathering process for the inference that it will produce the publications that we want rather than for proof of the individual's protected purpose.[220] Examining the process can tell us whether it is likely to result in the regular dissemination of truthful information to the public, that is, that its product is likely to be the constitutionally protected kind.

This Article therefore proposes that any individual engaged in journalism should be protected by journalists' shield laws. An individual is "engaged in journalism" when he or she is involved in a process that is intended to generate and disseminate truthful information to the public on a regular basis. The proposal identifies key elements of the newsgathering process that can be judged objectively—without undue intrusion into the editorial process—no matter who uses them or in what medium.[221] The first element is the reporter's or publisher's

---

219. Anderson, *Freedom*, *supra* note 4, at 435.

220. *See* Bezanson, *Editorial Judgment*, *supra* note 14, at 852–53 ("[P]rocess is best seen . . . not as a separate criterion of editorial judgment, but as a form of corroborating proof that it has occurred in ways that the First Amendment protects . . . .").

221. One possible objection to such an inquiry is overcome by the Supreme Court's

record of publication: Is information regularly disseminated? Is information publicly disseminated? Is the information usually truthful? The next element is the presence of verification measures: Are internal mechanisms in place to evaluate and check information before distributing it to an audience? The final element is the availability of information from which readers can judge the publisher's or the reporter's independence: Who owns or sponsors the publication? Who do the publishers and reporters work for? What editorial standards do they recognize and follow?[222]

This proposal is easily incorporated into the federal case law recognizing a constitutional journalist's privilege for those who are acting as journalists. For state statutes, the proposal could provide an additional ground of protection for those who are performing the functions of journalism but who do not qualify under the more traditional statutory definitions of journalists.[223]

1. Does the Process Show a Commitment to Regular and Public Dissemination of "Journalistic Truth" as Evidenced by a Track Record of Gathering and Publicly Disseminating Usually Truthful Information? Because shield law protection is necessary to support the process of gathering news, a publisher who simply reprints information first published elsewhere has no need for it. Thus, to be engaged in the process of journalism, the publisher or reporter must have an independent role in generating information; he cannot just republish, but must engage in some information-gathering, information-verification, or decisionmaking process about the content to be disseminated.[224] Whether the claimant is involved in such a process may be judged objectively: What reportorial activities are ongoing? What kinds of investigative tools, techniques, sources

---

ruling that there is no journalist's privilege protecting against discovery into the editorial process. Herbert v. Lando, 441 U.S. 153, 169 (1979) (allowing a libel plaintiff to inquire into the editorial process of a defendant without implicating an absolute First Amendment privilege).

222. The AEJMC Task Force on Teaching and Learning in the New Millennium offered recommendations for future journalism education that recognized technological change, but noted that among the things that should not change are the following: "defining what constitutes a great story"; "relying on reliable, known sources"; "checking and rechecking the facts"; "using balance, fairness and impartiality in presenting the facts"; "asking tough questions"; and "adhering to high ethical standards." Pavlik et al., *supra* note 41, at 16.

223. To avoid the interference that would result if every journalist were required to prove that he or she was engaged in the process of journalism, state statutes should continue to provide safe harbors by defining job titles and employment relationships that automatically qualify. This proposal would extend to those nontraditional journalists who do not fit within those definitions.

224. *See* Bezanson, *Editorial Judgment*, *supra* note 14, at 838–41 (discussing cases evaluating what actions constitute being part of the editorial process).

are used? Does the claimant have a track record of gathering information?

Similarly, there is no need for shield law protection for the writers and publishers of fiction. Such writers are unlikely to develop or to require the kinds of continuing relationships with sources that lead to obtaining and publishing truthful information. Thus, an individual claiming the privilege should show some evidence of intent to publish truthful, nonfiction information. The extent to which there is an effort to verify information before publication shows such an intent, as does a record of "more truthful than not" past publications. From libel law, courts already are familiar with the truth-falsity distinction,[225] and it is far less subjective than a newsworthiness determination, which is based at least in part on a value judgment about the content of the publication.[226]

Moreover, if the reporter or publisher intends to publish only once, there is no real need for shield law protection. The law's purpose is to protect the free flow of information; that flow is not diminished if a reporter is forced to testify about the information obtained in order to report one story, when that story is the only newsgathering the reporter will ever do.[227] On the other hand, if the reporter or publisher has published at least periodically, there is some evidence that regular information dissemination is the claimant's purpose, and some chance that information withheld today will eventually lead to disclosure of other information in the future. In addition, regular or periodical publication increases opportunities for verification of the information disseminated as well as for publication of rebuttal information and corrections.

Finally, some evidence of intent to disseminate information to a public audience is necessary to fulfill journalism's role of providing information necessary for self-governance. The goal of building citizenship and community is undercut when information is obtained only from extremely segmented media that do not reach "across the lines that separate people with

---

225. Professor Bezanson criticizes the truth-falsity distinction on the basis that the "connection between the content of a publication and the presence of editorial judgment is potentially coincidental only . . . . the most responsible and careful editorial judgment would go unprotected if its end product turned out, in fact, to be false." *Id.* at 796.

226. *See, e.g.*, Shulman v. Group W Prods., Inc., 955 P.2d 469, 481 (Cal. 1998) (emphasizing the difficulty in defining newsworthiness).

227. There should be little chilling effect on continuing relationships between other reporters and their sources if the rationale is made clear; that is, the privilege did not apply because there was a one-time-only publication.

special interests."[228] Media that are segmented for commercial reasons undermine citizenship because a segmented audience will never come across the new facts and arguments that allow for advancement of thought.[229] If the information being gathered will be disseminated to only a few, or to only a private audience, its gathering and publication will not serve the purpose of shield law protection—to enhance the flow of information to the people who need such information for self-governance. Evidence of past publication to a broader audience or other evidence of intent to disseminate to at least a portion of some "public" audience increases the chances that the information being gathered will eventually become the kind of communication the First Amendment is assumed to protect.[230]

2. Does the Process Show a Commitment to Regular and Public Dissemination of "Journalistic Truth" as Evidenced by the Presence of Internal Mechanisms Designed to Verify and Evaluate Information Before It Is Disseminated? From the profession's point of view, the essence of journalism is the "discipline of verification."[231] From the legal point of view, the use of appropriate verification procedures is "[t]he most often discussed procedural hallmark of a protected editorial judgment."[232] So, for example, in libel cases, the courts look at the verification measures used by the publisher to determine whether the defendant acted with reckless disregard for the truth. In addition to evaluating whether some semblance of appropriate verification is customarily undertaken to investigate the sources of information and confirm their accuracy,[233] the courts could look for whether the publisher has mechanisms in place to systematically exercise judgment over the content of the publication.

---

228. LEONARD, *supra* note 45, at 191. A theory of complex democracy requires both segmented media that can help particular groups participate in political bargaining and inclusive, nonsegmented media that "support a search for general societal agreement on 'common goods.'" Baker, *Media Citizens Need*, *supra* note 135, at 344.

229. *See* LEONARD, *supra* note 45, at 191 (reasoning that although commercially segmented publications may at times address public issues, only the narrowly targeted readers are exposed to the expressed viewpoints).

230. According to Professor Bezanson:

> [The line should be] drawn not in terms of the size of the audience or the value or public content of the publication, as such, but instead in terms of the public orientation of the judgment leading to publication . . . . The purposes served by the publication decision must not . . . be private and personal. Nor must the choice of material for publication rest on circumscribed commercial purposes.

Bezanson, *Editorial Judgment*, *supra* note 14, at 804.

231. KOVACH & ROSENSTIEL, *supra* note 18, at 12.

232. Bezanson, *Editorial Judgment*, *supra* note 14, at 831.

233. *Id.* at 831–38 (declaring that courts require only "minimal habits of verification" and examining state cases in support).

Such determinations could be made objectively based on the processes and procedures established by the publisher.

Some proponents of the "unmedia" contend that a verification function is performed by readers of Internet publications.[234] So, for example, blogger Mickey Kaus posted an item about

> [the] virtue of blogging as a form of journalism. The Web really does put a premium on speed and spontaneity over painstaking accuracy. Bloggers instantly print what they learn, and what they believe to be true. They sometimes—often, actually—get it wrong. But even those errors prompt swift corrections that take the story . . . closer to the truth.[235]

Thus, it is possible that external verification might be provided not by an editor, but by the kind of feedback and correction that actually occurs when information is published fairly widely and the audience is able to respond. If, however, the individual claiming the journalist's privilege puts no premium on accuracy, whether painstaking or not, he or she would not qualify for protection under this criterion.

3. Does the Process Show a Commitment to Regular and Public Dissemination of "Journalistic Truth" as Evidenced by Publication of Information from Which Readers Can Judge the Degree of Independence from Both Inside and Outside Forces? Rather than requiring a court to examine the intent of the reporter or publisher to find out whether editorial judgment has been exercised independently, this proposal would turn the determination of independence over to the audience. That is, evidence of journalistic independence would be established by providing enough information to allow audience members to evaluate the credibility of the information that is disseminated. Because recognized and established news media sources have a history of publication, their audience is better able to judge their biases and their credibility; moreover, such sources usually are subject to both self-criticism and criticism by media groups and critics.[236] For new media, a similar credibility monitor is needed to provide for "verification" in the sense of transparency; that is, does the publisher tell the reader or listener

---

234. *See, e.g.*, Godwin, *supra* note 20, at 39 (explaining that Internet publishers receive immediate feedback from readers, which the writer may use to modify the writing).

235. Rutten, *supra* note 1, at E4 (quoting Mickey Kaus).

236. For examples of such criticism, see generally LEAVING READERS BEHIND, *supra* note 33 (producing as many as twenty articles on American journalism criticizing both the patterns and directions of newspaper corporations and their impact on coverage).

or viewer enough about himself or herself for the reader to be able to judge whether the information provided is the product of an independent newsgathering and editorial process?[237] Thus, "[i]f journalists are truth seekers, it must follow that they be honest and truthful with their audiences, too—that they be truth presenters. . . . [that they] level with people about what [they] know . . . . How do [they] know what [they] know? Who are [their] sources? How direct is their [sources'] knowledge? What biases might [their sources] have? Are there conflicting accounts?"[238]

Again, whether the publisher has disclosed sufficient information to the reader can be evaluated objectively and without any intrusion into the editorial process. The evaluation focuses only on whether the publisher answers the right questions about the newsgathering process and the newsgatherer: Is the information that is being disseminated correct? Where did it originate? What are the sources? Is the publisher independent, or dependent on industry sources or on advertisers? How long has the publisher or reporter been gathering and publishing information? What is the track record? In this way, the inevitably subjective determination of whether the publication is the product of an independent process and therefore more likely truthful and credible is shifted away from a suspect decisionmaker, the court, to an accepted decisionmaker, the audience.[239]

VI. CONCLUSION

When the participants are "engaged in journalism," application of the journalist's shield laws will accomplish their purpose regardless of the status or intent of the participants or the subject matter or chosen medium of their communication. By turning to the profession for a definition of what it means to be engaged in journalism, we may be able to preserve the journalist's privilege and accommodate the "unmedia" without undermining journalism's values.

---

237. Similarly, the American Association of Law Libraries has developed evaluation criteria to help users distinguish good sources of legal information from poor sources. *See* AMERICAN ASSOCIATION OF LAW LIBRARIES, ACCESS TO ELECTRONIC LEGAL INFORMATION COMMITTEE EVALUATION CRITERIA, *at* http://www.aallnet.org/committee/aelic/index.html (last visited Nov. 4, 2002).

238. KOVACH & ROSENSTIEL, *supra* note 18, at 80.

239. An example is the Code of Conduct adopted by the Health On the Net (HON) Foundation; medical websites displaying the "HONcode" notation are required to clearly attribute to sources the information found on the site as well as to provide clear information about authors, sponsors, and advertisers. HEALTH ON THE NET FOUNDATION, HON CODE OF CONDUCT: PRINCIPLES, *at* http://www.hon.ch/HONcode/Conduct.html (last visited Oct. 14, 2002).